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POLICE POWERS

HOW AND WHY TO CHALLENGE THEM

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Date: 9 February, 2016

Police Powers – How and why to challenge them. (Neill Hutton – Barrister)

A few weeks ago we had reports here in Melbourne of the new 'Australian Border Force' exercise whereupon they proposed to randomly stop anyone who 'crossed their paths' and demand proof of identity and visa status.

It seemed appropriate to take note of that exercise considering I was planning for this presentation. The ABF exercise (as reported) seemed to me to raise this question - Is there a police power to randomly stop people and ask for identity (or even their names and addresses) or visa status?

The answer is no. There is no power to randomly stop and question people in this country or state. We live in a country free from arbitrary searches, seizures or detention. Searches, seizures, detention are commonly creatures of statute and unlawful unless properly exercised with a factual basis for their exercise.

It is your job – as defence practitioners or indeed prosecutors – to be the vanguard against the improper exercise of these powers. It is your job to ensure that police don't overstep their legislative imprimatur. As we saw with the ABF exercise – politicians and departmental heads often implement new policy without checking whether or not what they're doing is lawful or unlawful.

In thinking about how to deliver this talk I first started collecting from various statutes the various powers police have and their trigger points. But this is a large exercise – too big for today. So I thought it best to tackle it from the back end – you're all practitioners in the criminal field. What will be important from your end is when a client comes to you and says that a particular power has been exercised and something adverse to their interests has been found/done. What you'll need to do is find out what power has been exercised and why. Ask yourself what is the foundation/pre-condition for the exercise of that power. Examine the evidence to ascertain whether or not there is sufficient material to support that foundation/pre-condition.

Commonly, police execute searches and seizures and detail people based on nothing more than suspicion or gut feeling. Unless this 'gut feeling' or 'suspicion' has a factual basis that

meets the particular legislative test it is an unlawful search/seizure/detention and subject to challenge in the courts.

The common law is terribly protective of our liberties and more than willing to prevent abuse of power. Unlawful searches/seizures are not condoned. Most commonly this results in exclusion of evidence – it is the one tool the court has to support our freedoms and send a message of intolerance to those who would abuse such power. While the courts can't directly intervene in a situation – they are more than willing to say 'no' – because you have abused your power we won't let you use the evidence in this court room.

What are the powers?

Police powers fall into three main categories (with or without warrant):

A) Powers to search and seize;

B) Power to detain; and

C) Power to impound (vehicles etc).

What I'll do is give some examples of each – and examine their pre-conditions.

A) Power to search/seize (go hand in hand):

Drugs, Poisons and Controlled Substances Act 1981

> ***81 Warrant to search premises***
>
> *(1) Any magistrate who is satisfied by evidence on oath or by affidavit of any member of the police force of or above the rank of sergeant or for the time being in charge of a police station that there is reasonable ground for believing that there is, or will be within the next 72 hours, on or in any land or premises (including any vehicle on or in that land or those premises), or on or in a particular vehicle located in a public place—*
>
> . *(a) any thing in respect of which an offence under this Act or the regulations has been or is reasonably suspected to have been committed or is being or is likely to be committed within the next 72*

hours;

. *(b) any thing which there is reasonable ground to believe will afford evidence of the commission of an offence under this Act or the regulations; or*

. *(c) any document directly or indirectly relating to or concerning a transaction or dealing which is or would be, if carried out, an offence under this Act or the regulations or under a provision of a law in force in a place outside Victoria corresponding to Part V of this Act—*

may at any time issue a warrant under his hand authorizing a member of the police force named in the warrant to enter and search the land, premises or vehicle for any such thing or document and to seize and carry it before the Court so that the matter may be dealt with according to law.

82 Search without warrant

Where a member of the police force has reasonable grounds for suspecting that—

. *(a) on or in a vehicle in or upon a public place;*

. *(b) on an animal in a public place;*

. *(c) in the possession of a person in a public place;*

. *(d) on or in a boat or vessel, underway or not; or*

. *(e) on or in an aircraft—*

there is a drug of dependence in respect of which an offence has been committed or is reasonably suspected to have been committed under a provision of Part V, the member may with such assistance as he thinks necessary—

. *(f) search the vehicle, animal, person, boat vessel or aircraft;*

. *(g) seize and carry away any instrument device or substance which he reasonably believes to be used or capable of being used for or in the manufacture, sale, preparation for manufacture, preparation for sale, or use of any drug of dependence;*

. *(h) seize and carry away the drug of dependence—*

and deal with it according to law.

Control of Weapons Act 1990:

10 Search without a warrant

. *(1) If—*

(a) a member of the police force has reasonable grounds for suspecting that a person is carrying or has in his or her possession in a public place a weapon contrary to this Act; and

(b) the member informs the person of the grounds for his or her suspicion; and

(c) the member complies with subsection (3)—

. *the member may, without a warrant—*

(d) search the person and any vehicle or thing in his or her possession or under his or her control for the weapon; and

(e) seize and detain any item detected during the search that the member reasonably suspects is a weapon.

Crimes Act 1958:

92 Search for stolen goods

(1) If a magistrate is satisfied by evidence on oath or by affidavit that there is reasonable cause to believe that any person has—

. *(a) in the custody or possession of the person; or*

. *(b) on any premises (including any vehicle on or in those premises) of the person; or*

. *(c) on or in a particular vehicle located in a public place—*

any stolen goods, the magistrate may grant a warrant to search for and seize those goods.

459A Entry and search of premises

. *(1) A police officer may, for the purpose of arresting under section 458 or 459 or any other enactment a person whom he—*

. *(a) believes on reasonable grounds—*

(i) to have committed in Victoria a serious indictable offence;

(ii) to have committed an offence elsewhere which if committed in Victoria would be a serious indictable offence; or

(iii) to be escaping from legal custody; or …

. *— enter and search any place where the police officer on reasonable grounds believes him to be.*

Firearms Act 1996:

146 Warrants to search premises

. *(1) A member of the police force may apply to a magistrate for the issue of a search warrant in relation to particular premises (including any vehicle on or in those premises) or a particular vehicle located in a public place, if the member believes on reasonable grounds that an offence against this Act is being or is about to be committed.*

ss.53/53A/53B (surrender provisions)

(2) If a member of the police force has reasonable grounds for believing that a person has not complied with subsection (1), the member—

(b) may, at any reasonable time, without warrant, enter and search any premises where the person resides or has resided for the purpose of seizing any such firearm or cartridge ammunition.

B) Power to detain (arrest powers):

Summary Offences Act 1966:

. ***15 Arrest of person found drunk or drunk and disorderly***

(1) A person found drunk, or drunk and disorderly, in a public place may be arrested by—

(a) a member of the police force; or

(b) if the public place is at or in the vicinity of a designated place—a protective services officer on duty at the designated place.

. ***26 Unexplained possession of personal property reasonably suspected to be stolen***

(1) Any person having in his actual possession or conveying in any manner

any personal property whatsoever reasonably suspected of being stolen or unlawfully obtained whether in or outside Victoria may be arrested either with or without warrant and brought before a bail justice or the Magistrates' Court, or may be summoned to appear before the Magistrates' Court.

Crimes Act 1958:

. ***458 Person found committing offences may be arrested without warrant by any person***

(1) Any person, whether a police officer or not, may at any time without warrant apprehend and take before a bail justice or the Magistrates' Court to be dealt with according to law or deliver to a police officer to be so taken, any person—

(a) he finds committing any offence (whether an indictable offence or an offence punishable on summary conviction) where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons, namely …

459 Powers of police officer or protective services officer to apprehend offenders

(1) In addition to exercising any of the powers conferred by section 458 or by or under any other Act a police officer … may at any time without warrant apprehend any person—

. *(a) he believes on reasonable grounds has committed an indictable offence in Victoria (including any indictable offence which may be heard and determined summarily); or*

. *(b) he believes on reasonable grounds has committed an offence elsewhere which if committed in Victoria would be an indictable offence against the law of Victoria (including any indictable offence which may be heard and determined summarily).*

C) Power to impound (vehicles etc):

Road Safety Act 1986:

84F Powers of Victoria Police

(1) If a police officer believes on reasonable grounds that a motor vehicle is being, or has been used in the commission of a relevant offence, he or she may—

. *(aa) search for, or gain access to, the motor vehicle; and*

. *(ab) direct a person of or over the age of 18 years at the premises being searched to provide information concerning the location of the motor vehicle; and*

(a) seize the motor vehicle or require it to be surrendered; and

(b) impound or immobilise the motor vehicle for the designated period.

84GA Search for motor vehicle

(1) Subject to subsection (3), for the purpose of seizing a motor vehicle under this Part, a police officer may, without consent and without warrant, enter and search—

(a) the garage address for that motor vehicle; or

(b) any land or premises, or any part of land or premises, where the police officer reasonably believes that the motor vehicle is present (either at that time or from time to time).

What are the pre-conditions?

You can see that for the search/seizure/detention powers I've detailed (and they're all fairly generic examples of powers in legislation) the pre-condition is either 'reasonable belief' or 'reasonable suspicion' or 'reasonable grounds for believing' or similar. We have guidance on what that means.

The High Court in George v Rockett (1990) 170 CLR 104 provided a unanimous decision that states (among other things):

8. When a statute prescribes that there must be "reasonable grounds" for a state of mind - including suspicion and belief - it requires the existence of facts

which are sufficient to induce that state of mind in a reasonable person. (NB – Objective test)

It follows that the issuing justice needs to be satisfied that there are sufficient grounds reasonably to induce that state of mind. (Relevant for search warrants – in other cases it is the state of mind of the relevant police officer)

It is worth noting that while it is an objective test (ie: in the mind of the arresting/seizing/searching person) it is insufficient for the person exercising the particular power to simply assert '*I had reasonable grounds*' or '*I had a reasonable belief/suspicion*'. What the court is saying here is that when it comes to the examination of that exercise of the particular power the police officer must prove to the court the factual circumstances underpinning the particular belief/suspicion. This becomes clear in the following passages.

13. In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s.679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind.

14. Suspicion, as Lord Devlin said in Hussien v. Chong Fook Kam [1969] UKPC 26; (1970) AC 942, at p 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'"

*The **facts** which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet **some factual basis** for the suspicion must be shown.*

In Queensland Bacon Pty. Ltd. v. Rees[1966] HCA 21; (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was unable to pay (its) debts as they became due" as that phrase was used in s.95(4) of the Bankruptcy Act 1924 (Cth). Kitto J. said (at p 303):

"A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as

> *Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s.(4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."*
>
> *The objective circumstances sufficient to show a reason to believe something need to point* ***more clearly*** *to the subject matter of the belief, but that is* ***not to say that the objective circumstances must establish on the balance of probabilities*** *that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.*

There are clearly differences between the two states of mind – suspicion v belief – with suspicion being a lower state of mind but nonetheless one which is caused by or aroused by a particular factual basis (not mere conjecture or surmise). Both states of mind fall below that of 'balance of probabilities' – so make of that what you will.

Continuing, the High Court said,

> *15. It is necessary to identify the subject matter of suspicion and the subject matter of belief.*
>
> *16. A thing must be identified either as a specific object or as an object which answers a particular description. It is by reference to the means of identification of the object of the search that the sufficiency of both reasonable grounds for suspecting and reasonable grounds for believing must be judged. Where a specific object is identified, the question whether there are reasonable grounds for believing that, if it exists and is found, it will afford*

> *evidence as to the commission of an offence is a discrete question to be answered according to the facts set out in the complaint.*
>
> *Where the object is identified by description, the broader and less specific the description, the more difficult it is likely to be to satisfy the requirement of reasonable grounds for believing that a thing answering the description will afford evidence of the commission of an offence. Conversely, the narrower and more specific the description, the more difficult it may be to satisfy the requirement of reasonable grounds for suspecting that the designated object is in the particular location. The point is probably best made by illustration.*

So we see here that there are two limbs to examine and (potentially) challenge. When police are looking for a particular identified object (for example a car with a known registration number) it is a comparatively simple exercise to connect that particular identified object with the crime. However, as it is an identified object the difficulty is in finding reasonable grounds for believing/suspecting that it is to be found in a particular place at a particular time.

Conversely, if the description of the items is broader and vague – for instance 'a large kitchen knife' used in a stabbing – it will be much more difficult to form a reasonable basis for believing that such a broadly described item (as is likely to be found in almost any house in the country) will afford evidence of the commission of a crime. The High Court considered that below.

> *17. Suppose that a person has been killed by a revolver bullet and that A, who is believed on reasonable grounds to be the killer, was seen burying an object wrapped in cloth in the backyard of his house.*
>
> *If application were made to a justice for a warrant to search for "an object wrapped in cloth" in A's backyard, the fact that A had been seen burying something wrapped in cloth would obviously provide compelling grounds for suspecting that an object of that description was in that place.*
>
> *On the other hand, there may, depending on the circumstances, be difficulty in sustaining a conclusion that there were reasonable grounds for believing that*

> *any object which answered that general description (i.e. "an object wrapped in cloth") "will", if found, afford evidence as to the commission of an offence.*
>
> *Conversely, if the object of the proposed search was described as a revolver, the grounds for suspecting that it was hidden in A's backyard would be much less compelling. There would, however, be little difficulty in satisfying the requirement of reasonable grounds for believing that the object so described would, if it was found in that place, afford evidence as to the commission of the particular offence.*

What you can glean from George v Rockett is that (depending on the particular pre-condition relevant to your case) it is within your grasp to make an independent assessment of the material available to the police officer who exercised the power (or the magistrate).

As practitioners – you'll need to examine the brief carefully for the factual basis (p. 8 above … requires the existence of facts) that formed the 'reasonable belief' or 'reasonable suspicion'. You'll need to look at what power has been exercised and why. What were the police looking for? Was it a particular identified item? If so – how did they form the reasonable belief that it was in your client's vehicle or possession? Was it something vague (stolen goods/drugs)? How did the police form the reasonable belief that something so vague could be connected to a particular crime.

Commonly these details will be contained in the informant's statement or notes. But there's a particular bad habit of police officers that you may find useful – laziness/arrogance.

You will find – if you look – plenty of examples where police have searched and found evidence <u>without properly documenting</u> their grounds for the search/seizure. Consider running a voir dire on the basis for the search. It is an area of fertile ground for having both (usually there's at least two) police officers cross-examined. Police officers are extremely good at acting upon 'gut feeling' or talking people (usually young people) into 'consent'

searches. (Side topic – pet hate)

A 'gut feeling' may well translate into a 'reasonable belief' or a 'reasonable suspicion' if the reason for their 'gut feeling' is properly documented. Police officers are NOT very good at translating these things into notes. Accordingly, when cross-examined during a voir dire one member may well admit 'gut feeling' while the other attempts to note factual basis – this clearly creates a problem for both of them.

If it's a warrant – ask for or subpoena the affidavit. Commonly you'll find resistance (PII) but you may end up getting a redacted version. Again, look at this document for the factual basis for the issue of the warrant – it may provide fuel for a collateral challenge on the issue of the warrant.

If you can show to a court that there was no 'reasonable grounds' no 'reasonable suspicion' or 'reasonable belief' – the ordinary result is exclusion of the evidence. (Evidence Act s138 argument – essentially a codification of the Bunning v Cross discretion). As I stated earlier the courts are zealous to protect people from arbitrary/random/unlawful searches.

Collateral challenges:

This topic is both interesting and vexing. It appears to me at least that the topic is largely unsettled. The High Court in *Ousley v R* (1997) 71 ALJR 1598 seemed to come down with some fairly simple rules for guidance on what may/may not be challenged – and on my interpretation at least:

1. There's no bar to a lower court (Magistrate's Court/County Court) hearing a challenge to a warrant issued by a superior court. Court's who issue warrants (whether they be for seizure/search, installation of listening device or telephone intercept) are acting in an administrative capacity albeit exercising their jurisdiction judicially. Accordingly, lower courts can hear the issue and decide same (it is in the

public interest to have a person's trial decided in a single court hearing rather than splitting litigation across multiple forums).

2. Courts are more amenable to hearing a challenge to a warrant if it can be comfortable that the challenge has a solid factual basis (ie it's not just a fishing expedition).

3. For a court to rule a warrant invalid there must be some invalidity on the face of the warrant. It is insufficient that the warrant does not explicitly mention the pre-conditions for its level of satisfaction. However, if the warrant (on its face) contains errors such as taking into account an incorrect or irrelevant matter it goes much closer to being invalid. (Remembering invalidity – by itself – does not necessarily mean exclusion but it gets to a s.138 type argument which puts the prosecution on the back foot)

4. (If you can get a copy of the warrant affidavit – even redacted) It is the level of satisfaction of the person who issued the warrant that is important – not whether or not the examining court would have or would not have issued the warrant in those particular circumstances. However, the Wednesbury unreasonableness rules apply – if a warrant is issued on the basis of information that is so unreasonable that no reasonable justice could have issued it – it is open to a ruling of invalidity.

'Consent' searches:

A side issue – consent searches – clearly not a 'police power' but of increasing use by various police members. What they do is purport to gain 'consent' to search. Again, this is usually young people or others who are uneducated or migrants or mentally unwell. What you see is that there is a 'power imbalance' between the police and the searched persons. You might well imagine that any person intimidated by police presence (usually in pairs or more, with guns, reflective vests, capsicum spray, apparent authority etc) will say 'yes' when a police

officer says, 'May I search you'.

We have had some success in challenging some of these searches. The basis for the attach lays is in showing that there is no real choice made by the person searched. Unless a police officer gives a full statement along the lines of '*you don't have to say yes to a search, if you say no I have no power to search you, if you say yes and I find something illegal then I will charge you with it*' the search is likely to be ruled illegal. What person in their right mind carrying drugs/knife/stolen property etc is going to say 'yes' to a search when such a warning is given? Not many.

Exceptions:

I started this talk by discussing the thought that the ABF was acting illegally by randomly stopping people and asking for identification and proof of visa status. I went on to discuss how police powers of search/seizure and detention were tightly constrained – based upon legislative pre-conditions – and open to independent assessment and curial challenge.

The truth is though – that there are a great number of situations where the police do have great powers – apparently random – to search/seize/demand identification etc. Just to name a few:

A) Licensed premises (Liquor Control Act);
B) Driving a motor vehicle (Road Safety Act);
C) Presence in court (Court Security Act);
D) Designated Areas (Control of Weapons Act); and
E) On public transport (Public Transport Act).

You lose a lot of your normal 'rights' when you are in these situations.

Conclusion:

Hopefully, what I've given you today is some guidance/assistance into police powers and how to assess whether or not a police officer exercised a power without foundation.

Remember – it is you that stands as a checkpoint between the lawful and unlawful exercise of police powers. The comment below is from George v Rockett:

'What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs.'

In your case – it is you that opens up the challenge in order that the Court can properly assess whether or not the actual police power exercised was justified in all the circumstances of the particular case.

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