Evidence In Civil Proceedings: An Australian Perspective On Documentary And Electronic Evidence

EVIDENCE IN CIVIL PROCEEDINGS: AN AUSTRALIAN PERSPECTIVE ON DOCUMENTARY AND ELECTRONIC EVIDENCE

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Introduction

The purpose of this paper is to explain the manner in which documentary evidence – and computer evidence, which is treated as a form of documentary evidence – is used in civil proceedings in Australia. After an overview of the primacy of oral testimonial evidence in a common law trial and of the rules pertaining to the admissibility of evidence, I will address:

- Written testimonial evidence;
- Proof of documents;
- First-hand documentary hearsay: previous representations by a witness;
- Business records;
- Computer-produced evidence; and
- Other uses of information technology in evidence.

In light of the significant role that they play in commercial (or as I think you would call it, "economic") cases, I will also refer to how documentary evidence is gathered and may be presented to the Court, including the process of discovery of documents, the use of subpoenas for production of documents, and the use of bundles of documents for the presentation of documentary evidence to the court.

At points, I refer to what I understand to be the practice in China, a no doubt imperfect understanding of which I have gleaned from an article by Professors Woo and Wang, [1] to whose work I am indebted for that reason, but any errors in my understanding of the Chinese practice are my responsibility.

The oral adversarial trial

I will first provide an overview of the nature of a common law civil trial, since that is the context in which the specific rules relating to documentary evidence have evolved and operate.

The oral adversarial trial is a firmly established feature in common law legal systems. Conventionally, evidence is given orally in court by witnesses, who are called and examined in chief by the party who tenders their evidence, then cross-examined by the opposing party, and re-examined by the party calling them. There are at least two significant rationales for this historical and traditional preference for oral evidence: first, that a party has the opportunity to hear, and challenge and test by cross-examination, the evidence adduced by the opposing party; and secondly, that the court has the opportunity the see and hear the witness and have regard to his or her demeanour in the witness box, which can inform judgments about the credibility of the witness – a topic which my colleague Justice Hoeben is to address.

This preference for oral testimonial evidence is reflected in and enforced by the hearsay rule, the effect of which is that a statement (oral or written) made otherwise than in the course of giving evidence in the proceeding is not admissible to prove the existence of a fact asserted in the statement. While there are numerous exceptions to the hearsay rule, its effect is that the starting point is that to prove a fact, a witness must give oral evidence of the fact in court. In this way, the common law tradition gives primacy to the oral evidence of witnesses in Court, and for a long time – until about the 1960s – the hearsay rule excluded much documentary evidence.

As I understand it, the Chinese position is quite different. According to Professors Woo and Wang: [2]

> By and large, documentary evidence remains overwhelmingly important in Chinese civil courts, while witnesses and oral testimony continue to play a more limited role. In the sample files reviewed, documentary evidence was presented and used extensively in all cases from the three Intermediate Courts. In many sample files, documentary evidence even appeared to be the only form of evidence presented, with cases resolved on that basis alone.
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> Specifically, oral evidence was presented in only 16 cases from Intermediate Court A [out of a sample of 140 cases], with only one sample in which there was a specific record of oral testimony given by witnesses in court. Similarly, in Intermediate Court B, witnesses and oral evidence were presented in only 16 cases [out of a sample of 177], of which only two cases contained a specific record of in-court oral testimony …
>
> In our interviews, judges pointed out that almost all civil and economic cases were decided based primarily on documentary evidence.

Even today, it remains exceptionally rare in Australia for a case to be heard and decided without at least some testimonial evidence – that is, evidence given by a witness, either orally in Court or in a sworn statement (affidavit) placed before the Court. [3] However, there is a far greater readiness to accept documentary evidence than there was fifty years ago, and in many commercial (or as I think you would call them, "economic") cases documentary evidence predominates and is often decisive. The increased acceptance of documentary evidence resulted from recognition of two matters of human experience:

- that documents brought into existence close in time to the events they record will often be more reliable sources than the recollections of witnesses related orally in court years later; and
- that in commerce and public administration, records were routinely made of events and transactions, which were relied on as accurate for the purposes of public administration and commerce, and if they were regarded as reliable for those purposes, then they ought to be reliable for the purposes of the courts also.

As a result, in and about the 1960s, statutory provision was made, in the Commonwealth and most States, for the more widespread admissibility of documentary evidence. Subject to some exceptions designed to ensure that their reliability and impartiality was reasonably assured, statements in documents were made admissible when the maker of the statement was unavailable, or where the document formed part of the records of a business. These provisions, though modified, continue to form the basis for the admissibility of most documentary evidence.

An overview of the law as to admissibility of evidence in New South Wales

The use of documentary evidence is but one aspect of the law of evidence, and many of the rules that govern the admissibility of evidence generally are relevant to the use of documentary evidence. I will therefore provide an overview of the rules of evidence applicable to the admissibility of evidence in civil proceedings in Australia.

The purpose of the law of evidence is to ensure so far as practicable that courts act only on evidence that is relevant, reliable and probative. Although our law of evidence originally comprised judge-made common law rules, these rules were supplemented during the 20th century by statutory provisions. The shift from a common law to a mainly (though not exclusively) statutory basis culminated with the Commonwealth *Evidence Act* 1995. Some (though not all) Australian States (including New South Wales) have adopted uniform legislation. The 1995 *Evidence Act* effectively codifies much of the law of evidence, and, to the extent that several of the States have adopted it, provides a uniform law of evidence in all Commonwealth courts and the courts of the participating States.

Many provisions of the 1995 Act restate the pre-existing common law and statutory law, but the 1995 Act also contains novel and reforming provisions. This paper, except where otherwise indicated, is based on the New South Wales *Evidence Act* 1995, which is substantially identical to the Commonwealth *Evidence Act* 1995.

The starting point is that, except as otherwise provided by the Act, evidence that is relevant in a proceeding is admissible in the proceeding; and evidence that is not relevant in the proceeding is never admissible. [4] The evidence that is relevant in a proceeding is evidence that, if accepted, could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding. [5] This requires a minimal logical connection between the evidence and a "fact in issue"; the evidence need not make the fact probable, or sufficiently probable, but merely more probable than it would have been in the absence of the evidence, so that it can be said that it could affect the probability of the fact.

Where determination of whether evidence is relevant depends on the court making another preliminary finding (including that the evidence is what the party tendering it claims it to be), the court may find that the evidence is relevant:

- if it is reasonably open to make that finding; or

- subject to further evidence being admitted at a later stage that will make it reasonably open to make that finding. [6]

The Act "otherwise provides" – through several exclusionary rules, which provide that certain evidence is not admissible (although it would satisfy the test of relevance), and through a judicial discretion to exclude relevant evidence (if its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to a party, or misleading or confusing, or cause or result in an undue waste of time). [7]

The hearsay rule. The first of the exclusionary rules is the hearsay rule, which provides that evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation (called "an asserted fact"). [8] The hearsay rule applies to statements and to conduct – thus the term "representation". A "previous representation" is a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced, and a "representation" includes an express or implied representation whether oral or in writing, a representation to be inferred from conduct, a representation not intended by its maker to be communicated to or seen by another person, or a representation that for any reason is not communicated. Most statements in documents are "previous representations", and subject to the exceptions about to be mentioned, would be excluded by the hearsay rule.

There are many exceptions to the hearsay rule, some of which have particular relevance to documentary evidence and to which we shall return for further consideration. The exceptions include:

- evidence that is relevant for a non-hearsay purpose; [9]
- first-hand hearsay where the maker of the representation is unavailable [10]or available [11] and appropriate notice where required has been given;
- business records,[12] tags and labels;[13]
- telecommunications; [14]
- evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind. [15] This means that evidence can be given by a witness who heard a person make statements about that person's health or state of mind, to prove that person's health or state of mind;
- evidence of reputation concerning whether a person was married, whether a man or woman cohabiting at a particular time were married to each other, or a person's age, or family history or a family relationship. [16] Previously, such evidence was inadmissible hearsay;
- public or general rights; [17]
- evidence for use in interlocutory proceedings; [18]
- admissions against interest. [19] This is an important and frequently used exception. The hearsay rule does not apply to evidence of an admission, which is a previous representation made by a person who is or becomes a party to a proceeding and is adverse to the person's interest in the outcome of the proceeding. [20] This is relevant in the context of documentary evidence, because many documents contain admissions: correspondence passing between parties often contains admissions against interest by the sender. Admissions are received as evidence only against the party who made the admission. [21] Evidence of an admission is only admissible, however, if the court is satisfied that the admission and the making of the admission were not influenced by violence, coercion or threats; [22]and
- representations about employment or authority [23].

The opinion rule. The second major exclusionary rule is the opinion rule, which provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. [24] Generally speaking, we will not receive evidence of opinion, as distinct from evidence of fact: evidence of fact is what a witness has seen, heard or otherwise perceived; evidence of opinion is what a witness believes or concludes from perceived or assumed facts. However, the distinction is sometimes elusive.

There is an exception for evidence of an opinion admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed. [25]

There is a further exception for evidence of an opinion expressed by a person if the opinion is based on what the person saw, heard or otherwise perceived about a matter or event *and* evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event. [26] This provision is designed to permit evidence of opinion that would facilitate the understanding of evidence that is otherwise relevant and admissible. It assumes that the matter or event as perceived by the witness is relevant to the proceeding, and makes the lay opinion evidence admissible as incidental to an understanding of the primary evidence. [27] Opinions as to the identity of individuals, the apparent age of a person, the speed of a vehicle, the state of the weather or a road or the floor of a factory, and whether a person was under the influence of intoxicating liquor may be admitted under this section.

The most important exception is for expert evidence: the opinion rule does not apply to exclude evidence of an opinion of a person that is wholly or substantially based on a person's specialised knowledge based on that person's training, study or experience. [28] It is on this basis that expert evidence is admitted. Such evidence is now admissible, even if it is about a fact in issue or an ultimate issue or a matter of common knowledge. [29]

The tendency and co-incidence rules. Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency to act in a particular way, unless reasonable notice of intention to adduce it has been given, and the court thinks that the evidence would, either by itself or having regard to other evidence, have significant probative value. [30] Similarly, evidence that two or more related events occurred is not admissible to prove that because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind, unless reasonable notice has been given, and the court thinks that the evidence would, either by itself or having regard to other evidence, have significant probative value. [31] The rationale of these rules is that "similar fact" evidence – that a person did an act on another occasion – is not of itself probative that he or she did it on the occasion in question, but has the potential to be highly prejudicial, and ought to be received only if the court is satisfied that it has significant probative value.

The credibility rule. Evidence that is relevant only to a witness' credibility is not admissible, [32]except:

- in cross-examination, if it has substantial probative value; [33] or
- to rebut denials by a witness that the witness is biased or has a motive for being untruthful, or has been convicted of an offence, or has made a prior inconsistent statement, or is or was unable to be aware of matters to which his or her evidence relates, or has knowingly or recklessly made a false representation while under an obligation to tell the truth; [34] or

- in re-examination, to re-establish credibility, or – in the case of a prior consistent statement of a witness – in response to evidence of a prior inconsistent statement, or to answer a suggestion that evidence of the witness is a recent invention. [35]

Privileges. The admissibility of evidence is also affected by a number of privileges, which permit the party entitled to the privilege to refuse to give the evidence protected by the privilege. The main privileges are client legal privilege (protecting confidential legal advice), [36] litigation privilege (protecting confidential communications between a client and a lawyer for the purposes of litigation), [37] protected confidences (but only where the court so directs), [38] religious confessions, [39] self-incrimination privilege (which protects evidence that may tend to prove that the witness has committed an offence, but if the witness gives the evidence the court may grant the witness a certificate by reason of which the evidence cannot be used against the person in any other proceeding), [40] public interest immunity (where the desirability of admitting the information into evidence is outweighed by the public interest in preserving secrecy or confidentiality including for reasons of security, defence or international relations), [41] and without prejudice communications (that would disclose settlement negotiations). [42]

Exclusionary discretions. The court has a discretion to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, or be misleading or confusing, or cause or result in undue waste of time. [43] Similarly, the court may limit the use to be made of evidence, if there is a danger the particular use of the evidence might be unfairly prejudicial to a party or might be misleading or confusing. [44]

Written testimonial evidence

Before dealing with documentary evidence properly so-called, I will make some further observations about testimonial evidence in written form.

In the Chancery Division (and its predecessors) in England, and in their Australian descendants, it has always been conventional for the evidence in chief of witnesses to be given by an affidavit – a sworn written statement containing their evidence. That affidavit is notionally "read" in court as the witness' evidence in chief, but nowadays the judge will usually have read it in advance. If required by the opposing party, the witness will still be called at the trial for the purpose of cross-examination, but the affidavit will stand as the witness' evidence in chief. The procedure has spread to other jurisdictions, so that it is quite commonplace to require that written statements of evidence, and reports of expert witnesses where expert opinion evidence is to be called, to be served in advance of a trial, which will stand as the

witness' evidence in chief, but subject to cross-examination if required.

The procedure apparently has a Chinese equivalent, and Professors Woo and Wang's explanation of why the Chinese judges they interviewed preferred documentary to testimonial evidence is equally applicable to our use of affidavit evidence: [45]

> These judges found oral evidence and witness testimony to be unreliable. They believed that witnesses do not always speak the truth as they often have an interest in the disputes or are closely related to one interested party or the other. …
>
> The reluctance to accept witnesses and oral evidence seems to be connected with the manner in which they are presented. A party or his attorney generally would not request that a witness be present in court (apparently because it is difficult and costly to appear), but instead asks these witnesses to produce a written statement, or talks to the witness and submits a record of the conversation as oral evidence. Without the witness' presence in court, however, it is difficult for the court to assess the credibility of the testimony presented. Having only a document of "oral testimony" will inevitably cause a judge to question accepting such "oral evidence".

This passage identifies as problems with such evidence:

- its lack of impartiality and objectivity, because it is often obtained from parties or their associates; and
- the difficulty in evaluating its credibility without oral cross-examination before the Court.

Those problems are just as relevant for us. In addition, affidavits and witness statements are almost invariably prepared by lawyers (as they must be, to ensure that they address the relevant issues and comply with the rules of evidence), and the effect of a lawyer's input may also be to colour the recollection and evidence of the witness and diminish its value as an independent recollection even below that of oral testimonial evidence.

However, the procedure also has significant benefits: it has the advantages of notifying the opposing party of the evidence to be adduced – which facilitates its investigation, testing and contradiction, of allowing a judge to understand the evidence in advance of the hearing, and of saving time at the trial. It is an important element of procedures designed to avoiding a "trial by ambush" in which each party endeavours to take the other by surprise.

For those reasons, we prefer to receive rather than disallow evidence from a biased witness, but we take into account the witness' bias in deciding what weight his or her evidence should be given. Often a witness may be entirely truthful, despite their interest or connection with a party. But we would regard the availability of the witness for cross-examination, if required by the opposing party, as essential; where the facts are controversial it would be unsafe to act on testimonial evidence, written or oral, that could not be tested by cross-examination. Nonetheless, the shortcomings of testimonial evidence, written as well as oral, to which I have referred and which apparently in your country significantly influence a preference for documentary evidence, have contributed to the increasing acceptance in common law jurisdictions of documentary evidence as a reliable and objective aid to fact finding.

Documentary evidence

I now turn to the use of documentary evidence properly so-called.

In the *Evidence Act*, "document" is defined in the dictionary to the *Evidence Act* to mean "any record of information" and to include:

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

It will be apparent that this definition catches electronic records.

A reference to a document includes a reference to any part of the document; any copy, reproduction or duplicate of the document or of any part of a document; or any part of such a copy, reproduction or duplicate.

The contents of a document may be proved by tendering the document, or by any of the following alternative means:

- Adducing evidence of an admission made by another party to the proceeding as to the contents of the document (such as a conversation or another document which contains the admission);
- Tendering a document that is or purports to be a copy of the document and has been or purports to have been produced by a device that reproduces the contents of documents (such as a photocopy);
- If it is an article or thing by which words are recorded so as to be capable of being reproduced as sound, or in which words are recorded in a code – tendering a document that is or purports to be a transcript of the words (such as a transcript of a recorded conversation);
- If an article or thing on or in which information is stored so that it cannot be used by the court unless a device is used to retrieve, produce or collate it – tendering a document that was or purports to have been produced by use of the device (such as printout from a computer);
- Tendering a document that forms part of the records of or kept by a business and is or purports to be a copy of or an extract from or a summary of the document in question;
- In the case of a public document – tendering a document that is or purports to be a copy of the document in question and to have been printed by the Government Printer or by authority of the Government or Parliament.

In addition, if the document in question is not available to the party or its existence and contents are not in issue, a party may adduce evidence of its contents by tendering a document that is a copy of or an extract from or summary of the document in question, or adducing oral evidence of the contents.

Proof in any of those ways of the contents of a document does not of itself make the document admissible: it must also be relevant, and it must not contravene any of the exclusionary rules.

Before a document can be relevant, it must be shown to be what the party tendering it claims it is. However section 75, referred to above, facilitates this, by permitting the court to find that a document is what the party tendering it claims it to be if it is reasonably open to make that finding.

First-hand documentary hearsay: previous representations by witnesses

The *Evidence Act* permits, in certain circumstances, the reception of first hand (but not more remote) hearsay. First-hand hearsay is a previous representation that was made by a person who had personal knowledge of an asserted fact. For this purpose, a person has personal knowledge of the asserted fact if his or her knowledge of the fact was or might reasonably be supposed to have been based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact. (NSW) *Evidence Act*, s 62. Often, a previous representation is recorded in a document – a statement made at the time of an event, an entry in a diary, a letter or a report.

Where maker not available. If a person who made a previous representation is not available to give evidence about an asserted fact, the hearsay rule does not apply to 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). (NSW) *Evidence Act*, s 63. For this purpose, a person is taken to be not available to give evidence about a fact if the person is dead, or not competent to give the evidence about the fact, or it would be unlawful for the person to give evidence about the fact, or a provision of the Act prohibits the evidence being given, or all reasonable steps have been taken by the party seeking to prove the person is not available to find the person or secure his or her attendance but without success, or all reasonable steps have been taken by the party seeking to prove the person is not available to compel the person to give the evidence but without success; otherwise, the person is taken to be available to give evidence about the fact. Where a witness is “not available” in any of those ways, a document containing the witness’ previous representation may be admitted.

However, if a party intends to tender first hand hearsay evidence under this provision, then that party must give reasonable notice in writing to each other party of the first party’s intention to adduce the evidence – although the court has a (rarely used) discretion to dispense with the requirement for notice. The purpose of this is to enable the other party to investigate the circumstances and assemble any contradictory evidence, as if the document is received in evidence there will be no opportunity to cross-examine the person who made the previous representation.

Where maker available. Where a person who made a previous representation is available to give evidence about an asserted fact, the hearsay rule does not apply to 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. [48] The term "undue" gives the court a fairly broad discretion, relevant considerations including the nature of the proceedings, the amount in issue, the importance of the evidence, and so on. Again, a party intending to rely on this provision must give reasonable notice of its intention to do so, for the same reasons.

Where maker called. Further, where a person who made a previous representation is called to give evidence at the trial, the hearsay rule does not apply to evidence of the previous representation given by that person – or by a person who saw, heard or otherwise perceived 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. [49] Although the concept of "fresh in the memory" provides a degree of flexibility, it limits the tendering of hearsay material to circumstances where the maker of the representation is called, to that which has the value of being "fresh", and generally speaking this has been taken to be limited to statements made "very soon after" the events in question – in terms of hours or days, certainly not years. [50]

The effect of this is that if a witness made a previous representation when the events were fresh in his or her memory (for example, a contemporaneous report or diary entry), and the witness is called to give oral evidence, the documentary record may also be admitted. This can be powerful corroboration of the oral evidence. However, in those circumstances, a document containing a previous representation must not be tendered until the conclusion of the witness' examination in chief, unless the court gives leave – the reason for this is to prevent practical circumvention of the requirement to give oral evidence by, in effect, receiving the previous representation first and merely adopting it. [51]

Thus documentary evidence containing first-hand hearsay is admissible in exception to the hearsay rule in three circumstances:

- Where the witness is unavailable to give evidence; or
- Where, though the witness is available, it would be unduly expensive or cause undue delay or not be reasonably practicable to call the witness; or
- Where the witness is called, and the previous representation was made when the event was fresh in the witness' memory.

Essentially, these provisions seek to strike a balance between ensuring that relevant evidence is available, while preserving, where practicable, the ability to challenge it by cross-examination. They facilitate the receipt into evidence of documents containing statements by witnesses who have first hand knowledge of an event (through seeing, hearing or otherwise perceiving it):

- despite the absence of opportunity to test it, where cross-examination is impossible or impracticable, or
- where there is an opportunity to test it, if it is so contemporaneous with the events it records that its reliability is likely to be superior to oral recollections.

Business Records

The hearsay rule does not apply to a document that 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 at any time was or formed part of such a record, and contains a previous representation made or recorded in the document in the course of or for the purposes of the business – so far as the document contains the representation – if the representation was made:

- by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
- 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. [52]

For this purpose, 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). [53]

Further, if there is a question as to the occurrence of an event of a particular kind and in the course of a business there is a system of making and keeping a record of the occurrence of all events of that kind, the hearsay rule does not exclude evidence that tends to prove that there is no record kept in accordance with that system of the occurrence of the event. [54] Thus if a business keeps a record of all events of a particular type, and it is asserted that such an event did not take place, the business record may be used to prove, by the absence of any record of the particular event, that the event did not take place.

"Business" is very widely defined: it includes a profession, calling, occupation, trade or undertaking; an activity engaged

in or carried on by the State in any of its capacities; an activity engaged in or carried on by the government of a foreign country; an activity engaged in or carried on by a person holding office or exercising power under or because of the Australian Constitution, an Australian law or the law of a foreign country; the proceedings of an Australian Parliament, a House of an Australian Parliament, or a Committee of such a House; the proceedings of a Legislature of a foreign country; and a business that is not engaged in or carried on for profit; and a business engaged in or carried on outside Australia.

The Australian Law Reform Commission described the rationale for the admissibility of business records in exception to the hearsay rule as follows: [55]

They relate to representations contained in records of or kept by a business and recorded in the course of or for the purposes of the business. Although computers can be used for a variety of purposes, it is principally as record keeping devices that they must be considered in relation to the hearsay rule. Computer records are kept by electronic means and with less human involvement than is the case with written records. It is suggested that the safeguards of the document being part of a record of a business and of the statement being recorded in the course of or for the purposes of the business are sufficient threshold requirements to apply at the stage of admissibility of records kept by whatever means they are.

> The New South Wales Law Reform Commission in its report [NSWLRC 17, paragraph 48] commented that the fact that the statements were to be used by the business provided a strong incentive for accuracy. The same sort of threshold requirement has been used in Victoria and in Queensland in the provisions dealing with books of account of a business (general financial records and records of goods produced and stock records) and in the legislation of Victoria, Queensland and Western Australia enabling statements in documents to be admitted in criminal proceedings … . It is true that errors, accidental and deliberate, occur and can occur at every stage of the process of record keeping by computers. The fact is, however, that they are the exception rather than the rule, they tend to occur at the stage when the information is fed into the system, and there are techniques available which can be, and are, employed at each stage of the record-keeping process to eliminate error … . In many cases there will be no *bona fide* issue as to the accuracy of the record. It is more efficient to leave the party against whom the evidence is led to raise any queries and make any challenges it may have.

However, the exception does not apply if the representation 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 in connection with an investigation relating to or leading to a criminal proceeding. [56] The rationale for this exclusion from the exception – of representations made or obtained for the purpose of proceedings – is to prevent the receipt, in exception to the hearsay rule, of hearsay material that cannot be tested by cross-examination, which is prepared in an atmosphere or context that may cause it to be self-serving, in the sense of possibly being prepared to assist the proof of something known or at least apprehended to be relevant to the outcome of identifiable legal proceedings. [57]

Under the business records provisions, it is commonplace for large quantities of documentary records to be admitted. Correspondence (and copies retained by a business), written and electronic, invoices, written contracts, file notes and files, medical and hospital records, and the records of government departments and of business corporations, are frequently received under this provision.

Often, business records are the most important evidence in commercial litigation. Typically they provide a relatively uncontroversial framework of facts. It is important not to overlook that business records can be wrong, as often they depend on the accuracy of the person who makes or generates the record. But the theory of their admissibility is that they are more likely to be right than wrong, and more likely to be reliable (because they are usually contemporaneous) than the recollections of witnesses years later.

The hearsay rule also does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag, or label or writing may reasonably be supposed to have been so attached or placed in the course of a business, for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents if any of the object. [58]

Computer-produced evidence

Evidence derived from computers is admissible on the same basis as other documentary evidence. As already mentioned, an electronic record of information is within the definition of “document” and the rules relating to admissibility of documents apply to information stored in a computer. A party wishing to adduce evidence of the contents of a computer record may do so by any of the methods by which the contents of a document can be proved, including by tendering a printout from the computer.

Apart from issues relating to admissibility of documentary evidence and hearsay generally, evidence produced by a computer will only be shown to be relevant if it is established that the computer does what it is claimed to do. It is often necessary to prove that a computer does what it is asserted by a party to do. While, as with other documentary evidence, section 57 facilitates this by allowing the court to find that a computer does what it is claimed to do, if it is reasonably open to find that the computer does what it is claimed to do, the position is even stronger in the case of computer-generated evidence, because a computer is presumed to do what it is asserted by a party to do if it is

reasonably open to find that the device or process is one that, or is of a kind that, if properly used ordinarily produces that outcome – unless evidence is adduced to the contrary. Thus where a party tenders a document produced by a "device or process" and asserts that in producing the document the device or process has produced a particular outcome; then if it is reasonably open to find that the device or process is one that if properly used ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the device or process has produced that outcome. [59] And where the information is or has been part of the records of a business and is produced by a computer used for the purpose of the business, there is a presumption – where the party adducing it asserts that the computer will produce a particular outcome – that it does so, unless evidence sufficient to raise doubt about the presumption is adduced. [60]

These provisions are intended to facilitate the admission of computer-produced evidence. The rationale is that, while errors, both accidental and deliberate, can and do occur at every stage of the process of record keeping by computers, those errors are the exception rather than the rule, and to require extensive proof of the reliability of the computer would place a costly burden on the party tendering the computer generated information, give the opposing party a substantial tactical weapon, and add to the workload of the courts; in many cases there is no good faith issue as to the accuracy of the records, and it is more efficient to leave it to the opposing party to raise any queries and make any challenges. [61]

A previous representation may be stored in a computer. Where evidence of a previous representation is admissible (in any of the ways to which reference has been made), then evidence of the contents of the computer record may be adduced by tendering a document produced by use of a device that retrieves information from the computer – for example, a printer.

Not all computer-generated evidence is hearsay – the computer may itself generate information, rather than reproduce information contained in it. In such a case, it will not be necessary to bring the computer-produced information within any exception to the hearsay rule.

The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex, so far as the representation is a representation as to the identity of the person from whom or on whose behalf it was sent, or the date on which or the time at which the message was sent, or the message's destination or the identity of the person to whom it was addressed. [62] The effect of this provision is that evidence of electronic messages and other data in computers used for communications is admissible to prove the identity of senders and receivers and the date and time of the message.

It is open to a party to request the production of documents or the calling of witnesses to permit the authenticity of computer information to be tested. [63] If it cannot be tested, the computer evidence may be excluded if its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to a party. [64]

Other uses of information technology in evidence

It may be of interest to refer to other ways in which information technology is used in civil litigation in Australia.

Traditionally, where the evidence of a witness could not be taken at a trial, it would be taken before trial, by an examiner, either within or outside the jurisdiction. This procedure had the significant disadvantage that the trial judge would not hear and see the witness, but would be reliant on a transcript. Now, where an examiner takes evidence, an audio-visual record is often kept, so that the trial judge can hear and see the witness. However, where for one reason or another it is impracticable for a witness to attend at the trial, it is often preferred that the evidence be taken by audio-visual link. While this is less ideal than having the witness present in person, it is vastly preferable to reliance on a written transcript. It allows some evaluation of the witness' demeanour. However, it can present difficulties – of timing and expense – where the evidence will be lengthy, or where there are clashes in time zones.

A "real time transcript" provides an almost instantaneous computer transcript of the evidence, which can be searched and annotated electronically. It facilitates understanding and following the evidence and dealing with objections. Although the court reporting service does not yet provide a "real time transcript", some private transcription services do, and parties often engage these for long, multi-party trials. It is neither economic nor necessary for smaller cases.

Again in large trials with large numbers of documents, documentary databases are sometimes prepared and document-imaging systems employed to display them.

Obtaining and presenting documentary evidence

Particularly in commercial litigation, in which documents typically play a significant role, the obtaining of documentary evidence is a vital part of the pre-trial process. The courts usually insist on presentation of the documentary evidence to the court in a manner, which aids understanding by the court.

Discovery of Documents. During the pre-trial phase, each party investigates the facts and assembles evidence. A very important part of this process involves the obtaining by compulsory process of the other party's relevant documents. This is called "discovery of documents".

In its general form, the discovery process entitles each party to give the other a notice, requiring the other to make a list,

verified by affidavit, of all documents in the other's possession, custody or power which are relevant to any fact in issue in the proceedings, and to produce those documents for inspection. However, because of the burden, which this obligation can impose – given the extent of documentation both electronic and written now generated in commerce and public administration – it is commonplace to limit the entitlement to discovery to particular categories or classes of documents. Even so, the burden can still be a very considerable one. Our court now encourages parties, wherever possible, to give discovery electronically.

Subpoenas for Production. In addition to the process of discovery of documents, a party may (as of right) have the court issue subpoenas for production of documents, either to the other party, or to a stranger to the proceedings, commanding the production to the court for the purposes of the proceedings of any document in the recipient's possession, custody or power. A subpoena can only be issued for a legitimate forensic purpose, which essentially involves the purpose of obtaining documents, which might throw light on issues in the proceedings.

Presentation of Documents to Court. Where there is to be any significant body of documentary evidence, the court usually requires the parties to prepare a "bundle of documents", indexed and paginated and arranged in chronological or other logical sequence. Usually, we find that a chronological arrangement facilitates understanding the evidence, because the judge can then read through the documentary record of events and transactions in the sequence in which they took place. Often, a chronological bundle of documents will provide a sound and relatively uncontroversial structure for the evidence, and the documents will often afford important and significant bases for finding facts where there is controversy.

Conclusion

While, in Australia, the primacy of oral evidence is well established and persists today in the common law tradition, nonetheless we recognise many advantages of documentary evidence. The rules of evidence now permit extensive use of documentary evidence in exception to the hearsay rule, particularly in the case of business records, and first-hand hearsay where it is not possible or practical to call the witness to give oral evidence, or where the document records a previous representation made when the events were fresh in the witness' memory. Computer generated evidence is admissible on the same basis as other documentary evidence, and special provision is made to facilitate the proof of computer records in light of what may be assumed to be their general accuracy. These endeavour to balance recognition of some of the shortcomings of testimonial evidence, the need for efficiency in court processes, the *prima facie* reliability of contemporaneous documents, and the importance attributed to giving an opposing party an opportunity to hear, test and challenge by cross-examination, and contradict the evidence. The residual preference for oral evidence is in order to permit the evidence to be challenged by cross-examination, and the court to evaluate the witness in that context.

END NOTES

1. Margaret Y.K. Woo, Professor of Law, Northeastern State University School of Law, Boston, Mass.; Yaxin Wang, Professor of Tsinghua University School of Law, Beijing, "Civil Justice in China: An Empirical Study of Courts in Three Provinces", 53 *American Journal of Comparative Law* 911 (2005).
2. Woo & Wang, op cit., p932f.
3. Despite the tradition of the oral trial, the evidence in chief of witnesses is conventionally given by way of affidavit, a sworn statement of the witness prepared and served before the hearing, in some jurisdictions, including in Equity in New South Wales, in matrimonial litigation, and almost universally in interlocutory applications. The practice originated in the Chancery Division and its predecessors in England. The witness may be required to attend court by the opposing party, for the purposes of cross-examination.
4. (NSW) *Evidence Act*, s 56.
5. (NSW) *Evidence Act*, s 55.
6. (NSW) *Evidence Act*, s 57.
7. (NSW) *Evidence Act*, s 135.
8. (NSW) *Evidence Act*, s 59.
9. (NSW) *Evidence Act*, s 60.
10. (NSW) *Evidence Act*, s 63.
11. (NSW) *Evidence Act*, s 64.
12. (NSW) *Evidence Act*, s 69.
13. (NSW) *Evidence Act*, s 70.
14. (NSW) *Evidence Act*, s 71.
15. (NSW) *Evidence Act*, s 72.
16. (NSW) *Evidence Act*, s 73.
17. (NSW) *Evidence Act*, s 74.
18. (NSW) *Evidence Act*, s 75.
19. (NSW) *Evidence Act*, s 81.
20. (NSW) *Evidence Act*, s 81.
21. (NSW) *Evidence Act*, s 83.
22. (NSW) *Evidence Act*, s 84.
23. (NSW) *Evidence Act*, s 87(2).
24. (NSW) *Evidence Act*, s 76.
25. (NSW) *Evidence Act*, s 77.
26. (NSW) *Evidence Act*, s 78.

27. R v Leung & Wong (1999) 47 New South Wales Law Reports 405.
28. (NSW) *Evidence Act*, s 79.
29. (NSW) *Evidence Act*, s 80.
30. (NSW) *Evidence Act*, s 97.
31. (NSW) *Evidence Act*, s 98.
32. (NSW) *Evidence Act*, s 102.
33. (NSW) *Evidence Act*, s 103.
34. (NSW) *Evidence Act*, s 106.
35. (NSW) *Evidence Act*, s 108.
36. (NSW) *Evidence Act*, s 118.
37. (NSW) *Evidence Act*, s 119.
38. (NSW) *Evidence Act*, s 126B.
39. (NSW) *Evidence Act*, s 127.
40. (NSW) *Evidence Act*, s 128.
41. (NSW) *Evidence Act*, s 130.
42. (NSW) *Evidence Act*, s 131.
43. (NSW) *Evidence Act*, s 135.
44. (NSW) *Evidence Act*, s 136.
45. Woo & Wang, art. cit., p935.
46. (NSW) *Evidence Act*, s 62.
47. (NSW) *Evidence Act*, s 63.
48. (NSW) *Evidence Act*, s 64.
49. (NSW) *Evidence Act*, s 64(3).
50. Graham v The Queen (1998) 195 Commonwealth Law Reports 606, 608 (Gaudron, Gummow & Hayne JJ).
51. (NSW) *Evidence Act*, s 64(4).
52. (NSW) *Evidence Act*, s 69.
53. (NSW) *Evidence Act*, s 69(5).
54. (NSW) *Evidence Act*, s 69(4).
55. Australian Law Reform Commission, *Evidence*, Report No 26 (1985) [702]-[705]
56. (NSW) *Evidence Act*, s 69(3).
57. Vitali v Stachnik [2001] New South Wales Supreme Court 303, [12]; *Street v Luna Park Sydney Pty Ltd* [2007] New South Wales Supreme Court 695.
58. (NSW) *Evidence Act*, s 70.
59. (NSW) *Evidence Act*, s 146.
60. (NSW) *Evidence Act*, s 147.
61. Australian Law Reform Commission 26, vol 1, para 705.
62. (NSW) *Evidence Act*, s 71.
63. (NSW) *Evidence Act*, sections 166-169.
64. (NSW) *Evidence Act*, s 135(a).