

Illegally Obtained Evidence

Introduction

Per **s138(1)**, despite being admissible per [section (often admissions)], the evidence of [X] will be inadmissible if it was obtained:

- (a) improperly or in contravention of an Australian law (s138(1)(a)); or
- (b) in consequences of an impropriety or of a contravention of an Australian law (s138(1)(b))

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

Note: s138(1)(b) protects **derivative** evidence

- This would be engaged where there was an issue with admissions (i.e. not cautioned) and then the Police go and get evidence from your house under search and seizure.

The **onus** initially falls on the party arguing that the evidence ought to be excluded on the basis of s138.

- The [D] must establish that the conduct falls within the meaning of s138.
- Once this onus is discharged, the onus shifts to the Crown (or party seeking to tender the evidence) to prove that the desirability of admitting the evidence outweighs the undesirability of admitting illegally or improperly obtained evidence (ALRC).

Step 1: How was the evidence obtained? Satisfy s138(1)(a) or s138(1)(b)

‘Improperly’ refers to conduct which is ‘quite inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement’ (Ridgeway).

Where no pre-existing standard exists, it will be rare to exclude on the basis of impropriety. Mere doubts regarding the appropriateness of conduct is insufficient (Robinson).

Contravention of an Australian law

The failure to adhere to legislative provisions and requirements will result in a contravention of Australian law. This includes:

- Reasonable time in detention before release/bail/bail justice (s464A(1) CA)
- Cautioned before questioning with investigating official (s464A(3) CA)
 - ⇒ Evidence of a statement made/act done by a person during questioning is taken to have been obtained improperly if the person was not cautioned (s139 EA).
 - ⇒ This caution needs to be translated (s139(3))
 - ⇒ **Consider** s90 unfairness here as well (Natale)
- Right to communicate/attempt to communicate with friend/relative or lawyer (s464C CA)
- Right to communicate/attempt to communicate with interpreter if sufficient knowledge of English (s464D CA)
- Right to parent/guardian/independent person present if a child (s464E CA)
- Illegal arrest (s458-s459 CA)
- Illegal search and seizure (s459A CA)

s138(1)(b)

s138(1)(b) would require a causal link between the evidence and the contravention engaging s138(1)(b) due to the presence of 'in consequences of' (Kadir).

s138(1)(b) protects **derivative** evidence

- This would be engaged where there was an issue with admissions (i.e. not cautioned) and then the Police go and get evidence from your house under search and seizure.

Step 2: Can we engage the deeming provisions?

Per **s138(2)**, evidence of [admission] will be deemed to have been obtained improperly if [questioner]:

(a) Did, or omitted to do, an act in the course of the questioning even though [he/she] knew or ought to reasonably have known that [act/omission] would likely substantially impair ability of [the person being questioned] to respond rationally to the questioning (**s138(2)(a)**);

OR

- i.e. if they withheld medical treatment, not letting them see their children, manipulating photographs in a way that could impair their ability to act rationally

(b) made a false statement in the course of the questioning even though [he/she] knew or ought to reasonably have known that the statement was false and that making the false statement was likely to cause [person who was being questioned] to make an admission (**s138(2)(b)**)

- i.e. 'yes, your co-accused has told us everything' or 'yes, your wife has told us everything'

Step 3: Balancing Act

As above, [D] has proved that the evidence was [illegally (contravention of Australian law)/improperly obtained]. Accordingly, P bears the onus of satisfying the Court that the balancing test in s138(1) is resolved in favour of admission, applying the mandatory factors in s138(3).

The court will need to look at all of the mandatory factors in s138(3). OTF, the relevant factors include (s138(3):

(a) the probative value of the evidence (s138(3)(a))

- the higher the probative value, the more likely in favour of admission (Ridgeway)

(b) the importance of the evidence in the proceeding (s138(3)(b))

- the more important that the evidence is, the greater the argument for admissibility on a public policy basis (Marijancevic; Kadir; Ridgeway)

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding (s138(3)(c))

- the more serious the offence, the greater the argument for admissibility on a public policy basis; criminal proceedings are more important than civil.

(d) the gravity of the impropriety or contravention (s138(3)(d))

The court in *Marijancevic* distinguished between three levels of seriousness.

- Most serious: Knowing and done to gain an advantage (Ridgeway)

- *Ridgeway*: knowingly arranged importation to gain extra evidence against Ridgeway.