



# Admissible Admissions

under the *Evidence Act 2008*



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## Proving Facts by the Use of Admissions

A party to a proceeding, whether criminal or civil, may make a statement concerning the subject matter of the proceedings out of court. If true, that statement may tend to undermine the party's own interests in the proceeding. Simple examples include:

- **Example 1:** An Accused made a statement to another person concerning the death of the recently deceased, 'I killed him and I thoroughly enjoyed it.' If what the Accused asserted is true, his words go some way towards establishing both the physical and mental elements of the offence of murder.
- **Example 2:** A doctor made a note in the hospital records that the Plaintiff complained of 'moderate chest pain - on and off - start 2 days ago' a week before the Plaintiff suffered a major cardiac arrest leading to long-term health complications. If what the doctor asserted is true, the Plaintiff's complaint at the time may go some way towards establishing negligence on the part of the doctor and the hospital for failing to carry out further investigative procedures.

The Prosecution in Example 1, and the Plaintiff in Example 2, would each seek to adduce the evidence as an admission made against the opposing party's own interests. It is a convenient way for a party to prove part of its case when all the work in producing the evidence has been done by the other side.

Admissions are regulated by Part 3.4 (ss 81-90) of the *Evidence Act 2008* (Vic) ('the Act'). Section 81 creates an exception to the general rules that operate to preclude hearsay and opinion evidence (**reproduced below**). It recognises admissions usually involve a degree of hearsay, and sometimes involve opinions.

The statutory expression 'admission' is defined (**reproduced below**). It comprises several elements all of which must be satisfied if the evidence proposed to be adduced qualifies as an admission for the purposes of the Act. First, the evidence must be evidence of a **previous representation**. Second, that representation must have been **made by a party** to a proceeding. Third, the evidence must be **adverse to the person's interest** in the outcome of the proceeding. The expressions 'representation' and 'previous representation' are also defined, being elements of an admission that overlap significantly with the statutory elements of hearsay evidence that are prescribed by s 59 of the Act.

### Dictionary

#### Part 1 - Definitions

**admission** means a previous representation that is—

- (a) made by a person who is or becomes a party to a proceeding (including an accused in a criminal proceeding); and
- (b) adverse to the person's interest in the outcome of the proceeding.

**representation** includes—

- (a) an express or implied representation (whether oral or in writing); or
- (b) a representation to be inferred from conduct; or
- (c) a representation not intended by its maker to be communicated to or seen by another person; or
- (d) a representation not intended by its maker to be communicated to or seen by another person;

**previous representation** means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced;

### *Evidence Act 2008*

#### 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.

## Elements of an Admission

- (1) a previous representation
- (2) made by a party to a proceeding
- (3) adverse to the person's interests in the outcome of the proceeding

# Distinction between Admissions and Hearsay

Although there is a significant degree of overlap between the concepts of hearsay and admissions, upon closer inspection of the statutory definitions, there appear to be significant differences. The common element between both hearsay and an admission is that the evidence must be constituted by a 'previous representation'. However, from there the elements diverge.

For hearsay, the previous representation must be made by 'a person'. For an admission, it must be made by 'a party to a proceeding' - a very narrow subset of 'a person' contemplated by the hearsay definition. For hearsay, attention must then be given to the asserted fact contained in the representation, the intention of the person who made it, and whether the forensic purpose for adducing it coincides with what it precisely asserts. For admissions, the inquiry is much simpler - is the evidence adverse to the party's interests in the outcome of the proceeding?

A number of observations may be made in this regard:

- Hearsay includes statements made by anyone. Admissions include statements only made by parties to a proceeding. In this sense, hearsay is wider in scope.
- Hearsay proves what a representation asserts. False statements, adduced to demonstrate their falsity, do not amount to hearsay. By contrast, admissions need only be adverse to the interests of a party. False statements, adduced to demonstrate their falsity, would usually qualify. In this sense, admissions are wider in scope than hearsay.
- For hearsay, the maker of the representation must intend to assert what is conveyed by the statement. For admissions, the intentions of the party making the statement are not necessarily important.
- Hearsay includes exculpatory statements. Admissions do not. They are not adverse to an Accused's interests (although if the Prosecution invites the tribunal of fact to reject the exculpatory statements as lies, then arguably they are admissions).

In short, some situations of hearsay evidence also amount to evidence of an admission. Examples 1 and 2 (on page 1 above) would qualify as evidence that meets both statutory definitions. However, to be clear, not all hearsay is an admission, and not all admissions are hearsay.

## Post-Offence Conduct

The definition of **post-offence incriminating conduct** under s 18 of the *Jury Directions Act 2015* ('JDA') refers to '*conduct that amounts to an implied admission by the accused*'. Having regard to the broad definitions of 'admission' and 'representation' under the Act, it would seem that all post-offence incriminating conduct under the JDA amounts to an admission under the Act.

## Evidence Act 2008

### 59 The hearsay rule—exclusion of hearsay evidence

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
- (2) Such a fact is in this Part referred to as an **asserted fact**.
- (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

#### Note

Subsection (2A) was inserted as a response to the decision of the Supreme Court of New South Wales in *R v Hannes* (2000) 158 FLR 359.

## Elements of Hearsay (s 59)

- (1) a **previous representation**
- (2) made by a **person**
- (3) containing an **asserted fact**
- (4) **intended to be asserted by the maker** (objectively determined)
- (5) adduced by a party to **prove the asserted fact**

## Rationale for Allowing Admissions to be Admitted

The rationale for allowing admissions to be admitted in a proceeding can only be properly understood with reference to the fundamental rationale for the general prohibition against hearsay.

Hearsay is generally inadmissible because it is potentially unreliable and is not able to be tested by the rigours of cross-examination. The assertions contained in hearsay statements are also often self-serving. However, if the statement is not self-serving, but actually tends to undermine a person's own interests in a court proceeding, then it is likely to be much more reliable. People tend not to say or do things against their own interests unless they are true.

Accordingly, the concern about the reliability of such statements disappears the rule against hearsay should have no work to do. By definition, this is the kind of conduct that s 81 of the Act seeks to allow.

'What a party himself admits to be true may reasonably be presumed to be so.'

*Slatterie v Pooley* (1840) 6 M & W 664, 669 (Exch)

# Defensive Measures

Even if it appears that the evidence qualifies as an admission for the purposes of s 81 of the Act, a number of other provisions can be invoked to exclude the admission or limit the use that can be made of it. These include:

- **Admissions not recorded by investigating officials:** Section 464H of the *Crimes Act 1958* creates a general prohibition against the admissibility of admissions made to an investigating official (e.g. Police) in relation to an **indictable** offence, unless it is recorded. *Note: There is no such general exclusion in relation to admissions made in the course of a summary offence investigation.*
  - **Admissions influenced by violence, threats, oppressive conduct, etc:** Section 84 of the Act allows admissions to be excluded if they were brought about by an act of 'violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person', or 'a threat of conduct of that kind'. This provision may be invoked in criminal or civil proceedings.
  - **Unreliable admissions made by defendants in criminal matters:** Section 85 of the Act allows admissions to be excluded if the circumstances in which the admission was made were such as to make it likely that the truth of the admission was adversely affected (e.g. if the Accused was interviewed when he was drug-affected or cognitively impaired). The provision only applies to admissions made in the presence of investigating officials (e.g. in a formal interview, or a field interview) or as a result of the act of another person who was in a position to influence the decision to prosecute (e.g. a demand made by a complainant of the Accused to admit his crime).
  - **Unfairness:** Section 90 of the Act allows a court to refuse to admit evidence of an admission adduced by the Prosecution if it would be 'unfair' to the Accused to use the evidence. Note, however, that this provision is rarely utilised due to the broader scope of other provisions in the Act that address issues of unfairness.
  - **Illegally/Improperly obtained evidence:** Section 138 of the Act permits a court to exclude evidence (including evidence of an admission) that was obtained improperly or in contravention of an Australian law. Section 138(2) specifically targets improper questioning designed to elicit admissions from a criminal defendant. Admissions obtained before the giving a formal caution may also be potentially excluded under this provision.
  - **General discretionary exclusion powers:** The probative value of an admission may be low. The admission may be vague or ambiguous, misleading or confusing. It may be too prejudicial. Section 135 of the Act (criminal and civil proceedings) and s 137 (criminal proceedings only) may be invoked to exclude the admissions on any of these bases.
- **Warnings:** If admitted, Counsel may request directions be given to the tribunal of fact that they should treat the evidence of the admissions with some degree of caution. In criminal proceedings, a general direction on the potential unreliability of an admission may be given (s 32, JDA) or a more specific warning for post-offence incriminating conduct evidence (ss 21, 22, 23, JDA). In civil proceedings, s 165 of the Act may be invoked for this purpose.

