IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S83 of 2016

BETWEEN:

DANIEL JEFFEREY SIO
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Issues presented by the appeal and referred special leave application

Issues on the appeal

2. **Issue one:** What flows from the failure to direct the jury on a critical element of the offence of which the appellant was convicted?

3. **Issue two:** Are the verdicts in the appellant's trial inconsistent?

4. **Issue three:** If the verdicts are inconsistent, is the appropriate course to enter a verdict of acquittal or is it open to this Court pursuant to ss 7 or 8 of the *Criminal Appeal Act 1912* (NSW) to substitute a verdict or order a retrial in respect of an offence not charged on the indictment?

Issue on the special leave application[1]

5. **Issue four**: How does a court assess whether a representation was "made in circumstances that make it likely that the representation is reliable" for the purposes of admissibility of hearsay evidence of that representation pursuant to s 65(2)(d) of the *Evidence Act 1995* (NSW)?

Part III: In the appellant's view s 78B *Judiciary Act 1903* notices are not required.

Part IV: Citation of the reasons for judgment

6. The citation of the reasons for judgment of the intermediate court is *Sio v R* [2015] NSWCCA 42. The citation of the reasons for judgment of the primary judge in respect of the referred special leave application is *R v Sio* [2013] NSWSC 1412.

[1] Mr Sio remains the "applicant" in respect of the referred special leave application. For ease of reference only he will be referred to throughout as the "appellant".

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Part V: Narrative statement of relevant facts

7. The appellant was convicted by a jury of one count of armed robbery with wounding contrary to s 98 of the *Crimes Act 1900* (NSW) in a trial before Adamson J in the Supreme Court of New South Wales, having been acquitted of constructive murder for which armed robbery with wounding was the underlying offence. He was sentenced to a term of imprisonment of 10 years with a non-parole period of 7 years and 6 months. His earliest date of release for parole is 24 October 2020.

8. On 24 October 2012, the appellant drove the co-offender, Mr Filihia, to a brothel in Clyde. It was not in dispute that a Ms Coffison was also in the vehicle, seated in the front seat. Mr Filihia entered the brothel alone, armed with a knife, intending to commit robbery. During an altercation with an employee of the brothel, Mr Gaudry, Mr Filihia stabbed him. Mr Gaudry died from his wounds. Mr Filihia removed a pencil case from Mr Gaudry's back pocket which contained cash and left the brothel, running past the appellant's car. The appellant caught up with and collected Mr Filihia, and accelerated away from the scene: *Sio v R* [2015] NSWCCA 42 (**CCA**) [3].

9. Mr Filihia was recognised by police on CCTV footage and arrested when he reported on bail later that day (having shaved his head in a bid to avoid detection): CCA [4]. He participated in an electronically recorded interview that day (**first ERISP**) and made admissions about the robbery and stabbing. He said a man called Jacob had driven him to and from the brothel, drew him a layout of the brothel and told him where the money would be. He said that no one else had been in the car and that the front seat had been empty. Once, he referred to 'Dan' instead of Jacob, but when questioned said he had been referring to his brother Dan.

10. Mr Filihia said that it "just didn't go the way it was meant to… Just no one was to get hurt like that… There was no intent": Q24-25, 28. He said that the knife "wasn't meant to" go into the deceased (Q260-261), that he "wasn't meant to use it" (Q 606) that he had "no intent to harm him" and brought the knife "just to scare him": Q311-313, 608-610. He said he was "just meant to take the money that was there… And then it just got out of hand" (Q55-56) and he agreed that Jacob had "basically" given him instructions "just to rob it": Q465-466. He said he had smoked $600 worth of ice from Jacob in the car before going into the brothel: Q507-512. When asked how he was going to pay for

the drugs he said, "that's why he had turned on me... he's just took off with everything... I don't know if it's because I've only known him for a short while or if it's because I smoked his, his drugs, ah, I don't know man, if you can get him man fucken put him in my cell": E536-539. He said he used the knife despite not intending to because he had "not come all this way for nothing... I just wanted some money": Q612-614. Mr Filihia said he had stabbed the deceased after the deceased had come towards him and there was a scuffle, however he agreed that still images from a surveillance camera showed the deceased backing away from Mr Filihia and then Mr Filihia crouching over him: Q628-648.

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11. Mr Filihia provided the police with "Jacob's" phone number (which was the appellant's) from his memory: Q374. He said he had only been told it a week or two prior (Q 379-380) and had only known Jacob and his "dyke mate" "in the last two weeks that [they had] been neighbours" prior to Mr Filihia's move to a new motel. He said Jacob would come around to where Mr Filihia had been living to drop off drugs: Q331-348. He asked if an identification parade would "help [him] out in court": Q673.

12. After midnight (now 25 October 2012), Mr Filihia provided a supplementary statement to police in which he changed critical aspects of his account (**first statement**). In
20 particular, he named the appellant, who he said "put me up to robbing the brothel. He gave me the knife and drove me there": at [6]. Mr Filihia said he previously called the appellant "Jacob" as he did not want to "come over as a rat": first statement at [7].

13. The following afternoon, Mr Filihia identified the appellant from a photo array, calling him "my driver": **second ERISP**, Q 25. He said that the appellant "drove me up there and I done a robbery... Like, together": Q11-12. Mr Filihia also said to police that he was "Just hoping you can fuckin help me out with him, hey", and "Just I hope you'se can help me out. Like, I hope you can help me out": Q29, 33. He made a statement confirming the identification (**second statement**), and stating that the man he identified
30 "is the same man who took me to the brothel and put me up to rob it": at [5].

14. The appellant had been inside the brothel on more than one occasion when dropping off Ms Gaudiosi, who worked there. Ms Gaudiosi gave evidence that he asked her to

help him do a robbery at the brothel, and she told him where the deceased kept the brothel's money. She said she told the appellant that a weapon would not be required to commit the robbery. She produced a drawing she said the appellant made of the brothel layout and a handwritten note that said "keep tabs on money that Brian's holding".

15. The knife used by Mr Filihia belonged to Mr O'Hare, who was a friend of Ms Coffison (she was the third person in the car, in the front passenger's seat). It had been kept at Mr Coffison's home. Mr O'Hare gave evidence that he had heard the appellant and Ms Coffison discussing plans to rob a brothel. Mr O'Hare noticed his knife missing from its place in Ms Coffison's lounge room about two weeks before the robbery. The appellant had visited Ms Coffison's house previously.

16. Ms Coffison gave evidence that on the morning of the robbery, after smoking ice together, Mr Filihia asked if he could come with them and if he could commit the robbery. She said that the day after the robbery, she was removing a plastic bag from the appellant's car when the appellant asked if he could put a few things in the bag. She agreed. She said she later put the bag in her closet without looking into it. One week after the robbery, after she had given an induced statement to police, she said she discovered the knife in the plastic bag and handed it over to police. Ms Coffison had initially made false statements to police that she was unfamiliar with the brothel.

17. The appellant was charged with the murder of Brian Gaudry. The Crown put its case as one of constructive murder (i.e. felony murder) either by way of a joint criminal enterprise to commit armed robbery with Mr Filihia or as an accessory before the fact to the armed robbery (which is not a relevant felony for the purposes of felony murder), both with foresight of wounding with a knife (which would then bring about liability for a relevant felony for the purposes of s 18). The appellant was also charged with armed robbery with wounding by way of a joint criminal enterprise with Mr Filihia.

18. Mr Filihia was called to give evidence on a voir dire but refused to answer any questions. The Crown sought to tender Mr Filihia's ERISPs and statements pursuant to s 65 of the *Evidence Act 1995* (NSW). They were admitted over objection pursuant to s 65(2)(d). The appellant appealed to the CCA on the grounds that Mr Filihia's first

ERISP and both statements should not have been admitted, and that the verdict was unreasonable and could not be supported by the evidence. Leave was granted on the first ground, but the appeal was dismissed (per Leeming JA, Johnson and Schmidt JJ agreeing).

Part VI: Legal argument

Argument on the appeal: unreasonable verdict

19. The jury were provided with the following written directions:

Outline of basic ingredients of constructive murder

1. The Crime of murder has been committed by **Daniel Sio** if

A. The Crown has established beyond reasonable doubt each of the following elements:
   (a) On 24 October 2012 at Clyde Richard Filihia robbed Brian Gaudry. **(Admitted)**
   (b) At the time or immediately before Richard Filihia robbed Brian Gaudry he was armed with an offensive weapon, namely a knife. **(Admitted)**
   (c) At the time or immediately before Richard Filihia robbed Brian Gaudry he stabbed and wounded Brian Gaudry. **(Admitted)**
   (d) As a result of being stabbed and wounded by Richard Filihia Brian Gaudry died. **(Admitted)**
   (e) Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia.
   (f) Mr Sio foresaw the possibility that the victim might be wounded by the use of a knife.

2. Dealing first with A, the accused has formally admitted (a), (b), (c) and (d) which means that you should take it that these matters are established to the requisite standard.

3. The remaining issues for the Crown to prove beyond reasonable doubt are elements (e) and (f).

4. To prove element (e), the Crown must prove Mr Sio did a positive act that signified his agreement for a joint criminal enterprise to commit armed robbery. His mere presence is not enough.

5. If you find (e) proved, then you turn to (f). The time at which Mr Sio must have the relevant foresight for (f) is the time of his participation in the joint criminal enterprise.

6. If you find elements (e) and (f) proved beyond reasonable doubt then you should return a verdict of guilty on the first charge, of murder. If you are not satisfied that they have been proved beyond reasonable doubt, then you must consider the second way in which the Crown says the first charge is made out, **B**.

7. The crime of murder has been committed by Daniel Sio if:

B. The Crown has established beyond reasonable doubt each of the following elements:
   (a) Mr Filihia committed the crime of armed robbery with wounding. **(Admitted)**
   (b) Mr Sio was an accessory before the fact to the offence of armed robbery.
   (c) Mr Sio foresaw the possibility that the victim might be wounded by the use of a knife.
   (d) Mr Gaudry died as a result of the wounding. **(Admitted)**

Note: in order to establish (b) above, the Crown must prove either that Mr Sio:
(i) *intentionally encouraged Mr Filihia to commit that offence; or*
(ii) *intentionally set out to assist Mr Filihia in preparations to commit that offence.*

Outline of basis ingredients of armed robbery with wounding

8. The crime of armed robbery with wounding has been committed by Daniel Sio if the Crown has established beyond reasonable doubt each of the following elements:
   (a) On 24 October 2012 at Clyde Richard Filihia robbed Brian Gaudry. **(Admitted)**
   (b) At the time or immediately before Richard Filihia robbed Brian Gaudry he was armed with an offensive weapon, namely a knife. **(Admitted)**
   (c) Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia.

9. Element (c) requires the Crown to prove Mr Sio did a positive act that signified his agreement to the joint criminal enterprise to commit armed robbery. His mere presence is not enough.

20. As with written direction 8, the oral directions also failed to refer to the wounding element of the armed robbery with wounding charge. Her Honour said (SU [34]-[35]):

> The Crown case is that there was an agreement or an arrangement made or reached between Mr Sio and Mr Filihia to commit an armed robbery on the brothel at Clyde. ... If the agreed crime is committed by one or other of the parties to that joint criminal enterprise, then they are both guilty.

21. After the summing up the jury asked whether, if they reached a majority view on (1)(A)(e) (joint criminal enterprise to commit armed robbery) "but not complete consensus at this time", they required an "instruction on majority verdict" in order to proceed to consider (1)(A)(f) (whether the appellant foresaw the possibility of wounding with the knife). Her Honour directed that (SU 67):

> no, you do not need an instruction on majority verdict, certainly not at this stage. In terms of how you come to a verdict and what unanimity you require, what needs to be unanimous is your verdict, whether it be guilty or not guilty, but it does not matter how you come to that verdict.

Her Honour went on to explain that half of the jurors could find guilt via (A) and half via (B). Her Honour was answering a different question to that which was asked. At no point did she clarify that all elements of at least one of the ways in which the charge had been put had to be established beyond reasonable doubt (i.e. in respect of A, both (e) *and* (f)) before a juror could be satisfied of guilt in accordance with that charge.

22. Whatever be the correctness of the directions on murder,[2] the directions given in respect of armed robbery with wounding, on which the appellant was convicted, were erroneous. They are directions which would fix liability in respect of armed robbery, not armed robbery with wounding. Section 98 of the *Crimes Act 1900* (NSW) provides:

> Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs, or assaults with intent to rob, any person, and immediately before, or at the time of, or immediately after, such robbery, or assault, wounds, or inflicts grievous bodily harm upon, such person, shall be liable to imprisonment for 25 years.

10 23. For the primary offence of armed robbery with wounding, no specific intent to wound must be proved, only that the act which caused the wounding was voluntary: *Ryan v The Queen* (1967) 121 CLR 205 at 224 per Barwick CJ, 230 per Taylor and Owen JJ, 235 per Menzies J and 243 per Windeyer J. However, as liability was sought to be extended to another person, a correct direction on the elements of armed robbery with wounding would have included, at the least, wounding, and foresight of the possibility of such wounding by Mr Filihia (consistently with how armed robbery with wounding was put as the foundational offence in the directions on constructive murder). Foresight of the possibility of wounding would give rise to liability by way of extended joint criminal enterprise (the foundational offence being armed robbery), at least in so far as
20 extended joint criminal enterprise is currently understood in Australia[3]: see, eg, *R v Sharah* (1992) 30 NSWLR 292 at 297C-298A citing *R v Johns* [1978] 1 NSWLR 282 at 294-295 affirmed in *The Queen v Johns* (1980) 143 CLR 108. Conventional accessorial liability would require a greater level of knowledge or intention on the part of the appellant. To establish liability by way of aiding and abetting armed robbery

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[2] Each murder charge was constructed on the basis of multiple layers of extended liability. Under (A), liability for an armed robbery was extended to the appellant by reason of an alleged joint criminal enterprise. Liability was then extended to an offence of armed robbery with wounding by reason of foresight of the possibility of wounding. This brought the penalty for the appellant's offence to 25 years, which enabled a further extension of liability to murder, by reason of the death of Mr Gaudry. Under (B), liability for an armed robbery was extended to the appellant by reason of his alleged role as accessory before the fact. Liability was then extended to armed robbery with wounding by reason of foresight of the possibility of wounding, again bringing the maximum penalty to 25 years, enabling a further extension of liability to murder.

[3] The appellant is aware that argument is to be put before this Court in *Smith v The Queen* (A22/2015) and *Miller v The Queen* (A28/2015) that the doctrine of extended joint enterprise as enunciated in *McAuliffe v The Queen* (1995) 183 CLR 108 should be revised or abandoned in light of the decision of the Supreme Court of the United Kingdom in *R v Jogee* [2016] 2 WLR 681. If accepted, this would have consequences for the manner in which the jury should have been directed in this case and for any retrial of the appellant.

with wounding, the act of wounding by Mr Filihia would have to have been intended by the appellant: *Giorgianni v The Queen* (1985) 156 CLR 473.

24. In the circumstances of this case, the acquittal on murder necessarily encompasses a verdict of not guilty of armed robbery with wounding (properly understood and if directed in a consistent way). Only two elements were in issue on joint criminal enterprise to murder: (e) that Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia and (f) that Mr Sio foresaw the possibility that the victim might be wounded by the use of a knife. The only element the jury were told was in issue on the armed robbery with wounding was (c), which was identical to (e): that Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia. The jury convicted the appellant of armed robbery with wounding, therefore they must have accepted that he participated in a joint criminal enterprise of armed robbery (albeit it is also possible, having regard to the ambiguous direction as to whether they all had to be satisfied of (e) prior to moving to (f) above at [21], that some were not even satisfied of (e)).

25. The only logical basis for acquittal of murder by way of joint criminal enterprise, as it was left to the jury, must therefore have been that, at the least, they were not satisfied of (f), namely that the appellant foresaw the possibility that the victim might be wounded by the use of a knife. However, in law the jury were required to be satisfied, at the least, that the appellant foresaw this possibility in order to convict him of armed robbery with wounding. It can be taken, incontrovertibly, that the jury were not satisfied that the appellant had foresight of the possibility of wounding. Had the jury been so satisfied, they must have convicted for murder. Had they been correctly directed, the only rational verdict in respect of the armed robbery with wounding consistent with their findings was not guilty.

26. In the CCA, the appeal was also dealt with as if the question for that Court to determine was whether the appellant was guilty of armed robbery (not armed robbery with wounding): CCA [38] and [54]. The judgment concluded:

> [54] Acknowledging that certain aspects of the evidence favour Mr Sio, I consider that it was undoubtedly open to the jury to be satisfied of Mr Sio's guilt in participating in a joint criminal enterprise (namely armed robbery) beyond reasonable doubt. I cannot conclude that they must, as distinct from might, have entertained a reasonable doubt about Mr Sio's

agreement or understanding with Mr Filihia to commit an armed robbery, and thus Mr Sio's guilt in respect of the charge of armed robbery by way of joint criminal enterprise.

27. The CCA failed to deal with the offence actually charged, and erred in failing to find that the verdict was unreasonable. Attention was not drawn by the parties or the Court to the erroneous jury directions in the CCA. Nevertheless, the error is fundamental. Further, a necessary part of considering an appeal under the first limb of s 6(1) of the *Criminal Appeal Act 1912* (NSW) is determining whether the evidence is capable of supporting a verdict. Given the appeal was dismissed, it must be concluded that the s 6(1) exercise was conducted without reference to all of the requisite elements of the charged offence.

28. Having regard to the complete coincidence of elements in issue on the constructive murder and armed robbery with wounding charges (properly understood and explained), any retrial on armed robbery with wounding would "necessitate the presentation by the Crown either of the case on which the accused had substantially been acquitted or of a new case which had not been made at the first trial" and therefore the conviction should be quashed and a verdict of acquittal entered: *R v Wilkes* (1948) 77 CLR 511 per Dixon J at 518.

29. There is also no basis to enter a substituted verdict in this case. Subsection 7(2) of the *Criminal Appeal Act* 1912 (NSW) provides that an appeal Court may do so only where the substituted verdict is for an offence on the indictment. There is no alternative offence on the indictment in this case (such as armed robbery, for example) which the jury, by reason of their verdict, could be taken to be satisfied of. The appellant submits that the only appropriate outcome in this case is entry of a verdict of acquittal.

Argument on the referred special leave application: subs 65(2)(d) of the *Evidence Act*

30. The issue raised by the referred special leave application is of public importance as s 65(2) (including subs (b) and (c), which also concern "circumstances" and reliability) is of considerable significance in criminal trials in all six uniform evidence jurisdictions in Australia (being the Commonwealth, NSW, Victoria, Tasmanian, ACT and Northern Territory).

31. This application concerns the first ERISP and first and second statements of Mr Filihia, set out above at [9]-[13]. The untested representations of Mr Filihia in the first ERISP and statement provided the only direct evidence that the appellant may have foreseen the use of an offensive weapon (that is, that he participated in a joint criminal enterprise to commit *armed* robbery). Indeed, the evidence of Ms Gaudiosi was that she had advised the appellant that a weapon would not be necessary in order to rob the brothel. Mr Filihia refused to answer questions on voir dire and it was not in issue on the appeal that he was a not available for the purposes of the hearsay provisions of the *Evidence Act 1995* (NSW) (**the Act**). His ERISPs and statements were admitted pursuant to s 65(2)(d) of the Act.

32. The appellant submits that s 65(2)(d) was misapplied by the trial judge and CCA in a number of respects. Had s 65(2)(d) been properly applied, significant aspects of Mr Filihia's ERISP and statements (if not their entirety) would not have been admitted (albeit it is only necessary to show that, if an error is found, it would be reasonably open to exclude the evidence: *Graham v The Queen* (1998) 195 CLR 606 at [10] *Stanoevski v The Queen* (2001) 202 CLR 115 at [67]). At the least, those aspects which were "demonstrably unreliable" relating to the origin and disposal of the knife should have been excluded. This would have borne on the jury's determination of whether the appellant was party to a joint criminal enterprise to commit armed robbery (about which the jury evidently had questions: SU 67).

33. Section 65 of the Act relevantly provides:

> (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
>
> (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:
>
> ...
>
> (d) was:
>
> (i) against the interests of the person who made it at the time it was made, and
>
> (ii) made in circumstances that make it likely that the representation is reliable.

34. The history of s 65(2)(d) is set out in the Australian Law Reform Commission Reports that corresponded to the introduction and amendment of the Act. As enacted, subs 65(2)(d) required only that the statement be made against the interests of the person

who made it. This was considered a "guarantee of reliability"; reliability being of particular importance when evidence is sought to be used against a criminally accused: ALRC 38 [128](a), [139](b). In 2002, the NSWCCA gave judgment in *R v Suteski* (2002) 56 NSWLR 182 (***Suteski***), in which it upheld the decision of the trial judge to admit as hearsay evidence the ERISP of an accomplice who subsequently pleaded guilty, but refused to give evidence at committal or trial. That case became central to the amendment of s 65(2)(d) into its present form. After setting out the facts of *Suteski* and noting the concern that case had provoked in "allowing the admission of previous representations from a person complicit in an offence to be used against a defendant who does not have the opportunity to cross-examine the person" (at [8.41]), ALRC 102 said in support of the recommendation to amend s 65(2) to its current form (citations omitted):

> [8.45] The assumption behind s 65(2)(d) is that where a statement is against the interests of the person who made it, this provides an assurance of reliability. However, where the person who made the statement is an accomplice or co-accused, this may not be the case. An accomplice or co-accused may be motivated to downplay the extent of his or her involvement in relevant events and to emphasise the culpability of the other.
>
> ...
>
> [8.48] While the admission and use of evidence from an accomplice or co-accused can be controlled by ss 135–137, amendment of s 65(2)(d) has the advantage of excluding evidence that carries such a risk of being unreliable. A rule making it inadmissible unless it meets some criteria of trustworthiness is warranted. Evidence of that quality should not be prima facie admissible.
>
> [8.49] A submission is made that, by introducing a second limb to s 65(2)(d), the proposed amendment introduces unwanted complexity. ... the Commissions take the view that the amendment is relatively simple and clear. A safeguard of the proposed kind is necessary to avoid the outcomes described above [referring to *Suteski*].

35. In short, subs (2)(d)(ii) was inserted by the *Evidence Amendment Act 2007* (NSW) (and has been replicated in all uniform jurisdictions), specifically to address the undesirable situation that arose in *Suteski*. That situation, in which an accused is unable to test the account of an alleged accomplice, is precisely analogous to the circumstance of the present case. It is widely recognised that most co-accused have *prima facie* reason to downplay their own involvement (or the involvement of certain other co-accused) and emphasise the culpability of others; whether as a result of a desire to secure and maintain immunity, or, as here, where an offender has been caught red handed and wishes to garner assistance from police and/or mitigate ultimate punishment.

36. ALRC 102 also considered the development of case law concerning the assessment of whether a representation was made in "circumstances" that made it more or less likely to be reliable (which was required, to varying standards, under s 65(2)(b) and (c), prior to the introduction of s 65(2)(d)(ii)). The ALRC 102 recommended leaving s 65(2) unchanged as to the meaning of circumstances, favouring the approach in *R v Ambrosoli* (2002) 55 NSWLR 603 (***Ambrosoli***) which had been said to settle the issue: ALRC 102 [8.52]-[8.58]. The development of this case law was also recently set out by the Court of Appeal in *R v Robertson* [2015] QCA 11 (***Robertson***) (ultimately following *Ambrosoli* in interpreting s 93B(2) of the *Evidence Act 1977* (Qld) which is relevantly similar to s 65(2)(b)):

> [58] ...The narrower view was represented by a ruling which Sperling J had given in *R v Mankotia*, in which he had construed the term as limited to the circumstances of the factual setting in which a representation was made, to the exclusion of events subsequent to the representation or other representations made by the same person at other times. At the other extreme were decisions which suggested that anything which confirmed the accuracy of what was said could be taken into account as a circumstance. Somewhere along the spectrum between the two approaches was *Conway v The Queen* [(2000) 98 FCR 204], in which the Full Federal Court considered it legitimate for a trial judge to have regard to evidence of what the maker of the representation had said at other times in determining whether it was highly probable that a particular representation was reliable.
> [59] The court [in *Ambrosoli*] endorsed Sperling J's approach ... but considered that events subsequent to the representation might nonetheless throw light on the circumstances of its making. Examples were an express retraction by its maker or evidence indicating that he or she could not have heard or seen the relevant matter.

37. In the present case, it was not in issue on appeal that all of Mr Filihia's representations in the ERISP and statements were deemed to be against his interests by s 65(7)(b). In issue was the meaning of s 65(2)(d)(ii). The appellant submits the CCA misapplied s 65(2)(d)(ii) in three respects. First, the CCA and trial judge erroneously considered themselves constrained, in assessing reliability, by the NSWCCA's reasoning in *R v Shamouil* (2006) 66 NSWLR 228 (***Shamouil***) in relation to assessing probative value. Second, the CCA construed the words "made in circumstances that make it likely that the representation is reliable" such that the "demonstrable unreliability" of the representation cannot be taken into account: CCA [33]. Third, the CCA did not take into account the different circumstances of each "representation", but at times treated the whole of the first ERISP and first statement as a single "representation".

38. Mr Filihia's representations as to the appellant's awareness of the knife came from the first ERISP and statement. Notably, Mr Filihia left Ms Coffison out of his account

entirely. Ms Coffison was, on her own account and by reference to CCTV footage, in the front seat of the car. This is where Mr Filihia says he returned the knife to, saying "here's your knife". The knife also came from Ms Coffison's house, was (on her account unknowingly) returned by her to her house, and was handed in to police by her after she had given an induced interview. In the first ERISP Mr Filihia said relevantly:

Q236 … where did you get that knife from?
A Jacob already had it in his car.
Q237 O.K. And where did it go?
A Like last that I know of it was still in the car.
…
Q241 Where in the car was the last place you saw it?
A It was just on the seat next to him.
Q242 In the seat next to ---
A Yea, the driver.
Q243 Can you, O.K. So just ---
A On the passenger seat.
Q244 Yeah, front or back?
A The back, the front.
Q245 The front.
A Passenger side.
Q246 So just to confirm 'cause I think I confused you there. Front passenger seat?
A Yeah.
…
Q469 Where did [the knife] come from?
A So it was just like ---
Q470 Where did that come from?
A Um, it had come from him.
Q471 He gave it to you?
A Yeah.
…
Q596 O.K. All right. And where's this knife now?
A Ah, I don't know, probably it's with him.
Q597 The last time you, where the knife when you last saw it?
A It was in his car.
Q598 In the car, in the and you, I think you said the front passenger seat.
A Passenger seat yeah.
Q599 What seat did you get into in the car when you, when you, after you'd done it?
A Well, I went to the back door.
Q600 The back.
A Behind the driver.
Q601 And how did the knife get into the front?
A I just chucked it onto the seat.
Q602 You didn't sit in the front seat at all?
A No, not at all.
Q603 So you've thrown it in the front.
A Yeah I jut put it down there and said, "Here's your knife."

39. In the first statement Mr Filihia also said that the appellant "gave me the knife": at [6].

40. Mr Filihia was being patently untruthful in at least some aspects of his account of the knife. There was another person in the car, Ms Coffison. She was seated in the front. He could not have "chucked" the knife onto the front seat. Indeed, passing it to the front passenger's seat and saying "here's your knife" (Q603) suggests, contrary to his account, that he was returning the knife to Ms Coffison. Mr Filihia also told police a number of things during the course of the first ERISP which he later contradicted, were inconsistent with surveillance footage and/or downplayed his role. These included:

    a. that the driver of the car was "Jacob";
    b. that there was no one in the car apart from him and Jacob and that he did not sit in the front because he gets paranoid (Q179-181);
    c. that he did not know where he was going when he left his residence with Jacob and that Jacob "lured" him to the brothel (Q149-150, 164, 460);
    d. that it was his intention to pay for sexual services (Q209-210, 531-532);
    e. that he had only met Jacob twice previously (Q67);
    f. that the "Dan" he referred to was his brother Dan Filihia (Q352-359); and
    g. that Mr Filihia had told police "basically... the whole thing" (Q679).

41. The CCA did not accept that each of the "representations" had to be considered individually against the s 65(2)(d) criteria. Citing *Ambrosoli* at [28] and *Robertson* at [58]-[64], the CCA held that the words "made in circumstances that make it likely that the representation is reliable" are "not directed to any particular asserted fact, but instead to the reliability of *the representation as a whole*": at [27], *emphasis added.* By "representation" the CCA must, in this context, have been referring to the whole of the first ERISP and first statement (as opposed to what was intended in *Ambrosoli,* that individual representations be considered in context).[4] The CCA went on (at [27]):

> In *Ambrosoli*, Mason P, with the agreement of Hulme and Simpson JJ, emphasised that the words in s 65(2)(b) and (c) are directed to the circumstances of the *making* of the representation. That accords with the fundamentally different roles of judge and jury in a criminal trial, to which Spigelman CJ referred to in *R v Shamouil* (2006) 66 NSWLR 228 at [65].

42. Applying this to Mr Filihia's representations, the CCA held (emphasis added):

> [33] ... the fact that Mr Filihia was trying to conceal the presence of Ms Coffison does not, of itself, bear materially on the question posed by statute. Nor do Mr Filihia's repeated references to "Jacob" when referring to Mr Sio. The question posed by the statute is *not* whether the actual statements made are themselves accurate or likely reliable, but whether the *circumstances* in which they were made are such that they are likely to be reliable. In

[4] The trial judge also did not distinguish between the "circumstances" in which the first ERISP and first statement were made, and the "circumstances" during the afternoon of the following day during which the second ERISP and statement were made.

> order to address the statutory question, the Court examines the circumstances in which a statement is made, not the particular statement itself. That is to say, it is no part of the analysis required by s 65(2)(d) to point to the fact that Mr Filihia's answers were demonstrably *unreliable* insofar as they denied the presence of Ms Coffison or referred to "Jacob". (That is a consideration that could inform a discretion under ss 135 or 137, and a warning to a jury.)

43. The CCA rejected the notion that a distinction could be drawn "between the reliability of some representations made by Mr Filihia (those against interest) as compared to others (those relevant to Mr Sio)": CCA [34]. It held that this approach "sits ill with *Suteski* at [93], and with the distinction between the functions of judge and jury. To the extent that these statements were made in the same circumstances, they must be considered together for the purposes of s 65(d)(ii)": CCA [34]. The CCA concluded by noting that a strong s 165 unreliable evidence warning had been given because "Mr Filihia was criminally involved, had pleaded guilty to murder, 'may have his own axe to grind', and was not subject to cross-examination": CCA [35]. However, the "*possibility*" of unreliability did not "stand in the way of a conclusion that the circumstances made it *likely* that the evidence is reliable": CCA [35], emphasis in original.

44. It is submitted that this view is the result of a misreading of *Shamouil, Ambrosoli* and *Suteski*, and, in any event, reflects an erroneous interpretation of s 65(2)(d)(ii).

45. First, the remarks in *Shamouil* at [65] (and at [56], cited by the trial judge) have no bearing on the operation of s 65(2)(d). The trial judge also relied upon *Shamouil* (as well as *R v Cook* [2004] NSWCCA 52 at [43] and *R v XY* (2013) 84 NSWLR 363), to the effect that under s 65(2)(d)(ii) she was not assessing the credibility of Mr Filihia's evidence, but only the circumstances that make it likely that the representation is reliable: SC [54]. However, her Honour's analysis then proceeded to take into account those factors favourable to Mr Filihia's credibility (such as his apparent forthcoming and unrehearsed demeanor, and apparent disregard of self-incrimination: SC [55]), having earlier rejected, in relation to the assessment under s 65(2)(c), the "tainting" effect of unfavourable factors (such as his demonstrable lies: SC [48]-[49]).

46. Even assuming *Shamouil* is held to correctly state the limited task of the trial judge in relation to the assessment of "probative value" for the purposes of determining

admissibility (contra. *Dupas v R* (2012) 40 VR 182 and cf. *IMM v The Queen* [2015] HCATrans 266 and [2016] HCATrans 8), s 65(2)(d)(ii) is expressly directed to determining the likelihood of reliability. Plainly, the circumstance that the maker of the representation was demonstrably lying in critical respects at the time of making his statement tells strongly against the weight of other circumstances which may suggest that his representations were likely to be reliable (such as that they were against interest). This is particularly so in respect of the individual representations directly affected by falsehoods. In the present case, falsehoods occurred in the very representations that concerned the involvement of the appellant and the knife: see above at [38]-[40]. Whether or not these falsehoods bore on the assessment of the likelihood of reliability in the circumstances in which the representations directly inculpating Mr Filihia were made (for example, as to his own involvement in the robbery and stabbing), they provide direct evidence that the circumstances did not give rise to a likelihood of reliability in respect of representations specifically inculpating the appellant (his alleged accomplice), and concerning the origins of the knife.

47. There is no basis in the text of s 65 to interpret "made in circumstances that make it likely that the representation is reliable" – words designed to have a protective function – in a way that prevents the judge from having regard to relevant available material about those circumstances; whether or not issues of reliability are otherwise generally matters for the jury. The CCA's view is also contrary to the work that surrounding provisions do. The circumstance in s 65(2)(d)(i), for example, is precisely of the type that informs reliability and would not be taken into account in assessing "probative value" in accordance with *Shamouil* (as are the circumstances in subss 65(2)(a)-(c)).

48. Second, both the purpose of s 65(2)(d)(ii) and cases such as *Ambrosoli* support the relevance of "demonstrable unreliability" in an assessment of whether circumstances were such that it was likely that a representation was reliable: cf. CCA [33]. There is an inherent risk of unreliability in hearsay evidence and evidence from persons criminally concerned in the events the subject of the proceeding (as the mandatory warning provided in s 165 expressly recognises), particularly where the accused cannot test their account. These factors were combined, and so the risks compounded, in this case. Evidence that the (presumptively unreliable) maker of the representation lied in

material respects is direct evidence that the circumstances did not mean that the representations were likely to be reliable; it outweighs circumstantial evidence to the opposite effect. To construe s 65(2)(d) in a way that excludes this from assessment is contrary to the purpose of subs (2)(d). Indeed, subs (2)(d)(ii) was inserted explicitly as a safeguard against the outcome that occurred in *Suteski*. It was "directed specifically to address[ing] problems concerning the evidence of an accomplice or co-accused" which, in spite of ss 135-137, nevertheless "should not be prima facie admissible": ALRC Report 102, [8.50] and [8.48]; see also CCA [22]. The prejudice to the accused in admitting Mr Filihia's representations is patent. Indeed, the Court in *Ambrosoli* noted expressly that (at [29]):

> ... it does not necessarily follow that evidence of events other than those of the making of the previous representation cannot throw light upon the circumstances of the making of that representation and its reliability as affected thereby. Events subsequent to the representation being made might do this, for example a (genuine) express retraction by the maker of the previous representation...

49. This is precisely what occurred in this case; Mr Filihia genuinely retracted some of his representations in the first ERISP. This retraction was held by the CCA to play "no part" in and have no material bearing on the s 65(2)(d)(ii) question: CCA [33]. Similarly, it was not in issue that, contrary to Mr Filihia, there was a third person in the front seat of the car. The "circumstances" in which he made the representations plainly did not prevent unreliability.

50. Third, *Suteski* did not reject that "each question and answer should be considered separately and measured against s 65(2)(d)": contra CCA [20]. Rather, it was said that each representation must be considered in context, by reference to other questions and answers, so that, when read together, they might constitute an admission or answer against interests: *Suteski* [93]. It is still necessary to consider the admissibility of each representation individually. Indeed, in *Suteski* the trial judge had done just that (appropriately according to the CCA in that case), excluding individual questions and answers that were incapable of being described as against interests or which amounted to second hand hearsay: *Suteski* at [95]-[96].

51. The trial judge was required to address each of the representations upon which the Crown wished to rely. The first ERISP and statement contained numerous

representations upon which the Crown was evidently seeking to rely, although they were not particularised in the s 67 hearsay notice. Of particular concern are the representations identified above at [38] relating to the knife, each of which was affected by the unreliability in Mr Filihia's representations in relation to the empty front seat and return of the knife (as well as the general unreliability of a statement of a co-offender caught red handed). These representations were also affected by changing circumstances over the course of the interviews. The extent to which Mr Filihia implicated the appellant, particularly in relation to the knife, escalated over the course of the first ERISP and statement. Initially, he said the knife was just in "Jacob's" car; later in the interview and after prompting from police as to where the knife had come from he said it had "come from him" and he answered "yeah" to the question "He gave it to you?". Only in the statement given some hours after the ERISP did he say it was "Dan" who "gave me the knife". Between the key representations in the first ERISP and those in the first statement, Mr Filihia learned that he was on CCTV stabbing the deceased, who had died, and that he was facing liability for murder. He had also asked police if his cooperation would help him in Court.

52. There is no basis in the Act to construe "representation" as constituting the whole of an ERISP, recorded over 1.5 hours, as well as a statement made some hours after that ERISP. "Representation" is not exhaustively defined, however the Dictionary states that it includes:

> (a) an express or implied representation (whether oral or in writing), or
> (b) a representation to be inferred from conduct, or
> (c) a representation not intended by its maker to be communicated to or seen by another person, or
> (d) a representation that for any reason is not communicated.

It is implicit from this entry and its use in Pt 3.2 of the Act that a "representation" is something discrete and capable of characterisation by reference to the assertion of fact contained within it. Such a representation is made "about" "an asserted fact", "a fact" and/or "the fact": see, eg, ss 59(1) and (2A), 60(2), 61(2) and (3).

53. Sometimes an asserted fact can only be identified from a series of representations. For example, consider the following exchange from the first ERISP:

> Q469 Where did [the knife] come from?

A	So it was just like ---
Q470	Where did that come from?
A	Um, it had come from him.
Q471	He gave it to you?
A	Yeah.

It is necessary to read these statements together, and look to earlier questions and answers in respect of the "he" (being "Jacob"), to arrive at the representation of the asserted fact that Jacob gave Mr Filihia the knife. This constitutes part of the "context" within which individual representations are permissibly assessed: see, eg, *Suteski* at [93]. It might even be that this series of answers, in context, constitutes a single representation. However, it is one thing to consider a series of answers in context or as a single representation about an asserted fact; it is quite another to consider a 1.5 hour record of interview, containing myriad representations and asserted facts, a single representation for the purpose of the hearsay provisions. Erroneously treating the first ERISP and statement as a single representation caused the CCA to ignore the change in circumstances affecting representations made over some hours, and the different circumstances affecting representations about different matters (i.e. such as the difference between representations that were only against Mr Filihia's interest and those that were also inculpatory of the appellant, those affected directly by demonstrable unreliability, and those affected by some combination of these factors).

54. Finally, the trial judge and CCA also erred in failing to exclude the representations of Mr Filihia, particularly those relating to the knife, pursuant to s 137, for the same reasons as set out above. It is submitted that *Shamouil* is wrongly decided in so far as it precludes consideration of reliability for the purposes of s 137: cf. CCA [33].

55. The appellant submits that s 65(2)(d), correctly construed: must be applied to each discrete representation about an asserted fact on which a party seeks to rely; does not preclude consideration of matters that bear on the truth of the asserted fact where such matters would impact upon the assessment of whether the circumstances were such that the representations are likely to be reliable; and is not constrained by the principles set out in *Shamouil.* Had s 65(2)(d) been correctly applied in this case, it would have been reasonably open to exclude most, if not all, of Mr Filihia's representations.

56. In short, based on the misapplication of *Shamouil, Ambrosoli* and *Suteski*, the CCA erroneously constrained itself from considering factors demonstrative of unreliability, held that "demonstrable unreliability" was "no part" of the assessment of whether a representation was made in circumstances that made it likely to be reliable, and treated representations about different things, made in differing circumstances and affected by different external factors, as a single representation for the purpose of applying s 65(2)(d). As a result, the very circumstance which s 65(2)(d) was amended to avoid – the use of untested hearsay evidence of an alleged accomplice – was permitted and was likely determinative of the appellant's conviction.

10

Part VII: Applicable statute: See Annexure A.

Part VIII: Precise form of orders sought

1. The appeal is allowed.
2. The orders of the Court of Criminal Appeal are set aside.
3. The appellant's conviction is quashed.
4. Verdict of acquittal is entered.

Part IX: Time estimate: The appellant estimates oral argument will take 2 hours.

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Dated: 11 April 2016

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ANNEXURE A - All relevant provisions are still in force at the date of making these submissions

Crimes Act 1900 No 40

Status information

Currency of version

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Does not include amendments by:

Sec 310L of this Act (sec 310L repeals Part 6B on 13.9.2016)
Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016 No 7 (not commenced)

See also:

Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016

Part 3 Offences against the person

Division 1 Homicide

17 (Repealed)

17A Date of death

(1) The rule of law that it is conclusively presumed that an injury was not the cause of death of a person if the person died after the expiration of the period of a year and a day after the date on which the person received the injury is abrogated.

(2) This section does not apply in respect of an injury received before the commencement of this section.

18 Murder and manslaughter defined

(1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

19 (Repealed)

19A Punishment for murder

(1) A person who commits the crime of murder is liable to imprisonment for life.

(2) A person sentenced to imprisonment for life for the crime of murder is to serve that sentence for the term of the person's natural life.

(3) Nothing in this section affects the operation of section 21 (1) of the *Crimes (Sentencing Procedure) Act 1999* (which authorises the passing of a lesser sentence than imprisonment for life).

(4) This section applies to murder committed before or after the commencement of this section.

(5) However, this section does not apply where committal proceedings (or proceedings by way of ex officio indictment) for the murder were instituted against the convicted person before the commencement of this section. In such a case, section 19 as in force before that commencement continues to apply.

(6) Nothing in this section affects the prerogative of mercy.

19B Mandatory life sentences for murder of police officers

(1) A court is to impose a sentence of imprisonment for life for the murder of a police officer if the murder was committed:

(a) while the police officer was executing his or her duty, or

Part 4 Stealing and similar offences

Division 1 General

94AA Property previously stolen

Where on the trial of a person for any offence which includes the stealing of any property it appears that the property was, at the time when it was taken by the accused, already out of the possession of the owner by reason of its having been previously stolen, the accused may be convicted of the offence charged notwithstanding that it is not proved that the taking by him or her amounted to an interference with the right to possession of, or a trespass against, the owner.

Division 2 Robbery

94 Robbery or stealing from the person

Whosoever:

robs or assaults with intent to rob any person, or

steals any chattel, money, or valuable security from the person of another,

shall, except where a greater punishment is provided by this Act, be liable to imprisonment for fourteen years.

95 Same in circumstances of aggravation

(1) Whosoever robs, or assaults with intent to rob, any person, or steals any chattel, money, or valuable security, from the person of another, in circumstances of aggravation, shall be liable to imprisonment for twenty years.

(2) In this section, ***circumstances of aggravation*** means circumstances that (immediately before, or at the time of, or immediately after the robbery, assault or larceny) involve any one or more of the following:

(a) the alleged offender uses corporal violence on any person,

(b) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person,

(c) the alleged offender deprives any person of his or her liberty.

96 Same (robbery) with wounding

Whosoever commits any offence under section 95, and thereby wounds or inflicts grievous bodily harm on any person, shall be liable to imprisonment for 25 years.

97 Robbery etc or stopping a mail, being armed or in company

(1) Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person,

robs, or assaults with intent to rob, any person, or

stops any mail, or vehicle, railway train, or person conveying a mail, with intent to rob, or search the same,

shall be liable to imprisonment for twenty years.

(2) **Aggravated offence**

A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) when armed with a dangerous weapon. A person convicted of an offence under this subsection is liable to imprisonment for 25 years.

(3) **Alternative verdict**

If on the trial of a person for an offence under subsection (2) the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under subsection (1), it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

98 Robbery with arms etc and wounding

Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs, or assaults with intent to rob, any person, and immediately before, or at the time of, or immediately after, such robbery, or assault, wounds, or inflicts grievous bodily harm upon, such person, shall be liable to imprisonment for 25 years.

Division 3 Demanding property with intent to steal

99 Demanding property with intent to steal

(1) Whosoever, with menaces, or by force, demands any property from any person, with intent to steal the same, shall be liable to imprisonment for ten years.

(2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in the company of another person or persons. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.

(3) It is immaterial whether any such menace is of violence or injury by the offender or by any other person.

100–105 (Repealed)

Division 4 Sacrilege and housebreaking

105A Definitions

(1) In sections 106–115A:

building includes any place of Divine worship.

circumstances of aggravation means circumstances involving any one or more of the following:

(a) the alleged offender is armed with an offensive weapon, or instrument,

(b) the alleged offender is in the company of another person or persons,

(c) the alleged offender uses corporal violence on any person,

(d) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person,

(e) the alleged offender deprives any person of his or her liberty,

(f) the alleged offender knows that there is a person, or that there are persons, in the place where the offence is alleged to be committed.

circumstances of special aggravation means circumstances involving any or all of the following:

(a) the alleged offender intentionally wounds or intentionally inflicts grievous bodily harm on any person,

(b) the alleged offender inflicts grievous bodily harm on any person and is reckless as to causing actual bodily harm to that or any other person,

(c) the alleged offender is armed with a dangerous weapon.

Criminal Appeal Act 1912 No 16

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Formerly known as:

Criminal Appeal Act of 1912

Does not include amendments by:

Courts Legislation Amendment Act 2004 No 68 (not commenced)

(7) A person may not appeal to the Court of Criminal Appeal under this section against an interlocutory judgment or order if the person has instituted an appeal against the interlocutory judgment or order to the Supreme Court under Part 5 of the *Crimes (Appeal and Review) Act 2001*.

5G Appeal against discharge of whole jury

(1) The Attorney General, Director of Public Prosecutions or any other party to a trial of criminal proceedings before a jury may appeal to the Court of Criminal Appeal for review of any decision by the court to discharge the jury, but only with the leave of the Court of Criminal Appeal.

(2) The Court of Criminal Appeal is to deal with an appeal as soon as possible after the application for leave to appeal is lodged.

(3) The Court of Criminal Appeal:

(a) may affirm or vacate the decision appealed against, and

(b) if it vacates the decision, may make some other decision instead of the decision appealed against.

(4) If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.

(5) This section does not apply to the discharge of a jury under section 51, 55E, 56 or 58 of the *Jury Act 1977*.

6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

6AA Appeal against sentence may be heard by 2 judges

(1) The Chief Justice may direct that proceedings under this Act on an appeal (including proceedings on an application for leave to appeal) against a sentence be heard and determined by such 2 judges of the Supreme Court as the Chief Justice directs.

(2) Such a direction may only be given if the Chief Justice is of the opinion that the appeal is not likely to require the resolution of a disputed issue of general principle.

(3) For the purposes of proceedings the subject of a direction under this section, the Court of Criminal Appeal is constituted by the 2 judges directed by the Chief Justice.

(4) The decision of the court when constituted by 2 judges is to be in accordance with the opinion of those judges.

(5) If the judges are divided in opinion:

(a) as to the decision determining the proceedings, the proceedings are to be reheard and determined by the court constituted by such 3 judges as the Chief Justice directs (including, if practicable, the 2 judges who first heard the proceedings on appeal), or

(b) as to any other decision, the decision of the court is to be in accordance with the opinion of the senior judge present.

(6) Proceedings heard by the court constituted by 2 judges under this section are rendered abortive for the purposes of section 6A (1) (a1) of the *Suitors' Fund Act 1951* if they are required to be reheard because the judges were divided in opinion as to the decision determining the proceedings. The rehearing of the proceedings is considered to be a new trial for the purposes of that Act.

6A Powers of court in relation to certain convictions and sentences concerning mentally ill persons

On an appeal under section 5 (1) against a conviction or sentence, being:

(a) a finding or verdict under or in accordance with section 14, 22 (1) or 30 (2) of the *Mental Health (Forensic Provisions) Act 1990* in respect of a person, or

(b) a limiting term within the meaning of section 24 of the *Mental Health (Forensic Provisions) Act 1990* or an order under section 39 of that Act in respect of a person, or

(c) a penalty imposed, or any order made, under section 23 (2) of the *Mental Health (Forensic Provisions) Act 1990* in respect of a person,

the court may make any finding, verdict, order or determination which could have been made in relation to the proceedings before the court of trial.

7 Powers of court in special cases

(1) If it appears to the court that an appellant on an appeal under section 5 (1), though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed at the trial or pass such sentence whether more or less severe in substitution therefor as it thinks proper, and as may be warranted in law by the conviction on the count or part of the indictment on which it considers the appellant has been properly convicted.

(1A) If on an appeal against a sentence under section 5 (1), 5D, 5DA or 5DB, the court quashes or varies the sentence passed at trial on any count or part of an indictment, the court may quash or vary any other sentence passed at the trial:

(a) in relation to any offence charged in any other count or part of the same indictment, or

(b) in relation to any offence charged in any count or part of any other indictment, or

(c) in relation to any offence dealt with under section 105 of the *Criminal Procedure Act 1986*, or

(d) in relation to any back up offence or related offence dealt with under section 167 of the *Criminal Procedure Act 1986*,

and pass such sentence, whether more or less severe, in substitution for the other sentence as the court thinks proper, and as may be warranted in law, in respect of the offence.

(2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

(3) Where on the conviction of the appellant the jury have found a special verdict, and the court considers that a wrong conclusion has been arrived at by the court of trial on the effect of that verdict, the court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence whether more or less severe, in substitution for the sentence passed, as may be warranted in law.

(4) If, on any appeal, it appears to the court that, although the appellant committed the act or made the omission charged against the appellant, the appellant was mentally ill, so as not to be responsible, according to law, for the appellant's action at the time when the act was done or omission made, the court may quash the conviction and sentence passed at the trial and order that the appellant be detained in strict custody in such place and in such manner as the court thinks fit until released by due process of law or may make such other order (including an order releasing the appellant from custody, either unconditionally or subject to conditions) as the court considers appropriate.

8 Power of court to grant new trial

(1) On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make.

(2) Provision shall be made by rules of court for detaining the appellant until the fresh trial has terminated, or for ordering the appellant into any former custody.

8A Power of court to order committal proceedings to be continued in certain cases

(1) Where a person deemed to be convicted on indictment under section 105 (2) of the *Criminal Procedure Act 1986*, appeals to the court against the conviction, the court may, either of its own motion, or on the application of the appellant, order that the proceedings before the Magistrate at which the appellant pleaded guilty be continued at a time and place to be specified in the order, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, the miscarriage of justice can be more adequately remedied by an order that those proceedings be so continued than by any other order which the court is empowered to make.

(2) Where an order is made under subsection (1), the proceedings before the Magistrate shall be continued in all respects as if the appellant had not pleaded guilty and as if those proceedings had been adjourned by the Magistrate to the time and place specified in the order.

Upon the making of the order, the court may, subject to the *Bail Act 2013*, exercise any power that the Magistrate might have exercised under section 41 of the *Criminal Procedure Act 1986*, if the order had been an order made by the Magistrate adjourning the proceedings to the time and place so specified, and the provisions of section 41 of that Act apply to and in respect of the appellant.

Evidence Act 1995 No 25

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Provisions in force

All the provisions displayed in this version of the legislation have commenced. For commencement and other details see the Historical notes.

(b) the admissibility of other evidence, or

(c) a failure to adduce evidence.

56 Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

57 Provisional relevance

(1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:

(a) if it is reasonably open to make that finding, or

(b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

(2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

58 Inferences as to relevance

(1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

Part 3.2 Hearsay

Division 1 The hearsay rule

59 The hearsay rule—exclusion of hearsay evidence

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

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

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

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

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

Notes. Specific exceptions to the hearsay rule are as follows:

- evidence relevant for a non-hearsay purpose (section 60),
- first-hand hearsay:

— civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64)

— criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66)

- contemporaneous statements about a person's health etc (section 66A)
- business records (section 69)
- tags and labels (section 70)
- electronic communications (section 71)
- Aboriginal and Torres Strait Islander traditional laws and customs (section 72)
- marriage, family history or family relationships (section 73)
- public or general rights (section 74)
- use of evidence in interlocutory proceedings (section 75)
- admissions (section 81)
- representations about employment or authority (section 87 (2))
- exceptions to the rule excluding evidence of judgments and convictions (section 92 (3))
- character of and expert opinion about accused persons (sections 110 and 111).

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

Examples:

1 D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

2 P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.

3 W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

60 Exception: evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)).

Note. Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

Note. The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

61 Exceptions to the hearsay rule dependent on competency

(1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of section 13 (1).

(2) This section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind.

Note. For the admissibility of such contemporaneous representations, see section 66A.

(3) For the purposes of this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact.

Division 2 "First-hand" hearsay

62 Restriction to "first-hand" hearsay

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

63 Exception: civil proceedings if maker not available

(1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Notes.

1 Section 67 imposes notice requirements relating to this subsection.

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

64 Exception: civil proceedings if maker available

(1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation,

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Note. Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

(3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made.

(4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

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

65 Exception: criminal proceedings if maker not available

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

(a) was made under a duty to make that representation or to make representations of that kind, or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) was made in circumstances that make it highly probable that the representation is reliable, or

(d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

Note. Section 67 imposes notice requirements relating to this subsection.

(3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

(a) cross-examined the person who made the representation about it, or

(b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Note. Section 67 imposes notice requirements relating to this subsection.

(4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

(a) is given in an Australian or overseas proceeding, and

(b) is admitted into evidence in the criminal proceeding because of subsection (3),

cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.

(5) For the purposes of subsections (3) and (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:

(a) could reasonably have been present at that time, and

(b) if present could have cross-examined the person.

(6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by:

(a) the person to whom, or the court or other body to which, the representation was made, or

(b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made, or

(c) the person or body responsible for producing the transcript or recording.

(7) Without limiting subsection (2) (d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:

(a) to damage the person's reputation, or

(b) to show that the person has committed an offence for which the person has not been convicted, or

(c) to show that the person is liable in an action for damages.

(8) The hearsay rule does not apply to:

(a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made, or

(b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note. Section 67 imposes notice requirements relating to this subsection.

(9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

(a) is adduced by another party, and

(b) is given by a person who saw, heard or otherwise perceived the other representation being made.

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

66 Exception: criminal proceedings if maker available

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned, and

(b) the age and health of the person, and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note. Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

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

66A Exception: contemporaneous statements about a person's health etc

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

67 Notice to be given

(1) Sections 63 (2), 64 (2) and 65 (2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.

(2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.

(3) The notice must state:

(a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence, and

(b) if section 64 (2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.

(4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

(5) The direction:

(a) is subject to such conditions (if any) as the court thinks fit, and

(b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

68 Objections to tender of hearsay evidence in civil proceedings if maker available

(1) In a civil proceeding, if the notice discloses that it is not intended to call the person who made the previous representation concerned because it:

(a) would cause undue expense or undue delay, or

(b) would not be reasonably practicable,

a party may, not later than 21 days after notice has been given, object to the tender of the evidence, or of a specified part of the evidence.

(2) The objection is to be made by giving to each other party a written notice setting out the grounds on which the objection is made.

(3) The court may, on the application of a party, determine the objection at or before the hearing.

(4) If the objection is unreasonable, the court may order that, in any event, the party objecting is to bear the costs incurred by another party:

(a) in relation to the objection, and

(b) in calling the person who made the representation to give evidence.

Note. This subsection differs from section 68 (4) of the Commonwealth Act because of the different way costs are ascertained by NSW courts.

Division 3 Other exceptions to the hearsay rule

69 Exception: business records

(1) This section applies to a document that:

(a) either:

(b) all the parties to the proceeding are parties to the contract, and

(c) subsection (1) is inconsistent with a term of the contract.

Note. Section 182 of the Commonwealth Act gives section 162 of the Commonwealth Act a wider application in relation to Commonwealth records.

163 Proof of letters having been sent by Commonwealth agencies

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Note. Section 5 of the Commonwealth Act extends the operation of section 163 of the Commonwealth Act to proceedings in all Australian courts.

Part 4.4 Corroboration

164 Corroboration requirements abolished

(1) It is not necessary that evidence on which a party relies be corroborated.

(2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence.

(3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge:

(a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect, or

(b) give a direction relating to the absence of corroboration.

Part 4.5 Warnings and information

165 Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

(a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies,

(b) identification evidence,

(c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like,

(d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding,

(e) evidence given in a criminal proceeding by a witness who is a prison informer,

(f) oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant,

(g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) If there is a jury and a party so requests, the judge is to:

(a) warn the jury that the evidence may be unreliable, and

(b) inform the jury of matters that may cause it to be unreliable, and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

(6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A (2) and (3).

Note. The Commonwealth Act does not include subsection (6).

165A Warnings in relation to children's evidence

(1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:

(a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses,

(b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,

(c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child,

(d) in the case of a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

(2) Subsection (1) does not prevent the judge, at the request of a party, from:

(a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable, and

(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it,

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

165B Delay in prosecution

(1) This section applies in a criminal proceeding in which there is a jury.

(2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.

probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

prosecutor means a person who institutes or is responsible for the conduct of a prosecution.

public document means a document that:

(a) forms part of the records of the Crown in any of its capacities, or

(b) forms part of the records of the government of a foreign country, or

(c) forms part of the records of a person or body holding office or exercising a function under or because of the Commonwealth Constitution, an Australian law or a law of a foreign country, or

(d) is being kept by or on behalf of the Crown, such a government or such a person or body,

and includes the records of the proceedings of, and papers presented to:

(e) an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament, and

(f) a legislature of a foreign country, including a House or committee (however described) of such a legislature.

re-examination is defined in clause 2 (3) and (4) of Part 2 of this Dictionary.

representation includes:

(a) an express or implied representation (whether oral or in writing), or

(b) a representation to be inferred from conduct, or

(c) a representation not intended by its maker to be communicated to or seen by another person, or

(d) a representation that for any reason is not communicated.

seal includes a stamp.

tendency evidence means evidence of a kind referred to in section 97 (1) that a party seeks to have adduced for the purpose referred to in that subsection.

tendency rule means section 97 (1).

traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

visual identification evidence is defined in section 114.

witness includes the meaning given in clause 7 of Part 2 of this Dictionary.

Part 2 Other expressions

1 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,

(d) an activity engaged in or carried on by a person or body holding office or exercising power under or because of the Commonwealth Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power (otherwise than in a private capacity),

(e) the proceedings of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament,