

Week 7: Hearsay II (Exceptions)

There are three forms of hearsay exceptions:

- (a) Where evidence is used for an ulterior purpose;
- (b) First-hand hearsay exception;
- (c) Section 69-74.

Evidence Act 1995 s 60 Exception: evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)). **Note:** Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

(3) However, this section does not apply in a criminal proceeding to evidence of an admission. **Note:** The admission might be admissible under section 81 as an exception to the hearsay rule if it is “first-hand” hearsay: see section 82.

Provides for evidence to be relevant and admissible for their non-hearsay purpose when serving as evidence of the facts stated, including to prove a prior consistent or inconsistent statement, or to prove the basis of the expert’s opinion. Whenever ‘evidence relevant for a non-hearsay purpose is admitted on that basis, it will be admissible also as evidence of the facts stated’. The effect of inserting subsection 2 was to ensure the provision does apply to second-hand or remote hearsay. Section 3 was inserted to create an exception to this proposition in criminal proceedings in relation to evidence of an omission.

Examples included representations which are admissible because they formed part of conversations which were relevant to prove the making of an agreement for sale and were admitted on that basis (*R v Macrauld unreported*), evidence of a prior consistent statement (*R v Singh-Bal* (1997) 92 A Crim 397), evidence of a prior inconsistent statement (*Lee v The Queen* (1998) 195 CLR 594) and evidence of the basis of an expert’s opinion (*R v Welsh* (1996) A Crim R 364).

(a) “Evidence of an admission” in criminal proceedings

implementation of section three ‘would make clear that evidence of an admission, constituted by a statement which is more remote than first-hand hearsay, should be excluded from the ambit of section 60’. It may still be admissible under section 81 as an exception to the hearsay rule if it was ‘first-hand’.

(b) Jury Directions

When section 60 is applied to evidence of a previous representation in a jury trial, it is preferable, although not obligatory that a direction be given that the evidence may be used to prove the truth of the fact or fact asserted in the representation as well as for a non-hearsay purpose (*R v Hilder* (1997) 97 A Crim R 70).

First-Hand Hearsay

Evidence in which the fact asserted by the previous representation is in the personal knowledge of the maker of the previous representation.

Reliability of the hearsay depends on:

- The circumstances in which the previous representation was perceived by the witness
- The identity of the maker of the previous representation
- Their knowledge of the asserted fact

Evidence Act 1995 s 62 Restriction to “first-hand” hearsay

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

It requires that the person who made the previous representation had knowledge of the asserted fact which 'was or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived'. It was confirmed in *Lithgow City Council v Jackson* (2011) 85 ALJR 1130 that the ordinary meaning of 'perceive' is to 'observe by one of the five sense of sight, hearing, smell, taste or touch'.

First Hand Hearsay is where there is evidence of a previous representation by A that fact X occurred, where A had personal knowledge of the fact. First-hand hearsay is where the person who made the PR has personal knowledge of the asserted fact.

Second-hand hearsay is where there is evidence of a previous representation by A that B said X occurred where B had personal knowledge of the fact (*Vickers v The Queen* (2006) 160 A Crim R 195). Second-hand hearsay is where the person who made the PR has gained knowledge of the asserted fact from other people.

The exception for first-hand hearsay is divided into two parts where the person who made the previous representation is available to give that evidence (sexually assaulted victim in *Papakosmas*) or not available (*Walton*).

	Civil	Criminal
Maker available	s 64(3)	s 66(2)
Maker available (but it is not reasonably practicable)	s 64(2)	
Maker not available	s 63(2)	s 65(8) (Defence) s 65(2) (Prosecution)

Evidence Act 1995 s 63 Exception: Civil Proceedings if maker isn't available

(1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

- (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made, or
- (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

The effect of the provision is in first-hand hearsay, oral or documentary form isn't excluded. Evidence of a document or thing which is to be proved by a person permitted under section 171, can be completed by affidavit or if a public document, by a written statement. The party who tenders the affidavit or statement must, if another party requests, call the person who made the statement to give evidence under section 173.

Evidence Act 1995 s 64 Exception: Civil Proceedings if maker available

(1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

- (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made, or
- (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation, if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

(3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made.

(4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.