

HEARSAY (+ EXCLUSION)

X is seeking to adduce _____ evidence to show _____. Per s59, hearsay evidence is not admissible, unless an exception applies.

As this is a question of the evidence's admissibility, it must be dealt with on a voir dire (s189).

s59 – The Hearsay Rule – Exclusion of Hearsay Evidence

(1) Evidence of a **previous representation** made by a person is **not admissible** to **prove existence of a fact** that it can reasonably be supported that the person intended to assert by the representation

(2) for this part, a fact mentioned in (1) is an asserted fact.

Presumptions:

- All witnesses are presumed to be competent and compellable (s12)
- The accused is not competent to give evidence for the prosecution (s17)
- Domestic partners, parents & children cannot be compelled to give evidence (s18)
 - They first have to object, then it's a s7 balancing act on how badly it would break down the relationship

1 Is (EVIDENCE) Hearsay?

Hearsay is a previous representation (out of court declaration) offered by a witness to prove the truth of a matter asserted in the declaration. Evidence of a previous representation made by _____ is not admissible to prove the existence of an asserted fact that can be reasonably supported that the person intended to assert by the representation (s59(1)).

- a. **Identify the previous representation**
- b. **Identify the asserted fact**
- c. **What is the relevant use of the previous representation?**

(a) Is _____ a previous representation?

A previous representation is any out of court declaration offered to prove the truth of a matter asserted in the declaration, whether oral or in writing.

Evidence Law

- As defined by the *EA*, a PR is an express or implied representation, made other than in the course of giving evidence in the proceedings, whether oral or in writing.

A representation includes:

- An express or implied representation (oral or in writing); or
- A representation to be inferred from conduct; or
- A representation not intended by its maker to be communicated to or seen by someone else.

On the facts ____ is a previous representation because it was a statement made by X in writing/orally, that was not made in the course of giving evidence.

(b) What was the Asserted Fact?

The asserted fact is what can reasonably supposed that the maker of the previous representation intended to assert by making the representation. Here, the asserted fact is _____.

(c) What was the relevant use of the Previous Representation?

Whether the evidence will be considered hearsay depends on the use of the **PR**. If the **PR** is being used to prove the existence of asserted fact (/ the truth of the matter asserted), then it will be hearsay and inadmissible under *s59(1)*. On the facts, _____.

(d) Is the Previous Representation being used to prove the Asserted Fact?

As X is seeking to adduce the previous representation of __(PR)__ to show __(AF)__, this evidence is hearsay and inadmissible under *s59(1)*.

Yes Hearsay:

Example: To prove that there was a dangerous condition that injured tenants, employee offers testimony that neighbour said to the landlord “that porch is in bad shape”.

- **AF** = porch is in bad shape → PR is being used to prove AF = hearsay

Non-hearsay purposes:

Subramanian example:

- **PR** = That the terrorists said ‘hold this ammunition or I will kill you’

Evidence Law

- **AF** = That the terrorist will kill him if he does not hold the ammunition
- **The real reason they wanted to admit it:** To prove that he had a reasonable belief that he *thought* was going to be killed
- This is *NOT* hearsay – as the PR is being used to prove something other than the AF

Kamleh (No 1) example:

- The PR that ‘the volume was up’ was NOT used to prove the volume was up; it was used to prove that the declarant was at the crime scene and had special knowledge of it.
- **Fake alibi (*Kamleh (No 2)*):** The PR that he was at the nightclub during the offence was not adduced to prove that he was at the club, it was adduced to prove he had concocted an alibi

Col example (**prior inconsistent statement**):

- The PR that ‘my husband attacked me’ was not used to prove if her husband attacked her, it was used to show that the witness has made a **prior inconsistent statement** which goes to her **credibility!**

II HEARSAY EXCEPTIONS

1 s60 - Was there a Dual Use for the Evidence?

The hearsay rule does NOT apply to evidence of a previous representation that is admitted because it is relevant/ admissible **for another purpose**, other than to prove the asserted fact (s60(1)).

- This applies to first- and second-hand hearsay (s60(2))
- This does not apply to criminal admissions (s60(3); *Lee v R*)

As X is adducing the previous representation to show (tendency/ coincidence/ credibility etc.)

→ Go to the relevant section and work through it.

→ If it is admissible under that section, then: The hearsay rule (**exclusion**) does not apply to the previous representation because it is relevant for a (tendency/ coincidence/ credibility etc.) purpose, other than proof of the asserted fact (s60).

If the evidence has an admissible non-hearsay used, s60 allows the hearsay use of the evidence to be used too (*Col*).

Evidence Law

- *If this happens*, the party not trying to get it admitted may want to use a s136 discretion to limit the use of the evidence to one purpose
 - The court may limit the use to be made of the evidence if there is a danger that the hearsay use might be unfair prejudice to the accused (s136) (→ Look to s165 jury direction).

Lee v The Queen [1998] HCA 60	
Facts	<p>Lee accused assaulting Jones to rob her; Calin arrested with Lee; Calin signs a written statement saying “I walked down the street; I saw Lee walking fast and he was sweaty; Lee said to me ‘leave me alone, cause I’m running because I fired two shots... I did a job’”</p> <p>Calin refuses to adopt those statements at trial</p> <ul style="list-style-type: none"> • Probably because he was being threatened <p>There are rules that allow it to be admitted to impeach credibility (non-hearsay rule)</p>
Issue	<p>Can they be admitted as proof of the facts asserted (e.g. that Lee fired two shots/ did a job) via Section 60?</p>
Held	<p>No, section 60 does not save the hearsay use → thus, it can be admitted</p> <ul style="list-style-type: none"> • But the HCA says this needs to be read down, it is too powerful of an exception • This is especially problematic with very remote confessions (long chains of he said, she said)

2 FIRST-HAND HEARSAY EXCEPTIONS

CIVIL	CRIMINAL
Maker not available (s63)	Maker not available (s65)
Maker available (s64)	Maker available (s66)

Evidence Law

A previous representation is first-hand hearsay if it was made by a person who had personal knowledge of an asserted fact (s62(1)), being that they saw, heard or otherwise perceived it (s62(2)).

Example: Firsthand: A → B (witness): “I attacked X”

- B observed A’s R
- A had personal knowledge of attacking
- Observing the attacking is also firsthand

Not firsthand: A → B → Police (witness): “I attacked X”

- A had personal knowledge of attacking BUT witness did not observe the PR

If based on their knowledge: ____ is first-hand hearsay because _____. Therefore, the relevant hearsay exceptions may apply. (proceed)

If not based on their knowledge: ____ is second-hand hearsay because _____. Therefore, the relevant hearsay exceptions won't apply, and the previous representation is inadmissible as hearsay.

(1) CIVIL – Maker Unavailable (s63)

63 Exception-civil proceedings if maker not 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.

Per s63, in a civil proceeding, where the person that made a PR is unavailable to give evidence, the hearsay rule does not apply to the evidence of that representation or a document containing that representation.

Per s4, a person is taken to be unavailable where they are dead, not competent to give evidence, mentally or physically unable to, or you have taken all reasonable steps to find them without success.

- If they are available, go to s64
- *Caterpillar v John Deer*: Sending them one letter does not amount to taking ‘all reasonable steps’ - did not amount to unavailability

(2) CIVIL – Maker Available (s64)

Per s64, in a civil proceeding, where the person that made a PR is available to give evidence, the hearsay rule does not apply to the evidence if it would cause undue expense or undue delay, or would not be reasonably practicable to call the person to give evidence.

On the facts, it would cause undue expense, delay or would not be reasonably practicable to call X WITNESS to give evidence because _____.

Caterpillar v John Deer: Being overseas does not satisfy the cost test. If the defence consider an overseas witness to be helpful, costs should not stand in the way.

(3) CRIMINAL – Maker Unavailable (s65)

Per s65, in a criminal proceeding, where the person that made a PR is unavailable to give evidence, the hearsay rule does not apply to the evidence of that representation if the representation: (see 2(a)-(d))

s65 - Exception—criminal proceedings if maker not available

- (1) This section applies in a criminal 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 evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—
 - (a) was made under a duty to make that representation or to make representations of that kind; or
 - (b) was made when or shortly after the asserted fact happened and in circumstances that make it unlikely that the representation is a fabrication; or
 - (c) was made in circumstances that make it highly probable that the representation is reliable; or
 - (d) was—
 - (i) against the interests of the person who made it at the time it was made; and
 - (ii) made in circumstances that make it likely that the representation is reliable.
- (7) Without limiting subsection (2) (d), a representation is taken for subsection (2) (d) to be against the interests of the person who made it if it tends—