

## **Admissibility – Discretionary exclusions and limits on use**

### Probative value

Evidence is to be regarded as truthful and reliable: *IMM*

BUT identification evidence may be of low probative value because of the circumstances of observation or the circumstances in which identification is made: *Dickman*

-Assessing the probative value of circumstantial evidence: Just because an alternative inference is more plausible does not mean circumstantial evidence is not probative: *Sood* cf *XY*. Trial judge cannot have regard to competing explanations: *Sood* [cash receipts found in doctor's bins].

*Probative value must always be compared with unfair prejudice: Sood (Latham J)*

### Unfair prejudice

Means damage to the accused's case in some unacceptable way, by provoking some irrational, emotional response, or giving evidence more weight than it should have: ALRC Report No. 26; *Ainsworth*.

### *Not unfair prejudice*

-Because it makes it more likely that the accused will be convicted: *Papakosmas* (McHugh J)

-Generally, procedural disadvantages: *Papakosmas* (McHugh J)

-Inability to cross-examine is not capable of itself causing unfair prejudice – trial judge/jury can take into account as to weight of the evidence that cross-examination did not occur: *Ordukaya*

### *May be unfair prejudice*

-Objection could be raised to the admissibility of evidence because counsel is prejudiced by not being able to effectively cross-examine due to lack of information regarding the basis of that evidence. BUT in *La Trobe* the FCA held that any prejudice so caused was not a basis for excluding the evidence under s135

### *Can any danger be reduced*

By editing the evidence, adjourning proceedings, or giving directions to the jury.

## **s135 general discretion to exclude [civil and criminal proceedings]**

Court has a discretion to exclude otherwise admissible evidence where its probative value [balancing exercise] is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing [where tribunal of fact is at risk of being misled by incorrectly assessing the weight of the evidence. ALRC, Report No 26], or
- (c) cause or result in undue waste of time.

The onus is on the party seeking exclusion (s142).

NOTE: *R v Taylor*— whilst s135 could operate to exclude evidence adduced by an accused in criminal proceedings, the circumstances in which this would occur are few.

## **s136 general discretion to limit use [civil and criminal proceedings]**

Court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing.

The onus is on the party seeking limitation of evidence (s142).

-> Operation of this section becomes relevant when an item of evidence has multiple relevance.

## **s137 Mandatory exclusion of prejudicial evidence [criminal proceedings]**

A court must exclude prosecution evidence (*Blick*) if its probative value is outweighed by the danger of unfair prejudice to the defendant.

-The unattractive nature of the subject matter is itself prejudicial: *Dann*

-There must be a real risk of unfairness, not just speculation: *Sood*

-The intelligence of the general community should not be underestimated *Aytugrul* (Heydon J) [though one description of evidence did sound worse no expert evidence was led that the exclusion percentage would subliminally effect the mind of a layman]

## Delay by complainant in sexual assault cases

### 165B Delay in prosecution/reporting

Delay (s165B(6)(a)) on its own is disregarded as a disadvantage to the accused (s165B(4)) (*TO v R* per Price J cf. *Kilby; Longman; Crofts*), save for in cases where the court decides the lapse in time is of sufficient magnitude (*Robbins*). The court may give a warning if satisfied that the accused has suffered a significant forensic disadvantage, and that this arises because of the delay:

s165B(2); *Robbins; PT*.

s165B(7) "significant forensic disadvantage" includes

- (a) the fact that any potential witnesses have died or are not able to be located,
- (b) the fact that any potential evidence has been lost or is otherwise unavailable.

-> must be more than speculation: *PT*

s165B(3): The judge need not comply with subsection (2) if there are good reasons for not doing so.

s165B(5): The judge can give a forensic disadvantage warning at their own discretion but it must be in line with s165B: *Lever* (Basten JA)

### Recent NSW Authority on delay

Basten JA in *Lever* (see also *Robbins*): delay can itself create a significant forensic disadvantage. A numerical figure is not given but in *Binns* Basten JA specified "a long passage of time." In *Greensill* the VSCA considered 30 years as significant on its own.

### **s294 Criminal Procedure Act: Absence or delay in sexual offence complaint**

- s294 applies if, on trial, evidence is given or a question is asked of W that tends to suggest:
  - (a) an absence of complaint by V in respect of the commission of the alleged offence; or
  - (b) delay by V in making any such complaint.
- 294(2): Judge
  - (a) must warn the jury that absence of complaint/delay in complaining does not necessarily indicate that the allegation is false; and
  - (b) must warn jury that there may be good reasons why V may hesitate in making, or may refrain from making, complaint; and
  - (c) must not warn jury that delay in complaining is relevant to V's credibility, unless there is 'sufficient evidence' to justify such a warning.

## **CPA s281 Electronically recorded admissions [criminal only + indictable offence]**

Section 281 applies to admissions made by an accused person who was or could reasonably have been suspected of having committed an offence (s281(1)(a)), in the course of official questioning (s281(1)(b)) relating to an indictable offence (s281(1)(c)).

Such an admission must be recorded to be admissible s281(2)(a)(i), unless s281(2)(a)(ii) or s281(2)(b) can be made out.

Evidence of an admission is not admissible unless:

- there is a tape recording available of the admission (s 281(2)(a)(i)), or
- of an interview about the making and terms of the admission, where the person states they made the admission (s 281(2)(a)(ii)), or
- the prosecution establishes that there was a reasonable excuse as to why a tape recording could not be made (s 281(2)(b)).

s281(4) defines a reasonable excuse to include a mechanical failure, or the refusal of a person being questioned to have the questioning electronically recorded (see *Em*), or the lack of availability of recording equipment.

### **Was the admission made in the course of official questioning?**

*Kelly v Queen*: Official questioning concluded when police advised 'we will conclude the interview at 9.17pm' and switched off the recording; accused made admission in car park

Majority: Strict approach – "we will conclude the interview" and switched off the recording, so that was the end of official questioning. Therefore police officers evidence was admissible, because it didn't need to be taped.

## **s90 Discretion to exclude admission [criminal only]**

Section 90 confers a discretion to exclude if, having regard to the circumstances surrounding the admission, it would be unfair to a defendant to use the evidence: *Zhang* (Simpson J)

-> The section's language is broad and general; the application of s90 is likely to be highly fact-specific: Gleeson CJ and Heydon J in *Em*

-> s90 is a final or 'safety net' provision to be considered after all other provisions containing more specific exclusions have been dealt with: Gummow and Hayne JJ in *Em*

*Swaffield* – Unfairness relates to an accused's right to fair trial, which may be jeopardised if a statement is obtained in circumstances affecting statement's reliability.

*Pavic* – s90 is not limited to admissions made to police officers

'Unfairness' factors to consider

- Serious and reckless infringement of accused's rights and privileges: *Foster* (threats, not allowed to leave, unlawful detention, no contact with lawyer, poor literacy, freedom not to speak impugned)
- Misrepresentation/trickery is considered, but not determinative: *Swaffield*; *Em*
- Misapprehension of circumstances is considered, but not determinative: *Swaffield*; *Em*

### **Confession made to undercover officer or informer**

*R v Swaffield* – excluded; admission to undercover officer, nothing illegal done but S's freedom to choose to speak to police was impugned; admission elicited by a lie and akin to interrogation

*Pavic v R* – not excluded; confession to friend who was informant, the accused engaged in normal conversation with a known friend, P volunteered the admission

*Em v The Queen* – not excluded; accused made admission to police during walk in the park, accused warned that he had right not to speak, but not that they were secretly recording him and that answers could be used in evidence.

Gleeson CJ, Heydon J: first, accused's misapprehension was not product of police act, but rather an instance of 'every day' situation where police take advantage of 'ignorance and stupidity'; second, police action was expressly authorised by *Listening Devices Act*.

*R v DRF* (Simpson JA): secretly recording a conversation is not unfair itself

### **Cross-reference s 90 and admissions generally with:**

s135/6 [civil and criminal]: general discretion to exclude/limit

s137 [criminal]: mandatory exclusion where probative value outweighed by prejudice

s138: improperly and illegally obtained evidence

s139: cautioning of persons