

VOIR DIRE APPLICATIONS TO EXCLUDE PROSECUTION EVIDENCE

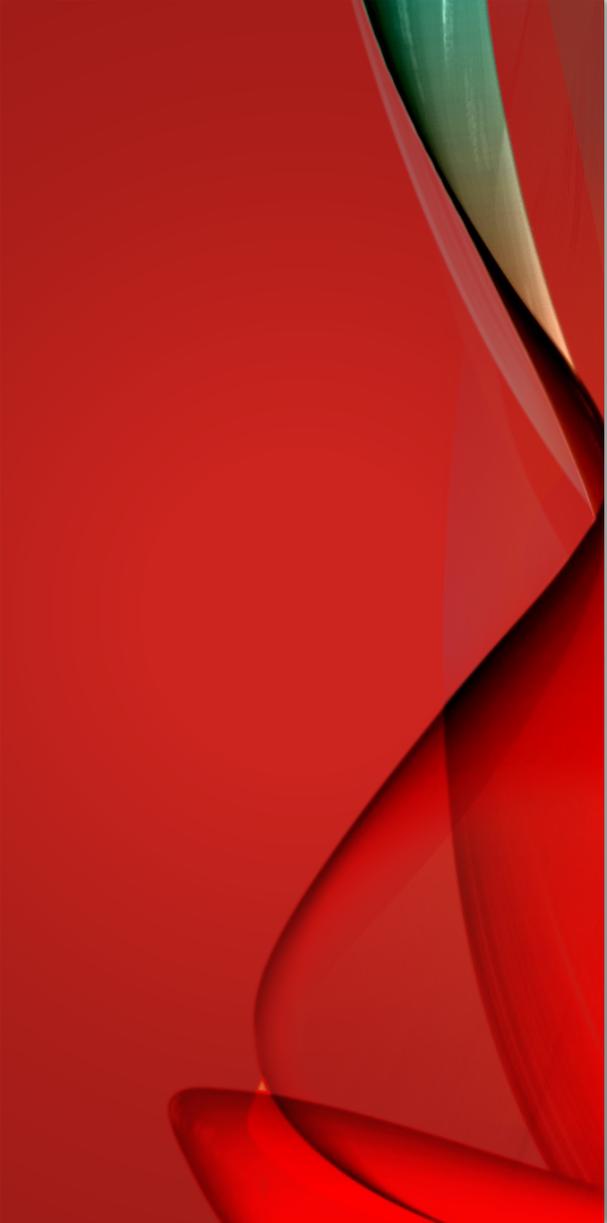


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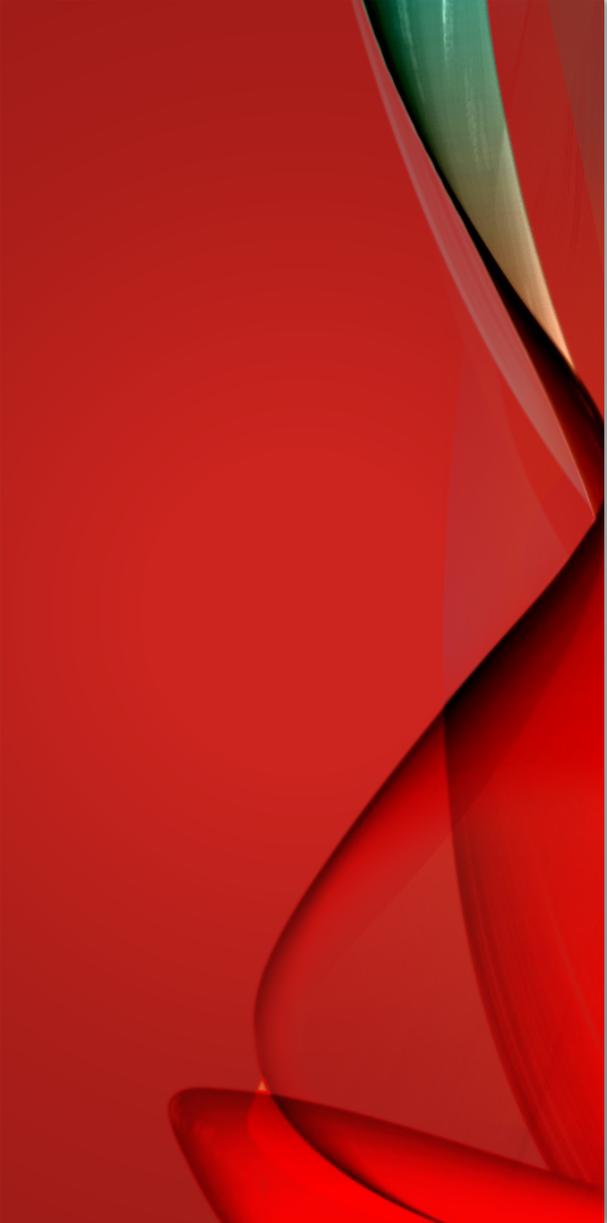
TOPICS COVERED

- Role of trial and general rules of evidence;
- Evidence law in South Australia;
- Historical development;
- The meaning and purpose of *voir dire*;
- Uses of *voir dire*;
- Foundation for *voir dire*;
- *The relevant principles*;
- *When an application may be sought*;
- Questions determined in a *voir dire*;
- Discretion to grant a *voir dire*;
- Procedure;
- Onus of proof;
- Distinction between admissibility and weight;
- How to file *voir dire*;
- Effect of ruling and outcome;
- Important cases.

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THE ROLE OF A TRIAL

- The role of a trial is to determine the facts in dispute. The court does so by assessing and weighing the evidence presented to it.



GENERAL RULES OF EVIDENCE

- **Relevance**
- **Hearsay**
- **Opinion**
- **Character**
- **Confessions**
- **Evidence of a close relative**
- **Other rules**



EVIDENCE LAW IN SOUTH AUSTRALIA

- The law of evidence is predominantly contained in the *Evidence Act 1929 (SA)*. However, section 5 of the Act preserves the operation of common law principles.
- Accordingly, both statutory provisions and common law doctrines continue to apply.
- The procedure of a *voir dire* is not codified in the *Evidence Act 1929 (SA)*.
- By contrast, the Commonwealth and several other Australian states have codified *voir dire* procedures.



HISTORICAL DEVELOPMENT

- **Historical Context:** Originating in the medieval period (Anglo-Norman), it was an examination where a prospective witness or juror was sworn to tell the truth regarding their competency or potential bias.
- Formerly objection being taken to a witness's competency – a person was initially sworn by the special form of oath and examined by “voir ” or “vraie dire ” in which event he was sworn to answer truly all such questions as the court demanded of him.
- **Evolution:** While it originated as a mechanism for swearing in, it developed into a broader examination process, with records of the phrase in English law appearing as early as 1676.
- Over time, it has evolved into a pre-trial process in many common law systems for determining admissibility of evidence.



THE MEANING AND PURPOSE OF *VOIR DIRE*

- *Voir dire* originates from Anglo-Norman/Old French, translating to "to speak the truth" (from *voir* "true" + *dire* "to say").
- The expression "*voir dire*" is used loosely to describe any examination or enquiry in court which is not part of the trial itself.
- In South Australia, a *voir dire* is a preliminary "trial within a trial" held to determine legal disputes about evidence admissibility, witness competency, or legality of evidence collection.
- Conducted in the absence of a jury, it allows the judge or magistrate to hear evidence on specific issues before ruling on whether it can be presented in the main trial.
- It is a procedure designed to elicit facts which will enable the Court hearing the particular proceedings before it to determine whether certain evidence may or may not be given in those proceedings. It is a procedure subsidiary to the main proceedings.

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USES OF *VOIR DIRE*

- Challenge admissibility of confessions in criminal trials;
- determine whether a child is competent to take an oath;
- whether a person is an expert;
- whether documents are admissible;
- whether a declaration is a dying declaration;
- insanity of a witness;
- identification evidence;
- genuineness of handwriting specimens;
- other like matters which go to the matter of competence or admissibility;
- *Wigmore on Evidence*, 3rd ed, Vol IX, para 2550



FOUNDATION FOR VOIR DIRE

- Wells J in *Furnell v Betts* (1978) 20 SASR 300 at 301:

It is essential that the Magistrate should insist that counsel should be explicit and precise on the subject: nothing but misconception and error can result if a *voir dire* hearing is embarked upon without all concerned being aware of what the exact inquiry is.



THE RELEVANT PRINCIPLES

- Gibbs C.J. in *Cleland v. The Queen* (1982) 151 CLR 1:
- "A confession will not be admitted unless it was made voluntarily, that is in the exercise of a free choice to speak or be silent. But even if the statement was voluntary, and therefore admissible, the trial judge has a discretion to reject it if he considers that it was obtained in circumstances that would render it unfair to use it against the accused."
- The scope and operation of the principle have been explored by this Court in a number of cases: see for instance *McDermott v. The King* (1948) 76 CLR 501, at pp 506-507; *The King v. Lee* (1950) 82 CLR 133, at pp 151, 154; *MacPherson v. The Queen* (1981) 147 CLR 512, at pp 519-520, 532-533.
- "The rules may be regarded in a general way as prescribing a standard of propriety, and it is in this sense that what may be called the spirit of the rules should be regarded."



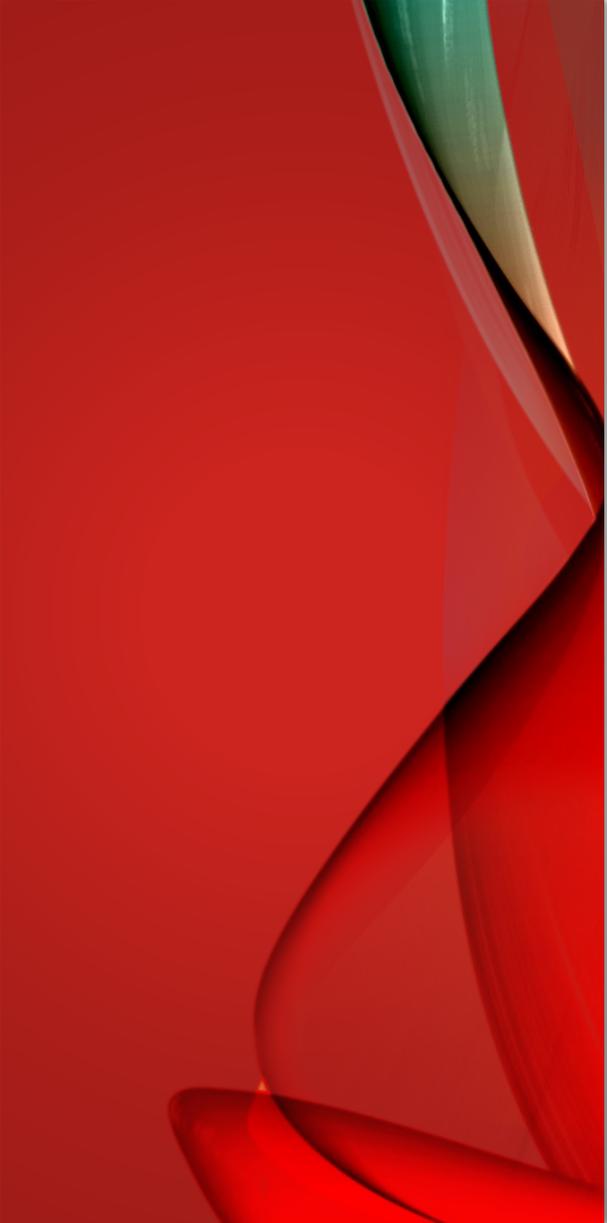
THE RELEVANT PRINCIPLES

- In considering whether a confessional statement should be excluded, the question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him: *Lee*, at p 154; *Cleland*, at p 18. Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardized if a statement is obtained in circumstances which affect the reliability of the statement.
- Where the defence objects to admitting evidence of a confession on the basis that it was made involuntarily, typically, a trial judge will hear evidence on a *voir dire* as to the circumstances in which the confession was obtained (*MacPherson v R*). In such circumstances, the issue of whether the admission is true or not is to be disregarded unless the issue is introduced by the accused. A court must not admit an involuntary confession on the basis that it is truthful *R v Tofilau* (No 2) (2006) 13 VR 28; *Wong Kam-Ming v R* [1980] AC 247.
- The rules of evidence are just as applicable to an examination on the *voir dire* as to the main proceedings e.g. leading questions, privilege, etc

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WHEN AN APPLICATION MAY BE SOUGHT

- *Voir dire* generally occurs before the main or proper trial, but it can occur at any stage of the proceedings.
- *Voir dire*s in criminal proceedings are held on application. Such applications are generally sought if the prosecution proposes to adduce evidence the defence believes is inadmissible.
- A *voir dire* may also be appropriate in summary hearings. This would allow the accused to challenge the admissibility of prosecution evidence and enable them to give relevant evidence on the *voir dire* without being exposed to cross-examination in the trial itself.
- The prosecution may seek a *voir dire* if, for example, it proposes to rely on evidence that is *prima facie* inadmissible but that the prosecution argues should be admitted for another reason, such as in the interests of public policy.



QUESTIONS DETERMINED IN A *VOIR DIRE*

- whether an admission was unlawfully obtained, influenced by violent, oppressive, inhuman or degrading conduct, or was made in circumstances that may adversely affect the truth of the admission (see *R v McNeill* [2007] NFSC 2; *R v Em* [2003] NSWCCA 374; *MacPherson v R*);
- whether the privilege against self-incrimination is available to a witness *R v Roberts & Urbanec* (2004) 9 VR 295;
- whether a sample of writing was written by the accused (*R v Browne-Kerr* [1990] VR 78);
- whether a witness is unfavourable (*R v Andrews* [1987] 1 Qd R 21; *R v Lam & Ors* (Ruling No 6) [2005] VSC 280;
- whether a search warrant was lawfully executed and whether the evidence was improperly or illegally obtained (*R v Young* [2002] VSCA 2);
- whether it is necessary to discharge the jury due to an apprehension of bias (*R v Lawrence*, Unreported, VSCA, 7 October 1997).



DISCRETION TO GRANT A *VOIR DIRE*

- A *voir dire* may be ordered by a magistrate or judge sitting alone and a judge with a jury empanelled. Granting a *voir dire* by a court is a matter of discretion for the trial judge or magistrate and is not a right.
- A *voir dire* should only be held where it is “essential for the purpose of ensuring a fair trial (*R v Rowley* (1986) 23 A Crim R 371 (VCA) at 375). A party seeking a *voir dire* must satisfy the judge or magistrate that there are reasonable grounds for a *voir dire*, and counsel must specify issues to be examined, and evidence sought to be adduced (*Director of Public Prosecutions (NSW) v Zhang*, [2007] NSWSC 308, Johnson J at [112]).
- A *voir dire* will not usually be granted if the witnesses were cross-examined at the committal hearing, as all the relevant evidence is available in the depositions.
- If an issue is in dispute regarding the voluntariness of a confession, a *voir dire* will generally be available upon application or even without application if an accused is unrepresented (*MacPherson v The Queen*).



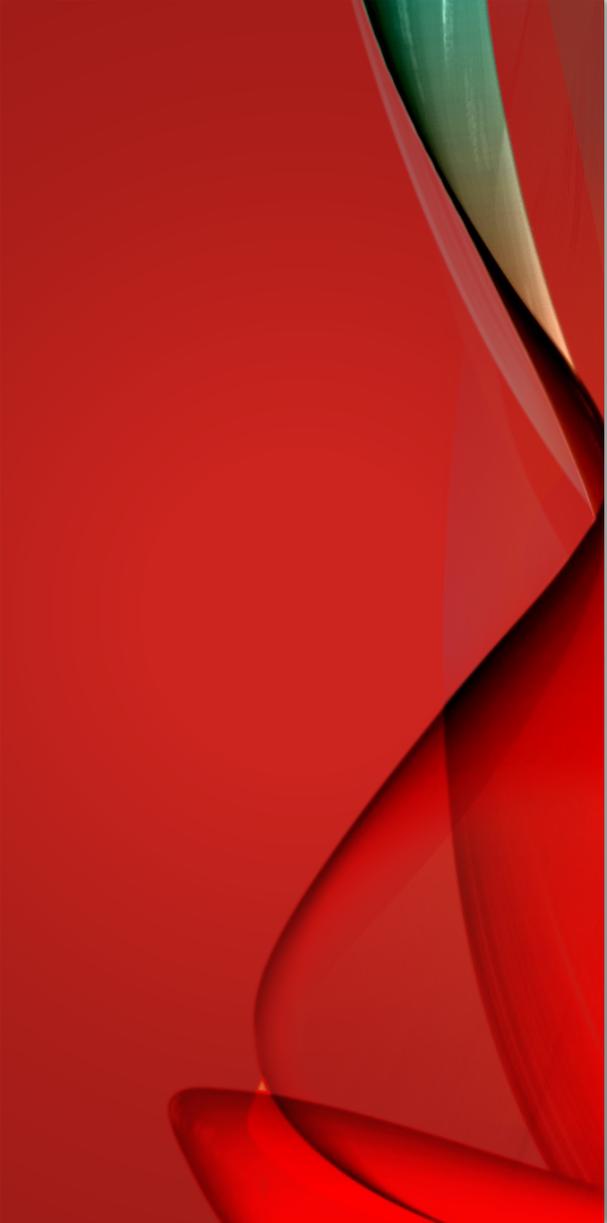
PROCEDURE

- During a *voir dire*, the crown and defence may call evidence and cross-examine witnesses if the judge decides it is within the purpose of the *voir dire* and in the interests of justice to do so. The rules of evidence apply, and the standard of proof for evidence to be admissible is on the balance of probabilities.
- The judge controls the conduct of the *voir dire* and the order in which parties present evidence and may limit the questioning of a witness to the purposes of the *voir dire* to ensure proceedings are conducted fairly (*R v Bradshaw* (1978) 18 SASR 83; *MacPherson v The Queen*). However, the process is not inquisitorial. Parties select the evidence they bring before the court, and a judge retains the power to question witnesses to clarify issues but should call witnesses (*MacPherson v The Queen*).
- A judge may also terminate a *voir dire* if satisfied that it is unlikely to serve any useful purpose (*R v Lee*). At the conclusion of the *voir dire*, the judge will not generally explain the outcome to the jury, as it may influence the jury in its fact-finding role in the criminal trial. Instead, the judge may explain to the jury that questions of law were determined in the jury's absence (*R v Banner* [1970] VR 240).
- In a judge-alone or magistrate-alone trial, the judicial officer is presumed due to their training and experience, to determine a case based solely on the evidence led in the main hearing, disregarding evidence led on the *voir dire* (*Egan v Bott* [1985] VR 787; *Smithers v Andrews* [1978] Qd R 64).



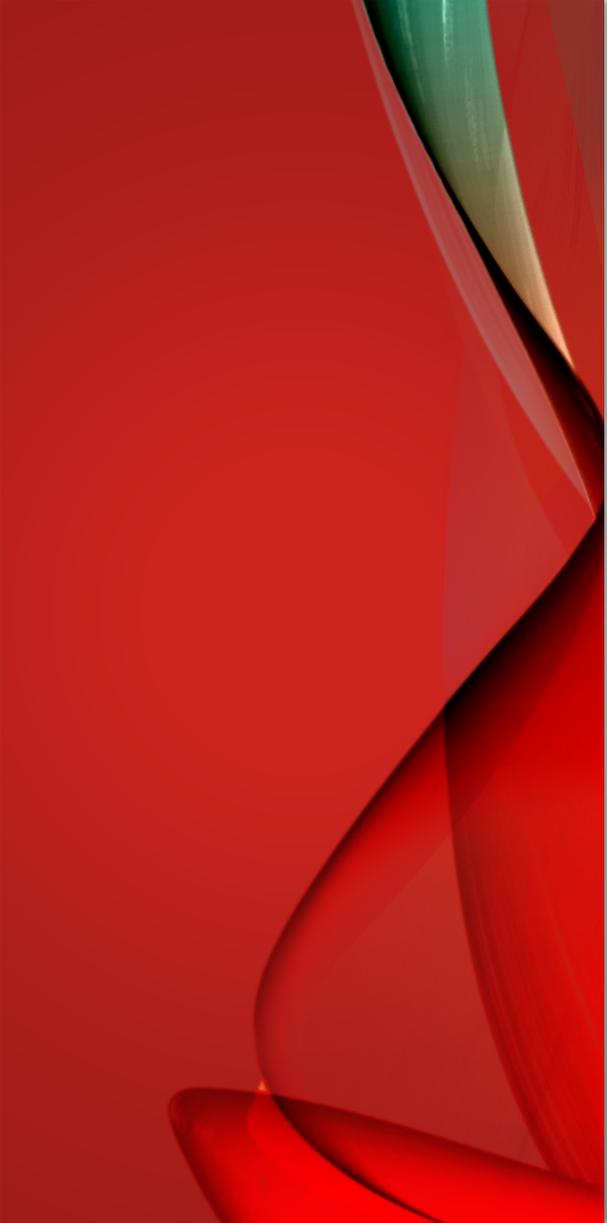
ONUS OF PROOF

- If there be anything to suggest that the alleged confession may not have been voluntary, the onus lies on the prosecution to show, on the balance of probability, that it was (see, as to the onus of proof being on the balance of probability, *Wendo v. The Queen* (1963)109CLR, at pp 562,572-573 ; *MacPherson v. The Queen* (1981) 147 CLR, at pp 519-522 ;
- And note, to the contrary, *Director of Public Prosecutions v. Ping Lin* (1976) AC 574, at pp 597, 604 ; *Wong Kam-Ming v. The Queen* (1980)AC247, at p 261 ; On the question whether the admission of evidence of the alleged confession would be unfair to the accused, the onus lies on the accused to persuade the trial judge, again on the balance of probability, that it would be (see *R. v. Lee* (1950)82 CLR, at pp 152-153 ; *Wendo v. The Queen* (1963)109 CLR, at p 565 ; *MacPherson v. The Queen* (1981)147 CLR, at pp 519-520).



DISTINCTION BETWEEN ADMISSIBILITY AND WEIGHT

- The *voir dire* should never be permitted to be used as a means of attacking in advance the credibility of the testimony of a witness.
- The question most frequently arising will be, "is this evidence admissible" according to legal criteria? If it is, its weight is a matter to be considered by the Court at the end of the whole evidence.
- Thus where it is shown *prima facie* that a witness is an expert in the particular field to which his attention is being directed, cross-examination on the *voir dire* should not be permitted so as to show that his qualifications are not as high as those of some other witness called or to be called. This goes to weight and not admissibility.
- But where his qualifications are put forward it may be that further evidence is desirable to ascertain whether those qualifications do in fact qualify him in the field of learning as to which he is to speak, and then cross-examination on the *voir dire* will be permitted.
- Once the confession is admitted its weight is for the jury to determine — ie, the jury determines its probative force — and the same evidence led by the accused on the *voir dire*, can be given by him in the presence of the jury to this end: *R v Pratt* (1965) 83 WN (Pt 1) (NSW) 358



HOW TO FILE VOIR DIRE

- Under Rule 39.1(1)(d) of the *Joint Criminal Rules 2022 (SA)*.
 - An application (Form 92) is required
 - Application must be filed at least 7 days before the hearing at which the orders are to be sought
- Written submissions or a summary of arguments to be relied on at a hearing or affidavits, report, reference or any other documents must be filed and served at least 2 business days before the listed hearing date. (Rule 65.4)
- Must be made 14 days before the pre-trial conference date (Rule 66.1)
- District Court and Supreme Court have similar rules but are not identical.
- Under Rule 102.1:
 - Must be made by the date fixed for filing the defendant's case statement;
 - Any other application to determine an issue before the commencement of the trial must be made at least 6 weeks before the trial date.



EFFECT OF RULING & OUTCOME

- If evidence is ruled inadmissible, it must be completely disregarded in the main trial. In the Magistrates Court (where there is no jury), the magistrate must "put the evidence out of their mind" when deciding the final verdict.
- A ruling on the *voir dire* can significantly affect a case, sometimes leading to a quick resolution.

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IMPORTANT CASES

- *Sinclair v R* (1946) 73 CLR 316;
- *Cleland v. The Queen*(1982) 151 CLR 1;
- *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW);
- *Wendo v R* (1963) 109 CLR 559;
- *McDermott v. The King* (1948) 76 CLR 501;
- *The King v. Lee* (1950) 82 CLR 133;
- *MacPherson v. The Queen* (1981) 147 CLR 512.

THANK YOU

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