

Admissions / Real Evidence and Exclusion

What is an admission? (Dictionary)

- **admission** means a previous representation that is—
 - (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
 - (b) adverse to the person's interest in the outcome of the proceeding;
- This definition applies in both civil and criminal proceedings
- Note, the Crimes Act 1958 (Vic) continues to use the previous definitions, “confession” and “admission,” with admission being the same, but a confession being a full acknowledgement of responsibility. Under the UEA, a confession would be considered an admission.

How is an admission admissible? ss 81, 82

- 81 Hearsay and opinion rules—exception for admissions and related representations
- (1) The hearsay rule and the opinion rule do not apply to evidence of an admission.
- (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation—
- (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
- (b) to which it is reasonably necessary to refer in order to understand the admission.

- 82 Exclusion of evidence of admissions that is not first-hand
- Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless—
- (a) it is given by a person who saw, heard or otherwise perceived the admission being made; or
- (b) it is a document in which the admission is made.

- [Note s 83: admissions are only admissible against the admitter, not a co-accused or third party]

Problem solving

1. How is the statement / assertive conduct an admission? (how is it against interest, how does it represent a concession)?

[Here, collect your facts in anticipation of the following provisions; consider the admitter's vulnerabilities, consider the behaviour of the police or anyone else who has influenced the admission]:

2. Exclusion at law

- S 84: admissions influenced by violence and certain other conduct
- S 85: reliability

3. Exclusion in the exercise of judicial discretion

- S 90: unfairness
- S 138: improperly or illegally obtained evidence (nb this section also applies to real evidence)

Exclusion as a matter of law

The Evidence Act outlines a number of circumstances in which exclusions are inadmissible, in other words, the trial Judge must exclude and does not need to use a discretion to do so

1. s 84 – Exclusion of admissions influenced by violence and certain other conduct (all proceedings)
2. S 85 – Exclusion based upon unreliability (criminal proceedings)

Section 84 – violent and other similar conduct

- (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by—
 - (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
 - (b) a threat of conduct of that kind.
- (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

Notes

- Applies both to criminal and civil proceedings
- Not limited to police behaviour – would also apply to civilian misconduct
- The scope of ‘oppressive conduct’ is not limited to physical conduct, but can encompass mental and psychological pressure.
- Once a party raises the issue of violent, oppressive, inhuman or degrading conduct, the onus falls on the party seeking to tender the evidence to establish, on the balance of probabilities, that the admission and the making of the admission were not influenced by the proscribed conduct or threat.
- The maker of the alleged admission does not need to prove that violent, oppressive, inhuman or degrading conduct did influence the admission
- Once proscribed conduct or threats that may influence an admission or the making of an admission occur, the party tendering the admission must show that the conduct or threat did not influence the admission or the making of it.
- Focus is on police/other external behaviour, not the admitter’s circumstances

s 85 – Criminal proceedings: reliability of admissions by accused

- (1) This section applies only in a criminal proceeding and only to evidence of an admission made by an accused—
 - (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or
 - (b) as a result of an act of another person who was, and who the accused knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the accused should be brought or should be continued.
- (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
- (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account—
 - (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
 - (b) if the admission was made in response to questioning—
 - (i) the nature of the questions and the manner in which they were put; and
 - (ii) the nature of any threat, promise or other inducement made to the person questioned.

Notes

- Applies only to criminal proceedings
- Once the accused satisfies the evidentiary burden required to raise an issue under s85, the prosecution bears the onus of establishing, on the balance of probabilities, that the circumstances in which the admission were such as to make it unlikely that the truth of the admission was adversely affected
- The focus is very much on the admitter
- It will be relevant to consider the age, mental or physical condition, intellectual capacity, or state of sobriety, of the accused impaired his or her orientation, comprehension or recollection and hence the reliability or truthfulness of the accused's statements
- The expression 'the circumstances in which the admission was made' means the circumstances of and surrounding the making of the admissions, not the general circumstances of the events said to form part of the offence to which the admissions were relevant
- Ie, s85 is not concerned with whether the admission was made or whether it was truthful. Those are matters for the jury

Notes cont

- Section 85(3) specifies a number of matters the court must take into account as part of the circumstances, including characteristics of the accused and, if the admission was made in response to questioning, the nature of the questions, the manner of questioning and the nature of any threat, promise or inducement offered to the accused.
- For the purpose of s85(2), it is not necessary to show that the circumstances involved any misconduct on the part of investigating officials. The section focuses on circumstances in existence at the time of questioning by an investigating official, as well as anything done prior to questioning by a person capable of influencing the decision to commence or continue a prosecution (*R v Mclaughlan* [2008] ACTSC 49; *R v Esposito* (1998) 45 NSWLR 442).
- The court will also consider any personal or psychological vulnerabilities which affect the accused's truthfulness

Exclusion in the exercise of discretion

Further and separately to exclusion at law, the Evidence Act outlines a number of circumstances in which discretionary exclusions are available

(Note you would draw from the same matrix of circumstances that informed your exclusionary discussion under ss 84 and 85)

1. s 90 – Fairness to the accused (criminal proceedings)
2. S 138 – Admissions and real evidence that has been improperly or unlawfully obtained (criminal proceedings)

S 90 - Fairness

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if—

- (a) the evidence is adduced by the prosecution; and
- (b) having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.

Notes

- Applies only in criminal proceedings
- The onus is on the accused to demonstrate that it would be unfair to admit evidence of an admission
- The purpose of s90 is to exclude evidence if its use would be unfair to the accused
- Focus is therefore primarily the accused, but is also influenced by police or other outside conduct
- 'Unfair' is not defined and there is no guidance in the application of the discretion; for example, the discretion may include but is not limited to considerations of reliability and/or any infringement of the rights and privileges of the accused (ALRC Report 102 at [10.137]-[10.143])

Notes cont

- Odgers notes that, given the elusiveness of the s90 concept of fairness, detailed guidance relevant to the exercise of this discretion is difficult (Odgers, Uniform Evidence Law in Victoria (2010) at [1.3.5770]). However, he states, it is 'clear' that the following factors ought to be considered:
 - the nature and extent of any infringement on the accused's rights and privileges;
 - the impact of any such infringement on the accused;
 - any unlawfulness or impropriety relevant to the s138 discretion;
 - misrepresentation/trickery ought to be considered but is not determinative;
 - misapprehension of circumstances by an accused ought to be considered but is not determinative;
 - circumstances which make the admission unreliable but do not enliven s84 (including as between unreliability of evidence of an admission and unreliability of an admission - for instance where language difficulties throw doubt upon whether an admission was made at all);
 - mental incapacity of the accused

S 138 – Improperly or unlawfully obtained evidence

(1) Evidence that was obtained—

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law—

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—

- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

S 138 cont

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Notes

- The section provides a procedure for resolving the fundamental dilemma between the public interest in admitting reliable evidence and the public interest in vindicating individual rights, deterring misconduct and maintaining the legitimacy of the judicial system
- As opposed to s90, which focuses on unfairness to the accused, s138 refers to the 'desirability' of admitting the evidence. Thus, policy considerations are relevant to the exercise of the section. There is no guidance as to the relative weight to be accorded to the factors relevant to exercising the discretion.
- The section applies to both evidence obtained improperly or in contravention of an Australian law ("use") and evidence obtained in consequence of an impropriety or of a contravention of an Australian law ("derivative use").

Notes cont

- Section 138 requires determining whether:
 1. the evidence sought to be adduced was, in fact, obtained improperly or illegally in the sense of s138(1)(a) or (b) – that is, whether the evidence was obtained by or in consequence of such contravention or impropriety; and, if so
 2. the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way the particular evidence was obtained, having regard to the considerations in s138(3) and any other relevant non-mandatory matters
- The onus is:
 1. initially on the party seeking to exclude the evidence to establish that it falls within the terms of s138;
 2. then, if that onus is met, the party seeking admission must persuade the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the circumstances in which it was obtained
- See s 139 for one example of evidence which has been improperly obtained

S 139 – cautioning

- (1) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—
 - (a) the person was under arrest for an offence at the time; and
 - (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and
 - (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
- (2) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—
 - (a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and
 - (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and
 - (c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
- (3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.