Case Note

The Unsettled Safety Net of the Unfairness Discretion: Section 90 of the *Evidence Act* 1995 (NSW) in *Em v The Queen*

ANNA GARSIA*

Abstract

Em v The Queen was the first time the High Court directly considered the discretion to exclude from evidence admissions adduced by the prosecution on the basis that use of the evidence would be 'unfair to the defendant' which is found in s 90 of the *Evidence Act* 1995 (NSW). A majority dismissed the appeal before the Court, but there was no clear majority approach on the construction of s 90. This paper analyses the different approaches found in each of the decision's judgments and highlights that the particular approach chosen to construe s 90 in the context of the other exclusionary provisions in the *Evidence Act* has a large impact on the factors that might be relevant to 'unfairness' under s 90.

1. Introduction

Em v The Queen[1] was the first time that the High Court was presented with an opportunity to consider directly s 90 of the *Evidence Act* 1995 (NSW).[2] This provision grants a wide discretion to exclude from evidence admissions adduced by the prosecution on the basis that it would be 'unfair to the defendant' to use the evidence at trial.

As well as requiring examination of the general principles of s 90, the circumstances of *Em* also necessitated that the Court consider the application of the provision to admissions obtained in the context of covertly recorded questioning by police and incorrect assumptions held by the accused.

A majority dismissed the appeal, however even amongst the majority the reasoning and analysis differed significantly between judgments. As a result many questions about the operation of s 90 which were raised by the case remain unsettled. In particular no clear majority approach emerged on how s 90 should interact with other exclusionary provisions in the *Evidence Act* and the related issue of the factors that might be relevant to 'unfairness' under s 90. These issues

* Final year student, Bachelor of Laws, University of Sydney. I would like to express my sincere thanks to Miiko Kumar for her assistance in the preparation of this note.

1 [2007] HCA 46.

2 The same provision is found as s 90 of *Evidence Act* 1995 (Cth) and *Evidence Act* 2001 (Tas).

are fundamental to the application of the provision. It is therefore important to compare the different approaches outlined in *Em* as each may well be drawn upon by lower courts until there is another opportunity for the law on the unfairness discretion to be clarified.

2. Preliminary Issues

Sophear Em ('the appellant') faced trial in the Supreme Court of New South Wales for offences committed during a home invasion. At trial before James J and a jury he was convicted of the offences of murder, assault with intent to rob while armed with a dangerous weapon and firing a firearm with disregard for safety.[3] At the same trial the appellant also pleaded guilty to five offences arising from a separate home invasion.[4]

An appeal against the contested convictions was dismissed by the New South Wales Court of Criminal Appeal.[5] Special leave to appeal that decision to the High Court was granted on two grounds: first, that part of a confession recorded by police on 15 May 2002 should have been excluded from evidence under s 90 of the *Evidence Act* 1995 (NSW) (s 90)[6] and second, alternatively, that the primary judge erred in failing to give the jury a warning about the unreliability of the confession.[7] It is the analysis of the Court in relation to the first ground of appeal which is the focus of this case note.

As the grounds for appeal were related to the admission of a particular piece of evidence a brief outline of the facts relating to the collection of the evidence, the procedural history and s 90 is necessary to understand the Court's reasoning.

A. Facts Relating to the Collection of the Evidence

The interview that occurred on 15 May 2002 was not the first time the appellant had been questioned by police in relation to either home invasion. After his arrest on 24 April 2002 he was taken to the police station for questioning where he received a caution by police.[8] During this interview the appellant refused to answer questions while being recorded.[9] Eventually the appellant answered questions without being taped and the police prepared a written record his answers after the interview.[10] This written evidence was excluded from the trial because it had not been recorded on tape.[11]

In early May 2002 warrants were issued authorising the police to wear covert listening device transmitter and recorders in conversations with the appellant.[12]

3 *Em v The Queen* [2007] HCA 46 at [1] (Gleeson CJ & Heydon J).
4 *Em v The Queen* [2007] HCA 46 at [1] (Gleeson CJ & Heydon J).
5 *Em v The Queen* [2006] NSWCCA 336 (Giles JA, Grove & Hidden JJ).
6 *Em v The Queen* [2007] HCA 46 at [2] (Gleeson CJ & Heydon J).
7 *Em v The Queen* [2007] HCA 46 at [2] (Gleeson CJ & Heydon J).
8 Pursuant to s 365M(1)(a) of the *Crimes Act* 1910 (NSW) as it stood at the relevant time of the case, *Em v The Queen* [2007] HCA 46 at [8] (Gleeson CJ & Heydon J).
9 *Em v The Queen* [2007] HCA 46 at [8]-[11] (Gleeson CJ & Heydon J).
10 *Em v The Queen* [2007] HCA 46 at [13] (Gleeson CJ & Heydon J).
11 Pursuant to s 281 of the *Criminal Procedure Act* 1986 (NSW).

On 15 May 2002 the police officers, wearing such devices, visited the appellant at home and asked him to come to a nearby park.[13] The police officers reminded the appellant of the caution that he had been given at the police station and that he did not have to talk to the police.[14] However the appellant was not told on this occasion that what he said might be recorded and might be used in evidence — he was effectively only administered only the first half of the caution he had previously received.[15]

During the conversation with the police at the park the appellant made statements which were arguably admissions.[16] Later in this conversation the appellant was told by one of the police officers, Detective Abdy, that he was not going to be arrested, as if that would be the police's intention when they would be at the police station.[17] This police 'assurance' to the appellant was to be significant to the admissibility of parts of the conversation as evidence in the trial, as outlined below.

B. Procedural History

It is important to note that prior to the trial before James J, a trial had previously been held before Shaw J.[18] In a *voir dire* Shaw J had made an order excluding all of the conversation in the park (including before the assurance was given) on three grounds, including that it would be unfair to the appellant pursuant to s 90 of the *Evidence Act* 1995 (NSW) (*Evidence Act*).[19] The Crown appealed to the NSW Court of Criminal Appeal (NSWCCA) under s 5F of the *Criminal Appeal Act* 1912 (NSW).[20] All three grounds for excluding the evidence were overturned by the NSWCCA. The ground related to s 90 was overturned because Shaw J took into account irrelevant considerations.[21]

There was then a second trial before James J and a jury. James J excluded all the recorded statements given by the appellant *after* the assurance by police that he was not going to be arrested as it would be unfair, pursuant to s 90 to use the evidence against the defendant.[22] However James J did not exclude the evidence of the conversation in the park *before* the police assurance occurred and this decision formed the basis of an appeal to the NSWCCA against conviction and sentence. The NSWCCA (Giles JA, Grove and Hidden JJ) concurred with the

12 *Em v The Queen* [2007] HCA 46 at [15] (Gleeson CJ & Heydon J).The warrants were issued pursuant to s 16 of the *Listening Devices Act* 1984 (NSW).
13 *Em v The Queen* [2007] HCA 46 at [16] (Gleeson CJ & Heydon J).
14 *Em v The Queen* [2007] HCA 46 at [16] (Gleeson CJ & Heydon J).
15 *Em v The Queen* [2007] HCA 46 at [16] (Gleeson CJ & Heydon J).
16 *Em v The Queen* [2007] HCA 46 at [21] (Gleeson CJ & Heydon J).
17 *Em v The Queen* [2007] HCA 46 at [21] (Gleeson CJ & Heydon J).
18 *Em v The Queen* [2007] HCA 46 at [22] (Gleeson CJ & Heydon J).
19 *Em v The Queen* [2007] HCA 46 at [21] (Gleeson CJ & Heydon J).
20 Pursuant to s 5F(3A) '[t]he Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.'
21 *R v Em* [2003] NSWCCA 374 (Ipp JA, Hulme & Howie JJ).
22 *Em v The Queen* [2007] HCA 46 at [25] (Gleeson CJ & Heydon J).

decision of James J not to exclude the evidence and dismissed the appeal.[23] Special leave was then granted to appeal to the High Court. The only evidence that was in question at the appeal was therefore the statements made by the appellant prior to the police assurance.

C. The Provision of the Evidence Act Addressed in the Appeal

For the purposes of special leave s 90 was the only section of the *Evidence Act* whose application to the evidence was in question. The appeal was premised on the fact that the evidence had not been excluded under ss 84, 85, 137 or 138.[24]

Section 90 is found in Part 3.4 of the *Evidence Act* and states:

> In a criminal proceeding, the Court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
>
> (a) the evidence is adduced by the prosecution, and
>
> (b) having regard to the circumstances in which the admission was made, it would have been unfair to the defendant to use the evidence.[25]

At common law there is discretion to exclude admissions that would otherwise be admissible on the basis that to admit the evidence would be 'unfair' to the accused. This discretion was discussed in *R v Lee*[26] and is often referred to as the *Lee* discretion. A provision developed out the *Lee* discretion, was included in the Australian Law Reform Commission's Final Report on evidence[27] and this gave rise to s 90 in the *Evidence Act*.

This appeal was the first time that the High Court had considered s 90 directly since the introduction of the *Evidence Act*, although in 1998 in *R v Swaffield; Pavic v The Queen* [28] the High Court did briefly address the section in *obiter* when considering the common law unfairness discretion in the context of the newly introduced *Evidence Act*.

3. The Judgments

Em's appeal was heard before five judges in the High Court and was dismissed by a majority of four (Gleeson CJ, Gummow, Hayne and Heydon JJ) to one (Kirby J). In the majority two separate joint judgments were handed down, one by Gleeson CJ and Heydon J and another by Gummow and Hayne JJ. The approach and reasoning differed quite significantly between the two judgments. It is therefore appropriate to consider each judgment separately before analysing the position of the law of s 90 after this decision.

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23 *Em v The Queen* [2006] NSWCCA 336

24 *Em v The Queen* [2007] HCA 46 at [27]-[40] (Gleeson CJ & Heydon J).

25 The same provision is found as s 90 of *Evidence Act* 1995 (Cth) and *Evidence Act* 2001 (Tas). No change was made to s 90 in *Evidence Act Amendment Act* 2007 (NSW).

26 (1950) 82 CLR 133.

27 Australian Law Reform Commission, *Evidence*, Report No 38 (1987) at 90.

28 (1998) 192 CLR 159 at [67]-[70] (Toohey, Gaudron & Gummow JJ)

A. Gleeson CJ and Heydon J

The judgment of Gleeson CJ and Heydon J featured detailed analysis of the case's specific facts. However, this note will deal with three key areas of general principle about s 90 that can be identified in this analysis: first, the focus of inquiry under s 90; second, the relevance of the evidence's reliability to s 90; and third, incorrect assumptions of the accused as a focus of 90.

(i) The Focus of Inquiry under s 90

Section 90 is drafted in wide, general terms and 'unfairness' is not defined in the Act. Nevertheless, many of the appellant's arguments were based on the premise that some factors about the evidence in question were relevant to an inquiry into whether s 90 is engaged, and that there were other factors which were not relevant to such an inquiry.[29] In particular, some of the appellant's submissions sought identification of the primary focus or 'touchstones' of 'unfairness' under s 90,[30] and to differentiate between factors that were touchstones and those that were not touchstones but were nevertheless relevant considerations.[31]

However in their analysis Gleeson CJ and Heydon J did not appear to adopt the classifications used in the appellant's arguments. Rather it was noted that '[t]he language in s 90 is so general that it would not be possible in any particular case to mark out the full extent of its meaning'[32] and 'the application of s 90 is likely to be highly fact specific'.[33] Their Honours did not identify a 'touchstone' of unfairness on this occasion, although they did not expressly rule out that one could be identified in a later case. This demonstrates an approach whereby the factors that are relevant unfairness to the defendant will be developed through identification on a case by case basis.

Proceeding on this approach Gleeson CJ and Heydon J went on to accept that first, the reliability of the evidence was a relevant factor to 'unfairness' and second, the incorrect assumptions of the accused were 'one focus'[34] of s 90. The latter was a conclusion consistent with the Australian Law Reform Commission's final report on evidence.[35] Both of these factors are considered in greater detail in sections below.

At this point it is also important to note that Gleeson CJ and Heydon J expressly left open a number of questions relating to how the focus of inquiry under s 90 is affected by other provisions in the *Evidence Act* which deal with the exclusion of evidence. The appellant had submitted that factors addressed under ss 84, 85, 86,

29 *Em v The Queen* [2007] HCA 46 at [52]-[54] (Gleeson CJ & Heydon J).

30 *Em v The Queen* [2007] HCA 46 at [52] (Gleeson CJ & Heydon J).

31 *Em v The Queen* [2007] HCA 46 at [54] (Gleeson CJ & Heydon J).

32 *Em v The Queen* [2007] HCA 46 at [56] (Gleeson CJ & Heydon J).

33 *Em v The Queen* [2007] HCA 46 at [56] (Gleeson CJ & Heydon J).

34 *Em v The Queen* [2007] HCA 46 at [56] (Gleeson CJ & Heydon J).

35 Australian Law Reform Commission, *Evidence*, Report No 38 (1987) at 90 stated '[t]he *Lee* discretion focuses on the question whether it would be unfair to the accused to admit the evidence. The discretion to obtain illegally or improperly obtained evidence requires a balancing of public interests. It would therefore be less effective than the *Lee* discretion in the situation where the confession was obtained because the accused proceeded on a false assumption'.

137, 138 and 139 (for example 'violence and the like, unreliability and unlawful or improper obtaining'[36]) were potentially relevant to s 90 but not 'touchstones' of the provision.[37] However, Gleeson CJ and Heydon J declined to answer these questions because they held that the behaviour of police was not the same as those dealt with under the provisions.[38]

(ii) Reliability

After pointing out that at common law the reliability of evidence was a factor affecting the fairness its use,[39] Gleeson CJ and Heydon J went on to examine the reliability of the admission in question, demonstrating that they also saw reliability as a relevant, though not necessarily determinative factor when evaluating unfairness under s 90.[40]

In this particular case the evidence was found in fact to be reliable and thus reliability was not a factor indicating that the use of this evidence would be unfair to the appellant.[41] The analysis on reliability therefore did not accept the appellant's argument that it should be irrelevant to s 90 that evidence is found in fact to be reliable as s 90 should only consider whether there is a risk of unreliability that might give rise to unfairness.[42] Such an argument suggests that reliability considerations should only be reasons weighing in favour of exclusion of evidence. In contrast, the position accepted is that, when the evidence is in fact reliable, reliability can be a reason weighing against the exclusion of evidence under s 90.

(iii) The Incorrect Assumptions of the Accused

That the appellant had made his confession in circumstances involving an incorrect assumption was an uncontested finding from the trial before James J. The assumption was 'that if a conversation he had with police officers was not being recorded, evidence of the conversation could not be used against him in criminal proceedings'.[43] Gleeson CJ and Heydon J analysed this incorrect assumption in detail before ultimately reaching the conclusion that the judge had not erred in failing to exclude the evidence under s 90.

Though they were not identified as such, the analysis effectively examined the subjective mental state of the accused in two key areas: first, the connection between police behaviour and the accused's state of mind; and second, the logic of the actual assumptions of the accused. Taking into account these two areas, Gleeson CJ and Heydon J then ultimately considered whether the incorrect assumptions meant that the appellant's right not to speak to police had been impugned.

36 *Em v The Queen* [2007] HCA 46 at [53] (Gleeson CJ & Heydon J).
37 *Em v The Queen* [2007] HCA 46 at [53]-[54] (Gleeson CJ & Heydon J).
38 *Em v The Queen* [2007] HCA 46 at [53]-[54] (Gleeson CJ & Heydon J).
39 *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at [78] (Toohey, Gaudron & Gummow JJ).
40 *Em v The Queen* [2007] HCA 46 at [72]-[73] (Gleeson CJ & Heydon J).
41 *Em v The Queen* [2007] HCA 46 at [73]-[74] (Gleeson CJ & Heydon J).
42 *Em v The Queen* [2007] HCA 46 at [72] (Gleeson CJ & Heydon J).
43 *Em v The Queen* [2007] HCA 46 at [43] (Gleeson CJ & Heydon J).

The Connection between Police Behaviour and the Accused's State of Mind

There are several ways in which the behaviour or actions of police can possibly have an impact on any incorrect assumptions an accused might hold when he or she makes an admission: the police can induce or contribute to the formation of the assumptions; the police can confirm or reinforce existing assumptions; or the police can fail to correct existing assumptions. Although Gleeson CJ and Heydon J do not expressly identify these categories the judgment does address (at varying levels of depth) each of these three possible scenarios.

There was no need to focus greatly on the inducement because it was found at trial that the police had not contributed to the formation of the appellant's incorrect assumption.[44] Thus the way s 90 might operate in circumstances where the police did actually induce the formation of the incorrect assumption did not have to be resolved. However, in addressing questions about the reasoning of the lower Courts Gleeson CJ and Heydon J did clarify in *obiter* that inducement of the incorrect assumption is not required to enliven s 90 — it is possible to find it unfair to the defendant to use the confession when the formation of the incorrect assumption related to the evidence was not connected to the actions of police.[45]

With regards to reinforcement of existing beliefs, Gleeson CJ and Heydon J found that in this case the police did not reinforce or confirm the belief of the appellant because once he had formed his assumption there was 'no evidence that had he turned his mind to the question again, or he had any doubt about it which might cause him to question it, or that he had any desire to search for confirmation'.[46] Underpinning this reasoning appears to be the principle that for police to reinforce an assumption it must be possible to point both to a time when there was doubt in the appellant's mind and then to police behaviour that subsequently confirmed the original assumption. Moreover the presumption appears to be that they did not turn their mind to the question.

Having found that the police did not reinforce the appellant's existing incorrect assumption, the way s 90 might operate to exclude admissions made in these circumstances did not have to be resolved in this case. In particular it remains open as to whether this type of connection between police behaviour and the accused's state of mind would *prima facie* make it unfair to admit the confession or whether factors about the propriety or otherwise of the police actions such as those found in s 138(3) (for example the gravity of the impropriety and whether the behaviour was reckless) would also need to balanced before a decision was made to apply s 90.[47] There is however *obiter* of Gleeson CJ and Heydon J that, drawing upon common law unfairness discretion jurisprudence, suggest that the propriety or otherwise of police actions might be relevant to 'unfairness' under s 90.[48]

44 *Em v The Queen* [2007] HCA 46 at [43] (Gleeson CJ & Heydon J).
45 *Em v The Queen* [2007] HCA 46 at [74] (Gleeson CJ & Heydon J).
46 *Em v The Queen* [2007] HCA 46 at [65] (Gleeson CJ & Heydon J).
47 *Em v The Queen* [2007] HCA 46 at [54] (Gleeson CJ & Heydon J).
48 *Em v The Queen* [2007] HCA 46 at [54] (Gleeson CJ & Heydon J).

Finally, having ruled out the inducement and reinforcement scenarios, this case was analysed as one in which the connection between police behaviour and the accused's state of mind was that the police failed to correct an already existing assumption. Gleeson CJ and Heydon J found that this did not amount to 'unfairness' under s 90 because

> everyday the police take advantage of the ignorance or stupidity of persons whom they eventually prosecute and a mistake of the kind the appellant was operating under was simply a species of ignorance or stupidity.[49]

Their Honours did not see it appropriate to extend into evidence law the equitable principles permitting rescission of a contract where one party entered it under a disability or under mistake deliberately not corrected by the other party.[50] Moreover, Gleeson CJ and Heydon J found that the fact that an accused has made an incorrect assumption which could have been corrected by a caution does not create an obligation to administer the caution if the circumstances do not create an express legal obligation to do so.[51] Their Honours noted on this point that to give recourse to s 90 in such circumstances would be to create effectively an implicit obligation to caution in a situation where Parliament had not set out that a caution was necessary.[52]

The Content of the Assumption

The reasoning of Gleeson CJ and Heydon J indicates that an inquiry into whether an accused's incorrect assumptions render use of an admission unfair must also consider whether unfairness arises from the content of the assumptions themselves.

In the appellant's case it was important that the conversation was being covertly recorded. Gleeson CJ and Heydon J stressed that the fact that a conversation is being secretly recorded does not make it unfair to the defendant to admit a confession.[53] To hold so 'would create an automatic and universal rule of exclusion in place of a provision calling for case by case judgment'.[54] It followed that an incorrect assumption by the accused that statements are not being recorded does not enliven s 90.

However, in this case the appellant's incorrect assumption was more than that he was not being recorded; it was also that what was being said could not be used in evidence against him. Nevertheless, Gleeson CJ and Heydon J found that this also was not state of mind that made use of the evidence unfair because the assumption that the statements could not be used against the accused was 'inextricably linked'[55] to the assumption that the statements were not being

49 *Em v The Queen* [2007] HCA 46 at [77] (Gleeson CJ & Heydon J).
50 *Em v The Queen* [2007] HCA 46 at [76]-[77] (Gleeson CJ & Heydon J).
51 *Em v The Queen* [2007] HCA 46 at [77] (Gleeson CJ & Heydon J).
52 *Em v The Queen* [2007] HCA 46 at [77] (Gleeson CJ & Heydon J).
53 *Em v The Queen* [2007] HCA 46 at [66]-[67] (Gleeson CJ & Heydon J).
54 *Em v The Queen* [2007] HCA 46 at [67] (Gleeson CJ & Heydon J).
55 *Em v The Queen* [2007] HCA 46 at [78] (Gleeson CJ & Heydon J).

recorded.[56] Their Honours held that it would be 'illogical' to have a situation where a second assumption made an admission unfair when it was based on a first assumption that did not amount to unfairness.[57] This reasoning narrows any application of s 90 in situations covert recordings — to engage the provision it will seemingly be necessary to show that the assumption leading to unfairness can be completely separated logically and analytically from an assumption that the conversation is not being recorded.

Concluding the Incorrect Assumption Analysis: the Right Not to Speak

Gleeson CJ and Heydon J concluded their analysis of incorrect assumption by a final consideration of whether the appellant's state of mind when he chose to speak to police was such that his 'right not to speak' was impugned. After a close examination of the circumstances, with particular emphasis on the appellants awareness of many facts about the situation (including for example he knew he was speaking to police officers and he knew he did not have to answer questions) their Honours held that the accused's right had not been transgressed in a way that s 90 was engaged.[58] In this analysis they noted that when an accused's right not to speak is partially impugned by statute sanctioned covert recordings, it is not *prima facie* unfair to use the evidence.[59]

It is somewhat significant that Gleeson CJ and Heydon J gave final consideration to whether the appellant's incorrect assumptions resulted in unfairness through the lens of the 'right not to speak'. The approach is consistent with the continued development of common law unfairness discretion, particularly in the joint judgment *R v Swaffield*.[60] It also clearly demonstrates a view that s 90 can be used to protect an accused's right not to speak if it is found on the facts to have been impugned, even if such protection will be quite limited in the case of covert recordings.

B. Gummow and Hayne JJ

Using very different reasoning the judgment of Gummow and Hayne JJ also came to the conclusion that the evidence should not have been excluded under s 90. This judgment was far less grounded in the specific facts of the case than the judgment of Gleeson CJ and Heydon J. It centred on one key area of analysis in relation to s 90, that being the way in which s 90 must be constructed in the context of the *Evidence Act* as a whole.

Section 90 is one of a number of provisions in the *Evidence Act* which deal with the exclusion of evidence. For example other provisions deal with issues such as admissions influenced by violence,[61] reliability of admissions,[62] records of oral

56 *Em v The Queen* [2007] HCA 46 at [71], [78] (Gleeson CJ & Heydon J).
57 *Em v The Queen* [2007] HCA 46 at [71] (Gleeson CJ & Heydon J).
58 *Em v The Queen* [2007] HCA 46 at [78] (Gleeson CJ & Heydon J).
59 *Em v The Queen* [2007] HCA 46 at [78] (Gleeson CJ & Heydon J).
60 *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at [80]–[94] (Toohey, Gaudron & Gummow JJ).
61 *Evidence Act* 1995 (NSW) s 84.

questioning,[63] prejudicial evidence,[64] improperly or illegally obtained evidence,[65] and cautions.[66] As Gummow and Hayne JJ point out, 'many cases in which the use of the evidence of an out-of-court admission would be judged, in the exercise of the common law discretion, to be unfair to an accused are dealt with expressly by a particular provision of the Act other than s 90.'[67]

For Gummow and Hayne JJ the inclusion of the other provisions in the Act is critical when s 90 is considered in the context of the *Evidence Act* as a whole. Not only do they hold that as a result s 90 as a general provision should be only applied to the evidence after the other, more specific, provisions have been applied,[68] they go on to conclude that 'questions' dealt with under the other sections 'are not to be dealt with under s 90.'[69] Reading the statute in this manner greatly reduces the possible areas of enquiry for unfairness under s 90. It seems that their Honours held that the specific provisions should be construed as, for want of a better term, effectively 'covering the field' on a particular evidentiary issue.

Gummow and Hayne JJ comment that reading the *Evidence Act* in this way results in s 90 being a 'final or "safety net"' provision.[70] It is important to remember that this comment did not mean 'safety net' in the sense that s 90 provides an additional test in relation to an evidentiary issue. Gummow and Hayne JJ demonstrated this through the example of illegal and improper policing methods. Their Honours held that, once the evidence was not excluded under s 138 (as occurred in appellant's case[71]) it was then incorrect to approach any consideration of 'unfairness' under s 90 from the premise that the behaviour of the police, including the lack of complete caution should be criticised or 'condemned'.[72]

Considering the interaction between ss 138 and 90 also demonstrates the significant restriction placed on the application of s 90 if the *Evidence Act* is construed in this manner. Under s 138, improperly or illegally obtained evidence can be admitted if it is found, after balancing public policy interests in s 138(3), that 'the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in th[at] way'.[73] It seems logical that an admission could potentially pass this threshold and be admitted under s 138, but nevertheless be excluded under s 90 because the use of the evidence could then be found to be 'unfair to the defendant'. In fact, when James J excluded the second half of the conversation with the appellant at trial this was precisely the process of reasoning

62 *Evidence Act* 1995 (NSW) s 85.
63 *Evidence Act* 1995 (NSW) s 86.
64 *Evidence Act* 1995 (NSW) s 137.
65 *Evidence Act* 1995 (NSW) s 138.
66 *Evidence Act* 1995 (NSW) s 139.
67 *Em v The Queen* [2007] HCA 46 at [109] (Gummow & Hayne JJ).
68 *Em v The Queen* [2007] HCA 46 at [109] (Gummow & Hayne JJ).
69 *Em v The Queen* [2007] HCA 46 at [109] (Gummow & Hayne JJ).
70 *Em v The Queen* [2007] HCA 46 at [109] (Gummow & Hayne JJ).
71 *Em v The Queen* [2007] HCA 46 at [103]-[104] (Gummow & Hayne JJ).
72 *Em v The Queen* [2007] HCA 46 at [119] (Gummow & Hayne JJ).
73 *Evidence Act* 1995 (NSW) s 138(1).

used.[74] Applying the judgment of Gummow and Hayne JJ it would be incorrect for future trial judges to use s 90 in this way.

While the judgment makes it clear what is excluded from consideration under s 90, it is not clear what considerations or factors the 'safety net' of Gummow and Hayne JJ would or could actually catch. Their Honours state that s 90 'catches a residual category of cases not expressly dealt with elsewhere in the Act' [75] but there is no clear guidance in the judgment on what types of factors this residual category might include.

Moreover the way in which Gummow and Hayne JJ analysed this particular case highlights how difficult it might be to identify considerations relevant to unfairness under this approach. Their Honours held that questions about whether the evidence should be excluded because of 'incorrect assumptions' of the accused were actually questions of reliability and improper policing dealt with in ss 85 and 138.[76] In this context Gummow and Hayne JJ point out that '[s]howing that the person making the admission acted under some misapprehension is not to the point'.[77] The judgment also did not address the right not to speak to police at all, suggesting it would not be considered a separate question potentially relevant to unfairness.

From this reasoning it seems that framing the inquiry in terms an issue not actually directly addressed by the Act is insufficient to engage s 90 if the issue cannot be analytically separated from, or touches upon, issues covered in the specific exclusionary provisions. The result in this case suggests that in practice the construction of s 90 will actually exclude more than the consideration 'expressly dealt with in the Act'. It thus remains to be seen what considerations, if any, will be relevant to Gummow and Hayne JJ's construction of the s 90 discretion in the future.

C. Dissenting Judgment: Kirby J

Kirby J gave a very strongly worded dissenting judgment which found that James J and the Court of Appeal had erred in failing to exclude the evidence under s 90. His Honour thus would have allowed the appeal, quashed the appellant's convictions and entered an acquittal.[78]

Kirby J found that many of the circumstances in relation to the confession made use of that evidence at trial unfair to the appellant. Rather than giving a detailed summary of these conclusions this note will focus on the key areas of difference in general principle and analysis which lead to Kirby J reaching a different conclusion to the majority: first, the scope of s 90; second, the importance of the 'right not to speak'; and third the analysis of police behaviour.

74 *Em v The Queen* [2007] HCA 46 at [2], [35] (Gleeson CJ & Heydon J).
75 *Em v The Queen* [2007] HCA 46 at [114] (Gummow & Hayne JJ).
76 *Em v The Queen* [2007] HCA 46 at [121] (Gummow & Hayne JJ).
77 *Em v The Queen* [2007] HCA 46 at [121] (Gummow & Hayne JJ).
78 *Em v The Queen* [2007] HCA 46 at [238] (Kirby J).

(i) The Scope of s 90

Kirby J strongly emphasised that s 90 had been included in the *Evidence Act* with the intention of preserving the common law *Lee* or unfairness discretion.[79] After detailed analysis of the provision Kirby J held that the unfairness provision in s 90 of the *Evidence Act* was 'at least as broad as that provided by the common law',[80] suggesting that 'it may even be that s 90 casts a wider net'.[81]

In reaching this conclusion Kirby J directly rejected the position central to the judgment of Gummow and Hayne JJ that the scope of the provision should be limited by the other exclusionary provisions in the *Evidence Act* stating that '[i]t would be a serious departure from the text, inimical to the purpose of s 90 to impose broad language restrictions imported from the language of other exclusionary provisions'.[82]

(ii) The 'Right Not to Speak' and Informed Choices

Gummow and Hayne JJ did not address the impact of the accused's 'right not to speak' on unfairness at all in their reasoning. Gleeson CJ and Heydon J used the 'right not to speak' to conclude their analysis of the incorrect assumptions but it did not underpin the judgment in a substantial way. In contrast, Kirby J used this right as the central approach to the entire judgment, seeing it as intimately connected with the right of the accused to a fair trial[83] and therefore whether admission of evidence resulted in unfairness to the defendant.

Kirby J therefore analysed many aspects of the circumstances surrounding the collection of the accused's evidence, including police behaviour[84] and the selection of the park as a venue,[85] in terms of whether or not they allowed the accused to make an informed choice whether or not to speak to police. This approach was particularly relevant to the way Kirby J considered the incorrect assumptions of the accused and came to the opposite conclusion to Gleeson CJ and Heydon J that the content of those assumptions would result in unfairness if the evidence was adduced. Having accepted that the 'mere fact' that a conversation was being covertly recorded did not make use of the evidence unfair,[86] Kirby J went on to hold that the appellant's right not to speak had been infringed because:

> [T]here is a clear and not particularly subtle distinction between a belief (often correct) that unrecorded evidence of admissions to police cannot be used in a subsequent criminal trial and a false assumption (encouraged by things said and done by police) that on a particular occasion police were not in fact recording a conversation.[87]

79 *Em v The Queen* [2007] HCA 46 at [188] (Kirby J).
80 *Em v The Queen* [2007] HCA 46 at [195] (Kirby J).
81 *Em v The Queen* [2007] HCA 46 at [205] (Kirby J).
82 *Em v The Queen* [2007] HCA 46 at [196] (Kirby J).
83 *Em v The Queen* [2007] HCA 46 at [191] (Kirby J).
84 *Em v The Queen* [2007] HCA 46 at [206] (Kirby J).
85 *Em v The Queen* [2007] HCA 46 at [220]-[224] (Kirby J).
86 *Em v The Queen* [2007] HCA 46 at [202] (Kirby J).
87 *Em v The Queen* [2007] HCA 46 at [204] (Kirby J).

(iii) The Behaviour of the Police

Given Kirby J did not limit the scope of s 90 by provisions such as s 138, his Honour was at liberty to consider police behaviour. Whereas Gleeson CJ and Heydon J had held that no question of police propriety arose on the facts,[88] Kirby J was highly critical of the police and found in light of this behaviour it would be unfair to use the evidence. He also stated that a failure to reach this conclusion would only condone such behaviour and make it more prevalent.[89]

Although Kirby J accepted that trickery had a role to play in the collection of evidence,[90] he felt that that in this case the behaviour of the police went too far and as a result deprived the appellant of an informed choice to speak to police.[91] On this issue his Honour expressly rejected the statement of Gleeson CJ and Heydon J that police should be free to take advantage of the ignorance and stupidity of suspects.[92]

Finally Kirby J also held that unfairness arose out of his finding that the police had deliberately failed administer the second half of the caution.[93] In contrast to the position of Gleeson CJ and Heydon J His Honour held that the incorrect assumptions of the accused and the general circumstances of the case did give rise to the need to administer a caution, even if one was not strictly required by statute in the circumstances, because this would have alerted the appellant to a 'vital consequence' of the conversation.[94]

4. Considering the Various Judgments — s 90 after Em v The Queen

After the decision in *Em* there is still very little clarity about the operation of s 90. Some key questions were left open, including the standard of review required for decisions involving the provision.[95] Moreover, as highlighted above by the analyses of the individual judgments, there was limited overlap or agreement in approach towards the provision. Even putting aside the dissenting judgment of Kirby J, the significant differences in the reasoning and analysis used by the majority judgments to dismiss the appeal means that many issues to do with the operation of s 90 remain unsettled with no clear High Court majority in support of one approach to the provision. This is especially relevant to two inter connected

88 *Em v The Queen* [2007] HCA 46 at [54] (Gleeson CJ & Heydon J).
89 *Em v The Queen* [2007] HCA 46 at [215] (Kirby J).
90 *Em v The Queen* [2007] HCA 46 at [193] (Kirby J).
91 *Em v The Queen* [2007] HCA 46 at [218]–[222] (Kirby J).
92 *Em v The Queen* [2007] HCA 46 at [228]–[230] (Kirby J).
93 *Em v The Queen* [2007] HCA 46 at [213] (Kirby J).
94 *Em v The Queen* [2007] HCA 46 at [210] (Kirby J).
95 Gleeson CJ & Heydon J held that they did not need to resolve this question as 'whatever standard of review is applied, the conclusion of James J and the Court of Criminal Appeal are correct': *Em v The Queen* [2007] HCA 46 at [55] (Gleeson CJ & Heydon J); Gummow & Hayne JJ did not address the issue in the second joint judgment and Kirby J held that s 90 did not actually create a discretion and therefore that the Court of Criminal Appeal had therefore applied the incorrect standard of review: *Em v The Queen* [2007] HCA 46 at [198]–[200] (Kirby J).

and very significant areas of general principle: the interaction between s 90 and other provisions of the *Evidence Act* and the identification of factors relevant to 'unfairness' under s 90.

A. The Interaction between s 90 and other Provisions of the Evidence Act

Gummow and Hayne JJ adopted a very clear approach to the interaction between s 90 and other provisions of the *Evidence Act* in holding that questions addressed by the specific exclusionary provisions were not relevant to the general s 90 exclusion.[96] Gleeson CJ and Heydon J expressly left open the question of how the other exclusionary provisions would interact with an inquiry under s 90.[97] However, there are some indications in their Honours' reasoning which suggests that they would not limit s 90's operation by other provisions to the same extent as Gummow and Hayne JJ.

First, there was a comment in the judgment that failure to 'invoke or successfully invoke' any other ground of exclusion did not rule out the application of s 90.[98] Secondly, though the police actions were held not to bear 'any resemblance'[99] to behaviour described in other provisions Gleeson CJ and Heydon J were nevertheless prepared to examine the connection police behaviour and the accused's incorrect assumptions (although in this case no unfairness was found). This demonstrates an analytical approach whereby questions about police actions can be addressed under s 90 even if provisions such as ss 85 and 138 have not been triggered by those actions. Thirdly, in identifying the reliability of the evidence as being relevant to s 90, Gleeson CJ and Heydon J did not in any way limit this analysis by reference to s 85 which also deals with reliability.[100]

There is thus the very strong possibility that if Gleeson CJ and Heydon J were to address the question of interaction between the exclusionary provisions in the future they would not adopt the Gummow and Hayne JJ construction of s 90 and therefore not limit the scope of the provision in the same manner.

B. Factors Relevant to Unfairness under s 90

There was also limited clarity from the majority judgments on what factors are relevant when considering 'unfairness' to the defendant under s 90. Gleeson CJ and Heydon J identified incorrect assumptions as one possible focus of s 90;[101] however, at least in circumstances where that inquiry raises issues of police conduct, Gummow and Hayne JJ did not accept that incorrect assumptions should be analysed under this provision.[102] There is therefore less than a High Court majority in support of the various principles articulated in the Gleeson CJ and Heydon J reasoning, including that failure to correct assumptions does not amount

96 *Em v The Queen* [2007] HCA 46 at [109] (Gummow & Hayne JJ).
97 *Em v The Queen* [2007] HCA 46 at [53]-[54] (Gleeson CJ & Heydon J).
98 *Em v The Queen* [2007] HCA 46 at [42] (Gleeson CJ & Heydon J).
99 *Em v The Queen* [2007] HCA 46 at [53] (Gleeson CJ & Heydon J).
100 *Em v The Queen* [2007] HCA 46 at [72]-[73](Gleeson CJ & Heydon J).
101 *Em v The Queen* [2007] HCA 46 at [56] (Gleeson CJ & Heydon J).
102 *Em v The Queen* [2007] HCA 46 at [121] (Gummow & Hayne JJ).

to unfairness and the need to consider the impact of the incorrect assumption on the accused's right not to speak. More fundamentally it also remains to be seen whether lower courts will adopt incorrect assumption as a possible focus of s 90, let alone the more detailed principles.

The Gleeson CJ and Heydon J judgment also identified the evidence's reliability as a factor relevant to the fairness of its use.[103] At least so far the question is addressed under s 85, Gummow and Hayne JJ disagreed,[104] although they leave open that reliability might be relevant in circumstances where s 85 does not apply, such as outside of official questioning.[105] Nevertheless there is actually a majority on the relevance of reliability as Kirby J expressly agrees that reliability is relevant to unfairness under s 90.[106] It is therefore likely that lower courts will consider reliability when s 90 is engaged.

Considering the differing opinions of the judgments with regard to the relevance of reliability and incorrect assumptions it becomes apparent why the approach to s 90 remains so uncertain after this case — identification of factors are relevant to unfairness under s 90 is dependent upon the approach taken towards the interaction between s 90 and the other exclusionary provisions. While Gummow and Hayne JJ arrived at the same decision as Gleeson CJ and Heydon J they did so because they found s 90 had no work to do at in this case, not because they agreed with Gleeson CJ and Heydon J as to what were relevant considerations to unfairness and then came to the same conclusion. The way the Courts identify factors relevant to s 90 unfairness on a case-by-case basis will therefore be influenced by the approach they take to construction of s 90 in the context of the *Evidence Act* as a whole. As noted above, if the Gummow and Hayne JJ construction is adopted it is very unclear what sorts of factors, if any, may be identified as relevant to the discretion.

5. Conclusion

Many aspects of the law with regard to the s 90 unfairness discretion remain unclear after the decision in *Em v The Queen*. The questions of approach on which no clear majority emerged from the decision are of fundamental importance to the operation of the provision. In particular the approach adopted to the construction of s 90 in the context of the other exclusionary provisions in the *Evidence Act* will have a large impact on what is identified in future cases as relevant factors of inquiry to unfairness under s 90. It is therefore hoped that the High Court will soon be presented with another opportunity to consider the s 90 unfairness discretion so that the law can be clarified.

103 *Em v The Queen* [2007] HCA 46 at [72]-[73] (Gleeson CJ & Heydon J).
104 *Em v The Queen* [2007] HCA 46 at [112] (Gummow & Hayne JJ).
105 *Em v The Queen* [2007] HCA 46 at [112] (Gummow & Hayne JJ).
106 *Em v The Queen* [2007] HCA 46 at [205] (Kirby J).