

# RELEVANCE AND ADMISSIBILITY

## s 68 Relevant Evidence

1. Evidence that is relevant in a proceeding is evidence that, **if it were accepted**, could **rationally affect** (**directly or indirectly**) the assessment of the probability of the existence of a **FII** in the proceeding
2. Evidence cannot be considered irrelevant only because it relates only to
  - a. The credibility of a witness; or
  - b. The admissibility of other evidence; or
  - c. A failure to adduce evidence

## Key Points from s 68

- **'If it were accepted'**
  - At this stage, it is assumed the jury will accept the evidence
  - *IMM* states that the assumption denies to a TJ any personal consideration as to whether the evidence is credible or not, further it is not necessary for a TJ to determine if evidence is reliable
- **'Could rationally affect'** requires a minimal logical connection
  - *Paulino* states for evidence to be relevant it **must be capable of rendering a fact in issue more or less probable than it would have been without the evidence**
- **'Directly or indirectly'**
  - Directly is where evidence goes right into the existence or non-existence of an ultimate FII
    - Evidence of a direct perception (someone seeing an act that satisfies an element)
  - Indirectly either:
    - **Requires an inference or series of inferences before satisfying an element** (circumstantial)
      - For example, in an assault charge, the victim had a large bruise, and the accused had broken knuckles and a grudge against the victim
    - **Goes to the credibility of other evidence** (collateral or credibility)
      - The witness claiming to have seen the assault was 50m away, not wearing glasses
- *Hughes* states that **FII** are facts which establish the elements of the offence or defence

## s 69 Relevant Evidence to be Admissible

1. Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding
2. Evidence that is not relevant in the proceeding is not admissible

## *Smith v The Queen* [2001]

- Smith convicted of bank robbery at trial
- Prosecution adduced CCTV footage of the robbery, as well as evidence from police officers who spent time with the accused at the police station
  - Officers gave evidence that the person in the footage was the accused
- Smith appealed to HCA arguing the evidence from the officers was improperly admitted
  - HCA stated they must begin by identifying the ultimate FII that evidence may be relevant to, in this case, the identity of the bank robber (element of 'a person')
  - Held that identification based on CCTV should be left to the jury themselves

## Lithgow CC v Jackson [2011]

- Plaintiff fell into a ditch, causing life changing injuries
- Issue at trial was which side of the drain P had fallen from, which would determine if it were a negligence issue or if P were at personal fault
  - Ambulance officer wrote a note stating that 'P suffered a 1.5m fall'
  - P attempted to use this as evidence it was from the non-vertical side; however, it turned out all sides were 1.5m tall, and it was therefore entirely equivocal evidence
- HCA stated that the statement was so ambiguous that it had no probative value, it supported neither the theory of a fall from the vertical head wall nor the theory of a fall from one of the sides

## Green v The Queen [2015]

- Green convicted of sexually abusing step-daughter as a child
  - Attempted to use letters the child wrote to herself at the time, which stated she wished to have a sexual relationship with her then-boyfriend, putting forward the argument that the tone used was too light and happy to be consistent with a child being abused
- HCA stated that the threshold for relevance, for an accused, is quite low, because it need only be capable of rationally affecting the probability of the existence of a fact in issue by raising a doubt in respect of it
  - Test of relevance is even lower for an accused as they are only aiming to raise a doubt to the evidence being raised against them
  - TJ should be slow to exclude evidence, sought to be adduced on behalf of an accused, unless it is clear that the evidence does not satisfy the relevance contained in s 68
    - Ultimately, HCA upheld decision, finding that the letters were irrelevant to the trial

# GENERAL EXCLUSIONS

## s 201 General Discretion to Exclude Evidence

- Court may refuse to admit evidence if its probative value is substantially outweighed by the danger it might
  - a. Be unfairly prejudicial to a party;
  - b. Be **misleading or confusing**; or
  - c. Cause an **undue waste of time**

## Key Points on s 201

- **Misleading or confusing**
  - Less relevant in trial by judge alone than in trial by jury
    - *Re GHI* [2005]
      - Bizarre to submit to a judge sitting alone that they should reject evidence on the ground that it might mislead or confuse
  - *Reading v ABC* [2003]
    - TJ excluded transcript as evidence where an audiovisual program was itself admitted
    - Transcript had the potential to mislead jurors because it could result in focus on words alone, removed from their context as spoken

- **Undue waste of time**

- High threshold for this, undue means that any waste of time is not enough to warrant exclusion
  - *Cadbury v Darrell Lea* [2007]
    - If the matter about which expert evidence is to be given is patent and known to all, the Court's time would normally be wasted by such evidence
  - *Faruqi v Hanson* [2024]
    - Unnecessary duplication of evidence making the same point may give rise to exercise on this ground

### s 203 Exclusion of Prejudicial Evidence in Criminal Proceedings

- In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused

### Differences between ss 201 and 203

- General differences
  - Applicable proceedings
    - s 201 applies to criminal and civil, whilst s 203 only applies to criminal
  - Standard
    - s 201 requires the probative value to be substantially outweighed, whilst s 203 only requires it to be outweighed – clearly a lower standard
  - Party usage
    - Accused would use s 203 to argue exclusion as it is a lower bar through outweighed
    - Prosecution cannot argue through s 203, but can through s 201
  - s 201 also includes possibilities for exclusions other than unfair prejudice
- Probative value
  - **s 3** defines **probative value** to mean the extent to which the evidence could rationally affect the assessment of the probability of the existence of a FII
    - Evidence at this stage taken to be 'at its highest' meaning that issues relating to credibility and reliability should not be considered in determining PV – should be a task left to the jury
      - Exception is if the credibility issues are such that a rational jury could not accept it
        - *IMM v The Queen* [2016]
- *Festa v The Queen* [2001]
  - McHugh JA states that evidence is not prejudicial merely because it strengthens the prosecution case (this is PV) but when the jury are likely to give the evidence more weight than it deserves or when the nature or content of evidence may inflame the jury
- *Papakosmas v The Queen* [1999]
  - Can also be prejudicial where there is a real risk the jury will misuse the evidence, such as in an improper chain of reasoning or for a forbidden purpose

### s 202 General Discretion to Limit Use

- A court may **limit the use to be made of evidence** if there is a danger that a particular use might
  - a. Be unfairly prejudicial; or
  - b. Mislead/confuse

## Key Points on s 202

- **Limiting the use of evidence**
  - Can only apply if the evidence is relevant/admissible for more than one purpose
    - Allows TJ to forbid use for any purpose if there is a danger that such use might be unfairly prejudicial or misleading/confusing
- *Ainsworth v Burden* [2005]
  - When a TJ exercises s 202 EAWA, they will need to give a strong direction to the jury that they can only use it for the limited purpose
- *Seven Network v News* [2005]
  - This discretion is more likely to be used in a jury trial
  - A judge can typically abate the risk of prejudice by appropriately adjusting the weight to be afforded to the evidence for each of its purposes

## s 204 Exclusion of Improperly or Illegally Obtained Evidence

1. Evidence that was obtained—
  - a. Improperly or in contravention of an Australian law; or
  - b. In consequence of 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
2. Deems certain conduct during official questioning will result in an admission, and evidence obtained in consequence of such an admission, being obtained improperly
3. Without limiting the matters that the court may consider under (1), it is to consider
  - a. The probative value of the evidence;
  - b. The importance of the evidence in the proceeding;
  - c. The nature of the relevant offence, cause of action, defence and subject-matter of the proceeding;
  - d. The gravity of the impropriety or contravention;
  - e. How grave was the law-breaking to obtain evidence
  - f. Whether the impropriety or contravention was deliberate or reckless;
  - g. Whether the impropriety or contravention was contrary to or inconsistent with ICCPR;
  - h. Whether any other proceeding is likely to be taken in relation to the impropriety; and
  - i. The difficulty (if any) of obtaining the evidence without impropriety or contravention of law

# COURSE OF THE TRIAL

## Calling Witnesses

- Witnesses can be called by the prosecution, the defence, or the trial judge
  - *Whitehorn v The Queen* [1983]
    - Prosecution has the main duty to do so

## s 37 Order of EIC, XXN, and RE

- Unless the court otherwise directs:
  - a. XXN of a witness must not take place before the EIC of the witness; and
  - b. RE of a witness must not take place before all other parties who wish to do so have XXN

## Accused's Presence in the Courtroom

- *Criminal Procedure Act WA* s 88 covers provisions relating to the accused's presence, when required
  - Proceedings that relate to an accused must take place in his or her presence unless s 140 or the *Sentencing Act 1995* provides otherwise
  - The court may order proceedings that relate to an accused to proceed in the accused's absence if it is satisfied
    - That the accused's interests will not be prejudiced by his or her absence; and
    - That to do so will not be contrary to the interests of justice
  - This section does not prevent a court from allowing an accused to be present before the court by means of a video link or audio link or from taking evidence from an accused by either such means
- *RPS v The Queen* [2003]
  - While the accused should give evidence first, it is not expressly necessary

## s 370 Preliminary Questions (Voir Dire Hearings)

1. In this section, a preliminary question is a question as to whether a particular fact exists, being a question of fact that must be decided by the court before it makes a determination as to whether
  - a. Evidence should be admitted (whether in the exercise of a discretion or not); or
  - b. Evidence can be used against a person; or
  - c. A witness is competent or compellable
2. If there is a jury, each of the following preliminary questions must be heard and determined in the jury's absence
  - a. A question of whether particular evidence is evidence of an admission, or evidence to which s 204 (illegally obtained evidence) applies;
  - b. A question of whether evidence of an admission, or evidence to which s 204 applies, should be admitted
4. If there is a jury, the jury must not be present at a hearing to decide any other preliminary question unless the court otherwise orders
5. Without limiting the matters that the court may take into account in deciding whether to make that order, it must take into account
  - a. Whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the accused; and

Whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question