DOCUMENTARY HEARSAY: THE SCOPE OF THE QUEENSLAND EVIDENCE ACT

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The rule against hearsay is formulated by Cross as follows:

> . . . express or implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted.[1]

The classic judicial pronouncement on hearsay is to be found in the case of *Subramaniam* v. *Public Prosecutor*:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[2]

Thus, it is the purpose for which the evidence is tendered, rather than the mere fact that it comprises a statement by a person other than the one who is testifying, which is the key to the hearsay rule.

If a document is tendered for the purpose of proving that it was prepared, or that a statement it contains was actually made, then it is capable of being received as original evidence so far as those issues are relevant, and it is not hearsay. If, however, it is tendered for the purpose of proving the truth of a statement which it contains, a document is hearsay unless the person making the statement is called as a witness. In *Myers* v. *Director of Public Prosecutions*[3] application of this rule meant that factory records of vehicle engine numbers, highly relevant and seemingly highly reliable, were excluded as it was impossible to identify much less call as a witness the person or persons responsible for making them.

At common law, hearsay evidence is not admissible unless it falls under one of the recognised exceptions to the exclusionary rule, or unless it forms part of the *res gestae*. The common law exceptions can be roughly categorised into four main areas i.e. statements of persons since deceased, statements in public documents, admissions or confessions of the parties and a miscellaneous group including matters such as postmarks, ancient documents and the like. As is well known, the majority of the House of Lords in *Myers* v. *Director of Public Prosecutions*[4] were of the view that no further exceptions to the hearsay rule should be judicially created and indeed none have been since that decision.

In the area of documentary hearsay, however, there have been created by statute a number of exceptions to the hearsay rule. The first of these was the Evidence Act 1938 (UK) s.1,[5] which after some substantial delay was enacted with five alterations as s.42B of the *Evidence and Discovery Acts* 1867-1962 (Qld.). The latter provision has now been repealed

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1. J. Gobbo (ed.), *Cross on Evidence*, (1980) at 456.
2. [1956] 1 W.L.R. 965, at 969-70.
3. [1965] A.C. 1001.
4. *Ibid.*
5. 1 & 2 Geo VI Ch 28.

and succeeded in this State by s.92 of the *Evidence Act* 1977-84. The 1938 English Act (and its derivatives enacted in all Australian States) applied only to civil proceedings and was of no use in *Myers*. In response to that decision there was enacted the Criminal Evidence Act 1965 (UK), from which s.93 of the *Evidence Act* 1977-84 (Qld.) derives. The 1938 English Act has itself been repealed and replaced by the Civil Evidence Act 1968 (UK), but the documentary hearsay provisions of that Act have not been adopted in Queensland.

The purpose of this article is to examine the scope and effect of the two Queensland provisions concerning documentary hearsay mentioned above, sections 92 and 93 of the *Evidence Act* 1977-84.

What is remarkable about this area of the law is that despite the wealth of comparatively complex statutory material there is a paucity of reported judicial decisions, not least in Queensland. Such cases as there are come in the main from England, New South Wales and Victoria, and it will be necessary to look to those and other jurisdictions for some guide as to how the Queensland provisions might be interpreted.

Although there are other sections in the Queensland *Evidence Act,* such as s.84 and s.95, which deal with specific areas of documentary hearsay it will be necessary to defer an examination of them to a later time. This article will concentrate on the two general and most widely-used provisions.

1. **Section 92**

Section 92(1) reads:

> (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this Part, be admissible as evidence of that fact if—
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> (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
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> (b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

It is now necessary to examine individually the component parts of this provision.

(a) *Civil proceedings.* The first thing s.92(1) does is limit its applicability to proceedings which are not criminal proceedings. The word "proceeding" is defined in s.5(1) of the Act:

> "proceeding" means any civil, criminal or other proceeding or inquiry, reference or examination in which by law or by consent of parties evidence is or may be given, and includes an arbitration;

"Criminal proceeding" is also defined in s.5(1). Whilst *prima facie* exhaustive, the definition of proceeding is wide enough to include, for example, proceedings in chambers before either a judge or a master, proceedings before the Taxation Board of Review and proceedings before an industrial magistrate.

(b) *'. . . direct oral evidence . . .'.* The second restriction which the section places on its applicability is that it may be used only in cases where the evidence it would allow in tends to 'establish a fact' of which direct oral evidence would be admissible. Despite the positive phraseology, there can be no doubt that the section is available when such evidence tends to establish that such a fact does not or did not exist as well as the reverse. It would seem that this second restriction has been placed in the section primarily to preserve the common law requirement of relevance as a pre-condition to admissibility.

However, in *Carusi* v. *Housing Commission*[6] Lush J. was obliged to hold that s.55 of the *Evidence Act* 1958 (Vic.) (which contains an identical restriction) could not apply where something other than considerations of relevance would prevent direct oral evidence from being given. In that case, s.28(2) of the *Evidence Act* 1958 (Vic.) prohibited a medical practitioner from giving evidence about the treatment of his patient without the consent of the latter, which Lush J. held had not been effectively given. Thus, a statement in a document made by the medical practitioner containing such evidence and otherwise admissible under s.55 could not be received under that section.

In the recent Queensland decision in *Russell* v. *Craddock* [6A] a majority of the Full Court held that s.92 is not available to prove in a civil case the previous criminal convictions of one of the parties, even where those convictions are relevant and admissible under a provision such as s.79 of the Act. As McPherson J. pointed out, this is because direct oral evidence of the conviction (e.g. by a witness present when it was recorded) would not be admissible. The common law requires that a conviction be proved only by production of the court record; whilst s.53 of the Act extends the range of ducments which might be used to facilitate such proof it does not allow proof of convictions by oral evidence. Further, s.79 does not of itself alter the form in which convictions may be proved. Andrews S.P.J. agreed that s.92 is not available to prove convictions in civil cases, but D.M. Campbell J. preferred to leave the question open.

(c) *Statements.* Provided the above two conditions are met s.92(1) makes admissible 'statements' which are contained in 'documents'. Statement is defined in s.5(1) of the Act:

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

Thus, nods, gestures and other physical signals are to be regarded as statements. In *Lenehan* v. *Qld Trustees Ltd*[7] Hart J., interpreting s.42B of the *Evidence and Discovery Acts* 1867-1962 (Qld) (which contained a definition of 'statement' identical to the current provision) held that requests and statements of intention are also included.

In *Tobias* v. *Allen* (*No 2*)[8] Sholl J., dealing with s.3 of the *Evidence Act* 1946 (Vic.) (based on the 1938 U.K. statute and in similar form to the *Evidence and Discovery Acts* 1867-1962 (Qld.) s.42B), held that the statement tendered must itself be in an admissible form, that is a form in which the maker of the statement would be permitted to give oral evidence if called as a witness. To hold otherwise, his Honour said, would be a 'curious interpretation'. If the maker of the statement would be incompetent as a witness it will not be in admissible form.

The question of whether a statement of opinion can be received under s.92(1) gives rise to some difficulty. The cases tend to show that a statement of opinion is admissible under s.92(1) as evidence of the subject matter of the opinion, provided the maker of the statement is qualified to give the opinion (i.e. it is in admissible form) and provided it meets the other requirements of the section. The definition of statement given in s.5 is not exhaustive and there seems no reason to read it narrowly. In *Lenehan v. Qld Trustees Ltd*[8A] Hart J was of the view that the definition of statement contained in the earlier act[8B] should be given a wide interpretation so as to include all that would be encompassed within the ordinary meaning of the word.

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6. [1973] V.R. 215.
6A. Q.L.R. 16th March 1985.
7. [1965] Qd.R. 559.
8. [1957] V.R. 221.
8A. *Supra* n.7.
8B. *Evidence and Discovery Acts* 1867-1962 (Qld).

In *Warner* v. *Womens Hospital*[9] Sholl J., dealing with s.3 of the *Evidence Act* 1946 (Vic.) (which contained the same definition of 'statement' as s.92), was of the view that a statement of medical opinion would be admissible and that it was unlikely that parliament intended to exclude opinions from the operation of the Act. His Honour noted however that there was no necessity for him to decide the matter in that case. The contemporaneity of the opinion with the hearing of the case was, according to his Honour, a matter of weight rather than admissibility.

In *Tobias* v. *Allen (No 2)*[10] Sholl J., again dealing with s.3 of the *Evidence Act* 1946 (Vic.) rejected a statement of opinion not because it contained opinion but because that opinion incorporated a conclusion of law and therefore to admit it would have been contrary to well-established principles.[11]

In *Morley* v. *National Insurance Co.*[12] McInerney J., dealing with s.55 of the *Evidence Act* 1958 (Vic.) (which contains an identical definition to that in the Qld Act), held that expert opinion was admissible and that to hold otherwise would be contrary to the policy of the legislation.

In *Dass* v. *Masih*[13] Denning M.R., interpreting S.1 of the Evidence Act 1938 (UK), said:

> It has been said that statements of opinion are not admissible under the Evidence Act, 1938, but only statements of fact. I do not agree. When there is a fact in issue (such as the cause of death), the statements made by an expert in a report (stating the nature of the wounds and their probable cause) tend to establish the fact. Such a report by an expert who has examined the body is admissible. So also with any other report which is based on an analysis of observed facts.
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> . . . I would not suggest that every statement of opinion is admissible. For instance, if a bystander who saw an accident makes a statement of facts seen by him, that would be admissible: but if he gave his opinion that one of the drivers was negligent, it would not be admissible. It would not be admissible even if given on oath. So it is certainly not admissible under the Evidence Act, 1938. But the opinion of an expert, based on his observed facts, is admissible on oath: and if he is not available, his report is admissible under the Evidence Act, 1938.

In that same case, Salmon L.J., after quoting the first four lines of the English section said:

> Pausing there, I would have no doubt at all but that the words are wide enough in circumstances such as these to let in a statement of opinion, providing such a statement would be admissible if made orally in the witness box. The fact about which direct oral evidence is obviously admissible is the fact as to whether or not the postscript was in the handwriting of the defendant. A statement of opinion by a handwriting expert as to whether or not the postscript was in the handwriting of the defendant clearly tends to establish the fact as to whether or not it was in the handwriting of the defendant. It is only if you read into the words of the section which I have recited the words "of fact" after the word "statement", so that it reads "any statement of fact made by a person in a document", and so on, that the section would exclude statements of opinion. I can see no compelling reason to read such a limitation into the section.

After referring to the rest of the section, his Lordship went on:

> That looks perhaps as if the section is referring, at any rate primarily, to statements of fact. I think on the whole, however, that the word "statement" may cover statements

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9. [1954] V.L.R. 410.
10. *Supra* n.8.
11. *R* v. *Tonkin and Montgomery* [1975] Qd. R. 1.
12. [1967] V.R 566.
13. [1968] 2 All E.R. 226 at 230.

> of opinion as well as statements of fact although the conditions may appear to be particularly designed to meet the case where the statement concerned is a statement of fact. The written statement of opinion must, as I have already indicated, certainly be of a kind which would be receivable in evidence if given orally.[14]

Salmon L.J. noted that his opinions were only provisional, and DenningM.R. that it was unnecessary for him to decide the point.

In *Mansour* v. *Standard Telephones and Cables Pty Ltd*[15] the New South Wales Court of Appeal, interpreting s.14B of the Evidence Act, 1898 (N.S.W.) (which so far as is material is in identical terms to the Queensland section), unanimously held that a statement of opinion by an expert was admissible as a fact under s.14B where the maker of the statement has personal knowledge of the field of his expertise and draws on that expertise to express his opinion.

It is submitted that in the light of the above authorities the courts in Queensland will probably interpret s.92(1) as admitting statements of opinion, by experts when expertise is required and perhaps by lay witnesses in the limited circumstances where they would be permitted to give oral evidence of their opinions.[16] To date there is no reported decision in this state on the issue.

It should be noted that s.92(1) makes admissible 'statements' and not the documents which contain them. In *Re Marra Developments Ltd*[17] it was held that the presence of an admissible statement in a document does not make the balance of the document admissible *per se*. Other parts of the document may be looked at to resolve any ambiguity in the admissible statement but are not in any other respect evidence of their particular contents. In that case, Needham J. was interpreting ss.14CE and 14CN of the Evidence Act, 1898 (NSW) which, like s.92(1), refer to statements contained in documents.

(d) *Document.* Section 5(1) of the Act defines document as:

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

The definition is not exhaustive and is clearly wide enough to encompass all forms of information records including computer tapes and discs.

The Act does not, as in some states, require the original document to be produced. Section 97 states:

> Where in any proceeding a statement contained in a document is proposed to be given in evidence by virtue of this Part, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of

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14. *Ibid* at 233.
15. [1983] 3 N.S.W.L.R. 205.
16. E.g. *Sherrard* v. *Jacob* [1965] N.I. 151, *Weal* v. *Bottom* (1966) 40 A.L.J.R. 436.
17. [1979] 2 N.S.W.L.R. 193.

a copy of that document, or the material part thereof, authenticated in such manner as the court may approve.

Section 5(2) of the Act defines copies for the purposes of the Act as:

(2) In this Act, any reference to a copy of a document includes-
  (a) in the case of a document falling within paragraph (e) but not paragraph (f) of the definition "document" in subsection (1), a transcript of the sounds or other data embodied therein;
  (b) in the case of a document falling within paragraph (f) but not paragraph (e) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;
  (c) in the case of a document falling within both those paragraphs, such a transcript together with such a reproduction or still reproduction; and
  (d) in the case of a document not falling within the said paragraph (f) of which a visual image is embodied in a document falling within that paragraph, a reproduction or still reproduction of that image, whether enlarged or not.

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

The case of *R* v. *Jones* (*Benjamin*)[18] suggests that the document need not have been completed or brought into being within the jurisdiction, and the same conclusion was reached in Victoria recently in *R.* v. *Ernst.*[19]

(e) *The two "Limbs".* Section 93(1) sets out two pre-conditions, one of which must be satisfied before, in terms of the above discussion, relevant statements in documents tendered in civil proceedings can become admissible.
  (i) *The First Limb, s.92(1)(a),* requires that the maker of the statement have had personal knowledge of the matters dealt with by the statement *and* be called as a witness.

Section 92(4) sets out who is the maker of a statement:

(4) For the purposes of this Part a statement contained in a document is made by a person if—
  (a) it was written, made, dictated or otherwise produced by him;
  (b) it was recorded with his knowledge;
  (c) it was recorded in the course of and ancillary to a proceeding; or
  (d) it was recognized by him as his statement by signing, initialling or otherwise in writing.

Where a signature, initial or other handwriting is relied on to satisfy s.92(4)(a) or (d) it will usually be necessary to prove that the writing is in fact that of the maker of the statement. Where that person is called as a witness there will be no difficulty; where the person is not called the signature or writing might be proved in some other way, perhaps by calling as a witness someone who saw the maker sign, or who can identify the handwriting as that of the maker. It is possible that s.96(1) of the Act may also be of some assistance in this regard. Section 96(1) provides:

(1) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of this Part, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances.

Where it is sought to rely on dictation or production of the document by its maker otherwise than by writing, or on its having been recorded with the maker's knowledge, it will be necessary to call as a witness someone who can swear to such facts from their own

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18. [1978] 1 W.L.R. 195.
19. [1984] V.R. 555.

knowledge. Section 92(4)(b) may create difficulty on occasion, but again s.96(1) may help resolve the issue. It seems however, that at least one of the requirements of s.92(4) must be fulfilled; s.96(1) cannot be used to make a statement admissible notwithstanding that none of these requirements has been satisfied, its purpose being only to assist the Court in determining that issue.[20]

In *Vocisano* v. *Vocisano*[21] it was held by Barwick C.J. (with whom Stephen and Jacobs JJ. agreed) interpreting s.35 of the *Evidence Ordinance* 1971 (A.C.T. that in a case where reliance is placed on a signature or writing by the maker of the statement it is not necessary to show that the maker could read and did in fact read and understand the written statement. No doubt this is an important matter to take into account in assessing the weight to be given to the statement, even though it has no effect on the issue of admissibility.

The Queensland Act makes no stipulation that the statement must be signed at the time of, or soon after, its making for it to be admissible. Neither, as in some jurisdictions,[22] does the Queensland Act stipulate that the maker must not at the time of making the statement have been a person interested in the proceedings then pending or anticipated. However, S.102 (Qld) makes both of these matters of specific importance on the question of weight.

The requirement that the maker of the statement have personal knowledge of the matters with which it deals means that he, or she, must not perpetuate hearsay which has come to them. Thus in *Compagnie Generale Maritime* v. *Diakan Spirit S.A.; The Ymnos*[23] it was held that s.2 of the Civil Evidence Act 1968 (UK) did not operate to admit statements by other persons to the maker of the statement sought to be admitted, and contained in *his* statement. Where the question was simply one of whether the other person had in fact stated something, as a matter of original evidence, this restriction probably would not apply. The accuracy of the maker's personal knowledge, and its depth, are matters to be considered on weight and do not affect admissibility. In *Re Hennessy's Self Service Stores Pty Ltd* (*In Liquidation*),[24] the company liquidators had sought to have certain stock sheets admitted under s.42B of the *Evidence and Discovery Acts* 1867-1962 (Qld). The method of taking the stock was that one person would call out the quantity of stock in a particular place and another person would write down what the person who was calling out said. The two persons would be close to one another so that the person who was doing the writing would be able to see what the other person was doing. In the case of unopened cartons the person doing the writing had the same opportunity of seeing them as the person doing the calling. In the case of an opened carton into which it might be necessary for the caller to look, the person doing the writing would not have the same opportunity. The probability was that the person doing the writing would not check the correctness of any of the statements made by the caller. Gibbs J. held that it was a reasonable inference that the person doing the writing (the maker of the statement) had *some* personal knowledge of the quantity of stock, albeit limited, since it was impossible for him to fail to observe that there was *some* stock. This, his Honour said, was sufficient for the statements on the stock sheets to be admitted.

Where the maker of the statement is called as a witness, s.92(1)(a) is not operating as an exception to the hearsay rule. Nevertheless it can be a valuable means of getting into evidence statements which the witness may have made contemporaneously with the events to which they refer but which events may now be hazy in the witnesses mind, or even totally forgotten, due to factors such as age or lengthy periods between the events and the trial. In *Jarman* v. *Lambert and Cooke Ltd*[25] Denning L.J. remarked on the value of such

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20. *Newton* v. *Pieper* [1968] 1 N.S.W.R. 42.
21. (1974) 130 C.L.R. 267.
22. E.g. Evidence Act 1898 S.14B(3) N.S.W.
23. [1981] Lloyds Rep. 550.
24. [1965] Qd.R. 576.
25. [1951] 2 K.B. 937 at 947.

statements, which may come about for example when a motor accident is described to a policeman or solicitor or a claim form completed in an insurance or workers compensation context. Where the maker is called, the statement may be tendered either before *viva voce* evidence is given,[26] after such evidence is completed[27] or at any time in between before the case for that party is closed. Here, s.92(1)(a) operates as an exception to the rule against self-serving or prior consistent statements. This is so because the Act makes the documentary statement evidence in its own right of the facts stated, not just relevant on the issue of credit alone. Of this effect, the present Chief Justice of Queensland Sir Walter Campbell (CampbellJ. as he then was) wrote:

> But is any problem really involved in the tendering of self-serving statements? Is it not always a question of the impression which is given to the court by this method and of the weight which the court (be it judge or jury) would in its common sense approach give to the statement? I take the view that if all statements made by a witness at any time were able to be put to him either by his own counsel or by opposing counsel not only would no harm result but a great deal of uncertainty which presently arises from the rules concerning hostile witnesses, recent fabrication, etc. would be overcome.[28]

Section 100 of the Act prevents statements admitted under s.92(or s.93) from serving as corroboration of evidence given by their maker where such corroboration is required by either law or practice. Clearly, this is of much greater importance in criminal cases under s.93 than civil cases under s.92.

The object of the requirement that the maker of the statement be called as a witness is no doubt to afford the other party an opportunity for cross-examination. Nonetheless, s.92(2) sets out six circumstances in which that requirement need not be satisfied. Section 92(2) states:

> (2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where —
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> (a) he is dead, or unfit by reason of his bodily or mental condition to attend as a witness;
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> (b) he is out of the State and it is not reasonably practicable to secure his attendance;
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> (c) he cannot with reasonable diligence be found or identified;
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> (d) it cannot reasonably be supposed (having regard to the time which has elapsed since he made the statement, or supplied the information, and to all the circumstances) that he would have any recollection of the matters dealt with by the statement he made or in the information he supplied;
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> (e) no party to the proceeding who would have the right to cross-examine him requires his being called as a witness; or
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> (f) at any stage of the proceeding it appears to the court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling him as a witness.

Section 92(3) provides that the court may act on hearsay evidence for the purpose of deciding all but (e) above, and s.96(2) provides that in deciding (a) above the court may act on a certificate purporting to be signed by a legally qualified medical practitioner.

In *Downs Irrigation Co-Operative Association Ltd* v. *The National Bank of Australasia Ltd (No 2)*[29] it was held by Andrews S.P.J., on hearing a summons for directions, that it is

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26. *Hilton* v. *Lancashire Dynamo Nevelin Ltd* [1964] 1 W.L.R. 952.
27. *Shepherd* v. *Shepherd* [1954] V.L.R. 514, *Re Hennessy's Self-Service Stores Pty Ltd (In Liquidation) supra* n.24.
28. (1967) 8 U.W.A.L.R. 61 at 74.
29. [1983] 1 Qd.R. 475.

not possible to employ 0.20 R.2 of the Supreme Court Rules (Qld.) to seek to dispense with calling a witness under s.92. This provision enables a judge or master on hearing a summons for directions to, inter alia, order that evidence of a particular fact may be given at the trial by production of documents or entries in books or by copies of such documents or entries. His Honour held that 0.20 R.2 applies to peripheral or formal matters only, and that it is necessary to establish at least one of the requirements of s.92(2) before a party can be excused from calling the maker of a statement.

(ii) *The second limb, s.92(1)(b).* This alternative requires that the statement concerned be contained in a document which is or forms part of a record relating to any undertaking and made in the course of that undertaking.

Undertaking is defined in s.5 as:

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

In *O'Donnell* v. *Dakin*[30] a similar definition in the *Evidence Act* 1910-77 (Tas.) was held to include both private and public hospitals; the same occurred in *Bates* v. *Nelson*[31] in respect of the Evidence Act 1929-76 (S.A.). It would seem that hobbies are definitely excluded from s.92(1)(b) through the definition of undertaking though it is interesting to note that s.95(2)(a) (referring to computer generated hearsay) speaks of 'activities' which seems wide enough to include even hobbies.

The word 'record' is not defined in the Act. For a document to be or form part of a record it need not necessarily have been prepared with a view to any long-term permanence. This has not always been so. In *R* v. *Tirado*[32] the Court of Appeal, interpreting s.1(1) of the Criminal Evidence Act 1965 (UK), after remarking that it was not necessary to decide the point in that case, said:

> . . . we have at least some hesitation in saying that a file of correspondence, maintained simply as a file of correspondence, and added to from time to time as letters come in, is or can be a record relating to any trade or business and compiled from information supplied within the meaning of section 1 of the Act of 1965. The language of section 1 seems on its face to contemplate the making or compilation of a record. That means the keeping of a book or a file, or a card index, into which information is deliberately put in order that it may be available to others another day. A cash book, a ledger, a stock book: all these may be records because they contain information deliberately entered in order that the information may be preserved.[33]

But, in *R.* v. *Jones* (*Benjamin*)[34] three years later the same court, interpreting the same section, said:

> Although it is not an exhaustive definition of the word, 'record' in this context means a history of events in some form which is not evanescent. How long the record is likely to be kept is immaterial: it may be something which will not survive the end of the transaction in question, it may be something which is indeed more lasting than bronze, but the degree of permanence does not seem to us to make or mar the

30. [1966] Tas. S.R. 87.
31. (1973) 6 S.A.S.R. 149.
32. (1975) 59 Cr.App.Rep. 80.
33. *Ibid* at 90.
34. *Supra* n.18.

> fulfilment of the definition of the word 'record'. The record in each individual case will last as long as commercial necessity may demand.[35]

The court specifically stated that it is not necessary for a record to take the form of a book or ledger. It must be remembered that in this case the court were referring to a 'trade or business' record rather than one relating to the broader 'undertaking', hence the reference to commercial necessity.

In *H* v. *Schering Chemicals,*[36] Bingham J. held, at an interlocutory stage of the proceedings in the Queens Bench Division and referring to the meaning of record in the Civil Evidence Act 1968 (UK):

> The intention of that section was, I believe, to admit in evidence records which a historian would regard as original or primary sources, that is documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts.
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> Judged by this standard, the commercial documents in *Reg.* v. *Jones* (*Benjamin*) [1978] 1 W.L.R.195; the tithe map in *Knight* v. *David* [1971] 1 W.L.R. 1671; the record in *Edmonds* v. *Edmonds* [1947] P. 67 and the transcript in *Taylor* (*J.*) v. *Taylor* (*I.L.*) [1970] 1 W.L.R. 1148, would rank as records, as in those cases they were held to be. On the other hand, the documents in *Ioannou* v. *Demetriou* [1952] A.C. 84; the file of letters in *Reg.* v. *Tirado,* 59 Cr.App.R. 80, and the summary of cases in *In re Koscot Interplanetary* (*U.K.*) *Ltd.* [1972] 3 All E.R. 829, would fail to be admitted as records, as in the first two cases they did.
>
> Judged by the same standard the documents in the present case, I think, are not records and are not primary or original sources. They are a digest or analysis of records which must exist or have existed, but they are not themselves those records. If the plaintiffs' submission were right it would, I think, mean that anyone who wrote a letter to 'The Times', having done research and summarising the result of that research in his letter, would find his letter admissible as evidence of the facts under section 4. That is not, I think, the intent of the section.

In *Savings and Investment Bank* v. *Gasco Investments* (*Netherlands*)[37] a report containing both information and statements of opinion was held, due to inclusion of the latter, not to be an original or primary source and thus not a record.

To date there is no reported Queensland decision on the meaning of record for the purposes of the Act. There have, however, been a number of cases in other Australian jurisdictions. In *Compafina Bank* v. *ANZ Banking Group Ltd*[38] Hunt J. held that business records could include copies of letters sent to third parties where the copy had been stored for future reference and it was part of the business to write such letters. It appears that none of the English cases were cited to Hunt J., but his Honour did note several Australian authorities for admission of various types of documents as business records. These were bank ledger cards (*R.* v. *Mitchell* [1971] V.R. 46) bank statements of account (*R.* v. *Jenkins* [1970] Tas. S.R. 13) reports to a board of directors, inter-office memoranda and records of conversations between company officers (*Re Marra Developments Ltd* [1979] 2 N.S.W.L.R. 193) hospital treatment records (*Albrighton* v. *Royal Prince Alfred Hospital* [1980] 2 N.S.W.L.R. 542) company books of account, invoices received, ledger sheets and bank statements (*Re Action Waste Collections Pty Ltd* (*In Liquidation*); *Crawford* v. *O'Brien [1981] V.R. 691)* hospital temperature charts (*R* v. *Perry* (*No. 3*) (1981) 28 S.A.S.R. 112) and bank managers' diary notes (*R* v. *Smart* [1983] V.R. 265).

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35. *Ibid* at 199.
36. [1983] 1 W.L.R. 143 at 146.
37. Noted in Solicitors Journal 1984, Vol 128 at 115.
38. [1982] 1 N.S.W.L.R. 409.

In *Trade Practices Commission* v. *T.N.T. Management Pty Ltd*[39] a copy of a letter written by a company director to a customer which concerned business matters and which was kept in a file belonging to the company was admitted as a business record for the purposes of S.7B(1)(a) of the Evidence Act 1905 (Cth); a conclusion of law contained in it was rejected but other statements it contained were admitted.

In Queensland it is not necessary, as it is in some other jurisdictions, that the record in question be a continuous record. None of the cases cited above turn on this point.

Not only must the document be or form part of a record, it must 'relate to' and be made 'in the course of' an undertaking. It is not enough, it is submitted, that a document simply be made by or on behalf of an undertaking if it is unconnected with the usual activities of that concern. Thus, in *R* v. *Barber*[40] a statement by a solicitor as to the mental state of his client at a particular time was not admissible: it was not given in the course of his business, which was to conduct legal affairs not give opinions on mental capacity. In *Trade Practices Commission* v. *T.N.T. Management Pty Ltd*[41] a letter from its own solicitors to a company was rejected as it contained no statement made in the course of company business.

It is not fatal, however, that the document be completed by a person not part of the relevant undertaking. In *R.* v. *Cook*[42] a customs official affixed a stamp to a document which was otherwise a record relating to and made in the course of a business; notwithstanding that he was neither principal nor agent of that business the Court of Appeal held the stamped document to be admissible where the stamp itself was an important issue.

Three further matters must be noted in connection with s.92(1)(b). Firstly, the document must be one which is based on information supplied by persons who had personal knowledge of that information, or who could reasonably be supposed to have had such knowledge. It will be necessary to look to the facts of each case to determine whether this requirement is met, but the court by virtue of s.96 of the Act is enabled, as previously noted, to draw inferences from the form and contents of the document itself as well as from any other circumstances. Thus, as in a case with facts such as those in *Re Hennessy's Self-Service Stores Pty Ltd (In Liquidation)*,[43] a person making observations may pass that information on to a second person who may himself prepare a document based on, but not necessarily a *verbatim* account of, what he has been told. However in *R* v. *Cook*[44] a record made from readings on petrol pumps was rejected because it was not compiled from information supplied by a person but a machine. Similarly, in *R* v. *Pettigrew,*[45] the facts concerned a machine owned by the Bank of England. An operator fed into the machine bundles of notes, of which the operator knew the serial number of only the first note in each bundle. The machine would reject defective notes, recording their serial numbers of which the operator could have no knowledge, and produced a print-out of its activities. As only the machine had knowledge of the serial numbers of rejected notes the print-out was excluded from evidence because it was not compiled from information supplied by a person and no person could have personal knowledge of its contents.[46]

Secondly, it is not necessary that the information be supplied directly from the observer (or person with the personal knowledge) to the person making the record. S.92(1)(b) permits the information to be supplied either 'directly or indirectly', thus the information may pass through many hands before reaching the person preparing the document which contains the

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39. [1984] A.T.P.R. 45, 531.
40. [1976] Tas. S.R. 52.
41. *Supra* n.39.
42. (1980) 71 Cr.App.R. 205.
43. *Supra* n.24.
44. [1982] Crim L.R. 669.
45. Times Law Reports 21 January 1980.
46. Cf. s.95 Evidence Act 1977 - 84 (Qld).

relevant statement. Such a process of hearsay upon hearsay does not affect the admissibility of the statement though undoubtedly its weight will be diminished in direct proportion to the number of links in the hearsay 'chain'.

Thirdly, s.92(1)(b) requires that the person who supplied the information in the first place be called as a witness. The purpose of this requirement is to give the other party a chance to check the accuracy of the record through cross-examination, but as with s.92(1)(a) any of the circumstances set out in s.92(2) will, if proved to the satisfaction of the court, provide sufficient excuse not to call the supplier of information as a witness. Again, s.92(3) states that the court may act on hearsay evidence in all but one of these matters.

Section 100 of the Act prevents the testimony of the supplier of information being corroborated by a record containing the information where such corroboration is required either by law or practice.

2. **Section 93**

S.93(1) provides:

(1)

(1) In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this Part, be admissible as evidence of that fact if

(a) the document is or forms part of a record relating to any trade or business and made in the course of that trade or business from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied; and

(b) the person who supplied the information recorded in the statement in question -

(i) is dead, or unfit by reason of his bodily or mental condition to attend as a witness;

(ii) is out of the State and it is not reasonably practicable to secure his attendance;

(iii) cannot with reasonable diligence be found or identified; or

(iv) cannot reasonably be supposed (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.

It can be readily seen that s.93(1) has a much more restricted application than does s.92(1). The section contains the same introductory phrases as s.92(1) (save that it refers to criminal proceedings only) and the discussion above concerning 'criminal proceeding', 'direct oral evidence', 'fact', 'statement', 'document', 'record' and 'tending to establish' in respect of s.92(1) applies equally to s.93(1). However, four major differences between the two provisions must be noted.

Firstly, s.93(1) lacks the equivalent of s.92(1)(a) whereby the statement becomes admissible merely upon proof that its maker had personal knowledge of the matters with which it deals and, subject to s.92(2), upon calling that person as a witness. Thus, in criminal proceedings, even though the maker of a statement cannot be called and even though such statement may be totally reliable and extremely relevant it may not be admissible; s.93 requires that the document containing it have the added status of being a 'record' relating to a 'trade or business'. Given the general discretion in s.98 of the Act which enables the court to exclude evidence otherwise admissible under s.92 or s.93 based on the 'interests of justice' it is difficult to offer any compelling explanation as to why s.93(1) should lack the 'first limb' of s.92(1). As previously noted, s.92(1)(a) does, in addition to creating an exception to the hearsay rule where the maker is not called, create exceptions to the rule against self-serving and prior consistent statements as well as prior inconsistent

statements by merely unfavourable witnesses where the maker *is* called; perhaps it was a desire to avoid such exceptions entirely in criminal cases which prompted the Legislature to omit any 'first limb' from s.93(1). If so, then Parliament appears to have lacked confidence in the ability of the judiciary to protect an accused through use of the discretion in s.98, whilst at the same time it has ensured that no benefit can accrue to the accused in an appropriate case. Undoubtedly much objection could be taken to use of a provision such as s.92(1)(a) in respect of confessional evidence to the exclusion of the common law rules on that subject. Some difficulty may be encountered in creating an adequate definition of 'confession', but a 'first limb' to s.93(1) which excluded confessions, together with the discretion already mentioned, would provide suitable protection to the accused in that area. Section 130 of the Evidence Act also preserves the judicial discretion in criminal trials to exclude evidence based on concepts of fairness to the accused.

Secondly, s.93(1) rather than referring to 'undertakings' refers to records relating to any 'trade or business'. What is a trade or business for the purposes of this section is not without difficulty. The Act does not define 'trade' and gives no general definition of 'business' in s.5. In *Rolls* v. *Miller*[47] Lindley L.J. (referring to the dictionary definition of business) said:

> The word means almost anything which is an occupation, as distinguished from a pleasure — anything which is an occupation or duty which required attention is a business.

It seems unlikely that the Queensland Legislature intended business to have such a wide meaning in the context of s.93; if a wide meaning were intended the word 'undertaking' could again have been employed and still operated to exclude hobby and leisure 'activities'.

Use of the words 'trade' and 'business' in the definition of 'undertaking' in s.5 of the Act and selection of these two components alone from that wide - meaning definition suggests a much more restricted scope for s.93. It is submitted that the definition is *prima facie* confined to private sector commercial activities which are undertaken with a view to profit. Whilst there is as yet no judicial support or otherwise for such a view, it is submitted that such an interpretation squares with the absence of reference to 'undertakings' in the section and the extraction of the only two words which connote private commercial profit from the broad definition of undertaking contained in s.5.

> (2) In this section "business" includes any public transport, public utility or similar undertaking carried on in Queensland or elsewhere by the Crown (in right of the State of Queensland or any other right) or a statutory body.

In *R* v. *Crayden,*[48] Lawton L.J., interpreting the word 'business' and a similar extension to the meaning of that word in the Criminal Evidence Act 1965 (UK), noted that each of the activities specified in the enlarging words of the equivalent to s.93(2) has the common element of supplying goods or services as a public sector commercial activity. This caused his Lordship to adjudge that 'business' as used in the Act had a commercial connotation. If this were not so, he asked, why would the inclusive definition refer to specific activities such as it does rather than simply to 'public administration' or government activities generally? Why, for example, does it exclude reference to such bodies as the police?

In *Crayden,* the Court of Appeal did not consider the significance of the word 'undertaking' in the equivalent of s.93(2). The English Act provides no definition of 'undertaking', whereas the Queensland Act contains in s.5 a comprehensive definition, which is subject to the proviso 'unless the contrary intention appears'. It is submitted that 'undertaking' in s.93(2) is not to be given the wide meaning set out in s.5 of the Act. To do

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47. (1884) 27 Ch. D. 71 at 88.
48. [1978] 1 W.L.R. 604.

so would require one to ignore the word 'similar' appearing immediately before 'undertaking' in s.93(2). Had the Legislature intended 'business' to include 'undertaking' as defined in s.5 then they need not have gone to such lengths to achieve that result; they could simply have left out s.93(2) and used 'undertaking' instead of 'trade or business' in the operative part of s.93. It is submitted that what is required is to read 'similar undertaking' *ejusdem generis* with 'public transport' and 'public utility', the common *genus* being public sector commercial activities. Thus, undertaking may be read down and sense made of the provision. On such a reading, bodies such as the police, and perhaps even public hospitals,[49] would be excluded. Private hospitals would be included under the general definition of 'business'.

As with s.92, s.93 requires that the relevant document be one 'relating to' and 'made in the course of' a trade or business, and that information may be supplied either 'directly or indirectly' by persons who had or may reasonably be supposed to have had personal knowledge of the information they supply. The above discussion of each of these phrases in the context of s.92 will apply equally to s.93.

The third major difference between s.92 and s.93 is that whereas the former provides six grounds of excuse for not calling as a witness the supplier of information, the latter provides only four. The two grounds omitted from s.93 are that no party having the right to cross-examine the witness requires him to be called and that undue delay or expense would be caused by calling the witness.

3. General

A number of provisions in the Act are relevant to the operation of both s.92 and s.93. Some of these have been mentioned previously, but all are set out here for ease of reference.

Section 98 gives the trial judge a discretion to reject evidence which has satisfied the admissibility requirements of either section; he may do so 'if for any reason it appears to be inexpedient in the interests of justice that the statement should be admitted'. In *Tobias* v. *Allen (No 2)*[50] Sholl J., applying a similar discretion in the *Evidence Act* 1946 (Vic), excluded a statement by a witness who was unable to attend due to his mental condition. As the proceedings were penal in nature, his Honour ruled that it would be wrong to admit a statement by a person suffering a mental condition which contained ambiguities not to be explored in cross-examination. The discretion is available in both s.92 civil cases and s.93 criminal cases, as well as in respect of computer-generated hearsay sought to be admitted under s.95.

Section 99 of the Act enables a trial judge, in proceedings before a jury, to direct that documentary statements admissible under either s.92 or s.93 be withheld from the jury during their deliberations if it appears that they may give the statement undue weight with the document before them.

Section 94(1) of the Act deals with the credibility of the maker of a statement or the supplier of information where that person is not called. The sub-section provides that any evidence which would be admissible as to such a person's credit if he or she were called is admissible notwithstanding that they are not called. The sub-section also provides that, for the purpose of showing that such a person has at another time contradicted herself or himself, evidence may be adduced that either before or after making the statement or supplying the information in question, the person concerned, either orally or in writing, made a statement or supplied information inconsistent with that being tendered. Such prior

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49. For a contrary view on this, see 5 *The Queensland Lawyer* at 18-20.
50. *Supra* n.8.

inconsistent statements are, pursuant to s.101(2) of the Act, evidence of the facts they state so long as they are in admissible form.

Section 94(1) is subject to the general proviso that it cannot enable evidence to be given of any matter unless at common law the cross-examining party would have been entitled to adduce such evidence after the witness had denied the matter in cross examination. Thus it does not permit collateral issues to be pursued, save where permitted at common law.

Section 94(2) of the Act deals with proof of previous convictions where the maker of a statement or the supplier of information is not called. The sub-section provides that, with leave of the court, evidence may be given of such a person's previous convictions as if he or she had been called and had either denied or refused to admit the conviction.[51]

Section 97 of the Act permits copies of documents to be tendered for the purposes of s.92 and s.93 notwithstanding the so-called 'best evidence rule' i.e. it is not necessary to prove loss or destruction of the original.

Section 100 of the Act prevents statements admitted under s.92 and s.93 from serving as corroboration of evidence given by the maker or the supplier of information.

Section 102 of the Act deals with factors to be considered in estimating the weight to be given to an admissible statement. Section 102 reads:

> In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including —
>
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
>
> (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

Thus, factors of bias and contemporaneity are, unlike jurisdictions such as New South Wales, treated as affecting weight only, not admissibility of the statement concerned. No doubt in appropriate cases there would be no point in tendering a statement which was technically admissible but which, by reason of s.102, would be given no weight.

4. Conclusion

The scope and effect of S.92 and S.93 of the *Evidence Act* 1977-84 (Qld) have yet to be fully tested in the Queensland Courts. Nonetheless, the sections do not appear to be giving rise to many practical difficulties. The paucity of reported decisions about them in this State is evidence in itself that the sections are serving well enough the needs of those who wish to tender documents containing hearsay statements. Whether the simplified measures of the Civil Evidence Act 1968 (UK) concerning documentary evidence in civil cases will ever be introduced in Queensland will be a matter of interest for the future. For the time being it could be argued that such measures are not necessary.

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51. Refer to s.16 Evidence Act 1977-84 (Qld).