Goods in Custody and the Admissibility of Hearsay

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Thanks to Mark Dennis for his informative paper 'Goods in Custody: A Discussion Paper' and to Nicholas Leach for his assistance with this paper.

The focus of this paper is to examine the state of the law surrounding the offence of goods in custody. In particular, this paper considers whether hearsay evidence is admissible when the tribunal of fact is considering, as an element of the offence whether or not they are satisfied beyond reasonable doubt (considering the admissible evidence on the day of the hearing) that the "thing may be reasonably suspected of being stolen or otherwise unlawfully obtained".

The author is particularly interested in exploring whether the issue is treated as definitely settled one way or the other in your local court/s in northern and western NSW, as it has arisen as a recent issue in the Dubbo area.

i) The offence

Section 527C[1] Persons unlawfully in possession of property

(1) Any person who:
(a) has any thing in his or her custody,
(b) has any thing in the custody of another person,
(c) has any thing in or on premises, whether belonging to or occupied by himself or herself or not, or whether that thing is there for his or her own use or the use of another, or
(d) gives custody of any thing to a person who is not lawfully entitled to possession of the thing,
which thing may be reasonably suspected of being stolen or otherwise unlawfully obtained, is liable on conviction before the Local Court:
(a) if the thing is a motor vehicle or a motor vehicle part, or a vessel or a vessel part, to imprisonment for 1 year, or to a fine of 10 penalty units, or both, or
(b) in the case of any other thing, to imprisonment for 6 months, or to a fine of 5 penalty units, or both.

(1A) A prosecution for an offence under subsection (1) involving the giving of custody of a motor vehicle to a person who is not lawfully entitled to possession of the motor vehicle may be commenced at any time within 2 years after the date of commission of the offence.

(2) It is a sufficient defence to a prosecution for an offence under subsection (1) if the defendant satisfies the court that he or she had no reasonable grounds for suspecting that the thing referred to in the charge was stolen or otherwise unlawfully obtained.

(3) In this section:
motor vehicle has the same meaning as it has in Division 5A of Part 4.
***premises includes any** structure, building, **vehicle**, vessel or place, whether built on or not, **and any part of any such** structure, building, **vehicle**, vessel or place.*
vessel means a vessel within the meaning of the Marine Safety Act 1998. [author's emphasis]

ii) Common issues

While being one of the least serious charges in the dishonesty offence family, goods in custody is an extremely commonly charged offence for ALS clients. In the author's experience, goods in custody charges are also generally ripe for legal argument at hearing.

Aside from the focus of this paper, there are a number of issues which commonly arise in goods in custody matters. The author recommends reviewing Mark Dennis' paper *'Goods in Custody: A Discussion Paper'* (March 2013) for a more fulsome discussion of some of these issues.

[1] *Crimes Act 1900* (NSW).

In a nutshell, keep in mind:

1. Was the stop and search lawful?
   - See below.
2. Is the correct type of custody charged?
   - Note in particular that a vehicle is defined as a premises under s 527C(3).
3. Did the client actually have the goods 'in custody', as opposed to the broader concept of 'possession'?
4. Is the charge statute barred?
   - While the Officer in Charge (OIC) may not have realised that a vehicle is a 'premises' (for instance), the Police Prosecutor may pick up on this mistake and instruct the OIC to lay the correct charge (under s 527C(1)(c)) on the day of the hearing.
   - However, the charge will be statute barred if it has been more than 2 years (if the charge involves "the giving of custody of a motor vehicle to a person who is not lawfully entitled to possession")[2] or more than 6 months (if the charge involves any other "thing").[3]
   - The 4 goods in custody offences have different elements and changing the type of custody charged on the hearing date is not a mere variance – it is laying a new and separate charge.
5. Is there any evidence the "thing" may reasonably be suspected of being stolen or otherwise unlawfully obtained?
   - Reasonable suspicion must attach to the "thing" not the person.[4]
   - An Aboriginal man walking through the Apollo estate with an iPhone or expensive looking piece/s of jewellery is not evidence that the "thing" may reasonably be suspected of being stolen or otherwise unlawfully obtained.
   - In the author's experience, officers often make value judgments about the type of "things" a person of low socio-economic status may lawfully possess and then neglect to investigate the "thing" the subject of the charge any further.
6. The statutory defence under s 527C(2).
   - The onus of proof is on the Defence to satisfy the Court on the balance of probabilities to that the defendant "had no reasonable grounds for suspecting that the thing referred to in the charge was stolen or otherwise unlawfully obtained" *at the time that the defendant had custody of the "thing" (not on the hearing date).*
   - For example, the defendant may now be aware through reviewing the brief of evidence that that expensive looking necklace is in fact stolen, but they may have had no such suspicion when their partner gave it to them in a 'Prouds' box for their birthday – the latter is the relevant time when the Court is considering the application of the statutory defence.
   - Once the Defence discharges its onus, the Prosecution must disprove the statutory defence beyond reasonable doubt.

[2] *Crimes Act 1900* (NSW), s 527C(1A).
[3] *Criminal Procedure Act 1986* (NSW), s 179.
[4] *O'Sullivan v Tregaskis* [1948] SASR 12; *Yeo v Capper* [1964] SASR 1.

iii) What is "reasonable suspicion"?

R v Rondo (2001) 126 A Crim R 562, at [53]:

"These propositions emerge:

(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered … ***A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.***

(b) ***Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.***

(c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question, regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances." [author's emphasis]

iv) Was the stop and search lawful?

Reasonable suspicion of the relevant officer at the scene

In considering reasonable suspicion, practitioners must be familiar with police powers. Three common provisions are sections 21, 36A and 36 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). These sections are extracted in full below.

Section 21 Power to search persons and seize and detain things without warrant
(cf Crimes Act 1900, ss 357, 357E, Drug Misuse and Trafficking Act 1985, s 37)

(1) A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists:
(a) the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,
(b) the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence,
(c) the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence,
(d) the person has in his or her possession or under his or her control, in contravention of the Drug Misuse and Trafficking Act 1985, a prohibited plant or a prohibited drug.

(2) A police officer may seize and detain:
(a) all or part of a thing that the police officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, and
(b) all or part of a thing that the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, and
(c) any dangerous article, and
(d) any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985,
found as a result of a search under this section.

Section 36A Power to stop vehicles

A police officer may stop a vehicle if the police officer suspects on reasonable grounds that the driver of, or a passenger in or on, the vehicle is a person in respect of whom the police officer has grounds to exercise a power of arrest or detention or a search power under this Act or any other law.

Section 36 Power to search vehicles and seize things without warrant

(cf Crimes Act 1900, ss 357, 357E, Police Powers (Vehicles) Act 1998, s 10, Drug Misuse and Trafficking Act 1985, s 37)

(1) A police officer may, without a warrant, stop, search and detain a vehicle if the police officer suspects on reasonable grounds that any of the following circumstances exists:
(a) the vehicle contains, or a person in the vehicle has in his or her possession or under his or her control, anything stolen or otherwise unlawfully obtained,
(b) the vehicle is being, or was, or may have been, used in or in connection with the commission of a relevant offence,
(c) the vehicle contains anything used or intended to be used in or in connection with the commission of a relevant offence,
(d) the vehicle is in a public place or school and contains a dangerous article that is being, or was, or may have been, used in or in connection with the commission of a relevant offence,
(e) the vehicle contains, or a person in the vehicle has in his or her possession or under his or her control, a prohibited plant or prohibited drug in contravention of the Drug Misuse and Trafficking Act 1985,
(f) circumstances exist on or in the vicinity of a public place or school that are likely to give rise to a serious risk to public safety and that the exercise of the powers may lessen the risk.

(2) A police officer may, without a warrant, stop, search and detain a class of vehicles on a road, road related area or other public place or school if the police officer suspects on reasonable grounds that any of the following circumstances exist:
(a) a vehicle of the specified class of vehicles is being, or was, or may have been, used in or in connection with the commission of an indictable offence and the exercise of the powers may provide evidence of the commission of the offence,
(b) circumstances exist on or in the vicinity of a public place or school that are likely to give rise to a serious risk to public safety and that the exercise of the powers may lessen the risk.

(3) A police officer may seize and detain:
(a) all or part of a thing that the police officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, and
(b) all or part of a thing that the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, and
(c) any dangerous article, and
(d) any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985,
found as a result of a search under this section.

- 1st limb of the test – When stopping and/or searching the defendant, did the officer subjectively suspect / apprehend / fear one of the state of affairs covered by the relevant police power?
    - For example, that the defendant possessed something stolen or unlawfully obtained[5] or drugs.[6]
    - Noting, "A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence."[7]
    - Further noting, "In part it is a subjective test, because he must have formed a genuine suspicion in his own mind".[8]
    - The relevant officer may fall down at this point, in that they may not have possessed a suspicion that is covered by their police powers (for example, "I suspected the defendant was trying to avoid Police" or "I suspected the

[5] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 21(1)(a).
[6] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 21(1)(d).
[7] *R v Rondo* (2001) 126 A Crim R 562 at [53].
[8] *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 2 WLR 1 at 11; cited with approval in *Streat v Bauer & Blanco* BC 9802155 at 10.

defendant was trying to conceal something under his jumper" – if that is as far as the evidence goes, it is not far enough.)

- 2nd limb of the test – Having ascertained what the relevant officer subjectively suspected, what was the information on which the officer based that suspicion?
    - Noting, "Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value."[9]
    - It is important to identify each of the factors relied upon by the relevant officer. "Grounds" commonly provided by officers include time of night, behaviour of the defendant (see below), knowledge of the criminal record of the defendant (see below) and intel (see below).

- 3rd limb of the test – Having ascertained the information on which the relevant officer based his/her suspicion, "the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed"?[10]
    - Noting, "In part it is also an objective one [test], because there must also be reasonable grounds for the suspicion which he has formed."[11]
    - The relevant officer may say (in his/her statement, in evidence or both) that he/she reasonably suspected that the defendant possessed drugs (for instance), but when consideration is given to the grounds provided for that purported suspicion, the officer may have possessed no more than a reason to consider or look into that possibility.

Behaviour of the defendant

The relevant officer may proffer the behaviour of the defendant as one of the grounds on which he/she based his/her suspicion. For example, "The defendant appeared nervous. He would not maintain eye contact and was sweating."

In *R v Yana ORM* [2011] NSWDC 26, Judge Lakatos noted at [55]:

> *"I pause to note that it is one thing for a police officer to use his commonsense and experience to seek out and investigate leads in relation to an offence.*
> *In my view,* ***it is quite another for an officer to make value judgments about the actions of a suspect and to translate those value judgments to the level of a reasonable suspicion of offending.***
> *This is especially so when the officer appears to make little effort to consider any innocent explanation for such actions. This approach may suggest that the officer's intention was to gain evidence inculpating the accused."* [author's emphasis]

In this matter, the relevant officer pulled a vehicle with South Australian registration plates over for a random breath test after the vehicle turned back into a service station on the Hume Highway at Gundagai and appeared to leave the service station by a different exit. The breath test was negative, a licence check revealed the defendant's South Australian licence had been cancelled and certain other details relating to the vehicle. The defendant said he had been on holidays at Liverpool, where he had visited cousins. After some time, the defendant got out of the vehicle and started to

[9] *R v Rondo* (2001) 126 A Crim R 562 at [53].
[10] *R v Rondo* (2001) 126 A Crim R 562 at [53].
[11] *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 2 WLR 1 at 11; cited with approval in *Streat v Bauer & Blanco* BC 9802155 at 10.

smoke. The relevant officer formed the suspicion that the defendant may be in the possession of drugs. He searched the vehicle. Drugs and money were located in the vehicle.

The relevant officer proffered five grounds for his suspicion:

> *"that the accused avoided eye contact with him; secondly, that the accused stayed at Liverpool at the Formule [sic] 1 Hotel; thirdly, that the accused did not stay at the home of his cousins for whom he could not nominate an address; fourthly, that the accused attempted to avoid the random breath test, although the officer conceded that that could have been by reason of the position concerning his cancelled licence; and lastly, that the accused got out of the car and smoked a cigarette."*

The Crown conceded on appeal that the officer's suspicion was not reasonable. The evidence was ultimately admitted under s 138 because the Court found that the defendant had given consent for his vehicle to be searched. However, the Court was quite critical of the relevant officer in a number of respects – see [113]-[120].

Knowledge by the relevant officer of the defendant's criminal record

The relevant officer may proffer his/her knowledge of the defendant's criminal record as one of the grounds on which he/she based his/her suspicion.

In *O'Connor v R* (12 August 2010) NSWDC, Judge Charteris held, at page 5:

> *"Parliament could not have intended that if police officers were aware of a citizen's criminal record, that would mean the police officer could stop, detain and search a person at any time on the basis of a reasonable suspicion that person might have possession of stolen goods. Had Parliament had such a view, in my view, it would be easily accommodated in the legislation."*

In this matter, the relevant officer knew the defendant had a criminal record for property and "street" offences (page 2).

The magic word – "intel"

The relevant officer may proffer his/her knowledge of Police intelligence as one of the grounds on which he/she based his/her reasonable suspicion. In the author's experience, officers often give evidence that, at the time of the search, they were aware of "intel" regarding:

- the defendant;
- a vehicle in which the defendant was travelling;
- a "known drug house" that the defendant exited, walked away from or pulled up in front of; and/or
- "a recent spike in break and enters".

Frustratingly, this "intel" is often not referred to *at all* in the officer's statement but is suddenly elicited during examination-in-chief by the Prosecution at hearing once the Defence requests a voir dire excluding the evidence obtained as a result of the search. In the author's view, the Defence may seek exclusion of such evidence under sections 183-184 and 186-188 of the *Criminal Procedure Act 1986* (NSW), especially in circumstances where the Defence are not on notice of the existence of intel and/or its contents *at all*.

In circumstances where intel is referred to in statements served as part the brief of evidence, in the author's experience, the intel itself is never served. Further, if the Defence calls for the production of the intel on the day of hearing, the response tends to be "It's privileged material." So, "intel" is squarely hearsay evidence. However, "A

suspicion may be based on hearsay material or materials which may be inadmissible in evidence."[12]

In the author's view, knowledge of "intel" falls into a similar category as knowledge of a defendant's criminal record – see above. However, "intel" arguably has less probative value as a category of evidence given it is compromised of information which may not be enough to charge the defendant, let alone secure a conviction.

Further, the hearsay materials "must have some probative value." Further still, it is unclear to the author how the Defence and the Court are to assess "whether that information afforded reasonable grounds for the suspicion which the police officer formed", having regard to "the source of the information and its content, seen in the light of the whole of the surrounding circumstances", in circumstances where the intel is never served.[13]

In the author's view, the Defence may seek exclusion of such evidence under s 137 of the *Evidence Act 1995* (NSW), extracted in full below.

Section 137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Dictionary

probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Section 138

If the Defence satisfies the Court on the balance of probabilities that the stop and/or search was improper or illegal,[14] the onus is then on the Prosecution to satisfy the Court that the evidence should be admitted under s 138 of the *Evidence Act 1995* (NSW).[15] Section 138 is extracted in full below.

Section 138 Exclusion of improperly or illegally obtained evidence

(1) 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.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:
(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or

[12] *R v Rondo* (2001) 126 A Crim R 562 at [53].
[13] *R v Rondo* (2001) 126 A Crim R 562 at [53].
[14] *R v Yana ORM* [2011] NSWDC 26, at [18].
[15] *R v Yana ORM* [2011] NSWDC 26, at [18].

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

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
(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

- Note the relevant officer's experience as potentially relevant in considering this factor. A Senior Constable has been in the Police Force for at least 5 years. Arguably, the argument for exclusion becomes stronger the more experienced the relevant officer.

(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.

- Note that it is not at all difficult to ask a suspect whether they consent to a search.

In the author's experience, in arguing for exclusion under s 138, it assists if the Defence can point to more than one unlawful / improper act, although this will not always be necessary. Consider, for instance:

- Did the relevant officer also fail to provide evidence that he/she is a Police officer (unless in uniform), his/her name and place of duty and the reason for the exercise of the power?[16]
- Did the relevant officer deliver a full caution when required under s 139?[17] If not, the evidence is considered improperly obtained for the purposes of s 138.[18]

There are many cases examining s 138. One such decision is *O'Connor v R* (12 August 2010) NSWDC, which was an ALS conviction appeal to Broken Hill District Court against a charge of possess prohibited drug. The issue in the Local Court and on appeal was whether the relevant officer's suspicion was reasonable and, therefore, whether the stop and search was lawful.
In applying s 138 to exclude the evidence, Judge Charteris held, at page 7:

> *"[T]he Courts must be careful not to send a message to serving police officers that compliance with laws passed by our Parliament is, in some way, not essential. I am bound by the laws passed by our Parliament. Section 21 and s 201 [of LEPRA] have to be observed. The Court should be cautious about creating a climate where it can be considered by police who investigate matters that there is no need to rigorously consider the command of Parliament in carrying out one's duties."*

[16] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 202(1) and 201.
[17] *Evidence Act 1995* (NSW).
[18] *Evidence Act 1995* (NSW), s 139(1) and (2).

v) Section 136 – limiting direction

While hearsay evidence may be admissible in a voir dire regarding the reasonable suspicion of the relevant officer, if the stop and search is found to be legal (and/or the evidence is admitted), the Defence may seek a limiting direction to limit the use of the evidence to that point (i.e. the officer's reasonable suspicion).

Section 136 of the *Evidence Act 1995* (NSW) is extracted in full below.

Section 136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
(a) be unfairly prejudicial to a party, or
(b) be misleading or confusing.

The basis relied upon would be that there is a danger that a particular use of the evidence (i.e. the use of the evidence by the tribunal of fact to consider whether they are satisfied beyond reasonable doubt (as an element of the offence) that the thing may reasonably be suspected of being stolen or otherwise unlawfully obtained) *might* be unfairly prejudicial to the Defence given that the material is hearsay evidence and therefore not subject to testing through cross-examination. Note, however, that the Court *may* still determine not to give the direction.

vi) Reasonable suspicion of the tribunal of fact on the day of hearing
(as distinct from the suspicion of the Police at the time of the search)

The tribunal of fact must be satisfied, as an element of the offence of goods in custody, that the "thing may be reasonably suspected of being stolen or otherwise unlawfully obtained". In considering whether or not the Court is so satisfied, the Court will consider the admissible evidence on the day of the hearing. For example, although the Police may not have had definitive evidence at the time that they searched the defendant that the necklace they located in his/her pocket was stolen or otherwise unlawfully obtained, they may have such definitive evidence by the date of the hearing. The Magistrate considers the admissible evidence on the day of the hearing.

However, what happens when the Police never obtained and served a statement from the owner of the "thing" about how their necklace was stolen and that they have positively identified the necklace found in the defendant's custody as theirs?

In the author's view, the hearsay evidence in the officer's statement recounting the conversation the officer had with the owner is NOT admissible when the Court is considering whether or not the "thing may be reasonably suspected of being stolen or otherwise unlawfully obtained".

Section 66 is extracted in full below.

Section 66 Exception: criminal proceedings if maker available

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
(a) that person, or
(b) a person who saw, heard or otherwise perceived the representation being made,
if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:
(a) the nature of the event concerned, and
(b) the age and health of the person, and
(c) the period of time between the occurrence of the asserted fact and the making of the representation.
Note. Subsection (2A) was inserted as a response to the decision of the High Court of Australia in Graham v The Queen (1998) 195 CLR 606.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.
Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Dictionary

Section 4 Unavailability of persons
(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:
(a) the person is dead, or
(b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence, or
(c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability, or
(d) it would be unlawful for the person to give the evidence, or
(e) a provision of this Act prohibits the evidence being given, or
(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or
(g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

(2) In all other cases the person is taken to be available to give evidence about the fact.

If the owner is unavailable, see of course s 65 of the *Evidence Act 1995* (NSW).

Caselaw

The author has been able to find very few cases *directly* relevant to the question of whether hearsay evidence is admissible when the Court is considering whether or not the "thing may be reasonably suspected of being stolen or otherwise unlawfully obtained".

- Most cases consider the admissibility of hearsay evidence when the Court is considering whether or not the relevant officer possessed the requisite reasonable suspicion to search or arrest without a warrant. For example:
  - *Azar v DPP* [2014] NSWSC 132: Adamson J held the searching officers reasonably suspected that the defendant had drugs in his possession. The grounds for the search were set out at [43]:
    (1) Mr Azar was driving a hire car, against a background of police experience that it is not uncommon for drug dealers to use hire cars to transport drugs for supply;
    (2) He was in an area known to police to be connected with drug use and supply [the King Street Wharf area in Sydney, in the proximity of the Cargo and Bungalow 8 bars]; and
    (3) The other male got in and out of Mr Azar's car in a short period of time (which led the officers to suspect that a drug transaction had taken place).

    The Court seemed to place particular significance on the 3rd ground listed above.

    However, see [39]:

    "Where generalisations are based on nothing more than prejudice they could not amount to a basis for a reasonable suspicion but where they are, as in the present case, potential indicia of criminal conduct, they are capable of doing so."
  - *Hyder v Commonwealth of Australia* [2012] NSWCA 336: McColl JA (Hoeben JA agreeing and Basten JA dissenting) held that a Federal officer possessed the requisite reasonable "belief" to arrest without a warrant under the *Crimes Act 1914* (Cth). "[T]he officer formed his belief on the basis of a sworn affidavit and a 'statement of facts' provided by a senior investigator with the ATO, the body responsible for investigating 'Operation Starfish' [(into tax fraud)]"[19] and was entitled to do so.

    See also the 10 propositions set out at [15].

- *Lewis v Spencer and Another* [2007] NSWSC 1383 is a judgment by Rothman J which directly considers the issue, albeit in obiter remarks:
  - *"The magistrate admitted evidence from a witness, a police officer, that the witness had interviewed a member of staff at the BP Service Station from which Mr Lewis had said he had purchased the sunglasses. The police officer gave evidence that the member of staff had told him that the records of the establishment did not disclose that a pair of sunglasses had been sold on the day in question. If that evidence were given by the police officer for the purpose of proving the truth of the statement, namely, that no such sunglasses were purchased from that store on the day in question, it was inadmissible. It is evidence from the police officer of a representation made to him of the contents of the records of the shop.* ***No exception to the rules on the admission of hearsay evidence would cover such a circumstance. … The reasonable suspicion is a reasonable suspicion of the magistrate at the time of hearing: Ex parte Patmoy; Re Jack (1944) 44 SR (NSW) 351.*** *The only basis upon which the hearsay representation by the shop staff member to the police officer could be relevant would be if it were the reasonable suspicion of the police officer at the time of arrest that was the relevant test. One of the means by which one could reasonably suspect that the sunglasses were stolen or otherwise unlawfully obtained would be that the place from which the accused alleges it was purchased had not sold any sunglasses (or those sunglasses) on the day in question. However the evidence of the police officer does not prove that fact: see Manley v Tucs (1985) 40 SASR 1 at 12-13; 19 A Crim R 310 at 314; Hussien v Chong Fook Kam [1970] AC 942 at 949; Williams v*

[19] *Hyder v Commonwealth of Australia* [2012] NSWCA 336, at [10].

Keelty (2001) 111 FCR 175 at [176], [177]; Morris v Russell (1990) 100 FLR 386 (ACT Supreme Court)."[20] [author's emphasis]

- *"In this case, the learned magistrate may have suspected, reasonably, that the goods were stolen or unlawfully obtained, if the magistrate were able to consider evidence that the goods were not purchased from the store nominated. But the police officer's evidence was not evidence of that fact. It was "evidence" of a representation by a staff member of the contents of records, ie, evidence (the police officer's) of a representation (the staff member's) of a representation (the contents of the record). The staff member's representation may be sufficient to give rise in the mind of the learned magistrate of the non-purchase from the store. While that may not prove that the goods were stolen, it may be sufficient to found, when added to other material, a reasonable suspicion. But the material before the learned magistrate does not go that far."*[21]

- The issue was also considered in the South Australian Supreme Court judgment of *Tucs v Manley* (1985) 40 SASR 1. Matheson J and Jacobs J were in the majority, Johnston J was dissenting (in the author's view, persuasively).
  - The relevant offence was set out at s 233B(1) of the *Customs Act* 1901. The provision states "Any person who … without reasonable excuse (proof whereof shall lie on him) has in his possession … any prohibited imports … **which <u>are</u> reasonably suspected of having been imported** into Australia in contravention of this Act … shall be guilty of an offence." [author's emphasis]
  - The facts, in a nutshell, are that AFP officers entered and lawfully searched the respondent's residence. They found a small cardboard box containing a "brown resinous substance" in a handbag in the respondent's bedroom. The only evidence relevant to the question of whether the substance was reasonably suspected of having been imported was from a scientist, Dr Trennery, who examined the substance.
  - An appeal against the Magistrate's decision was originally allowed by Olsson J. The matter came before Matheson, Jacobs and Johnston JJ when Olsson J's decision was appealed.
  - <u>Matheson J</u> held:

    "Is it permissible to take into account hearsay evidence in considering whether there is a reasonable suspicion? In my opinion, the answer is "Yes". I rely on Shaaban Bin Hussien & Others v Chong Fook Kam & another 1969 3 All ER 1626 where Lord Devlin, in delivering the opinion of the Board, said

    "Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof …

    There is another distinction between reasonable suspicion and prima facie proof. Prima facie [proof] consists of admissible evidence. Suspicion can take into account matters that could not be put into evidence at all. Suspicion can take into account also matters which, though admissible could not form part of a prima facie case. Thus, the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime …"

    I also rely on reg, v T.C. Lavelle 1978 Crim. LJ 105 106, where Cantor J said "In order to found a reasonable suspicion hearsay material may properly be considered." It is clear from the published judgment of the court of Criminal Appeal of New South Wales that Street CJ and Carmichael J agreed with Cantor J."[22]

    It is not entirely clear whose suspicion Matheson J was referring to (the officer's or the Court's). However, Matheson J held:

    "Dr Trennery, an experienced and highly qualified chemist, stated that although cannabis resin could be manufactured in Australia, in all his experience, reading of relevant literature and discussion with colleagues, he had never heard of it being manufactured here, and that, in his opinion, it came from overseas. The respondent called no evidence to the

[20] *Lewis v Spencer and Another* [2007] NSWSC 1383, at 54.
[21] *Lewis v Spencer and Another* [2007] NSWSC 1383, at 55.
[22] *Tucs v Manley* (1985) 40 SASR 1, at pages 4-5.

contrary, and in my opinion the prosecution evidence was sufficient to establish the necessary "reasonable suspicion".[23]

- Jacobs J (agreeing with Matheson J) held:
  "There is no doubt that Dr Trennery did entertain that 'suspicion'; and particularly in the absence of any evidence to the contrary, I think it is impossible for this court to say that the learned Special Magistrate was not entitled to hold that the suspicion was reasonable, ie that there were reasonable grounds for the suspicion. … Whatever one may think of the grounds of the suspicion in this case, it is my opinion impossible to say that the long experience of Dr Trennery with this type of material was not sufficient to enable his suspicion, that the material was imported, to be charactized as a 'reasonable' suspicion."[24]
- Johnson J (dissenting) was much more critical of the evidence of Dr Trennery.
- Johnson J noted that Olsson J had held that the Magistrate had misdirected himself in considering whether it had been proved that the informant officer Tucs suspected the substance of having been imported. Olsson J followed the NSWCCA decision of *R v Abbrederis* (1981) 36 ALR 109 "that the section requires the court to be satisfied (beyond reasonable doubt) that the substance in question has the quality of being reasonably suspected of having been imported according to the Act." It was not argued at the second appeal that Olsson J was in error on this point.
- Johnson J attaches considerable significance to this. Johnson J held:
  *"It was put that Olsson J was right in accepting that hearsay evidence could be given in relation to this aspect of the case. In my opinion, this is not so and the cases on which the argument was based are distinguishable. Those cases are Shaaban Bin Hussien & Others v Shong Fook Kaarn & Another (1969) 3 A.E.R 1626, Lavelle (1978) 2 Crim. LJ 105; McLean v Dawkins (1930) SASR 94 and various cases in other jurisdictions referred to in R v Abbrederis (1981) 36 ALR 109. …. **A distinguishable feature of these cases (I do not include R v Abbrederis) is that they relate to the question of whether some person had a reasonable suspicion at the time of doing some act.**"*[25] [author's emphasis]

  Johnson J continues:

  "Those cases … clearly relate to the formation of a suspicion in the mind of someone prior to there being a charge laid. It is natural that hearsay material and other material which is not admissible as part of the prosecution case once a charge has been laid may enter into the formation of the suspicion. *It is, in fact, impossible to determine at that stage what material might or might not be admissible on the charge as ultimately laid, if there is a charge. Of course there may be no charge at all where the holding of the reasonable suspicion is a prerequisite to some other step, such as searching.* ***But once it is determined that this section does not deal with a suspicion existing in the mind of an arresting officer, etc, and that what it requires is that the Crown produce evidence of objective facts from which the court is asked to reach a conclusion that the material has the quality of being reasonably suspected of having been imported, that issue falls to be determined in accordance with the ordinary rules of evidence."***[26]
  [author's emphasis]

In the author's view, this is clearly analogous to the NSW offence of goods in custody and the element of the offence that the tribunal of fact must be satisfied beyond reasonable doubt that the "thing may be reasonably suspected of being stolen or otherwise unlawfully obtained", after considering the admissible evidence on the day of the hearing.

It is also noteworthy that *Tucs v Manley* (1985) 40 SASR 1:

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[23] *Tucs v Manley* (1985) 40 SASR 1, at page 6.
[24] *Tucs v Manley* (1985) 40 SASR 1, at page 1.
[25] *Tucs v Manley* (1985) 40 SASR 1, at page 17.
[26] *Tucs v Manley* (1985) 40 SASR 1, at page 18.

- is a South Australian Supreme Court decision;
- was not a unanimous decision; and
- **most significantly, pre-dates the commencement of the *Evidence Act*.**

vii) Section 137

Failing exclusion under the hearsay provisions, the Defence may seek exclusion under s 137 (again, extracted in full below).

Section 137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Dictionary

probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

viii) Section 165 – warning

If the evidence is admitted, the Defence may request a warning under s 165 of the *Evidence Act 1995* (NSW) (extracted in full below), with an ultimate submission that the Court would have a doubt that the "thing may be reasonably suspected of being stolen or otherwise unlawfully obtained".

Section 165 Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:
(a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies,
(b) identification evidence,
(c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like,
(d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding,
(e) evidence given in a criminal proceeding by a witness who is a prison informer,
(f) oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant,
(g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) If there is a jury and a party so requests, the judge is to:
(a) warn the jury that the evidence may be unreliable, and
(b) inform the jury of matters that may cause it to be unreliable, and
(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

(6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A (2) and (3).
Note. The Commonwealth Act does not include subsection (6).

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The author welcomes comments and feedback on the subject.

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