

# NAB v Rusu

*National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309  
s57 Evidence Act (NSW) 1995

---

The ratio in *NAB v Rusu*<sup>1</sup> 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 by explaining the concept of authentication.

## 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 NAB v 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 tried to tender statements for Ms Rusu's account at Advance Bank to show the money had been deposited in her account. Unfortunately, NAB did not have a witness from Advance Bank through which 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 request for Ms Rusu's account 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.

---

<sup>1</sup> *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309

# Application

So lets apply the principle to a hypothetical assault matter in the Local Court. Lets 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 second 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 of 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?

Section 57 Evidence Act provides that where the relevance of particular evidence is initially unclear, it can be admitted provisionally and a ruling made as to its effect at the conclusion of the case.<sup>2</sup> Police will often try to tender the CCTV on this basis. The issue as to whether s57 permits the issue of a document's authenticity to be postponed until after its relevance has been determined has not yet been satisfactorily determined.

There are two problems with applying s57 to this scenario. The first is that it conflates the concept of authenticity with that of relevance. They are separate and distinct and relevance depends on authenticity. If the the document is not authentic, then it cannot be relevant. The police must first authenticate the document with 'extrinsic evidence', only then can they seek to show that it is relevance to a fact in issue.<sup>3</sup>

This was confirmed by the Court of Appeal in Trimcoll.<sup>4</sup> They held at [30] that:

*'the relevance of a document in the particular proceedings may depend on the identity of its author, when it was created and whence it was extracted, whereas its authenticity depended on whether the document is what it purports to be; there is no entirely clear dividing line between questions of authenticity and identity and each may provide a basis for admissibility'*.

The second problem is one of service. The police are required to serve their evidence on the accused 14 days before the hearing. Even if the police can obtain a statement to authenticate the document, they will need a two week adjournment to comply with the service requirements or else show some reason why the service requirements should be waived.

Chris Nowlan  
Barrister-at-Law  
Ph: (02) 9024 9533  
[chris@chrisnowlan.com](mailto:chris@chrisnowlan.com)

---

<sup>2</sup> Merrylands Bowling, Sporting and Recreation Club Ltd v P & H Property Services Pty Ltd [2001] NSWCA 358 at [35]

<sup>3</sup> National Australia Bank Ltd v Rusu (1999) 47 NSWLR 309 (SC) at [19] et seq

<sup>4</sup> Trimcoll Pty Ltd v Deputy Commissioner of Taxation[2007] NSWCA 307 at [30]