

Week 7: Section 138 – Improperly Obtained Evidence and Other Discretions to Exclude

1. Section 138 – Improperly or Illegally Obtained Evidence

- **Principle: Exclusion of Improperly or Illegally Obtained Evidence (s.138)**
 1. **Codification:** Section 138 is a codification of the common law *Bunning v Cross* discretion.
 2. **Core Rule:** Evidence obtained improperly, in contravention of an Australian law, or in consequence of such conduct, is not admissible unless the desirability of admitting it outweighs the undesirability.
 3. **Purpose:** Aims to ensure accurate fact-finding, deter impropriety, protect rights, and uphold judicial integrity.
 4. **Application:** Applies in both civil and criminal trials.
- **Onus of Proof (s.138)**
 1. **Party seeking exclusion:** Bears the onus to prove (on the balance of probabilities) that the evidence was obtained improperly or illegally.
 2. **Party seeking admission (Prosecution):** Bears the onus to prove (on the balance of probabilities) that the desirability of admitting the evidence outweighs the undesirability.
- **"In consequence of" (s.138(1))**
 1. This includes evidence obtained twice, unlawfully obtained evidence leading to lawfully obtained evidence, or unlawfully obtained evidence providing an investigation avenue.
 2. **Case: Slater v The Queen (2020)**
 - **Facts:** Case discussing the connection between evidence obtained 'in consequence of' an impropriety and that impropriety.
 - **Principle:** The degree of connection between the evidence and the impropriety/contravention is relevant to the balancing exercise. A distant causal relationship might make admission more likely; a close connection might deter the improper method of obtaining evidence.
 3. **Case: R v Shaheed (2002)**
 - **Facts:** Example of unlawfully obtained evidence providing an investigation avenue.
 - **Principle:** Evidence obtained as a consequence of prior unlawful conduct can be subject to exclusion under s.138.
- **"Discretion" (Mandatory Exclusion with Conditional Admission)**
 1. **Case: Wu (A pseudonym) v The Queen (2020)**
 - **Facts:** Clarification of the mandatory nature of s.138.
 - **Principle:** Section 138 is mandatory; if evidence is found to be improperly obtained, it *must* be excluded unless the desirability of admission outweighs undesirability. It's not merely a discretion to exclude, but a conditional admission.
 2. **Case: Kadir v The Queen (2020)**
 - **Facts:** Discussion on s.138 being broader than the common law *Bunning v Cross* discretion.
 - **Principle:** Section 138 applies in *any* proceeding (not just criminal) and is not confined to misconduct by law enforcement. The public interests weighed are broader, including the general public interest in not giving curial approval to illegally or improperly obtaining evidence, not just deterring police misconduct.
- **What Constitutes "Improper Conduct" (s.138(2))**
 1. **General:** Conduct that falls below "minimum standards" or is "clearly inconsistent".
 - **Case: Robinson v Woolworths Ltd (2005)**