

ADMISSIONS: STATEMENTS MADE OUT OF COURT BY A CO-ACCUSED¹

Admissions

The dictionary of the *Evidence Act 1995* (NSW) (EA) defines admission as follows:

admission means a previous representation² 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.

The hearsay rule does not apply to (first-hand) admissions: EA ss 59, 81 and 82.

The focus of this talk

This talk focuses on statements made out of court (in any form) by a co-accused.

More specifically, it focuses on the admissibility of such statements where the co-accused is being tried jointly with the accused.

Joint trials

The way that the rules of evidence operate in joint trials is explained in *McNamara v The King* (2023) 280 CLR 201; [2023] HCA 36. That case explains that:

1. A joint trial is a single “proceeding”.
2. Each accused is a “party” to that “proceeding”.
3. Some evidence might be admitted against one accused only (McNamara) and therefore cannot be used against the other accused (Rogerson).
4. But the other accused (Rogerson) may still seek that such evidence be excluded from the whole “proceeding”.

Characterising the co-accused's statement

When a co-accused has made a statement out of court, the accused might view that statement in one of three ways:

1. Unhelpful to the accused because it inculpates the accused.
2. Helpful to the accused because it exculpates the accused.

¹ Presentation by Tom Quilter SC, Public Defender, Legal Aid Conference, 3 July 2026.

² **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.

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 that for any reason is not communicated: see EA Dictionary.

- Helpful to the accused because it inculpatates the co-accused (and therefore indirectly exculpatates the accused, for example, in a “cut-throat” case).

Such analysis will dictate whether an accused will seek inclusion or exclusion of such statements.

Three rules

Three rules that are relevant to achieving inclusion or exclusion of the evidence are: ss 81(2), 83(2) and 87(1)(c) and are discussed in turn by reference to examples.

For each example Glen is the accused (your client); Roger is the co-accused.

1st Rule: s 81(2)	
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.	Example - Roger told John (the Witness) that: Roger and Glen were present where an incident occurred; they had a physical fight with the complainant; but they acted in self-defence. - Glen is present during that conversation but remains silent throughout. - Is Glen’s silence in that conversation an admission that he was present when the crime occurred? If so, is Roger’s whole account to John admissible against Glen because of s 81(2)?
Further reading <i>Nguyen v The Queen</i> (2020) 269 CLR 299; [2020] HCA 23. <i>Abernethy v The Queen</i> (2020) 282 A Crim R 513; [2020] VSCA 96.	

2nd Rule: s 83(2)	
83 Exclusion of evidence of admissions as against third parties (1) Section 81 does not prevent the application of the hearsay rule or the opinion rule to evidence of an admission in respect of the case of a third party. (2) The evidence may be used in respect of the case of a third party if that party consents.	Example - Roger told John (the Witness) that: Roger and Glen were present where an incident occurred; they had a physical fight with the complainant; but they acted in self-defence. - Glen was absent during that conversation. - Is Roger’s account to John an admission against Roger? If so, can

(3) <i>Consent cannot be given in respect of part only of the evidence.</i> (4) <i>In this section—</i> <i>third party means a party to the proceeding concerned, other than the party who—</i> <i>(a) made the admission, or</i> <i>(b) adduced the evidence.</i>	Glen consent to Roger’s account being admitted against Glen? What if part of the account is unhelpful?
Further reading • <i>Abernethy v The Queen</i> (2020) 282 A Crim R 513; [2020] VSCA 96. • <i>Evidence Act</i> s 65(8); <i>R v Davis and Quinn (No 6)</i> [2020] NSWSC 1888.	

3rd Rule: s 87(1)(c)	
87 Admissions made with authority (1) <i>For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that—</i> ... <i>(c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.</i> ... <i>Ahern v The Queen</i> (1988) 165 CLR 87 at 94-95; [1988] HCA 39: “... when two or more persons are bound together in the pursuit of an unlawful object, anything said, done or written by one in furtherance of the common purpose is admissible in evidence against the others. The combination implies an authority in each to act or speak on behalf of the others ... [t]hus anything said or done by one conspirator in pursuit of the common object may be treated as having been said or done on behalf of another conspirator...”	Example 1 • Roger told John (the Witness) that Roger and Glen had just robbed a bank. • Glen is absent from that conversation. Example 2 • Roger said to John (the Witness) “Glen and I need to borrow your car cause Glen and I are about to rob a bank.” • Glen is absent from that conversation. Example 3 • Roger told John (the Witness) that he wants John to help him hide some money because Roger and Glen robbed a bank last month. • Glen was absent from that conversation.
Further reading • <i>Macdonald v R; Obeid v R; Obeid v R</i> [2023] NSWCCA 250. • <i>Audish v R</i> [2024] NSWCCA 196. • <i>Higgins v R</i> [2020] NSWCCA 149. • <i>R v Dolding</i> (2018) 100 NSWLR 314; [2018] NSWCCA 127.	