



Pacific Judicial  
Integrity Program

# Advanced Judicial Officers' Fraud and Corruption Online Course

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## *Topic 3: Evidence*



**FEDERAL COURT  
OF AUSTRALIA**



Papua New Guinea  
**Centre for Judicial Excellence**

## Relevance

Information may be relevant where it bears upon the 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 the narrative.

- *HML v The Queen (2008) 235 CLR 334 at 351 per Gleeson CJ*

## Relevance

Evidence is relevant if, were it accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

*Evidence Act 1995 (Cth) s55*



## Particulars

Purpose - to give an accused sufficient indication of the nature of the case he/she is called on to meet.

Admissibility of evidence particularly as it relates to relevance is determined by reference to the particulars.

## Authentication

A party relying on a document must prove its provenance (where the document comes from) and its authenticity (that it is what it purports to be).

For a business record provenance and authenticity can 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.



# Authentication

Drawing inferences from the document itself

Electronic recordings

Best evidence rule or what is left of it

## Rule against hearsay

Evidence of a statement to a witness by a person who is not himself called as a witness 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 at 970

# Exceptions to the rule against hearsay



Hearsay evidence is considered unreliable.

Exceptions tend to relate to an acceptance that a particular type of hearsay evidence is likely reliable

## Exception – res gestae

Contemporaneous statements about an event are often an instinctive reaction to an event so less likely to be concocted or distorted.



## **Exception – confessions/admissions**

Considered reliable because a person is not likely to implicate himself/herself in a crime unless it is true.

Silence as an implied confession – reliable because if a person is confronted with an allegation that they know to be false it would be expected that they would deny it



## Business records

- Reliable because a business record is, by its very nature being used by a business. Those running the business rely upon the accuracy of the records that are kept in order to operate an efficient hopefully profitable business.

# Business records

## Fiji Evidence Act 1944

### s 4. Admissibility of certain trade or business records 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, on production of the document, 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 compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and
- (b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he or she supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he or she supplied.

## Business records

- What is a business record?
- Documents which record the activities of the business in the course of carrying out the business
- Consider the type of document; its contents and whether it is kept as a record



## Business records

- Computer records
- Screenshots of a web page
- Emails (internal and external) if they relate to the business and are for the purpose of the business
- Document received from another business

## Business records

- The hearsay rule does not apply if the representation recorded in the document for the purposes of the business was made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact or 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.



## **Business records**

- Proving a negative



## Other documents

- Text messages
- “notorious scientific or technical instruments”  
and judicial notice
- Closed-circuit television
- Snapchat

## Cross-admissibility

- Confessional evidence recorded out-of-court
- Evidence given by an accused in a trial
- Hearsay confession exculpating a co-accused
- Co-conspirators' rule

## Expert evidence

- The expert opinion must be on a matter which is a proper matter for expert opinion
- There must be a field of specialised knowledge in which the witness is expert
- The opinion expressed must be wholly or substantially based upon the witness' expert knowledge

## Expert evidence

- The facts on which the opinion is based must be identified
- Expert evidence is inadmissible unless the facts on which the opinion is based are identified and proved in evidence.

## Expert evidence

- The extent that the opinion rests on facts “observed” by the expert, they must be admissibly proved by the expert.

## Expert evidence

- The expert must state, in chief, the reasoning by which the conclusion arrived at flows from the facts proved or assumed by the expert so as to reveal that the opinion is based on the expert's expertise.
- *Makita (Aust) Ptd Ltd v Sprowles* (2001) NSWLR 705
- *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588



## Character witnesses

- An accused can adduce evidence of good character
- How?
  - Reputation
  - Disposition

## Character evidence

- Lack of criminal convictions
- *People who are mean, greedy, ruthlessly ambitious, devoid of sympathy for the weaknesses or needs of others, exploitative, ungenerous, and unkind, can go through life without any convictions for criminal offences. An absence of them says very little about character.*

## Character witnesses

- Why?
  - Unlikely to have committed the offence
  - Credibility of accused

## Character evidence

- Directions
  - Are they necessary?
  - If so, they should relate to the purposes
- Bad character
  - General propensity vs proof of a specific relevant matter

# Hostile witnesses

- Why?
  - To prove a prior inconsistent statement
  - Unfavourable vs hostile
  - Application in practice

## Hostile witnesses

- If a witness disappointed the party calling them, another witness might be called to give a different account of the transaction.
- It was permissible for a party calling a witness to ask questions about prior inconsistent statements
- The statutory provisions supplemented the existing law by permitting proof of a prior inconsistent statement in addition to the discretion to permit cross-examination afforded by the common law.



## Hostile witnesses

- What is adverse/hostile?
- There must also be hostility to the cause of the party calling the witness.
- ...if called by a party who cannot ask him leading questions, to tell the truth and the whole truth in answer to non-leading questions.
- It does not follow that every witness who is inconsistent will be hostile.

## Evidence Management

- Agreement as to the elements of the offence
- Early provision of particulars
- Identification of admissible evidence relied upon
- Formal admissions
- Identification of the issues in dispute