

# Illegally Obtained Evidence

*s138 Evidence Act (NSW) 1995*

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Last month I had a client who was searched by police and found to possess speed and another person's credit cards. He was charged with drug possession and goods in custody reasonably suspected of being stolen. I persuaded the magistrate that the search was unlawful and applied to have the proceeds of the search excluded under s138. The magistrate agreed and dismissed the charges. The hearing lasted all of ten minutes.

It is common for the police to obtain evidence in a manner that is improper or even illegal. Every lawyer needs to understand the procedure and how to apply to exclude evidence under s138 in order to advise and represent their clients effectively. This article aims to assist legal practitioners appearing in the Local Court of NSW.

## 'Desirability' of Admitting the Evidence

Section 138 provides that Evidence that was obtained (a) improperly or in contravention of an Australian law, or (b) in consequence of an impropriety or of a 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.

In determining the 'desirability' of admitting the evidence, the court is required to take into account:<sup>1</sup>

- (a) the probative value of the evidence, and*
- (b) the importance of the evidence in the proceeding, and*
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and*
- (d) the gravity of the impropriety or contravention, and*
- (e) whether the impropriety or contravention was deliberate or reckless, and*
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and*
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and*
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.*

## Application

In the present case, the proceeds of the search had high probative value and importance in the proceedings. In fact, in the absence of any admissions, it was the only evidence that a crime had been committed. However, the court found that, although highly prevalent, drug possession and GIC were relatively minor offences. Whereas, the gravity of an arbitrary search (an unlawful search is an assault) meant that the undesirability outweighed desirability.

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<sup>1</sup> s138(3) Evidence Act (NSW) 1995

## Submissions

Every case turns on its own facts. To learn more about police search powers, click [here](#). But remember that the different types of impropriety and illegality are endless. It is the task of the defence advocate to make the application and bring impropriety and illegality to the attention of the court and then make submissions referring to the factors in s138(3). In my case, we held a voir dire regarding the search and then I submitted:

*May it please the court, I submit that the search was unlawful and make application under s138 to exclude the evidence obtained from it. My client was not under arrest at the time, so the search was not incidental to an arrest. The informant purports to have been exercising power to search under s21 LEPPRA. However, in my submission, the informant did not have grounds to reasonably suspect any of the four circumstances provided in s21.*

*My client did not do or say anything at the time that could have created a 'reasonable suspicion' in the mind of the informant. In fact, it is clear from the informant's statement that his suspicion only arose after he conducted a radio check and learned of my client's criminal antecedents. This cannot by itself be 'reasonable grounds'.*

*That fact that the drug was found in my client's possession cannot provide those grounds retrospectively. Nor can his criminal antecedents be sufficient grounds. If it were, then he could be subject to arbitrary searches on a daily basis. A police power of arbitrary arrest would be a negation of any true right to personal liberty.*

*I submit that, in the context of the case, the undesirability of admitting evidence obtained in this manner outweighs the desirability of admitting the evidence.*

The prosecution then make their submissions. Remember that although it is a defence application, the burden falls on the prosecution to demonstrate that the desirability outweighs the undesirability. The statute mandates that the evidence is to be excluded unless the prosecution can satisfy the court of this.

I'm available every day if you have any interesting issues.

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