GOBBLEDEGOOK, THE HEARSAY RULE AND REFORM OF SECTION 60

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The Hearsay Rule and the Uniform Evidence Act

The Hearsay Rule Prior to the Uniform Evidence Act

Across common law jurisdictions over many years the hearsay rule and its exceptions evolved into what one author famously described as resembling 'an old fashioned crazy-quilt made of patches cut from... paintings by cubists, futurists and surrealists'.[1] This description is a result of the rule being considered overly technical and inconsistent in its application both within and across jurisdictions.[2] Indicative of these problems are the large number of reviews that have been undertaken of the hearsay rule by various law reform bodies in multiple common law jurisdictions.[3]

In Australia, authors have described the common law rule against hearsay as one of the 'most complex and confusing' [4] rules or evidence law. Typically the common law definition of the hearsay rule is drawn from *Subramaniam v Public Prosecutor*:

> Evidence of a statement made to a witness by a person who is not himself called as a witness[5] 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

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[1] Morgan, Edmund M., Maguire, John MacArthur, Looking Backward and Forward at Evidence, (1937) 50 Harv. L. Rev. 909, 921.

[2] Australian Law Reform Commission, *Evidence (interim)*, Report No 26 (1985) vol 1 [330]–[345].

[3] As at 1985 there had been at least 12 reports by law reform bodies in the United Kingdom and Commonwealth countries, above n 2, [329]

[4] LexisNexis Australia, *Cross on Evidence*, vol 1, [31001] <www.lexisnexis.com.au> at 8 July 2006.

[5] Most definitions of the hearsay rule also encompass the rule against narration which states that prior statements made by witnesses who are giving evidence are not admissible, above n 4, [31025].

> proposed to establish by the evidence, not the truth of the statement, but the fact it was made.[6]

In the 1980s the Australian Law Reform Commission's (ALRC) undertook a review and consultation process of the hearsay rule as part of its wider review of evidence law. This review lead to the production a decade later of the *Uniform Evidence Act* which included comprehensive legislative reform of the hearsay rule.

At the start of the review by the ALRC it was recognised that the hearsay rule, as it existed at the time, was the subject of significant dissatisfaction and criticism. Much of this was the result of uncertainty and complexity regarding the application of the hearsay rule. This included, for example, whether implied assertions made out of court fitted within the hearsay rule. *Cross on Evidence* describes six different views regarding the answer to this question under the existing common law.[7] An overlapping controversy was the distinction as to whether statements were being admitted to prove the truth of their contents or only as original evidence.[8] Distinguishing between these two was acknowledged as being an 'artificial and difficult'[9] task. In addition to the many definitional and interpretation issues, there had developed a complex array of common law and legislative exceptions to the hearsay rule. [10]
The ALRC concluded that the fundamental problem was a lack of a coherent policy framework upon which the law of hearsay had developed.[11] The ALRC therefore undertook to provide this framework within the *Uniform Evidence Act* and to codify and clarify the common law and statutory exceptions to the rule which had developed over the last 200 years.

The Hearsay Provisions in Overview

The provisions regarding hearsay evidence are contained within Part 3.2 of the *Uniform Evidence Act.* This Part commences with s 59. It defines the hearsay rule as a primary rule of exclusion:

[6] *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 970.

[7] Above n 4, [31040].

[8] see, eg, *Ratten v The Queen* [1972] AC 378; *Walton v The Queen* (1989) 84 ALR 59, [64], [74].

[9] *Walton v The Queen* (1989) 84 ALR 59, [64] (Mason CJ).

[10] For common law exceptions see Butterworths, *Halsbury's Laws of Australia*, 195 Evidence, 'II Proof of Facts' [195-1125] www.lexisnexis.com.au at 9 July 2006, for legislative exceptions see above n 2, [132] and for critique [341] - [345].

[11] Above n 2, [329].

> (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by that representation.[12]

Importantly, the ALRC accepted that hearsay evidence should be excluded as a fundamental rule. The reasons for this view include the absence of oath by the declarant, the lack of opportunity to cross-examine the maker of the representation and a number of specific concerns regarding the quality of the evidence. These concerns are based largely upon experimental evidence showing that the dangers inherent in the presentation of any evidence are magnified when the evidence is not within the personal knowledge of the witness. These dangers include problems with perception, memory, recall and narration by witnesses and out of court declarants. Reinforcement of error through repetition and reduced ability to detect fabrication fortify these concerns.[13]

The Act provides that assertions are hearsay only if they are intended to be asserted by the declarant. A representation is defined to include those made orally, in writing or by conduct.[14] It also includes express or implied representations, but excludes those made by incompetent witnesses other than certain contemporaneous representations.[15]
The statutory definition of the rule attempts to overcome the previous difficulties in the common law with regard to determining whether implied assertions made out of court fitted within the hearsay rule. The court must determine whether the implied assertion was one which was intended by the maker. If the assertion was intended, then the risk of intentional deception exists and therefore it should be excluded under the rule.[16] Unintended assertions on the other hand do not carry the same risk of intentional deception and are therefore not caught by the rule. The ALRC considered that a similar definition was said to be operating effectively in United States jurisdictions.[17]

The Act then provides for a number of exemptions to the hearsay rule. Section 60 exempts the hearsay rule where evidence of an assertion is

[12] *Evidence Act 1995* (NSW) s 59(1).

[13] Above n 2, [661] - [675].

[14] *Evidence Act 1995* (NSW) Dictionary Pt 1.

[15] *Evidence Act 1995* (NSW) s61.

[16] But see *R v Hannes* [2000] NSWCCA 503, [354]–[355].

[17] Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper No 69 (2005) [7.28]–[7.38].

admitted for a non-hearsay purpose. This is a significant departure from the common law position and is discussed in detail below. The Act also provides in a systematic fashion for many of the previous exceptions applicable at common law. It rationalises them and brings them within broad overarching exceptions. Divisions 2 and 3 of Part 3.2 of the Act define the remaining exceptions to the rule. Division 2 limits exceptions to those assertions made by a declarant relying on his or her personal knowledge, in other words, first hand hearsay. These exceptions are subdivided into civil proceedings and criminal proceedings and further divided according to whether or not the maker of the representation is available.[18] Division 3 defines exceptions to the rule that are second hand hearsay. This includes business records, labels, telecommunications, contemporaneous statements about a person's health, reputations as to relationships and age, reputation as to public or general rights and interlocutory proceedings.[19] The separate and distinct provisions for second hand and more remote hearsay reflects the ALRC's view concerning the significant unreliability of such evidence.[20] This view is supported by psychological research. The ALRC stated:

> second hand hearsay is generally so unreliable that it should be inadmissible except where some guarantees of reliability can be shown together with the need for its admissibility.[21]
>
> Selected exceptions require reasonable notice of the intention to adduce hearsay to be provided to the opposing party.[22]

Finally, the hearsay rule provisions are supplemented by the discretionary provisions in Part 3.11 of the Act. These allow exclusion of, or limits to be placed on, the use of hearsay evidence by the judge when the evidence is considered to have a significant prejudicial effect. Note that the ALRC considered unreliability to be a potential cause of prejudice which could justify exercise of the discretionary provisions.[23] Finally, the framework of the Act provides also that where hearsay evidence is admissible and an exclusionary discretion not applied, the inclusion of the evidence in a jury trial may require a judicial warning to be given under s165 of the Act.[24]

[18] *Evidence Act 1995* (NSW) ss 62-68.

[19] *Evidence Act 1995* (NSW) ss 69-75.

[20] Above n 2, vol 2 [678].

[21] Australian Law Reform Commission, *Evidence*, Report No 38 (1987), [139].

[22] *Evidence Act 1995* (NSW) s67.

[23] Above n 21, [146].

[24] See eg McHugh J in *Papakosmas v The Queen* (1999) 164 ALR 548 [85]-[87].

Gobbledegook and Section 60 of the Uniform Evidence Act

Section 60 of the Uniform Evidence Act

At common law, evidence admitted for a non-hearsay purpose, for example to demonstrate the subjective mental state of the witness,[25] or to show a prior consistent representation or complaint,[26] is inadmissible to prove the truth of the assertion. This distinction can cause significant difficulty.[27] Section 60 of the *Uniform Evidence Act* attempts to resolve these difficulties with a provision that cuts across an otherwise carefully constructed statutory scheme of 'discriminately drafted hearsay exceptions'.[28] Section 60 reflects a significant change from the traditional hearsay doctrine and is acknowledged as a controversial exception to the hearsay rule.[29]

Section 60 states:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation. [30]

In other words, s 60 allows representations, once admitted for another relevant purpose, to be used as evidence of the truth of the assertion they contain. For example, the history given to a doctor by a patient used as the basis of that expert's opinion, may also be admitted for the truth of its contents.[31] Similarly, prior consistent statements lead to rebut allegations of recent invention may be admitted as evidence of their truth.[32] The admission of such hearsay evidence need not meet the requirements of Division 2 or Division 3 exceptions. Importantly, it was the intent of the

[25] *Subramaniam v Public Prosecutor* [1956] 1 WLR 965,for example to show the declarant was acting under duress.

[26] *Kilby v The Queen* (1973) 129 CLR 460, [6]. Application for special leave refused, as per the trial judge '[I]t is not evidence of any facts, it is only evidence that her conduct was consistent with that of a woman who had been raped'.

[27] See eg, *Walton v The Queen* (1989) 84 ALR 59.

[28] LexisNexis Australia, *Cross on Evidence*, vol 1, [35440] <www.lexisnexis.com.au> at 8 July 2006.

[29] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005), [7.66] - [7.67].

[30] *Evidence Act 1995* (NSW) s 60.

[31] Above n 4, [35440].

[32] Ibid.

ALRC that s 60 stand outside the first hand hearsay exceptions and therefore not be limited in its application to only first hand hearsay.
The ALRC's justification for such a wide departure from the common law consists of three strands. First they considered the provision simplified the operation of the law and eliminated areas of so-called 'schizophrenia' or 'gobbledegook' in the existing law.[33] The change would avoid the need for courts to draw unrealistic distinctions with regard to the admission of hearsay evidence. and would overcome the problem of the jury engaging in 'mental gymnastics'[34] when using such evidence. The provision also obviates the need for a multiplicity of other complicated exceptions dealing with particular situations.

Secondly, as mentioned above, the ALRC combines the test of relevance with the use of the discretions in Part 3.11 and the judicial warning requirement in s165 to cure concerns regarding the admission of unreliable or prejudicial evidence.

Finally, the ALRC considered the section would operate primarily on either hearsay evidence led to either support the factual basis of an expert's opinion or as evidence of a prior consistent or inconsistent statement. In both cases the ALRC reasoned that the evidence would still be subject to judicial controls to ensure reliability. For example, prior consistent statements will be tendered only in response to an attack on credibility where 'parties would have no reason to expect that there should be any advantage in creating written statements for the trial'.[35]

Four Cases Interpreting Section 60

In *Uniform Evidence Act* jurisdictions, s 60 has been considered and applied in numerous cases since its enactment. Four key cases are singled out here to highlight how the section has been interpreted and applied.

R v Singh-Bal

In *R v Singh-Bal*,[36] the treatment of prior consistent statements under the *Uniform Evidence Act* was considered. Two police officers gave evidence of a confession. The making of this confession was disputed. The alleged confession had not been documented in the officers' notebooks and not mentioned in any of the officers' statements. The defendant alleged that the evidence was recently invented. In response, further evidence was

[33] Above n 21, [144].
[34] Ibid.
[35] Above n 2, vol 1 [685].
[36] *R v Singh-Bal* (1997) 92 A Crim R 397.

lead from a third police officer who stated that both other officers had told him about the confession soon after it had been made. This evidence was admitted pursuant to s 108(2) to re-establish credibility and rebut the allegation of fabrication.[37]

On appeal, Hunt CJ confirmed that s 60 allowed the evidence of the third police officer to be used for the truth of its contents that is, the truth of the confession. In this case however, there were reasonable grounds to infer that the evidence may not be reliable. It is also of note that the evidence was second hand hearsay by virtue of s 82. The trial judge had provided a direction to the jury pursuant to s 136 that the evidence should not be used as evidence of the confession but only for the purposes of rebutting the suggestion of fabrication. That is, the trial judge determined that the evidence was of such a prejudicial nature that its use should be limited. There was no suggestion by Hunt CJ on appeal that this decision was not an appropriate exercise of discretion available to the trial judge.
The approach in this case would appear to be consistent with the way the ALRC intended s 60 to operate and to interrelate with the discretions in the *Uniform Evidence Act* to exclude prejudicial or misleading evidence.

Lee v R

The most significant decision regarding s 60 is that of *Lee v R*[38] where the High Court gave specific consideration to s 60 and its application to out of court statements including second hand and more remote hearsay.[39] The case involved the admissibility of an out of court statement made to police by a witness named Calin, who stated that he saw the appellant Lee walking quickly in an area near the crime scene and heard him say:

> Leave me alone, cause I'm running because I fired two shots ... I did a job and the other guy was with me bailed out.[40]

Calin did not admit repeating this statement when questioned in court. The NSW Court of Criminal Appeal upheld the admission of Calin's reporting to police of Lee's admission as a prior inconsistent statement relevant to Calin's credibility. The Court held that once relevant and admitted for its credibility purpose, Calin's statement could be used as

[37] Note the approach in *R v Singh-Bal* preceded the High Courts approach in *Lee* and *Adam* described below.

[38] *Lee v The Queen* (1998) 157 ALR 394.

[39] J Anderson, JB Hunter, N Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts*, (2002) [60.05].

[40] *Lee v The Queen* (1998) 157 ALR 394, [17].

evidence of the truth of its contents under s 60, that is to prove that Lee had confessed to Calin.

In a carefully reasoned judgement the High Court rejected the above Court of Criminal Appeal's analysis. Their argument was based upon three factors. First the need to look for the intent of the maker of the hearsay statement, secondly the need for the hearsay purpose to be relevant to a fact in issue and finally concerns about the admission of second hand hearsay under s 60.

The High Court said that in his statement to police Calin had intended to assert both what he had *done or seen* and what he had *said or heard.* Relevant in this case was that he said he heard the appellant state 'I did a job'. However, he did not intend to assert that the appellant had actually committed the crime as he had no way of knowing this. He was merely reporting what he had heard. The High Court stated:

> s 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert.[41]

In addition, whilst the witness in his prior statement may have been indirectly asserting his belief that the appellant had committed the crime, the belief of the witness was not relevant to the facts in issue. The only relevance of the witness's prior statement was to his credibility.
Finally, the High Court observed that the admission by the appellant Lee - relayed via Calin's out of court statement - was second hand hearsay and therefore inherently unreliable. The Court also reasoned that there was nothing in the Act that expressly or by necessary intendment allowed the admission of such unreliable evidence:

> There is no basis ... for concluding that s 60 was intended to provide a gateway for the proof of any form of hearsay, however remote.[42]

As a result of this analysis, the High Court concluded that the preferable approach would be for the trial judge to exclude the evidence by applying s 137.[43] Alternatively, the trial judge could give a direction to the jury under s 136 that Calin's report of Lee's assertions could only to be used

[41] *Lee v The Queen* (1998) 157 ALR 394, [29].
[42] Ibid [40].
[43] Ibid [41].

by the jury for the specific purpose of assessing Calin's credibility.[44] Both of the approaches suggested by the High Court are based upon the use of discretions under Part 3.11 because of the unreliable and therefore prejudicial nature of the evidence. On the issue of the broader implications of the decision the Court stated their conclusion was:

> consistent with the 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.[45]

R v Adam

In *R v Adam*, the NSW Court of Criminal Appeal and subsequently the High Court used s 60 to provide a ground for the use of credibility evidence also for its hearsay purpose even though the evidence was not initially admissible for that hearsay purpose.[46] The matter concerned a witness, Sako who claimed to be an eyewitness to the assault and subsequent murder of an off-duty police officer. Sako provided statements to the police of the appellant's conduct at the crime scene. However, at trial he would did not give evidence of this observed conduct. Evidence of his prior inconsistent statement was led as being relevant to his credibility. It was also relevant, though not directly admissible, as hearsay evidence of the appellant's conduct. The admissibility for credibility was therefore allowed. This multiple relevance permitted admission of Sako's statement to the police as a prior inconsistent statement and also by application of s 60 for its hearsay purpose, that is, as evidence of the appellant's conduct.[47]

In *Adam,* the evidence was first hand hearsay being a statement the witness previously made regarding conduct of the appellant he had directly observed. In terms of the analysis applied in *Lee*, Sako in *Adam* intended to assert what he had *done or seen*. This was direct evidence of a fact in issue, namely, the appellant's conduct, and it was relevant for its hearsay purpose. In other words it was relevant for its first hand hearsay purpose, and no direction to limit the use if the evidence was required. This is in contrast to *Lee* where Calin's assertion was relevant only as second hand hearsay evidence and the Court determined the evidence

[44] Ibid [41].

[45] Ibid [31].

[46] *R v Adam* [1999] NSWCCA 197; *Adam v The Queen* [2001] HCA 57.

[47] *Adam v The Queen* [2001] HCA 57 [39].

should have been excluded or limited in its use as a result of concerns about its reliability.

R v Rymer

R v Rymer,[48] a NSW Criminal Court of Appeal case, concerned a denial made by the appellant in his initial statement to the police upon arrest for child sexual offences. Grove J, with Barr and Latham JJ in agreement, stated s 60 could be used by the defence to admit out of court denials in criminal cases even where the maker, that is the accused, was not called to give evidence. In regard to concerns that an accused might 'bring forward a contrived hearsay case'[49], Grove J relied upon the discretions provided in the *Uniform Evidence Act* to 'inhibit abuse'[50] and exclude such evidence.

Australian Law Reform Commission's 2005 Review of Section 60

In its 2005 review of the *Uniform Evidence Act*, the ALRC commented on the judicial interpretations given to s 60 during the first 10 years of the Act's operation. As a result the ALRC recommended reform of s 60 to overrule the reasoning in *Lee v R* and make it explicit that the admission of second hand or more remote hearsay was not excluded under s 60.[51] Specifically the ALRC proposed to add the following subsection to s 60:

> This section applies whether or not the evidence is of a previous representation that was made by a person who had personal knowledge of an asserted fact.[52]

This change confirms s 60 may be used to admit second hand hearsay evidence and is intended to overrule the decision in *Lee*. Similar wording has now been incorporated into proposed amendments to s 60 of the *Uniform Evidence Act.*[53] At the same time the ALRC also recommended that the Act be changed to prevent second hand or more remote hearsay being used as evidence of an admission in criminal proceedings. This change has also been incorporated into proposed amendments to the Act.[54]

[48] *R v Patrick Wayne Rymer*, [2005] NSWCCA 310.

[49] Ibid [58].

[50] Ibid [60].

[51] Above note 29, [7.105]–[7.106].

[52] Ibid appendix 1.

[53] s 60 Model Uniform Evidence Bill 2007 (NSW) based on the *Evidence Act 1995* (NSW) as amended by the model Evidence Amendment Bill 2007 (NSW).

[54] s 60 Model Uniform Evidence Bill 2007 (NSW).

Unfortunately, the ALRC's recommendation to amend s 60 in this way fails to consider the true rationale for the High Court's interpretation of s 60 and adds unnecessary and artificial complexity to the application of the hearsay rule and its exclusions within the *Uniform Evidence Act.*

The ALRC described the High Court's reasoning in *Lee* as follows: section 60 only operates on representations excluded by s 59, which in turn only operates on facts intended to be represented by the maker, therefore s 60 does not apply to evidence the maker did not intend to assert. The ALRC considered that there were doubts regarding the precise principle applied in *Lee* and that the Court's formulation created uncertainty about the scope of s 60. The Commission further considered the formulation to be problematic as it could follow that if Calin did not intend to assert the truth of Lee's confession, logically s 59 should not apply at all.[55] Finally, the ALRC suggested the High Court was wrong to link the concerns regarding second hand hearsay to the proposal which became s 60.[56]

The ALRC's analysis oversimplifies the decision and fails to fully account for all of the High Court's reasoning. Whilst it is acknowledged that some of the High Court's reasoning may be criticised, the fundamental basis of the decision was acknowledgement of the dangers of remote hearsay evidence and is therefore an appropriate application of the legislative intent of the *Uniform Evidence Act.*

The rationale for the Court's decision in *Lee* was based on determining what was intended to be asserted by Calin in his first hand hearsay statement and the subsequent *relevance* of that assertion. Where the intended assertion is not directly relevant to a fact in issue, the High Court determined that the evidence should be excluded or limited in its use to prevent it being used by the jury in an unfair way. This is an important point to note. The High Court did not determine that s 60 would not apply to second hand hearsay as a matter of fundamental principle.

Instead, the Court determined that Calin's first hand hearsay statement to the police had only intended to assert the fact that he had heard Lee make an out of court confession. Reporting this confession constituted second hand hearsay and Calin certainly could not attest to its veracity.

[55] Above n 29, [7.90]–[7.94].
[56] Above n 29, [7.95]–[7.97].

Therefore, admitting the confession was potentially prejudicial because there was a risk the jury may have used Calin's report of the alleged confession as evidence of its truth. The Court therefore concluded that the admission should have been excluded as per s 137.[57] This is an appropriate application of Justice McHugh's observations in *Papakosmas v R*. That is, s 137 should be used to exclude evidence where there is a 'real risk the evidence will be misused by the jury in some unfair way' or where the tribunal of fact may use the evidence in a manner 'logically unconnected with the issues in the case'.[58]

Obviously the practical effect of the decision in *Lee* is that second hand hearsay is typically excluded from s 60, at least in the circumstances of *Lee* where it is being admitted as evidence of a prior confession to a criminal act. However, this approach is not a radical departure from the approach in other post *Uniform Evidence Act* cases where the reliability of the hearsay statements has been the critical element relevant to their admission or exclusion. This also means that second hand hearsay will almost always be considered too unreliable and therefore potentially prejudicial if allowed to be admitted for its truth. A good example is *R v Singh-Bal*[59] discussed above where there was little debate limiting the use of second hand hearsay due to similar considerations regarding its prejudicial nature. This is contrasted with *R v Rymer*[60] where the court was comfortable to admit first hand hearsay under s 60 with the proviso that the discretions could be used to inhibit abuse regarding the admission of such evidence. The approach by the High Court in *Lee,* whilst based on a more analytical view of the out of court admissions, is still consistent with this approach whereby admission under s 60 interrelates with the use of the discretions to exclude potentially prejudicial evidence. This is the approach the ALRC should support.

The ALRC argued that another possible outcome of the High Court's formulation was that s 59 would now not apply to Calin's out of court assertion regarding Lee's confession. This was because it was now an 'unintended' assertion about the commission of the offence. This is flawed reasoning. The High Court was distinguishing Calin's intended and unintended assertions as a means to decide the relevance of Calin's own first hand hearsay statement. However, the statement by the

[57] *Lee v The Queen* (1998) 157 ALR 394 [41].

[58] *Papakosmas v The Queen* (1999) 164 ALR 548 [91]–[92].

[59] *R v Singh-Bal* (1997) 92 A Crim R 397.

[60] *R v Patrick Wayne Rymer*, [2005] NSWCCA 310.

appellant Lee remains an intended assertion if attempted to be admitted for its truth as second hand hearsay. It therefore still falls under s 59 and the hearsay rule provisions. As per the Court:

> The fact that the statement or the conduct concerned might unintendedly convey some assertion is not to the point. The inquiry is about what the person who made the representation intended to assert by it.[61]

With regard to second hand hearsay evidence, the ALRC suggested the High Court was mistaken when they linked the concerns regarding second hand hearsay to the proposal which became s 60. Instead the ALRC stated the main reason for s 60 was to avoid the need for courts to be asked to draw unrealistic distinctions.[62] Whilst this may be true, the ALRC has expressed consistent concerns regarding the unreliability of second hand hearsay evidence. The ALRC stated in its earlier report that second hand hearsay was generally of 'no value' and it was 'impossible to assess its weight'.[63] The entire structure of Part 3.2 of the Act is based upon an acknowledgement of this fact. *Lee* was a case where the reliability of a second hand hearsay statement was considered. The High Court's approach was founded upon the lack of reliability of such evidence and was an entirely appropriate course to take. It was also consistent with the ALRC's own conclusions about this type of evidence as well as a line of dicta immediately pre-dating the *Evidence Act* whereby the common law in Australia was moving towards a reliability based approach to hearsay evidence.[64]

In the same report criticising the dicta from *Lee*, the ALRC recommends that s 82 of the Act be amended so that in criminal trials, admissions against the accused which are not first hand be excluded from the operation of s 60.[65] This recommendation has been incorporated into a proposed amendment to s 60 of the *Uniform Evidence Act* which excludes admissions in criminal proceedings from the operation of s 60.[66] The reason for this change was to protect defendants from the dangers of

[61] *Lee v The Queen* (1998) 157 ALR 394 [22].

[62] Above n 29, [7.95]–[7.97].

[63] Above n 2, [678].

[64] A Palmer, 'The Reliability-Based Approach to Hearsay' (1995) 17 *Sydney Law Review*, 522.

[65] Above n 29, [10.150]–[10.159].

[66] s 60 Model Uniform Evidence Bill 2007 (NSW) based on the *Evidence Act 1995* (NSW) as amended by the Model Evidence Amendment Bill 2007 (NSW).

admitting remote hearsay under s 60.[67] It is not consistent that the ALRC criticise the rationale for a decision by the High Court made well within an existing statutory exclusionary discretion, and then proceed to recommend changes to the Act based on entirely the same rationale. In addition, it would appear this amendment is now necessary because of the change made to s 60 to overrule *Lee* and allow s 60 to apply to second hand and more remote hearsay. These amendments incrementally add to the complexity of the hearsay rule and its exclusions. However, this complexity is what the ALRC was trying to rectify when it reformed the hearsay rule within the *Uniform Evidence Act.*

It is acknowledged that the High Court's somewhat analytical approach in *Lee* to justify the exclusion of Calin's statement does create potential problems. For example, it may be argued that, according to the High Court's analysis, if Calin's statement was not relevant to the truth of Lee's confession then s 60 in fact has no application. Upon this view, it should have been excluded by the credibility rule in s 102, unless s 103 applied and the use of s 137 would either not apply (if already excluded under s 102) or be very unlikely to apply (if found to have substantial probative value under s 103). However, because the court did apply s 60 to Calin's statement, it must have had some relevance to the facts in issue being the fact of Lee's confession. This potentially contradicts the High Court's conclusion that the statement was not relevant for this purpose. Nevertheless, it still follows because Calin could not have known the veracity of Lee's confession and because Calin's statement itself was hearsay thus making Lee's confession second hand hearsay, it is entirely consistent with the *Uniform Evidence Act* not to allow the admission of Calin's statement on the basis of its potential prejudicial effect.

Another possible criticism of the High Court's reasoning is that Lee's confession was intended when made by Lee and therefore should have been admitted for its truth along with Calin's statement under s 60. However, looking behind the High Court's reasoning it is clear that they were unwilling to extend s 60 this far because of the dangers of admitting such remote hearsay evidence for the purpose of proving its truth. The High Court admitted Calin's statement for its hearsay purpose in accordance with s 60. This is because Calin's statement was relevant to his credibility and as per s 60 is therefore admissible for the truth of its intended assertion. However, using the rationale that Calin could not know the veracity of Lee's confession, the High Court provided some

[67] Above n 29, [7.144].

substance to the argument that to admit Lee's statement for its truth under s 60 would be highly prejudicial. That is, to admit an out of court statement of first hand hearsay so as to prove the truth of a statement of second hand hearsay - the truth of which the maker of the first hand hearsay statement did not intend to assert - is not how s 60 should operate. Fundamentally, this rationale is based upon the well established dangers of admitting remote hearsay evidence for the truth of its content.

It is worth highlighting that the distinction between intended and unintended assertions for the purposes of s 60 established by the High Court in *Lee* was limited to statements made out of court. That is, statements that are themselves hearsay. One problem with the High Court's reasoning on this point is that it could be suggested that the rationale for the distinction between intended and unintended assertions should apply to all evidence of out of court statements. Following this logic through, even admissions that are first hand hearsay may be excluded from s 60 if the person reporting the out of court admission is not also able to attest to its truth. The resolution to this problem is to recognise that implicit in the High Court's reasoning is the unreliability of second hand and more remote hearsay. It is consistent with this approach that the High Court limited the distinction to the intention of statements made out of court. The distinction should not apply to evidence given in court of a first hand hearsay admission and potentially prevent s 60 being used to admit that evidence. This approach is justified because first hand hearsay is generally less unreliable than second hand or more remote hearsay. However, the use by the High Court of the distinction between intended and unintended assertions in out of court statements, whilst providing substance to the argument to exclude the application of s 60 to Lee's second hand hearsay statement, also adds an additional layer of complexity to the analysis of the hearsay rule. Whilst it is a valid analysis, it tends to overshadow the fundamental reason for the decision being based upon the reliability of the hearsay evidence under consideration and the use of the discretions to exclude that evidence where appropriate.

Reliability Based Approach to Hearsay and Section 60

The rationale for the development of the hearsay rule was to protect the interests of the party against whom it was admitted. This incorporates protections in the form of the oath, testing of evidence via cross examination and avoiding reliance on the witness's credulity.[68] The

[68] See, eg, E M Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept.' (1948) 62(2) *Harvard Law Review*, 177.

unreliable nature of hearsay evidence is based upon the inability of the court to assess the maker of the representation as to their sincerity, perception and memory.[69] These difficulties are magnified for second hand and more remote hearsay which therefore justifies the application of even greater safeguards where such evidence is concerned. However, the approach by the ALRC to the reform of s 60 is to give primacy to preventing the jury being asked to make what they consider unrealistic distinctions. The assumption is therefore that a jury will be unable to make certain distinctions even in the light of adequate judicial direction. The efficacy of judicial directions to the jury has never been a reason for the existence of the hearsay rule.[70] It should therefore not take primacy over fundamental protections to ensure the exclusion of unreliable evidence. As demonstrated in many cases, relying on provisions such as s 136 to ask that juries draw certain distinctions is at times appropriate.

The Act confirms that as a general rule, second hand hearsay is not sufficiently reliable to justify its admission into evidence. Specific exceptions apply under the Act (and did so prior to the Act). However, if the same evidence is also relevant for another purpose, it is entirely appropriate that at times it may be admitted for such a purpose and the jury advised to limit its use to this purpose. If the court feels this is unrealistic or prejudicial in a particular case, the evidence may be excluded as an alternative. This is the fundamental dicta of *Lee* and is likely to continue to apply notwithstanding the proposed changes to s 60 recommended by the ALRC. Unfortunately, by attempting to overrule the dicta in *Lee*, the changes to the *Uniform Evidence Act* are only likely to further complicate the interpretation of s 60. This is also likely to inhibit what was developing as an entirely appropriate reliability based approach to the hearsay rule.

Conclusion

The hearsay rule is one of the most complex and debated rules of evidence law. Maintenance of the rule is justified because of the inherent unreliability of hearsay evidence which is primarily based on the inability to properly test the evidence through cross examination. Exceptions to the hearsay rule are justified where reliability can be established and particularly where the availability of alternative evidence is limited.

[69] See, eg, LexisNexis Australia, *Cross on Evidence*, vol 1, [31001] <www.lexisnexis.com.au> at 8 July 2006; C C Wheaton, 'What is Hearsay?' (1961) 46 *Iowa Law Review*, 222.

[70] See, eg, C C Wheaton, 'What is Hearsay?' (1961) 46 *Iowa Law Review*, 220.

The *Uniform Evidence Act* has done a masterful job of revisiting and modernising the complex rules regarding the admissibility of hearsay evidence. Section 60 of the Act has been a particularly controversial part of the legislation as it allows a window for admission of hearsay evidence outside the carefully constructed and appropriately justified exceptions throughout the rest of the Act. The primary justification for s 60 was to avoid juries being asked to make unrealistic distinctions in the use of hearsay evidence.

Courts have responded to s 60 by use of the discretions to exclude or limit the use of hearsay evidence where the evidence is considered unreliable or its admission prejudicial. *Lee* should be read as an exclusion of hearsay evidence based upon the well-established factors of relevance, reliability and the use of the discretions to avoid prejudice. This approach is consistent both with the provisions of the original *Uniform Evidence Act* as well as prior judicial trends regarding a more reliability based approach to the admission of hearsay evidence. These are sound principles upon which to assess the admissibility of hearsay evidence under s 60. The ALRC's proposed amendments to s 60 to overrule the decision in *Lee* are unnecessary and likely to only further complicate the interpretation of the hearsay rule under the *Uniform Evidence Act.*