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THE RECEIPT OF EVIDENCE BY QUEENSLAND COURTS:

ELECTRONIC RECORDS

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CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE AND SUBMISSIONS

The Commission has been requested, as part of its Fifth Program,[1] to review the law in Queensland relating to the Court's receipt into evidence (that is, the admissibility) of information that is stored and/or conveyed using various electronic and similar media. The full terms of the Commission's reference are as follows:[2]

> [To review] the capacity of the judicial system, both in its criminal and civil aspects to receive into evidence information stored and conveyed in electronic, magnetic or similar form.

In April 1997, the Commission called for public comment on the types of issues that should be addressed during the course of this reference. The Commission received 19 submissions. A list of respondents is set out in the Appendix to this paper.[3] The submissions received in response to the Commission's call for public input have been of great assistance to the Commission and have been taken into account in the preparation of this Issues Paper. There will be a further opportunity for public comment following the distribution of this paper.

The Commission encourages interested individuals and organisations to make written, oral or electronic submissions on the issues and options for reform discussed in this paper and on any other matters that respondents consider relevant to the reference.

Details of how to make a submission are set out at the beginning of this paper. The closing date for submissions is 30 November 1998.

2. FOCUS OF THE TERMS OF REFERENCE

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[1] The Fifth Program of References was given to the Commission by the former Attorney-General, the Honourable Denver Beanland MLA.

[2] The Commission also has a reference from the Attorney-General to review the law relating to the evidence of children in Queensland. A Discussion Paper on this reference is due to be published in November 1998. In the course of that reference, the Commission will be examining the extent to which the current law in Queensland allows children to give evidence with the assistance of modern technology such as closed-circuit television.

[3] At the end of October 1997, a representative from the Commission spoke about the reference at an "Evidence and Technology" seminar hosted by the Records Management Association of Australia (Qld). In May 1998, a further talk was given at a seminar hosted by the Institute for Information Management Ltd (Qld). The comments made by attendees at both seminars have been of great assistance to the Commission.

In light of the responses to the Commission's call for preliminary comments on the reference, the Commission has confined its consideration of the terms of the reference to a review of the law on the admissibility[4] of electronic records. The Commission makes the following observations as to the scope of this reference:

- Extensive reviews of evidence legislation in other jurisdictions have resulted in radical changes to the rules of evidence applying in those jurisdictions.[5] However, the Commission's terms of reference are specific and are not conducive to a detailed consideration of other aspects of the *Evidence Act 1977* (Qld). Further, there are provisions outside the *Evidence Act 1977* (Qld) that govern the admissibility of certain electronic records. For example, section 16A(16B) of the *Traffic Act 1949* (Qld) provides that breath analysis certificates shall be conclusive evidence of their contents until the contrary is proved. Presumably, these types of certificates would in many cases be generated by, or be copied from, computers. Because the admissibility of these types of records is regulated by specific legislation, the purpose of which is to facilitate their proof, the Commission does not propose to examine these provisions in this reference.

- Issues that are not directly related to the law of evidence - such as the use of modern technology by judges, parties, counsel and juries during the course of a hearing - have been excluded from the reference. Those issues have been the subject of recent review.[6] The Commission is aware that various types of modern technology are already being used in a number of Queensland and

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4 Whether or not an electronic record is accepted or admitted as part of the evidence in a court proceeding depends on whether the electronic record satisfies certain rules of evidence. These rules of evidence are known as "the rules of admissibility". A brief overview of the main rules of evidence is set out in Chapter 2 of this paper.

5 In 1987, the Australian Law Reform Commission produced its Report on *Evidence*, which concluded an extensive review of the laws of evidence and formed the basis of the *Evidence Act 1995* (Cth). The terms of reference for that Commission's review were significantly broader than those of this Commission: see the Terms of Reference set out at the commencement of the Australian Law Reform Commission's Report, *Evidence* (ALRC 38, 1987). In particular, the Australian Law Reform Commission was to have regard to the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs that a comprehensive review of the law of evidence be undertaken with a view to producing a code of evidence, and that a Uniform Evidence Act be drafted.

6 For example, the Policy and Legislation Division of the Queensland Department of Justice and Attorney-General is currently co-ordinating a video and teleconference working party and the Council of Chief Justices of Australia and New Zealand released a report on its Electronic Appeals Book Project on 25 May 1998 <http://www.ccj.org> (17 August 1998). See also the Australian Institute of Judicial Administration Inc "Technology for Justice" conference: 23-25 March 1998 <http://www.austlii.edu.au/conferences/techjust/> (10 August 1998); the consultation draft of the *Evidence (Audio and Video Links) Bill 1998* (Qld) (yet to be introduced); and Australian Law Reform Commission, Issues Paper, *Technology - what it means for federal dispute resolutions* (IP 23, March 1998).

Australian courts.[7] However, the Commission agrees with the respondent who suggested that:[8]

> the Commission is not the body to undertake the hard nosed technical and business analysis needed to assess the cost effectiveness of new technologies.

- The Commission regards the issue of the admissibility of electronic records as one that may be relevant to all areas of the law. For that reason, the Commission has elected not to focus its review on any particular area of substantive law, for example, the law of contracts, within which the admissibility of information in an electronic format may arise. In some jurisdictions, issues relating to the admissibility of electronic records have been addressed simply in the context of the facilitation of electronic commerce. For example, the United Nations Council of International Trade Law has developed a Model Law aimed at the facilitation of electronic commerce.[9] The emphasis of the Model Law is on issues surrounding the entering, fulfilment and enforcement of commercial agreements.[10] A number of jurisdictions, including Australia, are considering whether to adopt the Model Law.[11]

- The Commission is not proposing to review the possible security problems that may be attached to different modes of electronic storage, or problems associated with transferring information from one mode of storage to another (for example, if it becomes difficult for information stored on CD-ROMs to be

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7 See the discussion of the availability of real-time court reporting, video and audio links, and document display video cameras in: Supreme Court of Queensland, Supreme Court Brochure Series No 8, *Technology in Trials in the Supreme Court* (October 1997).

8 Submission 7.

9 United Nations Commission on International Trade Law, *Model Law on Electronic Commerce* (December 1996) <http://www.un.or.at/uncitral/en-index.htm> (14 August 1998).

10 In a limited way, the *Model Law on Electronic Commerce* touches on questions of admissibility. Article 9(1) provides:

> In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:
> (a) on the sole ground that it is a data message; or,
> (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

11 See Electronic Commerce Expert Group, *Electronic Commerce: Building the Legal Framework* (Report to the Cth Attorney-General, 31 March 1998) <http://law.gov.au/aghome/advisory/eceg/ecegreport.html> (10 August 1988). Model legislation based upon the Report will be developed through the Standing Committee of Attorneys General for implementation in each jurisdiction. The legislation will not include provisions dealing with evidence issues (recommendation 9 of the Report states that the *Evidence Act 1995* (Cth) deals with electronic evidence). See also Press Release of the Commonwealth Attorney-General, “Legal Framework for Electronic Commerce” (24 July 1998).

transferred to future electronic storage media). The Commission is of the view that these matters do not come within its terms of reference. They are not matters that concern the substantive rules of evidence. In the view of the Commission, it is more appropriate that those issues be addressed by concerned organisations, which may wish to develop protocols for their own internal use.

Although the Commission is unaware of extensive practical problems to date with applying existing law on admissibility of evidence to electronic records,[12] the issues surrounding their admissibility may become more apparent as the use of, and reliance on, electronic records increases.[13]

In this paper, the Commission is inviting comment on a range of issues. The Commission will develop its recommendations for reform after taking into account submissions received in response to this paper.

3. TYPES OF RECORDS COVERED IN THIS ISSUES PAPER

Information can be expressed using:

- words or symbols;
- numbers or mathematical equations;
- images (either moving or still; graphical or pictorial); or
- sound.

Just as information may be expressed in different ways, information may be stored or conveyed using a number of different formats. Paper is only one of these formats. Much information is now stored and conveyed electronically. Currently available electronic formats used to store or convey the expression of information include:

- computer files on a floppy disk;

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12 For example, in relation to electronic commerce, the Electronic Commerce Expert Group, a Commonwealth committee, has noted that in Australia there are few cases dealing with the issues targeted as likely to cause problems: Electronic Commerce Expert Group, *Electronic Commerce: Building the Legal Framework* (Report to the Cth Attorney-General, 31 March 1998) <http://law.gov.au/aghome/advisory/eceg/ecegreport.html> (10 August 1998) at para 1.12.

13 See the similar comments made by the Uniform Law Conference of Canada, Consultation Paper, *Uniform Electronic Evidence Acts* (March 1997) <http://www.law.ualberta.ca/alri/ulc/current/eelv.html> (10 August 1998).

- computer files on a hard disk;
- electronic mail;
- internet transactions;
- compact disks ("CDs");
- compact disks - read only memory ("CD-ROMs");
- audiotapes;
- videotapes;
- magnetic tapes;
- digital video displays ("DVDs"); and
- laserdisc.

In this paper, the Commission has used the term "electronic record" to describe information stored in formats such as those listed above. This term is used to cover records that are stored and/or conveyed using electronic technology[14] as well as records that are stored and/or conveyed using magnetic technology[15] or some other similar technology.[16]

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14 An example of a record that is stored using electronic technology is the data contained on a smart card. A smart card is simply a plastic card (like a credit card) with an embedded computer chip for storing information. An example of a smart card is the new public phone card (which stores electronic money). (The old public phone card was made using magnetic disks.)

An example of a record that is conveyed using electronic technology is electronic mail or e-mail. See the discussion of issues concerning the admissibility of electronic mail in Chapter 11 of this paper.

15 An example of a record that is stored using magnetic technology is a record that is stored using a magnetic disk (as opposed to a CD-ROM). For reasons that include cost and speed, many work environments are still using magnetic disks. In Australia, credit cards and most audiotapes are currently still made using magnetic disks.

16 An example of a record that is stored using "some other similar technology" is a record that is stored on a CD-ROM using optical (as opposed to magnetic) technology.

CHAPTER 2

THE LAW OF EVIDENCE

1. INTRODUCTION

The capacity of the judicial system to receive particular information as evidence of the existence of certain facts in issue is governed by rules of evidence. For the most part, these rules do not distinguish between information stored, or contained, in different media, although the application of these rules does depend on the purpose for which the information is being tendered as evidence.[17]

The rules of evidence are complex and do not lend themselves to easy explanation. A very general summary is provided by Forbes:[18]

> Courts of law are not so free to gather information as other decision makers. Generally they depend on the parties to inform them and may not conduct their own inquiries. Sometimes they are bound to disregard relevant material in deference to interests which compete with the **"best evidence"** ideal. Thus the **hearsay** rule excludes some relevant information as untested and unreliable and the rules of privilege protect confidence and candour between lawyer and client. Ultimately the principle of **relevance**, modified by these and other rules of exclusion, constitutes the law of evidence.
>
> [**admissibility** is made up of] ... the classes of information which may be considered, as distinct from that which ought to be *accepted*. [emphasis in bold added]

Some of the concepts referred to in this quote are discussed briefly below.

The law of evidence has not been codified in any Australian jurisdiction. State, Territory and Federal evidence law consists of the common law (law that develops through the decisions made by judges in particular cases), which is supplemented by different legislation in each jurisdiction.[19]

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17 See the discussion at pages 13-14 of this paper concerning the different purposes for which evidence may be tendered.

18 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [A.1].

19 In 1995, the Commonwealth and New South Wales each passed the *Evidence Act 1995* in virtually identical terms. The *Evidence Act 1995* (Cth) also applies in Australian Capital Territory Courts. (The *Evidence Act 1971* (ACT) applies in the Australian Capital Territory in relation to proceedings that began to be heard before the commencement of the Commonwealth Act: see Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at para [103000].)

2. THE MANNER IN WHICH EVIDENCE IS RECEIVED BY THE COURT

The manner in which evidence is received by the court depends on the type of evidence in question. If a witness is giving evidence or oral testimony in court, the witness will take an oath or an affirmation and then give his or her testimony. However, much of the evidence received by courts is not given by witnesses in the traditional sense. It is common for "documents"[20] to be tendered during the course of a trial. The process by which a document that has been tendered becomes an exhibit can be described as follows:[21]

> The physical process whereby a document is placed before a court for consideration is through the document being *tendered*. That is, it is simply handed up to the judge after counsel has indicated his or her intention to tender it, and after it has been shown to opposing counsel for any objections to its tender to be raised. If the tender is accepted, either without objection or where objections are rejected, the document is in evidence for relevant purposes, and becomes an exhibit in the trial. If the tender is rejected, the document is *not* in evidence ... [original emphasis]

In the great majority of cases, objection is not taken to the admissibility of documentary evidence, except on the grounds of relevance, or with a view to attempting to ensure that a document is received into evidence for a limited purpose only - for example, in the case of a letter, as evidence of the fact that it was written, sent and received, but not as evidence of the truth of the assertions contained in it. In the case of documents in a paper form, it is rare for an objection to be taken to the tender of a copy rather than the original in reliance on the secondary evidence rule.[22] Such objections normally arise from an attempt by the objector to gain a forensic advantage by, for example, causing the party seeking to tender the document to call, as a witness to explain the absence of the original, a person who will then be exposed to cross-examination.

As a matter of practice, the rules of evidence discussed in this paper will be applicable if raised by a party in an objection to the admissibility of certain evidence, or if raised by the court itself.

3. RELEVANCE

The primary rule of admissibility for all evidence is that:

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20 Here the term "document" is used in its broadest meaning to convey a record of information not necessarily in a paper form, and would include an electronic record.

21 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 92.

22 The secondary evidence rule is discussed at pages 9-12 of this paper.

- evidence that is relevant[23] to the issues in a proceeding is admissible unless there is another rule to exclude it;[24] and

- evidence that is not relevant is not admissible.[25]

One aspect of the relevance rule, at least in relation to documentary evidence, is that a document must be authenticated by an extrinsic source before it is admissible.[26] A document cannot authenticate itself. This means that the party seeking to rely on a document must adduce evidence that confirms that the document is what it purports to be or what the party claims it to be.[27]

The evidence required to authenticate a document will be determined in part by the nature of the document in issue. For example, a paper document might be authenticated by the testimony of the document's author or the testimony of a person who saw the author sign the document.[28] It may include evidence that confirms that, where a device has been used to produce the evidence, the device used was reliable and accurate.

There appears to be some confusion at common law in relation to authentication requirements for some evidence. For example, if evidence is presented that goes to establishing the accuracy of a type of instrument, it is unclear whether a presumption thereby arises that the instrument was working accurately on the occasion in question

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23 The term "relevant" has been defined in a number of different ways. For a comprehensive discussion of the different views on the meaning of "relevance" in evidence, see Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at para 94.

24 The rule against hearsay, discussed later in this chapter, is one example of an evidentiary rule that renders relevant evidence inadmissible.

25 Smith TH (The Hon Justice), "The More Things Change the More They Stay the Same? The Evidence Acts 1995 - An Overview" (1995) 18 *UNSW Law Journal* 1 at 12-14.

26 While the authentication rule is usually treated as a discrete issue by evidence commentators, it is better treated as an aspect of relevance: Riordan JA (ed), *The Laws of Australia (*looseleaf), Vol 16.5 at para [38]; Law Commission (NZ), Preliminary Paper, *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, May 1994) at 13-14.

27 Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at para [39085]. However, this principle is qualified in respect of documents that are, or have been in the possession of a party: Howard MN, *Phipson on Evidence* (14th ed 1990) at para 26-10:

> Documents which are, or have been, in the possession of a party will ... generally be admissible against him as *original (circumstantial) evidence* to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, or his state of mind with reference thereto. [notes omitted]

28 Law Commission (NZ), Preliminary Paper, *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, May 1994) at 13-14.

or whether more evidence is required.[29]

In relation to the standard of proof required for authenticating evidence, the Australian Law Reform Commission has also noted some obscurity in the common law:[30]

> This issue does not appear to have been discussed to any great extent in the authorities. In practice the trial judge will admit evidence of objects and other evidence on being given an assurance that evidence capable of demonstrating its connection to the issues will be led. In practice, writings are admitted into evidence on the giving of evidence-in-chief as to their authenticity - that is, the court proceeds on the basis that it assumes that the evidence will be accepted. With evidence produced by devices or systems, however, the courts appear to have required that the trial judge be satisfied - presumably, on the balance of probabilities - as to the accuracy of the technique and of the particular application of it.

The *Evidence Act 1977* (Qld) contains a number of provisions to facilitate the task of authenticating certain types of evidence. Relevant provisions are discussed in subsequent chapters of this Issues Paper.

4. THE TWO MAIN EXCLUSIONARY RULES OF EVIDENCE

As noted above, although the contents of a document may be relevant to the matters in issue before the court, that evidence may still be excluded if it infringes one of the exclusionary rules of evidence. The two main exclusionary rules are discussed below.

(a) The rule as to secondary evidence of the contents of a document

(i) The general rule

An exception to the general rule regarding the admissibility of relevant evidence is referred to as the secondary evidence rule.[31] The general effect of this rule

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[29] See Chapter 11 of this paper for a discussion of the authentication problems relating to audiotapes. See also Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at para 179.

[30] Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at para 180.

[31] This rule is sometimes described as the last vestige of the "best evidence" rule which is now considered to be obsolete. Under the "best evidence" rule, no evidence was admissible unless it was "the best that the nature of the case will allow": see per Lord Hardwicke LC in *Omychund v Barker* (1745) 1 Atk 21 at 49, 26 ER 15 at 33. See Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at para [1460].

is that:[32]

> A party relying on the words used in a document for any purpose other than that of identifying it must, as a general rule, adduce primary evidence of its contents.

The rule was developed in relation to documentary evidence and requires that the original document be produced, or that its absence be explained before a copy can be admitted as evidence. The secondary evidence rule was developed at a time when there were no computers, photocopiers or even carbon paper. The rationale for the rule was the risk of inadvertent error in copying, as well as the prevention and detection of fraud.[33]

(ii) Exceptions

There are a number of common law and statutory exceptions to the secondary evidence rule. In these circumstances, the law permits secondary evidence, such as a copy of a document, to be given to prove the contents of a document.

A number of statutory exceptions to the secondary evidence rule are found in the *Evidence Act 1977* (Qld).[34]

The main common law exceptions are:

A. Failure to comply with a notice to produce

As Cross explains:[35]

> A notice to produce informs the party upon whom it is served that that party is required to produce the documents specified therein at the trial to which the notice relates. The notice does not compel production of the documents in question, but the fact that it has been served provides a foundation for the reception of secondary evidence.

If the party served with the notice fails to produce the document, the opposing

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32 Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at paras [39005]-[39010].

33 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at para 320; Law Commission (NZ), Preliminary Paper, *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, May 1994) at 50.

34 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [5.16]. See, for example, ss 84(b) and 97 and Part 7 of the *Evidence Act 1977* (Qld). Part 7 of the *Evidence Act 1977* (Qld), which deals with the admissibility of reproductions of documents, is discussed in detail in Chapter 10 of this paper.

35 Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at para [39045].

party is entitled to give secondary evidence of the contents of that document.[36] If, however, the original document is not in the possession or power of the opposing party, the proper course is to subpoena the party who does have control of the document.

B. Document lost or destroyed

If it is proved, by or on behalf of the person who should have had possession of the document, that it has been searched for without success, secondary evidence of the contents of the document will be admissible.[37]

C. Production of original impossible

If the original of a document is in the hands of a person out of the jurisdiction so that the person could not be compelled to produce it, secondary evidence of the contents of the document will be admissible.[38]

D. Production of original inconvenient

Where it would be difficult to produce the original of a document in court, secondary evidence is sometimes allowed.[39] For example, on this basis, secondary evidence has been permitted of a document that was written on a wall.[40]

E. Public documents

At common law, the content of a number of types of public documents could be proved by copies of various kinds, on account of the inconvenience that would be occasioned by production of the originals.[41] Cross observes that such documents are now usually proved by the various statutory exceptions.[42]

(iii) Types of secondary evidence

Secondary evidence may take the form of a copy of the document, or of oral

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36 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 125-126.

37 Id at 128-129.

38 Id at 129.

39 Id at 130.

40 Ibid, citing *Jones v Tarleton* (1842) 9 M and W 675, 152 ER 285.

41 Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at para [39070].

42 Ibid.

testimony by a person who recollects the contents of a document.[43] Cross makes the point that there are "no degrees" of secondary evidence:[44]

> As a general rule there are no degrees of secondary evidence, so oral evidence of the contents of a document may be adduced without accounting for the absence of any copies that may be in existence, and there are no preferences as between the different kinds of copy. [note omitted]

(iv) Significance of the rule in the context of this reference

The admissibility of a "document" at common law generally requires the production of the original of that document, unless one of the exceptions to the secondary evidence rule can be established.

In the context of electronic records,[45] the question of what is an original record and what is a copy of that record is not as obvious as it is in relation to documents that exist in a paper format. This raises the issue of whether the rule as to secondary evidence of the contents of a document should apply at all in relation to electronic records, and, if so, whether some clarification is required in that context as to what constitutes an original or a copy of an electronic record. This issue is discussed in more detail in Chapter 3 of this paper.

In some jurisdictions, a different approach has been taken to this issue. Rather than specify a number of exceptions to the rule, the rule has been abolished and replaced with provisions that contain a comprehensive list of ways in which a party may adduce evidence of the contents of a document.[46]

(b) The rule against hearsay

A further exception to the general rule that all relevant evidence is admissible is referred to as the rule against hearsay. The rule precludes a statement (whether written or oral) made by a person from being admitted as evidence of any fact or opinion contained in the statement, unless the statement was actually made by the witness in court.[47]

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[43] Id at para [39035].

[44] Ibid.

[45] See page 5 of this paper as to the Commission's use of the term "electronic record".

[46] See *Evidence Act 1995 (*Cth) ss 48 ("Original document rule abolished") and 51 ("Proof of contents of documents") and the *Evidence Act 1995* (NSW) ss 48 and 51. See also the discussion of these provisions in Chapter 3 of this paper.

[47] Riordan JA (ed), *The Laws of Australia* (looseleaf) Vol 16.4 at para [66].

The application of the rule is most readily recognised where a witness tells the court what he or she has been told by someone else - for example, if witness A gives evidence that B told A that he or she saw something that is relevant to the proceedings. If the purpose of A's evidence is to prove that that is in fact what B saw (rather than merely that it is what B uttered), A's evidence as to what B said would be inadmissible on the ground that it infringes the rule against hearsay. The proper way to prove the fact in question would be to call B to give evidence of his or her own observations in court under oath, where B's evidence could also be tested by cross-examination.

The rule applies equally to statements in "documents", regardless of their format, where the purpose of tendering a document is to prove that a statement recorded in a document is in fact true - for example, that a transaction that is recorded occurred on the date that appears in the document. When a document is tendered for this purpose, it infringes the rule against hearsay because it is sought to prove a fact by means of a statement made out of court, rather than by calling the person with the relevant knowledge as a witness to give that evidence in court under oath.

There are, however, a number of common law and statutory exceptions to the rule against hearsay, which are outlined in Chapter 4 of this paper. The main statutory exceptions, and the extent to which they have been used to admit electronic records, are discussed in more detail in Chapters 5 to 9 of this paper.

5. THE PURPOSES FOR WHICH EVIDENCE MAY BE TENDERED

The rules of evidence that govern the admissibility of a particular piece of evidence depend, in part, on the purpose for which that evidence is tendered. Forbes describes the different ways in which a document may be used as evidence:[48]

> A document may be used as evidence in several ways: (a) it may be tendered simply as a piece of real evidence, for example as property found in the possession of a person charged with stealing it ... ; or (b) it may be tendered *as a document*, either as a narrative of relevant facts, or as a legal instrument such as a deed, contract, or testamentary devise. [original emphasis]

The application of the various rules of evidence discussed below varies depending on the purpose for which the evidence is being tendered. In particular, it is important when considering the admissibility of a particular piece of evidence to distinguish between whether or not it is tendered for a "testimonial" purpose.[49] If it is tendered for such a purpose, it must be brought within one of the exceptions to the hearsay rule if the

48 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [5.14].

49 See page 14 of this paper for a discussion of the admission of a document for a "testimonial" purpose.

tender is to be accepted.

(a) Real evidence

When a document is tendered as real evidence, its contents are of limited significance:[50]

> A document may ... be tendered in evidence merely as a physical object, as, for instance, in a case of theft when the information which the document contains is of no significance other than, perhaps, to identify the document stolen.

Real evidence is information or a thing that is observed or experienced directly by the court. In the case of real evidence, the court reaches its conclusion on the basis of its own observation and experience.[51] Examples of where a document could be used as real evidence include using a label to identify a particular bottle[52] and to show a particular person's handwriting on the label.[53] In these instances, the document could not be used as evidence of the actual contents of the bottle or the truth of the statements in the document. To be used in such a capacity, the documents would need to satisfy the requirements for admission as "testimonial" evidence.

(b) Admission for a testimonial purpose

Very often, a party will seek to rely on a document as evidence of the truth (or otherwise) of a statement contained in it. Such evidence is referred to as "testimonial" evidence.

Where evidence is sought to be admitted under the common law as testimonial evidence, the exclusionary rules of evidence including those referred to above (namely, the rule against hearsay and the secondary evidence rule) apply.[54] However, if a party simply seeks to prove the existence of information or thing (by way of tendering real evidence), neither the rule against hearsay nor the secondary evidence rule applies.

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50 *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 per Dawson J at 194.

51 Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at para [1270].

52 *Commissioner for Railways (NSW) v Young* (1962) 106 CLR 535 at 546.

53 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 115.

54 The rule against opinion evidence and the rule against evidence of the character, or previous misconduct, of the accused are two further examples of the exclusionary rules of evidence. In this paper the Commission has focussed its considerations on the secondary evidence rule and the hearsay rule, which both have particular application to documentary evidence.

(c) Admission for a non-testimonial purpose

Sometimes, a party who is tendering a document does not wish to prove that a particular statement in a document is true, but merely what the contents of the document are. For example, if it were relevant to establish a history of complaint about a product purchased, the party making the complaint might wish to tender correspondence detailing the complaints made - not as proof of the substance of the complaints, but simply as evidence that he or she did in fact complain.

In such a case, because the party is not endeavouring to prove the truth of the complaints in the correspondence, but only the fact that the complaints were made, it is not necessary for the document to come within one of the exceptions to the hearsay rule.[55]

6. JUDICIAL DISCRETION TO EXCLUDE ADMISSIBLE EVIDENCE

Even though a piece of evidence may satisfy the relevant test of admissibility, that does not necessarily mean that the evidence will be admitted into evidence. Under the common law, as well as under the *Evidence Act 1977* (Qld),[56] a judge has a discretion to exclude certain evidence that would otherwise be relevant and admissible evidence.

A judge may rely on one of a number of different grounds to exclude evidence that would otherwise be admissible. Two significant grounds are:

- where the evidence has been illegally or improperly obtained; and
- where the evidence is more prejudicial than probative.[57]

The discretion applies in criminal proceedings,[58] although its applicability in civil proceedings is less clear.[59] The rationale behind the discretion to exclude evidence that has been illegally or improperly obtained is that the judiciary should not appear to

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55 See the discussion of the hearsay rule at pages 12-13 of this paper.

56 See ss 98 and 130 of the *Evidence Act 1977* (Qld).

57 Some Australian commentators argue that, although the discretion has been applied in a civil case (see *Taylor v Harvey* [1986] 2 Qd R 137), the better view is that it applies only to criminal proceedings. See, for example, Forbes JR, "Extent of the Judicial Discretion to Reject Prejudicial Evidence in Civil Cases" (1988) 62 *ALJ* 211; Riordan JA (ed), *The Laws of Australia* (looseleaf) Vol 16.1 at para [27].

58 *Bunning v Cross* (1978) 141 CLR 54.

59 *Mazinski v Bakka* (1979) 20 SASR 350; *Irving v Heferen* [1995] 1 Qd R 255.

condone or to turn a blind eye to such misconduct.[60]

7. THE WEIGHT OF EVIDENCE

Even though certain evidence may be admitted, the weight that is ultimately given to that evidence is a matter for the court or - in the case of a jury trial - the jury to determine. As Brown observes:[61]

> Once a document, or a particular statement in a document, has been ruled admissible in evidence, one must determine what the document or statement is evidence of, and what weight should be given to it. As with a witness, the fact that specific evidence from a source is admissible does not mean that it will all be accepted by the court, or even given the same weight throughout.

The primary concern of the Commission in this reference is what the test of admissibility for electronic records should be. The Commission is not concerned with the further question of the weight that should be given to a piece of evidence, once it is admitted.

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60 Forbes JR, "Extent of the Judicial Discretion to Reject Prejudicial Evidence in Civil Cases" (1988) 62 *ALJ* 211 at 211-212.

61 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 112.

CHAPTER 3

PROVING THE CONTENTS OF AN ELECTRONIC RECORD

1. INTRODUCTION

As discussed in Chapter 2 of this paper, when a document is relied on for its contents - whether it is used testimonially or not[62] - the original document must be produced, or its absence explained before a copy may be admitted as evidence.[63] This rule of evidence is known as the secondary evidence rule. The purpose of this chapter is to examine the rule's application to electronic records.[64]

2. THE APPLICABILITY OF THE SECONDARY EVIDENCE RULE TO ELECTRONIC RECORDS

The secondary evidence rule is a rule that applies to documentary evidence. The term "document" has been interpreted widely at common law[65] and would seem to encompass electronic records.

The fact that an electronic record probably constitutes a "document" does not, however, dispose of the question as to the operation of the secondary evidence rule in relation to the admissibility of an electronic record. This question was posed by Dawson J in *Butera v Director of Public Prosecutions for the State of Victoria*[66] (*Butera*'s case) in relation to one particular type of electronic record, namely, an audiotape, although it could equally be asked of other types of electronic records:[67]

> If then a tape recording is of a documentary character such that it is discoverable, does that mean that its contents must be proved by the production of the original tape and cannot be proved by means of a copy, either in the form of another tape or in the form of a transcript? Such a rule applies to written documents, namely, that the effect of a document must be proved by the production of the original document itself and not by secondary evidence of its contents unless the absence of the original is accounted for and

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62 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [5.16].

63 See pages 9-12 of this paper.

64 See page 5 of this paper as to the Commission's use of the term "electronic record".

65 See *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 per Dawson J at 193; *Cassidy v Engwirda Constructions Company* [1967] QWN 16; and *Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582 at 594.

66 (1987) 164 CLR 180.

67 Id at 194.

excused.

The question of what must be proved to admit an electronic record into evidence is one of increasing importance as new technologies emerge. Unlike paper documents, the contents of which can usually be readily observed (even though it might at times be inconvenient to bring the original to court), electronic records commonly rely on some other device to reproduce the data that is held by them. In *Butera*'s case the following observation was made in relation to the admissibility of an audiotape:[68]

> A tape is not by itself an admissible object for by itself it is incapable of proving what is recorded on it: it is admissible only because it is capable of being used to prove what is recorded on it by being played over. By using sound reproduction equipment to play over the tape, the court obtains evidence of the conversation or other sound which is to be proved; it is that evidence, aurally received, which is admissible to prove the relevant fact.

This aspect of electronic records also makes the task of identifying what the original of an electronic record is, and what are merely copies, more uncertain than when dealing with paper documents. For example, for the purpose of the secondary evidence rule, is a computer file that exists on a hard disk an "original" document? If so, is a computer printout of that file a "copy" of that document?

The courts have distinguished between specific types of electronic records and documents that exist in a paper format. As the majority of the High Court observed in *Butera*'s case in relation to a tape recording:[69]

> A tape recording may be used to produce a form of evidence which is different from both oral testimony and documentary evidence. The rules which govern the admission in evidence of tape recordings and the procedure to be followed by a court in ascertaining what is alleged to have been recorded on them must be moulded so as to deal with the technical and logical conditions which must be satisfied before a tape recording can furnish proof of what is recorded.

Although *Butera*'s case concerned the admissibility of a transcript of a tape-recorded conversation, as opposed to the admissibility of a copy of a tape recording, a majority of the court suggested that a copy of a tape recording would be admissible as evidence of the contents of the original recording:[70]

> It is desirable to add, however, that the best evidence rule is not applicable to exclude evidence derived from tapes which are mechanically or electronically copied from an original tape. Provided the provenance of the original tape, the accuracy of the copying process and the provenance of the copy tape are satisfactorily proved, there is no reason why the copy tape should not be played over in court to produce admissible evidence of the conversation or sounds originally recorded. There is no reason to apply the best

[68] Id per Mason CJ, Brennan and Deane JJ at 186.

[69] Id per Mason CJ, Brennan and Deane JJ at 184-185. See pages 76-79 of this paper for a detailed discussion of the admissibility of tape recordings.

[70] Id per Mason CJ, Brennan and Deane JJ at 186-187. See also per Dawson J at 194-195.

> evidence rule to copy tapes ...

While the courts undoubtedly have the capacity to develop principles that will deal with the applicability of the secondary evidence rule to different types of electronic records, it is arguable that leaving the common law to develop such principles on an *ad hoc* basis is undesirable for two reasons: the development of the law will depend on particular cases being litigated; and the law will be left in a state of uncertainty in the meantime.

3. POSSIBLE APPROACHES

(a) Abolition of the secondary evidence rule for electronic records

In 1987, the Australian Law Reform Commission produced its Report on *Evidence*, which concluded an extensive review of the laws of evidence and formed the basis of the *Evidence Act 1995* (Cth). The terms of reference for that Commission's review were significantly broader than those of this Commission.[71] Consequently, the Australian Law Reform Commission was able to make recommendations of general application for the reform of the law of evidence. Although the terms of reference of this Commission are quite narrow - being limited to questions concerning the admissibility of information stored and conveyed in an electronic, magnetic or similar form - it is still useful to consider the Australian Law Reform Commission's recommendations insofar as they could be used as a model for the admissibility of electronic records.

A major recommendation of the Australian Law Reform Commission concerned the ways in which it should be possible to prove the contents of a document. That Commission suggested that the rule that the original must be produced was inflexible.[72] In particular it noted:[73]

> The application of common law rules has given rise to a number of difficulties in proving the contents of writings contained in modern photocopies and microfilm ...
>
> Many organisations keep their records in copy form using these techniques. Microfilming, in particular, results in large cost savings by reducing storage costs and making retrieval of records easier. Tax, company and other legislation, however, requires that original business records be retained. As a result, the original writing will often be in existence at the time of the trial. Where this is so, the common law would require the original to be produced. It may, however, be difficult and costly to find it and to get it to court whereas

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[71] See the Terms of Reference set out in the Australian Law Reform Commission's Report, *Evidence* (ALRC 38, 1987) at page xi, which are discussed at note 5 of this paper. The terms of reference of this Commission's review are set out at page 1 of this paper.

[72] Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at para 321.

[73] Ibid.

the business could easily and cheaply produce the copy records.

The Australian Law Reform Commission recommended a new regime to deal with proving the contents of a document.[74] This regime was subsequently implemented in Part 2.2 of the *Evidence Act 1995* (Cth).

The *Evidence Act 1995* (Cth) abolishes the secondary evidence rule altogether, and no longer requires an original of a document to be tendered in preference to a copy. In fact, the *Evidence Act 1995* (Cth) avoids any reference to an "original" document.[75] This obviates the need to determine which format of a document is the original and which is merely a copy. Sections 47 and 48 of the *Evidence Act 1995* (Cth) provide:

47. Definitions

(1) A reference in this Part to a document[76] in question is a reference to a document as to the contents of which it is sought to adduce evidence.

(2) A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.

48. Proof of contents of documents

(1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:

...

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[74] Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) at xxxix-xl.

[75] This approach is similar to that taken in s 45c(1) of the *Evidence Act 1929* (SA), which provides:

> A document that accurately reproduces the contents of another document is admissible in evidence before a court in the same circumstances, and for the same purposes, as that other document (whether or not that other document still exists).

See the discussion of s 45c of the *Evidence Act 1929* (SA) at pages 69-70 of this paper.

[76] "Document" is defined in Part 1 of the Dictionary to the *Evidence Act 1995* (Cth) as follows:

> **"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.

Further, Part 2 s 8 of the Dictionary to the *Evidence Act 1995* (Cth) expands the definition of "document" by providing:

> 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.

(b) tendering a document that:

(i) is or purports to be a copy of the document in question; and

(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;

...

(d) if the document in question is an article or thing on or in which information is stored in such a way 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;

...

(2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.

...

(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:

(a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or

(b) adducing oral evidence of the contents of the document in question.

Note: Clause 5 of Part 2 of the Dictionary is about the availability of documents. [note added]

Brown comments in relation to the effect of section 48:[77]

> If the literal intention of the section does survive judicial interpretation, the contents of a paper document will be provable by a simple photocopy, the contents of a computer disk (or diskette) by either a copy thereof, or under s 48(1)(d), by means of a print-out of the relevant parts, without any further complication.

If the application of the secondary evidence rule were abolished in relation to electronic records, that would not affect the question of the weight that the court might accord to a particular piece of evidence. As Dawson J observed in *Butera*'s case:[78]

> Of course, some modes of proof are better than others, but that, save in the case of written documents, goes to weight rather than admissibility.

(b) Modification of the secondary evidence rule

An alternative to abolishing the application of the secondary evidence rule to electronic

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77 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 368.

78 (1987) 164 CLR 180 at 195.

records is to modify the operation of the rule. In particular, it may be desirable to clarify what is regarded as an "original" and a "copy" in relation to particular types of electronic records.

Care would need to be taken, however, to ensure that any definitions were not so medium-specific that they would be likely to become out of date as new technologies emerge.

4. ISSUES FOR CONSIDERATION

(1) Should the secondary evidence rule, with its emphasis on the production of an "original" document, apply to electronic records?

(2) If "no" to (1), is the approach taken in sections 47 and 48 of the *Evidence Act 1995* (Cth) generally desirable, in particular, section 48(1)(b) and (d)?

(3) If the secondary evidence rule should not apply to the admissibility of electronic records, what, if any, restrictions should apply to the admissibility of such records?

(4) If the secondary evidence rule should be retained, is it necessary to define the term "original" in relation to different types of electronic records and, if so, how should it be defined?

CHAPTER 4

ADMISSION OF DOCUMENTS FOR A TESTIMONIAL PURPOSE: AN OVERVIEW OF THE LAW

1. INTRODUCTION

When a party seeks to rely on a document as evidence of the truth of a statement contained in it, the statement is said to be admitted for a "testimonial purpose".[79] The statement in the document is being used instead of having a witness give the relevant evidence orally in court. Ordinarily, the use of a document to prove a statement contained in it, rather than proving the fact in question by the oral testimony of a witness who appears in court, would infringe the rule against hearsay.[80] However, there are both common law and statutory exceptions to the rule that evidence should generally be given orally by a witness who is present in court.

The purpose of this chapter is to outline the exceptions to the hearsay rule that permit, in certain circumstances, a statement contained in a document to be admitted to prove the truth of a particular fact. The relevant provisions of the *Evidence Act 1977* (Qld) that are introduced in this chapter are dealt with in more detail in subsequent chapters of this paper.[81] In particular, in this chapter and in Chapters 5 to 9 of this paper, the Commission examines the application of these common law rules and statutory provisions to electronic records,[82] bearing in mind that, when the relevant common law exceptions were developed and the statutory provisions (other than specific "computer" provisions) were first enacted, it was with a view to the admission of statements contained in "paper documents".[83]

The type of situation to which the Commission's attention is directed is illustrated by the following scenario:

> *Suppose a supplier of a product receives a telephone order for a product and enters the order directly into a computer that is programmed to produce invoices to be forwarded with the relevant product. The question may later arise as to how it may be proved that the order was placed.*

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79 See page 14 of this paper.

80 See pages 12-13 of this paper for a discussion of the rule against hearsay.

81 Chapter 6 (Public Documents); Chapter 7 (Books of Account); Chapter 8 (Proof of Truth of Statements Contained in "Documents"); and Chapter 9 (Statements Produced by Computers).

82 See page 5 of this paper as to the Commission's use of the term "electronic record".

83 For example, the books of account provisions of the *Evidence Act 1977* (Qld) (ss 83-91) are derived from the *Bankers' Books Evidence Act 1879* (UK). See page 35 of this paper.

Is it necessary to call as a witness the person who received the telephone order, or should the computer-generated invoice that records the placement of the order constitute proof that the order was in fact placed? If so, in what circumstances should the invoice constitute proof that the order was placed?

The scenario set out above - while illustrative of the admission of a statement in a document for a testimonial purpose - arguably represents the most basic function of a computer, namely, the storage and retrieval of information. The application of the existing provisions becomes more complex when an electronic record is created as a result of input from a number of people and, in particular, from the processing of data, as opposed to its mere storage.

2. ADMISSIBILITY UNDER THE COMMON LAW

As mentioned earlier in this chapter, the main impediment to admitting a document for a testimonial purpose is that, in the absence of a specific exception, it would infringe the rule against hearsay.[84] The common law contains a number of exceptions to the hearsay rule, although the scope of these exceptions is fairly limited. The four main common law exceptions to the rule against hearsay are:[85]

- certain types of statements made by deceased persons;[86]
- statements in public documents;[87]
- informal admissions made by the parties to the action;[88] and

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84 See the discussion of the rule against hearsay at pages 12-13 of this paper.

85 For a detailed discussion of the main exceptions to the rule against hearsay, see Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at Chapter 17.

86 Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at paras [33005]-[33340]. These are identified as:
- declarations against interest;
- declarations in the course of duty;
- declarations as to public or general rights;
- pedigree declarations;
- dying declarations; and
- post-testamentary declarations of testators concerning the contents of their wills.

87 Id at paras [33345]-[33415].

88 Id at paras [33420]-[33590]. Note the comment at para [33420] that, unlike formal admissions, which bind the party by whom they are made, informal admissions may be explained away by their maker, and it is for the tribunal of fact to determine the weight to be attached to them. See *Markovina v The Queen* (1996) 16 WAR 354 per Malcolm CJ at 383

- a voluntary confession made by an accused.[89]

3. ADMISSIBILITY UNDER THE *EVIDENCE ACT 1977* (QLD)

A number of provisions of the *Evidence Act 1977* (Qld) permit, in certain circumstances, a fact to be proved by means of the admission of a statement in a document, rather than by the oral testimony of a witness as to that fact. These provisions are said to constitute statutory exceptions to the rule against hearsay. The rationale for allowing this "documentary hearsay" into evidence is the view that what is written down or recorded is more reliable as evidence than the, sometimes failing, memory of a witness.[90]

The exceptions being examined by the Commission are: certain public documents;[91] transactions recorded in books of account;[92] statements in documents that form part of a record relating to an undertaking or any trade or business;[93] and statements in documents produced by computers.[94] There will often be an overlap between these provisions. For example, a book of account, if created by computer, raises the possibility of admission under both the provisions relating to books of account, as well as the provision that specifically deals with the admission of statements in documents produced by computers.

Broadly speaking, the *Evidence Act 1977* (Qld) provides for the admission, in certain circumstances, of the following documents or statements in documents as proof of the truth of a transaction or statement recorded in them:

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where it was held that records in an electronic diary, which related to the distribution of drugs, constituted evidence of an informal admission by the accused not to a person in authority:

> The reason why [the diaries would be admissible as real evidence against the appellant] ... would be insofar as they contained relevant admissions made by the appellant. [words in square brackets added]

89 Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at paras [33595]-[33785].

90 See Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [92.1].

91 *Evidence Act 1977* (Qld) ss 44-58.

92 *Evidence Act 1977* (Qld) ss 83-91.

93 *Evidence Act 1977* (Qld) ss 92, 93.

94 *Evidence Act 1977* (Qld) s 95.

(a) Public documents[95]

Part 5, Division 1 of the *Evidence Act 1977* (Qld) contains a number of provisions that deem certain public documents to be evidence as to the truth of their contents when proved in court in the specified manner.

(b) Books of account[96]

Part 5, Division 6 of the *Evidence Act 1977* (Qld)[97] deals with the proof of transactions contained in books of account. In particular, section 84 provides that, in certain circumstances, an entry or a copy of an entry in a book of account is evidence of "the matters transactions and accounts" recorded.

(c) Statements in "documents"[98]

(i) Proceedings other than criminal proceedings

Section 92 of the *Evidence Act 1977* (Qld), which applies to proceedings other than criminal proceedings, sets out the circumstances in which a statement contained in a document and tending to establish a fact is admissible as evidence of that fact. Section 92(1) contains two limbs. Forbes describes the two distinct types of evidence that may be admitted under each limb of section 92(1) as follows:[99]

- statements that convey first-hand information, whether they are business records or not;[100] and
- statements recorded in the ordinary course of an undertaking.[101]

Both limbs of section 92(1) generally require the person who made the

95 Public documents are discussed in more detail in Chapter 6 of this paper.

96 Books of account are discussed in more detail in Chapter 7 of this paper.

97 *Evidence Act 1977* (Qld) ss 83-91.

98 The admissibility of such statements is discussed in more detail in Chapter 8 of this paper.

99 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [92.5].

100 *Evidence Act 1977* (Qld) s 92(1)(a).

101 *Evidence Act 1977* (Qld) s 92(1)(b). "Undertaking" is defined in s 3 of the *Evidence Act 1977* (Qld).

statement or supplied the information recorded in the statement to be called as a witness in the proceeding. However, section 92(2) of the *Evidence Act 1977* (Qld) sets out the circumstances in which that requirement need not be satisfied in order for the statement to be admitted under the section.[102]

(ii) Criminal proceedings

Section 93 of the *Evidence Act 1977* (Qld), which applies to criminal proceedings, sets out the circumstances in which a statement contained in a document and tending to establish a fact is admissible as evidence of that fact.

Although section 93 is similar to section 92 in a number of respects, it has a narrower operation. Forbes suggests the following rationale for the relevant differences between the sections:[103]

> Section 93 uses language which, for the greater part, follows that of s 92 ... Probably because of the higher standard of proof in criminal matters the gateway offered by s 93 is somewhat narrower than that provided by s 92.

Section 93 does not contain an equivalent provision to the first limb of section 92(1). Rather, the operation of section 93 is confined to business records.

Forbes identifies a further difference between sections 92 and 93:[104]

> Here [under section 93] there is no question of tendering the document *and* calling the "source" of the information ... the statement is admissible only when the "source" is absent for one of the reasons set out in s 93(1)(b) ... The grounds of permissible absence are narrower than in s 92 and there is no question of producing *both* the document and the witness ... [original emphasis; words in square brackets added]

Both sections 92 and 93 deal with the admissibility of a statement contained in a document, rather than with the admissibility of the document itself.

(d) Statements in documents produced by computers[105]

Section 95 of the *Evidence Act 1977* (Qld) sets out the circumstances in which a statement contained in a document produced by a computer and tending to establish a fact is evidence of that fact.

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102 For a discussion of this subsection see page 46 of this paper.

103 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [93.2].

104 Id at para [93.3].

105 The admissibility of these statements is discussed in more detail in Chapter 9 of this paper.

CHAPTER 5

MEANING OF "DOCUMENT" FOR THE PURPOSES OF THE *EVIDENCE ACT 1977* (QLD)

1. INTRODUCTION

The provisions of the *Evidence Act 1977* (Qld) referred to in the previous chapter have in common that they apply to "documents" and, in the case of sections 92, 93 and 95, to "statements" in "documents". Section 83 defines "book of account" for the purposes of the books of account provisions to include "any document" used in the ordinary course of any undertaking to record various matters; sections 92(1) and 93(1) each refer to a "statement contained in a document"; and section 95(1) refers to a "statement contained in a document produced by a computer".

As a threshold issue, the admissibility of an electronic record as a "book of account"[106] is therefore dependent on the record falling within the definition of "document". The admissibility of a statement in an electronic record under section 92, 93 or 95 is similarly dependent on the electronic record falling within the definition of "document" and, additionally, on the "document" containing a "statement".

2. DEFINITIONS OF THE TERMS "DOCUMENT" AND "STATEMENT"

The terms "document" and "statement" are defined in section 3 of the *Evidence Act 1977* (Qld) as follows:

> **"document"** includes, in addition to a document in writing -
>
> (a) any part of a document in writing or of any other document as defined herein; and
>
> (b) any book, map, plan, graph or drawing; and
>
> (c) any photograph; and
>
> (d) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatever; and
>
> (e) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
>
> (f) any film, negative, tape or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

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106 See Chapter 7 of this paper.

(g) any other record of information whatever.

"statement" includes any representation of fact, whether made in words or otherwise and whether made by a person, computer or otherwise.

Although the definition of "statement" includes a reference to a representation of fact made by a computer, the definition of "document" does not expressly refer to computers. It is clear, however, that the term "document" encompasses many types of electronic records, and it has been construed widely by the courts.[107]

A "copy" of a document is defined in section 4 of the *Evidence Act 1977* (Qld), which provides:

In this Act, any reference to a copy of a document includes -

(a) in the case of a document falling within paragraph (e) but not paragraph (f) of the definition "document" in section 3 - a transcript of the sounds or other data embodied therein; and

(b) in the case of a document falling within paragraph (f) but not paragraph (e) of that definition - a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not; and

(c) in the case of a document falling within both those paragraphs - such a transcript together with such a reproduction or still reproduction; and

(d) in the case of a document not falling within the said paragraph (f) of which a visual image is embodied in a document falling within that paragraph - a reproduction or still reproduction of that image, whether enlarged or not;

and any reference to a copy of the material part of a document shall be construed accordingly.

3. INTERPRETATION OF THE TERM "DOCUMENT"

In *Murphy & Another v Lew & Others*,[108] the Supreme Court of Victoria considered, as a threshold question, whether the provisions of the *Evidence Act 1958* (Vic) that are equivalent to sections 84, 92, 93 and 95 of the *Evidence Act 1977* (Qld) applied to computer records and computer-produced documents. In particular, the court considered paragraph (d) of the definition of "document" in section 3 of the *Evidence Act 1958* (Vic), which is virtually identical to paragraph (e) of the definition of "document" in section 3 of the *Evidence Act 1977* (Qld). The court held that the term

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107 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [5.12].

108 Unreported, Sup Ct, Vic, No 12377 of 1991, 12 September 1997.

"document" was capable of encompassing computer records and computer-produced documents:[109]

> The general issue that remains is whether the provisions of Division 3A [Qld: ss 83-91] and s55 [Qld: ss 92-93] apply to computer records and computer-produced documents.
>
> The word "document" is used in each of the relevant provisions. It is defined in the broadest terms to include:
>
> > "(d) any disk, tape, soundtrack or other device in which sounds or other data, not being visual images, are embodied so as to be capable with or without the aid of some other equipment of being reproduced therefrom."
>
> Thus, the definition of "document" is plainly able to cover computerised records stored within a computer system. As a result, the Books of Accounts sections, and s55B [Qld: s 95], are in fact capable of applying to computerised records, as well as to documents produced by those records. This is the result of the above definitions. As to s55 [Qld: ss 92-93], the definition of "statement" also assists. "Statement" is defined as "any representation of fact, whether made in words or otherwise".[110]
>
> It was also argued for the objecting parties that it cannot have been intended that the Books of Account provisions in s58A to s58J were intended to apply to computerised books of account because there was no need for s55B [Qld: s 95] if they did. In my view this does not follow because s55B [Qld: s 95] plainly applies to computer-produced documents of all kinds and not just those which constitute financial records. The apparently more rigorous requirements of s55B [Qld: s 95] rather point to a concern that computer-produced documents needed special treatment because they may not carry within them prima facie guarantees of reliability, such as are to be found with books of account, of the kind referred to in s58A. [note added; words in square brackets added]

The broad, inclusive definition of "document" in section 3 of the *Evidence Act 1977* (Qld) would appear to include many types of electronic records within its terms.[111]

4. A BROADER DEFINITION OF THE TERM "DOCUMENT"

"Document" is defined in the *Evidence Act 1995* (Cth) in terms that are somewhat broader than the definition contained in the *Evidence Act 1977* (Qld). Part 1 of the

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[109] Id at 12-13.

[110] Note that, unlike its Victorian counterpart, the definition of "statement" in s 3 of the *Evidence Act 1977* (Qld) expressly includes a representation made by a computer.

[111] For further discussion see Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [5.12].

Dictionary to the *Evidence Act 1995* (Cth) contains the following definition:[112]

> **"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.

In the United Kingdom, the *Criminal Evidence Act 1965*[113] defined "document" to include "any device by means of which information is recorded or stored". In *R v Ewing*,[114] an issue was whether a computer printout of a bank account showing payments into an account was admissible as evidence of the payments pursuant to the then United Kingdom equivalent of section 93 of the *Evidence Act 1977* (Qld).[115] The United Kingdom Court of Appeal held that the printout was part of "a device by means of which information is recorded or stored" and was therefore a "document" forming part of a record compiled in the course of the bank's business:[116]

> The computer is undoubtedly a "device by means of which information is recorded or stored". The print-out is part of that device, for there is no other means of discovering the information recorded or stored by the device. The print-out is, therefore a "document" within the meaning of subsection (4). There is no doubt that the document either is, or forms part of, a record relating to the business of the bank and that it was compiled in the course of business.

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112 Further, Part 2 s 8 of the Dictionary to the *Evidence Act 1995* (Cth) expands the definition of "document" by including the following:

> 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.

113 The *Criminal Evidence Act 1965* (UK) was repealed and replaced by the *Police and Criminal Evidence Act 1984* (UK). See note 115 below.

114 [1983] QB 1039.

115 S 1 of the *Criminal Evidence Act 1965* (UK). The *Criminal Evidence Act 1965* (UK) was repealed and replaced by the *Police and Criminal Evidence Act 1984* (UK), with s 1 of the former Act being replaced by s 68 of the latter Act. S 68 of the *Police and Criminal Evidence Act 1984* (UK) has since been repealed and replaced by s 24 of the *Criminal Justice Act 1988* (UK).

116 [1983] QB 1039 per O'Connor LJ at 1050-1051.

Brown has commented in relation to this decision:[117]

> The reason for O'Connor LJ's somewhat odd construction is itself a semantic difficulty in the *Criminal Evidence Act* 1965 (UK). Section 1(1) requires production of the document; production of the computer in court would be both cumbersome (if possible at all), and useless. Furthermore, under s 1(1)(a) the document must be, or form part of, a business record, and it does not seem logical to say that a computer, as a document, can be part of a record that is contained within itself. Hence, the conclusion his Lordship was seeking to attain was that the *computer print-out* was the document that formed part of a business record. [original emphasis]

5. ISSUES FOR CONSIDERATION

(1) Is the definition of "document" in section 3 of the *Evidence Act 1977* (Qld)[118] too narrow, with the result that there are relevant electronic records that would not be encompassed within that definition?

(2) If "yes" to (1), what types of electronic records would not be encompassed by the definition of "document" in section 3 of the *Evidence Act 1977* (Qld)?

(3) Would a more general definition of "document" - such as is found in the *Evidence Act 1995* (Cth)[119] - be more appropriate?

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117 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 270.

118 This definition is set out at pages 28-29 of this paper.

119 This definition is set out at page 31 of this paper.

CHAPTER 6

PUBLIC DOCUMENTS

1. INTRODUCTION

Part 5, Division 1 of the *Evidence Act 1977* (Qld) contains a number of provisions that deem certain public documents to be evidence as to the truth of their contents when proved in court in the specified manner.

The rationale behind providing rules as to the proof of such documents is to ensure that parties are not put to unreasonable expense or inconvenience in trying to establish their authenticity. The provisions re-enact the common law exception to the secondary evidence rule afforded to public documents.[120]

Statutory provisions in all Australian jurisdictions allow for certified copies of public documents to be admitted as if they were originals.[121]

2. PAPER v ELECTRONIC FORM

The provisions in Part 5, Division 1 of the *Evidence Act 1977* (Qld) envisage the use of paper documents rather than documents in electronic form, especially in relation to the certification of public documents. For example, section 51 of the *Evidence Act 1977* (Qld) provides:

> Where a document is of such a public nature as to be admissible in evidence on its mere production from proper custody, a copy of or extract from the document shall be admissible in evidence if -
>
> (a) it is proved to be an examined copy or extract; or
>
> (b) it purports to be certified as a true copy or extract **under the hand of a person** described in the certificate as the person to whose custody the original is entrusted. [emphasis added]

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120 At common law, to be admissible as a public document, the document had to possess the following criteria: the document must be created and stored for public use on a public matter; the document must be available for public inspection; the information in the document must be recorded contemporaneously with the events of which it purports to be a record; and the record must be created by a person having a duty to inquire and satisfy himself or herself as to the truth of the recorded facts. See *Gaggin v Moss* [1984] 2 Qd R 513 where the transcript of evidence given at a marine inquiry was considered not to be a public document as the purpose of the document's coming into existence was not its preservation for public use, and it was not open for public inspection.

121 For example, *Evidence Act 1906* (WA) s 78; *Evidence Act 1995* (Cth) ss 153-159; *Evidence Act 1958* (Vic) ss 82-86.

The *Evidence Act 1995* (Cth) does not seem to have strayed significantly from this position. For example, section 156 of that Act provides:

> (1) A document that purports to be a copy of, or an extract from or summary of, a public document and to have been:
>
> (a) **sealed with the seal of a person** who, or a body that, might reasonably be supposed to have the custody of the public document; or
>
> (b) **certified as such a copy**, extract or summary by a person who might reasonably be supposed to have custody of the public document;
>
> is presumed, unless the contrary is proved, to be a copy of the public document, or an extract from or summary of the public document.
>
> (2) If an officer entrusted with the custody of a public document is required by a court to produce the public document, it is sufficient compliance with the requirement for the officer to produce a copy of, or extract from, the public document if it **purports to be signed and certified** by the officer as a true copy or extract.
>
> ...
>
> (4) The court before which a copy or extract is produced under subsection (2) may direct the officer to produce the original public document. [emphasis added]

The reliance by a court on the truth of the contents of a public document might be considered so serious that the authenticity of a copy of, or extract from, the public document should be beyond doubt. A manual certification by an appropriate officer of the authenticity of a copy of, or extract from, the public record might not be considered an excessive requirement.

3. ISSUES FOR CONSIDERATION

(1) Is it appropriate that the public document provisions envisage only paper documents?

(2) What public documents are currently held as electronic records?

(3) Is it appropriate that a printout of an electronic record could be certified as a true and correct “copy” of the “original” public document?

(4) Is there a need to facilitate the admission into evidence of electronic versions of public documents?

CHAPTER 7

BOOKS OF ACCOUNT

1. INTRODUCTION

The books of account provisions of the type found in the *Evidence Act 1977* (Qld) have generally been described as "remedial legislation intended to remove the difficulty or, in some instances, impossibility of proving certain business facts by admitting material which in common experience is likely to be accurate, and should be construed liberally and not pedantically".[122]

All Australian jurisdictions have statutory exceptions to the hearsay rule to facilitate the admission in legal proceedings of reliable statements in "bankers' books" - however kept or produced - as evidence of the matters recorded. The legislation is derived from the *Bankers' Books Evidence Act 1879* (UK). The purpose of this type of legislation is, according to Brown:[123]

> ... to make proof of bank (and other) accounting records straightforward, without the necessity of calling employees of a bank to prove matters relating to particular accounts, and without causing the bank the inconvenience of removing its records from its premises. Prior to this legislation, the inconvenience of producing books of the Bank of England had led to English courts accepting copies and extracts from that Bank's books without requiring production of the original documents, and it was clear that other bankers desired the same convenience. [notes omitted]

In Queensland, the scope of the traditional bankers' books provisions has been expanded to include books of account of businesses other than banks. The definition of "book of account" in section 83 of the *Evidence Act 1977* (Qld) provides:

> **"book of account"** includes any document used in the ordinary course of any undertaking to record the financial transactions of the undertaking or to record anything acquired or otherwise dealt with by, produced in, held for or on behalf of, or taken or lost from the undertaking and any particulars relating to any such thing.

Section 84 of the *Evidence Act 1977* (Qld) then provides:

> Subject to this division, in all proceedings -
>
> (a) an entry in a book of account shall be evidence of the matters transactions and accounts therein recorded; and

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[122] Byrne D and Heydon JD, *Cross on Evidence* (Australian Edition, looseleaf) at para [35195] referring to *Re Marra Developments Ltd and the Companies Act* [1979] 2 NSWLR 193 at 202; *Trade Practices Commission v TNT Management Pty Ltd* (1984) 56 ALR 647 at 650; *Ross McConnel Kitchen & Co Pty (in liq) v Ross* (No 1) (1985) 1 NSWLR 233.

[123] Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 325.

(b) a copy of an entry in a book of account shall be evidence of the entry and of the matters transactions and accounts therein recorded.

The term "document" is widely defined in section 3 of the *Evidence Act 1977* (Qld).[124] The term "undertaking" is also widely defined in section 3:

> **"undertaking"** includes public administration and any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on -
>
> (a) by the Crown (in right of the State of Queensland or any other right), or by a statutory body, or by any other person; or
>
> (b) for profit or not; or
>
> (c) in Queensland or elsewhere.

The concept of an "undertaking" is clearly broader than simply a business operating for profit. Its equivalent in other jurisdictions has been held to include the Taxation Office[125] and a sporting body.[126]

To fall within the definition of a "book of account" the document must satisfy two criteria:

- It must be used in the ordinary course of that undertaking. It is enough if it is a document used ordinarily by that particular undertaking. It need not be used by all organisations of the type in question.[127] A standard claim form used by an employee of the Commissioner of Railways to claim reimbursement for expenses has been held to be a "book of account" under section 83.[128]

- The document must also record the financial transactions of the undertaking or "anything acquired or otherwise dealt with by, produced in, held for or on behalf of, or taken or lost from the undertaking and any particulars relating to any such thing". This cumbersome phrase seems to require that the document relate to the "business" of the undertaking in some way, although it is not limited to the formal financial records of an organisation.

The books of account provisions apply to both criminal and civil proceedings.

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124 See the discussion of the definition of "document" in Chapter 5 of this paper.

125 *Re Riggs; ex parte Deputy Commissioner of Taxation (WA)* (1986) 17 ATR 366.

126 *Mather and Deegan v Morgan* [1971] Tas SR 192.

127 *Compafina Bank v Australia & New Zealand Banking Group Ltd* [1982] 1 NSWLR 409.

128 *R v Ireland; ex parte Attorney-General of Queensland* unreported, CA, Qld, No 526 of 1994, 31 March 1995.

Section 84 is in two parts - enabling an entry, as well as a "copy of an entry", in a book of account to be admitted into evidence as proof of the matters recorded.[129]

The evidence that falls within these provisions may be tendered without calling the person who made the record or who supplied the information. All that is required initially is someone to give the general evidence that identifies the record as one of the "undertaking" and establishes that it was made in the usual and ordinary course of that undertaking. However, as the Australian Law Reform Commission noted in relation to provisions of this type:[130]

> If an attack is made on the accuracy of the record by the other party, the party tendering the record may be forced for tactical reasons to call persons involved in making the entries but it is not obliged to call them before the evidence is received.

2. SCOPE OF THE BOOKS OF ACCOUNT PROVISIONS: COMPUTERISED RECORDS

Although the Queensland provisions do not specifically refer to computerised books of account, there is nothing in the provisions to suggest that their operation does not extend to books of account that consist of computerised records.

In *Griffiths v Australia and New Zealand Banking Group Limited*,[131] the Full Court of the Supreme Court of South Australia held that a copy of a microfiche was a copy of a banking record within the meaning of section 46 of the *Evidence Act 1929* (SA) and was

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129 S 85 of the *Evidence Act 1977* (Qld) further provides:

> **Proof that book is a book of account**
>
> (1) An entry or a copy of an entry in a book of account shall not be admissible in evidence under this division unless it is first proved that the book was at the time of the making of the entry 1 of the ordinary books of account of the undertaking to which it purports to relate and that the entry was made in the usual and ordinary course of that undertaking.
>
> (2) Such proof may be given by a responsible person familiar with the books of account of the undertaking and may be given orally or by an affidavit sworn or by a declaration made before a commissioner or person authorised to take affidavits or statutory declarations.

130 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 2 at para 94. That Commission in its Report *Evidence* (ALRC 38, 1987) at paras 129 and 142 recommended "business records" provisions that incorporate a number of concepts found in the *Evidence Act 1977* (Qld), including the books of account provisions. It would be outside this Commission's terms of reference generally to consider broadening the operation of the books of account provisions as recommended by the Australian Law Reform Commission.

131 (1990) 53 SASR 256.

admissible under section 47 of that Act.[132] The documents in question consisted of photocopies of duplicate bank statements relating to an account of the respondent. The information from which those statements were compiled was stored in the bank's computer and had at some stage been printed out for convenience on microfiche.[133]

The questions at issue during proceedings on this matter included:[134]

- Whether the documents produced by the computer from information concerning banking transactions recorded and stored by a bank upon the computer were copies of a banking record within the meaning of section 46 of the South Australian Act.[135] If so -

- Whether the documents were admissible pursuant to section 47(1) of the South Australian Act.[136]

The magistrate hearing the matter at first instance held that section 46 of the South Australian Act did not include computer records because there was no reference to computers in that section, and it would therefore be stretching the definition of "copy" to infer that sections 46 and 47 encompassed computers.[137] Millhouse J, hearing an appeal from the magistrate's decision, was in no doubt that the definition of "copy" in

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132 These provisions are narrower than ss 83 and 84 of the *Evidence Act 1977* (Qld) in that they apply only to banking records, rather than to "books of account" generally, although the latter concept is simply an extension of the former.

133 *Griffiths v Australia and New Zealand Banking Group Limited* (1990) 53 SASR 256 at 259.

134 Id at 257.

135 S 46 of the *Evidence Act 1929* (SA) defines "bank", "banking records" and "copy". It provides that "'copy', in relation to a banking record made by microfilming or by a mechanical or electronic process, means a document produced from the record containing, in an intelligible form, the information stored in the record".

136 S 47(1) of the *Evidence Act 1929* (SA) enables a copy of a banking record to be admitted as evidence of the record and the transactions therein, provided certain things are first proved (such as that the record was compiled in the ordinary course of business).

Similarly, s 84(b) of the *Evidence Act 1977* (Qld) facilitates the admission of a copy of an entry in a book of account as evidence of the entry and the contents thereof. The copy is not admissible unless it is further proved that the copy has been examined with the original entry and is correct. S 86 of the *Evidence Act 1977* (Qld) then provides:

Verification of copy

(1) A copy of an entry in a book of account shall not be admissible in evidence under this division unless it is further proved that the copy has been examined with the original entry and is correct.

(2) Such proof may be given by some person who has examined the copy with the original entry and may be given either orally or by an affidavit sworn or by a declaration made before a commissioner or person authorised to take affidavits or statutory declarations.

137 *ANZ Banking Group Ltd v Griffiths* (1988) 49 SASR 385 at 387.

the South Australian Act clearly included a copy of a record made by a computer.[138]

The Full Court of the Supreme Court of South Australia also held that the copy of the microfiche record of the computer record was a “copy” for the purposes of the South Australian provisions.[139] The basis for that finding was that the microfiche - because it had been generated and used by the bank in the ordinary course of its business - constituted a banking record in its own right, such that a copy of it was a copy of a banking record for the purposes of the relevant provision:[140]

> [W]hatever may be the status under these sections of the computer data itself, there can be no doubt, I think, that a print-out of banking information from a computer will be capable of constituting in due course a “banking” record, within the meaning of s 46, whether it is produced by microfilming or by photocopying or by some other mechanical or electronic process. If the print-out remains in the possession or control of the bank, and is used as an accounting or other record by the bank in the course of carrying on its banking business, it will become a “banking record” in its own right. That, on the uncontradicted documentary and oral evidence presented by the respondent, was the position with respect to the microfiche records in this case. The respondent found it convenient to use the microfiche in its ordinary banking business, and it thus became a “banking record” within the meaning of the statutory definition. It follows that any copy of the microfiche - and that could be a photocopy-type print, as in this case, or an exact replica of the microfiche that would require the use of a microfiche reader - was a “copy of a banking record” that might appropriately be tendered in evidence under s 47.

The decision in this case does not, however, stand as authority for the proposition that any computer printout of a business record, or copy of such a printout, will be admissible under the relevant provisions as proof of the matters recorded in it. It was important in *Griffiths*'s case[141] that the microfiche from which the copy had been made was held to constitute a banking record in its own right. The court did not take the further step of deciding whether the data recorded in the computer itself constituted a “banking record”, or whether a printout generated for the purposes of the litigation would have been admissible under the banking records provision:[142]

> I take the precaution of pointing out that there was no need in this case to pursue the interaction of Part V of the Act, dealing with banking records, and Part VIA, dealing with computer evidence - in particular, to answer the question whether computer data itself (the electronic impulses, if that is the way to describe it: cf s 59a) may be without more a “banking record” within the meaning of s 46. That question would only have arisen had

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138 Id at 388.

139 *Griffiths v Australia and New Zealand Banking Group Limited* (1990) 53 SASR 256 per Cox J at 259:

> The microfiche, made thus from the respondent's electronic records, itself became a record that was used by the respondent in the course of carrying on the business of the bank.

140 Id per Cox J at 262.

141 (1990) 53 SASR 256.

142 Id per Cox J at 264.

> the appellant sought to tender a print-out direct from the computer ("computer output") that was made especially for evidentiary purposes and had not itself acquired the character of a bona fide, though computer-derived, banking record.

This may leave some doubt as to whether, if the information recorded in the computer had been stored exclusively in that form and had never been printed out on to the microfiche, it could have been admitted under the banking records provisions, or whether it would have been necessary to try to admit the information under the provisions that are equivalent to sections 92, 93 and 95 of the *Evidence Act 1977* (Qld).

However, in *Markovina v The Queen*,[143] the Full Court of the Supreme Court of Western Australia held that one of the bases for admitting into evidence the electronic diaries of a person charged with drug-related offences was that "the diaries were a record of business dealings and could be looked at in the same way as entries in books of account".[144]

3. RELATIONSHIP BETWEEN SECTIONS 84 AND 95

Under section 95 of the *Evidence Act 1977* (Qld), a statement in a document produced by a computer is admissible as evidence of the matters recorded in the statement if certain conditions regarding the operations of the computer are satisfied. This raises the question of whether those requirements must be satisfied before a computer-derived record can be admitted under section 84 of the *Evidence Act 1977* (Qld).

In *Griffiths v Australia and New Zealand Banking Group Limited*,[145] the Full Court of the Supreme Court of South Australia emphasised that the accuracy or validity of the banking record itself will not be a relevant question under section 47 of the South Australian legislation (which is conceptually similar to section 84 of the Queensland legislation). Cox J noted:[146]

> From one point of view it might be thought paradoxical that the sections go to considerable trouble to ensure that whatever is tendered in evidence is a faithful copy of a banking record - and given the reliability in that respect of the typical photocopier or other such reproduction process, that will not usually provoke an issue -, but do not require a word of evidence about the validity of the banking record itself, that is, the reliability of the bank's bookkeeping or, in this case, its computer storage procedures upon which the substantial accuracy of what is in due course copied and tendered in evidence will depend. In this respect, computer-derived banking records may be thought to stand in a privileged position, as far as the admissibility of copies of print-outs is concerned, when compared

143 (1996) 16 WAR 354.

144 Id per Malcolm CJ at 380.

145 (1990) 53 SASR 256.

146 Id at 263.

> with other computer-derived records. Sections 59a and 59b [Qld: s 95] lay down exacting requirements for the verification of computer print-outs that a party seeks to tender in evidence. For instance, the court must be satisfied that the computer is correctly programmed and that there is no good reason to doubt the accuracy of the computer output. There is nothing like that in s 47, which thus provides a bank with a much simpler and easier way of getting certain computer-derived evidence before a court. [words in square brackets added]

This analysis is consistent with the basis for the original bankers' books provisions (from which the South Australian bankers' books provisions and the Queensland books of account provisions are derived) - namely, that an entry in a banker's book was evidence of the transaction recorded in it because of the likelihood of its accuracy. Similar analyses of the interaction between the equivalent of section 95 of the *Evidence Act 1977* (Qld) and other specific provisions enabling computer records to be admitted have verified that the provisions are not cumulative.[147]

In relation to the admission of a document under section 84 or its equivalent in other jurisdictions, if a party can show that the computer was prone to malfunction, or that there is some other reason to question the reliability of the record, that is a matter that the court may take into account when ultimately deciding what weight to give to the document.

Cox J in *Griffiths v Australia and New Zealand Banking Group Limited* noted:[148]

> The implication of the enactment of these special sections [SA: s 47 and Qld: s 84] is that Parliament is satisfied that banking records [Qld: records from the more general category of books of account], including computer-derived records, are likely in the nature of things to be kept accurately - more accurately, one may evidently infer, than mere computer output (s 59a) [Qld: s 95], at least when that output has not itself been used in the course of carrying on a banking business. However, s 47 does not make a copy of a banking record conclusive evidence of the transactions or matters to which the banking record relates and, where the reliability of the record is plausibly challenged, it will be for the court to decide on the whole of the evidence whether it should act on the documents that are put before it. The status of exhibits admitted under s 47 [Qld: s 84] will be the same in that respect as exhibits admitted under other such provisions of the *Evidence Act* - s 45a, for instance, or s 54 or s 59b [Qld: s 95]. [words in square brackets added]

4. ISSUES FOR CONSIDERATION

(1) Would it be appropriate to amend the definition of "book of account" in section 83 of the *Evidence Act 1977* (Qld) to make it clear that a book of

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[147] See the discussion of *Deputy Commissioner of Taxation of the Commonwealth of Australia v Capron* (1993) 93 ATC 4,144 at pages 51-52 of this paper.

[148] (1990) 53 SASR 256 at 263-264.

account can include a computer file?

(2) Would it be appropriate to include a definition of "copy" in section 83 or section 84 of the *Evidence Act 1977* (Qld) to make it clear that "copy" for the purposes of section 84 includes a computer printout of a record from a book of account?

(3) Are you aware of any and, if so, what, problems in having computerised books of account, or printouts thereof, admitted for a testimonial purpose under section 84 of the *Evidence Act 1977* (Qld)?

CHAPTER 8

PROOF OF THE TRUTH OF STATEMENTS CONTAINED IN "DOCUMENTS"

1. ADMISSIBILITY OF STATEMENTS IN DOCUMENTS IN CIVIL PROCEEDINGS

(a) Introduction

Section 92 of the *Evidence Act 1977* (Qld) is derived from the *Evidence Act 1938* (UK),[149] which made admissible as documentary evidence in civil cases certain kinds of hearsay statements that tend to establish a fact. The Australian Law Reform Commission has suggested that the provisions[150] tended to be enacted in response to difficulties that emerged in trials, particularly in relation to the admission of commercial documents.[151]

The following explanation has been given for the *Evidence Act 1938* (UK), which was the precursor to section 92:[152]

> In 1939 Lord Maugham LC offered this explanation for the English Act of the previous year:
>
> > "During my long time at the Bar I came across a number of cases in which [s 92], had it been in force, would have been of extraordinary value. I have had cases in which it was necessary to prove reports by engineers as to the value of ore deposits ... in distant lands ... circumstances connected with landing facilities ... on a distant island .. [But] before the recent Act, such a report ... could never be put in evidence. The engineer in many cases could be called, but even then he could use his report to refresh his memory, but not for any other purpose": (1939) 17 *Can Bar Rev* at 481.

Forbes notes that "[c]ommon sense urges that documentary hearsay is often more reliable than 'personal knowledge' drawn from a witness's fast fading memory" and that Part VI of the *Evidence Act 1977* (Qld), which incorporates sections 92 and 93,

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149 The *Evidence Act 1938* (UK) was repealed and replaced by the *Civil Evidence Act 1968* (UK). Part 1 of the latter Act, which dealt with the admissibility of hearsay evidence, was repealed and replaced by the *Civil Evidence Act 1995* (UK). Reforms in relation to the admissibility of documentary hearsay were introduced into Queensland in 1962 in the form of ss 42A-42C of the *Evidence and Discovery Act 1867* (Qld).

150 As well as the equivalent of the books of account provisions and the equivalent of s 95 of the *Evidence Act 1977* (Qld).

151 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 2 at para 92.

152 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [92.1].

advances this view.[153]

Section 92, which applies only in civil proceedings, provides:

> (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement[154] contained in a document[155] and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if -
>
> (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
>
> (b) the document is or forms part of a record relating to any undertaking[156] and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.
>
> (2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where -
>
> (a) the maker or supplier is dead, or unfit by reason of bodily or mental condition to attend as a witness; or
>
> (b) the maker or supplier is out of the State and it is not reasonably practicable to secure the attendance of the maker or supplier; or
>
> (c) the maker or supplier cannot with reasonable diligence be found or identified; or
>
> (d) it cannot reasonably be supposed (having regard to the time which has elapsed since the maker or supplier made the statement, or supplied the information, and to all the circumstances) that the maker or supplier would have any recollection of the matters dealt with by the statement the maker or supplier made or in the information the maker or supplier supplied; or

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153 Ibid.

154 The term "statement" is defined in s 3 of the *Evidence Act 1977* (Qld) to include:

> ... any representation of fact, whether made in words or otherwise and whether made by a person, <u>computer</u> or otherwise. [emphasis added]

155 The term "document" is discussed in Chapter 5.

156 The term "undertaking" is widely defined in s 3 of the *Evidence Act 1977* (Qld) to include:

> ... public administration and any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on -
> (a) by the Crown (in right of the State of Queensland or any other right), or by a statutory body, or by any other person; or
> (b) for profit or not; or
> (c) in Queensland or elsewhere.

(e) no party to the proceeding who would have the right to cross-examine the maker or supplier requires the maker or supplier being called as a witness; or

(f) at any stage of the proceeding it appears to the court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling the maker or supplier as a witness.

(3) The court may act on hearsay evidence for the purpose of deciding any of the matters mentioned in subsection (2)(a), (b), (c), (d) or (f).

(4) For the purposes of this part, a statement contained in a document is made by a person if -

(a) it was written, made, dictated or otherwise produced by the person; or

(b) it was recorded with the person's knowledge; or

(c) it was recorded in the course of and ancillary to a proceeding; or

(d) it was recognised by the person as the person's statement by signing, initialling or otherwise in writing. [notes added]

The provision applies only where direct oral evidence of a fact would be admissible and where documents contain statements that would tend to establish such a fact (section 92(1)). At common law, a statement in a document asserting a fact as something within the personal knowledge of the statement-maker would generally be inadmissible. This is because, if the statement is offered as a true narrative of the events in issue, the statement is made out of court and is not subject to cross-examination.

(b) Requirements for admissibility under section 92

The main requirement for admissibility under section 92 and similar provisions in other jurisdictions is that the maker of the statement must have personal knowledge of the matters dealt with in it, or that the record is a record of an undertaking (or a business record) that contains statements made from information supplied by persons with personal knowledge of the matters recorded. Statements in records will then be admissible even where the information has passed through several hands. A second requirement is that the maker of the statement must be called as a witness unless he or she is unavailable for one of the reasons specified in section 92(2).

Section 92 enables two types of documentary hearsay evidence to be admitted in civil cases: statements that record personal experience (that is, statements that assert a fact that is something within the personal knowledge of the statement-maker); and statements recorded in the ordinary course of an "undertaking". Forbes notes that the provisions are alternative - not cumulative - and that some documents would fit into both categories: "Thus a business record setting out the personal experience of the

statement-maker is admissible under both ss 92(1)(a) and 92(1)(b)".[157]

In proceedings where the maker of a statement had personal knowledge of the matters dealt with in the statement and is called as a witness, the statement will be admissible as evidence of the matters in it (section 92(1)(a)). If the maker of the statement is not available to give evidence for certain specified reasons (such as that he or she is dead or is out of the State), the statement will still be admissible as evidence of the matters in it (section 92(1)(a) and (2)).

In proceedings where the document is part of a "record relating to any undertaking" and is made in the course of that undertaking from information supplied by persons who had, or may reasonably be supposed to have had, knowledge of the matters dealt with in the information they supplied and the person who supplied the information is called as a witness, the statement in the document will be admissible as evidence of the matters in it (section 92(1)(b)). Again, there are exceptions if the maker of the statement is not available for certain specified reasons (such as death) (section 92(1)(b) and (2)).

Brown has observed that there "seems to be general judicial agreement that the legislation should be liberally construed, so as to broaden the scope of admissible evidence as far as reasonably possible".[158]

(c) Qualifications on the operation of section 92

The operation of section 92 is subject to a number of provisions in Part 6 of the *Evidence Act 1977* (Qld):

- section 96(1) (in deciding whether a statement is to be admitted in evidence, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances);

- section 97 (if a statement in a document is admissible, it may be proved by the production of a copy of that document authenticated in such manner as the court may approve);

- section 98 (the court may reject any statement if it appears to it to be inexpedient in the interests of justice that the statement should be admitted);

- section 99 (the court may withhold a document from a jury if it appears that the jury might give a statement in the document undue weight);

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157 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [92.5].

158 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 171.

- section 100 (a statement that is admitted is not to be treated as corroboration of evidence given by the maker of the statement or person who supplied the information from which the record containing the statement was made).

2. ADMISSIBILITY OF STATEMENTS IN DOCUMENTS IN CRIMINAL PROCEEDINGS

(a) Introduction

Section 93 of the *Evidence Act 1977* (Qld) is similar to section 92, but applies to criminal proceedings as opposed to civil proceedings. Forbes suggests that it is probably due to the higher standard of proof in criminal matters[159] that it is more difficult to admit a statement in a document as evidence of the matters in the statement in criminal proceedings than in civil proceedings.[160] Forbes does, however, note that the demands of section 93 apply to both the defence and prosecution.[161]

Section 93 provides:

> (1) In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if -
>
> (a) the document is or forms part of a record relating to any trade or business and made in the course of that trade or business from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied; and
>
> (b) the person who supplied the information recorded in the statement in question -
>
> (i) is dead, or unfit by reason of the person's bodily or mental condition to attend as a witness; or
>
> (ii) is out of the State and it is not reasonably practicable to secure the person's attendance; or
>
> (iii) cannot with reasonable diligence be found or identified; or
>
> (iv) cannot reasonably be supposed (having regard to the time which

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159 The standard of proof in criminal matters is "beyond reasonable doubt" as opposed to the civil standard of "on the balance of probabilities".

160 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [93.2].

161 Ibid.

has lapsed since the person supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information the person supplied.

(2) In this section -

"business" includes any public transport, public utility or similar undertaking carried on in Queensland or elsewhere by the Crown (in right of the State of Queensland or any other right) or a statutory body.

Section 93 of the *Evidence Act 1977* (Qld) is based on the *Criminal Evidence Act 1965* (UK), which was a response to the difficulty encountered in the case of *Myers v Director of Public Prosecutions*.[162] In that case Myers was charged with receiving stolen cars. The prosecution tendered records of the car manufacturer as evidence of identity of some of the cars. The House of Lords held that the records were not admissible because the numbers entered upon them were merely "assertions by the unidentifiable men who made them that they had entered numbers they had seen on the cars".[163] The Court was not prepared to create a new exception to the hearsay rule to cover this type of situation. In Queensland, the records sought to be admitted in that case would be admissible under section 93(1)(a) of the *Evidence Act 1977* (Qld) as records of a "trade or business".

Section 92(4), which specifies the ways in which a statement in a document may be "made by a person",[164] also applies to section 93.

(b) Qualifications on the operation of section 93

The operation of section 93 is subject to the same provisions of the *Evidence Act 1977* (Qld) as is section 92.[165]

3. DIFFERENCES BETWEEN SECTIONS 92 AND 93

The main differences between sections 92 and 93 are:

(1) There is no equivalent of section 92(1)(a) in section 93. Accordingly, only

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162 [1965] AC 1001.

163 Id per Lord Reid at 1022.

164 S 92(4) of the *Evidence Act 1977* (Qld) is set out on page 45 of this paper.

165 See page 46 of this paper.

business records are admissible under section 93.[166]

(2) Under section 93 there is no question of tendering the document and then calling the source of the information. A statement in a document is admissible under section 93 only if the source is absent for one of the reasons set out in section 93(1)(b). In relation to the permissible reasons for absence, there is no equivalent in section 93 of section 92(2)(e) or (f).[167]

(3) The term "trade or business" is used in section 93, whereas the term "undertaking" is used in section 92.

Forbes doubts whether police records would be admissible under section 93:[168]

> Arguably the police force is a "public utility" within the meaning of s 93(2), but it is understandable that the courts would not wish to create a precedent for the reception, in criminal proceedings, of police officers' "business" notes or unsigned records of interview, although the latter are already excluded by the decision in *Driscoll v R* (1977) 137 CLR 517 ... However, it is clear that police records may be admitted under s 92 in civil proceedings: *McKay v Hutchins and Fire & All Risks Insurance Co Ltd* [1990] 1 Qd R 533.

4. ADMISSIBILITY OF COPIES OF DOCUMENTS CONTAINING STATEMENTS

In other jurisdictions, the law is unclear, in the absence of specific statutory provisions, as to whether a copy of a document containing a statement can be admitted under the equivalent of sections 92 or 93 of the *Evidence Act 1977* (Qld).[169]

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[166] Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [93.3].

[167] Ibid. S 92(2)(e) and (f) provide that the maker of the statement or supplier of information need not be called as a witness where:

> ...
> (e) no party to the proceeding who would have the right to cross-examine the maker or supplier requires the maker or supplier being called as a witness; or
> (f) at any stage of the proceeding it appears to the court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling the maker or supplier as a witness.

[168] Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [93.10].

[169] Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 179-180 refers to *Edmonds v Edmonds* [1947] P 67 where a properly authenticated copy of a document was admitted as evidence of the material therein; and *Bowskill v Dawson* [1954] 1 QB 288 where, despite a statutory provision enabling copies to be admitted, the court held that that provision implicitly required the original document to be in existence, the only question being whether it would cause unnecessary delay or expense to have it produced. That case was followed in *White v Venus* [1968] SASR 83.

However, in Queensland, section 97 of the *Evidence Act 1977* (Qld) removes this doubt. It specifically provides that, if a statement may be proved by production of a document, a copy of the document is admissible as evidence of the material contained in the statement, whether or not the original is still in existence.

Section 97 provides:

> Where in any proceeding a statement contained in a document is proposed to be given in evidence by virtue of this part, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or the material part thereof, authenticated in such manner as the court may approve.

The provision specifies that the copy must be appropriately authenticated. There are no requirements set out in the *Evidence Act 1977* (Qld) relating to authentication of copies of documents. Thus, the proof that is required to verify that the copy accurately reflects the original is left to the discretion of the court.

Courts have used various assumptions or other means to admit into evidence statements contained in records from computers - for example, by treating the information as "real" evidence[170] and thus not requiring it to fulfil the requirements of provisions equivalent to the provisions in Part VI of the *Evidence Act 1977* (Qld).

In *R v Governor of Brixton Prison and Another, Ex parte Levin*[171] the House of Lords held that, where a bank's computer transfers funds from one account to another and the computer records the transaction automatically, a printout of the record is not a hearsay assertion that the transaction occurred; it is a record of the transfer itself. Similarly, in *R v Spiby*,[172] the printouts of computer records of telephone conversations made by people charged with drug-related offences were produced without the intervention of a human mind, and so were held to be real evidence outside the scope of the evidence legislation.[173]

5. JUDICIAL DISCRETION TO EXCLUDE STATEMENTS OTHERWISE

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[170] See the discussion of "real" evidence at pages 13-14 of this paper.

[171] [1997] AC 741.

[172] (1990) 91 Cr App R 186.

[173] In *R v Shephard* [1993] AC 380, the House of Lords held that the decision in *R v Spiby* should not be followed to the extent that it permitted computer printouts to be admitted without first satisfying the requirements of s 69 of the *Police and Criminal Evidence Act 1984* (UK). However, because of the differences between s 95 of the *Evidence Act 1977* (Qld) and s 69 of the *Police and Criminal Evidence Act 1984* (UK), that reasoning would not apply in Queensland. See the analysis of those differences in *Deputy Commissioner of Taxation of the Commonwealth of Australia v Capron* (1993) 93 ATC 4,144, discussed at pages 51-52 of this paper.

ADMISSIBLE UNDER SECTIONS 92 AND 93

Section 98 of the *Evidence Act 1977* (Qld) enables a court, in its discretion, to reject any statement, even if it has satisfied the requirements of sections 92 or 93, "if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted".

Forbes suggests that the "origins of this section probably lie in the political necessity to re-assure those who thought (and any who still think) that Pt VI is too revolutionary".[174]

In criminal matters the court may also, under section 130 of the *Evidence Act 1977* (Qld), reject evidence that is otherwise admissible under section 93. Section 130 provides:

> Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.

6. RELATIONSHIP BETWEEN SECTIONS 92, 93 AND 95

Each of sections 92, 93 and 95 specifies the circumstances in which a statement contained in a particular type of document is admissible as evidence of a fact in that statement. It is possible for a statement to be admissible under more than one of those sections, although it need only satisfy the criteria of one of those sections to be admitted. In particular, it is not necessary for a statement in a computer-generated document to satisfy the criteria for admissibility under section 95 if it would otherwise be admissible under either section 92 or section 93.[175]

In relation to the Victorian counterparts of sections 92, 93 and 95 of the *Evidence Act 1977* (Qld) - sections 55 and 55B of the *Evidence Act 1958* (Vic) - Hayne J in *Deputy Commissioner of Taxation of the Commonwealth of Australia v Capron*[176] held that the requirements of sections 55 and 55B of the Victorian Act were not cumulative; the fact that a business record was generated by a computer did not mean that it must be first shown to be admissible as a computer record before being admissible under section 55 of the Victorian Act.

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[174] Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [98.1].

[175] Similarly, a statement would not have to be admissible under s 95 of the *Evidence Act 1977* (Qld) if it were otherwise admissible under s 84.

[176] (1993) 93 ATC 4,144.

In coming to this conclusion, Hayne J distinguished the decision in *R v Shephard*,[177] where the House of Lords held that a computer-generated statement must satisfy the requirements of the specific computer section in the *Police and Criminal Evidence Act 1984* (UK)[178] before it would be admissible under section 24 of the *Criminal Justice Act 1988* (UK).[179] His Honour emphasised the different wording of the two computer provisions:[180]

> The Police and Criminal Evidence Act 1984 (UK) when dealing with computer-produced documents provides that statements in such documents "shall not be admissible" unless certain things are shown. Both s. 55 [Qld: ss 92 and 93] and s. 55B [Qld: s 95] of the Victorian Evidence Act provide simply that in certain circumstances a statement contained in a document and tending to establish a fact shall be admissible if certain conditions are met. If the conditions relating to computer-generated documents are met then s. 55B will apply. If the conditions relating to business records are met then the document will be admissible under s. 55. The provisions do not have a cumulative operation. [words in square brackets added]

The same reasoning would apply to sections 92, 93 and 95 of the *Evidence Act 1977* (Qld), which are expressed in similar terms to their Victorian counterparts.

7. ISSUES FOR CONSIDERATION

(1) Should section 93 of the *Evidence Act 1977* (Qld) be expanded to cover "undertakings" as does section 92 (and the United Kingdom provision in relation to business records)?

(2) Would it be advantageous to have one provision covering the admissibility of copies of all documentary evidence admissible under the *Evidence Act 1977* (Qld)?

(3) Should sections 92 and 93 of the *Evidence Act 1977* (Qld) be expanded to cover the situation where the "maker" of the statement may be not one but a number of people, or where the statement may have been partially created by mechanical or electronic input?

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177 [1993] AC 380.

178 *Police and Criminal Evidence Act 1984* (UK) s 69.

179 S 24 of the *Criminal Justice Act 1988* (UK), which repealed and replaced s 68 of the *Police and Criminal Evidence Act 1984* (UK), is similar to s 55 of the *Evidence Act 1958* (Vic) and s 93 of the *Evidence Act 1977* (Qld).

180 (1993) 93 ATC 4,144 at 4,151.

CHAPTER 9

STATEMENTS IN DOCUMENTS PRODUCED BY COMPUTERS

1. INTRODUCTION

Where a computer records a statement produced with a person's input, a printout of that statement will not, without statutory intervention, be admissible as evidence of the truth of the contents of the statement. In such cases, the common law would classify the evidence as hearsay and the only way it could be admitted would be to call the maker of the statement as a witness.[181] In apparent recognition of the significant role that computers play in recording and processing information in business and other aspects of everyday life, a number of jurisdictions have adopted a statutory provision based on section 5 of the *Civil Evidence Act 1968* (UK)[182] to facilitate the admission into evidence of computer records - by providing a statutory exception to the hearsay rule.[183]

However, unlike the statutory exceptions to the hearsay rule relevant to books of account[184] and statements contained in documents that are tendered as evidence of the facts in issue where the maker of the statement is available (or, for certain specified reasons, not available),[185] statutory provisions facilitating the admissibility of statements produced by computers are subject to a number of specific restrictions. This is most probably because, without more, computer records generally cannot be assumed to be as *prima facie* reliable as books of account (including computerised books of account). Smith J of the Supreme Court of Victoria, when discussing the Victorian equivalents of section 95 of the *Evidence Act 1977* (Qld) (section 55B) and sections 83 to 91 of the *Evidence Act 1977* (Qld) (sections 58A-58J), observed:[186]

> The apparently more rigorous requirements of s55B rather point to a concern that computer-produced documents needed special treatment because they may not carry within them prima facie guarantees of reliability, such as are to be found with books of account, of the kind referred to in s58A.

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181 Where the computer is used as a calculator to process information and where the computer produces information without human input (apart from the programming, installation and maintenance) - the computer output is often referred to as "real" evidence and is not subject to the rule against hearsay.

182 For example, *Evidence Act 1971* (ACT) Part VII; and *Evidence Act 1958* s 55B (Vic).

183 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 347.

184 *Evidence Act 1977* (Qld) ss 83-91. See Chapter 7 of this paper.

185 *Evidence Act 1977* (Qld) ss 92, 93. See Chapter 8 of this paper.

186 *Murphy & Anor v Lew & Ors* unreported, Sup Ct, Vic, No 12377 of 1991, 12 September 1997 at 13.

If a statement can be admitted under either section 92 or 93 of the *Evidence Act 1977* (Qld), it is unlikely that there will be an attempt to admit the statement under section 95 of the *Evidence Act 1977* (Qld). This is because the conditions to be fulfilled prior to admission under section 95 are so much more onerous. When comparing the South Australian equivalent of Queensland's books of account provisions[187] with the South Australian equivalent of section 95, Cox J in *Griffiths v Australia and New Zealand Banking Group Limited* noted:[188]

> [C]omputer-derived banking records may be thought to stand in a privileged position, as far as the admissibility of copies of print-outs is concerned, when compared with other computer-derived records. Sections 59a and 59b [South Australia's computer-specific provisions] lay down exacting requirements for the verification of computer print-outs that a party seeks to tender in evidence. For instance, the court must be satisfied that the computer is correctly programmed and that there is no good reason to doubt the accuracy of the computer output. There is nothing like that in s 47 [the South Australian counterpart to Queensland's books of account provisions], which thus provides a bank with a much simpler and easier way of getting certain computer-derived evidence before a court. [words in square brackets added]

2. SECTION 95 *EVIDENCE ACT 1977* (QLD)

Section 95 of the *Evidence Act 1977* (Qld) provides:

> (1) In any proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document produced by a computer and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question.
>
> (2) The said conditions are -
>
> (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person; and
>
> (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived; and
>
> (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

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187 See Chapter 7 of this paper.

188 (1990) 53 SASR 256 at 263.

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of 1 or more computers and 1 or more combinations of computers;

all the computers used for that purpose during that period shall be treated for the purposes of this part as constituting a single computer and references in this part to a computer shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing all or any of the following things, that is to say -

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate;

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of the matters stated in the certificate and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) Any person who in a certificate tendered in evidence by virtue of subsection (4) wilfully makes a statement material in that proceeding which the person knows to be false or does not believe to be true is guilty of an offence.

Maximum penalty - 20 penalty units or 1 year’s imprisonment.

(6) For the purposes of this part -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any person, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(7) Subject to subsection (3), in this section -

"computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

Thus, where direct oral evidence of a fact would be admissible, any statement contained in a "document"[189] produced by a computer and tending to establish that fact is admissible provided the following conditions are fulfilled:

- The document must be produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over the period, whether for profit or not, by any person (section 95(2)(a)). The term "store" in the Victorian equivalent of this condition has been read simply to mean the retention of data by the computer system and does not impute a requirement of placing information in the system (this is dealt with in section 95(2)(b) and (d)).[190]

- Over that period there must have been supplied to the computer, "regularly" and "in the ordinary course of those activities", information of the kind contained in the statement or of the kind from which information so contained is derived (section 95(2)(b)). As to the term "regularly", the Victorian equivalent has been said to be satisfied where there has been a "substantially continuous storage of information for the purposes of the activities of the person in question, as opposed to a casual or intermittent storage of such information".[191]

- Throughout the material part of that period the computer must have been operating properly or, if not, any defect must have been such as not to affect the production of the document or the accuracy of its contents (section 95(2)(c)). This does not appear to have been a difficult barrier to the admissibility of computer documents. In *Murphy & Another v Lew & Others*,[192] the court was

189 See Chapter 5 of this paper for a discussion of the term "document".

190 *Murphy & Anor v Lew & Ors* unreported, Sup Ct, Vic, No 12377 of 1991, 12 September 1997 at 19-20.

191 Id at 21.

192 Id at 22.

satisfied that malfunctions in the computer in question did not affect the production of certain documents or the accuracy of their contents notwithstanding the failure of the plaintiffs to call the computer staff: "[a]lternatively, the evidence is sufficient to place the evidentiary onus on the objecting parties, and their failure to call such witnesses supports the inference that any malfunctions did not affect the production of the documents or their accuracy".[193]

- The information contained in the statement must reproduce or be derived from information supplied to the computer in the ordinary course of those activities (section 95(2)(d)).

Where one or more computers, or one or more combinations of computers, carries out the storing or processing of information during the relevant period, they are to be regarded as constituting one computer (section 95(3)).

Where a statement is tendered under section 95 of the *Evidence Act 1977* (Qld), a certificate purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device, or the management of the relevant activities, is admissible if it:

- identifies the statement and describes the manner of its production;

- gives such particulars of any device involved in the production of the document as may be appropriate for the purpose of showing that the document was produced by a computer; or

- deals with any of the matters to which the conditions of section 95(2) relate (section 95(4)).

In *R v Shephard*,[194] the House of Lords held that, having regard to the supplementary provisions to section 69 of the *Police and Criminal Evidence Act 1984* (UK)[195] (the equivalent of section 95(4) of the *Evidence Act 1977* (Qld)), oral evidence could be accepted in lieu of a certificate signed by a person with responsibility for the operation of the computer:[196]

> Proof that the computer is reliable can be provided in two ways. Either by calling oral evidence or by tendering a written certificate in accordance with the terms of paragraph 8

193 Ibid.

194 [1993] AC 380.

195 Paragraph 9 of Schedule 3 to the *Police and Criminal Evidence Act 1984* (UK) enables a court to require oral evidence to be given of anything of which evidence could be given by a certificate under paragraph 8 (which supplements s 69 of that Act).

196 [1993] AC 380 per Lord Griffiths at 386.

of Schedule 3 [Qld: s 95(4)], subject to the power of the judge to require oral evidence.
[words in square brackets added]

The House of Lords held that oral evidence as to the requirements of the section concerning the workings of the computer could be satisfied by "the oral evidence of a person familiar with the operation of the computer who can give evidence of its reliability and such a person need not be a computer expert".[197]

Information is to be taken to be supplied to a computer if it is supplied to it in any appropriate form, and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment (section 95(6)(a)).

Where, in the course of activities carried on by any person, information is supplied with a view to being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, is to be taken to be supplied to it in the course of those activities (section 95(6)(b)).

A document is to be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of appropriate equipment (section 95(6)(c)).

Section 95 applies in criminal as well as civil proceedings. It applies to computerised documents of all kinds and not just those that constitute financial records.[198]

3. QUALIFICATIONS ON THE OPERATION OF SECTION 95

The operation of section 95 is subject to the same provisions of the *Evidence Act 1977* (Qld) as is section 92.[199]

4. APPARENT SHORTCOMINGS OF SECTION 95

Although the Commission is unaware of any reported cases where section 95 of the

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197 Id per Lord Griffiths at 387. See also note 195 above.

198 See, for example, *Murphy & Anor v Lew & Ors* unreported, Sup Ct, Vic, No 12377 of 1991, 12 September 1997 at 13, where it was argued that the book of account provisions in the *Evidence Act 1958* (Vic) could not have been intended to apply to computerised books of account because there would be no need for the equivalent of s 95 of the *Evidence Act 1977* (Qld) if they did. That argument was rejected because s 55B (the equivalent of s 95 of the *Evidence Act 1977* (Qld)) plainly applied to computer-produced records of all kinds, not just those that constitute financial records.

199 See page 46 of this paper.

Evidence Act 1977 (Qld) has been an issue, it has been brought to the Commission's attention that the provision is relied upon not infrequently during, for example, summary judgment proceedings.

In *Murphy & Another v Lew & Others*,[200] the plaintiffs sought to rely on sections 55, 55B and 58A to 58J of the *Evidence Act 1958* (Vic) - the equivalents respectively of sections 92, 93, 95 and 83 to 91 of the *Evidence Act 1977* (Qld) - to secure the admission of documents, including documents printed by a computer system. Smith J stated that:[201]

> It is now well established that these statutory provisions, which have been enacted to facilitate the admission of documentary evidence, should be construed liberally and not restrictively. They should be approached in a common-sense way.

In most of the cases reviewed by the Commission that have involved the consideration of computer records, there has been no reported issue about the admissibility of the computer printouts of those records. It is not known whether in those cases admissibility under section 95 or its equivalent in other jurisdictions was argued at all. It is perhaps more likely that the printout was simply assumed to be an admissible document under the common law.

Brown takes a fairly pessimistic view as to the usefulness of computer-specific provisions such as section 95:[202]

> It is apparent from the paucity of case-law surrounding computer-specific legislation in both England and Australia (with the only reported decisions being in South Australia), the negative reactions of the courts to such legislation in the rare cases where it has been considered, and the reliance by judges on the developing common law rather than on the legislation to admit computer-produced evidence, that such statutes have been such a marked failure. This failure is in no way the fault of the courts. It arises first from the unrealistic complexity of the conditions for admissibility in computer-specific legislation, secondly, from the relative ease with which the common law can be used in the cases that have arisen so far, and, thirdly, from the clear unwillingness of counsel to come to grips with the legislation and argue its application before the courts.

Brown distinguishes between admissibility and weight - which section 95 seems to have intermingled:[203]

> [W]hat is the purpose of the laws of evidence when we will trust our lives to computer-designed aircraft and cars, yet refuse to receive computer reports in evidence unless they have been tried through all the levels of Dante's Inferno?
>
> The law of evidence is perhaps best viewed as a method originally designed to increase

200 Unreported, Sup Ct, Vic, No 12377 of 1991, 12 September 1997.

201 Id at 10.

202 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 366.

203 Ibid.

> the probability that material on which courts, particularly criminal courts, could act, was as reliable as possible. Reliability is the path that leads, hopefully, to judicially determined truth.
>
> Herein lies the flaw of the South Australian legislation [similar to Qld: s 95] ... For, in deigning to admit the computer into the evidentiary maze at all, legislators and courts have demanded of it unreasonably high standards of reliability: in fact, I suspect, some quasi-scientific standards of reliability are being demanded in the forensic sphere for computers, when such are not required for other "scientific instruments", or for witnesses. [words in square brackets added]

5. ISSUES FOR CONSIDERATION

(1) To what extent is section 95 of the *Evidence Act 1977* (Qld) relied upon to admit statements in documents produced by computers as evidence in Queensland?

(2) What, if any, issues have arisen when seeking to admit such statements under that provision?

(3) Is it necessary to have a provision along the lines of section 95 of the *Evidence Act 1977* (Qld), or is it sufficient to leave the question of the admissibility of statements in computer-produced documents to sections 84, 92 and 93 of the *Evidence Act 1977* (Qld)?

(4) If a provision to the effect of section 95 should be retained in the *Evidence Act 1977* (Qld), is it appropriate to simplify, or make less onerous, the admissibility criteria of that provision? If so, how?

(5) Should the *Evidence Act 1977* (Qld) specifically permit oral evidence to be given in lieu of, or in addition to, the certificate currently required under section 95(4) of the *Evidence Act 1977* (Qld)?

CHAPTER 10

REPRODUCTIONS

1. INTRODUCTION

Part 7 of the *Evidence Act 1977* (Qld), encompassing sections 104 to 129, regulates the use of reproductions as evidence. Part 7, which has been part of the Act since its passage, can be considered to be a statutory exception to the secondary evidence rule. It provides for situations where a copy will be admissible as evidence without an original being produced or its absence being explained. However, the sections in Part 7 are not intended to widen the class of original documents that are admissible. This is made clear by, for example, sections 106 and 116; only copies of documents that would have been admissible are admissible under the provisions of Part 7. The common law rules of admissibility are preserved.

The purpose of Part 7 has been described in the following terms:[204]

> The object of this Part is to adapt the rules of documentary evidence to modern methods of preserving documents in convenient, space-saving forms such as microfilm or microfiche and then discarding the originals. The common law principle which is modified here is not the rule against hearsay but the rule which requires the contents of a document (whether tendered testimonially or not) to be proved by production of the original ...

However, Part 7 and its interstate equivalents have been criticised as being too narrow and as being technologically obsolete and intimidating in their length and detail.[205] In particular, there have been concerns about whether these types of provisions apply so as to facilitate the admission of records that have been copied and stored by more modern means. These concerns have been expressed in the following terms:[206]

> Experienced information specialists expect optical disc technology to gain wide acceptance in the marketplace as an alternative to traditional electro magnetic technology and microfilm or paper-based document management systems.
>
> Archivists, librarians, records managers and computer systems managers alike, however, have expressed concern related to the legal status of records and data maintained using this technology. Specific concern relates primarily to the admissibility of optical disc records as evidence and as a consequence the acceptance of this type of electronic record by the business community, administrative agencies and other organisations.
>
> ... no statute or regulation, or judicial decision, seemingly exists in any Australian

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204 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [104.2].

205 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at para 323.

206 Reynolds PM, "Optical Disc Document Images: Evidentiary Aspects in Victoria" (1991) 3 *Bond Law Review* 85.

> jurisdiction which directly addresses the application of this particular technology to document reproduction and storage. Apparently the Courts have yet to be confronted with a challenge to the reliability of records or data maintained by these systems and may not be required to respond for several years based upon the past history with other technologies.

The Part 7 provisions, while having a clear and simple purpose, are quite complex in their terminology and require some explanation.

A further, more specific, issue that has been raised in the context of storage and retrieval of information relates to transcripts of court proceedings.

2. DEFINITIONS: REPRODUCTIONS

The main definitions focus on what is a "reproduction" for the purposes of Part 7 of the *Evidence Act 1977* (Qld).

A "reproduction" is defined by section 104 of the *Evidence Act 1977* (Qld) in the following terms:[207]

> **"reproduction"** in relation to a document means a machine copy of the document or a print made from a transparency of the document and "reproduce" and any derivatives thereof have a corresponding meaning.

A "machine copy" is defined by section 104 of the *Evidence Act 1977* (Qld) in the following terms:

> **"machine copy"**, in relation to a document, means a copy of the document made by a machine performing a process -
>
> (a) involving the production of a latent image of the document (not being a latent image on photosensitive material on a transparent base) and the development of that image by chemical means or otherwise; or
>
> (b) that, without the use of photosensitive material, produces a copy of the document simultaneously with the making of the document.

A "machine copy" would include such things as a photostat and even a carbon copy.

A "transparency" of a document is defined to mean, *inter alia*:[208]

> (a) a developed negative or positive photograph of that document ... made on a

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207 Similar definitions and provisions may be found in other legislation, for example: *Evidence Act 1958* (Vic) ss 53-53T; *Evidence Act 1910* (Tas) ss 68-68ZA; and *Evidence Act 1906* (WA) ss 73A-73V.

208 *Evidence Act 1977* (Qld) s 104.

transparent base by means of light reflected from, or transmitted through, the document; or

(b) a copy of an original photograph made by the use of photosensitive material (being photosensitive material on a transparent base) placed in surface contact with the original photograph.

Brown notes that these definitions, and their equivalents, were aimed at permitting the microfilming and destruction of bulky paper records in both government and business, and that the provisions have become technologically obsolete through the replacement of microfilming with computer data storage and retrieval techniques.[209] The provisions do not seem to encompass the copying of documents by the use of more modern technologies, such as modern photocopying, scanning or imaging technology.[210]

On their face, the reproduction provisions would not seem to include a printout from an electronic record, given that there is no "latent image" of the document that is being produced and subsequently chemically treated.[211] Nor could it be said that the "copy" is being made simultaneously with the document, as the electronic record that is being treated as a document for the purposes of Part 7 might have been created long before the "reproduction" is created.

This conclusion is supported by the comments of the Australian Law Reform Commission in its review of the law of evidence. In discussing the definitions contained in "reproductions legislation", the Australian Law Reform Commission noted:[212]

> What is perhaps most important is that the definition of 'machine' copy excludes copies made by the use of transparent film and the expressions 'negative' and 'transparency' are defined by using the expression 'photograph'. This, for example, excludes computer output on microfilm, produced using laser techniques and the new technology of optical discs which also uses laser techniques.

The Australian Law Reform Commission noted that if such reproductions were to be admitted they would need to fall within some other exception, for example, the business record provisions.[213]

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209 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 24.

210 These newer technologies operate by, in effect, placing a grid over the document to be copied, and breaking down the "original" into a series of pixels, or picture elements. The arrangement and number of pixels is read into the scanner's memory and then reassembled, either in a computer file, screen or document.

211 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 25.

212 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 2 at para 65.

213 See Chapter 8 of this paper.

3. REPRODUCTIONS OF OFFICIAL DOCUMENTS

Section 105 of the *Evidence Act 1977* (Qld) makes specific provision for the reproduction of official documents.

Under this section, a copy of an official document will be admissible if it bears, or is accompanied by, a certificate signed by an "approved person" stating that it is a "reproduction" of a document that was in the custody or control of the approved person in the approved person's official capacity at the time the machine copy or transparency was made.[214] An "approved person" is defined as a person the Minister declares by gazette notice to be an approved person.[215] Where such a certificate is present the copy is admissible without any further proof - it is treated as if the copy were in fact the original for any evidentiary purpose.

Forbes notes that the section was intended to facilitate the use of prints of microfilm records and photostats by such persons as the Registrar-General and the Registrar of Titles.[216]

However, even if the definitions of "machine copy" and "transparency" were appropriate for electronic records, the requirement that the copy be certified by an "approved person" may be difficult to apply to an electronic record, as the necessary documents would need to be printed out before they could be certified.

Section 105 of the *Evidence Act 1977* (Qld) does not appear to have been interpreted by the courts.[217]

4. REPRODUCTIONS OF BUSINESS DOCUMENTS

Section 106 of the *Evidence Act 1977* (Qld) provides that a copy of a business document will be admissible as evidence where it can be shown that it is a reproduction made in good faith and that the original document has been lost or destroyed, or that it is not reasonably practicable to produce the original document. This can be shown, *inter alia*, by the production of an affidavit by the person who destroyed the document

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214 *Evidence Act 1977* (Qld) s 105(3).

215 *Evidence Act 1977* (Qld) s 105(1).

216 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [105.1].

217 In *Wran v Australian Broadcasting Commission* [1984] 3 NSWLR 241 at 261 Hunt J briefly considered the effect of the New South Wales equivalent of s 105 on the New South Wales Archives Authority. His Honour held that the reproduction provisions could be relied upon if a person were required to produce a document held in the Archives.

or who has unsuccessfully searched for the document.[218] From this it can be seen that the party wishing to tender the evidence must still explain the absence of the original, as required by the secondary evidence rule. However, the explanation is given by affidavit, rather than by oral testimony.

The requirement that the reproduction of a business document be made in "good faith" was considered in the Victorian case of *Bellini v ANZ Banking Group Ltd*.[219] In that case, it was argued that the photocopy of a credit voucher from a credit card was not admissible under section 53B of the *Evidence Act 1958* (Vic) - the Victorian equivalent of section 106 of the *Evidence Act 1977* (Qld) - as there was no evidence that the reproduction of the credit voucher had been made in good faith. As a result, there was no evidence that the photocopy was a reproduction of the original.

The judge dismissed this argument, noting that, as the photocopy was admitted into evidence at trial without objection, the point did not need to be decided. However, the judge noted that, if it were the case that photocopies were not admissible unless it could be shown they were made in good faith:[220]

> such a narrow construction would surely so limit the operation of the section that it would have marginal enabling effect. It cannot be overlooked that the section presumptively operates when there is no original in existence (that is, "destroyed"), or it is not able to be produced (that is, "lost" or "impracticable to obtain").

If a copy of a document fulfils the requirements of section 106 of the *Evidence Act 1977* (Qld), it may be used in evidence in the same way as the original document might have been used.[221] This means that the original document must not infringe the other rules of evidence, such as the hearsay rule.[222] To prove that the copy fulfils the requirements, an affidavit must be made by the person who made the copy, at about the time the copy was made. This affidavit must contain a number of particulars including an indication of when the copy was made and a description of the process of copying. The affidavit should also state that the copying process was carried out properly and that the machine copy was made in good faith.[223] This process is facilitated, in some measure, if the copy was made by an "approved machine" under section 107 of the *Evidence Act 1977* (Qld), although an affidavit or some other form

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218 *Evidence Act 1977* (Qld) s 112.

219 Unreported, Sup Ct, Vic, No 6954 of 1997, 24 February 1998.

220 Id at 10.

221 *Evidence Act 1977* (Qld) s 106(1).

222 See Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [106.4]. Accordingly, if it is sought to tender the copy for a testimonial purpose, it would have to fall within one of the common law or statutory exceptions to the hearsay rule. See Chapter 4 of this paper.

223 *Evidence Act 1977* (Qld) s 106(2).

of proof is still required from the person who copied the original document, attesting to such things as the legibility of the original document.

A process that requires an affidavit to be completed each time the copying process is carried out may be impractical for many businesses,[224] even though the same affidavit could be used repeatedly to prove documents that have been copied in a series on the same length of film or have the same identification mark.[225] It would seem even more impractical when using more modern copying techniques.

Section 107(2) of the *Evidence Act 1977* (Qld) makes allowance for the use of a "copy of a copy" of a business record in certain limited circumstances. However, a print made from a transparency will be admissible as evidence only if it can be shown that:[226]

- the transparency was in existence at the time of the court proceedings; and
- the original document that was copied into a transparency was in existence for at least twelve months after the document was made, or that the original document was delivered or sent by the party relying on the transparency to another party.

These requirements are relaxed for certain government bodies, insurance companies and banks.[227]

5. SCOPE OF PART 7 OF THE *EVIDENCE ACT 1977* (QLD)

The provisions of Part 7 are quite complex in their terminology and would appear to have limited application. This could cause problems for parties seeking to admit into evidence reproductions that do not comply with the provisions. However, two sections in Part 7, sections 116 and 126, indicate that Part 7 is not intended to be viewed in isolation from other parts of the Act and the law in general.

On its face, it seems that section 116 of the *Evidence Act 1977* (Qld) increases the range of reproductions that will fall within Part 7. The section provides that, where a document has been copied by a "photographic or other machine" that creates a facsimile copy and the court is satisfied that the copy was made by that machine from the original document, the copy will be admissible in evidence to the same extent as

[224] Reynolds PM, "Optical Disc Document Images: Evidentiary Aspects in Victoria" (1991) 3 *Bond Law Review* 85 at 100.

[225] See the conditions set out in ss 113 and 114 of the *Evidence Act 1977* (Qld).

[226] *Evidence Act 1977* (Qld) s 110(1).

[227] *Evidence Act 1977* (Qld) s 110(2).

the original. It will still be admissible without proof that it was compared with the original document and without there being a notice to produce the original.

The width of the application of section 116 is unclear; there does not appear to have been any judicial consideration of that section or of its Australian counterparts. Arguably, section 116 could be relied upon to bring into evidence reproductions created by means other than microfilming or microfiching.

This section should also be read in conjunction with section 126 of the *Evidence Act 1977* (Qld). This section provides that Part 7 should be viewed as an alternative to, and in aid of, any other provision in the Act, any other law, or any practice or usage, with respect to the production to the court, or the admissibility in evidence in a proceeding, of reproductions of documents.

This indicates that Part 7 should not be viewed as the sole source of law in relation to the admissibility of reproductions. This conclusion is supported by *Bellini v ANZ Banking Group Ltd*,[228] where Hedigan J made the following comment on the Victorian equivalent of section 126:[229]

> The relevant section [s53B] is therefore facultative and is not a single criterion of admissibility. The common law has long permitted copy documents to be put into evidence when originals cannot be obtained on good grounds. [words in square brackets added]

6. JUDICIAL DISCRETION TO REJECT A REPRODUCTION

Where a reproduction is accepted by the court under Part 7 of the *Evidence Act 1977* (Qld), it is treated in the same way as the original document.[230] There is no need for a party to show that the reproduction was compared with the original document.[231]

However, the court retains a discretion to refuse to admit in evidence a reproduction tendered under Part 7 if it considers that to do so would be inexpedient in the interests of justice as a result of any reasonable inference drawn by the court from the nature of the reproduction, the machine or process by which the reproduction was made.[232]

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[228] Unreported, Sup Ct, Vic, No 6954 of 1997, 24 February 1998.

[229] Id at 11.

[230] See s 115 in relation to discovery, s 121 in respect of “ancient documents”, s 123 with respect to judicial notice, and s 127 in relation to stamp duty.

[231] *Evidence Act 1977* (Qld) s 120.

[232] *Evidence Act 1977* (Qld) s 124.

This discretion is expressed in similar terms to the discretion conferred by section 98 of the *Evidence Act 1977* (Qld) to exclude evidence. This discretion could be used if the court believed that the reproduction had been falsified in some way.

7. PART 7 OF THE *EVIDENCE ACT 1977* (QLD) AND ELECTRONIC RECORDS

Part 7 of the *Evidence Act 1977* (Qld) and its interstate equivalents have not been extensively considered by the courts, either in relation to electronic records or traditional hard-copy documents.

The operation of the Western Australian provisions in relation to electronic records was considered briefly in *Markovina v The Queen*.[233] In that case, the Full Court of the Supreme Court of Western Australia considered the question of whether or not a printout from an electronic diary was a "reproduction" of the contents of the diary under the Western Australian equivalent of Part 7 of the *Evidence Act 1977* (Qld). The Full Court held that such a printout could be considered to be a "reproduction".

Malcolm CJ, in coming to this decision, made the assumption, though not deciding the point, that material displayed on a computer screen was a "document" as defined by section 73A of the *Evidence Act 1906* (WA). This definition, which is narrower than its Queensland equivalent, provides *inter alia* that a document:[234]

> includes any book, plan, paper, parchment or other material or part thereof on which there is any writing or printing which is marked with any letters or marks denoting words or any other signs capable of carrying a definite meaning to persons conversant with them.

His Honour determined that, for the purposes of determining whether the printout was a "reproduction", a computer screen constituted material on which there was writing or printing within the meaning of the definition of "document" in section 73A of the Western Australian Act. His Honour went on to hold that, while the printout was not a print made from a negative, the printout did constitute a machine copy of the material on the computer screen.[235]

His Honour also used the discretion contained in the Western Australian equivalent of section 124 of the *Evidence Act 1977* (Qld) to include the printout as evidence rather than to exclude it, despite the apparent legislative intention of the section, which seems to be to exclude evidence upon which it may be unsafe to rely.

It does not appear that the decision in *Markovina* has been judicially considered in any

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233 *Markovina v The Queen* (1996) 16 WAR 354 .

234 Id at 384. See the discussion of the term "document" in Chapter 5 of this paper.

235 Id at 384.

subsequent cases.

8. REPRODUCTIONS IN OTHER JURISDICTIONS: *EVIDENCE ACT 1995* (CTH)

The provisions of Part 7 of the *Evidence Act 1977* (Qld) are in stark contrast with the provisions in the *Evidence Act 1995* (Cth).[236]

Section 51 of the Commonwealth Act abolishes the secondary evidence rule. As a result there is no need for lengthy provisions governing the admissibility of "reproductions".

Under clause 8 of Part 2 of the Dictionary in the Commonwealth Act, a reference to a "document" includes a reference to any copy, reproduction or duplicate of the entirety or part of the document. This is reinforced by section 48 of the Commonwealth Act which provides, *inter alia*, that the contents of a document in question may be adduced by tendering a document that is, or purports to be, a copy of the document in question and has been produced by a device that reproduces the contents of documents.[237] Copies of business or official records may also be tendered to adduce the contents of a document in question.[238]

In addition to these records, the task of authenticating a copy of a document is aided by the presumption in section 146 of the Commonwealth Act. The presumption states that, where a document or thing is produced wholly or partly by a device and it is reasonable to assume that the device normally produces a particular outcome, it is presumed (in the absence of any evidence to the contrary) that, in producing the document or thing in question, the device produced that outcome. The Act provides that an example of the operation of this presumption is that it is not necessary to call evidence to prove that a photocopier normally produces complete copies of documents and that it was working properly when it was used to photocopy a particular document.

A similar presumption in relation to business records is contained in section 147 of the Commonwealth Act.

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[236] There are equivalent provisions to the *Evidence Act 1995* (Cth) in the *Evidence Act 1995* (NSW).

[237] *Evidence Act 1995* (Cth) s 48(1)(b).

[238] *Evidence Act 1995* (Cth) s 48(1)(e), (f).

9. REPRODUCTIONS IN OTHER JURISDICTIONS: *EVIDENCE ACT 1929* (SA)

Another example of a method of dealing with the difficulty of determining the admissibility of reproductions is provided by section 45c of the *Evidence Act 1929* (SA).

Section 45c(1) of the South Australian Act provides that a document that accurately reproduces the contents of another document is admissible in evidence for the same purposes as the original document. This will be the case regardless of whether or not the original document is still in existence.

Section 45c(2) of the South Australian Act provides that, in determining whether the document accurately reproduces the contents of another, the court is not bound by the rules of evidence. The section goes on to provide that, in determining whether the reproduction is accurate:

(a) the court may rely on its own knowledge of the nature and reliability of the processes by which the reproduction was made;

(b) the court may make findings based on the certificate of a person with knowledge and experience of the processes by which the reproduction was made;

(c) the court may make findings based on the certificate of a person who has compared the contents of both documents and found them to be identical;

(d) the court may act on any other basis it considers appropriate in the circumstances.

Section 45c of the South Australian Act applies to reproductions made by an instantaneous process, or by a process in which the contents of a document are recorded (by photographic, electronic or other means) and the reproduction is subsequently produced from that record, or in any other way. The section provides for a process to be approved by regulation for the reproduction of a document.

It has been held that a carbon copy of a statement certifying the amount of alcohol in a person's blood fell within section 45c of the South Australian Act.[239]

10. ISSUES FOR CONSIDERATION: REPRODUCTIONS

It remains unclear whether reproductions of documents, particularly of electronic records, that do not fall within the narrow terms of Part 7 of the *Evidence Act 1977* (Qld) will be admissible in court. For example, it is unclear whether a business that elects to store its records on CD-ROM would be able to take advantage of section 106 of the *Evidence Act 1977* (Qld). The admissibility of records that are not business or official

[239] *SA Police v Oakes* (1996) 85 A Crim R 209 at 213.

records is even more problematic.

Even if such reproductions are potentially admissible because of the broadening effect of sections 116 and 126 of the *Evidence Act 1977* (Qld), it is unclear what standards or requirements must be followed to ensure that the records will not be excluded from evidence on the basis of being potentially unreliable. In relation to microfiche and microfilm, it was considered desirable to set down legislative conditions to govern admissibility; the same need to assure authenticity would logically apply to reproductions made by other means.

(1) Are the definitions in Part 7 of the *Evidence Act 1977* (Qld) adequate to encompass the various means by which electronic records are produced and reproduced?

(2) If not, how should the provisions be changed?

(3) Should provisions similar to those in the *Evidence Act 1995* (Cth),[240] as described in this chapter, be incorporated into the *Evidence Act 1977* (Qld)?

(4) Alternatively, should provisions similar to those contained in section 45c of the *Evidence Act 1929* (SA) be incorporated into the *Evidence Act 1977* (Qld)?

(5) Should the existing definitions of "reproduction", "machine copy" and "transparency" remain in the *Evidence Act 1977* (Qld)? If yes, should they be limited to apply only to the microfilming and microfiching of hard copy documents?

(6) Are you aware of any problems or potential problems with the application of the Part 7 provisions to electronic records? If so, what was the nature of the problems?

11. THE *RECORDING OF EVIDENCE ACT 1962* (QLD): STORAGE AND RETRIEVAL OF COURT RECORDS FOR EVIDENTIARY PURPOSES

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[240] These provisions are discussed at page 69 of this paper.

The Commission has been informed of a particular issue facing the State Reporting Bureau, which may be peculiar to the situation facing that organisation and other organisations covered by the *Recording of Evidence Act 1962* (Qld). The State Reporting Bureau is responsible for the recording of proceedings of Queensland court cases and for providing transcripts of those proceedings when required.

The issue relates to the storage of transcripts and other materials held by the Bureau. The Bureau is facing a shortage of storage for its paper-based transcripts and is assessing alternative methods of storage. In particular, it is considering the electronic storage of transcripts via imaging on to magneto optical disks and recording on CD-ROMs (that is, compact disks - read only memory), with a view to using the information so stored to reproduce the transcript pages if they are required in future court proceedings.

The *Recording of Evidence Act 1962* (Qld) enables a record under that Act of a legal proceeding to be received as evidence of anything recorded in the record.[241] Also, a transcription of a record under that Act, appropriately certified as being a transcription thereof, is to be received by a court or judicial person as evidence of anything recorded in the transcription.[242]

The Act defines "transcription" as follows:[243]

> **"transcription"**, in relation to any record under this Act, means the transcription to longhand writing, typewriting or other mode of the record.

The Act enables legal proceedings to be recorded, subject to the court's discretion, in shorthand, by a mechanical device or partly in shorthand and partly by a mechanical device.[244]

There is no provision in that Act specifically authorising the admission into evidence of electronically-stored versions of transcripts, or printouts thereof.

If a printout from a CD-ROM version of a transcript is tendered in later proceedings as evidence, the rules of evidence may hinder its admission. An example of where a transcript may be required as evidence would be a perjury case, where it would be necessary to tender the transcript of the allegedly perjured evidence.[245]

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241 *Recording of Evidence Act 1962* (Qld) s 10(1).

242 *Recording of Evidence Act 1962* (Qld) s 10(2).

243 *Recording of Evidence Act 1962* (Qld) s 4.

244 *Recording of Evidence Act 1962* (Qld) s 5.

245 Transcripts of criminal proceedings are often sought to be admitted as evidence in subsequent civil proceedings.

It may be possible for a printout from the CD-ROM version of a transcript to be tendered in a civil proceeding under section 92 of the *Evidence Act 1977* (Qld) as a record relating to any undertaking and made in the course of that undertaking.[246] The definition of "document" in the *Evidence Act 1977* (Qld)[247] might also be sufficient to include information stored on CD-ROM or other storage mechanism in digital form (under paragraph (e) of the definition or under paragraph (f) if what is stored is read as a "visual image"). However, the position is not free from doubt. Even if this argument is accepted it will apply only to non-criminal proceedings.

As section 93 of the *Evidence Act 1977* (Qld) - which relates to the admissibility of statements in documents in criminal proceedings[248] - is limited to storage in the course of a "trade or business", it is unlikely that section 93 could be used to admit in criminal proceedings a CD-ROM version of a transcript that had been kept by the Bureau.

There are also limitations to the use of section 95 of the *Evidence Act 1977* (Qld)[249] for admitting CD-ROM versions of a transcript. The section does not appear to contemplate the electronic storage of records that were not produced by electronic means. The section appears to be limited to those documents that are regularly produced by a computer.

The reproduction provisions of the *Evidence Act 1977* (Qld) would also appear to be inapplicable as their wording is directed toward the storage of records on microfilm and microfiche.

The question of whether court transcripts can be stored using CD-ROM technology cannot be determined conclusively given the existing legislation. Legislative amendment is required to clarify the situation.

Although there appears to be no equivalent to the *Recording of Evidence Act 1962* (Qld) at the Commonwealth level, Auscript Pty Ltd, the major provider of court reporting services for Commonwealth courts, archives original transcripts in paper form, as required under the *Archives Act 1983* (Cth).[250] Although Auscript Pty Ltd also stores transcripts on CD-ROMs, this is for its own purposes - for example, to sell printout copies to clients. A suggestion has been made by the Queensland manager of Auscript Pty Ltd that it dispense with paper copies altogether - perhaps with a certification requirement at the time that the transcript is put onto CD-ROM that it is an accurate reproduction of the original transcript.

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246 See Chapter 8 of this paper.

247 See the discussion of the definition of "document" in Chapter 5 of this paper.

248 See Chapter 8 of this paper.

249 See Chapter 9 of this paper.

250 Discussion with Queensland Manager of Auscript Pty Ltd (22 July 1998).

12. ISSUES FOR CONSIDERATION: STORAGE AND RETRIEVAL OF TRANSCRIPTS

(1) Would it be appropriate for the *Recording of Evidence Act 1962* (Qld) to be amended to enable certified printouts of transcripts held on CD-ROM to be accepted as evidence of anything recorded therein?

(2) Should any such amendment also contemplate the development of new technology for the storage of information which may be preferable to CD-ROMs, for example, by being drafted in wider, technologically-neutral terms?

CHAPTER 11

ADMISSIBILITY OF COMMONLY USED ELECTRONIC RECORDS[251]

1. INTRODUCTION

Records held as audiotapes, videotapes and facsimiles appear to have been used in business settings, law enforcement settings and, more recently, in private settings to such an extent that they have caused the development of quite specialised case law.[252] The use of electronic mail ("e-mail") is also becoming increasingly common.

In determining the status of these new forms of evidence, the courts seem to be favouring their admissibility, provided the information is relevant to an issue in dispute. This view was enunciated by the English Court of Criminal Appeal in *R v Maqsud Ali*[253] in relation to the admissibility of audiotapes. Marshall J noted:[254]

> For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescope or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording, conversations. We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, **but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices**, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. **Such evidence should always be regarded with some caution and assessed in light of all the circumstances of each case**. [emphasis added]

In Queensland, too, there has been a desire to admit as evidence, where relevant, new forms of communication. This desire can be traced to the enactment of the *Telegraphic Messages Act 1872* (Qld), which facilitated the proof of telegrams and which allowed writs, orders and warrants to be sent by telegraph. Parts of that Act survive in sections 75 to 77 of the *Evidence Act 1977* (Qld).[255]

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251 See the discussion of the Commission's use of the term "electronic record" at page 5 of this paper.

252 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 40.

253 [1966] 1 QB 688.

254 Id at 701.

255 These sections enable the fact of a message to be proved without production of the original and without evidence of accurate transmission.

Forbes has also noted how the provisions have been adapted to new technology:[256]

> While these provisions were designed for the communications technology of well over a century ago they have been adapted to modern conditions. For example, references to "telegraphic stations within the Colony" have given way to a requirement that a message be sent between any two "places" linked by a "system of telecommunication operated by an authority of the Commonwealth". The current practice of allowing facsimile affidavits to be read (subject to filing the original when received) disposes of cases which cast doubt on the sending of urgent affidavits by telegraph ...

2. AUDIOTAPE RECORDINGS

Different types of evidence can be recorded on an audiotape. For example, a voluntary confession may be formally recorded at a police station; a conversation may be secretly taped by a "wired" undercover police agent; a radio interview may be recorded; and a message may be left on a person's dictaphone, answering machine or voicemail.

Sometimes an audiotape recording may be very difficult to understand because, for example, there is too much background noise, or the taped conversation is in a foreign language. Where an audiotape recording is difficult to understand, a transcript or a written translation is typically produced.

The rules that govern the use and admissibility of transcripts are somewhat different from those that govern the admissibility of audiotape recordings.[257]

(a) Admissibility under the common law

(i) Relevance and authenticity

As with all forms of evidence, an audiotape recording will be admissible only if it is relevant to an issue in dispute between the parties.

In determining the relevance of the audiotape recording, it may be necessary to show that the audiotape recording is what it purports to be. The importance of authentication was highlighted by the High Court in *Butera v Director of Public Prosecutions for the State of Victoria* in the following terms:[258]

> ... it is obvious that the provenance of the tape recording must be satisfactorily

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256 Forbes JRS, *Evidence in Queensland: Statute Law and Related Common Law and Its Extension to Federal Courts* (2nd ed 1992) at para [75.3].

257 See *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180.

258 Id per Mason CJ, Brennan and Deane JJ at 184.

established before it is played over to the jury.

Examples of the sort of extrinsic evidence that will be required to establish the authenticity or "provenance" of the tape recording are:[259]

- evidence that identifies the voices and/or sounds recorded;
- evidence that establishes how the recording was brought into existence;
- evidence about the general reliability and accuracy of the equipment that was used to produce the recording; and
- evidence that the recording has not been interfered with or altered.

Exactly what evidence, if any, will be required to authenticate the tape recording will depend upon the circumstances of the case. In *R v Chen*,[260] the Victorian Court of Criminal Appeal held that the test is whether there is sufficient material before the court to allow the tribunal of fact, acting reasonably, to conclude that the recorded sounds reproduce those originally made by the person identified by the evidence. It is not necessary for the party tendering the tapes to remove absolutely any chance that they are inaccurate.[261]

(ii) The secondary evidence rule

Until quite recently, there were a number of conflicting authorities on whether an audiotape recording should be treated as a document for the purpose of applying the common law secondary evidence rule.[262]

For example, in *R v Gaudion*,[263] the court held that a transcript of an audiotape recording was admissible whether or not the original of the audiotape was produced, provided that if the audiotape had been produced, it would have been admissible. That decision was followed in Queensland in *R v Beames*,[264] where the Court of Criminal Appeal held that a transcript of an audiotape recording

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259 For a discussion of the application of the common law authentication rule to audiotape recordings, see *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180; *R v Chen* [1993] 2 VR 139 at 149-150; and Wilson IA and Garner KN, "Evidence of Tape Recordings" (1988) 4 *QUTLJ* 113 at 114-115.

260 [1993] 2 VR 139.

261 Id at 150.

262 See Chapter 2 of this paper.

263 [1979] VR 57.

264 (1979) 1 A Crim R 239 at 241.

could be admitted as original evidence of the sounds that were uttered. The court held that the audiotape recording was a physical object and not a document.

These decisions can be contrasted with the decision in *Conwell v Tapfield and Anor*,[265] where the court held that the transcript of an audiotape recording was inadmissible because it was not "the best evidence of the sounds entrapped in the record".[266]

Since the High Court's decision in *Butera v Director of Public Prosecutions for the State of Victoria*,[267] it is now reasonably clear[268] that the common law secondary evidence rule applies to audiotape recordings, at least to the extent that a transcript of a recording can be admitted only if the audiotape is not available. The secondary evidence rule does not, however, operate to exclude a copy of an audiotape recording from being admitted.

In *Butera v Director of Public Prosecutions for the State of Victoria*, Mason CJ and Brennan and Deane JJ laid down the following rules regarding the admissibility of audiotape recordings:[269]

- An audiotape recording is not by itself admissible evidence of what is recorded on it. It is the sounds that are produced when the audiotape is played in court that are the evidence admitted to prove what is recorded;[270]

- When an audiotape recording is available, or its absence is not accounted for satisfactorily, the contents of the recording can be proved only by playing the recording in court;[271]

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265 [1981] 1 NSWLR 595.

266 Id at 598.

267 (1987) 164 CLR 180.

268 The High Court's decision in *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 was a majority decision. Dawson and Gaudron JJ did not agree that an audiotape recording should be treated like a written document for the purpose of applying the common law secondary evidence rule. According to Dawson J, the absence of an original audiotape recording affects only the weight (and not the admissibility) of other evidence about the audiotape's contents: see per Dawson J at 194-195.

269 The majority judgment of Mason CJ and Brennan and Deane JJ in *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 has been applied in a number of cases including *R v Watts* [1992] 1 Qd R 214 and *R v Chen* [1993] 2 VR 139.

270 (1987) 164 CLR 180 at 185-186.

271 Id at 186.

- If an audiotape recording is not available and its absence has been accounted for satisfactorily, secondary evidence of its contents may be given by a witness who heard it played over, or by the receipt of a transcript of the recording;[272] and
- The secondary evidence rule does not exclude evidence derived from an audiotape recording that has been mechanically or electronically copied from an original audiotape recording. Provided the provenance of the original recording, the accuracy of the recording process and the provenance of the copy audiotape recording are satisfactorily proved, there is no reason why the copy audiotape recording cannot be played over in court to prove the contents of the original recording.[273]

(b) Admissibility under the *Evidence Act 1977* (Qld)

To be admissible under the *Evidence Act 1977* (Qld), an audiotape recording must first fall under the definition of a "document" contained in section 3.

Section 3 of the *Evidence Act 1977* (Qld) provides, *inter alia*, that a "document" includes:

> (e) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; ...

An audiotape would fall within this definition and, if one of the relevant provisions of the *Evidence Act 1977* (Qld) is satisfied,[274] may be admitted as evidence of the truth of the contents of the audiotape.[275]

3. TRANSCRIPTS OF AUDIOTAPE RECORDINGS

(a) Admissibility under the common law

The High Court has defined the transcript of an audiotape recording as:[276]

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272 Ibid.

273 Id at 186-187.

274 See Chapter 4 of this paper.

275 See, for example, s 93A of the *Evidence Act 1977* (Qld) and the explanation of that section at note 298 of this paper.

276 *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 at 185.

> ... a document setting out words which can be heard on playing over the tape. It is not a copy of the tape, but a written record of what has been heard.

There has been some debate about the use of audiotape transcripts as evidence. Brown summarises the position with transcripts from audiotape recordings in the following terms:[277]

> Although there is little doubt that the original of a tape recording is admissible as evidence of the actual sounds recorded, considerable difficulties have arisen in respect to various aspects of such recordings, and there is a sharp division of opinion among the appellate courts in different Australian jurisdictions over the proper function of transcripts.

It will often be convenient to have the transcript of a recording available to the court. In *R v Maqsud Ali*,[278] the court explained:[279]

> Having a transcript of a tape recording is, on any view, a most obvious convenience and a great aid to the jury, otherwise a tape recording would have to be played over and over again. Provided that a jury is guided by what they hear themselves and upon that they base their ultimate decision, we see no objection to a copy of a transcript, properly proved, being put before them.

In Australia, guidelines as to admissibility of the transcripts of audiotape recordings have been provided in *Butera v Director of Public Prosecutions for the State of Victoria*.[280]

In *Butera v Director of Public Prosecutions for the State of Victoria*, the majority of the High Court held that a transcript should not be used to prove whether the recorded conversation took place. Rather, that issue should be determined by playing the audiotape recording in court, if it is available. That is preferable to the use of written or oral evidence of what the witness heard when the audiotape recording was played out of court. The transcript can be used as secondary evidence where the audiotape recording is not available.[281]

The majority of the High Court considered transcripts not to be evidence of what is recorded on the tape recording but, rather, as an “aid to perception” for the listeners of the evidence.[282]

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277 Brown RA, *Documentary Evidence in Australia* (2nd ed 1996) at 45.

278 [1966] 1 QB 688.

279 Id at 702.

280 (1987) 164 CLR 180. This decision was followed and applied in *R v Watts* [1992] 1 Qd R 214.

281 *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 per Mason CJ, Brennan and Deane JJ at 185-186.

282 Id at 187.

The High Court majority adopted the guidelines for the use of transcripts set down by the majority in the New Zealand case*, R v Menzies*:[283]

- If an audiotape recording is reasonably short and clearly audible, no transcript should be received into evidence.
- If an audiotape recording is indistinct, a transcript prepared by an expert (which would include a person who has listened to the tape many times) should be admitted to assist the jury in understanding the sounds on the tape.[284]
- If an audiotape recording is long but audible, a transcript may be received in evidence.
- Where a transcript is tendered in evidence, the jury must be told that the transcript is not independent evidence of the conversation, but is to be used to aid them in understanding the conversation that is recorded on the audiotape. The jury should be warned against using the transcript as a substitute for the audiotape if it is not satisfied that the transcript correctly sets out what is heard on the audiotape.

(b) Admissibility under the *Evidence Act 1977* (Qld)

Under section 3 of the *Evidence Act 1977* (Qld), an audiotape recording is included within the definition of a "document". Pursuant to section 4 of the Act, a transcript of an audiotape recording is deemed to be a copy of the "document".

However, admissibility under the *Evidence Act 1977* (Qld) will depend on satisfying the conditions for admission of one of the substantive provisions of the Act.[285]

(c) Admissibility of translations of audiotape recordings containing foreign language

283 [1982] 1 NZLR 40 at 49 quoted in *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 180 at 187-188.

284 In *Krakouer v R* (1996) 16 WAR 1 the court held that, because of the quality of the tape recording, it was proper for the jury to have a transcript, prepared by an expert in front of them as they listened to the audiotape recording for the first time, as an aid to listening. In this case, the transcript had been prepared by a professor of electrical engineering who had listened to the recording many times using earphones, graphic equaliser equipment and filtering techniques.

285 See, for example, s 93A of the *Evidence Act 1977* (Qld) and the explanation of that section at note 298 of this paper.

The High Court in *Butera v Director of Public Prosecutions for the State of Victoria*,[286] also had to consider the evidentiary status of a translation of an audiotape recording in a foreign language. In that case, the accused, along with four others, had been convicted of conspiring to traffic in heroin. Part of the evidence relied upon was an audiotape recording of a conversation of the accused's co-conspirators, which referred to the accused several times. The conversations were conducted in English, Punjabi, Thai and Malay. Interpreters had translated the tape into English for the court proceedings.

In determining the issue of the admissibility of the translation, the majority of the High Court held that such a translation could not be considered to be a copy of the audiotape recording.[287] It could not have been made admissible as an aid to the jury's understanding of the sounds recorded on the tape. To prove the translation, the audiotape recording would need to be played in court and the interpreters would need to give oral testimony as to their translations of the conversations on the tape.

(d) Admissibility of audiotape transcripts in other jurisdictions

The admissibility of audiotape transcripts under the common law and the *Evidence Act 1977* (Qld) can be contrasted with the provisions contained in the *Evidence Act 1995* (Cth) and with certain provisions in the New Zealand Law Commission's recommended draft evidence code.

The relevant provision of the *Evidence Act 1995* (Cth) is section 48(1)(c) and (2), which provides:[288]

> 48(1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:
>
> ...
>
> (c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing) - tendering a document that is or purports to be a transcript of the words;
>
> ...
>
> (2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.

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286 (1987) 164 CLR 180.

287 Id at 188-189.

288 Odgers S, *Uniform Evidence Law* (2nd ed 1997) at 70-74. See also Heydon JD, *A Guide to the Evidence Act 1995 (Cth)* (1995) at 31-32.

The term "document in question" is defined in section 47(1). The word "document" is defined in Part 1 of the Dictionary to include "anything from which sounds, images or writings can be reproduced with or without the aid of anything else".

Under these provisions, a transcript could be tendered as evidence of the sounds on an audiotape recording without the court hearing the actual sounds on the recording. These provisions effect a significant change to the common law and are very different from the general documentary provisions in the *Evidence Act 1977* (Qld), which do not deal expressly with the admissibility of transcripts.

The Federal Court has commented on the operation of section 48(1)(c) in *Eastman v R*:[289]

> Where, on the evidence adduced in a particular case, there is doubt or disagreement whether the transcript, or part of it, accurately deciphers the sounds captured on the tape, it seems to us that [the transcript should only be received into evidence as an aid in understanding what conversation is recorded on the tape], notwithstanding the provisions of section 48(1)(c) of the *Evidence Act*. [words in square brackets added]

The relevant provision of the New Zealand Law Commission's draft evidence code[290] is section 4. The relevant subsections provide:

> (1) A party may prove the contents of a document by offering evidence in any manner authorized in subsections (2) to (6), whether or not an original of the document is available to that party.
>
> ...
>
> (6) If information or other matter is recorded in a code (including shorthand writing) or in such a way as to be capable of being reproduced as sound, a party may offer a document that purports to be a transcript of the information or matter.
>
> (7) A party who offers a transcript of information or other matter in a sound recording under subsection (6) must play the recorded sound of all or part of that information or matter in court during the hearing if the sound recording is available and the court so directs, either on the application of another party or of its own motion.

Unlike the *Evidence Act 1995* (Cth), the New Zealand Law Commission's draft evidence code contains a provision giving a party the right to request the court to direct that an

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289 (1997) 76 FCR 9.

290 The draft evidence code, which has been developed by the New Zealand Law Commission and the New Zealand Legislative Counsel, is set out in Law Commission (NZ), Preliminary Paper, *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, May 1994) commencing at page 95. The draft code has not been finalised. The New Zealand Law Commission has not yet published its final report on documentary evidence. According to its 1997 Annual Report, the Commission expects to complete the whole of its evidence reference by the end of 1998.

audiotape recording be played.[291] The New Zealand Law Commission gave the following reasons for the inclusion of this provision:[292]

> [T]he production of the transcript without the playing of the tape may give the fact-finder a misleading impression. Transcripts do not convey the tone in which words are spoken, though the tone may completely change the interpretation. While we therefore agree that the transcript of a tape recording should be admissible, we think this needs to be accompanied by a provision giving a party the right to request the court to direct that the tape be played. If the recording is available this is a necessary safeguard to ensure fairness, particularly in criminal trials. If the recording is not available, the transcript will be admissible as secondary evidence of an unavailable original.

(e) Audiotape recordings of trial proceedings: a miscellaneous case

The High Court case of *Bulejcik v R*[293] concerned the right of a jury to request that part of the recorded trial proceedings be replayed for its benefit. In that case, the Crown tendered an audiotape recording of a conversation between an undercover policeman, a police informer and a third person. The Crown alleged that the third person was the accused. The audiotape recording was admitted into evidence.

The accused had made an unsworn statement at his trial. The statement - along with the rest of the trial proceedings - had been recorded.

During the summing up, the jury asked the trial judge to replay the recording of the unsworn statement. It was obvious that the jury wanted to compare the recording of the unsworn statement with the voice of the third person on the police recording. The trial judge allowed the unsworn statement to be replayed.

A majority of the High Court held that there had been a miscarriage of justice in the jury's comparison of the two tape recordings. The conviction was quashed and a new trial ordered.

Toohey and Gaudron JJ based their decision on the failure of the trial judge to warn the jury properly about the dangers inherent in a comparison of the two recordings.

McHugh and Gummow JJ gave an entirely different reason for their decision. In their view, the miscarriage of justice occurred when the trial judge allowed the unsworn statement to be replayed to the jury. When the jury compared the two recordings, they were using the recording of the unsworn statement as "real evidence" of the sound of

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[291] See s 4(7) of the draft evidence code in Law Commission (NZ), Preliminary Paper, *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, May 1994) at 114.

[292] Law Commission (NZ), Preliminary Paper, *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, May 1994) at 63.

[293] (1996) 185 CLR 375.

the accused's voice. Since the recording of the unsworn statement had not been admitted into evidence, "there [was] a real risk that the accused [had] been convicted on 'evidence' that was not tendered at his trial. In technical terms, a miscarriage of justice [had] occurred".[294]

Brennan CJ and Toohey and Gaudron JJ disagreed with the view that the recording of the unsworn statement should have been formally admitted into evidence before being replayed to the jury.[295]

This case raises the issue of the proper use of recordings of trial proceedings.

4. VIDEOTAPES

(a) Admissibility under the common law

Only one Queensland case, *R v Sitek*,[296] appears to have discussed in detail the admissibility of videotapes into evidence, although in that case the applicability of the *Evidence Act 1977* (Qld) was not discussed. The accused had been charged with misappropriation of property under the *Criminal Code*. The act of misappropriation had been videotaped. The prosecution had relied on the evidence of the videotape and on the testimony of a surveillance operator who had viewed the incident on her monitor as the videotape was made. In upholding the conviction, the Court of Criminal Appeal held, after discussing a number of English authorities, that the videotape was admissible as real evidence of the events the videotape recorded.[297]

(b) Admissibility under the *Evidence Act 1977* (Qld)

To be admissible under one of the documentary evidence provisions of the *Evidence Act 1977* (Qld), a videotape must first fall within the definition of a "document". Section 3 of the *Evidence Act 1977* (Qld) provides, *inter alia*, that a "document" includes:

> (f) any film, negative, tape or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom ...

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294 Id at 409.

295 Id per Brennan CJ at 384-385 and per Toohey and Gaudron JJ at 399-400.

296 [1988] 2 Qd R 284. See also, for example, *R v Michaux* [1984] 2 Qd R 159 where at page 161 the Court of Criminal Appeal accepted into evidence without comment a videotape showing the accused committing an assault against a police officer and at page 161 where the contents of the videotape are described but there is no mention of their admissibility or weight.

297 [1988] 2 Qd R 284 per Carter J at 286-288 and per de Jersey J at 292.

This definition clearly includes a videotape.[298]

Further, as with audiotape recordings, section 4 of the *Evidence Act 1977* (Qld) would include, within a "copy" of a videotape, a reproduction or still reproduction of an image or images contained in the videotape.[299]

5. FACSIMILES

Facsimiles are commonly used in business and, to an increasing extent, in private settings; they are frequently preferred to the post or the telephone because they are regarded by many as more convenient and time efficient. Facsimiles arrive at their destination almost instantaneously - unlike a letter. Unlike a phone call, one need not be concerned with time zones with a facsimile.

(a) Admissibility under the common law

In relation to a facsimile, as with a telex, it could be argued that the identifying messages sent by the transmitting and receiving machines amount to a signature.[300] However, the identification messages of telex machines or facsimile machines identify only the machine, not the sender; it is possible to program a telex machine or facsimile machine to send a false identification message. Further, if the message is stored on disk, it is possible to edit the contents and amend the identification message to take account of the alteration. These possibilities may weigh heavily against any suggestion that a telex or facsimile should be treated as signed.

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298 See, for example, *R v Morris; ex parte Attorney-General* [1996] 2 Qd R 68. In that case, a videotaped police interview with a child complainant was accepted without discussion as a document for the purposes of s 93A of the *Evidence Act 1977* (Qld). Operating as a statutory exception to the hearsay rule, s 93A allows documents containing statements made by a child under the age of 12 or by an intellectually impaired person to be admitted as proof of the truth of those statements where certain stated conditions are satisfied. The Commission is reviewing this provision in its current reference on *The Receipt of Evidence by Queensland Courts: The Evidence of Children*. See the Commission's forthcoming Discussion Paper on that reference.

299 S 4 of the *Evidence Act 1977* (Qld) is set out at page 29 of this paper.

300 This was held to be the case in *Doherty v Registry of Motor Vehicles* (1997) Massachusetts Trial Court, <http://www.state.ma.us/itd/legal/case.htm> (15 July 1998) where Agnes J held that "a police officer who files or transmits ... a report that is required by law to be made to the Registry of Motor Vehicles or some other agency or individual by means of E-mail or some other electronic method in which there is a statement that identifies the officer making the report and a statement that it is 'made under the penalties of perjury' has 'signed' the document and is subject to a prosecution for perjury if the report is wilfully false in a material manner even though the report does not contain a handwritten signature".

(b) Admissibility under the *Evidence Act 1977* (Qld)

While facsimiles are not expressly included in the definition of "document" in section 3 of the *Evidence Act 1977* (Qld), they would be covered by the introductory words of that definition - "a document in writing" - or at least by paragraph (g) - "any other record of information whatever".[301] There do not appear to be any cases to confirm this interpretation. Nor does it appear that there are any cases concerning the admissibility of a facsimile under the *Evidence Act 1977* (Qld) provisions.

If it can be shown that a facsimile falls within the definition of "document" contained in section 3, and that the other requirements of a relevant provision of the *Evidence Act 1977* (Qld) are fulfilled, then the facsimile may be admitted as evidence of the truth of a statement contained in it.

(c) *Evidence Act 1995* (Cth)

Section 71 of the *Evidence Act 1995* (Cth) provides an exception to the hearsay rule for certain representations contained in a document sent by facsimile, electronic mail, telegram, lettergram or telex. The Australian Law Reform Commission, which recommended the adoption of such a provision, stated in its Report on *Evidence*:[302]

> Its operation is best seen by example. Under present law, the hearsay rule prevents the contents of an incoming telex being used to prove the identity of the person from whom the telex came, where and when the telex was sent or the identity of the person to whom the telex is addressed. This clause provides an exception to the hearsay rule for each of these matters.

Section 71 of the *Evidence Act 1995* (Cth) provides:

> 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:
>
> (a) the identity of the person from whom or on whose behalf the message was sent; or
>
> (b) the date on which or the time at which the message was sent; or
>
> (c) the message's destination or the identity of the person to whom the message was addressed.
>
> Note 1: Division 3 of Part 4.3 contains presumptions about telexes, lettergrams and telegrams.

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[301] The definition of "document" is set out at pages 28-29 of this paper.

[302] Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) App A notes on clauses at 231, para 164, commenting on cl 63.

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

This provision seems to have a similar effect to section 76 of the *Evidence Act 1977* (Qld), although it is more up to date in terms of the technology to which it applies than section 76, which applies only to telegraphic messages.[303]

6. ELECTRONIC MAIL (E-MAIL)

In recent years, individuals and organisations have increasingly used the communication form known as electronic mail or "e-mail". E-mail refers to the transmission of messages over computer networks. The networks may exist within an organisation or between different organisations. Messages may comprise text, videoclips, sounds or pictures.

Unlike traditional communications, such as paper and facsimiles, e-mail does not necessarily involve the creation of a hard-copy or paper record. This means that alternatives to traditional signatures, such as digital signatures, have been developed.

The Commission is of the view that the United States cases reviewed by it may indicate a need for organisations using e-mail or other forms of electronic communication - as part of their organisation's records or in the conduct of their businesses - to establish and document procedures relating to the creation, management and destruction of such records - at least if such organisations contemplate the possibility of litigation in which records of those communications may be relevant. However, the Commission considers that the recommendation of such procedures is outside the scope of this reference. As noted at the outset of this paper, the Commission is concerned only with the admissibility of electronic records.[304]

(a) Admissibility under the common law

If an e-mail, regardless of whether there is a hard-copy, is considered to be a "document" for evidentiary purposes, then authentication of the e-mail and the potential application of secondary evidence rule must be considered.

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303 S 76 of the *Evidence Act 1977* (Qld) provides:

> **Proof of message**
> Where a notice under section 75 has been given, the production of a telegraphic message described in the notice and purporting to have been sent by any person, together with evidence that the same was duly received from a telegraph office, shall be evidence that such message was sent by the person so purporting to be the sender thereof to the person to whom the same is addressed.

304 See pages 1-3 of this paper.

(i) Authentication

The capacity to send e-mail via computer networks has been a significant development in communications and business; its use is likely to continue and expand as the convenience and cost savings involved in instantaneous paperless communications are accepted. However, where e-mail or the information contained in an e-mail is relevant to, or may be relevant to, court proceedings, there may be difficulties involved in authenticating the sender's identity and the contents of the communications in the event of a dispute - unless, of course, the electronic communication has been followed up in written form.

Reed observes that the most important consideration for anyone wishing to produce a copy of an e-mail as evidence of contractual or other rights is the need to prove that his or her copy is an authentic copy of the message:[305]

> The obvious way of so doing is to give oral evidence to that effect, and it is clear that the failure to do so will render the copy inadmissible. The problems arise when there is a conflict of oral evidence - for example, where the recipient produces an E-mail message which he claims is from the sender but the sender denies ever sending such a message, or where both sender and recipient agree that a message was sent but the copies they produce are not identical in content and each claims his own to be the authentic message. In such a case, the oral evidence tends to cancel out, and the court may be forced to hold that the party putting forward the document as authentic has failed to satisfy the burden of proof unless some further evidence can be produced.

Reed suggests that, ideally, the evidence of authenticity should be found in the document itself - just as the signature of a written document goes some way towards authenticating the written document. One possibility for authenticating an e-mail is the sender's "header" that normally accompanies an e-mail. This part of the document normally identifies the sender, the date and the time. However, it is possible for this type of information to be altered.

There are various methods that can be adopted by the sender or receiver of e-mail to assist in the authentication of the version of the message that may subsequently be tendered in court. One possibility, mentioned briefly above, is the use of a digital signature (which entails the use of a particular algorithmic code or "key") to help prove that the e-mail came from a particular person or place.

In *R v Frolchenko*,[306] the issue of the signature on a document was briefly canvassed by Williams J in the Queensland Court of Appeal. Williams J noted

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305 Reed C, "Authenticating Electronic Mail Messages - Some Evidential Problems" (1989) 52 *Modern Law Review* 649 at 653-654.

306 Unreported, CA, Qld, No 413 of 1997, 20 March 1998 per Williams J at 2.

that, given modern methods of communication, such as e-mail, many communications in writing will not bear a personal signature. However, the document can still be authenticated by looking at such things as whether the name appears in typescript at the end of the document.

One possible factor that the court could take into account is the implementation and use of an audit trail by the organisation or individual who receives or sends the e-mail message. This would go part of the way in showing that the output from the system that is audited is what it purports to be.

In the United States, some commentators have adopted a pragmatic attitude to the potential difficulties raised by authentication:[307]

> You can write E-mail and make it appear to come from someone else. You can easily send E-mail from an address opened under a false name. But just as you can fake E-mail, so you can fake letters, telegrams and faxes.
>
> ... regardless of the medium through which a business message is carried, the origin and genuineness of the message can usually be proved in court. Rarely are they proven from the signature that happens to be attached to the message (or document) despite what you may think from watching Perry Mason. Much more often, origin and genuineness are determined in court from all the facts and circumstances that surround the message - the full relationship of the people involved ... we can play the same authentication games with paper that we can with plaintext E-mail. When you receive a paper letter in the mail, bearing what looks to be an original autograph, you have no technical proof of its origin. Neither do you have technical proof of origin when you get a telegram or telex (unless you require it to be authenticated with a cipher code, which is rarely done). So the reality is that routine business communications are, and have always been, risky. Still, business traders seem to have compensated for this risk.

(ii) Application of the secondary evidence rule

As noted earlier, the secondary evidence rule requires that, where a document is to be used for a testimonial purpose and the original of the document exists, the original must be produced to the court. For a document that exists only in electronic form, the task of identifying an "original" is problematic. The "original" (assuming this concept has any meaning in this context) probably resides in the computer that sends the message or the computer that receives the message, and ceases to exist when the computer is turned off.[308]

Reed notes, at least in the English context, that the secondary evidence rule

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[307] Wright B, "The Verdict on Plaintext Signatures: They're Legal" [1994] 10 *The Computer Law and Security Report* 311-312.

[308] Reed C, "Authenticating Electronic Mail Messages - Some Evidential Problems" (1989) 52 *Modern Law Review* 649 at 652.

is:[309]

> ... subject to a number of exceptions, and in any event may not apply to E-mail. It has been held that films, tapes and video recordings are not to be regarded as documents for the purposes of the rule, with the result that authenticated copies are admissible, and it is arguable that computer-stored copies are subject to similar treatment ... The fact that a document is a copy goes solely to its weight as evidence, not its admissibility, even bearing in mind the fact that ... electronic messages ... are capable of potentially undetectable forgery. [note omitted]

Reed considers the applicability of the secondary evidence rule to e-mail:[310]

> Even if E-mail transmissions are documents within the rule, it does not apply where the original is lost or where its production is physically impossible or extremely inconvenient, one of which must be the case with E-mail. Even if the court holds that the original is the copy of the message that is stored on one party's computer, the other will be able to put his copy in evidence if he serves a notice to produce[311] and the original is not forthcoming. In any event, the original (if it exists) is not readable by the human eye, and a copy on paper or on a computer screen will need to be prepared.[312]
>
> It is clear then that the fact that the E-mail messages in possession of the parties

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309 Ibid.

310 Id at 652-653.

311 Reed observes (at note 18) that, in the United Kingdom, this is normally effected by the exchange of a list of documents under RSC O 27 r 4(3). Unless the other party denies the authenticity of the documents on the list within 21 days, or unless this is denied in the pleadings, he is taken to have admitted their authenticity. In Queensland, RSC O 35 r 18 provides for the production of documents at trial:

> **Production of documents at trial**
>
> (1) Documents disclosed under this order must be produced at the trial if -
>
> (a) notice to produce them has been given with reasonable particularity; and
>
> (b) their production is asked for at the trial.
>
> (2) If a document disclosed under this order is tendered at the trial, it is admissible in evidence against the disclosing party as relevant and as being what it purports to be.

Note the discussion at page 10 of this paper that non-compliance with a notice to produce is an exception to the secondary evidence rule.

312 Reed sets out the argument (at note 19) that the paper version of an e-mail can only ever be a copy of the e-mail:

> Goode and Bergensten argue ... that the original of an electronic document is that version of it which is intended to have legal effect. Given that the purpose of E-mail is to enable communication without the production of paper documents, the version intended to be operative (and thus the original) can only be a version held in computer memory, so any paper version must necessarily be a copy.

are copies is no barrier to their production in court.[313]

(b) Admissibility under the *Evidence Act 1977* (Qld)

It is not clear whether e-mails fall within the definition of "document" in section 3 of the *Evidence Act 1977* (Qld). In large part, the application of the section will depend upon how an e-mail is characterised. For example, in determining the application of the Act, is an e-mail to be treated as a file on the computer?

Even if an e-mail is not characterised as a file on a computer, it is possible that an e-mail will fall within the extremely broad terms of paragraph (g) of the definition of "document". This paragraph provides that a document "includes, in addition to a document in writing - any other record of information whatever". If this paragraph is read literally, it is broad enough to encompass e-mail.

Some concern has been expressed to the Commission about the uncertain application of the documentary evidence provisions of the *Evidence Act 1977* (Qld) to e-mail.[314]

If the definition of "document" in the *Evidence Act 1977* (Qld) does encompass e-mail, and the requirements of a relevant documentary evidence provision in the Act are fulfilled, an e-mail will be admissible as evidence of the truth of its contents.

(c) Other jurisdictions

The uncertainty as to whether e-mail falls within the scope of the *Evidence Act 1977* (Qld), can be compared with the position under the *Evidence Act 1995* (Cth). It is evident that e-mail was intended to fall within the scope of that Act given the presumptions applying to e-mails in section 71 of the *Evidence Act 1977* (Qld).[315]

The issue of the admissibility of e-mail has not been the subject of extensive deliberation in the Australian courts. However, some guidance can be gained from decisions from the United States.

The issue of whether a particular e-mail constituted a business record was considered by the United States Court of Appeals in *Monotype Corp PLC v International Typeface*

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313 Reed observes (at note 20):

> This applies even if the first copy has been deleted, for example because that disk has been backed up onto a tape for permanent storage. Once a copy is admissible, a copy of that copy is similarly admissible as the law makes no distinction between degrees of copying - *R v Wayte* (1983) 76 Cr App R 110.

314 Submission 19.

315 S 71 of the *Evidence Act 1995* (Cth) is set out at page 87 of this paper.

Corp.[316] The Court held that an e-mail from an employee to his superior, the record of which was kept in the course of regularly-conducted business, was properly excluded as evidence by the trial judge. One ground for exclusion was the prejudicial nature of the evidence (similar to Queensland's judicial discretion to exclude otherwise admissible evidence[317]). The other ground relied upon was that, contrary to what was claimed, the e-mail did not constitute a "business record":[318]

> E-mail is far less of a systematic business activity than a monthly inventory printout. E-mail is an ongoing electronic message and retrieval system whereas an electronic inventory recording system is a regular, systematic function of a bookkeeper prepared in the course of business.

In *Public Citizen Inc v Carlin*,[319] a United States federal regulation governing the disposal of electronic records created by agencies of the federal government permitted the destruction of word processing files recorded on electronic media and e-mail once the records had been copied to an electronic-record keeping system, to paper, or to microfilm for record-keeping purposes. The Court found the destruction guidelines were invalid:[320]

> Simply put, electronic communications are rarely identical to their paper counterparts; they are records unique and distinct from printed versions of the same records.

In the case of *Armstrong v Executive Office of the President*,[321] the legal status of e-mails used in the White House was considered; in particular, the question was whether e-mails were "federal records" for the purposes of the *Federal Records Act*. The United States Court of Appeals decided that all the e-mail records must initially be considered federal records since they were prepared in the conduct of federal business. Because no approved procedures existed to distinguish which records were not federal records, none of the e-mail records could be destroyed under the then prevailing practices.

The Court determined that e-mail records could not be preserved simply by printing out the text that appeared on the screen. The Court further concluded that the electronic version contained a great deal of additional information, such as the date of the

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316 43 F 3d 443 (9th Cir 1994).

317 *Evidence Act 1977* (Qld) s 98, *Federal Rule of Evidence* Rule 403 (US).

318 43 F 3d 443 (9th Cir 1994) at 450.

319 No 96-2840 (PLF) (DDC Oct 22, 1997) cited in Dockery Associates, *Case Reference Repository* <http://www.finder.com//cases.html> (14 July 1998).

320 Ibid.

321 810 F Supp 335 (DDC 193), affirmed in part, 1 F 3d 1274 (CADC 1993), cited in Skupsky DS, "Discovery and Destruction of E-mail" in Computer Law Association, *The Internet and Business: A Lawyer's Guide to the Emerging Legal Issues* (1996) <http://cla.org/RuhBook/ch5.htm> (14 July 1998).

transmission, date of receipt, detailed listing of recipients, linkages between messages sent and replies received, that was not contained in the screen print. For this reason the printout could not be considered even a copy of the original version under the *Federal Records Act*.

At times, however, the differences between the information contained in the electronic version and that contained in the printed version of an e-mail may not be significant. In those cases, a provision to the effect of section 47(2) of the *Evidence 1995* (Cth) may assist in overcoming problems in relation to admissibility that arise because a printed copy of a document does not exactly replicate what appears on a computer screen. In relation to proving the contents of a document, section 47(2) provides:

> A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.

7. ISSUES FOR CONSIDERATION

(1) Have you experienced any, and if so, what, difficulty with seeking to admit as evidence:

(a) audiotape recordings;
(b) transcripts from audiotapes;
(c) videorecordings;
(d) transcripts of videorecordings;
(e) photographs reproduced from videorecordings;
(f) facsimiles;
(g) e-mail; or
(h) other forms of "electronic records"?

(2) What, if any, changes to the law would facilitate the admission of electronic records, or particular types of electronic records, as evidence?

(3) What, if any, specific provisions should be incorporated into the *Evidence Act 1977* (Qld) for the authentication of particular types of electronic records?

(4) In Chapter 3 of this paper, specific questions were asked in relation to the application of the secondary evidence rule to electronic records. Do you have any further comments on the application of that rule in the light of the

current chapter's discussion of particular types of electronic records?

(5) Should a presumption be introduced into the *Evidence Act 1977* (Qld) similar to that contained in section 71 of the *Evidence Act 1995* (Cth) in relation to electronic mail, facsimiles, telegrams, lettergrams, telexes or any other forms of electronic communication?

APPENDIX

RESPONDENTS TO THE CALL FOR PRELIMINARY SUBMISSIONS

Australian Bankers' Association

Australian Finance Conference

Covell, Ms Judi

Howard, Ms Carmel

Legal Aid Office (Queensland)

Mater Misericordiae Hospitals

McCullagh, Mr Adrian

Queensland Advocacy Incorporated

Queensland Deaf Society (Inc)

Queensland Department of Justice (Courts Division)

Queensland Health Scientific Services

Queensland Police Service (Commissioner's Office)

Queensland Police Service (Information Security)

Radics, Ms Joanne

Records Management Association of Australia (Queensland Branch)

State Reporting Bureau (Queensland)

Swinson, Mr John

Turnbull, Mr Douglas

Wilson, Mr Ian