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Notes on Documentary Evidence

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1. A "DOCUMENT"

A document connotes a physical thing or medium[1] more or less permanently recording data in such a way that the data can subsequently be retrieved.[2] Those three elements define the subject of this paper.

- **The physical medium**

What is recorded in the physical medium is data rather than information. Information is, by its nature, something that a person derives from reading or observing data in a document. A collection of dots that convey no information, at least to most people, might nonetheless be a document.[3]

- **Permanence**

The physical medium must be capable of more or less permanently recording the data. For example, Neasey J in ***Williams v The Queen***[4] said that magnetic patterns on a tape recording:

> "*Are a permanent record, in the sense that they remain stable for a substantial length of time unless interfered with, and moreover can be replicated indefinitely by re-recording*". [Emphasis added]

As to the degree of permanence, Geoffrey Lane LJ said in the context of business records that:[5]

> "*Although it is not an exhaustive definition of the word, 'record'*[6] *in this context means a history of events in some form which is not evanescent.*

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[1] Brown R A, "Documentary Evidence in Australia", (Second Edition) LBC, 1996 at p 9 (hereafter "Brown").
[2] Ibid.
[3] Brown at pp 10-11.
[4] [1982] Tas SR 266.
[5] [1978] 2 All ER 718 at p 721.
[6] Given the statutory definitions of document dealt with below the word 'record' can be equated with document.

> *How long the record is likely to be kept is immaterial: it may be something which will not survive the end of the transaction in question; it may be something which is indeed more lasting than bronze, but the degree of permanence does not seem to us to make or mar the fulfilment of the definition of the word 'record'.* " [Emphasis added].

The requirement for permanence lies not in the method of displaying data but in the physical medium upon which it is capable of being retained.[7]

- **Retrieved**

It is not necessary that the data must be able to be retrieved in any particular way. Thus, data might be retrieved by means of a tape player, a CD Rom, by human sight in the case of words on a piece of paper, by means of a projector or by software enabling data stored on a computer's hard drive to be viewed via the computer screen.

2. Original Documents and Copies

The significance of original documents as opposed to copies (which were treated with suspicion), appears to have been an age in which a document, if it were to be copied, would be transcribed by hand. As Holt CJ said in ***Steyner v Burgesses of Droitwich***[8]:

> "[A copy is inadmissible] *for it is liable to the mistake of the transcriber*"

Brown observes[9] that the risk of error in transcription was one of the reasons for the evolution of the best evidence rule.[10]

- Originals

> Deciding what is the original of a document is not as easy as it might at first appear. The author of Cross on Evidence[11] says[12]:
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> > "*The primary evidence par excellence of the contents of a document is the original. Generally speaking there can be no great difficulty in*

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[7] See Brown at p 11.
[8] (1696) Skin 623; 90 ER 280.
[9] Brown at p 17.
[10] Dealt with below.
[11] Heydon JD, Cross on Evidence - 6th Australian Edition, Butterworths, Sydney 2000 (hereafter "Cross").
[12] At paragraph [39015].

> *determining which of several documents is the original; but it is sometimes necessary to have regard to the purpose for which or the party against whom the contents are tendered in evidence. In the case of a telegram, if the contents are tendered in evidence against the sender, the original is the message handed in at the post office. So far as the receiver is concerned, there are many cases in which the original will be the written message received."*

There are many other examples dealt with in Cross.[13] It should also be noted that there are cases where there might be multiple originals. For example, where two contracts are signed with one original being provided to each of the parties.[14] Also, a counterpart of a lease signed by one of the parties is the original insofar as it is tendered against that party.

- Copies

Secondary evidence in the form of copies of original documents may be given in some circumstances. The common law rule in relation to use of copies is that a copy can only be used when it is proved to be a true copy of the original, either by way of calling a witness who has made a comparison, or, by the person who copied it.[15]

Section 116 of the *Evidence Act 1977*[16] provides:

> ***"116 Copies to be evidence***
>
> *Notwithstanding any other provision of this part, where a document has been copied by means of a photographic or other machine which produces a facsimile copy of the document, the copy is, upon proof to the satisfaction of the Court that the copy was taken or made from the original document by means of the machine, admissible in evidence to the same extent as the original document would be admissible in evidence without:*
>
> *(a) proof that the copy was compared with the original document; and*
>
> *(b) notice to produce the original document having been given."*

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[13] At paragraph [39015]. See also Brown at pp 18-19.
[14] ***Forbes v Samuel*** [1913] 3 KB 706.
[15] ***Permanent Trustee Co. of New South Wales v Fels*** [1918] AC 879.
[16] Hereafter referred to as the *Queensland Act*.

Thus a copy of a document is admissible to the same extent as the original document:

(i) when it has been copied by a machine which produces a facsimile copy of it;

(ii) where upon the Court is satisfied that the copy was taken or made from the original document;

(iii) without proof of comparison; and

(iv) without any need to give notice to produce the original. In ***Harrison v Smith***,[17] Molesworth J held, in relation to the Victorian equivalent to s.116, that subsection (b) only applied to documents in the hands of the opposite party and not those in the hands of third parties producible under subpoena duces tecum. His Honour held that the best evidence rule was preserved under the section. In other words, his Honour was of the view that secondary evidence could only be given after proof of loss of the document or satisfaction of one of the other exceptions to the best evidence rule.[18]

By contrast, in ***R v Ryan***[19], Stawell CJ upheld admission of a press copy of a letter on the basis that the trial judge appeared to have been satisfied that the press copy was taken from the original writing by means of a machine or press and that:

> *"To hold that the evidence is not sufficient, would be to render the section useless."*

Plainly, it is necessary that evidence be led that the facsimile copy produced is <u>in fact</u> a copy or the relevant original document.[20]

❖ Commonwealth

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[17] (1869) 6 WW and A'B (Eq) 182.
[18] Followed in ***Grieve v Bodey*** (1894) 20 VLR 269.
[19] (1870) 1 AJR 27.
[20] See ***Douglas v The Queen*** (1955) 72 WN (NSW) 184.

s.48(1)(b) of the *Commonwealth Evidence Act 1995* (Cth)[21] permits a party to adduce evidence of the contents of the document in question by tendering a document that is, or purports to be, a copy of the document in question, and has been produced, or purports to have been produced, by a device that reproduces the contents of documents.

- Photographic reproductions

Sections 104ff of the *Queensland Act*.

The purpose of these provisions was to allow for the microfilming and subsequent destruction of bulky paper records. It is clear from the definition of "original document" in s.104 of the *Queensland Act*, that what Part 7 is aimed at is making copies admissible rather than extending the categories of documents, which would be admissible apart from the effect of the Act.

3. Statutory Definitions of documents

- Commonwealth

The *Commonwealth Act* provides:

> ***"Document***
>
> *Means any record of information, and includes:*
>
> *(a) anything on which there is writing; or*
>
> *(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or*
>
> *(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or*
>
> *(d) a map, plan, drawing or photograph."*

[21] Referred to hereafter as the *Commonwealth Act*.

That already wide definition is expanded by s.8 of Part 2 of the dictionary, which provides:

> *"(8) A reference in this Act to a document includes a reference to:*
>
> *(a) any part of the document; or*
>
> *(b) any copy, reproduction or duplicate of the document or any part of the document; or*
>
> *(c) any part of such a copy, reproduction or duplicate."*

- Queensland

The *Queensland Act* defines document as follows:

> *"**"Document"** includes, in addition to a document in writing:*
>
> *(a) any part of a document in writing or of any other document as defined herein; and*
>
> *(b) any book, map, plan, graph or drawing; and*
>
> *(c) any photograph; and*
>
> *(d) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatever; and*
>
> *(e) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and*
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> *(f) any film, negative, tape or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and*
>
> *(g) any other record of information whatever."*

The width and likely longevity of that definition can be seen from sub-paragraph (g) by which a document includes any other record of

information whatever. The relevance of the elaborate statutory definition is the provision (for example in s. 92 of the *Queensland Act*) in providing for proving the truth of the contents of a document by its tender in various circumstances.

4. SOME PARTICULAR CLASSES OF DOCUMENTS

There are a variety of classes of documents to which particular rules apply.

- **Photographs**

Photographs have long been admissible in evidence. The requirements for admissibility are subject to relevance; that the photograph to be tendered is an accurate print from the negative; and that the negatives have not been altered; that the scene depicted in the photograph is the scene in question. These matters are usually demonstrated by tracing custody of the film from the time the photograph was taken until the production of the print in court or by other evidence identifying the scene being depicted in the photograph.[22] Ordinarily the relevance of the photograph will be proved by oral evidence from the photographer. It is thought that digital images must be provided in the same way – cf. & cn. film and video tape.

- **Tape Recordings**

When a tape recording is played, it may either be as real evidence if the intonation of the words is treated as relevant or, if the words used are the focus, it may be being received as an exception to the rule against hearsay. An example is the recording of an admission by one of the parties.

In order to render a tape recording admissible, it is necessary to lead evidence identifying the voice recorded, the means by which it was recorded, that the tape was authentic and as to the custody of the tape prior to its production in Court.[23] If a tape is lost, secondary evidence may be given via a witness who heard it being played.[24]

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[22] ***Russell v Russell*** (1875) 4 QCSR 103; ***Schmidt v Schmidt*** ([1969] QWN 3 at p5.
[23] ***Butera v The Queen*** (1987) 164 CLR 180 at p184 per Mason CJ, Brennan and Deane JJ.
[24] ***R v Cassell*** (1998) 45 NSWLR 325 at p337.

In ***R v Matthews***[25] the Full Court of the Supreme Court of Victoria said in relation to tape recordings that:

> *"Provided a recording on tape is proved to be accurately recorded and the voices of those participating are properly identified, and provided the contents of the recording are relevant to some issue in the trial, we are of the opinion that such recording is in law admissible."*

- **Transcripts**

Under the *Commonwealth Act* (s.48(1)(c)), the contents of a tape recording may be proved by a transcript of the words thereon without any need to produce the original recording.

Prior to the passing of the *Commonwealth Act*, in ***Butera v Queen***,[26] Mason CJ, Brennan and Deane JJ said:

> *"Prima facie, the issue whether the recorded conversation took place should be proved by playing the tape in Court if it is available, not by tendering evidence, whether written or oral, of what a witness heard when the tape was played over out of Court."*

Their Honours went on to say, relevant to transcripts of the original tape recording that:

> *"If the tape is not available and its absence has been accounted for satisfactorily, the evidence of its contents given by a witness who heard it played over may be received as secondary evidence. ... When the tape is available or where its absence is not accounted for satisfactorily, there can be no reason to admit the evidence of an out-of-court listener to the tape recording to prove what the tape recorded: it should be proved by the playing over of the tape. Prudence and convenience combine to support the application of the best evidence rule in such a case.*
>
> *If the oral testimony of an out of court listener is not to be admitted, it can make no difference that the listener has reduced what he has heard to writing so that a transcript can be tendered.*[27]*"*

In the criminal context, Mason CJ, Brennan and Deane JJ said:[28]

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[25] [1972] VR 3.
[26] (1987) 164 CLR 180 at p185.
[27] Ibid at p186.

> *"That the purpose of admitting a transcript is not to provide independent evidence of the conversation but so as to aid (the jury) in understanding what conversation is recorded on the tape, and that they cannot use the transcript as a substitute for the tape if they are not satisfied that the transcript correctly sets out what they heard on the tape."*

Under the *Queensland Act*, the transcript of a tape recording falls within the definition of a copy of the recording.[29] In those circumstances, whenever a copy of a document is admissible under the Act, transcripts of tape recordings will also be admissible as copies of the recording. Commonly there will be argument as to actual words used or the meaning of those words in context. It is thus better to ensure if possible that both the original tape and a transcript are available for a trial Judge.

- **Judgments**

  - Commonwealth

Section 157 of the *Commonwealth Act* provides as follows:

> *"157* ***Public documents relating to Court processes***
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> *Evidence of a public document that is a judgment, act or other process of an Australian Court or a foreign Court, or that is a document lodged with an Australian Court or a foreign Court, may be adduced by producing a document that purports to be a copy of the public document and that:*
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> *(a) is proved to be an examined copy; or*
>
> *(b) purports to be sealed with the seal of that Court; or*
>
> *(c) purports to be signed by a judge, magistrate, registrar or other proper officer of that Court.*

  - Queensland

Section 69 of the *Queensland Act* allows for evidence of judgments and other orders, affidavits, pleadings and other documents filed to be proved

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[28] Ibid at p188.
[29] Section 5(2)(a).

by production of an examined copy or copy purporting to be sealed with the seal of any court in an overseas country, or signed by a judge thereof.

- Care should be taken as to the proper use of judgments etc. The fact (for example) that a trial Judge has not accepted evidence given by a witness at a trial is not proof in the proceedings against that witness that the facts found in the Judgment are true.

- **Ancient Documents**

Under both the *Commonwealth Act* and the *Queensland Act*, there is a presumption that a private document more than 20 years old produced from proper custody has been duly executed.[30] The presumption extends beyond due execution and includes a presumption that all formalities required to make the document effective have been complied with.[31] It should be noted that the rule does not apply to a copy, which has been retained for the requisite period if the original of the document is still in existence and a properly proved copy is able to be obtained.[32]

- **Documents from Other Jurisdictions**

  - Commonwealth

    Parts 4.3 and 4.6 of the *Commonwealth Act* provide general provisions dealing with the recognition throughout Australia of the legislation and public documents of various states and territories.

  - Queensland

    The provisions in the *Queensland Act* appear in ss 67-74. The types of things dealt with are statutes, documents published by the authority of a government of that state, territory or country containing statutes or acts,

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[30] *Queensland Act*, (s.62); *Commonwealth Act* (s.152).
[31] ***Roe d Brune v Rawlings*** (1806) 7 East 279 at p291; 103 ER 107 at p112.
[32] ***Permanent Trustee Co. of NSW v Fels*** [1918] AC 879 per Lord Buckmaster at p885.

judgments,[33] public documents[34] and documents recording births, adoptions, deaths or marriage.

- **Pleadings**

In ***Laws v Australian Broadcasting Tribunal***[35], the High Court held that pleadings, at least if not verified, should not be treated as containing admissions. Prior to ***Laws***, there was disagreement as to whether pleadings in one set of proceedings were admissible as admissions in other proceedings involving the party who filed the pleading. In ***Stohl Aviation v Electrum Finance*** [36] it was held that such documents were inadmissible. That view was, however, rejected by Hunt J in ***Singleton v John Fairfax & Sons Ltd***[37].

- **Affidavits**

The admissibility of affidavits is dealt with in Part 7 of Chapter 11 of the UCPR. Relevantly as to the contents of affidavit r.430 provides that unless otherwise provided, evidence must be given by affidavit made by the person giving the evidence. There are numerous exceptions to this. One example is r.295(2) of the UCPR which provides that an affidavit on a summary judgment application may contain statements of information and belief if the person making it states the sources of the information and the reasons for the belief.

The admissibility of affidavits in the Federal Court is dealt with under o.14 r.2 of the Federal Court Rules.

- **Public Documents**

  - The nature of public documents

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[33] Dealt with above.
[34] Dealt with below.
[35] (1990) 170 CLR 70 at pp85-6.
[36] (1984) 56 ALR 716.
[37] [1982] 2 NSWLR 38.

In ***R v Halpin*** [38], the English Court of Appeal held that for a document to be classified as a public document it must:

(a) be brought into existence and preserved for public use on a public matter; and

(b) be open for public inspection.

A third matter which, goes to the weight to be given to the evidence rather than its admissibility, is how promptly the document has been made after the events which it purports to record. In ***R v Halpin*** is was contended that the entry must be made by a person having a duty to enquire and satisfy himself as to the truth of the recorded facts. [39] The Court rejected that submission and held that it was not necessary that the official charged with recording that the matter have personal knowledge of their accuracy. [40]

- Evidentiary value of public documents

A public document produced from proper custody is evidence of its contents. [41]

What the contents of a public document is evidence of, was dealt with in ***Re Stollery; Weir v Treasury Solicitor*** [42] there the birth and death certificates stating the names of the parents of a child and the name of the deceased (the child) were admissible as evidence that the parents of the deceased were married. [43] That is, although the documents did not state that the parents were married, the majority was prepared to infer that. However, Pollock MR went on to say [44] that although the certificates provided some evidence of marriage, they did not give rise to a rebuttable presumption of that.

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[38] [1975] 3 WLR 260 at p263 and p265.
[39] Supra at p263.
[40] Supra at p265 and see Brown opcit at pp 65-66.
[41] ***Wilton & Co v Phillips*** (1903) 19 TLR 390 – see s 51 of the *Queensland Act* re admissibility of certified copies.
[42] [1926] Ch 284.
[43] Supra at p314 and pp322-324.
[44] At p314.

Brown suggests that material other than that required by law to appear in a public document should be inadmissible as evidence of the facts it purports to state. [45]

- **Statutory Certificates**

Although various statutes specifically provide that such certificates are admissible, they may well be admissible outside those statutes as public documents. The weight to be given to certificates varies between the statutes which render them admissible. In a similar vein to the controversy as to whether a public document is evidence of everything stated in it, is the proposition that a certificate should not be admitted as evidence of matters not expressly required or permitted by law to be stated in it. [46]

  - Documents as "evidence"

    If a statute provides that a certificate or document constitutes evidence of a fact, that is the extent of the use that may be made of it. That is, the evidence may be contradicted by other evidence. [47]

  - Documents as "prima facie evidence"

    In this category the certificate is sufficient to prove a fact unless evidence inconsistent with that depending upon the measure of proof required raises a reasonable doubt or, on the balance of probabilities, indicates the matters stated in the certificate not to be correct.

    The amount of evidence required to rebut a statutory presumption depends upon the words used in the statute. For example, Sholl J in ***R v Governor of Metropolitan Jail; Ex parte Di Nardo***,[48] in the context of the words: "in the absence of proof to the contrary" held that the effect of such a

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[45] Brown at pp68-69 citing ***Trade Practices Commission v TNT Management Pty Ltd*** (1984) 56 ALR 647 at p667.
[46] ***Burra of Balmain v Mort's Dock & Engineering Co*** (1902) 2 SR (NSW) 16.
[47] See: ***Queenstown Garden Plaza Pty Ltd v Port Adelaide City Corporation*** (1975) 11 SASR 505 at pp537-538.
[48] [1963] VR 61.

provision was to reverse the onus of proof and to require the defendant to negative the matters stated in the certificate.

- Certificate "prima facie" evidence

In ***R v Hush; Ex parte Devanny*** [49] Dixon J expressed the view that the onus of proof is not reversed by making a document prima facie evidence of the facts stated therein. Rather, the effect is to make the document sufficient evidence of the facts stated in it in the absence of evidence from the other party casting doubt on that.

- Documents as "conclusive evidence"

Although the intention of parliament in respect of provisions worded in this way is clear, there are two areas in which Courts have nonetheless held them ineffective. First, in ***Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation*** [50] Fullagar J held that a regulation purportedly made under an Act was wholly invalid as it purported to preclude the Court from deciding questions which were remitted by the Act to the Court for determination.

Secondly, Griffith CJ in ***FEDFA v BHP Coal Co Ltd***[51] held that a certificate which was said to provide "conclusive evidence of the registration of the organisation therein mentioned and that it has complied with the prescribed conditions to entitle it to be registered" did not allow an association (which was assumed by the provision to be capable of being registered) to be conclusively presumed registered when it could not, under the relevant Act, avail itself of the section.

5. GETTING A DOCUMENT INTO EVIDENCE - SUBPOENAS

- Nature of subpoena and power to issue

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[49] (1932) 48 CLR 487.
[50] (1953) 88 CLR 23 at p35.
[51] (1911) 12 CLR 398 at p413.

Subpoenas are provided for in Part 4 Chapter 11 *Uniform Civil Procedure Rules*.

A subpoena duces tecum is a writ issued by a court requiring a person to attend court to produce a document or thing described in the subpoena.

The Supreme Courts of the States and Territories have an inherent jurisdiction to issue the writ but inferior courts require statutory authority to do so.[52] Rule 414 of the UCPR provides a power to issue subpoenas for the Supreme Court, District Court and the Magistrates Court.

The ordinary rules in relation to service should be followed with subpoenas so that, where a corporation is to be served, it should be served at its registered office. Despite the terms of the request to issue a subpoena duces tecum,[53] there is a discretion in the issuing authority under r.414 as to whether or not to issue a subpoena. It is in practice never utilized.

A subpoena for production does not compel a witness to produce documents other than those in their possession, custody or control.[54] In ***Rochfort v Trade Practices Commission***[55] Gibbs CJ said:

> *"I have suggested that the person to whom the subpoena is directed should have possession of the documents, but it does not seem to me that it is necessary to enquire whether the person concerned is a bailee or a mere custodian. Some authorities use 'custody' or 'control' interchangeably with 'possession' in this regard: see, eg, Eccles [1912] 1 KB at page 145. The question is whether the servant has such possession, custody or control of the documents that he may bring them to Court in obedience to the subpoena without violating his duty to his master. ...*
>
> *The rules to which I have referred are not designed to enmesh legal proceedings in meaningless technicalities. Their purpose is to ensure that a subpoena duces tecum is addressed to the right person . It will not always be the case that a servant who has custody of documents will be the wrong person to require to produce them; his authority may*

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[52] See ***Ex parte A-G (NSW)***; ***re Cook*** (1967) 86 WN (NSW) (Pt 2) 222 at p231 and in relation to the Magistrates Court see the *Justices Act* s.83.
[53] Brown at p99.
[54] ***Amey v Long*** (1808) 9 East 473; 103 ER 653.
[55] (1982) 153 CLR 134 at p140.

> *be such that he can produce them without violating his duty to his master.*"

It is thus of critical importance that appropriate consideration be given to the person to whom it is directed. For example often objection is raised to a subpoena directed to a partner for firm documents as to a parent corporation for a subsidiary's books.

- Requirement for a valid subpoena

The requirements for valid subpoenas are set out in rr 414 and 415 and 419 of the UCPR. Relevantly the person to whom it is directed must be notified that they have the right to apply to the Court to have the subpoena set aside on any sufficient grounds including those things set out in sub-rule 415(8)(d). Under r.414(8) a subpoena requiring a person to produce a document or thing must include an adequate description of the document or thing. Even if the documents are adequately identified, the subpoena may be objectionable if a great many documents are sought and the foundation of relevance is not adequately established.[56]

Rule 419 of the UCPR excuses a person from complying with a subpoena unless conduct money "sufficient to meet the reasonable expenses of complying with the subpoena is tendered." In practice substantial expense may be incurred in requiring production of documents other than from an opposing party. Cost considerations should also be borne in mind if the documents are an admissible copy of it is produced by an opposing party or by the tendering party.

Not surprisingly, there is a significant overlap between the requirements for a valid subpoena and the circumstances in which a subpoena might be set aside. A useful statement of principle in relation to the requirements for a valid subpoena appears in the judgment of Moffitt P (with whom

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[56] ***Steele v Savory*** [1891] WN 195; ***Spencer Motors Pty Ltd v LNC Industries Ltd*** [1982] 2 NSWLR 921.

Hutley and Glass JJA agreed) in ***Waind v Hill & National Employers Mutual General Association Limited.***[57]

- Setting subpoenas aside

Rule 415(2) requires a subpoena for production of documents to include a statement as to the right of the party compelled thereby to apply to have the subpoena set aside on various bases. Those matters are want of relevance, privilege, oppressiveness (including oppressiveness because substantial expenses may not be reimbursed) or non-compliance with the UCPR. In addition, r.416 gives the court an apparently unfettered discretion to set aside a subpoena.

One basis upon which a subpoena might be set aside is that it is being used for some purpose ulterior to the litigation. As Moffitt P said in ***Waind*** [58], such a purpose might be:

> *"to inspect the documents in connection with other proceedings, or for some private purpose, or in collusive proceedings to give them publicity. A witness might argue the documents must be sought for some undefined spurious reason, as they have no conceivable relation to the proceedings. The court would jealously consider any of such submissions having regard to the invasion of the private rights of the stranger occasioned by the operation of the subpoena."*

What is required is that a subpoena be issued for a "legitimate forensic purpose".[59]

In ***Botany Bay Instrumentation & Control Pty Ltd v Stewart*** [60], Powell J gave the following examples of situations in which a court would set aside a subpoena:

> *"1. unless the subpoena was issued for the purpose of a pending trial, hearing or application: see, for example, Central News Co v Eastern News Telegraph Co (1884) WN (Eng) 23 (Mathew J); 53 LJ QB 236 (Divl Ct); Elder v Carter; cp Raymond v Tapson;*

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[57] [1978] 1 NSWLR 372, set out in *Brown* at pp 104-106.
[58] Supra at p382.
[59] ***Maddison v Goldrick*** [1976] 1 NSWLR 651; ***R v Saleam*** (1989) 16 NSWLR 14.
[60] [1984] 3 NSWLR 98 at p100.

2. where to require the attendance of a witness would be oppressive: Raymond v Tapson; Re Mundell; Fenton v Cumberlege;
3. where the subpoena had not been issued bona fide for the purpose of obtaining relevant evidence and the witness to whom the subpoena had been addressed was unable to give relevant evidence; R v Baines; R v Hove Justices; Ex parte Donne;
4. where the subpoena has been used for the purpose of obtaining discovery or further discovery against a party: Commissioner for Railways v Small; Waind v Hill; Finnie v Dalglish;
5. where the subpoena has been used for the purpose of obtaining discovery against a third party: Burchard v Macfarlen; Ex parte Tyndall; Commissioner for Railways v Small; Senior v Holdsworth; Ex parte Independent Television News Ltd; Waind v Hill; Finnie v Dalglish;
6. where to require a party to comply with a subpoena to produce documents would be oppressive: Commissioner for Railways v Small; Senior v Holdsworth; Ex parte Independent Television News Ltd; Waind v Hill; Finnie v Dalglish;
7. where the subpoena has been issued for a purpose which is impermissible, as, for example, "fishing": Hennessey v Wright (No 2)(1888) LR 24 QBD 445(n) at 448; Griebart v Morris [1920] 1 KB 659 at 664, 667; Commissioner for Railways v Small at 574;"

- Costs and expenses

Rule 419 requires conduct money to be tendered at the time the subpoena is served or within a reasonable time before attendance under the subpoena is required. In addition, r.417 provides that upon application a Court may make an order for the payment of any loss or expense incurred in complying with the subpoena. Further, r.418 deals with the costs of complying with a subpoena issued to a non-party.

6. EVIDENCE OF WHAT?

- **Admissibility and Effect of Contents of a Document**

Documents may be admitted as either real evidence or a statement in a document may be sought to be relied on as truth of its contents, in which case the document constitutes testimonial evidence.

It is important to consider the common law rule or the Act under which a document becomes admissible in discovering the forensic use of a document admitted into

evidence. Public documents and statutory certificates as dealt with above. General admissibility provisions under the *Queensland Act* and business records legislation are dealt with below. The primary distinction between the 2 classes of provisions is that it is a statement contained in a document which is admissible under the later provision and not necessarily the whole document. Generally the position with public documents is that they are admissible in their entirety. Not all statements in the business records of the corporation will be admissible for or against that corporation but all public records relating to it will be.

- **The "Best Evidence" Rule**

In ***Omychund v Barker*** [61] Lord Hardwicke said that:

> "*The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.*"

Cross says of Lord Hardwicke's judgment that: [62]

> "*... It seems that Lord Hardwicke was thinking of the rule as inclusionary as well as exclusionary. His view appears to have been that, where there was nothing better, recourse might be had to evidence which would be inadmissible in other cases; but the typical illustrations of the rule are provided by cases in which evidence is excluded because better was available.*"

Cross states that: [63]

> "*It is sometimes said that all that is left of the best evidence rule is the requirement that the original of a private document must be produced in order to prove its contents unless its absence can be explained; in fact this rule antedated the best evidence rule. Apart from this, it is said that the rule is merely a counsel of prudence, for the absence of the best evidence may always be the subject of adverse comment by the Judge.*"

- **The Rule as to Secondary Evidence of Contents**

  - Scope of the rule

    Cross states that: [64]

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[61] (1745) 1 Atk 21 at 49; 26 ER 15 at p33.
[62] Cross at paragraph [1465].
[63] Cross at paragraph [1480].

> *"A party relying on the words used in a document for any purpose other than that of identifying it must, as a general rule, adduce primary evidence of its contents. This is often spoken of as the most important survival of the 'best evidence' rule, ..."*

It should be noted that the rule only applies where direct reliance is placed upon the words used in it. The rationale of the rule is stated by Wigmore[65]:

> *"(1) As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfulness or by inadvertence; this contingency wholly disappears when the original is produced. Moreover, the original may contain, and the copy will lack, such features of handwriting, paper, and the like, as may afford the opponent valuable means of learning legitimate objections to the significance of a document.*
>
> *(2) As between oral testimony, based on recollection, and the original, the added risk, almost certainty, exists of errors of recollection due to the difficulty of carrying in the memory literally the tenor of the document."*

The rule has not been applied to markings on objects other than documents so that, for example, a bottle with a label attached to it, upon which things are written, is something about which secondary evidence may be given. Of course the weight which might be given to that evidence in the absence of production of the object is another question. Brown suggests that inscribed chattels (such as a labelled bottle) should be included within the definition of a document and the secondary evidence rule should be applied to all documents including such chattels [66]. Brown notes that for both the Commonwealth and Queensland the definitions of "document" are wide enough to include inscribed chattels. [67]

- Nature and effect of the rule

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[64] Cross at paragraph [39005].
[65] Wigmore on Evidence (Third Edition), Volume IV, paragraph [1179].
[66] Brown at p121.
[67] See: *Acts Interpretation Act 1901* (Cth) section 25 and section 51d of the *Queensland Act.*

In ***R v Alexander & Taylor*** [68] the Full Court of the Supreme Court of Victoria said:

> *"secondary evidence of a document is admissible, unless an opposite party objects on the ground that the original document (assuming it not to be lost or destroyed) ought to be produced."*

There are no degrees of secondary evidence. A copy of the entire document may, or as extracts[69] may be tendered or oral evidence may be given as to its contents. Different weight will be afforded depending on the nature of the secondary evidence adduced. The admissibility of copies both at common law and under statute has already been dealt with above.

- Exceptions

  - Stranger's lawful refusal to produce

    Secondary evidence of the contents of a document in the possession of a non-party is admissible where that person lawfully refuses to produce the document. [70] In this context it should be noted that secondary evidence is only able to be given in circumstances where the stranger to the proceeding is not compellable to produce the original. [71]

  - Document lost or destroyed

    Plainly, if this exception is to be relied upon, evidence must be given of the steps that have been taken to search for a document where it is alleged to have been lost [72] or, in the case of destruction. [73] Secondary evidence will be admissible even in circumstances where the original document has been destroyed by the person seeking to

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[68] [1975] VR 741 at p751.
[69] ***Grain Sorghum Marketing Board v J Jackson & Co (Produce & Seeds) Pty Ltd ; Ex parte The Grain Sorghum Marketing Board*** [1962] Qd R 427 at p444 per Stanley J.
[70] ***Doe d Gilbert v Ross*** (1840) 7 M & W 102; 151 ER 696.
[71] ***Bell v David Jones Ltd*** (1948) 49 SR (NSW) 223.
[72] ***Port Jackson Steamship Co v Mayers*** (1888) 9 NSWR 470.
[73] ***R v Hall*** (1871) 12 Cox CC 159.

rely on secondary evidence. [74] Obviously, the weight likely to be afforded the copy in such circumstances would be limited. There is no need that the search for a lost document be carried out contemporaneously with the hearing. [75]

- Production of original impossible

This exception will apply where, for example, a document is in the hands of a person not in the jurisdiction and therefore not able to be compelled to produce it. [76]

Note that there are also examples set out in Brown [77] of circumstances in which the inconvenience (rather than impossibility) of the production of an original has been held to justify the reception of secondary evidence as to the document's contents.

7. USE OF DOCUMENTS BY WITNESS OTHER THAN BY TENDER

- **Refreshing Memory**

  - In Court

Leave is required to enable a witness to refresh memory from a document while giving evidence. The witness should give evidence to the extent of his or her recollection and refer to the document only where his or her memory is exhausted.[78] The conditions which must be satisfied are that:

(a) The document must have been made, or accepted as accurate by the witness using it to refresh their memory, while the events described were still fresh in the witness's memory;

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[74] ***R v Curran*** [1983] 2 VR 133 at p138 per McGarvie J.
[75] ***Fitz v Rabbits*** (1837) 2 M & Rob 60; 174 ER 214.
[76] ***Alivon v Furnival*** (1834) 1 C N & R 276; 149 ER 1084.
[77] At p130.
[78] ***Hetherington v Brookes*** [1963] SASR 321.

(b) The witness's memory must require refreshing;[79]

(c) The document must be produced to opposing counsel for inspection if required.

❖ Facts Fresh in the Witness's Memory

It is not necessary that there be any particular degree of contemporaneity. What is necessary is that the events be fresh in the witness's mind when the witness made or accepted the document.[80] The appropriate inquiry but whether the events were fresh in the witness's mind at the time the document was made, or accepted by the witness not necessarily the time at which the document was made – although the 2 propositions are directly related.

❖ Maker of the Document

A witness may refresh memory from a document even if the witness did not make the document. What is necessary is that a witness verify, whilst the matters are fresh in his or her mind, that the record made is accurate.[81]

❖ Production of the Document

If a document is used by a witness to refresh memory in court, it must be produced to opposing counsel for inspection.[82]

If a document used in court to refresh memory is subject to legal professional privilege, the privilege is waived when it is so used.

❖ Section 32 of the *Commonwealth Act* provides:

"32 Attempt to revive memory in Court

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[79] ***R v Baffigo*** [1957] VR 303 at p305 per Smith J.
[80] See for example ***R v Van Beelen*** (1972) 6 SASR 534 at p536.
[81] See ***R v Kelsey*** (1981) 74 Cr App R 213 at p217.
[82] ***R v Kingston*** [1986] 2 Qd R 114 at p127.

(1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the Court gives leave.

(2) Without limiting the matters that the Court may take into account in deciding whether to give leave, it is to take into account:

(a) whether the witness will be able to recall the fact or opinion adequately without using the document; and

(b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that:

(i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or

(ii) was, at such a time, found by the witness to be accurate.

(3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the Court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.

(4) The Court is, on the request of a party, to give such directions as the Court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

- Out of Court

Obviously documents are commonly used by witnesses prior to coming to court in order to attempt to stimulate their memory. If such a document is used, and the witness's memory is refreshed, there is no requirement to

produce the document.[83] However, if the witness's memory is not revived by the document it must be produced, if required by opposing counsel, and non-production will render the oral evidence inadmissible.[84]

The position is different where the *Commonwealth Act* applies. Section 34 provides:

> *"34 **Attempts to revive memory out of Court***
>
> *(1) The Court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.*
>
> *(2) The Court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with.*

8. USE OF DOCUMENTS BY COUNSEL – WITNESS UNDER CROSS-EXAMINATION

- Prior statements

Section 19 of the *Queensland Act* provides:

> *"19 **Witness may be cross-examined as to written statement without being shown it***
>
> *19(1) A witness may be cross-examined as to a previous statement made by the witness in writing or reduced into writing relative to the subject matter of the proceeding without such writing being shown to the witness.*
>
> *(1A) However, if it is intended to contradict the witness by the writing the attention of the witness must, before such contradictory proof can be given, be called to*

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[83] ***Ken v Bryant (No 2)*** [1956] St R (Qld) 570, approved in ***R v Kingston*** supra at pp 126 – 127.
[84] ***Ken v Bryant*** supra.

those parts of the writing which are to be used for the purpose of so contradicting the witness.

(2) A Court may at any time during the hearing of a proceeding direct that the writing containing a statement referred to in subsection (1) be produced to the Court and the Court may make such use in the proceeding of the writing as the Court thinks fit."

The effect of s.19 is to allow cross-examination upon a previous statement in writing without showing it to the witness. If the witness agrees that he or she made the statement and said the things alleged, those parts of the statement obviously become part of the witness's evidence and there is no entitlement in opposing counsel to see the document.[85] If the witness denies what he or she has alleged to have said, the document then may be proved under s.18.

The proper approach under s.19 is to give the witness sufficient information to identify the occasion upon which the statement is alleged to have been made and the document to which reference has been made. If the witness acknowledges the statement, the cross-examiner may put extracts from it to the witness. The document need not be put before the witness. However to the extent that it is intended to contradict the witness by the statement, the witness must be shown those specific parts of it which are said to be in conflict with the witness' oral evidence.[86] Once that has occurred, the witness may be asked whether he or she still adheres to those portions of his or her evidence which the cross-examiner suggests are inconsistent with the statement. If the witness adheres to them, the cross-examiner may simply invite the Court to reject the oral evidence to the extent that it is inconsistent. If the witness does not adhere to their previous evidence, they may be invited to adopt what was said in the statement.

The court may be invited to reject the witness's oral evidence on the basis of the questions asked without tender of the document so long as the series

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[85] ***North Australian Territory Company v Goldsborough Mort & Co*** [1893] 2 Ch 381.
[86] Section 19(1A).

of questions is sufficiently intelligible without the document. However, if the cross-examiner desires to tender the statement, he or she may proceed to do so where the witness admits having made it, or it can otherwise be proved that the witness made the document.

- Proper evidentiary use of prior inconsistent statements

  As Gibbs J observed in ***R v Driscoll***:[87]

  > *"The whole purpose of contradicting the witness by proof of the inconsistent statement is to show that the witness is unreliable".*

  At common law, a prior inconsistent statement by a party would generally be admissible as containing admissions against that party's interest and thus as an exception to the hearsay rule. However, unless it does constitute an exception to the hearsay rule, the document would not be admissible as evidence at the truth of its contents but only to diminish the witness's credit.[88] In ***Savanoff v Re – Car Pty Ltd***[89], McPherson J commented that s.19 (2) of the *Queensland Act* "*enables the Court to require that [the previous statement] be put in evidence ...*".

  Under s.101(1) of the *Queensland Act*, unlike the position at common law, a witness's prior inconsistent statement is evidence of any fact stated therein of which direct oral evidence from the witness would have been admissible.

  - Use of documents not made by the witness

    Section 19 of the *Queensland Act* applies only to a written statement made by the witness being cross-examined. Where a document made by a person other than the witness is being used, the proper course is to ask the witness to look at the document without identifying it and then to ask

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[87] (1977) 137 CLR 517 at p536.
[88] ***R v Titijewski*** [1970] VR 371.
[89] [1983] 2 Qd R 219.

whether having read it, they adhere to their previous evidence.[90] If the witness adheres to their former testimony, no further use may be made of the document,[91] and it does not become evidence.[92] If the witness does not adhere to their previous answers, the appropriate approach is to lead the witness back through his or her evidence to highlight the discrepancies. Of course, if the document is otherwise useful for the cross-examiner's case, it may be appropriately proved and tendered.

9. GENERAL ADMISSIBILITY PROVISIONS

Section 92 of the *Queensland Act* provides:

> ***92 Admissibility of documentary evidence as to facts in issue***
>
> *(1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if:*
>
> *(a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or*
>
> *(b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.*
>
> *(2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where:*

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[90] ***The Queens Case*** (1820) 2 Brod & B284; 129 ER 976; ***Alister v The Queen*** (1984) 154 CLR 404 at pp 442 – 443 per Wilson and Dawson JJ; ***R v Bedington*** [1970] Qd R 353, at p359.

[91] ***Paterson v Paterson*** (1953) 89 CLR 213.

[92] It may, of course, be able to be tendered by some other means.

(a) the maker or supplier is dead, or unfit by reason of bodily or mental condition to attend as a witness; or

(b) the maker or supplier is out of the State and it is not reasonably practicable to secure the attendance of the maker or supplier; or

(c) the maker or supplier cannot with reasonable diligence be found or identified; or

(d) it cannot reasonably be supposed (having regard to the time which has elapsed since the maker or supplier made the statement, or supplied the information, and to all the circumstances) that the maker or supplier would have any recollection of the matters dealt with by the statement the maker made or in the information the supplier supplied; or

(e) no party to the proceeding who would have the right to cross-examine the maker or supplier requires the maker or supplier being called as a witness; or

(f) at any stage of the proceeding it appears to the Court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling the maker or supplier as a witness.

(3) The Court may act on hearsay evidence for the purpose of deciding any of the matters mentioned in subsection (2)(a), (b), (c), (d) or (f).

(4) For the purposes of this part, a statement contained in a document is made by a person if:

(a) it was written, made, dictated or otherwise produced by the person; or

(b) it was recorded with the person's knowledge; or

(c) it was recorded in the course of and ancillary to a proceeding; or

(d) it was recognised by the person as the person's statement by signing, initialing or otherwise in writing.

Section 92 permits documentary hearsay if either subsection 92(1)(a) or (b) are satisfied, unless the calling of the maker of this statement is not required because of one of the matters in s.92(2).

The section allows the proof of prior consistent statements. Further prior inconsistent statements of non-party witnesses (not covered by s.19 of the *Queensland Act*) are admissible as evidence of the facts contained therein rather than as going simply to credit.

What s.92 does not do is allow for documentary hearsay to be admitted in circumstances where the oral evidence proposed to be given would not be admissible because it was itself hearsay or was, for some other reason, objectionable.

- **"Direct Oral Evidence of a Fact would be Admissible"**

In order for direct oral evidence of a fact to be admissible, it must not infringe the hearsay rule or other rules directed at limiting those matters as to which evidence might be given. In ***Carusi v Housing Commission***[93] Lush J said in relation to the Victorian equivalent of s.92 that:

> *"The words 'where direct oral evidence of the fact would be admissible' contemplated a situation in which the hypothetical evidence is given by the maker of the statement of the facts in the statement ... . The various statements by the doctors in the documents can only be admitted if those doctors, when called, could have given evidence of the deceased's condition."* [Emphasis added].

By contrast in ***Tausz v Elton***[94] Mahoney J said:

> *"However, in order that the document be admissible, it is necessary that 'direct oral evidence' of the relevant facts would be admissible. In my opinion it would. It is arguable that this requirement is not satisfied by the assumption that the deceased itself could have given such oral evidence, because the proceedings are brought on the basis that the deceased is dead. However this be, direct oral evidence, if given by a third party present at the time, would be admissible, and this, in my opinion, is sufficient to satisfy the section."*

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[93] [1973] VR 215.

[94] [1974] 2 NSWLR 163 at pp 171 – 172 and see also ***Ritz Hotel v Charles of The Ritz (Nos 15 & 16)*** (1987) 14 NSWLR 107 at p111.

Where the relevant statement contains expressions of opinion, it is necessary that the person expressing the opinion is qualified to do so.[95]

- **Statement of Fact**

What is admissible by s.92 is a statement contained in a document rather than the document itself. It may be that the document only contains a statement of fact of which direct oral evidence might have been admissible, in which case, the whole document would be admissible. However, it may be necessary that parts of the document are excised.

It should be noted that a "fact" includes an opinion in circumstances where the maker of the statement is qualified to express it.[96]

Consistently with the requirement that the maker of the statement have personal knowledge of the facts of which it is based, the source of that knowledge cannot be hearsay.[97]

- **"Tending to Establish"**

It is sufficient if the evidence "tends" to establish a fact, as in the case of circumstantial evidence taken together with other evidence being sufficient to establish a fact.[98]

BUSINESS RECORDS LEGISLATION

- **Queensland**

Under the *Queensland Act* the provisions relevant to the admission of business records as an exception to the hearsay rule are dealt with in s83-91. Section 84 makes admissible an entry in a book of account and a copy of an entry in a book of account.

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[95] ***R v Barker*** [1976] Tas SR 52.
[96] ***Thiess Properties Pty Ltd v Ipswich Hospitals Board*** [1985] 2 Qd R 318.
[97] ***Ramsay v Watson*** (1961) 108 CLR 642 at p649.
[98] ***Plomp v R*** (1963) 110 CLR 234 and ***Martin v Osborne*** (1936) 55 CLR 367 at p375.

Once admitted, such an entry is evidence of the matters, transactions and accounts therein recorded. [99]

A "book of account":

> "*Includes any document used in the ordinary course of any undertaking to record the financial transactions of the undertaking or to record anything acquired or otherwise dealt with by, produced in, held for or on behalf of, or taken or lost from the undertaking and any particulars relating to any such thing.*" [100]

Whether or not something is "used in the ordinary course" of an undertaking depends upon the practices of the particular undertaking and not businesses of that kind. [101] The necessary connection is that document be used in the ordinary course; there is no requirement that the entry be made by the person or entity of which the document is a record. [102]

An undertaking includes public and private hospitals [103], and the Australian Taxation Office [104]. An undertaking is defined in schedule 3 as including:

> "*...public administration and any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on by the Crown or by any other person for profit or not ...*"

In order to qualify as a "record", some apparent degree of "permanence" is required. [105] It should be noted that the mere fact that the record is located in the company's files does not necessarily make it a record of that company. [106]

Although books of account are not confined to what might be classed as strictly accounting records, the document must have some financial character. [107]

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[99] Section 84(a).
[100] Section 83.
[101] ***Compafina Bank v ANZ Banking Group Ltd*** [1982] 1 NSWLR 409.
[102] *R v Cook* (1980) 71 Cr App R 205 at p212.
[103] ***O'Donnell v Dakin*** [1966] Tas SR 87.
[104] ***Re Riggs; Ex parte: Deputy Commissioner of Taxation (WA)*** (1986) 17 ATR 366.
[105] ***Ryan v ETSA (No. 2)*** (1987) 47 SASR 239 at p246.
[106] Forbes JRS, Evidence Law in Queensland (Fourth Edition) Law Book Company 2002 Sydney (hereafter Forbes) at paragraph [83.14] citing *Ross McConnell Kitchen & Co Pty Ltd (In Liq) v Ross (No. 1)* [1985] 1 NSWLR 233 at p235.
[107] Forbes at paragraph [83.15] and see also Cross at paragraph [35340].

Section 85 deals with proving that a book is a book of account [108]. The evidence is to be given by "a responsible person" familiar with the books of account of the undertaking and may be given orally or by affidavit or statutory declaration [109]. Section 86 deals with what is required where a copy of an entry in a book of account is sought to be relied upon.

Although there is no requirement that the "responsible person familiar with books of account of the undertaking" be called [110], s.94 applies to allow the admission of evidence for the purpose of destroying or supporting the person's credibility as a witness.

Section 87 provides that a person engaged in an undertaking (who is not a party to the proceeding) is not compellable to produce any book of account which can be proved under the "books of account" provisions of the *Queensland Act* or to appear as a witness to prove the matters, transactions and accounts recorded therein in the absence of a Court order.

Section 88 deals with disclosure of books of account by parties and non-parties. In the case of non-parties, the Court has a discretion [111] while for parties there is a right to inspection [112].

It should be noted that s.134A of the *Queensland Act* gives access to documents held by government and semi-governmental agencies without a Court order. Chapter 7 Part 2 of the UCPR also provides for non-party disclosure.

Section 89 allows a responsible person familiar with the books of account of the undertaking to give evidence that a particular person did not at a given time have an account with the undertaking.

Section 91 makes certain of the books of account provisions applicable to books of account and persons engaged in undertakings in another State or Territory.

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[108] Although see also s96.
[109] Section 85(2).
[110] Compare with s.92.
[111] Section 88(1).
[112] Section 88(5).

- **Commonwealth**

The subject of admissibility of business records under the *Commonwealth Act* is dealt with in s.69. The term "business" is defined as follows:

> "*References to businesses*
>
> *1(1) A reference in this Act to a business includes a reference to the following:*
>
> *(a) a profession, calling, occupation, trade or undertaking;*
>
> *(b) an activity engaged in or carried out by the Crown in any of its capacities;*
>
> *(c) an activity engaged in or carried on by the government of a foreign country;*
>
> *(d) an activity engaged in or carried on by a person holding office or exercising power under or because of the Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried out on in the performance of the functions of the office of in the exercise of the power (otherwise than in a private capacity);*
>
> *(e) the proceedings of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament;*
>
> *(f) the proceedings of a legislature of a foreign country, including a House or committee (however described) of such a legislature;*
>
> *(2) A reference in this Act to a business also includes a reference to:*
>
> *(a) a business that is not engaged in or carried on for profit; or*
>
> *a business engaged in or carried on outside Australia.*"

The term "record" in s.69(1) is not defined. There seems no reason in principle why the considerations above in relation to the *Queensland Act* should not apply to the Commonwealth legislation. Similarly, the words "in the course of, or for the purposes of, a business" are not defined in the Act. The omission of the word "ordinary" potentially makes this section apply to less routine documents than those of the State Act.

The second requirement of s.69(1) is that the relevant document contain a previous representation made or recorded in the document in the course of, or for the purposes of, the business. Sub-section 2 then deals with the conditions of admissibility namely that the representation was made: by a person who had or might reasonably be supposed to have personal knowledge of the fact asserted; or on the basis of information directly or indirectly supplied by such a person.

The purpose behind such a requirement was explained by the Australian Law Reform Commission as being to prevent the tender of records where the information recorded was provided by persons who were not closely associated with the business.[113]

An "asserted fact" is defined in s.59(2) to mean a fact the existence of which is intended to be asserted in the representation.

COMPUTER - PRODUCED EVIDENCE

- **Queensland**

Computer produced evidence may be admissible under the business records legislation or under s.92 of the *Queensland Act*. Nevertheless, the question of admissibility of statements produced by computers is specifically dealt with in s.95. The following is required under s.95(1):

- Where direct or oral evidence would be admissible;
- A fact;
- In a document;
- Tending to establish;
- Shall be admissible as evidence,

The requirements are dealt with above under the heading "General Admissibility Provisions". Admissibility is further conditional upon the matters enumerated in s.95(2) which requires production of the document during a period of regular use of the computer; that over that period there was regularly supplied to the computer

[113] ALRC 26, Volume 1, paragraph [707].

information in the ordinary course; that the computer operated properly at material times, and that the information contained in the statement reproduces or is derived from the information supplied in the ordinary course.

The matters in sub-section 2 may be proved by a certificate under s.95(4).

It should be noted that s.95(2)(d) does not require that a person supply the information. Another computer might, or a camera or other medium might be the source.

- **Commonwealth**

The *Commonwealth Act* provides for a number of circumstances in which the hearsay rule does not apply. Computer records may be admissible under the business records section of the *Commonwealth Act* or under sections 146 and 147 which deal specifically with computer records. To the extent that a "representation" is the product of a computer or a process, the hearsay rule does not apply. Section 59 of the *Commonwealth Act* defines "hearsay" in terms of there being a "previous representation made by a person" with an intention to assert the existence of a particular fact. That element is not made out where the representation is itself the product of a computer.

STAMPING - UNDERTAKINGS TO STAMP

There is some difference in judicial opinion in Queensland as to the use that may be made of instruments which require stamping but have not been stamped.

In ***Hoggett v O'Rourke*** [114] Holmes J was concerned with s.4A of the *Stamp Act* 1894. That section provided in part:

> *"4A Restriction on effect of unstamped instruments*
>
> *(1) An instrument chargeable with stamp duty ... shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped."*

[114] [2002] 1 QdR 490.

The application was one to strike out the plaintiff's proceeding on the basis that statement of claim pleaded an unstamped document. The submission was made for the plaintiff that it would be inappropriate to strike out the proceeding on the basis that it was open to the plaintiff at any time prior to the trial to stamp the document or give an undertaking under s.4A(2) of the Act. Her Honour expressed the view that s.4A(1) was sufficiently wide to prevent reliance on the instrument of any kind. [115] Her Honour also did not think that an undertaking to pay stamp duty at whatever stage offered would resolve the plaintiff's difficulties because such an undertaking would not overcome the fundamental problem that such a document may not be relied upon as founding a cause of action. [116]

In ***Caxton Street Agencies Pty Ltd v Korkidas*** [117] Holmes J was concerned with s.487 of the *Duties Act* 2001. Section 487 provides:

> *"487 Receipt of instruments in evidence*
>
> *(2) Unless an instrument is properly stamped, it -*
>
> *(a) is not available for use in law or equity for any purpose; and*
>
> *(b) must not be received in evidence in a legal proceeding, other than a criminal proceeding.*
>
> *(3) However, a Court may receive the instrument in evidence if -*
>
> *(a) after it is received in evidence, the instrument is given to the Commissioner as required by arrangements approved by the Court; or*
>
> *(b) if the person who produces the instrument is not the person liable to pay the duty, the name and address of the person so liable, and the instrument, is given to the Commissioner as required by arrangements approved by the Court*
>
> ..."

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[115] Supra at paragraph [15].
[116] Supra at paragraph [19].
[117] [2002] QSC 210.

In ***Caxton Street Agencies*** counsel for the plaintiff tendered an undertaking to pay the stamp duty found to be exigible and argued that s.487(2) permitted such an undertaking to be given. Her Honour repeats a passage from ***Hoggett v O'Rourke*** [118] to the following effect:

> *"I do not think that an undertaking to pay stamp duty, at whatever stage offered, would resolve the applicant's difficulties. Section 4A(2) enables the admission in evidence of an unstamped document on such an undertaking but it does not overcome the fundamental problem that such a document may not be relied on as founding a cause of action."*

The difficulty with that position seems to be that it produces the odd result that an undertaking might be given when seeking to tender the document at trial but not at an earlier stage so as to preserve the right to do that.

In ***Burnitt & Anor v Pacific Paradise Resort Pty Ltd,***[119] McGill DCJ was concerned with an argument over costs in relation to an application to strike out where the relevant contract had been stamped after the application was filed but before it was heard. His Honour held that the absence of stamping of the contract was no basis for striking out the statement of claim and thus the plaintiff should have costs. [120] His Honour observed:

> *"Once the duty has been paid, any obstacle to the validity or enforcement of the document imposed by that section disappears, and is taken to have done so from the time when the document would have become valid but for that section:* ***Shepherd v Felt & Textiles of Australia Ltd*** *(1931) 45 CLR 359."*

His Honour adopted a statement of Hodgson CJ in Equity in ***Official Trustee in Bankruptcy v D'Jamirze*** [121] in the following terms:

> *"Until stamped, an instrument has whatever effect is consistent with the proposition that, if stamped, it will be effective ab initio. To put this another way, Shepherd must mean that an instrument is effective from the start conditionally upon being stamped before relied on in Court, or alternatively, from the start carries the potentiality of being so effective."*

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[118] Supra at p495.
[119] [2004] QDC 218.
[120] Supra at paragraph [3].
[121] (1999) 48 NSWLR 416 at p427.

In those circumstances, his Honour thought that a failure to stamp could not be a strike out point because the absence of a stamp does not mean that the plaintiff's case cannot possibly succeed on the basis that the deficiency could be overcome prior to the time at which the plaintiff's case is properly tested at trial. [122] His Honour thought that Holmes J was wrong when she said that although an undertaking would overcome the prohibition on admissibility of the unstamped document, it did not overcome the fundamental problem that such a document may not be relied on as founding an action. His Honour said that he was unable to reconcile that position with the analysis in Shepherd. [123]

In ***Franks v Norfolk Estates Pty Ltd*** [124] Moynihan J was concerned with another situation in which after an application was filed but before it was heard, the relevant documents had been assessed, duly paid and the deed stamped. His Honour said that consistently with ***Shepherd***, in those circumstances, any obstacle to the validity of the enforcement had been overcome from the time the document would have been valid but for the prohibition. [125] His Honour did not deal with ***Hoggett v O'Rourke*** but says of ***Burnitt*** that it was a product of close examination by McGill DCJ of the relevant authorities. His Honour repeats a point McGill DCJ made about ***Dent v Moore*** [126].

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[122] Supra at paragraph [6].
[123] See also paragraphs [27] and [28].
[124] [2004] QSC 301.
[125] Supra at paragraph [20].
[126] (1919) 26 CLR 316.