Chapter 7

Documentary and Real Evidence

Documentary Evidence

Introduction

[7.10] The topic of documentary evidence is concerned with the circumstances in which a court will receive evidence of a document to prove its contents. Part 2.2 of the Act, containing ss 47-51, states the governing rules. It is also necessary to take account of the need to demonstrate the 'authenticity' of a document, as a step in establishing that proof of its contents would be relevant to proof of a fact in issue in terms of s 55.

Section 48 prescribes a number of ways in which a party may offer proof of the contents of a document. It is, of course, axiomatic that proof of the contents must be relevant in some way to proof of a fact in issue, and the contents must not be otherwise inadmissible through the operation of an exclusionary rule of evidence. Moreover, evidence of the contents of a document is not admissible merely because its contents can be proved in a way provided for in s 48. Section 48

'is in Chapter 2 of the Act which deals with the adducing of evidence and provides how the contents of the document may be proved. The section does not deal with admissibility, which is governed by Chapter 3': *Dimkovski v Ken's Painting & Decorating Services Pty Ltd* [2002] NSWSC 99 at [7] per Dunford J.

[7.20] There are many reasons why a party may wish to adduce evidence of the contents of a document. The way in which the contents are relevant will affect the application of other rules of exclusion, and the way the document is authenticated. By 'authentication' it is meant that the document is shown to be what it purports to be or, to put it another way, the evidence of its contents must be connected to some person or event in a way that will demonstrate the relevance of proof of the contents.[1]

- The contents may include a previous representation and be adduced as evidence of the truth of the facts asserted by the maker of the document. This use brings the hearsay rule (s 59) and its exceptions into play.
- The contents may be adduced for a non-hearsay purpose, such as to prove the contents of an allegedly defamatory statement: [8.220].

In the examples above, the evidence of the contents will not be relevant unless it is also proved that a particular person made the document.

- The contents may be adduced together with evidence to show that the document was read by someone, as a basis, for example, to infer that that person had knowledge of those contents (*R v Colby* [1999] NSWCCA 261 (see [7.160])), or as a basis to infer that a person had a particular motive: *R v Burrell* [2001] NSWSC 120 (see [7.160]). In these examples, the evidence of the contents will not be relevant (or authenticated in a wider sense), unless it is also proved that the document was found in a particular place and that the relevant person had an opportunity to read the document.

On the other hand, proof merely that a particular document exists or existed may not involve proof of its contents. For example, it may be sought to prove that a person had been in a particular place by evidence that a document kept at that place bore the fingerprints of that person. In such a case, the document is a piece of real evidence. Part 2.2 of the Act has no application in such cases.

In ALRC 102, the Law Reform Commissions noted that 'the documentary evidence provisions of the uniform Evidence Acts have been largely successful in balancing the interests of the parties with facilitating the admission of documentary evidence': [6.8].

Proof of the contents of a document

[7.30] The common law 'original document rule' requires that where the words of a document are relied upon for a purpose other than that of identifying the document, the original of the document must be adduced in evidence (subject to many exceptions). Section 51 of the Act abolishes this rule:

1 It is not proposed to examine situations where admissibility will also depend on evidence that the document has been properly stamped: see *Cross on Evidence* at [39135].

Original document rule abolished
51. The principles and rules of the common law that relate to the means of proving the contents of documents are abolished.[2]

In place of these common law principles and rules, s 48(1) states a number of methods whereby a party may adduce evidence of the contents of a document in question.[3]

[7.40] The term 'document' is defined in Part 1 of the Dictionary to the Act:

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.

[7.50]

PART 2.2 – DOCUMENTS

Definitions
47. (1) A reference in this Part to a ***document in question*** is a reference to a document as to the contents of which it is sought to adduce evidence.

(2) A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.[4]

Proof of contents of documents[5]
48. (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:
(a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;
(b) tendering a document that:
(i) is or purports to be a copy of the document in question; and
(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
(c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)-tendering a document that is or purports to be a transcript of the words;
(d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it – tendering a document that was or purports to have been produced by use of the device;

2 See *Vella v Minister for Immigration and Border Protection* [2014] FCA 1177 at [38] per Wigney J; *Fato v Regione Calabria Pty Ltd* [2014] VSC 435 at [90] per Kyrou JA; *Hamilton v New South Wales (No 3)* [2014] NSWSC 1915 at [20] per Campbell J; *Anglo American Investments Pty Ltd (Trustee) (No 2) v Commissioner of Taxation* [2019] FCA 1028 at [11]-[23] per Logan J.

3 See, for example, *Minassian v Minassian* [2010] NSWSC 708 at [44] per Ball J.

4 See, for example *Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja* [2018] NSWCA 26 at [75]-[81] per Leeming JA, Basten and Gleeson JJA agreeing (copies of original documents admitted even though altered by the addition of a heading and footers – sufficient to be 'identical in all *relevant* respects'); and *R v Warwick (No 48)* [2019] NSWSC 206 at [24]-[32] per Garling J (copies of original three pages of a note book into a single sheet of paper held to be still sufficiently identical for the application of s 48).

5 See *Smith v Pangallo* [2017] ACTCA 61 at [48] per Burns and Perry JJ, Penfold J agreeing, where the policy underlying s 48 is briefly explained.

(e) tendering a document that:
  (i) forms part of the records of or kept by a business (whether or not the business is still in existence); and
  (ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary;
(f) if the document in question is a public document – tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed:
  (i) by a person authorised by or on behalf of the government to print the document or by the Government Printer of the Commonwealth or by the government or official printer of a State or Territory; or
  (ii) by authority of the Government or administration of the State, the Commonwealth, another State, a Territory or a foreign country; or
  (iii) by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.

(2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.

(3) If the party adduces evidence of the contents of a document under paragraph (1)(a), the evidence may only be used:
(a) in respect of the party's case against the other party who made the admission concerned; or
(b) in respect of the other party's case against the party who adduced the evidence in that way.

(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:
(a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or
(b) adducing from a witness evidence of the contents of the document in question.

Notes.

1 Clause 5 of Part 2 of the Dictionary is about the availability of documents.
2 Section 182 of the Commonwealth Act gives section 48 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Dictionary Part 2

Unavailability of documents and things

5. For the purposes of this Act, a document or thing is taken not to be available to a party if and only if:
(a) it cannot be found after reasonable inquiry and search by the party; or
(b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person; or
(c) it would be impractical to produce the document or thing during the course of the proceeding; or
(d) production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence; or
(e) it is not in the possession or under the control of the party and:
  (i) it cannot be obtained by any judicial procedure of the court; or
  (ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding; or

(iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding. …

References to documents

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 of any part of the document; or

(c) any part of such a copy, reproduction or duplicate.

Some other Dictionary Part 1 definitions are relevant to the application of some of the provisions of s 48: see 'admission'; 'business'; and 'public document'. Section 183 [7.230] may also assist in proof of some of the requirements in s 48.

There has been some criticism that it is not clear whether the 'or' in s 48(1) is disjunctive. Odgers comments that a disjunctive reading means 'a party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the specified methods, but may not (under this provision at least) tender both the document in question and adduce evidence in accordance with one or more of the specified methods'.[6] Odgers suggests that 'the better view is that the provision should be read as if it contained the words "or, or as well" bearing in mind the facilitative purpose behind it and the statutory context' so that tendering the original document should not routinely prevent the adducing of additional secondary evidence in accordance with one of the specified methods.[7] It is probably most clearly an issue where an original tape recording is tendered and it is also sought to tender a transcript of the recorded words from the audio tape using s 48(1)(c), although it should be noted that s 29(4) may, in any event, be used to facilitate the admission of the transcript into evidence: *R v Georgiou* [2005] NSWCCA 237 at [11]-[17]. There might then be an argument for discretionary exclusion under s 135 based on time and cost factors but it is contended that s 48 should not operate as a mandatory barrier to the tender of both original and secondary evidence of the same document. This issue was not raised for specific consideration by the Law Reform Commissions in ALRC DP69 or ALRC 102. A more definitive statement was made by Kellam AJ in *R v Eastman (No 43)* [2018] ACTSC 186 in holding that both a tape recording and a transcript of the words recorded could be tendered in accordance with the correct reading of the word 'or' in s 48:

> 134. A document that purports to be a transcript of words recorded on a tape is admissible as evidence of the contents of a recording pursuant to s 48(1)(c) of the Act. It is appropriate here to deal with the submission made on behalf of the defence that because s 48(1) states that a party may present evidence of the contents of a document by tendering the document **or** by other methods, the prosecution must choose between tendering the document and providing a transcript. The defence argues that the plain words of s 48(1) of the Act do not permit both. It is my view that use of the word **'or'** in s 48 should not be read disjunctively. As the prosecution points out, if the defence is correct in its interpretation, a party could not tender the original document and a transcript of it, but could instead choose to tender a copy of it under s 48(1)(b) and s 48(1)(c) of the Act, which would be a perverse reading of the section.

6 Odgers [EA.48.60]. Also, see *R v Georgiou* [2005] NSWCCA 237 at [11]-[12]; and later *Voelte v Australian Broadcasting Corporation (No 4)* [2016] NSWSC 1012 at [13] where this argument was raised but not resolved by the court in either case.

7 Ibid.

In the circumstances of this particular case Kellam AJ found that some of the original and enhanced tape recordings were admissible and some were inadmissible (pursuant to s 137) with the transcripts of the admissible tape recordings also admitted as an 'aide memoire' for the jury: at [140]-[149].

[7.60] Other provisions that bear on evidence of the contents of a document are Part 4.6 Division 1 ss 166-169 (the request procedure), and see *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309 at 318 [43] ([7.180] below); Part 4.3 (facilitation of proof of documents, see [3.560] above); and Part 4.6 Division 2 ss 170-173 (proof of certain matters by affidavits or written statements).

[7.70] Section 50 is a useful provision that allows for proof of the contents of voluminous or complex documents by tendering a summary, thus making litigation involving large quantities of documents more manageable.[8]

> **Proof of voluminous or complex documents**
> **50.** (1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.
>
> (2) The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has:
>
> (a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and
>
> (b) given each other party a reasonable opportunity to examine or copy the documents in question.
>
> (3) The opinion rule does not apply to evidence adduced in accordance with a direction under this section.

Section 49 deals with documents in foreign countries. Additional notice requirements are contained in this section, including pre-trial service on other parties of a copy of the document proposed to be tendered. Section 193(1) empowers a court to order discovery of documents.

The scope of section 48

[7.80] The following comments draw attention to only a few aspects of s 48.[9] At the outset, the *Polygram Records* case is included here as an illustration of how easily the need to comply with s 48 may be overlooked in practice.

8 See, for example, *R v Seller; R v McCarthy* [2015] NSWCCA 76 at [26], [89] per Bathurst CJ; *Re Gunns Plantations Ltd (in liq) (recs & mgrs apptd)* [2015] VSC 102 at [40]-[44] per Gardiner AsJ; *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 568; *Thackray v Gunns Plantations Ltd* [2011] VSC 380 especially at [67] per Davies J; *Beattie v Osmon (No 3)* [2009] NSWSC 824 especially at [25]-[26] per White J. Also, see *Roach v The Queen* [2019] NSWCCA 160 at [130]-[137] per the Court for observations made in the context of a criminal trial involving substantial documentary evidence (corporate fraud and associated offences) and the interaction with the case management procedures in the *Criminal Procedure Act 1986* (NSW) ss 134-149F.

9 See, generally, ALRC 26 vol 1 [651] and [654]-[656].

Polygram Records v Raben Footwear

Federal Court of Australia: Foster J
[1996] FCA 797

Foster J: (a) Does PolyGram USA own the copyright in the Pilz recordings?

PolyGram USA must establish this issue in its favour. …

During the course of the hearing, counsel for Raben objected to the admission of certain paragraphs in the affidavits of a Mr Maurice Russell regarding ownership of the copyright in the PolyGram recordings. …

The two paragraphs objected to relate to an alleged chain of title to the copyright in the PolyGram sound recordings, from Casablanca to PolyGram USA. As noted previously, Casablanca made the PolyGram recordings in 1979. On 26 January 1984, Casablanca (under a new name) entered into a written agreement with PolyGram USA (under its earlier name 'Chappell & Co Inc') whereby Casablanca transferred 'all right, title and interest in certain recorded music properties, licensing agreements, trademarks, contract rights, accounts receivable, goodwill, business equipment and office furniture in connection with the recorded music business [of Casablanca]' to PolyGram USA. However, nowhere in the agreement, a copy of which was annexed to the affidavit of Mr Russell of 25 April 1995, is there a list of assets specifying what exactly was being transferred.

In part of paragraph 7 of his affidavit of 25 April 1995 which was objected to, Mr Russell asserts that the PolyGram recordings were included in the assets transferred to PolyGram USA. In the paragraph of the affidavit of 12 March 1996 objected to, Mr Russell states that his knowledge of the inclusion of the PolyGram recordings in the assets transferred is based on his 'access to the books and records of PolyGram [USA] and Casablanca Records, Inc'.

In paragraph 2 of his affidavit of 25 April 1995, Mr Russell also states that: –

> 'Except where otherwise expressly indicated, the facts and matters to which I depose in this affidavit are within my own knowledge. In addition, I have access to the books and records of [Polygram USA] and … of Casablanca Records Inc.'

Apart from this statement, there is no clear indication, however, that Mr Russell was personally aware precisely what assets were assigned by Casablanca to PolyGram USA. Indeed there is no evidence that Mr Russell was even working for PolyGram USA at the time of the transfer in 1984. According to his affidavit, the earliest point of time at which he held a position at PolyGram USA was in 1990, some six years after the transaction concerned took place.

Counsel for Raben contended that, since Mr Russell could not have personal knowledge of the facts alleged in paragraph 7, he must have derived that knowledge from certain documents, presumably the 'books and records of PolyGram [USA]' that he inspected. Counsel objected to the admission of paragraph 7 therefore on the ground that Mr Russell was thus attempting to give secondary evidence of the contents of documents in a manner not permitted by law.

A party seeking to adduce evidence of the contents of a document must comply with s 48(1) of the *Evidence Act* (Cth). Under that section, a party seeking to adduce such evidence may, so far as this proceeding is concerned, tender either the document in question (sub-s (1)), a copy or purported copy of that document (sub-s 1(b)(i)), or a business record (sub-s (1)(e)(i)). In this case the applicants did none of the above.

It is my view that in part of paragraph 7 of the affidavit of Maurice Russell dated 25 April 1995, he is attempting to adduce evidence of the contents of one or more documents. As the applicants have not complied with the requirements of s 48 of the *Evidence Act*, his evidence in that regard in paragraph 7 is inadmissible, and I therefore uphold counsel's objection to the admission of that part of the paragraph.

[7.90] The more generous allowance for proof where the document forms part of the records of a business is evident from a comparison of s 48(1)(b) to s 48(1)(e).[10]

[7.100] Section 48(1)(c) facilitates proof of a tape-recorded conversation by tender of a transcript.[11] It is evidence of the conversation and not merely, as at common law, admissible only as an aid to understanding the tape.[12] Unless conceded by the opponent, there must be proof that the transcript is a true record of what was said. In *Eastman v The Queen* (1997) 76 FCR 9 at 113, the court said that where there is 'doubt or disagreement whether the transcript, or part of it, accurately deciphers the sounds captured on the tape', the fact-finder should use the transcript only as an aid to understanding what they hear on the tape. Proof of the veracity of the transcript is often by evidence of a temporary or ad hoc expert who, by repeated listening to the tapes, is qualified to give evidence as to what is said on the tapes.[13]

In *Nuclear Utility Technology & Environmental Corp Inc (Nu-Tec) v Australian Broadcasting Corporation* [2010] NSWSC 711, the admissibility of transcripts of the broadcasts of two '7.30 Report' programs was considered in defamation proceedings where DVD recordings of each broadcast was already in evidence. After considering the different views in a line of cases about the permissibility and desirability of the jury having access to both the DVD recordings and transcripts, McCallum J rejected the tender of the two transcripts by exercising her discretion under s 135(a) of the *Evidence Act* and following the reasoning of Levine J in *Griffith v Australian Broadcasting Corporation* [2003] NSWSC 483:

> 11. The conclusion reached by Levine J that a transcript of a broadcast is not 'relevant' within the meaning of s 55 of the Act where a tape or disc recording of the broadcast is available to be put before the jury may be open to debate. Assuming the tape itself is admissible, it is probably a 'document in question' as defined in s 47. On that basis, there may be force in the view expressed by Dunford J in *Goldsworthy* that a transcript of the tape is admissible by reason of the operation of s 48(1)(c).
>
> 12. However, it is not necessary for me to decide that question. Assuming for present purposes that the transcript is admissible, I would exercise my discretion under s 135 to exclude it, for the reasons explained by Clarke JA in *Parker*, by Dunford J in *Goldsworthy* and by Levine J in *Griffith*. In my view, there is a significant danger that the availability of a written version of a transient publication would compromise the already difficult task for the jury of assessing the likely impression of the publication on the viewer who saw it once, in its original form, as an ordinary, reasonable member of the community would see it.

10 The effect of s 48(1)(e) was considered by the Federal Court of Australia in *Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 4)* (2011) 194 FCR 479; [2011] FCA 578. See especially [9]-[15] per Collier J, where an email was held to be admissible as a business record. Also, see *Matthews v SPI Electricity Pty Ltd (Ruling No 35)* [2014] VSC 59 at [16] per J Forrest J.

11 See *Registrar of Aboriginal and Torres Strait Islander Corporations v Ponto* (2012) 208 FCR 346; [2012] FCA 1500 at [38]-[40] per Reeves J, where it was held the 'documents that the Registrar sought to tender in this case clearly purport to be transcripts of words recorded on the tapes', and as such 'no further oral evidence is required to validate them'.

12 See *Daya v CX Reinsurance Co Ltd* [2012] NSWSC 1616 at [19]-[21] per Brereton J. Compare *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180.

13 For example, see *Eastman* (1997) 76 FCR 9 at 114; and *R v Eastman (No 43)* [2018] ACTSC 186 at [135]-[149] per Kellam AJ. See too *R v Hall* [2001] NSWSC 827 at [35] and *R v Cassar & Sleiman (No 17)* [1999] NSWSC 436 at [7]. Also, in *R v Giovannone* (2002) 140 A Crim R 1; [2002] NSWCCA 323 an enhanced CD version of a poor quality listening device recording and a 'purported transcript' of what it contained were held to be admissible to prove the contents of the conversations: per Mason P at [60]-[62].

> 13. Further, as noted by Levine J in *Griffith* at [11] (and accepted by Sperling J in *Vacik*), the probative value of a transcript is negligible where a tape or disc that can be understood is available to the jury. In my view, the probative value is plainly outweighed by the danger to which I have referred.[14]

[7.110] Section 48(4) is a vehicle for oral evidence to be given of the contents of a document, but only where 'the contents of a document in question … is not available to the party, or the existence and contents of which are not in issue in the proceeding'.[15] Clause 5 of Part 2 of the Dictionary [7.50] states the circumstances in which the document will not be available. In *Polygram Records,* the documents were probably available, and this may explain why no reference was made to s 48(4). In *Guide Dog Owners' and Friends' Association Inc v Guide Dog Association of NSW & ACT* (1998) 154 ALR 527, Sackville J held, with reference to Dictionary, Part 2 cl 5, that on the facts the party seeking to rely on s 48(4) had not undertaken a reasonable inquiry and search for the documents in question, namely orders of the Supreme Court of Victoria in earlier proceedings, nor had the party shown that it would be impractical to produce the documents in the course of the proceeding. On the other hand, in *Payten v Perpetual Trustee Company* [2005] NSWSC 345, s 48(4)(b) was used to allow oral evidence of the contents of a document (a 'missing will') that was not available to the plaintiff: Austin J at [68]-[69].

In *Wade (a pseudonym) v The Queen* (2014) 41 VR 434; [2014] VSCA 13, evidence of what a police officer had viewed about the person in CCTV footage of events giving rise to charges of armed robbery and attempted armed robbery against the applicant, was held to have been properly admitted as the CCTV footage, which had been mistakenly deleted subsequent to this viewing, was correctly treated as a 'document' within the meaning of s 48:

> **Nettle JA** [Redlich JA (with additional reasons) and Coghlan JA agreeing]: 24. According to the plain and ordinary meaning of the words of that definition ('document' in Part 1 of the Dictionary to the *Evidence Act*), CCTV footage of the commission of an offence is a 'document' because it is a medium from which images of the offence can be reproduced with the aid of an appropriate play-back machine. …
>
> 26. … Security camera footage of the commission of a crime is a photograph or perhaps more accurately a series of photographs comprising a 'visual and permanent record of what could have been seen by a person positioned where the camera was'. As such, it falls squarely within the conception of 'photograph' in para (d) of the definition of document. Whether or not that accords with common law conceptions of documentary evidence is largely immaterial. But, if it matters, I note that, even at common law, a video cassette was and is recognised as a document for some purposes.

---

14 The same line of reasoning was followed again by McCallum J in *Voelte v Australian Broadcasting Corporation* [2016] NSWSC 1012 at [16]-[17]. Compare *Habib v Radio 2UE Sydney Pty Ltd (No 2)* (2011) 12 DCLR (NSW) 123; [2011] NSWDC 7, where the plaintiff's submission that transcripts of the broadcasts should be provided to the jury 'either as exhibits, or as an aid to memory' (at [2]) in order to assist with their 'complex deliberations' (at [3]) was permitted, to an extent, by Levy SC DCJ. Typed transcripts of the relevant broadcasts by John Laws and Ray Hadley were able to be provided to the jury 'as memory aids, to assist the jury in the deliberation of the issues before them, but not by way of tender as exhibits, and subject to directions that are to be given to the jury by the court concerning the distinction between documents and materials provided to them for their consideration as evidence in the form of exhibits, and documents simply provided to them for convenience as memory aids' (at [58]). See too *Hatfield v TCN Channel Nine Pty Ltd* [2010] NSWSC 161 at [37]-[39] per Harrison J.

15 See, generally, *Director of Public Prosecutions v Koopelian* [2012] NSWSC 309.

> 27. Additionally, even if there were any substance in the point, it would make no difference to the outcome of the case; as indeed counsel for the applicant ultimately conceded. At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). Subject to considerations of reliability, prejudice and the exercise of discretion, it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.

Therefore, the conditions for the operation of s 48(4) had been satisfied in this case which enabled P to prove the contents of the CCTV footage by the secondary evidence of the viewing by the police officer (at [39]). Further, there was considered to be no basis to exclude the evidence under s 137 as there was no risk of the jury overestimating the reliability of the police officer's evidence when he 'did not give evidence of positive identification as such' (at [33]-[34]).[16]

In *Minassian v Minassian* [2010] NSWSC 708, the lost document in question was an agreement created in 1980 between several family members. This agreement was said to constitute an express written trust concerning the ownership of a property in Carlingford. The plaintiff (referred to as George in the judgment) sought to prove the contents of this lost document in several ways, including direct evidence from those who allegedly saw the relevant document (at [42]). Despite holding 'the contents of the 1980 agreement can be proved either through admissions by Elie [the defendant] or through direct evidence of someone who saw the agreement' (at [54]), Ball J concluded 'I am not satisfied that George has established that the 1980 agreement contains the terms alleged by him' (at [63]). Ball J's reasoning was as follows:

> 44. Although s 51 of the *Evidence Act* abolishes the common law principles relating to the admissibility of evidence to prove the contents of documents, it does not affect the principle that, at least where property disputes are in question, clear and convincing evidence of the contents of the lost document is necessary. In *Maks v Maks* (1986) 6 NSWLR 34, for example, the plaintiff sought to establish by oral secondary evidence the contents of a declaration of trust by the defendant in favour of the plaintiff in respect of a half share in a house. McLelland J said (at 36):
>
> > 'I am of the opinion that where the original writing is not produced and secondary evidence is relied on, there must be clear and convincing proof not only of the existence, but also of the relevant contents, of the writing, of the same order as the proof required to establish an entitlement to the rectification of a written instrument … the two classes of case being to my mind in relevant aspects analogous.' …
>
> 45. There is no specific provision of the *Evidence Act* dealing with how the *existence* of a document is to be proved. That depends on the common law as modified by the general provisions of the *Evidence Act* …
>
> 48. I am prepared to accept that the 1980 agreement was 'not available' to George in the sense required by the *Evidence Act* …
>
> 49. However, I do not accept Mr Loofs' [George's counsel] interpretation of s 48(4) of the *Evidence Act*. That subsection permits a party to adduce evidence of the 'contents' of the document. That evidence could take the form of evidence from a person who has seen the document and who can give evidence about what it contained. It could also take the form of another document that purported to record the contents of the document that is unavailable … However, I do not think that it includes evidence concerning people's

16 See also *R v Jenkin (No 14)* [2018] NSWSC 837 where Hamill J applied the reasoning from *Wade* in relation to s 48(4) in holding that a 'recovered or repaired' file (by means of the *Untrunc* programme) from a corrupted mobile phone video was a 'document' and that 'section 48(4) would allow evidence to be given of the contents of the document (that is, the data, images and audio on the corrupted video file) because it "is not available to the party"': at [23].

intentions or beliefs from which the contents of the document might be inferred. That evidence is not evidence of the contents of the document.

50. For similar reasons, I do not think admissible hearsay evidence of the contents of a document (such as evidence from a witness that Mr Minas told the witness about the contents of the 1980 agreement) is admissible under s 48(4). That evidence is evidence of what one person said to another concerning the contents of the document in question. It is not itself evidence of the contents of the document.

Where section 48 may not be applicable

[7.120] That some fact may be proved by evidence of the contents of a document does not preclude that fact being proved in some other way. P may seek to prove the existence of a tenancy by production of the lease document, in which case s 48 would apply. Section 48 would not apply if proof were attempted by evidence, such as by regular payment of rent, from which the inference that there was a tenancy could be drawn.

[7.130] More difficult is the question whether s 48 applies where the party seeks to adduce evidence of the contents of a document for the purpose of merely identifying it or, in other words, where those terms or words are simply part of the appearance of the document. At common law, Dixon CJ distinguished between 'physical things bearing written inscriptions and documents the written contents of which amount to what may be called an instrument or writing which, because of the significance of what it expresses, has some legal or evidentiary operation or effect material to the case': *Commissioner for Railways (NSW) v Young* (1962) 106 CLR 535 at 554-546. The rules concerning the proof of the contents of documents do not apply in the first category. The position under the Act is not entirely clear as illustrated in the example that follows.

W might identify a particular car by reference to its physical characteristics, such as colour, make and model, without reference to any document. W might also describe it by reference to its numberplate being 'XYZ 123'. The numberplate is a document (see para (a) of the Dictionary definition). On Dixon J's approach, s 48 does not apply, because this is not a case where the contents of the document are of any significance in themselves. The contents of the numberplate are relied on merely to identify the car by reason of its association with a certain document, being the numberplate. (To apply this elusive distinction, one can ask whether it would make any difference to the relevance of the evidence of the contents of the document if those contents were different from those of the actual document in issue. If 'no', s 48 has no application.)

But can this reasoning be employed under the Act? It might be said that s 48 applies whenever a party seeks to 'adduce the evidence of the contents of a document', irrespective of the purpose involved. The common law distinction is in part designed to accommodate situations where the document (such as a numberplate) could not easily be brought to court, or may not be available to the party. These situations are, however, accommodated by s 48(4), when read with cl 5 of Part 2 of the Dictionary [7.50]. In particular, cl 5(c) provides that a document is to be taken not to be available where 'it would be impracticable to produce the document … during the course of the proceeding'.

Proof of the authenticity of a document

[7.140] Proof of authenticity is an aspect of relevance and requires little elaboration. Just what is required in a particular case depends on how proof of the contents of the document is said to be relevant to the facts in issue. Section 58 is designed to facilitate proof of authenticity, although its interpretation by the courts has raised a question about the extent of its utility in this regard: see *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309 ([7.180] below), and *Australian Securities and Investments Commission v Rich* [2005] NSWSC 417. However, the conclusion in *Rusu* about the operation of s 58 has been rejected as 'plainly wrong' in later cases: *Australian Competition and Consumer Commission v Air New Zealand (No 1)* (2012) 207 FCR 448; 301 ALR 326; [2012] FCA 1355; *Matthews v SPI Electricity Pty Ltd (Ruling No 35)* [2014] VSC 59; *Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; [2018] FCAFC 212 at [64]-[66] per Steward J, Greenwood and Logan JJ agreeing; *Quaker Chemical (Australasia) Pty Ltd v Fuchs Lubricants (Australasia) Pty Ltd* (2019) 368 ALR 573; [2019] FCA 370 at [9]-[16] per Robertson J; and *Gregg v The Queen* [2020] NSWCCA 245 at [365]-[368] per Bathurst CJ, Hoeben CJ at CL and Leeming JA (with additional remarks at [714]-[716]) agreeing ([7.200], [7.210], [7.220]). Further, in *Antov v Bokan* [2018] NSWSC 1474, Ward CJ in Eq (at [318]-[345]) agreed with the propositions by Perram J in *Australian Competition and Consumer Commission v Air New Zealand (No 1)* and the comments made on these by Adamson J in *Director of Public Prosecutions v Pinn* [2015] NSWSC 1684 at [36]-[46].

[7.150] A common mode of proof of authenticity is evidence that the document was executed or adopted by, or otherwise connected to, a particular person.[17] The request procedure in ss 166-169 facilitates proof of the authenticity of a document. There are many other statutory provisions that also facilitate such proof. Part 4.3 of the *Evidence Act* contains several such provisions (see [3.560] above) and, in particular situations, there may be applicable certain rules found in rules of court, in other statutes and in statutory instruments.

[7.160] In *R v Colby* [1999] NSWCCA 261 at [144]ff, the 'authenticity' of the document, being a magazine, lay in the fact that it was found in a particular place, which in turn was said to be relevant to proof that a person who had access to the document had certain knowledge gained by reading the document. See too *R v Burrell* [2001] NSWSC 120 at [42]ff, where proof of the place where a magazine was found, and of its contents, was (unsuccessfully) sought to be adduced as evidence probative of D's motive to kidnap a person.

The interpretation and application of section 58

[7.170] The ALRC viewed the common law requirement that the authenticity of a document be established by evidence extrinsic to the document as largely ritualistic. 'In everyday life we accept letters and the like at face value – we assume their authenticity. It may be argued that most writings introduced into evidence are not fraudulent. Further, in the case of writings purporting to originate from

17 Illustrative is *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309 at 312 [17], and *Citibank Ltd v Liu* [2003] NSWSC 236 at [4]. It is not proposed to review the various means whereby it may be proved that a document was written, executed or adopted by a particular person: see *Cross on Evidence* at [39085]ff.

a party, the probability that they do (so originate) is high. The risks are likely to arise in a minority of cases' (footnotes omitted): ALRC 26 vol 1 [981]. Its view was that the control of the admissibility of the evidence to be authenticated should be by the application of the relevance proposals: [982]. They were following an American approach that views 'authentication and identification evidence' as 'required to establish relevance': [979]. This is the background to s 58.

> **Inferences as to relevance**
> **58.** (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
>
> (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

ALRC 38 makes clear that the purpose of s 58 is to permit the court 'to examine a document or thing, the relevance of which was in issue, and draw any reasonable inference from it that would go towards establishing its relevance [eg the authenticity of the document – it is what the party tendering it claims it to be]': [124]. The ALRC pointed to the provisions in ss 166-169, which permit an opponent party to request the calling of persons involved in the making of the document and the production of related documents, as a counterbalance to a more liberal attitude towards proof of authenticity: ALRC 26 vol 1 [986].

This legislative history notwithstanding, and noting that s 58 merely permits a court to examine a document and draw an inference from it, both the NSW Supreme Court and the Federal Court gave s 58 a restricted scope of operation in early interpretations of the provision. In *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309 at 315 [29]ff [7.180], Bryson J examined the legislative history, although no account was taken of the comment in ALRC 38 concerning s 58. Bryson J's holding (at 314-315 [26]-[27]) was applied in *Kingham v Sutton (No 3)* [2001] FCA 1117, where Goldberg J held:

> 127. The tender of the petition, albeit pursuant to s 48(1) of the *Evidence Act*, is not evidence of the fact that the signature opposite a name was signed by the named person. Section 48 does not have that consequence. Section 48 enables proof of the existence of the petition to be established by a number of methods, but it does not have the effect of establishing evidence*, prima facie* or otherwise, that the signatures on it were in fact signed by the named persons.[18]

It should be noted that, even if the document is admitted, a doubt about its authenticity will affect the probative value of the document. Moreover, the ALRC noted that 'it is to be expected that parties will continue to authenticate key documents with extrinsic evidence': ALRC 26 vol 1 [986]. Such authentication will most likely enhance the weight of the probative value of the document.

18 In *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25 at [46] per Heydon JA, Priestley and Sheller JJA concurring, there is the Delphic comment: 'The *Evidence Act 1995* does not permit documents to authenticate themselves save in limited circumstances: *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309'.

[7.180]

National Australia Bank Ltd v Rusu

New South Wales Supreme Court: Bryson J
(1999) 47 NSWLR 309; [1999] NSWSC 539

[P (the National Bank) tendered documents on the basis that they were business records. P alleged that moneys belonging to it had been stolen by Monica Rusu, the first defendant, in collaboration with Peter Mato, the second defendant. Bryson J noted that he had been told that other evidence would show that soon after the theft, the Ds had 'significant amounts of funds available to them …, in contrast to their resources before': [8]. To prove D's state of financial affairs, P wished to tender documents, described as 'pages 25 and 26 of Exhibit SEG3'. Given this purpose, if the contents of the documents were proved, s 59 would apply. P invoked the business records exception in s 69 to avoid s 59. Bryson J held that the contents of the documents could not be adduced because the document had not been authenticated. His Honour reviews several ways authentication might have been established. Of particular note is his rejection (at [19]) of the application of s 58.]

Bryson J: [311] 10. As one step in what I expect will be a very elaborate body of evidence in support of its case the bank's counsel has tendered pages 25 and 26 of Exhibit SEG3. These appear on their face to be pages 1 and 2 of a transaction history inquiry relating to an Account No 146459720, and internal material in those pages is obviously appropriate for them to be bank statements. The pages do not identify the bank or the customer. Other documents at pages 14-29 inclusive of Exhibit SEG2 are tendered to show what pages 25 and 26 refer to and to support their admissibility.

11. Ms Simone Emma Gilbert is a solicitor in the office of the solicitors who represent the Bank. Annexure A to the Affidavit of Ms Gilbert sworn 23 April 1999 is a Schedule of payments which, according to Ms Gilbert's analysis of documents produced on subpoena by various persons and companies, were made by the first and second defendants after 17 June 1996.

12. Item 1 in the Schedule contains statements to the effect that on 18 June 1996 the second defendant paid Advance Bank $2,850 cash, and bases this on documents produced under subpoena by Advance Bank Australia Limited. …

[312] 15. Tender of pages 25 and 26 appears to me to raise a question of their authentication; that is whether there is evidence that they truly are what counsel alleges they are; that is copies of bank statements which record dealings between the second defendant and the Advance Bank. No witness from the Advance Bank and no other witness has said in oral evidence or on affidavit that that is what they are.

16. The plaintiff's counsel asked me to find that the documents tendered are bank statements of the Advance Bank relating to an account conducted by the second defendant, on the basis of the contents of those documents and on some other documents which show the manner in which pages 25 and 26 come to be available.

17. Before a business record or any other document is admitted in evidence it is obviously necessary that there should be an evidentiary basis for finding that it is what it purports to be. Documents are not ordinarily taken to prove themselves or accepted as what they purport to be; there are exceptions under the Common Law and under statutes for public registers and for many kinds of documents when certified in various ways: and see the method of proof provided in some cases by s 170 and s 171 of the *Evidence Act* 1995. At the simplest, the authenticity of a document may be proved by the evidence of the person who made it or one of the persons who made it, or a person who was present when it was made, or in the case of a business record, a person who participates in the

conduct of the business and compiled the document, or found it among the business's records, or can recognise it as one of the records of the business.

18. In equity and commercial litigation proof of the authenticity of business documents does not often claim attention because practices are followed which limit the occasions when it needs attention. The authenticity of documents is **[313]** often established in accordance with Rules of Court for documents which have been subject of discovery (*Supreme Court Rules 1970*, Pt 18 r 4) or of notices to admit their authenticity (Form 22), or where counsel against whom a document is tendered has reasons to accept its authenticity, and decides not to object to its tender. These practices have not been followed here as the Advance Bank has not been involved in Discovery, the defendants are unrepresented and there has been no Notice to Admit Facts and Authenticity of Documents. …

19. It is necessary to establish by evidence other than by pages 25 and 26 the facts that pages 25 and 26 are a bank statement, they are a statement of the Advance Bank and that the account to which they refer is an account of the second defendant. In effect counsel asked me to assume that pages 25 and 26 are relevant and assured me that he would make them relevant. I accept this assurance and my concerns about admissibility of pages 25 and 26 do not relate to their relevance; they would be relevant if they are authentic. If counsel's assurance had already been made good it would be possible, s 57(1)(b). However that stage has not been reached. In the language used in s 57(1), a finding that the evidence is what the party claims it to be is distinguished from the question whether the evidence is relevant; authenticity is something on which relevance depends. (Justice Smith saw authenticity as an aspect of relevance in his Honour's article 'The More Things Change the More They Stay The Same? The Evidence Act 1995 – An Overview' [1995] UNSWLJ at 13: I see them as distinguished to some degree for this purpose.) As counsel's assurance has not been made good, I have not reached the point where the documents could be provisionally admitted. In my opinion, a question of authenticity is not a question as to the relevance of documents within s 58(1), which treats authenticity as part of the material on which relevance may be determined.

20. The record at page 25 "180696 … cash deposit $2,850 …" is a previous representation as defined in the dictionary to the *Evidence Act 1995*. Evidence of a previous representation is not admissible to prove the facts asserted: see s 59 (1); but s 69 creates an exception for business records and s 69(1) relates to authentication: [Bryson J then set out s 69(1) and (2), see [8.1020] below.]

21. If pages 25 and 26 are to be admitted the plaintiff must show (and I abbreviate s 69):

(i) they are part of the records belonging to or kept by the Advance Bank in the course of its business;
(ii) they contain a previous representation made in the course of the business;
(iii) the previous representation was made by a person who had personal knowledge or on the basis of information supplied by a person who had personal knowledge.

[Section 48(1)(b) and (e) of the Act were set out, and s 51 referred to.]

26. Section 51 does not abolish or in any way affect the need to prove that a document tendered is the document which it purports to be, and s 48(1) does not authorise the adduction of evidence merely by tendering a document in the **[315]** absence of any evidence establishing what the document is. Section 48(1) is not an enactment to the effect that documents are to be received in evidence on the basis of what appears on their own face. Section 48(1) prescribes the means of adducing evidence of the contents of documents, and leaves untouched the need to establish that a document is what it purports to be; it does not mean that documents prove themselves, as if judicial notice must be taken of them.

27. If s 48(1) meant that all that had to be done to establish the authenticity of a document was to tender it, it would dispense with the need to prove the authenticity of a document and put the Court entirely in the hands of whatever a document which a party

chose to tender purported to be, subject to whatever opportunity another party had of overcoming its apparent effect. I would regard an enactment to that effect as absurd, and I would look for other constructions; however I do not think that s 48(1) has that effect.

28. So far as I am aware there is no judgment which has decided that under the *Evidence Act 1995* the authenticity of a document tendered in evidence may be determined simply on the basis of the form and contents of the document or on that basis taken with information about the source from which it was produced showing that it was produced on subpoena and by whom. References in case law to authentication of documents tendered are usually brief and incidental. Texts dealing with the legislation do not appear to have commented to the effect that under the legislation documents establish their own authenticity. …

29. The Law Reform Commission appears not to have regarded their drafts as bringing about that result: see ALRC 26, vol 1, par 31 particularly par 654; the comments in par 654 appear to assume the continuing need for proof of authenticity; see text at note 16 in the final sentence; see too Chapter 40, Judicial Notice, par 985 and par 986 dealing with self-authentication; see too par 981; see Chapter 24 authentication and identification, par 498; see too par 981; see too pars 707, 981, 982 and 983. In ALRC 26 Vol 2, Par 282 again dealing with authentication and identification, the Law Reform Commission referred to s 45b of the *Evidence Act 1929* (SA) and commented: 'No authentication is required initially – it is enough that the document be apparently genuine.'

30. At page 551, note 25 to par 985 includes this sentence: 'Consideration was given to including a proposal that in Civil trials a document tendered in evidence be assumed to be authentic in the absence of objection.' This proposal was not adopted by the Law Reform Commission. At par 992 there is a recommendation for legislation providing to the effect that a document 20 years old produced from proper custody is presumed to be authentic. Other references at pars 707, 982, 983 and 986 may illustrate what was proposed.

31. The Law Reform Commission's drafts were not in the same form as the legislation as later enacted. Chapter 31 of ALRC 26 – Evidence of Documents – was directed to proposals which were not enacted; the distinction between primary and secondary evidence of the contents of documents was to be **[316]** preserved in the proposals, but the Act takes a different course. The need for authentication of evidence was seen as continuing – par 659 shows this.

32. Commentary in ALRC 38 (Canberra AGPS: 1987) does not appear to support the view that the Law Reform Commission recommended dispensing with authentication of documents, or doing so prima facie, or adopting the principles of the South Australian s 45b. The draft Explanatory Memorandum dealing with cl 125, at Appendix A, page 243, does not suggest that cl 125 (which corresponds with s 48 as enacted) made any large change in the need for evidence authenticating a document. It does not seem possible that, after addressing s 45b, the Law Reform Commission could have contemplated adoption of its principles without explicitly indicating that it was recommending this large change.

33. Section 152 of the *Evidence Act 1995*, which relates to documents more than 20 years old produced from proper custody, appears to deal with authentication. Its presence in the Act is inconsistent with there being a wider general presumption of authenticity. The reference in s 144(1)(b) to 'a document the authority of which cannot reasonably be questioned' is also inconsistent with a wide general presumption of authenticity.

34. If the Court is to find a significant fact on which a large liability may depend, there is a need for the Court to have some measure of confidence in the source of the Court's belief that the fact exists. The Court acts almost always on narrations which must have a human origin; not usually on the Court's own knowledge or on states of fact which are taken to be incontestable. The balance of probabilities is not a demanding standard, as the possibility that the less probable state of fact may be the true one is very obvious, and makes civil justice very vulnerable to error. For the Court to feel confident that it should act on any narration it is very important to have a human witness who has pledged, by

oath or affirmation, that the narration is true: someone who is responsible for it. Business records may be incomplete; they often are. They record what there is perceived to be a business need to record, and that may be a small part or an oblique aspect of the objective event.

35. The factual context in which the plaintiff is in a position to tender pages 25 and 26 appears from the affidavit of Ms Gilbert and from other documents in Exhibit SEG3. On 25 March the plaintiff served a subpoena on Advance Bank Australia Ltd at its office in George Street, Sydney and the schedule of the subpoena called for a very long list of original documents or copies including statements of account No 146459720 in the name of Peter Mato for the period 1 August 1996 to date, and for a number of other records and deposit slips, but none specifically relating to the deposit of $2,850 on 18 June 1996 to that account. In answer the Advance Bank produced a copy of a bank cheque dated 2 July 1996, pages 25 and 26, a record of transaction relating to deposit of $2,850 on 18 June 1996 but not identifying the depositor and at pages 28 and 29 a personal account application of obscure date by Francis Mato relating to account No 146459720. (The second defendant's name is Peter Francis Mato).

36. In summary these documents show that when ordered by the Court's subpoena to produce statement of account No 146479720 in the name of Peter Mato, Advance Bank produced documents, including pages 25 and 26, relating to its customer Francis Mato. The statements do not relate to the period called for; they relate to the period from 31 January 1996 to 8 July 1996.

37. I am asked then to find on the basis of Advance Bank's behaviour in **[317]** responding to the subpoena that pages 25 and 26 meet the three requirements of s 69 to which I earlier referred. The evidence of Ms Gibson establishes that Advance Bank responded in that way to the calls in the subpoena. In support of the tender counsel referred me to other documents of which I have nothing before me but their face value; they are the subpoena, a copy of the affidavit of service of subpoena and the other documents which the bank produced. All of them are subject to at least the same difficulties for their admissibility, even for the purpose of testing the admissibility of a document tendered; and possibly greater difficulties as some of them are less apparently business records even in purport.

38. The plaintiff needs to obtain a finding for the purposes of the admission of the evidence tendered to the effect that pages 25 and 26 meet the three requirements of s 69, and to obtain that finding must rely on evidence relevant to the conditions in s 69 according to the prescription of s 55(1). That test is:

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

The standard of proof for a fact on which the admissibility of evidence depends is the balance of probability (s 142(1)).

39. The line of reasoning that I am asked to follow is the effect that the fact that Advance Bank produced pages 25 and 26 in answer to the call in the subpoena for bank statements could rationally affect the assessment of the probability that the bank statement of which pages 25 and 26 are copies forms part of the records belonging to Advance Bank, that it contains information recorded in the course of Advance Bank's business, and that that information was made in one of the ways referred to in s 69(2). In this line of reasoning, as Advance Bank sent these documents to the Court and had a duty to do so, everything that the documents apparently record is probably in order as a business record.

40. I think it is obvious that reasoning in this way could easily and often produce seriously erroneous findings; it surrenders all the vigilance which experience of life and the law suggests to me is required in serious affairs. However, the test of relevance in s 55(1) is a test stated with studied breadth, and it appears to me as a matter of fact that Advance Bank's behaviour in producing a document in response to the subpoena could rationally affect the assessment of the probability of the existence of the facts which make

the document a business record within s 69. The unsatisfactory nature of the process of reasoning is somewhat masked by the circumstance that the recipient of the subpoena was a bank; there would be many recipients of subpoenas whose response might receive an initially less generous interpretation than an institution in the conduct of which the community usually replaces confidence, while the superficiality of that interpretation of the conduct of a bank is clear enough.

41. As means of proof of the records of the Advance Bank, the circumstances relating to Advance Bank's response to the subpoena appear to me to be vehemently unsatisfactory; the peril that a finding of fact would be erroneous if it is based on such material appears to me to be great. In saying this I bring to bear on my appraisal of the facts my experience of the conduct of legal business and the responses of parties to subpoenas; that is not a branch of human behaviour in which I regard people as highly reliable. Far better means of proving the authenticity of bank statements are obvious and ready to hand, **[318]** and I have to consider how readily they could have been used in a serious endeavour to prove important facts.

42. I am not satisfied on the balance of probabilities that pages 25 and 26 are what they are alleged to be; that is I am not satisfied and do not find for the purpose of their admissibility that they are business records being bank statements of the account conducted by the second defendant with the Advance Bank.

43. The machinery in ss 166 to 169 of the *Evidence Act 1995* is not applicable as the plaintiff did not give notice of its intention to tender these documents in time to allow a request under s 167(1) to be made within 21 days (s 168(1)). One outcome of the machinery is that the Court may make orders in s 169(1) including an order that the evidence is not to be admitted in evidence (par (c)): this group of sections and the machinery for which it provides do not enable any document or other evidence to be admitted in evidence, and the legal basis for its admission must be found elsewhere. If authenticity must be proved, these sections do not provide means of proof of authenticity.

44. The tender is rejected.

[7.190] Bryson J's reasoning in relation to s 58 has been criticised as 'inconsistent with the intention behind this provision and its legislative history (because) [i]t was plainly intended that, for the purposes of determining the admissibility (s 56) of a document, a question of prima facie authenticity (on which relevance will depend) may be decided with the assistance of reasonable inferences from the document itself'.[19] It has been subsequently held, however, that 'Bryson J did not deny that inferences may be drawn from the document itself, relevant to the question of authenticity': *Australian Securities and Investments Commission v Rich* [2005] NSWSC 417 at [117] per Austin J. In considering all the relevant authorities following from *National Australia Bank Ltd v Rusu* (at [105]-[115]) and the criticism offered by Odgers, Austin J concluded:

117. '*Rusu* insists on the need for authenticity to be established, and asserts that authentication cannot be achieved *solely* by drawing inferences from the face of the document where there is no other evidence to indicate provenance. The other cases do not deny these propositions, in my opinion.

118. … Authentication is about showing that the document is what it is claimed to be, not about assessing, at the point of the adducing of the evidence, whether the document proves what the tendering party claims it proves. …

119. Although a simple way of authenticating a document is by evidence from its creator, or someone who superintends the maintenance of business records that include it, *Rusu* does not lay down that authentication by such means is necessary. On the other hand, *Rusu* establishes that there must be something more than the mere tender of the document

19 Odgers [EA.58.60]. Also, see *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; 301 ALR 326; [2012] FCA 1355 at [101] per Perram J.

> itself, where the tender is contested. Thus in the present case ASIC would not, … be able to tender the Carter Exhibits or its Merged Tender Bundle without any evidentiary support whatever. But ASIC does not purport to do so. It has provided an enormous quantity of provenance evidence, designed to trace the tendered documents back to a source such as the Ferriers I:/Drive or documents acquired from liquidators or solicitors.

The operation of s 58 was not specifically considered in ALRC 102; it was simply noted as one of the documentary evidence provisions that 'have been largely successful in balancing the interests of the parties with facilitating the admission of documentary evidence': [6.7]-[6.8]. In fact, s 58 was drawn out in ALRC DP69 as an example of an effective provision which has assisted in successfully 'balancing the interests of the parties against reducing the previous level of difficulty in having copies and computer-stored documents admitted into evidence … [but] parties are free to raise evidence challenging the authenticity of documents': [6.10]. It may be extrapolated from this that Bryson J's interpretation of s 58 in *National Australia Bank Ltd v Rusu* and the limits on its application recognised in subsequent cases including *Australian Securities and Investments Commission v Rich,* is seen as not being inconsistent with its intended operation and it is operating effectively in practice.

[7.200] Later judicial decisions have, however, concluded that Bryson J's interpretation of s 58 in *Rusu* was 'plainly wrong'.

Australian Competition and Consumer Commission v Air New Zealand (No 1)

Federal Court of Australia: Perram J
(2012) 207 FCR 448; 301 ALR 326; [2012] FCA 1355

[D (Air New Zealand) objected to P's (ACCC) proposed tender of a number of documents on several grounds. The penultimate ground concerned the authenticity of those documents. Some basic propositions in this regard were formulated.]

Perram J: 92. …

1. There is no provision of the *Evidence Act* which requires that only authentic documents be admitted into evidence. The requirement for admissibility under the Act is that evidence be relevant, not that it be authentic. On some occasions, the fact that a document is not authentic will be what makes it relevant, ie, in a forgery prosecution. In other cases, there may be a debate as to whether a particular document is or is not authentic, for example, a contested grant of probate where it said that the testator's signature is not genuine.
2. In cases of that kind, the issue of authenticity will be for the tribunal of fact to determine. In cases heard by a judge alone, this will be the judge at the time that judgment is delivered and the facts found. In cases with a jury, it will be the jury.
3. The question of what evidence will be admitted is a question of law for the tribunal of law, which will be the Court.
4. Since authenticity is not a ground of admissibility under the *Evidence Act*, the issue of authenticity does not directly arise for the tribunal of law's consideration at the level of objections to evidence.
5. What does arise for its consideration is the question of relevance under s 55. If the evidence is relevant it is admissible: s 56. It will be relevant under s 55 if the evidence is such that if it were accepted, [it] could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.

6. The question of a document's authenticity is relevant only to the tribunal of law's consideration of relevance under s 55. It has no other role.
7. In that inquiry, the question for the tribunal of law is not whether the document is authentic but whether receipt of the document could, to paraphrase s 55, rationally affect the assessment of the probability of a fact.
8. If there is raised a question about the authenticity of a document (and assuming that, if authentic, it would otherwise be relevant to an issue) then there will be an issue in the proceedings about its authenticity. This will be a question for the tribunal of fact to resolve, if the document is admitted.
9. The question for the tribunal of law, by contrast, will be whether the document is relevant to a fact in issue under s 55. That is, the question will be whether the document can rationally affect the assessment of the probabilities of the fact, including its authenticity.
10. What materials may be examined in answering this question? The answer is provided by s 58 …
11. The position then is clear. In answering the only question before the tribunal of law – relevance – the tribunal may examine the document to see what may be reasonably inferred from it (s 58(1)). It may also examine other material (s 58(2)).
12. The tribunal of law does not find that the document is authentic. It finds that there is, or there is not, a reasonable inference to that effect and hence that the document is, or is not, relevant. If there is a reasonable inference that the receipt of the document will rationally affect the probability of a finding of fact, then the matter may to go to the tribunal of fact which will then determine at the end of the trial whether the document is authentic and whether the fact is proved.
13. At no time does the tribunal of law determine that the document is or is not authentic because this is not a question for it. It may, however, determine that no reasonable inference to that effect is open and thereby conclude that it is not relevant. In a jury context, that will be similar to taking the question of authenticity away from the jury. Analytically, it will be the same where the tribunal of fact is a judge.
14. In deciding relevance (ie whether the tribunal of fact could reasonably infer that the document (otherwise relevant) was authentic), the tribunal of law is explicitly authorised by s 58(1) to ask what inferences as to authenticity are available from the document itself. That is what s 58(1) says.

Based upon these propositions, Perram J held 'AirNZ's submission that "no inference as to authenticity can be drawn from the face of these documents" ought to be rejected' (at [93]). Perram J considered that Bryson J's reasoning in *National Australia Bank v Rusu* involved 'a confusion between the role of the court as the tribunal of law in admitting relevant evidence and the role of tribunal of fact in determining, if it be an issue, whether a document is authentic' (at [97]). Perram J then reasoned that Bryson J's interpretation of s 58(1) was 'plainly wrong' and declined to follow it in application to the documents in question in this case:

> 98. The question for the former is not, as *Rusu* suggests, whether the document proves itself. The question is whether it is relevant. If it is alleged not to be authentic it will still be relevant as long as there is material from which its authenticity may reasonably be inferred. By s 58(1), that material expressly includes what may reasonably be inferred from the document itself.
>
> 99. I ought not to depart from Bryson J's interpretation of s 58(1) unless persuaded it is plainly wrong and this is particularly so in the case of a provision operating in more than one jurisdiction, such as the Uniform Evidence Acts: *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2003) 133 FCR 190 at 206 [52] per

French J. The 'plainly wrong' test requires me to ask whether the disposition of the earlier controversy (here *Rusu*) has somehow miscarried: cf *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at 253 [83]-[84] per Greenwood J. In my opinion the decision in *Rusu* satisfies the test because it:

(i) overlooks and confuses the different functions of the tribunals of fact and law, eliding them;

(ii) overlooks the fact that the Act does not make unauthenticated documents inadmissible. The criterion the Act operates on is relevance; and

(iii) concludes that only authentic documents may be admitted into evidence with the consequence that (a) all forgery prosecutions must fail and (b) no jury ever gets to decide whether a document is authentic.

100. These suggest, and I conclude, that the reasoning in *Rusu*, with respect, is plainly wrong. *Rusu* has been criticised before. It was doubted by Gyles and Weinberg JJ in *O'Meara v Dominican Fathers* [2003] ACTCA 24 at [85] and it was described as 'controversial' by Madgwick J in *Lee v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 305 at [25].

101. *Rusu* is also inconsistent with ALRC Report 26 on Evidence (Australian Law Reform Commission, Evidence, Report No 26 (1985)). That report discussed at [979]-[981] the previous position at common law where self-authentication was not possible (as *Rusu* holds) and then recommended at [985]-[986] that the position be liberalised by making the issue of authentication one of relevance. At [985] it said this:

> *Self-Authentication.* There is a strong case for liberalizing the law by permitting the courts to take content of the proffered evidence into account together with the surrounding circumstances in determining its authenticity. This is particularly so in relation to writings. The existing standard of authentication creates only a slight obstacle to the witting or unwitting presentation of forge writings. The present 'agnostic' approach imposes unnecessary and considerable cost burdens. Further, authentication difficulties usually arise where the writing did not originate with the party tendering it and the opposing party has the knowledge as to its origins. As to objects, self-authentication or identification is not likely to be possible. *Proposals are included [in the draft legislation annexed to the report] which permit inferences to be drawn from a document in determining its authenticity.* In this way the proposals recognise the reality that most documents produced in court are authentic.
>
> (Footnotes omitted, emphasis added.)

102. Section 58(1) is the fruit of that recommendation. It is almost identical in terms to cl 46 of the draft legislation annexed to ALRC 26 and cl 53 of that annexed to ALRC 38 (Australian Law Reform Commission, Evidence, Report No 38 (1987)). *Rusu's* interpretation results in the entire point of s 58(1) being thwarted and a return to the common law position which s 58(1) was explicitly intended to alter. I note the learned author of *Odgers* shares the same opinion (S Odgers, *Uniform Evidence Law* (Thomson Reuters, 10th ed, 2012) at [1.3.480]).

103. It is true that the critical passage in *Rusu* was apparently approved by the NSW Court of Appeal in *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25 at [46] per Heydon JA (Priestley and Sheller JJA agreeing). However, that was an obiter dictum and does not bind me. It is also true that *Rusu* was followed by Austin J in *ASIC v Rich* (2005) 191 FLR 385; [2005] NSWSC 417 at [116], but even his Honour thought that *Rusu* was intended to be 'illustrative rather than comprehensive': see [99]. For the reasons I have given, I do not share that view. *Rusu* is an accurate statement of the common law but s 58(1) was intended to alter that position.

[7.210] Perram J's interpretation of s 58 was subsequently followed by J Forrest J in *Matthews v SPI Electricity Pty Ltd (Ruling No 35)* [2014] VSC 59:

> 26. SPI wants to tender the documents as business records of the three electricity distribution companies and use it as evidence of their policies and practices pre-Black Saturday.

It is therefore necessary for SPI to establish that the documents are indeed authentic or genuine records of those companies. The debate on this point is what is necessary to establish authenticity so that the documents can be said to fall within the scope of s 69 of the *Evidence Act*.

27. Given the terms of s 48 of the *Evidence Act*, there has been a surprising debate as to the need to prove the authenticity of a document when its contents, upon inspection, make it probable that the document is an authentic business record of the organisation producing it. I do not propose to enter into the fray. It is sufficient to say that I accept the following propositions of Perram J in *Australian Competition & Consumer Commission v Air New Zealand Ltd (No 1)* to the following effect [propositions 1 through 14 are then set out].

28. In *ASIC v Rich* Austin J (following an earlier decision of *National Australia Bank Ltd v Rusu*) took a different position in not requiring evidence from the creator of a document to prove its authenticity, but requiring something in addition to the mere tender of the document itself to establish its provenance: [paragraph [119] of Austin J's judgment [7.190 above] is then set out]

29. Counsel for Mrs Matthews contended that for SPI to establish that the documents were authentic, notwithstanding their obvious provenance, the documents needed to be shown to have been authorised by an officer or employee of the company providing the records. In his submissions, counsel referred to *Rich*; 'authenticity cannot be achieved *solely* by drawing inferences from the face of the document where there is no other evidence to indicate provenance.' Counsel asserted that there is no evidence in the present case showing:

(a) the file source of the documents;
(b) their status within the subpoenaed organisations;
(c) whether they were the only iterations of the document; or
(d) whether they were accurately extracted.

30. I reject this submission. In my opinion neither the decision in *Rich* nor *Air New Zealand* require such rigorous proof. I accept that in this case, where the documents are tendered as emanating from the business records of an organisation, it is necessary to establish that the documents are authentic or genuine records of that organisation to trigger the exception to the hearsay rule set out in s 69 of the *Evidence Act*.

31. As will be seen in a moment, this is a case in which a document – on its face – can be inferred to be authentic and relevant. Section 58 does not mandate any additional requirement. In this case the additional factor (if it is necessary, which I doubt) is the terms of the subpoena addressed to each of the companies.

32. Consistent with the decision in *Air New Zealand*, a combination of ss 55 and 58 of the *Evidence Act* enables a court to examine the document itself and then determine whether it is authentic – absent other evidence. So for the purpose of this application it is appropriate to examine each of the documents and the surrounding circumstances of their production and draw appropriate inferences, where applicable, as to:

(a) how the document came to be adduced in evidence;
(b) whether it was a document prepared by one of the companies;
(c) whether it was a document prepared by one of the companies for the purpose of its business;
(d) whether the contents of the document form part of the records of the business;
(e) whether the documents contain statements relevant to the proceeding made in the course of or for the purpose of the business;
(f) whether the representation contained in the document was made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact relied upon; and
(g) whether the representation was made 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.

33. With two exceptions (the email and attachment) I consider Mrs Matthews' submissions to be devoid of merit and contrary to the purpose and intent of s 58, which is to enable a common sense examination of the content of the documents to determine its authenticity.[20]

[7.220] The reasoning of Perram J in deciding that the interpretation of s 58 by Bryson J in *National Australia Bank v Rusu* was 'plainly wrong' has most recently been approved at appellate level by the Full Court of the Federal Court of Australia in *Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; [2018] FCAFC 212. In considering how PAYG payment summaries and payslips could be authenticated in that case, Steward J (Greenwood and Logan JJ agreeing) stated:

65. From these observations, his Honour [referring to the 14 basic propositions set out by Perram J in *Australian Competition and Consumer Commission v Air New Zealand (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 at [92] – see [7.200]] concluded that the provenance of a document could be inferred from its contents, and for that purpose, declined to follow the earlier decision of *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309. I respectfully agree with Perram J: see also *Australian Securities and Investments Commission v Flugge (No 10)* [2015] VSC 690 per Robson J.

66. In addition, business records may be admitted and used as proof of the truth of any facts they recite without the need to identify the author of the document. As Heerey J observed in *Guest v Federal Commissioner of Taxation* [2007] FCA 193; 65 ATR 815 (*Guest*) at [25]:

> The terms of s 69(2)(a) do not suggest that it is an essential precondition of admissibility that the "person" in question be identified. The ordinary meaning of the language is that it is sufficient that the person who made the representation, whoever he or she is, had or might reasonably be supposed to have had, personal knowledge of the asserted fact. The policy behind the provision is clear enough. Routine business records, made before any legal proceeding arises or is contemplated (cf the exception in s 69(3)), have an inherent likelihood of reliability which outweighs the common law's aversion to hearsay evidence where the maker of a statement cannot be tested by cross-examination. The utility of s 69 would be greatly diminished if it were necessary to locate among large organisations, perhaps over a long period of time, persons who made representations, often in circumstances where the practical needs of the organisation did not require any identification at the time the representations were made.

67. Examining the contents of the PAYG payment summaries and payslips, I would have agreed with the respondent's submission that it should be inferred that they are authentic. The PAYG payment summaries appear to use the Commissioner's own form, are addressed to the respondent at her residential address, disclose amounts consistent with her salary, as agreed to be paid in accordance with her letters of offer, and they either bear the name of Ms Karen Foster, who was a director of Ultra Nova, or Mr Michael Lowe. The payslips are headed with the name and letterhead of each employer, are again addressed to the respondent, contain amounts which are consistent with her letters of offer of employment, and contain additional details concerning the number of hours worked, the accrual of holiday leave, the accrual of personal forward/carer's leave and the amounts of superannuation guarantee paid. In my view, the contents of these documents is consistent with them having a provenance from each of the three employers. Consistently,

20 Also, see *Antov v Bokan* [2018] NSWSC 1474 at [318]-[345] per Ward CJ in Eq; *Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja* [2018] NSWCA 26 at [99]-[101] per Leeming JA, Basten and Gleeson JJA agreeing; *DPP v Pinn* [2015] NSWSC 1684 at [36]-[46] per Adamson J; *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 105 ACSR 116; [2015] FCA 342 at [92]-[98] per White J; *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 4)* (2011) 280 ALR 97; [2011] FCA 338 at [63]-[65], [76]-[87] per Nicholas J.

> with *Guest*, I do not need to know the identity of the maker of each document in order to be satisfied that each said document is admissible and may be given probative weight.

Subsequently, in *Quaker Chemical (Australasia) Pty Ltd v Fuchs Lubricants (Australasia) Pty Ltd* (2019) 368 ALR 573; [2019] FCA 370, Robertson J reviewed the extant authorities in relation to the interpretation of s 58 and concluded that he was bound to follow the decision of the Full Court in *Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; [2018] FCAFC 212. His Honour ultimately admitted the documents over the objection based on the fact that they had not been authenticated when simply produced on subpoena by a third party: at [12]-[16]. Further appellate level consideration was given when Bathurst CJ (Hoeben CJ at CL and Leeming JA (with additional remarks at [714]-[716]) agreeing) reviewed the relevant authorities as to proof of the authenticity of a document in *Gregg v The Queen* [2020] NSWCCA 245 and concluded (at [368]):

> Since the decision in *Calleja*, the Full Court of the Federal Court in *Federal Commissioner of Taxation v Cassaniti* at [65] agreed with Perram J in *Australian Competition and Consumer Commission v Air New Zealand (No 1)* that *Rusu* was plainly wrong. Quite apart from the fact that the Court should follow a decision of another intermediate appellate court on what is effectively uniform legislation unless it is of the opinion that it is plainly wrong (*Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; [1993] HCA 15), I respectfully agree that *Rusu* was incorrectly decided. There is no reason in principle that to the extent necessary, the authenticity of a document cannot be determined from the terms of the document itself. …

Section 183

[7.230]

Inferences

183. If a question arises about the application of a provision of this Act in relation to a document or thing, the court may:

(a) examine the document or thing; and

(b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.

Note. Section 182 of the Commonwealth Act gives section 183 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Section 183 is directed to facilitating proof of matters other than the authenticity of a document. It pertains only to consideration of whether a provision of the Act applies in relation to a document or thing. As Austin J observed in *Australian Securities and Investments Commission v Rich* [2005] NSWSC 417 at [117], s 183 provides 'express statutory authority … [to draw inferences from the document itself] when a question arises about the applicability of a provision of the *Evidence Act*'. There is a particular connection with the exceptions to the hearsay rule. For example, s 183 would apply where it is in issue whether the maker of a document that contains a previous representation, that is sought to be adduced under s 66(2), made the document when the events were fresh in the maker's mind. Similarly, it would assist in answer to a question whether a document was a business record for the purpose of s 69.[21] It has been applied in considering the

21 See, for example, *Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja* [2018] NSWCA 26 at [91]-[98] per Leeming JA, Basten and Gleeson JJA agreeing; *Addenbrooke Pty Ltd v Duncan (No 5)* [2014] FCA 625 at [32], [41] per Foster J; *HP Mercantile*

admissibility of a report by an expert produced for the purposes of a business under s 147: *Roads and Traffic Authority of New South Wales v Tetley* [2004] NSWSC 925.

Real Evidence

Introduction

[7.240] The distinguishing feature of real evidence, the general admissibility of which is preserved by s 52, is that it is evidence that the jury perceives for itself, unaided, ultimately, by the evidence of a witness.[22]

> **Adducing of other evidence not affected**
> **52.** This Act (other than this Part) does not affect the operation of any Australian law or rule of practice so far as it permits evidence to be adduced in a way other than by witnesses giving evidence or documents being tendered in evidence.

[7.250] Real evidence is a thing, a person, or an event examined by the jury as means of proof of some fact, as distinguished from a description given of the thing, person or event by oral evidence of a witness. Proof of the fact must of course be relevant and otherwise not inadmissible. The evidence is subject to exclusion under s 135 and/or s 137, and its use might be subject to a limiting direction under s 136.

Suppose D, charged with murder, pleads self-defence, and proposes to adduce evidence from W that V attacked him (D) with a sword. The size of the sword and its characteristics would be facts relevant to the issue of whether D acted in self-defence. W may simply describe the sword, in which case the jury would need to rely on W's evidence alone. D might be in a better position if W was asked to examine an object, and then asked to say whether that was the sword used by V in attacking D. If W thus authenticated the sword, it could be tendered in evidence towards proof of the size and other characteristics of the sword.

The members of the jury would use their senses to form a view about the size and other characteristics of the sword. But on the issue of whether this was the sword used by V, the jury must still accept W as a witness of truth. This example shows that, in most cases, the value of a piece of real evidence also depends on the value attached by the fact-finder to the evidence of a witness who identifies the thing as having been seen on a particular occasion. That is, to have any value, a witness must give oral evidence to explain 'how it is relevant to, and incorporated into, the case'.[23]

If it was P who adduced the evidence of the sword on the basis that it was the weapon used by the culprit, D might in some situations persuade the trial judge to exclude the real evidence of the sword under s 137 on the ground that the jury might react emotionally or irrationally in the sense of taking a bias against D, in circumstances, say, where the sword had a particularly menacing appearance.

Pty Ltd v Clements [2014] NSWSC 290 at [14] per Black J; *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 4)* (2011) 280 ALR 97; [2011] FCA 338 at [64]-[65] per Nicholas J; *Itaoui v Yamaha Motor Finance Australia Pty Ltd* [2009] NSWSC 1363 at [14], [17] per Schmidt J.

22 See *Hua Wang Bank Berhad v Commissioner of Taxation (No 15)* (2013) 217 FCR 26; [2013] FCA 1124 at [7]-[8] per Perram J; *Whittaker v Child Support Registrar* (2010) 264 ALR 473; [2010] FCA 43 at [336] per Lindgren J.

23 WAN Wells, *Evidence and Advocacy* (1988) 159.

The trial judge might exclude the evidence of the sword, and confine evidence of its characteristics to an oral description of it by a witness. On the other hand, it might be relevant for the fact-finder to inspect the sword for a particular reason, such as to ascertain that it was of a particular kind, where that was relevant to show that it was D (and not some other person) that used it.[24]

[7.260] Sometimes, authentication of real evidence requires that a chain of custody be shown. If a gun is said to have been found on D, each person who then subsequently handled the gun would need to give evidence of how they did actually handle it, to the point of showing that there is a rational basis for a finding that the gun tendered in evidence is that which was found on D. The need for chain of custody evidence is particularly important where the thing does not have a unique identifier, and/or where its characteristics were capable of being altered.

A trial judge may admit evidence of a thing provisionally under s 57, usually upon an assurance that proof of authenticity will be forthcoming. The thing will not then be admitted as an exhibit, but given an MFI number or letter. Once admitted, it will be given an exhibit number or letter. Section 58 [7.170] may assist in proof of authenticity, although the ALRC noted that '[as] to objects, self-authentication or identification is not likely to be possible': ALRC 26 vol 1 [985].

[7.270] The individual appearance of a person, and their demeanour in court, are kinds of real evidence.[25]

[7.280] A document is a kind of real evidence, but only where some characteristic of the substance (such as the piece of paper) on which the information is inscribed is significant. In most cases, this is not significant; rather, all that the proponent of the evidence wishes to adduce is evidence of the contents of what is inscribed [7.20].[26]

[7.290] Whether a particular person used certain words may, of course, be proved by oral evidence from W that he or she overheard those words being spoken. W, or another witness, would identify the speaker. The fact of the person speaking may also be proved by a tape-recording. Proof of the contents of the tape would be by a means stated in s 48: see the definition of document [7.40]. The relevance

24 Illustrative is *Kozul v The Queen* (1981) 147 CLR 221 where a revolver was tendered as an exhibit in a murder trial and on appeal Gibbs CJ commented that it would have been appropriate for the jury 'to examine the revolver and to feel for themselves how much pressure was required to discharge it': at 228. They could not, however, embark on an independent evidence-gathering exercise by testing the hypothesis of accidental discharge from a blow to the hand of the person holding it, and the trial judge was in error by inviting the jury to experiment with the gun in that way. See also *R v Martin (No 6)* [2017] NSWSC 1344, where Hamill J in a murder trial held that the use of gaffer tape in a demonstration to attempt to replicate binding and demonstrate the strength of the tape was not admissible because the experiment lacked scientific rigour and did not satisfactorily replicate the circumstances under consideration so that it may be misleading for the jury. Hamill J refused to admit the evidence as a demonstration both as a video made by the investigating police and as an in-court demonstration: at [18]-[25]. Further, Hamill J refused to allow the jury to handle the tape concerned where P had relied upon *Kozul v The Queen* as an analogous case: at [26]-[28].

25 See *Bou-Hamdam v NRMA* (1998) 28 MVR 283 at 286: see [1.370]. Also, see *Bailiff v The Queen* [2011] ACTCA 7 at [15] per Marshall J, Nield and Teague AJJ: 'Nothing in s 52 of the *Evidence Act* prohibits a court, in the course of an investigation or inquiry undertaken such as the one undertaken by the primary judge, from taking into account what the court observes about the behaviour of a party'.

26 In *Wade (a pseudonym) v The Queen* (2014) 41 VR 434; [2014] VSCA 13, the appellate court held that, while the CCTV footage satisfied the definition of 'document' for the purposes of s 48, it was also real evidence – see [27] per Nettle JA and [51] per Redlich JA.

of showing that those words were used will turn entirely on the facts in issue in the case. If O or the court raises the matter, the authenticity of the tape will turn on proof of the efficacy and capacity of both the recording equipment and sound-reproducing equipment, and perhaps on proof that there has not been tampering. Proof of some of these facts will be assisted by the presumption of accuracy of scientific instruments [3.600], and s 144 (judicial notice) [1.400]. Section 146 [3.610] will also facilitate proof.

[7.300] Photographs, video-recordings, x-rays and the like are also kinds of real evidence. Where the evidence of the photograph is adduced for a purpose that involves proof of its contents, such as where an x-ray is adduced to prove facts about the condition of a person's spine, it is a 'document' as defined [7.40], and must be proved in accordance with s 48. Often a photograph will be adduced not to prove its contents, but as evidence that something happened. In compensation matters, films are often adduced to prove the extent of incapacity of the plaintiff. Proof of authenticity in these situations raises the same kinds of general issues as does the proof of authenticity of a tape-recording [7.290]. Where a photograph is adduced as evidence of the nature of the wounds of a victim of the crime with which D is charged, it may, if so gruesome as to provoke an irrational or emotional response, be excluded under s 137 [4.200].

Views: demonstrations, experiments and inspections

[7.310]

Views

53. (1) A judge may, on application, order that a demonstration, experiment or inspection be held.

(2) A judge is not to make an order unless he or she is satisfied that:

(a) the parties will be given a reasonable opportunity to be present; and

(b) the judge and, if there is a jury, the jury will be present.

(3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following:

(a) whether the parties will be present;

(b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence;

(c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time;

(d) in the case of a demonstration – the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated;

(e) in the case of an inspection – the extent to which the place or thing to be inspected has materially altered.

(4) The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.

(5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

Views to be evidence

54. The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

[7.320] A party may wish to *demonstrate* a process, such as the consequences of an injury. 'A demonstration is a special kind of view, whose distinguishing mark is movement: movement may be the acting or behaviour of a man or an animal, or the physical motion or function of some inanimate object'.[27] In a personal injury case, a witness, usually P, commonly demonstrates a range of movement of her or his arm, or other injured part/s of the body. (It is important that someone state for the transcript a description of that movement!)

An *experiment* is akin to a demonstration involving the testing of a hypothesis through a procedure conducted before the tribunal of fact or with results reported through a witness, usually an expert. It is designed to show that some event or action, such as whether one happening caused another, was or was not possible.[28]

The probative value of a demonstration or experiment will turn critically on the extent of the similarity of conditions between the events and actions involved in the demonstration or experiment, and that event or action that is said to have occurred (or not).[29] As Wells says, 'there must be adequate conformity between what is demonstrated or viewed and the original subject matter which is in issue or relevant thereto. What is usually decisive is the purpose of the demonstration or view. If the degree of conformity offered permits a court to comprehend that purpose and safely to evaluate the subject matter, absolute conformity will not be insisted upon'.[30] Like other real evidence, a view and a demonstration 'must be supported and explained by other evidence'.[31] Wells gives practical advice as to how inspections and demonstrations should proceed. A demonstration or experiment might take place in court.[32]

[7.330] In *Evans v The Queen* [2006] NSWCCA 277, the Court of Criminal Appeal considered the interpretation of s 53 [7.310] and its application to demonstrations in court. D was charged with two counts of 'armed robbery' and one count of

27 Wells, above n 23, 165.

28 Illustrative is *Thompson v The Queen* (1986) 23 A Crim R 340.

29 For example, see *Director of Public Prosecutions v Farquharson (No 2) (Ruling No 4)* [2010] VSC 210. D was convicted at trial of murdering his three sons after P contended that D deliberately drove his vehicle into a dam. D was able to escape the vehicle after it sank to a depth of some seven metres, yet all three children drowned in the vehicle. There was no direct evidence concerning the path the vehicle took in leaving the road and approaching the dam. No witnesses were present and D alleged he blacked out following an extreme coughing fit and only regained consciousness after the car was already in the dam. Following a successful appeal by D, at the ensuing re-trial P sought to adduce evidence, as adduced in the first trial, from Acting Sergeant Glen Urquhart of the Major Collision Investigation Unit of several 'drive throughs' in a similar vehicle to determine whether the vehicle could have left the road in the way it did in the absence of any deliberate acts by D. Lasry J held at [56] that the 'drive throughs' in the similar vehicle constituted 'experiments' for the purpose of s 53 and allowed the filmed driving experiments to be admitted (at [74]): 'The evidence of the three driving tests by Mr Urquhart is relevant and admissible and is a means of demonstrating to the jury that the condition of the roadway on which the vehicle was driven, at least on that particular part of the roadway, may not have contributed to the vehicle veering to the right just prior to the vehicle entering the dam'. Compare *R v Martin (No 6)* [2017] NSWSC 1344 outlined above n 24.

30 Wells, above n 23, 160.

31 Ibid 163.

32 Illustrative is *R v Kirby* [2000] NSWCCA 330 at [46]ff. See too *Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd* [2015] FCA 227, especially at [144], [293] per Nicholas J; *Streetworx Pty Ltd v Artcraft Urban Group Pty Ltd* (2014) 110 IPR 82; [2014] FCA 1366 at [370] per Beach J. Compare *Matthews v SPI Electricity Pty Ltd (Ruling No 34)* [2014] VSC 40 at [11] per J Forrest J, where it was held s 53 of the *Evidence Act 2008* (Vic) was not applicable to in-court demonstrations, thus 'the common law applies and so strict rules of proof attach to such an exercise'.

'assault with intent to rob' arising from the same incident. The issue was whether D was the person responsible for the crimes. The perpetrator of the robberies wore overalls and a balaclava which covered his head. In cross-examination of D, the Crown Prosecutor asked D to put on a balaclava (exhibit), a pair of sunglasses (which P later told the court were her own old skiing glasses) and the overalls (exhibit), then to walk up and down in front of the jury box and speak the words used by the perpetrator during the course of the robberies. On appeal it was argued that these were all 'demonstrations' within s 53 and the trial judge had not taken the procedures contained in this section into account in determining whether these 'demonstrations' should be ordered and thus be admissible as evidence. In dismissing the appeal, James J (with whom Hidden and Hoeben JJ agreed) held that s 53 'is limited to demonstrations, experiments or inspections taking place outside the courtroom': at [177]. Although there are no words expressly limiting the application of s 53 to demonstrations outside the courtroom, the 'elaborate procedure' to be followed and 'the conditions that an order should not be made unless the parties will be given a reasonable opportunity to be present and that the judge (and if there is a jury, the jury) will be present would be unlikely to be necessary in the case of demonstrations, experiments or inspections taking place inside the courtroom during a trial': at [182]-[183]. Further, James J observed:

> 184. … [D]emonstrations by witnesses in the course of giving evidence occur in a great number of criminal trials and often a number of times in the same criminal trial. For example, a witness is asked to demonstrate how a particular object such as a knife or gun was held or how a particular part of the human body was moved, for example in striking or punching. Expert witnesses are asked to demonstrate, for example where a particular part of the body is situated or what kind of blow might have inflicted a particular kind of injury.
>
> 185. In my opinion, it is not to be supposed that the elaborate procedure in s 53 is required to be applied, whenever a witness in giving evidence in court is asked to engage in a demonstration.
>
> 186. In *Kirby* the accused was asked in cross-examination to put on a hat which he had agreed was similar to the hat worn by the offender as seen on video stills of the commission of the offence. This incident was referred to by the Court of Criminal Appeal as a 'demonstration' but there is no reference anywhere in the judgments of the Court of Criminal Appeal to s 53 of the *Evidence Act*. Wood CJ at CL who delivered the leading judgment in the Court of Criminal Appeal referred to such demonstrations as being 'a common place event' (par 47). …
>
> 189. I have held that s 53 of the *Evidence Act* does not apply to demonstrations, experiments or inspections in the courtroom. However, if a proposed demonstration, experiment or inspection to be held in the courtroom is objected to, some of the matters set out in sub-s (3) of s 53 may well be relevant in determining whether what is proposed should be permitted or should be rejected, for example pursuant to s 137 of the *Evidence Act*.

D was granted special leave to appeal to the High Court and the interpretation by the NSWCCA that s 53 of the Act does not apply to in-court activities at a trial was unanimously upheld: *Evans v The Queen* (2007) 241 ALR 400; [2007] HCA 59 at 407 [30] per Gummow and Hayne JJ, at 414 [63] per Kirby J, at 441-454 [186]-[223] per Heydon J (with whom Crennan J agreed). Heydon J gave the leading judgment on the construction of s 53 and provided an extended analysis in this regard concluding that 'the ordinary meaning of the text of s 53, taking into account its context in the Act and the purpose or object underlying the Act, which includes the expeditious conduct of trials, is that s 53(1)-(3) does not apply to conduct inside the courtroom': at 449 [206].

Overall, however D's appeal was allowed by a majority of 3:2 with Heydon J and Crennan J the dissentients. Gummow and Hayne JJ allowed the appeal on the primary basis that the evidence of dressing the appellant in the various items was not relevant to the determination of any fact in issue (at 406-407 [23]-[29]) and, as the appellant was required to do this at trial, 'the trial departed from the fundamental assumptions underpinning a fair trial' (at 407 [32]) such that, along with other unsatisfactory evidentiary features of the trial, the proviso could not be applied: at 409-412 [37]-[51]. Kirby J disagreed with the joint reasons of Gummow and Hayne JJ in relation to the question of relevance (at 418-422 [80]-[103]) preferring to allow the appeal on the basis that the in-court demonstration was unfairly prejudicial to the appellant in accordance with common law principles. As s 53 did not apply to the 'demonstration' or 'reconstruction' (Heydon J, at 455-456 [226], preferred this term to describe the events in this case), it is clear that common law principles continued to apply, as reflected to a large extent in ss 53(3), 135 and 137 of the Act: Kirby J at 424 [113] and Heydon J (with whom Crennan J agreed) at 455-456 [224]-[226]. Kirby J's judgment is instructive in relation to the application of the relevant common law principles to this case (footnotes omitted):

> **[422]** 102. … It was open to the jury to consider that all or some of the evidence was relevant to their decision. Dangerous, unfair, humiliating and prejudicial, yes. But irrelevant, no. Some of the most prejudicial evidence in a trial is that which is potentially most relevant in the opinion of lay jurors. …
>
> **[423]** 105. … When I address the issues presented in the way I regard to be correct … I nonetheless reach the same conclusion as that stated in the joint reasons. The *Evidence Act* did not apply to govern the demonstration. Instead the common law principles applied. The conduct of demonstrations in court before a jury is subject to rules protecting the accused from unfair prejudice or from being engaged in conduct that is misleading, confusing, demeaning, prejudicial or unjust. In the context of a jury trial, such rules must be upheld by the trial judge.
>
> 106. It can be expected that, in Australia, in the future the common law rules in this respect will develop in ways generally harmonious with the provisions of the Uniform Evidence Acts. These provisions acknowledge the broad powers enjoyed by trial judges to ensure the fairness, applicability and utility of demonstrations. They direct attention to whether the demonstration will 'assist the court in resolving issues of fact or understanding the evidence'. They demand vigilance against 'the danger that the demonstration … might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time' and the need to 'properly reproduce the conduct or event to be demonstrated'. All of these are considerations that are reflected in the common law principles that fall to be applied in this case.
>
> 107. With due respect to Heydon J, who has reached the opposite conclusion, it is my opinion that what the prosecutor required the appellant to do was a 'demonstration' so far as the common law rules applying to in-court demonstrations are concerned. The prosecutor obliged him to dress up; to walk before the jury; and to say particular words. She did so for the manifest purpose of allowing the jury to draw their own comparisons between what they saw and heard for themselves and other available evidence relevant to the identity of the offender.
>
> 108. It is not correct to dismiss the prejudice to the appellant as insubstantial because of the fact that he was obliged to sit in the witness box for a relatively short time, measured against the duration of the entire trial, during part of which the jury's attention would have been distracted and focused on the objections being voiced by the appellant's trial counsel. Counsel protested that what was happening was 'totally improper' and 'patently unfair'. The duration of the demonstration is not the essence of the appellant's complaint.

> The complaint is that the prosecutor's questions made him sit, in the jury's presence, in a garb often associated with armed robberies, inescapably similar to the appearance of the offender shown on the video film and photographic stills; and necessarily looking sinister and criminal-like. Even if glanced at for a moment, such **[424]** an image (like images of hijackers, terrorists and murderers in well-remembered films, documentaries and news broadcasts) would etch an eidetic imprint on the jury's collective mind. It is an image unfairly prejudicial to the appellant.
>
> 109. There have been cases where witnesses have been requested to engage in in-court demonstrations by revealing a particular part of the body, otherwise clothed; providing a sample of handwriting; wearing a hat or where they have otherwise been tested on some idiosyncratic spoken or written reproduction of particular words. However, never in my experience has conduct in which the accused person has been asked to engage come close to the serious prejudice to which the appellant was subjected by the questioning by the prosecutor and the demonstration that she led him to perform in his trial. …
>
> 111. … [I]t falls to this Court to insist on a return to basic standards of fairness in prosecution practice and in the conduct of such trials. That means ensuring that serious potential prejudice to an accused person, by obliging him to dress in court in the presence of the jury as a villain, should not be allowed. It should be disallowed in the clearest of terms. …
>
> 113. No one suggested that the generality of the exclusionary language of ss 135 and 137 of the *Evidence Act* did not apply where the source of the governing rule lay in the common law rather than the *Evidence Act* itself. It follows that the Court of Criminal Appeal erred in failing to hold that any probative value of the evidence which the prosecutor sought to adduce by way of the demonstration was outweighed by the danger that the evidence might be unfairly prejudicial to the accused. On this ground, the trial judge should have **[425]** declined to admit the evidence adduced by the prosecutor. She should have excluded that evidence and stopped the demonstration …
>
> **[427]** 127. … [I]n being subjected to a demonstration in court, in the presence of the jury, the appellant was cast in a sinister light in a way that was seriously prejudicial to him. That error was never repaired, or attempted to be repaired, by accurate, corrective instructions from the trial judge. These were grave departures from the requirements of a fair trial. … a retrial must be had.

[7.340] The Act refers to *an inspection* in place of the common law notion of a view. This describes the situation where the judge and jury leave the courtroom to go to another place to make an observation of some place, event or thing.[33]

In accordance with s 53(2)(a), D is entitled to be present at any inspection, regardless of whether they are represented by counsel. In *Jamal v The Queen* (2012) 223 A Crim R 585; [2012] NSWCCA 198, the Lakemba Police Station was the site of a drive-by shooting in 1998 in which D was alleged to have been involved. Before D's trial, P requested a view at the Lakemba Police Station. Counsel for D opposed the application. Despite being informed of D's desire to be present should the application for a view be granted, the trial judge held that, as D was considered 'an "extreme high risk" inmate' (at [26]) and such stringent security measures would have to be adopted (outlined at [27]), D should not attend and his counsel would attend on his behalf. The view subsequently took place in the absence of D. On appeal, Hidden J, McClellan CJ at CL and Rothman J agreeing, held that the trial judge had breached the statutory requirement under s 53(2)(a) that all parties be given 'a reasonable opportunity to be present':

33 See, for example, *R v Jenkin (No 13)* [2018] NSWSC 791; *Director of Public Prosecutions v Scriven (Ruling No 3)* [2015] VSC 219; *Hughes v Janrule Pty Ltd (t/as Gregory's Ford)* [2010] ACTSC 5; *Environmental Protection Authority v Unomedical Pty Ltd (No 2)* [2009] NSWLEC 111.

> 41. In this court, the Crown prosecutor focused on the discretion conferred by s 53(3) and submitted that, given the manner in which the view was conducted and the fact that the appellant's counsel was present, there had been no miscarriage of justice. The fact remains, however, that the view took place in the absence of the appellant, contrary to the mandatory requirement of subs (2)(a). It was not suggested that the level of security required by the appellant's high risk status bore on the question whether there could be a 'reasonable opportunity' for him to be present, within the meaning of that provision. In my opinion, his absence from the view means that the trial was fundamentally flawed. Indeed, in oral argument the Crown prosecutor acknowledged that if the court found this ground established, the trial could not 'be saved.' …
>
> 46. The conduct of a view in breach of the statutory requirement to provide the accused with a reasonable opportunity to be present constitutes a fundamental flaw in the trial process. This ground is made out and, standing alone, would be sufficient to establish that the conviction must be set aside.[34]

[7.350] Section 54 makes clear that a demonstration, experiment or inspection is a kind of real evidence, and not simply an aid to understanding other evidence (cf common law position as stated in *Scott v Numurkah Corporation* (1954) 91 CLR 300).[35] The conduct of these activities is under judicial direction. It has been observed that 's 54 … elevates an inspection to the status of evidence in that it can provide a foundation for the drawing of inferences' giving experiences such as 'inspecting the site of the accident and driving along the road towards the accident site' an 'enhanced utility': *Pledge v Roads and Traffic Authority* (2004) 78 ALJR 572; [2004] HCA 13 at [35] and [49] per Callinan and Heydon JJ.

In addition to the factors stated in s 53(3), it is suggested that the trial judge may take into account the significance of the information to be gained from a demonstration, experiment or inspection, and whether it might be gained by equivalent in-court evidence, such as by photographs, or maps and charts. In *NM Rural Enterprises Pty Ltd v Rimanui Farms Ltd* [2011] NSWSC 106, for example, Harrison J (at [18]) refused D's application for an inspection of the relevant rural properties in the litigation when 'maps, plans, diagrams, transparencies and overlays, and manifold photographs' were included in the extensive and detailed material that was already in evidence before the court. An inspection of the very large properties outside Moree would only result in 'an undue waste of time' and further costs without any particular benefit to the court.

In *R v Tully (No 2)* [2014] ACTSC 118, Burns J (at [6]-[7]) refused an application for a view on the basis that inspecting certain farm buildings where sexual offences were alleged to have taken place was not necessary or in the interests of justice. It was emphasised that a view would potentially cause confusion considering the long period of time that had passed since the offences occurred and that the witnesses could prepare 'diagrams or plans' if desirable and the scene of the alleged offences could not otherwise be adequately described by them when giving their evidence.

---

34 See also *R v Briggs (No 2)* [2014] NSWSC 851. Compare *R v Ahola* [2013] NSWSC 698, where Button J granted an application for a view in the absence of D where they had waived their right to be present. This is clearly a different circumstance to *Jamal*, where the appellant overtly expressed their desire to be present at any inspection.

35 See *Verrocchi v Direct Chemist Outlet Pty Ltd* (2015) 112 IPR 200; [2015] FCA 234 at [15] per Middleton J; *Director of Public Prosecutions v Scriven (Ruling No 3)* [2015] VSC 219 at [6], [48] per Maxwell P; *R v Weaver* [2014] ACTSC 228 at [10] per Murrell CJ; *Ha v The Queen* (2014) 44 VR 319; [2014] VSCA 335 at [3] per Weinberg JA, [24] per Priest JA; *Tongahai v The Queen* [2014] NSWCCA 81; *Zraika v Walsh (No 2)* [2014] NSWSC 893 at [8] per Campbell J.

Charts

[7.360] Section 29(4) provides: 'Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given'. This provision, when read in association with ss 135 and 137, reflects the common law position as expressed by the High Court in *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 at 189-190. Ultimately to be admissible, the explanatory chart, diagram or summary must facilitate the giving of accurate, comprehensible evidence that is likely to assist the tribunal of fact in its deliberations about the issues in the proceeding. This will most probably be in trials involving complicated transactions or other complex circumstances.