

# HEARSAY:

## THE RULE, THE RATIONALE, THE EXCEPTIONS

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# HEARSAY under The Common Law

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# Common Law Rule Against Hearsay

## Hearsay Rule

- also referred to as “rule against narrative” or “rule against self-corroboration”
- hearsay evidence is not admissible as evidence of facts stated

**Walton v R (1989) 166 CLR 283** at 302-4, per Mason CJ

- Hearsay rule applies only to out-of-court statements “tendered for the purpose of directly proving that the facts are as asserted in the statement”
- Evidence of relevant out court statements relied on for another purpose is not excluded – eg to establish the maker’s knowledge or state of mind *where that is a fact in issue or a fact relevant to a fact in issue.*

**Bannon v The Queen (1995) 185 CLR 1**, per Dawson, Toohey & Gummow JJ at 22, 101, 385:

- Out of court statements are not evidence of the truth of what is said unless the statement falls within an exception to the rule against hearsay

# Rationale for Rule against Hearsay

- Hearsay is not the best evidence
- Out of court statements are not given on oath
  - original declarant carries no responsibility and suffers no consequences (of not telling the truth)
- Concern about the quality of evidence
- Risk of unreliability – dangers of inaccuracy through repetition
- Risk of fabrication, mistake or exaggeration going undetected
- No opportunity to cross-examine maker of statement in an adversarial system
  - Veracity, accuracy and reliability of evidence cannot be tested by assessment of witness demeanour
  - Cannot inquire into the perception, memory, narration or sincerity of witness
- Risk of undue weight being attached to hearsay evidence
- Admission of hearsay evidence can result in a miscarriage of justice

# Dangers of Hearsay Evidence

- Danger of hearsay is its testimonial use to prove the truth of what is asserted
- Further danger of using remote hearsay (second or third hand hearsay)
- Danger of implied assertions and inferences made from hearsay statements
  - **Assertions implied from statements**
    - Abbie hears Bob say “Hello Charlie” – can infer that Bob was talking to Charlie; that Charlie was present; or that Bob believed he was talking to Charlie
  - **Assertions implied from conduct**
    - Flight, telling a lie or interfering with witnesses inferred to be evidence of a consciousness of guilt

# Scenario 1 – Combined testimony of 2 witnesses where primary evidence is missing

- A robbery at a fuel station occurs
- Abby observes a car number of the get-away car and tells Bob to record it.
- By time of trial, Abby can no longer remember the number and Bob cannot testify to having observed the car number.
- Bob's note of the number plate is inadmissible hearsay
- Abby having dictated the number correctly is irrelevant
- If Abby had written down the number herself, or seen Bob writing it, and checked its accuracy at the time, the note could have been used to refresh Abby's memory to enable direct oral evidence of the number.
- Evidence of a person's identity, if given by 2 people, also raises this problem.
- Diplock LJ in *Jones v Metcalfe* [1976] 3 All ER 205 (in which this scenario occurred), stated: "The hearsay rule has little to do with common sense"

# Scenario 2 – multiple levels of records

- Investigator records an **interview** with a suspect who does not speak English
- Suspect's responses to conveyed to Investigator by **interpreter** in English – interpretation is first-hand hearsay
- Office intern is asked to listen to the recording to produce a **transcript** of the interview – contents of transcript is second-hand hearsay
- Another investigator takes over the matter and reviews the transcript, making a **report** recommending charges, based on admissions against interest made by the suspect during the interview – the report contains third-hand hearsay
- The content of that report is used to draft a **precis of facts** for court – the precis contains fourth-hand hearsay
- At the first return of the case to court, the prosecutor **reads the precis onto the court record** in opposing a bail application – fifth-hand hearsay
- Court may take into account hearsay evidence in assessing matters to determine a bail application – s24(2) Bail Act 1982 (NT)

# Scenario 3 – multiple levels of interpretation

- Representation of an Indigenous person who is deaf and mute and does not speak English, and who suffers schizophrenia
- Sign language interpreter brought in, who speaks an Indigenous language close to the language spoken by client (but is not the exact language)
- Need to discuss with client and seek instructions about complex matters (that exist in completely different frameworks: medical and legal and cultural)
  - Medication given and taken
  - Symptoms, treatment, familial supports
  - Mental Health Review Tribunal (MHRT) process and likely outcomes
  - What client wants to do
- Sign language interpreter does their best, both to assist Doctor and Lawyer, respectively
- Doctor relies on interpretation to make diagnosis and advise on treatment
- Lawyer presents client's instructions (as conveyed by sign language interpreter) to MHRT
- MHRT determines to keep client on involuntary treatment



# Common Law Exceptions to Hearsay Rule

- Admissions against interest and voluntary confessions in criminal cases
- Dying declarations and Statements of deceased persons
- Evidence tending to prove a person's state of mind (if state of mind is relevant to fact in issue)
- Evidence of fresh complaint in sexual assault cases (to show consistency)
- Evidence from earlier proceedings involving same parties and similar issues
- Evidence of age and Declarations of pedigree
- Postmarks (eg to show country of origin)
- Statements in public documents
- Declarations in the course of duty and Declarations as to public or general rights
  
- *Res gestae*: “things done” in the course of an event or occurrence (both prior and after)
  - *Walton v The Queen* (1989) 166 CLR 283 per Wilson, Dawson and Toohey JJ at [204]
  - Rationale: spontaneity or contemporaneity of assertions forming part of the *res gestae* tends to exclude the possibility of concoction or distortion: *Ratten* [1972] AC 378; [1971] 174 2 All ER 801

**UNIFORM  
EVIDENCE  
LAW**

**HEARSAY**

and the

**Uniform Evidence Act**

[Evidence (National Uniform Legislation) Act (NT)]

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# ENULA Reforms to the Common Law Position

## The Uniform Evidence Act (UEA) was designed to relax common law approaches:

- Allows out of court statements to be included by abolishing the distinction between admitting statements for their truth and admitting a statement to prove it was made
- Evidence relevant for a non-hearsay purpose can be used to prove an asserted fact: s60
  - eg. prior inconsistent statement used to discredit witness can now be used as evidence of asserted fact
- Contrary to common law position, implied assertions are able to be included.
- Develops the concept of first hand hearsay with several exceptions relating to this type of hearsay (based on concept that 1<sup>st</sup> hand hearsay is more reliable than other types of hearsay)

## Other changes / implications include:

- Codifies many of the common law exceptions into one section: s66A
- Allows first hand hearsay to be admitted in criminal & civil matters where maker is *not available*: ss63 and 65
- Allows first hand hearsay to be admitted where maker *is available* and called as a witness: s66
- Enables admissibility of business records without calling the author: s68
- Allows hearsay in civil cases to be admitted if calling witness results in undue expense or delay: s64

# Hearsay and Relevance

- **Relevance** (Part 3.1, ENULA) is the starting point for admissibility of evidence
  - Evidence that is relevant is admissible (s56).
  - Definition of relevance: s55: “evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding”
- **Rule against hearsay** (Part 3.2, ENULA) is an exception to the rule that all relevant evidence is admissible
  - Hearsay evidence is excluded – unless an exception applies
  - s59(1): “Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation”

# The Hearsay Rule under ENULA

## The Hearsay Rule (Part 3.2, ENULA)

- Hearsay evidence is excluded – unless an exception applies
  - *s59(1): “Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation”*
- To understand “hearsay” under the UEA, you need to understand “representation” and “previous representation”

# “Representation” and “Previous representation”

## Representation means:

- an express or implied representation (whether oral or in writing); or
- a representation to be inferred from conduct; or
- a representation not intended by its maker to be communicated to or seen by another person; or
- a representation that for any reason is not communicated.

## Previous representation means:

- a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced
- That is, any statement made orally, in writing or through conduct, made outside of court proceedings.

# Statutory (ENULA) Exceptions to the Hearsay Rule

## Evidence relevant for a non-hearsay purpose (s 60)

- Relevant to establish a purpose other than proof of the asserted fact - s60(1)
  - **Means: evidence admitted for a non-hearsay purpose may be admitted for a hearsay purpose**
- Not limited to 1st hand hearsay – applies whether or not person who made representation had personal knowledge of the asserted fact – s60(2)
  - **Evidence admitted to establish someone's state of mind can be used for the purposes of:**
    - Establish the veracity of the asserted fact
    - Establishing prior inconsistent statement
    - Undermining credit

# First Hand Hearsay

## Restriction to First-hand hearsay – s 62

- “Previous representation” means “a previous representation that was made by a person who had personal knowledge of an asserted fact” (s 62(1))
- A Person has personal knowledge of an asserted fact if his/her knowledge was, or might reasonably be supposed to have been, based on something a person saw, heard or otherwise perceived (s 62(2))
  - A witness’ diary entry describing an event
  - An investigator’s report following their execution of a search warrant
  - A lawyer’s file note from a conference
- Incorporates an objective test relevant to reliability of evidence especially if maker of statement is not person in witness box



# First hand hearsay – civil and criminal cases

- **Civil proceedings**
  - where maker of representation is unavailable (s 63) or available (s 64)
  - Objection to tender of hearsay evidence if maker available, can be made, under s 68.
- **Criminal proceedings**
  - where maker of representation is unavailable (s 65) or available (s 66)
- s 67 – Reasonable notice of intention to adduce hearsay evidence must be given in writing to other side
  - if relying on s63(2), s 64(2) or s 65(2), (3) and (8):

# Statutory (ENULA) Exceptions to the Hearsay Rule

## Evidence relevant for a non-hearsay purpose (s 60)

- Relevant to establish a purpose other than proof of the asserted fact
- Eg Bob says car is not working –relevant to establish that Bob thought car was not working

## Contemporaneous statements about a person's health etc. (s 66A)

- about the person's health, feelings, sensations, intention, knowledge or state of mind

## Business records (s 69)

## Tags, labels and writing (s 70)

## Electronic communications (s 71)

## Admissions against interest (s 81)

# Other statutory exceptions under the UEA

- Aboriginal and Torres Strait Islander traditional laws and customs (s 72)
- Marriage, family history or family relationships (s 73)
- Public or general rights (s 74)
- Use of evidence in interlocutory proceedings (s 75)
- Representations about employment or authority (s 87(2))
- Exceptions to rule excluding evidence of judgments & convictions (s 92(3))
- Character of and expert opinion about accused persons (s 110 and 111).



**BUSINESS RECORDS**

**AND OTHER**

**EXCEPTIONS**

**TO THE HEARSAY RULE**

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# Business Records – s69

For CPD on Business Records, see: <https://lymanguyen.com/wp-content/uploads/2019/12/s69-ENULA-Business-Records-PDF-LN.pdf>

To constitute an exception to the hearsay rule, the document:

- forms (or formed) **part of the records** belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a **business** – s69(1)(a)
- contains a **previous representation made in the course of, or for purposes of, business** – s69(1)(b)
- The Hearsay Rule does not apply to the document if the representation was made:
  - (a) by a person who had or might reasonably be supposed to have had **personal knowledge of the asserted fact** – s69(2)(1), or
  - (b) on the basis of **information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact** – s69(2)(b)
- A person is taken to have had personal knowledge of a fact if the **person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived** (other than a previous representation made by a person about the fact) – s69(5)

## Requirements of s69 for exception to hearsay rule:

- A **representation** is made **in a document**
- The **document forms**, or had formed, part of the **records** kept for the purpose of a **business**
- The **representation was made** or recorded in the course of, or for the **purpose of a business**
- The representation was made by a **person** who had, or might reasonably be supposed to have had, **personal knowledge of the asserted fact** – or the representation was made on **information supplied** by such a person
- **s183 E(NUL)A** allows a court to “examine the document or thing” and “draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn”
- **ss170 – 172 E(NUL)A**: a person who has/had a position of responsibility re keeping documents may give evidence based on their knowledge, information or belief about a document, to address the requirements of s69

# Business Records – s69

However, an exception to the hearsay rule *does not apply* if:

- The representation was **prepared or obtained** for the purpose of conducting, or for or in contemplation of or in connection with, an **Australian or overseas proceeding** – s69(3)(a)
- The representation was made in connection with a **criminal investigation** – s69(3)(b)
- Note: **Hearsay rule does not apply to evidence that tends to prove that there is no record kept**, in accordance with a system for recording occurrences and events in the course of a business – s69(4)

# Application of s69 Exception

## Ask yourself:

- Is the document **relevant**? – (s55 & 56: relevant evidence is admissible)
  - s55(1) – evidence is relevant where, if accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue
- For what **purpose** is the document produced?
  - If using it for testimonial purposes, it needs to fall within an exception to hearsay rule
- Who or what **produced** the document? How was it produced?
  - Human input or machine generated data?
  - If tendered to prove the truth of its contents, accuracy, reliability, and systems operations, will need to be proved unless a presumption (eg s146 is relied upon)
- Was it made by someone with **personal knowledge of the asserted fact** (or who might reasonably be supposed to), OR on information supplied by such person?
- Does the document form part of the **records of a business**?
  - Was it made for or in connection with court proceedings?



# Tags, Labels and Writing – s70

## Electronic Communications – s71

- **s70** – Hearsay rule does not apply to a tag, label or writing placed on an object (including a document) if the tag or label or writing may reasonably be supposed to have been placed or attached
  - In the course of a business, and
  - for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of its contents
- **s71** – Hearsay rule does not apply to a representation contained in a document recording an electronic communication if the representation concerns:
  - Identity of the person for whom or on whose behalf the communication was sent; or
  - The date or time at which the communication was sent; or
  - The destination of the communication or the identity of the person to whom it was addressed

# Questions for Lawyers and Investigators

1. What is the fact you want to establish?
2. What is the evidence upon which you rely? (a witness; a document)?
3. Is the evidence an out of court statement previously made by a person other than the person who has personal knowledge of the fact asserted?
4. Does an exception to the hearsay rule apply?
5. Is the evidence first-hand hearsay?
6. Is the maker of the statement available or unavailable?
7. Can it be admitted?