



Commonwealth Consolidated Acts

**EVIDENCE ACT 1995 - SECT 59 The hearsay rule--  
exclusion of hearsay evidence**

**EVIDENCE ACT 1995 - SECT 59**

**The hearsay rule--exclusion of hearsay evidence**

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

(2) Such a fact is in this Part referred to as an **asserted fact** .

(2A) For the purposes of determining under [subsection \(1\)](#) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note: [Subsection \(2A\)](#) was inserted as a response to the decision of the Supreme Court of NSW in *R. v Hannes* (2000) 158 FLR 359.

(3) [Subsection \(1\)](#) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the hearsay rule are as follows:

- \* evidence relevant for a non-hearsay purpose (section 60);
- \* [first-hand](#) hearsay:
  - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64);
  - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66);
- \* contemporaneous statements about a person's health etc. (section 66A);
- \* business records (section 69);
- \* tags and labels (section 70);
- \* electronic communications (section 71);

- \* Aboriginal and Torres Strait Islander traditional laws and customs (section 72);
- \* marriage, family history or family relationships (section 73);
- \* public or general rights (section 74);
- \* use of evidence in interlocutory proceedings (section 75);
- \* admissions (section 81);
- \* representations about employment or authority (subsection 87(2));
- \* exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- \* character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

*Examples:*

- (1) D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.
- (2) P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.
- (3) W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.



## EVIDENCE ACT 1995 - SECT 60 Exception: evidence relevant for a non-hearsay purpose

### EVIDENCE ACT 1995 - SECT 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 [subsection 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 still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.



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**EVIDENCE ACT 1995 - SECT 63 Exception: civil proceedings if maker not available**

**EVIDENCE ACT 1995 - SECT 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.

(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.

Note 1: Section 67 imposes notice requirements relating to this [subsection](#).

Note 2: Clause 4 of Part 2 of the Dictionary is about the availability of persons.



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**EVIDENCE ACT 1995 - SECT 64 Exception: civil proceedings if maker available**

**EVIDENCE ACT 1995 - SECT 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.

Note: Section 67 imposes notice requirements relating to this [subsection](#). Section 68 is about objections to notices that relate to this [subsection](#).

(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.

Note: Clause 4 of Part 2 of the Dictionary is about the availability of persons.



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**EVIDENCE ACT 1995 - SECT 69 Exception: business records**

**EVIDENCE ACT 1995 - SECT 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.

(3) [Subsection \(2\)](#) does not apply if the representation:

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

(b) was made in connection with an investigation relating or leading to a criminal proceeding.

(4) If:

(a) the occurrence of an event of a particular kind is in question; and

(b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind;

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

(5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Note 1: Sections 48, 49, 50, 146, 147 and [subsection 150\(1\)](#) are relevant to the mode of proof, and authentication, of business records.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.



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**EVIDENCE ACT 1995 - SECT 71 Exception: electronic communications**

**EVIDENCE ACT 1995 - SECT 71**

**Exception: electronic communications**

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:

(a) the identity of the person from whom or on whose behalf the communication was sent; or

(b) the date on which or the time at which the communication was sent; or

(c) the destination of the communication or the identity of the person to whom the communication was addressed.

Note 1: Division 3 of Part 4.3 contains presumptions about electronic communications.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

Note 3: ***Electronic communication*** is defined in the Dictionary.



## **EVIDENCE ACT 1995 - SECT 76 The opinion rule**

### **EVIDENCE ACT 1995 - SECT 76**

#### **The opinion rule**

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) **Subsection** (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

**Note:** Specific exceptions to the opinion rule are as follows:

- \* summaries of voluminous or complex documents (subsection 50(3));
- \* evidence relevant otherwise than as opinion evidence (section 77);
- \* lay opinion (section 78);
- \* Aboriginal and Torres Strait Islander traditional laws and customs (section 78A);
- \* expert opinion (section 79);
- \* admissions (section 81);
- \* exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- \* character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

#### *Examples:*

- (1) P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.

- (2) P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.



**EVIDENCE ACT 1995 - SECT 78 Exception: lay opinions**

**EVIDENCE ACT 1995 - SECT 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.



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**EVIDENCE ACT 1995 - SECT 79 Exception: opinions based on specialised knowledge**

**EVIDENCE ACT 1995 - SECT 79**

**Exception: opinions based on specialised knowledge**

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, and without limiting [subsection \(1\)](#):

(a) a reference in that [subsection](#) to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and

(b) a reference in that [subsection](#) to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in [paragraph \(a\)](#), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally;

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.



**EVIDENCE ACT 1995 - SECT 140 Civil proceedings:  
standard of proof**

**EVIDENCE ACT 1995 - SECT 140**

**Civil proceedings: standard of proof**

(1) In a civil proceeding, the court must find the case of a [party](#) proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

- (a) the nature of the cause of action or defence; and
- (b) the nature of the subject-matter of the proceeding; and
- (c) the gravity of the matters alleged.



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**EVIDENCE ACT 1995 - SECT 141 Criminal proceedings:  
standard of proof**

**EVIDENCE ACT 1995 - SECT 141**

**Criminal proceedings: standard of proof**

(1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

(2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.