

Admissibility of common forms of documentary evidence

Tuesday 3 December 2024

Presenter:

Her Honour Judge Loury KC



**BAR ASSOCIATION
OF QUEENSLAND**

Admissibility of common forms of documentary evidence

A presentation delivered to the Bar Association of Queensland

Judge Vicki Loury KC

First principle - relevance

Evidence is not admissible unless it is relevant.

Evidence is relevant where it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding, noting that evidence can rationally affect the assessment of that probability indirectly, by assisting in the evaluation of other evidence.

R v LBE [2024] QCA 53

Information may be relevant, and therefore potentially admissible as evidence, where it bears upon assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or an event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful, or even necessary, for an understanding of a narrative.

HML v The Queen (2008) 235 CLR 334

Rule against hearsay

Evidence of a statement to a witness by a person who is not himself called as a witness at a trial may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.

Subramaniam v Public Prosecutor [1956] 1 WLR 965

Business records

Rationale behind the hearsay exception – things recorded or communicated in the course of a business about a business' activities are, by their very nature, likely to be correct.

E.g. hospital records – much more reliable source of information than the memory of the treating doctor.

Not all records kept by a business are business records – resort to the statutory provision is necessary.

Business records

s 93 Admissibility of documentary evidence as to facts in issue in criminal proceedings

In any criminal proceedings 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 document is or forms part of a record relating to any trade or business and made in the course of that trade or business 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
- (b) the person who supplied the information recorded in the statement in question–
 - ...
 - (iv) cannot reasonably be supposed (having regard to the time which has lapsed since the person supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information the person supplied.

Business records

An internal record kept in an organised form accessible in the usual course of business, actually recording the business activities themselves.

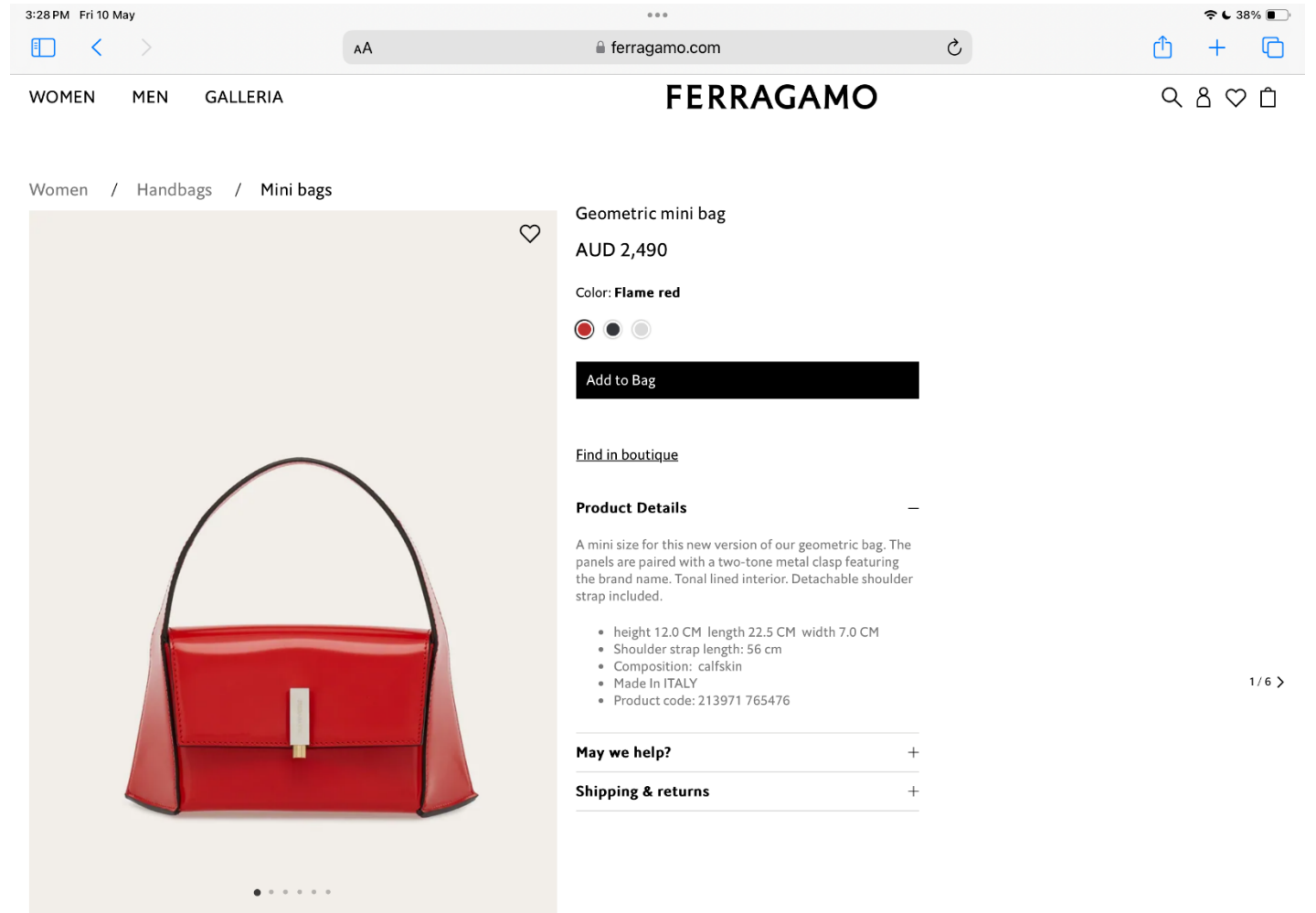
Examples:

- Financial records/books of account
- Internal communications between the business and customers/suppliers – emails
- A valuation of assets kept for insurance purposes
- Invoices
- Terms of a contract between a customer and the business which might be entered into online
- Evidence of a fact includes an opinion, provided the person is qualified to give the opinion
- A business record does not include the product of a business if the product is itself a document (eg magazine)

Business records

Screenshots of websites

Online retailer



The screenshot shows the Ferragamo website interface. At the top, the browser address bar displays 'ferragamo.com'. The navigation menu includes 'WOMEN', 'MEN', and 'GALLERIA'. The main header features the 'FERRAGAMO' logo and utility icons for search, user profile, heart, and cart. The breadcrumb trail reads 'Women / Handbags / Mini bags'. The product image is a red geometric mini bag with a black handle and a gold clasp. To the right of the image, the product name 'Geometric mini bag' is listed with a price of 'AUD 2,490'. Below the price, the color is specified as 'Flame red' with three color selection circles. A black 'Add to Bag' button is present. Further down, there is a 'Find in boutique' link, a 'Product Details' section with a minus sign, and a list of specifications: height 12.0 CM, length 22.5 CM, width 7.0 CM; shoulder strap length 56 cm; composition: calfskin; made in ITALY; and product code 213971 765476. At the bottom of the product details, there are expandable sections for 'May we help?' and 'Shipping & returns', both with plus signs. A '1/6 >' indicator is visible on the right side of the product details area.

- *Pinnacle Runway Pty Lt v Triangl Ltd (2019) 375 ALR 251*

Legal

- Legal notice and Privacy policy
- Privacy Policy
- [Terms & Conditions](#)
- Cookie Policy

Terms & conditions

General Information

1.1 Products offered for sale (hereinafter the "Products") through our website www.ferragamo.com (hereinafter the "Website") are governed by these general terms and conditions of sale (the "Terms").

1.2 Ferragamo Australia Pty Ltd. (hereinafter "Ferragamo") reserves the right to apply specific contractual estimations (the "Specific Estimations") to any order (hereinafter "Order" or "Orders"). In such case, the contractual conditions applicable to an Order will be both the Terms and the Specific Estimations, which are intended to be independent and separate contracts from each other.

1.3 The Products are directly sold by Ferragamo. To protect the originality and quality, as well as identify the provenance of our products, a passive NFC (Near Field Communication) tag has been inserted in some shoe models. The tag contains no personal information and is not readable at distance.

1.4 Ferragamo is incorporated under the laws of Australia with a principal office located at Suite 0801, Level 8, 75 Elizabeth Street Sydney NSW 2000 Australia.

Trade Policy

2.1. The Products are only intended for sale to individuals who are end-user consumers (herein after "Customers"). Customers include the individual adult who acts for purposes not related to trade, business or professional activity.

2.2 Ferragamo reserves the right not to accept Orders from those who are not "Customers".

2.3 At any time Ferragamo may modify or amend these Terms. Customer will be subject to the Terms in effect at the time their Order is submitted.

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Purchase Conditions

3.1 Each Product offered for sale can be selected through a dedicated web frame that will display the photo, the unit price, and the colours and sizes available (where applicable). Applicable sales tax will be displayed at checkout.

3.2 Some products may be displayed on the Website for promotional reasons only and not for sale. Such products are not for sale and may not be purchased.

3.3 Images and colours of Products offered, in some cases may be different than they appear on the Website because of the technical characteristics and resolution of equipment and software used by the Customer. Images and colours, then, must be considered only as indicative, and Customers are responsible for verifying whether the Product matches their expectations with respect to colour and texture. Ferragamo will not be responsible for any inappropriate images or colours of Products due to the technical characteristics of equipment and software used by a Customer.

3.4 To complete any Orders for the Products selected, the Customer will have to follow the instructions and procedures provided on the Website.

3.5 The Customer is responsible for checking the accuracy of the contents of each Order placed before confirming the Order and the Customer is responsible for filling in the purchase form according to the instructions provided on the corresponding page of the Website. Before completing each Order, Customer will be asked to confirm that Customer carefully read and accepts the Terms and any Specific Estimations. In case of non-acceptance by Customer of the Terms and any Specific Estimations, the Order will not be completed.

3.6 If the Customer wants to make changes or corrections to the Order after confirmation, Customer must contact Customer Care Service ("Customer Care Service") at the number displayed in the "Contacts" section of the Website. A confirmed Order cannot be further modified or cancelled, except as may be expressly provided by the Terms, Specific Estimations or otherwise provided by applicable law. Customer can check an Order status at any time by entering the Customer restricted area on the Website or by contacting Customer Care Service.

Business records

Emails

- Retained by businesses and kept permanently
- Still necessary to consider the particular statement made in the email and determine whether it was made in the course of the business.
- Not every email sent/received will be for business purposes – eg work Xmas party
- Documents sent by email from one business to another may amount to business records of both businesses eg invoices kept by a recipient business and the issuing business
- *Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595

Business records

Drawing inferences

- Made by persons who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with
- *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2004] NSWSC 984
- Negative hearsay – Uniform Evidence Acts; Qld Evidence Act; Common Law
- Accepted that an inference can be drawn from the absence of a record if an appropriate person has searched for the record and sworn that there is no such record
- *Ackroyd v The Honourable Peter Richard McKecknie (Minister for Tourism)* [1986] QSC 13
- *R v Shield* (1866) 5 SCR (NSW) 213

Notorious scientific instruments

There is a rebuttable presumption at common law as to the accuracy of 'notorious' scientific or technical instruments which, by general experience are known to be reliable. Accordingly, readings from watches, clocks, thermometers, speedometers, and 'a variety of other ingenious contrivances for detecting different matters' can be received into evidence without specific proof of their accuracy. This presumption can also apply to scientific or technical processes and things such as chemical tests to detect bloodstains, recordings of radar echoes showing movements of ships and printouts of computerised data.

The presumption amounts to judicial notice of the fact that an instrument, device or process which is in general use and knowledge to be trustworthy, is prima facie accurate. It follows that when evidence from a new type of scientific instrument or process is adduced for the first time, there must be proof of its reliability and accuracy. As and when the reliability of a new instrument becomes more generally known, the law permits the shorthand of judicial notice, and specific evidence of accuracy is unnecessary.

Bevan v Western Australia (2010) 202 A Crim R 27

Notorious scientific instruments

Mobile phones and laptops

- Ubiquitous items in common use over many years
- Most people are very familiar with sending text messages by phone
- Most people are very familiar with downloading data from computers
- Matter of common experience that these processes are accurate in the sense that the data displayed or printed out replicates what is actually there

Notorious scientific instruments

PDF of a computer screen

The common law presumption of the accuracy of a scientific instrument, device or process means that when it is proved that what was used belongs to a class of notoriously accurate scientific instruments, what is produced will be admitted into evidence without more unless the opposing party adduces evidence which displaces that presumption by suggesting inaccuracy in some way.

R v SDI [2023] QCA 67

Notorious scientific instruments

Expert evidence

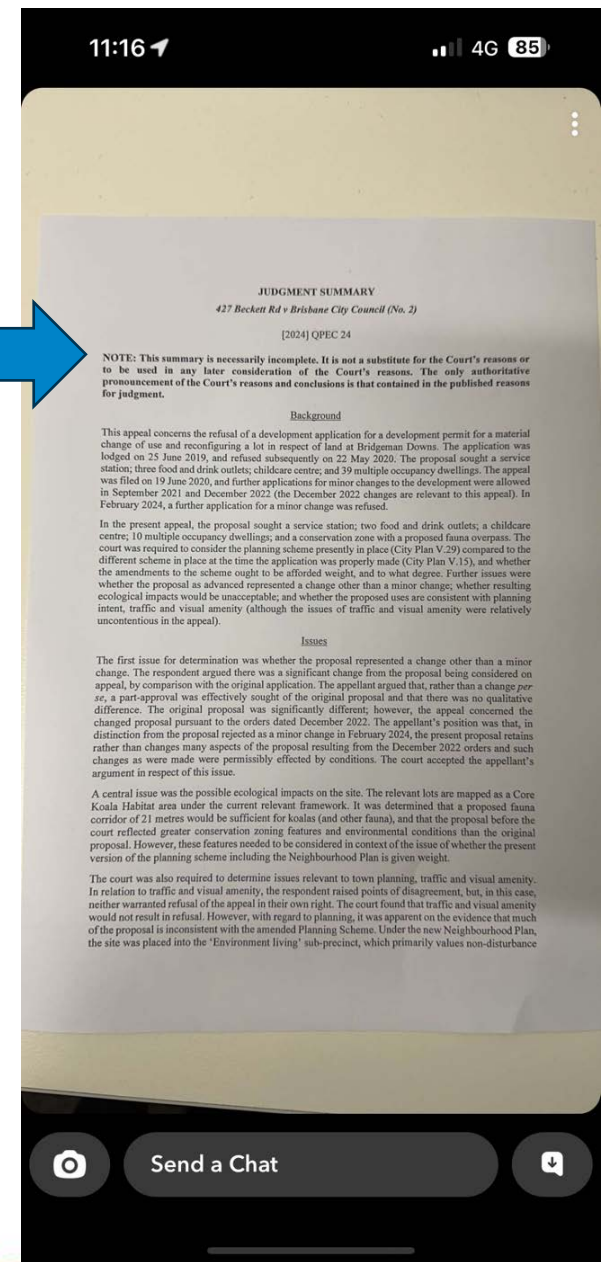
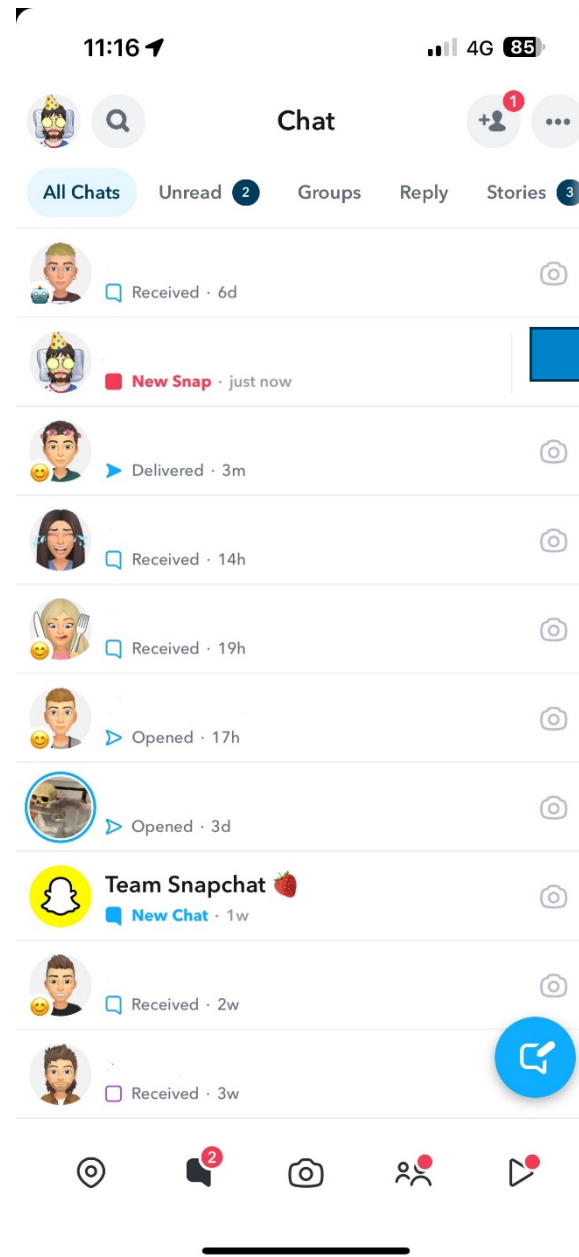
- When is it required?
- Synchronisation of google accounts ✓
- Sending and receiving still and moving digital images???
- *Ford v The King* [2023] SASCA 117
- Storage of information – Facebook messenger/google???
- Text messaging???

CCTV footage / Snapchat

What is left of the best evidence rule?

Snapchat – *Athans v The Queen (No 2)*
(2022) 300 A Crim R 389

CCTV – *R v Sitek* [1988] 2 Qd R 284



Authentication

Provenance and authenticity

A document must be proved to be what it is alleged to be, before it is admissible.

Authenticity of a business record can be (and ordinarily would be) proved by a person involved in the conduct of the business, if that person compiled the document, found it in the business records or recognised it as a record of the business.

Drawing of inferences as to authenticity.

Federal Commissioner of Taxation v Cassaniti (2018) 266 FCR 385

McKay v Hutchins [1990] 1 Qd R 533

Authentication

ss 96 & 97 Evidence Act 1977 (Qld)

- s 96(1) For the purposes of deciding whether or not a statement is admissible in evidence by virtue of this part, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances.
- s 97 Where in any proceeding a statement contained in a document is proposed to be given in evidence by virtue of this part, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or the material part thereof, authenticated in such manner as the court may approve.

Authentication

For any of the preconditions to admissibility found in Part 6 (includes business records and computer generated records) it is permissible for the court to draw inferences including an inference as to personal knowledge, from the form or content of the document or from any other circumstances.

Rigorous scrutiny should be applied in the examination of documents from which an inference of authenticity is said to be available.

Commissioner of the Australian Federal Police v Zhang (No 2) [2015] VSC 437

s 95 Evidence Act 1977 (Qld)

- (1) In a proceeding where direct oral evidence of a fact would be admissible, a statement contained in a document or thing produced wholly or partly by a device or process and tending to establish that fact is, subject to this part, admissible as evidence of that fact.
- (2) A court may presume the process or device produced the document or thing containing the statement if the court considers an inference can reasonably be made that the process or device, if properly used, produces a document or thing of that kind.
- (3) In a proceeding, a certificate purporting to be signed by a responsible person for the process or device and stating any of the following matters is evidence of the matter for the purposes of subsection (2) –
 - a) that the document or thing was produced wholly or partly by the process or device;
 - b) that the document or thing was produced wholly or partly in a particular way by the process or device;
 - c) that, if properly used, the process or device produces documents or things of a particular kind;
 - d) any particulars relevant to a matter mentioned in paragraph (a), (b) or (c).

Common law continues to apply

s 103 – ss 92 – 95 and s 101 shall be construed as in aid of and as alternative to one another, any other provision in any other part, and any other law practice or usage with respect to the admissibility in evidence of statements.