HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **ALBERT THORN**

Appellant

and

THE KING

Respondent

SUBMISSIONS OF THE APPELLANT

PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUE

2. The single issue presented by this appeal is whether evidence of an admission can be said to be 'first-hand' within the meaning of s 82 of the *Evidence Act 2008* (Vic) where:

10 (1) no person who saw, heard or otherwise perceived the admission being made is available to give evidence of the admission;

(2) no document in which the admission is made is available to be tendered; and

(3) the evidence of the admission is a recording of an unavailable person's account in which they purport to recall the admission being made to them.

PART III SECTION 78B NOTICE

3. The appellant does not consider that any notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV CITATION OF REASONS BELOW

4. The judgment of the Court of Appeal of the Supreme Court of Victoria is not reported. Its medium neutral citation is *Thorn v The King* [2026] VSCA 99 (**CoA**). The appeal to that Court was against a conviction following a jury trial, hence there is no primary judgment.

PART V FACTS

5. ***The allegations:*** The appellant was jointly charged with two co-accused, Jordan **Bottom** and Rikki **Smith**, with the murder of Bradley Lyons in the early hours of 3 December 2018 in East Gippsland, Victoria. Each of the accused was also charged with related offences against the deceased in the lead up to his death. The prosecution case was that the offending was motivated by vigilantism in response to rumours that the deceased had sexually abused one or more of his step-children (CoA [3]). In essence, the prosecution case was that on 2 December 2018 the appellant and Smith attended the deceased's house (with others), assaulted him and drove him against his will to the appellant's farm, where Bottom was present (CoA [4]–[6]). It was alleged that, after some time, the deceased was removed from the car and further assaulted before being driven, early the next morning, to a remote location and shot dead (CoA [6]–[7]). The prosecution alleged that each accused was present at the shooting and each was complicit in the statutory sense[1] (CoA [7]).

6. The appellant pleaded not guilty to murder and to a common assault alleged to have taken place in a shed on his farm (CoA [8]) but pleaded guilty to assaulting, kidnapping and falsely imprisoning the deceased earlier in the charged interactions (CoA [9], [79]). The appellant did not give evidence (CoA [78]). His case at trial corresponded with what he had said in the second of two interviews he participated in with police (CoA [78], see also [61]–[64]). In essence, his case was that Bottom and Smith had assaulted the deceased when he was brought back to the farm and that they had taken the deceased to a remote location and shot him while the appellant remained at the farm and was not involved (CoA [78]–[83]). Bottom and Smith also did not give evidence at trial and relied on their

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[1] *Crimes Act 1958* (Vic) ss 323 and 324.

police interviews (CoA [84]). In essence, each of their cases was that the appellant was responsible for the murder (CoA [85]).

7. ***RT's account ahead of, and at, the first trial:*** An important plank of the prosecution case against the appellant were admissions he allegedly made to his then 8-year-old daughter, RT. RT had participated in two Video and Audio Recorded Evidence (**VARE**) statements with police, the first on 13 March 2019 and the second on 21 August 2020 (CoA [90]–[93]). In the second VARE statement, RT purported to recount the appellant making admissions to her, in particular, that he had killed the deceased (CoA [92], see also [45]–[51]).[2] She had also been asked about the alleged admissions in 'limited preparatory cross-examination' at a pre-trial hearing on 20 April 2021 conducted pursuant to s 198B of the *Criminal Procedure Act 2009* (Vic) (**s 198B hearing**) (CoA [95]–[99]).[3] At that hearing, RT was not asked to attest to the truthfulness of, relevantly, the second VARE statement but she did adhere to the essence of her account as to the admissions made to her, albeit allowing for the fact she could not remember exact words (CoA [97], [99]). Her answers at this pre-trial hearing were on oath (CoA [95]).

8. The prosecution called RT to give evidence at the appellant's first, aborted, trial, which was to be held from 18 August to 12 September 2022 (CoA [100]). On 6 September 2022, RT was to give her evidence remotely, via video link, with the assistance of an intermediary (CoA [101]). Before RT had commenced her sworn evidence it became apparent that she 'was struggling to verbalise her responses' (CoA [102]). Ultimately, an attempt was made to pre-record her evidence in the absence of the jury due to her 'emotional state' and apparent fear of the appellant (CoA [103]). When examined by the prosecutor, RT confirmed the truthfulness of her second VARE statement (CoA [106]). However, soon after the appellant's counsel commenced cross-examination of RT, she became distressed to such a point that the parties and the trial judge accepted that she was unable to continue (CoA [107]). In the result, RT was not able to be cross-examined about the alleged admissions, and the attempt to pre-record her evidence was abandoned (CoA [108]). The appellant's counsel conceded that the trial judge could conclude that RT had

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2 The Amended Notice served pursuant to s 67 of the *Evidence Act* in fact identified multiple representations, which the Court of Appeal referred to as a single composite representation that the appellant had said 'Last night, I killed somebody', which, if accepted, could refer only to the deceased: CoA [93]–[94].

3 *Criminal Procedure Act 2009* (Vic) s 198B.

become unavailable (CoA [109]). The jury was subsequently discharged on 9 September 2022, on a presently irrelevant basis (CoA [111]).

9. ***The second trial:*** On 12 April 2023, ahead of the second trial, the prosecution filed an amended hearsay notice pursuant to s 67 of the *Evidence Act*. The notice relevantly foreshadowed an intention to adduce evidence of all of RT's previous representations in her two VARE statements, her cross-examination at the s 198B hearing and the examination in chief at the aborted pre-recording during the first trial (CoA [112]–[113]). The evidence of those representations was said by the prosecution to fall within the exceptions to the hearsay rule in s 65(2)(c) and/or (3) (CoA [114]). The basis on which it was alleged that RT was 'unavailable' so as to satisfy the pre-condition to those provisions' application was that she was, in the language of the statute, 'mentally … *unable to give the evidence* and it is not reasonably practicable to overcome that inability'[4] (CoA [114], [117]). The appellant conceded that she was unavailable (CoA [118]–[119]). The appellant's trial counsel also conceded that RT's previous representations as to the appellant's alleged admissions were admissible under s 65(3); the limitation in s 62 was not adverted to, nor the provision governing pre-recorded evidence[5] (CoA [121]–[122]).

10. The second trial was held from 24 April to 16 June 2023 (CoA [123]). The prosecution led evidence of RT's previous representations broadly as foreshadowed in the hearsay notice, playing the two VARE statements and the recording of the s 198B hearing (CoA [124]–[125]) and adducing an agreed fact that RT relevantly had 'in a previous court hearing, attested to the truthfulness of the contents of her [second] VARE' (CoA [124]).

11. At the conclusion of the trial the jury convicted the appellant of murder and common assault and acquitted Bottom and Smith of murder (CoA [11]).

12. The appellant appealed to the Court of Appeal relevantly on the ground that evidence of admissions allegedly made by him to RT was wrongly admitted, albeit that there had been no objection taken at trial.[6] The respondent contended that the evidence of the admissions was admissible either pursuant to s 65(3) or as recorded evidence in chief pursuant to s

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4 *Evidence Act 2008* (Vic) Dictionary, part 2, clause 4(1)(c) (emphasis added).

5 *Criminal Procedure Act 2009* (Vic) s 368.

6 The appellant also advanced an unrelated ground relating to his applications for a separate trial that is no longer relevant.

368(4) of the *Criminal Procedure Act 2009* (Vic) (CoA [346]–[348]). The respondent did not ultimately contend that the appellant's trial counsel's failure to object had any significance to the resolution of the appeal (CoA [182]-[184]). As to the respondent's reliance upon s 368(4), the Court of Appeal (correctly) rejected this argument because the requirements in s 368(1)(c)(ii) that RT be 'available for cross-examination and re-examination' were not met (CoA [360]–[370]). As to s 65(3), after the hearing, the Court of Appeal invited the parties to make submissions on 'the interaction of s 65(3) with ss 81-82(a) of the *Evidence Act*',[7] which led the respondent to belatedly rely upon ss 81 and 82 as rendering the evidence admissible, when combined with s 65(3).

10 13. The Court of Appeal granted leave to appeal but dismissed the appeal (CoA [376]). It accepted that s 65(3) alone was not available to the prosecution to prove the truth of the alleged admission. But it followed another 'pathway' through ss 81 and 82(a) of the *Evidence Act* (CoA [215]–[216]). Adopting a 'wide construction' of s 82(a), the Court found an unavailable witness could 'give' evidence of a representation containing an admission not in the proceeding in which it was sought to be adduced, but in the form of prior sworn evidence 'separately adduced' pursuant to s 81 but 'through the gateway of s 65(3) and (6)' (CoA [224]). By this pathway, the Court of Appeal found that RT's representations were admissible as a confession to murder.

PART VI ARGUMENT

20 14. RT did not give evidence in the appellant's trial. Rather, her account was received by the jury in documentary form, as audio-visual recordings.[8] In the recordings, RT purported to recount admissions made to her by the appellant. The prosecution relied on the recordings to prove the truth of these admissions. However, no exception to the hearsay rule was properly engaged to allow the appellant's alleged previous representations to be used in that way. Section 82 of the *Evidence Act* relevantly limits the admissions exception to the hearsay rule to two categories of evidence (described collectively in the heading to the

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7 Email invitation for parties to provide further submissions dated 19 September 2025, Appellant's Book of Further Material, p 4.

8 The agreed fact went no further than the second VARE statement to which it related.

provision as 'first-hand' evidence of admissions). The recordings in this case fell into neither category. In particular:

(1) The recordings were not 'evidence' 'given' by a person who saw, heard or otherwise perceived the admission being made. Thus, s 82(a) was not engaged.

(2) None of the recordings was 'a document in which the admission is made'. Thus, s 82(b) was not engaged.

15. Accordingly, the recordings were not admissible to prove the truth of the alleged admissions. That was the straightforward answer to the question of whether the recordings were admissible. Instead of reaching that answer, though, the Court of Appeal purported to identify a novel means of admitting evidence of admissions that is not first-hand, in apparent defiance of the evident purpose of s 82, which is clear from its title: 'Exclusion of evidence of admissions that is not first-hand'.

16. The Court of Appeal's novel approach involved combining s 65(3) and (6) with s 81 to avoid the strictures of both ss 62 and 82. This was not, or not only, a 'wider construction' of s 82(a) (CoA [226]); it was, with respect, a distortion of the statutory scheme for the regulation of hearsay. That the Court of Appeal's reasoning did not accord with the Act's intended operation is apparent from the fact that accepting that reasoning would introduce inconsistencies in the application of the Act's various provisions. In particular:

(1) On the Court of Appeal's reasoning, a previous representation can fall foul of the first-hand hearsay restriction in s 62 but avoid the same restriction in s 82.

(2) The Court of Appeal's reasoning upended the approach to the admission of documents containing admissions in ss 81 and 82. The recordings of RT's account were each a 'document' within the meaning of the Act (see the definition of 'document' in Part 1 of the Dictionary to the Act). The Act deals expressly with proposals to adduce documents said to contain admissions; it does so in s 82(b). Such a document can only avoid the application of the hearsay rule where the document is 'a document in which the admission is made'. These were not such documents. To hold that such documents, and the hearsay admissions in them, could nevertheless be admitted by reason of s 82(a) is to create a disharmonious operation of two sub-sections within the same provision.

(3) Further, the Court of Appeal accepted that RT was unavailable by reason of falling into paragraph (1)(c) of the definition of unavailable persons in clause 4 of part 2 of the Dictionary to the Act. To use the statutory language, RT was not 'available to *give evidence* about a fact' because she was 'mentally … unable to *give the evidence*' (emphasis added). Notwithstanding that being the statutory gateway through which the hearsay exceptions were held to be engaged, the Court of Appeal separately concluded that RT's accounts in her VARE statements and recorded pre-trial evidence were evidence of admissions 'given' by her for the purpose of s 82(a). That conclusion could not logically hold. It is inconsistent with the scheme of the Act to hold both that a person is unavailable to give evidence in a proceeding and has given evidence in the proceeding.

17. To develop those contentions it is necessary to summarise the *Evidence Act*'s scheme for the regulation of hearsay evidence. Having done so, it will be possible to explain how the provisions ought to have been applied in this case and how the Court of Appeal erred.

The *Evidence Act*'s scheme for the regulation of hearsay

18. Section 59 of the *Evidence Act* creates a 'general rule of exclusion' in respect of hearsay evidence.[9] That rule is concerned with both 'the quality of the evidence that is given at trial', and with 'the manner of trial'.[10] Subsequent provisions of the Act create various exceptions to the general rule, and some provisions create exceptions to the exceptions. However, 'it is to the rule that attention must be directed first.'[11] The content of the hearsay rule is determined by a number of constituent elements. First, there is the concept of a 'previous representation',[12] which is defined in the Dictionary to the Act to mean 'a representation made otherwise than in the course of giving evidence in the proceeding in which the evidence of the representation is sought to be adduced'.[13] Second, there is the purposive aspect to the rule, by which the test for admissibility depends on the purpose for which the evidence is sought to be admitted. '[H]earsay evidence', as that term is used

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9 *Lee v The Queen* (1998) 195 CLR 594, [18] (the Court).

10 *Lee v The Queen* (1998) 195 CLR 594, [32] (the Court).

11 *Lee v The Queen* (1998) 195 CLR 594, [18] (the Court).

12 The word 'representation' is also defined (broadly) in the Dictionary but need not be reproduced here.

13 This accords with the common law position by which hearsay was described as 'out-of-court statements'. See, eg, *Walton v The Queen* (1989) 166 CLR 283, 288 (Mason CJ).

in the heading to s 59, is evidence of a previous representation admitted to prove, in essence, the truth of the fact asserted by the representor.[14] This can conveniently be described as a 'hearsay purpose'.[15] Application of the hearsay rule thus requires at least, first, identification of the previous representation sought to be adduced and, second, identification of 'why it is sought to lead evidence' of that representation.[16]

19. Where it has been determined that evidence of a previous representation is sought to be adduced to prove the truth of the fact asserted by the representor, the next question posed by the Act is whether an exception to the hearsay rule applies. (If none apply, the evidence will not be admissible for that purpose.) It is convenient to consider the exceptions to the
10 hearsay rule in three categories. The first category is limited to a single exception, that in s 60, where the evidence of a previous representation is relevant for a non-hearsay purpose. The second category captures the exceptions that are expressly[17] limited to first-hand hearsay, namely, those exceptions appearing in Part 3.2, Division 2 (being, ss 63, 64, 65, 66, 66A) and also the admissions exception in s 81 (which is limited to first-hand hearsay by s 82). The third category is a residual one that captures the remaining exceptions. It is convenient to say something brief about each of these categories of exception as they can all be understood, to varying degrees, to be framed by reference to the basal concerns that animate the hearsay rule itself – concerns about the quality of hearsay evidence, in particular its credibility and reliability, and the manner of trial.

20 20. The first category may appear, at first blush, to swallow the rule. Unlike almost all of the other exceptions, s 60 is not framed by reference to any characteristic of the evidence as hearsay; rather, it is a pragmatic departure from the common law designed to avoid what were seen as 'unrealistic distinctions'.[18] The provision permits hearsay evidence to be used for a hearsay purpose simply because it also happens to be relevant (and admitted)

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14 This accords with the common law position. See, eg, *Pollitt v The Queen* (1992) 174 CLR 558, 563 (Mason CJ).

15 *Papakosmas v The Queen* (1999) 196 CLR 297, [24] (Gleeson CJ and Hayne J).

16 Cf *Lee v The Queen* (1998) 195 CLR 594, [22] (the Court).

17 It is noted that other exceptions to the hearsay rule can be understood to be limited to first-hand hearsay insofar as they relate to representations made in documents, even though those exceptions do not use the descriptor 'first-hand'. For example, the business records exception is limited by a requirement that the business's document 'contains' the previous representation (s 69(1)(b)).

18 Australian Law Reform Commission (**ALRC**), *Evidence, Report No 26 Interim*, (1985), vol 1, [685]. See also *Lee v The Queen* (1998) 195 CLR 594, [39] (the Court).

for some other purpose.[19] However, sub-section (3) confirms the Act's special concern with the quality of evidence of admissions in criminal proceedings, and with the manner of trial. Where it not for that provision, s 60(2) would mean that evidence of an admission could be adduced to prove the truth of the admission even if the evidence was not first-hand (provided the admission was relevant for a non-hearsay purpose) thereby avoiding Parliament's clearly expressed intention in s 82 that evidence of admissions be limited to that which is first-hand.[20]

21. The second category of exception is expressly limited to first-hand hearsay. Even amongst the provisions in this category, there is some slippage in the descriptor 'first-hand': it is effectively defined in s 62 but only for Part 3.2, Division 2; it is not defined for s 81 despite the fact that s 82 uses the term 'first-hand'. Nevertheless, the central idea is clear. First-hand hearsay is either: (a) evidence of a previous representation given by a person with personal knowledge of the asserted fact; or (b) evidence of a document in which the previous representation is made. The requirement that the evidence be first-hand can readily be understood as a loose guarantee of the quality of evidence,[21] as well as preserving the orality of criminal trials. In addition to that guarantee, various exceptions within this category have their own built-in 'guarantees of reliability'.[22] The most obvious examples are the express references to reliability in s 65(2)(c) and (d)(i).[23] The concept of 'against interest' representations – both for witnesses and a party (ss 65(2)(d)(i) and 81) – also serves as a guarantee of quality, on the logic that a person is less likely to lie or be inaccurate to their own discredit. The touchstone of contemporaneity in s 66A is another obvious pointer to reliability, with a similar concept informing the 'shortly after' requirement in s 65(2)(b).

22. While a number of exceptions in the third (residual) category are capable of applying to more remote hearsay, they are framed such as to be engaged 'where some guarantees of

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19 Though, of course, s 136 is capable of depriving this rule of its operation in respect of particular evidence.

20 Section 60(3) was explained in this manner in ALRC, *Uniform Evidence Law*, 8 February 2006, [10.155]. The note to s 60(3) explains it was enacted in response to *Lee v The Queen* (1998) 195 CLR 594.

21 Other than a guarantee as to the quality of evidence, the first-hand hearsay exceptions are reflective of the law's abiding preference that evidence of a witness's observations be given orally at trial so that it may be subject to cross-examination. See *Lee v The Queen* (1998) 195 CLR 594, [32]–[33] (the Court).

22 ALRC, *Evidence, Report No 26 Interim*, (1985), vol 1, [692].

23 See also *Sio v The Queen* (2016) 259 CLR 47, [63]–[64] (the Court).

reliability can be shown together with a need for its admissibility'.[24] The business records exception in s 69 is one example, the rationale for it deriving from the idea that a business has a particular interest in maintaining accurate records.[25]

23. It can be seen from the above that each of the exceptions to the hearsay rule is carefully designed to apply in individually identified circumstances. Each exception strikes a particular balance between competing interests. This carefully calibrated scheme would be thrown out if individual exceptions could be combined, or if the strictures imposed by one section could be avoided by the extension of another.

The straightforward answer to the question in this case

24. Shorn of some of its ultimately immaterial factual nuances, this case is a simple one. The prosecution sought to lead evidence of previous representations of the appellant to prove the truth of the facts asserted in those representations, that is to say, for a hearsay purpose. The admissions exception was not engaged because the evidence of the alleged admissions was not first-hand (a matter to be returned to below in the discussion of the Court of Appeal's reasoning). Nor was any other exception engaged.

25. Some parallels can be drawn between the present case and ***Lee*** *v The Queen*.[26] The issue in that case concerned the admissibility of parts of a witness's signed police statement in which he recounted admissions allegedly made to him by the accused. At trial, the witness denied (or at least did not accept) that he had heard the accused say these things. The prosecution adduced evidence of the witness's prior statement to the contrary, which was permitted to be used as proof of the truth of the admissions. An appeal against conviction was dismissed by the New South Wales Court of Criminal Appeal on the basis that s 60 of the *Evidence Act 1995* (NSW) – which, at the time, contained no equivalent to what is now s 60(3) of the Victorian Act – permitted the evidence to be used in that way. The High Court allowed a further appeal.

26. The Court explained:

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24 ALRC, *Evidence, Report No 26 Interim*, (1985), vol 1, [678].

25 *Roach v Page (No 27)* [2003] NSWSC 1046, [11] (Sperling J).

26 (1998) 195 CLR 594. See also *Ridgeway v The King* [2024] NSWCCA 85, [70]–[77] (the Court).

> The nature of what [the witness] said in his statements to the police was such that evidence of those statements was evidence both of representations made by [the witness] to the police (about what [the witness] had seen and heard) and of representations made to [the witness] by the appellant (about what the appellant had done). By virtue of s 59, the evidence was not admissible to prove the existence either of the facts which [the witness] intended to assert to the police or of the facts which the appellant intended to assert to [the witness]. Section 60 operated only upon the former representations; it had nothing to say to the representations made by the appellant to [the witness]. It was only the representations made by [the witness] to the police that were relevant for a purpose referred to in s 60: the purpose being to prove that [the witness] had made a prior inconsistent statement and that his credibility was thus affected. The hearsay rule was rendered inapplicable to [the witness]'s representations, but not to the representations allegedly made by the appellant. And, of course, the representations allegedly made by the appellant were not admissible under the confession exceptions to the hearsay rule created by s 81 because the evidence of these confessional statements was not first hand [citing s 82].[27]

27. The Court continued:

> The conclusion that the evidence of the reported confession by the appellant was inadmissible as evidence of the truth of the alleged confession is consistent with basic principle and with the scheme of the Act as a whole; it is not to be seen as some retreat to outdated and outworn technical distinctions.[28]

28. The same logic ought to have compelled the same result in this case, as it has in three other cases, *R v* ***Dillon*** *(No 3)*,[29] *DPP v* ***Price*** *and Brown (Ruling No 1)*,[30] and *Glowacki v The King*.[31]

The Court of Appeal's errors

29. The Court of Appeal's reasoning may be summarised as follows:

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27 *Lee v The Queen* (1998) 195 CLR 594, [28] (the Court, emphasis added). The Court acknowledged at [29] that: 'Of course, it would be different if [the witness] had said in evidence in court that the appellant had said he had done a job. Then the representation made out of court would be the appellant's, not [the witness]'s.'

28 *Lee v The Queen* (1998) 195 CLR 594, [31] (the Court).

29 [2019] NSWSC 1537.

30 [2023] VSC 149.

31 [2023] VSCA 176.

(1) The evidence the prosecution adduced of things previously said by RT satisfied the preconditions to s 65(3) because RT's representation – namely, that the appellant had said he killed somebody – was made in the course of giving evidence in an Australian proceeding (CoA [186]).

(2) RT's representation about what the appellant had said was first-hand hearsay, and thus s 62 did not preclude its admission through s 65(3) (CoA [187]). However, the fact asserted in the appellant's representation – that he had, in fact, killed somebody – was not first-hand hearsay, and so s 62 prevented it being adduced through s 65(3) (CoA [188]).

10 (3) Nevertheless, s 65(3) and (6) could 'operate in combination' with s 81 'to allow for proof of [the truth of] the admission', notwithstanding the first-hand hearsay limitation in s 82 (CoA [189]), because evidence of the admission was 'given by' RT, who had heard the admission being made – thus satisfying s 82(a) (CoA [189]).

30. There were a number of problems with this reasoning. In particular, the Court:

(1) misidentified the *representation* and the *purpose* for which the evidence of the representation was sought to be admitted; and

(2) misconstrued what is entailed in a person *giving* evidence.

31. ***Misidentification of previous representation and purpose for which the evidence was sought to be admitted:*** The Court of Appeal focussed its analysis on RT's previous
20 representations (see, eg, CoA [186]). That is understandable, because *all* of RT's previous representations were hearsay and for any parts of the recordings of RT to be admissible to prove their truth, the evidence had to fall within an exception to the hearsay rule. But the previous representations that really mattered were not RT's but the appellant's, in particular, his alleged representations that he had 'killed somebody'.

32. The starting point for the analysis of the admissibility of evidence of that previous representation was s 59. As has been explained earlier, s 59 requires identification of the representation and the purpose for which it is sought to be led in evidence. Here, the only purpose for which it was sought to be led was to prove the truth of the asserted fact, that is, for a hearsay purpose. Section 59 thus required that evidence of the appellant's

previous representation fall within an exception to the hearsay rule if it was to be admissible.

33. Instead of following that analysis to the conclusion that no exception was applicable to the appellant's representation, the Court of Appeal focussed on what was described as 'RT's "previous representation" … that the applicant had said the words "last night, I killed somebody"' (CoA [186]). The Court of Appeal then considered whether evidence of this previous representation was admissible (CoA [197(a)], [199]–[209]). It concluded that 's 65(3) applied to allow proof that the applicant said the words' (CoA [189]). But RT's representation that the appellant had said the words was irrelevant unless it was asserted that the words were true (CoA [278]).

34. The Court of Appeal's response to this problem was to hold that the evidence of what RT heard the appellant say 'was *relevant* towards proving it as an admission' (CoA [277], emphasis in original). But to hold as much was to acknowledge that RT's representation had no independent relevance; it was merely a medium for the appellant's representation, the truth of which is what was really sought to be proved by the whole exercise.

35. ***Misconstruction of what is entailed in 'giving' evidence:*** The Court of Appeal concluded that the evidence of the alleged admissions was 'given by' RT in circumstances where RT was unavailable and the means by which the evidence was proposed to be adduced was through recordings (i.e. documents). The text, context and purpose of the *Evidence Act* do not permit the conclusion that tendering documents in which an unavailable person has made certain representations involves that person 'giving evidence'.

36. Textually, the various references to giving evidence throughout the *Evidence Act* make plain that what is involved is a person being called as a witness in the hearing at which the evidence is admitted. Part 2.1 is entitled 'Witnesses'. It contains many and various references to 'giving evidence'. By contrast, Part 2.2 is entitled 'Documents', the contents of which are 'adduced' (see ss 47 and 48). Part 2.3, entitled 'Other evidence', contains s 52, which preserves the operation of any Australian law or rule of practice so far as it permits evidence to be adduced 'in a way other than by witnesses giving evidence or documents being tendered in evidence' (none of which was relied upon by the Court of Appeal), and provisions relating to views (ss 53 and 54). Of the multiple ways evidence can be presented in a proceeding to which the *Evidence Act* applies, the words 'to give

evidence' are contained almost exclusively in the Part of the Act relating to (live) witnesses.

37. Of those provisions in Part 2.1:

(1) Section 12 creates presumptions relating to the competence and compellability of 'persons' to 'give evidence' and s 13(1)–(3) direct attention to a person's capacity to understand and answer questions about facts and understand the obligation to do so truthfully.

(2) Sections 17 and 18 create exceptions to the presumption that a person is competent and compellable 'to give evidence' that apply specifically to criminal proceedings, provisions that are deprived of meaningful operation if evidence has previously been 'given' in another proceeding.

(3) Section 21(1) contains a requirement that a witness take an oath or make an affirmation before 'giving evidence'; subs (4)–(6) contain requirements for doing so.

(4) Division 3 is entitled 'General rules about giving evidence'. It contains rules about the order of questioning in s 28, the manner and form of questioning in s 29 (including a power to direct that a witness 'give evidence' wholly or partly in narrative form in s 29(2)), attempts to revive memory in court in s 32, and out of court in s 34, and the special manner in which a police officer can 'give evidence' in a criminal proceeding by reading or being led through a statement in s 33.

(5) Division 4 contains prescriptive rules relating to examination in chief and re-examination, a reference to which is a reference to 'the questioning of a witness by the party who called the witness to *give evidence'* (clause 2 of part 2 of the Dictionary to the Act, emphasis added). Section 38(1) contains special rules applying when evidence is 'given by' a witness that is unfavourable to a party, or relates to a matter of which the witness might reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to 'give evidence'.

(6) Division 5 contains prescriptive rules about the nature of questioning in cross-examination (which is 'the questioning of a witness by a party other than the party who called the witness to *give evidence*': clause 2 of part 2 of the Dictionary to the Act, emphasis added), including a prohibition on improper questions in s 41, limitations on leading questions in s 42, and rules relating to prior inconsistent statements in 43, previous representations of other persons in s 44, production of documents in s 45 and leave to recall witnesses to 'give evidence' about additional matters in certain circumstances in s 46.

38. The legislative history supports the conclusion that the Act's reference to a person 'giving evidence' involves that person being a witness at the hearing in which the evidence is admitted. The Australian Law Reform Commission report preceding the enactment of the uniform legislation included:[32]

> **Terminology**
>
> ***Giving, etc, evidence.*** Before considering the detail of the proposals, it is appropriate to make clear the sense in which certain words are commonly used in the proposed Evidence Bill 1987, and to explain some of the commonly used terms. Not all the definitions appearing in cl 3 of the Bill are explained here. Some are explained later, in the detailed consideration of the proposals to which they relate. The Bill is drafted on the basis that a witness in the witness box is 'giving' evidence. The party who is questioning the witness (whether in examination in chief or in cross-examination) is 'adducing' the evidence that the witness is giving. It is the court's function to admit or refuse to admit the evidence so adduced.

39. The uniform evidence legislation 'reflects the drafting intention expressed by the Commission' in that particular paragraph.[33]

40. The purpose of the hearsay exceptions – as discerned by this Court in *Lee* – supports understanding the notion of 'giving evidence' to involve a person being a witness in the proceeding. In finding that evidence of an out of court representation should not have been admitted as evidence of its truth,[34] this Court recognised that the common law of evidence 'has long focussed on the quality of the evidence that is given at trial and has

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32 ALRC, *Report 38: Evidence* (1987) [58].

33 *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* (2008) 167 FCR 314, [26] (Rares J).

34 *Lee v The Queen* (1998) 195 CLR 594, [41] (the Court).

required that the evidence that is given at trial is given orally, not least so that it might be subject to cross-examination'.[35] In that context, it was 'not surprising' that Divisions 2 and 3 of Part 3.2 of the *Evidence Act* provided limited exceptions, one of which is to confine hearsay statements to those that are first-hand.[36]

41. The *Evidence Act* must be given a coherent and harmonious construction.[37] To read s 82(a) in the way the Court of Appeal did produces the opposite result. In particular, it produces three anomalies, namely:

(1) The mirroring restrictions to first-hand hearsay in ss 62 and 82 contradict each other such that evidence of a previous representation that would be held to fall foul of s 62 can nevertheless satisfy s 82.

(2) The two limbs of s 82 operate in tension, with para (a) avoiding the intended operation of para (b) such that a document that includes a hearsay representation of an admission that would not satisfy (b) can nevertheless be adduced through (a).

(3) A person can be at once unavailable to give evidence for the purposes of s 65 but have 'given evidence' for the purposes of s 82(a).

42. As against the above matters, four further points were thought to support the Court of Appeal's conclusion. Properly understood, none provided that support.

43. The Court of Appeal found that amendments to the NSW and Commonwealth evidence legislation to remove the word 'orally' from s 82(a) 'signals support' for its wider interpretation (CoA [229]). But, as the extrinsic material to which the Court referred (CoA [230]) confirms, the deletion of this word was merely a recognition that evidence in chief is commonly given in written from, such as by affidavit.[38] The amendment was not an indication 'that the requirement that the evidence be *given by* the person should be construed liberally rather than prescriptively', as the Court of Appeal found it to be (CoA

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35 *Lee v The Queen* (1998) 195 CLR 594, [32] (the Court).

36 *Lee v The Queen* (1998) 195 CLR 594, [34]–[35] (the Court).

37 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [70] (McHugh, Gummow, Kirby and Hayne JJ).

38 Explanatory Notes, *Statute Law (Miscellaneous Provisions) Bill 2000* (NSW) 10; Explanatory Memorandum, *Law and Justice Legislation Amendment Bill 1998* (Cth) [49].

[233], emphasis in original). The provisions of the *Evidence Act* are proscriptive. They contain clear textual limits, as in s 62. An amendment recognising the possibility of non-oral evidence did not – and does not – justify expanding the notion of 'giving evidence' beyond those textual limits. There is nothing in the extrinsic materials to those amendments, nor in Victoria's subsequent adoption of the amended text, to suggest an intention on the part of Parliament to achieve the result reached by the Court of Appeal.

44. The Court of Appeal drew support, which it considered 'critical' (CoA [254]), for its construction from s 65(6), which it understood to result in 'the prior evidence of an unavailable witness [being] adduced *directly* into the trial' (CoA [234(c)], emphasis in original). However, this rested on an erroneous assumption that s 65(3) would only ever be engaged in combination with s 65(6) (CoA [234(a)]). Section 65(6) is only one means of adducing evidence through s 65(3), as the word 'may' in the chapeau of s 65(6) makes clear. Other than a transcript or recording, s 65(3) would permit a witness who was present at a previous court hearing to testify as to the evidence given by another person (who has since become unavailable) at that hearing. This demonstrates that s 65(3) provides no guarantee of 'directness' in the way the unavailable witness's account will be adduced in the trial; rather, it involves a further layer of hearsay, which may be documentary (by a recording or transcript), or may not. The Court of Appeal's failure to appreciate this infected the analysis that followed at CoA [235]–[240].

45. Moreover, the point overlooked in this aspect of the Court of Appeal's analysis reveals an additional incongruity in its approach, as the admissibility of the prior evidence would depend on whether it was introduced using the s 65(6) mechanism. If so, the evidence would be treated as 'given' in the trial; if not, it would not be. That would convert s 65(6) from a mechanical provision which merely addresses the means by which evidence may be adduced, and which explicitly operates only after the question of admissibility has been determined ('Evidence… to which subsection (3) applies may be adduced by….'), into one which substantively determines the admissibility of the evidence.

46. Similarly, the passages in *Cross on Evidence*[39] and *R v Ngo*[40] lent no realistic support to the Court of Appeal's wider construction. The Court correctly observed (CoA [246]) that

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39 JD Heydon, *Cross on Evidence* (Lexis Nexis, 14th ed, 2023) [35605].

40 (2001) 122 A Crim R 467, [17]–[18] (Dunford J).

the analysis in those sources is limited. The analysis in *Price* and *Dillon* is to the contrary, and more persuasive because, like the appellant's argument, it is grounded in the statutory language – which is, after all, 'the surest guide to legislative intention'.[41]

47. The Court of Appeal's conclusion that the result of failing to adopt its wider construction would be 'anomalous' because a hearsay account of an accused person's conduct might be admissible, but an account of words spoken by the accused would not (CoA [255]–[257]), again, with respect, does not withstand scrutiny. The difference is entirely sensible. The latter involves a layer of hearsay whilst the former does not. The accounts are not 'equally first-hand and equally reliable' as the Court of Appeal stated them to be (CoA [258]). For the reasons recognised by this Court in *Lee*, it is entirely explicable that the two would be treated differently – that the admission of the latter account, merely of what someone was told, must be subject to a 'guarantee of reliability' not attaching to the former.

48. A final point should be made. There is a sense in which the Court of Appeal's reasoning appears to be animated by a desire to avoid a result that might be seen to be inconvenient or that could be seen to elevate form over substance. For the reasons already given, on a proper understanding of the *Evidence Act*'s differential treatment of admissions and other evidence, there is nothing incongruous in the appellant's construction of the Act. However, even if it could be said that the inadmissibility of RT's evidence might be unintended (and the appellant does not concede this is such a case) 'it is not the Court's function to attempt to overcome unintended consequences of the intended operation of a provision by construing the provision as if it had a meaning that Parliament did not intend it to have'.[42] The provisions of Part 3.2 can be, and should be, applied in their terms; it was neither necessary nor warranted to chart a separate pathway involving a combined or sequential application of s 65(3) and (6) and ss 81 and 82(a).

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41 *Alcan (NT) v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47] (Hayne, Heydon, Crennan and Kiefel JJ).

42 *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551, [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

Conclusion

49. The text, context and purpose of the *Evidence Act* makes plain that the intended consequence of s 82(a) and (b) is that a person with personal knowledge of an admission by an accused can give evidence of it in the proceeding to which the *Evidence Act* is being applied – that is, in this case, before the jury empanelled as the trier of fact – or, if the admission is in a document, that document can be adduced. Neither of those things happened in the appellant's case. There was no separate legislative provision that would operate to render RT's evidence admissible.[43] The failure to object ought not be understood to have rendered the evidence admissible; it was plainly an oversight or error, as the respondent ultimately accepted in the Court of Appeal (CoA [184]).[44] In any event, the evidence should not have been permitted to be used for the purpose that it was and this caused a substantial miscarriage of justice.[45]

50. For the above reasons, the Court of Appeal was wrong to dismiss the appeal.

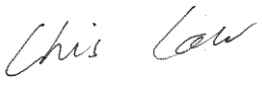
PART VII ORDERS SOUGHT

51. The appeal should be allowed and orders made as set out in the notice of appeal.

PART VIII ESTIMATE

52. The appellant estimates that 1.5 hours will be required to present his oral argument.

Dated: 29 October 2026



Chris Carr
(03) 9225 7000
chris.carr@vicbar.com.au

Anthony Pyne
(03) 9225 7222
anthony.pyne@vicbar.com.au

Julian R Murphy
(03) 9225 7777
julian.murphy@vicbar.com.au

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43 RT was not cross-examined and re-examined at the appellant's first trial, when a failed attempt was made to pre-record her evidence pursuant to s 198 of the *Criminal Procedure Act 2009* (Vic). Section 368(4) of that Act was also not engaged because the requirements of s 368(1)(c)(ii) were not met.

44 Cf *Ridgeway v The King* [2024] NSWCCA 85, [77] (the Court).

45 Cf *Ridgeway v The King* [2024] NSWCCA 85, [78]–[81] (the Court).

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
1.	*Evidence Act 2008* (Vic)	Version 26 (1 July 2020 to 24 March 2024)	Sections 62, 65, 81, 82 and the relevant parts of the Dictionary	Act in force at the time of the appellant's trial	17 April 2023 to 16 June 2023
2.	*Criminal Procedure Act 2009* (Vic)	Version 93 (30 March 2023 to 29 July 2023)	Sections 198B and 368	Act in force at the time of the appellant's trial	17 April 2023 to 16 June 2023
3.	*Crimes Act 1958* (Vic)	Version 283 (28 October 2018 to 28 February 2019)	Sections 323 and 324	Act in force at the time of alleged offences	2-3 December 2018