Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) - [2012] FCA 1355

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FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Air New Zealand Limited (No 1) [2012] FCA 1355

Citation: Australian Competition and Consumer Commission v Air New Zealand Limited (No 1) [2012] FCA 1355

Parties: **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v AIR NEW ZEALAND LIMITED (ARBN 000 312 685)**

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v P.T. GARUDA INDONESIA LTD (ARBN 000 861 165)

File numbers: NSD 534 of 2010
NSD 955 of 2009

Judge: **PERRAM J**

Date of judgment: 30 November 2012

Catchwords:

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EVIDENCE – Admissibility – relevance – whether documents relevant to case as pleaded

EVIDENCE – Admissibility – relevance – whether documents concerning alleged conspirators not at trial are relevant to the allegations made against those who are – whether use of such documents is coincidence reasoning – discussion of the matters that such documents might be used to prove

EVIDENCE – Admissibility – business records – whether minutes of meetings of an organisation that represents businesses are business records of the businesses or, alternatively, the organisation – whether representations made therein are made 'in the course of, or for the purposes of, the business' of each member business or, alternatively, of the organisation – whether document must belong to the entity to whose business the document relates – whether minutes discovered on the computer networks of a business are 'belonging to or kept by' the business

EVIDENCE – Admissibility – business records – whether statements of opinion in business records are admissible

EVIDENCE – Admissibility – relevance – authenticity – whether document's authenticity must be proved for the document to be admissible – whether inferences as to authenticity may be drawn from the document itself – whether *National Australia Bank v Rusu* (1999) 47 NSWLR 309 should be followed

EVIDENCE – Admissibility – business records – whether representation 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'

Legislation:

Evidence Act 1905 (Cth) Pt IIIA, s 7B
Evidence Act 1995 (Cth) ss 55, 56, 57, 58, 69, 78, 87, 97, 98 , Dictionary
Evidence Act 1898 (NSW) Part IIC
Evidence (Amendment) Act 1976 (NSW) sch 4
Evidence Amendment Act 1978 (Cth) s 3
Trade Practices Act 1974 (Cth) s 45

Federal Court Rules 2011 r 16.21(1)(e)

Australian Law Reform Commission, *Evidence*, Report No 26 (1985)
Australian Law Reform Commission, *Evidence*, Report No 38 (1987)
JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 8th ed, 2010)
JH Wigmore, *Evidence in Trials at Common Law* (Li ttle Brown, 1978)
S Odgers, *Uniform Evidence Law* (Thompson Reuters, 10th ed, 2012)

Cases cited:

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Ahern v The Queen (1988) 165 CLR 87 applied
Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 4) (2011) 194 FCR 479 cited
ASIC v Hellicar [2012] HCA 17 cited
ASIC v Rich (2005) 191 FLR 385; [2005] NSWSC 417 cited
ASIC v Rich (2005) 54 ACSR 28; [2005] NSWSC 471 cited
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BHP Billiton Iron Ore Pty Ltd v National Competition Council (2007) 162 FCR 234 applied

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Blomfield v Nationwide News Pty Ltd (No 2) [2009] NSWSC 978 cited
Connex Group Australia Pty Ltd v Butt [2004] NSWSC 379 cited
Daw v Toyworld (NSW) Pty Ltd [2001] NSWCA 25 cited
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Investmentsource v Knox Street Apartments [2007] NSWSC 1128 cited
Land Enviro Corp Pty Limited v HTT Huntley Heritage Pty Limited [2012] NSWSC 177 cited
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Lee v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 305 cited
National Australia Bank v Rusu (1999) 47 NSWLR 309 not followed
Neilson v Overseas Projects Corporation of Victoria Ltd (2005) 223 CLR 331 cited
Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2003) 133 FCR 190 applied
O'Meara v Dominican Fathers [2003] ACTCA 24 cited
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SPAR Licensing Pty Ltd v MIS QLD Pty Ltd (No 2) [2012] FCA 1116 cited
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Street v Luna Park Sydney Pty Limited [2007] NSWSC 688 cited
Supetina Pty Ltd v Lombok Pty Ltd (1984) 5 FCR 439 cited
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Tubby Trout Pty Ltd v Sailbay Pty Ltd (1992) 42 FCR 595 cited

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IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NSD 534 of 2010

GENERAL DIVISION

BETWEEN: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

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AND: **AIR NEW ZEALAND LIMITED (ARBN 000 312 685)**
Respondent

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NSD 955 OF 2009

GENERAL DIVISION

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Applicant

AND: **P.T. GARUDA INDONESIA LTD (ARBN 000 861 165)**
Respondent

JUDGE: **PERRAM J**

DATE: **30 NOVEMBER 2012**

PLACE: **SYDNEY**

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1. On 27 November 2012, I indicated that I had rejected Air New Zealand ('AirNZ') and Garuda' s sample objections to the ACCC's proposed tender on its conduct case (save in relation to one document). These are my reasons for taking that course.

2. The Australian Competition and Consumer Commission (the 'ACCC') tenders documents relating to its conduct case against AirNZ and Garuda. The tender is divided into three categories:

    (a) documents relating to the historical context (set out in ACCC. 500.001.0210);

    (b) documents relating to the Hong Kong ('HK') understandings which are relevant to both airlines (set out in ACCC.500.001.0453); and

    (c) documents relating to the Singapore understandings relevant only to AirNZ (set out in ACCC.500.001.0231).

3. AirNZ and Garuda formally objected to the tender. It is useful to consider each class of objection in turn. The objections pursued by AirNZ were also adopted by Garuda, which also had some additional objections. I will address the former category first.

Ruling on objections raised by Air New Zealand

First objection: records of communications between members of the Hong Kong BAR-CSC Executive Committee and the Surcharge Working Group

4. In Hong Kong ('HK'), the Board of Airline Representatives (the 'HK BAR') had a Cargo Sub-Committee (the 'HK BAR-CSC'). The HK BAR-CSC's structure included an Executive Committee and a Surcharge Working Group. Neither AirNZ nor Garuda were members of the HK BAR–CSC Executive Committee ('EC') or the Surcharge Working Group ('SWG'). At paragraph 151 of the ACCC's Further Amended Statement of Claim against AirNZ ('the AirNZ FASOC') it alleges that AirNZ made an arrangement or arrived at an understanding with a large number of airlines that the HK BAR-CSC should apply to the HK Civil Aviation Department ('the CAD') to extend the CAD's approval of the HK Lufthansa Methodology. This is alleged to have occurred on or about 16 December 2003. It was not alleged to have occurred at a meeting of the SWG but the particular provided to the paragraph does say:

> Meeting of the Surcharge Working Group held on or about 16 December 2003, at which it was agreed that the HK BAR-CSC should apply to the CAD to extend the approval for the Hong Kong Lufthansa Methodology, and that members should continue to apply the surcharge in accordance with that methodology.

5. Collectively, this was referred to as the 'Second Hong Kong Surcharge Extension Understanding'. A similar allegation is made in relation to Garuda at paragraph 139 of the

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ACCC's Amended Statement of Claim against it ('the Garuda ASOC'). There are a number of other Hong Kong surcharge extension understandings alleged, but each shares the structural feature that the particulars either indicate that the understanding arose from meetings at which AirNZ and Garuda were not present or, alternatively, as a result of discussions or correspondence between the members of the EC or the SWG (which did not include AirNZ or Garuda).

6. AirNZ initially submitted in writing that the ACCC relied upon the proposition that the members of the EC and SWG were authorised by AirNZ to arrive at the relevant understanding. It then submitted that the evidence upon which the ACCC depended to make good the authorisation allegation was insufficient. After the delivery of the ACCC's written submissions it was then submitted by AirNZ that the ACCC had abandoned any case based on agency.

7. I do not accept either of these submissions. At paragraphs 118 and 119 of the AirNZ FASOC (and at paragraphs 107 and 108 of the Garuda ASOC: see below at [111]), the ACCC alleges that the members of the SWG and EC had authority to act on behalf of HK BAR-CSC members (which membership included AirNZ and Garuda). The ACCC's case in relation to the second to eighth surcharge extension applications is that these were arrived at through the means of the meetings of the EC and the SWG or communications between those committees' members. If the ACCC succeeds in establishing the authority of the members of the EC and SWG to deal with surcharge matters on behalf of AirNZ as alleged in paragraphs 118 and 119, then there will be no difficulty in the fact that AirNZ was not a member of either committee.

8. It was no doubt for that reason that AirNZ submitted that the ACCC's authority case could not succeed. But the issues are defined by the pleadings and the fact is that authorisation is alleged. I do not see that I should, in effect, entertain a summary judgment application on the authorisation issue so as to conclude that there is no issue about authorisation.

9. I reject also AirNZ's submission that the ACCC had abandoned its case on authorisation at paragraph 42 of its written submissions. That paragraph was as follows:

> In any event, a distinction needs to be drawn between authority to submit applications to and correspond with CAD on airlines' behalf, and authority to enter into understandings on behalf of participating airlines. The ACCC does not plead that the Chair of BAR-CSC or any member of [the EC] or SWG entered into any of the pleaded understandings on behalf of a participating airline.

10. I do not accept that the second sentence involves an abandonment of what was pleaded at paragraphs 118 and 119. Those paragraphs do not plead authority to enter into understandings but rather authority to deal with surcharges. Correspondingly, the allegation at, for example, paragraph 151 is that the understanding was arrived at during a meeting of the SWG in relation to a surcharge. The case is that the airlines authorised the EC and SWG to deal with surcharges and that as a result of those dealings an understanding was reached.

11. I reject, therefore, AirNZ's objection to this class of document.

12. The ACCC pursued an alternate basis for the relevance of the material. It was said that the meeting of the relevant committee was only the first step in arriving at the conclusion that an understanding had been reached. There were other steps, too. It was said that the SWG or EC

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made recommendations in respect of proposed applications by the HK BAR-CSC to the CAD; that the chair of the HK BAR-CSC made the application to the CAD and distributed the application to the members; that the chair received the CAD approval and forwarded it to members; and that members then distributed announcements of the surcharge alteration before implementing it. There were thus to be seen a number of distinct events – recommendation, submission of proposal, forwarding, distributing, implementation and so forth – from which, viewed as a whole, the participation of AirNZ or Garuda in the understanding might be inferred. So viewed, the case alleged was circumstantial.

13. To be clear, the value of this case from the ACCC's perspective was as an alternate to its authorisation case pleaded at paragraphs 118 and 119. Under this alternate case, it does not matter whether the EC and SWG were authorised or not – their actions are merely pieces in a larger mosaic (including each airline's announcement and implementation of the surcharge variation) from which the relevant understanding could be inferred.

14. Both AirNZ and Garuda objected that this alternative case was outside that which was pleaded. I accept this. The case pleaded at paragraph 151 is that the relevant understanding was reached at a meeting on or around 6 December 2003. The single particular provided for this (which I have set out above at [9]) is that there was a meeting of the SWG on or about that day. The particulars to the subsequent surcharge extension understandings similarly point only to a meeting of the EC or correspondence between its members as the events that gave rise to the understandings. Those particulars do not disclose the case now foreshadowed.

15. Mr Halley SC pointed to the transcript of two of the directions hearings which had taken place before Jacobson J (who was previously the docket judge for these matters). These revealed that:

    - the ACCC had indicated to AirNZ (and, at the time, others) which documents it was going to rely upon in relation to each understanding;

    - AirNZ had sought particulars as to the significance of the documents. Perhaps to paraphrase, they had sought to be informed not only of the pieces in the mosaic (with which they had been provided) but also how those pieces fitted together;

    - Jacobson J accepted that this was necessary, but was of the view that the explanation for how the strands might be pulled together could await the ACCC's written opening. Accordingly, he declined to order the particulars sought on what were, in effect, case management principles.

16. When the trial opened before me, the ACCC opened at length (although not in writing). It appeared to be accepted before me on the present argument that the ACCC's opening had included the manner of circumstantial proof now put forward by it as an alternative way to establish the understandings.

17. Mr Leeming SC who, with Mr Brennan of counsel, appeared for Garuda submitted, on the strength of *Dare v Pulham* (1982) 148 CLR 658 at 664, that the pleadings defined the issues

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in the proceedings unless the parties had departed from them and that in this case this had not occurred as both airlines had taken the point as an objection to evidence at the earliest available opportunity. I accept this submission.

18. Despite the practicality of the course adopted by Jacobson J, I do not think that I can, as a matter of formality, proceed on the basis that the issues are defined, not by the pleadings, but by Mr Halley's opening. I do not think this can be done under the *Federal Court Rules 2011* without suspending their operation and I do not think that a course upon which I should now embark. This is for three reasons. *First*, this is hard-fought and complex civil penalty litigation. The proper conduct of the trial is going to require a precise articulation of the ACCC's case, which I do not think that the opening necessarily sufficiently provides. *Secondly*, I do not think that using the transcript of the ACCC's opening effectively as a set of particulars would be practical in view of its style and length. *Thirdly*, if and when these two cases reach the appeal stage, it is imperative that the trial record of precisely what is in issue be clear.

19. For those reasons, I do not accept that the circumstantial case articulated by the ACCC on the hearing of the objections is part of its pleaded case. Had I not accepted that these materials were relevant on the authority basis, I would have rejected their tender.

20. There are two additional matters I should note for completeness. The *first* is the fact that, whatever else happened before Jacobson J, it occurred at a time when Garuda was not involved in the proceedings. Even if I were of the view, which I am not, that what had occurred before his Honour had resulted in the ACCC's opening being a pleading or serving the purpose of a pleading, this could not affect Garuda, which was not there. *Secondly*, I do not think that anything said by Mr Halley during the course of his opening (when challenged that he was departing from the pleading) is relevant to the present issues. The challenges at that time did not sufficiently indentify the present matter to constitute, as Mr Brennan submitted they should, a species of waiver by the ACCC.

21. However, for the reasons I have already given, the documents in question are relevant to the ACCC's case and I will allow their tender.

Second objection: documents said to have no connection with AirNZ or Garuda

22. Broadly speaking, this category concerned documents passing between other airlines or, indeed, internal communications within other airlines. For example, AirNZ pointed to ACCC.008.023.0339 which was an internal email generated within Cathay Pacific on 12 July 2005. The email was as follows:

> From: Tom Wong
> To: David Sae Chiu
> Cc: Gary Chan; Kenneth Tsui; Leslie Lu; Ron Mathison; Christine Liu
> Bcc:
> Subject: fsc/cad
>
> David,
> I attended last night's CAD/BAR Excom dinner, Norman Lo and his team including

> Stephen Kwok were present. Norman hinted to Tony that next round of pax fsc should be "ok". CAD seem to take a relatively positive attitude toward pax and cargo fsc since the public in general hasn't made too much noise.
>
> anyway, further to Monday's bar-esc excom and full meetings, we agreed to start lobbying cad to see if there are ways to increase fsc by using a higher exchange rate to convert the LH index's euro rates to hkd, adjust the whole mechanism, or whatever options we could come up with. I think it would be useful if we could have your help again to raise these subjects with cad informally before any formal communication.
>
> At the same time LH/Carsten will try to get from LH headoffice some data/analysis that we might possibly be able to use in future to justify higher fsc.
>
> Next step is to review the situation by end Jul. Will let Christine to follow up with you, LH, and bar-csc excom.
>
> Thanks. rgds, tom

23. AirNZ was not at the dinner in question. The ACCC submitted that such a document was admissible for the non-hearsay purpose of establishing the existence of an agreement to engage in a common enterprise, namely, the purpose of reaching an agreement on the surcharges. It noted that this was so even where the communication in question did not involve the party against whom its tender was sought. No question of an exception to the hearsay rule arose (such as whether the communication could be taken as an admission by a co-conspirator). Since the evidence was not hearsay, the hearsay rule did not apply to it: *Aher n v The Queen* (1988) 165 CLR 87 at 93.

24. In response, Mr Owens for AirNZ put these matters: *first*, there was a relevant distinction between a case in which conspiracy was alleged and a case in which it was alleged that a person was a party to an agreement or understanding of the kind referred in s 45 of the *Trade Practices Act 1974* (Cth) . An important aspect of this difference was said to be that, in this case, there were available 'equally innocent and malign interpretations' of the conduct alleged. This was said to be contrasted with an ordinary criminal conspiracy where, it was pointed out, the burden of the Crown case is that there is no other reasonable explanation of the circumstantial evidence consistent with the accused's innocence: see, for example, *Gebert v The Queen* (1992) SASR 110 at 114-116 per Mullighan J (King CJ and Olsson J agreeing)..

25. I do accept the principle invoked by the ACCC, namely: that one may prove an agreement or understanding between a group of people by proving behaviour of individual group members consistent with the existence of the agreement; that such behaviour may include evidence of what members of the group said to each other or even to third parties; and, that this use of conduct as circumstantial evidence of an agreement does not involve a hearsay use of the words used when some or all of the conduct relied upon consists of speech acts. This is straightforward: *Ahern* at 93-94 . If three airlines go to dinner and discuss reaching an agreement not to compete on a fuel surcharge on cargo, this is evidence which is capable of bearing on the existence such an agreement. Whether that evidence is ultimately accepted is a different question, as is the question of whether AirNZ and Garuda are shown to be parties to such an arrangement. But as an element in a circumstantial case, I do not doubt its relevance.

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26. I do not accept that I am required to ask whether this individual communication shows that AirNZ or Garuda were parties to the agreement or understanding. Talking, it is true, of the application of the standard of proof to a civil case of fraud by circumstantial evidence, Ipp JA (with whom Tobias and Basten JJA agreed) referred with approval to what had been said by Winneke P in *Transport Industries Co Ltd v Longmuir* [1997] 1 VR 125 at 129 : 'It is erroneous to divide the process into stages and, at each state, apply some particular standard of proof. To do so destroys the integrity of [a] circumstantial case': *Palmer v Dolman* [2005] NSWCA 361 at [41], [125], [126] . Of course here the question is not, as it was in *Palmer* , whether the particular integer alleged *proved* the fraud. Here the question is whether the integer is *admissible* to prove the existence of the agreement.

27. At the moment, there is no admitted evidence that AirNZ or Garuda acted pursuant to any such understanding. But it is plain from the way the case has been opened that the ACCC intends to prove that both airlines announced the surcharge adjustment hot on the heels of the CAD approval and implemented those announcements shortly afterwards. If evidence to that effect is admitted at a later stage of the proceedings then, in my opinion, it will be reasonably open to conclude that evidence of the present kind is relevant. I propose, therefore, to admit the present evidence under s 57(1)(b) of the *Evidence Act 1995* (Cth) ('the Act') subject to such evidence linking to two airlines to the agreement later being led. To be clear there are three steps in this process:

    (a) receipt of circumstantial evidence establishing the existence of an understanding or agreement between various airlines not necessarily including AirNZ or Garuda. Discussions between the relevant airlines consistent with the existence of the understanding or agreement alleged are admissible to prove that matter and such use is not a hearsay use;

    (b) receipt of evidence linking AirNZ and/or Garuda to the understanding; and

    (c) acceptance of evidence in (a) as involving admissions by 'co-conspirators' under s 87(1)(c) . The statements thus received are received as evidence of the truth of statements.

28. The evidence in (c) would be irrelevant without (b). There is good reason to think that evidence of the kind in (b) will be tendered and admitted. The evidence in (a) may be received provisionally under s 57 . The evidence in (c) will be admissible under s 87 if it is 'reasonably open' to conclude that the airlines were acting in furtherance of a common purpose. I do not think that, until the evidence in (b) is tendered, this test is satisfied. If and when the evidence in (b) is tendered, the question of whether the non-hearsay evidence in (c) should be received to prove its truth under s 87(1)(c) can be considered.

29. I do not accept Mr Owen's *second* submission that, in this case, there were other innocent explanations consistent with conduct not contrary to s 45 . I do so because the question on a civil circumstantial case is not whether the only reasonable explanation of the material is the one put forward by the applicant but rather whether 'the circumstances raise a more probable inference in favour of what is alleged': *Palmer* at [39] . The existence of other reasonable

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innocent explanations is not a complete answer, as it might be, at least at the level of liability, in a criminal conspiracy case. In any event, and possibly more importantly, the submission again elides questions of proof with questions of admissibility. Here the ACCC seeks to prove that the more likely inference from the available circumstances is that there was an agreement or understanding. Evidence tending to have that effect is not rendered inadmissible because there is other evidence which, if accepted, suggests a different hypothesis to be true. Question of that kind are directed to the final question of what the Court should find. They have little role in a debate about admissibility.

30. AirNZ submitted, *thirdly*, that the ACCC had decided to prove its case using documents rather than by calling any of the people alleged to have participated in the formulation of the understandings. Having elected to pursue proof by circumstantial means, it was not to be relieved of the burdens consequent upon that decision. I accept this, but I did not apprehend the ACCC sought so to be unburdened.

31. *Finally*, Mr Owens submitted on AirNZ's behalf that the argument being pursued by the ACCC was in fact coincidence reasoning governed by s 98 . Section 98(1) provides:

> **98 The coincidence rule**
>
> (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

32. No such notices have been served by the ACCC. Mr Owens submitted that the fact that the ACCC was using the material as part of coincidence reasoning was to be seen from paragraph 8 of its written submissions where, *inter alia*, it was said that the acts of an alleged conspirator may be fixed with the results of another's acts for the purpose of proving common design because 'there may a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement'.

33. **Following paragraph cited by:**

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Ultimately, it will be the ACCC's onus to establish that the hypothesis of the existence of an understanding or agreement can be proved on the balance of probabilities. Already in this case there are competing hypotheses to explain the two airlines' announcement that they were increasing or decreasing the surcharges at similar times to the other airlines and by similar amounts. One is that they were bound, along with the other airlines, to do so by Hong Kong law; the other that, as small players in the market, they simply followed the market leaders. Section 98 prohibits the ACCC from advancing an argument that its hypothesis is the more likely given that it is highly unlikely that the airlines made their announcements and changed their surcharge by coincidence.

34. However, that is not how the ACCC opened its case. Its case is, instead, that I should infer the understanding from a large number of factors: the original IATA directive, the Lufthansa index, the various committee meetings, the actions of the HK BAR-CSC Chair and the actions of individual airlines in receiving the minutes and thereafter making pricing decisions. I did not apprehend in any of this that the ACCC contend that an alternative hypothesis of coincidence was unlikely. Its case is consistency not coincidence.

35. Mr Brennan for Garuda made some additional points about the kind of material presently under consideration. *First*, like Mr Owens, he submitted that care was needed in applying the style of reasoning in *Ahern* to cases about s 45 . In particular, he observed that there was a significant distinguishing feature, which was that in a s 45 case the understanding or the agreement was the very act which constituted the act breaching the requisite law. By this he meant, I think, that whilst one may be prosecuted for conspiring to do something unlawful, such as robbing a bank (an analogy which argument at the Bar table has shown to be curiously attractive to commercial lawyers), in the case of s 45 what was unlawful was the agreement itself. However, I do not think this is, with respect, either correct or a useful basis for distinguishing *Ahern* . Section 45 is not a rule proscribing agreements or understandings simpliciter; it is a rule proscribing agreements or understandings with a particular character, namely, having the purpose or likely effect of substantially lessening competition. In any event and even if that were not so, I do not see it as providing any reason for distinguishing *Ahern* 's statement that agreement may be proved by circumstantial evidence consisting of statements made by the protagonists, not necessarily to each other, tendered to prove behaviour consistent with the agreement rather than the truth of the statements.

36. Mr Brennan also submitted that in *Ahern* there was evidence linking the accused to the conspiracy. It was permissible to prove events showing conspiracy between and A and B against C but only where there was also evidence linking C to the conspiracy. Here there was nothing in evidence linking Garuda to the understandings. I accept that is presently so, but it is clear from the way the ACCC opened its case that it intends to adduce such evidence at least linking Garuda to the alleged understanding by means of the timing of its announcements and surcharge alterations, together with its presence at some meetings. As in AirNZ's case, this therefore requires only that evidence of the kind presently under consideration be admitted subject to the receipt of evidence linking Garuda to the arrangement or understanding at a later stage of the proceedings.

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37. As a variant on this argument, Mr Brennan submitted that the ACCC's case that there was such an understanding in 2002 was statute-barred and that this complicated the picture for present purposes. I do not agree. The question of whether Garuda may plead a limitation defence has nothing to say about issues of admissibility.

38. Lastly, Mr Brennan submitted that *Australian Competition and Consumer Commission v Leahy Petroleum* (2007) 160 FCR 321 at 339-340 [52]-[54] stood for the proposition that it was not permissible to use an admission by one co-conspirator against another in s 45 cases. I do not think that that principle is presently apposite. The ACCC does not seek to outflank the hearsay rule by using statements by other airlines as admissions on Garuda's behalf of the things alleged to have been said. At the moment it uses them only for the non-hearsay purpose of establishing the existence of the agreement or understandings. If and when the ACCC seeks to invoke the co-conspirators rule in s 87(1)(c) to prove the truth of something said by one of the airlines against Garuda (or AirNZ) by means of an admission, this question will arise.

39. In any event, for the reasons I have given, this category of documents ought to be admitted pursuant to s 57(1) of the *Evidence Act* for the non-hearsay purpose of proving the understandings. If the parties wish, I will direct that its use be so limited. I will consider the use of the non-hearsay material on an admissions basis when the ACCC seeks so to use it.

Third objection: minutes of BAR-CSC, EC and SWG meetings

40. AirNZ submitted that the minutes of these meetings did not fall within the business records exception to the hearsay rule in s 69 of the *Evidence Act*. In a nutshell, the submission was that the HK BAR-CSC and the EC and SWG were not businesses and that the mere fact that Cathay Pacific appeared to have had possession of the minutes did not mean that they formed part of a record or records kept by it. An allied submission was that, where the minutes contained statements such as '[i]t was agreed that the surcharge would be increased', the word 'agreed' was an inadmissible opinion not rescued from inadmissibility by being in a business record.

41. Section 69(1) and (2) of the *Evidence Act* provide:

> **69 Exception: business records**
>
> (1) This section applies to a document that:
>
> (a) either:
>
> (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
>
> (ii) at any time was or formed part of such a record; and
>
> (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
>
> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

42. It was not put in dispute on the present argument that the minutes in question had been produced by one or more airlines in response to various compulsory notices. I was told that the minutes had been retrieved in each case from the relevant airline's stored data. It is clear that the minutes were distributed to the airlines by email and I infer from the fact of production that each airline kept the emails received by its staff, at least for some period of time. I do not know whether – as is likely in most organisations – they were later archived on less expensive storage media or whether they persisted on the relevant airline's servers. But the relevant point is that the emails and their attachments had been stored by the relevant airlines.

43. About this Mr Owens had two slightly different arguments. The *first* was that the reference in s 69(1)(b) to something being recorded in a document for the purposes of a business meant that the recording had to be done by the business or entity whose business the records were said to belong to. In this case the preparation of the minutes was carried into effect by the HK BAR-CSC, the EC and SWG so that it could not be accepted, on this view, that the minutes had been recorded by an airline for the purposes of s 69(1)(b) . The *second* argument assumed that a record prepared by a third party might nevertheless satisfy the requirements of s 69(1)(b) but pointed to the requirement in s 69(1)(a) that the records form part of the records belonging to or kept by a business. Here the contention was that mere receipt by an airline of an email attaching minutes was not sufficient to constitute either as a record of or kept by a business.

44. I do not accept the *first* argument. I do accept Mr Owens' submission that the business referred to in s 69(1)(b) must be the same as the business referred to in s 69(1)(a) . The exception to the hearsay rule in s 69(2) only applies to the representation referred to in s 69(1)(b) so that it follows that s 69 will be of no utility even where a business record under s 69(1)(a) is accepted to exist unless the representation contained in the document which is sought to be tendered is of the kind described in s 69(1)(b) , that is, it must be 'made or recorded in the document in the course of the business, or for the purposes of the business'. That requirement is not new, having first appeared (albeit worded slightly differently) in Part IIC of the *Evidence Act 1898* (NSW) after 1976 and Part IIIA of the *Evidence Act 1905* (Cth) after 1978: see *Evidence (Amendment) Act 1976* (NSW), sch 4 ; *Evidence Amendment Act 1978* (Cth), s 3 .

45. It is clear that a representation made by a third party can still be said to be 'for the purposes of the business'. The learned author of the 8th Edition of *Cross on Evidence* (JD Heydon, LexisNexis Butterworths, 2010) notes that a valuation report prepared for a business would contain representations which were made for the purposes of the business: see [35215] (although *quaere* whether such a statement of expert opinion could be a representation about a fact under s 69(2)) . The learned author also notes the decision of Needham J in *Re Marra Developments Ltd and the Companies Act* [1979] 2 NSWLR 193 at 205-206 which appears to deny the view that such a third party document would engage s 69(1) : 'I do not think that statements by outsiders, such as an officer of the Bank of New South Wales, relating to

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matters which are of interest to Partnership Pacific Ltd can be said to have been made in the course of, and for the purposes of, that business. Therefore, I do not think that this document is admissible'.

46. There is a similar statement by Franki J in *Trade Practices Commission v TNT Management Pty Ltd* (1984) 56 ALR 647 at 659 :

> In general, a statement of fact in a letter from A to B found in the files of B is not admissible as a business record of B merely because it was filed and kept by B. This is because statements in the letter are not made in the course of, or for the purposes of, B' s business.

47. **Following paragraph cited by:**

Microsoft Corporation v CPL Notting Hill Pty Ltd (No 7) (30 September 2022) (Baird J)

492. A representation made by a third party can still be said to be '*for the purposes of the business*'. In *ACCC v Air New Zealand* , at [47] Perram J adopted the observations of the learned author of the 8th edition of *Cross on Evidence* that an outsider may make a representation '*for the purposes*' of a business even though separate from the business in question. His Honour quoted Drummond J's explanation in ***Tubby Trout** Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595, at 599 :

> [47] Despite those two statements, I agree with the observations of the learned author of *Cross* that an outsider may make a representation 'for the purposes' of a business even though separate from the business in question. And, indeed, Drummond J accepted as much in *Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595 at 598-599 . He doubted whether Franki J had truly meant what he said in the quotation above (noting that, a few lines later, Franki J may have accepted that a third party invoice might fall within s 7B(1)(b) of the *Evidence Act 1905* (Cth)). In any event, if Franki J had said that, Drummond J thought it was wrong. He explained (at 599):
>
> > However, the question of admissibility of a document under s 7B [i.e. the predecessor to s 69] will depend in large part upon the nature of the document in question. There is a difference, it seems to me, between an invoice and a letter received by a business from an outsider. If the evidence shows that in the case of an invoice, for example, it was kept in a file of invoices sent by outsiders who have supplied goods and services to the business and that the invoice purports to record the supply of goods or services of a kind commonly used by the business in the course of its activities, that would, I think, be sufficient to satisfy s 7B(1)(b) [i.e. s 69(1)(b)]. Such a document could fairly be said to be

> made for the purposes of the recipient business although it was also made in the course of and for the purposes of the other business that supplied the goods or services listed in the invoice.

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48. This approach seems, with respect, to have much to commend it. It is not unnatural to think of the statements contained in an invoice as being created by the entity issuing it not only for the purposes of its own business but also for the purposes of its intended recipient.

49. This is consistent with the approach taken in *Cross* and also with the decision of Evans J in *State of Tasmania v Lin* [2011] TASSC 54 at [27]-[29] .

50. **Following paragraph cited by:**

> Australian Competition and Consumer Commission v Air New Zealand Limited (No 5) (21 December 2012) (Perram J)
>
> 3. I am prepared to infer that each airline kept a copy of each edition of its cargo magazine for archival purposes. Further, it is difficult to avoid the conclusion that, in keeping each copy of the magazine for that archival purpose, this was done for the purposes of its business. Those observations, which are I think irresistible as a matter of common sense, formed the basis of Mr Halley SC's submission that this was sufficient to constitute each magazine as a business record. In this regard, he reminded me of my own words in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* [2012] FCA 1355 at [50] . There, in the course of discussing whether one business' records could

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form part of the business records of another business (answer: yes), I said this:

> 50 The question in each case will, therefore, be twofold. *First*, was the representation made or recorded in the document 'in the course of the business'? *Secondly*, was it made or recorded 'for the purposes of' the business? The first inquiry will largely devolve to an examination of the business involved. But the second will invite consideration of the purposes of the business which made the representation and here it should be accepted that one business may intend its documentary output to serve a record keeping function for other businesses. Invoices and receipts will be the paradigm examples.

The question in each case will, therefore, be twofold. *First*, was the representation made or recorded in the document 'in the course of the business'? *Secondly*, was it made or recorded 'for the purposes of' the business? The first inquiry will largely devolve to an examination of the business involved. But the second will invite consideration of the purposes of the business which made the representation and here it should be accepted that one business may intend its documentary output to serve a record keeping function for other businesses. Invoices and receipts will be the paradigm examples.

51. The documents in question here are minutes of the HK BAR-CSC, the EC and the SWG. The purpose of a minute of a meeting is twofold. It performs a role as the official record of what occurred at the relevant meeting for the purposes of the organisation constituted or administered by the meeting in question. But it also serves a secondary purpose; as an official record of what occurred at the meeting for the persons attending the meeting or, as will often be the case, the organisations they represent.

52. That observation means that each of the minutes involved contains representations which were included in them, not just for the purposes of the BAR and its committees, but also for the purposes of the airlines who were the BAR's members. Accordingly, I reject Mr Owens' first argument.

53. I turn then to Mr Owens' *second* argument, that the minutes did not form part of the records 'belonging to or kept by the business'. It is useful initially to assume that the business here is the business from whose electronic records the minutes were retrieved. I struggle to see how electronic records recovered from an airline can be said not to be 'kept by' that business. But AirNZ submitted that support for this proposition could be found in *TNT Management* and *Tub by Trout* .

54. I do not think *TNT Management* assists. It was concerned with whether an outsider's document contained statements which could be said to have been made 'for the purposes' of the outsider's business. I do not read it as being directed to whether such a document is itself a business record of the receiving party.

55. On the other hand, AirNZ is assisted to some extent by *Tubby Trout* . It is plain that Drummond J explicitly considered the question in that case of whether a letter received by a

firm from another firm was a record of the receiving firm's business (the question posed, at the time, by s 7B(1)(a) and, now, by s 69(1)(a)) . Drummond J did not accept that mere possession of a document by a firm was sufficient to constitute the document possessed a record (at 597-598):

> In my view, for s. 7B(l)(a) to be satisfied it is not enough that a document is in the possession of the operator of a business and it is not enough that the letter in terms deals with topics relevant to the conduct of that business. If the position were that the letter were received and passed on to [the recipient's] solicitors for advice and then retrieved for the purposes of the discovery exercise, it would not, as a matter of fact, be able to be said to be part of [the recipient's] records. If it was simply kept by the recipient in its office and not incorporated in some form of record system, similarly I do not think it could be said, as a matter of fact, that the letter formed part of a record of the business of [the recipient]. It is the fact that a document can be shown to be part of a store of information that can be said to be the records of a business that provides a sufficient acknowledgment by the operator of that business of the document's reliability as a record of facts concerning the business that justifies the use in evidence of otherwise inadmissible hearsay.

56. So one would not expect a copy of a newspaper kept at a business' reception to be a record in this sense. And, although I do not need to decide it, there may be many items of correspondence received by a firm which do not get filed and hence do not ever form part of a record. Advertisements for office stationery, invitations to Christmas parties and thank you notes are all examples of the documentary correspondence received by a business which would not normally be expected to be business records.

57. The question of email, however, is somewhat different. Because the email system is built on a highly formalised file system, all the communications which take place over it are kept, at least for some time, and often permanently. In that sense they are records and, where an email system is maintained by a firm, it is natural to see the records thus maintained as records of that business. Textually, it is difficult to see that records of that kind are not ones which are 'kept by' a business, the critical wording in s 69(1)(a) .

58. **Following paragraph cited by:**

Rodney Jane Racing Pty Ltd v Monster Energy Company (21 June 2019) (O'Bryan J)

> 183. The first element is whether the Facebook and Instagram posts sought to be adduced in evidence are or form part of the records belonging to or kept by an entity in the course of, or for the purposes of a business, or at any time were or formed part of such a record. In a business context, the posts are communications by the business concerned to persons who follow the Facebook or Instagram account of the business. I infer that such followers would be past or potential future customers of the business. Taking the Sin City Rims Facebook posts as an example (described above), the posts are not a direct record of a business activity; drawing necessary inferences in favour of MEC, the posts are a form of promotion, publicising the sale of "Monster Energy" wheels. While

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> email communications of a business have been found to be business records (see *ACCC v Air New Zealand Limited (No 1)* (2012) 207 FCR 448 at [58] per Perram J and the cases there cited), the Sin City Rims Facebook posts are of a different nature in that they are not communications to specific persons but are published more broadly to "followers". Nevertheless, applying the statutory language, it seems to me that the Sin City Rims Facebook posts are documents that form part of the records belonging to or kept by Sin City Rims in the course of or for the purposes of its business. The posts are a record of the communications made by the business to its followers, and are analogous to emails that might be sent to a customer distribution list.

Although there seems to be no direct treatment of this question, the modern practice of courts in relation to email points in this direction. It is known that 'kept by' in s 69(1) means 'retained or held': *ASIC v Rich* (2005) 191 FLR 385; [2005] NSWSC 417 at [190] per Austin J ; *Roach v Page (No 15)* [2003] NSWSC 939 at [5] per Sperling J; *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 at [122] per Barker J. This has led to the assumption – implicit until AirNZ submitted to the contrary – that emails are records retained by a business: see, for example, *AS IC v Rich* (2005) 54 ACSR 28; [2005] NSWSC 471 at [42]-[44] per Austin J; *Osborne v Boral Resources (NSW) Pty Ltd* [2012] NSWCA 155 at [12] per Bathurst CJ (Allsop P concurring) and especially at [18] where Macfarlan JA said that he thought that 'it should be inferred that a copy of that email was retained by [the company], for at least a short period, as part of the records of its business'; see also *Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 4)* (2011) 194 FCR 479 at [10] per Collier J; *Blomfield v Nationwide News Pty Ltd (No 2)* [2009] NSWSC 978 at [20] per Harrison J.

59. Of course, not every email sent or received by an employee to or from his or her work email address will be for work purposes but this does not mean that it ceases, as a result, to be a business record. One justification for email retention is to ensure and/or encourage responsible email use and this, by itself, is probably a purpose of the business. In practice, the communications contained in a personal email from a work address are unlikely to satisfy the requirements of s 69(1)(b) ; that is, the representations contained in them will not have been made in the course of or for the purposes of the business, but this does not mean that they are not business records.

60. In those circumstances, I conclude that emails received by a firm (including attachments) that are stored even for a brief period by the firm are business records. I infer that the minutes in question were so stored because of the fact of their retrieval. In those circumstances, I accept that the minutes of the HK BAR-CSC, the EC and the SWG are all business records containing representations which, in principle, satisfy the requirements of s 69(1)(b) .

61. I reach that conclusion for another reason, too. The HK BAR is a business within the meaning of s 69 . From the documents I have been taken to concerning the HK BAR, it is apparent that one of its functions is to provide a forum for members to discuss issues of concern to the international airline industry in HK. It also lobbies on behalf of airlines with the CAD and makes applications on the airlines' behalf. This is plainly an 'undertaking' within the meaning

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of cl 1(1)(a) of the definition of a 'business' in the Dictionary to the *Evidence Act*. It does not matter that it is not conducted for profit or that it is conducted overseas: cl 1(2). Each of the HK BAR's subcommittees are, in consequence, part of the same business. All that being so, the records of the HK BAR (and its various committees) are records created for the purpose of the HK BAR's business.

62. Mr Owens then submitted that, even if that were so, s 69(1) did not have the effect of rendering statements of opinion appearing in the minutes as admissible. He gave as an example a sentence in one set of minutes (ACCC.009.097.0125) which contained this statement; 'Member airlines agreed that there would be no reduction to the ISS charge'. It was said that the word 'agreed' was a statement of opinion, that s 69 applied only to asserted facts and, therefore, that it was inadmissible. It was also submitted that, quite apart from that problem, the requirements for the receipt of lay opinion evidence had not been satisfied.

63. A considerable body of first instance decisions have concluded that an opinion as to the existence of a fact falls within the scope of the term 'asserted fact' in s 69 : *ASIC v Rich* (2005) 191 FLR 385 at 433-434; [2005] NSWSC 417 at [206]-[207] per Austin J; *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379 at [3] per White J; *Land Enviro Corp Pty Limited v HTT Huntley Heritage Pty Limited* [2012] NSWSC 177 at [95] per Stevenson J; *Ringrow Pty Ltd v BP Australia Ltd* (2003) 130 FCR 569 at 573 per Hely J; *Supetina Pty Ltd v Lombok Pty Ltd* (1984) 5 FCR 439 at 442 per Spender J; *Investmentsource v Knox Street Apartments* [2007] NSWSC 1128 at [19]-[21] per McDougall J; *Street v Luna Park Sydney Pty Limited* [2007] NSWSC 688 at [5] per Brereton J; *SPAR Licensing Pty Ltd v MIS QLD Pty Ltd (No 2)* [2012] FCA 1116 at [238] per Griffiths J.

64. I should not depart from this view of s 69 unless persuaded that it is plainly wrong. I am not of that view. It is true that French CJ, Heydon and Bell JJ described this approach to the construction of s 69 as a 'little strained' in *Lithgow City Council v Jackson* (2011) 244 CLR 352 at 362 [11] , but I reject the submission that that statement should be characterised as considered dicta of the High Court binding on me. I take that course because in the same paragraph their Honours also said:

> However, it was not argued in this Court that the authorities which state that "asserted fact" includes an opinion in relation to a matter of fact are wrong. It is not necessary further to deal with this point, which the parties did not debate at any stage.

65. **Following paragraph cited by:**

Sydney Attractions Group Pty Ltd v Frederick Schulman (28 June 2013) (Sackar J)

I would not, in any event, accept that the mere fact that an interpretation is 'strained' means inevitably it is wrong. Here the legislation was always intended as a beneficial reform. If 'asserted fact' does not extend at least to lay opinion as defined in s 78 then an important, reliable and common form of business record will be inadmissible. For example, a building site log recording that the site is 'slippery due to rain'; a hotel incident report that a patron was 'drunk'; a police pocket note that a person was 'angry' and so on.

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66. I reject also the submission that the word 'agree' did not satisfy the requirements of s 78 . It was not suggested that s 78 was inapplicable to non-testimonial evidence, an issue foreclosed by *Lithgow* . Instead the debate was whether s 78 was satisfied: It provides:

> **78 Exception: lay opinions**
>
> The opinion rule does not apply to evidence of an opinion expressed by a person if:
>
> (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
>
> (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

67. It was submitted for AirNZ that, in the present case, the exemplar lay opinion outlined at [62] was not 'necessary to obtain an adequate account or understanding of the person's perception of the matter or event' (that is, s 78(b) was not satisfied). The ACCC submitted that this approach was contrary to the way the High Court had approached the critical minutes in *ASIC v Hellicar* [2012] HCA 17 at [69] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, at [210] per Heydon J where the minutes had recorded that the critical press release had been approved and where the High Court said that those same minutes had been admitted as business records.

68. I am not sure that too much can be drawn from that, as the issue was not argued in *Hellicar* .

69. The approach to be applied by me is dictated by the language of s 78 and the High Court's decision in *Lithgow* . The lay opinion rule in s 78 clearly needs to be accommodated to the business records provision in s 69 . Should the relaxation in giving testimonial evidence about facts in the form of opinions permitted in court be the same as the analogous relaxation about similar statements in documents? That question, interesting though it may be, is not for this Court. The tasks for me are:

- the identification of what the person saw, heard or otherwise perceived (s 78(a));
- an inquiry into whether the opinion is necessary to give an account of what he or she saw (s 78(b)).

70. For reasons later to be given, I may draw inferences about these matters from the documents themselves: see below at [92]-[104].

71. **Following paragraph cited by:**

Prysmian Cavi E Sistemi SRL v Australian Competition and Consumer Commission (13 March 2018) (Middleton, Perram and Griffiths JJ)
Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi S.R. L. (No 12) (20 July 2016) (Besanko J)

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On the s 78(a) question, I infer that the author of each minute was present, saw a number of people speak and finally assent to an agreed position. On the s 78(b) question, French CJ, Heydon and Bell JJ in *Lithgow* at 371-372 [46] approved this passage cited by Wigmore (*Evid ence in Trials at Common Law* (Little Brown, 1978), Vol 7 at 13) from *Sydleman v Beckwith* (1875) 43 Conn 9 at 12-14:

> [O]n the ground of necessity, where the subject of the inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness bases his opinion are so numerous and so evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time.

72. In my opinion, the distillation of the events at a meeting leading to agreement are so numerous and evanescent that it would be unrealistic either to require an explication of them in a minute of the relevant meeting or in the testimony of a witness giving evidence as to what happened at the meeting.

73. In those circumstances, I conclude:

    (a) the committee minutes contain representations made for the purposes of each member airline's business (and also of the HK BAR);

    (b) statements such as 'its was agreed' are admissible as lay opinions under s 78 ;

    (c) such statements are also representations about asserted facts to which s 69 applies; and

    (d) the minutes are business records of each airline because they were received as emails on each airline's email system. They are also business records of the relevant BAR.

74. It follows that the various minutes are admissible.

Fourth objection: historical matters

75. The structure of the ACCC's case against AirNZ in relation to HK is as follows:

    (a) AirNZ was a member of IATA, the industry peak body for airlines. In 1997 IATA formulated, but did not implement, a proposed fuel surcharge methodology which would permit IATA to announce fuel surcharges with fluctuations in the fuel price and permit member airlines to implement those surcharges. This was known as Resolution 116ss and the index established by it was known as the IATA Fuel Price Index;

    (b) this index was published for some time and airlines, including AirNZ, implemented the surcharge announced;

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(c) the US Department of Transport eventually indicated that it would not approve the index on 14 March 2000;

(d) IATA then wrote to its members and indicated it would no longer be publishing its index;

(e) during 2000, Lufthansa published on a website maintained by it a largely similar index;

(f) airlines, including AirNZ, then altered their fuel surcharges in line with Lufthansa's index;

(g) in July 2002, a number of airlines – including AirNZ – reached an understanding to apply a modified Lufthansa methodology to the fuel surcharges and to apply to the CAD for approval of those charges;

(h) thereafter, as the index fluctuated, fresh understandings are alleged to have been reached between airlines, including AirNZ, to make fresh applications to the CAD in respect of the altered index level; and

(i) it is alleged that there was also a single overreaching understanding to impose fuel surcharges in accordance with the index as approved by the CAD.

76. AirNZ alleges that the ACCC's allegations about IATA Resolution 116ss was not probative of any issue and, in particular, was not relevant to the allegations concerning the Lufthansa methodology and the CAD applications.

77. The issues in the proceedings are defined by the pleadings. A series of matters are alleged in the AirNZ FASOC at [46]-[56] which are not admitted. These include allegations that:

· IATA has 230 members making up 90% of scheduled international traffic;

· there was a special composite meeting of the Cargo Tariff Coordinating Conference of IATA on 14-16 January 1997 to discuss whether IATA should impose a fuel surcharge in defined circumstances;

· IATA was informed in May 1998 that the US Department of Trade would not approve Resolution 116ss unsupported by an economic justification;

· the fuel surcharges imposed by AirNZ in February 2000 were in the amount of US$ 0.10/kg or € 0.10 kg (the same amount as in Resolution 116ss);

· IATA applied for US regulatory approval but that this was denied;

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- Lufthansa began to publish its own index in February 2000 (shortly before the US had indicated to IATA that it would not approve Resolution 116ss); and

- IATA warned its members that publishing fuel indexes with a view to co-ordinating pricing action could include an illegal conspiracy.

78. On the state of the pleadings, these are all issues. AirNZ has not applied to have any of these parts struck out under r 16.21(1)(e), *Federal Court Rules 2011* as failing to disclose any reasonable cause of action. I do not understand how they could be irrelevant whilst the ACCC's allegations remain in the FASOC and remain unadmitted. The ACCC is permitted to prove its pleaded case.

79. Despite that, debate was jointed by the parties on the issue of whether, and if so how, the ACCC's allegations about Resolution 116ss and the Lufthansa Index could assist its case in relation to events in HK during and after July 2002. I can understand why those arguments might show that the allegations about Resolution 116ss and the Lufthansa Index might be liable to be struck out, but I do not understand how, if they have not been struck out, they do not define the issues for evidentiary purposes.

80. Leaving that matter aside AirNZ's point, as I understood it, was that knowing the history which led to the initial HK understanding in July 2002 did not assist the ACCC in making good its case in 2002 or at any time later.

81. Mr Halley for the ACCC submitted that the history revealed that the airlines had been actuated by a single purpose since 1997 which was to avoid competition *inter se* resulting from fluctuations in the price of aviation fuel. This was why the understandings had been engaged in HK after July 2002 and it was the same purpose on display with Resolution 116ss and the Lufthansa Index. Those events were relevant because they showed the same purpose.

82. Mr Owens submitted that this invoked tendency or coincidence reasoning contrary to ss 97 and 98 of the *Evidence Act*. I do not agree. The ACCC does not allege that its case that AirNZ reached an agreement in 2002 is made more likely because it had reached similar agreements in the past. Its case, in effect, that its conduct was all actuated by the same motive. It is not tendency or coincidence evidence. It is direct evidence of the existence of a motive in the airlines to engage in the conduct alleged.

83. Garuda made an additional point. It submitted that, to the extent that this was a circumstantial case, there was an alternate innocent explanation. Granted that be so, I do not accept, as I have already explained, that this has the consequence of inadmissibility: see above at [24].

84. I do not accept that the historical matters are inadmissible.

Fifth objection: documents relating to the introduction of the Singapore competition law

85. In 2005 Singapore introduced, or was soon to introduce, a competition law. AirNZ objected to a number of documents touching upon this topic which may suggest that the competition

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law's introduction led to a change in the airlines' behaviour. One such is ACCC. 008.016.0256, which is an email from Winston Tan to Alvin Lau of 17 March 2005 in these terms:

> With the inmtroduction [sic] of competition law (anti-trust as some of us may know it as), carriers now communicate very little about pricing issues.

86. AirNZ made two submissions. *First*, it was said that there was no evidence about the content of the Singaporean competition law so that I would be unable to gauge what this meant. However, in the absence of any evidence about that topic I would proceed on the basis that its content is the same as Australian law where that can be given practical content: *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 343 [16] per Gleeson CJ, 372 [125] per Gummow and Hayne JJ, 411 [249] per Callinan J and 420 [275] per Heydon J. At least for a debate about admissibility, I think I should approach the issue on the basis that the ACCC is likely to be able to demonstrate that Mr Tan and Mr Lau are discussing a law which contains a provision like s 45 of the *Trade Practices Act* .

87. Mr Owens submitted *secondly* that Mr Tan and Mr Lau were not AirNZ employees and that a change of behaviour in other airlines proved nothing about AirNZ. I reject this for reasons already given in relation to *Ahern* above at [25] and [35]-[36] . The exchange (and exchanges of that kind) are capable of proving: that the airlines party to them thought that their prior conduct breached a law like s 45 ; and that the airlines thought the prior conduct consisted of a collusive arrangement. The evidence is used for that non-hearsay purpose. If at a later time an attempt is made to have it admitted under s 87(1)(c) , the issues which will then arise may be considered.

88. All that is presently required is provisional admission under s 57 of the *Evidence Act* pending the adduction of that evidence. At this stage, I would be prepared to direct that its use be limited to non-hearsay purposes.

Sixth objection: authenticity

89. AirNZ object to a number of documents upon the basis that they had not been authenticated. AirNZ points to two examples. The first is ACCC.011.006.0215. This document appears to be a spreadsheet. I will not set out its entire contents, but it contains six fields which appears to summarise the position in relation to the fuel surcharge out of various international airports including Hong Kong, Jakarta, Denpasar and Singapore. To give the flavour, the entry for Singapore (with the relevant field headings) is as follows:

TG Stations	Date	Conditions	Changing	Re-implement	Revision 2003
23 Singapore (SIN)		- Pending implementation		- TG will impose feul [sic] sur of SGC0.17/K based on actual	SGD 0.20/K to SE Asian, SGD 0.25/K to other destinations, on actual weight, eff 01MAR03 (SQ: SGD0. 20 to SEA, SGD0.38 to other points)

/gross wt.
Eff
1OCT02

90. The ACCC did not submit to me that this document was obtained from any particular airline or pursuant to any particular process. Strictly, I do not know *directly* where the document comes from or who produced it.

91. For reasons which follow, AirNZ's authenticity objection should be rejected.

92. **Following paragraph cited by:**

Kheir Group Pty Ltd v Panoramic Resources Ltd (29 July 2025) (Stellios J)
Wang v Fan (24 October 2024) (Walton J)

105. That said, in my view the approach by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; 301 ALR 326; [2012] FCA 1355 at [92] ("*Air New Zealand")* is, in my view, and with respect, correct. His Honour there stated:

> "92. It is useful to begin with some basic propositions:
>
> 1. There is no provision of the 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 is 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 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: “58 Inferences as to relevance (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.”

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 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.

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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."

Wei & Xia (No 5) (16 August 2023) (Harper J)
Self Care Corporation Pty Ltd v Green Forest International Pty Ltd (No 13) (30 November 2022) (Baird J)

29. Mr Li refers to the propositions discussed by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* [2012] FCA 1355 (**ACCC v Air New Zealand**) at [92] to which I have earlier referred him. Mr Li today submits to the following effect, " *It doesn't matter about authenticity, because that can be argued later*". Mr Li misapprehends the matter. Today, at this point in the final hearing further to provisionally admitting the documents I propose to decide not only the claimed relevance, but whether, given the matters his Honour set out in *ACCC v Air New Zealand* , both admissibility and authenticity are satisfied.

Microsoft Corporation v CPL Notting Hill Pty Ltd (No 7) (30 September 2022) (Baird J)
Fowles & Fowles (No 3) (30 May 2022) (Bennett J)

68. In *Commissioner of Taxation v Cassantiti* [16] the Full Court of the Federal Court approved of the reasoning of Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No. 1) [17]* as to the correct approach when interpreting s 56 Perram J stated:

> It is useful to begin with some basic propositions:
>
> 1. There is no provision of the [Evidence Act (the "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, i.e., 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.

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4. Since authenticity is not a ground of admissibility under the 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 0if 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 :

    58 Inferences as to relevance

    (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.

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

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affect the probability of a finding of fact, then the matter may 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.

via

[17] (2012) FCA 1355 ; [2012] 207 FCR 448 at [92] .

In the matter of Caernarvon Canobolas Pty Ltd (In Liq) (05 April 2022) (Ward CJ in Eq)

132. The circumstances in which those documents were produced by John Nunn Building Contractors were addressed in the affidavit evidence of Ms Ferris but it is not necessary here to outline those circumstances as Timothy does not cavil with the proposition that the documents in question were produced in answer to a subpoena (issued at the request of Timothy on 25 May 2021) (see T 318.1); and, in the case of the documents for the 2014/2015 and 2015/2016 financial years, were not produced initially when the subpoena was answered but, after enquiry was made of the company's solicitors, were produced only on the first day of the hearing. Nor does Timothy cavil with the legal principles summarised in submissions for Bernard and Fiona as to the test applicable when assessing the relevance of the documents to a matter in issue in the proceeding (see *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 at [92] (5) per Perram J (*ACCC v Air New Zealand*), approved in *Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; [2018] FCAFC 212 at [64] per Steward J (his Honour then sitting in the Federal Court), and in *Gregg v The Queen* (2020) 355 FLR 348; [2020] NSWCCA 245 per Bathurst CJ at [362]).

Home Grown Brands Australia Pty Ltd v Sperling Enterprises Pty Ltd (16 July 2021) (Manousaridis J)

37. In *Australian Competition and Consumer Commission v Air New Zealand Ltd* , Perram J held that "*authenticity is not a ground of admissibility under the*" Evidence Act ; the question of authenticity does not "*directly arise for the tribunal of law's consideration at the level of objections to evidence*"; and that, if "*there is raised a question about the authenticity of a document . . . then there will be an issue in the proceedings about its authenticity*". [39] It is true that, unlike the *Federal Rules of Evidence 1975* (US), the Evidence Act does not contain a provision that in terms requires that a document or thing be authenticated before it can be admitted into evidence. But s 57(1) and s 58(1) of the Evidence Act use the language of authentication; and a court must at the point of admissibility consider questions of the authenticity of a disputed document if its authenticity is in issue; and that question is determined by the court considering, not whether the document is in fact that which the proponent claims it to be, but whether it is open to find that the document is what the proponent claims it to be. If the court answers that question in the affirmative, the document is admitted into evidence, but the question of the document's authenticity remains open and is to be decided when the court considers all of the evidence before it makes its findings of fact.

via

[39] *Australian Competition and Consumer Commission v Air New Zealand Ltd* [2012] FCA 1355, at [92]

Yalda v Consulate General of the Republic of Iraq, Sydney (19 March 2021) (Manousaridis J)

27. In *Australian Competition and Consumer Commission v Air New Zealand Ltd* , Perram J held that "*authenticity is not a ground of admissibility under the*" Evidence Act ; the question of authenticity does not "*directly arise for the tribunal of law's consideration at the level of objections to evidence*"; and that, if "*there is raised a question about the authenticity of a document . . . then there will be an issue in the proceedings about its authenticity*". [14] It is true that, unlike the *Federal Rules of Evidence 1975* (US), the Evidence Act does not contain a provision that in terms requires that a document or thing be authenticated before it can be admitted into evidence. But s 57(1) and s 58(1) of the Evidence Act use the language of authentication; and a court must consider questions of the authenticity of a document if the opponent claims the document is not what the proponent claims it to be; and that objection is determined by the court considering, not whether the document is in fact that which the proponent claims it to be, but whether it is open to find that the document is what the proponent claims it to be. If the court answers that question in the affirmative, the document is admitted into evidence, but the question of the document's authenticity remains open and is to be decided when the court considers all of the evidence before it makes its findings of fact.

via

[14] *Australian Competition and Consumer Commission v Air New Zealand Ltd* [2012] FCA 1355, at [92]

Gregg v R (30 September 2020) (Bathurst CJ at [1]; Hoeben CJ at CL at [712]; Leeming JA at [713])

362. The first question is to determine the relevance of the document to the facts in issue: *Australian Competition and Consumer Commission v Air New Zealand (No 1)* at [92] (5), approved by the Full Court of the Federal Court in *Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; [2018] FCAFC 212 at [64] .

Commissioner of Taxation v Cassaniti (30 November 2018) (Greenwood, Logan, Steward JJ)

64. In *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* (2012) 207 FCR 448, Perram J at [92] said:

> It is useful to begin with some basic propositions:
>
> 1. There is no provision of the [Evidence Act (the "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, i.e., 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 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 0if 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".

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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 :

> 58 Inferences as to relevance
>
> (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.

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 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

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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.

It is useful to begin with some basic propositions:

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, i.e., 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 *Evidenc e 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

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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 :

> **58 Inferences as to relevance**
>
> (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.

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 (i.e. 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.

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93. It will follow that AirNZ's submission that 'no inference as to authenticity can be drawn from the face of these documents' ought to be rejected. In determining a relevance objection, that is precisely what s 58(1) permits.

94. AirNZ's submission is, however, supported by authority. In *National Australia Bank v Rusu* (1999) 47 NSWLR 309 at 313 [19] Bryson J said of s 58(1) :

> 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.

95. His Honour concluded at 312 [17] that a document could not be used to authenticate itself. This reasoning involves the following problems:

    (a) since authenticity is not a question which arises for the tribunal of law under the *Evidence Act*, it is not clear what the 'question of authenticity' to which his Honour refers is, if it is not the question of relevance; and

    (b) it leaves s 58(1) with no work to do. If *Rusu* is correct, a party may ensure that recourse may not be had to the content of a document in determining admissibility by calling the objection 'Authenticity' rather than 'Relevance', and it may do this even though the former does not appear in the Act and the latter does.

96. Apart from those problems, the reasoning led his Honour to this corollary at 312 [17]:

> Before a business record or any other document is admitted into 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.

97. The passage involves, with respect, 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.

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:

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(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. **Following paragraph cited by:**

C P Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd (22 November 2023) (Macnamara J)

> 167 Mr Moon conceded that Perram J of the Federal Court of Australia in *Australian Competition and Consumer Commission v Air New Zealand Ltd & Anor (No 1)* (2012) 207 FCR 448 at [100], disagreed with the judgment of Bryson J in *Rusu's* case, taking the view that Bryson J did not consider the operation of s183 of the *Evidence Act*, which I have already quoted, or s58 of the Act which provides:
>
> "(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."

SZUYP v Minister for Immigration (05 May 2017) (Judge Nicholls)

> 23. While a contrary view to that put by the Minister was expressed in *NAB v Rusu* [1999] NSWSC 539; (1999) 47 NSWLR 309 ("*Rusu*"), in *ACCC v ANZ* Justice Perram reviewed relevant authorities and found *Rusu* was "plainly wrong" (*ACCC v ANZ* at [100]). His Honour held (see [94] – [101]), that a Court may draw "reasonable inferences" from the contents of such documents for the purpose of determining their authenticity (see also *DPP v Pinn* [2015] NSWSC 1684 at [42] – [46]).

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) w as explicitly intended to alter. I note the learned author of *Odgers* shares the same opinion (S Odgers, *Uniform Evidence Law* (Thompson Reuters, 10th ed, 2012) at [1.3.480]).

103. **Following paragraph cited by:**

> Barrett v TCN Channel Nine Pty Ltd (28 November 2017) (McColl, Simpson and Payne JJA)
>
> > Cf Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) (2012) 207 FCR 448; [2012] FCA 1355 at [103] (Perram J) .
>
> Barrett v TCN Channel Nine Pty Ltd (28 November 2017) (McColl, Simpson and Payne JJA)
>
> > 73. Cf Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) (2012) 207 FCR 448; [2012] FCA 1355 (at [103]) per Perram J.

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

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that view. *Rusu* is an accurate statement of the common law but s 58(1) was intended to alter that position.

104. In those circumstances, I decline to follow *Rusu* . Accordingly, I do not accept the objection to the first document. It is reasonable to infer from its contents that it is a document generated by Thai Airways about fuel surcharges.

105. AirNZ also pointed to ACCC.001.016.0258 as an example of a document with the same problem. This is a document headed 'Conference Call 22 Dec 2004'. There is set out in the document an apparent reporting by the cargo manager for each airport in the preceding week. It is not expressly apparent which airline is involved although the mentioning of the names of various competitors shows to an extent which airlines are not. Mr Halley told me during the course of his opening that it was a Qantas meeting.

106. It is reasonable to infer from this document that:

(a) it was generated by an airline operating in Asia and the United States in the cargo business;

(b) it competed with at least Polar Air and Singapore Airlines;

(c) the document was prepared by a person attending a telephone conference in which the relevant cargo manager reported the position in that manger's airport;

(d) that person heard what the cargo managers said;

(e) what the cargo managers said about the position in their respective airports was very likely to be accurate;

(f) the document was stored electronically on the airline's computer;

(g) if tendered, it will be relevant in the *Ahern* sense for the non-hearsay purpose of showing agreement or understanding.

107. It is reasonable to infer that it is what it appears to be. AirNZ then submitted that, when the nature of the document was not apparent from its face, it could not satisfy the business records provisions. In light of my conclusion that s 58 permits me to draw reasonable inferences as to authenticity from the terms of each document, the minor premise of this submission is not made good.

Seventh objection: documents relevant to the HK Security Surcharge

108. Objection by way of example was taken to ACCC.001.504.0054 and ACCC.002.012.0285. I will not set these out. They show, if accepted, that some airlines made individual applications to the CAD. AirNZ submitted that the only issue is what HK law required. I reject this objection. It may well be that the requirements of HK law turn on what the HK CAD in practice required or permitted. AirNZ sought, in the alternate, the making of a s 136

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direction. I decline this as I do not see that it is necessary. The fact that some airlines made individual applications is the fact which these documents prove. What may be inferred from what they prove is a matter for submission which I will not truncate through a s 136 order.

Ruling on objections raised by Garuda

109. Garuda objected to each of the categories of documents to which AirNZ objected on the same bases and, during the course of its counsel's address, adopted the same nominal structure as AirNZ had. However, its written submissions (and address) developed other themes which I have experienced some difficulties in reducing into a clear form. To aid clarity, these points were as follows:

(a) objection was taken to ACCC.009.070.0002;

(b) the ACCC needed to prove the authority of various committees to act for Garuda to establish the admissibility of its case against Garuda;

(c) the material relied upon by the ACCC to prove that Garuda authorised the actions of the HK BAR-CSC, the SWG and the EC were either insufficient for that purpose or inadmissible;

(d) as to the insufficiency of the material referred to in (c), Garuda submitted that certain documents showed something different to that which the ACCC submitted;

(e) as to inadmissibility, Garuda submitted that:

(i) the evidence relied upon by the ACCC to show that Garuda completed and returned a surcharge survey to the HK BAR-CSC was inadmissible;

(ii) the evidence relied upon by the ACCC to show that Garuda attended a meeting of the HK BAR-CSC in September 2001 (where the fuel surcharge was discussed), a meeting of the HK BAR-CSC on 2 December 2002 or a meeting on 12 June 2003 was all inadmissible;

(f) the fact that Garuda is silent in the face of the minutes of various meetings being distributed did not permit an inference of authority to be drawn;

(g) the minutes of the meetings of the HK BAR-CSC, SWG and EC were inadmissible hearsay;

(h) the communications by those same bodies to Garuda were irrelevant and therefore inadmissible (because there was no evidence that Garuda had authorised the acts of those committees);

(i) internal communications of other airlines were inadmissible hearsay;

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(j) market announcements of other airlines were inadmissible hearsay;

(k) all communications between other airlines were inadmissible hearsay.

110. The document at (a) falls into category (i). Categories (g)-(i) and (k) have been dealt with above at [4]-[74] in my treatment of AirNZ's objections. I reject them again. They proceed on the erroneous assumption that the primary relevance of the evidence is as to its truth when this is not so. Category (j) is governed by the same principle. The market announcements are relevant to prove conduct consistent with, and therefore probative of, the understandings alleged.

111. Categories (b) and, to an extent, categories (d) and (f) proceed from a misconception as to the ACCC's case. That case is not that Garuda authorised the BAR-CSC, SWG or EC to enter into understandings on its behalf but rather that the SWG and EC were authorised to deal with surcharges and the like. This is apparent from paragraphs 107 and 108 of the Amended Statement of Claim against Garuda:

> 107. In or about December 2003, a sub-committee of the HK BAR-CSC known as the Surcharge Working Group (the "**Surcharge Working Group**") was formed. The Surcharge Working Group had authority to act on behalf of HK BAR-CSC members in relation to insurance, security and fuel surcharges.
>
> 108. At a meeting of the HK BAR-CSC on or about 15 March 2004, an Executive Committee of the HK BAR-CSC (the "**HK BAR-CSC Ex Com**") was formed and given authority to deal with surcharges, including fuel and security surcharges.

112. As I have explained above at [27] in relation to the AirNZ objections, proof of the understanding or agreement is said by the ACCC to occur in two, and possibly three, steps:

i. proof of the existence of an understanding between at least two airlines. This will be circumstantial in nature and will include evidence not only of what the airlines were doing but of what they were saying to each other and/or third parties. This evidence is relevant for the non-hearsay purpose of proving conduct tending to show the existence of an agreement;

ii. evidence linking Garuda to that agreement. This may consist of the fact that Garuda moved its prices in parallel with the other airlines. It may also consist of its receipt of minutes and so on. Again, this has little to do with authority;

iii. if Garuda be shown to be one of the parties to the agreement, the question of the admissibility against it of admissions made by other airlines will arise (here the question under s 87(1)(c) will be whether there is reasonable material to that effect).

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113. Garuda's submissions therefore pose the wrong question. I reject the objections to categories (b), (d) and (f).

114. Category (c) is a compendious form of categories (d) and (e) and I have dealt with category (d) already.

115. This leaves category (e). Although the matter could be clearer I take this to be an objection to:

i. ACCC.008.004.0095;

ii. ACCC.008.004.0097;

iii. ACCC.008.027.0120;

iv. ACCC.008.004.0086;

v. ACCC.008.004.0087;

vi. CXA.001.028.300.001400; and

vii. ACCC.008.004.0312.

116. I deal first with (i)-(iii). I admit (iii). It is a letter from the Chair of the HK BAR-CSC to the CAD dated 4 October 2001 enclosing a list of airlines who had voted in favour of imposing an insurance surcharge of HK$0.5/kg. The attached list (at ACCC.008.027.0121) includes Garuda. The objection was based on the proposition that the Chair of the HK BAR-CSC would not have personal knowledge of the fact asserted, i.e., that Garuda had voted in favour. It is true that this is required by s 69(2)(a) , but Garuda's argument overlooks s 69(2)(b) which makes admissible such statements if 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'.

117. It is reasonable to draw the inference that the Chair of the HK BAR-CSC obtained the information indirectly from the person who prepared the attachment which listed the airlines who had voted in favour of the proposal. It is reasonable to infer that the list was prepared by a person who had access to document (i) (ACCC.008.004.0095), which was last updated on the day before the Chair's letter. It is a spreadsheet setting out the results of a survey administered by the HK BAR-CSC to the airlines in which their attitudes to, and proposals about, levying a surcharge were recorded. It is reasonable to infer that this document was prepared within the HK BAR-CSC by a person or persons having access to the returned surveys. No other organisation would have had that material. It is reasonable to infer that the airlines would have had personal knowledge of the matters referred to in the surveys.

118. It is also a reasonable inference that the summary attached to document (iii) was drawn from document (i) because it is difficult to conceive of any other way it could have come into existence.

119. Document (ii) appears to be another document prepared from the spreadsheet in (i). It is reasonable to infer that it was prepared by someone having access to the survey results because the erroneous reference to '35' has been changed by hand to '36' (the missing airline

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being United). For similar reasons as that applying the case of documents (i) and (iii), I conclude that the objection based on s 69(2) does not succeed. I did not apprehend an objection based on s 69(1) to be advanced. I therefore admit (i)-(iii).

120. Documents (iv)-(vii) are all attendance lists for meetings which appear to show that Garuda had been present at certain meetings. The point made was that there was no basis to conclude that whoever filled the forms out knew that the person attending on behalf of a particular airline was from that airline. To take the example of document (v), it was said that the fact that list showed a Mr Kenneth Lam and Mr Paul Kwoh attending for Garuda could not be tendered against Garuda to prove it was represented at the meeting. In this particular case, this was submitted to be all the more so because there is no evidence as to who either of those gentlemen are. This is, essentially, an objection to the authenticity of the document. For the reasons I have explained in relation to the authenticity objections taken by AirNZ at [89] -[107], this is not the time to prove or disprove whether those gentlemen attended the meeting as representatives of Garuda or not. The only question presently under consideration is whether this document could rationally affect the assessment of the probability of that being so. In my view, it could.

121. It follows that I reject this argument. It is reasonable to infer from the attendance sheets either that the persons attending wrote their own names and airlines down or they told the person filling the sheet out their names and airlines. It follows that s 69(2)(a) or (b) was certainly satisfied. For those reasons I admit (v).

122. Garuda was not on (iv). I do not see that this detracts from the relevance of (v). It may contradict (v) (or it may be page two of a single list) but this has nothing to do with relevance. I admit the attendance lists, i.e., (iv)-(vii).

123. When I pronounced these rulings, I indicated that I proposed to reject the tender of ACCC. 008.004.0097, that is, (ii). It will be apparent from these reasons that I have since reached a different view. To the extent necessary I revoke the former ruling.

I certify that the preceding one hundred and twenty-three (123) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 30 November 2012

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Cited by:

Kheir Group Pty Ltd v Panoramic Resources Ltd [2025] FCA 868 -
Jacksons Drawing Supplies Pty Ltd v Jackson's Art Supplies Ltd [2025] FCA 530 (23 May 2025) (Jackson J)

> 487. Whether a representation by a third party that is recorded in a business record was made for the purposes of a business 'will depend in large part upon the nature of the document in question': *Air New Zealand Limited (No 1)* at [47]-[48] , agreeing with Drummond J in *The Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595 at 599. In this case, I have taken the view that representations made by customers of JDS or JAS cannot be said to have been made in or for the purposes of the respective businesses. So those representations were not admissible under the business record exception.

Jacksons Drawing Supplies Pty Ltd v Jackson's Art Supplies Ltd [2025] FCA 530 (23 May 2025) (Jackson J)

> 485. Each of JDS and JAS is obviously a business within the meaning of s 69 . An email sent or received in the course of that business, including its attachments, is generally capable of being a business record within the meaning of s 69(1)(a) of the *Evidence Act* : see *Australian Competition and Consumer Commission v* ***Air New Zealand Limited (No 1)*** [2012] FCA 1355; (2012) 207 FCR 448 at [57]-[60] (Perram J) .

Uniform Evidence Manual [2023] JCV Uniform_Evidence_Manual (06 May 2025)

> It is suggested that a court does not need to make a finding as to the authenticity of a document when determining if it is provisionally relevant, provided that a finding as to authenticity is reasonably open (Boucher v The Queen [2022] VSCA 3, [51]–[56] ; Cordelia Holdings Pty Ltd v Newkey Investment Pty Ltd [2002] FCA 1018, [52]–[54] ; Lee v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 305, [25] ; O'Meara v Dominican Fathers (2003) 153 ACTR 1, [85]; Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) [2012] FCA 1355, [99]–[100]).

Wang v Fan [2024] NSWSC 1339 (24 October 2024) (Walton J)

> 105. That said, in my view the approach by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; 301 ALR 326; [2012] FCA 1355 at [92] (" *Air New Zealand")* is, in my view, and with respect, correct. His Honour there stated:
>
> > "92. It is useful to begin with some basic propositions:
> >
> > > 1. There is no provision of the 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 is 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 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: "58 Inferences as to relevance (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."

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 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."

Wang v Fan [2024] NSWSC 1339 -
J Hutchinson Pty Ltd v Australian Competition and Consumer Commission [2024] FCAFC 18 (29 February 2024) (Wigney, Bromwich and Anderson JJ)

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104. It is therefore convenient to reproduce the primary judge's detailed summary of the relevant legal principles in order to frame the debate and better understand the context for her Honour's reasoning in finding that the ACCC had proved, inferentially, the existence of the alleged proscribed arrangement or understanding (emphasis in original):

> [320] The CFMEU cited the decision of Gordon J (as her Honour then was) in *Norcast S.ár.L v Bradken (No 2)* (2013) 219 FCR 14; [2013] FCA 235 at [263] which contained this helpful statement of the relevant legal principles in relation to the concept of arrangement or understanding:
>
> > The relevant applicable legal principles may be summarised as follows:
> >
> > 1. an arrangement or understanding is apt to describe something less than a binding contract or agreement: *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at [75] ; see also *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 (Privy Council) cited with approval in *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286 at 290-291; 5 ALR 465 at 469 ;
> >
> > 2. the elements of an arrangement or understanding are:
> >
> > 2.1 evidence of a consensus or meeting of the minds of the parties, under which one party or both of them must assume an obligation or give an assurance or undertaking that it will act in a certain way which may not be enforceable at law: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [10] and the authorities cited;
> >
> > 2.2 a hope or mere expectation that as a matter of fact a party will act in a certain way is not itself sufficient to establish an arrangement or understanding, even if it has been engendered by that party: *ACCC v CFMEU* at [10] and the authorities cited including *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 at [45] and *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at [79] ;
> >
> > 2.3 the necessary consensus or meeting of minds need not involve, though it commonly will in fact embody, a reciprocity of obligations: *AC CC v CFMEU* at [10] and the authorities cited;
> >
> > 2.4 in relation to whether or not mutual obligation is a necessary ingredient of an arrangement or understanding, it has been suggested that it is difficult to envisage circumstances that would be an understanding within s 45 of the TPA involving the commitment by one party without some reciprocal obligation by the other party: *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 at 230-231 and 238. That statement applies equally to ss 44ZZRJ and 44ZZRK of the CCA ;
> >
> > 2.5 an arrangement may be informal as well as unenforceable with the parties free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it: *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444 ;
> >
> > 3. whether there is a difference between an arrangement and an understanding has not been resolved: *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 at 22-26 but cf *Australian Competition and Consumer Commission v Australian Medical Association WA Branch Inc* (2003) 199 ALR 423 at 460. However, the concept of an understanding is

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broad and flexible: cf *L Grollo & Company Pty Ltd v Nu-Statt Decorating Pty Ltd* (1978) 34 FLR 81 at 89 and *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183 at [54] ;

4. whether or not an arrangement or understanding has been reached will depend on the view formed of all of the circumstances. **A meeting of minds may be proved by independent facts and from inferences drawn from primary facts including, without limitation, evidence of joint action by the parties in relation to relevant matters, evidence of parallel conduct and evidence of collusion between the parties.** As Isaacs J said in *R v Associated Northern Collieries* (1911) 14 CLR 387 at 400 :

Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.

See also *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 573-574 .

(emphasis added)

[321] In *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286 at 291, Smithers J observed that:

... Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of ... the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act.

[322] This statement was cited with approval by Finn J in *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [10] .

[323] Just as contractual assent may be inferred from conduct, so too may the adoption or consensual nature of an arrangement or understanding: see *CEPU v ACCC* at [136] (Weinberg, Bennett and Rares JJ) in which the Full Court observed that:

The activities which the Parliament proscribed in s 45E are often likely to be proved by circumstantial rather than direct evidence, given the nature of proceedings where such conduct is in issue... As is often the case in proceedings where a contract, arrangement or understanding (made or arrived at in contravention of a legislative proscription) must be proved, circumstantial evidence is sometimes the only evidence available.

[324] An arrangement or understanding which is inferred from conduct is not qualitatively different from one that is proved by direct evidence. The difference is in the method of proof. The nature of a circumstantial case is such that the Court can consider the whole of the evidence in arriving at a decision on any fact or facts: *CEPU v ACCC* at [143] (Weinberg, Bennett and Rares JJ).

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[325] As stated in *Norcast v Bradken* at [264] , "where proof of an arrangement or understanding rests on inferences to be drawn from primary facts, it is not sufficient for the circumstances to give rise to conflicting inferences of equal degrees of probability".

[326] In *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* [2017] ATPR 42-540; [2017] FCA 222 at [478] , Beach J observed that:

> ... as to the question of proof, an inference that an arrangement or understanding existed may be drawn from circumstantial evidence that the conduct of the parties exhibits "a concurrence of time, character, direction and result" (*R v Associated Northern Collieries* (1911) 14 CLR 387 at 400)... the existence of a motive is a matter that can be taken into account in assessing whether an arrangement or understanding was entered into by parties.

[327] In *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388; [2014] FCA 1157 at [463] , Perram J stated that:

> In cases where direct evidence is not available, the proof of a collusive understanding needs must be circumstantial. Pausing there, it is important to note that there is nothing inherently weak about cases based on circumstantial evidence. **In truth, the strength of any particular circumstantial case will be a function of the number of elements of which it consists and the corresponding unlikelihood of those elements happening for reasons other than as a result of the posited collusive behaviour.** Just as with any case of circumstantial evidence, it is forlorn to seek to work out the significance of the individual elements. The circumstantial case's nature and its strength emerge organically from a consideration of it as a whole. Thus, the onus of proof is to be applied only at the end:... however, this does not mean that the court is prevented in the ordinary way from finding particular circumstances proved or not proved. Rather, what is meant is that the question of whether the inference, which it is said should be drawn, is to be asked holistically at the end of the process rather than it being asked whether the inference should be drawn from any individual circumstances.
>
> (emphasis added)

[328] In *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 3)* [2021] FCA 1147 at [64] , O'Bryan J stated that:

> It is well established that the making of an arrangement or the arriving at an understanding may be proved by direct or circumstantial evidence. Direct evidence includes the content of communications passing between the parties to the alleged arrangement or understanding. **Circumstantial evidence includes conduct consistent with the making or acting upon (giving effect to) the alleged arrangement or understanding. A wide range of evidence of communications and conduct may be admissible in proof of an arrangement or understanding. Not all communications need be between the alleged parties to the arrangement or understanding.** As Perram J explained in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 (at [25]-[26]):
>
> > I do accept the principle invoked by the ACCC, namely: that one may prove an agreement or understanding between a group of people by proving behaviour of

> individual group members consistent with the existence of the agreement; that such behaviour may include evidence of what members of the group said to each other or even to third parties; and, that this use of conduct as circumstantial evidence of an agreement does not involve a hearsay use of the words used when some or all of the conduct relied upon consists of speech acts. This is straightforward ...
>
> (emphasis added)

[329] In terms of distinguishing between the two concepts, an "arrangement" connotes a consensual dealing lacking some of the essential elements that would otherwise make it a contract: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321; [2007] FCA 794 at [26] . It need not be legally binding, but it must still involve commitment; that is, it must be at least morally binding: *ACCC v Leahy* at [37]. There must also be at least some express communication between the parties, although what is said may not, for the purposes of the law of contract, amount to offer and acceptance in a contractual sense: *ACCC v Leahy* at [26]; cited with approval in *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* (2015) 332 ALR 396; [2015] FCA 1304 at [47] .

[330] The concept of an understanding is "broad and flexible": *L Grollo & Co Pty Ltd v Nu-Statt Decorating Pty Ltd* [1978] FCA 33; (1978) 34 FLR 81 at 89 ; *ACCC v Olex* at [477]; *Norcast v Bradken* at [263] ; *ACCC v Leahy* at [27]. However broad and flexible an understanding might be, it must be a consensual dealing between parties: *ACCC v Leahy* at [28].

[331] Unlike an arrangement, an understanding can be tacit, in the sense that it can be arrived at by each party, either by words or acts, signifying an intention to act in a particular way in relation to a matter of concern to another party. In order to be a consensual dealing, however, an understanding must involve a meeting of minds: *ACCC v Leahy* at [29].

C P Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd [2023] VCC 2134 (22 November 2023) (Macnamara J)

Cases Cited: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *National Australia Bank Ltd v Rusu & Ors* (1999) 47 NSWLR 309; *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35)* [2014] VSC 59; *Australian Competition and Consumer Commission v Air New Zealand Ltd & Anor (No 1)* (2012) 207 FCR 448 ; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Traffic Calming Australia Pty Ltd v CTS Creative Traffic Solutions Pty Ltd & Ors* [2015] VSC 741; *Foakes v Beer* (1884) 9 App Cas 605; *Amos v Citibank Ltd* [1996] QCA 129; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1

C P Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd [2023] VCC 2134 (22 November 2023) (Macnamara J)

167 Mr Moon conceded that Perram J of the Federal Court of Australia in *Australian Competition and Consumer Commission v Air New Zealand Ltd & Anor (No 1)* (2012) 207 FCR 448 at [100] , disagreed with the judgment of Bryson J in *Rusu's* case, taking the view that Bryson J did not consider the operation of s183 of the *Evidence Act*, which I have already quoted, or s58 of the Act which provides:

> "(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.

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(2) Subsection (1) does not limit the matters from which inferences may properly be drawn."

Wei & Xia (No 5) [2023] FedCFamC1F 679 (16 August 2023) (Harper J)

210. Fourthly, the authentication and provenance of a document are separate but closely linked, and there has been some controversy over whether a document can stand alone in resolving either question. In *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309 ("*Rusu*"), Bryson J held that authentication cannot be achieved *solely* by drawing inferences from the face of the document where there is no other evidence to indicate provenance. Despite criticism in some quarters up to 2012 the decision in *Rusu* was followed or approved a number of times. But in *Air New Zealand* , Perram J expressly declined to follow *Rusu* to the extent it held that a document could not be used to authenticate itself, on the basis that such a view was plainly wrong. He did so despite decisions of intermediate appellate courts, such *Daw v Toyworld (NSW) Pty Ltd* (2001) 21 NSWCCR 389 at [46] , appearing to approve the relevant aspects of the reasoning in *Rusu* . Later in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 at [94]–[97] , White J, correctly with respect, pointed out that, having determined the relevant aspects of *Rusu* were plainly wrong, Perram J in *Air New Zealand* did not offend the injunction upon single judges to follow the decisions of intermediate appellate courts when interpreting uniform national legislation.

Wei & Xia (No 5) [2023] FedCFamC1F 679 -
Wei & Xia (No 5) [2023] FedCFamC1F 679 -
Yin v Wu [2023] VSCA 130 (01 June 2023) (Kyrou, T Forrest and Hargrave JJA)

123. In *Matthews v SPI Electricity Pty Ltd (Ruling No 35)* ,[166] J Forrest J considered what is necessary to establish authenticity of business records so that they can be said to fall within the scope of s 69 of the *Evidence Act*. J Forrest J reviewed the authorities, including the statement in *ASIC v Rich* that 'authenticity cannot be achieved *solely* by drawing inferences from the face of the document where there is no other evidence to indicate provenance'. [167] J Forrest J stated the following approach to establishing authenticity from the face of the document and the evidence as to how it came to be produced:

32. Consistent with the decision in *Air New Zealand*, a combination of s 55 and s 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: [168]

(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

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(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. [169]

via

[168] *ACCC v Air New Zealand (No 1)* (2012) 207 FCR 448, 467–9 [92]–[93] ; [2012] FCA 1355 .

Invisalign Australia Pty Ltd v SmileDirectClub LLC [2023] FCA 395 (05 May 2023) (Anderson J)

83. Invisalign relies upon the decisions of *Roach v Page (No 15)* [2013] NSWSC 939 per Sperling J and *Australian Competition and Consumer Commission v Air New Zealand (No 1)* [2012] FCA 1355; 207 FCR 448 for the proposition that published output of a business in literary form such as books, magazines and newspapers are not "business records", but rather, are "products of the business", falling outside the business records exception in s 69(1) of the *Evidence Act* .

Self Care Corporation Pty Ltd v Green Forest International Pty Ltd (No 13) [2022] FedCFamC2G 1031 (30 November 2022) (Baird J)

29. Mr Li refers to the propositions discussed by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* [2012] FCA 1355 (**ACCC v Air New Zealand**) at [92] to which I have earlier referred him. Mr Li today submits to the following effect, " *It doesn't matter about authenticity, because that can be argued later*". Mr Li misapprehends the matter. Today, at this point in the final hearing further to provisionally admitting the documents I propose to decide not only the claimed relevance, but whether, given the matters his Honour set out in *ACCC v Air New Zealand* , both admissibility and authenticity are satisfied.

Self Care Corporation Pty Ltd v Green Forest International Pty Ltd (No 13) [2022] FedCFamC2G 1031 (30 November 2022) (Baird J)

29. Mr Li refers to the propositions discussed by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* [2012] FCA 1355 (**ACCC v Air New Zealand**) at [92] to which I have earlier referred him. Mr Li today submits to the following effect, "*It doesn't matter about authenticity, because that can be argued later*". Mr Li misapprehends the matter. Today, at this point in the final hearing further to provisionally admitting the documents I propose to decide not only the claimed relevance, but whether, given the matters his Honour set out in *ACCC v Air New Zealand* , both admissibility and authenticity are satisfied.

Self Care Corporation Pty Ltd v Green Forest International Pty Ltd (No 13) [2022] FedCFamC2G 1031 (30 November 2022) (Baird J)

30. Recently in ***Microsoft*** *Corporation v CPL Notting Hill Pty Ltd (No 7)* [2022] FedCFamC2G 590, at [487] to [498] I summarised relevant provisions and principles concerning admissibility and authenticity of documents. At [495] I set out Perram J's propositions in *ACCC v Air New Zealand* . I incorporate by reference what I said in *Microsoft* .

Microsoft Corporation v CPL Notting Hill Pty Ltd (No 7) [2022] FedCFamC2G 590 (30 September 2022) (Baird J)

495. In *ACCC v Air New Zealand* , in a passage since approved by a number of courts, including the Full Court of the Federal Court of Australia [280] , Perram J provided a statement of propositions in relation to the admissibility of a document as follows:

[92] It is useful to begin with some basic propositions:

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, i.e., 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 *Evide nce 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 : ...[*set out above, reasons at* [490]].

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

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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 (i.e. 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.

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498. In ***Yalda** v Consulate General of the Republic of Iraq, Sydney* [2021] FCCA 499, Judge Manousaridis explained:

[17] In the context of a litigated hearing "*authentication*" denotes a process associated with a proponent's seeking to adduce a thing into evidence. Although not often acknowledged, "*authentication*" also describes a process that is associated with what a proponent does in relation to a thing after the thing has been admitted into evidence. ... The process "*authentication*" denotes is the proponent adducing evidence and making submissions to a court that is intended to show that the thing the proponent seeks to adduce, or the thing that has been admitted into evidence, is what the proponent claims the thing to be. [fn: [s]ee, for example, *ASIC v Rich* [2005] NSWSC 417, at [118] : "*Authentication is about showing that the document is what it is claimed to be* . . . ."] If a court in its capacity of finder of fact accepts the thing is that which a party claims it to be, the thing is said to have been authenticated.

...

[19] ...[The] capacity of the contents of a document itself to satisfy a court that the document is what its contents represent the document to be is often described as "*selfa uthenticating*"; and a court finding that a document is that which it purports to be solely on the basis of its contents is often referred to as "*self-authentication*" ...

[20] But it is not in every case that the opponent accepts a document is self-authenticating; and where that occurs, that is, where the authenticity of a document is put in issue, it is necessary for the proponent to prove the document (**disputed document**) is what the proponent claims it to be. It may cause confusion, however, not to appreciate that authentication occurs at two stages in the evidentiary life of a disputed document. The first stage is when the proponent seeks to adduce the disputed document into evidence. As with all evidence that a party seeks to adduce into evidence where the *Evidence Act 1995* applies, the proponent must show the disputed document is "*relevant*" within the meaning of s 55 of that Act; and that is because s 56(2) of the Evidence Act provides that evidence that is not relevant is not admissible.

[21] The relevance of a disputed document depends on the combination of two things. The first is the contents of the disputed document and their links to issues in the proceeding. The contents of a document usually consist of language or images. The language or images may be relevant to an issue in the proceeding either because the proponent wishes to rely on the language or images testimonially, that is, as evidence of the truth of the matters the language or images may reasonably be taken

to intend to represent; or the language and images may be relevant for some other reason. The second thing on which the relevance of a disputed document depends is whether there is some evidence on the basis of which it would be reasonably open to find that the disputed document is that which the proponent claims it to be. This relationship between the authenticity of a document and the relevance of the contents of a document is reflected in s 57(1) of the Evidence Act (emphasis added) … [*s et out above at* [489]*; his Honour emphasising:* ***(including a finding that the evidence is what the party claims it to be)***] …

[22] When applied to documents, s 57(1) of the Evidence Act assumes that the authenticity of a document – that is, the quality of a document's being what the proponent claims it to be – is or at least may be relevant to determining whether the disputed document is relevant under s 56(1) of the Evidence Act; and where the relevance of a document under s 56 of the Evidence Act depends on a finding that the document is what the proponent claims it to be, the court may find the document is relevant if it is reasonably open to make a finding that the document is what the proponent claims it to be.

[23] That a disputed document has been admitted into evidence because the court has found it is relevant because it is reasonably open to find the document is what the proponent claims it to be does not mean the court as trier of fact must regard the document as being that which the proponent claims it to be. Subsection 57(1) of the Evidence Act only requires the court to determine, at the point questions of admissibility are raised, whether it is reasonably open to make a finding that the document is what the proponent claims it to be; it does not require or even authorise the court to find that the document is in fact what the proponent claims it to be. If the court finds it is reasonably open to find that the document is what the proponent claims it to be, and finds the document is relevant, whether the document is in fact what the proponent claims it to be is to be determined by the court in its capacity as trier of fact at the time the court considers all of the evidence that has been admitted into evidence and makes its findings of fact. The process by which the proponent seeks to persuade the court as a trier of fact that the disputed document is what the proponent claims it to be is equally to be described as "*authentication*"; and it constitutes the second of the two stages at which the process of authentication of a disputed document occurs.

…

[27] In [*ACCC v Air New Zealand*], Perram J held that " *authenticity is not a ground of admissibility under the*" Evidence Act; the question of authenticity does not "*directly arise for the tribunal of law's consideration at the level of objections to evidence*"; and that, if "*there is raised a question about the authenticity of a document . . . then there will be an issue in the proceedings about its authenticity*". It is true that, unlike the *Federal Rules of Evidence 1975* (US), the Evidence Act does not contain a provision that in terms requires that a document or thing be authenticated before it can be admitted into evidence. But s 57(1) and s 58(1) of the Evidence Act use the language of authentication; and a court must consider questions of the authenticity of a document if the opponent claims the document is not what the proponent claims it to be; and that objection is determined by the court considering, not whether the document is in fact that which the proponent claims it to be, but whether it is open to find that the document is what the proponent claims it to be. If the court answers that question in the affirmative, the document is admitted into evidence, but the question of the document's authenticity remains open and is to be decided when the court considers all of the evidence before it makes its findings of fact.

5. Consideration

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494. However, as Drummond J observed in *Tubby Trout* , in the passages appearing before and after the above passage, and as Perram J acknowledged in *ACCC v Air New Zealand* e.g. at [55][56] , not all representations made by a third party will satisfy the requirements of s 69 , and be admissible; mere possession of a document may not suffice.

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492. A representation made by a third party can still be said to be '*for the purposes of the business*'. In *ACCC v Air New Zealand* , at [47] Perram J adopted the observations of the learned author of the 8th edition of *Cross on Evidence* that an outsider may make a representation '*for the purposes*' of a business even though separate from the business in question. His Honour quoted Drummond J's explanation in ***Tubby Trout*** *Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595, at 599 :

> [47] Despite those two statements, I agree with the observations of the learned author of *Cross* that an outsider may make a representation 'for the purposes' of a business even though separate from the business in question. And, indeed, Drummond J accepted as much in *Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595 at 598-599 . He doubted whether Franki J had truly meant what he said in the quotation above (noting that, a few lines later, Franki J may have accepted that a third party invoice might fall within s 7B(1)(b) of the *Evidence Act 1905* (Cth)). In any event, if Franki J had said that, Drummond J thought it was wrong. He explained (at 599):
>
> > However, the question of admissibility of a document under s 7B [i.e. the predecessor to s 69] will depend in large part upon the nature of the document in question. There is a difference, it seems to me, between an invoice and a letter received by a business from an outsider. If the evidence shows that in the case of an invoice, for example, it was kept in a file of invoices sent by outsiders who have supplied goods and services to the business and that the invoice purports to record the supply of goods or services of a kind commonly used by the business in the course of its activities, that would, I think, be sufficient to satisfy s 7B(1)(b) [i.e. s 69(1)(b)]. Such a document could fairly be said to be made for the purposes of the recipient business although it was also made in the course of and for the purposes of the other business that supplied the goods or services listed in the invoice.

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479. The Microsoft parties rely on the decision of Perram J in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* [2012] FCA 1355; (2012) 207 FCR 448, (***ACCC v Air New Zealand***) at [94]-[104] , in which his Honour held that the correct principle is whether documents are relevant, not whether they are authentic, and that the decision of Bryson J in *National Australia Bank v Rusu* [1999] NSWSC 539, that a document must be authenticated before it is admissible, is plainly wrong. They refer to decisions in a number of courts following *ACCC v Air New Zealand* .

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69. In *Re Wollongong Coal Ltd* (formerly known as *Gujarat NRE Coking Coal Limited*) [18] Brereton J made the following observations:

7 A number of cases in this Court hold that a document does not prove itself simply by being tendered. Before admitting a document, a Court must be satisfied that it is what it purports to be. Sometimes, that inference can be drawn from the document itself. In *National Australia Bank Ltd v Rusu* [1999] NSWSC 539; (1999) 47 NSWLR 309, Bryson J, as he then was, held that neither s 69 nor any other part of (NSW) *Evidence Act 1995* had the effect of causing a document to be self-authenticating or permitted authenticity to be established simply by inference from the form or contents of the document.

8 His Honour's approach was considered in some detail by Austin J in *Australian Securities and Investments Commission v Rich* [2005] NSWSC 417; (2005) 53 ACSR 752, particularly at [93] – [117] . His Honour observed that Rusu was approved by the Court of Appeal in *Daw v Toyworld NSW Pty Ltd* [2001] NSWCA 25, where Heydon JA, with whom Priestley and Sheller JJA agreed, observed (at [46]):

> If the document was of unknown origin, it could have been objected to as unauthenticated and irrelevant. The *Evidence Act 1995* does not permit documents to authenticate themselves save in limited circumstances.

9 *Rusu* has also been cited with approval in *Kingham v Sutton* (No 3) [2001] FCA 1117, [127] (Goldberg J).

10 As I pointed out in In the matter of *Maiden Civil Pty Ltd* [2012] NSWSC 1618 at [16] , *Rusu* has not been without controversy, and aspects of Bryson J's reasoning are criticised in Odgers, *Uniform Evidence Law*, (8th edition, 2009) 1.3.480, a criticism that was taken up by Madgwick J in the *Federal Court in Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 305, [25] . *Rusu* was also questioned by the Court of Appeal of the Australian Capital Territory in *O'Meara v Dominican Fathers* [2003] ACTCA 24.

11 After reviewing those authorities and the judgment of Needham J in *Re Marra Developments Pty Ltd and the Companies Act* [1979] 2 NSWLR 193, which was endorsed in *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542, I concluded in *Maiden Civil* that while the mere production of a document cannot authenticate it, *Marra Developments* establishes, though *Rusu* might contradict, that production on subpoena from an identified source might suffice to show that it was produced from the custody of the entity whose business it is, which would facilitate an inference that it was a business record, and *Rusu* should not be taken to limit the way in which authenticity of the document can be proved.

12 I should add that *Rusu* has since not been followed in the Federal Court by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* [2012] FCA 1355 . His Honour identified a distinction between authenticity and relevance and pointed out that the test of admissibility was relevance, not authenticity, and indeed that in some cases it would be absence of authenticity that might make a document relevant. To that extent, I agree, but it will always depend on the purpose of the tender.

13 A transactional document that is not binding on a party against whom it is tendered to prove the transaction is likely to be irrelevant. In order to establish that it is arguably relevant, something needs to be proven to show that party's assent to the document. For example, where

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a party seeks to prove a commercial transaction and relief for that purpose on a document signed by the other, if execution is in dispute then there will need to be some evidence of execution. The document does not become relevant until that is established. It is in that sense, I think, that Bryson J was referring to the concept of authenticity.

14 In this case, there is a live issue as to the authenticity of the fixture note. That there has been such an issue has been evident for some time. In the course of ruling on objections, I have indicated that I am inclined to reject it on the basis that it has not been authenticated in a manner sufficient to make it relevant. That is because, to be relevant, it would have to be shown that it was received by the applicant some time in or about June or July of 2013. It seems to me that on the material presently available, this document is not shown to be relevant.

15 It would seem that the applicant has assumed that I would reach the opposite conclusion and admit the document and in that respect entirely embrace the reasoning of Perram J, disregarding that of Bryson J, Austin J, the Court of Appeal and my earlier judgment in *Maiden Civil*. That may be thought to be a bold assumption.

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68. In *Commissioner of Taxation v Cassantiti* [16] the Full Court of the Federal Court approved of the reasoning of Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No.1) [17]* as to the correct approach when interpreting s 56 Perram J stated:

It is useful to begin with some basic propositions:

1. There is no provision of the [Evidence Act (the "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, i.e., 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 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 oif 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.

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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 :

58 Inferences as to relevance

> (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.

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 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.

via

[17] (2012) FCA 1355 ; [2012] 207 FCR 448 at [92] .

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68. In *Commissioner of Taxation v Cassantiti* [16] the Full Court of the Federal Court approved of the reasoning of Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No.1)* [17] as to the correct approach when interpreting s 56 Perram J stated:

> It is useful to begin with some basic propositions:
>
> 1. There is no provision of the [Evidence Act (the "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, i.e., 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 Act, the issue of authenticity does not directly arise for the tribunal of law's consideration at the level of objections to evidence.
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> 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 oif 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".
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> 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.
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> 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.
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> 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.
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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.

Herron v HarperCollins Publishers Australia Pty Ltd [2022] FCAFC 68 (29 April 2022) (Rares, Wigney and Lee JJ)

485. In adopting this line of reasoning, her Honour was following, by parity of reasoning, what has been said in respect of the business records exception to the hearsay rule in s 69 of the *Evidence Act*. Relevantly, in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* [2012] FCA 1355; (2012) 207 FCR 448, Perram J referred (at 463 [63]) to a large number of authorities to the effect that: "an opinion as to the existence of a fact falls within the scope of the term 'asserted fact' in s 69 ". After considering certain *obiter* comments of the High Court in *Lithgow City Council v Jackson* [2011] HCA 36; (2011) 244 CLR 352 (at 362 [17]) to the effect that such an interpretation was a "little strained", Perram J said (at 463 [65]):

> I would not, in any event, accept that the mere fact that an interpretation is "strained" means inevitably it is wrong. Here the legislation was always intended as a beneficial reform. If "asserted fact" does not extend at least to lay opinion as defined in s 78 then an important, reliable and common form of business record will be inadmissible. For example, a building site log recording that the site is 'slippery due to rain'; a hotel incident report that a patron was 'drunk'; a police pocket note that a person was 'angry' and so on.

Herron v HarperCollins Publishers Australia Pty Ltd [2022] FCAFC 68 (29 April 2022) (Rares, Wigney and Lee JJ)

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486. It may be accepted that Perram J was addressing the business records exception (s 69) to the hearsay rule, rather than one of the first-hand hearsay exceptions (such as s 63), and that his Honour referred specifically to the exception to the opinion rule for lay opinion (s 78), but there is no difference in analysis. Both ss 63 and 69 rely on the question of whether the person involved had personal knowledge of the "asserted fact", and there is no reason why the same analysis applicable to lay opinion under s 78 should not be applicable to expert opinion under s 79. Consistently with what Perram J said in *Air New Zealand Ltd (No 1)* and the reasoning of the primary judge, it is the *opinion* which is the asserted fact. No error has been demonstrated in her Honour reaching this conclusion at a level of principle.

In the matter of Caernarvon Canobolas Pty Ltd (In Liq) [2022] NSWSC 382 (05 April 2022) (Ward CJ in Eq)

132. The circumstances in which those documents were produced by John Nunn Building Contractors were addressed in the affidavit evidence of Ms Ferris but it is not necessary here to outline those circumstances as Timothy does not cavil with the proposition that the documents in question were produced in answer to a subpoena (issued at the request of Timothy on 25 May 2021) (see T 318.1); and, in the case of the documents for the 2014/2015 and 2015/2016 financial years, were not produced initially when the subpoena was answered but, after enquiry was made of the company's solicitors, were produced only on the first day of the hearing. Nor does Timothy cavil with the legal principles summarised in submissions for Bernard and Fiona as to the test applicable when assessing the relevance of the documents to a matter in issue in the proceeding (see *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 at [92] (5) per Perram J (*ACCC v Air New Zealand*), approved in *Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; [2018] FCAFC 212 at [64] per Steward J (his Honour then sitting in the Federal Court), and in *Gregg v The Queen* (2020) 355 FLR 348; [2020] NSWCCA 245 per Bathurst CJ at [362]).

Knight v Mayart Pty Ltd [2022] VSCA 36 (23 March 2022) (McLeish, Sifris and Kennedy JJA)

96. The decision of *Rusu* is regarded as controversial, and Odgers suggests that the 'clear weight of authority' is that *Rusu* was incorrectly decided. [43] In particular, various decisions have highlighted that a tribunal of law is explicitly authorised by s 58 of the *Evidence Act 2008* to ask what inferences as to authenticity are available from the document itself. [44]

via

[44] *Matthews v SPI Electricity Pty Ltd (No 35)* [2014] VSC 59, [27] (J Forrest J), citing *ACCC v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 .

Australian Competition and Consumer Commission v J Hutchinson Pty Ltd [2022] FCA 98 (14 February 2022) (Downes J)

328. In *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 3)* [2021] FCA 1147 at [64] , O'Bryan J stated that:

> It is well established that the making of an arrangement or the arriving at an understanding may be proved by direct or circumstantial evidence. Direct evidence includes the content of communications passing between the parties to the alleged arrangement or understanding. **Circumstantial evidence includes conduct consistent with the making or acting upon (giving effect to) the alleged arrangement or understanding. A wide range of evidence of communications and**

conduct may be admissible in proof of an arrangement or understanding. Not all communications need be between the alleged parties to the arrangement or understanding. As Perram J explained in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 (at [25]-[26]):

> I do accept the principle invoked by the ACCC, namely: that one may prove an agreement or understanding between a group of people by proving behaviour of individual group members consistent with the existence of the agreement; that such behaviour may include evidence of what members of the group said to each other or even to third parties; and, that this use of conduct as circumstantial evidence of an agreement does not involve a hearsay use of the words used when some or all of the conduct relied upon consists of speech acts. This is straightforward...

(emphasis added)

Green v Fairfax Media Publications Pty Ltd [No 4] [2021] WASC 474 (23 December 2021) (Le Miere J)

120. In support of the contention that the email is a business record, the defendants refer to ***Australian Competition and Consumer Commission v Air New Zealand Ltd*** [7] and in particular [60] where Perram J held that emails received by a firm including attachments that are stored even for a brief period by the firm are business records and inferred that the attachments were so stored because of the fact of their retrieval.

via

[7] ***Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)*** [2012] FCA 1355; (2012) 207 FCR 448 .

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Di Liristi v Matautia Developments Pty Ltd [2021] NSWCA 328 (17 December 2021) (Macfarlan, Gleeson and Brereton JJA)

Maaz v Fullerton Property Pty Ltd [2021] NSWCA 79; *Gregg v R* [2020] NSWCCA 245; *Australian Securities and Investments Commission v Rich* [2005] NSWSC 417; (2005) 53 ACSR 752; *Ritz Hotel Ltd v Charles of the Ritz Ltd (Nos 13, 18, 19)* (1988) 14 NSWLR 116; *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 ; *Jadwan Pty Ltd v Rae & Partners (A Firm) (No 3)* [2017] FCA 1045 referred to.

Di Liristi v Matautia Developments Pty Ltd [2021] NSWCA 328 (17 December 2021) (Macfarlan, Gleeson and Brereton JJA)

50. As to the second condition (s 69(1)(b)), it is essential to identify the relevant business because the business to which it refers must be the same business as that referred to in the first

condition (s 69(1)(a)): *Maaz* at [63] , citing *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 at 459 [44] ; [2012] FCA 1355 (Perram J) , which was followed in *Jadwan Pty Ltd v Rae & Partners (A Firm) (No 3)* [2017] FCA 1045 at [25] (Kerr J).

Gindy v Capital Lawyers Pty Ltd (No 2) [2021] ACTSC 304 -
Gindy v Capital Lawyers Pty Ltd (No 2) [2021] ACTSC 304 -
Cao & Trong [2021] FedCFamC1F 228 (23 November 2021) (Wilson J)

5. At first blush, the letter also appears contrary to s 49 of the *Evidence Act*. It could not be said that the documents are business records even recognising the observations by other judges of superior courts in cases such as *Matthews v SPI Electricity Pty Ltd (Ruling No 35)* [1] and *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1).* [2] .

Cao & Trong [2021] FedCFamC1F 228 (23 November 2021) (Wilson J)

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via

[2] (2012) 207 FCR 448 .

Australian Competition and Consumer Commission v BlueScope Steel Ltd (No 3) [2021] FCA 1147 (23 September 2021) (O'Bryan J)

64. It is well established that the making of an arrangement or the arriving at an understanding may be proved by direct or circumstantial evidence. Direct evidence includes the content of communications passing between the parties to the alleged arrangement or understanding. Circumstantial evidence includes conduct consistent with the making or acting upon (giving effect to) the alleged arrangement or understanding. A wide range of evidence of communications and conduct may be admissible in proof of an arrangement or understanding. Not all communications need be between the alleged parties to the arrangement or understanding. As Perram J explained in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 (at [25]-[26]):

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>
> I do not accept that I am required to ask whether this individual communication shows that AirNZ or Garuda were parties to the agreement or understanding. Talking, it is true, of the application of the standard of proof to a civil case of fraud by circumstantial evidence, Ipp JA (with whom Tobias and Basten JJA agreed) referred with approval to what had been said by Winneke P in *Transport Industries Insurance*

Company Ltd v Longmuir [1997] 1 VR 125 at 129 : "It is erroneous to divide the process into stages and, at each state, apply some particular standard of proof. To do so destroys the integrity of [a] circumstantial case": *Palmer v Dolman* [2005] NSWCA 361 at [41], [125], [126] . Of course here the question is not, as it was in *Palmer* , whether the particular integer alleged *proved* the fraud. Here the question is whether the integer is *admissible* to prove the existence of the agreement.

Fitzroy & Oliversen [2021] FedCFamC1F 4 -
Home Grown Brands Australia Pty Ltd v Sperling Enterprises Pty Ltd [2021] FCCA 1597 (16 July 2021) (Manousaridis J)

37. In *Australian Competition and Consumer Commission v Air New Zealand Ltd* , Perram J held that " *authenticity is not a ground of admissibility under the*" Evidence Act ; the question of authenticity does not "*directly arise for the tribunal of law's consideration at the level of objections to evidence*"; and that, if "*there is raised a question about the authenticity of a document . . . then there will be an issue in the proceedings about its authenticity*". [39] It is true that, unlike the *Federa l Rules of Evidence 1975* (US), the Evidence Act does not contain a provision that in terms requires that a document or thing be authenticated before it can be admitted into evidence. But s 57(1) and s 58(1) of the Evidence Act use the language of authentication; and a court must at the point of admissibility consider questions of the authenticity of a disputed document if its authenticity is in issue; and that question is determined by the court considering, not whether the document is in fact that which the proponent claims it to be, but whether it is open to find that the document is what the proponent claims it to be. If the court answers that question in the affirmative, the document is admitted into evidence, but the question of the document's authenticity remains open and is to be decided when the court considers all of the evidence before it makes its findings of fact.

via

[39] *Australian Competition and Consumer Commission v Air New Zealand Ltd* [2012] FCA 1355, at [92]

Home Grown Brands Australia Pty Ltd v Sperling Enterprises Pty Ltd [2021] FCCA 1597 (16 July 2021) (Manousaridis J)

29. As I noted at the beginning of these reasons, Sperling relies on documents recording screenshots of searches conducted on a website known as "*The Wayback Machine*" (**Wayback Machine documents**). I admitted the Wayback Machine documents over objection, but subject to relevance. At the time of my ruling I had in mind Perram J's discussion of the "*auth enticity*" of documents in *Australian Competition and Consumer Commission v Air New Zealand Ltd* . [36] Before I consider the relevance of the Wayback Machine documents, it will therefore be necessary to say something about the " *authenticity*" and the "*authentication*" of documents.

via

[36] *Australian Competition and Consumer Commission v Air New Zealand Ltd* [2012] FCA 1355

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Home Grown Brands Australia Pty Ltd v Sperling Enterprises Pty Ltd [2021] FCCA 1597 - Maaz v Fullerton Property Pty Ltd [2021] NSWCA 79 (07 May 2021) (Basten, Gleeson and Brereton JJA)

68. *State of Tasmania v Lin* and *Air New Zealand* were followed by Reeves J in *Asden Developments Pty Ltd (in liq) v Dinoris (No 2)* , [41] holding that a document, of which an invoice is an example, complies with s 69(1)(b) if it is prepared in the course of one business, partly for the purposes of that business and partly for the purposes of the recipient business of which it becomes a record: [42]

> "[10] However, I do not accept the remainder of Mr Martin's submissions on this second ground. In my view, they fail to address the different purposes of s 69(1)(a) and s 69(1)(b) and, more importantly, the two alternatives that are open under the latter, which raise a different distinction between the businesses that are potentially engaged. As to the different purposes, s 69(1)(a) is directed to the way in which the document is recorded in the business concerned, whereas s 69(1)(b) is directed to the contents of the document in question, specifically the previous representation contained in it and how, or why, that representation was made in the document. It is the how, or why, the representation was made in the document that gives rise to the alternative expressed in s 69(1)(b) , which I alluded to earlier.
>
> [11] Under s 69(1)(b) , the representation can be made or recorded in the document in the course of the business — that is, how it comes into existence — or it can be recorded in the document for the purposes of the business — that is, why it comes into existence. In many circumstances, if not most, the means by which, and the purposes for which, the representation comes into existence will exclusively serve the same business, that is, the representation will be prepared in the course of a business and be solely for the purposes of that business. However, in some circumstances, the representation will be prepared in the course of one business and be partly prepared for the purposes of that business and partly for the purposes of another business.
>
> [12] Invoices are a classic example of this: see *Air New Zealand* at [48] and *Tasmania v Tu Ai Lin* (2011) 225 A Crim R 1; [2011] TASSC 54 at [27]-[29] per Evans J."

Maaz v Fullerton Property Pty Ltd [2021] NSWCA 79 (07 May 2021) (Basten, Gleeson and Brereton JJA)

63. Turning next to the second condition (s 69(1)(b)), it is essential to identify the relevant business, because the business to which it refers must be the same business as that referred to in the first condition (s 69(1)(a)), as Perram J accepted in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* ('*Air New Zealand*'): [31]

> "I do not accept the first argument. I do accept Mr Owens' submission that the business referred to in s 69(1)(b) must be the same as the business referred to in s 69(1)(a) . The exception to the hearsay rule in s 69(2) only applies to the representation referred to in s 69(1)(b) so that it follows that s 69 will be of no utility even where a business record under s 69(1)(a) is accepted to exist unless the representation contained in the document which is sought to be tendered is of the kind described in s 69(1)(b) , that is, it must be "made or recorded in the document in the course of the business, or for the purposes of the business". That requirement is not new, having first appeared (albeit worded slightly differently) in Pt IIC of the *Evidence Act 1898* (NSW) after 1976 and Part IIIA of the *Evidence Act 1905* (Cth) after 1978: see *Evidence (Amendment) Act 1976* (NSW), sch 4 ; *Evidence Amendment Act 1978* (Cth), s 3 ."

via

31. Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) (2012) 207 FCR 448 at 459 [44] ; [2012] FCA 1355 ; followed by Jadwan Pty Ltd v Rae & Partners (A Firm) (No 3) [2017] FCA 1045 at [25] (Kerr J).

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63. Turning next to the second condition (s 69(1)(b)), it is essential to identify the relevant business, because the business to which it refers must be the same business as that referred to in the first condition (s 69(1)(a)), as Perram J accepted in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* ('*Air New Zealand*'): [31]

> "I do not accept the first argument. I do accept Mr Owens' submission that the business referred to in s 69(1)(b) must be the same as the business referred to in s 69(1)(a) . The exception to the hearsay rule in s 69(2) only applies to the representation referred to in s 69(1)(b) so that it follows that s 69 will be of no utility even where a business record under s 69(1)(a) is accepted to exist unless the representation contained in the document which is sought to be tendered is of the kind described in s 69(1)(b) , that is, it must be "made or recorded in the document in the course of the business, or for the purposes of the business". That requirement is not new, having first appeared (albeit worded slightly differently) in Pt IIC of the *Evidence Act 1898* (NSW) after 1976 and Part IIIA of the *Evidence Act 1905* (Cth) after 1978: see *Evidence (Amendment) Act 1976* (NSW), sch 4 ; *Evidence Amendment Act 1978* (Cth), s 3 ."

Maaz v Fullerton Property Pty Ltd [2021] NSWCA 79 (07 May 2021) (Basten, Gleeson and Brereton JJA)

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Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) (2012) 207 FCR 448; [2012] FCA 1355 ; *Asden Developments Pty Ltd v Dinoris (No 2)* (2015) 235 FCR 382; [2015] FCA 1025; *Jadwan Pty Ltd v Rae & Partners (No 3)* [2017] FCA 1045; *Tasmania v Lin* (2011) 225 A Crim R 1; *Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595, applied.

Maaz v Fullerton Property Pty Ltd [2021] NSWCA 79 (07 May 2021) (Basten, Gleeson and Brereton JJA)

67. These authorities were followed, by Perram J, in *Air New Zealand* . After referring to statements which appeared contrary to the view that a third-party document would engage s 69(1) , by Needham J in *Re Marra Developments Ltd and the Companies Act*: [38]

> "I do not think that statements by outsiders, such as an officer of the Bank of New South Wales, relating to matters which are of interest to Partnership Pacific Ltd can be said to have been made in the course of, and for the purposes of, that business. Therefore, I do not think that this document is admissible."

and by Franki J in *Trade Practices Commission v TNT Management Pty Ltd* : [39]

> "In general, a statement of fact in a letter from A to B found in the files of B is not admissible as a business record of B merely because it was filed and kept by B. This is because statements in the letter are not made in the course of, or for the purposes of, B's business."

his Honour said: [40]

> "[47] Despite those two statements, I agree with the observations of the learned author of Cross that an outsider may make a representation "for the purposes" of a business even though separate from the business in question. And, indeed, Drummond J accepted as much in *Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1992) 42 FCR 595 at 598-599 . He doubted whether Franki J had truly meant what he said in the quotation above (noting that, a few lines later, Franki J may have accepted that a third party invoice might fall within s 7B(1)(b) of the Evidence Act 1905 (Cth)). In any event, if Franki J had said that, Drummond J thought it was wrong. He explained (at 599):
>
> > However, the question of admissibility of a document under s 7B [ie the predecessor to s 69] will depend in large part upon the nature of the document in question. There is a difference, it seems to me, between an invoice and a letter received by a business from an outsider. If the evidence shows that in the case of an invoice, for example, it was kept in a file of invoices sent by outsiders who have supplied goods and services to the business and that the invoice purports to record the supply of goods or services of a kind commonly used by the business in the course of its activities, that would, I think, be sufficient to satisfy s 7B(1)(b) [ie s 69(1)(b)]. Such a document could fairly be said to be made for the purposes of the recipient business although it was also made in the course of and for the purposes of the other business that supplied the goods or services listed in the invoice.
>
> [48] This approach seems, with respect, to have much to commend it. It is not unnatural to think of the statements contained in an invoice as being created by the entity issuing it not only for the purposes of its own business but also for the purposes of its intended recipient.
>
> [49] This is consistent with the approach taken in *Cross* and also with the decision of Evans J in *Tasmania v Lin* [2011] TASSC 54 at [27]-[29] ."

via

40. (2012) 207 FCR 448 at 460 [47]-[49] (Perram J); [2012] FCA 1355 ; followed by Kerr J in Jadwan Pty Ltd v Rae & Partners (A Firm) (No 3) 2017 FCA 1045 at [25].

Maaz v Fullerton Property Pty Ltd [2021] NSWCA 79 -

Maaz v Fullerton Property Pty Ltd [2021] NSWCA 79 -
Commonwealth Director of Public Prosecutions v The Country Care Group Pty Ltd (Ruling No 8) [2021] FCA 365 (15 April 2021) (Bromwich J)

39. The primary submission advanced by all three accused was that the representations within the file note could not be attributed to any particular person. A number of authorities considering this issue, both in civil and criminal contexts, make it clear that under s 69 it is not necessarily required that the person who made the representation or who supplied the information upon which it was based be specifically identified: see, e.g., ***Lin*** *v Tasmania* [2012] TASCCA 9 at [87] (noting that this decision was overturned on appeal, but not for any reason relating to the admissibility of evidence); and ***Lee*** *v Minister for Immigration & Multicultural Affairs* [2002] FCA 303 at [22] . *Lin* and *Lee* were generally endorsed in *Calleja* at [89] and [108] r espectively. To the extent that it was submitted it was unclear whether representatives from Country Care or the DVA made the representations recorded in MFI-P, I also note that the rule in s 69 has been found to go as far as to extending to records and statements by other organisations as being evidence admissible as a business record: *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* [2012] FCA 1355; 207 FCR 448 at [47]-[50] . It is also instructive to have regard to the careful approach and analysis by Robson J in *Australia n Securities and Investments Commission v Flugge (No 10)* [2015] VSC 690 of a broadly similar meeting note, especially at [29(5)] and [45]-[52] .

Yalda v Consulate General of the Republic of Iraq, Sydney [2021] FCCA 499 (19 March 2021) (Manousaridis J)

27. In *Australian Competition and Consumer Commission v Air New Zealand Ltd* , Perram J held that " *authenticity is not a ground of admissibility under the*" Evidence Act ; the question of authenticity does not "*directly arise for the tribunal of law's consideration at the level of objections to evidence*"; and that, if "*there is raised a question about the authenticity of a document . . . then there will be an issue in the proceedings about its authenticity*". [14] It is true that, unlike the *Federa l Rules of Evidence 1975* (US), the Evidence Act does not contain a provision that in terms requires that a document or thing be authenticated before it can be admitted into evidence. But s 57(1) and s 58(1) of the Evidence Act use the language of authentication; and a court must consider questions of the authenticity of a document if the opponent claims the document is not what the proponent claims it to be; and that objection is determined by the court considering, not whether the document is in fact that which the proponent claims it to be, but whether it is open to find that the document is what the proponent claims it to be. If the court answers that question in the affirmative, the document is admitted into evidence, but the question of the document's authenticity remains open and is to be decided when the court considers all of the evidence before it makes its findings of fact.

via

[14] *Australian Competition and Consumer Commission v Air New Zealand Ltd* [2012] FCA 1355, at [92]

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document is not what the proponent claims it to be; and that objection is determined by the court considering, not whether the document is in fact that which the proponent claims it to be, but whether it is open to find that the document is what the proponent claims it to be. If the court answers that question in the affirmative, the document is admitted into evidence, but the question of the document's authenticity remains open and is to be decided when the court considers all of the evidence before it makes its findings of fact.

Gregg v R [2020] NSWCCA 245 (30 September 2020) (Bathurst CJ at [1]; Hoeben CJ at CL at [712]; Leeming JA at [713])

354. It was also submitted the trial judge was incorrect in holding that the document did not fall within s 69 of the *Evidence Act* . It was submitted that the assertion itself proved that the author had personal knowledge of the fact that someone had made a statement that centralised procurement should be considered. It was also contended that the trial judge erred in applying *Rusu* to the effect that there was a need to prove that a tendered document was what it purported to be and that could not be done by merely tendering the document in the absence of any evidence establishing what the document was. The submissions pointed to the fact that *Rusu* had been held to be plainly wrong: see *Australian Competition and Consumer Commission v Air New Zealand (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 . It was also submitted that an examination of the document clearly established its authenticity.

Gregg v R [2020] NSWCCA 245 (30 September 2020) (Bathurst CJ at [1]; Hoeben CJ at CL at [712]; Leeming JA at [713])

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. Bryson J, who did not have the benefit of argument on the question, was not referred to s 183 of the *Evidence Act* .

Gregg v R [2020] NSWCCA 245 (30 September 2020) (Bathurst CJ at [1]; Hoeben CJ at CL at [712]; Leeming JA at [713])

362. The first question is to determine the relevance of the document to the facts in issue: *Australian Competition and Consumer Commission v Air New Zealand (No 1)* at [92] (5), approved by the Full Court of the Federal Court in *Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; [2018] FCAFC 212 at [64] .

Gregg v R [2020] NSWCCA 245 (30 September 2020) (Bathurst CJ at [1]; Hoeben CJ at CL at [712]; Leeming JA at [713])

Australian Competition *and Consumer Commission v Air New Zealand (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 ; *Capital Securities XV Pty Ltd v Calleja* [2018] NSWCA 26, referred to.

Gregg v R [2020] NSWCCA 245 (30 September 2020) (Bathurst CJ at [1]; Hoeben CJ at CL at [712]; Leeming JA at [713])

714. First, I agree that *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309; [1999] NSWSC 539 should be regarded as bad in law, insofar as it holds that inferences as to the authenticity of a document cannot be drawn from its form and contents. The correctness of this aspect of *Rusu* was doubted by Gyles and Weinberg JJ in *O'Meara v Dominican Fathers* [2003] ACTCA 24; 153 ACTR 1 at [85] and by Basten and Gleeson JJA and me in *Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja* [2018] NSWCA 26 at [99]-[102] . It was regarded as plainly wrong by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 at [99]-[104] , by White J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181; [2015] FCA 342 at [94] , and, at the appellate level, in *Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; [2018] FCAFC 212 at [64]-[65] (Stewart J, Greenwood and Logan JJ agreeing). There have also been appellate statements that it is not necessary to determine the correctness of *Rusu* : see for example *Jones Lang LaSalle (NSW) Pty Ltd v Taouk* [2012] NSWCA 342 at [34] . Such statements also carry weight. Curial paralipsis – pointedly reminding the reader of what a decision is *not* authority for – is seldom accidental, and serves the useful purpose of flagging the possibility of a future change in the law.

Shafston Avenue Construction Pty Ltd, in the matter of CRCG-Rimfire Pty Ltd (subject to deed of company arrangement) v McCann (No 2) [2020] FCA 1444 (01 September 2020) (Reeves J)

8. It has been held that the expression "asserted fact" which appears several times in the hearsay rule exceptions mentioned above extends to include opinion (see *Ringrow Pty Ltd v BP Australia Ltd* (2003) 130 FCR 569; [2003] FCA 933 at [18] per Hely J, *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 at [6 3]-[65] per Perram J and *Jadwan Pty Ltd v Rae & Partners (A Firm) (No 3)* [2017] FCA 1045).

Motorola Solutions, Inc. v Hytera Communications Corporation Ltd (Business Records) [2020] FCA 1195 (19 August 2020) (Perram J)

15. I accept proposition (a) for the reasons I gave in *Australian Competition and Consumer Commissioner v Air New Zealand Limited (No 1)* [2012] FCA 1355; 207 FCR 448 at 462-463 [62]-[64] .

Weatherbeeta Ltd v Hammersmith Nominees Pty Ltd [2019] VSC 559 -
Rodney Jane Racing Pty Ltd v Monster Energy Company [2019] FCA 923 (21 June 2019) (O'Bryan J)

183. The first element is whether the Facebook and Instagram posts sought to be adduced in evidence are or form part of the records belonging to or kept by an entity in the course of, or for the purposes of a business, or at any time were or formed part of such a record. In a business context, the posts are communications by the business concerned to persons who follow the Facebook or Instagram account of the business. I infer that such followers would be past or potential future customers of the business. Taking the Sin City Rims Facebook posts as an example (described above), the posts are not a direct record of a business activity; drawing necessary inferences in favour of MEC, the posts are a form of promotion, publicising the sale of "Monster Energy" wheels. While email communications of a business have been found to be business records (see *ACCC v Air New Zealand Limited (No 1)* (2012) 207 FCR 448 at [58] per Perram J and the cases there cited), the Sin City Rims Facebook posts are of a different nature in that they are not communications to specific persons but are published more broadly to "followers". Nevertheless, applying the statutory language, it seems to me that the Sin City Rims Facebook posts are documents that form part of the records belonging to or kept by Sin City Rims in the course of or for the purposes of its business. The posts are a record of the communications made by the business to its followers, and are analogous to emails that might be sent to a customer distribution list.

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Quaker Chemical (Australasia) Pty Ltd v Fuchs Lubricants (Australasia) Pty Ltd [2019] FCA 370 (18 March 2019) (Robertson J)

14. Perram J in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* [2012] FCA 1355; 207 FCR 448 at [89]-[107] held that the approach of Bryson J was "plainly wrong". Perram J, at [92], having said that authenticity is not a ground of admissibility and does not directly arise for the tribunal of law's consideration at the level of objections to evidence, went on to say that the tribunal of law does not 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 deciding the relevance of a document (which may involve asking whether the tribunal of fact can reasonably infer that the document, otherwise relevant, is authentic), the tribunal of law is explicitly authorised by s 58(1) of the *Evidence Act* to ask what inferences as to authenticity are available from the document itself.

Kinnersly v Johnson [2018] VSC 752 (05 December 2018) (Cavanough J)

40. The appellant relies very heavily on the suggested precedential value of *Hannon v Norman* [51] and *McWhirter*. [52] Hence it is appropriate for me to deal with those cases and the other cases in the same line at this stage, [53] before coming to the principal task of analysing and construing the relevant provisions of the CPA itself.

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[53] In doing so, I am conscious of the cases cited above that were referred to by the respondent in relation to the circumstances in which a single judge might decline to follow the decisions of another single judge of the same Court. I have also had regard to the following cases which are to much the same effect: *Engebreston v Bartlett* [2007] VSC 163, [63] (Bell J); *Knight v Money* [2015] VSC 105, [53] (Cavanough J); *ACCC v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448, 469-471 [99]-[104] (Perram J) . See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Le xisNexis Butterworths, 8th ed, 2014) 10-13 [1.9].

Commissioner of Taxation v Cassaniti [2018] FCAFC 212 (30 November 2018) (Greenwood, Logan, Steward JJ)

64. In *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* (2012) 207 FCR 448, Perram J at [92] said:

> It is useful to begin with some basic propositions:
>
> 1. There is no provision of the [Evidence Act (the "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, i.e., 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.

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4. Since authenticity is not a ground of admissibility under the 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 0if 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 :

> 58 Inferences as to relevance
>
> (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.

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 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

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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.

Saroj v Minister for Immigration [2018] FCCA 3134 (05 November 2018) (Dowdy J)

14. Additional evidence establishing that the notification of refusal letter and Decision Record were forwarded by email on 1 February 2016 is to be found in the affidavit of Nicola Johnson, sworn on 8 June 2017, which attaches business records of the Department of the Minister which I infer and consider to be authentic (see: s. 58 of the *Evidence Act 1995* (Cth) and *Australian Competition and Consumer Commission v Air New Zealand* (2012) 207 FCR 448 per Perram J and *DZE17 v Minister for Immigration and Border Protection* [2018] FCA 1521 per Allsop CJ (***DZE17***)).

Aqa18 v Minister for Home Affairs [2018] FCCA 3059 (19 October 2018) (Dowdy J)

11. Further evidence establishing that the notification of refusal letter and Decision Record were forwarded by email on 23 March 2017 is to be found in the affidavit of Katherine Louise Evans, affirmed on 4 September 2018, which attaches business records of the Department of the Minister which I infer and consider to be authentic (see: s. 58 of the *Evidence Act 1995* (Cth) and *Australian Competition and Consumer Commission v AIR New Zealand* (2012) 207 FCR 448 per Perram J and *DZE17 v Minister for Immigration and Border Protection* [2018] FCA 1521 per Allsop CJ (***DZE17***)).

Aqa18 v Minister for Home Affairs [2018] FCCA 3059 (19 October 2018) (Dowdy J)
Australian Competition and Consumer Commission v AIR New Zealand (2012) 207 FCR 448
AWA15 v Minister for Immigration

Antov v Bokan [2018] NSWSC 1474 (03 October 2018) (Ward CJ in Eq)

267. After hearing submissions in relation to the availability of the original document or documents, and having drawn the parties' attention to the decision of Perram J in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 (*ACCC v Air New Zealand*), in which there was criticism of the approach followed by Bryson J in *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309; [1999] NSWSC 539 (*Rusu*) , leave was sought and obtained by Counsel for Lidija to address written submissions on that point and I deferred ruling on those parts of Vase's affidavit of 2 November 2016 ([42] and [59]) which annexed the critical documents. (I also at that time deferred ruling on the affidavits of Ms Kostovska, Mr Danilov and Mr Dabeski – in respect of all of which there were issues as to the manner in which they had been executed and/or attested.)

Antov v Bokan [2018] NSWSC 1474 (03 October 2018) (Ward CJ in Eq)

336. The Court of Appeal has expressly reserved its position as to the correctness of *Rusu* on several occasions; most recently, in *Calleja* , part of which has already been extracted above at [319] . There, Leeming JA (with whom Basten and Gleeson JJA agreed), said at [99]-[102]:

In support of her objection to the tender of the 12 pages of file notes, Ms Obrart relied upon a single decision, *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309; [1999] NSWSC 539. Neither party made submissions on the decision. In it, Bryson J rejected the tender of documents apparently obtained on subpoena from the Advance Bank and tendered as business records on the basis that:

> "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": at [28].

In making that ruling, Bryson J lacked the benefit of argument. All of the defendants who opposed the tender were unrepresented; further it seems that none of them spoke English, there was no skilled interpreter and the defendant most directly affected by the tender, the second defendant, was not present at the hearing because, so the Court was told, he was in prison: see at [12]. His Honour does not appear to have been taken to s 183 , nor do his reasons mention that section. The absence of argument in *Rusu* was emphasised by V Bell, "Documentary Evidence under the *Evidence Act 1995* (NSW) " (2000) 5 *The Judicial Review* 1 at 3.

Regrettably, the primary judge was not referred to s 183 , nor the authorities on that section referred to above, nor to the authorities which have either doubted this aspect of the reasoning in *Rusu* or indeed considered it to be plainly wrong. Without being exhaustive, in *Australian Competition and Consumer Commission v Air New Zealand (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 at [94]-[104] , Perram J held that the decision was plainly wrong and declined to follow it. His Honour's reasons were approved by White J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181; [2015] FCA 342 at [93]-[94] . They have also been endorsed in N Williams et al, *Uniform Evidence in Australia* (LexisNexis Butterworths Australia, 2015), p 312. On the other hand, parts of the reasoning in *Rusu* were endorsed in *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25 at [46] and in J D Heydon, *Cross on Evidence* (LexisNexis Butterworths Australia, 11th ed 2017), pp 1448, 1516. See also the analysis by Brereton J in *Re Wollongong Coal Ltd (formerly known as Gujarat NRE Coking Coal Ltd)* [2014] NSWSC 1952 at [7]-[15] . Most recently, this Court noted that aspects of *Rusu* are controversial, without deciding its correctness, in *Bobol as v Waverley Council (No 4)* [2015] NSWCA 337 at [42] .

This Court heard no submissions on the correctness of *Rusu* and it is sufficient to note the foregoing, and to observe that it is regrettable that her Honour was not given the assistance to which she was entitled on this issue.

Antov v Bokan [2018] NSWSC 1474 (03 October 2018) (Ward CJ in Eq)

319. At [101] in *Calleja* , Leeming JA said:

> Regrettably, the primary judge was not referred to s 183 , nor the authorities on that section referred to above, nor to the authorities which have either doubted this aspect of the reasoning in *Rusu* or indeed considered it to be plainly wrong. Without being exhaustive, in *Australian Competition and Consumer Commission v Air New Zealand (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 at [94]-[104] , Perram J held that the decision was plainly wrong and declined to follow it. His Honour's reasons were approved by White J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181; [2015] FCA 342 at [93]-[94] . They have also been endorsed in N Williams et al, *Uniform Evidence in Australia* (LexisNexis Butterworths Australia, 2015), p 312. On the other hand, parts of the reasoning in *Rusu* were endorsed in *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25 at [46] and in J D Heydon, *Cross on Evidence* (LexisNexis Butterworths Australia, 11th ed 2017), pp 1448, 1516. See also the analysis by Brereton J in *Re Wollongong Coal Ltd (formerly known as*

Gujarat NRE Coking Coal Ltd) [2014] NSWSC 1952 at [7]-[15] . Most recently, this Court noted that aspects of *Rusu* are controversial, without deciding its correctness, in *Bobol as v Waverley Council (No 4)* [2015] NSWCA 337 at [42] .

Roo-Roofing Pty Ltd v The Commonwealth (Ruling No 5) [2018] VSC 338 (21 June 2018) (John Dixon J)

43. I am satisfied that the representations in the document were made or recorded in the document in the course of the business of the ESO and for the purposes of that business. [11] It might reasonably be supposed that insulation session was a meeting that persons attended, and I consider that inference is open from the content of the document. It might, for the same reason, reasonably be supposed that the author of the document attended the meeting. Although this person is unidentified, the cases show that there is no need to identify the person who made the record or the person with the requisite personal knowledge. [12] Sectio n 69(5) provides that a person is taken to have had personal knowledge of a fact if that person' s knowledge was based on what they saw heard or otherwise perceived. In this sense, the issue of the personal knowledge of the author is distinguished from the issue of the personal knowledge of the ambulance officer in *Lithgow City Council v Jackson*. [13] In other respects, the content of the document can be traced as drawn from other business records of ESO that the author may reasonably be supposed to have seen. The letter to Australian Standards represents the views of the ESO and it appears that the author of the document in question had reproduced the contents of that letter by accessing other business records of the ESO.

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[11] *Air New Zealand* (2012) 207 FCR 448, 460 [50] .

Roo-Roofing Pty Ltd v The Commonwealth (Ruling No 5) [2018] VSC 338 -
Roo-Roofing Pty Ltd v The Commonwealth (Ruling No 5) [2018] VSC 338 -
Multisteps Pty Ltd v Specialty Packaging Aust Pty Ltd [2018] FCA 587 (02 May 2018) (Jagot J)

125. The address shown in this document, to the extent it refers to 153 North Road, Woodridge QLD 4114, reflects the registered address and principal place of business of the first respondent as shown on a company search dated 18 October 2016. Accordingly, this document (which must be inferred from its face to have been prepared and uploaded by a person with the first respondent's authority) also constitutes an admission by or on behalf of the first respondent that its general manager for Australia as at 18 October 2016 was Mr Ainslie (see ss 58, 81(1), 87(1), 88 and 183 of the Evidence Act , as well as *Air New Zealand* and *Ca lleja* , as referred to above). It is not, however, an admission by Mr Ainslie to that effect. This does not mean the evidence is irrelevant as against Mr Ainslie. The first respondent's admission is itself probative evidence of Mr Ainslie's role within the first respondent as at 18 October 2016.

Prysmian Cavi E Sistemi SRL v Australian Competition and Consumer Commission [2018] FCAFC 30 -
Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja [2018] NSWCA 26 (26 February 2018) (Basten, Gleeson and Leeming JJA)

101. Regrettably, the primary judge was not referred to s 183 , nor the authorities on that section referred to above, nor to the authorities which have either doubted this aspect of the reasoning in *Rusu* or indeed considered it to be plainly wrong. Without being exhaustive, in *A ustralian Competition and Consumer Commission v Air New Zealand (No 1)* (2012) 207 FCR 448; [20 12] FCA 1355 at [94]-[104] , Perram J held that the decision was plainly wrong and declined to follow it. His Honour's reasons were approved by White J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181; [2015] FCA 342 at [93] -[94] . They have also been endorsed in N Williams et al, *Uniform Evidence in Australia* (LexisN exis Butterworths Australia, 2015), p 312. On the other hand, parts of the reasoning in *Rusu* wer

e endorsed in *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25 at [46] and in J D Heydon, *Cross on Evidence* (LexisNexis Butterworths Australia, 11th ed 2017), pp 1448, 1516. See also the analysis by Brereton J in *Re Wollongong Coal Ltd (formerly known as Gujarat NRE Coking Coal Ltd)* [2014] NSWSC 1952 at [7]-[15] . Most recently, this Court noted that aspects of *Rusu* are controversial, without deciding its correctness, in *Bobolas v Waverley Council (No 4)* [2015] NSWCA 337 at [42] .

Barrett v TCN Channel Nine Pty Ltd [2017] NSWCA 304 (28 November 2017) (McColl, Simpson and Payne JJA)

Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) (2012) 207 FCR 448 ; [2012] FCA 1355 Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485 ; [1993] HCA 15 Barrett v TCN Channel Nine Pty Ltd [2016] NSWSC 1663 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 ; [1996] HCA 25 Bull v Attorney-General for New South Wales (1913) 17 CLR 370 ; [1913] HCA 60 CAL No 14 Pty Ltd v Motor Accidents Insurance Board (2009) 239 CLR 390 ; [2009] HCA 47 Carey v Australian Broadcasting Corporation (2012) 84 NSWLR 90 ; [2012] NSWCA 176 Casley v Australian Broadcasting Corporation [2013] VSC 251 Casley v Australian Broadcasting Corporation (2013) 39 VR 526 ; [2013] VSCA 182 Cave v Robinson Jarvis & Rolf [2002] 2 All ER 641 ; [2002] UKHL 18 CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 ; [1997] HCA 2 Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia (1981) 147 CLR 297 ; [1981] HCA 26 Davis, In re (1947) 75 CLR 409 ; [1947] HCA 53 Director of Public Prosecutions v George (2008) 102 SASR 246 ; [2008] SASC 330 Director of Public Prosecutions (Cth) v Thomas (2016) 315 FLR 31 ; [2016] VSCA 237 Donovan v Gwentoys Ltd [1990] 1 WLR 472 ; 1 All ER 1018 Fairfax Media Publications Pty Ltd v Kermode (2011) 81 NSWLR 157 ; [2011] NSWCA 174 Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89 ; [2007] HCA 22 Ghosh v Ninemsn Pty Ltd (2015) 90 NSWLR 595 ; [2015] NSWCA 334 Hall v Jones (1942) 42 SR (NSW) 203 Houda v State of New South Wales [2012] NSWSC 1036 IW v City of Perth (1997) 191 CLR 1 ; [1997] HCA 30 Jamieson v Chiropractic Board of Australia [2011] QCA 56 Johnston v Holland (No 2) [2017] VSC 597 M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 146 ; [2003] FCAFC 131 Macatangay v State of New South Wales (No 2) [2009] NSWCA 272 Metropolitan Coal Company of Sydney Ltd v Australian Coal and Shale Employees' Federation (1917) 24 CLR 85 ; [1917] HCA 64 Minister for Immigration and Border Protection v Kumar (2017) 91 ALJR 466 ; [2017] HCA 11 Noonan v MacLennan [2010] 2 Qd R 537 ; [2010] QCA 50 O'Sullivan v Farrer (1989) 168 CLR 210 ; [1989] HCA 61 Oshlack v Richmond River Council (1998) 193 CLR 72 ; [1998] HCA 11 Pingel v Toowoomba Newspapers Pty Ltd [2010] QCA 175 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 ; [1998] HCA 28 Public Transport Commission of New South Wales v J Murray-More (NSW) Pty Ltd (1975) 132 CLR 336 ; [1975] HCA 28 Rayney v State of Western Australia (No 3) [2010] WASC 83 Riske v Oxley Insurance Brokers Pty Ltd (No 2) [2014] NSWSC 1611 Ritson v Gay & Lesbian Community Publishing Ltd [2012] NSWSC 483 Rouss, Re 116 NE 782 (1917) Saraswati v The Queen (1991) 172 CLR 1 ; [1991] HCA 21 Sola Optical Australia Pty Ltd v Mills (1987) 163 CLR 628 ; [1987] HCA 57 State of Queensland v O'Keefe [2016] QCA 135 State of Queensland v Stephenson (2006) 226 CLR 197 ; [2006] HCA 20 SZTAL v Minister for Immigration and Border Protection (2017) 91 ALJR 936 ; [2017] HCA 34 Western Australian Planning Commission v Southregal Pty Ltd (2017) 259 CLR 106 ; [2017] HCA 7 Zhao v Commissioner of the Australian Federal Police (2014) 43 VR 187 ; [2014] VSCA 137

Barrett v TCN Channel Nine Pty Ltd [2017] NSWCA 304 (28 November 2017) (McColl, Simpson and Payne JJA)

Cf Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) (2012) 207 FCR 448; [2012] FCA 1355 at [103] (Perram J) .

Barrett v TCN Channel Nine Pty Ltd [2017] NSWCA 304 (28 November 2017) (McColl, Simpson and Payne JJA)

73. Cf Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) (2012) 207 FCR 448; [2012] FCA 1355 (at [103]) per Perram J.

Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd [2017] FCA 1305 (10 November 2017) (Moshinsky J)

45. In *Roach v Page (No 27)* [2003] NSWSC 1046, Sperling J said at [11] : "The thinking behind the section is clear enough. Things recorded or communicated in the course of the business and constituting or concerning business activities are likely to be correct. There is good reason for the courts to afford to such records the same kind of reliability as those engaged in business operations customarily do." The word "kept" in s 69(1)(a) has been construed as meaning "retained or held": see *Australian Securities and Investments Commission v Rich* (2005) 216 ALR 320 at [190] . In relation to s 69(1)(b) , a representation may be made or recorded in a document for the purposes of a business, even though it is not made by an officer of the business: *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 at [45]-[50] . In relation to s 69(3) , it has been observed that it is an unusual use of language to refer to the "preparing" of a representation, but the intention is clear enough; the reference is to the person who prepared, formulated, shaped or framed the terms in which the representation was made; and this will typically, perhaps always, be or include the maker of the representation: *Australian Competition and Consumer Commission v Advanced Medical Institute Pty Ltd* (2005) 147 FCR 235 at [25] . Further, the person who "obtains" the representation is the person who seeks the representation or procures it to be made: *Australia n Competition and Consumer Commission v Advanced Medical Institute Pty Ltd* at [26]-[27] .

Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union (No 2) [2017] FCA 1191 (05 October 2017) (Middleton J)

78. In addition, the ACCC relied upon *R v Associated Northern Collieries* (1911) 14 CLR 387 ('***Associat ed Northern Collieries***') and *ACCC v Air New Zealand Limited (No 1)* (2012) 207 FCR 448 ('***Air New Zealand***').

Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union (No 2) [2017] FCA 1191 -
Jadwan Pty Ltd v Rae & Partners (A Firm) (No 3) [2017] FCA 1045 (19 July 2017) (Kerr J)

25. The more specific issue was considered by Perram J in *Australian Competition and Consumer Commission v Air New Zealand and Another (No. 1)* (2012) 207 FCR 448 (**Air New Zealand**). His Honour held, at paragraphs [47] to [50] that it was consistent with the scheme of the Act that a statement from Business A found in the records of Business B can be accepted to form part of Business B's records. I should follow that decision unless I regard it as clearly wrong. I do not regard his Honour to have been in error and I respectfully adopt both his Honour's reasoning and his conclusion.

SZUYP v Minister for Immigration [2017] FCCA 860 (05 May 2017) (Judge Nicholls)

17. The Minister accepts that Mr Pinder is not an "authorised person" within the meaning of s. 17 1(3) of the EA . He submits that it is the contents of the documents themselves that give rise to the "obvious" inference that they are the department's records, pursuant to

s. 58(1) of the EA . He relies on *Australian Competition and Consumer Commission v Air New Zealand Limited (No.1)* [2012] FCA 1355; (2012) 207 FCR 448 ("*ACCC v ANZ*") at [92] to [107] for the proposition that "there is no doubt" that s. 58 of the Act applies to determining the "authenticity" of the documents ([15] of the Minister's written submissions of 21 March 2017).

SZUYP v Minister for Immigration [2017] FCCA 860 (05 May 2017) (Judge Nicholls)

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23. While a contrary view to that put by the Minister was expressed in *NAB v Rusu* [1999] NSWSC 539; (1999) 47 NSWLR 309 ("*Rusu*"), in *ACCC v ANZ* Justice Perram reviewed relevant authorities and found *Rusu* was "plainly wrong" (*ACCC v ANZ* at [100]). His Honour held (see [94] – [101]), that a Court may draw "reasonable inferences" from the contents of such documents for the purpose of determining their authenticity (see also *DPP v Pinn* [2015] NSWSC 1684 at [42] – [46]).

SZUYP v Minister for Immigration [2017] FCCA 860 (05 May 2017) (Judge Nicholls)

23. While a contrary view to that put by the Minister was expressed in *NAB v Rusu* [1999] NSWSC 539; (1999) 47 NSWLR 309 ("*Rusu*"), in *ACCC v ANZ* Justice Perram reviewed relevant authorities and found *Rusu* was "plainly wrong" (*ACCC v ANZ* at [100]). His Honour held (see [94] – [101]), that a Court may draw "reasonable inferences" from the contents of such documents for the purpose of determining their authenticity (see also *DPP v Pinn* [2015] NSWSC 1684 at [42] – [46]).

SZUYP v Minister for Immigration [2017] FCCA 860 -
Brentwood Village Limited (in liq) v Terrigal Grosvenor Lodge Pty Limited (No 3) [2016] FCA 825 (20 July 2016) (Markovic J)

6. Authenticity of itself is not a basis for an objection to the tender of evidence. The requirement for the admissibility of evidence under the *Evidence Act 1995* (Cth) (**the Act**) is relevance. That is, whether a document is relevant to a fact in issue pursuant to s 55 of the Act . Section 58 sets out what the Court may examine in determining this question: see *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 (Perram J) at [92] to [104] .

Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi S.R.L. (No 12) [2016] FCA 822 -
Nichia Corporation v Arrow Electronics Australia Pty Ltd (No 3) [2016] FCA 466 (05 May 2016) (Yates J)

31. I would not, therefore, reject Document 1 and the Menden letter on discretionary grounds, although the weight to be attached to them as probative of Representations 1A and 1B is, of course, another matter, which will fall to be assessed in light of all the evidence. Therefore, I would admit Document 1 and the Menden letter provided that an evidentiary basis is established at trial for finding that the documents are what they purport to be: *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309; [1999] NSWSC 539 at [17] and [27] ; *Australian Securities and Investments Commission v Rich* (2005) 216 ALR 320; [2005] NSWSC 417 at [116]-[121] ; see also *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 at [89]-[107] .

Traffic Calming Australia Pty Ltd v CTS Creative Traffic Solutions [2015] VSC 741 (17 December 2015) (Almond J)

102. In some cases, it has been held sufficient to infer from the content of the document on its face whether it is authentic and relevant. As J Forrest J concluded in *Matthews v SPI Electricity Pty Ltd & ors (Ruling 35)* (following *Australian Competition and Consumer Commissioner v Air New Zealand (No 1)*), [66] a combination of s 55 and s 58 [67] of the *Evidence Act* 'enables a court to examine the document itself and then determine whether it is authentic – absent other evidence'. [68]

via

[66] [2012] FCA 1355 ('*Air New Zealand*')).

Traffic Calming Australia Pty Ltd v CTS Creative Traffic Solutions [2015] VSC 741 (17 December 2015) (Almond J)

105. I prefer the view taken by J Forrest J in *Matthews* following Perram J in *Air New Zealand* . Secti on 58 does not mandate any additional requirement and s 58(2) makes clear that the Court is not limited in the matters from which inferences may properly be drawn. The focus in this case is not solely on the pro forma invoices but includes other matters arising in the evidence from which inferences may properly be drawn. These matters raise many questions about the authenticity of the things which are printed on the face of the documents.

Australian Securities and Investments Commission v Flugge (No 10) [2015] VSC 690 (03 December 2015) (Robson J)

246. *ASIC v Rich* was decided prior to *ACCC v Air New Zealand* . [49] The references in *Rich* to 'the requirement to authenticate a document' should be understood by reference to the discussion of authenticity and relevance in *ACCC v Air New Zealand* — namely, that if authenticity is contested, the document will still be relevant as long as there is material from which its authenticity may reasonably be inferred.

Australian Securities and Investments Commission v Flugge (No 10) [2015] VSC 690 (03 December 2015) (Robson J)

246. *ASIC v Rich* was decided prior to *ACCC v Air New Zealand* . [49] The references in *Rich* to 'the requirement to authenticate a document' should be understood by reference to the discussion of authenticity and relevance in *ACCC v Air New Zealand* — namely, that if authenticity is contested, the document will still be relevant as long as there is material from which its authenticity may reasonably be inferred.

via

[49] *ACCC v Air New Zealand* (2012) 207 FCR 448 .

Australian Securities and Investments Commission v Flugge (No 10) [2015] VSC 690 -
Australian Securities and Investments Commission v Flugge (No 10) [2015] VSC 690 -
Australian Securities and Investments Commission v Flugge (No 10) [2015] VSC 690 -
Australian Competition and Consumer Commission v Yazaki Corporation (No 2) [2015] FCA 1304 (24 November 2015) (Besanko J)
Australian Competition and Consumer Commission v Air New Zealand and Another (No 1) [2012] FCA 1355; (2012) 207 FCR 448
Australian Competition and Consumer Commission v Air New Zealand Limited

Australian Competition and Consumer Commission v Yazaki Corporation (No 2) [2015] FCA 1304 (24 November 2015) (Besanko J)

58. French CJ, Heydon and Bell JJ also referred with approval to the following passage cited by Wigmore (Wigmore JH, *Evidence in Trials at Common Law* (Chadbourn rev 1978) Vol 7 p 13) from *Sydleman v Beckwith* (1875) 43 Conn 9 at 12-14:

> [O]n the ground of necessity, where the subject of the inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness bases his opinion are so numerous and so evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time.

(See *Australian Competition and Consumer Commission v Air New Zealand and Another (No 1)* [2012] FCA 1355; (2012) 207 FCR 448 at 464 [71]-[72] per Perram J .)

DPP v Pinn [2015] NSWSC 1684 (12 November 2015) (Adamson J)

Australian Competition and Consumer Commission v Air New Zealand (No. 1) (2012) 207 FCR 448
Australian Securities and Investments Commission v Rich [2005] NSWSC 417
Mir Bros Developments Pty Ltd v Atlantic Constructions Pty Ltd (1985) 1 NSWLR 491
National Australia Bank v Rusu [1999] NSWSC 539; 47 NSWLR 309

DPP v Pinn [2015] NSWSC 1684 (12 November 2015) (Adamson J)

28. The Magistrate noted the prosecutor's reliance on: Constable McCarron's evidence of the IAVO and how he had obtained it from the Court via the police intranet; s 144(1)(b) of the *Evidence Act* in relation to the bench sheet; and s 183 of the *Evidence Act* . Her Honour also referred to *Australian Competition and Consumer Commission v Air New Zealand (No. 1)* (2012) 207 FCR 448 (*ACCC v Air New Zealand (No. 1)*) and *Australian Securities and Investments Commission v Rich* [2005] NSWSC 417 (*ASIC v Rich*), to which she had been referred by the prosecution.

Asden Developments Pty Ltd (in liq) v Dinoris (No 2) [2015] FCA 1025 (08 September 2015) (Reeves J)

9. This fact is not admitted by the respondents in their amended defence and, in submissions, Mr Erskine did not seek to challenge Mr Martin's submission that it is a live issue to which this representation may be relevant. I therefore accept Mr Martin's submission that the representation in the invoice is relevant to that issue. I also accept Mr Martin's submission that the business referred to in s 69(1)(a) of the Evidence Act is one and the same business as that referred to in s 69(1)(b) : see *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448; [2012] FCA 1355 (*Air New Zealand*) at [44] per Perram J.

Asden Developments Pty Ltd (in liq) v Dinoris (No 2) [2015] FCA 1025 -
Murko v Greenfields Narellan Holdings trading as Narellan Town Centre [2015] NSWDC 132 (25 June 2015) (Gibson DCJ)

29. My rulings are based on an approach of caution. *Rusu* is a controversial decisions, and one which has received almost no appellate consideration. The only appellate decision to refer to *Rusu* since the enactment of the *Civil Procedure Act* 2005 (NSW) is *Trimcoll Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWCA 307 where Basten JA (at [30]) notes the three requirements of "authenticity, identity and admissibility", citing *Rusu* without comment. With the passage of time, and the enactment of ss 56-62 *Civil Procedure Act* 2005 (NSW) , the correctness of Bryson J's approach in *Rusu* has been questioned, as Schmidt J noted in *Attorney-General (NSW) v Markisic* [2014] NSWSC 1596 at [106]-[108] :

> "[106] It should also be noted, however, that the correctness of Bryson J's approach in *Rusu* has since been questioned. In *the Matter of Maiden Civil Pty Ltd* [2012] NSWSC 1618, Brereton J considered the decision and the cases which later considered it, concluding at [23] :
>
> > "As in other cases in which a *Rusu* objection has recently been taken before me, so in this, Needham J's judgment in *Marra Developments* has been in the back of my mind, and I have used this opportunity to consult it more fully in the light of *Rusu* . In my view, the position shortly stated is, first, that the mere production of a document cannot authenticate it; secondly, *Marra* establishes, although *Rusu* might contradict, that production on subpoena from an identified source might suffice to show that it is produced from the custody of the entity whose business it is, which would facilitate an inference that it was a business record; and thirdly, *Rusu* should not to be taken to limit the way in which authenticity of a document can be proven. For my part, I would respectfully doubt whether production on subpoena by the entity whose business the document is alleged to be a record of would always be insufficient to found the requisite inference; however, *Rusu*

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has been endorsed, subject to the minor qualification of the words, "save in limited circumstances" in the Court of Appeal and by Austin J in this Division, and on that basis, I should follow it."

[107] In this case those observations apply to those of the disputed documents obtained either from court files on Ms Kavanagh's request and those obtained from Crown Solicitor's files.

[108] In *Australian Competition and Consumer Commission v Air New Zealand* [2012] FCA 1355; (2012) 207 FCR 448 , Perram J also considered the authorities which had questioned *Rusu* and declined to follow it, taking the view that its approval in *Daw v Toyworld (NSW) Pty Ltd* was obiter (see at [92]–[104]). His Honour there discussed the distinction between admissibility of evidence, a question of law and authenticity of documents, a question of fact. He considered that a document the authenticity of which was in issue could be relevant and admissible under ss 55 and 56 of the *Evidence Act* , with its authenticity being a question of fact in issue which had to be determined on all of the evidence in the proceedings. His Honour gave examples of such cases, including forgery prosecutions and contests over whether a signature on a Will was genuine."

Murko v Greenfields Narellan Holdings trading as Narellan Town Centre [2015] NSWDC 132 (25 June 2015) (Gibson DCJ)

24. The defendants were under an obligation to produce the documents sought under subpoena, namely the reports of the persons who attended for the purpose of noting down the plaintiff's details and the reports that they prepared. Does that mean that, by production of the documents, they waive objections to authenticity? Is authenticity in fact a prerequisite for admissibility of a document (*ACCC v Air New Zealand Ltd (No 2)* [2012] FCA 1355 at [92]-[93])? If *Rusu* is applied (and I accept, for the purpose of argument, the submission that these documents are not business records as they were prepared in anticipation of litigation), can the court dispense with the requirement that these witnesses be called if there is something more than mere tender of the documents to show their authenticity (*ASIC v Rich* (2005) 216 ALR 320 at [119])?

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) [2015] FCA 342 (14 April 2015) (White J)

Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1) [2012] FCA 1355; (2012) 207 FCR 448

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 2)

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) [2015] FCA 342 -
El-Haddad v The Queen [2015] NSWCCA 10 -
Attorney General in and for the State of New South Wales v Markisic [2014] NSWSC 1596 (13 November 2014) (Schmidt J)

108. In *Australian Competition and Consumer Commission v Air New Zealand* [2012] FCA 1355; (2012) 207 FCR 448 , Perram J also considered the authorities which had questioned *Rusu* and declined to follow it, taking the view that its approval in *Daw v Toyworld (NSW) Pty Ltd* was obiter (see at [92] - [104]). His Honour there discussed the distinction between admissibility of evidence, a question of law and authenticity of documents, a question of fact. He considered that a document the authenticity of which was in issue could be relevant and admissible under s 55 and s 56 of the *Evidence Act* , with its authenticity being a question of fact in issue which had to be determined on all of the evidence in the proceedings. His Honour gave examples of such cases, including forgery prosecutions and contests over whether a signature on a Will was genuine.

Australian Competition and Consumer Commission v Air New Zealand Limited [2014] FCA 1157 -

In the matter of Wollongong Coal Limited (formerly known as Gujarat NRE Coking Coal Limited) [2014] NSWSC 1952 (05 September 2014) (Brereton J)

12. I should add that *Rusu* has since not been followed in the Federal Court by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* [2012] FCA 1355 . His Honour identified a distinction between authenticity and relevance and pointed out that the test of admissibility was relevance, not authenticity, and indeed that in some cases it would be absence of authenticity that might make a document relevant. To that extent, I agree, but it will always depend on the purpose of the tender.

Investa Properties Pty Ltd v Nankervis (No 5) [2014] FCA 632 (16 June 2014) (Collier J)

6. Annexure CB54 is an email from the first respondent to the second respondent, referring to a State Government valuation for the relevant site and annexing a one page RP Data statement. On its face the email (which includes other communications in an email "trail") appears to have been sent on 13 June 2008. The first respondent's email address is given as being at Investa, during the time he was employed by Investa. In my view it is open to the Court to find that this email is a business record as defined by s 69 of the Evidence Act , because it is a document which "is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business": *AquaMarine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 4)* [2011] FCA 578; *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* (2012) 207 FCR 448 . I am satisfied that the relevant "person, body or organisation" for the purposes of s 69 includes potentially Mr Nankervis, Mr Barclay or the applicants. To the extent that this document includes opinions, in respect of figures stated in the body of the email and the one page annexure, I am satisfied that that material forms part of the business communication and ought be admitted.

Advance Business Finance Pty Ltd v Zip Zap Pty Ltd [2014] FCCA 483 (14 March 2014) (Judge Burnett)

104. I note also Perram J's comment in *ACCC v Air NZ (No.1)* (2012) 207 FCR 448 at 455 , that " *one may prove an agreement or understanding between a group of people by proving behaviour of individual group members consistent with the existence of the agreement*."

Advance Business Finance Pty Ltd v Zip Zap Pty Ltd [2014] FCCA 483 (14 March 2014) (Judge Burnett)
ACCC v Air NZ (No.1) (2012) 207 FCR 448
ACCC v CFMEU

Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35) [2014] VSC 59 (27 February 2014) (J Forrest J)

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* .

Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35) [2014] VSC 59 (27 February 2014) (J Forrest J)

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]* [12] to the following effect:

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1. There is no provision of the 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 is said that the testator's signature is not genuine.

...

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.

It will follow that AirNZ's submission that "no inference as to authenticity can be drawn from the face of these documents" ought to be rejected. In determining a relevance objection, that is precisely what s 58(1) permits. [13]

via

[12] [2012] FCA 1355 ('*Air New Zealand*').

Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35) [2014] VSC 59 (27 February 2014) (J Forrest J)

39. In *Air New Zealand* Perram J stated:

> The question in each case will, therefore, be twofold. First, was the representation made or recorded in the document 'in the course of the business?' Secondly, was it made or recorded 'for the purpose of' the business? The first inquiry will largely devolve to an examination of the business involved. But the second will invite consideration of the purposes of the businesses which made the representation and here it should be accepted that one business may intend its documentary output to serve a record keeping function for other businesses. Invoices and receipts will be the paradigm examples. [27]

Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35) [2014] VSC 59 (27 February 2014) (J Forrest J)

32. Consistent with the decision in *Air New Zealand* , a combination of s 55 and s 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: [20]

(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;

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(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.

via

[20] *Air New Zealand* [2012] FCA 1355 , [92]-[93] .

Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35) [2014] VSC 59 (27 February 2014) (J Forrest J)

39. In *Air New Zealand* Perram J stated:

> The question in each case will, therefore, be twofold. First, was the representation made or recorded in the document 'in the course of the business?' Secondly, was it made or recorded 'for the purpose of' the business? The first inquiry will largely devolve to an examination of the business involved. But the second will invite consideration of the purposes of the businesses which made the representation and here it should be accepted that one business may intend its documentary output to serve a record keeping function for other businesses. Invoices and receipts will be the paradigm examples. [27]

via

[27] [2012] FCA 1355 , 460 [50] .

Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35) [2014] VSC 59 -
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Sydney Attractions Group Pty Ltd v Frederick Schulman [2013] NSWSC 858 -
Australian Competition and Consumer Commission v P. T. Garuda Indonesia Ltd (No 3) [2012] FCA 1481 (21 December 2012) (Perram J)

4. As to the second point, Mr Leeming SC submitted that it was too early to know whether prejudice within the meaning of s 136 had arisen. I do not agree. If the evidence is not limited in the fashion sought by the Commission, then it will be exposed to the risk that the case has been conducted *dehors* the pleadings and it may have to meet a case it presently has no procedural obligation to counter: see *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* [2012] FCA 1355 at [13]-[19] . This is sufficient prejudice for the purposes of s 136 .

Australian Competition and Consumer Commission v Air New Zealand Limited (No 5) [2012] FCA 1479 (21 December 2012) (Perram J)

3. I am prepared to infer that each airline kept a copy of each edition of its cargo magazine for archival purposes. Further, it is difficult to avoid the conclusion that, in keeping each copy of the magazine for that archival purpose, this was done for the purposes of its business. Those observations, which are I think irresistible as a matter of common sense, formed the basis of Mr Halley SC's submission that this was sufficient to constitute each magazine as a business record. In this regard, he reminded me of my own words in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 1)* [2012] FCA 1355 at [50] . There, in the

course of discussing whether one business' records could form part of the business records of another business (answer: yes), I said this:

> 50 The question in each case will, therefore, be twofold. *First*, was the representation made or recorded in the document 'in the course of the business'? *Secondly*, was it made or recorded 'for the purposes of' the business? The first inquiry will largely devolve to an examination of the business involved. But the second will invite consideration of the purposes of the business which made the representation and here it should be accepted that one business may intend its documentary output to serve a record keeping function for other businesses. Invoices and receipts will be the paradigm examples.

Australian Competition and Consumer Commission v Air New Zealand Limited (No 5) [2012] FCA 1479 -
Australian Competition and Consumer Commission v Air New Zealand Limited (No 6) [2012] FCA 1480 -
Australian Competition and Consumer Commission v Air New Zealand Limited (No 2) [2012] FCA 1363 -

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