

NAB v Rusu

National Australia Bank Ltd v Rusu (1999) 47 NSWLR 309
Capital Securities XV Pty Ltd v Calleja [2018] NSWCA 26

[NB: Rusu was overturned on 30 September 2020 in [Gregg v R \[2020\] NSWCCA 245](#). This paper is provided for historical purposes only]

The ratio in NAB v Rusu is often cited by lawyers in an attempt to exclude documents from evidence. These often fail only because the advocate doesn't understand the underlying principles. This article aims to assist practitioners appearing in the Local Court of NSW.

The Principles

In his judgment in NAB v Rusu, Bryson J laid down two very simple principles:

1. A judge must object to evidence on behalf of an unrepresented litigant, and
2. If documents are tendered into evidence, their provenance must be proved by 'extrinsic evidence'.

The Facts of Rusu

An employee embezzled money from NAB and this money was deposited into the account of Ms Rusu at Advance Bank. NAB sought to recover this money from Ms Rusu in the Supreme Court of NSW.

NAB sought to tender statements for Ms Rusu's account at Advance Bank to show the money had been deposited into her account. Unfortunately, NAB did not have a witness from Advance Bank through whom to tender the statements. NAB sought to tender the statements from the bar table and asked the court to accept that they were what they purported to be on their face.

As Ms Rusu was unrepresented at the hearing, Bryson J objected to the tender on her behalf (the first principle). Bryson J held that he could not accept the documents into evidence unless they were authenticated by some 'extrinsic evidence' (the second principle). As such, the statements were rejected and NAB failed to recover the money.

What should NAB have done?

NAB should have obtained an affidavit from someone at Advance bank to say:

1. I work at Advance Bank,
2. I have custody of the business records,
3. I received a subpoena ordering production of certain statements, and
4. I have attached a true copy of those statements to this affidavit.

This would be extrinsic evidence that served to 'authenticate' the documents. The defendant would then have an opportunity to cross-examine the author to see if they met the business records exception to the hearsay rule in s69 Evidence Act.

Application

Let's apply the principle to a hypothetical assault matter in the Local Court. Let's say the police attempt to tender CCTV of the incident. The DVD falls within the definition of a document in the Evidence Act. As such, the principle in *NAB v Rusu* requires that the DVD be authenticated by 'extrinsic evidence'. So, the police would need a statement from the operator of the CCTV system to authenticate the DVD.

Without this, the police are offering a document without any explanation as to what it is. They are asking the court to accept that it is what it purports to be on its face and denying the defence the opportunity to cross-examine the author.

Why Is This Controversial?

In 2018, the Court of Appeal considered a case very similar to *Rusu* and allowed the tender. In *Capital Securities*,¹ the plaintiff subpoenaed records from a non-bank lender and sought to tender them from the bar table. The trial judge rejected the tender on the basis that the records were incomplete, inaccurate, not contemporaneous and the author was not identified. Her Honour relied on *Rusu* and the discretion in s135 Evidence Act.

The Court of Appeal disagreed and allowed the tender. Leeming J (Basten & Gleeson agreeing) found that these deficiencies can be overcome by having regard to other evidence and by drawing inferences from the face of the document which is permissible under s183 Evidence Act. The court referred at [101] to two judgments in the Federal Court^{2 3} which disapproved *Rusu* but then noted another judgment of the NSW Court of Appeal that approved it.⁴

The upshot is that the Court of Appeal acknowledged the controversy surrounding *Rusu* but conspicuously failed to overturn it. The Federal Court judgments are persuasive precedents, but they are not binding on state courts because they are in a different court hierarchy. Whereas, *Daw v Toyworld* is binding on the state courts of NSW. So, *Rusu* is still good law in NSW and will remain so until the Court of Appeal or High Court says otherwise.

I'm available every day if you have any interesting issues.

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¹ *Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja* [2018] NSWCA 26

² *Australian Competition and Consumer Commission v Air New Zealand (No 1)* (2012) 207 FCR 448; [2012] FCA 1355

³ *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181; [2015] FCA 342

⁴ *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25