THE EVIDENCE (DOCUMENTS) ACT 1971 AND THE HEARSAY RULE

(a) *Introduction*

Deeply embedded in the Anglo-American adversary tradition,[1] the exclusionary hearsay rule has woven its 'serpentine absurdities'.[2] The rule itself, difficult of precise definition has been roughly formulated as follows:

> Oral or written assertions of persons other than the witness who is testifying are inadmissible as evidence of the truth of that which was asserted.[3]

The rule was aimed primarily at excluding what was considered unreliable evidence, such as statements or documents made by persons not under oath or subject to cross-examination. But tension was created as the gap between what was considered relevant (*i.e.* logically probative of the fact in issue) and that considered admissible (*i.e.* that which the rule did not exclude) grew wider.

Whatever the rationale of the rule, its effect was the 'inexorable exclusion of evidence which in many cases might be of material assistance to the court in arriving at the truth'.[4] This led to the creation of numerous exceptions, such as where the maker of the statement was dead, prior statements in the nature of admissions and confessions, complaints in sexual assault cases and so on.

The expansion of the list of exceptions which could be created by the courts was limited by the House of Lords in *Myers v. Director of Public Prosecutions*[5] and one must therefore look to legislative action to either expand the number of exceptions, or to abolish the hearsay rule altogether.

One of the principal statutory exceptions to the rule was to be found in the Evidence Act (Eng.) 1938, which was substantially adopted in all States of Australia.[6] This Act made admissible in civil proceedings as evidence of the facts stated therein, statements in documents that fulfilled certain conditions. These are set out in the Evidence Act 1958, sections 54-6, and provide that the document be part of a continuous record, that

[1] *Cf.* civil law countries such as France and Sweden where hearsay as such is not excluded from the court but its weight is subject to closer judicial scrutiny that other forms of proof: see note, 'Comparative Study of Hearsay Evidence Abroad' (1969-70) 4 *International Lawyer* 156.

[2] Tapper, 'Hearsay Evidence in Civil Proceedings' (1966) 29 *Modern Law Review* 653.

[3] Cross, 'The Periphery of Hearsay' (1969) 7 *M.U.L.R.* 1.

[4] McPherson, 'A Statutory Exception to the Hearsay Rule' (1965) 5 *University of Queensland Law Journal* 30.

[5] [1965] A.C. 1001.

[6] Evidence Act 1958, ss 54-6; Evidence Act 1898-1966 (N.S.W.), ss 14B-C; Evidence and Discovery Acts 1867-1967 (Qld), ss 42B-C; Evidence Act 1929-69 (S.A.), ss 34C-D; Evidence Act 1906-67 (W.A.), ss 79B-D; Evidence Act 1910-65 (Tas.), ss 78-9.

the maker have personal knowledge, that he not be an 'interested person' *etc.*

The Evidence Act (Eng.) 1938 although considerably eroding the common law rule against hearsay, has been harshly criticized in that it still lacks a

> rational basis, results sometimes in injustice and often in avoidable expense, and introduces much unnecessary complication in the preparation and hearing of civil actions.[7]

In England, by the Civil Evidence Act 1968, the hearsay rule has been substantially abrogated. Drawing inspiration from this and various other enactments[8] the Victorian legislature brought down the Evidence (Documents) Act 1971 (hereafter cited as the Act), which apart from amending sections 54-6 of the Evidence Act 1958, also deals with the admissibility of statements made in computer printouts (section 55B) and enlarges the scope of the existing provisions dealing with books of account (section 58A).

(b) *Scope*

(i) LEGAL PROCEEDINGS

The Act applies to all legal proceedings[9] unless otherwise excepted.[10] This expands the operation of the Evidence Act 1958, sections 54-6 (which previously only applied to civil proceedings) and aims at a uniformity of evidence practices in various courts while safeguarding the rights of the accused in criminal proceedings.

(ii) STATEMENT

The term 'statement' has been left unchanged by the Act, and is defined as including any representation of fact whether made in words or otherwise.[11] It therefore still leaves open the question as to whether statements of opinion are included. Authority on this is divided[12] but the English Law Reform Commission construed this as referring only to 'facts'[13] and proposed to deal with opinion evidence in a separate report.

(c) *Effect and Conditions of Admissibility*

Since its introduction, the Evidence Act 1958 has 'hardly worked a revolution in the attitude of the legal profession to the hearsay rule'.[14] The

[7] United Kingdom, *Law Reform Committee 13th Report (Hearsay Evidence in Civil Proceedings)* (1966) Cmnd 2964, para. 5.

[8] *I.e.* the Criminal Evidence Act 1965 (Eng.), the Evidence and Discovery Act 1867-1962 (Qld) and the Evidence Amendment Bill 1969 (N.Z.). For the contents of the Civil Evidence Act 1968 (Eng.) and comments thereon see Kean, *The Civil Evidence Act 1968* (1969).

[9] Defined in s. 2(1) to include civil, criminal or mixed proceedings.

[10] See s. 3 amending s. 55(1) (2) and (3).

[11] S. 2(1), amending s. 3(1).

[12] See *Cross on Evidence* (Aust. ed. 1970) 617-8 and cases cited therein.

[13] United Kingdom, *op. cit.* para. 13.

[14] *Ibid.* para. 11.

limiting and excluding provisions have been strictly construed by the courts and accordingly its full potential has not been realized. The Evidence (Documents) Act 1971 retains the basic structure of the Evidence Act 1958 and purports only to expand this form and not to re-examine its basic philosophy.

(i) PRE-CONDITIONS TO ADMISSIBILITY

To be admissible in evidence the statement must basically be contained in a document which forms part of a record relating to any business where the person supplying the information had or might reasonably be supposed to have had personal knowledge of the matters dealt with.

Document. The new section 55(1) stipulates that the statement must be made in a 'document', in contrast to the English legislation which allows 'a statement made, whether orally or in a document'.[15] The Chief Justice's Law Reform Committee was of the view that there were 'undoubted dangers'[16] in admitting oral statements and refused to relax the prohibition against oral hearsay until agreement could be reached as to the general philosophy which should underlie the legislation.

It is submitted that the better view is that of the English Law Reform Commission[17] which, while admitting the susceptibility to error of oral hearsay, states that this should go only to weight.[18] The definition of the word 'document' itself has been considerably expanded.[19] It previously included books, maps, photographs and drawings, but now includes discs, tape sound tracks, films, negatives and anything whatsoever which is capable of having a definite meaning to a person conversant with the medium.[20] It thus 'seems to include every possible production or reproduction of a document known to science at present.'[21]

The word 'document' must be read in conjunction with the term 'copy' which is also extensively defined to include transcripts, reproductions and stills.[22] These sections would obviate the problem which arose in *Beneficial Finance Co. Ltd v. Conway*[23] where a tape recording was held inadmissible. Copies must be authenticated in a manner approved by the court.[24]

Computer printouts, provided they comply with the Act, are now made expressly admissible.[25]

An interesting feature of the definition of document is the inclusion of section 2(1)(c) which states

[15] Civil Evidence Act 1968 (Eng.), s. 2(1).
[16] Chief Justice's Law Reform Committee, *Subcommittee to Consider Evidence Act, Draft Bill for Evidence (Documents) Act* (1971) 2.
[17] United Kingdom, *op. cit.* para. 14.
[18] See also discussion in Campbell, 'Recent and Suggested Reforms in the Law of Evidence' (1967) 8 *University of Western Australia Law Review* 61, 72.
[19] S. 2(1), amending s. 3(1) and *cf.* Evidence Act 1958, s. 54(1).
[20] S. 2(1), amending s. 3(1).
[21] Kean, *op. cit.* 22.
[22] S. 2 (1), amending s. 3(2).
[23] [1970] V.R. 321.
[24] S. 3, amending s. 55D.
[25] S. 3, amending s. 55B.

> any label marking or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever.

This would seem to be directed at the situation which arose in *Commissioner for Railways (N.S.W.) v. Young*[26] where there was considerable argument as to the distinction between a label as a means of identifying the contents of a bottle containing a blood sample, and as a means of communicating ideas. The bottle was not produced in court but oral evidence of the label was admissible on the former ground. That the label is now admissible on either ground seems quite clear.[27]

Section 3 of the Act deletes the requirement of the Evidence Act 1958, section 55(1) that the 'original document' must be produced. This, together with the new section 55D[28] and section 3(2)[29] would seem to be sufficient to overcome the decision in *Bowskill v. Dawson*[30] where a copy of a statement made to police was not admissible. A strict construction of the Evidence Act 1958, section 55(1) was held to require that an original must still be in existence so that it could be produced, though only after undue delay and expense.[31] Here it was assumed that the original had ceased to exist so that the copy was inadmissible.

The distinction between documents containing statements where the maker has personal knowledge[32] and those where the documents must be part of a record[33] has been retained, but with the following changes.

Record. The requirement that the record be a continuous one[34] has been repealed. The courts had restrictively interpreted this to mean not just

> the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject matter . . .[35]

The rationale of this requirement was that it 'would seem to be the higher degree of probability that entries in a record of this nature would be true'.[36] Considerations of this nature led to the exclusion of the records in *Myers v. Director of Public Prosecutions*.[37] The manufacturer's records, showing the engine, cylinder block and chassis numbers which had been recorded as the car was made were held inadmissible because they were tendered in

26 (1961-2) 106 C.L.R. 535.

27 How *R. v. Rice* [1963] 1 All E.R. 832 (which decided whether an airline ticket was evidence that the person named travelled on that flight) would be decided in this light is an interesting problem.

28 Which provides that a copy may be produced and authenticated whether or not the original is still in existence.

29 Which defines 'copy' very broadly.

30 [1953] 2 All E.R. 1393.

31 S. 55(2).

32 S. 55(1)(a).

33 S. 55(1)(b).

34 Evidence Act 1958, s. 55(1)(a)(ii).

35 *Thrasyvoulos Ioannou v. Papa Christoforos Demetriou* [1952] 1 All E.R. 179, 184.

36 *Berjak (Victoria) Pty Ltd v. Peerless Processing Co. Pty Ltd* [1963] V.R. 515, 519.

37 [1965] A.C. 1001.

order to prove the truth of the facts recorded. They were not within any of the recognized exceptions to the rule.[38]

The repeal of the requirement of continuity is warranted; for, in effect, the requirement is little more than an aspect of probative value which should be left to the court, unfettered by *a priori* assumptions as to the inherent value of certain types of documents.

In *Newton v. Pieper*[39] a part of a policeman's notebook containing statements made by an eyewitness, who was not able to be called and who had not authenticated the statement, was held inadmissible.[40] If such a case were to arise in Victoria now, a statement of this kind would be admissible because there is no requirement that there be a continuous record, and also because the definition of business[41] would include a document made by the police.

Business. The new definition of business[42] is very broad[43] and includes such things as public administration and undertakings carried on by the Crown or a statutory authority; *prima facie* this would seem to include the police.[44]

The fear that this expanded definition would allow the admission into evidence, in criminal proceedings, of statements to the police or others made in the course of an investigation of a crime, led to the insertion of section 55(3) into the Act. This precludes statements made in the course of the investigation of facts constituting the alleged offence or in the preparation of the defence or prosecution case. However, facts such as the records in *Myers'* case[45] are admissible.

It should be noted that the requirement that the record be made 'in the course' of the business or 'relating to any business'[46] also supplants the necessity for the statement being recorded 'in the performance of a duty to record information supplied'[47] though it has been retained in the equivalent English legislation. It seems however that there is no substantial difference between the Act and its predecessor or the Civil Evidence Act 1968 (Eng.) as the latter's definition of 'acting under a duty' includes a 'reference to a person acting in the course of any trade, business profession' *etc.*[48]

Personal Knowledge. It has been thought necessary to retain the provision that the maker of the statement must have received the information from

[38] The Criminal Evidence Act 1965 (Eng.) was introduced as a result of the decision in this case.
[39] [1968] 1 N.S.W.R. 42.
[40] *Cf. Simpson v. Lever* [1962] 3 All E.R. 870.
[41] See *infra.*
[42] S. 2(1), amending s. 3(1).
[43] *Cf.* Evidence Act 1958, s. 53.
[44] See *Newton v. Pieper* [1968] 1 N.S.W.R. 42.
[45] *Myers v. Director of Public Prosecutions* [1965] A.C. 1001.
[46] See the new s. 55 (1)(b).
[47] Evidence Act 1958, s. 55(1)(a)(ii).
[48] Civil Evidence Act 1968 (Eng.), s. 4(3).

> a person who had, or may reasonably be supposed to have had personal knowledge of the matters dealt with [in the information supplied].[49]

However, the Evidence Act 1958 has been changed by the inclusion of the words 'directly or indirectly'. This new provision takes note, as the English Law Reform Commission stated, that

> direct reporting to the record keeper is not usual in modern business methods . . . The length of the chain goes to probative value only in so far as it increases the risk of error in transmission of the information.[50]

The effect of these words would be seen in such a case as *Re Hennessey's Self Service Stores Pty Ltd (In Liquidation)*[51] where the admissibility of certain stock sheets was in question. The evidence was that the compiler (the maker of the statement) would write down what other employees would call out to him as they were checking stocks. It was held that there was some very limited personal knowledge because of the proximity of the maker to the caller, but it was treated here as a question of weight.

The phrase 'directly or indirectly' would also seem to apply to what is called 'hearsay on hearsay', *e.g.* where an inscription 'Produce of Morocco' is put as evidence that the goods so inscribed were in fact produced in Morocco.[52] This would also be admissible now under the definition of document as including 'label'.[53]

In *Barkway v. South Wales Transport Co. Ltd*[54] the facts were that a transcript of evidence given in earlier proceedings by a deceased witness was held inadmissible because, it was said, the witness was not engaged in 'supplying information' to the shorthand writer. Such a situation now seems to fall within the terms of the new section 55(1)(b).[55]

Also facilitating the admissibility of such evidence as in *Barkway's* case[56] is the fact that section 54(4) of the Evidence Act 1958, which required authentication of the statement in some way, has been repealed. This section only restricted the means by which authenticity could be proved.[57]

(ii) DISPENSING WITH THE MAKER

Under the proviso to section 55(1) of the Evidence Act 1958, the condition that the maker of the statement be called did not need to be satisfied where the maker was dead, unfit, out of Victoria or could not

[49] S. 55(1)(b). This requirement has been omitted in the Queensland legislation without adverse effects; see McPherson, *op. cit.* 40.

[50] United Kingdom, *op. cit.* para. 16.

[51] [1965] Qd. R. 576.

[52] See Cross, *op. cit.* 10; *Patel v. Customs Comptroller* [1966] A.C. 356.

[53] S. 2(1)(c), amending s. 3(1).

[54] [1949] 1 K.B. 54.

[55] The English Act makes specific provision for the admissibility of evidence given in other proceedings: Civil Evidence Act 1968 (Eng.), s. 2(3).

[56] *Barkway v. South Wales Transport Co. Ltd* [1969] 1 K.B. 54; see also *Bullock v. Borrett* [1939] 1 All E.R. 505; *Re Powe (deceased)* [1955] 3 All E.R. 448.

[57] See United Kingdom, *op. cit.* para 17. The West Australian legislation does not require authentication and no deleterious effects have been found.

practicably be found. The new section 55(5)(d) and (e) amends these provisions to include dispensation where neither party requires the attendance of the witness or where they consent to his not being required to attend. These sub-sections create a potential for the streamlining and simplification of legal proceedings, but they will depend a great deal on the good will of the legal advisers. It will not necessarily mean a revolution in attitude towards the adversary process.[58]

The Evidence Act 1958 also made provision[59] for dispensing with the maker where there would be 'undue delay or expense'. This was not used extensively[60] but has been retained in the Act. These sections should be used to avoid delays and expenses, but at the moment it is not 'regarded as good tactics in litigation to smooth the way for the other side'.[61]

(d) *Safeguards*

Lest it be thought that the Act is too radical a step forward, and perhaps to mollify the legal profession, sufficient safeguards have been retained or introduced to cover most eventualities.

(i) 'PERSON INTERESTED'

Section 3 of the Act, amending section 55(4), substantially re-enacts section 55(3) of the Evidence Act 1958. This clause has created many problems with respect to the definition of a 'person interested' and to the determination of when proceedings are 'anticipated'.[62] Statements made under these conditions are not admissible. Queensland and Western Australia have omitted this provision without any harmful effects; the English Law Reform Commission viewed this limitation as going to probative value only,[63] and the Civil Evidence Act 1968 (Eng.) treats it as a matter going only to weight rather than to admissibility.[64]

The main argument advanced for its retention by the Chief Justice's Law Reform Committee[65] was that if persons were to be exposed to the risk of being convicted of indictable and summary offences upon statements by persons whom they could not cross-examine, it might be better to exclude such statements by interested persons. Interrogatories or other self-serving statements might also become admissible. It is submitted that the English solution is the better alternative.

(ii) 'FORM OR CONTENT'

The new section 55C allows the court to draw any reasonable inference from the form or content of the relevant document or 'from any other

[58] *Cf.* Civil Evidence Act 1968 (Eng.), s. 8, *re* procedure for giving notice to the other party where hearsay will be introduced.

[59] S. 55 (2).

[60] United Kingdom, *op. cit.* para. 23.

[61] *Ibid.*

[62] See discussion in *Cross on Evidence* (Aust. ed 1970) 621ff.

[63] United Kingdom, *op. cit.* para. 18.

[64] S. 6(3).

[65] Chief Justice's Law Reform Committee, *op. cit.* 3.

circumstances' when considering the admissibility of the document.[66] The English court, in contrast, has no discretion to refuse to admit a hearsay statement which is admissible under the Civil Evidence Act 1968 (Eng.), but it has been given wide criteria to decide both admissibility and weight.[67] These are somewhat analogous to the provisions of section 56(1) of the Evidence Act 1958 which have been repealed.[68] This repeal is a forward move as the matters dealt with were such that a court would have had regard to them in any event. Nokes[69] considered it unusual for the legislature to try to assist a court in deciding the cogency of evidence.

(iii) 'CORROBORATION'

The new section 56 corresponds substantially with section 56(2) of the Evidence Act 1958 and stipulates that a statement admissible by virtue of sections 54 to 56 should not be treated as corroboration of evidence given by the maker of the statement or of the person who supplied the information from which the record containing the statement was made.

(iv) 'CREDIBILITY OF THE MAKER OF THE STATEMENT'

Section 3 of the Act, inserting section 55A, renders admissible, where the maker of the statement is not called as a witness, any evidence which, had he been called, would be admissible for the purpose of destroying or supporting his credibility as a witness.[70] Also, any evidence tending to prove a prior inconsistent statement is admissible in evidence to prove the fact of contradiction.[71]

This is thought necessary as a compensation for the fact that even though the maker has not been called, the probative value of his statement still depends on his credibility and this should be impeachable in the same way as if he had been called.

The new section 55A(2) makes special provision for the proof of prior convictions of an absent witness. These sections must be read in conjunction with sections 33-6 of the Evidence Act 1958 which set out the conditions under which prior convictions and statements are admissible when a witness is called.

(v) 'RESIDUAL DISCRETION'

Section 3 of the Act, inserting section 55(9), gives the Court wide powers to exclude any statement, even if all the other requirements are met,

[66] See *Re Hennessey's Self Service Stores Pty Ltd (In Liquidation)* [1965] Qd. R. 576.

[67] Ss. 6(2) and (3).

[68] S. 56(1) stated that in estimating the weight of evidence, where no witness is called, the court should have regard to such things as the contemporaneity of the statement to the event, that there was no cross-examination, and whether the maker had any motive to conceal or misrepresent facts.

[69] Nokes, *An Introduction to Evidence* (4th ed., 1967) 352.

[70] S. 55A(1)(a). [71] S. 55A(1)(b).

if it thinks it inexpedient in the interests of justice that it should be admitted.[72]

(e) *Conclusion*

There seem to be two basic rules of evidence:

> First, that all relevant evidence is admissible to establish the factum probandum; second, that evidence to establish a fact should be the best that the nature of the case will allow. The end product must be a compromise between the two . . . [but] the exclusionary rules of evidence limit to an absurd degree the search for truth made by the court.[73]

It is unfortunate that the legislature did not at this time, with all the information presently available, grasp the chance to completely re-examine the basis of the law of hearsay and put it on a rational footing, and perhaps produce a comprehensive code of evidence. Especially overdue is a review of the use of prior consistent and inconsistent statements as evidence of the facts stated.[74]

It is to be regretted that the opportunity was not taken to enact a provision equivalent to section 2(2)(ii) of the Civil Evidence Act 1968 (Eng.) which allows a witness to narrate a hearsay statement in the course of his evidence in chief 'on the ground that to prevent him doing so would adversely affect the intelligibility of his evidence'. This would help a witness overcome his bewilderment and distress when confronted with the unnatural method of giving evidence used at present in legal proceedings.[75]

But as long as the jury, that 'lamp of freedom',[76] continues to burn brightly in Victorian civil courts, the legislature will remain loathe to give to the tribunal of fact the responsibility of discriminating between the various kinds of relevant evidence.

The Act is a welcome step forward in the relaxation of the hearsay rule. One hopes it is not the last.

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[72] An earlier version of this clause was invoked in *Tobias v. Allen* (*No. 2*) [1957] V.R. 221.

[73] Campbell, *op. cit.* 61.

[74] Prior statements, especially those of eye-witnesses made closer to the event, would seem to have more probative value than statements made in court, perhaps years later. See United Kingdom, *op cit.* paras 35-8; Campbell, *op. cit.* 74.

[75] In Sweden the witness is allowed to first narrate his statement without interruption, and only after that may questions be put. This also seems to decrease the amount of suggestion inherent in the testimonial process. Ginsburg, 'Comparative Study of Hearsay Evidence Abroad—Sweden' (1969-70) 4 *International Lawyer* 156.

[76] Devlin, *Trial by Jury* (3rd ed., 1966) 164.