

DOCUMENTS AND OTHER EVIDENCE

1. Is the evidence in a document?

- a. On balance, it is likely that the **[EVIDENCE]** would fall within the definition of a document, as the non-exhaustive definition under the Dictionary has a wide ambit. **[EVIDENCE]** meets the definition of a document as it is **[SELECT RELEVANT DEFINITION]** per EA Dictionary Pt 1/it is a reference to a document EA s 47(2), Dictionary Part 2, CClause 9. Thus, **EVIDENCE** can be considered documentary for the purposes of the EA.

2. Is it relevant to a fact in issue?

Dictionary Pt 1 : document means any record of information, and includes—

- (a) anything on which there is writing, or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) a map, plan, drawing or photograph

CI 8 Pt 2 Dictionary 8 References to documents

A reference in this Act to a document includes a reference to—

- (a) any part of the document, or
- (b) any copy, reproduction or duplicate of the document or of any part of the document, or
- (c) any part of such a copy, reproduction or duplicate.

- Note: Do not need the original document (s 51)
- Pt 2.2 rules for documents only apply when its CONTENTS are relevant → if the actual contents of the documents are not being relied on, apply Pt 2.3
 - E.g. document found at the crime scene had the accused's finger prints on it → this fact is being used to prove the accused was at the scene of the crime
 - What is on the document is irrelevant → is it real evidence

3. If document available → prove contents - s 48

a. CHOOSE ONE:

- i. Pursuant to s 48(1), **PARTY** has tendered the document themselves, and thus the contents of the document may be proved.
- ii. Pursuant to s 48(1)(a), **PARTY** has adduced evidence as to the contents of the documents through admissions about its contents. **EXPLAIN**. Thus the contents of the document may be proved. Note s 48(3)
 1. If adduced under (1)(a), the evidence may only be used:
 - a. (a) in respect of the party's case against the other party who made the admission concerned, or
 - b. (b) in respect of the other party's case against the party who adduced the evidence in that way
- iii. Pursuant to s 48(1)(b), **PARTY** has tendered a copy of the document and the copy is identical in all relevant aspects. The copy has been produced by a device that reproduces the contents of documents (s 48(1)(b)(ii). **EXPLAIN**. Consequently, the contents of the document may be proved
- iv. Pursuant to s 48(1)(c), **PARTY** has tendered a transcript of the document and the transcript is identical in all relevant aspects. **EXPLAIN**. Thus the contents of the document may be proved

RIGHT TO SILENCE/COMMENT ON FAILURE TO GIVE EVIDENCE

For the right to silence provisions to be enlivened, we must be in the criminal jurisdiction and the offence in question must be a serious indictable offence.

S 89: Rule

- Pursuant to s 89(1) an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused (a) to answer one or more questions, or (b) to respond to a representation put to them during the investigation stage of a proceeding
- 89(4) inference includes (a) an inference of consciousness of guilt, or (b) an inference relevant to a party's credibility

S 89A: exception

However, s 89A is the exception to this rule in that it allows adverse inferences to be drawn from pre-trial silence related to a serious indictable offence if (1)(a) the defendant could reasonably have been expected to mention a fact in the circumstances and it is relied on in their defence.

APPLY:

1. Could they have reasonably been expected to mention it?
2. Did they rely on it in their defence?

For the exception to apply,

(2)(a) - a special caution must have been given (b) before the failure or refusal to mention the fact (c) in the presence of a legal practitioner who the defendant (d) had a reasonable opportunity to consult with.

(5) s 89A does not apply if the defendant is under 18 or incapable of understanding the general nature of the special caution,

S 20: Comment on failure to give evidence

(1) In a criminal proceeding for an indictable offence, (2) a judge may comment on the failure of the defendant to give evidence. This comment must not suggest guilt and can only be a positive comment on the failure to give evidence.

Dyers re s 20 - Charged with assault	Weissensteiner re s 20 - Defendant went on a boat trip with a young couple and returned alone, charged with their murder and did not give evidence at trial
- Held trial judge should not direct the jury that the accused would be expected to give evidence	Note: Victorian courts have said Weissensteiner has no place alongside s 20, but the HC has not overruled this.

- i. **S 64(1)** As the maker of the representation in the civil proceeding is available to give evidence about the asserted fact, the hearsay rule does not **s 64(2)(a)** apply to evidence of the representation given by a person **[IDENTIFY]** who **S/H/OP** the representation being made 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.

c. 65: UNAVAILABLE CRIMINAL

- i. **(1)** As the maker of the representation in the criminal proceeding is unavailable to give evidence about the asserted fact, **(2)** the hearsay rule does not apply if the representation to evidence given by a person **[IDENTIFY]** who **S/H/OP** the representation being made if the representation was - **CHOOSE:**
 - 1. **(a)** Was made under a duty to make that representation or to make representations of that kind
 - 2. **(b)** Was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication
 - 3. **(c)** Was made in circumstances that make it highly probable that the representation is reliable
 - 4. **(d)** Was
 - a. **(i)** against the interests of the person who made it at the time it was made and
 - b. **(ii)** made in circumstances that make it likely that the representation is reliable
- ii. **IF RELEVANT: Under 65(3)-(6)**, the prosecution's evidence of statements made in previous court proceedings may be adduced for their hearsay purpose as long as the defendant had the opportunity to cross-examine in those earlier proceedings. E.g. evidence in committal proceedings being used again at trial.

d. 66: AVAILABLE CRIMINAL - FRESH IN THE MEMORY

- i. **66(1)** As the maker of the representation in this criminal proceeding, is available to give evidence about the asserted fact, the hearsay rule does not apply to **(66(2)(a))** their evidence, if they were called, or, evidence of the representation given by **(66(2)(b))** a person who **S/H/OP** the representation being made if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation
- ii. Per **s 66(2A)**, to determine whether the occurrence of the asserted fact was fresh in the memory, the court may take into account:
 - 1. **(a)** the nature of the event concerned and
 - 2. **(b)** the age and health of the person and
 - 3. **(c)** the period of time between the occurrence of the asserted fact and the making of the representation
- e. **S 66A** provides that the hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the **person's health, feelings, sensations, intention, knowledge or state of mind**
 - i. *This means that a person's physical, mental state or intentions can be inferred by what they say.*
 - *E.g. the fact that Sue says to William 'I have a really bad headache at the moment' can be adduced by William to prove the fact that Sue in fact did have a headache at that time.*

- 5. **s 67 - Notice to be given** - As **[CHOOSE: s 63(2), 64(2), 65(2)]** apply in these circumstances, the party adducing the evidence must give the other party reasonable notice of their intention to adduce the evidence.

IF BUSINESS RECORD: GO TO S 69: Documentary written evidence is inherently a previous representation. This document [specify] is a business record because...

IF OTHER DOCUMENT E.G. DIARY: not a business record, will need to go through hearsay steps

- 6. **s 165(1)(a)** - If there is a jury and a party so requests, the judge is to **(a)** warn the jury that hearsay evidence may be unreliable, and **(b)** inform the jury of matters that may cause it to be unreliable, and **(c)** warn the jury