

STEPS FOR ILLEGALLY OBTAINED EVIDENCE

1. State the exclusionary rule → s 138(1)

As per **s 138(1)**, evidence that was obtained improperly or in contravention of an Australian law, is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Notes:

- Applies to both civil and criminal!
- The onus is on the D to show that the evidence was obtained improperly/illegally.
- This applies to both real (eg fingerprints) and testimonial evidence
- ALRC 26, vol 1: “the fundamental dilemma should be reflected – the conflict between the public interest in admitting reliable evidence (thereby convicting the guilty) and the public interest in vindicating individual rights and deterring misconduct, and maintaining the legitimacy of the judicial system” [964]

2. Is there an impropriety or illegality?

ILLEGALITY

- **Consider any breaches of the Crimes Act above** (right to lawyer, interpreter, guardian etc)
- Evidence obtained as a consequence of breaking the law (*Marijancevic*)
- Have the officials themselves engaged in the charged offence/procured the commission of the offence? (*Ridgeway*)

Differentiate between where the evidence was obtained in consequence of an illegality (*Marijancevic*), vs where the police themselves committed the crime (*Ridgeway*)

Marijancevic → evidence obtained *IN CONSEQUENCE* of illegality

- FACTS: Illegality in searching and seizing marijuana crops from residential premises. Police need to complete affidavits/warrant to do this. Police were not signing and swearing the affidavits correctly, therefore the search warrants obtained were invalid, so were the weed plants
- HELD: Weed plants were obtained as a consequence of the illegality/trespass (no valid search warrant). Had the police never entered into the property after obtaining the warrants, they would never have obtained the evidence.

Ridgeway → offending actually committed/procured by police

- FACTS: Customs control allowed someone to bring drugs into the country, so they could then bust them. Did not have authority from Parliament to do this.
- HELD: Police here effectively aiding and abetting them bringing drugs into the country. The actual offence (trafficking) would never have occurred if it was not for this conduct → the actual CRIME was committed because of the police