

1 CONTENTS

2	Discretionary and mandatory exclusions S 135-138.....	5
2.1	S 135 General discretion in civil and criminal to exclude evidence.....	5
2.2	S 136 General provision is to limit the use of evidence.....	6
2.3	S 137 A court must refuse evidence if its probative value would outweigh any prejudicial to the accused.....	6
2.4	S 138 Considers illegal evidence – improperly or illegally obtained.....	Error! Bookmark not defined.
2.5	ALRC-unfair prejudice.....	Error! Bookmark not defined.
2.6	MAJOR CASES TO CONSIDER.....	Error! Bookmark not defined.
2.7	Cases considering s 135.....	Error! Bookmark not defined.
2.7.1	**Ordukaya v Hicks – discretion of s135 where evidence has little/no weight.	Error! Bookmark not defined.
2.7.2	Ainsworth v Burden – unfairly prejudicial = evidence will be used wrongly by the jury.	Error! Bookmark not defined.
2.7.3	La Trobe Capital & Mortgage Corp v Hay Property Consultants.....	Error! Bookmark not defined.
2.8	Cases considering s 137.....	Error! Bookmark not defined.
2.8.1	**R v Lisoff- s137 “requires a real risk of unfair prejudice.....	Error! Bookmark not defined.
2.8.2	R v Dann -s137, unattractive evidence does not equal prejudicial.....	Error! Bookmark not defined.
2.8.3	**R v Shamouil –s137 weighing unfair prejudice is like comparing a weight of a rock with length of a line.	Error! Bookmark not defined.
2.8.4	R v Sood – s137, a case where it was not unfairly prejudicial.	Error! Bookmark not defined.
2.8.5	Aytugrul v The Queen.....	Error! Bookmark not defined.
2.9	Cases considering s 138.....	Error! Bookmark not defined.
2.9.1	DPP v Carr – improperly obtained evidence.....	Error! Bookmark not defined.
2.9.2	Robinson v Woolworths – discretion to exclude improperly obtained evidence...	Error! Bookmark not defined.
2.9.3	DPP v Marijancevic; DPP v Preece.....	Error! Bookmark not defined.
3	Admissions : crim s82, 82, 90/Civil s82, 84, 87.	Error! Bookmark not defined.
3.1	Major Cases to Consider.....	Error! Bookmark not defined.
3.1.1	**R v Zhang –s84, shows the onus is on Crown to establish the admission was made voluntarily to be admissible.....	Error! Bookmark not defined.
3.1.2	Kelly v R.....	Error! Bookmark not defined.

3.1.3	R v Zhang.....	Error! Bookmark not defined.
3.1.4	R v Moffat.....	Error! Bookmark not defined.
3.1.5	R v McLaughlan	Error! Bookmark not defined.
3.2	v Helmhout.....	Error! Bookmark not defined.
3.2.1	Error! Bookmark not defined.
3.3	Forster v The Queen.....	Error! Bookmark not defined.
3.3.1	Error! Bookmark not defined.
3.3.2	**R v Swaffield- unreliable evidence and voluntariness of admissions AND public policy exclusion grounds.....	Error! Bookmark not defined.
3.3.3	Error! Bookmark not defined.
3.3.4	**Pavic v The Queen-public policy and illegality	Error! Bookmark not defined.
3.3.5	**Em v The Queen- right to silence (rejected)	Error! Bookmark not defined.
3.4	Petty and Maiden v The Queen S89- admissions alleged to be inferred from silence... Error! Bookmark not defined.	
4	Tendency and Coincidence: s95-101	Error! Bookmark not defined.
4.1.1	Summary:.....	Error! Bookmark not defined.
4.2	Major Cases to Consider	Error! Bookmark not defined.
4.2.1	**Pfennig v The Queen – TEST: the Crown must satisfy that there was no rational view of the evidence consistent with an accused’s innocence. VERY DIFFERENCE FROM STATUTE! Error! Bookmark not defined.	
4.2.2	**R v Ellis: the Pfennig test NO LONGER APPLIES. NEW TEST: whether probative effect outweighs prejudicial effect.	Error! Bookmark not defined.
4.2.3	**AE v The Queen : possibility of concocted story.....	Error! Bookmark not defined.
4.2.4	**Phillips v The Queen : QLD case so it applied Pfennig test.	Error! Bookmark not defined.
4.2.5	**Jacara Pty Ltd v Perpetual Trustees : STARTING POINT! S97(1) must have significant probative value.	Error! Bookmark not defined.
5	Credibility (s101) and Character (s110, 111-crim)	Error! Bookmark not defined.
5.1	Credibility	Error! Bookmark not defined.
5.2	MAJOR CASES TO CONSIDER.....	Error! Bookmark not defined.
5.2.1	**Palmer v The Queen: s103 –final rule and bolster rule. Evidence relevant to fact/credit distinction.	Error! Bookmark not defined.
5.2.2	**Nicholls v The Queen- collateral evidence rule.....	Error! Bookmark not defined.
5.2.3	Error! Bookmark not defined.
5.2.4	**Adam v The Queen s102: EA altered due to this case Error! Bookmark not defined.	
5.2.5	**R v RPS- s103 limits cross-examination of credit issues, must have substantial probative value.	Error! Bookmark not defined.
5.2.6	State Railway Authority of NSW V Brown.....	Error! Bookmark not defined.

5.2.7	R v Ngo	Error! Bookmark not defined.
5.2.8	v Whitmore	Error! Bookmark not defined.
5.2.9	Hargraves v The Queen; Stolen v The Queen	Error! Bookmark not defined.
5.3	Character -criminal.....	Error! Bookmark not defined.
5.3.1	MAJOR CASES TO CONSIDER.....	Error! Bookmark not defined.
5.3.2	Melbourne v The Queen	Error! Bookmark not defined.
5.3.3	**R v Zurita – could not raise character evidence	Error! Bookmark not defined.
5.3.4	Braysich v The Queen.....	Error! Bookmark not defined.
5.3.5	**Stanoevski v The Queen.....	Error! Bookmark not defined.
6	Documentary Evidence	Error! Bookmark not defined.
6.1	MAJOR CASES TO CONSIDER.....	Error! Bookmark not defined.
6.1.1	**Butera v DPP- best evidence rule.....	Error! Bookmark not defined.
6.1.2	Foreign Media v Konstantinidis.....	Error! Bookmark not defined.
6.1.3	**NAB v Rusu – authentication of documents	Error! Bookmark not defined.
6.1.4	R v Iva Milat.....	Error! Bookmark not defined.
6.1.5	Evans v The Queen	Error! Bookmark not defined.
6.1.6	R v Skaf	Error! Bookmark not defined.
6.1.7	Kozul v The Queen	Error! Bookmark not defined.
6.1.8	**O’Meara v Dominican Fathers [2003] ACTCA 24, [85] .	Error! Bookmark not defined.
6.1.9	**Kingham v Sutton (No3) [2001] FCA 1117, [127]- s48 proof of document.....	Error! Bookmark not defined.
6.1.10	**ASIC v Rich[2005] NSWSC 417 –inferences to authenticate documents.....	Error! Bookmark not defined.
7	Witnesses.....	Error! Bookmark not defined.
7.1	Section 20 Cases.....	Error! Bookmark not defined.
7.2	Section 38 case.....	Error! Bookmark not defined.
7.3	Section 46 case.....	Error! Bookmark not defined.
8	Relevance- s55.	Error! Bookmark not defined.
8.1	MAJOR CASES TO CONSIDER.....	Error! Bookmark not defined.
8.1.1	Smith v The Queen – look for rational probative value...	Error! Bookmark not defined.
8.1.2	Papakosmas v The Queen- important for complaint evidence	Error! Bookmark not defined.
8.1.3	Evans v The Queen	Error! Bookmark not defined.
9	Hearsay: s59.....	Error! Bookmark not defined.
9.1	MAJOR CASES TO CONSIDER.....	Error! Bookmark not defined.
9.1.1	Subramaniam v Public Prosecutor- difference between hearsay and original evidence.	Error! Bookmark not defined.

- used to prove the fact that the representation was made..... **Error! Bookmark not defined.**
- 9.1.2 Kameleh v The Queen – an example where evidence of a previous representation is relevant for a non-hearsay purpose. **Error! Bookmark not defined.**
- 9.1.3 Lee v The Queen - 2nd hand hearsay, consider ONLY what was intended to be represented..... **Error! Bookmark not defined.**
- 9.1.4 Caterpillar Inc v John Deere – Hearsay exceptions- 1st hand hearsay in civil proceedings s64(2)..... **Error! Bookmark not defined.**
- 9.1.5 Williams v The Queen- Hearsay exceptions- contemporaneous representations s65(2)(b) **Error! Bookmark not defined.**
- 9.1.6 Graham v The Queen- representations in CRIMINAL proceedings- s66(2). **Error! Bookmark not defined.**
- Fresh in the memory = recent or immediate and involves quality or memory. Measures by days/hours. **Error! Bookmark not defined.**
- 9.1.7 Section 69(3) Cases: what documents are admissible as business records? **Error! Bookmark not defined.**
- 9.1.8 Vitali v Stachnik **Error! Bookmark not defined.**
- 9.1.9 Thomas v State of New South Wales – for ‘Australian proceeding’ accepted **Error! Bookmark not defined.**
- 9.1.10 Lithgow City Council v Jackson- s69(2)- personal knowledge requirement. **Error! Bookmark not defined.**
- 10 Opinion is excluded s 76 (exceptions s78-s79) **Error! Bookmark not defined.**
- 10.1 MAJOR CASES TO CONSIDER..... **Error! Bookmark not defined.**
- 10.1.1 Lithgow City Council v Jackson- ambulance officers did not witness, hence excluded by opinion rule. **Error! Bookmark not defined.**
- 10.1.2 Expert Opinion Cases **Error! Bookmark not defined.**
- 10.1.3 HG v The Queen- must be expert opinion, NOT: speculation, inference, personal or second hand view as to credibility..... **Error! Bookmark not defined.**
- 10.1.4 S79 application: Adler v ASIC **Error! Bookmark not defined.**
- 10.1.5 Darseef Pty Ltd v Hawchar: s79 application..... **Error! Bookmark not defined.**
- 10.1.6 R v Hien Phuoc Tang- ad hoc expert, not a recognised training, not good enough. **Error! Bookmark not defined.**
- 10.1.7 Wood v R – expert must understand his responsibilities under Supreme Court. .. **Error! Bookmark not defined.**
- 11 Privilege: s117 **Error! Bookmark not defined.**
- 11.1.1 MAJOR CASES TO CONSIDER..... **Error! Bookmark not defined.**
- 11.1.2 Baker v Campbell dominant purpose test **Error! Bookmark not defined.**
- 11.1.3 **Esso Australia Resources Ltd v Federal Commissioner of Taxation: evidence adduced at trial only. Legal advice..... **Error! Bookmark not defined.**

	CLP was governed by common law for pre-trial matters (EA with adducing evidence)- s131A EA now governs pre trial too.....	Error! Bookmark not defined.
11.1.4	Southland Coal Pty Ltd	Error! Bookmark not defined.
11.1.5	Loss of CLP.....	Error! Bookmark not defined.
11.1.6	**Mann v Carnell- waiver of CLP can be express or implied.	Error! Bookmark not defined.
11.1.7	Sovereign Motor Inns v Bevillesta.....	Error! Bookmark not defined.
11.1.8	Divall v Misfud.....	Error! Bookmark not defined.
11.1.9	Kang v Kwan	Error! Bookmark not defined.
11.1.10	Exemptions from giving evidence	Error! Bookmark not defined.
11.1.11	Stergis- self-incrimination	Error! Bookmark not defined.
11.1.12	Public Interest Immunity – s130- government	Error! Bookmark not defined.
11.1.13	Commonwealth v Northern Land Council(1973) 176 CLR	Error! Bookmark not defined.
11.1.14	Settlement negotiations s131: Rush and Tompkins v Greater London Council .	Error! Bookmark not defined.
11.1.15	Director-General, Dept of Community Services v D	Error! Bookmark not defined.
11.1.16	R v Lodhi.....	Error! Bookmark not defined.
12	Burden and standard of proof	Error! Bookmark not defined.
	**Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments	Error! Bookmark not defined.
12.1.1	Qantas Airways v Gama	Error! Bookmark not defined.
12.1.2	Green v The Queen	Error! Bookmark not defined.
12.1.3	Shepard v The Queen.....	Error! Bookmark not defined.

2 Discretionary and mandatory exclusions S 135-138

Everything relevant will go in, and then look at exclusionary rules + discretions

- Operate to exclude evidence otherwise not excluded through some other rule
- Ultimately it allows evidence that is admissible to become inadmissible
- Discretions to exclude evidence that can't be excluded through another rule
- Irregularity or improperly obtained evidence
- **Exclusion is only an option if the court is satisfied that the probative value of the evidence is *substantially* outweighed by the danger that the evidence might be unfairly prejudicial**
- Just because something is unfair doesn't mean it should be excluded- **Papakosmas** (not unfair if it makes it more likely D will be convicted)
- ALRC- danger if fact finder use the evidence on an emotional basis

- Reliability and credibility only looked at in extreme cases, where unreliability has been proven to be an issue in the proceedings
- *R v Ireland*- discretionary-public need to convict criminals, but public interest in protection of rights

2.1 S 135 GENERAL DISCRETION IN CIVIL AND CRIMINAL TO EXCLUDE

- 'may refuse' if *misleading or confusing*-135 (b)
- If it would cause a *waste of time*-135 (c)
- *Unfairly prejudicial* to a party
- Basic proposition is relevance
- *Ordukaya v Hicks*- 92 y/o woman, negligence over foot path, impossible to give evidence. Allowed to do a stat dec over issue, this was admitted as evidence, unsuccessful bid under s 135 to exclude because couldn't examine. Probative value outweighed, any prejudice.
- *R v Clarke*-account of murder, prosecution gave evidence of relationship through witness testimony, questioning seemed unfair, Clarke wanted the evidence excluded. It wasn't misleading, confusing, time wasting. It was adverse to Clarke's trial but wasn't unfair. The court went on to consider *Papaksomas*-not unfair because there is a likelihood that the accused will be convicted
- If you don't apply 135 this precludes 137
- *Look at probative value*- evidence that could rationally affect the assessment of the existence of a fact in issue
- *R v Ames*- gruesome photos, admitted because they showed the direction of blood, relevant to decide whether the deceased had been murdered or committed suicide
- *R v McLean and Funk ex p Attorney General* (1991) 1 Qld R 231- evidence from an accomplice testifying for the prosecution-a high risk of fabrication if has been given an immunity from the prosecution

2.2 S 136 GENERAL PROVISION IS TO LIMIT THE USE OF EVIDENCE

- Can only operate when evidence is relevant for more than one purpose
- If wanting to be used for non-hearsay but for opinion evidence for example
- *R v Toai Siulaj; R v Madigan*-comment to the jury. Later case considered a log book of conversations, judge told jury not to take evidence as proof of the identity of the person said to be speaking

2.3 S 137 A COURT MUST REFUSE EVIDENCE IF ITS PROBATIVE VALUE WOULD OUTWEIGH ANY PREJUDICIAL TO THE ACCUSED

- Not really discretionary as it says 'must' not 'may'-mandatory
- *Again look at probative value*
- Refuse to admit it because its unfair to the defendant

- *R v Liso*ff- if probative value is outweighing by judicial effect. Can't be just a mere possibility that the jury will act in a way, just focusing on the court refusing evidence by prosecutor
- *Evans v The Queen*- balaclava theft, different views –wasn't misleading or confusing, didn't cause a waste of time, could have helped his case if he didn't look like the suspect
- *Papkosmas* [86]- s 137 not invoked, however was relied on in high court. Probative value is an important consideration in this discretion. Reliability. Case by case basis. Did not invoke s 136. Said that reliability should be considered.*Is a real risk the evidence will be misused by the jury in some unfair way*
- *R v Shamouil*-there is a presumption that the evidence is to be considered to be accepted, a restrictive approach to reliability was favoured. Probative value was not established
- *R v Mundine*- notions of reliability should not be considered
- Look at reasons the evidence cannot be rested or cross examined
- The extent to which the fact finder will miss-estimate the weight of the evidence