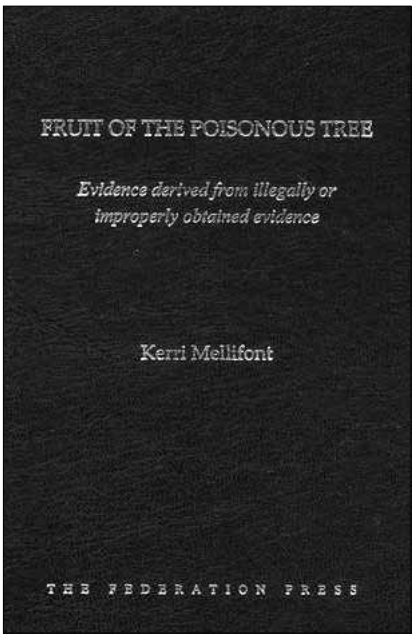
# Fruit of the Poisonous Tree: Evidence derived from illegally or improperly obtained evidence

By Kerri Mellifont | The Federation Press | 2010




The colourful term 'fruit of the poisonous tree' has been used in United States jurisprudence to describe the prohibition of the use of evidence uncovered as a result of initial unlawful police conduct since Frankfurter J coined the description in 1939 in *Nardone v United States* 308 US 338. As a description it has never gained the traction in Australia that it has in the United States. Perhaps this is because roots of the doctrine in that country lie in the firm foundations of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Bill of Rights annexed to the US Constitution. Those amendments provide a number of constitutional guarantees to US citizens: protection against unreasonable search and seizure; privilege against self-incrimination; the right to counsel; and extension of Federal rights protections to the States.

Australian principles governing the exclusion of illegally or improperly obtained evidence have more disparate origins in the common law in seminal decisions of the High Court such as *R v Lee* (1950) 82 CLR 133, in which the High Court articulated the discretion to exclude confessional evidence on the grounds of unfairness, and *R v Ireland* (1970) 126 CLR 321, the High Court's famous decision - subsequently confirmed by *Bunning v Cross* (1978) 141 CLR 54 – which vested Australian courts with a general discretion to exclude unlawfully or improperly obtained evidence on public policy grounds. These common law discretions have now been replaced but confirmed in a number of Australian jurisdictions including New South Wales by s 90 and s 138 of the *Uniform Evidence Law*.

The United Kingdom experience was different again, and it is the exploration and analysis of these differences, and the finding of the common philosophical threads underpinning the relevant jurisprudence in Australia, the United States and the United Kingdom, which makes this book so interesting, particularly to criminal practitioners. Thus we learn, for example, of the early robustness of the English common law, which produced dicta such as the statement of Crompton J in *R v Leatham* (1861) 8 Cox CC498: '[i]t matters not how you get it; if you steal it even, it would be admissible in evidence'. Whilst such sentiments might survive on *Midsomer Murders*, the modern English constabulary no longer have such free rein, as Mellifont demonstrates in her analysis of PACE – the legislated approach to discretionary exclusions enacted in the *Police and Criminal Evidence Act 1984* (UK).

Mellifont finds four common themes underpinning the common law and legislated approaches in all three jurisdictions to discretionary exclusion of illegally or improperly obtained evidence: (a) reliability – which looks to the reliability of the evidence; (b) deterrence – which premises exclusion on discouraging future illegality or impropriety by law enforcement officers; (c) rights protection – which looks to the protection of the rights of the accused; and (d) judicial integrity – which seeks exclusion where admission would otherwise erode the integrity of the judicial system. She applies these approaches in her analysis of the various approaches in each jurisdiction to 'derivative' evidence – i.e., evidence derived from primary evidence which was in turn illegally or improperly obtained. The murder weapon found as a result of an improperly obtained confession is an example of such fruit. In so doing, Mellifont has provided courts, practitioners and academics alike with a sophisticated and comprehensive analytical tool to use in this vital area, and I commend this book to them.

**Reviewed by Chris O'Donnell**