HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND EDELMAN JJ

Matter No S160/2019

ZEKI RAY KADIR — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No S163/2019

DONNA GRECH — APPELLANT

AND

THE QUEEN — RESPONDENT

Kadir v The Queen
Grech v The Queen
[2020] HCA 1
Date of Hearing: 15 October 2019
Date of Judgment: 5 February 2020
S160/2019 & S163/2019

ORDER

Matter No S160/2019

1. *Appeal allowed in part.*

2. *Set aside order 1 of the orders made by the Court of Criminal Appeal of the Supreme Court of New South Wales on 30 November 2017 and, in its place, order that the appeal from the ruling of Judge Buscombe made on 28 June 2017 with respect to the admissibility of the surveillance evidence be dismissed.*

Matter No S163/2019

1. *Appeal allowed in part.*

2. *Set aside order 1 of the orders made by the Court of Criminal Appeal of the Supreme Court of New South Wales on 30 November 2017 and, in its place, order that the appeal from the ruling of Judge Buscombe made on 28 June 2017 with respect to the admissibility of the surveillance evidence be dismissed.*

On appeal from the Supreme Court of New South Wales

Representation

G O'L Reynolds SC with D P Hume and R W Haddrick for the appellant in S160/2019 (instructed by Michael Bowe)

T A Game SC with K J Edwards and K I H Lindeman for the appellant in S163/2019 (instructed by Legal Aid NSW)

H Baker SC with H R Roberts and B K Baker for the respondent in both matters (instructed by Director of Public Prosecutions (NSW))

CATCHWORDS

Kadir v The Queen
Grech v The Queen

Evidence – Admissibility – Evidence obtained improperly or in contravention of Australian law – *Evidence Act 1995* (NSW), s 138 – Where appellants jointly charged on indictment with acts of serious animal cruelty – Where prosecution proposes to tender video-recordings obtained in contravention of Australian law – Where prosecution proposes to tender search warrant evidence and alleged admissions obtained in consequence of contravention of Australian law – Whether difficulty of lawfully obtaining evidence weighs in favour of admission – Whether weighing of competing public interests under s 138 different for evidence obtained in contravention of law as compared to evidence obtained in consequence of contravention of law – Whether each item of evidence admissible.

Words and phrases – "balancing test", "*Bunning v Cross* discretion", "causal link", "competing public interests", "deliberate contravention of the law", "desirability of admitting evidence", "difficulty of lawfully obtaining evidence", "ease of compliance", "evidence that was obtained improperly or in contravention of an Australian law", "false statement", "illegality", "improperly or illegally obtained", "impropriety", "in consequence of", "misconduct", "probative value", "public interest", "undesirability of admitting evidence", "vigilantism", "way in which the evidence was obtained".

Criminal Appeal Act 1912 (NSW), s 5F(3A).
Evidence Act 1995 (NSW), s 138.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND EDELMAN JJ. The appellants are jointly charged on indictment with acts of serious animal cruelty[1]. The charges relate to the alleged use of rabbits as "live bait" in training racing greyhounds at Mr Kadir's Londonderry property ("the Londonderry property")[2]. At the trial, the prosecution proposes to tender seven video-recordings depicting activities at the Londonderry property ("the surveillance evidence"). The recordings were made by a documentary photographer, Sarah Lynch, who was acting on behalf of, and paid by, Animals Australia, a company limited by guarantee which includes the investigation of cruelty to animals among its objects. The making of the recordings contravened s 8(1) of the *Surveillance Devices Act 2007* (NSW) ("the SDA"). Animals Australia supplied the Royal Society for the Prevention of Cruelty to Animals ("the RSPCA") with copies of the recordings. Armed with this material, officers of the RSPCA obtained a search warrant for the Londonderry property. Material supportive of the prosecution case was obtained as the result of the execution of the search warrant and the exercise of the powers conferred on RSPCA inspectors under s 24G of the *Prevention of Cruelty to Animals Act 1979* (NSW) ("the PCAA") ("the search warrant evidence"). Acting at the request of Animals Australia, Ms Lynch attended the Londonderry property on two occasions where she engaged in conversations with Mr Kadir in which he is alleged to have made certain admissions ("the admissions").

2 On the first day of the trial in the District Court of New South Wales (Judge Buscombe), the appellants applied to have the surveillance evidence, the search warrant evidence and, in Mr Kadir's case, the admissions excluded pursuant to s 138 of the *Evidence Act 1995* (NSW) ("the Act"). Section 138(1) relevantly provides that evidence that was obtained improperly or in contravention of an Australian law[3], or in consequence of such an impropriety or contravention, 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. Section 138(3) states

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1 *Crimes Act 1900* (NSW), s 530(1).

2 Mr Kadir is also charged with one count involving an act of serious cruelty to a possum, which is alleged to have been used as live bait.

3 *Evidence Act 1995* (NSW), Dictionary: "***Australian law*** means a law of the Commonwealth, a State or a Territory."

eight factors which the court must take into account in determining whether the tendering party has established that the public interest in the admission of the evidence outweighs the public interest in not admitting the evidence. One factor, s 138(3)(h), requires the court to take into account the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

3 Following a voir dire hearing, the trial judge rejected each of the three categories of evidence. His Honour found that the surveillance evidence had been obtained improperly or in contravention of an Australian law[4], and the search warrant evidence and the admissions had been obtained in consequence of that contravention[5]. The focus at the hearing was on the application of s 138(3)(h). The parties appear to have approached the determination upon the view that proof of the improbability that the police or the RSPCA would have been able to lawfully obtain evidence of acts of animal cruelty was a factor which weighed in favour of admitting the evidence.

4 The trial judge found that there would have been some difficulty in obtaining the evidence without contravening the law, but the degree of difficulty was not easy to gauge because no steps had been taken in an endeavour to obtain evidence lawfully. His Honour ruled in relation to each of the three categories that the desirability of admitting the evidence was outweighed by the undesirability of admitting evidence obtained in the way the evidence had been obtained[6]. The effect of the ruling was to eliminate the prosecution case on most of the joint counts in the indictment, and to substantially weaken the case on a thirteenth count, which charged Mr Kadir alone with an act of serious animal cruelty.

5 Section 5F(3A) of the *Criminal Appeal Act 1912* (NSW) ("the CAA") confers a right of appeal on the Director of Public Prosecutions against an evidentiary ruling that substantially weakens the prosecution case. The respondent appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales (Ward JA, Price and Beech-Jones JJ) under s 5F(3A) of the CAA contending, among other grounds, that the trial judge failed to properly

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4 *Evidence Act 1995* (NSW), s 138(1)(a).

5 *Evidence Act 1995* (NSW), s 138(1)(b).

6 *Evidence Act 1995* (NSW), s 138(1).

assess the difficulty of obtaining the evidence without contravening an Australian law. The Court of Criminal Appeal upheld this ground in part, finding that the difficulty of lawfully obtaining evidence of acts of animal cruelty at the Londonderry property "tip[ped] the balance" in favour of admitting the first recording[7]. Their Honours were critical of the trial judge's failure to consider the admissibility of the first recording separately from the subsequent recordings[8]. Their Honours reasoned that, once the first recording was obtained, Animals Australia might have approached the authorities with a view to further evidence being obtained by lawful means[9]. Their Honours agreed with the trial judge's conclusion that s 138(1) required exclusion of the balance of the recordings[10].

6 The Court of Criminal Appeal also held that the trial judge erred in his analysis of the admissibility of the search warrant evidence and the admissions: his Honour directly applied the findings respecting the surveillance evidence in balancing the competing public interests under s 138(1)[11]. The effect, their Honours said, was that the trial judge failed to take account of material differences between the surveillance evidence, the search warrant evidence and the admissions in the "way" each was obtained[12]. The Court of Criminal Appeal re-determined the admissibility of the first recording, the search warrant evidence and, in Mr Kadir's case, the admissions. Their Honours held that, in each instance, the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in the way the evidence was obtained[13].

7 On 17 May 2019, Bell and Keane JJ gave the appellants special leave to appeal. The appeals are each brought on three grounds, which assert that the Court of Criminal Appeal erred by: (i) finding that the trial judge did not assess

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7 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [111].

8 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [103]-[105].

9 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [102]-[103].

10 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [112].

11 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [121], [138].

12 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [128], [141].

13 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [111], [130], [142].

the first recording individually; (ii) finding that his Honour erred in directly applying the s 138(3) factors found in relation to the surveillance evidence to the search warrant evidence and the admissions; and (iii) failing to correctly apply the onus of proof in re-determining the admissibility of the evidence and taking into account considerations contrary to the evidence and, in Mr Kadir's case, failing to take into account a material consideration.

8 By Notices of Contention, the respondent argues in each appeal that the Court of Criminal Appeal erred in holding that it was required to demonstrate *House v The King*[14] error. The contention overstates the Court of Criminal Appeal's position. The respondents to the appeal (the appellants in this Court) submitted in the Court of Criminal Appeal that the prosecution was required to demonstrate *House v The King* error and the respondent accepted that was so. The Court of Criminal Appeal noted Bathurst CJ's observation in *Gedeon v The Queen* that the nature of a review of a decision to admit or reject evidence under s 138 cannot be said to be finally settled[15]. Their Honours proceeded upon the assumption that the determination was a discretionary ruling of the kind to which *House v The King* applies in circumstances in which the appeal had been argued on this footing and in which it was satisfied that error of that description was established[16].

9 For the reasons to be given, the basis upon which the parties and the Courts below approached s 138(3)(h) was misconceived: demonstration of the difficulty of obtaining evidence of the commission of acts of animal cruelty lawfully at the Londonderry property did not weigh in favour of admitting evidence obtained in deliberate defiance of the law. The trial judge's conclusion that all of the surveillance evidence should be excluded was correct. The Court of Criminal Appeal was right to find that the trial judge's assessment of the admissibility of the search warrant evidence and the admissions was flawed. The Court of Criminal Appeal's conclusion that each of these items of evidence is admissible is correct. In the circumstances, it is unnecessary to determine

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14 (1936) 55 CLR 499 at 504-505.

15 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [69], citing *Gedeon v The Queen* (2013) 237 A Crim R 326 at 361-362 [174]-[178] per Bathurst CJ, Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreeing.

16 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [69].

whether, as the respondent contends, the balancing test under s 138(1) admits of "a unique outcome" such that it is not required to demonstrate *House v The King* error in an appeal under s 5F(3A) of the CAA[17].

Section 138

10 Section 138 is in Pt 3.11 of the Act, which is headed "Discretionary and mandatory exclusions". It provides:

> "(1) Evidence that was obtained:
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> (a) improperly or in contravention of an Australian law, or
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> (b) in consequence of an impropriety or of a contravention of an Australian law,
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> 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.
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> (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:
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> (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

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17 See *Norbis v Norbis* (1986) 161 CLR 513 at 518-519 per Mason and Deane JJ; *Em v The Queen* (2007) 232 CLR 67 at 101 [95] per Gummow and Hayne JJ; *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138-139 [40] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; *Fleming v The Queen* (2009) 197 A Crim R 282 at 289 [22] per McClellan CJ at CL, Grove and R A Hulme JJ agreeing; *Director of Public Prosecutions v MD* (2010) 29 VR 434 at 440-441 [27]-[30] per Maxwell P, Nettle and Harper JJA; *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440 at 444 [13]-[14] per Warren CJ, Buchanan and Redlich JJA; *Gedeon v The Queen* (2013) 237 A Crim R 326 at 361-362 [174]-[178] per Bathurst CJ, Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreeing; *R v Rapolti* (2016) 317 FLR 79 at 120 [201] per N Adams J, Ward JA and Garling J agreeing.

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

(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

(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. The *International Covenant on Civil and Political Rights* is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth."

11 Section 138 is modelled on cl 119 of the draft Bill proposed by the Australian Law Reform Commission ("the ALRC") in its final report on the law of evidence ("the Final Report")[18]. With one alteration, cl 119 mirrors cl 116 of the draft Bill appended to the ALRC's interim report ("the Interim Report")[19]. The ALRC proposed that the admissibility of improperly or illegally obtained evidence should be governed by a modified form of the common law exclusionary public policy discretion articulated in *Bunning v Cross*[20]. The two modifications that the ALRC proposed were to place the onus on the tendering party to justify admission and to clearly articulate the factors informing the competing public interests[21].

12 In the event, s 138 enacts a "discretion"[22] which is wider than the modified *Bunning v Cross* discretion discussed by the ALRC in the Interim Report[23]. *Bunning v Cross* is an exclusionary discretion that applies in criminal proceedings and requires the court to balance the desirable goal of convicting wrongdoers against the undesirable effect of giving curial approval, or even encouragement, to the unlawful conduct of those whose task it is to enforce the law[24]. Section 138 provides for the conditional exclusion of evidence obtained by, or in consequence of, impropriety or illegality in any proceeding to which the Act applies. Notably, the exclusion is not confined to evidence that is improperly or illegally obtained by police or other law enforcement agencies. The

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18 ALRC, *Evidence*, Report No 38 (1987) (Appendix A) at 190.

19 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 2 (Appendix A) at 57-58.

20 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 534-537 [964]; *Bunning v Cross* (1978) 141 CLR 54.

21 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 536-537 [964].

22 See and compare *Em v The Queen* (2007) 232 CLR 67 at 101 [95] per Gummow and Hayne JJ; *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at 522 [162] per Heydon J; 252 ALR 619 at 656.

23 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 260-261 [468]-[473], 534-537 [964].

24 (1978) 141 CLR 54 at 74 per Stephen and Aickin JJ.

"discretion" conferred is to admit the evidence, should the court be persuaded that the balance of the competing public interests requires that outcome.

13 As s 138 is not confined to criminal proceedings or to evidence obtained by, or in consequence of, the misconduct of those engaged in law enforcement, the public interests that the court is required to weigh are broader than those weighed in the exercise of the *Bunning v Cross* discretion. The desirability of admitting evidence recognises the public interest in all relevant evidence being before the fact-finding tribunal. The undesirability of admitting evidence recognises the public interest in not giving curial approval, or encouragement, to illegally or improperly obtaining evidence generally. In a criminal proceeding in which the prosecution seeks to adduce evidence that has been improperly or illegally obtained by the police (or another law enforcement agency), the more focussed public interests identified in *Bunning v Cross* remain apt.

14 Recognition that s 138 is not confined to evidence obtained by the improper or illegal conduct of the police raises a number of issues. Whether evidence has been obtained improperly in such a case is determined by reference to "minimum standards of acceptable police conduct"[25]. The standard by which the court assesses the impropriety of the conduct of private individuals is less clear. That question is not raised in these appeals; it is common ground that the surveillance evidence was obtained in contravention of Australian law.

15 The Act does not provide guidance as to the relative weighting of each s 138(3) factor or whether it is a factor that favours admission or exclusion. The Interim Report makes clear[26] that each factor is drawn from the joint reasons of Stephen and Aickin JJ in *Bunning v Cross*[27]. Despite the wider reach of the exclusion for which s 138 provides, their Honours' analysis assists in understanding the significance of, and interplay between, each of them. The significance of some factors will vary depending upon whether the court is determining admissibility in criminal or civil proceedings or, as here, where the impropriety or illegality does not involve law enforcement officers.

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25 *Ridgeway v The Queen* (1995) 184 CLR 19 at 37 per Mason CJ, Deane and Dawson JJ.

26 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 534-536 [964].

27 (1978) 141 CLR 54 at 74, 78-80.

16 Factor (g) requires the court to take into account 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. The ALRC identified the deterrence of police misconduct as a consideration informing the public interest in not admitting evidence that has been improperly or illegally obtained[28]. It proposed that the availability of alternatives to the exclusion of evidence, such as civil actions, criminal prosecutions and internal and external disciplinary procedures, should be an important factor in the exercise of the discretion. Where an officer is likely to be dealt with in another forum for his or her misconduct, the need to exclude evidence as a deterrent is reduced[29]. The significance of the availability of other proceedings in the case of misconduct by a private individual to the wider public interest under s 138(1) is less apparent. Here, the trial judge appears, correctly, to have treated the fact that no proceedings are likely to be taken against any person in relation to the contravention of the SDA as a neutral factor.

17 As earlier noted, a focus of this case is s 138(3)(h), being the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law. In the equivalent provision of the draft Bill in the Interim Report, factor (h) was expressed as "whether the evidence could have been obtained in some other way"[30]. In the draft Bill in the Final Report, factor (h) is in the terms enacted in the Act[31]. There is little discussion of the treatment of improperly or illegally obtained evidence in the Final Report, and no explanation of the reason for the change.

18 The provenance of factor (h) can be traced to the analysis in *Bunning v Cross*. It will be recalled that the illegal conduct in that case was the patrolman's failure to require the driver of a motor vehicle to undergo an "alcotest" before requiring that he undergo a "breathalyser" test[32]. In their joint reasons, Stephen

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28 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 38 [80], 260 [468]-[469], 534-537 [964].

29 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 260 [468], 536 [964(g)].

30 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 2 (Appendix A) at 57-58, cl 116.

31 ALRC, *Evidence*, Report No 38 (1987) (Appendix A) at 190, cl 119.

32 (1978) 141 CLR 54 at 66.

and Aickin JJ identified as a relevant consideration the "ease with which the law might have been complied with in procuring the evidence in question"[33]. Their Honours explained that while a deliberate "cutting of corners" would tend against admission of the illegally obtained evidence, in the circumstances of this case, the fact that the driver had been unlawfully required to undergo a test which he could easily have lawfully been required to undergo was a factor of little significance. Their Honours said that there appeared to be no doubt that the results of an alcotest would have been positive and the course adopted by the officers may have been the result of their understandably mistaken assessment of the driver's condition (the officers were unaware that the driver had a chronic condition of the knee joints that may have affected his gait)[34]. In the circumstances, ease of compliance with the law was a "wholly equivocal factor"[35].

19 The ALRC, adopting the language of *Bunning v Cross*, proposed "ease of compliance" as a relevant factor to the assessment of the gravity of the misconduct, stating[36]:

> "*Ease of Compliance*. Evidence that it would have been easy to comply with legal requirements or other standards of behaviour may, depending on the circumstances, either support or detract from an argument for exclusion. A deliberate 'cutting of corners' would support exclusion, particularly from a deterrence perspective. But failure to comply with a rule which could have been simply complied with may suggest that the rule was trivial and that therefore the misconduct was not serious."

20 The significance of factor (h) to the balancing of the competing public interests under s 138(1) will vary depending upon the circumstances. In a case in which action is taken in circumstances of urgency in order to preserve evidence from loss or destruction, it is possible that factor (h) would weigh in favour of admission, notwithstanding that the action involved deliberate impropriety or

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33 *Bunning v Cross* (1978) 141 CLR 54 at 79.

34 *Bunning v Cross* (1978) 141 CLR 54 at 78-80.

35 *Bunning v Cross* (1978) 141 CLR 54 at 80.

36 ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 535 [964(e)(iv)] (footnote omitted).

illegality[37]. Putting such a case to one side, where the impropriety or illegality involved in obtaining the evidence is deliberate or reckless (factor (e)), proof that it would have been difficult to obtain the evidence lawfully will ordinarily weigh against admission[38]. By contrast, where the impropriety or illegality was neither deliberate nor reckless, the difficulty of obtaining the evidence lawfully is likely to be a neutral consideration. The assumption on which the parties and the Courts below proceeded, that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law, inverts the policy of the exclusion for which s 138 provides.

The evidence at the voir dire hearing

The surveillance evidence

21 In November 2014, Animals Australia received an anonymous complaint that greyhounds were being trained with the use of live rabbits and other prey at the Londonderry property. Its Chief Investigator, Lyn White, engaged Ms Lynch to obtain the surveillance evidence. Ms Lynch entered the Londonderry property on 5 December 2014. She placed a video camera just outside the fence line of "the bullring", the running area where the greyhounds were trained. The video camera was an "optical surveillance device" under the SDA[39]. Section 8(1) of the SDA makes it an offence for a person to knowingly install, use or maintain an optical surveillance device on premises to record visually an activity if the installation, use or maintenance of the device involves entry onto the premises without the consent of the owner or occupier. Ms Lynch trespassed on the Londonderry property and a neighbouring property in order to place the video camera.

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37 *Bunning v Cross* (1978) 141 CLR 54 at 79 per Stephen and Aickin JJ; *Director of Public Prosecutions (NSW) v Tamcelik* (2012) 224 A Crim R 350 at 370 [122] per Garling J.

38 *R v Borg* (2012) 220 A Crim R 522 at 547-548 [103]-[108] per Lasry J; *R v Gallagher* [2015] NSWCCA 228 at [47]-[48] per Beech-Jones J, Gleeson JA and Adams J agreeing.

39 *Surveillance Devices Act 2007* (NSW), s 4(1).

22 Ms Lynch returned to the Londonderry property the following night and downloaded the recording onto a USB device. She gave the USB device to Animals Australia on 12 December 2014. The images depicted on the USB device are supportive of the prosecution case. Ms White did not approach the police or the RSPCA upon receiving the recording. She instructed Ms Lynch to obtain further recordings.

23 Ms Lynch entered the Londonderry property on 11 occasions between December 2014 and 13 January 2015, and obtained seven recordings, all of which are supportive of the prosecution case. Ms White and Ms Lynch were each aware that recording the activity at the Londonderry property contravened the SDA.

24 Ms White made no attempt to refer the anonymous complaint to the police or the RSPCA before engaging Ms Lynch to obtain the surveillance evidence. Ms White had served as a police officer in South Australia. Her police work had not involved applying for surveillance or listening device warrants. Nonetheless, it was Ms White's assessment that a judicial officer was highly unlikely to issue a surveillance device warrant on the strength of an anonymous complaint. In her experience, the police referred complaints concerning animal welfare to the RSPCA. Ms White understood that the RSPCA had a memorandum of understanding with Greyhound Racing NSW ("GRNSW") and that, under this arrangement, any information given to the RSPCA would be shared with GRNSW. Ms White believed that persons engaged in live baiting would be "tipped off" if GRNSW was made aware of the complaint. It was Ms White's understanding that live baiting had been rumoured to occur systemically in the greyhound racing industry for decades, but that there had not been any successful prosecution for such conduct.

The search warrant evidence

25 The RSPCA, a charitable organisation, has standing to institute proceedings for offences under the PCAA and the regulations[40]. Under the PCAA, RSPCA officers and inspectors are given certain law enforcement powers[41]. These include the power to compel the production of information to

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40 *Prevention of Cruelty to Animals Act 1979* (NSW), s 34AA.

41 *Prevention of Cruelty to Animals Act 1979* (NSW), s 34B(1).

ascertain the identity of persons who have committed, or who are reasonably suspected of committing, offences against the PCAA[42]. Inspectors are empowered to enter land for the purposes of exercising functions under the PCAA[43] and to apply for the issue of a search warrant[44]. An inspector who is lawfully on land investigating a suspected offence is empowered to seize anything that will afford evidence of the commission of the offence[45].

26 David O'Shannessy, the Chief Inspector of the RSPCA New South Wales, explained that the RSPCA receives referrals from the police relating to allegations of animal cruelty. He said that the RSPCA will act on an anonymous complaint where the complaint relates to organised animal cruelty, as occurred here. Mr O'Shannessy acknowledged that the investigation of a complaint such as this anonymous complaint would include liaison with GRNSW. The RSPCA would not request the police to apply for an optical surveillance warrant based on no more than an anonymous complaint, but it might in such a case exercise its statutory power of entry and inspection.

27 On 2 February 2015, Ms White met with Mr O'Shannessy. At the meeting she provided him with a letter alleging that breaches of the PCAA and the *National Parks and Wildlife Act 1974* (NSW), involving live baiting, were taking place at the Londonderry property. The letter referred to statements made in connection with proceedings before the New South Wales Legislative Council's Select Committee on Greyhound Racing in New South Wales, to the effect that the RSPCA was unable to pursue an investigation into live baiting because of the "lack of first hand evidence". The letter continued:

> "Based on the above considerations, Animals Australia engaged an investigator to investigate the allegations relating to [Mr Kadir's property and another unrelated property] on the basis that any evidence gathered would be provided to the RSPCA NSW for further investigation and actioning. Animals Australia proceeded with the investigation on the determination that the RSPCA could not undertake the type of

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42 *Prevention of Cruelty to Animals Act 1979* (NSW), s 24A(1).

43 *Prevention of Cruelty to Animals Act 1979* (NSW), s 24E(1).

44 *Prevention of Cruelty to Animals Act 1979* (NSW), s 24F(2).

45 *Prevention of Cruelty to Animals Act 1979* (NSW), s 24K(1).

surveillance necessary to document the alleged practices occurring on the properties, and we provide herewith the primary evidence gathered."

28 At the meeting, Ms White supplied the RSPCA with an external hard drive containing unedited copies of the recordings made by Ms Lynch. She informed Mr O'Shannessy that "stewards and officials" involved in the regulation of the greyhound industry had been identified in the footage. Following the meeting, Mr O'Shannessy determined that the RSPCA would commence an investigation. In light of the suggestion that the integrity of the investigation might be compromised, the RSPCA did not inform GRNSW of the investigation.

29 On 10 February 2015, an RSPCA inspector, Flett Turner, obtained a search warrant which authorised entry onto the Londonderry property and the seizure of items evidencing the commission of an offence under the PCAA. The search warrant was executed on 11 February 2015. A dead rabbit and the remains of two other dead rabbits were found in the bullring. Body parts of a dead rabbit were found on a mechanical lure. Two live rabbits in a cage were in a state of severe pain and distress and were put down. A diary recording the cost of boarding dogs and the cost of rabbits was seized.

The admissions

30 After viewing the recordings, Ms White instructed Ms Lynch to try to obtain information about who was using Mr Kadir's services and "what dogs were being broken in". Ms Lynch arranged to speak with Mr Kadir. She called to the Londonderry property on 13 January 2015 where she spoke with Mr Kadir. She posed as a greyhound owner who was seeking to have two dogs broken in and she asked about Mr Kadir's training methods. Mr Kadir is alleged to have responded, "I get 30 live rabbits a week from a guy and I put them in the bullring with the dogs". Ms Lynch returned to the Londonderry property on 18 January 2015 where she again spoke with Mr Kadir. On this occasion it is alleged that Mr Kadir stated, "[y]ou know, this is a coursing sport". "Coursing" is the pursuit of game or other animals by dogs.

The trial judge's reasons

31 The respondent conceded that the surveillance evidence was illegally obtained and that the search warrant evidence was obtained "as a consequence" of that illegally obtained evidence. Ms White's opinion of the difficulty of obtaining evidence of live baiting lawfully was relied on by the respondent as a factor that weighed in favour of admitting the surveillance evidence. The respondent conceded that after Animals Australia obtained the first recording, its

case for admission was less strong "in terms of arguing that what was done was done because of the difficulties in obtaining the evidence in some other way".

32 The trial judge made findings that the probative value of the surveillance evidence was "very high", that it was "very important" in the proceeding, and that the offences were "serious". These factors favoured the admission of the recordings. In assessing the gravity of the contravention, his Honour took into account that the legislature has chosen to protect privacy by tightly controlling the lawful use of optical surveillance devices. Here, there had been repeated, deliberate breaches of the SDA without any attempt having been made to approach the authorities to conduct a lawful investigation. His Honour assessed the gravity of the contravention as "very high and serious". While the property did encompass Mr Kadir's home, the optical surveillance device did not record his home. While Mr Kadir's privacy had been interfered with, being a breach of Art 17 of the International Covenant on Civil and Political Rights ("the ICCPR"), his Honour did not consider this factor was one to which particular weight should be given. His Honour noted that no likely action was to be taken against either Ms White or Ms Lynch for the contravention and, as earlier noted, appears to have treated this factor as neutral.

33 The trial judge approached factor (h), consistently with the way the matter was argued, upon a view that demonstration of the difficulty of obtaining evidence of live baiting lawfully favoured admission. Nonetheless, his Honour assessed Ms White's opinion of the difficulties in this respect as involving a significant degree of speculation. His Honour considered that, given Ms White's limited experience in relation to obtaining warrants of any type, she was not in a position to conclude that the only way to obtain the evidence was by breach of the SDA. His Honour found that there was some difficulty in obtaining the evidence lawfully but that the degree of difficulty was not easily determined. His Honour said that the court should be reluctant to give curial approval to the deliberately illegal conduct of bodies that are not subject to any form of legislative or executive oversight. His Honour held that the respondent had not discharged the onus of showing that the desirability of admitting the surveillance evidence outweighed the undesirability of admitting evidence obtained in the way in which the surveillance evidence had been obtained.

34 His Honour was satisfied that "but for" the contravention of the SDA, no application for a search warrant would have been made, nor would the RSPCA have exercised its investigative powers under the PCAA. The balance of his Honour's assessment of the admissibility of the search warrant evidence is as follows:

> "The findings I made in relation to the factors concerning the exercise of the discretion in s 138 of the *Evidence Act* in relation to the recordings are directly applicable to my consideration of the evidence seized as a consequence of the execution of the search warrant and the exercise of the power under s 24G. I therefore do not, for these reasons, propose to admit the evidence obtained as a consequence of the execution of the search warrant or the exercise of the power under s 24G."

35 The respondent did not concede that the admissions were obtained in consequence of the contravention of the SDA. His Honour held that they were: Ms White asked Ms Lynch to return to the Londonderry property as a consequence of having watched the surveillance evidence because she wanted to obtain further information with which to brief the RSPCA. His Honour found that there was a sufficient causal connection under s 138(1)(b), as "but for" the surveillance evidence, Ms Lynch would not have been asked to return to the Londonderry property. His Honour went on to state that, for the reasons given in relation to the surveillance evidence and the search warrant evidence, the balancing test under s 138(1) resulted in the admissions not being admitted.

The Court of Criminal Appeal

36 The error which the Court of Criminal Appeal identified in the trial judge's determination of the admissibility of the surveillance evidence was the failure to weigh the gravity of the contravention (factor (d)) and the difficulty of obtaining the evidence without contravention of Australian law (factor (h)) separately in relation to the first video-recording[46]. The Court of Criminal Appeal observed that it stands to reason that once the first video-recording was obtained any perceived difficulty associated with the investigation of the anonymous complaint must have been lessened[47]. Their Honours reasoned that the difficulty of lawfully obtaining evidence of live baiting "tip[ped] the balance" in favour of admitting the first video-recording[48]. Their Honours said that although vigilantism (taking the law into one's own hands), even for laudable reasons, cannot and should not be encouraged, nevertheless there were "real concerns as to the unlikelihood of an anonymous complaint being able to be properly and

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46 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [102]-[105].

47 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [103].

48 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [111].

effectively investigated" and the suspected criminal activities were of a "high degree of seriousness"[49].

37 The gravity of the contravention (factor (d)) and the difficulty of obtaining evidence lawfully (factor (h)), along with whether the impropriety or contravention was deliberate or reckless (factor (e)), are overlapping factors. In the circumstances of this case, the trial judge did not err in failing to weigh the s 138(3) factors separately in relation to the first video-recording. His Honour was right to find that each video-recording was the product of a serious contravention of Australian law. The seriousness of the contravention was in each case the greater because the recording was made in deliberate contravention of the law with a view to assembling evidence which it was believed the proper authorities would be unable to lawfully obtain. To the extent that it was more difficult to lawfully obtain evidence of live baiting before the first video-recording was made, this was a factor which weighed against admitting it. There is no suggestion that the trial judge erred in his assessment of the other s 138(3) factors. His Honour's determination that none of the surveillance evidence is admissible is correct.

38 The balance of these reasons is concerned with the appeal against the Court of Criminal Appeal's orders admitting the search warrant evidence and, in Mr Kadir's case, the admissions. The Court of Criminal Appeal found that the trial judge erred in relation to each of these categories of evidence by reasoning that findings made in relation to the surveillance evidence were "directly applicable" to admissibility of the search warrant evidence and the admissions[50]. Their Honours observed that s 138(1) requires the court to address the undesirability of admitting evidence obtained by, or in consequence of, impropriety or illegality "in the *way* in which the evidence was obtained"[51]. The undesirability of receiving the search warrant evidence and the admissions, in the way each was obtained, materially differed from the undesirability of receiving the surveillance evidence in the way it was obtained. In the case of the search warrant evidence, while there was a serious breach of the SDA by Animals Australia which led to obtaining the search warrant, the RSPCA acted lawfully in

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49 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [111].

50 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [121], [141].

51 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [125] (emphasis added).

the performance of its regulatory functions[52]. In the case of the admissions, the causal connection between obtaining them, and the contravention of the SDA, was "tenuous"[53].

39 Mr Kadir submits that the Court of Criminal Appeal misapprehended the trial judge's reasons, and that the trial judge did not say that the surveillance evidence and search warrant evidence were obtained in the same way. Rather, the findings made with respect to the s 138(3) factors in relation to the surveillance evidence were, in fact, directly applicable to the admissibility of the search warrant evidence and the admissions. Ms Grech submits that the Court of Criminal Appeal's error was to read the reference in s 138(1) to "the *way* in which the evidence was obtained" narrowly, with the result that the legislative policy of excluding evidence obtained in consequence of impropriety or illegality is undermined. The "way" evidence is obtained, in Ms Grech's submission, is to be understood as referring to the entire chain of causation and not merely the final link in the chain**.**

40 As the Court of Criminal Appeal observed, s 138 does not enact the doctrine that prevailed in the United States, requiring the exclusion of the "fruit" of official illegality unless the impugned evidence was derived "by means sufficiently distinguishable to be purged of the primary taint"[54]. Section 138 provides for the exclusion of evidence obtained by, or in consequence of, impropriety or illegality, unless the product of balancing the competing public interests favours admitting the evidence. The trial judge's analysis of the admissibility of the search warrant evidence and the admissions did not go beyond satisfaction of the causal link between the evidence and the contravention of the SDA. The causal link engages s 138, but the weighing of the competing public interests under s 138(1) involved considerations which are not the same as those applying to the admissibility of the surveillance evidence.

41 As the Court of Criminal Appeal also observed, where the misconduct involves the same investigative body, the considerations relevant to weighing the

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52 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [124].

53 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [141].

54 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [120], citing *Wong Sun v United States* (1963) 371 US 471 at 484, 488; and see ALRC, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 532-533 [961].

public interests will commonly be the same in respect of evidence obtained under s 138(1)(a) or (b). Here, the surveillance evidence was obtained in contravention of the law by a private body (or persons engaged by it), whereas the search warrant evidence was obtained by a regulator acting lawfully and without prior knowledge of the contravention, albeit that it was procured on the strength of the surveillance evidence. The causal link between the contravention and the admissions was tenuous, a consideration which the Court of Criminal Appeal was right to find was capable of affecting the weighing of the public interest in not giving curial approval or encouragement to the unlawful conduct[55].

42 Self-evidently, factor (a), the probative value of the evidence, and factor (b), the importance of the evidence in the proceeding, cannot be picked up from findings made with respect to the surveillance evidence and applied to the search warrant evidence or the admissions. None of the s 138(3) factors can be considered in isolation. Evidence may possess high probative value but not be important in the proceeding in a case in which other equally probative evidence is available to the prosecution. In this case, the importance of the search warrant evidence, and, in Mr Kadir's case, the admissions, is greater by reason of the exclusion of the surveillance evidence. Moreover, the weighting of the factors that are concerned with the impropriety or illegality to the balancing of the public interests may differ as between the surveillance evidence, the search warrant evidence and the admissions.

43 The appellants challenge the Court of Criminal Appeal's re-determination of the admissibility of the search warrant evidence and Mr Kadir challenges the re-determination of the admissibility of the admissions. It is unnecessary to address these grounds of complaint. The Court of Criminal Appeal's re-determination of the admissibility of each of these categories of evidence was based upon the assumption that the difficulty of obtaining the evidence lawfully mitigated the gravity of the contravention and that the first video-recording is admissible. Neither assumption is correct.

44 The respondent submits that in the event error is found in the Court of Criminal Appeal's re-determination of the admissibility of any of the evidence, this Court should determine the matter itself or remit the proceeding to the Court of Criminal Appeal. The appellants submit that, in this event, the matter should be remitted to the trial judge for reconsideration. Mr Kadir submits that the trial

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55 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [141].

judge is best placed to determine the admissibility of evidence and to take into account any matters which have occurred (or will occur) subsequent to the voir dire. Mr Kadir submits that new material may arise requiring the trial judge to revisit the issues that are the subject of the appeals and that the trial judge will "almost certainly need to evaluate the nature and extent of the RSPCA's knowledge of and involvement in criminal activity (a matter so far not fully or adequately explored)".

45 Under s 5F(5) of the CAA, the Court of Criminal Appeal may vacate the ruling appealed against and make some other ruling, and this Court, in the exercise of its appellate jurisdiction, may give such judgment as ought to have been given in the first instance[56]. Taking into account the history of the proceedings, the appropriate course is for this Court to determine the admissibility of the search warrant evidence and the admissions. While there is the possibility of events occurring which may require the trial judge to revisit any evidentiary ruling, the suggestion that the admissibility of the search warrant evidence should be determined on remitter to enable the trial judge to evaluate matters which were not fully or adequately explored at the voir dire hearing is distinctly unpersuasive. Mr Kadir's opportunity to adduce such evidence, and put such submissions, respecting the conduct of the RSPCA was at the voir dire hearing.

46 The Court of Criminal Appeal rejected Mr Kadir's submission that the search warrant evidence was obtained by contravention of Australian law within s 138(1)(a) because, in receiving the surveillance evidence, officers of the RSPCA were themselves in breach of the SDA[57]. Section 12 makes it an offence to possess a record of the carrying on of an activity knowing that it has been obtained by the use of an optical surveillance device in contravention of the SDA. Mr Kadir submits that it is apparent from the surveillance evidence that it is (or is likely to have been) the product of a breach of the SDA. On the hearing in this Court, senior counsel for Mr Kadir maintained the submission that there is no warrant for finding that the RSPCA was not itself involved in the contravention of Australian law. Such a proposition was not put to Mr O'Shannessy, and, as the Court of Criminal Appeal rightly held, in these

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56 *Judiciary Act 1903* (Cth), s 37.

57 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [116]-[117].

circumstances it was not open to the trial judge to find that any breach of the SDA was deliberate, reckless or possibly even negligent[58].

47 The onus is upon the respondent to establish that the desirability of admitting the search warrant evidence outweighs the undesirability of admitting evidence obtained in the way it was obtained. The capacity of the search warrant evidence to rationally affect the assessment of the probability that the appellants committed acts of serious animal cruelty is high. The fact that the prosecution case does not include the surveillance evidence increases the importance of the search warrant evidence in the proceeding. Its importance is high. The nature of the offence is, as the trial judge found, serious. The gravity of the contravention is, as his Honour found, "very high". The contravention was repeated and deliberate. It interfered with Mr Kadir's privacy, a breach of Art 17 of the ICCPR. In circumstances in which the recording was confined to activity in the bullring and did not extend to Mr Kadir's home, and in light of the nature of the activity conducted in the area that was the subject of the recording, his Honour was right to accord this factor no particular weight. The circumstance that neither Ms White nor Ms Lynch is likely to be subject to any proceeding arising out of the contravention is a neutral consideration. In circumstances in which the RSPCA was not complicit in the contravention, factor (h) is also neutral.

48 The admissibility of the search warrant evidence arises in criminal proceedings in which the desirability of admitting the evidence reflects the public interest in the conviction of wrongdoers. The undesirability of admitting evidence obtained in consequence of the deliberate unlawful conduct of a private "activist" entity is the effect of curial approval, or even encouragement, of vigilantism. The RSPCA had no advance knowledge of Animals Australia's plan to illegally record activities at the Londonderry property. There is nothing to suggest a pattern of conduct by which Animals Australia or other activist groups illegally collect material upon which the RSPCA takes action. The desirability of admitting evidence that is important to the prosecution of these serious offences outweighs the undesirability of not admitting evidence obtained in the way the search warrant evidence was obtained.

49 Before turning, in Mr Kadir's appeal, to the factors bearing on the admissibility of the admissions, it is necessary to deal with one matter which appears to have been raised for the first time in Mr Kadir's submissions in reply.

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58 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [117].

Mr Kadir invokes s 138(2)(b) of the Act, which deems evidence to have been obtained "improperly" if an admission is made during questioning, if the person conducting the questioning knowingly makes a false statement, knowing that making the false statement was likely to cause the person to make an admission. The submission is that Ms Lynch's "questioning" was conducted upon a knowingly false basis that was likely to elicit an admission about the use of live baiting in training greyhounds at the Londonderry property, and that this is a consideration to which substantial weight should be given in determining whether the prosecution has discharged its onus under s 138.

50 Section 138(2) deems admissions made during or in consequence of questioning of the kind in para (a) or (b) to have been obtained improperly, thereby engaging conditional exclusion under s 138(1). These proceedings have been conducted on the basis that the admissions engage conditional exclusion under s 138(1)(b) because they were obtained in consequence of the illegality in obtaining the surveillance evidence. No attention was directed to the applicability of s 138(2) to circumstances in which the "person conducting the questioning" is not a police officer or other official[59]. On the hearing, senior counsel for Mr Kadir disavowed any suggestion that the provision applies to admissions obtained in "sting operations", or "pretext" telephone calls. Senior counsel submitted that the obtaining of the admissions by subterfuge was to be taken into account "as part of the panoply of factors". It is not apparent that the fact that the admissions were obtained by subterfuge has any relevant bearing on the competing public interests with which s 138 is concerned. The trial judge separately considered, and rejected, that the circumstances in which the admissions were made were unfair within s 90 of the Act or gave rise to the danger of unfair prejudice within s 137 of the Act.

51 Since the evidence of the admissions is capable of rational acceptance[60], consideration of the probative value of the admissions is to be assessed upon the

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59 ALRC, *Evidence*, Report No 38 (1987) at xxxix [66].

60 *IMM v The Queen* (2016) 257 CLR 300 at 312 [39], 317 [58] per French CJ, Kiefel, Bell and Keane JJ; *R v Bauer* (2018) 92 ALJR 846 at 865 [69] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ; 359 ALR 359 at 381.

assumption that the evidence will be accepted[61]. Their probative value is high and they are important evidence in the case against Mr Kadir. The remaining factors under s 138(3) have the same weight in relation to the admissions as to the search warrant evidence. The undesirability of admitting the admissions does not raise the same concerns with respect to condoning vigilantism as does the search warrant evidence. As the Court of Criminal Appeal rightly observed, the obtaining and viewing of the surveillance evidence was a step in the investigation by Animals Australia that led to Ms Lynch speaking with Mr Kadir, but that was all[62]. And as their Honours also observed, Ms Lynch did not make use of any knowledge that she gained from the surveillance evidence in her conversation with Mr Kadir[63]. Their Honours' conclusion, that the bare connection between the contravention of Australian law and obtaining the admissions is unlikely to convey curial approval or encouragement of the contravention, is apt[64]. The undesirability of admitting evidence obtained in the way the admissions were is outweighed by the desirability of the evidence being admitted in support of the prosecution case.

52 For these reasons, each appeal should be allowed in part. In each matter, order 1 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 30 November 2017 should be set aside and, in its place, the appeal from the ruling of Judge Buscombe made on 28 June 2017 with respect to the admissibility of the surveillance evidence should be dismissed.

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61 *IMM v The Queen* (2016) 257 CLR 300 at 315 [52] per French CJ, Kiefel, Bell and Keane JJ.

62 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [140].

63 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [139].

64 *R v Grech; R v Kadir* [2017] NSWCCA 288 at [141].