

EVIDENCE ACT 1995 - SECT 69

69 Exception: business records

WHAT A BUSINESS RECORD IS

- (1) This section applies to a ***document*** that:
 - (a) either:
 - (i) is or forms part of the records belonging to or kept by a person, body or organisation ***in the course of, or for the purposes of, a business***, or
 - (ii) at any time was or formed part of such a record, and
 - (b) contains a previous representation made or recorded in the document ***in the course of, or for the purposes of, the business***.

THE EXCEPTION TO THE HEARSAY RULE

- (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
 - (a) by a person who had or might reasonably be supposed to have had ***personal knowledge*** of the asserted fact, or
 - (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

THE EXCEPTION TO THE EXCEPTION IN 2 ABOVE (CARVE OUT)

- (3) Subsection (2) does not apply if the representation:
- (a) was prepared or obtained for the purpose of conducting, or for or ***in contemplation of or in connection with***, an Australian or overseas proceeding, or
 - (b) was made in connection with an investigation relating or leading to a criminal proceeding.
- (4) If:
- (a) the occurrence of an event of a particular kind is in question, and
 - (b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind,
- the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.
- (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Note:

1 Sections 48, 49, 50, 146, 147 and 150 (1) are relevant to the mode of proof, and authentication, of business records.

2 Section 182 of the Commonwealth Act gives section 69 of the Commonwealth Act a wider application in relation to Commonwealth records.

DEFINITION OF DOCUMENT

For the purpose of this Subpoena, “*document/s*” has the same definition as that given to this word in the Evidence Act 1995 (NSW) and includes, but is not limited to, all original and draft letters, facsimiles, notes, files (including file covers), file notes, emails, agreements, correspondence, diary notes, reports, agendas, minutes of meetings, internal memoranda, financial documents, bank statements, invoices, accounts, payments, receipts, electronically stored information such as computer records and notes referring to, concerning or in any way relating to the categories requested. Communications include any written, oral or electronic communications.

EXPLAIN THE PROVENANCE OF A DOCUMENT IN EVIDENCE IN CHIEF

1. The Plaintiff’s records maintained by the Company during the period whilst it was the managing agent for the Plaintiff are contained in documents (physical and computerised) and an electronic database (together the Records).
2. Since shortly after February 2010 the Company has had possession and control of the Plaintiff’s Records which it received directly from the Plaintiff. To the best of my recollection in or around April 2011 the Records were provided to the current strata managing agent for the Plaintiff.
3. The facts set out in this Affidavit are based upon my personal examination of the Records and from my own knowledge of the systems and practices of the Company.
4. Whenever a document is printed from the Company’s Records the date that appears on that document is the date it was printed, it is not necessarily the date it was created. Each document that forms part of the Records referred to in this Affidavit is created by the Company or someone on the Company’s behalf at or around the time that document is posted. I know this from my experience working for the Company for the last 10 years and the processes and software used by the Company in providing strata management services.

CHECKLIST

1. Meticulously examine every document in an Exhibit or Annexure
2. **DON'T CUT CORNERS**
3. Think carefully about each document and whether it's a business record
4. Identify the asserted fact in the previous representation sought to be advanced
5. Is it an opinion?
6. Examine the date of each document and the purpose when it was created
7. Consider adducing or testing evidence of provenance for any particular document/s

The potency of Business Records & System Evidence A practical modern approach

Overview – Business Records

1. Why you must use business records?
2. What is a business record?
3. How to ensure business records are admitted into evidence
4. When to use a business record

Why you must use business records

1. Business records are created all the time everyday and are everywhere in modern society
2. Business records speak for themselves
3. Evidentiary problems when not used
4. Support and corroborate other evidence

Why you must use business records

Commonwealth Bank of Australia v Serobian
[2009] NSWSC 302. Hammerschlag J made the following observations at [362]:

“Where a party seeks to rely upon spoken words as a foundation for a cause of action

In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof ...”

What is a business record?

Overview of section 69

1. 69(1) – Defines what a business record is
2. 69(2) – Creates an exception to the hearsay rule
3. 69(3) – Creates an exception to the exception in 2 above (i.e. a carve out)

What is a business record?

Lewis v Nortex Pty Ltd (in liq) [2002] NSWSC 1083 at [4](3).

Hamilton J observed that:

“[t]he cases in general terms indicate the inclusive provision of subs (1) and (2) of s 69 should be regarded as being of wide import and construed accordingly ... Equally the exclusory provisions of s 69 ought to be construed as sections of wide import.”

What is a business record

69(1) – Defines what a business record is

(1) This section applies to a document that:

(a) either:

- (i) is or forms part of the records belonging to or kept by a person, body or organisation ***in the course of, or for the purposes of, a business***, or
- (ii) at any time was or formed part of such a record, AND

(b) contains a previous representation made or recorded in the document ***in the course of, or for the purposes of, the business***.

What is a business record?

69(1) & (2) – Imposes a four part test

1. Must be a **document**
2. (a) Forms part of records **kept in the course of or for the purposes of a business**; OR
(b) at any time was or formed part of that record; AND
3. Contains a **previous representation** made or recorded in the document **in the course of, or for the purposes of, the business**; AND
4. Must be made by a person who had or might reasonably be supposed to have **personal knowledge** of the fact asserted

Must be a document

1. Definition of document (Part 1 - Dictionary)

"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.

- Exceedingly broad – the effect of (c) is that, in respect of records kept in computer systems, it is the system itself (hardware and software) that is a document

What is a business record?

1. Definition of business (Part 2 - Dictionary)

"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.

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What is a business record?

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What is a business record?

2. Definition of business (Part 2 - Dictionary)

References to businesses

- (1) A reference in this Act to a **business** includes a reference to the following:
 - (a) a profession, calling, occupation, trade or undertaking,
 - (b) an activity engaged in or carried on by the Crown in any of its capacities,
 - (c) an activity engaged in or carried on by the government of a foreign country...
- (2) A reference in this Act to a business also includes a reference to:
 - (a) a business that is not engaged in or carried on for profit, or
 - (b) a business engaged in or carried on outside Australia.

➤ Exceedingly broad definition

Volutin Pty Ltd v Furst (1998) 154 ALR 119 at 129

The activities of a trustee in the performance of a trust is a business for the purposes of the Act

Part of records belonging or kept by a person ... in the course of, or for the purposes of, a business

1. No definition of "record"
 - Judicial consideration of the same term used in other legislation may be useful

R v Jones & Sullivan [1978] 2 All ER 718 at 721

- When discussing the term "record" in the *Criminal Evidence Act 1965* (UK):
"although it is not an exhaustive definition of the word, "record" in this context means a history of events in some form which is not evanescent"

Part of records belonging or kept by a person ... in the course of, or for the purposes of, a business

2. No definition of phrase "in the course of, or for the purposes of, a business"

Roach v Page (No 15) [2003] NSWSC 939

- Sperling J drew a distinction between records of a business and the product of a business:

"The records of a business are the documents (or other means of holding information) by which activities of the business are recorded ... activities include internal communications and communications between the business and third parties."

"On the other hand where it is a function of a business to publish books, newspapers, magazines, journals such publications are not records of the business they are products of the business"- per Sperling J at [5]-[6]

Roach v Page (No 27) [2003] NSWSC 1046 Sperling J observed at [9] that:

- A book published by a business to provide a history of the business, and a "flyer or a media advertisement or a website publication, extolling the virtues of the business" are not "a record of the business merely because [they] purportedly record the activities of the business"
- Such records do not have the "same kind of reliability as those engaged in business operations customarily do"

Part of records belonging or kept by a person ... in the course of, or for the purposes of, a business

Hansen Beverage Co v Bickfords (Australia) Pty Ltd [2008] FCA at [133] Middleton J concluded that:

"the concept of a business record is an internal record, kept in an organised form accessible in the usual course of business, actually recording the business activities themselves and does not include the product of the business itself"

ASIC v Rich (2005) 216 ALR 320 at [190]

- The word kept simply means "retained or held" as opposed to "maintained systematically"

Part of records belonging or kept by a person ... in the course of, or for the purposes of, a business

Gordon v Ross [2006] NSWCA 157 at [38]

- A document may be a record of a business even if it is a draft or document that otherwise appears to be a document produced "along the way" to completion of a final document

Feltafield Pty Ltd v Heidelberg Graphic Equipment (1995) 56 FCR 481 at 483

- Employee's handwritten notes taken during a meeting (which related to the operation of a piece of machinery used in the business) held to be a business record
- A document may be kept "in the course of, or for the purposes of, a business" even if it is for the "personal use" of a particular employee

Need to establish provenance of documents

In the Matter of Maiden Civil Pty Ltd [2012] NSWSC 1618

- Receiver Plaintiffs tendered purported MYOB balance sheet of Maiden Civil Pty Ltd. Court not satisfied second document a business record of company because it was produced by a third party under subpoenas and no evidence whatsoever as to its provenance

- Brereton J at [24]:

"Here the document is not shown to be produced from the custody of the entity whose business record it is said to be, but is merely tendered without any evidence whatsoever of its provenance. In those circumstances, I could not be satisfied that it was, as required by s 69, a document that is or forms part of, or at any time was or formed part of, the records belonging to or kept by Maiden Civil"

Contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business

1. Definition of “previous representation” – Dictionary (section 3)
“Previous representation” means a representation made otherwise than in the course of giving evidence in the proceedings in which evidence of the representation is sought to be adduced
2. In the course of, or for the purposes of the business – not defined in the Act (previously discussed – distinction between record of and product of the business)

Examples

Ringrow Pty Ltd v BP Australia Ltd [2003] FCA 993

- Involved the tender of valuations of a BP service station prepared by valuers on the instructions of St George Bank Ltd
“A reasonable inference from those matters is that at least at some point in time:
 - the original valuation report formed part of the records kept by the Bank in the course of, and for the purpose of its business;
 - a copy of the valuation report formed part of the records kept by the valuer... in the course of and for the purposes of its business as a professional valuer;
 - the representations in the valuation reports were made in the course of and for the purposes of the business of [the valuer]; and
 - the representations in the valuation reports were made for the purposes of the business of the Bank”

Examples

- The fact that the previous representation was not made by a person who is not an employee of the business does not necessarily lead to the conclusion that it was not made for the purposes of the business” – per Hely J at [12]

Gordon v Ross [2006] NSWCA 157 at [37]

- There is no requirement that the representation made, or the record created, at anytime contemporaneous to the events to which it relates
- Factual finding made that cattle were “stirry” on 4 October 2000
- Plaintiff had relied in part upon a discussion he had had with the stock and station agent, Mr Maher, in 1999 in the course of which Mr Maher had made some comments on the temperament of the cattle, which the plaintiff recorded in a file note

Summary of first three tests – s69(1)

1. Must be a **document**
2. Forms part of records **kept in the course of or for the purposes of a business** or at any time was or formed part of that record; AND
3. Contains a **previous representation** made or recorded in the document **in the course of, or for the purposes of, the business**;
 - ❖ Distinction between record of a business and product of a business**AND**
4. Must be made by a person who had or might reasonably be supposed to have **personal knowledge** of the fact asserted – s69(2)

Personal Knowledge - s69(2)(a)

1. There is no need to identify the person who made the representation in the business record with the requisite personal knowledge - *Guest v FCT* [2007] FCA 193 per Heerey J at [25]-[31]
2. There is nothing in section 69(2) to suggest that the person having the relevant personal knowledge must bear any relationship to the enterprise whose business is involved - *Vitali v Stachnik* [2001] NSWSC 303 at [8] per Barrett J
3. It will be enough if the person “might reasonably be supposed” to have such knowledge – allows the court to draw inferences not just from the document but from the information contained in it – *Rickard Constructions v Rickard Hails Morretti* [2004] NSWSC 984 per McDougall J at [19]

Opinion Evidence in Business Records

4. Personal knowledge creates a problem in respect of statements of **opinion** contained in a business record

Lithgow City Council v Jackson [2011] HCA 36

- Jackson had been walking his dogs during darkness in the early morning through a local park. He was later found lying at the bottom of a concrete drain, unconscious and badly injured in a pool of urine and dried blood.
- There was a vertical retaining wall on one side of the drain that projected up into the grass, partially concealed by foliage. Jackson alleged that he had fallen over the concealed wall and approximately 1.5 metres onto the concrete drain.
- He sued the local council having care and management of the park

Opinion Evidence in Business Records

- There were no eyewitnesses or other direct evidence of Jackson's fall.
- Jackson himself suffered loss of memory as a result of his injuries and had no recollection of the fall.
- The case depended upon drawing inferences of what had happened from Jackson's injuries and where he was found.
- The trial judge found a duty of care was owed and that it had been breached by the failure to fence off the wall. However, the trial judge went on to find that Jackson had failed to establish causation because the evidence did not establish that he had fallen over the wall in the manner alleged, as opposed to stumbling down one of the other sides of the drain, or standing at the top of the wall and losing his balance.

Opinion Evidence in Business Records

- In the patient history notes made by ambulance officers who attended Jackson at the scene, it was written: "? Fall from 1.5 metres onto concrete" (the representation).
- The ambulance officers were not called to give evidence at the trial. The representation was allowed into evidence, but with the limitation that it was not evidence of the truth of what was written

NSW Court of Appeal

- The NSW Court of Appeal reversed the trial judge's decision. It held that the patient history was a "business record" under s.69 of Act and that the representation written in it was a "lay opinion".

High Court

- Held that s78 (lay opinion) requires the person giving the opinion to have witnessed the subject matter about which the opinion is given.

Opinion Evidence in Business Records

- What the ambulance officers had witnessed was Jackson's injuries. The representation was, or was relied upon as, an opinion about the cause of those injuries, an event not witnessed by the ambulance officers and thus outside the scope permitted by s78(a)
- High Court determined that opinions that are contained in business records are subject to the rules governing opinion evidence in ss.76-79 of the Act
- Evidence of opinions contained in business records will still be subject to the opinion rules in ss.76-79.

Opinion Evidence in Business Records

- An example is the financial records of a corporation such as an opinion stated in a Liquidator's Report
 - ❖ *ASIC v Rich Austin* [2005] NSWSC 417 – Austin J held that financial records of a corporation, admitted pursuant to the business records exception to the hearsay rule, were not subject to the opinion rule, which only operated with respect to opinion evidence given by a witness in court
 - Important to identify the asserted fact in the previous representation
- ##### Liquidator's Report Example
- Balance sheets and other financials in a Liquidator's Report may be used as evidence of the financial position of a company at any particular time, but could not be used as evidence to advance the opinion that the company was insolvent at that particular time.

Opinion Evidence in Business Records

ICM Investments Pty Ltd v San Miguel Corporation & Anor [Ruling No. 1] [2013] VSC 463 (27 August 2013)

- A 5pg spreadsheet (no author) comprising various calculations as to estimated damages potentially payable by X to settle legal proceedings in respect of a dispute.
- No representation in the nature of an "asserted fact" identified (i.e. what are you trying to prove)
"The failure to define what representation was in fact relied upon, make it not possible to determine whether or not the representation was a statement of fact or opinion. If it was in fact an opinion, the question also arises as to whether a statement of opinion in a business record must further comply with and pass through the gateway of ss76-79 to be admissible." – per Vickery J at [42]-[43]

Example of Business Records - Emails

Osborne v Boral Resources (NSW) Pty Ltd [2012] NSWCA 155

- Involved a company's failure to pay for concrete supplied to it by another company. The purchaser alleged that the concrete had never been ordered or delivered.
- The issue whether DIAG had ordered concrete from Boral turned on evidence contained in two emails. Implicit in the reasoning of Chief Justice Bathurst and Justice Allsop was the conclusion that these emails were business records and thus exceptions to the hearsay rule.
- Justice Macfarlan's approach was more detailed. In relation to an email sent by Mr James on behalf of DIAG, Justice Macfarlan:
 - Held that the email was presumed to have been sent by DIAG by virtue of s161 of the Evidence Act 1995 (Cth) (the Act);

Example of Business Records - Emails

- inferred that a copy had been retained by DIAG as part of its business records on the basis of the power conferred by s183 of the Act; and
 - concluded that the email was a copy of a business record within the meaning of s69 of the Act.
- As such, Mr James' email was admitted as evidence of his representation that he held the position of General Manager, Finance and Operations, of DIAG, notwithstanding that the evidence was hearsay.

Aqua-Marine v Reef Fisheries (No 4) [2011] FCA 578

- Justice Collier of the Federal Court of Australia held that an email was admissible under s69, even though it was a business record of a company not actually party to the proceedings.

Example of Business Records

VI v CJ 1997 FLC 97-772

- Full Court of the Family Court agreed with Baker J that statements in a police brief for the purposes of a coronial enquiry were business records
- Decision reversed by High Court but on different grounds

Provisions in other Legislation

- Effect of s8 of the Act is that other legislation relating to evidence of a business record are preserved
- Section 1305 *Corporations Act 2001* (Cth) makes admissible, in any legal proceedings, a "book" kept by a body corporate under a requirement of that Act
- Still subject to discretionary provisions to exclude evidence – *ASIC v Rich* (2005) 216 ALR 320 at [229] – [231] per Austin J

What is a Business Record - Summary

1. Must be a **document**
2. Forms part of records **kept in the course of or for the purposes of a business** or at any time was or formed part of that record; AND
3. Contains a **previous representation** made or recorded in the document **in the course of, or for the purposes of, the business**; AND
 - ❖ Distinction between **record** of a business and **product** of a business
4. Must be made by a person who had or might reasonably be supposed to have **personal knowledge** of the fact asserted
 - ❖ Identify the "asserted fact" in the previous representation (e.g. Liquidator's Report)
 - ❖ Opinions in business records still need to satisfy ss 76-79

How to ensure business records are admitted into evidence

1. Satisfy the four part test under s69(1) & (2)
2. Ensure that the exclusion in s69(3) doesn't apply:
 - (3) Subsection (2) does not apply if the representation:
 - (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding, or
 - (b) was made in connection with an investigation relating or leading to a criminal proceeding.

How to ensure a Business Record is admitted into evidence

Burden of proof

- The burden of proof is on the party arguing that a document (or part of a document) is admissible
- Standard of proof is to the balance of probabilities (s142)
- After section 69(1) & (2) are satisfied, the **onus of proof shifts** to the party opposing admissibility in reliance on section 69(3) – *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 984 per McDougall J at [30]
- Standard of proof of party relying on section 69(3) is to the balance of probabilities

How to ensure a Business Record is admitted into evidence

Test imposed under s69(3)

- **PURPOSE & TIMING TEST** – the person must have "prepared" or "obtained" the representation (not the document) in **contemplation** of an Australian or overseas proceeding

Vitali v Stachnik [2001] NSWSC 303 per Barrett J at [12]:

- Required to rule on the admissibility of documents that were said to evidence indebtedness of a company that was the corporate alter ego of one of the parties to a dispute under the *Property Relationship Act 1994* (NSW)
- After holding they were business records, considered s69(3) after evidence given on the voir dier was that one of them (MFI2) had been prepared for the purposes of "establishing the case" and also because "there was a concern" in the company that needed to be followed through"

