

and its indirect source (from the ATO rather than directly from the company) made it untrustworthy for the business records exception.

• **Vitali and Stachnik NSWSC 303:**

◦ **Facts:** A defendant sought to introduce two documents showing wage liabilities. One (MFI 2) was prepared by an employee, the other (MFI 3) by the plaintiff. The defendant stated documents were for “establishing the case” and addressing “a concern in the company.”

◦ **Principle:** The NSW Supreme Court found MFI 2 was caught by the Section 69(3)(a) restriction (prepared for legal proceedings) because it was made “to establish the case.” However, MFI 3 was *not* caught because it was prepared by the plaintiff as an employee *before* any litigation was contemplated, demonstrating that the purpose at the time of creation is crucial.

Week 8: Opinions, judgements and convictions

I. The Opinion Rule (s 76)

A. Definition and Distinction

1. **Definition of Opinion:** An opinion is a kind of **circumstantial evidence**, defined as **inferences drawn from facts**. 'Facts' are defined as **observed or experienced events**. An opinion is evidence of a **conclusion**, usually **judgmental or debatable**, based on facts.

◦ *Allstate Life Insurance Co v Aust and NZ Banking Corp Ltd [No 5] (1996) 64 FCR 73, 75 (per Lindgren J):* Defined opinion as **inference drawn from observed and communicable Data**.

2. **Distinction Between Opinion and Fact:** The distinction is approached as partly about form and partly about degree.

◦ **Form:** Refers to **how the witness gives evidence**. Making inferences categorizes the testimony as an opinion.

▪ *R v Leung and Wong (1999) 47 NSWLR 405 (per Simpson J):* Discusses how the manner in which the witness gives evidence determines form.

◦ **Degree:** Refers to the **number of increased inferences** made based on other facts or evidence.

▪ *R v Smith (1999) 47 NSWLR 419, 422 (per Sheller JA):* States the distinction is a **matter of degree**.

◦ **General Principle:** There is **no bright line test**. Evidence is considered **more factual when tied to direct observation or perception**.

3. Examples of Evidence:

◦ **Opinion Evidence:**

▪ Testimony based on **film footage (CCTV)** rather than observing the actual event (e.g., armed robbery). (*R v Drollett NSWCCA 356*). The officer's evidence here was an **interpretation** of what the footage depicted.

▪ Identification evidence with a **real risk of misidentification** (e.g., unclear photo).

◦ **Not Opinion Evidence:**

▪ Where a witness **questions the occurrence of a fact** (not making inferences in that sense). (*Lithgow City Council v Jackson (2011) 244 CLR 352, 362-263*).

- Anthropological observations, expert descriptions of accidents/reconstructions, witnesses stating actions in hypothetical situations, experts describing professional conduct, and evidence describing complex equipment.
- Identification evidence with **little risk of misidentification** (e.g., identifying a spouse in a photo) is considered **fact evidence**.

B. The Exclusionary Rule (s 76)

- **The Rule:** Section 76 is an **exclusionary rule**, much like the hearsay rule (s 59). It states: **Evidence of an opinion is not admissible to prove the existence of a fact** about the existence of which the opinion was expressed.
- **Rationale:** The rule requires witnesses to give evidence about what they directly perceive (facts), preferring **objective evidence over subjective evidence**. It aims to prevent **potential for bias** and **jury misuse of information**.
- **Restrictions:** S 76 applies only to opinions about the **existence of a fact**. It **doesn't exclude hypothetical questions**. It prevents using opinion evidence to infer the opinion is accurate, but **allows inferring that the opinion was held by that person**.
- **Hearsay Overlap:** Hearsay evidence of an opinion is itself opinion evidence (e.g., "John told me that he thought the car was speeding") and is subject to the exclusionary opinion rule.

II. Exceptions to the Opinion Rule

1. Summaries (s 50)

- **Rule:** Complex documents can be **summarised and admitted**. This involves interpreting the documents and summarising them into a statement, making the statement an opinion because inferences are made.
- **Safeguard:** The **truth of these summaries can be verified by checking the original documents**.

2. Relevant Otherwise (s 77)

- **Rule:** The opinion rule does not apply if the opinion is relevant for a purpose **other than proving the existence of a fact** about which the opinion was expressed (multiple relevancies).
- **Judicial Control:** Admissibility under s 77 is subject to **judicial discretion (ss 135-137)**. Counsel must invite the court to exercise discretion to exclude or limit the evidence.
- **Gateway Effect:** If admitted for a non-opinion purpose (e.g., to show the basis of the witness's conduct, credibility, or identification), the jury might also use it to **prove the fact** the opinion expresses.
- **R v Whyte NSWCCA 75:** Victim's opinion ("the defendant tried to rape me") was caught by s 76, but admissible under s 77 to show **consistency in her story** (victim's credibility), not to prove the truth of attempted rape.

3. Lay Persons' Opinion (s 78)

Lay opinions (non-expert) are admissible if they meet two cumulative requirements:

1. The opinion is **based on what the witness perceives** (saw, heard, or otherwise experienced).

1. Relevance and Admissibility Threshold (Sections 55-58)

Case Name	Facts	Issue	Decision	Key Principle
Smith v The Queen (2001) 206 CLR 650	A bank robbery case where the accused was identified by two police officers who recognized him in CCTV photographs frozen from video footage, depicting him keeping lookout.	Determination of relevance under Section 55; whether evidence by a police officer identifying the accused in a photograph logically affects the jury's task.	The court affirmed the minimal logical connection required for relevance. Kirby J dissented, stating the hurdle of relevance should not be set too high. The evidence of the police officer's identification from a photograph cannot logically affect the jury's task.	Relevance is binary: evidence is either relevant or not; no discretion is exercised in determining relevance. Relevance requires only a minimal logical connection. Facts in issue include those relevant to the ultimate issues.
Papakosmas v The Queen (1999) 196 CLR 297	N/A	Whether evidence is relevant.	N/A	The threshold test for relevance is whether there is a logical connection between the evidence and a fact in issue.
Washer v Western Australia (2007) 234 CLR 492	N/A	The capacity of evidence to rationally affect the assessment of the evidence.	N/A	The definition of relevance in Section 55 reflects the common law. It is necessary to point to a process of reasoning by which the evidence could rationally affect the assessment of the evidence.
Lithgow City Council v Jackson (2011) 244 CLR 352	Ambulance officers' report contained a questioned notation ("Jackson found by bystanders, [inaudible]? Fall from 1.5 metres onto concrete") regarding the victim's fall into	Whether the ambiguity of the evidence rendered it irrelevant; whether questioning the occurrence of a fact constitutes an opinion.	N/A	If the effect of the evidence is so ambiguous that it could not rationally affect the assessment of the fact in issue, the evidence is irrelevant. Questioning the occurrence of a fact is generally not considered opinion evidence.

	a drainage system.			
BBH v The Queen (2012) 245 CLR 499	N/A	Whether evidence is relevant and admissible regardless of its ultimate weight.	A majority of the High Court endorsed the proposition that evidence is relevant and therefore admissible as long as it has probative value.	Evidence is admissible so long as it has probative value, even if the tribunal of fact ultimately categorizes it as carrying no weight.
HML v The Queen (2008) 235 CLR 334	N/A	Consideration of facts in issue, including motive.	N/A	Facts in issue are not limited to the ultimate issues, but include facts relevant to those issues. Evidence that tends to establish motive may rationally affect the assessment of the probability of the existence of one or more of the elements of an offense.
Perish v R NSWCCA 89	N/A	Whether a miscarriage of justice may have occurred if no objection is taken to "irrelevant evidence".	N/A	"Not admissible" (Section 56(2)) means "not admissible over objection," although a judge in a criminal trial has an overriding duty to ensure a fair trial.
ASIC v Rich (2005) 216 ALR 320	N/A	Determination of relevance under the statutory test (s 55).	Austin J followed the view that relevance asks if the evidence, if accepted, could affect the probabilities.	Relevance hinges on whether the evidence, if accepted, could affect the probabilities.
Adam v The Queen (2001) 207 CLR 96	N/A	Requirement for the trial judge when assessing relevance and probative value.	N/A	In deciding relevance, the trial judge must proceed on the assumption that the evidence will be accepted by the jury.
R v Shamouil (2006) 66 NSWLR 228	N/A	Probative value assessment and the	N/A	The judge must proceed on the assumption that the jury will accept the