HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

VERA MOMCILOVIC APPELLANT

AND

THE QUEEN & ORS RESPONDENTS

Momcilovic v The Queen [2011] HCA 34
8 September 2011
M134/2010

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 1-5 of the order of the Court of Appeal of the Supreme Court of Victoria dated 25 March 2010, and in their place order that:*

   (a) the appellant have leave to appeal against her conviction;

   (b) the appeal be allowed;

   (c) the appellant's conviction be quashed and sentence set aside; and

   (d) a new trial be had.

3. *The second respondent pay two-thirds of the costs of the appellant in this Court.*

On appeal from the Supreme Court of Victoria

Representation

M J Croucher and K L Walker with C A Boston for the appellant (instructed by Melasecca, Kelly & Zayler)

G J C Silbert SC with B L Sonnet and C W Beale for the first respondent (instructed by Solicitor for Public Prosecutions (Vic))

S G E McLeish SC, Solicitor-General for the State of Victoria with J M Davidson and A M Dinelli for the second respondent (instructed by Victorian Government Solicitor)

S P Donaghue with E M Nekvapil for the third respondent (instructed by Victorian Equal Opportunity and Human Rights Commission)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with R M Doyle SC and A D Pound intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor) at the hearing on 8, 9 and 10 February 2011

H C Burmester QC with R M Doyle SC and A D Pound intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor) at the hearing on 7 June 2011

R J Meadows QC, Solicitor-General for the State of Western Australia and R M Mitchell SC with C L Conley intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

M G Sexton SC, Solicitor-General for the State of New South Wales and K M Richardson intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW)) at the hearing on 8, 9 and 10 February 2011

M G Sexton SC, Solicitor-General for the State of New South Wales with M L Rabsch intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW)) at the hearing on 7 June 2011

G L Sealy SC, Solicitor-General for the State of Tasmania with S Gates intervening on behalf of the Attorney-General for the State of Tasmania (instructed by Crown Solicitor for Tasmania)

M G Hinton QC, Solicitor-General for the State of South Australia with C Jacobi intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

M A Perry QC with P J F Garrisson and K A Stern intervening on behalf of the Australian Capital Territory Attorney-General (instructed by ACT Government Solicitor)

M K Moshinsky SC with C P Young appearing as amicus curiae on behalf of the Human Rights Law Centre Ltd (instructed by Allens Arthur Robinson)

CATCHWORDS

Momcilovic v The Queen

Constitutional law (Cth) – Inconsistency between Commonwealth and State laws – Appellant convicted of trafficking in methylamphetamine contrary to s 71AC of *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("Drugs Act") – Trafficking in methylamphetamine an indictable offence under s 302.4 of *Criminal Code* (Cth) – Commonwealth offence prescribed lower maximum penalty than State offence and different sentencing regime – Whether State law inconsistent with Commonwealth law and invalid to extent of inconsistency.

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Functions conferred on State courts by State law – Compatibility with role of State courts under Ch III – Section 32(1) of *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("Charter") provided "[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights" – Section 36(2) of Charter empowered Supreme Court of Victoria to make declaration that statutory provision cannot be interpreted consistently with a human right – Declaration had no effect upon validity of provision or legal rights of any person – Nature of task required by s 32(1) of Charter – Whether s 32(1) reflection of principle of legality – Whether s 32(1) invalid for incompatibility with institutional integrity of Supreme Court – Whether s 36 confers judicial function or function incidental to exercise of judicial power – Whether s 36 invalid for incompatibility with institutional integrity of Supreme Court.

Constitutional law (Cth) – High Court – Appellate jurisdiction – Whether declaration made under s 36 of Charter subject to appellate jurisdiction of High Court conferred by s 73 of Constitution.

Constitutional law (Cth) – Courts – State courts – Federal jurisdiction – Diversity jurisdiction – Appellant resident of Queensland at time presentment filed for offence under Drugs Act – Whether County Court and Court of Appeal exercising federal jurisdiction – Operation of s 79 of *Judiciary Act* 1903 (Cth) in respect of Charter and Drugs Act.

Criminal law – Particular offences – Drug offences – Trafficking – Possession for sale or supply – Section 5 of Drugs Act provided that any substance shall be deemed to be in possession of a person so long as it is upon any land or premises occupied by him, unless person satisfies court to the contrary – Section 70(1) of Drugs Act defined "traffick" to include "have in possession for sale" – Section 73(2) of Drugs Act provided that unauthorised possession of traffickable quantity of drug of dependence by a person is prima facie evidence of trafficking

by that person – Whether s 5 applicable to offence under s 71AC on basis of "possession for sale" – Whether s 5 applicable to s 73(2) – Whether onus on prosecution to prove appellant had knowledge of presence of drugs – Whether onus on appellant to prove not in possession of drugs.

Statutes – Validity – Severance – Section 33 of Charter provided for referral to Supreme Court of questions of law relating to application of Charter or interpretation of statutory provisions in accordance with Charter – Section 37 of Charter required Minister administering statutory provision in respect of which declaration made under s 36(2) to prepare written response and cause copies of declaration and response to be laid before Parliament and published in Government Gazette – Whether, if s 36 of Charter invalid, ss 33 and 37, and balance of Charter, severable from s 36.

Statutes – Interpretation – Section 7(2) of Charter provided that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society – Whether s 7(2) relevant to interpretive process under s 32(1) – Whether s 5 of Drugs Act to be construed to impose evidential rather than legal onus on appellant.

Procedure – Costs – Criminal appeal – Departing from general rule for costs where appeal raised significant issues of constitutional law – Whether appellant entitled to special costs order.

Words and phrases – "declaration", "diversity jurisdiction", "evidential onus", "incompatibility", "institutional integrity", "interpret", "legal onus", "legislative intention", "matter", "possession", "possession for sale", "resident of a State", "right to be presumed innocent".

Constitution, Ch III, ss 73, 75(iv), 77(iii), 109.
Commonwealth of Australia Constitution Act 1900 (Imp), s 5.
Crimes Act 1914 (Cth), s 4C(2).
Criminal Code (Cth), ss 13.1, 13.2, 300.4, 302.4, 302.5.
Judiciary Act 1903 (Cth), ss 39(2), 79.
Charter of Human Rights and Responsibilities Act 2006 (Vic), ss 7(2), 25(1), 32, 33, 36, 37.
Drugs, Poisons and Controlled Substances Act 1981 (Vic), ss 5, 70(1), 71AC, 73(2).
Interpretation of Legislation Act 1984 (Vic), s 6(1).

FRENCH CJ.

Introduction

1 The main purpose of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter") is "to protect and promote human rights"[1]. The mechanisms by which it seeks to achieve that purpose include[2]:

- "setting out the human rights that Parliament specifically seeks to protect and promote"; and
- "ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights."

The rights are set out in Pt 2 of the Charter and include the right of a person charged with a criminal offence to be presumed innocent[3]. This appeal, from the Court of Appeal of the Supreme Court of Victoria, was brought by Vera Momcilovic against her conviction for trafficking in a drug of dependence contrary to s 71AC of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Drugs Act"). Section 5 of the Drugs Act provides that a substance on premises occupied by a person is deemed, for the purposes of the Act, to be in the possession of that person unless the person satisfies the Court to the contrary. The appeal raises a number of issues:

- Whether s 5 of the Drugs Act should be interpreted, pursuant to the Charter, as placing on a person charged with an offence under the Act involving possession of drugs, only the evidential burden of introducing evidence tending to show that drugs found on premises occupied by that person were not in that person's possession.
- Whether s 5 applies to the offence of trafficking in drugs created by s 71AC of the Drugs Act.
- Whether s 71AC is invalid by reason of inconsistency with a provision of the *Criminal Code* (Cth) ("the Code") creating a similar offence with a different penalty.

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1 Charter, s 1(2).

2 Charter, s 1(2)(a) and (b).

3 Charter, s 25(1).

- Whether s 36(2) of the Charter, which provides that the Supreme Court may make a declaration that a statutory provision cannot be interpreted consistently with a human right, is valid and amenable to the appellate jurisdiction of this Court.

- Whether, given that the appellant was a resident of Queensland at the time she was charged in Victoria, the County Court of Victoria and the Court of Appeal were exercising federal jurisdiction and, if so, whether that has any effect on the outcome of this appeal.

2 There are four key provisions of the Charter in issue in this appeal. The first is s 25(1), which provides:

> "A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law."

Section 25(1) informs the interpretive principle set out in the second key provision, s 32(1):

> "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

The third key provision is s 7(2), which provides that a human right may be subject under law to such reasonable limits as can be justified in a free and democratic society based on human dignity, equality and freedom.

3 The fourth key provision, s 36(2) of the Charter, authorises the Supreme Court, when it is of the opinion that a statutory provision cannot be interpreted consistently with a human right, to make a declaration to that effect. The declaration does not have any legal effect on the outcome of any proceedings before the Court nor on the validity of the statutory provision the subject of the declaration[4].

4 The appeal was argued in the Court of Appeal as a case primarily concerned with the application of the interpretive rule under s 32(1) of the Charter, and the presumption of innocence under s 25(1) of the Charter, to s 5 of the Drugs Act. The appellant argued in this Court that, contrary to the finding of the Court of Appeal, s 5 should be interpreted as imposing only an evidential burden on an accused person to negative possession. On that interpretation, if the accused person could point to some evidence tending to show that he or she was not in possession of the substance, the legal burden would rest on the prosecution

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4 Charter, s 36(5).

of proving possession beyond reasonable doubt. The appellant also argued that s 5, properly construed, does not apply to the offence of trafficking in drugs created by s 71AC.

5 For the reasons that follow, the appellant cannot succeed on her first Charter point relating to the burden of proof imposed by s 5. Neither the common law, nor the interpretive rules contained in the *Interpretation of Legislation Act* 1984 (Vic) ("the Interpretation Act") and in s 32(1) of the Charter, can transform s 5 of the Drugs Act so as to reduce the legal burden which it imposes to an evidential burden. However, properly construed by reference to the Charter, s 5 does not apply to the trafficking offence with which the appellant was charged so as to lift from the prosecution the burden of proving that she knew of the existence of the drugs she was said to be trafficking. On that basis alone, the appellant succeeds in the appeal and is entitled to a retrial. Her further contention, that the provision creating the offence with which the appellant was charged is inconsistent with similar provisions of the Code and thereby invalid by operation of s 109 of the Constitution, should not be accepted.

6 The Court of Appeal made a declaration under s 36 of the Charter that s 5 of the Drugs Act cannot be interpreted consistently with the presumption of innocence under s 25(1) of the Charter. One of the orders sought by the appellant involved setting aside that declaration. The proposition that this Court should make such an order rested upon two premises:

1. That s 5 could be construed, compatibly with the right of a person accused of a criminal offence to be presumed innocent, so as to impose on that person only an evidential burden.

2. That the Court has jurisdiction to entertain an application to set aside a declaration under s 36.

Neither of the premises is satisfied. Although, in my opinion, s 36 validly conferred a non-judicial function on the Court of Appeal, it was not incidental to the Court's judicial function and was not, in any event, amenable to the appellate jurisdiction of this Court under s 73 of the Constitution. I agree, for the reasons given by Gummow J[5], that the County Court of Victoria and the Court of Appeal were exercising federal jurisdiction in this case. That does not affect the outcome of the appeal or the orders which should be made by this Court.

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5 Reasons of Gummow J at [134]-[139].

Factual and procedural background

7 On 23 July 2008, the appellant was convicted in the County Court of Victoria, after a trial before judge and jury, of the offence of trafficking in a drug of dependence, methylamphetamine, contrary to s 71AC of the Drugs Act. She was sentenced on 20 August 2008 to a term of imprisonment of 27 months with a non-parole period of 18 months. On 29 August 2008, the appellant applied for leave to appeal to the Court of Appeal against her conviction and sentence. Her application was heard on 22 and 23 July 2009, and on 17 March 2010 the Court of Appeal delivered judgment, refusing the application for leave to appeal against conviction, allowing the appeal against sentence and substituting a term of imprisonment of 18 months[6]. It directed that so much of the sentence as had not already been served, be suspended for a period of 16 months[7]. On 3 September 2010, the appellant was granted special leave to appeal from the judgment and order of the Court of Appeal.

8 Two undisputed facts in the case were:

1. In January 2006, the appellant owned and occupied an apartment in Melbourne. Her partner, Velimir Markovski, for the most part lived with the appellant in her apartment.

2. On 14 January 2006, police found quantities of substances containing methylamphetamine at the appellant's apartment exceeding 719 grams in total. The purity of methylamphetamine in 326 grams of a substance found in a coffee jar was not determined and consequently that substance was disregarded for the purposes of sentence[8]. Forensic evidence linked the seized drugs to her partner. There was no forensic evidence linking any of the items to her.

9 On 21 July 2008, the Crown Prosecutor for Victoria filed a presentment in the County Court of Victoria, which was in the following terms:

> "THE Director of Public Prosecutions presents that
>
> VERA MOMCILOVIC
>
> at Melbourne in the said State on the 14th day of January 2006 trafficked in a drug of dependence namely Methylamphetamine."

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6 *R v Momcilovic* (2010) 25 VR 436.

7 (2010) 25 VR 436 at 487 [200].

8 (2010) 25 VR 436 at 485 [190].

At the time that the presentment was filed, the appellant was a resident of Queensland. As explained by Gummow J[9], her trial, being a proceeding between a State and a resident of a different State, involved the exercise of federal jurisdiction conferred on the County Court of Victoria by virtue of s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") read with s 75(iv) of the Constitution.

10 The appellant denied knowledge of the drug and of her partner's involvement in trafficking. Her partner, who had pleaded guilty to charges brought against him in relation to the drug, admitted at the appellant's trial that the drug was in his possession for sale. He denied that the appellant had been aware of its presence or of his drug trafficking activities. The appellant adduced evidence that she had no prior convictions and was of good character.

11 The trial judge's direction to the jury included the following important propositions[10]:

1. The prosecution must prove beyond reasonable doubt that the appellant intentionally trafficked in a drug of dependence. The act of trafficking alleged was possession of a drug of dependence for sale.

2. By operation of s 5 of the Drugs Act, the jury must find that the appellant was in possession of the drug at her apartment unless she could prove, on the balance of probabilities, that she did not know it was there.

3. If the jury did not accept that the appellant did not know about the drug, the prosecution must still prove beyond reasonable doubt that the substance trafficked was a drug of dependence and that she intended to traffick a drug of dependence.

4. Absent evidence to the contrary, proof that the appellant possessed no less than six grams of methylamphetamine would be sufficient to enable the jury to find that she intentionally committed an act of trafficking and that what she trafficked was a drug of dependence.

5. Although the jury could use the uncontradicted evidence that the appellant possessed the relevant quantity of drugs to convict her, they could only do so if that evidence, either by itself or together with other evidence, satisfied the jury that the appellant was guilty beyond reasonable doubt of trafficking. The jury must look at all the evidence, including the quantity

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9 Reasons of Gummow J at [134]-[139].

10 The propositions are paraphrased for brevity.

> of drugs possessed by the appellant, and consider whether they were satisfied beyond reasonable doubt that she intentionally had, in her possession for sale, a prohibited drug.

Although the trial judge directed the jury that the prosecution must prove that the appellant intended to traffick in a drug of dependence, he did not expressly direct the jury that before they could return a verdict of guilty they would have to be satisfied that the prosecution had proved beyond reasonable doubt that the appellant knew of the presence of the drug on the premises which she occupied. The directions which were given were consistent with the assumption that s 5 applied to the offence of trafficking in a drug of dependence.

The Drugs Act

12 Part V of the Drugs Act is entitled "Drugs of Dependence and Related Matters". It covers ss 70 to 80.

13 The offence with which the appellant was charged is created by s 71AC of the Drugs Act, which provides:

> "**Trafficking in a drug of dependence**
>
> A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum)."

The term "drug of dependence" is defined in s 4(1) of the Drugs Act by reference, inter alia, to drugs set out in column 1 of Pt 3 of Sched 11 to the Act. Methylamphetamine is such a drug. The term "traffick", in relation to a drug of dependence, is defined in s 70(1) to include "have in possession for sale, a drug of dependence".

14 Section 73(1) creates the lesser offence of possession of a drug of dependence[11]. Section 73(2) provides that unauthorised possession by a person of a drug of dependence in a quantity that is not less than the applicable traffickable quantity "is prima facie evidence of trafficking by that person in that drug of dependence." Section 70(1) defines "traffickable quantity" in relation to a drug of dependence by reference to Sched 11 to the Act. The traffickable

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11 The maximum penalties for possession of methylamphetamine are greater (400 penalty units and five years imprisonment) or less (30 penalty units and one year imprisonment) according to whether the offence was or was not committed for any purpose relating to trafficking in that drug: s 73(1)(b) and (c).

quantity for methylamphetamine in January 2006 was six grams[12]. On its face, s 73(2) applies to s 71AC in relation to that aspect of trafficking defined as "possession for sale"[13].

15 Central to this appeal was the interaction between the above provisions and s 5 of the Drugs Act, which extends the concept of possession to encompass a deemed possession based upon occupancy of premises in which drugs are present:

> "**Meaning of *possession***
>
> Without restricting the meaning of the word ***possession***, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary."

16 The Drugs Act does not otherwise define "possession", which therefore bears its ordinary meaning. To ascertain that meaning, however, is no ordinary task. The word "possession" embodies "a deceptively simple concept"[14] which has never been completely logically and exhaustively defined and may vary according to its statutory context[15]. It has been described as "always giving rise to trouble."[16] Nevertheless, there are certain essential elements of the concept. Possession of a thing ordinarily involves physical custody or control of it[17].

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12 It was subsequently reduced to three grams: *Drugs, Poisons and Controlled Substances (Amendment) Act* 2006 (Vic), s 20.

13 Section 73(2) also appears to engage with the penalty provisions in s 73(1)(b) and (c).

14 *R v Boyesen* [1982] AC 768 at 773 per Lord Scarman.

15 *Tabe v The Queen* (2005) 225 CLR 418 at 423 [7] per Gleeson CJ; [2005] HCA 59, quoting Earl Jowitt in *United States v Dollfus Mieg et Cie SA* [1952] AC 582 at 605. See generally *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at 280-282 per Lord Reid, 286-289 per Lord Morris of Borth-y-Gest, 298-300 per Lord Guest, 303-306 per Lord Pearce, 309-311 per Lord Wilberforce.

16 *Towers & Co Ltd v Gray* [1961] 2 QB 351 at 361 per Lord Parker CJ.

17 *Hedberg v Woodhall* (1913) 15 CLR 531 at 535 per Griffith CJ, Barton J agreeing at 536; [1913] HCA 2; *Moors v Burke* (1919) 26 CLR 265 at 268-269; [1919] HCA 32; *Williams v Douglas* (1949) 78 CLR 521 at 526-527 per Latham CJ, Dixon and McTiernan JJ; [1949] HCA 40; *Tabe v The Queen* (2005) 225 CLR 418 at 423 [7]

(Footnote continues on next page)

Possession has also long been recognised as importing a requirement, independent of common law mens rea, that the person in possession of something knows that he or she has it in his or her custody or control[18]. As Gibbs CJ said in *He Kaw Teh v The Queen*[19]:

> "where a statute makes it an offence to have possession of particular goods, knowledge by the accused that those goods are in his custody will, in the absence of a sufficient indication of a contrary intention, be a necessary ingredient of the offence, because the words describing the offence ('in his possession') themselves necessarily import a mental element. In such a case it is unnecessary to rely on the common law presumption that mens rea is required."

The extent of the knowledge of a possessor inherent in the term "possession" used in a statutory context is "imprecise"[20]. It depends upon the statute. It need not be explored here. It is not necessary to consider the circumstances in which the word "possession" used in a statute implies knowledge of the nature of the thing possessed such as the identity of a drug. At the very least the knowledge imported by the use of the word "possession" in s 5 is knowledge of the existence of the substance possessed[21]. That knowledge is therefore deemed to exist as an incident of the deemed possession. The deemed possession may be negatived by negativing that knowledge. Whether it is necessary for the accused to go that far under s 5, interpreted in the light of the Charter, is one of the issues in this case.

17 Two questions relevant to s 5 arise in this appeal. The first question is whether the section casts a legal onus on an accused person to negative possession of drugs in premises occupied by the accused. That was the view of

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per Gleeson CJ, citing *Director of Public Prosecutions v Brooks* [1974] AC 862 at 866.

18 *Irving v Nishimura* (1907) 5 CLR 233 at 237 per Griffith CJ, Barton J agreeing at 237; [1907] HCA 50.

19 (1985) 157 CLR 523 at 539, Mason J agreeing at 546; [1985] HCA 43. See also at 589 per Brennan J, 599 per Dawson J.

20 *Tabe v The Queen* (2005) 225 CLR 418 at 423 [7] per Gleeson CJ.

21 This reflects the common law: *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 599 per Dawson J, citing Griffith CJ in *Irving v Nishimura* (1907) 5 CLR 233 at 237; *Tabe v The Queen* (2005) 225 CLR 418 at 446 [100]-[101] per Hayne J, 459 [143] per Callinan and Heydon JJ; *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at 305 per Lord Pearce; *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 at 642 [65] per Sir Anthony Mason NPJ.

the Court of Appeal. The appellant's contention is that s 5, interpreted compatibly with s 25(1) of the Charter, imposes only an evidential burden requiring the accused to do no more than introduce evidence capable of negativing possession[22]. The second question is whether the deemed "possession" in s 5 can be invoked by the prosecution and linked to the "traffickable quantity" provision in s 73(2) to establish "possession for sale". The term "traffick", as defined in s 70 and as used in s 71AC, includes having a drug of dependence in possession for sale. Both questions are to be answered by reference to common law and statutory rules of interpretation, including the interpretive rule created by s 32(1) of the Charter. Before considering those questions, however, it is necessary to refer to two additional provisions of the Charter: ss 32(2) and 7(2). The first expressly authorises resort to international law and decisions of international and foreign domestic courts relevant to human rights. The second declares that human rights may be subject to reasonable limits and sets out criteria for determining whether a limit on a human right is reasonable.

The use of international law and the decisions of international and foreign domestic courts

18 In addition to the interpretive rule created by s 32(1) of the Charter, s 32(2) provides:

> "International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision."

Section 32(2) does not authorise a court to do anything which it cannot already do. The use of comparative materials in judicial decision-making in Australia is not novel[23]. Courts may, without express statutory authority, refer to the judgments of international and foreign domestic courts which have logical or analogical relevance to the interpretation of a statutory provision. If such a judgment concerns a term identical to or substantially the same as that in the statutory provision being interpreted, then its potential logical or analogical relevance is apparent. The exercise by a court of its capacity to refer to such

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22 *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168 per Barwick CJ, Kitto and Taylor JJ; [1965] HCA 34; *Braysich v The Queen* (2011) 85 ALJR 593 at 604-605 [33] per French CJ, Crennan and Kiefel JJ; 276 ALR 451 at 464; [2011] HCA 14.

23 See eg Kiefel, "Comparative Analysis in Judicial Decision-Making: The Australian Experience", (2011) 75(2) *The Rabel Journal of Comparative and International Private Law* 354; Saunders, *The Constitution of Australia: A Contextual Analysis*, (2011) at 102-106.

material does not require the invocation of principles of interpretation affecting statutes giving effect to international treaties or conventions or specifically adopting their terminology[24]. Nor does it involve the application of the common law principle that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party[25]. Section 32(2) does not create a mechanism by which international law or interpretive principles affecting international treaties become part of the law of Victoria. On the other hand, it does not exclude the application of common law principles of interpretation relevant to a statute which adopts, as the Charter has, the terminology of an international convention.

19 The "right" declared by s 25(1) of the Charter is expressed in terms found in Art 14(2) of the International Covenant on Civil and Political Rights (1966) ("the ICCPR"), Art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("the ECHR") and Art 8(2) of the American Convention on Human Rights (1969) ("the ACHR"). It is found in other conventions and foreign domestic laws and constitutions[26]. Judgments of international and foreign domestic courts may be consulted in determining whether the right to be presumed innocent, declared in s 25(1), should be interpreted as congruent with the common law presumption of innocence or as extending beyond it. The content of a human right will affect the potential application of the interpretive requirement in s 32(1) in relation to that right.

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24 eg *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; [1997] HCA 4 concerning the application of Art 31 of the Vienna Convention on the Law of Treaties (1969); Pearce and Geddes, *Statutory Interpretation in Australia*, 7th ed (2011) at 43-46 [2.20]-[2.21].

25 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J; [1908] HCA 95; *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181 per Barton, Isaacs and Rich JJ; [1917] HCA 77; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69 per Latham CJ, 77 per Dixon J, 80-81 per Williams J; [1945] HCA 3; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304-305 per Gummow J. See also *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 771; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 at 747-748 per Lord Bridge of Harwich.

26 African Charter on Human and Peoples' Rights (1981), Art 7(1)(b); Arab Charter on Human Rights (2004), Art 16; Canadian Charter of Rights and Freedoms (1982), s 11(d); *New Zealand Bill of Rights Act* 1990 (NZ), s 25(c); Constitution of the Republic of South Africa (1996), s 35(3)(h). It is also imported by reference into the *Human Rights Act* 1998 (UK), discussed later in these reasons.

Nevertheless, international and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them. What McHugh J said in *Theophanous v The Herald & Weekly Times Ltd*[27] is applicable in this context:

> "The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture."

Despite our common legal heritage, that general proposition is relevant today in reading decisions of the courts of the United Kingdom, especially in relation to the *Human Rights Act* 1998 (UK) ("the HRA"). It is appropriate to take heed not only of Lord Bingham of Cornhill's remark about the need for caution "in considering different enactments decided under different constitutional arrangements"[28], but also his observation that "the United Kingdom courts must take their lead from Strasbourg."[29]

20 The same general caution applies to the use of comparative law materials in construing the interpretive principle in s 32(1). In this appeal what was said to be the strong or remedial approach taken by the House of Lords[30] to the application of the United Kingdom counterpart to s 32(1) of the Charter, namely s 3 of the HRA, was at the forefront of the appellant's submissions. However, s 3 differs textually from s 32(1) and finds its place in a different constitutional setting.

Reasonable limits – s 7 of the Charter

21 Section 7, which appears in Pt 2 of the Charter, recognises the possibility of justifiable limitations upon the enjoyment of the rights declared in the Charter. It provides:

> "**Human rights – what they are and when they may be limited**
>
> (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

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27 (1994) 182 CLR 104 at 196; [1994] HCA 46.

28 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 305 [33].

29 [2005] 1 AC 264 at 305 [33].

30 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person."

One of the issues in this appeal was whether s 7(2) has any part to play in the interpretation of statutes pursuant to s 32(1). On one view, a statutory provision limiting the enjoyment of a human right can nevertheless be compatible with that human right having regard to the criteria set out in s 7(2). Another view, that taken by the Court of Appeal, is that s 7(2) has no part to play in the interpretation of statutes pursuant to s 32(1), but is relevant to the question whether a declaration should be made under s 36(2) that the statute could not be interpreted consistently with a human right.

22 Section 7(2) sets out criteria for determining whether a limit imposed by law on a human right is "reasonable". As was said, in the Second Reading Speech for the Charter, it embodies "what is known as the 'proportionality test'."[31] That test is of a kind well known to European jurisdictions and originates in German law and rule of law concepts, and may have application in particular contexts in Australia[32]. Neither the ICCPR nor the ECHR contains a

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31 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1291.

32 Reasons of Crennan and Kiefel JJ at [549]-[556]. The application of proportionality in the context of judicial review of legislation for constitutional validity was discussed by Kiefel J in *Rowe v Electoral Commissioner* (2010) 85 ALJR 213 at 290-297 [424]-[466]; 273 ALR 1 at 103-112; [2010] HCA 46.

general "reasonable limitations" clause like s 7(2)[33]. The European Court of Human Rights has implied a similar qualification into Art 6(2) of the ECHR involving the application of a proportionality criterion. It has been described by the Privy Council as an implied "flexibility" in the Article[34]. The qualification appears to have been based on the reality acknowledged by the European Court of Human Rights that "[p]resumptions of fact or of law operate in every legal system."[35] That qualification has been adopted in the United Kingdom in the application of the HRA, which applies to the laws of the United Kingdom the human rights set out in the ECHR[36]. The decisions of the European Court of Human Rights and the United Kingdom courts may be a source of guidance in determining whether particular limitations on the right to be presumed innocent are reasonable. They are, however, of little assistance in determining the function of s 7(2) in the Charter.

23 The logical structure of s 7(2) presupposes the existence of the human rights protected and promoted by the Charter and declares the kinds of limits to which they may be subjected under the law. On its face it does not affect the content of those rights. They are the subjects of the limits to which it refers. It qualifies the extent of their protection and promotion. It has the appearance of a parliamentary reservation, which may be applied from time to time by leaving unamended existing legislation which encroaches on human rights or by enacting new legislation which does so. By way of example, in 2009 the *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act* 2009 (Vic) was enacted. Its "main purpose" was "to make amendments to various Acts to ensure compatibility with the Charter of Human Rights and Responsibilities."[37] It replaced reverse legal burdens of proof in three statutes with evidential burdens

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33 This is by way of contrast with the general limitations in Art 29(2) of the Universal Declaration of Human Rights (1948) and Art 4 of the International Covenant on Economic, Social and Cultural Rights (1966).

34 *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 at 969.

35 *Salabiaku v France* (1988) 13 EHRR 379 at 388. See also *Hoang v France* (1992) 16 EHRR 53; *Janosevic v Sweden* (2002) 38 EHRR 473.

36 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 297 [21] per Lord Bingham. See also, with respect to Art 11(1) of the Hong Kong Bill of Rights Ordinance 1991 (HK), *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 at 969-970. See generally Emmerson, Ashworth and Macdonald (eds), *Human Rights and Criminal Justice*, 2nd ed (2007), Ch 9.

37 *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act* 2009 (Vic), s 1.

and removed them entirely from offence provisions in another. However, it left the reverse onus provisions of other statutes unamended[38].

24 The question is – what operation does s 7(2) have beyond declaring the general character of limits on the Victorian Parliament's commitment to the protection and promotion of human rights set out in the Charter? In the Second Reading Speech for the Charter, Pt 2, which includes s 7, was said to reflect the proposition "that rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests."[39] Section 7 was described as "a general limitations clause that lists the factors that need to be taken into account in the balancing process."[40] It would "assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified in a free and democratic society."[41] Where a right is so limited, "action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right."[42] The Second Reading Speech did not spell out the context in which courts would be called on to make such decisions.

25 The Court of Appeal held that justification of a limit on a human right "becomes relevant only after the meaning of the challenged provision has been established."[43] The Court said that[44]:

> "the emphatic obligation which s 32(1) imposes – to interpret statutory provisions so far as possible compatibly with Charter rights – is directed at the promotion and protection of those rights as enacted in the Charter."

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38 Section 5 of the Drugs Act was not amended. Nor was s 145 of the *Firearms Act* 1996 (Vic), which is a similar provision relating to the possession of firearms.

39 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1291.

40 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1291.

41 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1291.

42 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1291.

43 (2010) 25 VR 436 at 465 [105].

44 (2010) 25 VR 436 at 466 [107].

The Court rejected the possibility that Parliament was to be taken to have intended "that s 32(1) was only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right."[45] On the approach taken by the Court of Appeal, s 7(2) is to be considered only after the statutory provision under examination has been interpreted by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the Interpretation Act[46].

26 The constitutions of Canada and South Africa constrain legislative power from infringing specified human rights and freedoms, subject to general provisions authorising the imposition of reasonable limitations on the enjoyment of those rights. In those jurisdictions the first question to be asked about an impugned law is whether it limits one of the protected rights. If the answer is in the affirmative, the second question is whether the law is nevertheless valid because it is justified as a reasonable limitation provision[47]. Section 7(2) was said, in the Explanatory Memorandum for the Charter, to have been modelled particularly on s 36 of the Constitution of South Africa. One approach to ascertaining the function of s 7(2) is to treat the reference to human rights "compatible" interpretation in s 32(1) as an analogue of the constitutional process for determining infringement. On the Canadian and South African authorities, the proportionality question goes to validity. It has no part to play in interpretation. That approach is consistent with the textual detachment of s 7(2) from the rights set out in the Charter and, thereby, from the interpretive rule in s 32(1).

27 The approach taken in Canada and South Africa has been described as "distinct from the traditional common law approach to rights, which carves out a space for justified interference in fundamental rights by limiting the scope of the

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45 (2010) 25 VR 436 at 466 [107].

46 (2010) 25 VR 436 at 446 [35], 465-466 [106].

47 This approach was taken in the application of s 1 of the Canadian Charter of Rights and Freedoms: *R v Oakes* [1986] 1 SCR 103, a decision involving a reverse onus provision in the *Narcotic Control Act*, which has since been followed in that country. See *R v Chaulk* [1990] 3 SCR 1303 at 1339-1345 per Lamer CJ, 1372-1393 per Wilson J. Section 36 of the Bill of Rights of the Constitution of the Republic of South Africa was applied in a similar way in *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 at 630-631 [26]-[27]; *S v Thebus* 2003 (6) SA 505 at 525-526 [29]. See also Currie and de Waal (eds), *The New Constitutional and Administrative Law*, (2002), vol 1 at 339; van Wyk et al (eds), *Rights and Constitutionalism: The New South African Legal Order*, (1995) at 639-640 [2.1].

rights themselves and requires those asserting their rights to show that their claims fall within the more limited scope of the relevant fundamental right."[48]

28 The *New Zealand Bill of Rights Act* 1990 (NZ) ("the NZBOR"), like the Charter, sets out rights and freedoms. Section 6, which is analogous to s 32(1) of the Charter, requires that preference be given to a meaning of an enactment "that is consistent with the rights and freedoms contained in this Bill of Rights". Section 5 of the NZBOR, like s 7(2) of the Charter, provides that the rights and freedoms in the Bill may be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

29 In *R v Hansen*[49], a majority of the Supreme Court of New Zealand held that if the natural meaning of a statutory provision is prima facie inconsistent with a right set out in the NZBOR, the court should apply s 5. If the natural meaning can be justified under that section, there is no inconsistency for the purposes of s 6. If the natural meaning cannot be justified, then the interpretive process under s 6 must be invoked to attempt to identify a preferred alternative meaning consistent with the NZBOR. A premise underlying that approach, articulated by Blanchard J, was that reasonable limitations of the kind justified under s 5 are constraints upon the rights and freedoms in the NZBOR[50]. Elias CJ, in dissent, applied the approaches adopted by the Supreme Court of Canada and the Constitutional Court of South Africa. Her Honour held that in the context of the NZBOR, s 5 is directed to those making or advising on the making of legal prescriptions potentially limiting the enunciated rights and freedoms[51].

30 The appellant submitted that the question whether a statutory provision, interpreted according to its ordinary meaning, imposes a reasonable limit on a human right within the meaning of s 7(2) is an element of the question whether the provision is compatible with that right. If it is not compatible then the interpretive principle in s 32(1) is engaged. This submission was linked to the appellant's contention that s 32 embodies a "strong rule of construction" closely analogous to that found in the HRA. On the appellant's submissions s 32(1) is similar to statutory rules of interpretation which provide for statutory provisions

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48 Klug, *The Constitution of South Africa: A Contextual Analysis*, (2010) at 117.

49 [2007] 3 NZLR 1.

50 [2007] 3 NZLR 1 at 27 [59]. See also at 36-37 [88]-[92] per Tipping J, 65-66 [190]-[192] per McGrath J; cf at 83 [266] per Anderson J.

51 [2007] 3 NZLR 1 at 15 [23].

to be read down or severed so as to avoid or minimise invalidity[52]. It should not, it was said, be seen as merely codifying the principle of legality.

31 The second respondent, the Attorney-General for Victoria, made a submission similar to that made by the appellant and pointed to the linkage in the Second Reading Speech between s 7(2) and the concept of compatibility. However, the same linkage was not made in the Explanatory Memorandum and, as already noted, is not made in the text of the Charter. Ministerial words in the Second Reading Speech cannot supply that statutory connection[53].

32 The third respondent, the Victorian Equal Opportunity and Human Rights Commission, pointed to ss 28 and 38 of the Charter. Section 28 requires that a Member of Parliament introducing a Bill into the Parliament prepare a "statement of compatibility" to be laid before the House of Parliament into which the Bill is introduced. Section 38 makes it unlawful for a public authority to "act in a way that is incompatible with a human right". The third respondent submitted that the term "compatible with human rights" should be given a consistent meaning throughout the Charter. The argument for consistent construction may be accepted, but it does not require the incorporation of s 7(2) into the test for compatibility. Section 28 imposes no such requirement. A s 28 statement disclosing incompatibility between a proposed Bill and human rights may also set out the justification for that incompatibility under s 7(2) or leave that justification for parliamentary debate. And as the Human Rights Law Centre ("the Centre")[54] submitted, s 38(2) and (3) delimit the field of unlawfulness in s 38(1). Section 38(1) does not apply "if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision."[55] The example given at the foot of s 38(2) is "[w]here the public authority is acting to give effect to a statutory provision that is incompatible with a human right."[56]

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52 *Acts Interpretation Act* 1901 (Cth), s 15A; Interpretation Act, s 6.

53 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 499 [55] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; [2010] HCA 23.

54 Intervening as amicus curiae.

55 Charter, s 38(2).

56 An example at the foot of a statutory provision forms part of the Act: Interpretation Act, s 36(3A).

33 The Centre contended that the provenance and purpose of s 7(2) supported the approach taken by the Court of Appeal. It traced the ancestry of the subsection through s 5 of the NZBOR and s 36 of the Constitution of the Republic of South Africa to the inspiration for those provisions in s 1 of the Canadian Charter of Rights and Freedoms. The Centre pointed out that in *R v Oakes*[57] the Supreme Court of Canada expressly declined to consider s 1 of the Canadian Charter when interpreting a reverse onus provision. It applied s 1 only when considering whether the impugned law should be upheld.

34 The Centre submitted that a proportionality assessment of the reasonableness of legislation is not an interpretive function. Section 7(2) cannot, it was said, form part of the interpretive process because the proportionality assessment that it requires cannot be undertaken until a construction has been reached. These submissions made by the Centre should be accepted.

35 The logical structure of s 7(2) is such that it cannot be incorporated into the content of the rights and freedoms set out in the Charter. The compatibility which is to be sought in applying s 32(1) is compatibility "with human rights". Section 7(2) cannot inform the interpretive process which s 32(1) mandates. The question whether a relevant human right is subject to a limit which answers the criteria in s 7(2) can only arise if the statutory provision under consideration imposes a limit on its enjoyment. Whether it does so or not will only be determined after the interpretive exercise is completed. As the question of reasonable limitations on rights under the Charter is dealt with by s 7(2), it is neither necessary nor appropriate to find in s 25(1) the implied "flexibility" found by the European Court of Human Rights in the presumption of innocence under Art 6(2) of the ECHR.

36 On the preceding logic, s 7(2) will also be excluded from consideration by the Supreme Court when determining, under s 36(2), whether a statutory provision cannot be interpreted consistently with a human right. Section 7(2) could still have a role to play in informing the discretion of the Court to decline to make a declaration of inconsistent interpretation under s 36(2). There would, after all, be no point in advising the Parliament of an inconsistency founded on a limitation that was "reasonable" according to the criteria in s 7(2). In the event, the justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the Parliament and the judiciary which, to the extent that it can validly be disturbed, is not to be so disturbed except by clear words. The Charter does not have that effect.

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57 [1986] 1 SCR 103.

Section 32(1) – the approach to interpretation

37 Section 32(1) takes its place in a milieu of principles and rules, statutory and non-statutory, relating to the interpretation of statutes. It also takes its place in a constitutional tradition inherited from the United Kingdom in which[58]:

> "it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it 'according to the intent of them that made it'."

38 The interpretation of a law of the State of Victoria by the Supreme Court of Victoria is "an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws."[59] In that context "[a]scertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts."[60] In that way, the duty of the Court defined in *Project Blue Sky Inc v Australian Broadcasting Authority*[61] is discharged:

> "to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have."

39 There are different ways of undertaking the interpretive task and, in a particular case, they may yield different answers to the same questions[62]. But if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function. The meaning given to the words must be a meaning which they can bear. As Lord Reid said in *Jones v Director of Public Prosecutions*[63]:

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58 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 234 per Viscount Dilhorne; [1978] 1 All ER 948 at 951, quoting 4 Co Inst 330.

59 *Zheng v Cai* (2009) 239 CLR 446 at 455 [28]; [2009] HCA 52.

60 *Lacey v Attorney-General (Qld)* (2011) 85 ALJR 508 at 521 [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; 275 ALR 646 at 661; [2011] HCA 10.

61 (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

62 Corcoran, "Theories of Statutory Interpretation", in Corcoran and Bottomley (eds), *Interpreting Statutes*, (2005) 8 at 30.

63 [1962] AC 635 at 662.

> "It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go."

40 In an exceptional case the common law allows a court to depart from grammatical rules and to give an unusual or strained meaning to statutory words where their ordinary meaning and grammatical construction would contradict the apparent purpose of the enactment. The court is not thereby authorised to legislate[64]. That common law approach is not open in this case as there is no disconformity between the language of s 5 of the Drugs Act and its purpose, or that of the Act as a whole[65].

41 Statutory provisions applicable to the interpretation of Victorian statutes are found in the Interpretation Act and include the requirement, in s 35(a), common to all Australian jurisdictions, that a construction that would promote the purpose or object underlying an Act shall be preferred to a construction that would not promote that purpose or object. The Court of Appeal drew a distinction between the application of s 32(1) of the Charter, which requires an interpretation which is consistent with the purpose of the relevant statutory provision, and s 35(a) of the Interpretation Act, which mandates a construction promoting the purpose or object of the Act as a whole[66]. The Court held that the result of its application of s 32(1) to s 5 of the Drugs Act would not have been different if s 32(1) were constrained only by the underlying purpose of the Act[67]. In any event, the purpose of a statutory provision, which constrains permissible interpretations under s 32(1), will ordinarily be a purpose that is consistent with and promotes the overall purpose of the Act in which the provision appears. It is not necessary to explore further the interaction between s 32(1) of the Charter and s 35(a) of the Interpretation Act having regard to the operation of s 32(1) in this case. Before turning to that operation it is desirable to consider the common law principle of legality.

42 The common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a

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64 *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 651-652 [9] per French CJ and Bell J; [2009] HCA 40.

65 See also Reasons of Crennan and Kiefel JJ at [580]-[581].

66 (2010) 25 VR 436 at 457-458 [75]-[76].

67 (2010) 25 VR 436 at 467 [114].

reflection of its character as "the ultimate constitutional foundation in Australia"[68]. It also underpins the attribution of legislative intention on the basis that legislative power in Australia, as in the United Kingdom, is exercised in the setting of a "liberal democracy founded on the principles and traditions of the common law."[69] It is in that context that this Court recognises the application to statutory interpretation of the common law principle of legality.

43 The principle of legality has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law[70]. The range of rights and freedoms covered by the principle has frequently been qualified by the adjective "fundamental". There are difficulties with that designation[71]. It might be better to discard it altogether in this context. The principle of legality, after all, does not constrain legislative power[72]. Nevertheless, the principle is a powerful one. It protects, within constitutional limits, commonly accepted "rights" and "freedoms". It applies to the rules of

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68 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182 per Gummow J; [1996] HCA 40.

69 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587 per Lord Steyn.

70 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63; *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427 at 436-437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; [2004] HCA 40.

71 Finn, "Statutes and The Common Law: The Continuing Story", in Corcoran and Bottomley (eds), *Interpreting Statutes*, (2005) 52 at 56-57, citing *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298-299 [27]-[29] per McHugh J; [2001] HCA 14.

72 Whether there are certain common law rights and freedoms which constrain legislative power is an unexplored question: *South Australia v Totani* (2010) 242 CLR 1 at 29 [31] per French CJ; [2010] HCA 39. See also Reasons of Crennan and Kiefel JJ at [562]. For a discussion of common law constraints on the executive power see Harris, "Government 'Third-Source' Action and Common Law Constitutionalism", (2010) 126 *Law Quarterly Review* 373.

procedural fairness in the exercise of statutory powers[73]. It applies to statutes affecting courts in relation to such matters as procedural fairness and the open court principle, albeit its application in such cases may be subsumed in statutory rules of interpretation which require that, where necessary, a statutory provision be read down so as to bring it within the limits of constitutional power[74]. It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations[75].

44 The common law "presumption of innocence" in criminal proceedings is an important incident of the liberty of the subject. The principle of legality will afford it such protection, in the interpretation of statutes which may affect it, as the language of the statute will allow. A statute, which on one construction would encroach upon the presumption of innocence, is to be construed, if an alternative construction be available, so as to avoid or mitigate that encroachment. On that basis, a statute which could be construed as imposing either a legal burden or an evidential burden upon an accused person in criminal proceedings will ordinarily be construed as imposing the evidential burden.

45 The rights and freedoms of the common law should not be thought to be unduly fragile. They have properly been described as "constitutional rights, even if … not formally entrenched against legislative repeal."[76] Nevertheless, statutory language may leave open only an interpretation or interpretations which infringe one or more rights or freedoms. The principle of legality, expressed as it is in terms of presumed legislative intention, is of no avail against such language.

46 The Court of Appeal held, in effect, that s 32(1) does not establish a new paradigm of interpretation. It does not require courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and hence from the intention of the parliament which enacted the

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73 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258-259 [11]-[15] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

74 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520-521 [47]-[49] per French CJ; [2009] HCA 4, and cases there cited.

75 Lacey, "The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing", in Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems*, (2005) 82 at 84-85.

76 Allan, "The Common Law as Constitution: Fundamental Rights and First Principles", in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, (1996) 146 at 148.

statute[77]. The Court referred to the Second Reading Speech, in which s 32(1) was described as a provision which "recognises the traditional role for the courts in interpreting legislation"[78]. The Court emphasised the importance of certainty in the interpretation of legislation pursuant to s 32(1)[79]. It observed, correctly in my respectful opinion, that if Parliament had intended to make a change in the rules of interpretation accepted by all areas of government in Victoria "its intention to do so would need to have been signalled in the clearest terms."[80] This application of the principle of legality, to a propounded disturbance of the established constitutional relationship between the Victorian judiciary and legislature, was an expression of common law constitutionalism.

47 The appellant submitted that s 32 was intended to enact a "strong rule of construction" exemplified in s 3(1) of the HRA[81]. Section 32, it was said, should not be interpreted as merely codifying the common law principle of legality. The analogical utility of s 3 of the HRA is undercut by its particular constitutional history and by its differing characterisations in the United Kingdom courts. Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*[82] characterised s 3 as an express enactment of the principle of legality. In *Ghaidan v Godin-Mendoza*[83], Lord Rodger of Earlsferry adopted Lord Hoffmann's characterisation[84]. Lord Hoffmann returned to his theme in *R (Wilkinson) v Inland Revenue Commissioners*[85], explaining s 3 of the HRA in the following way:

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77 *R v Momcilovic* (2010) 25 VR 436 at 459 [82].

78 (2010) 25 VR 436 at 458 [81], citing Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1293.

79 (2010) 25 VR 436 at 463 [97].

80 (2010) 25 VR 436 at 464 [100].

81 That subsection provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

82 [2000] 2 AC 115 at 132.

83 [2004] 2 AC 557.

84 [2004] 2 AC 557 at 593 [104].

85 [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535.

> "The important change in the process of interpretation which was made by section 3 was to deem the Convention to form a significant part of the background against which all statutes, whether passed before or after the 1998 Act came into force, had to be interpreted. Just as the 'principle of legality' meant that statutes were construed against the background of human rights subsisting at common law, so now, section 3 requires them to be construed against the background of Convention rights. There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights." (reference omitted)

The other Law Lords in *Wilkinson* agreed with Lord Hoffmann. That approach, however, was not consistent with the majority reasoning in *Ghaidan* which had supported a view of s 3 as travelling beyond the limits of the principle of legality. The section was described in that earlier decision as "apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant."[86] Lord Steyn described its function as "remedial"[87]. Metaphors were deployed to patrol these broadly defined boundaries. They required that the application of s 3 be "compatible with the underlying thrust of the legislation"[88], that words implied must "go with the grain of the legislation"[89] and that the interpretation adopted not remove "the very core and essence, the 'pith and substance'"[90] or violate a "cardinal principle"[91] of the legislation. The interpretive power, it was said, did not call for "legislative deliberation"[92].

48 Notwithstanding the difference in approach between *Ghaidan* and the later case of *Wilkinson*, it is *Ghaidan* which, as the third respondent submitted, is routinely cited and applied[93] and treated as authoritative in leading United

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86 [2004] 2 AC 557 at 571-572 [32] per Lord Nicholls of Birkenhead.

87 [2004] 2 AC 557 at 577 [49].

88 [2004] 2 AC 557 at 572 [33] per Lord Nicholls.

89 [2004] 2 AC 557 at 572 [33] per Lord Nicholls, quoting Lord Rodger at 601 [121].

90 [2004] 2 AC 557 at 597 [111] per Lord Rodger.

91 [2004] 2 AC 557 at 598 [113] per Lord Rodger.

92 [2004] 2 AC 557 at 572 [33] per Lord Nicholls.

93 See eg *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 303-304 [28] per Lord Bingham, Lord Steyn and Lord Phillips of Worth Matravers agreeing; *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch 77 at 90-92 [37]-[42]; *Principal Reporter v K* [2011] 1 WLR 18 at 40-41 [60]-[61];

(Footnote continues on next page)

Kingdom text books and journals[94]. In the Supreme Court of the United Kingdom in *Ahmed v Her Majesty's Treasury*[95], Lord Phillips said[96]:

> "I believe that the House of Lords has extended the reach of section 3 of the HRA beyond that of the principle of legality."

49 It is not necessary to explore further the general approach of the United Kingdom courts. Section 3 of the HRA has a history and operates in a constitutional setting which is materially different from that which exists in Australia. Before its enactment, United Kingdom courts, which had to give effect to the supremacy of European Community law, lacked domestic legislation providing for the direct application of rights under the ECHR. In the result there was a perception that British judges were denied the responsibility of safeguarding Convention rights and that the European Court of Human Rights had become "in effect a supreme constitutional court of the UK."[97] The HRA was enacted under the political rubric of "bringing rights home"[98]. If it has resulted in a shift in the constitutional relationship of the United Kingdom courts with the Parliament, that shift may at least have been informed by the interaction between those courts and the European Court of Human Rights[99]. Lord Bingham described the United Kingdom courts as "tak[ing] their lead from Strasbourg."[100]

Hounslow London Borough Council v Powell [2011] 2 WLR 287 at 309 [62]; [2011] 2 All ER 129 at 152.

94 See eg Clayton and Tomlinson (eds), *The Law of Human Rights*, 2nd ed (2009), vol 1 at 175-177 [4.01]-[4.08], 190 [4.32], 197-199 [4.44]-[4.45]; Beatson et al, *Human Rights: Judicial Protection in the United Kingdom*, (2008) at 459.

95 [2010] 2 AC 534.

96 [2010] 2 AC 534 at 646 [112].

97 Lester, Pannick and Herberg (eds), *Human Rights Law and Practice*, 3rd ed (2009) at 12 [1.34].

98 Lester, Pannick and Herberg (eds), *Human Rights Law and Practice*, 3rd ed (2009) at 12-15 [1.35]-[1.46].

99 For an account of that interaction with the House of Lords see Feldman, "Human Rights", in Blom-Cooper, Dickson and Drewry (eds), *The Judicial House of Lords 1876-2009*, (2009) 541.

100 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 305 [33].

In the *Countryside Alliance Case* in the House of Lords, Baroness Hale of Richmond said in connection with the application of the HRA[101]:

> "When we can make a good prediction of how Strasbourg would decide the matter, we cannot avoid doing so on the basis that it is a matter for Parliament. Strasbourg will be largely indifferent to which branch of government was responsible for the state of the domestic law."

50 Section 32(1) exists in a constitutional setting which differs from the setting in which the HRA operates. It mandates an attempt to interpret statutory provisions compatibly with human rights. There is, however, nothing in its text or context to suggest that the interpretation which it requires departs from established understandings of that process. The subsection limits the interpretation which it directs to that which is consistent with the purpose of the statutory provision under consideration. It operates upon constructional choices which the language of the statutory provision permits. Constructional choice subsumes the concept of ambiguity but lacks its negative connotation. It reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting.

51 Section 32(1) does what Lord Hoffmann and the other Law Lords in *Wilkinson* said s 3 of the HRA does. It requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application. The Court of Appeal was essentially correct in its treatment of s 32(1).

The right to be presumed innocent

52 In this case, it is not necessary to explore the full scope of the right to be presumed innocent under s 25(1). Article 6(2) of the ECHR has been held to extend to prejudicial pre-trial statements and proceedings for the award of costs or compensation for detention on remand following discontinuance of criminal proceedings or acquittal[102]. It may be that s 25(1) also extends that far. In this

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101 *R (Countryside Alliance) v Attorney General* [2008] AC 719 at 777 [125].

102 Harris et al, *Law of the European Convention on Human Rights*, 2nd ed (2009) at 299-306. See also Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*, 2nd ed (2005) at 426-428 [14.70]-[14.73]; Lester,

(Footnote continues on next page)

case, however, the Court is concerned only with its character as an expression of the requirement that the prosecution in a criminal case has the burden of proving guilt.

53 The concept of the presumption of innocence is part of the common law of Australia, subject to its statutory qualification or displacement in particular cases. It is therefore part of the law of the State of Victoria. Its content, so far as it is relevant to this case, was concisely stated in *Howe v The Queen*[103]:

> "The presumption of innocence in a criminal trial is relevant only in relation to an accused person and finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption."

Its meaning and operation were described by Sir James Fitzjames Stephen, in words still relevant, as "an emphatic caution against haste in coming to a conclusion adverse to a prisoner."[104]

54 The presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt[105]. In particular, Australian courts have not taken the view that a trial judge, who has correctly directed the jury as to the burden of proof, should also be required to make express reference to the presumption of innocence[106]. In the United States

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Pannick and Herberg (eds), *Human Rights Law and Practice*, 3rd ed (2009) at 332-335 [4.6.61]-[4.6.64].

103 (1980) 55 ALJR 5 at 7; 32 ALR 478 at 483.

104 Stephen, *A General View of the Criminal Law of England*, 2nd ed (1890) at 183, cited in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 352 per Starke J; [1938] HCA 34.

105 For an argument that the presumption of innocence was historically more than an instrument of proof and was unduly narrowed by common law scholars see Quintard-Morénas, "The Presumption of Innocence in the French and Anglo-American Legal Traditions", (2010) 58 *American Journal of Comparative Law* 107. Its historical application to allegations, in civil proceedings, of criminal conduct was noted in Best, *A Treatise on Presumptions of Law and Fact*, (1844) at 18 and 29. As to the standard of proof in such cases see *Briginshaw v Briginshaw* (1938) 60 CLR 336.

106 *Palmer* (1992) 64 A Crim R 1 at 6-7 per Finlay J, Gleeson CJ and Carruthers J agreeing; *Tulic v The Queen* (1999) 91 FCR 222 at 225 [13] per Dowsett J,

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Supreme Court in the late 19th century, the presumption of innocence and the prosecutor's burden of proof were held to be logically separate and distinct[107]. In the face of "sharp scholarly criticism" that distinction was not maintained[108]. The term "presumption of innocence" was nevertheless regarded as a source of "significant additional guidance" for the ordinary citizen sitting on a jury[109]. Scholarly criticism has continued[110].

55 For present purposes the relevant aspect of the presumption, both at common law and as declared in s 25(1), is that expressed in the imposition on the prosecution of the legal burden of proof of guilt in criminal proceedings. One consequence of that identity of content is that the protective operation of the common law principle of legality with respect to the common law presumption also protects the relevant expression of the Charter right to be presumed innocent. As appears below, however, that protective operation is ineffective against the clear language of s 5.

The construction of s 5

56 The starting point in construing s 5 is the ordinary and grammatical meaning of its words having regard to their context and legislative purpose. According to that ordinary meaning, the operation of the section places upon an occupier of premises, in proceedings in which possession of a substance on the premises is in issue, the legal burden of persuading a court that he or she was not in possession of the substance. On their face the words of the section defeat any attempt by applying common law principles of interpretation to read down the legal burden thus created.

57 Prior to the enactment of the Charter, the received construction of s 5 of the Drugs Act in Victoria was that enunciated by the Full Court of the Supreme

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Spender and Miles JJ agreeing; *Noble v The State of Western Australia* [2005] WASCA 33 at [19] per Steytler P, Roberts-Smith and Pullin JJA agreeing.

107 *Coffin v United States* 156 US 432 (1895).

108 *Taylor v Kentucky* 436 US 478 at 483 (1978).

109 436 US 478 at 484 (1978).

110 *McCormick on Evidence*, 5th ed (1999) at 519-520; Laufer, "The Rhetoric of Innocence", (1995) 70 *Washington Law Review* 329; Laudan, "The Presumption of Innocence: Material or Probatory?", (2005) 11 *Legal Theory* 333. See also Hamer, "A Dynamic Reconstruction of the Presumption of Innocence", (2011) 31 *Oxford Journal of Legal Studies* 417.

Court in *R v Clarke and Johnstone*[111]. It accorded with the ordinary meaning of the words of the section. On that construction, s 5 required that the occupier of the relevant land or premises prove, on the balance of probabilities, that he or she was not in possession of the relevant substance within the common law meaning of the term "possession"[112]. It was submitted for the first respondent, and was not in dispute, that the decision of the Full Court in *R v Clarke and Johnstone* has been followed in many hundreds of cases since it was decided[113].

58 The appellant submitted, against the received construction, that:

- Section 5 imposes an onus of disproof on an accused in relation to possession but does not require disproof on the balance of probabilities.
- A construction of s 5 as imposing only an evidential onus on an accused is consistent with the purpose of that section.
- The evidential onus would be discharged by the accused raising a reasonable doubt about his or her possession[114].
- The construction adopted by the Court of Appeal would have an anomalous result. The onus on an accused of disproving knowledge of the existence of the relevant drugs would extend to a charge of trafficking under s 71AC involving "possession for sale" but would not apply to trafficking not based upon possession for sale. As appears below, this anomaly does not arise if s 5 does not apply to "possession for sale".
- The ambiguous language of s 5 does not manifest a clear intention to impose the legal onus of proof on the balance of probabilities on the accused and, according to the principle of legality, s 5 should not be read as imposing that onus.

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111 [1986] VR 643.

112 [1986] VR 643 at 647.

113 *R v Tragear* (2003) 9 VR 107 at 117 [42] per Callaway JA, Batt JA agreeing; *R v Hiep Tan Tran* [2007] VSCA 19 at [23] per Redlich JA, Nettle and Neave JJA agreeing; *R v Georgiou* [2009] VSCA 57 at [30] per Robson AJA, Neave and Redlich JJA agreeing.

114 See *The People (Director of Public Prosecutions) v Smyth* [2010] 3 IR 688, a decision of the Irish Court of Criminal Appeal applying Art 38.1 of the Constitution of Ireland to s 29 of the Irish *Misuse of Drugs Act* 1977.

- If s 5 cannot be construed, pursuant to the principle of legality, as imposing only an evidential burden on an accused, such a construction is nevertheless "possible" within the meaning of s 32(1).

59 The appellant invoked s 7(2)(e) of the Charter, which provides that the reasonableness of limits on a human right may be assessed by the existence of "any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve." The appellant pointed to a concession by the first respondent that a change from a legal onus to an evidential onus in the application of s 5 would not make any demonstrable difference to trafficking prosecutions. However, for the reasons already explained, the criteria set out in s 7(2) play no part in the interpretation of a law "in a way that is compatible with human rights" pursuant to s 32(1).

60 The appellant directed attention to decisions of courts in other jurisdictions dealing with reverse onus provisions in the light of human rights instruments incorporating the right to be presumed innocent. Perhaps unnecessarily, she called in aid s 32(2) of the Charter to justify the references to those decisions. In *R v Lambert*[115] the House of Lords construed a reverse onus provision[116] requiring the accused to "prove" want of knowledge or suspicion of certain matters, as imposing an evidential rather than a legal burden. Its interpretive approach embodied proportionality considerations of the kind that would be relevant under s 7(2) of the Charter. That approach to s 32(1) is not open under the Charter. The distinction is made clear upon a consideration of the way in which the House of Lords in *Sheldrake v Director of Public Prosecutions*[117] applied s 3 of the HRA to interpret a reverse onus provision in s 11(2) of the *Terrorism Act* 2000 (UK). Section 11(2) began with the words "It is a defence for a person charged with an offence under subsection (1) to prove". Lord Bingham, with whom Lord Steyn and Lord Phillips agreed, found that there was no doubt that Parliament had intended the reverse onus provision to impose a legal burden on the defendant. There was no doubt that the provision was directed to a legitimate end[118]. The point of difference between s 3 of the HRA and s 32(1) of the Charter is thrown up by the observation of Lord Bingham that[119]:

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115 [2002] 2 AC 545.

116 *Misuse of Drugs Act* 1971 (UK), s 28.

117 [2005] 1 AC 264.

118 [2005] 1 AC 264 at 312 [50].

119 [2005] 1 AC 264 at 312-313 [50].

> "The crucial question is therefore whether … imposition of a legal burden on a defendant in this particular situation is a proportionate and justifiable legislative response to an undoubted problem. To answer this question the various tests identified in the Strasbourg jurisprudence as interpreted in the United Kingdom authorities fall to be applied."

On that approach s 11(2) was read down to impose an evidential instead of a legal burden[120].

61 Given the inapplicability of s 7(2) to the interpretive principle enunciated in s 32(1), and the similarity between the interpretive principle in that subsection and the principle of legality, *Lambert* is of little assistance in this case. Neither is the decision of the Hong Kong Court of Final Appeal in *HKSAR v Lam Kwong Wai*[121]. In that case, common law principles of interpretation could not justify the construction of a reverse onus provision as imposing an evidential onus rather than the persuasive onus which was apparent from its language and structure. Sir Anthony Mason NPJ, with whom the other members of the Court agreed, drew a distinction between common law principles of interpretation and what he called "remedial interpretation" pursuant to the Hong Kong Bill of Rights Ordinance[122]. His Honour described provisions such as s 3 of the HRA and s 6 of the NZBOR as "directed to the situation which arises when a statute *on its true interpretation*, derogates from an entrenched or statutory human right or fundamental freedom."[123] Such provisions would require courts[124]:

> "to give the statutory provision an interpretation that is consistent with the protected rights, even an interpretation that is strained in the sense that it was not an interpretation which the statute was capable of bearing as a matter of ordinary common law interpretation."

The power of the Hong Kong Court of Final Appeal to effect a remedial interpretation was implied in the Basic Law. Article 39 of the Basic Law gave

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120 See also *R v Webster* [2011] 1 Cr App R 207, cited by the appellant, in which the words "unless the contrary is proved" in the *Prevention of Corruption Act* 1916 (UK) were construed as imposing an evidential burden.

121 (2006) 9 HKCFAR 574.

122 (2006) 9 HKCFAR 574 at 605 [58], 606-607 [62]-[65].

123 (2006) 9 HKCFAR 574 at 607 [65] (emphasis added).

124 (2006) 9 HKCFAR 574 at 607 [65].

constitutional force to the provisions of the ICCPR "as applied to Hong Kong" by the Bill of Rights Ordinance and provided that they should "remain in force"[125].

62 The interpretive principle in s 32(1) does not require or authorise the interpretation of s 5 in such a way as to transform the legal burden of proof, which it imposes in clear terms, into an evidential burden. The interpretation mandated under s 32(1) must be consistent with the purpose of the statutory provision being interpreted. The purpose of s 5 is apparent from its text. It is to require the accused to negative possession of a substance otherwise deemed to be in his or her possession by operation of the section. On this limb of the appeal, the appellant fails.

Whether s 5 applies to the offence of trafficking

63 The trial judge directed the jury in terms which left it open to them to convict the appellant of trafficking even though they were not satisfied beyond reasonable doubt that she knew of the existence of the methylamphetamine in her apartment. The judge's direction rested on the premise that s 5 could be applied to prove possession of a traffickable quantity of the drug and thereby the knowledge of the drug necessary to prove trafficking in the sense of "possession for sale" within the definition of "traffick" in s 70(1).

64 The Court of Appeal said that[126]:

> "subject always to the reverse onus – proof merely of occupation of relevant premises operates (by means of s 5 and s 73(2)) to establish a prima facie case of trafficking against an accused."

The appellant submitted that despite s 5, a person cannot be found guilty of trafficking in a drug of dependence unless the prosecution proves beyond reasonable doubt that the accused is aware of the existence of the drug.

65 The first respondent submitted that the trial judge was correct to direct the jury as he did. The deemed possession by the appellant of a quantity of drugs exceeding the traffickable quantity was prima facie evidence that she possessed the drugs for sale. It was evidence which, according to the first respondent's submissions, entitled the jury to find that the element of trafficking was proven in the absence of evidence to the contrary.

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125 (2006) 9 HKCFAR 574 at 610-611 [78]-[79].

126 (2010) 25 VR 436 at 473 [135].

66 The interaction between ss 5 and 73(2) has been considered in a number of decisions of the Supreme Court of Victoria. The Full Court of the Supreme Court held in *R v Clarke and Johnstone*[127] that s 5 could be invoked to establish possession for the purposes of s 73(2)[128]. In that case, it was common ground that whoever possessed the substance was "obviously growing it for sale."[129] The Court of Appeal in *R v Tragear*[130] took the same view as the Full Court. In *Tragear*, however, the Court held that to prove an offence of trafficking under s 71AC, the prosecution must prove beyond reasonable doubt that the accused knew of the existence of the relevant drug even if possession, for the purposes of s 73(2), had been established by operation of s 5[131]. In *R v Georgiou*[132], Robson AJA referred to *Tragear* and said[133]:

> "Accordingly, even using s 5 and s 73(2), to establish trafficking beyond reasonable doubt, the Crown would be required to establish the elements of the trafficking alleged such as the accused possessed the drug for sale and the necessary *mens rea* or intent to do so."

His Honour accepted the proposition put by Callaway JA in *Tragear* that "even if the accused was in possession … of an amount that is *prima facie* evidence of trafficking, the onus was on the Crown to prove that the accused did know that it was cocaine."[134] In *Georgiou* however, it was held that it was not necessary for the trial judge to direct the jury that the accused had actual knowledge of the drugs because actual knowledge was not a live issue[135].

67 The appellant submitted on the basis of *Tragear* and *Georgiou* that despite s 5, a person cannot intentionally possess a drug for sale unless he or she is aware of the presence of the drug. The principal issue at trial in this case was whether

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127 [1986] VR 643.

128 [1986] VR 643 at 658-660.

129 [1986] VR 643 at 660.

130 (2003) 9 VR 107.

131 (2003) 9 VR 107 at 117 [43] per Callaway JA.

132 [2009] VSCA 57.

133 [2009] VSCA 57 at [51].

134 [2009] VSCA 57 at [56].

135 [2009] VSCA 57 at [60].

the appellant knew of the presence of the drugs in her apartment. The appellant submitted that the trial judge had wrongly failed to direct the jury that before they could convict the appellant of an offence against s 71AC, the prosecution had to prove beyond reasonable doubt that she knew of their presence in her apartment. The first respondent, in effect, submitted that the dicta in *Tragear* and *Georgiou* relied upon by the appellant were wrong and did not acknowledge the contrary view expressed by the Full Court in *R v Clarke and Johnstone*. As the first respondent pointed out, the Court of Appeal in the present case did not question the correctness of the observation made by Callaway JA in *Tragear*. Nevertheless, the Court of Appeal relied upon *Georgiou* to justify its conclusion that it was not necessary for the trial judge to direct the jury that the prosecution had to prove actual knowledge of the drugs. The first respondent submitted that it was sufficient in this case for the trial judge to direct the jury that possession of a traffickable quantity of drugs did not oblige them to convict the appellant of trafficking, that they had to consider the possession of a traffickable quantity in the light of all the other evidence in the case and that the onus of proof at all times rested on the prosecution to prove possession for sale beyond a reasonable doubt.

68 The extent, if any, to which s 5 can be applied to s 73(2) and the offence of trafficking under s 71AC depends upon the construction of s 5, which is informed by its purposes. They are, according to s 5, "the purposes of [the Drugs Act]". They obviously encompass proof of possession of a substance in contravention of offence-creating provisions of the Act. There are a number of such offences based on possession alone[136].

69 The approach taken in *Tragear* and *Georgiou* to ss 5 and 73(2) involves the proposition that proof of the following facts:

- occupation of premises by a person; and
- the presence on the premises of a quantity of a drug of dependence not less than a traffickable quantity;

amounts to prima facie evidence of trafficking by that person in that drug of dependence.

70 Section 70(1) defines "traffick" inclusively. It does so in order to extend the coverage of that term to conduct which is an element of, or incidental to, trafficking but might not amount to trafficking according to the ordinary meaning

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136 eg Drugs Act, s 36B(2) – unauthorised possession of poisons or controlled substances; s 71D – possession of precursor chemicals; s 73(1) – possession of a drug of dependence.

of that term. The manufacture and preparation of a drug of dependence and possession of such a drug for sale all fall into that category. Section 73(2) is enlivened only by "possession" of a traffickable quantity. It is difficult to see how, as a matter of logic, the trafficking of which such possession is prima facie evidence, could be other than trafficking constituted by "possession for sale". To extend the prima facie effect of possession of a traffickable quantity to support inferences of actual sale or exchange, manufacture or preparation of a drug of dependence is to stray outside the logical framework defined by the factual premise upon which s 73(2) operates. Prima facie evidence of possession for sale may be taken, with other evidence in a trial, to support findings of actual sale or exchange. There is, however, no reasonable basis upon which s 5 can be used, in conjunction with s 73(2), to translate occupation of premises upon which a traffickable quantity of drugs is found into prima facie evidence of trafficking constituted by sale, exchange, preparation or manufacture of a drug of dependence. The question then is whether s 5 can interact with s 73(2) to support a prima facie inference of trafficking constituted by possession for sale.

71 Mens rea is an element of the offence of trafficking under s 71AC. Proof that the accused person knew of the existence of the relevant substance is therefore a necessary part of the prosecution burden of proving mens rea unless that knowledge be admitted. It is a premise of the intention which the prosecution must establish.

72 The application of s 5 to trafficking under s 71AC could have two consequences:

1. deemed knowledge of the existence of the drugs, as a logical incident of deemed possession, could not logically be excluded from the mens rea calculus necessary for trafficking; and

2. the deemed knowledge would not inform other manifestations of trafficking in its ordinary meaning or in its extended meaning under s 70(1).

In my opinion, the application of s 5 to establish prima facie evidence of possession for sale constituting trafficking under s 71AC is anomalous and is not a purpose of the Act. As a matter of construction it should not be applied to that offence. The contrary view has the result that occupation of premises, upon which there is a quantity of drugs of or exceeding the traffickable quantity, would be prima facie evidence of trafficking in those drugs in circumstances in which the burden of disproving knowledge of the presence of the drugs on the premises would rest upon the accused.

73 The construction which excludes s 5 from application to an offence against s 71AC is to be preferred to any other construction. There are two very similar grounds for that preference: the principle of legality and s 32(1) of the

Charter. The enactment of s 32(1) post-dated the decisions in *R v Clarke and Johnstone* and *Tragear*. Both the principle of legality and s 32(1) apply to favour a constructional choice which will minimise the encroachment by s 5 upon the right of an accused person to be presumed innocent of the offence with which he or she is charged. The exclusion of s 5 from the very serious offence of trafficking reflects a proper application of those principles as discussed earlier in these reasons.

74 For the preceding reasons, and having regard to the way in which the case was conducted at first instance, there was a miscarriage of justice by reason of the misapplication of s 5 of the Drugs Act to the charge of trafficking. The various directions that the appellant bore the burden of proving that she did not know of the drugs should not have been made. The trial judge ought to have directed the jury that it was for the Crown to prove beyond reasonable doubt that the appellant was in possession of the methylamphetamine found in her apartment and, as a necessary part of that proof, to show that she knew of its existence. On that basis, the appeal should be allowed. The question then arises as to the disposition of the issues regarding the declaration of inconsistent interpretation made by the Court of Appeal under s 36 of the Charter.

The nature and validity of the power to make a declaration of inconsistent interpretation

75 Section 36(2) of the Charter establishes one of the mechanisms foreshadowed in s 1(2) of the Charter for the protection and promotion of human rights. That mechanism is described in s 1(2)(e) as:

> "conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration."

76 Section 36(2) relevantly provides:

> "if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section."

The section applies where a question of law involving the application of the Charter or a question with respect to the interpretation of a statutory provision in accordance with the Charter, has arisen in a Supreme Court proceeding, including an appeal before the Court of Appeal[137]. It also applies to proceedings in which the Supreme Court has had such a question referred to it by another

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137 Charter, s 36(1)(a) and (c).

court or tribunal, a referral which can be made pursuant to s 33(1) of the Charter[138].

77 The Court must not make a declaration of inconsistent interpretation unless it has first ensured that notice has been given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission[139]. It is also required to give them both a reasonable opportunity to "intervene in the proceeding or to make submissions in respect of the proposed declaration"[140].

78 Section 36(5) puts into statutory form a statement of the obvious, namely that a declaration of inconsistent interpretation does not:

> "(a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
>
> (b) create in any person any legal right or give rise to any civil cause of action."

The Supreme Court must cause a copy of a declaration to be given to the Attorney-General[141]. The Attorney-General must give a copy to the Minister administering the statutory provision in respect of which the declaration is made[142]. The Minister receiving the declaration is required, within six months of its receipt, to prepare a written response to it and to cause a copy of the declaration and the response to be laid before both Houses of Parliament and published in the Government Gazette[143].

79 As appears earlier in these reasons, the conclusion by the Court of Appeal that s 5 of the Drugs Act imposes a legal burden of proof on an accused person was correct. So too was its conclusion that s 5 is not compatible with the human right, declared under s 25(1) of the Charter, of an accused person to be presumed innocent of the offence with which he or she is charged. On the other hand, this appeal is to be allowed on the basis, not reflected in the trial judge's direction to the jury, that s 5 cannot relieve the Crown, in a prosecution for trafficking in a

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138 Charter, s 36(1)(b).

139 Charter, s 36(3).

140 Charter, s 36(4).

141 Charter, s 36(6).

142 Charter, s 36(7).

143 Charter, s 37.

drug of dependence, from the burden of proving that the accused knew of the drug's existence. The orders sought by the appellant would set aside all orders of the Court of Appeal, including the declaration of inconsistent interpretation. Three questions arise as to the nature and effect of s 36. Those questions are relevant to whether this Court, in the exercise of its appellate jurisdiction, can set aside the declaration:

1. Is the making of a declaration of inconsistent interpretation the exercise of judicial power?

2. If the making of a declaration of inconsistent interpretation is not the exercise of judicial power, is it incidental to the exercise of judicial power?

3. Is s 36 of the Charter, pursuant to which the declaration was made, a valid exercise of the legislative power of the Victorian Parliament?

80 The term "declaration", which appears in different statutory settings, embraces more than one species of administrative and judicial decision-making. A statute may provide for the making of a "declaration" which triggers legal consequences. The declaration may be an administrative act which has no speaking content[144]. It may be a declaration of some official finding or conclusion[145]. Declarations of that kind, which are not adjudications of disputes about existing legal rights and obligations but result in the creation of new sets of rights and obligations, when made by a non-judicial body, do not involve the exercise of judicial functions[146].

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144 Declaration of a service under Pt IIIA of the *Competition and Consumer Act* 2010 (Cth) results in the application of a statutory access regime to the relevant service.

145 See, by way of example, a declaration of unacceptable circumstances made by the Takeovers Panel pursuant to s 657A of the *Corporations Act* 2001 (Cth).

146 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191-192; [1991] HCA 58; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 578-579 [96] per Hayne J; [2008] HCA 2.

81 Judicial declarations which can be made by superior courts in the exercise of their inherent or implied incidental powers are confined by the boundaries of the judicial function[147]:

> "Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions." (footnote omitted)

Nevertheless courts have long exercised powers to make orders, declaratory in form, which do not merely declare legal rights and obligations but create new legal relationships. Examples are adoption orders, decrees of divorce or nullity and orders declaring the dissolution of partnerships. Such orders take their place in the long history of powers exercised by courts in England and Australia before and after Federation which do not involve determinations of rights[148]. These include administrative and investigative functions such as the examination of judgment debtors, bankrupts and officers of failed corporations[149]. As was pointed out by Dixon CJ and McTiernan J in *R v Davison*[150], the elements of a controversy between subjects and the determination of existing rights and liabilities were "entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English law." Examples given in that case included opinions, advices and directions as to the administration of trusts[151], orders relating to the maintenance and guardianship of infants, the exercise of a power of sale by way of family arrangement and consent to the marriage of a ward of the court. Declarations of legitimacy made by English courts were also cited.

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147 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ; [1992] HCA 10.

148 Historical and traditional factors can be significant in the characterisation of a power as judicial: *Cominos v Cominos* (1972) 127 CLR 588 at 605 per Stephen J; [1972] HCA 54, citing *R v Davison* (1954) 90 CLR 353 at 368 per Dixon CJ and McTiernan J; [1954] HCA 46.

149 *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490 at 507-508 [45] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; [2006] HCA 17.

150 (1954) 90 CLR 353 at 368.

151 See also *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 especially at 81-86 [33]-[45] per Gummow ACJ, Kirby, Hayne and Heydon JJ; [2008] HCA 42.

82 A statute may confer upon a court a novel function which is judicial in character. The court may be empowered to make an order designated as a "declaration". The empowering statute may attach a legal consequence to such an order. When conferred by a law of the Commonwealth upon a court exercising federal jurisdiction, the power must necessarily be referable to a "matter" in respect of which federal jurisdiction can be conferred under Ch III of the Constitution. The power purportedly conferred on this Court in 1910[152] by s 88 of the Judiciary Act to make, on reference from the Governor-General, a determination of the validity of an Act of Parliament, was held in *In re Judiciary and Navigation Acts*[153] to be "clearly a judicial function"[154]. This reflected the submission of Owen Dixon, as counsel for Victoria, that "[w]hat Part XII of the *Judiciary Act* seeks to obtain from the High Court is a judicial decision, and not an advisory opinion."[155] The power was not validly conferred because its exercise was not an exercise of part of the judicial power of the Commonwealth[156]. As Gleeson CJ pointed out in *Re Wakim; Ex parte McNally*[157]:

> "The basis of the decision was that, in the contemplated proceedings, there was no 'matter' within the meaning of Ch III (that is to say, no 'immediate right, duty or liability to be established by the determination of the Court')." (footnote omitted)

83 The understanding of the judicial power of the Commonwealth which informs Ch III of the Constitution and is closely linked to the concept of a "matter" in respect of which such jurisdiction is conferred or invested, does not mark out the bounds of judicial functions able to be exercised by State courts. The distinction between judicial power and the judicial power of the Commonwealth has long been acknowledged, directly and indirectly, in this

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152 *Judiciary Act* 1910 (Cth), s 3.

153 (1921) 29 CLR 257; [1921] HCA 20.

154 (1921) 29 CLR 257 at 264 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

155 (1921) 29 CLR 257 at 259.

156 (1921) 29 CLR 257 at 264 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

157 (1999) 198 CLR 511 at 542 [10]; [1999] HCA 27. See also *The Commonwealth v Queensland* (1975) 134 CLR 298 at 327 per Jacobs J, McTiernan J agreeing at 303; [1975] HCA 43; *Gould v Brown* (1998) 193 CLR 346 at 421 [118] per McHugh J, 440 [178] per Gummow J; [1998] HCA 6 and generally Zines, "Advisory Opinions and Declaratory Judgments at the Suit of Governments", (2010) 22.3 *Bond Law Review* 156 especially at 157.

Court[158]. As Gummow J said in *Kable v Director of Public Prosecutions (NSW)*[159]:

> "jurisdiction conferred by a State legislature on the courts of the State may be judicial in character, albeit insusceptible of investment by the Parliament of the Commonwealth as federal jurisdiction pursuant to s 77(iii)."

84 Novelty is no objection to the characterisation of a statutory power conferred upon a court as judicial[160]. The fact that a court is empowered to make a "declaration" of a kind that does not fit within the developed understanding of declaratory relief, and is entirely a creature of statute, is not determinative of the characterisation of the power. The character of the power must be determined by its content and statutory context and not by any disconformity between its content and that of other powers similarly designated.

85 Where a Court of Appeal or Court of Criminal Appeal is asked, by a case stated or question referred to it, pursuant to statute, to answer questions of law arising in proceedings before a trial court it is asked to undertake a judicial function. That is so whether or not the answers themselves determine the rights of the parties. So much flows from the decisions of this Court in *Mellifont v Attorney-General (Q)*[161] and *O'Toole v Charles David Pty Ltd*[162] and is consistent with *In re Judiciary and Navigation Acts*. The answers given in such a case are "not given in circumstances divorced from an attempt to administer the law as stated by the answers; they are given as an integral part of the process of

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158 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 271 per Higgins J; *The Commonwealth v Queensland* (1975) 134 CLR 298 at 325 per Jacobs J; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 136-137 per Gummow J; [1996] HCA 24; *Gould v Brown* (1998) 193 CLR 346 at 420-421 [118] per McHugh J; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 542 [10] per Gleeson CJ.

159 (1996) 189 CLR 51 at 137.

160 See eg s 81(1A) of the *Trade Practices Act* 1974 (Cth) considered in *WSGAL Pty Ltd v Trade Practices Commission* (1994) 51 FCR 115, especially at 131 per Lockhart J and 146-147 per Beaumont J; s 163A of the *Trade Practices Act* 1974 considered in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; [2000] HCA 11.

161 (1991) 173 CLR 289; [1991] HCA 53.

162 (1991) 171 CLR 232; [1991] HCA 14.

determining the rights and obligations of the parties which are at stake in the proceedings in which the questions are reserved."[163]

86 Section 669A of the *Criminal Code* (Q), considered in *Mellifont*, provided that the answers to questions of law referred to the Court of Criminal Appeal following the acquittal of an accused in whose trial the questions had arisen could have no effect on the trial or the acquittal. It was "fundamental" to the characterisation of the answers provided by the Court of Criminal Appeal as judicial that the referral process enabled that Court to correct an error of law at trial. As the plurality said in *Mellifont*[164]:

> "It is that characteristic of the proceedings that stamps them as an exercise of judicial power and the decision as a judgment or order within the meaning of s 73."

The referral process, like the stated case procedure considered in *O'Toole v Charles David Pty Ltd*, did not require the consideration of an abstract question of law not involving the rights or duties of any body or person[165].

87 The answers given by an appellate court, in the exercise of a statutory jurisdiction, to referred questions arising out of particular proceedings may properly be viewed as an incident of the judicial process even if those answers do not affect the outcome of the proceedings. Where they correct error, they ensure that what has been said at first instance does not influence the outcome of subsequent similar cases. In deciding cases the courts are not discharging private arbitral functions. They are exercising powers conferred by public law and doing so in a way that is calculated[166]:

> "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."

88 The condition which enlivens the exercise of the power in s 36(2) is the formation by the Supreme Court, in a proceeding, of an opinion that a statutory provision cannot be interpreted consistently with a human right. The opinion must have been formed by the Court in carrying out its judicial function. By

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163 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.

164 (1991) 173 CLR 289 at 305.

165 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303.

166 Fiss, "Against Settlement", (1984) 93 *Yale Law Journal* 1073 at 1085.

necessary implication, the opinion must have been part of the reasoning of the Court which led it to adopt an interpretation of the provision in question which was inconsistent with a human right. That interpretation will have affected the resolution of the proceedings before the court in which the rights and liabilities of the parties were determined. The declaration under s 36, however, does not decide or affect those rights or liabilities. Nor does it have any effect upon the operation of the statutory provision. It has only one legal consequence and that is to enliven the obligations imposed upon the Attorney-General and the relevant Minister by s 37 of the Charter. It is not a declaration of a kind that could be made in the exercise by the Supreme Court of its general powers to award declaratory relief. The question is whether it is a declaration which involves the exercise of judicial power. Gaudron J in *Truth About Motorways* said[167]:

> "a declaration cannot be made if it 'will produce no foreseeable consequences for the parties'. That is not simply a matter of discretion. Rather, a declaration that produces no foreseeable consequences is so divorced from the administration of the law as not to involve a matter for the purposes of Ch III of the Constitution. And as it is not a matter for those purposes, it cannot engage the judicial power of the Commonwealth." (footnotes omitted)

Although her Honour was speaking in relation to the exercise of Commonwealth judicial power, her observation has a wider significance for the proper subject matter and purposes of declarations in the exercise of judicial power generally and reflects what was said in that wider context in *Gardner v Dairy Industry Authority (NSW)*[168].

89 Despite its form and its connection to the proceedings before the Supreme Court and to the reasoning of the Court leading to the disposition of those proceedings, a declaration of inconsistent interpretation made under s 36 does not involve the exercise of a judicial function. At the point at which such a declaration is made the Court will have decided all matters relevant to the disposition of the proceedings. The power conferred by s 36 plays no part in that process. The declaration sets down no guidance for the disposition of future cases involving similar principles of law. It has no legal effect upon the validity of the statutory provision which is its subject. It has statutory consequences of a procedural character. Those statutory consequences are relevant to the Attorney-General as a member of the Executive and as a member of the Victorian Parliament and to the Parliament itself. The declaration of inconsistent

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167 (2000) 200 CLR 591 at 613 [52].

168 (1977) 52 ALJR 180 at 184 per Barwick CJ, 188 per Mason J, Jacobs and Murphy JJ agreeing, 188-189 per Aickin J; 18 ALR 55 at 60-61, 69, 71.

interpretation cannot be regarded as analogous to the judicial function nor to any functions historically exercised by courts and which, for that reason, have been regarded as judicial.

90 The declaration of inconsistent interpretation cannot be described as incidental to judicial power for essentially the same reasons that it cannot be described as an exercise of judicial power. Nevertheless, the distinction in principle between the two questions requires their separate consideration. The concept of a non-judicial function conferred as an incident of judicial power was referred to in the *Boilermakers' Case*[169] in the context of the authority conferred upon the Commonwealth Parliament by s 51(xxxix) of the Constitution to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the federal judicature. There it was said, in the joint judgment of Dixon CJ, McTiernan, Fullagar and Kitto JJ[170]:

> "What belongs to the judicial power or is incidental or ancillary to it cannot be determined except by ascertaining if it has a sufficient relation to the principal or judicial function or purpose to which it may be thought to be accessory."

The distinction between "a bare administrative function" and a function "appurtenant to the performance of a principal judicial duty to which it is an accessory" was made in *Steele v Defence Forces Retirement Benefits Board*[171]. In the context of federal jurisdiction, Deane J observed in *Re Tracey; Ex parte Ryan*[172]:

> "The Executive Government cannot absorb or be amalgamated with the judicature by the conferral of *non-ancillary* executive functions upon the courts." (emphasis added)

91 A declaration under s 36 does not enable nor support nor facilitate the exercise by the Court of its judicial function. Nor does it have any part to play in giving effect to the disposition of the proceedings by the Court. The declaration

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169 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10.

170 (1956) 94 CLR 254 at 278.

171 (1955) 92 CLR 177 at 186-187; [1955] HCA 34. See also *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (No 2)* (1982) 152 CLR 179 at 186-187 per Brennan J; [1982] HCA 57.

172 (1989) 166 CLR 518 at 580; [1989] HCA 12.

of inconsistent interpretation cannot be described as incidental or ancillary to the exercise, by the Supreme Court of Victoria, of its judicial power.

92 The characterisation of the declaration of inconsistent interpretation as a non-judicial function, which is not incidental to the exercise of judicial power by the Supreme Court of Victoria, is not fatal to its validity. The distinction between non-judicial functions which are incidental to the exercise of judicial power and those which are not is relevant in relation to federal courts and courts exercising federal jurisdiction because of the separation of judicial from legislative and executive powers mandated by the Constitution of the Commonwealth. The distinction does not have the same relevance in relation to State courts exercising jurisdiction conferred on them by State laws. In the joint judgment in *Mellifont*, their Honours said[173]:

> "in the absence of a constitutional separation of powers, there has existed the possibility that the Supreme Courts of the States might be entrusted with a jurisdiction that did not involve the exercise of judicial power."

Callinan and Heydon JJ made a similar point in *Fardon*[174]:

> "Not everything by way of decision-making denied to a federal judge is denied to a judge of a State."

Nevertheless, if a non-judicial function which is not incidental to a judicial function is conferred upon a State court a question may arise whether the non-judicial function is compatible with the institutional integrity of the State court and its status as a repository of federal jurisdiction pursuant to Ch III of the Constitution[175]. In this case, that question goes to the validity of s 36(2).

93 As explained in this Court in a line of decisions beginning with *Kable*, the placement of the courts of the States in the integrated national judicial system created by Ch III of the Constitution constrains the range of functions which can be conferred upon those courts. They cannot be authorised or required to do things which substantially impair their institutional integrity and which are

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173 (1991) 173 CLR 289 at 300.

174 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 656 [219]; [2004] HCA 46. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 424 [336] per Kirby J; [2007] HCA 33; *South Australia v Totani* (2010) 242 CLR 1 at 66 [145] per Gummow J.

175 *South Australia v Totani* (2010) 242 CLR 1 at 47 [69] per French CJ, 81-82 [201]-[207] per Hayne J; *Wainohu v New South Wales* (2011) 85 ALJR 746 at 763-764 [44]-[48] per French CJ and Kiefel J; 278 ALR 1 at 19-21; [2011] HCA 24.

therefore incompatible with their role as repositories of federal jurisdiction[176]. Legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth[177]. In particular, a State legislature cannot enact a law conferring upon a State court or a judge of a State court a non-judicial function which is substantially incompatible with the judicial functions of that court[178].

94 The constraints which Ch III imposes upon State legislatures in relation to the courts of the States do not have the effect that State legislatures are deprived of power to determine the constitution and organisation of State courts[179]. Professor Enid Campbell rightly cautioned against overprotective applications of the incompatibility doctrine which pay insufficient attention to "the assessments of elected parliaments about what functions are appropriate for courts to perform."[180]

95 The power conferred upon the Supreme Court of Victoria to make a declaration of inconsistent interpretation is, for the reasons already set out, a distinct non-judicial power. It provides a mechanism by which the Court can direct the attention of the legislature, through the Executive Government of Victoria, to disconformity between a law of the State and a human right set out in the Charter[181]. The making of the declaration does not affect the Court's judicial

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176 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 per Toohey J, 103 per Gaudron J, 116-119 per McHugh J, 127-128 per Gummow J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] per Gleeson CJ.

177 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 per Gaudron J, 134 per Gummow J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J, 628 [141] per Kirby J.

178 *Wainohu v New South Wales* (2011) 85 ALJR 746 at 764 [46]-[47] per French CJ and Kiefel J, 775 [105] per Gummow, Hayne, Crennan and Bell JJ; 278 ALR 1 at 20-21, 36.

179 *South Australia v Totani* (2010) 242 CLR 1 at 45-46 [66]-[68] per French CJ and cases there cited.

180 Campbell, "Constitutional Protection of State Courts and Judges", (1997) 23 *Monash University Law Review* 397 at 421.

181 A mechanism which might be thought to reflect the occasional phenomenon of judges drawing attention in their judgments to anomalies or inefficiencies in the operation of the law: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 20 fn 68 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ; [1996] HCA 18. See also *Hughes and Vale Pty Ltd v The State*

(Footnote continues on next page)

function. It is consistent with the existing constitutional relationship between the Court, the legislature and the Executive. The metaphor of "dialogue between the three arms of the government" has been used to describe the interaction between the Supreme Court, the Executive and the legislature for which the Charter provides[182]. The metaphor is inapposite. At best, it distracts from recognition of the subsisting constitutional relationship between the three branches of government. At worst, it points misleadingly in the direction of invalidity.

96 It is true that the Court, in making a declaration under s 36(2), may be seen as announcing that its decision in the proceedings is based upon an interpretation of the law which is inconsistent with a human right. That is a human right which, according to the Charter, Parliament specifically seeks to protect and promote. The making of the declaration, however, does no more than manifest, in a practical way, the constitutional limitations upon the Court's role and the fact that it is Parliament's responsibility ultimately to determine whether the laws it enacts will be consistent or inconsistent with human rights. The Court must decide the cases which come before it according to law. If the Parliament has enacted a valid law which cannot be interpreted consistently with a human right, the Court must nevertheless decide the case according to that law and not according to its view of what the law should be, whether by reference to the protection of human rights or otherwise. There is no distinction in principle to be drawn in this respect between civil and criminal proceedings which would render a declaration of inconsistent interpretation inappropriate in the latter class of case.

97 A declaration of inconsistent interpretation does not infringe upon the constraints derived from Ch III of the Constitution. By exemplifying the proper constitutional limits of the Court's functions it serves to reinforce, rather than impair, the institutional integrity of the Court.

Section 36 and federal jurisdiction

98 The next question is whether the Supreme Court of Victoria can make a declaration of inconsistent interpretation relating to a State statute when the proceedings in which the interpretation of the statute arises are proceedings in federal jurisdiction.

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of New South Wales (No 2) (1955) 93 CLR 127 at 175-176 per Dixon CJ, McTiernan and Webb JJ; [1955] HCA 28; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 497 per Barwick CJ; [1971] HCA 40 for examples of judicial indications of how a law might be brought within constitutional limits.

182 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1290.

99 State courts may be invested with federal jurisdiction pursuant to s 77(iii) of the Constitution in matters in which the High Court has original jurisdiction conferred on it by s 75 of the Constitution or can have original jurisdiction conferred on it by the Parliament pursuant to s 76 of the Constitution. The classes of matter in which the High Court has original jurisdiction conferred on it by s 75(iv) include matters "between a State and a resident of another State". By operation of s 39(2) of the Judiciary Act the Supreme Court is "invested with federal jurisdiction" in such matters. As explained by Gummow J[183], the County Court and the Court of Appeal were exercising that kind of federal jurisdiction in this case. There is a question, not debated at the hearing of the appeal, whether in the exercise of that jurisdiction the provisions of the Drugs Act applied directly along with the statutory and common law rules affecting their interpretation. Although I would not wish, in the absence of argument on the point, to express a concluded view, there is much to be said for the proposition that they did so apply and not by virtue of s 79 of the Judiciary Act. As Windeyer J said in *Felton v Mulligan*[184], in a passage approved by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller*[185]:

> "The existence of federal jurisdiction depends upon the grant of an authority to adjudicate rather than upon the law to be applied or the subject of adjudication."

A "matter" between a State and a resident of another State is a matter of federal jurisdiction notwithstanding that it arises under a State law or the common law or both. In that event the "matter" may be said to be defined by reference to the rights or liabilities to be determined under the relevant State law and/or the common law. The County Court was exercising federal jurisdiction. The Court of Appeal heard and determined the appeal from the County Court in the exercise of federal jurisdiction. Both Courts carried out their functions pursuant to an authority to adjudicate invested in them by s 39(2) of the Judiciary Act, read with s 75(iv) of the Constitution. The interpretive rule in s 32(1) of the Charter was part of the body of relevant State law defining the rights and liabilities to be determined by the Court of Appeal in the exercise of its jurisdiction.

100 The position of a State court exercising diversity jurisdiction in a matter arising under a State law may be thought, in some respects, to be similar to that of a court exercising federal jurisdiction which is required to deal with a claim under State law forming part of the "matter" in respect of which it exercises

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183 Reasons of Gummow J at [134]-[139].

184 (1971) 124 CLR 367 at 393; [1971] HCA 39.

185 (1983) 152 CLR 570 at 606; [1983] HCA 12.

federal jurisdiction. In such a case, where the court is exercising accrued jurisdiction[186]:

> "non-federal law is part of the single, composite body of law applicable alike to cases determined in the exercise of federal jurisdiction and to cases determined in the exercise of non-federal jurisdiction." (reference omitted)

As Professor Zines has observed[187]:

> "In the context of diversity jurisdiction … the *content* of the jurisdiction of State courts remains the same, but the *source* is different and the conditions and regulations imposed by s 39(2) are attached." (emphasis in original)

The implications of a proposition that the concept of "matter" in s 75(iv) does not extend to encompass rights and liabilities arising under State law may be considerable and were not explored on the appeal. On the "direct application" approach, s 79 of the Judiciary Act would not have to be invoked to "pick up" provisions such as ss 5 and 71AC of the Drugs Act in the determination of the proceedings or, for that matter, to "pick up" s 32(1) of the Charter so as to make them "surrogate federal laws"[188]. Section 36 could not apply in proceedings in the exercise of federal jurisdiction. Section 79 does not pick up a provision conferring non-judicial functions on a court which are not incidental to its judicial function[189]. Moreover the jurisdiction conferred upon the County Court and the Supreme Court of Victoria by s 39(2) of the Judiciary Act is limited by the scope of Commonwealth judicial power. The power conferred by s 36(2) lies beyond those limits.

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186 *Fencott v Muller* (1983) 152 CLR 570 at 607.

187 *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 90.

188 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [20] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ; [2002] HCA 47, a case involving the applicability of a State law in the exercise of federal jurisdiction in a matter arising under a law of the Commonwealth.

189 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593 [72]-[73] per Gleeson CJ, Gaudron and Gummow JJ; [2001] HCA 1; *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 135 [24] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

Section 36 and the appellate jurisdiction of the High Court

101 Accepting the validity of s 36, there is no reason in principle why the Court of Appeal, having exhausted its functions in the exercise of its federal jurisdiction in this case, could not proceed to exercise the distinct non-judicial power, conferred upon it by s 36, to make a declaration of inconsistent interpretation. In any event, in the exercise of appellate jurisdiction, this Court cannot interfere with such a declaration. A declaration of inconsistent interpretation, being non-judicial and not incidental to judicial power, cannot be characterised as a judgment, decree, order or sentence of the Supreme Court falling within the appellate jurisdiction conferred upon this Court by s 73 of the Constitution. As Gaudron, Gummow and Hayne JJ said of the words of s 73 in *Mobil Oil Australia Pty Ltd v Victoria*[190]:

> "It is well established that 'judgments, decrees, orders and sentences' is to be understood as confined to decisions made in the exercise of judicial power." (footnote omitted)

This Court has no jurisdiction under s 73 of the Constitution to entertain the appeal so far as it relates to the declaration of inconsistent interpretation made by the Court of Appeal. In allowing the appeal, no order should be made in respect of the declaration.

The Drugs Act and the Code

102 The appellant contended that ss 5 and 71AC (read with s 70(1)) of the Drugs Act were, in their application to her, inconsistent with ss 13.1, 13.2 and 302.4 of the Code and therefore invalid by operation of s 109 of the Constitution. This argument was not put in the Court of Appeal. The appellant was permitted to amend her notice of appeal to raise it in this Court. Section 109 of the Constitution provides:

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

It is necessary in considering its application to identify the law of the Commonwealth and the law of the State to which it is said to apply.

103 Section 302.4 of the Code, which creates the offence of trafficking in a controlled drug, is to be found in Pt 9.1 which is entitled "Serious drug

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190 (2002) 211 CLR 1 at 38 [63]; [2002] HCA 27.

offences"[191]. Sections 13.1 and 13.2, which appear in Pt 2.6, relate to the burden and standard of proof on the prosecution in criminal proceedings. A number of the offences created by the provisions of Pt 9.1 relate to conduct also covered by offence-creating provisions of the Drugs Act and other State and Territory laws. That congruence raises the possibility of inconsistency attracting the operation of s 109 of the Constitution in the way explained by Dixon J in *Ex parte McLean*[192]:

> "The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed."

Against that possibility, the Parliament of the Commonwealth enacted s 300.4 of the Code. Section 300.4 provides that Pt 9.1 is not intended to exclude or limit the concurrent operation of any law of a State or Territory[193], including a law that makes an act or omission that is an offence against a provision of Pt 9.1, or a similar act or omission, an offence against the law of the State or Territory[194]. That asserted absence of an exclusionary intention applies even if the law of the State or Territory provides for a penalty for the offence that differs from the penalty provided for in Pt 9.1[195]. It also applies if the State or Territory law provides for a fault element or defence in relation to the offence that differs from those applicable to the offence under Pt 9.1[196].

104 The coexistence of Commonwealth and State laws creating offences based upon the same or very similar conduct also raises the logical possibility that a person might be prosecuted and convicted of substantially the same offence under State and Commonwealth laws. Section 4C(2) of the *Crimes Act* 1914 (Cth) ("the Crimes Act") provides, inter alia, that where an act or omission constitutes an offence under both a law of the Commonwealth and a law of a

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191 Section 300.1(1) of the Code states the purpose of Pt 9.1 as being "to create offences relating to drug trafficking and to give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988."

192 (1930) 43 CLR 472 at 483; [1930] HCA 12.

193 Code, s 300.4(1).

194 Code, s 300.4(2).

195 Code, s 300.4(3)(a).

196 Code, s 300.4(3)(b) and (c).

State and an offender has been punished for that offence under the law of the State, the offender shall not be liable to be punished for the offence under the law of the Commonwealth. It is of some importance in the present case. It is one of a class of "roll-back" mechanisms which operate in different ways in a number of Commonwealth laws[197]. It qualifies, conditionally, the application of all Commonwealth laws creating offences. It is therefore to be read with any such law when judging any asserted inconsistency of an offence-creating Commonwealth law with a law of a State creating the same or a similar offence. That is not to say it is determinative of the question of inconsistency in every case in which it operates. Inconsistency may arise in different ways, some of which may not be amenable to "roll-back" mechanisms.

105 Section 302.4(1) makes it an offence to traffic in a substance which is a controlled drug and provides for a penalty of imprisonment for 10 years or 2,000 penalty units or both. The fault element for the requirement that the substance be a controlled drug is recklessness[198]. It is not in dispute that methylamphetamine is a controlled drug for the purposes of the Code[199]. The maximum penalty for the like offence under s 71AC of the Drugs Act is 15 years imprisonment.

106 If a person has possessed a trafficable quantity of a substance, the person is taken, by operation of s 302.5(1) of the Code, to have had the necessary intention or belief concerning the sale of the substance to have been trafficking in the substance. That presumption does not apply if the person "proves that he or she had neither that intention nor belief."[200] The trafficable quantity in relation to methamphetamine is two grams. The applicable traffickable quantity for the purposes of s 71AC of the Drugs Act in this case was six grams. Section 73(2) of the Drugs Act makes possession of a traffickable quantity of a relevant drug prima facie evidence of "possession for sale". It is apparent that the terms of s 73(2) impose a lesser burden on an accused person in possession of a traffickable quantity of a drug than that which is imposed by s 302.5 of the Code. No submission was made that the difference gives rise to an inconsistency between s 71AC of the Drugs Act and s 302.4 of the Code which would attract

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197 Leeming, *Resolving Conflicts of Laws*, (2011) at 166-167 and examples there given.

198 Code, s 302.4(2).

199 As noted in the Reasons of Crennan and Kiefel JJ at [614], methylamphetamine is the same substance as methamphetamine. Methamphetamine is listed as a controlled drug: Code, s 314.1(1), item 9.

200 Code, s 302.5(2).

the application of s 109. As noted by Gummow J in his reasons[201], this difference has the effect that the State law is less stringent in its application than the Code. In *Dickson v The Queen*[202], on the other hand, the relevant provisions of the Code were held to have left at liberty what s 109 would not permit to be "closed up" by State law[203]. *Dickson* does not assist the appellant in this case.

107 The term "traffics" is defined in s 302.1 by reference to a number of activities, each of which constitutes trafficking, and includes[204]:

"the person possesses the substance with the intention of selling any of it."

This aspect of the definition of "traffics" is similar to the definition of "traffick" in s 70(1) of the Drugs Act. Where possession is an element of an offence against s 302.4 as charged then, pursuant to s 13.1 of the Code, the burden of proving possession rests upon the prosecution. In this respect s 302.4 of the Code and s 71AC of the Drugs Act impose similar requirements, subject to the requirement under the Code to have regard to defined fault elements in relation to offences. There is no equivalent in the Code to s 5 of the Drugs Act relating to possession[205].

108 The appellant relied upon differences in the mode of trial for Commonwealth offences and offences against the law of Victoria. A verdict of guilty after a trial on indictment for an offence against a law of the Commonwealth must be unanimous. That is a requirement of s 80 of the Constitution as explained by this Court in *Cheatle v The Queen*[206]. On the other hand, a verdict after a trial on indictment for an offence against the law of Victoria may be the verdict of a majority of the jury[207]. Sentencing for an offence against the Code is carried out according to the provisions of Pt IB of the

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201 Reasons of Gummow J at [276].

202 (2010) 241 CLR 491; [2010] HCA 30.

203 Reasons of Gummow J at [276].

204 Code, s 302.1(1)(e).

205 The Code does, however, define possession to include "receiving or obtaining possession", "having control over the disposition" and "having joint possession" of a thing: Code, s 300.2.

206 (1993) 177 CLR 541; [1993] HCA 44. See also *Brownlee v The Queen* (2001) 207 CLR 278; [2001] HCA 36.

207 *Juries Act* 2000 (Vic), s 46.

Crimes Act. Sentencing for offences against the laws of Victoria is carried out according to the *Sentencing Act* 1991 (Vic).

109 A significant element of the appellant's inconsistency argument rested on the premise that s 5 of the Drugs Act could be invoked by the prosecution to prove "possession for sale" of drugs and thereby the commission of an offence against s 71AC of the Act. As explained earlier, that premise is wrong. The appellant's argument that s 71AC is "directly" inconsistent with s 302.4 because it effectively brings within its scope mere occupation of premises where a traffickable quantity of drugs is present, and thereby criminalises conduct not prohibited by s 302.4, does not arise for consideration. As to the modes of trial and the different sentencing regimes applicable to the Commonwealth and State offences, I agree with the views expressed by Gummow J[208]. That is to say, s 71AC is not to be read with Victorian statutes governing the operation of the system for the adjudication of criminal guilt, and judged for consistency with s 302.4 of the Code read with the requirements for mode of trial and sentencing under Commonwealth law.

110 The appellant pointed to the different maximum penalties applicable to the offence of trafficking under the Drugs Act and under the Code. Her argument about these differences is sufficiently answered by reference to s 4C(2) of the Crimes Act and its "roll-back" of an offence-creating provision of a law of the Commonwealth where a person has been convicted and punished for an offence against State law constituted by the same act or omission. The State law, in substance, prohibits conduct which is prohibited by the Commonwealth law. Section 4C(2) operates notwithstanding that the State law may qualify the incidence and standard of the burden of proof, and attract different modes of trial and different sentencing provisions. In that respect it accommodates federal diversity falling short of invalidating inconsistency. I agree with the reasons given by Gummow J[209], in this respect, for rejecting the appellant's argument of inconsistency based on the different maximum penalties applicable under the Commonwealth and State laws.

111 I agree with what Gummow J has said concerning the operation of s 300.4 of the Code[210]. I also agree with the observation of Hayne J that the relevant "intention" of the Federal Parliament is that which is disclosed by the

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208 Reasons of Gummow J at [237].

209 Reasons of Gummow J at [246]-[257].

210 Reasons of Gummow J at [266]-[272].

conventional processes of statutory construction[211]. That general proposition was recently reiterated by six Justices of this Court in *Lacey*[212]:

> "Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts. …
>
> The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction."

112 I agree also that any express statement in a federal law of the Federal Parliament's "intention" is relevant to the determination of inconsistency for the purposes of s 109[213], but not determinative.

Conclusion

113 The appeal should be allowed. In my opinion the following orders should be made:

1. Appeal allowed.

2. Set aside paragraphs 1 to 4 of the Order of the Court of Appeal of the Supreme Court of Victoria dated 25 March 2010 and, in their place, order that:

   (a) leave to appeal to that Court against conviction be granted;

   (b) the appeal to that Court be allowed;

   (c) the appellant's conviction be set aside; and

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211 Reasons of Hayne J at [315].

212 *Lacey v Attorney-General (Qld)* (2011) 85 ALJR 508 at 521-522 [43]-[44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; 275 ALR 646 at 660-661.

213 Reasons of Hayne J at [316].

(d) the matter be remitted to the County Court of Victoria for retrial.

3. The second respondent pay two thirds of the appellant's costs in this Court.

114 GUMMOW J. This appeal from the Court of Appeal of the Supreme Court of Victoria (Maxwell P, Ashley and Neave JJA)[214] raises a plethora of complex issues. The appeal attracted interventions by the Commonwealth, New South Wales, South Australia, Western Australia, Tasmania and the Australian Capital Territory. Submissions, as amicus curiae, were received from the Human Rights Law Centre.

115 As will appear, several of these issues are of major importance in the exercise by this Court of its authority to determine matters arising under the Constitution or involving its interpretation, and the significance of the outcome will extend well beyond the resolution of this appeal.

116 These reasons are organised as follows:

[A]	THE COURSE OF THE LITIGATION	[117] - [123]
[B]	THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS	[124] - [129]
[C]	FIVE ADDITIONAL MATTERS	[130] - [144]
	The Charter and s 5 of the Drugs Act	[130]
	Section 5 and s 71AC of the Drugs Act	[131] - [133]
	Section 75(iv) of the Constitution	[134] - [139]
	The validity of s 36 of the Charter	[140]
	Section 109 of the Constitution	[141] - [144]
[D]	PRIMARY CONCLUSION – STEPS (i)-(xiii)	[145] - [147]
[E]	THE RELEVANCE OF OTHER CHARTER SYSTEMS – STEPS (i), (ii) AND (iii)	[148] - [161]
[F]	THE RELATIONSHIP BETWEEN PTS 2 (ss 7-27) AND 3 (ss 28-39) OF THE CHARTER – STEPS (iv), (v) AND (vi)	[162] - [171]
[G]	VALIDITY OF s 36 AND SEVERANCE – STEPS (vii), (viii) AND (ix)	[172] - [189]
[H]	SECTION 5 OF THE DRUGS ACT – STEPS (x) AND (xi)	[190] - [200]
[I]	CONCLUSIONS – STEPS (xii) AND (xiii)	[201] - [205]
[J]	SECTION 109 OF THE CONSTITUTION	[206] - [277]
	The issues	[206] - [209]
	The derivation and place of s 109	[210] - [225]
	What comprises "a law of the Commonwealth" and "a law of a State"	[226] - [237]
	Inconsistency and federalism	[238] - [245]
	Operational inconsistency	[246] - [257]
	The importance of statutory construction	[258] - [261]

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214 *R v Momcilovic* (2010) 25 VR 436.

"Covering the field" [262] - [265]
Statements of legislative intention [266] - [272]
The position of the appellant [273] - [277]
[K] RESULT AND ORDERS [278] - [279]

[A] THE COURSE OF THE LITIGATION

117 On 17 March 2010, the Court of Appeal dismissed the appellant's application for leave to appeal against her conviction of 23 July 2008 in the County Court (Judge Murphy and a jury) on a count of trafficking in a drug of dependence, contrary to s 71AC of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Drugs Act"). However, the Court of Appeal granted the appellant leave to appeal against her sentence and allowed the appeal. The sentence of two years and three months' imprisonment was set aside and the appellant was resentenced to 18 months' imprisonment, suspending the 16 months not already served; she had been in custody for two months before she was granted bail pending the appeal[215].

118 The Court of Appeal also made a "declaration" pursuant to s 36(2) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter"). This was to the effect that the "reverse onus" provision in s 5 of the Drugs Act cannot be interpreted consistently with the human right identified in s 25(1) of the Charter. Section 25(1) provides that "[a] person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law". Section 5 of the Drugs Act states:

> "Without restricting the meaning of the word ***possession***, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, *unless the person satisfies the court to the contrary*." (second emphasis added)

119 The count based on s 71AC was contained in a presentment filed in the County Court on 21 July 2008. The Particulars of Offence stated that the offence had been committed several years previously, on 14 January 2006. The trial thereupon proceeded and the jury returned its verdict on 23 July 2008; the verdict was unanimous and there was no occasion for the prosecution to seek the application of the majority verdict provisions in the *Juries Act* 2000 (Vic)[216].

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215 (2010) 25 VR 436 at 487 [198]-[200].

216 cf *Re Rozenes; Ex parte Burd* (1994) 68 ALJR 372 at 373; 120 ALR 193 at 194-195; [1994] HCA 11.

120 The appellant was born in 1967. In his sentencing remarks the trial judge described her as highly intelligent. She is a law graduate of Monash University and holds multiple undergraduate and postgraduate degrees. The appellant held a practising certificate and was employed in Melbourne as an intellectual property consultant. She owned and occupied an apartment on the 14th floor of a high-rise apartment block in the central business district of Melbourne at 265 Exhibition Street.

121 The appellant had lived with Mr Velimir Markovski in the apartment since about 2002. Markovski gave his occupation as that of motor mechanic and he owned an apartment on the 25th floor of the same apartment block. He had previously been convicted of trafficking in heroin. In about December 2005, Markovski became the subject of a police operation targeting drug trafficking, and telephone interceptions and surveillance footage indicated that he was involved in drug trafficking activities conducted from the 14th floor apartment. On 14 January 2006, police officers entered the apartment under a search warrant, having been let in by the appellant. They found at various locations in the apartment (including the refrigerator and the kitchen cupboard) quantities of methylamphetamine with a wholesale value of about $100,000. Markovski was convicted of trafficking in methylamphetamine and cocaine between 9 December 2005 and 14 January 2006, and on 15 November 2007 he was sentenced to four years' imprisonment.

122 In his evidence at the appellant's trial, Markovski said that the methylamphetamine was in his possession for trafficking and that the appellant had no knowledge of the drugs or of his trafficking operation. The prosecution accepted that there was no evidence of the appellant's active participation in these activities but maintained that she was aware that Markovski was trafficking and storing the methylamphetamine in her apartment.

123 Before proceeding further, it is convenient to consider the position of the Director of Public Prosecutions ("the DPP") in this case and the issues which emerged in argument in this Court respecting the application of the Charter to the institution and conduct of the prosecution.

[B] THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

124 The office of the DPP is established by Pt IIIA (ss 87AA-87AF) of the *Constitution Act* 1975 (Vic) ("the Constitution Act"). The prosecution of the appellant was instituted, prepared and conducted on behalf of the Crown in right of the State of Victoria, but those "functions" of prosecution are conferred on and exercised by the DPP by force of s 22(1)(a) of the *Public Prosecutions Act* 1994 (Vic) ("the Public Prosecutions Act"). Section 22(1)(a) confers like functions with respect to appeals to the Court of Appeal and to this Court.

125 The Charter is expressed to bind the Crown in right of Victoria (s 6(4)). The Charter also states that "[a]ll persons have the human rights set out in Part 2 [ss 7-27]" (s 6(1)), and that the Charter applies to the Parliament, to courts and tribunals, and also to "public authorities" to the extent that they have functions to which provisions including s 38 apply (s 6(2)). The definition of "public authority" in s 4 includes "an entity established by a statutory provision that has functions of a public nature" (s 4(1)(b)), but does not apply to a court except when it is acting in an administrative capacity (s 4(1)(j)).

126 In general terms, s 38 of the Charter provides that "it is unlawful" for a public authority, in making a decision which is not of "a private nature" (s 38(3)), "to fail to give proper consideration to a relevant human right" (s 38(1)). However, and importantly, s 38(1) does not apply if, as a result of a statutory provision, the public authority "could not reasonably have acted differently or made a different decision" (s 38(2)). No point was sought to be taken at trial or in the Court of Appeal that the DPP had contravened s 38(1) in the institution, preparation and conduct of the prosecution of the appellant.

127 The DPP is the first respondent in this Court. (The Attorney-General for Victoria is the second respondent.) When the matter was raised in this Court, the DPP emphasised that the effect of the Constitution Act and Public Prosecutions Act is that proceedings in respect of indictable offences in the Supreme Court and the County Court are brought on behalf of the Crown. Hence, it was said, the identification of the first respondent to this appeal as the Crown[217]. Reference was made to the position in Victoria before the creation by statute of the office of the DPP and the discussion by the Full Court of the Supreme Court in *R v Parker*[218]. But it may be noted that, in *Parker*[219], Young CJ agreed that making presentment at a court "involved an act of a formal or public or official character such as the filing of it in the Court".

128 The DPP is "an entity established by a statutory provision" with functions which are of a "public nature", within the meaning of s 4(1)(b) of the Charter. Section 38 then is engaged in the manner described above. The effect of s 39(3) is that breach of the Charter does not of itself give rise to entitlement to an award of damages[220]. But the effect of the balance of s 39 is that the complainant may

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217 cf *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645; [1987] HCA 26.

218 [1977] VR 22.

219 [1977] VR 22 at 25.

220 cf *Simpson v Attorney-General* (*Baigent's Case*) [1994] 3 NZLR 667 at 675-678, and *Taunoa v Attorney-General* [2008] 1 NZLR 429 at 514-518 [231]-[242], with

(Footnote continues on next page)

seek such other remedy as the complainant may have on a ground of unlawfulness arising because of the Charter. The submissions to this effect by the Victorian Equal Opportunity and Human Rights Commission ("the Commission") should be accepted. (The Commission before the Court of Appeal exercised its right of intervention conferred by s 40 of the Charter and in this Court is the third respondent.)

129 However, the reasons which follow will seek to show that no Charter right of the appellant was contravened in her prosecution, conviction and sentence. The result is that it is unnecessary to enter upon the subject of whether, if the DPP had contravened s 38 of the Charter in the institution, preparation and conduct of the County Court prosecution, the appellant would have had available the common law curial remedy of a stay of the prosecution for abuse of process[221], or some other remedy, including the subsequent exercise of clemency by the Executive.

[C] FIVE ADDITIONAL MATTERS

The Charter and s 5 of the Drugs Act

130 No point was taken at trial concerning the application of the Charter to the construction of s 5 of the Drugs Act. The trial judge had instructed the jury that s 5 imposed on the appellant a legal burden to prove on the balance of probabilities that she had no knowledge of the presence of methylamphetamine in her apartment. It was only in the Court of Appeal that the appellant submitted, albeit unsuccessfully, that the Charter required that s 5 be read, in its application to s 71AC, as imposing upon her no more than an evidentiary burden. The appellant renewed the submission in this Court. The construction of s 5 and its place in the scheme of the Drugs Act are considered in Section [H].

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respect to the *New Zealand Bill of Rights Act* 1990 (NZ), which makes no express provision requiring or permitting damages awards but under which such awards are made; and *City of Vancouver v Ward* [2010] 2 SCR 28 at 34, with respect to s 24(1) of the *Canadian Charter of Rights and Freedoms*, which empowers the courts to grant such remedies to individuals for infringement of Charter rights as they consider "appropriate and just in the circumstances", including, as decided in *Vancouver*, damages.

221 See *Barton v The Queen* (1980) 147 CLR 75; [1980] HCA 48; *Dupas v The Queen* (2010) 241 CLR 237; [2010] HCA 20.

Section 5 and s 71AC of the Drugs Act

131 The second additional matter is that in construing the Drugs Act, a question is presented whether, whatever may be the effect of the Charter upon s 5 and whatever other operation the phrase in s 5 "for the purposes of this Act" may have, s 5 applies at all to the offence created by s 71AC.

132 Section 71AC appears in Pt V (ss 70-80) of the Drugs Act, which is headed "DRUGS OF DEPENDENCE AND RELATED MATTERS". For that Part, s 70(1) provides its own definitions. These include a definition of "traffick" which includes in par (c) thereof:

> "sell, exchange, agree to sell, offer for sale or *have in possession for sale*, a drug of dependence". (emphasis added)

Section 71AC then prohibits a person from, without authority, "trafficking" in a drug of dependence, for example, by having it in his or her possession for sale.

133 The appellant submitted in this Court that the words in par (c) of the definition of "traffick" which are emphasised above provide a composite expression from which the words "have in possession" are not to be severed; on the other hand s 5 of the Drugs Act speaks only to "possession" per se and so is not engaged by s 71AC. As will appear from Section [H] of these reasons, these submissions should be accepted.

Section 75(iv) of the Constitution

134 The third additional matter is as follows and may be disposed of forthwith. The presentment was filed, as noted above, some years after the date of the offence alleged. At trial the appellant gave unchallenged evidence that she had leased out the apartment in Melbourne and had moved to Queensland, where she now resided at Main Beach and pursued her occupation of a registered trademarks attorney. That meant that, while the appellant had the human rights conferred by the Charter because she was being prosecuted in a Victorian court and giving evidence at her trial, she was a resident of Queensland within the meaning of s 75(iv) of the Constitution[222]. It was only in this Court that the significance of these facts became apparent from the submissions presented by Western Australia as intervener.

135 Section 75(iv) relevantly provides that this Court shall have original jurisdiction in "all matters ... between a State and a resident of another State". The term "matter" is the "widest term" to denote justiciable controversies and its

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222 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 332-333; [1957] HCA 18.

application to s 75(iv) "falls to be determined by reference to the substantial subject matter of the controversy"[223]. In *Re McBain; Ex parte Australian Catholic Bishops Conference*[224], in a passage relied upon in the present case by Western Australia, Gaudron and Gummow JJ said:

> "More broadly, there is no general proposition respecting Ch III that the 'immediate right, duty or liability to be established by the determination of the Court', spoken of in *In re Judiciary and Navigation Acts*[225], must be a right, duty or liability in which the opposing parties have correlative interests. Thus, the prosecutor of an offence against a law of the Commonwealth and the defendant do not have correlative interests. Nevertheless, the proceeding seeks to vindicate and enforce the duty or liability of the defendant to observe the criminal law of the Commonwealth."

136 In that regard, in a statement in *R v Kidman*[226], which is equally applicable to the States of the Commonwealth, Griffith CJ (with the support of Isaacs J[227]) said:

> "In my opinion it is a function of the Executive Government of every sovereign State, and therefore of the Government of the Commonwealth, to invoke the aid of the judicial power of the State for any purposes for which it may properly be invoked, which purposes include the punishment of offences committed against its laws. The mode of invoking that aid is by a litigious proceeding which is commonly and properly described in such a context by the word 'matter'."

Dr Wynes described the view of Griffith CJ and Isaacs J as appearing "to be plainly correct"[228]. The submission by the Commonwealth and by Western

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223 *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37; [1985] HCA 69.

224 (2002) 209 CLR 372 at 407 [67]; [2002] HCA 16. See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 660 [183] per Hayne J; [2000] HCA 11.

225 (1921) 29 CLR 257 at 265; [1921] HCA 20.

226 (1915) 20 CLR 425 at 438; [1915] HCA 58.

227 (1915) 20 CLR 425 at 444.

228 Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 455.

Australia that a criminal prosecution by a State of a resident of another State is a "matter" of a kind specified in s 75(iv) should be accepted. The "Crown" on behalf of which the prosecution of the appellant was brought is the Crown in right of the State of Victoria[229].

137 The Attorney-General for Victoria referred to decisions of the United States Supreme Court[230] which indicated that it was recognised in 1900 that the diversity jurisdiction established by Art III §2 of the United States Constitution did not extend to criminal proceedings. But, as Western Australia emphasised in response, the position of the States in the Australian federal structure does not correspond to that of the States in the American federal structure[231]; further, the term "matter" differs from "controversies", the term used in Art III §2[232].

138 The significance of the scope of s 75(iv) does not rest upon the unlikely event of a State instituting a prosecution in the original jurisdiction of this Court. Rather, it lies in the conferral in broad terms by the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") of federal jurisdiction upon State courts and in the avenue of appeal to this Court which s 73(ii) of the Constitution provides in respect of any court of a State exercising federal jurisdiction.

139 Because the prosecution of the appellant was a "matter" which was "between a State and a resident of another State", the County Court was invested with federal jurisdiction by s 77(iii) of the Constitution and s 39(2) of the Judiciary Act, and the judicial power of the Commonwealth was engaged. This is so whether or not that was apparent at the time to the County Court[233].

The validity of s 36 of the Charter

140 The fourth additional matter is that the submissions to the Court of Appeal presented no opposition to the making of the declaration of inconsistent interpretation under s 36 of the Charter on the grounds that the power conferred upon the Supreme Court is invalid because it engages the Supreme Court in an

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229 cf *Commonwealth v Westwood* (2007) 163 FCR 71 at 80-82 [46]-[54].

230 *Chisholm v Georgia* 2 US 419 at 431-432 (1793); *Wisconsin v Pelican Insurance Co* 127 US 265 at 289-290, 298 (1888).

231 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 530 [52]-[53]; [2000] HCA 36.

232 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 603 [21], 610 [42], 650 [156], 670 [213].

233 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 261 [26]; [2005] HCA 38.

activity repugnant to the judicial process in a fundamental degree[234], and that s 36 is invalid whether or not the Supreme Court in a given case is exercising federal jurisdiction. This contention, if made good in this Court, would present issues of severance of s 36 from the balance of the Charter. The issues of severance also emerged only in this Court. As will appear from Section [G] of these reasons, s 36 of the Charter is invalid, as are ss 33 and 37, but they may be severed.

Section 109 of the Constitution

141 The fifth additional matter concerns s 109 of the Constitution. Neither at the trial nor in the Court of Appeal was any point taken referring to the existence of the serious drug offences in Pt 9.1 of Ch 9 of the *Criminal Code* (Cth) ("the Code"). These offences include that created by s 302.4, which is concerned with trafficking in controlled drugs. No point was taken that, by reason of s 302.4 of the Code, s 109 of the Constitution had rendered inoperative[235] the provisions of the Drugs Act under which the appellant had been convicted.

142 For the purposes of Pt 9.1 of the Code, a person "traffics" in a substance if "the person possesses the substance with the intention of selling any of it" (s 302.1(1)(e)). This may be compared with par (c) of the definition of "traffick" in s 70(1) of the Drugs Act, set out above in dealing with the second additional matter[236]. Section 302.4 of the Code is headed "Trafficking controlled drugs" and states:

> "(1) A person commits an offence if:
>
> (a) the person traffics in a substance; and
>
> (b) the substance is a controlled drug.
>
> Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.

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234 See *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49; *South Australia v Totani* (2010) 242 CLR 1; [2010] HCA 39; *Wainohu v New South Wales* (2011) 85 ALJR 746 at 775 [105]; 278 ALR 1 at 36; [2011] HCA 24.

235 See *Butler v Attorney-General (Vict)* (1961) 106 CLR 268; [1961] HCA 32, which indicates that "invalid" in s 109 is better understood as meaning that the State law is "inoperative" while the federal law remains in force.

236 At [132].

(2) The fault element for paragraph (1)(b) is recklessness."

Section 4AA of the *Crimes Act* 1914 (Cth) ("the Crimes Act") stipulates that a penalty unit is $110.

143 Section 71AC of the Drugs Act states:

> "A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum)."

The greater penalty which may be imposed under the law of the State will be apparent. The federal law also attracts the requirement in s 80 of the Constitution of jury unanimity[237] and the particular sentencing regime provided by Pt IB (ss 16-22A) of the Crimes Act. However, the jury was unanimous in finding the appellant guilty and the sentence she received was well under the maximum specified in both the federal and the State law.

144 In this Court, the appellant submitted an alternative argument to her other arguments. They would lead to success on the appeal but would not necessarily avoid a retrial. The alternative argument is that, by operation of s 109 of the Constitution, s 71AC of the Drugs Act was inoperative, with the result that the presentment should be quashed and the sentence set aside. It is convenient to deal first with the issues on the appeal which do not involve alleged inconsistency of State and federal laws.

[D] PRIMARY CONCLUSION – STEPS (i)-(xiii)

145 My primary conclusion is that the appeal should be allowed, the orders of the Court of Appeal (including its declaration) set aside, leave to appeal against conviction granted, the appeal allowed and a declaration made of the invalidity of ss 33, 36 and 37 of the Charter. The question then is whether the conviction should be set aside and a new trial ordered, or whether the presentment should be quashed and the conviction set aside. That latter outcome depends upon the operation of s 109 of the Constitution upon the Drugs Act and further consideration of this matter will be deferred to Section [J] of these reasons.

146 The primary conclusion stated above is reached in 13 steps, as follows:

(i) The human rights systems established in the United Kingdom, Canada, South Africa, New Zealand and Hong Kong provide only limited

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237 *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.

assistance in construing the Charter. They present imperfect analogues. None of them involves legislation of a state or provincial legislature in a federal structure with a rigid constitution. The competence of the Parliament of Victoria is constrained by the Constitution (ss 106, 107) and thus, for example, by the operation of federal jurisdiction and by what may be identified as the *Kable* principle, which is considered in Section [G] of these reasons. The *Human Rights Act* 2004 (ACT) has a structure which to a greater degree resembles that of the Charter, but there is no identity of expression in the critical provisions of the Territory law respecting the reasonable limits upon human rights (s 28) and the interpretation of laws (s 30) and the respective provisions of the Charter (ss 7, 32).

(ii) The proposition advanced by Lord Steyn in *R (Anderson) v Secretary of State for the Home Department*[238] that the comparable provision to s 36 of the Charter, which appears as s 4 of the *Human Rights Act* 1998 (UK) ("the UK Act"), was designed to preserve "Parliamentary sovereignty", speaks to a non-Australian universe of constitutional discourse. (It may be noted that in *Anderson*[239] the provision in s 4(2) of the UK Act that the court "may" make a declaration of incompatibility nevertheless was expressed by Lord Steyn as requiring that the court "must" do so in that case, where it had been impossible to apply s 3 to read and give effect to the relevant legislation in a way compatible with Convention rights.)

(iii) References to "dialogue"[240], going beyond the interaction between the legislature and the courts described in *Zheng v Cai*[241], which is further discussed below at (v), are apt to mislead. Such references encourage consideration of issues of basic constitutional principle which arise on this

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238 [2003] 1 AC 837 at 894 [58]. See also *R v Lambert* [2002] 2 AC 545 at 585 [79] per Lord Hope of Craighead, and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 583 [57] per Lord Millett.

239 [2003] 1 AC 837 at 894 [60].

240 See *Vriend v Alberta* [1998] 1 SCR 493 at 565-566; Hogg and Bushell, "The *Charter* Dialogue Between Courts and Legislatures", (1997) 35 *Osgoode Hall Law Journal* 75 at 79-82; Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998", (2005) *Public Law* 306 at 311-315, 326-330. See also *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 240 [74]-[76], 258-259 [143]-[144], and Lord Kerr, "The Conversation Between Strasbourg and National Courts – Dialogue or Dictation?", (2009) 44 *The Irish Jurist* 1.

241 (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52.

appeal at a level of generality, upon false assumptions of homogeneity between disparate constitutional systems, and at the expense of analysis of doctrines well established in this Court.

(iv) It is Pt 2 (ss 7-27) of the Charter which identifies and defines the human rights conferred upon all persons by s 6(1) and which then operate upon the provisions of Pt 3 Div 1 (ss 28-30) (scrutiny of new legislation), Pt 3 Div 2 (s 31) (override declarations by the Parliament), Pt 3 Div 3 (ss 32-37) (interpretation of laws) and Pt 3 Div 4 (ss 38-39) (obligations on public authorities).

(v) Section 32 (which is found in Div 3 of Pt 3 of the Charter) requires of the courts identified in s 6(2)(b) that statutory provisions, so far as it is possible to do so, "be interpreted" in a way which is compatible with the human rights identified and defined in Pt 2. The ordinary understanding of "interpret" when applied to statute law is to ascertain the "intention" of the legislature. The metaphor of "intention" must not be permitted to mislead[242]; "intention" is used here to direct the courts to the objective criteria of construction[243] and thus in the particular sense indicated in an important passage in the joint reasons of five Justices in *Zheng v Cai*[244]:

> "It has been said that to attribute an intention to the legislature is to apply something of a fiction[245]. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor[246]. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and*

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242 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 132 [389]; [2009] HCA 23.

243 *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at 410-413 [430]-[434].

244 (2009) 239 CLR 446 at 455-456 [28]. See also *Wilson v Anderson* (2002) 213 CLR 401 at 418 [8]; [2002] HCA 29; *Dickson v The Queen* (2010) 241 CLR 491 at 506-507 [32]; [2010] HCA 30; and see, further, "The importance of statutory construction" in Section [J] below at [258]-[261].

245 *Mills v Meeking* (1990) 169 CLR 214 at 234; [1990] HCA 6; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 339-340; [1991] HCA 28.

246 *Singh v The Commonwealth* (2004) 222 CLR 322 at 385 [159]; [2004] HCA 43.

Multicultural and Indigenous Affairs[247], the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy."

(vi) Section 32 is addressed by s 6(2)(b) to the courts; it confers an interpretative power which when exercised by courts is not offensive to the *Kable* principle as applied in recent cases including *Wainohu v New South Wales*[248]. In particular, s 32 does not confer upon the courts a law-making function of a character which is repugnant to the exercise of judicial power. One result of this is that, upon any appeal to this Court under s 73 of the Constitution, in litigation in which s 32 has been engaged, no issue similar to that considered in *Mellifont v Attorney-General (Q)*[249] will emerge. The submissions by the Commonwealth which drew an analogy with the approach to interpretation in *Project Blue Sky Inc v Australian Broadcasting Authority*[250] should be accepted.

(vii) However, s 36 of the Charter is offensive to the *Kable* principle and is invalid.

(viii) The declaration by the Court of Appeal should be set aside for want of jurisdiction to make it, given the invalidity of s 36; a consequence is that s 36 is absent from the corpus of State law to be "picked up" in this case by s 79 of the Judiciary Act. (It should be added that, in any event, had s 36 not been invalid as just stated, the present case being one in federal jurisdiction s 36 could not have been "picked up": to exercise the power conferred by s 36 would have been beyond the judicial power of the Commonwealth because the Court would have been authorised thereby "to make a declaration of the law divorced from any attempt to administer that law"[251].)

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247 (2002) 123 FCR 298 at 410-412 [430]-[432].

248 (2011) 85 ALJR 746; 278 ALR 1.

249 (1991) 173 CLR 289 at 299-306; [1991] HCA 53.

250 (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28.

251 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266; see also the remarks of Gaudron J in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 612 [48].

(ix) Section 36 is inseverable from ss 33 and 37 of the Charter and this Court should make the appropriate declaration of invalidity. However, applying s 6(1) of the *Interpretation of Legislation Act* 1984 (Vic) ("the Victorian Interpretation Act"), the balance of the Charter, including s 32, remains standing; s 6(1) of the Victorian Interpretation Act so operates that the remainder of the Charter is not affected by the circumstance that ss 33, 36 and 37 of the Charter are in excess of the legislative power of the State of Victoria.

(x) Section 5 of the Drugs Act had no application to the operation of s 71AC; the reasoning in decisions which apply s 5 to the "possession" offence created by s 73 and other "possession" offences in Pt V of the Drugs Act does not extend to provisions such as s 71AC where the offence itself is identified as "trafficking".

(xi) That being so, there was no denial by s 71AC of the Drugs Act of the right to the presumption of innocence which is recognised by s 25(1) of the Charter.

(xii) The foregoing condition of the law of Victoria, with the excision of ss 33, 36 and 37 of the Charter and the proper construction of s 71AC of the Drugs Act as indicated in (x) and (xi), then (subject to any anterior operation upon State law of s 109 of the Constitution as considered in Section [J]) was "picked up" by s 79 of the Judiciary Act[252].

(xiii) The trial miscarried by reason of the misapplication of s 5 of the Drugs Act; this makes it unnecessary to pursue other grounds of alleged misdirection to the jury.

There remains the question whether, in any event, no retrial should be ordered and the presentment should be quashed by reason of the operation of s 109 of the Constitution upon the Drugs Act.

147 I turn to consider the primary conclusion and steps (i)-(xiii).

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252 See *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134-135 [21]-[24]; [2002] HCA 47; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 271 [61]-[63]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405-407 [226]-[233]; [2005] HCA 44.

[E] THE RELEVANCE OF OTHER CHARTER SYSTEMS – STEPS (i), (ii) AND (iii)

148 The *Canadian Charter of Rights and Freedoms* ("the Canadian Charter") comprises Pt I (ss 1-34) of the *Constitution Act* 1982 (Can)[253]. The question whether a statute is inconsistent, for example, with the Canadian Charter presumption of innocence (s 11) presents a constitutional question; this is because the Canadian Charter is entrenched as part of the supreme law of Canada[254]. The Bill of Rights which comprises Ch 2 (ss 7-39) of the *Constitution of the Republic of South Africa* of 1996 is likewise entrenched. Further, s 8(3)(a) thereof requires the courts, in order to give effect to a right in the Bill, to develop the common law, if necessary, to the extent that legislation does not give effect to that right. With respect to the Hong Kong Bill of Rights Ordinance, in the present case the Court of Appeal noted that the Basic Law of Hong Kong had been construed as impliedly conferring a curial power to make "a remedial interpretation" which went beyond ordinary common law interpretation[255].

149 In *R v Lambert*[256], Lord Slynn of Hadley declared:

> "It is clear that the [UK] Act must be given its full import and that long or well entrenched ideas may have to be put aside, sacred cows culled."

But the subsequent course of authority in the United Kingdom suggests a reluctance to cull entrenched ideas and a preference for their accommodation to the new statutory regime.

150 In the present case the Court of Appeal made extensive reference to House of Lords decisions construing s 3(1) of the UK Act. This requires legislation to be read and given effect, "[s]o far as it is possible to do so", in a way which is compatible with the rights and freedoms guaranteed under the European Convention on Human Rights 1950 ("the European Convention") as set out in Sched 1 to the UK Act. In the present case the Court of Appeal referred extensively[257] to the approach to interpretation taken by Lord Nicholls of

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253 Enacted by s 1 of the *Canada Act* 1982 (Imp).

254 *R v Oakes* [1986] 1 SCR 103 at 119.

255 (2010) 25 VR 436 at 453 [59].

256 [2002] 2 AC 545 at 561 [6].

257 (2010) 25 VR 436 at 448-452 [44]-[57].

Birkenhead and Lord Steyn in *Ghaidan v Godin-Mendoza*[258] and to the apparently contrasting approach by Lord Hoffmann in *R (Wilkinson) v Inland Revenue Commissioners*[259].

151 The Charter is not laid out in a scheme which closely resembles the UK Act. The human rights are set out in Pt 2 of the Charter, not by reference to another source; s 7(2), which provides that in certain circumstances a human right may be subjected to reasonable limits, has no counterpart in the UK Act; and s 32(1) of the Charter uses the term "interpreted" with respect to the statutory provisions engaged by s 32(1), rather than the phrase "read and given effect" in s 3(1) of the UK Act.

152 It is not the task of the Australian courts to attempt any resolution of what to some may appear to be an unsettled confluence of various streams of legal thought apparent in the course of decisions to date upon the UK Act. However, in reading the decisions upon the UK Act, several considerations are apparent. First, there appears to be a desire to observe the doctrine which has come to be identified as the sovereignty of the Parliament at Westminster[260]; this, in turn, presupposes the continued exclusion of the English judges, fully achieved only in the 19th century, from participation in the other branches of government[261]. Secondly, however, there is the presence today of the system of adjudication which produces the decisions of the European Court of Human Rights applying the European Convention; s 2(1)(a) of the UK Act requires a court or tribunal which is determining a question which has arisen in connection with a right under the European Convention to "take into account" decisions of the court at Strasbourg. The resulting state of affairs is identified in Lord Rodger of Earlsferry's apothegm "Strasbourg has spoken, the case is closed"[262].

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258 [2004] 2 AC 557 at 571-572 [29]-[33], 573-574 [40]-[41].

259 [2005] 1 WLR 1718 at 1723-1724 [17]-[18]; [2006] 1 All ER 529 at 535.

260 See, for example, the caution given by Lord Millett against the adoption of "abnormal" methods of statutory construction which would "trespass upon the prerogative of Parliament": *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 584 [60]-[61].

261 See Jay, "Servants of Monarchs and Lords: The Advisory Role of Early English Judges", (1994) 38 *American Journal of Legal History* 118 at 186-193.

262 *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at 366 [98]. See also the remarks of Lord Phillips of Worth Matravers at 355-356 [64]-[65], Lord Hoffmann at 356-357 [70], Lord Carswell at 368-369 [108] and Lord Brown of Eaton-under-Heywood at 370 [114]; and see further Lord Kerr, "The Conversation Between Strasbourg and National Courts – Dialogue or Dictation?", (2009) 44 *The Irish Jurist* 1.

153 Finally, there is the legacy of the winding-up of the British Empire. Numerous post-colonial constitutions conferred a power of "modification" of existing laws to make them conform to the new constitutional norms[263]. In *Roodal v Trinidad and Tobago*[264], in their dissenting opinion Lord Millett and Lord Rodger observed:

> "[The] Parliament [of Trinidad and Tobago] apparently does not envisage that there will be an existing law that is not in conformity with the 1976 Constitution Act and yet cannot be construed in such a way as to bring it into conformity. Rather, existing laws are to survive but to conform to the Constitution – if need be, after the necessary modification. Precisely because of this, as the cases show, the courts have repeatedly felt able to go far beyond mere interpretation and have in effect amended the existing laws where that has been necessary to make them conform to the Constitution. *R v Hughes*[265] and *Fox v The Queen*[266] are only the most recent examples."

154 Sharp differences of opinion have emerged in the Privy Council in these cases, exemplified by *Matthew v Trinidad and Tobago*[267] and *Boyce v The Queen*[268]. The point to be made here is that in *Roodal*[269] the majority (Lord Bingham of Cornhill, Lord Steyn and Lord Walker of Gestingthorpe) appear to have treated ss 3 and 4 of the UK Act as "reading down" provisions *in pari materia* the constitutional provisions before the Privy Council in *Roodal* and other cases.

155 Australian courts must approach the questions presented by the Charter with a clear recognition of two matters: first, the constitutional framework within which those questions are to be decided, and second, the fact that, unsurprisingly, both the structure and the text of other human rights systems

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263 Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories*, (2007) at 247-263.

264 [2005] 1 AC 328 at 370 [100].

265 [2002] 2 AC 259.

266 [2002] 2 AC 284.

267 [2005] 1 AC 433.

268 [2005] 1 AC 400.

269 [2005] 1 AC 328 at 345-346 [27]-[28]; cf at 370 [100].

reflect the different constitutional frameworks within which they operate. In particular, in considering decisions made by the House of Lords about the UK Act, or decisions of the Privy Council about human rights charters in force in nations that were once British colonies, there are important differences of both context and text that must not be ignored.

156 The system of federal government in Australia is constructed upon the recognition that there rests upon the judicature "the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised"[270]. Judicial review of both the validity of legislation and the lawfulness of administrative action is thus an accepted part of the Australian legal landscape[271].

157 By contrast, in the United Kingdom, as noted above, Diceyan notions of parliamentary sovereignty remain influential. Those notions appear to be treated as compatible with the existence of European structures of law-making and adjudication and with the application of the UK Act as some superior form of law alongside the application of the European Convention by the European Court of Human Rights. In *R (Jackson) v Attorney General*[272], Baroness Hale of Richmond, whilst acknowledging that "Scotland may have taken a different view", observed that "[t]he concept of parliamentary sovereignty", which since the 17th century "has been fundamental to the constitution of England and Wales", means that "Parliament can do anything". To this her Ladyship made several qualifications. Any attempt to subvert the rule of law would be viewed by the courts with particular suspicion, and, "for the time being at least", the Parliament, by the *European Communities Act* 1972 (UK) and the UK Act, has "limited its own powers".

158 The accommodations reached between these apparently competing considerations necessarily affect the way in which doctrines of separation of powers are shaped and applied. Further, as Lord Hoffmann has explained[273], the way in which those doctrines are shaped and applied directly affects the decisions that are reached about the content and application of the UK Act. And former

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270 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276; [1956] HCA 10.

271 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43]; [2000] HCA 5.

272 [2006] 1 AC 262 at 318 [159].

273 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 240 [75]-[76].

British colonies have their own distinctive histories which similarly bear upon these questions.

159 These differences in context and relevant differences in text should not be cloaked by describing the rights in issue as "generally accepted" or "fundamental" human rights. That is, the universality of values reflected in various national or international statements of rights does not diminish the importance of considering the constitutional framework within which the Charter operates and recognising that it is to be construed according to its text.

160 Nevertheless, the House of Lords decisions upon the UK Act exercised a fascination to the point of obsession in the preparation and presentation of much of the submissions in the present appeal. That proved unfortunate, as what has been said above seeks to demonstrate.

161 Of greater comparative utility are the decisions upon the *New Zealand Bill of Rights Act* 1990 (NZ) ("the NZ Act"), particularly that of the Supreme Court in *R v Hansen*[274]. Further reference to *Hansen* is made below.

[F] THE RELATIONSHIP BETWEEN PTS 2 (ss 7-27) AND 3 (ss 28-39) OF THE CHARTER – STEPS (iv), (v) AND (vi)

162 The Charter states that it applies to "courts ... to the extent that they have functions under Part 2 and Division 3 of Part 3" (s 6(2)(b)). A question arises (which need not be answered here) whether s 6(2)(b) imposes an obligation upon a court to apply the Charter even in the absence of a point under the Charter being taken by a party before it.

163 Some of the human rights specifically identified and described in Pt 2 are expressed in absolute terms. Examples are the right to the presumption of innocence (s 25(1)), and the rights of freedom of movement (s 12) and of peaceful assembly (s 16(1)). Others, including the right to freedom of expression (s 15), which was considered in *Hogan v Hinch*[275], are so expressed as to permit qualifications which are "reasonably necessary".

164 Section 7(2) states:

> "A human right may be *subject under law* only to *such reasonable limits* as can be *demonstrably justified* in a free and democratic society based on

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274 [2007] 3 NZLR 1.

275 (2011) 85 ALJR 398; 275 ALR 408; [2011] HCA 4.

human dignity, equality and freedom, and taking into account all relevant factors including –

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve." (emphasis added)

165 This text presents several questions of construction which need not be resolved here. One is whether the phrase "subject under law" includes the common law. Another is whether provisions such as s 15, which set out specifically qualified rights, are further qualified by s 7(2). A third is the nature and standard of the evidence or other means by which "reasonable limits" are to be held to be "demonstrably justified".

166 Section 7(2) of the Charter may be compared with s 5 of the NZ Act, which also uses the phrases "reasonable limits" and "demonstrably justified". Section 5 is headed "Justified limitations" and s 6 "Interpretation consistent with Bill of Rights to be preferred". In *Hansen*[276], McGrath J said:

> "As between ss 5 and 6 it will usually be appropriate for a Court first to consider whether under s 5 there is scope for a justified limitation of the right in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment."

Blanchard J[277] and Tipping J[278] spoke to similar effect.

167 Section 32(1) of the Charter reads:

> "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

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276 [2007] 3 NZLR 1 at 65 [191].

277 [2007] 3 NZLR 1 at 26-28 [57]-[62].

278 [2007] 3 NZLR 1 at 36-37 [88]-[92].

168 Section 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Pt 2, including, where it has been engaged, s 7(2). This relationship between s 32(1) and s 7(2) is thus similar to that between s 5 and s 6 of the NZ Act.

169 No doubt the Parliament of the Commonwealth cannot delegate to courts exercising the judicial power an authority conferring a discretion or choice as to the content of a federal law[279]. Further, a law of a State, such as the Charter, is not readily construed as conferring such a power upon State courts[280]. This is because such a State law would require the State courts to act in a fashion incompatible with the proper discharge of their federal judicial responsibilities and with their institutional integrity.

170 However, the reference to "purpose" in such a provision as s 32(1) is to the legislative "intention" revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation. There falls within the constitutional limits of that curial process the activity which was identified in the joint reasons in *Project Blue Sky*[281]. This is so notwithstanding that their Honours were considering conflicting provisions within the one statute. McHugh, Gummow, Kirby and Hayne JJ, before setting out a lengthy passage from Bennion's work *Statutory Interpretation*[282], said[283]:

> "The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[284] may require the

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279 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 486; [1995] HCA 47.

280 *Hogan v Hinch* (2011) 85 ALJR 398 at 412-413 [40]-[46], 419 [80]; 275 ALR 408 at 422-424, 432.

281 (1998) 194 CLR 355.

282 3rd ed (1997) at 343-344.

283 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]. See also *Kennon v Spry* (2008) 238 CLR 366 at 397 [90]; [2008] HCA 56.

284 For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic

(Footnote continues on next page)

words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

That reasoning applies *a fortiori* where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1).

171 Once the significance of the reasoning in *Project Blue Sky* is appreciated and s 32(1) is understood in the sense described above, it is apparent that the provision does not confer upon the courts a function of a law-making character which for that reason is repugnant to the exercise of judicial power. Section 32(1) is not invalid.

[G] VALIDITY OF s 36 AND SEVERANCE – STEPS (vii), (viii) AND (ix)

172 The chapeau to s 36 of the Charter reads "Declaration of inconsistent interpretation". The use here of the term "declaration" may be thought at first blush to carry the reassurance that what is created by s 36 is no more than a new legislative species of the genus identified and well understood as the declaratory order. Any such reassurance would be misplaced. Section 36 provides for a novel regime which does not withstand constitutional scrutiny.

173 Section 36 applies if any of three circumstances are satisfied. These are set out as follows in s 36(1):

"(a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or

(b) the Supreme Court has had a question referred to it under section 33 [by a court or tribunal]; or

(c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a)."

174 The Supreme Court (including the Court of Appeal) is empowered by s 36(2), if, in a proceeding before it, it "is of the opinion that a statutory provision cannot be interpreted consistently with a human right", to proceed to "make a declaration to that effect in accordance with this section". Section 36(2) uses the expression "may make a declaration" rather than "must make a declaration". It is unnecessary to decide whether, if the Supreme Court is of the opinion identified

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rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437; [1994] HCA 15.

in s 36(2), it nevertheless may decline to make the declaration[285]. This is because it would be no answer, if the conferral of power otherwise were invalid, that the Court might decline to exercise it. If the provision be otherwise invalid, the Court is not to be put in the position of considering whether to act under it.

175 Before proceeding further, it is convenient to reiterate the appropriate starting point for consideration of the validity of s 36 and cognate provisions. In considering the application of *Kable v Director of Public Prosecutions (NSW)*[286], attention to matters of perception and public confidence as distinct and separately sufficient considerations is apt to mislead; the touchstone concerns the institutional integrity of the courts[287].

176 Prior to making a declaration of inconsistent interpretation, notice must first be given to the Attorney-General and the Commission (s 36(3)) and they must have been given a reasonable opportunity to intervene (s 36(4)). The Supreme Court "must" cause a copy of a declaration made under s 36(2) to be given to the Attorney-General (s 36(6)), who "must" give a copy thereof to any other Minister who administers the statutory provision concerned (s 36(7)).

177 Section 37 states:

> "Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must –
>
> (a) prepare a written response to the declaration; and
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> (b) cause a copy of the declaration and of his or her response to it to be –
>
> (i) laid before each House of Parliament; and
>
> (ii) published in the Government Gazette."

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285 cf *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664 [32]-[33]; [2010] HCA 21; *Hogan v Hinch* (2011) 85 ALJR 398 at 417 [68]; 275 ALR 408 at 429.

286 (1996) 189 CLR 51; [1996] HCA 24.

287 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617-618 [102]; [2004] HCA 46; *Wainohu v New South Wales* (2011) 85 ALJR 746 at 775 [105]; 278 ALR 1 at 36.

The written response to the declaration need not accept the conclusion as to incompatibility which was reached by the Supreme Court and which founded the declaration under s 36(2). Counsel for the Attorney-General for Victoria in oral argument in this Court properly accepted that this was so.

178 The declaration of inconsistent interpretation does not have dispositive effect. It cannot be described as a declaration of right, with the characteristics described in *Plaintiff M61/2010E v The Commonwealth*[288] and earlier authorities. Rather, it operates as a declaration of the absence of right. This appears from s 36(5), which provides:

> "A declaration of inconsistent interpretation does not –
>
> (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
>
> (b) create in any person any legal right or give rise to any civil cause of action."

179 As remarked above, the term "declaration" may have been devised as reassurance that this new remedy in s 36 has the character of the declaration of right as it generally is understood. However, in *Ainsworth v Criminal Justice Commission*[289], Mason CJ, Dawson, Toohey and Gaudron JJ said of declaratory relief:

> "It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.'[290] However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions[291]. The person seeking relief must have 'a real interest'[292] and relief will not be granted if the question 'is purely

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288 (2010) 85 ALJR 133 at 152 [103]; 272 ALR 14 at 38-39; [2010] HCA 41.

289 (1992) 175 CLR 564 at 581-582; [1992] HCA 10.

290 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437; [1972] HCA 61.

291 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

292 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437; *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448.

> hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen'[293] or if 'the Court's declaration will produce no foreseeable consequences for the parties'[294]."

Section 36(5), the text of which is set out above, denies to the judicial activity required by s 36(2) the character of declaratory relief as ordinarily understood.

180 In *Bass v Permanent Trustee Co Ltd*[295] it was said in the joint reasons of six Justices:

> "Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions[296] or to give advisory opinions. The jurisdiction with respect to declaratory relief has developed with an awareness of that traditional attitude."

181 The declaration of inconsistent interpretation by the Supreme Court pursuant to s 36(2) provides, in substance, formal advice to the Attorney-General which the Supreme Court tenders by causing a copy of the declaration to be given to the Attorney-General, pursuant to s 36(6). The advice is just that. It does not have the added character given to advice tendered by responsible Ministers to the Crown or its representative; namely because the Minister is not required to act on or in accordance with the advice provided by the Supreme Court.

182 Observations by McGrath J in *Hansen*[297] upon the paradoxical operation of s 4 of the NZ Act are also applicable to s 36 of the Charter. In the present case, upon the construction it gave to s 5 of the Drugs Act, the Court of Appeal was bound to give effect to s 5 in its attachment to the s 71AC prosecution, notwithstanding its conclusion that s 5 was not capable of being read consistently

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293 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10; [1975] HCA 26.

294 *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188, 189; 18 ALR 55 at 69, 71.

295 (1999) 198 CLR 334 at 355-356 [47]; [1999] HCA 9.

296 *Luna Park Ltd v The Commonwealth* (1923) 32 CLR 596 at 600; [1923] HCA 49; *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442 at 451; [1925] HCA 27; *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10.

297 [2007] 3 NZLR 1 at 82 [259].

with the right conferred upon the appellant by ss 6(1) and 25(1) of the Charter; further, notwithstanding the declaration made by the Court of Appeal under s 36, the other branches of government came under no obligation to remedy that inconsistency between s 5 and the Charter.

183 If valid, the creation of the advisory structure in s 36 and associated provisions (ss 33 and 37) attempts a significant change to the constitutional relationship between the arms of government with respect to the interpretation and application of statute law. This relationship is described in *Zheng v Cai*[298] in the passage set out in Section [D] of these reasons. In addition, s 36 has the vice described in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[299], namely the giving to the Executive of an advisory opinion upon a question of law. In *Wilson* that activity by a federal judge as *persona designata* was incompatible with the holding of that office; thus *a fortiori* were the function conferred on a federal court. The decision in *Wainohu*[300] indicates that the Supreme Court is in no relevantly different position.

184 In the division between judicial and legislative functions it is appropriately the responsibility of the legislature to decide whether the existing statute law should be altered or replaced[301]. It is no part of the judicial power, in exercise of a function sought to be conferred on the courts by statute, formally to set in train a process whereby the executive branch of government may or may not decide to engage legislative processes to change existing legislation.

185 Nor is it an answer to the invalidity of a provision such as s 36 that it may be read as conferring a function which the court may or may not decide to exercise. That proposition would require identification of criteria to be applied in deciding when it was imprudent to make a "declaration of inconsistent interpretation".

186 To fix upon the undesirability of undermining the criminal process as a reason for the Supreme Court to decline to act would be unsatisfactory in several respects. First, there is the well-recognised difficulty in classification of proceedings as either civil or criminal in character[302]. Secondly, the adoption of

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298 (2009) 239 CLR 446 at 455-456 [28].

299 (1996) 189 CLR 1 at 18-19; [1996] HCA 18.

300 (2011) 85 ALJR 746; 278 ALR 1.

301 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 634; [1979] HCA 40.

302 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; [2003] HCA 49; *Rich v Australian Securities and Investments*

(Footnote continues on next page)

such a criterion for the exercise of the power suggests, albeit perhaps *sub silentio*, an apprehension of partial invalidity were s 36 read as permitting a "declaration of inconsistent interpretation" which would be liable to undermine the criminal process. Thirdly, this course would be adopted without consideration of what might be other odious exercises of the s 36 function, and without consideration of those operations of s 36 which might be severed and those which may be saved as being valid.

187 Nor may s 36 be assimilated to those judicial functions which are not themselves exclusively judicial, and "which considered independently might belong to an administrator", but which are supported because "they are not independent functions but form incidents in the exercise of strictly judicial powers"[303]. The very circumstances present in this case demonstrate that the "declaration of inconsistent interpretation" which was made by the Court of Appeal was not "an integral part of the process of determining the rights and obligations of the parties which [were] at stake in the proceedings"[304].

188 The practical operation of s 36 as described above is incompatible with the institutional integrity of the Supreme Court and therefore the section is invalid. Sections 33 and 37 are integral to the operation of s 36 and are not saved by s 6(1) of the Victorian Interpretation Act.

189 However, the balance of the Charter is not "so bound up" with these provisions that one can fairly say that the former cannot stand without the continued operation of the latter. This is not a case where the balance of the Charter would operate differently by reason of the absence of the particular remedy created by s 36, or where the scheme of the Charter is such that none of its provisions are to operate unless all do[305].

Commission (2004) 220 CLR 129 at 145 [32]; [2004] HCA 42; *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 171 [29]; [2005] HCA 35.

303 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151; [1953] HCA 11; *R v Davison* (1954) 90 CLR 353 at 368; [1954] HCA 46. See also *R v Murphy* (1985) 158 CLR 596; [1985] HCA 50; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 647 [104]; [2006] HCA 40.

304 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303.

305 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371; [1948] HCA 7; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 93 [248].

[H] SECTION 5 OF THE DRUGS ACT – STEPS (x) AND (xi)

190 In *Tabe v The Queen*[306], Gleeson CJ referred to the absence from the common law of a logical and exhaustive definition of "possession", and observed that what constitutes "sufficient knowledge" for possession depends upon the purpose for which, and the context in which, the question is asked. In that regard his Honour went on to consider the construction given to s 233B of the *Customs Act* 1901 (Cth) in *He Kaw Teh v The Queen*[307].

191 The text of s 5 of the Drugs Act has been set out in Section [A] of these reasons, and s 71AC has been set out in Section [C] under the heading "Section 109 of the Constitution". Section 5 deems, in the circumstances postulated, a substance to be in the possession of a person and leaves it to that person to satisfy the court to the contrary. The section has no independent operation; it is enlivened only by attachment to substantive provisions. That attachment then serves to cast a particular burden on the accused and, for that reason, the existence of the attachment must be clearly demonstrated by the statutory text[308].

192 There have been several decisions in Victoria involving the application of s 5 to provisions of Pt V of the Drugs Act other than s 71AC. In particular, s 73(1) proscribes having in one's "possession" a drug of dependence. The penalty is then provided in pars (a), (b) and (c). Penalties at a lower level than the five years' imprisonment maximum penalty (par (c)) are provided for in pars (a) and (b) by criteria which include satisfaction on the balance of probabilities of the absence of a purpose "related to trafficking" or "relating to trafficking". Section 73(2) provides that prima facie evidence of trafficking (and thus for these penalty provisions) is provided by "possession" of not less than a traffickable quantity.

193 The operation of s 5 in this setting was described by the Full Court of the Supreme Court of Victoria in *R v Clarke and Johnstone*[309] as follows:

> "There is a distinct difference in operation between ss 5 and 73(2). The former section operates so that *facts establishing less than the possession* of a drug by an accused *are deemed to establish possession* unless the accused satisfies the jury on the balance of probabilities that he

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306 (2005) 225 CLR 418 at 423-425 [7]-[11]; [2005] HCA 59.

307 (1985) 157 CLR 523; [1985] HCA 43.

308 See *Tabe v The Queen* (2005) 225 CLR 418 at 446 [102].

309 [1986] VR 643 at 659-660. See also *Medici* (1989) 40 A Crim R 413 at 414-415.

> was not in possession of it. The latter sub-section operates so that if the accused has in his possession a traffickable quantity of drugs that is prima facie evidence of *trafficking* by the accused. However, it does not deem any fact to exist nor reverse an onus of proof. If further evidence is placed before the jury on the issue of trafficking the jury decides on the whole of the evidence whether they are satisfied that the accused trafficked in the drug." (emphasis added)

The Full Court, earlier in its reasons[310], had set out the definition of "traffick" in s 70(1).

194 However, in *R v Tragear*[311] the Court of Appeal gave to s 73(2) an operation beyond providing for prima facie evidence of trafficking for the purposes of the penalty provisions in s 73(1). The absence from s 73(2) of words such as "for the purposes of this section" was taken as indicative that s 73(2) was not purely ancillary to s 73(1) and that s 73(2): (i) applied to the offence itself of "trafficking", and (ii) brought with it the operation of s 5 relating to the "possession" which was prima facie evidence of "trafficking".

195 More recently, in *R v Hiep Tan Tran*[312] the prosecution appears to have relied on s 5 and s 73(2) in support of a count of trafficking contrary to s 71AC. In this Court, the DPP relied upon this course of authority as representing the well-established and orthodox view in Victoria.

196 However, counsel for the appellant pointed to another provision in Pt V of the Drugs Act[313] in addition to s 73(1), in which "possession" per se is an element of the offence. Counsel gave other instances of such provisions outside Pt V[314].

197 The submissions for the appellant also emphasised that the definition in s 70(1) of "traffick" includes preparation of a drug of dependence for trafficking (par (a)) and manufacture of a drug of dependence (par (b)), as well as "sell, exchange, agree to sell, [or] offer for sale ... a drug of dependence" (par (c)). Each of these forms of trafficking was correctly said by counsel to connote knowledge but not to attract the reverse onus provision in s 5. This result would preserve, for these species of the offence of trafficking proscribed by s 71AC, the

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310 [1986] VR 643 at 659.

311 (2003) 9 VR 107 at 116 [39].

312 [2007] VSCA 19.

313 Section 71A.

314 Sections 13, 14 and 36B(2).

common law requirement respecting onus of proof. But the reverse onus would apply only to one species of trafficking, that of which the appellant was convicted. This was said by the appellant to be a paradoxical result.

198 These submissions should be accepted. They support the reading of the phrase in par (c) of the definition of "traffick", to "have in possession for sale", as a composite expression which does not attract s 5 to s 71AC.

199 Further, ss 5, 70(1) and 71AC are to be read, if it is possible to do so consistently with their purpose, in a way compatible with the right to the presumption of innocence under s 25(1) of the Charter. This method of interpretation is required by s 32(1) of the Charter and it provides additional support for what is the construction of these provisions without the aid of s 32(1).

200 The result is that s 5 was not engaged in this prosecution and there was no displacement of the presumption of innocence recognised by s 25(1) of the Charter.

[I] CONCLUSIONS – STEPS (xii) AND (xiii)

201 Section 79 of the Judiciary Act renders binding on all courts exercising federal jurisdiction in the State of Victoria the laws of that State in all cases to which they are applicable; this is so except as otherwise provided by laws of the Commonwealth or by the Constitution itself.

202 As already indicated, by force of the Constitution, s 36 of the Charter is invalid and thus in the Court of Appeal proceedings was not attracted by operation of s 79 of the Judiciary Act. Section 5 of the Drugs Act was not applicable to the prosecution of the appellant and for that reason was not attracted by s 79. The trial miscarried by reason of a wrong decision on a question of law, being the misapplication of the Drugs Act, and a substantial miscarriage of justice ensued[315].

203 Independently of the misdirection based upon s 5, it was alleged by the appellant that there were other significant misdirections by the trial judge. However, it is unnecessary to pursue these questions. The Court of Appeal should have granted leave to appeal against conviction, and allowed the appeal.

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315 *Crimes Act* 1958 (Vic), s 568(1). This was repealed with effect 1 January 2010 by the *Criminal Procedure Act* 2009 (Vic), but not with respect to sentences imposed before that day: *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act* 2009 (Vic), s 58, which inserted savings and transitional provisions in the principal Act.

204 However, there remain the issues respecting the operation of s 109 of the Constitution, which, were they to be resolved favourably to the appellant, would deny a foundation for the count based on s 71AC of the Drugs Act and require the quashing of the presentment and of the conviction.

205 But, in any event, this Court should make a declaration that ss 33, 36 and 37 of the Charter are invalid.

[J] SECTION 109 OF THE CONSTITUTION

The issues

206 Several issues of principle respecting s 109 of the Constitution are presented by the submissions made to this Court. The first is whether the alleged inconsistency between s 302.4 of the Code (which is in Pt 9.1) and s 71AC of the Drugs Act is to be determined solely by reference to differences between the elements of the two offences as they appear in s 302.4 and s 71AC. This issue should be answered in the negative.

207 The second issue of principle is whether, even if there were no significant differences between the norms of conduct proscribed by the two laws, inconsistency nevertheless would appear from either or both: (a) the presence of differing penalty provisions, including provisions as to the principles to be applied in fixing the terms of the sentence[316]; and (b) different methods of determination by jury trial of contravention of those norms, with there being no permissible system of majority verdicts where s 80 of the Constitution operates[317]. The answer to both (a) and (b) again should be in the negative.

208 The third issue concerns the significance to be attached to both the provision in s 300.4 of the Code (which, like s 302.4, is found in Pt 9.1) in respect to "concurrent operation" of federal and State laws, and the presence of a choice available between federal and State prosecuting authorities to determine in a given case under which law a prosecution is to be brought. With further reference to this third issue, the Attorneys-General of the Commonwealth, New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Australian Capital Territory all join in submitting that "an express statement of Commonwealth legislative intention" is effective "for the purpose[s] of s 109", provided only that the statement be supported by a head of federal legislative

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316 In the present case, in accordance with Pt IB of the Crimes Act and the *Sentencing Act* 1991 (Vic): see *Hili v The Queen* (2010) 85 ALJR 195; 272 ALR 465; [2010] HCA 45.

317 *Cheatle v The Queen* (1993) 177 CLR 541.

power and by the substantive provisions of the federal law in question. That submission, as explained below under the heading "Statements of legislative intention", is too broadly framed.

209 It is convenient to begin by attending to some basic considerations respecting the derivation of s 109 and its place in the structure of the Constitution.

The derivation and place of s 109

210 Section 109 states:

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

211 The interaction of federal and state or provincial laws must be a matter of first importance in framing a federal constitution. Covering cl 5[318] makes not only federal laws, but also the Constitution itself, binding in the manner it specifies[319]. As Quick and Garran noted at the time[320], covering cl 5 is substantially similar in scope and intention to the Supremacy Clause (Art VI cl 2) of the United States Constitution[321]. But the framers of the Commonwealth Constitution went further by making the express provisions of Ch V (ss 106-120). Chapter V is headed "The States" and includes s 109. Whatever

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318 Constitution, covering cl 5 provides:

> "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State ..."

319 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102, 143-144; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92-93 [20]-[21]; [2000] HCA 57.

320 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 353.

321 Article VI cl 2 provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

may be the relationship between the amendment provision in s 128 of the Constitution and the covering clauses, there could be no doubt that s 128 applies to s 109.

212 The framers had before them s 22 of the *Federal Council of Australasia Act* 1885 (Imp)[322]. This stated:

> "If in any case the provisions of any Act of the Council shall be repugnant to, or inconsistent with, the law of any colony affected thereby, the former shall prevail, and the latter shall, so far as *such repugnance or inconsistency* extends, have no operation." (emphasis added)

The disjunction expressed between "repugnance" and "inconsistency" is consistent with an understanding that they were not necessarily synonyms.

213 The references to repugnancy in the drafts of what was to become s 109, which had been prepared by Inglis Clark and Kingston, disappeared in the drafting which took place on the *Lucinda* in March 1891, and the term "inconsistent" alone was used thereafter[323].

214 The *Colonial Laws Validity Act* 1865 (Imp)[324] ("the Colonial Laws Validity Act") used the term "repugnant" as the criterion rendering certain colonial laws "void and inoperative". The term had an extensive and lengthy history, summarised as follows by Justice McPherson in his work *The Reception of English Law Abroad*[325]:

> "A true limitation on colonial legislative power, and one that was incorporated in all colonial charters and later in commissions to royal governors, was that laws made in the colony should not be repugnant to English law. The requirement was stated in various forms, often in different places in the same instrument, but most commonly as a proviso limiting the grant of the power to make laws. It appears to have originated

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322 48 & 49 Vict c 60. This Act was repealed by covering cl 7 of the Constitution.

323 Leeming, *Resolving Conflicts of Laws*, (2011) at 130-133.

324 28 & 29 Vict c 63, ss 2, 3. A precedent for these provisions was supplied by s 3 of the *British North America Act* 1840 (Imp), 3 & 4 Vict c 35.

325 (2007) at 160-161. See also *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453 at 483-484 [36]-[39], 501-502 [101]-[103].

> in letters patent issued to the Muscovy Company (1555)[326], which in turn picked up a formula used in the Act for the Submission of the Clergy (1534)[327], where a requirement of conformity or non-repugnance to English law was imposed to limit the power of the clergy of making ordinances or canons for the reformed Church of England."

Professor Enid Campbell, with reference to the *Ipswich Tailors' Case*[328], also pointed to the long recognition of the principle that regulations or by-laws of corporate bodies which were repugnant to common law or statute were to that extent void ab initio[329].

215 The notion of repugnancy as no less than direct opposition or contrariety to English law had been urged by the colonial assembly in Pennsylvania as early as 1716 in the course of disputation with the Deputy Governor of that colony[330]. The criterion of repugnancy adopted in the Colonial Laws Validity Act applied to deny the competence of subordinate colonial legislatures; this being in the period after the development in the Australian colonies of representative and responsible government in the second half of the 19th century. Given the weakening in control by the Imperial authorities which had preceded the implementation of the Colonial Laws Validity Act, particular caution became appropriate when considering the strength of the repugnancy criterion, lest the position of the Parliament at Westminster be overstated. In *Attorney-General for Queensland v Attorney-General for the Commonwealth*[331], Isaacs J said that it was not sufficient that in its "practical operation" the colonial law "detracted from" that of an Imperial law; and Higgins J declared[332]:

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326 Madden and Fieldhouse (eds), *Select Documents on the Constitutional History of the British Empire and Commonwealth*, (1985), vol 1 at 231; Smith, *Cases and Materials on the Development of Legal Institutions*, (1965) at 428.

327 25 Hen VIII c 19, ss 1, 2 (not "contrarient or repugnant to ... the customs, laws or statutes of this realm").

328 (1614) 11 Co Rep 53a at 54a [77 ER 1218 at 1220].

329 Campbell, "Colonial Legislation and the Laws of England", (1965) 2 *University of Tasmania Law Review* 148 at 149-150. See also Goebel, *Antecedents and Beginnings to 1801*, (1971) at 57-60, being vol 1 of the *History of the Supreme Court of the United States*.

330 Smith, "Administrative Control of the Courts of the American Plantations", (1961) 61 *Columbia Law Review* 1210 at 1243-1244.

331 (1915) 20 CLR 148 at 167; [1915] HCA 39.

332 (1915) 20 CLR 148 at 178.

> "I am strongly inclined to think that no colonial Act can be repugnant to an Act of the Parliament of Great Britain unless it involve, either directly or ultimately, a contradictory proposition – probably, contradictory duties or contradictory rights."

216 However, as Sir Owen Dixon later emphasised in his address given at the Harvard Law School in 1955 and titled "Marshall and the Australian Constitution"[333], the position of the Parliament of the Commonwealth as "the paramount legislature" and "essential conceptions of federalism" required that fuller scope be given to the term "inconsistent" in s 109. Further reference to that address by Sir Owen Dixon is made later in these reasons under the heading "Inconsistency and federalism".

217 What, then, of the United States Constitution? Harrison Moore, writing in the early years of federation on the operation of s 109, referred to decisions of the United States Supreme Court upon the Supremacy Clause[334]. These he saw as the source of that treatment of the inter-State commerce power which has come to be known as the "Dormant Commerce Clause": the foundation of the exclusive legislative power of Congress with respect to inter-State commerce. As Harrison Moore put it[335], "the silence of Congress on the particular subject is treated as an expression of the will of Congress that commerce should be free", and thereby an implicit restraint is placed upon State power. This doctrine has not been adopted with respect to s 51(i) of the Constitution.

218 What, however, has to some degree been adopted from the United States decisions on the extent of the power of the Congress with respect to inter-State commerce, beginning with *Southern Railway Co v Reid*[336], the *Second Employers' Liability Cases*[337] and *Chicago, Rock Island & Pacific Railway Co v Hardwick Farmers Elevator Co*[338], is the expression "covering the field". To the significance and utility of the expression in applying s 109 of the Constitution, attention is given later in these reasons under the heading "'Covering the field'".

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333 (1955) 29 *Australian Law Journal* 420 at 427.

334 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 408-410.

335 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 410, fn 2.

336 222 US 424 at 437 (1912).

337 223 US 1 at 55 (1912).

338 226 US 426 at 435 (1913).

219 The decisions of the United States Supreme Court speak of the power of the Congress to "pre-empt" State law rather than of the consequences of "inconsistency". When delivering the Opinion of the Court, in which six other Justices joined, Souter J in *Crosby v National Foreign Trade Council*[339] said that "[e]ven without an express provision for preemption", State law must yield to an Act of the Congress both where "Congress intends federal law to 'occupy the field'" and where "state law is naturally preempted to the extent of any conflict with a federal statute", even though "Congress has not occupied the field". His Honour added that the categories of pre-emption were not rigidly distinct and also said[340]:

> "We will find preemption where it is impossible for a private party to comply with both state and federal law, ... and where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ... *What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects*". (emphasis added)

220 Section 109 appears immediately after sections which, subject to the Constitution, save the State Constitutions (s 106), the powers of the State Parliaments (s 107), and pre-federation laws (s 108). Section 109 looks ahead to the operation of the federal system, under which some of the legislative powers of the Parliament of the Commonwealth are exclusive of and others are concurrent with those of the State legislatures. The meaning and operation of s 109 has been revealed by the development of the body of case law in this Court.

221 In understanding that development, the following remarks by Dixon J in *Melbourne Corporation v The Commonwealth*[341] are pertinent here:

> "The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between State and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss 51, 52, 107, 108 and 109."

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339 530 US 363 at 372 (2000).

340 530 US 363 at 372-373 (2000).

341 (1947) 74 CLR 31 at 82; [1947] HCA 26.

222 The "law of the Commonwealth" of which s 109 speaks is a reference to those enacted by the Parliament in the exercise of the power to make "laws". The "law of a State" refers to those pre-federation laws saved by s 108 as well as to laws thereafter enacted by the Parliaments of the States pursuant to the powers conferred by their Constitutions, which are recognised and preserved by s 106 and s 107 of the Constitution. Section 109 assumes that, were it not for the inconsistency, each law would be effective in its terms. Thus, unlike s 5 of the Colonial Laws Validity Act, s 109 is addressed not to questions between law-making powers, but to the consequences of the exercise of concurrent law-making powers[342].

223 The phrases in s 109 "shall prevail" and "to the extent of the inconsistency" have been revealed by the course of decision in this Court to be important in various respects. First, s 109 has a temporal operation, as indicated by the following: (*i*) in 1961 *Butler v Attorney-General (Vict)*[343] decided that, on repeal of the federal law in question, the State law previously rendered inoperative by s 109 resumed operation; (*ii)* as indicated in 1984 by the Court in *University of Wollongong v Metwally*[344], the statement in s 51 of the Constitution that the powers conferred in pars (i)-(xxxix) thereof are subject to the Constitution has the consequence that the Parliament cannot reverse a past operation of s 109 which rendered inoperative the provisions of a State law so as retrospectively to impose as the law of a State that State law rendered inoperative for inconsistency with a federal law; to hold otherwise, as Deane J put it in *Metwally*[345], would be to fail "to take proper account of the temporal operation of the provisions of s 109"; and (*iii*) the notion of "operational inconsistency", referred to below[346], means that the occasion for the operation of s 109 may be deferred until the particular exercise of powers conferred by the laws in question; this temporal aspect of s 109 is important when dealing with the powers of sentencing conferred on the courts by the legislation at issue in this appeal.

224 Secondly, the phrase "to the extent of the inconsistency" indicates that something less than the whole of the State or federal statute in question may be

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342 *O'Sullivan v Noarlunga Meat Ltd* (1956) 95 CLR 177 at 182-183; [1957] AC 1 at 24-25.

343 (1961) 106 CLR 268.

344 (1984) 158 CLR 447; [1984] HCA 74.

345 (1984) 158 CLR 447 at 478.

346 At [246]-[257].

the relevant "law"; the issue is whether any *provisions* of the two laws conflict[347]. Thirdly, if less than the whole of a State statute is to be "invalid" for "inconsistency", this will be the result of the application to the balance of the State statute of the principles of severance most recently discussed in *Pape v Federal Commissioner of Taxation*[348].

225 With that understanding of s 109, one then asks what is it that gives to particular terms of a statute the character of a "law" with which a comparison with another "law" is to be made in applying s 109. This inquiry involves a process of abstraction and characterisation.

What comprises "a law of the Commonwealth" and "a law of a State"

226 In various provisions the Constitution speaks of a "law" or "laws"[349] and of a "proposed law" or "proposed laws"[350]. By "law", it is meant, at least as regards s 109, something more than a text. The point was made by Isaacs J in *Clyde Engineering Co Ltd v Cowburn*[351] when he said:

> "[T]he 'law' is not the piece of parchment or paper, nor is it the letters and words and figures printed upon the material. It consists of the 'rule' resolved upon and adopted by the legislative organ of the community as that which is to be observed, positively and negatively, by action or inaction according to the tenor of the rule adopted."

227 Of s 109, Taylor J remarked in *Butler*[352] that it deals not "merely with instruments as such" but with instruments designed during the period of their operation "to create rights and duties and to impose obligations according to their tenor".

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347 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 155; [1920] HCA 54. See also *Heli-Aust Pty Ltd v Cahill* (2011) 277 ALR 332 at 370-371 [112].

348 (2009) 238 CLR 1 at 92-94 [246]-[252], 131-133 [389]-[393].

349 Sections 7, 9, 10, 25, 27, 29, 31, 34, 41, 44, 45, 51, 52, 55, 59, 61, 74, 76, 77, 78, 80, 83, 84, 85, 98, 99, 100, 101, 102, 105A, 108, 109, 113, 116, 118, 120 and 122.

350 Sections 53, 54, 56, 57, 58, 60 and 128.

351 (1926) 37 CLR 466 at 497; [1926] HCA 6.

352 (1961) 106 CLR 268 at 283.

228 The authority of a legislature to enact "laws" ordinarily is understood as exercised by the making of statutes. However, as suggested by the above remarks of Isaacs J in *Clyde Engineering*, and Taylor J in *Butler*, this does not mean that s 109 operates only upon a comparison between two statutes, each taken as a unit.

229 The Constitution was framed, at least so far as s 109 is concerned, during the currency of doctrines which have been described as legal positivism and are associated with the writings of Jeremy Bentham and John Austin[353]. With the writings of Austin, Sir Isaac Isaacs, at least, was familiar[354]. The passage set out above from his reasons in *Clyde Engineering*[355] is expressive of positivist doctrine. The terms "command", "duty" and "sanction" were used in this discourse each to denote an inseparable element of the notion of a "law" imposed by a sovereign authority. More recent scholarship has tended to concentrate on the deficiencies of positivist doctrine for an understanding of the case law system[356]; this is at the expense of concentration upon its continuing significance for the study of statute law.

230 In dealing with statute law, further analysis may be required of what is involved in a "command". A repealing statute is creative in the sense that its command removes the requirement for further compliance with the anterior law. An amending statute of itself might have no operation beyond changing the requirements of that anterior law[357]. As Mason J observed in *Victoria v The Commonwealth and Hayden*[358], a law which neither creates rights nor imposes duties is "something of a rara avis in the world of statutes". His Honour instanced the limited operation of an appropriation Act, which is a "law" spoken of in s 83 of the Constitution. To that may be added laws which comply with s 55 of the Constitution by dealing "only with the imposition of taxation", and not with the assessment and collection of the tax.

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353 See Lobban, "Theories of Law and Government", in *The Oxford History of the Laws of England, Volume XI: 1820-1914 – English Legal System*, (2010) 72 at 74-90.

354 See *Australian Boot Trade Employes Federation v Whybrow & Co* (1910) 10 CLR 266 at 329; [1910] HCA 8.

355 (1926) 37 CLR 466 at 497.

356 Halpin, "Austin's Methodology? His Bequest to Jurisprudence", (2011) 70 *Cambridge Law Journal* 175.

357 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 375-376 [66]-[70]; [1998] HCA 22.

358 (1975) 134 CLR 338 at 393; [1975] HCA 52.

231 Many statutory provisions are expressed to create rights rather than to impose duties. But a "duty" nevertheless may be implicit in the presence of a sanction against third parties for invasion of the right so created. The notion of "sanction" is most readily understood in the sense of a penalty or punishment upon adjudication of guilt. But the sanction also may be understood as a civil remedy conferred by the law in question and may include notions of "voidness", "unenforceability" and "illegality" with respect to what otherwise are associated common law rights[359].

232 Each separate provision enacted by a statute as a section or sub-section will not necessarily answer these criteria of "a law". The phrase "duty of imperfect obligation"[360] may illustrate the point. So also, for example, a provision such as s 52 of the *Trade Practices Act* 1974 (Cth), which establishes a norm of conduct but which leaves to later provisions of the statute the sanctions and remedies for non-observance of that norm[361].

233 Each law of the Commonwealth and law of a State which are said to engage s 109 will comprise both the norm or rule of conduct each lays down and the attached sanctions and remedies. To consider these as discrete matters and to treat the first as conceptually distinct from the second may engender confusion.

234 An example is given by the provisions considered in *Hume v Palmer*[362]. As Knox CJ[363] and Starke J[364] indicated, both the federal and State regulations[365]

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359 See *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 458; [1969] HCA 4; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 38 [37]; [2001] HCA 44.

360 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 224 [40]-[41]; [2003] HCA 56; *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79 at 101 [68], 105 [78]; [2010] HCA 25.

361 *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 114 [31]; [2008] HCA 38.

362 (1926) 38 CLR 441; [1926] HCA 50.

363 (1926) 38 CLR 441 at 446.

364 (1926) 38 CLR 441 at 461.

365 Navigation (Collision) Regulations 1923 (Cth), Schedule, Art 19; Regulations for Preventing Collisions at Sea 1911 (NSW), Art 19. Both provisions had a precedent in Art 19 of Sched I to the Prevention of Accidents (Collisions and Signals of

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required of two steam vessels which were so crossing as to involve risk of collision, that the vessel which had the other on the starboard side keep out of the way of the other; and the appellant, the steamship's master, had disobeyed this rule. The State law[366] under which the appellant was convicted and fined by a magistrate provided for the penalty to be imposed only in the case of wilful default. But the federal law[367] provided that a contravention caused by wilful default was an indictable offence while, for a contravention not so caused, a fine might be imposed in a summary proceeding. Thus, wilful default was required for the State offence but not necessarily for the federal offence. The appeal against the conviction under the State law was allowed and the conviction quashed. Knox CJ said[368] that while "the rules" prescribed by the two laws were substantially identical, "the penalties imposed for their contravention differ". But, more accurately, one should have thought the position was that, for the purposes of s 109, the two "laws" differed.

235 Hence, perhaps, the statement by Dixon J in *Ex parte McLean*[369] that the "rule of conduct" prescribed by inconsistent "laws" might be identical, "at least when the sanctions they impose are diverse", and the citation of *Hume v Palmer* in support of this statement. Hence also, perhaps, the observation by Mason J in *R v Winneke; Ex parte Gallagher*[370] that it was a commonplace that the doing of a single act may involve the actor in the commission of more than one criminal offence, against both federal and State law.

236 Both s 71AC of the Drugs Act and s 302.4 of the Code state the elements of the offence and the maximum penalty. Section 71AC acquires content from the definition of "traffick" in s 70(1). Section 302.4 does so by means of the definition of "traffics" in s 302.1 and the provisions of Pt 2.2 of the Code respecting the physical elements and fault elements of the offence. It is these respective conceptual and linguistic composites, not merely the texts of s 71AC and s 302.4, which provide the content of "a law of a State" and "a law of the Commonwealth" within the meaning of s 109 of the Constitution. The first of the

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Distress) Regulations 1910 (Imp), made pursuant to s 434 of the *Merchant Shipping Act* 1894 (Imp).

366 *Navigation Act* 1901 (NSW), s 115(2).

367 *Navigation Act* 1912 (Cth), s 258.

368 (1926) 38 CLR 441 at 448.

369 (1930) 43 CLR 472 at 483; [1930] HCA 12.

370 (1982) 152 CLR 211 at 224; [1982] HCA 77.

issues of principle respecting s 109 identified above at [206] under the heading "The issues" should be answered accordingly.

237 However, the process of abstraction and characterisation which yields that result does not have the consequence that each law with which the appellant seeks to engage s 109, that of the State and that of the Commonwealth, includes the general provisions at federal and State level for the trial by jury of indictable offences. The steps in the prosecution, conviction and punishment of the appellant were taken in the general milieu of the system for adjudication of criminal guilt. The body of legislative provisions for the operation of that system is not part of the "law of a State" which may be rendered inoperative by reason of inconsistency with the federal laws upon which the appellant relied. It is on this ground that sub-issue (b) of the second issue of principle[371] should be decided adversely to the appellant. What of sub-issue (a), the significance of differing penalty provisions? This will be considered under the heading "Operational inconsistency" and after consideration of more general questions of inconsistency and federalism.

Inconsistency and federalism

238 Austin recognised that for his analysis, a federal system of government such as that in the United States presented the particular problem of commands by more than one sovereign authority[372]. In the United States[373], and then in Canada[374], the answer was found by the decisions of the courts which emphasised the paramount position of the central government. In Australia, the answer was supplied by the express terms of s 109. Thereafter, express provision, in terms with some affinity to those of s 109, was made by s 107(1) of the *Government of India Act* 1935 (Imp), and this provision was largely carried forward as Art 254(1) of the Constitution of India adopted on 26 November 1949[375]. In all four federations, the problem posed had been the production, by

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371 At [207].

372 Austin, *The Province of Jurisprudence Determined*, (1832) at 261-264.

373 See the discussion of the Supremacy Clause in the United States Constitution, at [211].

374 Hogg, *Constitutional Law of Canada*, 5th ed (2007), vol 1 at 483-485.

375 The chapeau to Art 254 reads "Inconsistency between laws made by Parliament and laws made by the Legislatures of States". The text of Art 254(1) resembles that of s 109 in stating that the Union law "shall prevail", and provides that the State law shall, "to the extent of the repugnancy, be void". Article 254(2), unlike s 109, provides for the prevalence of State over Union law if the State law has been reserved for consideration by, and has received the assent of, the head of state (the

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the co-existence of two sets of laws, of what Dixon J was to identify as "an antinomy inadmissible in any coherent system of law"[376].

239 That s 109 is susceptible of varied constructions became apparent in the early years of this Court. The term "inconsistent" is the negation of "consistent" and thus, as a matter of etymology, perhaps would indicate that the federal and State laws could not stand together because to obey one was to disobey the other. But the course of interpretation of s 109 has gone further. This has reflected an understanding of the nature of the federal structure of the Constitution, which emphasises the paramount position of the Commonwealth. This may be seen in the well-known statement by Dixon J in *Melbourne Corporation*[377]:

> "The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth."

His Honour saw as "protected by s 109 of the Constitution" those "legal rights which are the immediate product of federal statute"[378].

240 In the submissions in *Australian Boot Trade Employes Federation v Whybrow & Co*[379], Mitchell KC and Starke, for the respondents, drew upon their understanding of the contemporary state of authority respecting the Supremacy Clause of the United States Constitution, to submit that s 109 applied to three classes of cases:

> "(1) Where two conflicting duties are imposed by the two legislatures; (2) Where there is something in the nature of a right or privilege conferred by the paramount legislature, and the other legislature seeks to impose some additional restrictions on the exercise of that right or privilege; and (3) Where the Court forms the view from the language of the paramount

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President of India); but this is subject to the power of the Parliament to override the State law by adding to, altering or repealing it. See Seervai, *Constitutional Law of India*, 4th ed (1996), vol 1 at 165-166; vol 3 at 2544-2545.

376 *Ffrost v Stevenson* (1937) 58 CLR 528 at 572; [1937] HCA 41.

377 (1947) 74 CLR 31 at 82-83.

378 *The Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372 at 378 per Dixon CJ; [1962] HCA 40.

379 (1910) 10 CLR 266 at 272.

> legislature that they intended their law to be the only law upon the particular point."

Class (2) might have been supplemented to include cases where it is the State law which confers a right or privilege and it is the federal law that modifies or restricts it.

241 The view of Griffith CJ that the "test of inconsistency" was "whether a proposed act is consistent with obedience to both directions"[380] may be seen both as a translation into the Constitution of the understanding of "repugnancy" as a limitation upon the legislative powers of the colonies, and as an expression of Austinian positivism. This focus upon conflicting duties, if accepted, would have meant that class (1) conveyed exhaustively what was meant by "inconsistent" in s 109. But as is well known, the view of Griffith CJ has not prevailed. Speaking extrajudicially[381], Sir Owen Dixon said of the Griffith view of s 109 that:

> "For a moment it looked as if the word 'inconsistent' might receive a pedantic construction drawn rather from a verbal formalism than essential conceptions of federalism. In the end however the Court did not forget that it was a constitution it was expounding."

Whilst conflicting duties do attract s 109, it is no sufficient answer in construing s 109 that it is possible to obey the commands of both the federal and State laws.

242 With class (2), the inconsistency does not arise from the impossibility of obedience to both laws; abstention from the exercise of the right or privilege conferred by one law may be accompanied by exercise of the right or privilege under the other law. But the operation of the State law (in the phrase of Dixon J to which further reference will be made), to "alter, impair or detract from" that of the federal law, may enliven s 109. Likewise, class (3), which might be thought to be a precursor of what came to be identified with the metaphor of "covering the field", on reflection is but an instance of alteration, impairment and detraction. And the starting point in all cases must be an analysis of the laws in question and of their true construction.

243 In both classes (1) and (2), it is the comparison between the texts of the two laws as properly construed which is the focus of attention; hence in both

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380 *Federated Saw Mill &c Employes of Australasia v James Moore & Son Pty Ltd* (1909) 8 CLR 465 at 500; [1909] HCA 43; *Australian Boot Trade Employes Federation v Whybrow & Co* (1910) 10 CLR 266 at 286.

381 "Marshall and the Australian Constitution", (1955) 29 *Australian Law Journal* 420 at 427.

instances the use of the expression "direct inconsistency"[382]. But what is the situation where each law prescribes the same rule of conduct or confers a right or privilege in like terms so that the State law does not appear immediately to alter, impair or detract from the federal law?

244 This situation is addressed by class (3), which has come to be known as "indirect inconsistency". Here, the essential notion is that, upon its true construction, the federal law contains an implicit negative proposition that nothing other than what the federal law provides upon a particular subject-matter is to be the subject of legislation; a State law which impairs or detracts from that negative proposition will enliven s 109. This is an example of the proposition expressed with reference to Ch III of the Constitution by Dixon CJ, McTiernan, Fullagar and Kitto JJ in the *Boilermakers' Case*[383] as follows:

> "The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation. In Chap III we have a notable but very evident example." (footnote omitted)

245 There is, thus, as these reasons will seek further to demonstrate, the need for caution in speaking of different species or classes of "inconsistency". Such usage tends to obscure the task always at hand in cases where reliance is placed upon s 109, namely to apply that provision only after careful analysis of the particular laws in question to discern their true construction. These matters are considered further at [258]-[261] under the heading "The importance of statutory construction"**.**

Operational inconsistency

246 Something further should be said respecting this temporal element in the operation of s 109 of the Constitution.

247 First, various statutes confer authority to create delegated legislation and it will be upon the exercise of that authority that claimed inconsistency may

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382 *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388 at 396-397; [1994] HCA 17. See also the remarks of Mason J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 260-261; [1980] HCA 8.

383 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405 [227].

arise[384]. Further, many of the decisions concerning s 109 have turned upon the operation of awards made by tribunals operating from time to time within the federal industrial relations system as ordained by statute; the legislation and the authorities are collected and discussed in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*[385].

248 More generally, what in *Flaherty v Girgis*[386] Brennan J called "[a] facultative law of a State" and "a facultative law of the Commonwealth", which deal with the same subject-matter, are "not necessarily inconsistent". Thus a statute may invest a power in a body without any issue of inconsistency arising in advance of a particular exercise of the power. In instances where each law confers a power with respect to the same subject-matter, a conflict is created if and when each authority decides that it should exercise its powers[387]. But before that state of affairs arises, the federal law is not, as Dixon J put it in *Stock Motor Ploughs Ltd v Forsyth*[388], "*directly* impaired by State law" (emphasis added). In the first of the major decisions in this area, that given in 1937 in *Victoria v The Commonwealth* ("*The Kakariki*")[389], this Court held that the Victorian authority might proceed to exercise its statutory authority to remove the wreck of the steamship *Kakariki* in the absence of any intervention by the federal authority to exercise the power conferred by the *Navigation Act* 1912 (Cth) for the removal of wrecks. In advance of the exercise of the statutory power by the Commonwealth, the "practical operation" of the federal law was not impaired by the State law[390].

249 The important temporal distinction, for the operation of s 109, between a law which is self-executing and operates immediately upon a subject-matter, and one which does so only at the point of exercise of a power conferred by that law,

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384 *Heli-Aust Pty Ltd v Cahill* (2011) 277 ALR 332 at 354 [56].

385 [2011] HCA 33 at [11]-[16].

386 (1987) 162 CLR 574 at 602; [1987] HCA 17.

387 *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557 at 574-575, 584, 590, 598-599; [1942] HCA 30.

388 (1932) 48 CLR 128 at 137; [1932] HCA 40.

389 (1937) 58 CLR 618; [1937] HCA 82.

390 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 399 [201].

was explained, with reference to powers conferred on courts, by Gaudron J in *Re Macks; Ex parte Saint*[391] as follows:

> "In the case of a Federal Court order made within jurisdiction, a State law providing that the rights and liabilities of the parties were other than as contained in that order or permitting a State court to provide in a manner contrary to it would be inconsistent with a law of the Commonwealth conferring jurisdiction on the Federal Court in the matter in which the order was made. A State law of the former kind would be invalid for direct inconsistency because it would 'alter, impair or detract from' the operation of the law conferring jurisdiction on the Federal Court. A State law of the latter kind would be invalid for what is usually referred to as 'operational inconsistency'." (footnotes omitted)

250 In *Gallagher*, Gibbs CJ[392] and Wilson J[393] considered *The Kakariki* as an instance where it was only upon the actual exercise of federal executive authority conferred by a law of the Commonwealth that there could arise a conflict to be resolved by the operation of s 109. With reference to what had been said by Latham CJ in *Carter v Egg and Egg Pulp Marketing Board (Vict)*[394], Gibbs CJ added[395]:

> "[T]he fact that a Commonwealth statute and a State statute both authorized the acquisition of eggs would not necessarily mean that the Commonwealth statute excluded the operation of the State power, but if both the Commonwealth and the State sought to acquire the same eggs, there would be a conflict in the operation of the power, and in that case s 109 would give paramountcy to the Commonwealth statute which would, no doubt, be construed as meaning that the Commonwealth power of acquisition was to supersede any attempted acquisition by the State authority".

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391 (2000) 204 CLR 158 at 186 [54]; [2000] HCA 62. See also *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 217, 221; *Flaherty v Girgis* (1987) 162 CLR 574 at 588, 602; *The Commonwealth v Western Australia* (*Mining Act Case*) (1999) 196 CLR 392 at 417 [62], 439-441 [138]-[145], 478 [258]; [1999] HCA 5.

392 (1982) 152 CLR 211 at 216-217.

393 (1982) 152 CLR 211 at 233.

394 (1942) 66 CLR 557 at 574-576.

395 (1982) 152 CLR 211 at 217.

Carter concerned the Egg Control Regulations 1939 (Cth), which provided for the expropriation of eggs by the taking of possession thereof (reg 14), under authority of the Egg Supervision Committee. Failure to comply with the requirements of that Committee was made an offence by s 10 of the *National Security Act* 1939 (Cth).

251 The reasoning in these decisions as to the time of the engagement of s 109 is applicable where the executive power in question is one of institution and conduct of prosecution for offences, or the power is a judicial power exercisable at the stage of sentencing after conviction.

252 At common law there is a practice, "if not a rule of law, that a person should not be twice punished for what is substantially the same act [or omission]"[396]. Where the same act or omission is punishable under both federal and State law an added dimension is supplied. If, as in the present case, the federal and State penalty provisions each specify a maximum penalty, and that maximum differs, the provisions thereby confer a judicial discretion or power to be exercised within those respective limits and in the circumstances of the particular case. Conflict may arise, but only upon the exercise of those powers.

253 However, the Crimes Act diminishes the occasions for that conflict. Where "an act or omission" constitutes an offence under both a federal law and that of a State, and "the offender has been punished for that offence under [State law]", the offender "shall not be liable to be punished for the offence under [federal law]". Section 4C(2) of the Crimes Act so provides. It was added to the Crimes Act by s 11 of the *Crimes Legislation Amendment Act* 1987 (Cth), which, in Sched 5, repealed what had been s 30(2) of the *Acts Interpretation Act* 1901 (Cth). Section 30(2) had been added, after the decision in *Hume v Palmer*[397], by s 11 of the *Acts Interpretation Act* 1937 (Cth).

254 Section 4C(2) of the Crimes Act is designed to avoid the injustice of exposure to double punishment in cases where the doing of a single act may involve the actor in the commission of an offence against federal and State law[398]. Its effect, when the occasion for its operation arrives, is to achieve what

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396 *R v Hoar* (1981) 148 CLR 32 at 38; [1981] HCA 67.

397 (1926) 38 CLR 441.

398 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218-219, 232-233.

has been called a "roll-back" of the federal criminal law[399], or its "withdraw[al] pro tanto"[400].

255 With respect to the appellant in this case, there has been no prosecution of the federal offence and no occasion of operational inconsistency has arisen with respect to the application of the penalty provisions of the federal and State laws. If the occasion had arisen, s 4C(2) would have removed the occasion for any "direct" inconsistency. Were a federal prosecution now to be commenced, with no prospect of punishment by reason of the operation of s 4C(2), a question would arise whether the prosecution might be stayed as an abuse of process, even if a plea in bar was not available[401].

256 That these outcomes are the consequence of decisions taken, or not taken, by the federal and State prosecution authorities has obvious significance for the citizen and for the place of s 109 in adjusting the relationship between the citizen on the one hand and the exercise of concurrent powers of federal and State legislatures on the other[402]. However, this state of affairs is to be accepted as a product of the accommodations required by the federal system.

257 The result is that what is identified at [207] as sub-issue (a) (the difference between the penalty provisions) also should be decided adversely to the appellant.

The importance of statutory construction

258 The frequently used phrases "upon its true construction" and "having regard to subject, scope and purpose" carry a weighty body of doctrine built up by curial decision-making. The first task in any application of s 109 is to construe the federal law in question in accordance with that body of doctrine. Only when that has been done is it appropriate to consider whether upon its proper construction the State law is "inconsistent" with the federal law.

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399 See Saunders, "A New Direction for Intergovernmental Arrangements", (2001) 12 *Public Law Review* 274 at 284; Leeming, *Resolving Conflicts of Laws*, (2011) at 165-168.

400 *Native Title Act Case* (1995) 183 CLR 373 at 473. See also *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 373; [1989] HCA 49.

401 *Pearce v The Queen* (1998) 194 CLR 610 at 620 [29], 629 [67]; [1998] HCA 57.

402 *Dickson v The Queen* (2010) 241 CLR 491 at 503-504 [19].

259 The distillation of the scope and purpose of the federal law was of decisive importance in *Commercial Radio Coffs Harbour Ltd v Fuller*[403]. The provisions of the federal law for the licensing of radio transmitters were held to be cumulative upon those of State environmental protection laws; the conclusion was found "in the nature and purpose" of the federal law[404]. Similarly, the *Bills of Exchange Act* 1909 (Cth), considered in *Stock Motor Ploughs*[405], codified the law respecting negotiable instruments but did so in the general milieu of contract law, including modifications thereto by State moratorium legislation enacted during the Great Depression.

260 On the other hand, the head of legislative power supporting the federal law may, by express words, be exercised to exclude the rights or duties which the federal law creates from qualification, wholly or partly, by State laws of a particular description[406]. The authorities upholding the effectiveness of federal legislation of this kind, beginning with *The Commonwealth v State of Queensland*[407], and including *Australian Coastal Shipping Commission v O'Reilly*[408] and *Botany Municipal Council v Federal Airports Authority*[409], were considered and applied in *Bayside City Council v Telstra Corporation Ltd*[410], the *Work Choices Case*[411] and *John Holland Pty Ltd v Victorian Workcover*

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403 (1986) 161 CLR 47; [1986] HCA 42.

404 (1986) 161 CLR 47 at 49. See also *McWaters v Day* (1989) 168 CLR 289 at 298; [1989] HCA 59; *Dickson v The Queen* (2010) 241 CLR 491 at 506 [29].

405 (1932) 48 CLR 128 at 137-138. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 433, 460, 462; [1997] HCA 36; *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369 at 401-402 [54]; [2007] HCA 9.

406 The distinction between express exclusion wholly from State regulation and only partly therefrom is drawn, with examples from the decided cases, in Leeming, *Resolving Conflicts of Laws*, (2011) at 154.

407 (1920) 29 CLR 1; [1920] HCA 79.

408 (1962) 107 CLR 46; [1962] HCA 8.

409 (1992) 175 CLR 453; [1992] HCA 52.

410 (2004) 216 CLR 595 at 627-629 [34]-[39]; [2004] HCA 19.

411 *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 166-169 [370]-[372]; [2006] HCA 52.

Authority[412]. Again, the federal law may state that certain conduct is not to be subject to proscription by any State criminal law. *Croome v Tasmania*[413] was such a case.

261 Further, even in the absence of an express indication to that effect, the detailed character of the federal law may evince a legislative "intention", in the sense given to that term in the passage from *Zheng v Cai*[414] set out at [146] of these reasons, to deal completely and thus exclusively with the law governing a particular subject-matter. That proposition, which is drawn from what was said by Dixon J in *Ex parte McLean*[415], *Stock Motor Ploughs*[416] and *The Kakariki*[417], may be treated as presenting a "negative implication" criterion and has been discussed when dealing with class (3) as identified in the submissions in *Whybrow*[418]. The question then is whether the State law is upon the same subject-matter as the federal law and, if so, whether the State law is inconsistent with it because it detracts from or impairs that negative implication[419]. But the first question, and what Aickin J called "the central question"[420], always is one of statutory interpretation to discern legislative "intent" or "intention"[421].

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412 (2009) 239 CLR 518 at 526-527 [18], 528 [23]; [2009] HCA 45.

413 (1997) 191 CLR 119; [1997] HCA 5.

414 (2009) 239 CLR 446 at 455-456 [28].

415 (1930) 43 CLR 472 at 483.

416 (1932) 48 CLR 128 at 136-137.

417 (1937) 58 CLR 618 at 630.

418 At [240]-[244].

419 Professor Hogg explains that, while *Ex parte McLean* has not been adopted in Canada, a Canadian federal law will be interpreted to discover its purpose and a provincial law which frustrates that purpose will fail for inconsistency: Hogg, *Constitutional Law of Canada*, 5th ed (2007), vol 1 at 491-496.

420 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 280.

421 *P v P* (1994) 181 CLR 583 at 602-603; [1994] HCA 20; *Native Title Act Case* (1995) 183 CLR 373 at 466; *Mining Act Case* (1999) 196 CLR 392 at 415-416 [55], 439 [138]. See also Lindell, "Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation", (2005) 8 *Constitutional Law and Policy Review* 25 at 30-34; Rumble,

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"Covering the field"

262 It is significant that in none of the classical formulations by Dixon J of the operation of s 109, those in *Ex parte McLean*[422], *Stock Motor Ploughs*[423] and *The Kakariki*[424], does the phrase "covering the field" appear. The passage in *The Kakariki* is set out below. That in *Ex parte McLean* reads:

> "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume v Palmer*[425]). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

The passage in *Stock Motor Ploughs* states:

> "In this Court an interpretation of sec 109 of the Constitution has been adopted which invalidates a law of a State in so far as it would vary, detract from, or impair the operation of a law of the Commonwealth. Further, when the Parliament appears to have intended that the Federal law shall be a complete statement of the law governing a particular

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"Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice", (2010) 38 *Federal Law Review* 445 at 457-459.

422 (1930) 43 CLR 472 at 483.

423 (1932) 48 CLR 128 at 136-137.

424 (1937) 58 CLR 618 at 630.

425 (1926) 38 CLR 441.

> relation or thing, it is considered that the operation of the Federal law would be impaired if the State law were allowed to affect the matter at all (*Clyde Engineering Co v Cowburn*[426]; *H V McKay Pty Ltd v Hunt*[427]; *Hume v Palmer*[428]; *Ex parte McLean*[429]). Such an interpretation requires the consequence that, except in so far as the law of the Commonwealth appears otherwise to intend, enjoyment of a right arising under it may not be directly impaired by State law."

263 The use by Isaacs J in *Clyde Engineering*[430] of the metaphor "cover the whole field" to identify the consequence of an imputed legislative intention has served only to confuse what is a matter of statutory interpretation. Isaacs J had previously used the expression "occupy the field" in *Whybrow*[431]. Neither, to adapt what Dixon CJ said[432] of the use by Isaacs J of the phrase "corpuscular wealth", was a happy choice to convey his meaning.

264 This is because the metaphors used by Isaacs J are apt to distract attention from the task of constitutional interpretation by reference to the text and structure of the Constitution and for that reason are to be discouraged. In *Stock Motor Ploughs*[433], Evatt J said of the expression "cover the field":

> "This is a very ambiguous phrase, because subject matters of legislation bear little resemblance to geographical areas. It is no more than a *cliché* for expressing the fact that, by reason of the subject matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in

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426 (1926) 37 CLR 466.

427 (1926) 38 CLR 308; [1926] HCA 36.

428 (1926) 38 CLR 441.

429 (1930) 43 CLR 472.

430 (1926) 37 CLR 466 at 489.

431 (1910) 10 CLR 266 at 330.

432 *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 235; [1959] HCA 47.

433 (1932) 48 CLR 128 at 147.

> other words, the subject is either touched or trenched upon by State authority."

His Honour added, in *The Kakariki*[434], that little assistance was to be derived from an analogy between the picture of a two-dimensional field and "legislation with its infinite complexities and varieties". In the same case, more obliquely, Dixon J made the same point when he said[435]:

> "When a State law, if valid, would *alter, impair or detract from* the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a *detraction* from the full operation of the Commonwealth law and so as inconsistent." (emphasis added)

265 As noted above[436], there has developed in the United States, from the Supremacy Clause, a doctrine of "field pre-emption". This expression is associated with remarks of Brandeis J in his dissenting reasons in *New York Central Railroad Co v Winfield*[437]. Comprehensive federal regulation may be so pervasive as to support a reasonable inference that Congress left no room for the States to supplement it[438]. So stated, this doctrine may be thought to describe the operation of s 109 as described by Dixon J in *Ex parte McLean* and *The Kakariki*. However, as Professor Tribe notes[439], the field pre-emption doctrine may be criticised with justification as being "at times divorced from fair statutory interpretation".

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434 (1937) 58 CLR 618 at 634. See also the remarks of McPherson JA in *R v Morris* [2004] QCA 408 at [4].

435 (1937) 58 CLR 618 at 630. See also *Ex parte McLean* (1930) 43 CLR 472 at 483; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28]; [1999] HCA 12; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13].

436 At [217]-[219].

437 244 US 147 at 169 (1917). See Epstein and Greve, "Introduction: Preemption in Context", in *Federal Preemption: States' Powers, National Interests*, (2007) 1 at 11.

438 *Rice v Santa Fe Elevator Corp* 331 US 218 at 230 (1947). See Chemerinsky, *Constitutional Law: Principles and Policies*, 3rd ed (2006) at 401-409.

439 *American Constitutional Law*, 3rd ed (2000), vol 1 at 1205, fn 2.

Statements of legislative intention

266 There remains the third issue of principle identified at [208]. The joint submissions by the Commonwealth, New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Australian Capital Territory seek to address the significance of statements of legislative intention. They do so, at least in what has been identified at [240] as class (2) and class (3), by treating as determinative an "express statement" of the legislative intention of the Commonwealth Parliament which either accepts or rejects what would be an alteration, impairment or detraction otherwise effected by the State law in question (class (2)), or expresses or denies what otherwise would be an implicit negative proposition founding a case of "indirect" inconsistency (class (3)).

267 The joint submissions rely in particular upon s 300.4 of the Code. Section 300.4 appears in Pt 9.1 (ss 300.1-314.6), which is headed "Serious drug offences". It states:

> "(1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
>
> (2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:
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> (a) an act or omission that is an offence against a provision of this Part; or
>
> (b) a similar act or omission;
>
> an offence against the law of the State or Territory."

268 Section 4C(2) of the Crimes Act has further significance here, by supplementing s 300.4 of the Code. Section 4C(2) applies where the offender has been punished under s 71AC of the Drugs Act and then denies what otherwise would be liability to punishment for the federal offence of trafficking created by s 302.4 of the Code. Section 4C(2) thus assumes that despite the existence of the federal offence, including its penalty provision, the State law, including its different penalty provision, did have a concurrent operation. However, that concurrent operation ceases, upon punishment under the State law, by the withdrawal of the federal law. The result is that upon its proper construction Pt 9.1 of the Code evinces no intention to deal exclusively and exhaustively with the prosecution and punishment of the acts proscribed by the trafficking provision in s 302.4[440].

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440 cf *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 224.

269 It should, however, be added that s 300.4 of the Code does not have the general significance which the Commonwealth and its supporters apparently seek to give it in their joint submissions. Rather, this provision is best understood in light of various drafting devices which have been used by the Parliament from time to time to convey the notion that a federal law is to be construed so as to accommodate or not exclude the operation of State laws in specified respects.

270 Various examples may be given in which the Parliament has achieved this result by provisions which do not use the slippery term "intention" or the cognate "is not intended" which appears in s 300.4 of the Code. Section 41 of the *Copyright Act* 1912 (Cth) provided that nothing in the provision in s 40 for delivery of newly published books to the Parliamentary Library "shall be deemed to affect" the existing provisions in State laws requiring delivery to State libraries[441]. Section 9(1) of the *Copyright Act* 1968 (Cth) states that the statute, inter alia, "does not affect" the right of a person deriving title from a State to deal with articles forfeited under a State law. Section 5A of the *Fisheries Act* 1952 (Cth) stated that no federal law was to be taken to exclude the operation of State laws licensing the use of premises for the preparation, processing, storage or examination of fish. The *Bankruptcy Act* 1966 (Cth) "does not affect" a State law relating to matters with which that Act does not deal "expressly or by necessary implication" (s 9(1)). The *Marriage Act* 1961 (Cth) "shall not be taken to exclude the operation" of a State law relating to the registration of marriages (s 6). Certain provisions of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) "shall be read and construed as being in addition to, and not in derogation of or in substitution for any law of a State" (s 5(2)).

271 Perhaps the first forerunner of s 300.4 appeared in s 150 of the *Petroleum (Submerged Lands) Act* 1967 (Cth), which stated: "It is the *intention* of this Act not to affect the operation of any law of a State or Territory in the adjacent area" (emphasis added). Thereafter, s 75(1) of the *Trade Practices Act* 1974 (Cth) used the words "is not *intended* to exclude or limit the *concurrent operation* of any law of a State" (emphasis added). In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*[442], McLelland QC submitted that such a provision had a limited function of assisting in the construction of the operative provisions of the statute, but no more; the provision would be invalid if it attempted to override s 109 by rendering consistent laws that were inconsistent, or rendering inconsistent laws that were consistent, merely by stipulating this as the "intention" of the Parliament. The frequently cited[443] passage in the reasons

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441 See now *Copyright Act* 1968 (Cth), s 201(4).

442 (1977) 137 CLR 545 at 548-549; [1977] HCA 34.

443 See, most recently, *Dickson v The Queen* (2010) 241 CLR 491 at 507 [33].

of Mason J in *General Motors*[444] is consistent with those submissions, particularly when the term "intention" is understood to be used there in the sense described in these reasons at [146].

272 The result is that a provision such as s 300.4 of the Code requires the federal law in question to be read and construed in a particular fashion, namely as not disclosing a subject-matter or purpose with which it deals exhaustively and exclusively, and as not immunising the rule of conduct it creates from qualification by State law. To the federal law so read and construed, s 109 then applies and operates to render inoperative any State law inconsistent with it. But by reason of the construction to be given to the federal law, there will be greater likelihood of a concurrent operation of the two laws in question.

The position of the appellant

273 It had been open to the appellant to observe both the federal and State criminal laws and to commit no offence. Thus, no case of inconsistency in the limited sense accepted by Griffith CJ in the early years of the Court was open to her. But she relied upon inconsistency in the sense given to s 109 by Dixon J in *Ex parte McLean* and *The Kakariki*. The gravamen of the appellant's submissions respecting s 109 was that s 71AC of the Drugs Act, read with the special provision in s 5 which placed upon her the burden of displacing her deemed possession, imposed upon her a standard of criminal liability which rendered her liable to conviction, in circumstances where she would not be liable to conviction for the offence created by s 302.4 of the Code. The failure to include in the trafficking provisions of the Code an equivalent of s 5 of the Drugs Act was said to reflect a considered federal legislative choice from which the State law could not detract without engaging s 109.

274 The appellant submitted that her case and *Dickson v The Queen*[445] were *in pari materia*. But it should be noted that the law of Victoria creating the crime of conspiracy which was at stake in *Dickson* rendered criminal conduct deliberately excluded from the federal offence[446]; in particular, the federal offence required the commission of an overt act pursuant to the agreement by at least one party to it before the offence was complete, and permitted withdrawal from the agreement before commission of an overt act[447].

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444 (1977) 137 CLR 545 at 563.

445 (2010) 241 CLR 491.

446 (2010) 241 CLR 491 at 504 [22].

447 (2010) 241 CLR 491 at 505-506 [26]-[28].

275 With the conclusion reached in Section [H] of these reasons that s 5 of the Drugs Act has no linkage to s 71AC, there is removed the ground for the submissions by the appellant based upon *Dickson*. However, it should be added that the premise upon which the appellant's argument was based gave insufficient attention to the significance of the presumption against her which would have been presented by s 302.5 of the Code. This would have operated for the purpose of proving an offence against s 302.4 ("Trafficking controlled drugs") so that, if the appellant had possessed a traffickable quantity of a substance, she would be taken to have had the necessary intention of selling it to have been trafficking in the substance; this would be so unless she proved she did not have that intention.

276 By reason of the inapplicability of s 5 to s 71AC of the Drugs Act, there is no comparable provision in the State law to the presumption created by s 302.5 of the Code. The result is that the situation disclosed by the present case is the reverse of that considered in *Dickson*; there the federal law, s 11.5 of the Code, excluded from the rule of conduct it prescribed significant elements to which the State law attached criminal liability. Section 11.5 of the Code, like the federal law considered in *R v Loewenthal; Ex parte Blacklock*[448], upon its true construction may be seen to have contained an implicit negative; this denied the concurrent operation of the State law in respect of the acts the subject of the federal offence[449]. Here, absent the attachment of s 5 of the Drugs Act, s 71AC is less stringent than the provisions of the Code; the federal law cannot be said upon its proper construction designedly to have left a liberty which the operation of s 109 does not permit by the State law to be "closed up"[450]. Further, it is significant that to s 11.5 of the Code there was applicable no provision with respect to "intention", such as there is in s 300.4 of the Code[451].

277 The appellant then is left to emphasise differences in the maximum sanctions created by the two laws (15 years maximum for the State offence and 10 years maximum and 2,000 penalty units for the federal offence), and the possibility of a less than unanimous jury verdict at a State trial, as indicative of a legislative intention that the Code deal completely and exclusively with trafficking in proscribed substances. The appellant then submits that these differences so detract from the treatment of trafficking in the Code as to attract the operation of s 109. For the reasons given at [257] and [237] respectively in dealing with sub-issues (a) and (b) of the second issue of principle stated under

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448 (1974) 131 CLR 338; [1974] HCA 36.

449 See, further, the discussion in Leeming, *Resolving Conflicts of Laws*, (2011) at 176-180.

450 *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120; [1948] HCA 13.

451 *Dickson v The Queen* (2010) 241 CLR 491 at 508 [36]-[37].

the heading "The issues", these considerations cannot supply a case which impugns by force of s 109 the appellant's conviction and sentence under the State law.

[K] RESULT AND ORDERS

278 The appellant has succeeded in establishing that the Court of Appeal should have granted her leave to appeal against conviction and allowed her appeal. The orders of the Court of Appeal, including the declaration in order 5, should be set aside. In place thereof, there should be an order granting leave to appeal against conviction, allowing the appeal, setting aside the conviction and sentence, and ordering a new trial. There should also be a declaration that ss 33, 36 and 37 of the Charter are invalid.

279 The appellant seeks a special costs order in her favour, at least with respect to the appeal to this Court. The Court undoubtedly has the power to make such an order[452] although it would be unusual to exercise it in what was purely a "criminal case"[453]. But this appeal has been argued as a major constitutional case, including issues, such as the validity of s 36 of the Charter and the interpretation of s 75(iv) of the Constitution, in which the appellant had no immediate interest. In these special circumstances she should have an order against the second respondent for two-thirds of her costs in this Court.

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452 Judiciary Act, ss 26, 32; High Court Rules 2004, r 50.01.

453 *R v Whitworth* (1988) 164 CLR 500; [1988] HCA 20.

280 HAYNE J. I agree with Sections [A] to [I] of the reasons of Gummow J. I disagree about the engagement of s 109 in this matter. For the reasons that follow, s 71AC of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Drugs Act") is inconsistent with s 302.4 of the *Criminal Code* (Cth) ("the Code") and is thus invalidated by s 109 of the Constitution. Instead of ordering a new trial, the presentment filed against the appellant should be quashed and a declaration made that s 71AC of the Drugs Act is inconsistent with s 302.4 of the Code and invalid. The appellant should have two-thirds of her costs in this Court.

281 The application of s 109 in this case raises an issue of fundamental constitutional importance. There can be no doubt that the federal Parliament sought to avoid inconsistency. Section 300.4(1) of the Code states, in terms, that Pt 9.1 of the Code (which includes s 302.4) "is not intended to exclude or limit the concurrent operation of *any* law of a State or Territory" (emphasis added). And the Attorneys-General for the Commonwealth, New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Australian Capital Territory all joined in submitting that there is no inconsistency between the two provisions.

282 The question for this Court is whether the result that the political branches of government seek to achieve is constitutionally permitted. The question must be answered by the application of fundamental constitutional principles. Those principles are founded in, and require an understanding of, the consequences that follow from there being in Australia a federal system of government in which there are "independent governments existing in the one area and exercising powers in different fields of action carefully defined by law"[454]. In particular, the principles that are to be applied recognise two unavoidable consequences[455] of federation. First, the Constitution is and must be rigid. Second, within its powers, the federal Parliament is and must be paramount, but it is and must be incompetent to go beyond those powers. It is s 109 of the Constitution that expresses the principle of paramountcy.

283 Questions of legislative inconsistency and paramountcy must be decided recognising one other and equally fundamental principle that is common to all developed legal systems[456]. The law does not admit of contradiction. The law may say many different things. In a federation there may be more than one

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454 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268; [1956] HCA 10.

455 *Boilermakers* (1956) 94 CLR 254 at 267.

456 *Ffrost v Stevenson* (1937) 58 CLR 528 at 572 per Dixon J; [1937] HCA 41.

legislative voice. But in the end there is and can be only one body of law. There cannot be contrariety; there cannot be contradiction. The rules that make up the law, regardless of their origin as federal, State or Territorial, must speak as a single and coherent whole to those to whom they are addressed.

284 Contradiction or contrariety may take various forms. The most obvious is where those to whom the laws are directed cannot obey both simultaneously. But there is also contradiction or contrariety when conflicting consequences are attached to breach of the one norm of conduct. The conflict in such a case can be seen by asking, before a contravention has occurred, what will be the consequences of doing the prohibited act. The answer "it depends" (upon which law is applied to the particular case) shows that there is contradiction or contrariety.

285 The federal Parliament's statement that the law which it makes is "intended" to operate "concurrently" with State and Territory laws does not conclude an inquiry about the application of s 109. Just as the ultimate responsibility of deciding upon the limits of the respective powers of the integers of the federation is placed in the federal judicature[457], so too the determination of whether there is inconsistency between federal and State laws rests with the judicial branch of government, not the legislative branch. What the political branches of the governments of the several integers of the federation want to achieve is bounded by what the Constitution permits.

286 The issues that must be considered in this case are novel. Because the issues are novel they require much more than the consideration of extracts from reasons in past cases about the application of s 109, coupled with the assertion that those passages in the decided cases require the conclusion that the relevant laws of the Commonwealth constitute a concurrent scheme operating in parallel to State offences in respect of the same subject matter and are not inconsistent. Approaching the issue in that way, as so much of the argument in this matter has, does not recognise the novelty of the issues. More importantly, it does not address the relevant question: constitutionally, can the two laws constitute a concurrent scheme of that kind? To answer that question there must be a much deeper examination of the relevant principles.

287 The issues that must be considered in this case are presented by a combination of two relatively recent developments. First, the federal Parliament, in exercise of the external affairs power, has enacted criminal laws dealing directly with subject matters (in this case the possession and supply of and trafficking in certain drugs) that for many years were dealt with only by State and Territory criminal laws. Second, the parliaments of the Commonwealth, the

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457 *Boilermakers* (1956) 94 CLR 254 at 267-268.

States and the Territories have all enacted[458] their own distinctive sentencing legislation, the application of which will yield different outcomes in cases that are in all other relevant respects identical. So, for example, some States provide for fixing non-parole periods of imprisonment more or less mathematically; others do not. And of most immediate significance, with the enactment of the *Crimes Legislation Amendment Act (No 2)* 1989 (Cth), which introduced Pt IB into the *Crimes Act* 1914 (Cth), the Commonwealth ceased to pick up and apply[459] State sentencing laws to federal offenders.

288 Section 109 is engaged "[w]hen a law of a State is inconsistent with a law of the Commonwealth". Section 71AC of the Drugs Act and s 302.4 of the Code each provide a norm of conduct. The norm that each establishes may be assumed to be identical, but the consequences for contravention which the two sections prescribe are different. Each prescribes a different maximum penalty for contravention. Not only that, each section, by engaging other legislation of the relevant polity, prescribes, and will yield, different sentences for any contravention. The laws are inconsistent.

Identifying the relevant question

289 The question at the root of this case is how to identify the laws that are said to be inconsistent. Is it enough to notice that each provides for what may be assumed to be generally similar, even substantially identical, norms of conduct? Or does the different specification of penalty matter?

290 Neither s 71AC of the Drugs Act nor s 302.4 of the Code is sufficiently identified by describing only the norm of conduct that it creates. To identify the relevant "law of a State" and the relevant "law of the Commonwealth" it is necessary to identify what each establishes more fully than by stating what it prohibits: whether only at the very general level of saying that each proscribes trafficking in certain drugs, or at some more specific level. The purpose of each law is more than just to announce to society that certain actions are not to be taken; each law seeks to secure that fewer of the prohibited actions are done and

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458 *Crimes Act* 1914 (Cth), Pt IB (ss 16-22A); *Crimes (Sentencing Procedure) Act* 1999 (NSW); *Sentencing Act* 1991 (Vic); *Criminal Law (Sentencing) Act* 1988 (SA); *Penalties and Sentences Act* 1992 (Q); *Sentencing Act* 1995 (WA); *Sentencing Act* 1997 (Tas); *Sentencing Act* (NT); *Crimes (Sentencing) Act* 2005 (ACT).

459 *Judiciary Act* 1903 (Cth), s 68(1).

to do that by providing for the punishment of those who do the acts that are prohibited[460].

291 This Court has recognised[461] that the litigious world cannot be divided into only two parts, one marked "civil" and the other "criminal". But it remains useful, and in this case necessary, to acknowledge that the laws in question in this case each create a crime, and that a crime cannot sufficiently be described without reference to both the act or omission which is proscribed and the penal consequences that follow from contravention. So much has been accepted for centuries. Blackstone recognised it in his *Commentaries on the Laws of England* when he wrote[462] that:

> "Upon the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: viz. not only to redress the party injured … but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole."

John Austin, in *The Province of Jurisprudence Determined*, identified[463] the essential elements of a positive law or rule as "command", "duty" and "sanction". Hence the definition of "crime" adopted by James Fitzjames Stephen[464]: "an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act". And hence also the definition[465] by Sir Samuel Griffith, in 1899 in the *Criminal Code* (Q), of an "offence" as "[a]n act or omission which renders the person doing the act or making the omission liable to punishment".

292 It follows that, in this case, the identification of the laws to which s 109 refers as "a law of a State" and "a law of the Commonwealth" cannot stop at describing only those parts of the relevant sections of the Drugs Act and the

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460 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (1968) at 6-8.

461 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; [2003] HCA 49.

462 (1769), bk 4, c 1 at 7.

463 (1832) at 5-8.

464 *A History of the Criminal Law of England*, (1883), vol 1 at 1.

465 s 2.

Code that prescribe the content of the norm of conduct which is enacted. In each case the description of the relevant law must include the consequences of contravention that are prescribed by the section's specification of the maximum penalty that may be imposed. The better view is that the prescription of consequences cannot be described sufficiently accurately without reference also to the way in which the prescription of a maximum penalty (within the four corners of the provision which is in issue) is elaborated by other legislation. It is the applicable sentencing legislation which gives content to the otherwise bald statement of a maximum penalty for the offence. But for immediate purposes what is critical to the proper application of s 109 is recognition that the relevant law of a State and the relevant law of the Commonwealth are each to be identified as *both* a statement of a norm of conduct *and* a prescription of penalty. Each of those parts of the relevant laws is equally important to the application of s 109.

293 In the end this proposition was not challenged by any party or intervener. The appellant and the first and second respondents and interveners differed as to the consequences that followed once the relevant laws were identified in the manner described.

294 The prescription of penalty in each law cannot be treated as some secondary or lesser element in the description of the laws in question. More particularly, specification of penalty is not to be treated as no more than a statement of the powers that are available upon proof of contravention. As Dixon J explained[466] in *Ffrost v Stevenson*, a judge is not at liberty to disregard legislative commands once an accused has been presented. Upon conviction, a judge must act in accordance with the statute, and any applicable sentencing legislation, and make orders accordingly.

295 Specification of penalty (both the type of penalty and its quantum) is a defining and thus an essential element of any crime. The specification of penalty is the means by which the legislation seeks to secure that fewer of the prohibited actions are done as well as to provide for punishment of those who contravene. That is why the consequences of contravention of s 71AC of the Drugs Act and s 302.4 of the Code cannot be dismissed from consideration in the application of s 109. As the plurality pointed out in *Markarian v The Queen*[467]:

> "Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that

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466 (1937) 58 CLR 528 at 572.

467 (2005) 228 CLR 357 at 372 [30]-[31]; [2005] HCA 25.

> the maximum sentence available may in some cases be a matter of great relevance. …
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> [C]areful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick."

296 Inconsistency of laws, at least in this case, depends upon difference between the relevant laws. It is therefore convenient to begin the more particular consideration of the application of s 109 in this case by identifying features of the laws in question that were or might be said to be relevant differences between them. It will then be appropriate to identify the argument against inconsistency, next to amplify what has been said about the constitutional purposes of s 109, and only then to examine the relevant principles that have been developed and should now be applied in the resolution of this case.

Differences between the two laws

297 First, much of the argument in this matter centred upon whether or how s 5 of the Drugs Act intersected with s 71AC, in a case where, as here, a person was accused of trafficking drugs by having a trafficable quantity of the drug in possession for sale. As is explained in the reasons of Gummow J, that dispute is to be resolved by concluding that s 5 of the Drugs Act does not speak to the compound expression "possession for sale" when it is used in s 70(1), which defines "traffick" for the purposes of s 71AC, and that, accordingly, s 5 of the Drugs Act provides no relevant point of difference between the elements of the offences created by s 71AC of the Drugs Act and s 302.4 of the Code.

298 Second, it may be observed that the Drugs Act and the Code make different provisions with respect to the significance that is to be given to proof of possession of a certain quantity of prohibited drugs by an accused person. Section 73(2) of the Drugs Act provided that possession of a drug of dependence "in a quantity that is not less than the traffickable quantity applicable to that drug of dependence ... is prima facie evidence of trafficking by that person in that drug of dependence". By contrast, s 302.5 of the Code provided that:

> "(1) For the purposes of proving an offence against this Division, if a person has:
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> ...
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> (d) possessed a trafficable quantity of a substance;

the person is taken to have had the necessary intention or belief concerning the sale of the substance to have been trafficking in the substance.

(2) Subsection (1) does not apply if the person proves that he or she had neither that intention nor belief."

Neither the parties, nor any of the interveners, emphasised this difference between the two provisions and, for the purposes of considering the engagement of s 109 in this case, it is convenient to assume, without deciding, that nothing turns on it.

299 Third, at the relevant time, the two Acts prescribed a different weight of methylamphetamine as the relevant trafficable quantity for the purposes of the Act in question. For the purposes of s 302.4 of the Code, two grams was a trafficable quantity[468]. Under the Drugs Act, six grams was prescribed as a trafficable quantity[469]. Again, it was not submitted that anything turned, in this case, upon this difference and it, too, may be put aside from consideration.

300 Fourth, because s 302.4 of the Code makes an offence against that section punishable by a term of imprisonment exceeding 12 months, s 4G of the *Crimes Act* 1914 provides that the offence is an indictable offence. That being so, s 80 of the Constitution is engaged and the trial must be by jury. It follows, from this Court's decision in *Cheatle v The Queen*[470], that a verdict of guilt of an offence against s 302.4 of the Code cannot be returned otherwise than by unanimous verdict. By contrast, a verdict of guilt of an offence against s 71AC of the Drugs Act can, in certain circumstances, be returned by a majority verdict[471]. Contravention of the two provisions is thus to be determined by different modes of trial.

301 Fifth, s 302.4 of the Code and s 71AC of the Drugs Act prescribe different punishments. The maximum penalty for contravention of s 302.4 of the Code is imprisonment for 10 years or 2,000 penalty units, or both. The maximum

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468 *Criminal Code* (Cth), s 314.1(1). The relevant quantity was the weight of pure drug.

469 *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), s 70 and Sched 11, Pt 3. The definition of "traffickable quantity" in s 70(1) treated the relevant quantity as "including any other substance in which [the drug] is contained or with which it is mixed".

470 (1993) 177 CLR 541; [1993] HCA 44.

471 *Juries Act* 2000 (Vic), s 46(2).

penalty for contravention of s 71AC of the Drugs Act is "level 4 imprisonment", that is to say 15 years' imprisonment[472].

302 Sixth, not only are different maximum punishments prescribed by the two laws, different statutory provisions concerning the fixing of a sentence in any particular case will be engaged. A person convicted of an offence under s 302.4 of the Code is to be sentenced according to the provisions of Pt IB of the *Crimes Act* 1914. A person convicted of an offence under s 71AC of the Drugs Act is to be sentenced according to the provisions of applicable Victorian sentencing legislation, in particular the *Sentencing Act* 1991 (Vic). As cases like *Hili v The Queen*[473] show, the provisions of federal and State legislation concerning sentencing differ in important respects and their application will yield different results in cases otherwise identical.

303 It is the last two features of the two laws (the differences in maximum penalties and statutory sentencing provisions) that are most important in considering whether s 109 is engaged in this case. As already noted, whether the different prescription of what is a trafficable quantity, and whether the different statutory expression of the consequences at trial of proof of possession of a trafficable quantity, is or are important was not examined in argument and can conveniently be put aside from consideration. It will be sufficient for the purposes of this case to consider the application of s 109 of the Constitution on the footing that the two laws prescribe offences having identical elements, the punishment for which differs, both as to the maximum that may be imposed and as to the provisions that are engaged in fixing the sentence in any particular case.

304 Although reference will be made, from time to time, to the fact that contravention of each offence will be determined according to different modes of trial, it will be unnecessary to determine whether this difference requires the conclusion that the two laws are inconsistent. That is a large question. Although it has been said more than once in cases concerning the application of s 109[474] that the requirement of s 80 of the Constitution – that the trial of a federal indictable offence be by jury – is a consideration that bears upon the question of

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472 Section 49 of the *Sentencing Act* 1991 (Vic) permitted a sentencing court to impose a fine in addition to, or instead of, a sentence of imprisonment. The maximum fine for an offence for which a maximum sentence of 15 years' imprisonment might be imposed was fixed by s 109(2) of the *Sentencing Act* as 1,800 penalty units.

473 (2010) 85 ALJR 195; 272 ALR 465; [2010] HCA 45.

474 See, for example, *Hume v Palmer* (1926) 38 CLR 441 at 450-451 per Isaacs J; [1926] HCA 50; *Dickson v The Queen* (2010) 241 CLR 491 at 504 [20]; [2010] HCA 30.

inconsistency, it is better to leave for another day whether that requirement alone leads to the conclusion that two laws of the kind now in issue are inconsistent.

The argument against inconsistency

305 Despite the differences between the two laws, the first respondent (the prosecution at trial), the Attorney-General of the Commonwealth and the Attorneys-General for those States that intervened and the Australian Capital Territory all submitted that there is no inconsistency between them. Central to the argument against inconsistency was the provision made by s 300.4 of the Code. That section provides:

> "**Concurrent operation intended**
>
> (1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
>
> (2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:
>
> (a) an act or omission that is an offence against a provision of this Part; or
>
> (b) a similar act or omission;
>
> an offence against the law of the State or Territory.
>
> (3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:
>
> (a) provides for a penalty for the offence that differs from the penalty provided for in this Part;
>
> (b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;
>
> (c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part."

306 Section 300.4 of the Code was said to have determinative significance because, so it was submitted, "[t]he test for inconsistency *always* turns on

Commonwealth legislative intention" (emphasis added). This was said to be supported by the statement by Dixon J in *Ex parte McLean*[475] that:

> "The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed."

Support was also said to be found in the many decided cases[476] in which this passage from the reasons of Dixon J in *Ex parte McLean* has been referred to or cited with approval.

307 The proposition that the test for inconsistency always turns on Commonwealth legislative intention, if taken literally, would commit the application of s 109 to the Parliament. In terms the proposition is one which would always give determinative significance to a statement in federal legislation of what the Parliament intended as to the operation of State legislation. A proposition of that kind is not supported by any authority and should not be accepted.

308 Before considering whether some narrower understanding of the proposition can be accepted, it is essential to begin by recognising that s 109 of the Constitution fulfils particular constitutional purposes. It is necessary to consider what has been said in cases that have been decided about s 109 with those constitutional purposes at the forefront of consideration.

The constitutional purposes of s 109

309 The constitutional purposes of s 109 are identified by considering fundamental features of the Australian constitutional structure. As was pointed out in *R v Kirby; Ex parte Boilermakers' Society of Australia*[477], a federal constitution must be rigid. The government that the Constitution establishes "must be one of defined powers; *within those powers it must be paramount*, but it must be incompetent to go beyond them"[478] (emphasis added). As Joseph Story

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475 (1930) 43 CLR 472 at 483; [1930] HCA 12.

476 For example, *O'Sullivan v Noarlunga Meat Ltd* (1956) 95 CLR 177 at 182; [1957] AC 1 at 24; *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 311; [1977] HCA 46; *Viskauskas v Niland* (1983) 153 CLR 280; [1983] HCA 15; *McWaters v Day* (1989) 168 CLR 289 at 296; [1989] HCA 59.

477 (1956) 94 CLR 254 at 267.

478 *Boilermakers* (1956) 94 CLR 254 at 267.

wrote in the nineteenth century, in his *Commentaries on the Constitution of the United States*[479]: "It would be a perfect solecism to affirm, that a national government should exist with certain powers; and yet, that in the exercise of those powers it should not be supreme." Story went on to say[480]:

> "If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws, which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals, of whom they are composed. It would otherwise be a mere treaty, dependent upon the good faith of the parties, and not a government, which is only another name for political power and supremacy. ... Hence we perceive, that the above clause [the supremacy clause[481]] only declares a truth, which flows immediately and necessarily from the institution of a national government.[482]"

310 The points made by Story were made with respect to the United States Constitution. But, despite the differences between the two systems, these particular observations apply with equal force to the Commonwealth Constitution and serve to explain why laws of the Commonwealth, validly made, are and must be paramount. The points made by Story are given textual expression in the Commonwealth Constitution in covering cl 5 and the provisions of Ch V, particularly ss 106-109.

311 The provision, by s 109, that "[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid" must be understood as a necessary consequence of federation: a consequence expressed in covering cl 5 and its provision that "all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State

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479 (1833), vol 3 at 693 §1831.

480 at 693-694 §1831.

481 Article VI of the United States Constitution provides, in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

482 The Federalist No 33. See *Gibbons v Ogden* 9 US 1 at 210, 211 (1824); *McCulloch v Maryland* 17 US 316 at 405, 406 (1819).

and of every part of the Commonwealth, notwithstanding anything in the laws of any State".

312 As Mason J pointed out in *University of Wollongong v Metwally*[483], "[i]nconsistency or repugnancy is a long-standing concept in the field of statutory law". It is a concept that is engaged "[w]here the provisions of two statutes are in conflict, so much so that they cannot be reconciled one with the other"[484]. And the concept of inconsistency or repugnancy is engaged in such a case because, as Mason J said[485], "there is a consequential need to resolve the problem created by the conflict". If there is conflict between two statutes, and reconciliation is not possible, the law does not countenance simultaneous operation of the conflicting provisions. Doctrines of implied repeal resolve conflicts between legislation enacted by the one legislature. Conflicts between Imperial and colonial legislation were resolved in favour of the Imperial legislation. And in a federal system, the federal law prevails.

313 The way in which the consequences of the exercise of legislative power by both the Commonwealth and a State with respect to a particular subject matter which results in inconsistency are worked out through the application of s 109 is of equal importance to the Commonwealth and to the States[486]. Likewise, the result of that working out (of whether a State law is invalid because inconsistent with a law of the Commonwealth) is of equal importance to both the Commonwealth and the States. But whether, and to what extent, s 109 applies to invalidate a State law is also of fundamental importance to those to whom the federal and State laws are, or but for s 109 would be, directed. This being so, it is evidently wrong to consider any question about the application of s 109 by disregarding the effect of the decision upon those to whom the laws in question are directed. And it would be, as Story put it, "a perfect solecism" to conclude that it is for the federal legislature to determine for itself whether or to what extent s 109 is engaged with respect to any particular law of the Commonwealth. Resolution of the question must rest with the judicial branch by its application of accepted principles.

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483 (1984) 158 CLR 447 at 463; [1984] HCA 74.

484 (1984) 158 CLR 447 at 463.

485 (1984) 158 CLR 447 at 463.

486 cf *Boilermakers* (1956) 94 CLR 254 at 268 concerning the equal importance to the Commonwealth and the States of the demarcation of the powers of the judicature.

Principles

314 Examination of the cases decided about s 109 will reveal six points of present relevance. First, application of s 109 requires determination of the valid reach and operation of the federal law in question. (Here, no question of the validity of s 302.4 of the Code was agitated; argument centred upon the reach and operation of that section.)

315 Second, the reach and operation of the federal law is to be determined by construing that law; that is, by reference to the language, purpose and scope of the law, viewed as a whole within its context, as well as by reference to considerations of consistency and fairness[487]. More particularly, if the metaphor of "intention" is employed (and it now seems ineradicable), the relevant "intention" of the federal Parliament is revealed by construction of the federal law in question. Use of the metaphor of "intention" or "will" must not be understood as inviting attention to the wishes or hopes of those who promoted the legislation in question. What matters is the reach and operation of the law in question as that reach and operation are ascertained by the conventional processes of statutory construction. The metaphor of intention must not obscure the centrality of construing the laws in question.

316 Third, it must be accepted that any express statement in the federal law of the federal Parliament's "intention" will be relevant to the determination of whether s 109 is engaged. But such a statement does not, of itself and in every case, provide the answer to that question. In particular, a statement by the federal Parliament that an Act is not intended to cover a particular field, or that it is intended that federal and State law should operate "concurrently", does not conclude any issue about inconsistency of a State law with the relevant federal law.

317 Fourth, one law is "inconsistent" with another where they "are in conflict, so much so that they cannot be reconciled one with the other"[488]. Laws cannot be reconciled if to give effect to one would alter, impair or detract from the other.

318 Fifth, care must be exercised lest the classification of some examples of inconsistency as "direct", and others as "indirect", mask the central importance of deciding whether there is conflict by diverting attention to the attempt to classify what species of conflict is encountered.

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487 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]; [1998] HCA 28.

488 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 463.

319 Sixth, care must also be taken lest the use of the metaphor of "intention" or "will" mask one or both of two logical fallacies that permeated much of the argument against inconsistency.

320 The first of those fallacies is to treat a *sufficient* condition for concluding that two laws are inconsistent as a condition *necessary* to that conclusion. Recognising that a federal law is "intended" to be an exhaustive statement of the law on a particular subject matter (that is, that the federal law "covers the field") is undoubtedly *sufficient* reason to conclude that a State law on the same subject matter is inconsistent with the federal law. It by no means follows, however, that a conclusion that the federal law exhaustively states the law on a particular subject matter or covers a relevant field is a *necessary* condition for finding inconsistency. Section 300.4 is determinative of the present question *only* if intention is a necessary condition.

321 The second fallacy is closely related. It confuses premise with conclusion. More specifically, the proposition that a federal law is an exhaustive and exclusive statement of the rules that govern a particular subject matter may be no more than an expression, in other words, of a conclusion that s 109 applies to invalidate inconsistent State laws. If the proposition is taken, not as a conclusion, but as a premise for argument about the application of s 109, error beckons. First, there is the confusion just mentioned between what is necessary and what is sufficient to establish inconsistency. Second, the metaphor of intention is used to obscure not only the centrality of determining, by an orthodox process of construction, the reach and operation of the two laws but also the necessity to determine whether the State law alters, impairs or detracts from the federal law. The conclusion that the federal law is or is not paramount must not be taken as the premise for argument.

The development of accepted doctrine

322 As was mentioned in argument by the Solicitor-General of the Commonwealth, there was a time, early in the life of the federation, when s 109 was understood as requiring consideration of no more than whether it was possible to obey both the relevant federal and State laws. But so to understand s 109 was rightly seen, by at least the decision in 1926 in *Clyde Engineering Co Ltd v Cowburn*[489], as too narrow a view. In argument in *Clyde Engineering*, Owen Dixon KC described[490] the question as being whether "there is a conflict between the wills of the two Legislatures". But the use of the metaphor of "will" (like that of "legislative intention") is apt to mislead if it is taken as the starting point of the relevant inquiry. It will mislead if it distracts attention from the need

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489 (1926) 37 CLR 466; [1926] HCA 6.

490 (1926) 37 CLR 466 at 471.

to construe the legislation in question. It is only by construction of the legislation that its reach and operation can be determined.

323 That the construction of the legislation is the proper starting point for an inquiry about the application of s 109 is made plain by consideration of the whole of what was said by Dixon J not only in *Ex parte McLean* but also in *Stock Motor Ploughs Ltd v Forsyth*[491] and *Victoria v The Commonwealth* ("*The Kakariki*")[492].

324 It is commonplace to begin examination of the application of s 109 by quoting, or at least citing, that part of the reasons of Dixon J in *Ex parte McLean* in which a distinction was drawn[493] between a case in which "the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be" and a case where "the Federal law was intended to be supplementary to or cumulative upon State law". And frequent reference is made to this passage from the reasons of Dixon J with particular reference to the metaphor of "covering the field", an expression derived, at least immediately, from the reasons of Isaacs J in *Clyde Engineering*[494].

325 It is to be recalled that those who opposed inconsistency placed emphasis upon the statement of Dixon J, in *Ex parte McLean*, that inconsistency does not lie in the mere coexistence of two laws susceptible of simultaneous obedience but depends upon the intention of the paramount legislature to express by its enactment the law governing the particular conduct or matter completely. That proposition must be read in the light of all that Dixon J said in *Ex parte McLean* and in the light of the result to which he came.

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491 (1932) 48 CLR 128; [1932] HCA 40.

492 (1937) 58 CLR 618; [1937] HCA 82.

493 (1930) 43 CLR 472 at 483.

494 (1926) 37 CLR 466 at 489: "If, however, a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field." Very similar metaphors had been used previously in this connection in the arguments of counsel in *Australian Boot Trade Employes Federation v Whybrow & Co* (1910) 10 CLR 266 at 272; [1910] HCA 8 and *The Commonwealth v Queensland* (1920) 29 CLR 1 at 5; [1920] HCA 79, but had not been taken up in the decisions of the Court.

326 As to context, it is important to recognise the acceptance[495] by Dixon J, as settled principle, that when the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject matter and prescribe what the rule of conduct should be, they make inconsistent laws, even if the rule of conduct is identical, at least if the sanctions differ. For this proposition Dixon J cited *Hume v Palmer*[496]. The principle applied in *Hume v Palmer* was identified[497] by Dixon J as the federal statute showing "an intention to cover the subject matter" and provide exhaustively what the law upon that subject should be. And Dixon J drew a contrast with the case where "it appeared that the Federal law was intended to be supplementary to or cumulative upon State law".

327 The repeated references by Dixon J to "intention" must not be misunderstood. As he later demonstrated in *Stock Motor Ploughs Ltd*[498], the task is one of construing the relevant Act, not some exercise in divining the intention (expressed or unexpressed) of those who propounded or drafted the Act. And the point is put beyond doubt by the decision of Dixon J in *Wenn v Attorney-General (Vict)*[499] and the reference there made to "the intention of the State legislation [in that case], *ascertained by interpreting the statute*" (emphasis added). The intention of which Dixon J spoke in *Ex parte McLean* was the objective intention of the legislation as revealed by its proper construction.

328 So much is also revealed, in *Ex parte McLean*, by the application by Dixon J of the principle established in *Hume v Palmer*. It was that principle that dictated the outcome in *Ex parte McLean*. The State law in question in *Ex parte McLean* (s 4 of the *Masters and Servants Act* 1902 (NSW)) prescribed penal consequences for a worker who "neglects to fulfil" a contract of service. The federal law (s 44 of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth)) penalised the breach of an industrial award and the award in question required performance of the relevant contract of service. The State law dealing "directly with the relation of employer and employed, and in virtue of that industrial relation [making] penal the very default which the Federal law punishes somewhat differently in the regulation of the same relation"[500], was held to be inconsistent with the federal law. The Parliament of the Commonwealth

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495 (1930) 43 CLR 472 at 483.

496 (1926) 38 CLR 441.

497 (1930) 43 CLR 472 at 483.

498 (1932) 48 CLR 128 at 136-140.

499 (1948) 77 CLR 84 at 122; [1948] HCA 13. See also at 119-120.

500 (1930) 43 CLR 472 at 486.

and the Parliament of New South Wales had each legislated upon the same subject matter and had each prescribed what the rule of conduct should be; the penalties for contravention differed; the laws were inconsistent. The federal "intention" to legislate on the subject matter exhaustively was identified from its having legislated on subject matter which included the subject matter to which the State law was addressed. The fact of its having legislated on the same subject matter demonstrated the relevant intention.

329 The reference to the identity of the subject matter of the legislation is important.

Laws directed to different subject matters

330 More recent decisions show the importance of identifying whether a federal and a State law which are said to be inconsistent are directed to the same subject matter. Particular reference should be made to two of those cases: *R v Winneke; Ex parte Gallagher*[501] and *McWaters v Day*[502].

331 Some emphasis was given in argument of the present appeal to the statement by Gibbs CJ in *Gallagher*[503] that "the fact that a Commonwealth Act and a State Act impose different penalties for the same conduct does not necessarily mean that the laws are inconsistent". At times during the argument of this appeal, this proposition was treated as absolute and denying any relevance, in an inquiry about the application of s 109, to the observation that State and federal laws prescribe different penalties for the same conduct.

332 But that is not what was said in *Gallagher*. The proposition was a more limited one, the exact content of which turns on the significance given to the limitation "necessarily". What was said by Gibbs CJ about difference in penalties must be read in the context of the whole of his Honour's reasons and the context of the issues presented in that case. Those matters of context will be examined next. When the sentence is read in its context, it is plain that Gibbs CJ did not advance, and cannot be understood as advancing, some general, let alone universal, proposition that State and Commonwealth laws making "the same conduct" subject to "different penalties" are not, or cannot be, inconsistent.

333 At the time of the events the subject of consideration in *Gallagher*, s 6 of the *Royal Commissions Act* 1902 (Cth) made it an offence for a person appearing

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501 (1982) 152 CLR 211; [1982] HCA 77.

502 (1989) 168 CLR 289.

503 (1982) 152 CLR 211 at 218.

as a witness before a Royal Commission appointed by the federal Executive to refuse to answer any relevant question. A penalty of $1,000 was fixed. Section 19 of the *Evidence Act* 1958 (Vic), which applied to Royal Commissions established by the Victorian Executive, made it an offence for a person, without lawful excuse, to refuse or fail to answer any question touching the subject matter of the inquiry. The penalty fixed under s 20 of the *Evidence Act* was $1,500 or imprisonment for a term of not more than three months.

334 Royal Commissions had been established by both the Commonwealth and the Victorian Governments to inquire into subjects that were related and to some extent overlapped. The one person was appointed Commissioner to conduct both inquiries. A number of persons called to give evidence to the Commissioner refused to answer questions touching the subject matter of both inquiries. They were prosecuted for and convicted of offences under the *Evidence Act*. It was submitted that s 6 of the *Royal Commissions Act* and ss 19 and 20 of the *Evidence Act* were inconsistent because "witnesses are exposed to different penalties under the Commonwealth and the State provisions"[504]. This was advanced as some species of operational inconsistency[505] though, as Mason J said[506], the case alleging inconsistency was "somewhat elusive".

335 The Court held, by majority, that there was no inconsistency. For present purposes, it is convenient to focus chiefly upon the reasons of Gibbs CJ, which in relevant respects were adopted and applied in *Viskauskas v Niland*[507].

336 As Gibbs CJ said[508], the Commissioner was conducting two inquiries: one under Commonwealth authority for Commonwealth purposes, the other under State authority for State purposes. Had the inquiries been conducted separately, a refusal to answer questions at each inquiry would have constituted two separate offences. The inquiries being held together, the refusal to answer a question constituted contravention of both Acts and the offender could be prosecuted and convicted under either Act. And, as Gibbs CJ pointed out[509], the injustice of double punishment for what was a single act or omission was avoided

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504 (1982) 152 CLR 211 at 213.

505 (1982) 152 CLR 211 at 231-232 per Wilson J.

506 (1982) 152 CLR 211 at 220.

507 (1983) 153 CLR 280 at 295.

508 (1982) 152 CLR 211 at 218-219.

509 (1982) 152 CLR 211 at 219.

by the provision of s 30(2) of the *Acts Interpretation Act* 1901 (Cth) then in force[510]. But as Gibbs CJ went on to say[511]:

> "The different penalties provided by the two Acts [the *Royal Commissions Act* and the *Evidence Act*] are in respect of what are in truth independent offences which are created by law to serve different purposes. It is not right to say that the Acts provide different penalties for the one offence. *There is no inconsistency between Acts which prescribe different penalties for offences which, albeit constituted by the same conduct, are in substance different from one another*." (emphasis added)

By contrast, as Gibbs CJ had said earlier in his reasons[512]:

> "If the two laws are made for the *same purpose – e.g. if they prescribe substantially identical rules on a particular subject but with different penalties for contravention* – it will be easy to conclude that the Commonwealth law covers the whole subject-matter, and that there is an inconsistency: see *Hume v Palmer*[513] and *R v Loewenthal; Ex parte Blacklock*[514]." (emphasis added)

337 In *McWaters v Day*, the Court held that a provision of the *Defence Force Discipline Act* 1982 (Cth) making it an offence for "a defence member or a defence civilian" to drive a vehicle on service land while intoxicated to such an extent as to be incapable of having proper control of the vehicle was not inconsistent with a provision of a State Act (the *Traffic Act* 1949 (Q)) which made it an offence to drive a motor vehicle whilst under the influence of liquor. The Court held[515] that the federal Act contemplated "parallel systems of military and ordinary criminal law and [did] not evince any intention that defence force members enjoy an absolute immunity from liability under the ordinary criminal

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510 Section 30(2) provided that where an act or omission constituted an offence under a federal Act and a State Act, and the offender had been punished under the State Act, the offender was not liable to be punished for the offence under the federal Act.

511 (1982) 152 CLR 211 at 219.

512 (1982) 152 CLR 211 at 218.

513 (1926) 38 CLR 441.

514 (1974) 131 CLR 338; [1974] HCA 36.

515 (1989) 168 CLR 289 at 298.

law". The *Defence Force Discipline Act* was held[516] not "to do other than enact a system of military law in accordance with the traditional and constitutional view of the supplementary function of such law". The Court thus held[517] that the federal Act was "supplementary to, and not exclusive of, the ordinary criminal law" and that it did "not deal with the same subject-matter or serve the same purpose as laws forming part of the ordinary criminal law".

338 The laws now in question are, of course, evidently not directed to different subject matters. In the words of Gibbs CJ in *Gallagher*[518], they are "made for the same purpose". Each of s 71AC of the Drugs Act and s 302.4 of the Code forms a part of what was called[519], in *McWaters v Day*, "the ordinary criminal law": in the one case State criminal law and in the other federal criminal law. This is not a case like *Gallagher* where independent offences are created by law to serve different purposes. This is not a case like *McWaters v Day* where provisions made for the discipline of the defence forces stand in addition to, and not in substitution for, the ordinary criminal law. This is not a case like that postulated by Dixon J in *Ex parte McLean*[520] where one law (a federal industrial award forbidding shearers to injure sheep when shearing) can be described as directed to one subject matter (industrial relations) and the other (a State law proscribing the unlawful and malicious wounding of an animal) as directed to a different subject matter (animal cruelty).

"Direct" and "indirect" inconsistency

339 From time to time, argument in the present matter proceeded on a footing that appeared to assume some rigid distinction between cases in which s 109 is engaged because the State law would alter, impair or detract from the federal law (so-called direct inconsistency) and cases in which s 109 is engaged because the federal law covers the field (so-called indirect inconsistency). No distinction of that kind can be made. So much is made plain by the decisions of Dixon J in *Stock Motor Ploughs Ltd* and *The Kakariki*. In *Stock Motor Ploughs Ltd*, Dixon J said[521]:

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516 (1989) 168 CLR 289 at 298.

517 (1989) 168 CLR 289 at 299.

518 (1982) 152 CLR 211 at 218.

519 (1989) 168 CLR 289 at 299.

520 (1930) 43 CLR 472 at 485-486.

521 (1932) 48 CLR 128 at 136-137.

> "In this Court an interpretation of s 109 of the Constitution has been adopted which invalidates a law of a State in so far as it would vary, detract from, or impair the operation of a law of the Commonwealth. Further, when the Parliament appears to have intended that the Federal law shall be a complete statement of the law governing a particular relation or thing, it is considered that the operation of the Federal law would be impaired if the State law were allowed to affect the matter at all (*Clyde Engineering Co v Cowburn*[522]; *H V McKay Pty Ltd v Hunt*[523]; *Hume v Palmer*[524]; *Ex parte McLean*[525])."

That is, the case in which a federal law "covers the field" is a particular example of the more general proposition that there is inconsistency, and consequent invalidity, when to give effect to the State law would impair the operation of the federal law. Dixon J reiterated that principle in *The Kakariki*[526] when he said:

> "When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent."

Two features of this statement of relevant principles must be observed. First, the consequence of a conclusion that the federal law "covers the field" is that to give effect to the State law would detract from the full operation of the federal law, and it is on that account that inconsistency arises. That is, the case in which it is concluded that a federal law covers the relevant field is a particular example of a more general principle of inconsistency: that there is inconsistency whenever a State law alters, impairs or detracts from the operation of federal law.

340 While it may sometimes be a useful tool of thought to seek to apply s 109 by reference to classifications of past instances of inconsistency (for example, by reference to whether the State and Commonwealth laws cannot both be obeyed,

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522 (1926) 37 CLR 466.

523 (1926) 38 CLR 308; [1926] HCA 36.

524 (1926) 38 CLR 441.

525 (1930) 43 CLR 472.

526 (1937) 58 CLR 618 at 630.

the Commonwealth law confers rights, privileges or immunities that the State law removes or the Commonwealth law by its provisions is a complete statement of the law on a certain subject matter[527]), such classes are not closed and must not be treated as stating exhaustively the operation of s 109. The fundamental question remains whether the State law alters, impairs or detracts from the Commonwealth law[528].

341 The second, and no less important, point to observe about what was said by Dixon J in *The Kakariki* is that whether a federal law is intended "as a complete statement of the law governing a particular matter or set of rights and duties" is a matter that is to be determined "from the terms, the nature or the subject matter" of the relevant federal law. Or as Dixon J later put the same point in *Wenn v Attorney-General (Vict)*[529], the intention of legislation (there State legislation) is to be "ascertained by interpreting the statute". "Intention" is a conclusion reached about the proper construction of the law in question and nothing more.

342 The conclusion that, on its proper construction, a federal law is a complete statement of the law governing a particular matter or set of rights and duties is more easily reached if, in its terms, that law states that that is the intended result. That is, whatever may be the nature or the subject matter of the federal law, the inclusion, in terms, of such a statement will point plainly (but because the question is one of construction of the *whole* Act, not always irresistibly) to the conclusion that a State law that regulates or applies to the same matter or relation would detract from the operation of the federal law and thus be inconsistent with it.

Statements of negative intention

343 The statement in a federal law of a negative intention (that the law is *not* intended to be a complete and exhaustive statement of the law governing a particular matter or set of rights and duties) necessarily presents more difficult issues. Instead of the paramount legislature marking out a field in which its law (by force of s 109) will take effect to the exclusion of other laws, the paramount

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527 This classification of inconsistency, based on American cases, was suggested by Mitchell KC and Starke as counsel in *Australian Boot Trade Employes Federation v Whybrow & Co* (1910) 10 CLR 266 at 272.

528 See, for example, *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28]; [1999] HCA 12; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13].

529 (1948) 77 CLR 84 at 122.

legislature asserts that its law should be construed in a way that permits concurrent operation of State law.

344 That assertion of intended construction of the federal law cannot conclude the question whether any particular State law alters, impairs or detracts from the provisions of the federal law. As Mason J said in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*[530], with the concurrence of Barwick CJ, Gibbs, Stephen and Jacobs JJ, a statement in a Commonwealth law of a negative intention cannot displace the operation of s 109 in rendering the State law inoperative when there is "direct inconsistency or collision"[531]. As Mason J went on to say[532]: "All that it does is to make it clear that the Commonwealth law is not intended to cover the field, *thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law*" (emphasis added). And it is to be recalled that a paradigm example of direct inconsistency identified by Dixon J in *Ex parte McLean*[533] was: "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes", at least where different penalties are fixed.

345 Deciding whether the provisions made by the laws in question are inconsistent despite a legislative statement of negative intention directs attention to what is meant when it is said that the two laws are to operate "concurrently". Something more must be said about that question.

"Concurrent" operation

346 The notion of "concurrent" operation of two laws may evoke more than one description of the way in which the laws operate. In some cases, the description "simultaneous operation" may be apt; in others, "parallel operation" would be better. But whatever explanation is given of the notion of "concurrent" operation of two laws, being forced, by the very terms in which each law is cast, to choose between the engagement in any particular case of one rather than the other is the antithesis of concurrent operation. The need to make a choice between the laws bespeaks antinomy: contradiction or contrariety.

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530 (1977) 137 CLR 545 at 563; [1977] HCA 34.

531 See also *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 346-347 per Mason J.

532 (1977) 137 CLR 545 at 563.

533 (1930) 43 CLR 472 at 483.

347 Reference is made to the necessity to make a choice in any particular case between the two laws. It was not suggested by any party or intervener that the two laws at issue in this case could be applied simultaneously. Those opposing inconsistency were at some pains to point out that prosecution under one law would preclude prosecution under the other[534]. But because there cannot be simultaneous engagement or even sequential engagement of the two laws, it follows that in every case in which it is said that the norm of conduct for which each provides has been contravened, a choice must be made between the laws: one law is applied to the exclusion of the other. And the choice that is made matters. It matters because different consequences of contravention are prescribed in an area of law where the Court has repeatedly stressed[535] the importance of s 109 "not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies". To apply one law rather than the other, where the outcome of applying one differs from the outcome of applying the other, does not give *concurrent* operation to both.

Crimes Act 1914, s 4C(2)

348 The provision by the federal Parliament, in s 4C(2) of the *Crimes Act* 1914, that punishment for an act or omission that constitutes a State offence shall be an answer to punishment for the same act or omission as a federal offence does not bear upon whether the laws in question in this matter are inconsistent. This Court has held[536] more than once that s 4C(2) (or its legislative predecessor, s 30(2) of the *Acts Interpretation Act* 1901 (Cth)) can be engaged only if the relevant federal and State laws are both valid. Section 4C(2) is not to be engaged except in respect of a conviction for a State offence that has been duly entered. And of course there could not be a conviction for a State offence duly entered if the State law is invalidated by operation of s 109. This understanding of s 4C(2) is plainly right and should not be discarded. The provision operates on "a law of a State". If s 109 is engaged, there is no operative law of a State. Section 4C(2) thus does not speak at all to whether there is or is not concurrent operation of State and federal legislation that makes particular acts or omissions an offence against each. The Commonwealth submission to the contrary should be rejected.

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534 *Crimes Act* 1914 (Cth), s 4C(2).

535 *Dickson v The Queen* (2010) 241 CLR 491 at 503-504 [19]; see also *University of Wollongong v Metwally* (1984) 158 CLR 447 at 457-458, 476-477; *Croome v Tasmania* (1997) 191 CLR 119 at 129-130; [1997] HCA 5.

536 *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 347; *Dickson v The Queen* (2010) 241 CLR 491 at 504 [21].

Inconsistency in this case

349 In the present case the Parliament of the Commonwealth, in enacting s 302.4 of the Code, and the Parliament of Victoria, in enacting s 71AC of the Drugs Act, have each legislated upon the same subject. Each has prescribed what the rule of conduct shall be. The rule of conduct which each prescribes can be assumed to be identical. But the maximum penalties prescribed by the two provisions differ. The mode of trial of a prosecution for each offence differs by the engagement in respect of the federal offence of s 80 of the Constitution. The fixing of punishment upon conviction for the offences differs because of the engagement of Pt IB of the *Crimes Act* 1914 in respect of a conviction for the federal offence but the engagement of the State sentencing statutes in respect of a conviction for the State offence. The State law alters, impairs or detracts from the federal law. The laws are inconsistent.

350 The question presented by s 109 is *not* whether the State law alleged to be inconsistent with a law of the Commonwealth has limited or restricted some aspect of the Commonwealth's *powers*. That is, it is irrelevant, and wrong, to ask whether the Commonwealth's legislative power to create drug offences, or its executive power to prosecute offences against a law of the Commonwealth, is detracted from, altered or impaired by a State law that deals with that subject. As the plurality pointed out in *O'Sullivan v Noarlunga Meat Ltd [No 2]*[537], "[i]n this Court it [the application of s 109] has *always* been regarded as a question, not between powers, but between laws made under powers" (emphasis added).

351 Further, and no less importantly, principles about operational inconsistency considered in *The Kakariki* do not answer the question of inconsistency that arises here. No doubt it is right to say that the provisions of s 302.4 of the Code engage with other laws of the Commonwealth that provide a power to prosecute for an offence against a law of the Commonwealth. But whether the relevant power to prosecute is "or is intended to be" exclusive is wholly beside the point. The question is whether the two laws (as they have been identified earlier in these reasons) are inconsistent. That is a question about the coexistence of different criminal liabilities. To treat that question as answered by whether there is an exclusive power to prosecute is wrong as a matter of constitutional principle. Not least is that so because it is logically flawed. It assumes that there are two offences: one under State law and the other under Commonwealth law. It thus assumes the answer to the very question that is at issue. Asking whether powers to prosecute are concurrent is irrelevant.

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537 (1956) 94 CLR 367 at 374 per Dixon CJ, Williams, Webb and Fullagar JJ; [1956] HCA 9.

352 As noted earlier, the submission advanced on behalf of those who opposed inconsistency was that what would otherwise be a clear case of inconsistency of laws must in this case yield to the federal legislature's statement of intention in s 300.4 of the Code. That submission should be rejected. There are at least three reasons to do so.

353 First, no reason was offered for taking what would be a radical step away from what for so long has been the accepted doctrine of the Court. Hitherto, the "covering the field" test for inconsistency, with its associated inquiry about whether a federal law is a complete statement of the law governing a particular matter or set of rights and duties, has been seen as a particular species of the genus of inconsistency[538]. The submissions on behalf of those opposing inconsistency sought to promote what was described as the search for legislative intention to the position of constituting an exhaustive statement of the operation of s 109. That is, inconsistency would be determined according *only* to whether the federal Parliament asserted that there should or should not be inconsistency. Yet hitherto, accepted doctrine has been, as stated by Mason J in the *General Motors Acceptance Corporation* case[539], that

> "a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed."

354 Of course, an individual can obey both of the laws that are now in question. So much follows from the laws' prescription of prohibited conduct. Obedience is achieved by abstaining from the conduct in question. Hence the observation by Mason J that impossibility of dual obedience is but an *example* of direct inconsistency is important. The possibility of dual obedience does not conclude the inquiry about inconsistency.

355 The second reason to reject the submission that what would otherwise be a clear case of inconsistency must yield to the statement of intention in s 300.4 is this. Two laws creating an identical norm of conduct, contravention of which is punishable as crime, where the provisions governing not only the maximum sentence but also the determination of the proper sentence differ, simply cannot operate "concurrently".

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538 See, for example, *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28].

539 (1977) 137 CLR 545 at 563.

356 The notion of "concurrent" operation, as that expression is used in s 300.4 of the Code, masks more than it reveals. To the extent to which s 300.4 suggests that there can be *simultaneous application* of the two laws, it is only if attention is confined to the possibility of simultaneous obedience to both laws (by abstention from the prohibited conduct) that simultaneous application of the laws is possible. And as has already been seen, the possibility of simultaneous obedience does not, without more, answer the question presented by s 109.

357 In this case, two "independent governments" existing in the one area have exercised powers in the *same* field of operation: the prohibition of trafficking in certain drugs. An essential premise for much, if not the whole, of the argument against inconsistency was that, although both the federal and State laws had the same field of operation, the federal law was not to be an exhaustive statement of rights and obligations in that field of operation. But the validity of that premise depends upon it being possible for the two laws to operate together. As the *General Motors Acceptance Corporation* case demonstrates, that is a result that can be achieved where the two laws in question imply terms of different content in the one contract. But in this case there can be no simultaneous application of both laws, only simultaneous obedience. Only one of the laws could be engaged in any particular case. Prosecution of one, whether to conviction or acquittal, would be a plea in bar to prosecution for the other. But more fundamentally than those considerations, at least in this case, where the punishments to be exacted are to be fixed according to different provisions of differing content, it is a legal nonsense (a perfect solecism) to say that two laws directed to the same subject matter which each create a crime (with identical elements but different modes of trial and punishment) can coexist. A choice must be made between them in any case in which it is alleged that a person has done what each prohibits.

358 Inconsistency between the two laws is not avoided by treating the federal Parliament as having by s 300.4 enacted that, despite their inconsistency, either law may be engaged according to the choice made by a prosecuting authority. The logical and constitutional infirmity of the proposition is self-evident. The proposition is logically infirm because it presupposes the availability of choice when that is the question for decision. The constitutional infirmity lies in the implicit assumption that the Parliament can decide whether or when s 109 is engaged regardless of whether the relevant law of the State is inconsistent with the relevant law of the Commonwealth.

359 The fundamental nature of the difficulty presented by the proposition that the separate administration of each law can somehow avoid inconsistency is further elucidated by asking: by what criteria is the choice between laws to be made by prosecuting authorities? Is the choice to be made according to whim or fancy? Surely not. Is it to be made according to a prosecutor's estimation of the likelihood of obtaining a unanimous jury verdict or the prosecutor's view of which system of fixing punishment is the more desirable? Again, surely not. Is it to be made, as was said to be the case, according to which police force

investigated the crime? Why should the accident of the application of police resources alter the penalty to which an offender is to be exposed?

360 If criteria are to be identified for a choice of this kind they must be found in the structure, scope and content of one or more of the Acts. But which Act? Neither the proper source of any relevant criteria nor their content is apparent. And if the relevant criteria were thought to include the existence of differences between mode of trial and punishment, those differences bespeak inconsistency. They do not provide any logical or otherwise sound basis in principle for choosing prosecution for one offence rather than the other.

361 The difficulties attending such a choice point to the existence of a more fundamental difficulty. A choice is available only if the two laws are not inconsistent. The two laws are not inconsistent only if the penalties prescribed by each are treated as no more than powers available to a sentencing court upon conviction. But that is to deny the fundamental premise for consideration of the application of s 109 in this case: that the laws in issue must be identified as both norm *and* sanction.

362 Of course it must be recognised that it is a commonplace of the criminal law that the conduct of an alleged offender may constitute more than one different crime. Prosecuting authorities must and regularly do choose what charge or charges will be preferred against such an offender. But reference to prosecutorial discretion in the present context is at best a distraction. It provides no answer to the issue that arises in this matter. The question at issue is whether the State law is valid. If it is not, no question of discretion arises. Asserting that there is a discretion assumes validity; it provides no argument in favour of that conclusion.

363 Moreover, it is to be observed that there is a real and radical difference between observing that one course of conduct may constitute several *different* crimes and this case. An offender's conduct will often constitute more than one crime. But that is because *different* aspects of a single course of conduct can be isolated as satisfying the elements of offences that are defined differently and attract distinct punishments. Here it is said that an alleged offender's conduct constitutes two crimes whose elements are *identical*.

364 The third reason to reject the submission that s 300.4 avoids what would otherwise be inconsistency is no less fundamental than the two that have already been considered. As already noted, the argument against inconsistency depended in large part upon converting what has hitherto been well recognised as a *sufficient* basis for identifying inconsistency (the federal law reveals an intention to cover the area exhaustively) into a *necessary* condition for inconsistency. That step must not be taken. Even as the argument was advanced, the generality of the proposition that "the test for inconsistency *always* turns on Commonwealth legislative intention" was acknowledged to require qualification for cases where

dual obedience was not possible or where a right or privilege given by one law was taken away or qualified by the other. And a further telling qualification was accepted in the course of argument. It was accepted that there could be cases where the penalties prescribed by the State and federal law could be so different that the State law would alter, impair or detract from the federal law. That is, it was accepted that if one law treated breach of a norm as warranting relatively modest punishment but the other treated breach of the same norm as attracting condign punishment, one law altered, impaired or detracted from the other. Which law was the more stringent does not matter. The concession that difference in punishment alters, impairs or detracts from the federal law demonstrates the infirmity of the proposition that lay at the centre of the argument against inconsistency.

365 The acceptance of any qualification to the proposition advanced by those who asserted there was no inconsistency between the laws denies its validity as a proposition of universal application. As has also been pointed out earlier, the argument against inconsistency confused premise with conclusion by converting a statement of conclusion into a premise for an argument that s 109 is not engaged.

366 On the assumption identified at the outset of these reasons (that the two laws prescribe offences having identical elements) the two laws prescribe different punishments and are inconsistent. Which is the more lenient is irrelevant. The other differences between the laws identified at the outset of these reasons do not point away from that conclusion. Those differences do not deny that the laws are directed to the same subject matter. Their existence is further demonstration that the laws cannot be applied together. The differences not being addressed in argument they need not be considered further.

367 Nor was it suggested that, if there were inconsistency between the two laws, the inconsistency would invalidate s 71AC of the Drugs Act only as to part. Correctly, no question of severance or reading down was said to arise.

Consequences

368 To hold that s 71AC of the Drugs Act is inconsistent with s 302.4 of the Code and invalid will contradict the evident and expressed wish of those who framed the Code. It is a conclusion that will likely affect the validity of other provisions of State law. It may be said that so to hold will lead to disruption to the administration of the criminal law because it will cast doubt on the validity of the convictions of offenders who were prosecuted under State laws.

369 Whether or not that fear would come to pass would require close examination of whether and how a conviction recorded would be set aside when the time for appeal has expired or an appeal has already been heard and determined. Whatever the outcome of that analysis in any particular case, it is to

be borne at the forefront of consideration that the issue of inconsistency of laws is fundamental to the framework of the system of government for which the Constitution provides. Proper formulation and application of constitutional principle cannot yield to considerations of what may be temporarily expedient or convenient. Nor can the wishes of those who promote or support particular legislation be given precedence over the proper application of the Constitution.

370 HEYDON J. Was the jury direction adequate? That turns on the correct interpretation of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Act"). The interpretation of the Act is relevant to two issues. The first is whether the operation of the Act is different from that assumed by the parties, the trial judge and the Court of Appeal. The second is whether s 109 of the Constitution renders the Act partly inoperative because of inconsistencies with provisions of the *Criminal Code* (Cth) ("the Code"); if so, the appellant was convicted of an offence not known to the law. In turn the interpretation of the Act may depend on the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter").

371 It is necessary, then, to ask the following questions:

(a) "Is any part of the Charter valid?" The answer is "No"[540].

(b) "Does s 5 of the Act apply to s 71AC?" The answer is "Yes"[541].

(c) "Did the Court of Appeal interpret s 5 of the Act correctly?" The answer is "Yes"[542].

(d) "Are ss 5 and 71AC of the Act inconsistent with ss 13.1, 13.2 and 302.4 of the Code and therefore inoperative?" The answer is "No"[543].

(e) "Has the appellant any valid complaint about the adequacy of the directions to the jury?" The answer is "No"[544].

Hence the appeal must be dismissed.

The facts

372 On 14 January 2006, the appellant, Vera Momcilovic, owned and occupied apartment 1409 at Regency Towers, 265 Exhibition Street, Melbourne. It was a three bedroom apartment. She resided there with Velimir Markovski. On 14 January 2006, two men, Anthony Sheen and David Moir, were observed by police officers to enter the building and to meet Mr Markovski, who escorted

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540 See below at [379]-[457].

541 See below at [458]-[463].

542 See below at [464]-[469].

543 See below at [470]-[486].

544 See below at [487]-[499].

them to the 14th floor. Messrs Sheen and Moir were followed from the building by police officers who found them to be in possession of 28 grams of methylamphetamine in packages of 14 grams each. As a result, police officers executed a search warrant at apartment 1409 that afternoon.

373 In the course of the search, they found in the freezer compartment of a bar-size refrigerator in the kitchen a plastic bag containing 64.6 grams of 50 percent pure methylamphetamine. In the crisper section of the refrigerator they found a plastic Tupperware container containing 20 smaller plastic bags containing various amounts of methylamphetamine from 0.9 grams to 98.6 grams with purities ranging from 16 percent to 50 percent with a total weight of 394.2 grams. In the kitchen cupboard above the sink they found a Moccona coffee jar containing 325.8 grams of a substance that included an indeterminate amount of methylamphetamine. In addition, they located two sets of electronic scales, a further bag of an undefined crystalline material, a smaller container of a white crystalline material described by Mr Markovski in evidence as "artificial sugar" to be added to the methylamphetamine, another coffee jar containing a white powder, a number of smaller plastic bags similar to those found in the crisper, and a spatula. In the rubbish bin they found remnants of plastic bags that matched those found in the possession of Messrs Sheen and Moir. And they located the sum of $165,900 in cash in a shoe box on a shelf in a "walk-in robe" off the master bedroom which the appellant shared with Mr Markovski.

374 Mr Markovski's DNA was discovered on the plastic bag that contained the Tupperware container in the crisper. Neither the appellant's DNA nor her fingerprints were found on any of the items seized.

375 Mr Markovski pleaded guilty to trafficking in methylamphetamine and cocaine.

376 The prosecution case was that the appellant's apartment was operating as a minor amphetamine factory in which Mr Markovski was conducting a business of diluting amphetamine and selling it. The prosecution alleged that the appellant was providing the facility from which the operation took place. The prosecution alleged that the appellant was aware that Mr Markovski was trafficking in methylamphetamine from her apartment and storing it there. The appellant's difficulty was that the incriminating items were large in number and were found all over the small apartment. They were items not normally found in apartments. The appellant invited the jury to believe that she was unaware of any of them – that she had never noticed the plastic bag containing drugs in the freezer compartment, or the plastic bags in the crisper section, or the Moccona coffee jar containing drugs, or the other items capable of use in the manufacture of drugs, or the large amount of cash. She said that she hardly used the refrigerator and that other items were found in cupboards that were not easy to gain access to. In a most courteous cross-examination, counsel for the prosecution asked some simple questions about the customary course of domestic

life and the improbabilities of her evidence in view of it. The jury evidently did not think she dealt with these questions convincingly. The trial judge considered that the appellant was closely pressed as to her knowledge of the prior drug convictions of Mr Markovski and that she dissembled in her evidence before admitting awareness of them. It is plain that the jury rejected the appellant's invitations and disbelieved the exculpatory evidence of Mr Markovski as well.

The charge

377 The charge was:

> "The Director of Public Prosecutions presents that Vera Momcilovic at Melbourne … on the 14th day of January 2006 trafficked in a drug of dependence namely Methylamphetamine."

The provisions of the Act

378 The conduct charged was contrary to s 71AC of the Act. It provides:

> "A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum)."

The expression "traffick" in relation to a drug of dependence is defined in s 70(1) as including:

> "…
>
> (c) sell, exchange, agree to sell, offer for sale or have in possession for sale, a drug of dependence".

The prosecution relied on the words "have in possession for sale". Section 5 of the Act provides:

> "Without restricting the meaning of the word ***possession***, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary."

Issue (a): Is any part of the Charter valid?

379 *No contradictor.* Two notable features of the case created some difficulties. It is notable for the number of points which either were raised for the first time in this Court and not raised in the Victorian courts, or were not raised by the parties in this Court but were raised by members of the Court. It is

also notable for the fact that on a key point – the constitutional validity of the Charter as a whole – there was no contradictor, although the question was occasionally alluded to in oral argument. Naturally the appellant supported the validity of the Charter, for it was a key element in her arguments. Naturally the first respondent and the Attorney-General for the State of Victoria, who was the second respondent, supported the validity of the legislation enacted by the Victorian legislature, for they were organs of the Victorian Government. Naturally the Victorian Equal Opportunity and Human Rights Commission, the third respondent, argued for the validity of the Charter. Naturally the Australian Capital Territory Attorney-General did so, for it has legislation similar to the Charter. Naturally the Human Rights Law Centre Ltd ("the Centre") did so. And, whether naturally or not, all the other interveners did so, although the Attorney-General for the State of Western Australia, and to a lesser extent the Attorney-General of the Commonwealth, seemed to hover on the brink of attack.

380 *Two characteristics of the Charter*. The Charter may reflect much of what is best and most enlightened in the human spirit. But there are some virtues that cannot be claimed for it.

381 One is originality. For a great many of the rights it describes already exist at common law or under statute. In that form, the rights are worked out in a detailed, coherent and mutually consistent way. Thus the very general rights to liberty and security in s 21 may be compared with the incomparably more specific and detailed rules of criminal procedure which exist under the general law. Those rules are tough law. Infringement can lead to criminal punishment, damages in tort and evidentiary inadmissibility. They were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience. Then there has been introduced in recent decades a mass of detailed anti-discrimination and other human rights legislation, both State and federal. And there are the roles of State, federal and other ombudsmen. As a former Commonwealth Ombudsman has remarked[545]:

> "The metres of books about human rights on law library shelves rarely mention the Ombudsman as a human rights agency. The focus overwhelmingly is upon bills of rights, courts and international instruments. Yet … complaint investigation by the Ombudsman is directly concerned with human rights issues, in areas as diverse as law enforcement, withdrawal of social security benefits, detention of immigrants, treatment of young children, imposition of taxation penalties, and the exercise of government coercive power."

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545 McMillan, "The Ombudsman and the Rule of Law", paper delivered at the Public Law Weekend, 5-6 November 2004 at 15.

382 Another virtue which the Charter lacks is adherence to key values associated with the rule of law – and the protection of human rights is commonly, though not universally[546], thought to be closely connected to the rule of law. One value associated with the rule of law from which the Charter departs is certainty, particularly in s 7(2)[547]. Application of the Charter is very unlikely to make legislation more certain than it would have been without it. A further value associated with the rule of law from which the Charter departs is non-retrospectivity. Section 49(1) provides:

> "This Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement."

Thus the Charter applies to the very numerous enactments existing before it came into force. The Charter can also affect conduct carried out under those enactments before that time, because conduct carried out in reliance on a pre-Charter interpretation of legislation, and lawful if that interpretation is correct, may retrospectively be rendered unlawful by a new interpretation now compelled by the Charter.

383 The correct interpretation of the Charter is thus a matter of fundamental importance, for past as well as future legislation.

384 *Approaching the interpretation of the Charter.* There are several reasons for not interpreting the Charter narrowly.

385 First, if ever there were legislation which is on its face reforming and remedial in character, it is the Charter. Its very name is significant, with its echoes of Magna Carta, of the French Charter of 1814 and of the People's Charter of 1838. Reforming and remedial legislation, particularly human rights legislation, is to be interpreted amply, not narrowly[548]. As Cooke P said[549]:

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546 Raz, "The Rule of Law and Its Virtue", (1977) 93 *Law Quarterly Review* 195.

547 Discussed below at [408]-[439].

548 Examples where the principle has been applied to human rights legislation in specific fields include *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433; [1984] HCA 14 (Aboriginal land rights); *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 372; [1991] HCA 49 (anti-discrimination legislation); *IW v City of Perth* (1997) 191 CLR 1 at 12; [1997] HCA 30 (equal opportunity legislation).

549 *R v Butcher* [1992] 2 NZLR 257 at 264.

> "What can and should now be said unequivocally is that a parliamentary declaration of human rights and individual freedoms, intended partly to affirm … commitment to internationally proclaimed standards, is not to be construed narrowly or technically."

386 Secondly, s 32 of the Charter, which relates to the interpretation of statutory provisions in a way that is compatible with human rights, being a statutory provision, must itself be interpreted in a way that is compatible with human rights – that is, amply.

387 Thirdly, the more narrowly the Charter is interpreted, the more it will come to correspond only with various rules which can only be overturned by clear legislative words pursuant to what is sometimes called the "principle of legality"[550], and hence the less point it will have.

388 Fourthly, the Preamble is relevant:

> "On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.
>
> This Charter is founded on the following principles –
>
> - human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
> - human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
> - human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
> - human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters."

These are wide and important principles. Legislation which is founded on them cannot be interpreted in any restrictive fashion.

389 Fifthly, although normally recourse to travaux préparatoires is barren and useless, the generality and obscurity of the Charter[551] requires them to be

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550 See below at [444].

551 These and similar descriptions below of the statutory language are not criticisms of those who drafted the Charter. The drafting is in large measure based on

(Footnote continues on next page)

considered, both for the present purpose and for other purposes[552]. For example, the Attorney-General in his Second Reading Speech said[553]:

> "Australia is the last major common law-based country that does not have a *comprehensive* human rights instrument that *ensures* that *fundamental human rights* are *observed* and that the corresponding obligations and responsibilities are *recognised*." (emphasis added)

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legislation in other jurisdictions. The language was carefully chosen for particular purposes.

552 The *Interpretation of Legislation Act* 1984 (Vic), s 35, provides:

> "In the interpretation of a provision of an Act or subordinate instrument –
>
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and
>
> (b) consideration may be given to any matter or document that is relevant including but not limited to –
>
> …
>
> (ii) reports of proceedings in any House of the Parliament;
>
> (iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and
>
> (iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies."

Section 35(b)(ii) permits recourse to the Second Reading Speech, s 35(b)(iii) to the Explanatory Memorandum, and s 35(b)(iv) to the Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005). It is noteworthy that s 35 does not contain restrictions of the kind imposed by s 15AB(1) and (3) of the *Acts Interpretation Act* 1901 (Cth).

553 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1290.

"Speak for England!" cried out Leo Amery, and the Attorney-General for the State of Victoria seems to have decided to speak not just for Victoria, but for all Australia. The emphasised words are strong words. They send the message that Australia's benighted isolation on a lonely island lost in the middle of a foggy sea must be terminated. And if the Charter is to be *comprehensive*, and is to *ensure* both *observance* and *recognition* of *fundamental human rights*, it must be interpreted with some amplitude. In addition, the Attorney-General said[554]:

> "This bill further strengthens our democratic institutions and the protections that currently exist for those human rights that have a strong measure of acceptance in the community – civil and political rights. We must always remember that the principles and values which underlie our democratic and civic institutions are both precious and fragile."

The precious and fragile nature of these principles and values points to the view that the Charter will have to be interpreted so as to remove the fragility and preserve the preciousness. The same conclusion follows from the Attorney-General's statement that the Bill "will be a powerful tool"[555].

390 If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open[556]. One question here is whether the course of reading the Charter so as to validate it is reasonably open.

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554 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1290.

555 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1290.

556 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28]; [2000] HCA 33. See also *Davies and Jones v The State of Western Australia* (1904) 2 CLR 29 at 43; [1904] HCA 46; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 127 and 138; [1925] HCA 53; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; [1926] HCA 58; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267; [1945] HCA 30; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 374; [1975] HCA 62; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 14; [1992] HCA 64; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 504 [71]; [2003] HCA 2; *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 161 [355]; [2006] HCA 52; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4.

391 *The nature of judicial power in relation to the common law.* William Paley said[557]: "The first maxim of a free state is, that the laws be made by one set of men, and administered by another". Legislators make the laws. Judges administer them. Thus in *Osborn v Bank of the United States*, Marshall CJ said, speaking of statute law[558]:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

And in *Wayman v Southard* he said[559]:

> "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."

It is necessary to do so in this appeal.

392 In contrast, outside the field of statute law, there is a judicial power to change common law and equitable rules. The courts are entitled to fulfil the "purposes of developing the law, maintaining its continuity and preserving its coherence."[560] To that end, they may "seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against [unforeseen] instances which in reason might be subsumed thereunder."[561]

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557 *The Principles of Moral and Political Philosophy*, 10th American ed (1821) at 389.

558 22 US 738 at 866 (1824).

559 23 US 1 at 46 (1825). The first 20 words were quoted with approval by Isaacs J in *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 90; [1915] HCA 17.

560 Dixon, "Concerning Judicial Method", (1956) 29 *Australian Law Journal* 468 at 475.

561 Dixon, "Concerning Judicial Method", (1956) 29 *Australian Law Journal* 468 at 472.

393 However, there are limits on the judicial power to change common law and equitable rules. In *Breen v Williams*[562], Gaudron and McHugh JJ said:

> "Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles. The judges of Australia cannot, so to speak, 'make it up' as they go along. It is a serious constitutional mistake to think that the common law courts have authority to 'provide a solvent'[563] for every social, political or economic problem. The role of the common law courts is a far more modest one.
>
> In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the 'new' rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions."

394 In *Mabo v Queensland (No 2)*[564], Brennan J employed a colourful metaphor:

> "In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England."

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562 (1996) 186 CLR 71 at 115; [1996] HCA 57. See also at 99 per Dawson and Toohey JJ.

563 *Tucker v United States Department of Commerce* 958 F 2d 1411 at 1413 (7th Cir, 1992).

564 (1992) 175 CLR 1 at 29; [1992] HCA 23.

395 And Holmes CJ said[565]:

> "We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume [the power in dispute]. We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past."

396 Thus the courts seek not to "overstep the boundary which we traditionally set for ourselves, separating the legitimate development of the law by the judges from legislation."[566] There are "limits to permissible creativity for judges" and there is "forbidden territory"[567]. The following are among the factors relevant to marking the limits between what is permitted and what is forbidden: whether the rule being changed is seen as dealing with "[f]undamental legal doctrine", for that "should not be lightly set aside"[568]; whether the "solution is doubtful", in which case the matter is best left to the legislature[569]; whether the change is large or small, radical or insignificant; whether the courts have particular expertise in assessing the merits of the change and the methods by which it is to be effectuated; whether the Executive and the legislature have superior methods of investigating the need for change[570], and of persuading the public to support it or at least accept it; whether the change deals with controversial moral issues[571], or "[d]isputed matters of social policy", rather than "purely legal problems"[572];

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565 *Stack v New York, NH & HR Co* 58 NE 686 at 687 (Mass, 1900).

566 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 173 per Lord Goff of Chieveley.

567 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 328 [46] per Lord Steyn.

568 *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 28 per Lord Lowry.

569 *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 28 per Lord Lowry.

570 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 335 [77].

571 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 328 [46].

572 *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 28 per Lord Lowry.

whether the change will fail to produce "finality or certainty"[573]; whether the change will destabilise or render unclear or incoherent other parts of the law[574]; whether the field is one in which the legislature has been active[575], or one in which the legislature "has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched"[576]; whether the change will have "enormous consequences" for important institutions like "insurance companies and the National Health Service"[577]; and whether argument in favour of the change has been cursory or not[578].

397 It is very hard to predict how these factors will operate in a given case. Different minds give them different weight. Thus in 1992 Lord Keith of Kinkel said[579]: "the rule that money paid under a mistake of law is not recoverable … is … too deeply embedded … to be uprooted judicially." Yet six years later the House of Lords decided, by bare majority, to uproot it, because that majority took "a more robust view of judicial development" than Lord Keith[580].

398 *Judicial power and statutes.* The extent of judicial power to change the common law and equitable rules may be limited, and controversial at the margin, but it exists. In contrast, at common law judicial power to change the meaning of valid statutes does not exist. There is only power to ascertain that meaning by interpretation. That inevitably flows from the duty to resolve controversies about statutory meaning. But interpretation is distinct from amendment. "Amendment is a legislative act. It is an exercise which must be reserved to Parliament."[581] It does not extend to the performance of a legislative function. The "rewriting of

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573 *Myers v Director of Public Prosecutions* [1965] AC 1001 at 1021 per Lord Reid.

574 *Gregg v Scott* [2005] 2 AC 176 at 221 [172].

575 *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 24-26 and 40-41.

576 *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 28 per Lord Lowry.

577 *Gregg v Scott* [2005] 2 AC 176 at 198 [90] per Lord Hoffmann.

578 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 327 [43]-[44] and 334 [74].

579 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 154.

580 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 375 per Lord Goff of Chieveley.

581 *R v Lambert* [2002] 2 AC 545 at 586 [81] per Lord Hope of Craighead.

… statute[s]" is "the function of the Parliament, not a Ch III court"[582]. A federal statute which purports to delegate a legislative function like rewriting statutes to a court is invalid[583].

399 These principles have important consequences. One example relates to s 12 of the *Native Title Act* 1993 (Cth), which gave "the common law of Australia in respect of native title" the force of the law of the Commonwealth. Section 12 was held invalid[584]. The common law is the body of law which the courts create and define. Section 12 thus delegated to the judicial branch of government a legislative power to make law. Another example is s 15A of the *Acts Interpretation Act* 1901 (Cth), which is similar to s 6 of the *Interpretation of Legislation Act* 1984 (Vic), and which provides:

> "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

Section 15A cannot give power to a court to hold valid the provisions of an enactment from which void provisions have been severed, unless the enactment "itself indicates a standard or test which may be applied for the purpose of limiting, and thereby preserving the validity of, the law"[585] and "the operation of the law upon the subjects within power is not changed by placing a limited construction upon the law"[586]. This is because, as Rich and Williams JJ

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582 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

583 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 93; [1931] HCA 34; *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 66; [1943] HCA 47; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 349; [1995] HCA 16.

584 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373; [1995] HCA 47.

585 *Pidoto v Victoria* (1943) 68 CLR 87 at 109 per Latham CJ; [1943] HCA 37. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485; [1991] HCA 29; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339, 349, 355 and 372.

586 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339, applying *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 493; [1971] HCA 40. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 486; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 501-503; [1996] HCA 56.

said[587]: "the Court is not a legislative but a judicial body. It cannot legislate; that is the function of Parliament." In Latham CJ's words[588]: "The Court cannot re-write a statute and so assume the functions of the legislature." And, said Dixon J, federal legislation cannot "attempt an inadmissible delegation to the Court of the legislative task of making a new law from the constitutionally unobjectionable parts of the old."[589]

400 Hence if jurisdiction is conferred on a court, it must be governed by "legal standards or criteria": it is insufficient if there is "an attempt to delegate to the … courts the essentially legislative task of determining 'the content of a law as a rule of conduct or a declaration as to power, right or duty'."[590]

401 *The definition of "judicial power".* In *R v Kirby; Ex parte Boilermakers' Society of Australia*[591] this Court held that it was not possible for the legislature either to confer the judicial power of the Commonwealth on a non-judicial body or to add "to the judicial powers of a court set up as part of the national judicature some non-judicial powers that are not ancillary but are directed to a non-judicial purpose."[592]

402 A celebrated example of legislation conferring non-judicial powers of that type arose in *R v Spicer; Ex parte Australian Builders' Labourers' Federation*[593]. Dixon CJ, McTiernan, Kitto and Taylor JJ (Williams and Webb JJ dissenting) held that the power conferred by s 140 of the *Conciliation and Arbitration Act*

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587 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 252; [1948] HCA 7.

588 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 164.

589 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 372.

590 *Thomas v Mowbray* (2007) 233 CLR 307 at 344-345 [71] per Gummow and Crennan JJ; [2007] HCA 33, quoting *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82. See also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102].

591 (1956) 94 CLR 254; [1956] HCA 10.

592 (1956) 94 CLR 254 at 271 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; see also at 289.

593 (1957) 100 CLR 277; [1957] HCA 81. Other examples include *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144; [1953] HCA 11; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361; [1970] HCA 8.

1904 (Cth) was not part of the judicial power of the Commonwealth, and was invalid because it was conferred on a federal court. Section 140(1) provided that the Commonwealth Industrial Court might disallow any rule of an organisation which in the opinion of the Court:

> "(a) is contrary to law, or to an order or award;
>
> (b) is tyrannical or oppressive;
>
> (c) prevents or hinders members of the organization from observing the law or the provisions of an order or award; or
>
> (d) imposes unreasonable conditions upon the membership of any member or upon any applicant for membership".

403 Kitto J said that one indicium of non-judicial power arose where it was to be exercised "upon considerations of general policy and expediency alien to the judicial method."[594] He went on to set out subtle reasoning. Its subtlety ought not to be damaged by summary or undue truncation[595]:

> "Section 140 seems to me an example of a provision which, though it empowers a court to do an act – the disallowing of a rule – which is not insusceptible of a judicial performance, nevertheless is found to mean, on a clear preponderance of considerations, that the function for which it provides is to be performed as an administrative function, with a more elastic technique, and more of an eye to consequences and industrial policy generally, than could properly be expected of a court. … The kinds of rules which may be disallowed are described as possessing any of several qualities which are indicated in terms so broad as to be more appropriate for conveying general conceptions to a person engaged administratively in performing a function conceived of as part of a system of industrial regulation than for stating, to a body acting judicially, grounds of jurisdiction which it is to interpret and apply with precision. … Moreover – and this is the most important consideration of all – s 140 belongs to a group of provisions, comprising all those which deal with the registration and regulation of industrial organisations, which as a group are characterised by the purpose of facilitating the prevention and settlement of inter-State industrial disputes by conciliation and arbitration under the Act. It is difficult to think that s 140 intends a consideration of an organisation's rules to be undertaken otherwise than with a view to the improvement of the organisation as an instrument for the representation of

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594 (1957) 100 CLR 277 at 305.

595 (1957) 100 CLR 277 at 305-306.

> employees in everything connected with the maintenance and restoration of industrial harmony. To read the section as creating a jurisdiction to apply fixed standards to particular situations, and to make decrees with a judicial disregard of consequences, would be plainly incongruous with the scheme of the Act and the terms of the section. In particular, it seems to me to be required, as a matter of practical good sense, that in forming an opinion as to whether a rule of an organisation is 'tyrannical' or 'oppressive', or imposes 'unreasonable' conditions upon the membership of a member or upon an applicant for membership, the repository of the power should look to the effect which the existence or non-existence of the rule will be likely to have upon the working of the machinery of conciliation and arbitration under the Act; and this points unmistakably to an intention that the performance of the function provided for by the section is to be approached in a manner incompatible with the restraints peculiar to judicial power."

In the same case Dixon CJ said[596]:

> "the criteria set by pars (b), (c) and (d) are vague and general and give much more the impression of an attempt to afford some guidance in the exercise of what one may call an industrial discretion than to provide a legal standard governing a judicial decision. Parenthetically, it may be remarked that the meaning is by no means self-evident of the expression 'impose unreasonable conditions upon the membership of any member'."

404 In *Attorney-General (Cth) v Alinta Ltd* Gleeson CJ said[597]:

> "[T]here are features of the judicial process, fundamental to its nature, that make it ill-suited to the application of certain kinds of policy and the exercise of certain kinds of power. Judges are appointed on the basis of their legal knowledge and experience. Individual judges may have other talents or interests, but what these might be is usually unknown, and is not the subject of any process of assessment, formal or informal. The material on which they base their decisions is provided, and tested, in accordance with rules of procedure and evidence. The decisions of the parties and their lawyers, made in an adversarial setting, impose limitations upon the information according to which a court legitimately may proceed. The parties to litigation, acting within the limits set by the law, define the issues to be resolved and the courses open to be followed by way of judicial order. These constraints, although not absolute or inflexible, influence the nature of the judicial process, and affect the suitability of

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596 (1957) 100 CLR 277 at 290.

597 (2008) 233 CLR 542 at 551 [5]; [2008] HCA 2.

> that process for the exercise of certain forms of governmental power. It is to be expected that the Parliament, in deciding whether a certain kind of authority should be exercised judicially, or otherwise, would take account of the characteristics, and of the strengths, and the limitations, of the judicial method."

405 In contrast to *R v Spicer*, in *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section*[598] a prohibition of "oppressive, unreasonable or unjust" rules was upheld.

406 These authorities reveal that the courts have difficult judgments to make in assessing whether they have been given tasks outside judicial power.

407 *Key provisions of the Charter.* Section 32(1) of the Charter provides:

> "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

Section 32(2) provides:

> "International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision."

The expression "human rights" is defined in s 3(1) as meaning "the civil and political rights set out in Part 2". The first provision in Pt 2 is s 7. It provides:

> "(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
>
> "(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
>
> (a) the nature of the right; and

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598 (1960) 103 CLR 368; [1960] HCA 46. For examples of other holdings that judicial power existed, see *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25; [1943] HCA 13; *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87; [1974] HCA 8; *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194; [1976] HCA 48.

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person."

Section 5 provides:

> "A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included."

It is also relevant to set out some provisions in Pt 3 of the Charter. Section 28(1) provides:

> "A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill."

Section 28(2) provides for the "statement of compatibility" to be laid before the House before the Second Reading Speech. Section 28(3) deals with the contents of the statement of compatibility. It requires a statement whether, in the member's opinion, the Bill is "compatible with human rights" and, if so, how it is compatible. It also requires the statement to state, if, in the member's opinion, any part of the Bill is "incompatible with human rights, the nature and extent of the incompatibility." Section 38(1) provides:

> "Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right."

Section 38(2) provides:

> "Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision."

408 *Outline of conclusion on validity of s 7(2).* Section 7(2) is invalid. It is convenient at this point to outline why. In carrying out the task imposed by s 32(1) of considering whether a statutory provision is compatible with human rights, a court must ask what, relevantly, a human right is, and how far it can be subject to limits. Section 7(1) provides that Pt 2 sets out the human rights that Parliament specifically seeks to protect and promote. Sections 8-27 contain a long list of rights in very general form, in contrast with their detailed statement in common law and statutory rules. Further, individual rights – both the rights appearing in ss 8-27 and other rights referred to in s 5 – tend to collide with each other when stated in the abstract. The need for rights to be reconciled and collisions to be avoided is recognised in the third point in the Preamble[599], in s 5, and in s 7(3). And behind s 7(2) there is an assumption that just as human rights may be recognised and vindicated by common law and statutory rules, so they may be limited by them – for various reasons, one of which is to avoid collisions between them.

409 The rights which the Charter describes in ss 8-27 and refers to in s 5 are rights subject under law to the limits described in s 7(2). In assessing under s 32(1) whether a particular interpretation of a statutory provision is compatible with a human right, it is necessary to decide what a reasonable limit to that right is according to s 7(2) criteria. The criteria by which the limit is to be decided are so vague that s 7(2) is an impermissible delegation to the judiciary of power to make legislation.

410 Before developing that reasoning, it is desirable to state the submissions in this Court.

411 *Submissions on the relevance of s 7(2) to s 32(1).* The appellant submitted that the Court of Appeal erred in holding, first, that s 7(2) is "not to be taken into account in the interpretive exercise required by s 32(1) of the Charter" and, secondly, that "under s 32, when determining what is 'possible' consistently with the purpose of the provision in question, the court is constrained by the ordinary principles of statutory construction." The appellant criticised the Court of Appeal for adopting an unduly restricted interpretation of s 32(1) as merely codifying the common law principle of legality. This was a correct submission, but also a dangerous one: for if s 32(1) only does that, it would probably not be invalid, but the more it does, the greater the risk to its validity. The appellant submitted that s 7(2) was relevant to the s 32(1) process in requiring the following steps. The first step was to ascertain the meaning of the statute in accordance with ordinary principles of statutory interpretation: she called that "the ordinary meaning". The second step was to ascertain whether the ordinary meaning was apparently incompatible with a relevant right or freedom. If so, the

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599 Set out at [388] above.

third step was to ascertain whether that incompatibility was nevertheless a justified limit on the right in the light of s 7(2). If the apparent incompatibility was a justified limit, then the legislation was not incompatible with human rights and the ordinary meaning, ascertained in the first step, would prevail. The fourth step must be taken if the ordinary meaning involves an unjustified limit on the right. In that event the court, pursuant to s 32(1), must strive to interpret the legislation in a way that is compatible, or less incompatible, with the right in question if it is reasonably possible, consistently with the purpose of the legislation, to do so. The fifth step arises if it is not reasonably possible to find a compatible (or less incompatible) meaning: in that event the ordinary meaning must be adopted and the Supreme Court may make a declaration of inconsistent operation under s 36.

412 Subject to differences which it is not necessary to resolve, the appellant's submission that s 7(2) forms part of the "interpretive exercise" under s 32(1) was supported by the Attorney-General for the State of Victoria, the Victorian Equal Opportunity and Human Rights Commission, and the Australian Capital Territory Attorney-General. On that submission, the command in s 32(1) to interpret statutory provisions in a way compatible with human rights refers to human rights, not in the absolute senses described in ss 8-27, but within reasonable limits after s 7(2) scrutiny.

413 The Centre, on the other hand, submitted to the Court of Appeal that s 7(2) plays no role in the process of statutory interpretation required by s 32(1). The Court of Appeal agreed[600]. The Centre repeated the submissions in this Court[601].

414 *The submissions considered.* The appellant's submission is supported by the following considerations.

415 The first consideration springs from the Centre's argument that s 32(1) required statutory provisions to be interpreted in a way that is "compatible with human rights", not "compatible with human rights as reasonably limited in accordance with s 7(2)". What is a "human right"? The expression is defined in s 3(1) as meaning not merely something listed in ss 8-27, but the civil and political rights set out in Pt 2, namely ss 7-27, including s 7(2). That is, in assessing what human rights exist before the s 32(1) process of interpretation is completed, it is necessary to apply s 7(2) to ss 8-27. Where a statutory provision

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600 *R v Momcilovic* (2010) 25 VR 436 at 446 [35] (2) and 465-467 [105]-[110]. The difficulties of interpreting s 7 in relation to s 32 are discussed by Allan, "The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism", (2006) 30 *Melbourne University Law Review* 906 at 917-920.

601 See below at [415]-[426].

imposes limits on human rights, those limits are scrutinised under s 7(2). The relevant rights are not those which correspond to the full statements in ss 8-27, but those which have limits justified in the light of s 7(2).

416 The next consideration is that ss 28(1), 32(1) and 38(1) are fundamental operative provisions. They reflect the "main purposes" expressly enacted in, respectively, ss 1(2)(d), 1(2)(b) and 1(2)(c). They reveal "compatibility" as a central conception of the Charter. The function of s 28(1) is to ensure that all provisions proposed for enactment are compatible with human rights; the function of s 32(1) is to ensure that all statutory provisions are interpreted in a way that is compatible with human rights; and the function of s 38(1) is to ensure that public authorities act compatibly with human rights. The concept of "compatibility" is also referred to in ss 28(3), 30 and 31(1). As the Victorian Equal Opportunity and Human Rights Commission submitted, the close association of "compatibility" with s 7(2) analysis is supported by ss 28 and 38. The "statement of compatibility" required by s 28(1) must, by reason of s 28(3)(a), state whether the Bill is "compatible with human rights". That must refer to human rights as reasonably limited by s 7(2). Otherwise a member of Parliament who introduced a Bill limiting human rights, but only in a way that was demonstrably justified in the light of s 7(2), would be required by s 28(3)(b) to state that the Bill was "incompatible with human rights". That would be an untruthful statement, since the Bill actually was compatible with them. It is absurd to interpret the Charter as compelling untruthful statements by members of the legislature to one of its houses. And if in s 38(1) "incompatible with a human right" meant "incompatible with a human right in its absolute form, even if reasonable limits were imposed on it pursuant to s 7(2)", then a public authority would act unlawfully if it acted incompatibly with the absolute human right notwithstanding that it acted compatibly with the right limited in the light of s 7(2). This would be a harsh result. It would be particularly harsh because many "public authorities" falling within the definition in s 4(1) will be quite junior officials like police officers who have to act on short notice without legal guidance by reference to the apparent meaning of legislation, not a different s 32(1) meaning. The Centre answered by pointing to s 38(2). But that only applies where the public authority could not reasonably have acted differently or made a different decision. It does not apply where the public authority has choices.

417 Hence if the appellant's submission were not sound, s 7(2) would have no application to the principal operative provisions of the Charter. That would be a peculiar result in the light of its location in the Act in Pt 2, the first Part of the Charter containing substantive provisions, and in the first substantive provision, just before the list in ss 8-27 of what s 7(1) describes as "the human rights that Parliament specifically seeks to protect and promote."

418 The appellant's submission is supported by the Explanatory Memorandum. Not surprisingly, it described s 7(2) as one of the "key provisions" that

"recognises that no right is absolute and that there may be various limitations imposed on any right."[602] The Explanatory Memorandum also said that s 7(2)[603]:

> "reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests. The operation of this clause envisages a balancing exercise between Parliament's desire to protect and promote human rights and the need to limit human rights in some circumstances."

And the Explanatory Memorandum additionally said that s 32(2) will operate as a guide to the nature and meaning of the human rights listed in Pt 2[604]. Section 32(2) appears immediately after the command in s 32(1) that all statutory provisions be interpreted in a way compatible with human rights. The Explanatory Memorandum thus contemplates a linkage between s 32 and s 7(2).

419 The appellant's submission is also supported by the Second Reading Speech delivered by the Attorney-General[605]:

> "Part 2 reflects that rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests. Clause 7 is a general limitations clause that lists the factors that need to be taken into account in the balancing process. It will assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified in a free and democratic society. Where a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right."

The tendency of rights to collide, their need to be "balanced" against each other and the importance of their co-existence with each other are also recognised in s 7(3), s 5 and the third point of the Preamble. The Attorney-General's speech perceives the human right against which something else is being tested – a clause in a Bill pursuant to s 28(1), a statutory provision pursuant to s 32(1) or an action

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602 Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 7.

603 Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 9.

604 Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 8.

605 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1291.

taken pursuant to s 38(1) – as a right considered in the light of s 7(2), not independently of it. The same perception appears in the report which led to the legislation[606].

420 The Court of Appeal said that if s 7(2) were employed in interpreting legislation, "[j]udges and tribunal members, as well as public officials, would have to determine whether the relevant provision imposed a justifiable limit before determining finally how the provision was to be interpreted." This, it was said, "would inevitably [result in] inconsistencies in [the] application [of s 7(2)] and uncertainties in interpretation."[607] The force of this point is diminished by the fact that whatever approach is taken to s 32(1) and s 7(2), the difficulties in the field with which the Charter is dealing will mean that the Charter, perhaps inevitably, will lead to inconsistencies in application and uncertainties in interpretation.

421 The Court of Appeal considered that the approach it was rejecting would lead to a particular statutory provision having a different meaning depending on the offence charged. That is not so. Avoidance of that outcome would be a matter to be taken into account under both s 7(2) and s 32(1).

422 The Court of Appeal saw it as "fundamental" that s 32(1) was promoting and protecting the human rights enacted in the Charter. Their Honours said it was not the case "that s 32(1) was only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right."[608] This assumes the answer to the question raised. It also gives no significance to s 1(2)(b), which provides:

> "The main purpose of this Charter is to protect and promote human rights by –
>
> …
>
> (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights".

That refers to what is "compatible with human rights", not one particular human right considered absolutely and in isolation.

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606 Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) at 118.

607 *R v Momcilovic* (2010) 25 VR 436 at 467 [110].

608 *R v Momcilovic* (2010) 25 VR 436 at 466 [107].

423 The approach of the Centre would lead to the courts finding more legislation to be incompatible with human rights, or to be something which "breaches"[609] human rights, even though the incompatibility was minor and even though its existence flowed only from the need to establish a reasonable and justified limit – thereby, for example, operating to protect some other right. The Centre said its approach protected human rights better because it protected an absolute form of them. If the Centre's approach were correct, what is the significance of s 7(2)? "[I]t being improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect, one should look to see whether any other meaning produces a more reasonable result."[610] The Centre recognised and endeavoured to meet the difficulty. It submitted that while s 7(2) had nothing to do with s 32(1), it had three possible fields of work. One related to judicial review of a provision. The flaw in this submission is that the Charter does not provide for judicial review: ss 32(3) and 36(5). The Court of Appeal quoted from Elias CJ's dissenting judgment in *R v Hansen*[611], which referred to "a soft form of judicial review". But Elias CJ said that that was inconsistent with the *New Zealand Bill of Rights Act* 1990 (NZ), s 4, which does not provide for judicial review either. The second possible field of work for s 7(2) was said to be its relevance when the Supreme Court was deciding whether to exercise its discretion to make a declaration of inconsistent interpretation under s 36(2) that the Court was of the opinion that a statutory provision cannot be interpreted consistently with a human right (ie compatibly pursuant to s 32(1)). There is no indication in s 36 that s 7(2) is relevant in this way. On the Centre's approach s 7(2) is not material in relation to the s 32(1) conclusion that there was incompatibility with a human right, and, if that is so, it is difficult to see why it would be material at the s 36 discretion stage. The third possible field of work was to operate as a reminder "to those making or advising on legislative measures potentially limiting of human rights." That renders s 7(2) only a precatory provision with no practical effect. Section 7(2) would appear to have a much greater significance than that.

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609 *R v Momcilovic* (2010) 25 VR 436 at 446 [35] (2).

610 *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 per Gummow J, a passage which paraphrased what Lord Reid said in *AMP Inc v Utilux Pty Ltd* [1972] RPC 103 at 109, and which was approved in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70]; [1998] HCA 28. See also *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 and 419; [1905] HCA 11.

611 [2007] 3 NZLR 1 at 9 [6].

424 The Centre submitted that the origins of s 7(2) lay in s 1 of the *Canadian Charter of Rights and Freedoms* (which is part of the *Constitution Act* 1982 (Can)), s 36 of the Constitution of the Republic of South Africa, and s 5 of the *New Zealand Bill of Rights Act*. The Centre submitted that this "provenance" supported the Court of Appeal's approach. That cannot be so: for in Canada and South Africa there is judicial review of legislative validity, but not in Victoria or New Zealand.

425 The Centre advanced the proposition that a limitation on a human right could not be "demonstrably justifiable" under s 7(2) without evidence. If that proposition is correct, it contradicts the limited role which other submissions of the Centre give to s 7(2). For example, how would the deliberations of legislators and those advising them tie in with the reception of evidence and other material on the topics identified in s 7(2) with a view to demonstrating justification? If the Centre's proposition is correct, it is certainly true, as the Centre said, that it is difficult to reconcile the appellant's approach with the view that a court's role under s 32(1) is only its traditional role of interpreting legislation. But that is not the only reason for doubting that view[612].

426 The Centre contended that its opponents had not explained how s 7(2) could be applied as part of the interpretative process. In assessing whether "limits" on a human right imposed by a "law" are "reasonable", a court had to interpret the law. Hence, said the Centre, s 7(2) "cannot form part of the interpretive process because the proportionality assessment that it requires cannot be undertaken until a construction has been reached." One answer is that while the need for a particular type of s 7(2) analysis may be prompted by the particular field in which a statutory provision, whatever its precise meaning, is operating, it was not necessary for the s 7(2) analysis itself to be carried out with close reference to the terms of the statutory provision after arriving at a conclusion as to what they mean. Another answer to it lies in the appellant's contention that her five step process, or something functionally similar, must be employed.

427 Hence the appellant was correct to submit that s 7(2) is central to the interpretation process to be carried out under s 32(1). That conclusion requires attention to be given to the detail of s 7(2).

428 *The language of s 7(2).* In *Precision Data Holdings Ltd v Wills* Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ said[613]:

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612 See below at [440]-[455].

613 (1991) 173 CLR 167 at 189; [1991] HCA 58.

> "if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power."

Section 7(2) gives a court power to "determine what legal rights and obligations should be created" by giving it the power to decide the legal extent of the limit to a human right. The limit is then the criterion against which a particular statutory provision is measured under s 32(1) to determine whether it can be interpreted "in a way that is compatible with human rights." The limit to a human right must be "reasonable". What is the relevant criterion of reason? What can be "justified" – and not only justified, but "demonstrably" justified. What is the difference between that which is "justified" and that which is "demonstrably justified"? The shrill, intensifying adverb merely highlights the vacuity of the verb. The next question asks what can be demonstrably justified in a "free and democratic society" – and not just any free and democratic society, but one "based on human dignity, equality and freedom". Section 7(2) then calls for the "taking into account [of] all relevant factors". The criteria for identifying the relevance of a particular factor are not defined. But a non-exhaustive list of five relevant factors then appears. The first (s 7(2)(a)) is the "nature of the right" (but not its "purpose" (cf s 7(2)(b)) or its "extent" (cf s 7(2)(c)). The second (s 7(2)(b)) is the importance "of the purpose of the limitation" – not the importance of the limitation itself. The third (s 7(2)(c)) is the "nature and extent of the limitation". The fourth (s 7(2)(d)) is the "relationship between the limitation and its purpose". The fifth (s 7(2)(e)) is "any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve."

429 The origins of s 7(2) may be illustrious. But its language is highly general, indeterminate, lofty, aspirational and abstract. It is nebulous, turbid and cloudy. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[614] Windeyer J discussed the phrase "contrary to the public interest" as follows:

> "The public interest is a concept which attracts indefinite considerations of policy that are more appropriate to law-making than to adjudication according to existing law. The Act directs the Tribunal as to matters it is to 'take into account' in considering what the public interest requires. The generality of these matters prevents their providing objectively determinable criteria. In the result the jurisdiction of the Tribunal to make determinations and orders depending upon its view of where the public interest lies and what the public interest requires seems to be an exercise

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614 (1970) 123 CLR 361 at 399-400.

> of a legislative or administrative function of government rather than of the judicial power."

And in the same case Kitto J said "contrary to the public interest" was not "an ascertained standard" but "a description the content of which has no fixity [and] which refers the Tribunal ultimately to its own idiosyncratic conceptions and modes of thought."[615] So here, the generality of the words "all relevant factors including" the factors listed in s 7(2)(a)-(e) prevents them providing "objectively determinable criteria" and leaves the courts to their own "idiosyncratic conceptions and modes of thought." The opening words of s 7(2) have those characteristics even more markedly.

430 Section 7(2) depends in a number of respects on analysis by reference to "purpose" (s 7(2)(b), (d) and (e)). Does "purpose" refer only to the purpose revealed in the language, or something wider[616]? Section 7(2) depends in two respects on an appeal to reasonableness (the opening words of s 7(2) and s 7(2)(e)). Although s 7(2) does not talk of "balancing", as the Explanatory Memorandum and the Second Reading Speech did[617], that is the process it involves. But the things to be balanced or weighed are not readily comparable – the nature of a right and various aspects of a limitation on it, the nature of a right and other rights, the nature of a right and "all relevant factors", which could include many matters of practical expediency of which courts know nothing, social interests about which it is dangerous for courts to speculate and considerations of morality on which the opinions of the governed may sharply differ from those of the courts. It is for legislatures to decide what is expedient in practice, what social claims must be accepted, and what moral outcomes are to be favoured – not courts. The characteristically penetrating and valuable submissions of the Solicitor-General of the Commonwealth included an argument that the "actual criteria set out in s 7(2) are readily capable of judicial evaluation." In some contexts that may be so, but not in the context of the Charter. He gave examples of loose criteria having been accepted as within judicial power in the past[618], but s 7(2) goes well beyond those instances.

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615 (1970) 123 CLR 361 at 376.

616 See below at [441]-[444] and [446]-[454].

617 Quoted above at [418]-[419].

618 *Baker v The Queen* (2004) 223 CLR 513 at 532 [42]; [2004] HCA 45; *Thomas v Mowbray* (2007) 233 CLR 307 at 331-334 [20]-[28], 344-348 [71]-[82], 350-351 [88]-[92] and 507-508 [596]; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 553-554 [14] and 597 [168]-[169]. The submissions then invited a contrast with *Fardon v Attorney-General (Q)* (2004) 223 CLR 575 at 592-593 [21]; [2004] HCA 46.

431 Thus s 7(2) creates difficult tasks. It imposes them on judges. But they are not tasks for judges. They are tasks for a legislature. Section 7(2) reveals that the Victorian legislature has failed to carry out for itself the tasks it describes. Instead of doing that, it has delegated them to the judiciary. Because the delegation is in language so vague that it is essentially untrammelled, it is invalid. It contemplates the making of laws by the judiciary, not the legislature. It will lead to debates in which many different positions could be taken up. They may be debates on points about which reasonable minds may differ. They may be debates in which very unreasonable minds may agree. They are debates that call for resolution by legislative decision. An example is the debate which took place before the Court of Appeal in this case about whether the infringement of the presumption of innocence by s 5 of the Act was justifiable. The Court of Appeal said it was not justifiable. Many would agree. Those who move in prosecuting circles might take a different view. Many others would agree with them. But fundamental disputes of this kind – turning on questions of expediency, social policy and morality – call for legislative resolution, not judicial. The Court of Appeal called for evidence – that is, evidence or material of a "legislative fact" kind. But s 7(2) contemplates evidence or material of a kind going far beyond the evidence or material ordinarily considered by courts as going to "legislative facts". Is this evidence or material to be tendered or offered to trial judges so that they will arrive at the correct interpretation of the relevant statutory provision before directing the jury, or, if they are sitting without a jury, deciding the case? If so, how is this tender or offer to be accommodated with the need for trials, especially jury trials, to be conducted expeditiously and smoothly?

432 Section 7(2) creates a kind of "proportionality" regime without comprehensible criteria. The regime operates as a method of determining what the formulation of the law is to be – ie the precise form a legislatively recognised human right is to take, which in turn is used as a factor relevant to determining the interpretation of other statutes. But it creates a type of proportionality which "is plastic and can in principle be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgement that can be massively broad or incredibly narrow – and anything else between."[619]

433 In particular, at least in the non-constitutional context of s 7 and s 32(1), a consideration pursuant to s 7(2)(e) of whether there are less restrictive legislative means available to achieve a statutory purpose is a matter for a legislature, not a court. Courts decide what the language chosen by the legislature means. They do not decide on the meaning, operation and utility of language which the

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619 Poole, "The Reformation of English Administrative Law", (2009) 68 *Cambridge Law Journal* 142 at 146.

legislature might have chosen. The Attorney-General for the State of Victoria pointed to various supposed constitutional doctrines of proportionality. Constitutional doctrines are different from doctrines applicable to statutory interpretation. The insertion of a bill of rights into the Commonwealth Constitution by an amendment supported by the necessary popular majorities under s 128 could give the courts a role in interpreting statutes which departed from the separation of powers. But as the Constitution stands that is impermissible. It does not follow from the employment of "proportionality" techniques in applying the Constitution that they can be conferred by statute in relation to statutory interpretation.

434 Assume that a statutory provision which limits a human right has two possible meanings, meaning A and meaning B. Assume each is consistent with the "purpose" of the statutory provision. Assume the court would, but for s 32(1), favour meaning A. It is necessary to see whether meaning A is compatible with human rights. Assume that the relevant human right is absolute – ie falls within ss 8-27 without alteration pursuant to s 7(2) – and that meaning A would be found incompatible with the relevant human right. In that event meaning B would have to be adopted. But if the limit on the human right created by meaning A is found reasonable after applying s 7(2), then meaning A will be adopted. Section 7(2) requires the court to carry out the function which the legislature failed to carry out – refashioning the ss 8-27 human rights by working out what reasonable limits exist. The court is thus legislating through s 7(2) by giving a meaning to a particular "human right" which Parliament did not give. The legislature, instead of deciding for itself which rights are limited and in which circumstances, has delegated those tasks to the courts. As Griffith said of a similar, though more precise, provision, namely Art 10 par 2 of the European Convention on Human Rights, Pt 2 of the Charter is "the statement of a political conflict pretending to be a resolution of it."[620] The Attorney-General in his Second Reading Speech described s 7 as "a general limitations clause"[621]. It has been said that provisions similar to s 7(2) in other bills of rights have operated "to signal, explicitly, that the relationship between the bill of rights and contested claims of rights remained unresolved in law. They did so primarily by way of (one or more) limitation clauses."[622] So does s 7(2). It is a statement[623]:

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620 Griffith, "The Political Constitution", (1979) 42 *Modern Law Review* 1 at 14.

621 See above at [419].

622 Webber, "Legal Reasoning and Bills of Rights" in Ekins (ed), *Modern Challenges to the Rule of Law*, (2011) 143 at 149.

623 Webber, "Legal Reasoning and Bills of Rights" in Ekins (ed), *Modern Challenges to the Rule of Law*, (2011) 143 at 149.

> "that the law-makers of the bill of rights have delegated to others the resolution of political conflict surrounding which among the possible moral and legal meanings of 'P has the right to *x*' will be favoured in law. In this way, the lawmakers responsible for the bill of rights signal that this difficult work remains to be completed by subsequent lawmakers."

In relation to the Charter, those "subsequent lawmakers" are judges. The handing over of this type of work may be possible under some constitutions. It is not possible under the Australian Constitution.

435 The following warning of Brennan J is relevant to s 7(2)[624]:

> "[W]hen one comes to a court of law it is necessary always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable [of enforcing] and fitted to enforce. … [C]ourts perform one function and the political branches of government perform another. … Unless one observes the separation of powers and unless the courts are restricted to the application of the domestic law of this country, there would be a state of confusion and chaos which would be antipathetic … to the aspirations of the enforcement of any human rights."

436 For those reasons s 7(2) confers functions on the Victorian courts which could not be conferred on a court. As the Solicitor-General of the Commonwealth submitted, a legislative function conferred on a State court would, leaving aside legislative activity when the court is not carrying out a judicial role, like making rules of court[625], be so intertwined with the judicial functions of the court as to alter the nature of those judicial functions and the character of the court as an institution. In *Kable v Director of Public Prosecutions (NSW)*[626] Gaudron J said that it followed from Ch III of the Constitution:

> "that, although it is for the States to determine the organisation and structure of their court systems, they must each maintain courts, or, at least, a court for the exercise of the judicial power of the Commonwealth. Were they free to abolish their courts, the autochthonous expedient, more precisely, the provisions of Ch III which postulate an integrated judicial system would be frustrated in their entirety. …

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624 *Re Limbo* (1989) 64 ALJR 241 at 242; 92 ALR 81 at 82-83.

625 *R v Davison* (1954) 90 CLR 353 at 369; [1954] HCA 46.

626 (1996) 189 CLR 51 at 103; [1996] HCA 24.

> [T]he consideration that State courts have a role and existence transcending their status as State courts directs the conclusion that Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth."

437 The conferral on the Supreme Court of Victoria, for example, of legislative power means that it is not a "Supreme Court" or a "court of [a] State" within the meaning of s 73 of the Constitution. In 1900 the expression "court" meant a body which exercised judicial power, and the expression excluded bodies having "some non-judicial powers that are not ancillary but are directed to a non-judicial purpose."[627] The expression still has that meaning.

438 In *Kirk v Industrial Court (NSW)*[628] this Court held that the legislation of a State which removed from its Supreme Court power to grant relief for jurisdictional error was beyond power. A fortiori, legislation of a State conferring legislative power on its Supreme Court is beyond power.

439 Section 7(2) is thus invalid. Since s 7(2) is part of the process contemplated by s 32(1), so is s 32(1). That renders the whole Charter invalid, for the main operative provisions are connected with both ss 7(2) and 32(1). It is not possible to apply s 6(1) of the *Interpretation of Legislation Act* 1984 (Vic) to save the balance of the Charter, for its operation without s 7(2) would be relevantly different[629].

440 *The validity of s 32(1).* Even if s 7(2) were valid, is s 32(1) valid?

441 Pursuant to the principle of legality, the common law of statutory interpretation requires a court to bear in mind an assumption about the need for clarity if certain results are to be achieved[630], and then to search, not for the intention of the legislature, but for the meaning of the language it used[631],

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627 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

628 (2010) 239 CLR 531 at 581 [100] and 585 [113]; [2010] HCA 1.

629 See above at [399]-[400].

630 See below at [444].

631 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; [1996] HCA 40; *R v Secretary of State for the Environment, Transport and the Regions; Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 396-397; *Byrnes v Kendle* (2011) 85 ALJR 798 at 819 [97]; 279 ALR 212 at 236; [2011] HCA 26.

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interpreted in the context of that language. The context lies partly in the rest of the statute (which calls for interpretation of its language), partly in the pre-existing state of the law, partly in the mischief being dealt with and partly in the state of the surrounding law in which the statute is to operate. The search for "intention" is only a search for the intention revealed by the meaning of the language. It is not a search for something outside its meaning and anterior to it which may be used to control it. The same is true of another anthropomorphic reference to something which is also described as a mental state but in this field is not – "purpose". And it is also true of the search for "policy".

442 Thus in *Project Blue Sky Inc v Australian Broadcasting Authority* McHugh, Gummow, Kirby and Hayne JJ said of the common law rules of statutory interpretation[632]:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*[633], Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed."

What their Honours meant by "purpose" is what Dixon CJ meant by "purpose". What he meant by "purpose" may be inferred from his earlier analysis of a statutory discretion[634]:

> "it is incumbent upon the public authority in whom the discretion is vested … to decide … bona fide and not with a view of achieving ends or objects outside the purpose for which the discretion is conferred. … But courts of law have no source whence they may ascertain what is the purpose of

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The reasons why these principles exist are discussed in Radin, "Statutory Interpretation", (1930) 43 *Harvard Law Review* 863; Waldron, *Law and Disagreement*, (1999), Ch 6.

632 (1998) 194 CLR 355 at 381 [69] (three footnotes omitted).

633 (1955) 92 CLR 390 at 397; [1955] HCA 27.

634 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758; [1937] HCA 15 (emphasis added).

> the discretion *except the terms and subject matter of the statutory instrument*."

The subject-matter of an enactment, and its scope[635], like its purpose, can only be gauged from its language. And light is cast on what "policy" means by the statement of Mason and Wilson JJ that a court could decline to adopt a literal interpretation where this did not conform to the legislative intent, meaning "the legislative intent *as ascertained from the provisions of the statute*, including the *policy* which may be *discerned from those provisions*."[636]

443 In legislation like s 35(a) of the *Interpretation of Legislation Act* 1984 (Vic)[637] and s 15AA of the *Acts Interpretation Act* 1901 (Cth) as at common law, "purpose" means only the purpose as revealed in the statutory language. Thus in *Trevisan v Commissioner of Taxation*[638] Burchett J said, speaking of s 15AA:

> "The section is not a warrant for redrafting legislation nearer to an assumed desire of the legislature. It is not for the courts to legislate; a meaning, though illuminated by the statutory injunction to promote the purpose or object underlying the Act, must be found in the words of Parliament."

444 If the word "purpose" in s 32(1) means the purpose found in the statutory language, as is the case with the common law rule and s 15AA of the *Acts Interpretation Act* 1901 (Cth), there is force in the view advocated by the Attorney-General for the State of Western Australia, for example, that, apart from any s 7(2) problem, s 32(1) is valid, because it does not give the court power to depart from the objectively determined meaning of legislation; it only gives power to ascertain that meaning. Section 32(1), he said, was analogous to the common law principle of legality. That principle rests on an assumption that, unless clear words are used, the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms[639]. The fundamental rights or

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635 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 and 42 per Mason J; [1986] HCA 40.

636 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321; [1981] HCA 26 (emphasis added).

637 Quoted above at [389] n 552.

638 (1991) 29 FCR 157 at 162, approved in *R v L* (1994) 49 FCR 534 at 538 and *Comcare v Thompson* (2000) 100 FCR 375 at 382 [40].

639 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]. For the principle of legality, see Spigelman, *Statutory Interpretation and Human*

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freedoms often relate to human rights and are sometimes described as having a constitutional character. He gave illustrations: freedom from trespass by police officers on private property[640]; procedural fairness[641]; the conferral of jurisdiction on a court[642]; and vested property interests[643]. To these may be added others: rights of access to the courts[644]; rights to a fair trial[645]; the writ of habeas corpus[646]; open justice[647]; the non-retrospectivity of statutes extending the criminal law[648]; the non-retrospectivity of changes in rights or obligations generally[649]; mens rea as an element of legislatively-created crimes[650]; freedom

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Rights, (2008) at 22-39. The "principle of legality" might have been better named, for it is to be hoped that everything a court does rests on legality.

640 *Coco v The Queen* (1994) 179 CLR 427 at 436-437; [1994] HCA 15.

641 *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 147-148 [74]; 272 ALR 14 at 32; [2010] HCA 41.

642 *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]; [2002] HCA 19.

643 *Clissold v Perry* (1904) 1 CLR 363 at 373; [1904] HCA 12.

644 *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 at 286; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 977; *R v Secretary of State for the Home Department; Ex parte Leech* [1994] QB 198 at 210; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 at 585; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492-493 [32].

645 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 541-542; [1923] HCA 39; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 at 585; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298 [28]; [2001] HCA 14.

646 *Cox v Hakes* (1890) 15 App Cas 506 at 527-530; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 91; *Wall v The King; Ex parte King Won and Wah On [No 1]* (1927) 39 CLR 245 at 250; [1927] HCA 4.

647 *Scott v Scott* [1913] AC 417 at 473-477.

648 *R v Reah* [1968] 1 WLR 1508; [1968] 3 All ER 269; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298 [28].

649 *Maxwell v Murphy* (1957) 96 CLR 261 at 267; [1957] HCA 7; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194; [1960] HCA 80.

650 *Sweet v Parsley* [1970] AC 132 at 148 and 152.

from arbitrary arrest or search[651]; the criminal standard of proof[652]; the liberty of the individual[653]; the freedom of individuals to depart from and re-enter their country[654]; the freedom of individuals to trade as they wish[655]; the liberty of individuals to use the highways[656]; freedom of speech[657]; legal professional privilege[658]; the privilege against self-incrimination[659]; the non-existence of an appeal from an acquittal[660]; and the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction[661]. Similarly, the appellant submitted that s 32(1) bears an analogy with s 15A of the *Acts Interpretation Act* 1901 (Cth) and s 6 of the *Interpretation of Legislation Act* 1984 (Vic)[662].

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651 *Bowditch v Balchin* (1850) 5 Exch 378 at 381 [155 ER 165 at 166]; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298 [28].

652 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298 [28].

653 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520, 523 and 532; [1987] HCA 12.

654 *Potter v Minahan* (1908) 7 CLR 277 at 305-306; [1908] HCA 63.

655 *The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 464; [1910] HCA 28.

656 *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206; [1922] HCA 56.

657 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 130.

658 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11]; [2002] HCA 49.

659 *Hamilton v Oades* (1989) 166 CLR 486 at 495; [1989] HCA 21.

660 *Davern v Messel* (1984) 155 CLR 21 at 31, 48, 63 and 66; [1984] HCA 34.

661 *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252; [1992] HCA 24; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298 [28]; *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212 at 237-238 [124].

662 See above at [399].

445 In his Second Reading Speech, the Attorney-General said[663]:

> "Clause 32 of the bill recognises the traditional role for the courts in interpreting legislation passed by Parliament. While this bill will not allow courts to invalidate or strike down legislation, it does provide for courts to interpret statutory provisions in a way which is compatible with the human rights contained in the charter, so far as it is possible to do so consistently with their purpose and meaning."

The words "traditional role for the courts in interpreting legislation" are Delphic. Of course courts have a traditional role in interpreting legislation. Theirs, at the end of the day, is the only relevant role. Its interpretation is what they find it to be. If members of the public or officials or legislators dislike that finding, they have no recourse but to procure the enactment of different legislation. The Attorney-General was certainly saying that that traditional role is to continue under s 32(1). To deny it would be constitutionally revolutionary. But what rules of interpretation did the Attorney-General have in mind as those which the court would employ in carrying out its "traditional role"? On that specific topic he was silent.

446 The difficulty is that s 32(1) refers to "purpose" but not "meaning". The Explanatory Memorandum suggested that s 32(1) prevented the courts from relying on "meaning" at the expense of "purpose" or "object". Speaking of cl 32(1), which became s 32(1), it said[664]:

> "Sub-clause (1) establishes the requirement that courts and tribunals must interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the statutory provision. The object of this sub-clause is to ensure that courts and tribunals interpret legislation to give effect to human rights. The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation."

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663 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1293.

664 Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 23.

447 And the Human Rights Consultation Committee also revealed that its desire was to depart from a "meaning" based provision like s 30 of the *Human Rights Act* 2004 (ACT) in its original form[665]:

> "Section 30 of the ACT *Human Rights Act* 2004 states: 'In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.' The ACT model also indicates that the courts are to take account, at the same time, of the purpose of the law. The phrase 'working out the meaning of a Territory law' means:
>
> *(a) resolving an ambiguous or obscure provision of the law; or*
>
> *(b) confirming or displacing the apparent meaning of the law; or*
>
> *(c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or*
>
> *(d) finding the meaning of the law in any other case.*
>
> Section 3 of the United Kingdom *Human Rights Act* 1998 states: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'
>
> The Charter Group suggested that, in defining the phrase 'working out the meaning of a law', a similar provision to that in the ACT should be adopted. The Committee supports the ACT approach[.] However, the Committee also believes that the provision could be worded more simply so that it would read: 'So far as it is possible to do so, consistently with its purpose, a Victorian law must be read and given effect to in a way that is compatible with human rights.'
>
> By making this plain, the courts would be provided with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question. This is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured."

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665 Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) at 82-83 (footnote omitted).

Importantly, the Human Rights Consultation Committee then referred to *Ghaidan v Godin-Mendoza*[666]. That case concerned legislation permitting a spouse surviving a co-spouse who was a protected tenant to succeed to the protected tenancy. It was interpreted to extend to persons living with the deceased protected tenant "as if" or "as though" they were spouses, even though they were not. Lord Nicholls of Birkenhead said that s 3 "is … apt to require a court to *read in* words which change the meaning of the enacted legislation"[667]. Thus the Human Rights Consultation Committee proposed s 32(1) because it would require the courts to adopt a "purposive" approach requiring the courts to read words into and change the meaning of enacted legislation.

448 There is a further significance in that passage from the Report of the Human Rights Consultation Committee. In 2003 the ACT Bill of Rights Consultative Committee recommended a provision said to be based on the approaches adopted in New Zealand and the United Kingdom[668]:

> "(1) A court or tribunal must interpret a law of the Territory to be compatible with human rights and must ensure that the law is given effect to in a way that is compatible with human rights, as far as it is possible to do so."

That sub-clause contained no reference to meaning or to purpose. However, the recommendation was not adopted. The provision actually adopted in the first instance was s 30 of the *Human Rights Act* 2004 (ACT). The Human Rights Consultation Committee quoted s 30(1) in the passage set out above.

449 The chair of the ACT Bill of Rights Consultative Committee was a person whose interests and experience render her extremely knowledgeable in the field. In her opinion, s 30(1) as originally enacted could be read as:

> "a codification of the 'principle of legality' by which Parliament is assumed not to intend to impinge on basic rights, unless it uses clear words to do so. This may suggest that s 30 is weaker than both its New Zealand and United Kingdom counterparts"[669].

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666 [2004] 2 AC 557.

667 [2004] 2 AC 557 at 571-572 [32] (emphasis added).

668 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, (2003), App 4: Human Rights Bill 2003, cl 3.

669 Charlesworth, "Human Rights and Statutory Interpretation", in Corcoran and Bottomley (eds), *Interpreting Statutes*, (2005) 100 at 115 (footnote omitted). She

(Footnote continues on next page)

The Human Rights Consultation Committee thus appears to have wished to move away from the ACT model originally adopted in s 30(1) towards the United Kingdom model. Since the enactment of s 32(1), s 30(1) of the ACT legislation has been amended to correspond with it. The Explanatory Statement to the Human Rights Amendment Bill 2007 contended that it drew on such United Kingdom cases as *Ghaidan's* case. This too confirms that s 32(1) is to be read as creating a "purposive" approach requiring the courts to read words into and change the meaning of enacted legislation.

450 The adoption of the Human Rights Consultation Committee's approach in s 32(1) means that s 32(1) goes well beyond the common law and beyond s 15AA. Section 32(1) must, like the Charter as a whole, be interpreted amply, not restrictively. Section 32(1) does not say "consistently with their language" or "consistently with their meaning", but "consistently with their purpose" – a much wider expression. Further, there would be no point in s 32(1) unless its function was to go further than the common law principle of legality by which legislation is assumed not to affect human rights unless clear words are used[670]. The function of s 32(1) evidently is to make up for the putative failure of the common law rules by legitimising reliance on a much broader kind of "purposive" interpretation going beyond the traditional search for "purpose" as revealed in the statutory words. The Australian Capital Territory experience – first a recommendation for a wide provision, followed by its non-acceptance in 2004, followed by a change in s 30(1) as originally enacted in imitation of the Victorian model, coupled with an expression of admiration for the United Kingdom approach in *Ghaidan's* case in the Australian Capital Territory Explanatory Statement in 2007[671] – suggests that those expert in the field see s 32(1) as being much wider than the principle of legality. The language of s 32(1) thus suggests that there is some gap between "purpose" and "interpretative meaning", by which "purpose" controls "interpretation" rather than merely being a reflection of it. In effect s 32(1) permits the court to "disregard the express language of a statute when something not contained in the statute itself, called its 'purpose', can be employed to justify the result the court considers proper."[672] The wider the gap, the more "purpose" is an empty vessel into which particular judges can unrestrainedly pour their own wishes. Judges, having found a mischief, or

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did note the view stated in the Explanatory Statement that s 30(1) went further than codifying the principle of legality.

670 See above at [444].

671 As already noted, it is an admiration also expressed by the Human Rights Consultation Committee in Victoria: see [447] above.

672 Fuller, "The Case of the Speluncean Explorers", (1949) 62 *Harvard Law Review* 616 at 633.

redefined it to suit their own perceptions, can decide that the words used by the legislature have not caused it to be remedied well, can formulate their own view of what a satisfactory remedy would be, and can decide that the statutory purpose is to supply that remedy[673]. Ordinary statutory interpretation does not depend on the "*purpose*" of the statute, but its "*scope*"[674]. But s 32(1) calls for a different task, for "you simply cannot apply a statute as it is written and remake it to meet your own wishes at the same time."[675] Section 32(1) commands the courts not to apply statutory provisions but to remake them – an act of legislation.

451 Indeed, the inclusion of a reference to "purpose" in s 32(1) suggests that it is even wider than s 3(1) of the *Human Rights Act* 1998 (UK), on which the Human Rights Consultation Committee was avowedly relying. It provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

In form it is narrower than s 32(1). It does not contain the words "consistently with their purpose". It is therefore open to interpret it as conveying the idea: "so far as it is possible to do so consistently with the language". That is not how it has been interpreted in practice. There are not a few instances where a reading of legislation in the light of s 3(1) is different from its objectively determined meaning. As already noted, a leading example is *Ghaidan's* case[676], on which the Human Rights Consultation Committee in Victoria relied in recommending s 32(1), and on which the ACT Explanatory Statement relied in explaining why s 30(1) of the ACT legislation was amended to conform with s 32(1). In that case Lord Nicholls said that s 3 was apt to require a court to read in words which changed the meaning of the legislation.

452 There are other cases resting on that view. A legislative provision requiring a court to impose a life sentence in certain circumstances had added to it the rider "unless the offender does not constitute a significant risk to the public"[677]. A legislative provision that certain offenders be released unless it was

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673 Fuller, "The Case of the Speluncean Explorers", (1949) 62 *Harvard Law Review* 616 at 634.

674 Fuller, "The Case of the Speluncean Explorers", (1949) 62 *Harvard Law Review* 616 at 636 (emphasis in original).

675 Fuller, "The Case of the Speluncean Explorers", (1949) 62 *Harvard Law Review* 616 at 636.

676 See above at [447].

677 See *R v Offen* [2001] 1 WLR 253 at 277; [2001] 2 All ER 154 at 175.

no longer necessary for the protection of the public that they be confined was interpreted as meaning that there was a duty to release the offenders unless the public interest required their confinement to continue[678]. And, of immediate present relevance, in *Sheldrake v Director of Public Prosecutions*[679] a provision creating a legal burden of proof on the accused was read as imposing only an evidential burden even though this was not "the intention" of the legislature. The House of Lords thus applied s 3(1) to arrive at a meaning not otherwise open on the language. That is quite different from applying the principle of legality. It is instead an exercise in judicial legislation.

453 Should reference be made to "human rights" materials in foreign countries? There is little to be learned from African or Arab Charters, for example, for in 2006 Africa contained very few countries answering the description "liberal democracy", and the Arab world contained none. There is reason in answering the question "No", but for two factors. One is that the travaux préparatoires, by referring to *Ghaidan's* case, may make that case relevant to the meaning of s 32(1). The other is that, pursuant to s 32(2)[680], the courts have power to consider *Ghaidan's* case and others in its line in interpreting statutory provisions[681]. If this does not increase the power, whatever it is, of Victorian courts to examine comparative materials, what was its point? The effect is, as it has been said, to "ratchet-up" s 32(1) by reference to the most extreme foreign decisions[682]. The odour of human rights sanctity is sweet and addictive. It is a comforting drug stronger than poppy or mandragora or all the drowsy syrups of the world. But the effect can only be maintained over time by increasing the strength of the dose. In human rights circles there are no enemies on the left, so to speak. Because s 32(2) only permits consideration of foreign decisions, but does not compel it, the Victorian courts are empowered to consider those decisions they favour and decide not to consider those they dislike. "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."[683] But that will not stop it being

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678 *R (Sim) v Parole Board* [2004] QB 1288.

679 [2005] 1 AC 264. See also *R v Lambert* [2002] 2 AC 545, a case which was discussed in *Sheldrake's* case and on which the appellant relied.

680 See above at [407].

681 See Allan, "The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism", (2006) 30 *Melbourne University Law Review* 906 at 911-912.

682 Allan and Huscroft, "Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts", (2006) 43 *San Diego Law Review* 1 at 54-57.

683 *Roper v Simmons* 543 US 551 at 627 (2005) per Scalia J dissenting.

done, relentlessly and irreversibly – a factor which reinforces the invalidity of s 32(1).

454 It might be though that the appellant's position was greatly damaged by the *Ghaidan-Sheldrake* line of cases – that it was a shirt of Nessus which she could not throw off, try as she might. But she did not try to throw it off. She swathed herself in it. She asked the Court of Appeal in this case to act as a legislature by reasoning as the House of Lords did in *Sheldrake's* case. She submitted that even if in its ordinary meaning s 5 imposed a legal burden on the accused on the balance of probabilities, s 32(1) required that ordinary meaning to be departed from. The ordinary meaning of the expression "satisfies the court to the contrary" in s 5 is "persuade the court to the contrary on the balance of probabilities". The recognition, by reason of s 25(1), of a right to be presumed innocent until proved guilty cannot change that meaning. Nor can it support some other available meaning as the correct meaning, for there is no other available meaning. The appellant's submission to the contrary concentrates on what the legislature might have chosen as the desirable meaning for s 5, not on what it actually means. To interpret legislation as having a meaning which is in truth not the actual meaning, but a desired modification of it, is to legislate. The appellant's submission was correct to interpret s 32(1) widely. But on that interpretation it is invalid because the conferral of legislative functions on the courts alters their character.

455 *The futility of orthodoxy.* The parties and interveners in these proceedings were concerned on the whole to give the Charter a narrow interpretation. From their point of view, there were sound tactical reasons for this. There were things to be said to the contrary, mais pas devant les juges. It was important not to scare the horses if a finding of partial or total invalidity was to be avoided. However, an air of futility pervaded the interpretational debate. The adoption by a majority of this Court of a narrow interpretation of s 32(1) ensures validity. But future generations of barristers will be tempted to invite future generations of judges to depart from the narrow interpretation. They may even see it as their duty to yield to temptation. Because of the profound influence which barristers have on the judicial statement of the law, it is likely that those invitations will be accepted, expressly or silently. The judges of this country assert and apply the doctrine of precedent with a stern and unbending rigidity – except so far as it may affect their own conduct. The function of ordinary judicial work is to protect the rule of law. But, though vital, the task can be dreary and mundane. Often interest can only be found in rearranging the conventional order of legal clichés, or tinkering with the tired language of legal tests, or trying to avoid the sterile conflict of stale metaphors. Judicial fires which have sunk low may burn more brightly in response to a call to adventure. Where judicial appetites have been jaded or lost, the call may stimulate and freshen them to grow with what they feed on. In future the decision that s 32(1) is valid will be remembered. Not so the narrow interpretation on which the conclusion of validity rests. In numerous minds forensic oblivion will be its portion. Most of those who will remember it

will silently suppress it. Any protest about this will be silenced by a reference to the blessed vagueness of the word "purpose" in s 32(1).

456 *Validity of ss 33, 36 and 37.* Thus the whole Charter is invalid, either because of s 7(2) or because of s 32(1) or both. The effect of s 7(2) is to permit and compel a considerable redefinition of rights. The effect of s 32(1) is to cause statutes to be changed radically.

> "In order to maintain a coherent system of rules, they must be made slowly and infrequently, and legislating must be kept sharply distinguished from adjudicating. For unless laws are stable, they cannot be known; and if they cannot be known, they can neither be subscribed to nor enforced."[684]

Section 7(2) operates neither clearly nor infrequently. The same is true of s 32(1).

457 Alternatively, ss 33, 36 and 37 are invalid. While s 37 creates duties on the Minister administering the relevant statutory provision, they are created only by s 37. They are not created by the court in deciding the controversy between the parties[685]. When the court makes a s 36 declaration it is not making a "declaration of right". It is not exercising judicial power. A s 36 declaration is merely advisory in character. It does not declare any rights of the parties. It decides nothing. And it does not affect their rights: s 36(5)(b). This is illustrated by one of the appellant's arguments for a special costs order in these proceedings. She submitted that debate about s 36 was a matter of complete irrelevance to her rights and duties. In this respect her submission was entirely correct. A s 36 declaration does not involve the exercise of a judicial function and it is not an incident of the judicial process. The work of the Supreme Court of Victoria, sitting as such, is limited to the judicial process. The power to make a s 36 declaration takes the Supreme Court of Victoria outside the constitutional conception of a "court".

Issue (b): Does s 5 of the Act apply to s 71AC?

458 The prosecution case was that the appellant was guilty of an offence against s 71AC of trafficking in a drug of dependence. She was alleged to have had a drug of dependence "in [her] possession for sale". It was contended that

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684 Letwin, "On Conservative Individualism" in Cowling (ed), *Conservative Essays*, (1978) 52 at 63.

685 McHugh, "A Human Rights Act, the courts and the Constitution", paper delivered at the Australian Human Rights Commission, 5 March 2009 at 44.

this fell within par (c) of the definition of "traffick" in s 70(1). The trial judge directed the jury on the assumption that the definition of "possession" in s 5 applies to s 71AC via the definition of "traffick" in s 70(1) and reverses the legal burden of proof. Although the appellant submitted to the Court of Appeal that s 5 reverses only the evidential burden of proof, she did not contend that s 5 does not apply to s 71AC at all. And she did not so contend in this Court either until a doubt was raised by the bench.

459 The appellant's argument is that the meaning of "possession" given in s 5 does not apply to the word "possession" in the definition of "traffick" in s 70(1). This raises an important question about how the statutory criminal law of Victoria is to be interpreted. It is not satisfactory for the appellant to invite this Court to change the received interpretation in circumstances where the submission was not put, formally or otherwise, to the trial judge, was not put to the Court of Appeal, and was only advanced in a developed form in the course of counsel's oral address in reply. That is partly because the Court of Appeal has much wider and more intense experience of Victorian criminal law than this Court. And it is partly because the first and second respondents, who had an interest in maintaining the appellant's conviction and their Government's view of Victorian criminal law, lacked the normal opportunity to consider the problem at a little leisure. However, belatedly pursued though the argument was, there is no alternative but to deal with it.

460 Section 4(1) of the Act sets out numerous definitions which are to be applied in interpreting the Act unless "inconsistent with the context or subject-matter". Section 5 is a definitional provision, but it contains no equivalent words. It applies automatically, whatever the context or subject-matter. Section 70(1) resembles s 4(1) in containing definitions, one of which is the definition of "traffick", which do not apply if "inconsistent with the context or subject-matter". The present question is not whether the definition of "traffick" in s 70(1) should not be applied in a particular context or to a particular subject-matter, but whether the definition of "possession" in s 5 should not be applied to the definition of "traffick".

461 The appellant submitted that in the definition of "traffick" the word "possession" does not appear separately. It appears only as part of a larger expression – "have in possession for sale". In a sense it is a composite expression, but that is not in itself a reason to abstain from ascertaining the meaning of a particular component of the expression which is capable of separate analysis, by reference to a definition of that component which is not prevented from applying by reason of a particular context or subject-matter.

462 The appellant also submitted that if s 5 applies to the definition of "traffick", it would be paradoxical that some forms of trafficking would turn on proof of knowledge that it is a drug which is being prepared, manufactured, sold, exchanged, agreed to be sold or offered for sale, while no such proof of

knowledge was needed for the form of trafficking involved in having possession for sale. This contradicted another part of the appellant's argument in which she criticised the trial judge for allegedly not telling the jury that proof of knowledge that the substance in question is a drug is needed for the form of trafficking involved in having possession for sale notwithstanding the terms of s 5[686]. It also rests on the fallacy that the much-amended provisions of this area of the Act reflect a statutory scheme which has complete internal consistency and freedom from paradox.

463 The application of s 5 to s 71AC is not affected by the Charter, if only because the Charter is invalid.

Issue (c): Did the Court of Appeal interpret s 5 of the Act correctly?

464 Independently of the Charter, the Court of Appeal interpreted s 5 as imposing on accused persons the burden of satisfying the court that they were not in possession of a substance[687]. That was consistent with the earlier holding that "satisfies the court to the contrary" in s 5 means "persuades the court to the contrary on the balance of probabilities"[688]. To tender some evidence of non-possession is a quite different thing from satisfying triers of fact of non-possession.

465 The appellant attacked this in three ways.

466 First, the appellant submitted that the failure of s 5 to refer to the standard of proof was significant because it would have been easy to insert words referring to the standard of proof if the legislative scheme was to require that the accused meet a legal burden of proof on the balance of probabilities. She contrasted s 5 with s 72C and s 73(1) of the Act, which did refer to satisfaction on the balance of probabilities. She submitted that the legislation should be interpreted so as not to abrogate a fundamental common law right by reversing the legal burden of proof in the absence of clear words, and s 5 was not clear in the absence of any reference to the balance of probabilities. The answer to this argument is that even if the Act – a much-amended statute – exhibits untidiness, there is no reason to treat the explicit references in sections other than s 5 to the standard of proof as proceeding from anything other than an abundance of

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686 See below at [487]-[499].

687 *R v Momcilovic* (2010) 25 VR 436 at 467-468 [113]-[114].

688 *R v Clarke and Johnstone* [1986] VR 643 at 647-648 and 658-659 per Crockett, McGarvie and Southwell JJ.

caution. There is no difference between "satisfies" and "satisfies on the balance of probabilities".

467 Secondly, the appellant submitted that an evidential burden would amply fulfil the statutory goal of facilitating proof of possession while preventing accused persons being convicted where they had, in discharging the evidential burden, raised a reasonable doubt about possession. But unpalatable though a reverse legal burden of proof in criminal trials may be, particularly where as here it calls for proof of a negative, it does facilitate proof of possession much more than a simple placement of the evidential burden on the accused would. It increases the likelihood of the accused entering the witness box more than a reverse evidential burden would. That is because there is a radical difference between the two burdens. A legal burden of proof on the accused requires the accused to disprove possession on a preponderance of probabilities. An evidential burden of proof on the accused requires only a showing that there is sufficient evidence to raise an issue as to the non-existence of possession. The legal burden of proving something which the accused is best placed to prove like non-possession is much more likely to influence the accused to testify than an evidential burden, capable of being met by pointing to some piece of evidence tendered by other means and perhaps by the prosecution.

468 Thirdly, the appellant submitted that if s 5 cast a legal burden on the accused, anomalies would arise. Some crimes of trafficking would require proof by the prosecution beyond reasonable doubt that the accused was aware that the substance was a drug, while the crime of trafficking based on "having in possession for sale" would not. She said it was contradictory that while some drug offences required proof beyond reasonable doubt that the accused intended to traffick in an amount of the drug above a prohibited threshold, and hence created a requirement that the accused be aware of it, the creation by s 5 of a legal burden of proof on accused persons meant that accused persons had an onus to disprove awareness. Again, these submissions contradict the appellant's submission on jury direction. And the submissions assume, but do not establish, symmetry and internal consistency in the provisions.

469 Hence the Court of Appeal interpreted s 5 correctly.

Issue (d): Are ss 5 and 71AC of the Act inconsistent with ss 13.1, 13.2 and 302.4 of the Code and therefore inoperative?

470 In this Court, for the first time, the appellant contended that ss 5 and 71AC of the Act were inconsistent with s 302.4 of the Code, and were therefore inoperative pursuant to s 109 of the Constitution. The appellant said that the

point was only suggested by *Dickson v The Queen*[689], a decision of this Court handed down after the grant of special leave in the present appeal.

471 Section 300.4 of the Code provides:

> "(1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
>
> (2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:
>
> (a) an act or omission that is an offence against a provision of this Part; or
>
> (b) a similar act or omission;
>
> an offence against the law of the State or Territory.
>
> (3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:
>
> (a) provides for a penalty for the offence that differs from the penalty provided for in this Part;
>
> (b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;
>
> (c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part."

Section 302.4 is in the same Part as s 300.4.

472 In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* this Court considered similar words in s 75(1) of the *Trade Practices Act* 1974 (Cth):

> "this Part [ie Pt V] is not intended to exclude or limit the concurrent operation of any law of a State or Territory."

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689 (2010) 241 CLR 491; [2010] HCA 30.

Mason J (with whom Barwick CJ, Gibbs, Stephen and Jacobs JJ, and perhaps Murphy J, agreed) held that[690]:

> "where there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive."

473 Gibbs CJ later said[691]:

> "It is perhaps possible to imagine a case in which a Commonwealth Act did in truth fully cover the whole field with which it dealt, notwithstanding that it said that it was not intended to do so, but such a case may be left for consideration until it arises."

The present case is not a case of that kind.

474 There has been dissatisfaction about the formula approved in the *Credit Tribunal* case. It centres on "intention". In this it corresponds with the usage of innumerable statutes, eg the *Acts Interpretation Act* 1901 (Cth), s 8. Section 109 of the Constitution, however, does not talk of "intention". It relevantly provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail". There is a constant and perhaps ineradicable habit of referring to the intention of the Federal Parliament in enacting a law of the Commonwealth said to be inconsistent with a law of a State. But in this usage "intention" can mean only the intention as revealed in the words of the law. That is because s 109 does not provide: "When what a law of a State was intended to say is inconsistent with what a law of the Commonwealth was intended to say, the latter shall prevail".

475 The distinction drawn in many cases between direct inconsistency and the "covering the field" inconsistency which arises where the Commonwealth law is an "exhaustive and exclusive law" has also stimulated dissatisfaction. But its validity was accepted by the Court in the *Credit Tribunal* case. Applying that

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690 (1977) 137 CLR 545 at 563-564; [1977] HCA 34. As to the constitutional validity and utility of the reverse formula, to the effect that federal provisions apply to the exclusion of State provisions, see *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 166-169 [370]-[372].

691 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 456; [1984] HCA 74. See also *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1991) 28 NSWLR 443 at 460. On s 109 problems generally, see Leeming, *Resolving Conflicts of Laws*, (2011), Ch 5.

distinction, it cannot be said that there is inconsistency of the former kind in the present case.

476 The appellant advanced the following arguments in support of her claim that there was direct inconsistency.

477 The first related to s 5 of the Act. The appellant said it placed an evidential burden on her. It is in fact a legal burden of disproving possession – a circumstance which improves the appellant's argument as far as it goes. The appellant pointed out that the burden of proof of possession in the Code there lies on the prosecution beyond reasonable doubt. She submitted that in relation to the mere occupation of premises on which drugs are found, the Code preserved an "area of liberty designedly left"[692].

478 Secondly, the appellant submitted that the possible methods of trial were different. In a prosecution for contravention of the Act, the jury would not have to be unanimous: *Juries Act* 2000 (Vic), s 46. In a prosecution under s 302.4, since the crime is triable on indictment under s 4G of the *Crimes Act* 1914 (Cth), trial would be by jury, and the verdict would have to be unanimous by reason of s 80 of the Constitution.

479 The answer to these first two arguments is that they mischaracterise the legislation. Putting on one side a small difference in the prohibited quantity, on which the appellant did not rely, both the Act and the Code render the possession of drugs criminal by reference to the same substantive criteria of guilt. They forbid the same conduct and leave unforbidden the same conduct. The area of liberty each leaves is the same. In *Dickson v The Queen*[693] there was direct inconsistency between the laws because the Victorian law as a substantive matter rendered criminal that which the Commonwealth law did not, and the Commonwealth law was thus seen as preserving "areas of liberty designedly left" which should not be closed up by Victorian law. That is not the case here. The appellant relied on the following passage from *Dickson v The Queen*[694]:

> "In the absence of the operation of s 109 … the [State legislation] will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant

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692 See *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120; [1948] HCA 13.

693 (2010) 241 CLR 491.

694 (2010) 241 CLR 491 at 504 [22].

> extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury."

But the Court went on to "explain why this is so"[695]. It was so because of differences, not in procedural respects like burdens of proof and jury trial, but in three points of substantive law[696]. *Dixon v The Queen* is thus against the appellant's argument. It is the substantive criminal law which determines what areas of liberty are left, not procedural law.

480 The appellant's third argument was that the maximum penalty under s 71AC of the Act was greater than the maximum penalty imposed by s 302.4 of the Code and (belatedly) that the applicable sentencing principles differed. The appellant submitted that while the difference in maximum penalty was not determinative, it could be taken into account in deciding whether there was a direct inconsistency. Subject to the merits of this third argument, the present circumstances do not raise any direct inconsistency. In one of the few authorities in which a difference in penalty has aided in a conclusion of direct inconsistency, the difference was seen as only significant in covering the field inconsistency[697]. It was not submitted that there was covering the field inconsistency here. The appellant said nothing about how sentencing principles differed. If there are material differences, there was no demonstration of whether and how they were significant. Commonwealth legislation often has the result that, depending on the place of trial, different outcomes may arise under Commonwealth, State and Territory provisions in relation to the sentencing of an offender for a Commonwealth offence, and the Commonwealth legislation in relation to sentencing principles has been held not to cover the field and not to invalidate State legislation containing different principles[698]. The appellant submitted only

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695 (2010) 241 CLR 491 at 504 [23].

696 *Dickson v The Queen* (2010) 241 CLR 491 at 505-506 [26]-[28].

697 *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 346-347; [1974] HCA 36 ("at least when it appears that the Commonwealth statute by prescribing the rule to be observed evinces an intention to cover the subject matter to the exclusion of any other law" – per Mason J). See also at 339, 342-343 and 347-348; and see *Hume v Palmer* (1926) 38 CLR 441 at 447, 450-451 and 462; [1926] HCA 50; *Ex parte McLean* (1930) 43 CLR 472 at 479, 480-481 and 483-484; [1930] HCA 12; *Grace Bros Pty Ltd v Magistrates, Local Courts of New South Wales* (1988) 84 ALR 492 at 503-507.

698 *Putland v The Queen* (2004) 218 CLR 174 at 185 [23] and [25], 192-193 [51]-[52] and 215 [121]-[122]; [2004] HCA 8.

that persons convicted of an offence against a law of the Commonwealth had a "right" to have their sentences determined in accordance with Commonwealth sentencing principles, and that this "right" had been taken away by State law. This is not a "right" in the sense of a right conferred by the Commonwealth law which the State law can be said to have altered, impaired or detracted from.

481 Hence the present case is not one of direct inconsistency.

482 In that event, since it was not submitted that there was covering the field inconsistency, if the *Credit Tribunal* case is good law, the Act must be valid. To depart from the distinction between direct inconsistency and covering the field inconsistency, and to hold that the form of words approved in the *Credit Tribunal* case as a means of avoiding the application of s 109 where covering the field issues may arise was not an effective method of doing so, would involve overruling that case.

483 Like this case, the *Credit Tribunal* case had a criminal context. In the *Trade Practices Act* as it stood at the relevant time, Pt V, to which s 75(1) referred, included provisions establishing norms of conduct (ss 53-65) breach of which s 79 rendered criminal. The *Credit Tribunal* case was a decision supported by all but one, or all, depending on the correct reading of Murphy J's reasons, of the Justices. It was a decision delivered after hearing argument over two days from very able counsel – three future Justices of this Court, three future State Supreme Court judges and M H Byers QC – and after a substantial period of reservation. It has often been followed[699], most recently by seven Justices in *John Holland Pty Ltd v Victorian WorkCover Authority*[700] and *Dickson v The Queen*[701]. If leave to argue that it should be overruled be necessary, it was not sought by the appellant. And the appellant did not argue that it should be overruled. In *John v Federal Commissioner of Taxation*[702] Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ approved an earlier statement[703] that four

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699 *Palmdale-AGCI Ltd v Workers' Compensation Commission (NSW)* (1977) 140 CLR 236; [1977] HCA 69; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 456; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 466; *Houghton v Arms* (2006) 225 CLR 553 at 563 [22]; [2006] HCA 59.

700 (2009) 239 CLR 518 at 527-528 [21]; [2009] HCA 45.

701 (2010) 241 CLR 491 at 507 [33].

702 (1989) 166 CLR 417 at 438-439; [1989] HCA 5.

703 By Gibbs CJ (with whom Stephen and Aickin JJ agreed) in *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58; [1982] HCA 13.

matters were relevant to whether this Court should depart from one of its own earlier decisions.

> "The first was that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second was a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration".

None of the first three factors applies. So far as the fourth is concerned, the *Credit Tribunal* case has been relied on by the Commonwealth in many statutes. This reliance suggests that there is State legislation existing in the same areas as at least some of those statutes. Persons other than the Commonwealth may have relied on the validity of the formula approved in the *Credit Tribunal* case as efficacious to ensure the validity of the State legislation, and may then have ordered their affairs in accordance with that legislation. Overruling the *Credit Tribunal* case may disturb reasonable expectations.

484 As W P Deane QC, counsel for the Attorney-General for the State of New South Wales, pointed out in argument in the *Credit Tribunal* case, the formula approved in that case already appeared in four Commonwealth statutes apart from the *Trade Practices Act*[704]. The formula has been used many times in the Code[705], although, as pointed out in *Dickson v The Queen*[706], to some provisions it is not applied. The formula has been used in the provision which has replaced s 75 of the now renamed and radically altered *Trade Practices Act*, namely s 131C of the *Competition and Consumer Act* 2010 (Cth). The formula has been used in Commonwealth statutes which have been repealed[707]. And it has been

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704 *Petroleum (Submerged Lands) Act* 1967, s 150; *Pollution of Sea by Oil Act* 1960, s 4; *Family Law Act* 1975, s 10(2); and *Fisheries Act* 1952, s 5A.

705 Sections 70.6, 71.19, 72.5, 72.32, 100.6, 115.5, 261.1, 268.120, 270.12, 271.12, 272.7, 273.4, 274.6, 360.4, 400.16, 472.1, 475.1 and 476.4.

706 (2010) 241 CLR 491 at 508 [37].

707 *Australian Protective Service Act* 1987, s 21(4), (4A) and (5); *Crimes (Protection of Aircraft) Act* 1973, s 20; *Crimes (Torture) Act* 1988, s 5; *Environment Protection (Nuclear Codes) Act* 1978, s 12(6)(b); *Federal Airports Corporation Act* 1986, s 73; *Financial Corporations Act* 1974, s 19; *Interactive Gambling (Moratorium) Act* 2000, s 14; *National Parks and Wildlife Conservation Act* 1975, s 19(3); and *Year 2000 Information Disclosure Act* 1999, s 18.

used in numerous unrepealed Commonwealth statutes[708]. Variants on the formula, too, have often been employed in Commonwealth statutes[709].

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708 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984, s 7; *Age Discrimination Act* 2004, s 12; *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006, s 240; *Atomic Energy Act* 1953, s 41(4); *Australian Astronomical Observatory Act* 2010, s 25; *Australian Crime Commission Act* 2002, s 55A(8); *Australian Federal Police Act* 1979, ss 14G(4), (5), 14N; *Australian Human Rights Commission Act* 1986, s 4; *Australian Securities and Investments Commission Act* 2001, s 12AE; *Civil Dispute Resolution Act* 2011, s 17A; *Classification (Publications, Films and Computer Games) Act* 1995, s 100; *Copyright Act* 1968, s 201(4); *Corporations Act* 2001, s 5E; *Crimes Act* 1914, ss 3UH, 15YZF, 23A; *Crimes (Aviation) Act* 1991, s 50; *Crimes (Hostages) Act* 1989, s 6; *Crimes (Internationally Protected Persons) Act* 1976, s 6(1); *Crimes (Ships and Fixed Platforms) Act* 1992, s 6; *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act* 1990, s 5; *Cybercrime Act* 2001, s 476.4; *Defence Act* 1903, s 116ZC; *Defence Force Discipline Act* 1982, s 3(18); *Defence Service Homes Act* 1918, s 4D; *Disability Discrimination Act* 1992, s 13; *Do Not Call Register Act* 2006, s 42; *Environment Protection and Biodiversity Conservation Act* 1999, ss 10, 300A, 402(8); *Family Law Act* 1975, s 114AB; *Financial Sector (Collection of Data) Act* 2001, s 26; *Fisheries Management Act* 1991, s 10; *Foreign Evidence Act* 1994, s 18; *Interactive Gambling Act* 2001, s 69; *Maritime Transport and Offshore Facilities Security Act* 2003, s 8; *Meat Inspection Act* 1983, s 7; *Medical Indemnity (Prudential Supervision and Product Standards) Act* 2003, s 32; *National Consumer Credit Protection Act* 2009, s 23; *National Consumer Credit Protection (Transitional and Consequential Provisions) Act* 2009, Sched 1, Pt 2, item 6; *National Health and Hospitals Network Act* 2011, s 59; *National Measurement Act* 1960, s 4A(2); *National Vocational Education and Training Regulator Act* 2011, s 192(4); *Personal Property Securities Act* 2009, ss 253, 254; *Protection of the Sea (Civil Liability) Act* 1981, s 15(6); *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act* 2008, s 14; *Protection of the Sea (Powers of Intervention) Act* 1981, s 5; *Public Order (Protection of Persons and Property) Act* 1971, s 11(3A); *Racial Discrimination Act* 1975, ss 6A, 18F; *Radiocommunications Act* 1992, s 201; *Research Involving Human Embryos Act* 2002, s 43(4); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act* 2008, s 11A(3); *Sex Discrimination Act* 1984, ss 10, 11; *Shipping Registration Act* 1981, s 79; *Telecommunications (Consumer Protection and Service Standards) Act* 1999, ss 121, 158M; *Telecommunications (Interception and Access) Act* 1979, ss 107D, 168; *Therapeutic Goods Act* 1989, ss 6AAA, 42X; *Tobacco Advertising Prohibition Act* 1992, s 6; *Water Act* 2007, ss 40, 250B; *Water Efficiency Labelling and Standards Act* 2005, s 11. See also a similar formula: *Seas and Submerged Lands Act* 1973, s 16; *Proceeds of Crime Act* 2002, s 263.

709 For example, *Insurance Contracts Act* 1984, s 7.

485 Our law knows nothing of prospective overruling[710]. Lord Devlin once remarked that "[a] judge-made change in the law rarely comes out of a blue sky. Rumblings … will give warning of unsettled weather."[711] There have been no rumblings before the arguments in this appeal giving warnings to any States which have enacted legislation in the same areas as the Commonwealth legislation. The overruling of the *Credit Tribunal* case would come as a complete surprise. "Nullification of enactments and confusion of public business are not lightly to be introduced."[712] To describe the effect of reversing the *Credit Tribunal* case on the "public business" of the States as "confusion" could be to speak very euphemistically.

486 In all the circumstances the *Credit Tribunal* case must be followed. There is no s 109 inconsistency.

Issue (e): Has the appellant any valid complaint about the adequacy of the directions to the jury?

487 Ground 2 of the appellant's Amended Notice of Appeal in this Court was:

> "The Court of Appeal erred in concluding that there was no error in the trial judge's failure to direct that the appellant could not have the drugs in her possession for sale, and therefore could not be guilty of trafficking, unless the prosecution proved beyond reasonable doubt that she knew of the presence of the drugs."

488 The appellant's first submission on ground 2 was that whatever the burden of proof cast by s 5 in relation to the issue of possession of the drugs, she could not be guilty unless, in relation to the issue of trafficking, the prosecution proved beyond reasonable doubt that she was aware of the existence of the drugs[713]. The first respondent disputed that submission; for present purposes the correctness of the appellant's submission can be accepted without being decided. The appellant then submitted that the jury were not told that the prosecution had to prove

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710 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504; [1997] HCA 34.

711 "Judges and Lawmakers", (1976) 39 *Modern Law Review* 1 at 10.

712 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180 per Isaacs J.

713 She cited *R v Medici* (1989) 40 A Crim R 413 at 415; *R v Tragear* (2003) 9 VR 107 at 117 [43]-[44]; *R v Georgiou* [2009] VSCA 57 at [6]-[10], [48], [51] and [55]-[61]. In contrast, the first respondent relied on *R v Clarke and Johnstone* [1986] VR 643 at 660.

beyond reasonable doubt that the appellant knew of the existence of the methylamphetamine in her apartment. Finally, the appellant submitted that the summing up contained a specific deficiency in the italicised words of the following passage:

> "To summarise, before you can find her guilty of trafficking in a drug of dependence, the prosecution must prove to you beyond reasonable doubt:
>
> (1) She intentionally committed an act of trafficking, being in the possession of a prohibited drug for the purposes of sale.
>
> (2) That she intentionally trafficked in a drug of dependence. That is, the substance she possessed was methylamphetamine and that she intended to [traffick] in a prohibited drug.
>
> The Crown must prove both of those elements beyond reasonable doubt. *The accused must satisfy you on the balance of probabilities, that she did not know that she was in possession of the methylamphetamine.* If you find that any of these elements have not been proved beyond reasonable doubt, then you must find her not guilty of trafficking in a drug of dependence." (emphasis added)

The appellant submitted that the jurors would have had the italicised words "ringing in their ears". The appellant submitted:

> "[T]he trial was conducted on that issue and the jury were told over and over again that that is how it was to be determined and … they were never told that if the Crown failed to prove beyond reasonable doubt that she knew of the drugs … she had to be acquitted."

489 This complaint must fail. It is true that at times the trial judge said the burden of proving that the appellant did not know of the drugs lay on her on the balance of probabilities. But those references related to the burden of proof on the issue of possession under s 5. After the bulk of those references, the trial judge then made it plain that he was turning from s 5 to a new issue, on which there was a different burden of proof. He said:

> "If you accept, on the balance of probabilities, that the accused did not know of the methylamphetamine in the apartment, then that is the end of the case. You must bring in a verdict of not guilty. If you do not accept the defence case, that she did not know of the drugs, then you must consider the second element of the charge of trafficking. That is the two competing cases on whether she knew or not and the defence must prove, on the balance of probabilities, that she was not aware that there [were] these illegal drugs in that apartment.

> If you do not accept, on the balance of probabilities, that she was not aware, then you must consider the second element of the charge of trafficking. The second element that the prosecution must prove beyond reasonable doubt, is that the accused *intentionally trafficked*, in a drug of dependence. There are two parts of this element. The prosecution must prove that the substance, allegedly trafficked by the accused, was a drug of dependence and also prove that the accused *intended to [traffick]* in a drug of dependence." (emphasis added)

The trial judge also said:

> "[T]he prosecution must … prove beyond reasonable doubt that the accused intended to [traffick] in a drug of [dependence]. That is, the accused *deliberately possessed* for sale a prohibited drug." (emphasis added)

Thereafter the trial judge made numerous references to the standard of proof in relation to intention as being beyond reasonable doubt, and he made a further 13 references to intention.

490 To act "intentionally" is to act with intention or on purpose[714]. To "intend" is to "have in the mind as a fixed purpose"[715]. So, in ordinary speech, to say of the appellant that she "intentionally trafficked in" or "intended to traffick in" a drug of dependence is to say that she had in her mind as a fixed purpose the trafficking of the drug, and that cannot be done unless she knew that that which was trafficked or to be trafficked was a drug of dependence.

491 To act "deliberately" is to act with set purpose[716]. So, in ordinary speech, to say of the appellant that she "deliberately possessed for sale" a drug of dependence is to say that she possessed it with set purpose, and that cannot be done unless she knew that what she possessed was a drug of dependence.

492 These meanings correspond with the ordinary usage of the English language. Juries understand the ordinary usages of the English language.

493 It is necessary to return to ground 2 of the Amended Notice of Appeal. It complains that the trial judge did not tell the jury that the prosecution had to prove beyond reasonable doubt that the appellant "knew of the presence of the

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714 *The Oxford English Dictionary*, 2nd ed (1989), vol VII at 1080, meaning c.

715 *The Oxford English Dictionary*, 2nd ed (1989), vol VII at 1073, meaning 18 (described as the "chief current sense").

716 *The Oxford English Dictionary*, 2nd ed (1989), vol IV at 414, meaning 1.

drugs." There are two reasons for concluding that the trial judge did tell the jury that.

494 First, in the circumstances of this case, for the reasons just given, it was not possible to conclude that the appellant "*intentionally* trafficked" or "*intended* to traffick" in or "*deliberately possessed* for sale" a drug of dependence unless she *knew* that the substance in question was a drug of dependence.

495 Secondly, the trial judge expressly told the jury four times that an issue relevant to intention to traffick in a drug of dependence was whether the appellant had knowledge or awareness of the drugs, and that on that issue the jury had to be satisfied beyond reasonable doubt. He said:

> "The defence denied Vera Momcilovic had any intention to traffick in a drug of dependence, alleged that she did not *know* that she was in possession of a prohibited drug. The defence case here was the same as on the question of possession. The accused just did not *know* of the drugs and, therefore, could not have possessed them for the purpose of sale.
>
> It is important to remember that it is the prosecution who must prove beyond reasonable doubt, that the accused had the relevant intention. If you are not satisfied that the accused *knew* that it was a drug she was trafficking and there was no other basis from which you can infer that the accused intended to [traffick in] a drug of dependence, then this second element will not be met.
>
> The defence submitted you couldn't be satisfied that the accused was *aware* of the presence of drugs in the premises. You must decide, based on all the evidence, whether the substance trafficked by the accused was a drug of dependence, that's not in doubt, and that the accused intended to [traffick in] such a drug. It is only if you are satisfied of both of these elements beyond reasonable doubt that this second element is met." (emphasis added)

496 In view of that passage, it cannot be said, as the appellant submitted, that the jury "were never told that if the Crown failed to prove beyond reasonable doubt that she knew of the drugs … she had to be acquitted". And it cannot be said, as ground 2 alleges, that the trial judge failed to direct the jury that the appellant could not be convicted "unless the prosecution proved beyond reasonable doubt that she knew of the presence of the drugs."

497 The appellant submitted that the trial judge should have directed the jury that if some aspect of the evidence raised a doubt in their mind about her awareness of the drugs they should acquit. But that is merely another way of saying that he should have directed them that they had to be satisfied beyond a reasonable doubt that she knew of the drugs. He repeatedly did that.

498 The appellant also submitted that the parties conducted the case on the erroneous assumption that once the jury found that the appellant had not discharged on the balance of probabilities the burden of establishing that she did not have possession (and did not know of the drugs for that purpose), there was no need to go further and consider whether the prosecution had established her knowledge of the drugs beyond reasonable doubt in relation to trafficking. Whether or not the parties conducted the case on that assumption, it was not an assumption shared by the trial judge and it was not reflected in his summing up.

499 In other words, if the appellant's first submission on ground 2 is correct, the direction was adequate; if it is not correct, the direction was unduly favourable to the appellant. Either way the ground of complaint is not made out.

Orders

500 The appeal must be dismissed.

501 The appellant sought an order that if she were unsuccessful in the appeal the Court should order the first and second respondents to pay a proportion of her costs. The attractively presented argument turned on two points. One was that the case had caused argument to develop on issues which were irrelevant to the appellant's rights and duties: constitutional issues relating to s 36 of the Charter and issues in relation to whether the matter was heard in federal jurisdiction. The other was that there were constitutional issues in relation to s 109 of the Constitution and issues of the interpretation of the Charter which were of great public importance beyond the appellant's individual position.

502 The issues to which the argument in relation to the first point referred took up some time, but relatively little time. There is reason, however, to have sympathy with the appellant in relation to the issues connected with the second point. Those issues did indeed generate a lot of paper and take up a great deal of time once four parties and six interveners had been heard. But both the Charter issues and the s 109 issues were not forced on the appellant. They were raised by her in an attempt to have her conviction set aside. In the circumstances there should not be an order as to costs.

503 CRENNAN AND KIEFEL JJ. Following a trial by a jury in the County Court of Victoria, the appellant was convicted of the offence of trafficking in a drug of dependence, namely methylamphetamine, on 14 January 2006. She was sentenced to two years and three months' imprisonment with a non-parole period of 18 months[717].

504 The prosecution case against the appellant was based upon the presence of drugs in an apartment in Melbourne which she owned and which she shared with her partner of some years, Velimir Markovski. A search of the apartment was executed under warrant after surveillance of Markovski. In the course of the search the police found a plastic bag containing 64.6 grams of the drug methylamphetamine in the freezer of a small refrigerator; a plastic container which held 20 smaller plastic bags of the drug, containing a total weight of 394.2 grams of the drug; and a jar in the kitchen cupboard containing 325.8 grams of a substance that included an indeterminate amount of methylamphetamine. They also found other materials and equipment usually associated with the preparation of drugs for sale and they found $165,900 in cash in a shoe box in a walk-in wardrobe off the master bedroom. The prosecution alleged that the apartment was used as a minor amphetamine factory.

505 In a separate trial, Markovski was convicted of trafficking in methylamphetamine and cocaine in the period from 9 December 2005 to 14 January 2006. The appellant, a legal practitioner and an intellectual property consultant, denied any knowledge of the drugs. Markovski gave evidence at the appellant's trial that she had no knowledge of, or involvement in, the drug trafficking undertaken by him and was not aware of the money he kept in the wardrobe. The only DNA material which was present on any of the items located in the search was attributed to Markovski.

506 The appellant was charged with an offence under s 71AC of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Drugs Act"), which, in relevant part, provides that a person is guilty of an indictable offence if they traffick or attempt to traffick in a drug of dependence. The word "traffick" is defined by s 70(1) to include to "have in possession for sale, a drug of dependence". Section 73(2) is also relevant to a charge of trafficking in a drug of dependence. It provides that the possession by a person of a drug of dependence in a quantity not less than the traffickable quantity applicable to that drug of dependence, is prima facie evidence of trafficking by that person in that drug. That is to say, it is prima facie evidence of possession for sale. The traffickable

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717 *R v Momcilovic* unreported, County Court of Victoria, 20 August 2008.

quantity for methylamphetamine was six grams at the relevant time[718]. The possession relevant to the charge against the appellant was, by reference to s 70, "possession for sale", not possession simpliciter, which is made an offence by s 73(1) of the Drugs Act.

507 The prosecution relied upon a deeming provision, s 5 of the Drugs Act, to establish that the appellant was in possession of the drugs found in her apartment. That deeming provision was then linked to the quantity of drugs in her apartment to establish that her possession of the drugs was possession for sale. Section 5 provides:

> "**Meaning of *possession***
>
> Without restricting the meaning of the word ***possession***, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary." (emphasis in original)

508 It appears to have been assumed at trial and in the Court of Appeal of the Supreme Court of Victoria[719] that s 5 could be invoked, as it was at trial, to establish the appellant's possession of a quantity of drugs exceeding the traffickable quantity and thus the possession for sale relied upon as constituting trafficking in the drugs. The correctness of that assumption depends upon the proper construction of the provisions of the Drugs Act. If the assumption was not correct, then the appellant was convicted upon the basis of a reversal of the onus of proof applied to a critical issue in the case and the appeal should be allowed.

509 The trial judge directed the jury that once it was proved that the appellant was in occupation of the premises the appellant would be in possession of the drugs unless she satisfied them, on the balance of probabilities, that she did not know of the presence of the drugs in her apartment.

510 In its terms s 5 places a legal, not merely an evidentiary, onus on a person accused of an offence involving the possession of drugs to rebut the presumption there created, that the drugs found on land or premises occupied by him or her were in his or her possession. This is apparent from the requirement that the

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718 *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), Sched 11, Pt 3, col 3. It is presently three grams, this change having been effected by s 20 of the *Drugs, Poisons and Controlled Substances (Amendment) Act* 2006 (Vic).

719 *R v Momcilovic* (2010) 25 VR 436.

person *satisfy* the court *to the contrary*. The words "to the contrary" convey that it is proof of a state of affairs such as would overcome the presumption which is required. To "satisfy" a court requires that the court be persuaded and this is consistent with a legal onus[720].

511 Section 5 of the Drugs Act denies the operation of the common law rule that the prosecution prove the guilt of an accused person by proof, beyond reasonable doubt, of both negative and positive elements of an offence[721]. The rule reflects the common law concept of the presumption of a person's innocence[722].

512 The principle of legality at common law would require that a statutory provision affecting the presumption of innocence be construed, so far as the language of the provision allows, to minimise or avoid the displacement of the presumption. But, for the reasons which follow, its application to s 5 cannot yield a construction other than that required by the clear language of that section, which places the legal burden of proof on the accused.

513 In Victoria, the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter") sets out "the human rights that Parliament specifically seeks to protect and promote."[723] Section 25, "Rights in criminal proceedings", provides one of those rights by sub-s (1):

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720 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at 597 [34] per Sir Anthony Mason NPJ.

721 Referred to as the "golden thread": see *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481 per Viscount Sankey LC; and see *Phipson on Evidence*, 17th ed (2010) at 154 [6-09]. The rule is now embodied in s 141 of the *Evidence Act* 2008 (Vic) albeit, by s 8 of that Act, it does not affect the operation of any other Act.

722 A concept which has been criticised as an "inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion'": *Taylor v Kentucky* 436 US 478 at 484 fn 12 (1978). The right to a presumption of innocence, to which s 25(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) refers, may have a larger content: see Quintard-Morénas, "The Presumption of Innocence in the French and Anglo-American Legal Traditions", (2010) 58 *American Journal of Comparative Law* 107.

723 *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 7(1).

> "A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law."

It is not necessary for present purposes to consider whether the right so protected is limited to the common law concept of the presumption of innocence. It clearly incorporates it.

514 Following her conviction the appellant sought leave to appeal against conviction and sentence to the Court of Appeal. The appellant argued that as a matter of ordinary construction, s 5 required the discharge of only an evidentiary onus of proof. That contention was correctly rejected by the Court of Appeal. The alternative argument advanced by the appellant was that the same conclusion is reached by the particular construction required of statutes by the Charter in order that, so far as possible, they be compatible with the human rights recognised by the Charter. The Court of Appeal rejected that contention and refused leave to appeal against conviction. It granted leave to appeal against sentence, allowed the appeal and substituted a sentence of 18 months' imprisonment. Those decisions of the Court were dated 17 March 2010.

515 At the conclusion of orders made with respect to the applications for leave to appeal and the appeal, the Court of Appeal further stated:

> "And, on 25 March 2010, the Court of Appeal has further decided:–
>
> 5. It is declared pursuant to subsection 36(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter') that section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) cannot be interpreted consistently with the presumption of innocence under s 25(1) of the Charter."

The principal issues on the appeal

516 The appellant challenges the construction which the Court of Appeal gave to s 5, by reference to certain provisions of the Charter which are said to be relevant to its interpretation. The essential question raised by those Charter provisions[724] is whether they alter the approach to statutory construction which is ordinarily undertaken by the courts. In the event that the construction given to s 5 of the Drugs Act by the Court of Appeal, which was reached by reference to accepted principles of construction, is confirmed, it will be necessary to consider the provision made by s 36(2) of the Charter for the making of a "declaration of inconsistent interpretation". In that regard it will be necessary to consider

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724 *Charter of Human Rights and Responsibilities Act* 2006, ss 7(2) and 32.

whether such a function is one compatible with the role of the Supreme Court as a repository of the judicial power of the Commonwealth[725].

517 There are two further substantial questions on this appeal concerning the provisions of the Drugs Act. The first is whether s 5 engages with s 71AC for the purpose of establishing "possession for sale". The second question is whether, properly construed, ss 5 and 71AC of the Drugs Act are inconsistent with provisions of the *Criminal Code* (Cth) ("the Commonwealth Code") within the meaning of s 109 of the Constitution. If the first question is answered in favour of the appellant, the appeal must be allowed and a new trial ordered. If the constitutional question in relation to s 109 were to be answered in favour of the appellant, the indictment would have charged an offence not known to the law and should be quashed and the sentence set aside.

518 Because the approach to the construction of the provisions of the Drugs Act is logically anterior to these questions, it is necessary to first consider how the Charter is applied to that process of construction.

The Charter and its operation

The objects of the Charter

519 The Charter is said to be founded upon certain principles, the first of which is that "human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom"[726]. The main purpose of the Charter is the protection and promotion of human rights. It seeks to do this by identifying those human rights which are subject to its protection[727], by ensuring statutory provisions, whenever enacted, "are interpreted so far as is possible in a way that is compatible with human rights"[728] and, where that cannot be achieved, by empowering[729] the Supreme Court to "declare that a statutory provision cannot be interpreted consistently with a human right"[730]. Its purpose

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725 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24.

726 *Charter of Human Rights and Responsibilities Act* 2006, Preamble.

727 *Charter of Human Rights and Responsibilities Act* 2006, s 1(2)(a).

728 *Charter of Human Rights and Responsibilities Act* 2006, s 1(2)(b).

729 The section says "conferring jurisdiction" but for the reasons later given, in connection with s 36(2), that is incorrect.

730 *Charter of Human Rights and Responsibilities Act* 2006, s 1(2)(e).

is further said to be achieved by requiring public authorities to act in a way that is compatible with the human rights set out in the Charter[731] and requiring Bills introduced into Parliament to have a statement of compatibility with the rights[732]. However, the Charter allows the Parliament to override the application of the Charter "in exceptional circumstances"[733].

The Charter rights

520 Section 6(1) provides that "[a]ll persons have the human rights set out in Part 2."[734] The civil and political rights identified in Pt 2 are derived principally from the International Covenant on Civil and Political Rights (1966) ("the ICCPR")[735].

521 The ICCPR was opened for signature on 16 December 1966 and entered into force pursuant to Art 49(1) on 23 March 1976[736]. Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980[737]. The ICCPR entered into force for Australia pursuant to Art 49(2) on 13 November 1980[738]. The text of the ICCPR appears in Sched 2 to the *Australian Human Rights*

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731 *Charter of Human Rights and Responsibilities Act* 2006, s 1(2)(c).

732 *Charter of Human Rights and Responsibilities Act* 2006, s 1(2)(d).

733 *Charter of Human Rights and Responsibilities Act* 2006, s 1(3)(a).

734 "Human rights" are also defined in s 3(1) by reference to the civil and political rights set out in Pt 2.

735 Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 1 and 8, referring to the International Covenant on Civil and Political Rights.

736 With the exception of Art 41, which entered into force on 28 March 1979 pursuant to the requirement for the Article's entry into force outlined in par (2) of Art 41.

737 Australia's Instrument of Ratification of the International Covenant on Civil and Political Rights (1980) 1197 UNTS 411.

738 Owing to the requirements in Art 41(2), Art 41 did not enter into force for Australia until 28 January 1993.

Commission Act 1986 (Cth) (formerly known as the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth))[739].

522 In Pt 2 of the Charter ss 8 to 27 identify certain rights, freedoms and protections. Some of them are fundamental freedoms which have for some time been recognised and protected by the principle of legality at common law. The rights identified include recognition and equality before the law (s 8), the right to life (s 9), protection from torture and cruel, inhuman or degrading treatment (s 10), freedom from forced work (s 11), freedom of movement (s 12), freedom of thought, conscience, religion and belief (s 14[740]), freedom of expression (s 15), privacy and reputation (s 13) and peaceful assembly and association (s 16). Section 25(1), which states the presumption of innocence to be a right, is set out above. Sub-section (2) of that section provides that a person charged with a criminal offence is entitled to certain minimum guarantees in connection with his or her trial. It is worth noting that as long ago as 1923 Isaacs J referred to "the elementary right of every accused person to a fair and impartial trial" in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*[741] and said: "Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle." Since that case there have been many developments in Australia's common law in this regard.

523 Part 2 of the Charter commences with s 7, which is entitled "Human rights – what they are and when they may be limited". A question on this appeal is what part, if any, s 7 plays in the construction to be given by the courts to a statute. It relevantly provides:

> "(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
>
> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
>
> (a) the nature of the right; and

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739 This change in name was effected by the commencement, on 5 August 2009, of Item 35 of Sched 3 to the *Disability Discrimination and Other Human Rights Legislation Amendment Act* 2009 (Cth).

740 Freedom of religion is also protected under s 116 of the Constitution.

741 (1923) 32 CLR 518 at 541-542; [1923] HCA 39.

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve."

The application of the Charter

524 The Charter is expressed to apply to particular functions of the Parliament, of courts and tribunals, and of public authorities[742]. It applies to Parliament to the extent that Parliament has the functions of scrutiny of new legislation or of deciding whether to override the Charter. It applies to public authorities to the extent that s 38(1) provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. A "public authority" is defined in wide terms, to include any entity that has functions of a public nature, whether it is established by a statutory provision or exercises its functions on behalf of the State or a public authority[743].

525 The Charter applies to "courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3"[744]. Some of the rights identified and described in Pt 2 may require courts or tribunals to ensure that processes are complied with, for example to ensure a fair hearing[745], and that the matters guaranteed by the Charter with respect to a criminal trial are provided[746]. And the Charter contains, in s 32, a general injunction concerning the interpretation of statutes by reference to the Charter.

The provisions concerning the role of the Supreme Court

526 Section 32, which appears in Div 3 of Pt 3 of the Charter, is entitled "Interpretation". It provides:

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742 *Charter of Human Rights and Responsibilities Act* 2006, s 6(2).

743 *Charter of Human Rights and Responsibilities Act* 2006, s 4.

744 *Charter of Human Rights and Responsibilities Act* 2006, s 6(2)(b).

745 *Charter of Human Rights and Responsibilities Act* 2006, s 24.

746 *Charter of Human Rights and Responsibilities Act* 2006, s 25.

> "(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
>
> (3) This section does not affect the validity of –
>
> (a) an Act or provision of an Act that is incompatible with a human right; or
>
> (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made."

527 Where a question of law arises which concerns the application of the Charter or the interpretation of a statute in accordance with the Charter, notice is required to be given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission[747] ("the Commission"), unless they are already parties to the proceedings[748]. The Attorney-General has the right to intervene, in which case he or she is taken to be a party to the proceeding for the purpose of an appeal, and may be joined as a party where questions of the kind mentioned arise[749].

528 Where a question of the kind mentioned concerning the Charter arises in a proceeding before a court or a tribunal, the question may be referred to the Supreme Court[750] if the court or tribunal, on application by a party, considers that it is appropriate for determination by that Court[751]. Where a court or tribunal has referred a question it must not make a determination to which the question is relevant while the referral is pending or proceed in a manner, or make a

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747 Under the *Equal Opportunity Act* 1995 (Vic).

748 *Charter of Human Rights and Responsibilities Act* 2006, s 35.

749 *Charter of Human Rights and Responsibilities Act* 2006, s 34.

750 When the court is the Trial Division of the Supreme Court or the County Court, it is to refer the matter to the Court of Appeal: *Charter of Human Rights and Responsibilities Act* 2006, s 33(3).

751 *Charter of Human Rights and Responsibilities Act* 2006, s 33(1).

determination, which is inconsistent with the opinion of the Supreme Court on the question[752].

529 Where a question of the kind mentioned arises in a proceeding in the Supreme Court, or is referred to it, or in an appeal to the Court of Appeal[753], s 36(2) provides for the making of a "declaration of inconsistent interpretation" (referred to as a "declaration" in the balance of these reasons, although, as will be explained, it cannot have the status of a declaratory order granting relief[754] in respect of law):

> "Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section."

It may be observed that the Supreme Court is not obliged to make a declaration.

530 The Supreme Court must ensure notice is given to the Attorney-General and the Commission if it is considering making a declaration[755], and must not proceed to make a declaration unless it is satisfied that notice has been given and the Attorney-General and the Commission have had a reasonable opportunity to intervene in the proceedings or make submissions with respect to the proposed declaration[756].

531 The limited character and effect of such a declaration is spelled out by s 36(5), which provides:

> "A declaration of inconsistent interpretation does not –
>
> (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
>
> (b) create in any person any legal right or give rise to any civil cause of action."

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752 *Charter of Human Rights and Responsibilities Act* 2006, s 33(2).

753 *Charter of Human Rights and Responsibilities Act* 2006, s 36(1).

754 Such as a declaration of right or a declaration as to the rights of parties to litigation.

755 *Charter of Human Rights and Responsibilities Act* 2006, s 36(3).

756 *Charter of Human Rights and Responsibilities Act* 2006, s 36(4).

532 Whether any action is to be taken consequent upon the making of the declaration depends upon the response of the relevant Minister and Parliament. Section 36(6) requires the Supreme Court to cause a copy of the declaration to be given to the Attorney-General, within a specified period which relates to the conclusion of appeal rights. The Minister administering the statute in question is required, by s 37, to prepare a written response to the declaration, and cause the declaration and the response to be laid before each House of Parliament and be published in the Government Gazette. Such a procedure was not undertaken in this case following the making of the declaration by the Court of Appeal. It was said that this step was not undertaken because of the appeal pending in this Court. Nothing in the Charter requires the Attorney-General or the relevant Minister to take any action to rectify the inconsistency which is the subject of the declaration.

533 In the Second Reading Speech[757] it was said that the Charter sought to address human rights issues through "a formal dialogue between the three branches of government while recognising the ultimate sovereignty of Parliament to make laws for the good government of the people of Victoria." In the Report of the Human Rights Consultation Committee, which recommended the adoption of the Charter, the dialogue was said to be as between the community and different arms of government[758] and as between the courts, Parliament and the executive[759]. And it was said that declarations are a "channel through which the dialogue" takes place between the courts and the Parliament[760].

Questions as to ss 7(2), 32(1) and 36(2)

534 A "dialogue" is an inappropriate description of the relations between the Parliament and the courts and it is inaccurate to describe the process suggested by s 36(2) as involving a dialogue, just as the reference to the making of a "declaration" in that sub-section is inaccurate. The reference to a dialogue does, however, serve to highlight the novel aspect of s 36(2). Section 36(2) effects a novel alteration to the customary interchange between courts and Parliament

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757 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at 1293.

758 Victoria, Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, (2005) at 67.

759 Victoria, Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, (2005) at 85.

760 Victoria, Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, (2005) at 86.

which occurs under well-established principles of statutory construction and interpretation of legislation. But to say that it is novel that a court may, where appropriate, identify an inconsistency between legislation and a Charter right does not mean it impermissibly alters the relationship between the arms of government spoken of in *Zheng v Cai*[761] or compromises the institutional integrity of that court. It is necessary to analyse what is actually involved in the court making such a declaration. The question presented by s 36(2) is whether the provision offends against the Constitution by bestowing a power on the Supreme Court, incompatible with its position as a repository of the judicial power of the Commonwealth.

535 Courts exercise judicial power through their orders and judgments. Orders and judgments are respectively pronounced and published in response to questions raised in matters before a court, and are determinative of rights and interests. The use of the term "declaration" in s 36(2) is ambiguous because it evokes the familiar remedy of a declaratory order, yet s 36(5) makes it plain that the declaration has no dispositive effect. A declaration of inconsistency is not an order of the Supreme Court of Victoria[762]. As will be explained in these reasons, it is no more than a statement by the Supreme Court that, following upon its interpretation of a statutory provision in the context of the Charter, it has found the provision to be inconsistent with one or more Charter rights.

536 Conscious of the position of the Supreme Court of Victoria in the system of courts which exercise federal jurisdiction under the Constitution, the Attorney-General for Victoria submitted that the conferral of the power under s 36(2) to make a declaration does not contravene Ch III of the Constitution. It was submitted that it is not repugnant to, or incompatible with, the institutional integrity of the Supreme Court[763].

537 It was likewise submitted that nothing required of the Supreme Court in the process of its interpretation of statutes, by s 32(1), is incompatible with its role as a court to which Ch III is relevant. In that regard the central submission for the Attorney-General was that s 32(1) does not permit the Supreme Court to assume a legislative role. But the approach to construction under s 32(1) for

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761 (2009) 239 CLR 446; [2009] HCA 52.

762 This also appears to be the position in respect of s 4(6)(a) of the *Human Rights Act* 1998 (UK): see Lester, Pannick and Herberg, *Human Rights Law and Practice*, 3rd ed (2009) at 51 [2.4.5].

763 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96, 103, 116-119 and 127-128.

which the appellant contends may come much closer to a legislative function. Given the ordinary meaning of the words of s 5 of the Drugs Act, a conclusion that the presumption to be rebutted was only an evidentiary one would seem to require the words of the section to be altered.

538 Section 7(2) of the Charter assumes relevance to the appellant's argument on construction. The appellant suggested a four-step approach, as follows. After an initial conclusion is reached, that s 5 of the Drugs Act places a legal burden of displacing the presumption on the accused, the *second* step is to conclude, on its ordinary construction, that s 5 limits the presumption of innocence protected by s 25(1) of the Charter, as the Court of Appeal held[764]. The *third* step is to determine, in accordance with s 7(2), that s 5 does not place a reasonable limit on that right, or as the Court held, there was no "reasonable" or "demonstrable" justification for the restriction imposed by s 5 on the right[765]. The *fourth* and last step proposed by the appellant requires the Court to turn to s 32(1) of the Charter. The Court must, in accordance with the terms of s 32(1), strive to construe s 5 so that it is compatible with, or less incompatible with, the presumption of innocence. It is possible to construe s 5 as requiring only an evidentiary onus consistently with its purpose, the appellant contends. Section 32 therefore requires that construction to be adopted, it is submitted.

539 The Court of Appeal did not approach the operation of the Charter provisions in this way[766]. It considered that it was necessary to construe s 5 of the Drugs Act in a final way before turning to s 7(2). In the view of the Court, the question of whether the limit imposed on the right by s 5 was justified, pursuant to s 7(2), only becomes relevant after the meaning of s 5 is established. Section 32(1) was not seen to require any special rule of interpretation. Even if s 32(1) intended a departure from the usual approach to interpretation, the Court said that it was not possible to construe s 5 of the Drugs Act as requiring only an evidentiary onus, for to do so would be to "cross the line from interpretation to legislation"[767]. The Court applied s 7(2). It concluded that there "is no reasonable justification, let alone any 'demonstrable' justification", for reversing the onus of proof in connection with the offence and that "[i]t follows that s 5 cannot be interpreted consistently with s 25(1) of the Charter, although this does not affect the validity of s 5."[768] It was on that basis that the Court made the

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764 *R v Momcilovic* (2010) 25 VR 436 at 470-473 [122]-[136].

765 *R v Momcilovic* (2010) 25 VR 436 at 477 [152].

766 *R v Momcilovic* (2010) 25 VR 436 at 446 [35], 465-467 [105]-[110].

767 *R v Momcilovic* (2010) 25 VR 436 at 446 [35].

768 *R v Momcilovic* (2010) 25 VR 436 at 477 [152]-[154].

declaration of inconsistent interpretation. It did not return to further construe s 5 of the Drugs Act after applying s 7(2), as the appellant had submitted was necessary. On the Court's approach s 7(2) was not relevant to the question of interpretation, but it was a step preparatory to the making of a declaration under s 36(2).

540 The intended operation of s 7(2) in connection with the construction of a statute, to which s 32(1) refers, and the connection s 7(2) has to the making of a declaration under s 36(2), are not spelled out in the Charter. It may briefly be said that differing views of the operation of these provisions were proffered by the parties and some of the interveners on the appeal to this Court. These are matters to be determined by reference to the construction of the Charter in its own terms.

Sections 7(2) and 32(1): sources and comparisons

541 The Report of the Human Rights Consultation Committee and the Explanatory Memorandum make it plain that the Charter was drafted with an eye to legislative and constitutional instruments in other countries which have the general object of protection and promotion of human rights. They include the Canadian Charter of Rights and Freedoms ("the Canadian Charter"), which was enacted as a Schedule to the *Canada Act* 1982 (UK); the *New Zealand Bill of Rights Act* 1990 (NZ); the Bill of Rights which appears as Ch 2 of the Constitution of the Republic of South Africa[769]; and the *Human Rights Act* 1998 (UK) ("the HRA"). It should be added that the Charter was also drafted to acknowledge the operation of the rule of law in a democratic society. So much appears from the principles expressed in the Preamble and from the test provided in s 7(2), that of proportionality.

542 In argument on this appeal attention was directed to s 3 of the HRA in aid of a much broader interpretive power than might be achieved by the application of ordinary rules of construction. Section 3 relevantly provides:

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769 The final South African Constitution of 1996, to which reference is made, replaced the 1993 Interim Constitution, which outlined a number of "Fundamental rights" in Ch 3 and formed the basis of what became the Bill of Rights in the final South African Constitution.

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention[770] rights."

543 In *Ghaidan v Godin-Mendoza*[771], s 3 was taken to permit, if not to require, a court to modify or alter the words of a statute in order to eliminate a discriminatory effect on a person. At issue was whether the long-standing same-sex partner of the original, protected, tenant of a flat could succeed to the tenancy as a member of the tenant's family. The term "spouse" was defined by the legislation to mean persons living with a tenant as "his or her wife or husband". Compatibility with the Convention was achieved by reading the provision as extending to a person living with the original tenant "as if" they were his or her husband or wife.

544 *Ghaidan* produces an outcome of compatibility with Convention rights which might follow upon compliance with the rather emphatically expressed direction in s 3(1) that a statute "must be read and given effect" to that end. Such an approach pays insufficient attention to the opening words of the sub-section, "So far as it is possible to do so", and whether they are directed to compliance with the usual rules of statutory interpretation in the context of the Charter. That question is answered in large part by s 32(1) of the Charter. It too opens with the words "So far as it is possible to do so" but continues "consistently with their purpose". The reference to statutory purpose points clearly to the task ordinarily undertaken by courts in construing legislation. In *Project Blue Sky Inc v Australian Broadcasting Authority*[772] it was explained that the court's task is to construe the relevant provision in order to achieve consistency with the language and the purpose of the statute.

545 In the light of the Report of the Human Rights Consultation Committee and the Explanatory Memorandum to the Charter, s 32(1) must be taken to have been drafted with an awareness of s 3(1) of the HRA and the decisions in *Ghaidan* and later cases, to which reference will shortly be made. Section 32(1) does not direct, as s 3(1) does, that a statutory provision must be "read and given effect in a way which is compatible with [human] rights." It simply requires that, so far as it is possible to do so consistently with their purpose, all statutory provisions "must be *interpreted*" in a way which is compatible with Charter

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770 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("the Convention"), which is set out in Sched 1 to the *Human Rights Act* 1998 (UK).

771 [2004] 2 AC 557.

772 (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

rights. This is a firm statement and one which, it may be inferred, was intended to overcome any misapprehension about the role of the courts in construing legislation. The reference to interpretation must be taken to be a reference to that process of construction as understood and ordinarily applied by courts, a process which is to be taken as accepted by the other arms of government in a system of representative democracy[773].

546 The important differences in the terms of the sections are themselves sufficient to distinguish s 32(1) of the Charter from s 3(1) of the HRA. It is not necessary to go further and consider other factors which might explain the approach taken in *Ghaidan*, factors which may have to do with alterations to parliamentary and judicial sovereignty and power which have been taking place since the United Kingdom joined the European Community, the status which has been accorded to the Convention in the United Kingdom[774] and the role of the European Court of Human Rights in respect of the law of the United Kingdom[775]. It may be observed that *Ghaidan* was followed in *Sheldrake v Director of Public Prosecutions*[776], where Lord Bingham of Cornhill observed that the "interpretative obligation" under s 3 "may require the court to depart from the legislative intention of Parliament."[777] The later decision in *R (Wilkinson) v Inland Revenue Commissioners*[778] exemplifies a more orthodox approach to construction in the application of s 3(1) of the HRA. There the term "widow" was held not to include a surviving spouse of male gender. Lord Hoffmann

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773 *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28].

774 See *R v Director of Public Prosecutions; Ex parte Kebilene* [2000] 2 AC 326 at 380-381; *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 at 297; *Brown v Stott* [2003] 1 AC 681 at 703; *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at 875 [180].

775 Lord Rodger of Earlsferry observed in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at 366 [98]: "Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice … Strasbourg has spoken, the case is closed." See also *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45.

776 [2005] 1 AC 264.

777 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 303 [28], Lord Steyn and Lord Phillips of Worth Matravers MR agreeing at 314 [55]-[56]. See also *A v HM Treasury* [2010] 2 AC 534 at 647 [115] per Lord Phillips.

778 [2005] 1 WLR 1718; [2006] 1 All ER 529.

explained that, whilst the Convention forms part of the background against which a statute is to be construed, the question remains one of interpretation[779].

547 So far as concerns the use to be made of s 7(2) of the Charter, attention is directed, by the Explanatory Memorandum to the Charter[780], to s 5 of the *New Zealand Bill of Rights Act* and to s 36 of the Bill of Rights which appears as Ch 2 of the Constitution of the Republic of South Africa. It is these provisions, it is said, upon which s 7(2) was modelled.

548 The *New Zealand Bill of Rights Act* and the South African Bill of Rights have in common that they both propound a test of proportionality for a law which purports to limit a right or freedom which is sought to be protected. The provision in the *New Zealand Bill of Rights Act* which corresponds to s 7(2) is s 5. It is entitled "Justified limitations" and provides that the rights and freedoms referred to in the Act "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 5 of the *New Zealand Bill of Rights Act* does not provide tests of the principle of proportionality as s 7(2) does, but in *R v Hansen*[781] s 5 was taken to incorporate a test of proportionality, albeit differing in some respects from those listed in s 7(2).

549 Proportionality as a principle may generally be said to require that any statutory limitation or restriction upon a right or freedom having a particular status be proportionate to the object or purpose which it seeks to achieve. Proportionality is also stated to be a test, and in the sense just described it is, but the term does not itself explain how the conclusion whether a statutory measure is proportionate or disproportionate is to be reached. The tests for proportionality are not universal, although they may have some features in common. Some constitutional documents or statutes state the tests to be applied, others leave it to the courts to formulate tests directed to the more general question of whether a statutory measure is proportionate and therefore justified. Such is the case with the Canadian Charter, which may be contrasted with the tests which have been employed by the German courts and courts of the European Community, which are more structured in their approach.

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779 *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535.

780 Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 9.

781 [2007] 3 NZLR 1.

550 The terms of the New Zealand provision, and the words with which s 7(2) of the Charter commences, follow those of s 1 of the Canadian Charter, which guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In *Hansen* the test propounded by the Canadian Supreme Court in *R v Oakes*[782] was followed in the context of what constitutes a "justified limitation"[783]. The test was later summarised[784] as:

> "1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
>
> (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right or freedom in question as 'little as possible'; and
>
> (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective."

551 Section 7(2) of the Charter commences, in terms similar to s 1 of the Canadian Charter, "A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom" but then goes on to provide "and taking into account all relevant factors including" and then lists the five factors set out above[785].

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782 [1986] 1 SCR 103.

783 See *R v Hansen* [2007] 3 NZLR 1 at 28 [64] per Blanchard J, 40 [103] per Tipping J, 69 [203]-[205] per McGrath J and 84-85 [271]-[272] per Anderson J (referring to *R v Chaulk* [1990] 3 SCR 1303).

784 *R v Chaulk* [1990] 3 SCR 1303 at 1335-1336.

785 See [523] of these reasons.

552 A detailed comparison of these provisions against the test applied with respect to the general Canadian Charter provision, s 1, is not warranted in this case. It is sufficient to observe that there are some obvious differences which suggest that the test here to be applied is best understood within the confines of what is provided in s 7(2). By way of example, s 7(2) does not speak of a requirement that the right or freedom be impaired "as little as possible". It directs attention in par (e) to whether there are any less restrictive means reasonably available which might meet the statutory objective to which the limiting provision is directed.

553 Paragraphs (a) to (d) of s 7(2), taken together, may comprise another test, or at least the framework for a test, which has regard to the nature (and inferentially the importance) of the right affected on the one hand, and the importance and purpose of the limitation and the extent to which it operates as a limitation of the right. Depending upon the importance attributed to the right, the implication in a test structured this way is that a statutory provision may go too far, much more than is necessary to meet its objective. Whilst the Canadian test might involve some such test in par 2(c) above, it is expressed in a more open-ended way.

554 As will shortly be discussed in connection with the South African Bill of Rights, the tests which are provided in s 7(2) bear a closer resemblance to those already employed by this Court and may have a closer affinity to tests employed in some European jurisdictions. And, whilst s 7(2) does not purport to exclude other tests, there would appear to be real questions about the extent to which other tests would be consistent with it, given the specific test in s 7(2)(e) and the framework provided in the other paragraphs of the sub-section. Likewise there would be a real question about the consistency of s 7(2) with tests utilised in jurisdictions such as Canada.

555 Section 7 of the Charter follows the tests for proportionality set out in the South African Bill of Rights. Section 36(1) of the Bill of Rights provides that the rights to which it refers may be limited by general laws only to the extent that the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors". The factors there listed correspond to those in s 7(2) of the Charter.

556 The tests stated in s 7(2) for proportionality are not novel. They are well known to European jurisdictions and have their origin in German law and rule of law concepts[786]. Kiefel J discussed the principle of proportionality and its

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786 Schwarze, *European Administrative Law*, rev ed (2006) at 710-717.

application by this Court in *Rowe v Electoral Commissioner*[787]. One test of proportionality is that of "reasonable necessity". It asks whether there are less restrictive statutory measures available to achieve the purpose that is sought to be achieved. This test is stated in s 7(2)(e). It has been applied by this Court principally in cases concerning s 92 of the Constitution, such as *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*[788] and more recently *Betfair Pty Ltd v Western Australia*[789]. It requires that the alternative, less restrictive, measure which could have been employed is as effective to achieve the statutory purpose in question[790]. If there are such measures available, it would follow that the measure chosen is excessive and therefore disproportionate.

557 Paragraphs (a) to (d) of s 7(2) together are structured so as to permit another test of proportionality, which is sometimes called "proportionality in the strict sense"[791]. It too tests whether a legislative restriction is excessive and therefore disproportionate, but it does so by reference to the nature and importance of the right or interest sought to be protected and what is sought to be achieved. Cases involving the implied freedom of communication concerning government and political matters test whether a statutory restriction is excessive, not only by reference to what it seeks to achieve (which necessarily must be within legislative power), but also by reference to the freedom. Thus in *Australian Capital Television Pty Ltd v The Commonwealth*[792] Mason CJ said that only a "compelling justification" would warrant the imposition of a burden on the freedom. In *Lange v Australian Broadcasting Corporation*[793] it was said that the freedom cannot be absolute, but is limited to what is necessary for the effective operation of representative and responsible government.

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787 (2010) 85 ALJR 213 at 291-297 [431]-[466]; 273 ALR 1 at 105-112; [2010] HCA 46.

788 (1975) 134 CLR 559 at 616; [1975] HCA 45.

789 (2008) 234 CLR 418 at 477 [102]-[103]; [2008] HCA 11.

790 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306; [1980] HCA 40; *Rowe v Electoral Commissioner* (2010) 85 ALJR 213 at 292 [438] and 296-297 [463]; 273 ALR 1 at 106 and 112.

791 *Rowe v Electoral Commissioner* (2010) 85 ALJR 213 at 296 [460]; 273 ALR 1 at 111.

792 (1992) 177 CLR 106 at 143; [1992] HCA 45.

793 (1997) 189 CLR 520 at 561; [1997] HCA 25.

558 A statutory object may be important, to the public interest or to the maintenance of the Constitution itself. An assessment of whether a statutory restriction is disproportionate would therefore seem to require both the statutory object and the aspect of the freedom in question to be taken into account in determining whether the restriction is excessive. Indeed it may be that some such approach has informed judgments in this area, without the test of proportionality in the strict sense being expressly stated[794].

559 In each of the cases mentioned above[795] the requirement of proportionality was applied to a freedom which is the subject of a constitutional guarantee. The rights referred to in the South African Bill of Rights are entrenched within it. The Bill of Rights forms part of the South African Constitution, s 7(3) whereof provides that the rights in the Bill of Rights are subject to the limitations contained or referred to in s 36. Section 36(2) proclaims that no law may limit any such right, except as provided in sub-s (1) or some other provision of the Constitution. Any law which is not so justified is to be the subject of a declaration made by a court[796].

560 It is of interest to observe that the courts of South Africa may suspend a declaration for a period "to allow the competent authority to correct the defect."[797] The idea of a declaration made under s 36(2) of the Charter and notified to the Attorney-General and thence the relevant Minister may have been drawn from this provision, but the Attorney-General and the Minister are not subject to constitutional obligations such as those provided in the South African Constitution.

561 It may be seen that aspects of the South African Bill of Rights have been influential in the drafting of the Charter, but the South African provisions have not been translated to the Charter. The Charter is not a constitutional document.

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794 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 34 per Mason CJ, 57 per Brennan J, 78-79 per Deane and Toohey JJ and 101 per McHugh J; [1992] HCA 46; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143-144 per Mason CJ, 167 per Brennan J and 174 per Deane and Toohey JJ.

795 See [556] of these reasons.

796 Constitution of the Republic of South Africa, s 172(1)(a). An *order* of constitutional invalidity (as distinct from a declaration under s 172(1)) made by a court authorised to do so under s 172(2)(a) requires confirmation by the Constitutional Court: s 172(2)(b).

797 Constitution of the Republic of South Africa, s 172(1)(b)(ii).

The Victorian Parliament has not purported to bind its successors in relation to the enactment of legislation consistent with the Charter. Indeed, the provisions of the Charter itself relating to legislation incompatible with its terms indicate a contrary intention. The rights contained within it are not given constitutional status and the Supreme Court is not given the power to declare invalid legislation which is inconsistent with a Charter right. The authorities to date do not suggest that the Supreme Court itself has the power to declare legislation invalid for excess of power in the sense that it is manifestly disproportionate to its purpose.

562 In Australia the States are regarded as having the legislative powers that the Parliament of the United Kingdom might have exercised[798]. In *Union Steamship Co of Australia Pty Ltd v King*[799] it was said of the power to make laws for the peace, welfare and good government of a territory[800] that, just as is the case in the United Kingdom, the exercise of the legislative power of the New South Wales Parliament is not subject to review on the ground that a law does not secure the welfare and the public interest. It has been suggested that some common law rights might be "so deep" that Parliament cannot override them[801]. This question was "identified but not explored" in *Union Steamship*[802]. The Charter draws attention to another question. It is whether the rule of law, upon which the principle of proportionality is founded, may itself imply a limitation.

563 This is a large question concerning the limits, if any, which the rule may effect upon the grant of legislative power to State parliaments. It may also involve consideration of the Australian Constitution. The Constitution does not contain express guarantees to establish individual rights of the kind set out in the Fourteenth Amendment to the United States Constitution, which guarantees would have restricted State legislatures[803]. That was left to the rule of

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798 *Australia Act* 1986 (Cth), s 2(2); *Australia Act* 1986 (UK), s 2(2); see also *Powell v Apollo Candle Company* (1885) 10 App Cas 282.

799 (1988) 166 CLR 1 at 10; [1988] HCA 55.

800 Section 16 of the *Constitution Act* 1975 (Vic) refers to "power to make laws in and for Victoria in all cases whatsoever."

801 *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398.

802 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14]; [2001] HCA 7.

803 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 61 per Dawson J; [1997] HCA 27.

law[804], which Dixon J said, in *Australian Communist Party v The Commonwealth*, is an assumption in accordance with which the Constitution is framed[805]. These were not matters which were ventilated on this appeal and it is not appropriate to further consider them.

564 Whilst the terms of s 7(2) suggest that some consequence will follow a finding of an excessive limitation of a Charter right, that is not the case. The Supreme Court is not able to enforce a Charter right in the face of a statute which disproportionately limits or restricts the right and may not declare such a statute invalid in support of such a right. The power of the Supreme Court is limited to the interpretation of the statute in light of the Charter and to the making of a declaration – that is, a statement – of inconsistent interpretation which is not legally binding, where a provision cannot be construed consistently with a Charter right. The question is whether s 7(2) is part of that process, or has some other part to play in the framework of the Charter. In this regard the Charter must be construed on the basis that its provisions are intended to give effect to harmonious goals[806]. The key questions then are whether and how ss 7(2), 32(1) and 36(2) are intended to operate together.

The operation of ss 7(2), 32(1) and 36(2)

565 Section 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes. Its terms identify an approach of interpretation which has regard to the terms and to the purpose of the statutory provision in question, as previously discussed[807]. The statutory direction in s 32(1), that statutory provisions "must be interpreted in a way that is compatible with human rights", is qualified by the recognition that such an interpretation is to be effected only "[s]o far as it is possible to do so consistently with their purpose". This statutory direction seeks to ensure that Charter rights

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804 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 February 1898 at 664-691.

805 (1951) 83 CLR 1 at 193; [1951] HCA 5; see also Dixon, "The Common Law as an Ultimate Constitutional Foundation", in *Jesting Pilate*, (1965) 203. See also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31] per Gleeson CJ and 513 [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2; *South Australia v Totani* (2010) 242 CLR 1 at 155-156 [423] per Crennan and Bell JJ; [2010] HCA 39.

806 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70].

807 See [540] of these reasons.

are kept in mind when a statute is construed. The direction is not, strictly speaking, necessary. In the ordinary course of construction regard should be had to other existing laws[808]. The Charter forms part of the context in which a statute is to be construed. It will be recalled that Lord Hoffmann viewed the Convention in a similar way in *Wilkinson*[809]. The process of construction commences with an essential examination of the context of the provisions being construed[810].

566 Where it is possible, consistently with a statute's purpose, s 32(1) requires that all statutory provisions are to be read conformably with Charter rights. Section 32(3)(a) acknowledges that this may not be possible in all cases, by providing that s 32(1) does not affect the validity of an Act or a provision of an Act which is incompatible with a human right. It cannot therefore be said that s 32(1) requires the language of a section to be strained to effect consistency with the Charter. When a provision cannot be construed consistently with the Charter, the provision stands. McGrath J's observations in *Hansen*[811], in connection with s 4 of the *New Zealand Bill of Rights Act*[812], are apposite to s 32(3)(a). They are that the effect of such a provision is that any inconsistent legislation prevails over a Bill of Rights document. Such a provision reaffirms the role of the legislature and makes clear that a court's role in ascertaining the meaning of the legislation remains one of interpretation.

567 Under s 36(1), where the Supreme Court has determined the question of the interpretation of a statutory provision in the context of the Charter, it will be in a position, at the conclusion of that process, to determine whether the

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808 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

809 [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535.

810 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

811 [2007] 3 NZLR 1 at 62 [179].

812 "No court shall, in relation to any enactment …

(a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) decline to apply any provision of the enactment –

by reason only that the provision is inconsistent with any provision of this Bill of Rights."

provision is inconsistent with a Charter right. It will be in a position to determine the effect of the statutory provision on the Charter right and whether it limits or restricts it such as to be inconsistent with the existence of the right. At this point the Supreme Court is therefore in a position to make a declaration under s 36(2), should it choose to do so. It is notable that the declaration is described in s 36 as one of "inconsistent interpretation" to be made where a statutory provision cannot be interpreted consistently with a human right. This description is no doubt intended to tie the declaration to the process of interpretation to which s 32(1) refers. However, such a description cannot be allowed to mask the true nature of any enquiry which precedes a declaration. The approach of the Court of Appeal raises the question whether obtaining an answer to the question posed by s 7(2) is an essential step before the making of a declaration. It is therefore necessary to consider what is involved under s 7(2) in order to determine its connection, if any, to the interpretation task to which s 32(1) refers and to the making of a declaration under s 36(2).

568 The foundations for the enquiry under s 7(2) are an identified inconsistency between a statutory provision and a Charter right and an understanding of the extent of the restriction or limit giving rise to the inconsistency. Section 7(2) then enquires whether these restrictions or limits are justified as reasonable, having regard to the tests of proportionality there provided. Thus, an understanding of the extent of the effects of the statutory provision is essential to the enquiry under s 7(2). However, that enquiry involves much more, as will be explained. Moreover the question to which s 7(2) is directed, namely, whether a reasonable legislative limitation upon a Charter right is demonstrably justified, is a distinct and separate question from one as to the meaning of a provision, which is ascertained by a process of statutory construction.

569 Paragraph (e) of s 7(2) looks to the effect of a statutory limitation on a Charter right and enquires whether there is a reasonably available alternative, inferentially one which would be less restrictive in its effect. The other paragraphs of the sub-section are also directed to the effect of the statutory provision on a Charter right. The framework there provided suggests an enquiry as to whether, having regard to the nature of the right, the extent of the limitation is necessary in order to achieve the statutory purpose or objective. In this process the importance of that purpose may also be taken into account, although it may in some cases prove a task of some difficulty for a court. On this test, purpose assumes importance, not as part of a process of construing the statutory provision, but as part of an enquiry as to whether there is a justification for the limitation it effects on a Charter right having regard to the statutory purpose.

570 If it is concluded, after the application of the tests in s 7(2), that there are no other reasonably available alternative measures or that the statutory provision effecting the limitation cannot be said to be excessive or disproportionate, having

regard to the nature of the right and the importance of the statutory purpose, then the limits imposed by the statutory provision in question will be justified. What then follows from such a conclusion, or the alternative conclusion that the provision is not justified?

571 Section 7(2) is an acknowledgement that Charter rights are not absolute or always completely consistent with each other. So much is confirmed by the Explanatory Memorandum to the Bill which introduced the Charter[813]. It would appear to follow that if a limitation or restriction effected by a statutory provision is demonstrably justified, a Charter right is to be read and understood as subject to such a limitation or restriction. Section 7(2) may therefore be said to have something of an interpretive effect directed to the content of the Charter right rather than the statutory provision in question, which remains unchanged.

572 Section 7(2) has no bearing upon the meaning and effect of a statutory provision, which are derived by a process of construction, not any enquiry as to justification. However, s 7(2) may produce a conclusion that a statutory provision restricts or limits a Charter right but is nevertheless *compatible* with it because the Charter allows the right to be viewed as reduced in a case where the limitation is justified. It may be said that the Charter right has been rendered compatible with the statutory provision following this adjustment.

573 It is possible that a conclusion is reached that a statutory provision operates inconsistently with a Charter right. By the process undertaken pursuant to s 7(2) it might then be concluded that there may nevertheless be compatibility between the provision and the Charter right. But it will readily be apparent that nothing follows from such a conclusion so far as concerns the interpretation of the statutory provision. Likewise nothing follows if a conclusion of incompatibility is reached under s 7(2). It cannot spell the invalidity of the provision in question, for the reasons earlier given. And it cannot affect the interpretive process mandated under s 32(1).

574 Despite the word "compatible" appearing in s 32(1) (and "incompatible" in s 32(3)) it cannot be concluded that the enquiry and conclusion reached in s 7(2) informs the process to be undertaken by the courts under s 32(1). If some link between s 7(2) and s 32(1) were thought to be created by the use of such terms in s 32, such a result has not been achieved: (a) because the process referred to in s 32(1) is clearly one of interpretation in the ordinary way; and (b) because s 7(2) contains no method appropriate to the ascertainment of the meaning and effect of a statutory provision. The notion of incompatibility

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813 Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 7 and 9.

inherent in s 32(1) can only refer to an inconsistency found by a process of interpretation and no more. And so far as concerns the Supreme Court's role under s 36(2), its terms confirm that the concern of the Court is only with the question of whether a provision cannot be "interpreted consistently" with a human right. There is no suggestion in s 36(2) that the test provided by s 7(2) is to play any part in the making of a declaration. No attempt is made to link it with s 7(2), no doubt for good reason.

575 It is not possible to read s 7(2) so that it operates with s 32(1) or s 36(2). It is not necessary to determine whether it has any other consequences, although it is difficult to discern that it might. It might operate as a statement of principle directed to the legislature, but it forms no part of the role of the courts in interpreting a statutory provision in connection with the Charter or the making of a declaration by the Supreme Court.

576 It follows that neither the appellant's methodology nor that of the Court of Appeal was correct in their application of s 7(2). The appellant's method required s 32(1) to be applied after consideration of s 7(2)[814]. However, such an approach is not warranted given the terms of the Charter[815]. The Court of Appeal clearly considered that it was necessary to determine the question under s 7(2) and to determine if s 5 of the Drugs Act was incompatible before determining whether a declaration should be made. It correctly identified that s 7(2) might give an answer to a question of compatibility, but s 36(2) does not require that question to be addressed. By s 36(2) a declaration, if it is to be made, follows upon a conclusion by a court that a statutory provision cannot be interpreted consistently with a human right. The fact that s 7(2) is divorced from the process of determining inconsistency is a factor in favour of the validity of s 36(2), as will be discussed later in these reasons.

The construction of s 5 of the Drugs Act

577 The purpose of s 5 of the Drugs Act is to facilitate the prosecution of certain drug offences. It seeks to achieve that purpose by creating the presumption of possession which an accused person is required to rebut to a legal standard of proof. The appellant submitted that that purpose can be achieved by reading s 5 as requiring only the discharge of an evidentiary onus in order to rebut the presumption. It may be observed that that result would not completely remove all limitations upon, or inconsistency with, the right in s 25(1) of the Charter. It would serve only to reduce them.

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814 Following the approach in *R v Hansen* [2007] 3 NZLR 1 at 65 [189].

815 See [550]-[554] of these reasons.

578 Reliance was placed by the appellant, in this regard, upon a concession made in argument in the Court of Appeal by the Chief Crown Prosecutor, who appeared for the Crown, that "a change from a persuasive onus to an evidentiary onus would make little difference" to successfully prosecuting drug trafficking offences[816]. On this appeal the Chief Crown Prosecutor informed the Court that the practical effect of s 5 is to force an accused person to give evidence. Clearly that result could be achieved regardless of the degree of proof required to rebut the presumption.

579 The prospect that a statutory purpose may be achieved by other means, which may have a less restrictive effect upon the right in s 25(1) of the Charter, is clearly relevant to the test of proportionality under s 7(2)(e). It is not apposite to a process of construction, which is concerned with the ascertainment of the meaning of a statute. The ascertainment of meaning does not involve the substitution of statutory provisions which are unambiguously expressed.

580 In *Wentworth Securities Ltd v Jones*[817] Lord Diplock stated certain conditions as necessary to be fulfilled before a court, construing legislation, could read words into the text[818]. However, they were directed to correcting a defect or omission which had been overlooked by Parliament. Moreover, as Kirby J pointed out in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*[819], his Lordship made it plain that that possibility only arises "if the application of the literal or grammatical meaning would lead to a result which would defeat the clear purpose of a statute".

581 It could not be suggested that the purpose of s 5 of the Drugs Act is not achieved by imposing a legal onus. It certainly could not be said that the method of disproving the fact of possession as stated was the result of any inadvertence on the part of Parliament. The approach suggested by the appellant is simply to alter the words to achieve a different outcome. Such an approach is not warranted by the requirements of the process of construction. The Court of Appeal was correct to observe that to do so would involve something approaching a legislative function. It is not possible to read s 5 of the Drugs Act consistently with s 25(1) of the Charter.

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816 *R v Momcilovic* (2010) 25 VR 436 at 475-476 [145].

817 [1980] AC 74 at 105.

818 Followed in Australia: see *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113 per McHugh J; [1997] HCA 53.

819 (1998) 196 CLR 53 at 81 [73]; [1998] HCA 78.

The making of a declaration of inconsistency

582 It has earlier been observed that the declaration, for which s 36(2) of the Charter provides, is not a declaratory order granting relief[820].

583 Insofar as s 36(2) suggests a declaratory order, the word "declaration" is a misdescription, as is the statement of the object in s 1(2)(e), namely, "conferring jurisdiction" upon the Supreme Court to make a declaration of inconsistency. When the whole of s 36 is considered it is clear that the Supreme Court does not have jurisdiction to determine the question of inconsistency. Rather, the Supreme Court is empowered to make a declaration consequent upon exercising jurisdiction otherwise conferred, in this case, in respect of s 32.

584 The discretionary power to make a declaratory order was described by this Court in *Ainsworth v Criminal Justice Commission*[821] as "confined by the considerations which mark out the boundaries of judicial power." A declaration under s 36(2) is not directed to the determination of a legal controversy and has no binding effect. It is not an exercise of judicial power. The declaration of inconsistency for which s 36(2) provides is in the nature of a statement, made by the Supreme Court following upon its interpretation of a statutory provision in the context of the Charter, that an inconsistency between the two statutes is evident, and of which the Attorney-General is notified[822]. In that sense it constitutes a conclusion but not an advisory opinion of the kind with which this Court was concerned in *In re Judiciary and Navigation Acts*[823] and which the Court was required by those Acts to give. It is a formal conclusion arising out of the exercise undertaken by the Supreme Court in respect of s 32(1). That exercise under s 32(1) is integral to the resolution of the "matter" between the appellant and the first respondent. Standing alone, s 36 could not give rise to any "matter" within the meaning of Ch III of the Constitution.

585 The Attorney-General relied upon the fact that, pursuant to the Charter, a declaration is to be made in the course of proceedings where a question of interpretation concerning the Charter is raised, the resolution of which might affect an accused's rights or liabilities. But neither the placement by the legislature of the declaration within the course of the proceedings, nor the joinder

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820 See [529] and [535] of these reasons.

821 (1992) 175 CLR 564 at 582; [1992] HCA 10.

822 *Charter of Human Rights and Responsibilities Act* 2006, s 36(6).

823 (1921) 29 CLR 257 at 266-267; [1921] HCA 20.

of the Attorney-General and the Commission to the proceedings, can clothe the declaration made by the Court of Appeal with the qualities of a declaratory order made in connection with the "matter" which was the subject of the trial of the appellant. The interpretation of s 5 of the Drugs Act formed part of that matter, for it concerned questions as to the essential elements of the offence with which the appellant was charged and the obligations of the parties to prove those elements. It concerned the right of the appellant to require the Crown to prove her possession of the drugs for the purpose of sale.

586 The declaration involves a separate question, as to whether s 5 of the Drugs Act is compatible with s 25(1) of the Charter. It may be said that the enquiry into that question has a connection to the matter the subject of the appellant's trial, or that it is incidental or ancillary to it. The determination of the question of inconsistency with the Charter and a declaration giving expression to that determination does not establish any right, duty or liability[824]. The purposes of a declaration do not involve the administration of the law, but rather its possible alteration. A statement or conclusion, made incidentally to the exercise of judicial power, which induces a change in legislation, is not a judicial decision[825].

587 The consequences which are produced by the declaration are largely steps which the Charter requires the Attorney-General or the relevant Minister to take, once the inconsistency has been notified. It is not necessary to determine the extent of those obligations and whether they are of such a nature as to be enforceable. For present purposes it may be observed that they are not consequences which follow from the determination of the matter involving the appellant. This is not to say that it may not be possible for a law to be framed in such a way that a "matter" could arise for which a declaration was the legal consequence: for example, if it were binding between the parties. But that position does not pertain with respect to the Charter.

588 The discussion in *Mellifont v Attorney-General (Q)*[826] provides assistance. There, provision was made for the referral by the Attorney-General of the State of Queensland of a point of law arising in a criminal trial to the Court of Criminal Appeal for determination and opinion, even though the proceedings had resulted in an acquittal. But as this Court explained, the answer given was not

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824 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

825 *R v Davison* (1954) 90 CLR 353 at 369-370; [1954] HCA 46.

826 (1991) 173 CLR 289; [1991] HCA 53.

divorced from an attempt to administer the law[827]. The answers provided by the Court of Criminal Appeal constituted an important step in the judicial determination of the rights and liabilities of the parties in the trial of the accused[828]. The effect of the decision on the reference was to correct an error of law in the trial judge's ruling in those proceedings[829].

589 The exercise of judicial power by the Court of Appeal in proceedings concerning the interpretation of s 5 of the Drugs Act placed that Court in a position to identify any inconsistency between s 5 of the Drugs Act and s 25(1) of the Charter, and to draw a conclusion in respect of that inconsistency. That connection is not sufficient to render the power to make a declaration an exercise of judicial power, but it serves to show that the making of a declaration is a function incidental to an exercise of judicial power. This distinguishes such a function from the act of making a declaratory order about a hypothetical matter, which has been observed to be beyond the boundaries of judicial power[830].

590 In this regard it is important to recall that the declaration under s 36(2) does not require more than a statement or conclusion as to the interpretation of the Charter and the statutory provision in question. In particular the Supreme Court is not required, preparatory to a declaration, to undertake the tests under s 7(2). If that process had been required it may well have been said that the Court was being asked to consider an abstract question of law[831], as to the justification of s 5 of the Drugs Act tested by reference to its proportionality pursuant to s 7(2), which has no legal consequence. However, such a question is divorced from the question of statutory construction to which s 32 refers and which the declaration under s 36(2) is intended to follow.

591 *In re Judiciary and Navigation Acts*[832] did not hold that functions which are merely incidental to an exercise of judicial power cannot be given to a court

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827 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303, referring to *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266-267.

828 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303.

829 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 305.

830 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.

831 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267.

832 (1921) 29 CLR 257.

under federal law[833]. In that case the function in question was arguably of a judicial character, but could not be exercised because it was not part of the judicial power of the Commonwealth. In *R v Davison*, Dixon CJ and McTiernan J observed that there are many functions or duties that are not necessarily of a judicial character but which may nevertheless be performed judicially "whether because they are incidental to the exercise of judicial power or because they are proper subjects of its exercise"[834].

592 The description of a function as incidental to the exercise of judicial power may be thought largely to answer any question as to its compatibility with the role of the judge or the court undertaking the function. Nevertheless, questions were raised in argument as to the application of the principle identified in *Kable v Director of Public Prosecutions (NSW)*[835] to the declaration and it is necessary to turn to them.

593 The power of State legislatures to make law has been discussed earlier in these reasons. *Kable* holds that there are limits to that power respecting State courts. In *Thomas v Mowbray*, Gummow and Crennan JJ said that Ch III of the Constitution "gives practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy"[836]. It is not within the power of a State legislature to enact a law conferring upon a State court, which may exercise federal jurisdiction, functions incompatible with the State court's role as a repository of that jurisdiction. In particular, a State legislature cannot confer on a State court a function which substantially impairs its institutional integrity[837].

594 The prosecution of the appellant in the County Court had an additional federal element, arising from her status as a resident of Queensland at the time of

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833 As observed by Latham CJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 565-566; [1938] HCA 10.

834 (1954) 90 CLR 353 at 369-370; see also *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151; [1953] HCA 11; *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194 at 216; [1976] HCA 48.

835 (1996) 189 CLR 51.

836 (2007) 233 CLR 307 at 342 [61]; [2007] HCA 33.

837 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96, 103, 116-119 and 127-128.

her trial. The "matter" involving the appellant was between a State and a resident of another State, and the County Court therefore exercised federal jurisdiction[838].

595 In *Kable* it was said that the nature of some functions may be such as to be so incompatible with the exercise of the judicial power of the Commonwealth that the integrity of the judiciary may thereby be diminished[839]. State courts have a role and existence as part of the integrated judicial system under the Constitution[840] which transcends their status as State courts[841]. Whilst the limitation on State legislative power respecting courts which exercise federal jurisdiction, discussed in *Kable*, derives from a source different from that limitation discussed in *R v Kirby; Ex parte Boilermakers' Society of Australia*[842], in both cases the limitation is derived from the necessity to ensure the integrity of the judicial process and the integrity of the courts. The requirement of incompatibility in both areas of this constitutional discourse was discussed in *Wainohu v New South Wales*[843].

596 At issue in *Kable* was legislation which required the making of a preventive order directed to a named individual. In *South Australia v Totani*[844] the legislation required the Magistrates Court of South Australia on application by the Commissioner of Police to make a control order regarding an individual if the State Attorney-General had made a declaration in respect of an organisation of which he or she was a member. The legislation was held to be invalid because the legislature could not, consistently with Ch III, enlist the Court to give effect to legislative and executive policy.

597 Section 36(2) of the Charter does not oblige the Supreme Court to make a declaration. Whether it does so is a discretionary matter for the decision of the

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838 Sections 75(iv) and 77(iii) of the Constitution; *Judiciary Act* 1903 (Cth), s 68(1).

839 (1996) 189 CLR 51 at 98 per Toohey J, 103 per Gaudron J and 116 per McHugh J.

840 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-103 per Gaudron J, 110 per McHugh J and 139-140 per Gummow J.

841 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 per Gaudron J.

842 (1956) 94 CLR 254; [1956] HCA 10.

843 (2011) 85 ALJR 746 at 763-766 [44]-[53] per French CJ and Kiefel J; 278 ALR 1 at 19-23; [2011] HCA 24.

844 (2010) 242 CLR 1.

Court. The only requirement imposed on the Court is to ensure notice is given if a declaration is in contemplation[845] and, if one is made, to cause a copy of the declaration to be given to the Attorney-General[846]. But this is not to enlist the Court to give effect to any pre-determined conclusion on the part of the legislature or the executive, as was the case in *Totani*. The making of a declaration is not a function having a close connection with the executive or the legislature. It is made independently of any "instruction, advice or wish of the Legislature or the Executive Government"[847]. The declaration here was made by the Court of Appeal (albeit erroneously as will shortly be explained), as the result of its own, independent, assessment of s 5 of the Drugs Act, read with the Charter. The independence of that assessment, as relevant to the making of the declaration, is not affected by the Court having undertaken the unnecessary enquiry under s 7(2) of the Charter.

598 Independence of the courts is integral to their institutional integrity. Judgments of this Court confirm the importance of the perception of a judge's role in this regard. In connection with functions which do not involve exercising judicial power, it was held in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* that legislation which required a federal judge, appointed by the Minister, to report to the Minister was invalid. Gaudron J there said that "impartiality and the appearance of impartiality are defining features of judicial power."[848] Her Honour went on to observe that a court exercising judicial power must "be and be seen to be completely independent" of the legislative and executive branches of government[849]. The need for independence and impartiality, and the separation of the judiciary and the other arms of government, also underlie the requirement of a "matter" in s 76 of the Constitution which operates to limit the circumstances in which judicial power

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845 *Charter of Human Rights and Responsibilities Act* 2006, s 36(3) and (4).

846 *Charter of Human Rights and Responsibilities Act* 2006, s 36(6).

847 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17; [1996] HCA 18.

848 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 25.

849 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 25; see also *Hilton v Wells* (1985) 157 CLR 57 at 83-84 per Mason and Deane JJ; [1985] HCA 16; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [16] per Gleeson CJ and 597 [34] and 601-602 [43]-[44] per McHugh J; [2004] HCA 46.

can be exercised[850]. Closer to the subject at hand, and in connection with the application of *Kable*, Gummow J in *Fardon v Attorney-General (Qld)* stated that it was preferable to view a perception which may undermine public confidence as an indicator, but not the touchstone, of invalidity. The touchstone, his Honour said, is the institutional integrity of the court[851].

599 In some cases it may be difficult to view the way a court is perceived as unconnected to its integrity as an institution. Whilst the judgments in *Totani* confirmed that the practical operation of the legislation there was to enlist a judge to effect executive and legislative policy, the legislation also, and misleadingly, gave the appearance of the Magistrates Court participating in the pursuit of the objectives of the Act in question, whilst giving effect to that executive and legislative policy[852]. Problems created by the appearance of a want of independence were evident in *Wainohu*, where the statute denied the duty of a judge to give reasons, but at the same time created an apparent connection between the non-judicial function conferred and the exercise of jurisdiction by a Supreme Court judge. It was there said that[853]:

> "The appearance of a judge making a declaration is thereby created while the giving of reasons, a hallmark of that office, is denied. These features cannot but affect perceptions of the role of a judge of the court".

600 The process by which the Court of Appeal here reached its conclusion of inconsistency cannot be said to involve functions which are incompatible with, or antithetical to, judicial power. The process involves an ordinary interpretive task. The content of the declaration cannot be a cause for concern. It merely records a finding of inconsistency between s 5 of the Drugs Act and s 25(1) of the Charter. It does not answer a question directed to the Court, as to the validity of legislation, as was the case in *In re Judiciary and Navigation Acts*. The Court does not purport to advise as to law reform. It is not unknown for judges to incidentally pass comments upon conclusions they have reached about defects in legislation in the course of their reasons[854]. Doing so in the course of a

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850 Stellios, *The Federal Judicature: Chapter III of the Constitution*, (2010) at 124 [4.28].

851 (2004) 223 CLR 575 at 618 [102].

852 *South Australia v Totani* (2010) 242 CLR 1 at 172-173 [480] per Kiefel J; see also at 52 [82] per French CJ.

853 *Wainohu v New South Wales* (2011) 85 ALJR 746 at 769 [68]; 278 ALR 1 at 28.

854 See for example *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 304-305 per Mason CJ; [1994] HCA 44; *Georgiadis v Australian and Overseas*

(Footnote continues on next page)

permissible exercise of judicial power is "a function properly regarded as incidental to the exercise of the power."[855] However, that function is not a function which, if it were undertaken independently of the exercise of "a principal judicial duty"[856], might be said to "belong to an administrator."[857] The form of the process under s 36(2) does not alter that analysis.

601 The argument for the invalidity of s 36 is about perceptions. The matters in this case which are relevant to the appearance of the Supreme Court as independent of the executive and legislative branches of the Victorian State Government are (a) that the non-judicial function of making a declaration is embellished by being styled a "declaration" to give the appearance of an order of the Court; and (b) that the legislation requires a copy of the declaration to be given to the Attorney-General.

602 The first-mentioned feature calls to mind what was said in *Mistretta v United States*[858], namely, that the reputation of the judicial branch may not be borrowed by the legislative and executive branches "to cloak their work in the neutral colors of judicial action."[859] But that statement was directed to a legislative or executive function which was disguised by use of a court's processes. Here the declaration, whilst not dispositive because it is made only incidentally with respect to a matter, does not implement any policy or action of the executive or the legislature. Putting to one side the description given to it as a "declaration", it is readily apparent that it is no more than a statement made by the Supreme Court as to an apparent inconsistency. So far as it concerns the executive and the legislature, the statement serves only to draw attention to that

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Telecommunications Corporation (1994) 179 CLR 297 at 308 per Mason CJ, Deane and Gaudron JJ; [1994] HCA 6; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 538 [176] per Callinan J.

855 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 20, fn 68.

856 *Steele v Defence Forces Retirement Benefits Board* (1955) 92 CLR 177 at 187; [1955] HCA 34.

857 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151; see also *R v Davison* (1954) 90 CLR 353 at 368.

858 488 US 361 at 407 (1989) referred to in *Grollo v Palmer* (1995) 184 CLR 348 at 366, 377 and 392; [1995] HCA 26; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9; and *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 615 [91].

859 See also *South Australia v Totani* (2010) 242 CLR 1 at 172 [479] per Kiefel J.

effect. The steps, if any, which are proposed by the relevant Minister to change the law do not involve the Court.

603 The requirements of notification are the only mandatory aspects of the declaration process. Too much should not be read into these obligations, given that it is the Court which decides, in the first place, whether to make a declaration. In doing so it is not responsive to any legislative command. These requirements and the declaration itself are largely innocuous so far as concerns the Supreme Court. Their principal purpose is to set in train a process whereby the relevant Minister considers what should be done by way of legislative change. No incompatibility with the institutional integrity of the Supreme Court is disclosed by reference to these matters.

604 Of greater concern regarding the making of a declaration is the role of the County Court and the Supreme Court with respect to the appellant's trial. The concern arises in this way. There is little doubt that the Charter may serve to raise the expectations of an accused as to the recognition and enforcement of the rights to which it refers. The reality is otherwise. The trial judge in the County Court was, as the Court of Appeal held, obliged to give effect to s 5 of the Drugs Act if s 5 applied to s 71AC, under which the appellant was charged. If it did apply neither the County Court nor the Supreme Court had the power to give primacy and effect to a Charter right. The making of a declaration placed the Court of Appeal in a position where it acknowledged that the trial process conducted by the County Court involved a denial of the appellant's Charter rights even though it upheld the validity of the conviction. In such a circumstance not only does a declaration serve no useful purpose to the appellant, it is not appropriate that it be made.

605 It may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate. Undermining a conviction is a serious consideration. This does not, however, mean that the declaration will have no utility in other spheres. More importantly, it does not require a conclusion that the making of a declaration will impair the institutional integrity of the courts. Rather, in the sphere of criminal law, prudence dictates that a declaration be withheld.

606 Putting aside the prospect of undermining a conviction in this case, there is another, more fundamental, reason why the declaration should not have been made. The reason is that s 5 does not apply to s 71AC of the Drugs Act, with the result that the trial miscarried.

Sections 5 and 71AC of the Drugs Act

607 The direction given by the trial judge on the appellant's trial with respect to proof of possession applied what was said by the Full Court in *R v Clarke and*

Johnstone[860]. The Court considered the requirements of s 5 of the Drugs Act as a separate question arising in connection with the offence of trafficking in a large commercial quantity of a drug of dependence under s 71. It held that s 5 requires the prosecution to prove occupation of the land on which cannabis was grown or the other indicia referred to in s 5. Section 5 then operated to deem the accused in possession of the drugs unless he proved he was not in possession of them. He could do so only by proving that he had no knowledge of the drugs, on the balance of probabilities[861].

608 The opinion of the Full Court as to the extent of the onus does not accord with the terms of s 5, but this aspect of the decision in *Clarke and Johnstone* does not assume importance for present purposes. More to the point is the approach of the Court, in failing first to consider the terms of the offence charged and the evidentiary provisions which were provided with respect to it. Had it done so it would have been evident that s 5 could not be applied to the offence of trafficking.

609 The offence under s 71AC, read with that part of the definition of "traffick" in s 70(1) presently relevant, is trafficking in a drug of dependence by having that drug in "possession for sale". The expression "possession for sale" is a compound one, requiring proof of possession together with the intention or purpose to sell. Section 73(2) may facilitate the prosecution's proof of trafficking. It provides that where a traffickable quantity of a drug is found in a person's possession, the possession of that drug is prima facie evidence of trafficking by that person in the drug. The possession to which s 73(2) is directed, consistent with the statement of offence, is possession for sale. As Callaway JA observed in *R v Tragear*[862], s 73(2) is only prima facie evidence of mens rea. The burden of proving the requirements of an accused's possession of a drug of dependence for the purpose of sale remains on the prosecution.

610 In *Clarke and Johnstone* there may have been undue focus upon s 5, and less attention directed to the composite nature of the offence of trafficking, because it was common ground at trial that whoever possessed the cannabis growing on the property was obviously growing it for sale. In those circumstances it was not considered necessary for the trial judge to "explain the

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860 [1986] VR 643.

861 *R v Clarke and Johnstone* [1986] VR 643 at 648-649 and 659.

862 (2003) 9 VR 107 at 117 [43]-[44].

evidentiary effect of s 73(2) where no evidence suggested that the cannabis was possessed other than for sale"[863].

611 The requirement of proof by the prosecution of "possession for sale" cannot be met by treating possession as separated from its purpose, and then as subject to the deeming provision in s 5 of the Drugs Act. Section 5 is clearly applicable to the offence of possession simpliciter, which is dealt with in s 73(1), and to other offences in the Drugs Act. However, it cannot apply to the offence of trafficking presently under consideration, which is expressed as a compound notion. The only evidentiary provision which may apply is in s 73(2).

612 This construction denies the operation of the presumption of possession in s 5 as limiting the right to which s 25(1) of the Charter refers and therefore achieves consistency with the Charter. However, it is a construction which is arrived at by the application of the ordinary rules of construction. The conclusion reached by the process of construction, that s 5 does not apply to an offence of trafficking, means that the direction given by the trial judge to the jury was in error. It follows that the Court of Appeal should have granted the appellant leave to appeal from conviction on this ground and allowed the appeal.

Section 109 of the Constitution

613 As explained at the outset of these reasons, the appellant was found guilty of one count of trafficking in a drug of dependence, namely methylamphetamine, contrary to s 71AC of the Drugs Act. As the verdict was unanimous, the provisions of s 46 of the *Juries Act* 2000 (Vic), permitting a majority verdict, were not invoked.

614 Possession of methamphetamine, which is the same substance as methylamphetamine, is also regulated under Pt 9.1 of the Commonwealth Code (ss 300.1-314.6), headed "Serious drug offences". A person who "traffics" in a substance which is a controlled drug, such as methamphetamine[864], commits an offence under s 302.4.

615 No issue was raised by the appellant at trial or in the Court of Appeal that, by reason of the provisions of the Commonwealth Code, s 109 of the

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863 *R v Clarke and Johnstone* [1986] VR 643 at 660.

864 The Commonwealth Code, ss 300.2 (par (a) of definition of "controlled drug") and 314.1.

Constitution made inoperative[865] the State law under which the appellant was convicted. The appellant was granted leave to amend her notice of appeal to include an attack on the validity of that State law based on the operation of s 109 of the Constitution. As explained earlier[866], that additional ground of appeal was critical in respect of the remedies sought by the appellant.

616 Part 9.1 was inserted into the Commonwealth Code by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005 (Cth) in the exercise of the external affairs power under the Constitution. Section 300.1(1) of the Commonwealth Code states that the purpose of Pt 9.1 "is to create offences relating to drug trafficking and to give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988[867]."

617 Section 302.4, headed "Trafficking controlled drugs", provides:

> "(1) A person commits an offence if:
>
> (a) the person traffics in a substance; and
>
> (b) the substance is a controlled drug.
>
> Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.
>
> (2) The fault element for paragraph (1)(b) is recklessness."

618 For the purposes of Pt 9.1 the word "traffic" has the meaning given by s 302.1. Section 302.1(1)(e) provides that a person "traffics" in a substance if "the person possesses the substance with the intention of selling any of it." Further, Pt 2.2 of the Commonwealth Code deals with the fault elements of the offence.

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865 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 286 per Windeyer J; [1961] HCA 32; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 464-465 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1995] HCA 47; see also *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 122 per Dixon J; [1948] HCA 13.

866 See [517] of these reasons.

867 1582 UNTS 95; [1993] ATS 4.

619 Section 300.4(1) of the Commonwealth Code provides that Pt 9.1 "is not intended to exclude or limit the concurrent operation of any law of a State", which includes a law of a State which makes an act that is an offence against a provision of Pt 9.1 an offence against the law of the State (s 300.4(2)), even if different penalties are provided (s 300.4(3)(a)).

620 In the context of s 300.4, s 4C(2) of the *Crimes Act* 1914 (Cth) ("the Crimes Act") provides that, where an act or omission constitutes an offence under both a Commonwealth law and a State law "and the offender has been punished for that offence under the law of the State … the offender shall not be liable to be punished for the offence under the law of the Commonwealth."

621 Part V of the Drugs Act (ss 70-80) is headed "Drugs of Dependence and Related Matters".

622 Section 71AC provides:

> "A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum)."

623 As already mentioned[868], for the purposes of Pt V, the word "traffick" is defined by s 70(1) to include to "have in possession for sale, a drug of dependence".

624 It can be seen that both ss 302.4 and 71AC state the elements of the offence and the maximum penalties (which are different), and each section depends for its construction on other parts of the legislation of which it forms a part. In each case, these components taken together constitute the "law" for the purposes of the comparison required by s 109.

625 The "paramountcy"[869] or "supremacy"[870] of the Parliament of the Commonwealth under the Constitution resolves any conflict between a

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868 See [506] of these reasons.

869 *Ex parte McLean* (1930) 43 CLR 472 at 485 per Dixon J; [1930] HCA 12.

870 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 154-155 per Knox CJ, Isaacs, Rich and Starke JJ; [1920] HCA 54; *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 83 per Dixon J; [1947] HCA 26; *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 216 per Gibbs CJ; [1982] HCA 77.

Commonwealth law and a State law as set out in covering cl 5[871] and s 109 of the Constitution. Section 109 provides:

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

626 In its terms, s 109 is directed to laws made under the concurrent law-making powers of the Commonwealth and the States rather than to the limits inter se of their constitutional powers[872]. In the context of concurrent Commonwealth and State powers to legislate in respect of a particular subject matter, s 109 resolves conflict, if any exists, in favour of the Commonwealth.

627 The principles to be applied have been restated in the joint reasons of the whole Court in *Dickson v The Queen*[873] and in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*[874]. In particular, the Court in each case referred to the statement of principle made by Dixon J in *Victoria v The Commonwealth* ("*The Kakariki*")[875], taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing*[876]. It is worth repeating the two propositions which informed Dixon J's statement of principle.

628 The first proposition, associated often with the expression "direct inconsistency", is:

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871 Covering cl 5 relevantly provides:

> "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State".

872 *Ex parte McLean* (1930) 43 CLR 472 at 482 per Dixon J; *O'Sullivan v Noarlunga Meat Ltd* (1956) 95 CLR 177 at 182-183; [1957] AC 1 at 24-25; see also *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 216 per Gibbs CJ.

873 (2010) 241 CLR 491 at 502 [13]-[14]; [2010] HCA 30.

874 [2011] HCA 33 at [39]-[41].

875 (1937) 58 CLR 618 at 630; [1937] HCA 82.

876 (1999) 197 CLR 61 at 76 [28]; [1999] HCA 12.

> "When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid."

629 The second proposition, associated often with the expressions "indirect inconsistency" and "covering the field", immediately followed:

> "Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent."

630 The utility of recognising different approaches to inconsistency for the purposes of s 109 emerges from cases resolved by reference to the expressions "direct inconsistency" or "direct collision"[877] on the one hand, or by reference to the expressions "indirect inconsistency" or "covering the field"[878] on the other. However, as was recognised by Mason J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[879], different approaches to inconsistency all directed to the same end are inevitably interrelated. That end is to determine whether there is a "real conflict"[880] between the laws under consideration.

631 Utility has also been established in distinguishing different kinds of "direct inconsistency". Direct inconsistency can arise where one law commands what the other forbids or where one law compels disobedience to the other

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877 See for example *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258 per Barwick CJ; [1968] HCA 2; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [27]; *Dickson v The Queen* (2010) 241 CLR 491 at 504 [22].

878 See for example *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489, 491 and 499 per Isaacs J; [1926] HCA 6; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 108-109 per Latham CJ. The metaphor "covering the field" has not escaped criticism: see *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 147 per Evatt J; [1932] HCA 40; *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 633-634 per Evatt J.

879 (1980) 142 CLR 237 at 260; [1980] HCA 8.

880 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33 at [42].

law[881]. Because there is no impossibility of simultaneous obedience in respect of both s 302.4 of the Commonwealth Code and s 71AC of the Drugs Act, the appellant did not invoke this type of direct inconsistency, dealt with in *Australian Boot Trade Employes Federation v Whybrow & Co*[882]. Accordingly, nothing more needs to be said about this.

632 Direct inconsistency can also arise where there is a direct conflict or collision between a Commonwealth law and a State law, each of which creates rights and duties[883] or imposes obligations by stating a rule or norm of conduct and a sanction for a breach of that rule or norm. The appellant's submissions, in respect of s 109, were framed in terms of the first proposition of Dixon J in *The Kakariki* set out above. The direct inconsistency complained of was said to arise out of the differences between the Commonwealth law and the State law.

633 First, in reliance on *Dickson*[884], it was contended for the appellant that because of the interaction between ss 5 and 71AC of the Drugs Act the respective "criteria of adjudication" were different under s 302.4 of the Commonwealth Code (read with ss 13.1 and 13.2) and s 71AC of the Drugs Act "by reason of the different burdens and standards of proof". Thus, citing *Wenn v Attorney-General (Vict)*[885], it was said the State law closed up "areas of liberty designedly left" by the Commonwealth law.

634 Secondly, the appellant relied on the different methods of trial stipulated for the two offences. A prosecution under s 302.4, which by reason of s 4G of the Crimes Act is triable on indictment, requires a unanimous verdict under s 80 of the Constitution[886] whereas s 46 of the *Juries Act* 2000 (Vic) permits a

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881 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 29; [1920] HCA 24; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-456; [1984] HCA 74.

882 (1910) 10 CLR 266 at 286, 289 and 299; [1910] HCA 8.

883 See *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 478 per Knox CJ and Gavan Duffy J; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-456 per Gibbs CJ; *The Commonwealth v Western Australia* (*Mining Act Case*) (1999) 196 CLR 392 at 415 [54] per Gleeson CJ and Gaudron J and 450 [171] per Kirby J; [1999] HCA 5.

884 (2010) 241 CLR 491 at 504 [22].

885 (1948) 77 CLR 84 at 120 per Dixon J.

886 *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.

majority verdict for a prosecution under s 71AC, although no resort was made to s 46 in this case.

635 Thirdly, the appellant relied on the different maximum penalties for the offences (ten years' imprisonment for the Commonwealth offence[887] and 15 years' imprisonment for the State offence) and the different sentencing regimes relevant to ss 302.4 and 71AC.

636 As part of their response, the second respondent (the Attorney-General for Victoria), and the Attorney-General of the Commonwealth and the Attorneys-General for New South Wales, South Australia, Western Australia, Tasmania and the Australian Capital Territory, intervening, all relied on s 300.4 of the Commonwealth Code.

637 Inconsistency in the relevant sense does not arise merely because of the co-existence of two laws capable of simultaneous obedience[888] or because of the existence of differences between them[889]. Further, the fact that a Commonwealth law and a State law "impose different penalties for the same conduct does not necessarily mean that the laws are inconsistent."[890] What is required in every case is that the two laws being compared be construed so as to determine their operation, as a matter of construction, and, in particular, so as to determine whether the Commonwealth's coverage of the subject matter is complete, exhaustive or exclusive. As explained by Dixon J in *Ex parte McLean*[891]:

> "The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

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887 See the Crimes Act, s 4D(1) and (1A).

888 *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J.

889 *McWaters v Day* (1989) 168 CLR 289 at 296; [1989] HCA 59.

890 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218 per Gibbs CJ.

891 (1930) 43 CLR 472 at 483. See subsequently *McWaters v Day* (1989) 168 CLR 289 at 296.

638 To the extent that this involves ascertaining the intention of the Commonwealth Parliament, that exercise requires an objective determination achieved by "the application of rules of interpretation accepted by all arms of government in the system of representative democracy."[892]

639 Having regard to the finding set out above that s 5 of the Drugs Act has no application to the compound expression "possession for sale" contained in s 70(1), which defines "traffick" for the purposes of s 71AC, the first matter relied on by the appellant as evidencing inconsistency, namely differences in methods of proof, falls away[893]. This also has the result that the Commonwealth law and the State law can be compared for the purposes of s 109 on the basis that they proscribe the same conduct by reference to the same elements.

640 That leaves for resolution the allegations of inconsistency which depend on different modes of trial, and different penalties and sentencing regimes, which will include consideration of the effect of s 300.4 of the Commonwealth Code. It is convenient to deal with the question of different penalties first.

Different penalties

641 A difference in penalties prescribed for breach of a rule of conduct which is the subject of both a Commonwealth law and a State law has been held to give rise to a relevant inconsistency in *Hume v Palmer*[894], *Ex parte McLean*[895] and *R v Loewenthal; Ex parte Blacklock*[896]. However, as Mason J stated in the last-mentioned case[897], this conclusion was arrived at where it appeared that the Commonwealth statute "evince[d] an intention to cover the subject matter to the exclusion of any other law." That remains the question here.

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892 *Zheng v Cai* (2009) 239 CLR 446 at 456 [28], affirmed in *Dickson v The Queen* (2010) 241 CLR 491 at 507 [32].

893 This renders it unnecessary to consider the interaction between ss 13.1 and 13.2 of the Commonwealth Code, concerning the legal burden and standard of proof, and s 302.4.

894 (1926) 38 CLR 441 at 448, 450-451 and 462; [1926] HCA 50.

895 (1930) 43 CLR 472 at 479 and 486-487.

896 (1974) 131 CLR 338 at 346-347; [1974] HCA 36.

897 *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 347.

642 It may first be observed that s 4C(2) of the Crimes Act reflects the common law principle that an offender should not be prosecuted or punished twice for offending conduct and is directed to the exercise of both the power to institute and conduct a prosecution and the judicial power to punish by imposing a sentence after conviction. Mason J observed in *R v Loewenthal; Ex parte Blacklock*[898] of the predecessors to s 4C(2)[899], that they

> "plainly speak[] to a situation in which the State law is not inoperative under s 109, as for example when there is an absence of conflict between the provisions of the two laws and the Commonwealth law is not intended to be exclusive and exhaustive."

643 Further, in *R v Winneke; Ex parte Gallagher*[900] his Honour said of the predecessor provisions that they

> "proceed in accordance with the principle that there is no prima facie presumption that a Commonwealth statute, by making it an offence to do a particular act, evinces an intention to deal with that act to the exclusion of any other law."

644 In *McWaters v Day*, the Court considered different penalties in respect of substantially the same conduct under the *Traffic Act* 1949 (Q) and the *Defence Force Discipline Act* 1982 (Cth). The Court found that, "[v]iewed in their context", the provisions of the Commonwealth Act did not suggest the Act intended to exclude the operation of State criminal law[901]. The Commonwealth Act did not "serve the same purpose as laws forming part of the ordinary criminal law."[902]

645 Where a Commonwealth law and a State law impose different penalties in respect of essentially the same conduct but are not relevantly inconsistent[903], a

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898 (1974) 131 CLR 338 at 347.

899 The Crimes Act, s 11 and *Acts Interpretation Act* 1901 (Cth), s 30(2) as they stood at the date of that judgment.

900 (1982) 152 CLR 211 at 224.

901 *McWaters v Day* (1989) 168 CLR 289 at 299.

902 *McWaters v Day* (1989) 168 CLR 289 at 299.

903 As in *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 and *McWaters v Day* (1989) 168 CLR 289.

person who has engaged in the prescribed conduct cannot be punished under both laws[904]; however, the maximum penalty applicable to the conduct will not be known until there is reliance on one or other of the laws for the purposes of punishing that person's conduct.

646 *The Kakariki*[905] was concerned with a Commonwealth law and a Victorian law which both provided power to Commonwealth and State authorities respectively to secure the removal of shipwrecks likely to obstruct or hinder navigation. Dixon J, taking up and applying what he had said in *Ex parte McLean*, observed that there was

> "nothing in the language of [the Commonwealth provision] and certainly nothing in its nature or subject matter suggesting that, if a wreck fell within the description to which the section relates, the Commonwealth authority should have the exclusive power of determining whether or not the owner ought to remove it."[906]

647 Dixon J observed that there was the potential for conflict between the two laws if there were attempts by Commonwealth and State authorities to exercise their respective powers simultaneously. In such a case, the Commonwealth law would prevail. But, his Honour said, that meant only that the Commonwealth law conferred a power to remove wrecks, the exercise of which was exclusive, but not that the Commonwealth law was an exclusive statement of the existence of a power to compel the removal of wrecks[907].

648 Section 302.4 of the Commonwealth Code creates a Commonwealth offence of drug trafficking which Commonwealth prosecuting authorities are empowered to prosecute[908]. There is nothing in the terms in which the offence is created suggesting that the authorities are under a duty to do so in every case or that the power to prosecute the offence is intended to be exclusive. Moreover, there is nothing in the nature of the offence which suggests this to be necessary, such as would support the implication of an intention that the prosecution of trafficking offences be the exclusive preserve of the Commonwealth.

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904 The Crimes Act, s 4C(2)(a).

905 (1937) 58 CLR 618.

906 (1937) 58 CLR 618 at 630-631.

907 *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 631.

908 *Director of Public Prosecutions Act* 1983 (Cth), ss 5, 6 and 10.

649 In *The Kakariki*, Dixon J said that the purpose of the Commonwealth legislation was "not only compatible with, but … aided by, the co-existence of other powers for securing the removal of wrecks."[909] The same observation may be made respecting the purpose of the Commonwealth Code, having regard to the nature of the offence of drug trafficking.

650 As stated above, the purposes of Pt 9.1 of the Commonwealth Code include giving effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[910]. Article 3 of that Convention provides for the establishment of criminal offences under the domestic law of each party. Those offences include "possession … of any narcotic drug or psychotropic substance" for relevant purposes including for sale (Art 3(1)(a)(iii)). Article 4 provides that each party shall establish jurisdiction over the offences referred to in Art 3, when the offence "is committed in its territory" (Art 4(1)(a)(i)) or "on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed" (Art 4(1)(a)(ii)). Such purposes are distinguishable from, and both overlap with and supplement, the purpose of State laws in respect of drug trafficking.

651 In urging a uniform drug trafficking Act, the Report of the Australian Royal Commission of Inquiry into Drugs[911], commissioned by the Governments of the Commonwealth, Victoria, Queensland, Western Australia and Tasmania, described the reach of drug trafficking:

> "The prime target in a strategy to reduce the quantity of illegal drugs available in Australia should be the drug trafficker. There is abundant evidence to prove that groups engaged in drug trafficking do not respect Australia's State or national boundaries."

652 The context in which the Commonwealth offence was created does not support an inference of intended exclusivity; rather it supports the contrary inference. The aim of prosecuting drug trafficking offences in Australia can only be aided by concurrent and parallel Commonwealth and State laws for that purpose. The Commonwealth law enabling the prosecution of a drug trafficking offence is not detracted from, or impaired by, the concurrent State law which permits the same.

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909 (1937) 58 CLR 618 at 630.

910 The Commonwealth Code, s 300.1(1).

911 *Report of the Australian Royal Commission of Inquiry into Drugs*, (1980), Book D, Pt XIV, Ch 3 at D29.

653 The first respondent and the Attorney-General of the Commonwealth and the Attorney-General for South Australia intervening referred to co-operative arrangements facilitating the exercise of concurrent laws and powers in respect of drug trafficking. This is an example of "the extent to which law enforcement and policing in Australia depends both practically, and structurally (through bodies like the Australian Crime Commission) upon close co-operation of federal, State and Territory police forces"[912]. Such considerations cannot determine a question of inconsistency, if a real conflict between two laws exists; however, the arrangements confirm the pragmatism of current, concurrent and parallel systems in respect of drug trafficking offences.

Section 300.4 of the Commonwealth Code

654 Following *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*[913] (dealing with a provision similar to s 300.4 of the Commonwealth Code[914]), whilst the expression of intention in s 300.4 will not avoid direct inconsistency if such inconsistency exists, taken in its entirety it is a very clear indication that Pt 9.1 is not exhaustive or exclusive in respect of drug trafficking and is not intended to exclude the operation of the Drugs Act where the Drugs Act deals with the same subject matter but contains different penalties. Although not determinative of relevant inconsistency for the purposes of s 109, such an expression of intention assists in resolving, as a matter of statutory construction, whether the Commonwealth law covers the subject matter exhaustively or exclusively[915]. In the present case the statements of intention found in s 300.4 accord with the intention of Pt 9.1 ascertained by a process of construction. There is no reason why effect should not be given to these statements.

Different modes of trial and different sentencing regimes

655 Finally, different modes of trial and different sentencing regimes are part of the legal and constitutional landscape in respect of the administration of

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912 *Coleman v Power* (2004) 220 CLR 1 at 78 [197]; [2004] HCA 39.

913 (1977) 137 CLR 545 at 552 per Barwick CJ and 563-564 per Mason J; [1977] HCA 34.

914 Section 75(1) of the *Trade Practices Act* 1974 (Cth). Section 75(1) provided: "Except as provided by sub-section (2), this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory."

915 *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 at 527-528 [21]; [2009] HCA 45; *Dickson v The Queen* (2010) 241 CLR 491 at 507 [33].

criminal justice in Australia. They are a product of constitutional arrangements which permit both the Commonwealth (pursuant to s 51 of the Constitution) and the State of Victoria (pursuant to s 16 of the *Constitution Act* 1975 (Vic)) to legislate in respect of the administration of their respective criminal justice systems, and also of the circumstance that s 80 of the Constitution applies only in relation to offences against some Commonwealth laws. Such considerations cannot give rise to relevant inconsistency for the purpose of s 109.

Conclusions in respect of s 109

656 It can be accepted that differences between a Commonwealth law creating an offence and a State law creating an offence, including a difference in penalty, might imply that the Commonwealth law is exhaustive or exclusive of State law in respect of the subject matter covered[916]. However, there is nothing in the nature or subject matter of drug trafficking or in the express terms of Pt 9.1, including the terms of s 302.4, which implies or supports the conclusion that the purpose of s 302.4 is to exhaustively cover the subject matter of the offence of drug trafficking. Section 300.4 expressly counters such an implication. Moreover, the wider context of the introduction of Pt 9.1 into the Commonwealth Code supports the conclusion that Pt 9.1 is a concurrent scheme in respect of drug trafficking offences, operating in parallel to State offences in respect of the same subject matter[917].

657 In all the circumstances of this case, no inconsistency in the relevant sense has been established. The appellant's application to have the presentment quashed and her sentence set aside on that basis must be rejected.

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916 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218 per Gibbs CJ, referring to *Hume v Palmer* (1926) 38 CLR 441 and *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338.

917 See the Second Reading Speech for the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 2005 at 6, where reference is made to the fact that insofar as Pt 9.1 includes offences applying to drug dealings in Australia, the provisions will "operate alongside" State offences. See also the Explanatory Memorandum (Australia, House of Representatives, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005) at 2, where it is stated that "[o]verlapping State … drug offences will … operate alongside the offences in Part 9.1 of the Criminal Code."

Orders

658 The Court of Appeal should have granted the appellant leave to appeal and set aside her conviction. As explained in these reasons, the declaration purporting to be order 5 of the Court of Appeal should not have been made. In place of the orders of the Court of Appeal, there should be orders granting leave to appeal, allowing the appeal, quashing the conviction, setting aside the sentence, and ordering a new trial. We agree that in the special circumstances of this appeal, which has been argued as a major constitutional case, the appellant should have an order against the second respondent for two-thirds of her costs in this Court.

659 BELL J. The facts and the procedural history are set out in the reasons of the other members of the Court and it is not necessary to repeat them. For the reasons that follow, I consider that, in the prosecution of any offence under the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Drugs Act"), whenever the conditions for its engagement are established, s 5 imposes a legal burden on the accused. This is so notwithstanding that the provision of a reverse onus of proof with respect to an element of a criminal offence is incompatible with the right to be presumed innocent until proved guilty according to law that is set out in the *Charter of Human Rights and Responsibilities Ac*t 2006 (Vic) ("the Charter")[**918**]. Section 5 was engaged in the prosecution of the appellant for the offence of trafficking. It remained incumbent on the prosecution to prove that the appellant intended to traffick in the drug. Proof of that intent required satisfaction beyond reasonable doubt that the appellant was aware of the presence of the drug in her apartment. The trial judge's directions to the jury did not serve to make this clear. This deficiency caused the trial to miscarry. The appeal should be allowed[**919**].

660 Consideration of the consequential order requires that the appellant's challenge to the validity of the law under which she was prosecuted be addressed. If s 71AC of the Drugs Act is inoperative because it is inconsistent with the *Criminal Code* (Cth) ("the Code"), the appellant's conviction is a nullity and the appropriate consequential order is to quash the presentment. Among the appellant's submissions supporting her constitutional challenge is the contention that under Commonwealth law an area of liberty has been "designedly left", which area of liberty is closed up by operation of ss 5 and 71AC. The inconsistency is said to be of the same kind as in *Dickson v The Queen*[**920**]. The area of liberty on which the submission depends is the "mere occupation of premises on which drugs are found". The appellant characterises the conduct giving rise to her conviction as "her occupation of premises upon which the drugs were found". The conduct giving rise to the appellant's conviction was trafficking in methylamphetamine. The same conduct is proscribed under the Code[**921**]. State law makes different provision respecting proof of the offence. It does not trench on an area of liberty that the Commonwealth has chosen to leave open. I agree with Gummow J's reasons for concluding that the appellant's challenge to her presentment for the State offence should be rejected. Her conviction should be quashed and a new trial ordered.

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918 Charter, s 25(1).

919 *Crimes Act* 1958 (Vic), s 568(1).

920 (2010) 241 CLR 491 at 505 [25]; [2010] HCA 30, citing *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120 per Dixon J; [1948] HCA 13.

921 Code, s 302.4.

661 The declaration of inconsistent interpretation made by the Court of Appeal following the disposition of the appellant's appeal does not affect her rights or duties and she makes no submissions about it. The Attorney-General for Victoria invited the Court to set aside the declaration in the event that the appellant's challenge to the construction of s 5 succeeds. He did not submit that the declaration should be disturbed in the event that it does not. However, his submission raises an issue concerning the validity of s 36 of the Charter. That section confers power on the Supreme Court of Victoria to make a "declaration of inconsistent interpretation". I agree with French CJ's reasons for concluding that the power so conferred is a non-judicial power. I also agree with his Honour's reasons for concluding that the conferral of the power does not offend the *Kable* principle[922].

Section 5 and deemed possession under the Drugs Act

662 At the appellant's trial, the jury were directed that, if they were satisfied beyond reasonable doubt that the appellant was in occupation of the apartment and that the methylamphetamine was present in the apartment, she would have been in possession of it, subject to proof by her that she was not. The direction was consistent with decisions of the Victorian Supreme Court holding that s 5 of the Drugs Act places a legal burden of proof on an accused where the preconditions for its engagement are established[923]. There was no application for redirection[924].

663 Section 5 provides:

> "**Meaning of *possession***
>
> Without restricting the meaning of the word ***possession***, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary."

664 In the Court of Appeal and in this Court the appellant submitted that the authorities holding that s 5 imposes a legal burden were wrongly decided and that

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922 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24.

923 *R v Clarke and Johnstone* [1986] VR 643; *R v Tragear* (2003) 9 VR 107; *R v Hiep Tan Tran* [2007] VSCA 19.

924 *R v Momcilovic* (2010) 25 VR 436 at 441 [13].

on ordinary principles of statutory interpretation the provision imposes "an evidential onus of disproof" on the accused[925]. This, it was said, was an available interpretation that would bring the provision into line with a cardinal principle of the criminal law[926] and still achieve the evident purpose of the provision to facilitate proof of the fact of possession. It would do so by requiring the accused "to adduce evidence that he or she was not in possession" before requiring that the prosecution prove the contrary. The submission relied in part on the Chief Crown Prosecutor's submission in the Court of Appeal that the change from a legal to an evidential onus would make "little difference"[927].

665 An evidential burden is not an "onus of disproof"[928]. An evidential burden does no more than oblige a party to show that there is sufficient evidence to raise an issue as to the existence (or non-existence) of a fact[929]. Discharge of an evidential burden may require that an accused lead evidence in a defence case. It may be discharged by evidence adduced in cross-examination of witnesses in the prosecution case. In rare cases it may be discharged by reference to evidence adduced by the prosecution in chief[930]. It is not evident that reading the requirement of s 5 that the accused "satisf[y] the court to the contrary" as an evidential and not a legal burden would accord with the purpose of the provision.

666 The common law requires more in order to prove that an accused is in possession of a thing than establishing that the thing is in premises occupied by the accused[931]. The accused must have actual or constructive control of the thing and intend to exercise that control to the exclusion of those not acting in concert with him or her[932]. Proof of the intention requires that the accused know of the

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925 *R v Momcilovic* (2010) 25 VR 436 at 442 [16].

926 *Woolmington v Director of Public Prosecutions* [1935] AC 462.

927 *R v Momcilovic* (2010) 25 VR 436 at 475-476 [145].

928 See *Jayasena v The Queen* [1970] AC 618.

929 *Cross on Evidence*, 8th Aust ed (2010) at 282 [7015].

930 *Cross on Evidence*, 5th ed (1979) at 88.

931 *R v Cavendish* [1961] 1 WLR 1083 at 1085; [1961] 2 All ER 856 at 858; *Brook v Whitbread* [1966] SASR 310 at 313-315.

932 *Moors v Burke* (1919) 26 CLR 265 at 274 per Isaacs, Gavan Duffy and Rich JJ; [1919] HCA 32 as to the expression "actual possession" in s 40 of the *Police Offences Act* 1915 (Vic). See also *Tabe v The Queen* (2005) 225 CLR 418; [2005] HCA 59.

existence of the thing. However, knowledge alone may not establish the intention. An occupier of premises may have knowledge of the presence of a prohibited drug in the premises and yet not be in possession of the drug[933]. The prosecution of an accused who is in joint occupation of premises for an offence arising out of the seizure of drugs in the premises will commonly present the difficulty of excluding the reasonable possibility that the drugs were in the possession of another of the occupants[934]. The evident purpose of s 5 is to overcome difficulties of this kind. Reading the provision as imposing a mere evidential burden would not achieve that purpose. An evidential burden would be discharged by reference to evidence of the access of other occupants to the premises and the drugs. It would have been discharged in this case by the evidence in the prosecution case of Velimir Markovski's joint occupation of the apartment and exercise of control over the drug.

667 The Chief Crown Prosecutor's submission, earlier noted, was made with respect to the prosecution of trafficking offences. Proof of the *mens rea* for those offences requires that the prosecution exclude the reasonable possibility that the accused either did not know of the existence of the drug or did not intend alone or jointly to exercise control over it. Recognition of the practical effect of the discharge of this obligation may explain the submission.

668 The appellant and the Victorian Equal Opportunity and Human Rights Commission ("the Commission") pointed to the wording of s 5, noting that it does not provide in terms that the standard of satisfaction is upon the balance of probabilities. Those words are found in ss 72C and 73(1), which are provisions that are also directed to the need to satisfy the court of some matter. The Commission submitted that the silence of s 5 in this respect requires the court to "identify" an appropriate standard by reference to considerations standing outside the Act. The submission is misconceived. The standard of proof is either upon the balance of probabilities or beyond reasonable doubt, depending upon the identity of the party bearing the burden and the matter to be proved. Where the burden is placed upon the accused it is always discharged by proof on the balance of probabilities[935]. To allocate the legal burden of proof to the accused is to state the standard of proof.

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933 A sailor who was aware that shipmates had hidden illicit drugs in the cabin of which he was an occupant was held not to be in possession of the drugs in *R v Hussain* [1969] 2 QB 567.

934 *Filippetti* (1978) 13 A Crim R 335.

935 *Sodeman v The King* (1936) 55 CLR 192; [1936] HCA 75.

669 The appellant submitted that the imposition of a legal burden on the accused under s 5 is inconsistent with the statutory scheme for the prosecution of drugs offences. She contended that it does not sit with the requirement, in a prosecution for trafficking in a commercial quantity (or a large commercial quantity), of proof of the intention to traffick in an amount exceeding the threshold quantity. Similar inconsistency is suggested to arise from the requirement of proof of the requisite intention to traffick in the various ways other than by having the drug in "possession for sale"[936]. The submissions assume, contrary to those relied on in support of the appellant's second ground[937], that the prosecution is not required to prove the accused's awareness of the existence of the drug in a prosecution for a trafficking offence in which ss 5 and 73(2) are engaged. That assumption is wrong, as consideration of the appellant's second ground will show.

670 The courts of Victoria have for many years interpreted s 5 as imposing a legal burden of proof on the accused. It is an interpretation that accords with the ordinary grammatical meaning of the provision and with its evident purpose. Section 5 operates to deem or adjudge the occupier of premises in which a drug is found to be in possession of the drug unless he or she satisfies the court to the contrary. One does not satisfy a court that one is not in possession of a thing by pointing to evidence from which it would be open to draw that conclusion as a matter of possibility.

The Charter

671 The appellant and the Commission submitted that, if s 5 is correctly understood as placing a legal burden upon the accused at the time the provision was enacted[938], that interpretation has not survived the Charter. The Charter requires that statutory provisions, whenever enacted[939], are to be interpreted so far as it is possible to do so in a human rights compatible way[940]. The Charter does not affect any proceedings commenced or concluded before the

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936 Drugs Act, s 70(1), definition of "traffick".

937 "The Court of Appeal erred in concluding that there was no error in the trial judge's failure to direct that the appellant could not have the drugs in her possession for sale, and therefore could not be guilty of trafficking, unless the prosecution proved beyond reasonable doubt that she knew of the presence of the drugs."

938 The Drugs Act was assented to on 12 January 1982. Section 5 was based on s 28 of the *Poisons Act* 1962 (Vic), which the Drugs Act replaced.

939 Charter, ss 1(2)(b) and 49(1).

940 Charter, s 32(1).

commencement of Pt 2, which commenced on 1 January 2007[941]. The appellant's trial began on 21 July 2008. At that date it is submitted that the Charter required s 5 to be read as placing an evidential and not a legal burden upon an accused.

672 The human rights that the Parliament of Victoria seeks to protect and promote are set out in Pt 2 of the Charter. They are primarily derived from the International Covenant on Civil and Political Rights ("the ICCPR")[942]. The drafting conventions adopted in the two instruments differ. The ICCPR makes provision in the statement of the right for any circumstances in which the right may be limited. The Charter adopts this convention in the statement of some rights, for example, the right to privacy[943] and the right to freedom of expression[944]. A number of the rights which the ICCPR recognises as being subject to limitation are set out in the Charter without reference to the circumstances of limitation. These include the right to freedom of thought, conscience, religion and belief[945] and the right of peaceful assembly and freedom of association[946]. However, the rights in the Charter are subject to the general limitation provision of s 7, which is the first provision of Pt 2. Section 7 provides:

> "**Human rights – what they are and when they may be limited**
>
> (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

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941 Charter, ss 2(1) and 49(2).

942 Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 1.

943 Charter, s 13.

944 Charter, s 15.

945 Charter, s 14. By contrast, Art 18 of the ICCPR, dealing with the right to freedom of thought, conscience and religion, is expressed to be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

946 Charter, s 16. By contrast, Art 21 of the ICCPR, setting out the right to peaceful assembly, provides that no restrictions may be placed on the exercise of the right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person."

673 Among the rights protected and promoted by the Charter is the right to be presumed innocent of an offence until proved guilty according to law, which is set out in s 25(1). The provision of a reverse onus of proof of a fact that is an element of an offence is inconsistent with the right. The reason why that is so is illustrated by consideration of the offence of possession of a drug of dependence under s 73(1). The offence is a serious one punishable by a maximum of five years' imprisonment[947]. Where the conditions for its engagement are proved, the effect of s 5 is that the jury are required to convict in circumstances in which they consider it equally probable that the accused was not in possession of the drug. The Court of Appeal found that the imposition of a reverse onus by s 5 is inconsistent with the right conferred by s 25(1) of the Charter[948]. That finding is not challenged in this appeal.

674 The prosecution was not required to prove that the appellant was not authorised by or licensed under the Drugs Act to traffick in methylamphetamine. Proof of such authorisation or licence would have excepted the appellant from criminal liability. The Drugs Act places proof of matters of exception

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947 Drugs Act, s 73(1)(c). Under s 73(1)(b) of the Drugs Act, a lesser maximum penalty applies where the court is satisfied on the balance of probabilities that the offence was not committed for any purpose related to trafficking in the drug of dependence.

948 *R v Momcilovic* (2010) 25 VR 436 at 473 [135].

qualification and defence on the accused[949]. Whether allocating the burden of proving matters of exception or qualification to the accused impinges on the right to be presumed innocent of an offence until proved guilty according to law and, if it does, whether it is a demonstrably justified limitation on the right, were not in issue on the appeal.

675 One of the main ways in which the Charter seeks to protect and promote the rights that are set out in Pt 2 is by s 32(1), which provides:

> "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

676 The Court of Appeal rejected the submission that s 32(1) creates a "special" rule allowing a "remedial" interpretation of a statutory provision in order to render the provision rights compatible[950]. It said that s 32(1) requires the court to explore all possible interpretations of a provision and to adopt the interpretation which least infringes Charter rights[951]. It was necessary for the Court of Appeal to consider the relationship between ss 7(2) and 32(1) because the Attorney-General for Victoria submitted that s 5 was a demonstrably justified limitation on the right to be presumed innocent. The Court of Appeal concluded that the interpretive rule in s 32(1) is addressed to compatibility with the rights as stated in ss 8 to 27 and not as reasonably limited under s 7(2)[952]. The Court of Appeal said that the Parliament is not to be taken to have intended that s 32(1) was only to operate to avoid what would otherwise be an unjustified infringement of a right[953]. Its analysis of the relationship between s 7(2) and s 32(1) is consistent with the reasoning of Elias CJ in her dissenting judgment addressing the same issue under the *New Zealand Bill of Rights Act* 1990 (NZ) in *R v Hansen*[954].

677 The Court of Appeal concluded that, applying the interpretive rule of s 32(1) of the Charter, it is not possible to read s 5 other than as imposing a legal

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949 Drugs Act, s 104.

950 *R v Momcilovic* (2010) 25 VR 436 at 456 [69], 462 [92].

951 *R v Momcilovic* (2010) 25 VR 436 at 464 [103].

952 *R v Momcilovic* (2010) 25 VR 436 at 465-466 [105]-[106].

953 *R v Momcilovic* (2010) 25 VR 436 at 466 [107].

954 *R v Momcilovic* (2010) 25 VR 436 at 466 [108], citing *R v Hansen* [2007] 3 NZLR 1 at 9.

burden on the accused[955]. The Attorney-General for Victoria seeks to uphold the finding, although he contends that in arriving at it the Court of Appeal misapplied s 32(1). The Attorney-General for Victoria contends that the Court of Appeal should have held that the question of justification under s 7(2) is part of and inseparable from the task of statutory interpretation required by s 32(1). In this Court, the Attorney-General for Victoria did not maintain that the provision of a reverse onus in s 5, if construed as imposing a legal burden, is a demonstrably justified limitation on the Charter right. No party and no intervener put such a submission. Nonetheless a principal focus of the parties' submissions was on the relationship between s 7(2) and s 32(1). The parties were at one in submitting that the mandate of s 32(1) is to interpret statutory provisions in a way that is compatible with Charter rights as reasonably limited under s 7(2). Their submissions drew on the reasoning of the majority in *Hansen*. The Human Rights Law Centre ("the Centre"), appearing as amicus curiae, alone supported the Court of Appeal's interpretation of s 32(1) and the place of s 7(2) in the statutory scheme.

678 I consider that the Court of Appeal's construction pays insufficient regard to the place of s 7 in the scheme of the Charter[956]. The human rights that the Charter protects and promotes are the civil and political rights in Pt 2[957]. That Part commences with s 7, which is headed "Human rights – what they are and when they may be limited"[958]. The rights set out in the succeeding sections of Pt 2 are subject to demonstrably justified limits. This is consistent with the statement in the Preamble that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It accords with the extrinsic material to which the Court was referred[959]. The Charter's

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955 *R v Momcilovic* (2010) 25 VR 436 at 469 [119].

956 Section 7 was described in the Explanatory Memorandum as one of the "key provisions" of the Charter: Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 7.

957 Charter, s 3(1), definition of "human rights".

958 Section 36(2A) of the *Interpretation of Legislation Act* 1984 (Vic) provides that headings to sections form part of Acts passed on or after 1 January 2001.

959 The Explanatory Memorandum stated that s 7(2) reflects "Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests": Victoria, Legislative Assembly, Charter of Human Rights and Responsibilities Bill 2006, Explanatory Memorandum at 9. The Attorney-General's second reading speech recorded that the Bill provides that "rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests": Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 2006 at

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recognition that rights may be reasonably limited and that their exercise may require consideration of the rights of others informs the concept of compatibility with human rights. That concept is central to the ways in which the Charter applies to the Parliament, to courts and tribunals and to public authorities[960].

679 The Charter requires statements of compatibility to be prepared by the Member introducing a Bill into a House of Parliament[961]. The statement must state whether, in the Member's opinion, the Bill is compatible with human rights[962]. The Scrutiny of Acts and Regulations Committee ("the Committee") is under a duty to consider any Bill introduced into Parliament and to report to the Parliament as to whether the Bill is incompatible with human rights[963]. The Committee has a similar obligation to review all statutory rules[964]. The Centre submitted that these provisions are to be understood as requiring a Member introducing a Bill that contains a minor demonstrably justified limitation on a Charter right to inform the Parliament that the Bill is incompatible with human rights. In this way, it was said that the purpose of the Charter is vindicated by ensuring parliamentary scrutiny of any limitation on the human rights that it seeks to protect and promote. The submission tends to overlook the potential scope of some of the broadly stated rights. It is possible that the right to move freely within Victoria[965] has been reasonably limited by statute and regulations in a variety of ways including those regulating traffic. It is a questionable proposition that informed debate concerning the human rights implications of proposed legislation is advanced by a construction of the Charter that would require statements of incompatibility for every demonstrably justified limitation of a Charter right.

680 The Charter applies to public authorities by obliging them to act in a way that is compatible with human rights. Section 38 relevantly provides:

1291. See also Victoria, Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, (2005).

960 Charter, s 1(2)(b), (c) and (d).

961 Charter, s 28(2).

962 Charter, s 28(3).

963 Charter, s 30.

964 *Subordinate Legislation Act* 1994 (Vic), s 21.

965 Charter, s 12.

> "(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.
>
> **Example**
>
> Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.
>
> …"

681 One reason for concluding that compatibility with human rights for the purposes of the Charter is to be understood as compatibility with the rights as reasonably limited under s 7(2) is the improbability that the Parliament intended to make unlawful the demonstrably justified acts of public authorities which happen to reasonably limit a Charter right. Contrary to the Centre's submission, s 38(2) will not always be engaged to protect a public authority in such a case.

682 The Centre supported the Court of Appeal's construction of ss 7(2) and 32(1) by a textual consideration. Section 32(1) does not say that statutory provisions are to be interpreted in a way that is "compatible with human rights as reasonably limited". One answer is to observe that the human rights of which s 32(1) speaks are the rights in Pt 2 as reasonably limited by s 7(2). However, it was said that this ignores that s 7(2) assumes the existence of a "law" that limits human rights and requires an assessment of the limitation including its purpose and extent. The "proportionality assessment" which s 7(2) requires is submitted to be inconsistent with a process of interpretation. The Centre acknowledged in its written submissions that "[n]one of this is to say that the rights are absolute; the scope of some of the rights is expressly limited and they must, in any event, be read together". However, if s 7(2) does not inform the interpretive function, there is no mechanism for the court in interpreting statutory provisions in a rights compatible way to recognise the need for rights to be read together. As the Centre's submission noted, some Charter rights are subject to express limitations. Consideration of whether a statutory provision is compatible with the right of freedom of expression must require determination of whether any apparent limitation is a reasonably necessary limitation within s 15(3) of the Charter. It is a task that may be thought to be of the same character as the determination of whether an apparent limitation on the right of peaceful assembly is demonstrably justified within s 7(2).

683 The Victorian Attorney-General's submission that the question of justification in s 7(2) is part of, and inseparable from, the process of determining whether a possible interpretation of a statutory provision is compatible with human rights should be accepted. It is a construction that recognises the central place of s 7 in the statutory scheme and requires the court to give effect to the Charter's recognition that rights are not absolute and may need to be balanced against one another. The point is made by Blanchard J in *Hansen*[966]:

> "It would surely be difficult to argue that many, if any, statutes can be read completely consistently with the full breadth of each and every right and freedom in the Bill of Rights. Accordingly, it is only those meanings that *unjustifiably* limit guaranteed rights or freedoms that s 6 requires the Court to discard, if the statutory language so permits." (emphasis in original)

684 If the literal or grammatical meaning of a provision appears to limit a Charter right, the court must consider whether the limitation is demonstrably justified by reference to the s 7(2) criteria. As the Commonwealth submitted, these are criteria of a kind that are readily capable of judicial evaluation[967]. Consideration of the purpose of the limitation, its nature and extent, and the question of less restrictive means reasonably available to achieve the purpose are matters that commonly will be evident from the legislation. If the ordinary meaning of the provision would place an unjustified limitation on a human right, the court is required to seek to resolve the apparent conflict between the language of the provision and the mandate of the Charter by giving the provision a meaning that is compatible with the human right if it is possible to do so consistently with the purpose of the provision. Provisions enacted before the Charter may yield different, human rights compatible, meanings in consequence of s 32(1). However, the scope for this to occur is confined by the requirement of consistency with purpose. This directs attention to the intention, objectively ascertained, of the enacting Parliament. The task imposed by s 32(1) is one of interpretation and not of legislation. It does not admit of "remedial interpretation" of the type undertaken by the Hong Kong Court of Final Appeal as a means of avoiding invalidity[968].

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966 [2007] 3 NZLR 1 at 27 [59].

967 *Thomas v Mowbray* (2007) 233 CLR 307 at 331-334 [20]-[28] per Gleeson CJ, 344-348 [71]-[82], 350-351 [88]-[92] per Gummow and Crennan JJ, 507 [596] per Callinan J; [2007] HCA 33; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 553-554 [14] per Gummow J, 597 [168]-[169] per Crennan and Kiefel JJ; [2008] HCA 2.

968 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at 604-608 [57]-[66].

685 The appellant's and the Commission's submissions assume that an evidential burden respecting disproof of the fact of possession in the prosecution of drugs offences is a demonstrably justified limitation on the right to be presumed innocent. That assumption was not called into question and may be accepted for present purposes. The difficulty in acceding to the appellant's and the Commission's rights compatible interpretation of s 5 is its plain language and its purpose. The Court of Appeal was right to conclude that it is not possible, applying the interpretive rule of s 32(1), to interpret s 5 as placing a mere evidential burden upon an accused[969].

Possession for sale

686 On the appeal in this Court, the appellant relied on an alternative submission respecting the construction of s 5. She contended that the provision is not engaged in a prosecution for the offence of trafficking in a drug of dependence under s 71AC. Section 71AC is in Pt V, which contains the offences of possession of, and trafficking in, drugs of dependence. Section 71AC provides:

> "**Trafficking in a drug of dependence**
>
> A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum)."

687 Section 70 defines a number of words and expressions for the purposes of the offences contained in Pt V. Section 70(1) contains an inclusive definition of traffick:

> "***traffick*** in relation to a drug of dependence includes –
>
> (a) prepare a drug of dependence for trafficking;
>
> (b) manufacture a drug of dependence; or
>
> (c) sell, exchange, agree to sell, offer for sale or have in possession for sale, a drug of dependence".

688 The prosecution of the appellant engaged s 73(2), which should also be noted:

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969 *R v Momcilovic* (2010) 25 VR 436 at 469 [119].

> "Where a person has in his possession, without being authorized by or licensed under this Act or the regulations to do so, a drug of dependence in a quantity that is not less than the traffickable quantity applicable to that drug of dependence, the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence."

689 The appellant's deemed possession of a quantity of methylamphetamine exceeding the traffickable quantity[970] was relied upon at the trial as prima facie evidence of trafficking by way of her "possession for sale" of the drug.

690 Section 5 is set out earlier in these reasons. It is in Pt I of the Drugs Act, which deals with introductory and transitional matters. In the appellant's submission, s 5 does not speak to the composite expression "possession for sale" in the definition of trafficking.

691 Section 5 does not define possession; it deems a person to be in possession of a substance when the conditions for its engagement are met and it does so for "the purposes of [the] Act". A prosecution for an offence of trafficking based on the accused's possession of a quantity of a drug in excess of the traffickable quantity requires proof of the fact of possession. At the appellant's trial, s 5 was engaged once the prosecution established her occupation of the premises in which the methylamphetamine was located to prove the fact of possession.

692 Nothing connected the appellant to the drugs save the fact of her occupancy of the apartment in which they were found. While occupancy of premises in which illicit drugs are present may support an inference of possession, in this case there was no basis for excluding that the drugs were possessed by Velimir Markovski and no evidence to support an inference that the appellant was in joint possession with him. It was only by proof of the conditions for the engagement of s 5 that the prosecution established a prima facie case against the appellant. It is not possible, consistently with the purpose of the provision, to interpret s 5 as not engaged in a prosecution for the offence of trafficking contrary to s 71AC.

Proof of the mental element of the trafficking offence

693 The sufficiency of the trial judge's directions was attacked on five sub-grounds before the Court of Appeal[971]. In this Court, the challenge is confined to

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970 At the material time, the traffickable quantity for methylamphetamine was six grams: Drugs Act, Pt 3 of Sched 11.

971 "The learned judge erred in his directions on possession and trafficking; and in particular he erred:

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two of those complaints. Together they amount to the contention, summarised by the Court of Appeal, that the trial judge ought to have directed the jury that[972]:

> "[T]he applicant could not have the drug in her possession for sale, and therefore could not be guilty of trafficking, unless the prosecution proved beyond reasonable doubt that she knew of the presence of the drug."

694 The Court of Appeal dealt with this complaint shortly, saying that the identical submission had been made and rejected in *R v Georgiou*[973]. The Court of Appeal observed that the defence case had not been conducted on the footing that, should the appellant fail to prove that she was not in possession of the drugs, the jury might find that she nevertheless lacked the intent to possess the drugs for sale[974].

(a) in directing that, if the applicant failed to prove lack of knowledge of the drug on the balance of probabilities, 'then you must find that [she] was in possession of the drug';

(b) in failing to direct that, even if the applicant failed to prove that she did not know of the presence of the drug, she would not be in possession if she proved that she did not intend to possess the drug to the exclusion of others not acting in concert with her;

(c) in failing to direct on the meaning of possession at common law;

(d) in failing to direct that the applicant could not have the drug in her possession for sale, and therefore could not be guilty of trafficking, unless the prosecution proved beyond reasonable doubt that she knew of the presence of the drug;

(e) in failing to direct adequately on the 'prima facie' provision in s 73(2) of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic); in directing in a manner that suggested that there was uncontradicted evidence of possession of six grams of the drug; in failing to instruct that there was evidence to the contrary; and in failing to identify that evidence."

972 *R v Momcilovic* (2010) 25 VR 436 at 480 [164].

973 *R v Momcilovic* (2010) 25 VR 436 at 481 [165], citing *R v Georgiou* [2009] VSCA 57 at [48].

974 *R v Momcilovic* (2010) 25 VR 436 at 481 [166].

695 On the appeal in this Court it was not in issue that the Court of Appeal misconstrued *Georgiou*. That case held that, in a prosecution for trafficking based upon the engagement of ss 5 and 73(2), it is necessary for the Crown to prove the intention to possess the drug for sale[975]. The Court of Appeal in *Georgiou* approved Callaway JA's observations in *R v Tragear*[976]:

> "[E]ven if the Crown successfully invokes s 5 in relation to counts 1 [trafficking] and 2 [possession] to establish possession, it will still have to prove beyond reasonable doubt that the applicant knew of the cocaine in the knapsack in order to secure a conviction on count 1 [trafficking]. Otherwise he would lack the requisite mens rea, of which s 73(2) is only prima facie evidence."

696 The Director of Public Prosecutions maintained that the Court of Appeal's rejection of the appellant's complaint accords with the decision in *R v Clarke and Johnstone*[977]. He submitted that *Clarke and Johnstone* is an authority of long standing to which the courts in *Tragear* and *Georgiou* did not refer. The prosecution case against Johnstone at trial was put on alternative bases: he was the occupier of the farm on which cannabis was located or he was aiding and abetting the owner of the farm in trafficking in the plant. The jury were directed of the necessity that the prosecution prove beyond reasonable doubt that Johnstone was aware of the existence of the cannabis. The Full Court commented that the direction was too favourable respecting the deemed possession case but necessary in the aiding and abetting case[978]. The issue here raised was not live in *Clarke and Johnstone*. The Full Court in *Clarke and Johnstone* correctly noted the differing operation of s 5 and s 73(2), observing that the latter does not deem any fact to exist nor reverse an onus of proof[979]. A prima facie case against an accused admits of a conviction in the absence of further evidence but it does not require that result. Possession of a quantity of a drug exceeding the traffickable quantity is prima facie evidence of trafficking because such a quantity is taken to support the inference that the drug is possessed for sale. The offence of trafficking requires proof of the intention to traffick in the drug. A prosecution for trafficking that engages ss 5 and 73(2) to establish trafficking by way of possession of a quantity of a drug for sale requires proof that the accused had that intention.

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975 *R v Georgiou* [2009] VSCA 57 at [6], [51].

976 *R v Georgiou* [2009] VSCA 57 at [48], citing *R v Tragear* (2003) 9 VR 107 at 117 [43].

977 [1986] VR 643.

978 *R v Clarke and Johnstone* [1986] VR 643 at 660.

979 *R v Clarke and Johnstone* [1986] VR 643 at 659.

The trial judge's directions to the jury

697 The trial was conducted on the footing that it was for the appellant to satisfy the jury on the balance of probabilities that she did not know of the existence of the drugs[980]. The Court of Appeal considered this to be a correct analysis and rejected the submission that it was necessary for the jury to be instructed that the appellant could not have been in possession of the drugs for sale unless the prosecution proved that she knew of the existence of them[981]. Nonetheless, the Director of Public Prosecutions submits that an analysis of the directions reveals that the jury were informed of the need for the prosecution to prove that the appellant intentionally trafficked in the drugs. The submission should be rejected.

698 In the opening section of the charge, the trial judge directed the jury that:

> "In this case the Crown must prove all the elements of the offence, which I will come back to in a moment, beyond reasonable doubt, however, as both counsel have said, the accused must satisfy you that she did not know of the existence of the drugs on the balance of probability."

The trial judge went on to explain that, in the event the appellant failed to prove that she was not in possession of the drug, it would be necessary to consider the second element of the offence, which required the prosecution to prove that she intentionally trafficked in the drug. The directions respecting this element included that the prosecution must prove that the appellant "deliberately possessed for sale a prohibited drug". In the concluding part of the charge his Honour said this:

> "You must look at all the evidence, *including the quantity of drugs possessed* by Vera Momcilovic and consider whether you are satisfied beyond reasonable doubt that she intentionally had, in her possession for sale, a prohibited drug.
>
> If you don't accept, on the balance of probabilities that she didn't know about the drugs, then you must consider this second element, whether she possessed them for sale and what the law says, as I have just said to you, is if you possess more than six grams of methylamphetamine in a sufficient – for you to find that she was possessing it for sale, for trafficking." (emphasis added)

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980 *R v Momcilovic* (2010) 25 VR 436 at 479-480 [161]-[162].

981 *R v Momcilovic* (2010) 25 VR 436 at 480-481 [164]-[166].

699 The directions on proof of intention focussed on whether in the circumstances, including the quantity of the drug possessed by the appellant, the inference to be drawn was that her intention was to possess the drug for sale. The quantity of the drug made that inference well nigh irresistible. The central issue at the trial was the appellant's knowledge (or lack of knowledge) of the drug. On this issue the only direction was that it was upon the appellant to prove her lack of knowledge. What the directions concerning the intention to possess the drug for sale failed to tell the jury was that, if they considered it probable that the appellant knew of the drugs but they entertained a doubt about that matter, it was their duty to acquit.

700 There was evidence that the appellant was a person of good character and other evidence that was capable of raising the reasonable possibility that she was not aware of the existence of the drugs. This included her evidence of working long hours and of rarely cooking meals at home. The failure to direct the jury that the appellant could not be convicted of trafficking in the drug unless the prosecution proved her knowledge of its existence, in the circumstances of the trial, was productive of a substantial miscarriage of justice.

701 The appellant submitted that this Court should enter a verdict of acquittal. She advanced three reasons in support of the making of that order. First, she will by now have served the term of her sentence[982]. Secondly, she submitted that it is unlikely that she would be convicted at a trial at which the prosecution is required to prove her knowledge of the drug beyond reasonable doubt. Thirdly, it is more than five years since the events giving rise to the charge. It is not suggested that any delay associated with the proceedings has been brought about by the prosecution and nothing in the conduct of the prosecution at the trial militates against an order for a new trial. The charge involves an allegation of serious criminal conduct. The appropriate order is for a new trial.

702 I agree with the orders proposed by French CJ.

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982 The Court of Appeal allowed the appellant's appeal against the severity of sentence. The appellant was resentenced to a term of 18 months' imprisonment. All save the 52 days that the appellant had served was suspended for 16 months.