HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, CALLINAN AND CRENNAN JJ

STATE OF NEW SOUTH WALES APPELLANT

AND

JAMES JOHN CORBETT & ANOR RESPONDENTS

State of New South Wales v Corbett
[2007] HCA 32
1 August 2007
S2/2007

ORDER

1. Appeal allowed.

2. Set aside orders 2 to 5 of the Court of Appeal of the Supreme Court of New South Wales made on 13 June 2006 and, in their place, order that the appeal to that Court be dismissed.

3. The appellant to pay the respondents' costs of the appeal to this Court.

On appeal from the Supreme Court of New South Wales

Representation

M G Sexton SC Solicitor-General for the State of New South Wales with M J Neil QC and P R Sternberg for the appellant (instructed by Crown Solicitor for New South Wales)

J M Ireland QC with S G Moffet and J S Cooke for the respondents (instructed by Moloney Lawyers)

CATCHWORDS

State of New South Wales v Corbett

Police – Search warrants – Police conducted a search under apparent authority of a search warrant – Application for search warrant referred to offence under *Firearms Act* 1989 (NSW) when that Act had been repealed and replaced by *Firearms Act* 1996 (NSW) – An offence of unauthorised possession of a firearm existed under both Acts – Definition of "firearms offence" under the *Search Warrants Act* 1985 (NSW) continued to be identified by reference to the repealed *Firearms Act* 1989 (NSW) – Whether offence sufficiently stated in application – Whether search warrant valid – Savings and transitional provisions in Sched 3 to the *Firearms Act* 1996 (NSW).

Police – Search warrants – Object of search and boundaries of search warrant unambiguous – Nature of offence critical – Whether transitional provisions require reference to repealed Act to be read as reference to corresponding provisions in the *Firearms Act* 1996 (NSW).

Police – Search warrants – Whether applicant had reasonable grounds for belief in existence on premises of "a thing connected with a particular firearms offence".

Statutory interpretation – Approach to interpretation of provisions regarding search warrants – Generally strict approach to interpretation of enabling provisions – Reasons for such strictness – Whether transitional provisions require reference to repealed Act to be read as reference to corresponding provisions in the *Firearms Act* 1996 (NSW).

Words and phrases – "a thing connected with a particular firearms offence", "instrument", "corresponding provisions".

Search Warrants Act 1985 (NSW), ss 4, 5(1)(b).
Search Warrants Regulation 1994 (NSW), Form 1 in Sched 1.
Firearms Act 1989 (NSW), s 5.
Firearms Act 1996 (NSW), s 7(1), item 12 of Sched 3.

1 GLEESON CJ. The facts and issues are set out in the reasons of Callinan and Crennan JJ. I agree that the appeal should be allowed and consequential orders made as proposed in those reasons. I agree generally with the reasons of Callinan and Crennan JJ. I also agree with Gummow J as to the issue of statutory construction raised by the terms of the *Search Warrants Act* 1985 (NSW).

2 GUMMOW J. The appeal to this Court from the New South Wales Court of Appeal[1] should be allowed. Orders 1-5 made by that Court and entered 4 July 2006 should be set aside and in place thereof the appeal to that Court should be dismissed. In accordance with the undertaking given by the State upon the grant of Special Leave, the State (the appellant), must bear the costs of the respondents of the appeal to this Court and the costs order (order 6) made in favour of the present respondents by the Court of Appeal should not be disturbed.

3 The circumstances giving rise to the present litigation, an action in the District Court for trespass upon the property of the respondents at Goulburn, are explained in the reasons for judgment of Callinan and Crennan JJ. I agree generally with their Honours' reasons for allowing the appeal.

4 However, I will deal specifically with the issue of statutory construction raised by the terms of the *Search Warrants Act* 1985 (NSW) ("the Search Warrants Act"). Paragraph (b) of s 5(1) of that statute provides for the making of applications for a search warrant where there are reasonable grounds for believing that there is in or on any premises "a thing connected with a particular firearms offence". The phrase "connected with" a particular offence is given content by s 4(1) of the Search Warrants Act. This makes it clear that the "thing", on the one hand, may have been used in the past for the purpose of committing the firearms offence or, on the other, may be intended to be used for the firearms offence.

5 An appreciation of this time-scale is important for an understanding of the definition of "firearms offence" in s 5(2) of the Search Warrants Act. That phrase was defined in s 5(2) with reference initially to offences under the *Firearms and Dangerous Weapons Act* 1973 (NSW) and subsequently to offences under the *Firearms Act* 1989 ("the 1989 Act") and the *Prohibited Weapons Act* 1989 (NSW). At the time of the application for and the issue of the warrant with which this case is concerned, 3 June 1998, the 1989 Act had been replaced by the *Firearms Act* 1996 (NSW) ("the 1996 Act")[2]. However, the definition of "firearms offence" in s 5(2) of the Search Warrants Act was unchanged and still identified what by then was the repealed 1989 Act.

6 Schedule 3 to the 1996 Act contained detailed savings and transitional provisions. Item 12 stated:

> "Except as provided by the regulations, a reference in any instrument (other than this Act or the regulations) to any provision of the *Firearms*

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1 *Corbett v State of New South Wales* [2006] NSWCA 138.

2 Section 89 of the 1996 Act, which commenced 1 July 1997, repealed the 1989 Act.

> *Act 1989*, or the *Firearms Regulation 1990*, is to be read as a reference to the *corresponding provision* of this Act, or the regulations made under this Act, respectively." (emphasis added)

7 Two points should be made here respecting Item 12. First, the term "instrument", as appears from the text of Item 12 itself, was sufficiently broad to include other New South Wales statutes, including the Search Warrants Act. Secondly, the phrase "corresponding provision" is apt to include provisions in the 1989 Act and 1996 Act which create offences the gist of which is the unauthorised possession of a firearm.

8 The search warrant upon which this litigation turns was issued upon an application which was made under par (b) of s 5(1) of the Search Warrants Act and in purported compliance with the application form prescribed by regulations made under s 11(1) of that Act. The application form was prescribed Form 1 under the Search Warrants Regulation 1994 (NSW), and an "instrument" within the meaning of Item 12 in Sched 3 to the 1996 Act.

9 Paragraph 2(a) of the prescribed form read:

> "I have reasonable grounds for believing that:
>
> > (a) the things are connected with the following indictable offence/firearms offence/narcotics offence within the meaning of the Search Warrants Act 1985 (s 5(2))."

A blank space was provided below. A footnote stated: "Delete whichever is inapplicable."

10 It is to be expected that for some time after the repeal of the 1989 Act, the "reasonable grounds" basing some warrant applications would concern "a thing" used to commit a firearms offence while the 1989 Act was in force. The repeal of the 1989 Act would not remove a liability accrued under that statute to prosecution in respect of such an offence[3]. In these circumstances, notwithstanding the supervening repeal of the 1989 Act, the reference in the prescribed form under the Search Warrants Act to s 5(2) of that statute, with its identification of the 1989 Act, would be appropriate on its face to the state of affairs, an earlier offence, with which the warrant application was concerned.

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3 *Interpretation Act* 1987 (NSW) s 30(1). *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 105-106; *Byrne v Garrisson* [1965] VR 523 at 525, 529.

11 What of the situation, as in this case, of an apprehension after the repeal of the 1989 Act, of an intended use of a firearm to commit an offence? The statement in par 2(a) of the application form "within the meaning of the Search Warrants Act 1985 (s 5(2))" must be read with Item 12 in Sched 3 to the 1996 Act and thus to refer to the "corresponding provision" in the 1996 Act. There is no sensible doubt that s 7 was such a provision corresponding to s 5 of the 1989 Act. The gist of each might be expressed as "possession of firearm". These words were inserted in the blank space in par 2(a) of the form by Inspector Jago of Goulburn Local Area Command, the officer who made the search warrant application.

12 Where then is the fatal defect alleged by the respondents? It is said to be the addition to the inserted words of the phrase "Firearms Act No. 25/1989 Sect 5(a)". But again, by dint of Item 12 in the transitional provisions to the 1996 Act, this is to be read as a reference to the corresponding firearm possession provision, namely s 7 of the 1996 Act.

13 This operation of Item 12 upon the warrant application form at stake in the present case demonstrates the interaction between the Search Warrants Act on the one hand and the 1989 and 1996 Acts on the other. It gives effect to the ambulatory operation of the identification of the relevant "thing" in s 4 of the Search Warrants Act. The ambulatory operation allows for applications for warrants where there are reasonable grounds for the belief that in or on the premises there is a "thing" which is connected with a particular firearms offence for the purposes of which the "thing" is intended to be used, as well as a "thing" used in the past for the purpose of commission of an offence whilst the 1989 Act was in force.

14 The appeal should be allowed and consequential orders made as indicated earlier in these reasons.

15 KIRBY J. This appeal comes from a judgment of the Court of Appeal of the Supreme Court of New South Wales[4]. The facts, legislation and issues relevant to its determination are set out in the reasons of Callinan and Crennan JJ[5].

Search warrants and the rule of strictness

16 *A tension in the law*: From its earliest days, this Court has insisted on a rule of strictness in expressing the law governing search warrants[6]. It has done so, despite a recognition that, as Brennan J observed, in *Halliday v Nevill*[7]:

> "There is … a tension between the common law privileges that secure the privacy of individuals in their own homes, gardens and yards and the efficient exercise of statutory powers in aid of law enforcement."

17 In intermediate courts, opinions are sometimes expressed reflecting a perceived need to moderate the rule of strictness. This has followed the inconvenience that the application of the rule can sometimes occasion and a sympathy for those who seek and execute search warrants (generally police officers) who are accountable in law for defaults when the rule of strictness is rigorously applied. Instances of such opinions may be seen, for example, in the dissenting reasons in two important cases in the New South Wales Court of Appeal[8]. The dissents concern, and respond to, the tension to which Brennan J referred in *Halliday*.

18 Notwithstanding such differences, intermediate courts in Australia have normally adhered to the rule of strictness. They have correctly interpreted that to be their duty, conforming to the unanimous reasons of seven Justices of this Court in *George v Rockett*[9]. Those reasons, in turn, constituted a strong

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4 *Corbett v State of New South Wales* [2006] NSWCA 138.

5 Reasons of Callinan and Crennan JJ at [47]-[75].

6 *MacDonald v Beare* (1904) 1 CLR 513 at 522 per Griffith CJ.

7 (1984) 155 CLR 1 at 20.

8 *Carroll v Mijovich* (1991) 25 NSWLR 441 at 454 per Meagher JA (diss) and *Cassaniti v Croucher* (2000) 48 NSWLR 623 at 636 [52] per Heydon JA (diss).

9 (1990) 170 CLR 104 at 110-111, 115. See reasons of Callinan and Crennan JJ at [87].

reaffirmation of a line of federal cases such as *R v Tillett; Ex parte Newton*[10] and *Parker v Churchill*[11], extracted and cited with approval in *Rockett*[12].

19 The rule of strictness in this area of the law can only be fully understood against the background of its history in common law countries[13]; the basic principles expressed in that history commonly reflected in the constitutions of most such countries[14]; and the development of instruments expressing relevant norms of the international law of human rights to which Australia is a party[15].

20 *History of search warrant law*: In the 18th century, departures from the rule of strictness became common in England and, even more so, its colonies. Such departures constituted one of the causes of the American War of Independence against Britain[16]. They helped to explain the language of the Fourth Amendment to the Constitution of the United States of America[17].

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10 (1969) 14 FLR 101 at 106 per Fox J.

11 (1985) 9 FCR 316 at 322.

12 (1990) 170 CLR 104 at 111-113. See also *Crowley v Murphy* (1981) 34 ALR 496 at 515.

13 Described in *MacDonald* (1904) 1 CLR 513 at 522; *Carroll v Mijovich* (1991) 25 NSWLR 441 at 445-447.

14 See Constitution of the United States of America, Fourth Amendment; Canadian Charter of Rights and Freedoms 1982, s 8; *Hunter v Southam Inc* [1984] 2 SCR 145.

15 See, for example, International Covenant on Civil and Political Rights, Art 17: "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks": [1980] ATS 23. See also Universal Declaration of Human Rights, Art 12.

16 See *Declaration of Independence* (1776).

17 The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It should be noted that the provision does not require a particular description or identification of the statutory provision relied on for the search or seizure.

Concurrently, the departures eventually led in Britain itself to judicial and parliamentary reaffirmation of the rule of strictness[18]. The law of search warrants, so expressed in Britain, became part of the law inherited by the Australian colonies as they were established.

21 Although Australia has not adopted a constitutional rule similar to the Fourth Amendment to the United States Constitution and its equivalents in other countries and has not expressly incorporated the relevant rules of international law in its domestic legislation, the rule of strictness is reflected both in legislative provisions governing search warrants and in judicial expositions of their requirements[19].

22 *Reasons for strictness*: What are the reasons that lie behind this rule of strictness? They include:

(1) The protection of the ordinary quiet and tranquillity of the places in which people live and work and of their possessions as a precious feature of our type of society and the happiness of its people;

(2) The avoidance of disruption and the occasional violence that can arise in the case of unwarranted or excessive searches and seizures;

(3) The beneficial control of the agents of the State exerted because of their awareness that they will be held to conformity with strict rules whenever they conduct a search and will require statutory or common law that clearly supports their searches and seizures;

(4) The incentive that strict rules afford for the maintenance of respect for the basic rights of individuals who become subject to, or affected by, the processes of compulsory search and seizure; and

(5) The provision in advance to those persons of a warrant signifying, with a high degree of clarity, both the lawful ambit of the search and seizure that may take place and the assurance that an independent office-holder has been persuaded that a search and

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18 Described in the reasons of Callinan and Crennan JJ at [87]-[88].

19 See reasons of Callinan and Crennan JJ at [89]-[104]. See also New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 February 1985 at 3859 (Hon T W Sheahan); New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 March 1985 at 4666-4667 (Hon B J Unsworth); *Rockett* (1990) 170 CLR 104 at 110.

seizure, within that ambit, would be lawful and has been justified on reasonable grounds.

The Court of Appeal's decision

23 In the present case, the Court of Appeal concluded that the application of the rule of strictness to the established facts required rejection of the lawfulness of the application for the search warrant and the resulting warrant pursuant to which the police search of the respondents' premises took place. In effect, the Court held that the strict rule applied because the police officer who applied for the search warrant relied on a specifically identified legal offence which did not then exist[20]. For the same reason, the Justice issuing the warrant could not, in law, have had "reasonable grounds" for acting as he did. Their grounds for so acting were, in both cases, not "reasonable" not because of any malice or evil intent on their respective parts. It was simply because, on the face of the application and therefore the resulting warrant, they each had respectively in contemplation an irrelevant, repealed and hence inapplicable legal foundation for acting as they each did.

24 For the respondents, this limb of their argument was not based on a moral disapprobation, as such, of what the police officer and Justice had respectively done. Their submission simply required application to the uncontested facts of the rule of strictness expressed in the authority of this Court.

25 The reference to the repealed statutory provision might have had no significant conscious effect on the decision of the two officials in question: the applicant police officer and the issuing Justice. Each of them might well have made the same decision if the correct statutory provision had been nominated. Indeed, each might well have done so if no specific statutory provision had been identified. The respondents' argument was thus a technical one. At base, it represented no more than the insistence of the application to the facts of this case of the rule of strictness in the law governing search warrants as long applicable in this country.

The operation of the transitional provision

26 In these reasons I would not wish to cast any doubt on the rule of strictness nor to water it down by any thought that it is subject to exceptions based on considerations such as convenience or overall fairness and justice. That is not the way in which I would resolve this appeal.

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20 The reference to s 5(a) of the *Firearms Act* 1989 (NSW) rather than to s 7(1) of the *Firearms Act* 1996 (NSW). See reasons of Callinan and Crennan JJ at [70].

27 Obviously, because the rule of strictness is one of judicial approach, it must adjust to any applicable statutory provisions designed, in effect, to excuse or render inoperative, established, but immaterial, errors appearing on the face of a search warrant or ancillary documents. Similarly, it must adjust to cases where, by operation of law, the propounded error that, on a strict reading, might invalidate the application and resulting search warrant is revealed, on analysis, as no error at all. The appellant proffered each of these reasons to counter the respondents' appeal to the rule of strictness.

28 In my opinion, it is the latter argument that carries the day for the appellant. It saves the subject application and ensuing search warrant from invalidation for the presence of a legal defect. My reasons follow those of Gummow J[21]. They rely on the transitional provision contained in item 12 of Sched 3 to the *Firearms Act* 1996 (NSW) ("the 1996 Act"). That item states:

> "Except as provided by the regulations, a reference in any instrument (other than this Act or the regulations) to any provision of the *Firearms Act 1989*, or the *Firearms Regulation 1990*, is to be read as a reference to the corresponding provision of this Act, or the regulations made under this Act, respectively."

29 The reference in the application for the search warrant to the "Firearms Act No 25/1989 Sect 5(a)" was, by force of the transitional provision, to be read as a reference to the "corresponding provision" of the 1996 Act. Thus, by express statutory enactment, that item had the effect of replacing in the "instrument" (the application form and resulting search warrant) the reference to s 5(a) of the *Firearms Act* 1989 (NSW) ("the 1989 Act") with a reference to s 7 of the 1996 Act. In cases to which the transitional provision applied (such as this), it follows that there was no error, misdescription or material defect in the applicable search warrant or the resulting warrant issued pursuant to that application. By force of law, the supposedly incorrect reference to the 1989 Act was to be read as containing a correct reference to the "corresponding provision" by then in force, namely s 7 of the 1996 Act.

The transitional provision and the respondents' arguments

30 The respondents presented three arguments to defeat the foregoing conclusion.

31 The first was that the reliance on the transitional provision had not been expressly raised in the appellant's notice of appeal. This objection has no substance. The point is sufficiently tendered by the general language of

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21 Reasons of Gummow J at [6]-[13].

appellant's grounds 4 and 5. It involves an argument of law that was certainly advanced and dealt with by the Court of Appeal[22]. There is no procedural unfairness in this Court's now considering it[23]. Effectively the respondents acknowledged this by proceeding to argue the point both in their written and oral submissions.

32 Secondly, the respondents contended that, whilst the application form for the search warrant[24], the 1989 Act and other applicable regulations might be "instruments" within the transitional provision in the 1996 Act, an application for a search warrant was not an "instrument". It followed, so they argued, that the applicant police officer's reference to "Firearms Act No 25/1989 Sect 5(a)" in the application for the subject search warrant was not a reference in an "instrument" for the purpose of the transitional provision in the 1996 Act.

33 This narrow construction of the transitional provision should be rejected. The ordinary meaning of an "instrument", when used in a legal context such as the present, is a "formal legal document in writing" or a "formal document of any kind ... that is drawn up and executed in technical form"[25]. As the Court of Appeal recognised[26], depending on the circumstances, the word "instrument", appearing in an Act, might be given a wide scope or a narrow scope. Having regard to the present context, and the saving purpose of the transitional provision in question, its ordinary meaning should not be narrowly confined. As Gummow J points out[27], the context, in which the 1996 Act and its accompanying regulations are expressly stated to be excluded from the definition of "any instrument", suggests that the word was to be broadly construed. Otherwise, the 1996 Act and regulations must be taken to have been within the

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22 *Corbett v State of New South Wales* [2006] NSWCA 138 at [53]-[54] per Giles JA (McColl JA and Gzell J agreeing).

23 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9.

24 Form 1 as prescribed by a combination of s 11(1) of the *Search Warrants Act* 1985 (NSW) and s 4(a) of the Search Warrants Regulation (NSW). See reasons of Gummow J at [8]-[9]; reasons of Callinan and Crennan JJ at [54]-[55].

25 *Butterworths Australian Legal Dictionary*, (1997) at 606.

26 [2006] NSWCA 138 at [53].

27 Reasons of Gummow J at [6]-[7].

meaning of the word. To approach the meaning of "instrument" in this way conforms to many judicial elaborations of the word[28].

34 When this approach is adopted, an application for a search warrant is clearly to be regarded as an "instrument" that falls within the transitional provision, taking into account both the language and purpose of that provision.

35 Thirdly, the respondents submitted that this conclusion would not help the appellant because the question would remain whether, in the "instrument" in contention, the applicant police officer had in contemplation an incorrect statutory provision and was thus "asserting a belief in relation to s 5(a) of the 1989 [Firearms] Act"[29] which was unjustified in fact. This was the basis upon which the Court of Appeal rejected the appellant's appeal to the transitional provision. It might gain some support from the fifth of the reasons that I have suggested as explaining the persistence of the rule of strictness. If one of the purposes of such a rule, in relation to the search warrant issued on the basis of an application, is so that the person subject to it (or that person's representative) may know in advance the basis and limits of the permitted search, an appeal to a statutory fiction (substituting reference to other "corresponding" provisions for those expressly nominated) would normally be unknown and effectively unknowable to a recipient of the search warrant, confronted suddenly by the demand to submit to a search.

36 The answer to this argument is found in the clear language of the transitional provision itself. In effect, that language is designed to address the fact that not uncommon slips can occur where one statute replaces another yet, effectively, the new statute retains the substance of many of the repealed provisions. That was the situation here with the enactment of the 1996 Act to replace the 1989 Act. In a transitional period, references to repealed provisions will often continue to be made although the circumstances will make it plain that the true intended reference is to the corresponding provisions of the new statute where applicable, not the old one.

37 Thus, although the common law might be reluctant to import an imputed intention of such a kind, substituting one statutory provision for another expressly stated on an application form, Parliament can so provide, so long as it expresses its purpose clearly enough.

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28 *R v Hamilton Knight; Ex parte The Commonwealth Steamship Owners Association* (1952) 86 CLR 283 at 319-320 per Fullagar J; *Chittick v Ackland* (1984) 1 FCR 254 at 263-264 per Lockhart and Morling JJ.

29 [2006] NSWCA 138 at [54].

38 In my opinion the transitional provision applicable to this case is sufficiently clear. With the authority of Parliament, the misreference in the "instrument" to provisions of the 1989 Act was "to be read as a reference to the corresponding provision" of the 1996 Act. In effect, Parliament had acknowledged that an applicant (police officer) might state in the instrument (and even have in his mind) an identified provision of the 1989 Act but everyone would understand that this was to be read as a reference to the 1996 Act. At least this would be so as long as the latter contained a provision that would truly answer to the requirement of being "corresponding".

39 This s 7 of the 1996 Act plainly does in relation to s 5(a) of the 1989 Act. Accordingly, by force of the transitional provision there is an effective amendment of the "instrument", with a substitution for its reference to the superseded provision. So read, there was no error at all either in the application for the search warrant or in the warrant as issued.

Conclusion and orders

40 The consequence of this reasoning is that it is unnecessary for me to consider the other arguments advanced by the appellant as explained in the reasons of Callinan and Crennan JJ[30]. As I approach it, this is not a case in which there is any departure from (or qualification of) the rule of strictness which this Court has long adopted in expressing the law governing the requirements of precision and accuracy in applications for, and the issue and execution of, search warrants.

41 Understood with the assistance of the transitional provision, there was no relevant inaccuracy or imprecision in the application form. There was no invalidating flaw based on the reference in that application to a section in the repeal provisions of the 1989 Act. Read with the aid of express statutory provisions, the nominated section of the 1989 Act is taken as a reference to the corresponding provision of the 1996 Act. Necessarily, in the context that is also taken to be a "corresponding provision" that was in the contemplation of the police applicant when he applied for the subject warrant. His evidence at the trial supports, and certainly does not contradict, this conclusion.

42 It cannot be suggested that either of the respondents was in fact misled by the incorrect statutory citation. Mr Corbett was still in hospital when the search warrant was sought and executed. The reference to the provision of the 1989 Act would have had no more meaning for Mrs Corbett, as delimiting the ambit of the search, than would a concurrent reference to the transitional provision in the 1996 Act that had the effect of correcting the erroneous reference. The real

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30 Reasons of Callinan and Crennan JJ at [83]-[85], [109].

indication of the applicable ambit of the search warrant was contained in the words of the application for the search warrant that remain unaltered, namely "Possession of Firearms". That phrase adequately, and accurately, identified the subject matter of the search that was then conducted. The new provision was thus "corresponding".

43 So far as the issue raised in the Notice of Contention is concerned, I agree, for the reasons given by Callinan and Crennan JJ[31], that the respondents' submissions on their Notice of Contention should be rejected on the basis that no error has been shown in the concurrent findings of fact below. As my conclusions on the other arguments canvassed in the appeal are immaterial to the orders that I favour, I will refrain from expressing them. The foregoing is sufficient to require that the appeal be allowed.

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31 Reasons of Callinan and Crennan JJ at [106]-[108].

44 CALLINAN AND CRENNAN JJ. This is an appeal from a decision of the Court of Appeal of New South Wales[32] remitting a matter to the District Court of New South Wales, following a finding that a search warrant obtained pursuant to the provisions of the *Search Warrants Act* 1985 (NSW)[33] ("the Act") was invalid.

45 On 4 June 1998, pursuant to that search warrant, officers of the New South Wales Police Service (for whom the appellant has accepted legal responsibility) entered and searched the respondents' property at Goulburn for firearms. The respondents later commenced proceedings against the appellant seeking damages for trespass, on the basis that the search warrant was invalid and did not authorise the entry of the police officers onto their property.

46 This appeal turns on the language of s 5(1)(b) of the Act. That section requires an applicant for a search warrant to have reasonable grounds to believe that in or on nominated premises there will be "a thing connected with a particular firearms offence".

The legislation

47 The search warrant was issued pursuant to the power contained in Pt 2 of the Act, using the procedures set out in Pt 3. The application for the search warrant was made using Form 1 in the Search Warrants Regulation 1994 (NSW) ("the Regulations").

48 The respondents alleged two failures to comply with the provisions of the Act. First, it was contended that the application for the search warrant failed to state a particular offence to which the firearms the subject of the search were connected. That issue arose because the application contained a reference to a particular firearms offence by reference to a section in legislation which had been repealed and replaced by new firearms legislation. Secondly, it was contended that the officer who applied for the search warrant did not have a reasonable belief that the first respondent ("Mr Corbett") had any firearms in his possession at the relevant time.

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32 *Corbett v State of New South Wales* [2006] NSWCA 138. McColl JA and Gzell J agreed with the reasons of Giles JA.

33 The Act applicable at the relevant time has since been repealed and replaced by the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW).

49 The Act provided a complete statutory code in respect of search warrants in New South Wales[34]. Common law search warrants were abolished by s 24. It is convenient to set out the provisions of the Act, as they applied, which are material to these issues.

50 Sections 4, 5 and 6 in Pt 2 of the Act relevantly provided:

> "4 Definitions – things connected with offence etc
>
> (1) For the purposes of this Part, a thing is connected with a particular offence if it is:
>
> …
>
> (c) a thing that was used, or is intended to be used, for the purpose of committing the offence.
>
> …
>
> 5 Application for warrant in respect of certain offences, stolen property etc
>
> (1) A member of the police force may apply to an authorised justice for a search warrant if the member of the police force has reasonable grounds for believing that there is or, within 72 hours, will be in or on any premises:
>
> …
>
> (b) a thing connected with a particular firearms offence,
>
> …
>
> (2) In subsection (1):
>
> ***firearms offence*** means an offence under the *Firearms Act 1989*, the *Prohibited Weapons Act 1989* or regulations under either of those Acts, being an offence committed in respect of a firearm or a prohibited weapon within the meaning of those Acts.
>
> …

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34 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 February 1985 at 3859. See also s 10 of the Act.

6 Issue of warrant

An authorised justice to whom an application is made under section 5(1) may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the police force:

(a) to enter the premises, and

(b) to search the premises for things of the kind referred to in section 5(1)."

51 Section 5(2) defines "firearms offence" by reference to the *Firearms Act* 1989 (NSW) ("the 1989 Firearms Act") which at the relevant time had been repealed and replaced by the *Firearms Act* 1996 (NSW) ("the 1996 Firearms Act"). The Act was later updated to refer to the correct firearms legislation through the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1998 (NSW)[35].

52 Before going further, the cognate sections can be noted. Section 5 of the 1989 Firearms Act provided:

"5 A person shall not:

(a) possess a firearm; or

(b) use a firearm,

unless authorised to do so by a licence or a permit."

53 Section 7(1) of the 1996 Firearms Act, in force at the relevant time stated:

"(1) A person must not possess or use a firearm unless the person is authorised to do so by a licence or a permit."[36]

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35 Sched 2.31, which made the relevant amendments, came into operation on 26 November 1998.

36 The definition of "firearm" differs only slightly between the two acts.

"[F]irearm" was defined in s 3(1) of the 1989 Firearms Act as:

"(a) a gun, or other weapon, that can propel anything wholly or partly by means of an explosive; or

(b) a blank fire firearm; or

(Footnote continues on next page)

54 Sections 11(1), 12A and 14 in Pt 3 of the Act relevantly provided:

"11 Application for warrant in person

(1) An application for a search warrant must be in writing in the form prescribed by the regulations and must be made by the applicant in person.

…

12A Information in application for warrant

(1) An authorised justice must not issue a search warrant unless the application for the warrant includes the following information:

…

(f) any other information required by the regulations.

(2) An authorised justice when determining whether there are reasonable grounds to issue a search warrant is to consider (but is not limited to considering) the following matters:

...

(b) if the warrant is required to search for a thing in relation to an alleged offence – whether there is sufficient connection between the thing sought and the offence.

…

(c) an air gun,

but does not include an antique pistol or anything declared by the regulations not to be a firearm."

"[F]irearm" is defined in s 4 of the 1996 Firearms Act as "a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank fire firearm, or an air gun, but does not include anything declared by the regulations not to be a firearm."

14 Form of warrant

A search warrant shall be in or to the effect of the prescribed form."

55 The prescribed form, Form 1, in Sched 1 to the Regulations, relevantly contained the statement:

"(2) I have reasonable grounds for believing that:

(a) the things are connected with the following … firearms offence … within the meaning of the [Act] (s 5 (2))."

A footnoted instruction to this part of the Form stated "Insert description of offence".

56 The Act contained a saving provision in respect of defects in warrants as follows:

"23 Defects in warrant

A search warrant is not invalidated by any defect, other than a defect which affects the substance of the warrant in a material particular."

The litigation

57 The primary judge[37], Charteris DCJ, determined that the defects alleged in respect of the search warrant and its issue did not render it invalid, and therefore the search warrant provided a defence to the respondents' action for trespass.

58 In allowing the respondents' appeal, the Court of Appeal found that the search warrant was invalid because the application for the search warrant identified the offence as "Possession of Firearm, Firearms Act No 25/1989 Sect 5(a)". However, the Court of Appeal rejected the respondents' submission that the Acting Inspector of Police seeking the search warrant did not have reasonable grounds for a belief relating to the possession of firearms by Mr Corbett[38].

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37 *Corbett v State of New South Wales*, unreported, District Court of New South Wales, 22 October 2004.

38 [2006] NSWCA 138 at [86]-[87].

59 The appellant now appeals to this Court on the issue of the validity of the search warrant. The respondents have filed a notice of contention alleging error in the Court of Appeal's finding that the Acting Inspector seeking the search warrant had reasonable grounds for believing that there would be firearms located on the respondents' property.

Background

60 Mr Corbett, a police officer with the New South Wales Police Service since 1976, was based at the relevant time in rural New South Wales. In the 1980s, through the course of his work with the Police Service, Mr Corbett attended various traumatic incidents, including the bombing of a Hilton hotel, the Granville rail disaster and a serious plane crash near Goulburn, involving a number of fatalities. In about 1990 Mr Corbett was involved in a serious motor vehicle accident in which he suffered significant injuries, including head injuries. Throughout the 1990s, Mr Corbett experienced mental health problems, and attempted to commit suicide three times: once in 1992 and twice in 1998. In about 1992 Mr Corbett had held a shotgun to the head of his wife, the second respondent, and pulled the trigger. The primary judge noted that it was "[d]ue to the remarkably good fortune of the safety catch being engaged [that] the firearm did not discharge"[39].

61 A number of psychological and psychiatric reports were received in evidence at the trial, which identified a range of symptoms experienced at various times by Mr Corbett, including depression, fear, anger and anxiety, as well as possible diagnoses, including post-traumatic stress disorder or other mood disorders. Mr Corbett acknowledged that during the mid-1990s he had consumed alcohol to excess. The primary judge made a finding that Mr Corbett had experienced "a series of emotional and mental problems" and was "from time to time unstable", but that he was "no longer seriously ill".

62 During the latter part of his career, Mr Corbett became involved with systems of police radio communication, and in particular he spent significant effort developing a rural radio network in the Goulburn area, which allowed police to have 24 hour radio contact. Previously, between certain hours late at night and early in the morning, police contact could only be made via telephones.

63 A decision was taken in about 1997 to implement a new communications regime in which police radio systems would operate in conjunction with a mobile phone service provider. This development had the consequence that Mr Corbett

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39 *Corbett v State of New South Wales*, unreported, District Court of New South Wales, 22 October 2004.

would no longer have a position in the Goulburn area, and that the radio system he had established would no longer be used. The primary judge noted that Mr Corbett "became very concerned for police safety as a result of the proposed new communication system" and his Honour inferred that Mr Corbett "felt the system would fail police personnel and as a result the lives of police officers could be jeopardised".

64 After his second suicide attempt in February 1998 Mr Corbett went on sick leave and has not resumed employment as a police officer since then.

The facts

65 The third time Mr Corbett attempted suicide, through an overdose of barbiturates in combination with alcohol, was on the night of 28 May 1998, while attending a communications conference in Wollongong. He had written a suicide note. While it is not necessary to set out its contents, the suicide note contained the words "Police will die". Of this, Giles JA in the Court of Appeal observed[40]:

> "Read in context and in their place in the note, these words expressed Mr Corbett's belief that the new communications regime would put police safety at risk; but at the time the suicide note was thought to carry a threat of harm to the police officers."

66 After being discovered in his hotel room, Mr Corbett was eventually admitted to a psychiatric hospital in Port Kembla. The contents of the note were conveyed to certain police officers at Goulburn. It was known that Mr Corbett had a shooter licence or permit. On 29 May 1998 one of the local officers at Goulburn signed a suspension of that licence, to take effect until 31 August 1998[41]. However, that suspension was not served on Mr Corbett immediately. The relevant form stated that the reason for the suspension was Mr Corbett's "attempted self-harm". On the afternoon of 3 June 1998, under instructions from Inspector Hines, who was then stationed at the Goulburn Police Station, Acting Inspector Jago applied to an authorised justice for a search warrant which would allow him and a number of other officers to search the respondents' property for unspecified firearms.

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40 [2006] NSWCA 138 at [9].

41 Under cl 17 of the Firearms (General) Regulation 1997 (NSW), a licence could be revoked if the Commissioner considered that it was not in the public interest for the person to whom it was issued to continue to hold the licence.

67 The application for the search warrant, which had been generated as a pro forma form on a computer, had the following information (italicised here) entered into its various fields by Acting Inspector Jago:

"I say on oath that:

(1) I have reasonable grounds for believing that there is, or within 72 hours there will be, on or in these premises, the following things:

Unspecified firearms

(2) I have reasonable grounds for believing that:

(a) the things are connected with the following indictable offence/firearms offence/narcotics offence within the meaning of the [Act] (s 5(2))

Possession of Firearm Firearms Act No 25/1989 Sect 5(a),

…

(4) The grounds which I rely on are:

Police are in possession of documents written by the offender, where threats are made against other persons, including serving police officers. He was in possession of a number of firearms during the recent 'amnesty', however a search of records failed to locate them as having been surrendered.

Two recent attempts at self harm have been made by the offender, which included the ingestion of medication and then leaving the residence and wandering into bushland. The most recent attempt being last weekend, which caused him to be admitted to hospital at Port Kembla for treatment. He has made threats against Senior Officers within the Police Service and as a result concerns are held for the personal safety of the offender and other persons."

68 The authorised justice placed an asterisk against the reference to the records of the firearms suggesting they had not "been surrendered". The handwritten additions read:

"Pump action 12 gauge shotgun

Has Current Firearms License. Action is being taken to suspend License.

Person of Interest is a Police Officer."

69 The actual search warrant could not be found, but the "form and content"[42] were not in dispute.

70 Whilst the entry in par 2(a) of the search warrant application "*Firearms Act No 25/1989 Sect 5(a)*" followed s 5(2) of the Act as it appeared to then stand, the entry was not, in fact, a reference to the legislation in force at the relevant time. As explained above, the 1989 Firearms Act had been repealed and replaced by the 1996 Firearms Act, although consequential amendments to s 5(2) of the Act were yet to be made.

71 On 4 June 1998, while Mr Corbett was still in hospital, the suspension of his shooter licence was served on him by two local police officers. Once Inspector Hines had received confirmation of that service, he instructed Acting Inspector Jago to execute the search warrant. The search took approximately one hour and 15 minutes. No firearms were found. A report was then filed by Acting Inspector Jago with the authorised justice.

The hearing before the primary judge

72 There was evidence before the primary judge that Mr Corbett had at some point in time possessed a pump-action shotgun. Although records discovered later indicated that he had surrendered the shotgun during an amnesty in September 1997, the relevant records which were consulted just prior to the application for the search warrant were not conclusive on that point. There was also some suggestion of the existence of a second gun (a rifle), but Mr Corbett gave evidence before the primary judge that he had given this gun to his brother in the Northern Territory sometime before the 1997 amnesty.

73 Evidence was also received relating to conversations which took place between Inspector Hines and Detective Smart, who was previously a member of the Police Force, about whether Mr Corbett was likely to have had firearms in his possession. Although certain aspects of the evidence of these conversations were unclear, the trial judge concluded that:

> "Mr Hines genuinely believed at that time that Mr Smart had raised the issue of firearms being potentially possessed by Mr Corbett at his property and … that Mr Hines conveyed that information to Acting Inspector Jago."

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42 [2006] NSWCA 138 at [38].

74 The following exchanges took place between counsel and Acting Inspector Jago:

"Q. [W]as it your belief that … at least upon service of the suspension notice there were reasonable grounds to suspect that the plaintiff was then in possession of firearms to which he was not lawfully entitled to have possession?

A. Yes, that's correct.

Q. Did you personally turn your mind to which particular section of any Act it might be?

A. No.

…

Q. Did you have a belief that there was a potential offence relating to unlawful possession of a firearm?

A. Yes.

…

Q. Did you believe that the material created a proper foundation for a warrant to issue?

A. Yes, I did.

Q. Did you believe it was a reasonable foundation?

A. Yes."

And further:

"Charteris DCJ: What is the evidence, can you remind me, as to [who] wrote the reference to the Firearms Act in the document?

[Counsel]: It came out of the system.

Q: It's part of the form; is that right?

A: Yes. It's part of the macro that was used to create the document."

This aspect of the document's creation was explored further in cross examination:

> "Q. … You had a selection of offences you could have highlighted?
>
> A. Yes.
>
> Q. And you highlighted the Firearms Act offence?
>
> A. That's correct.
>
> …
>
> Q. And did you highlight or tick effectively the only firearms one? Was there a number of firearms ones?
>
> A. I believe there was only the one.
>
> Q. And this being a firearms matter then that's the reason you opted for that?
>
> A. Yes."

Question

75 The main question in this case was whether there was compliance with s 5(1)(b) of the Act when the application form for the search warrant set out a description of the offence which included an incorrect reference to a section of a statute which had been repealed and replaced. Subsidiary questions of compliance with statutory requirements all turned on that main question.

The decision of the Court of Appeal

76 Something more needs to be said about the decision of the Court of Appeal. Three issues were dealt with discretely. The first was whether the description of a particular offence in the application for the search warrant complied with the statutory requirements. The second issue was whether the applicant had reasonable grounds for believing there would be things connected with the offence on the property. The third issue was whether the actual search warrant, which was assumed to contain no reference to a particular offence[43], complied with statutory requirements.

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43 [2006] NSWCA 138 at [88].

77 With respect to the first issue, in concluding that the application failed to comply with statutory requirements, the Court of Appeal relied on differences between the 1989 Firearms Act and the 1996 Firearms Act. Each piece of legislation defined "firearm" and each contained a licensing regime. The latter legislation defined "firearm" more broadly and had what was described in the Court of Appeal as a "tighter" licensing regime[44]. In finding that Acting Inspector Jago's belief was a "belief in a non-existent offence"[45], the Court of Appeal stated that any belief in the presence of unspecified firearms would necessarily require him to have considered the range of firearms and the firearms licensing regime covered by the applicable legislation[46]. By reference to *Carroll v Mijovich*[47] and *Cassaniti v Croucher*[48] the Court of Appeal found the warrant defective in a manner incapable of being cured[49].

78 In relation to the second issue, the Court of Appeal determined that Acting Inspector Jago had a reasonable belief that once the licence had been suspended, any firearms on the property were connected with the offence of possession of a firearm[50].

79 In its finding, on the third issue, that the actual search warrant (which was not available at trial) complied with the Act, the Court of Appeal inferred that the search warrant contained no reference to a particular offence[51]. The Court of Appeal then relied on the relevant form for search warrants under the Regulations, which did not require a reference to a particular offence, as an indication by the legislature that a description of the offence did not have to appear on the face of the warrant.[52]

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44 [2006] NSWCA 138 at [63].

45 [2006] NSWCA 138 at [60].

46 [2006] NSWCA 138 at [65].

47 (1991) 25 NSWLR 441.

48 (2000) 48 NSWLR 623.

49 [2006] NSWCA 138 at [60].

50 [2006] NSWCA 138 at [86].

51 [2006] NSWCA 138 at [88].

52 [2006] NSWCA 138 at [111].

80 The first finding by the Court of Appeal regarding the application form, and what was required by s 5(1)(b), is the subject of this appeal. The second finding, relating to the "reasonable belief" of Acting Inspector Jago, is the subject of the notice of contention. The third issue, also raised in the notice of contention, was not pressed.

Submissions

81 The submissions of each party can be stated briefly. Each accepted the established principle that unless the entry and search of the respondents' property was authorised by the search warrant, a trespass would have been committed[53]. The appellant's primary submission in this Court was that there was no lack of compliance with the Act and that the incorrect reference to the 1989 Firearms Act in the application did not result in a material defect in the search warrant or vitiate the authorised justice's decision to issue the search warrant. It was contended that par 2(a) of the application form did not require that a particular legislative provision concerning the offence be stated. According to the appellant, it would have been sufficient for the purposes of the application form if Acting Inspector Jago had simply stated "possession of firearm". It was submitted that the particular reference to the 1989 Firearms Act, provided automatically by the computer system, was surplusage. In this Court, as well as before the Court of Appeal, the appellant argued that, in any event, the offence stated in the application for the search warrant (the unauthorised possession of a firearm under the 1989 Firearms Act) was "materially identical"[54] to the cognate offence applicable under the 1996 Firearms Act.

82 It was submitted by the appellant that the elements of the offence which must have been contemplated by Acting Inspector Jago when applying for the search warrant were the same for the old offence under the 1989 Firearms Act as for the then current offence: that is, a person possessing or using a firearm without authorisation to do so through a licence or permit. Once Mr Corbett's licence was suspended, it would have been illegal for him to possess a firearm. Transitional provisions in the 1996 Firearms Act were also relied upon[55].

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53 *Coco v The Queen* (1994) 179 CLR 427 at 436 per Mason CJ, Brennan, Gaudron and McHugh JJ.

54 [2006] NSWCA 138 at [48].

55 Item 12 of Sched 3 to the 1996 Firearms Act provides:

> "Except as provided by the regulations, a reference in any instrument (other than this Act or the regulations) to any provision of the *Firearms Act 1989*, or the *Firearms Regulation 1990*, is to be read as a reference to the

(Footnote continues on next page)

83 Alternatively, it was contended that as the description of the offence in the application form, by reference to repealed legislation, did not affect the substance of the search warrant in a material particular, the savings provision in s 23 of the Act would apply to the search warrant. In a similar vein, it was contended that the substantial compliance with Form 1 under the Regulations fell within s 80(1) of the *Interpretation Act* 1987 (NSW)[56].

84 In essence, the respondents submitted that the erroneous reference in the application for the search warrant to s 5(a) of the 1989 Firearms Act (instead of s 7(1) of the 1996 Firearms Act) constituted a failure to comply with ss 5(1)(b) and 11(1) of the Act because Acting Inspector Jago could not have a reasonable belief in an identified offence which did not exist. It was said that this amounted to a failure to describe an offence, which meant that the application contained a defect of substance.

85 The respondents then contended that the authorised justice was required by ss 6 and 12A(2)(b) of the Act to consider and be satisfied that there were reasonable grounds for believing that the things to be searched for were connected with the particular offence referred to in the application before issuing a search warrant. It was submitted that the justice could not have been so satisfied when faced with Acting Inspector Jago's application containing the erroneous reference to a section in legislation which had been repealed and replaced.

86 In that context, the respondents, like the appellant, contended that by force of the transitional provision in the 1996 Firearms Act, the references to the 1989 Firearms Act in s 5(2) of the Act and in par 2(a) of Form 1 must be read as references to the corresponding provisions of the 1996 Firearms Act. That contention should be accepted[57], for the reasons explained by Gummow J[58].

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corresponding provision of this Act, or the regulations made under this Act, respectively."

56 Section 80(1) of the *Interpretation Act* 1987 (NSW) provides:

"If a form is prescribed by, or approved under, an Act or statutory rule, strict compliance with the form is not necessary but substantial compliance is sufficient."

57 Section 3(1) of the *Interpretation Act* 1987 (NSW) provided at the relevant time that: "***instrument*** means an instrument (including a statutory rule) made under an Act, and includes an instrument made under any such instrument".

58 See reasons of Gummow J at [6]-[13].

87 In support of their main argument, the respondents relied on the established principle that strict compliance with statutory conditions governing the issue of search warrants is required as explained in the judgment of this Court in *George v Rockett*[59] ("*Rockett*"), which concerned s 679 of the *Criminal Code* (Q)[60]:

> "[I]n construing and applying such statutes, it needs to be kept in mind that they authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation."

88 It is necessary to construe the requirement or condition in s 5(1)(b) of the Act in order to test whether the condition has been complied with strictly. In the reasons which follow, the requirement in s 5(1)(b) will be construed and applied by reference to its purpose of ensuring the proper identification of the object of the search. The need to have "reasonable grounds for believing" in the existence

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59 (1990) 170 CLR 104 at 110-111 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also *Halliday v Nevill* (1984) 155 CLR 1 at 20 per Brennan J; cf *Coco v The Queen* (1994) 179 CLR 427 at 436 per Mason CJ, Brennan, Gaudron and McHugh JJ.

60 Section 679 provided:

> "If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft or place –
>
> (a) Anything with respect to which any offence which is such that the offender may be arrested with or without warrant has been, or is suspected, on reasonable grounds, to have been, committed; or
>
> …
>
> (c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence;
>
> he may issue his warrant".

of the object of the search, described by reference to a particular offence, is directed to making sure that the search warrant is properly confined.

Section 5(1)(b) of the Act

89 The balancing of a person's private interest in the inviolability of his house, his "castle and fortress"[61], against the public interest in the "gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law"[62], lies behind the statutory requirement in s 5(1)(b) that an applicant for a search warrant needs to have reasonable grounds for a belief in respect of "a thing connected with a particular firearms offence".

90 Accounts of the development of principles surrounding the issue and execution of search warrants can be found in *MacDonald v Beare*[63], *Crowley v Murphy*[64] and *Carroll v Mijovich*[65]. It is unnecessary to repeat all of what has been said before, except to assist in the resolution of the question which the facts here present.

91 The grant of search warrants in respect of stolen goods constituted the first exception to the principle that a person's home was inviolable. Common law courts insisted that an applicant complaining about stolen goods properly identify the nature of the offence as part of identifying the object of the search: "there must be an oath that the party has had his goods stolen, and his strong reason to believe they are concealed in such a place"[66]. In *Bostock v Saunders*[67] when dealing with a search warrant obtained by Commissioners of Excise, De Grey CJ described in more detail the precautions which the common law then imposed upon the grant and execution of a common law search warrant[68]:

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61 *Semayne's Case* (1604) 5 Co Rep 91a at 91b [77 ER 194 at 195].

62 *Rockett* (1990) 170 CLR 104 at 110 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

63 (1904) 1 CLR 513 at 522 per Griffith CJ.

64 (1981) 34 ALR 496 at 513-514 per Lockhart J.

65 (1991) 25 NSWLR 441 at 445-446 per Kirby P.

66 *Entick v Carrington* (1765) 2 Wils KB 275 at 291-292 [95 ER 807 at 818].

67 (1773) 2 Black W 912 [96 ER 539].

68 (1773) 2 Black W 912 at 914 [96 ER 539 at 540].

> "Every man's house is his castle. Lord Hale … lays down these guards upon executing search-warrants … even at common law: – 1. There must be an oath; 2. Grounds declared; 3. The warrant must be executed in the day-time; 4. By a known officer; 5. In the presence of the party informing. Yet though all these precautions are observed, the informer is liable to an action if nothing [is] found."

92 De Grey CJ was referring to circumstances existing before the institution of a professional police force in England in 1829[69]. A victim of crime could inform a justice and apply for a common law search warrant. These were subsequently executed by a local constable, in the presence of the victim or informer.

93 General warrants, which did not particularise a person whose premises were to be searched or the objects of the search, were used for the purposes of controlling the writing and printing of seditious or radical political works, first by the Star Chamber[70], then by the Secretary of State. In *Australian Broadcasting Corporation v O'Neill*[71] there was discussion of the censorship of publications by the Crown first asserted by Ordinance in 1534 and enforced by a licensing system which was dismantled by 1695[72].

94 In a trio of cases in the mid-18th century, after licensing of publications was no longer required, the common law courts struck down such general warrants[73]. In *Wilkes v Wood*[74], Lord Pratt CJ (later Lord Camden) instructed a jury that a warrant which did not identify a particular object of the search was "totally subversive of the liberty of the subject"[75]. In *Money v Leach*[76]

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69 *Metropolitan Police Act* 1829 (UK) 10 Geo IV c 44.

70 Which was abolished in 1640: Tronc, Crawford and Smith, *Search and Seizure in Australia and New Zealand* (1996) at 55.

71 (2006) 80 ALJR 1672 at 1685 [31] per Gleeson CJ and Crennan J; 229 ALR 457 at 469-470.

72 See *Entick v Carrington* (1765) 2 Wils KB 275 at 292 per Lord Pratt CJ [95 ER 807 at 818] referring to Statute 13 & 14 Car 2 c 33 (which his Lordship called the "Licensing Act").

73 *Wilkes v Wood* (1763) Lofft 1 [98 ER 489]; *Entick v Carrington* (1765) 2 Wils KB 275 [95 ER 807]; *Money v Leach* (1765) 1 Black W 555 [96 ER 320].

74 (1763) Lofft 1 [98 ER 489].

75 (1763) Lofft 1 at 18 [98 ER 489 at 498].

Lord Mansfield CJ found that a general warrant was invalid because no person was "named or particularly described"[77] to identify the premises and object of the search. In *Entick v Carrington*[78] ("*Entick*") the principle that an applicant for a warrant had to specify the object of the search was confirmed[79]. Those three cases led to the English Parliament's famous declaration by resolution in 1766 that general warrants were unlawful[80].

95 The need to specify the object of a search by reference to a particular offence is now a common statutory requirement, reflected in s 5(1)(b) of the Act. In the Second Reading Speech, the Attorney-General referred to *Entick* and acknowledged the continuing application of the common law principles described above: "freedom from arbitrary search was hard fought for in our constitutional history"[81].

96 Search warrants in aid of the criminal law may be issued in all jurisdictions in Australia[82]. All such legislation seeks to balance long established individual rights against the public interest in combating crime.

97 A search warrant under the Act is a statutory authorisation to enter, search for and seize, a particular "thing". That purpose is easily distinguishable from the purpose of a charge, indictment, conviction, judgment or order. The requirement for strict particularity in the description of an offence in an indictment or charge is explained by Dixon J in *Johnson v Miller*[83]:

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76 (1765) 1 Black W 555 [96 ER 320].

77 (1765) 1 Black W 555 at 561 [96 ER 320 at 323].

78 (1765) 2 Wils KB 275 [95 ER 807].

79 (1765) 2 Wils KB 275 at 292 [95 ER 807 at 818].

80 For a more detailed account see Tronc, Crawford and Smith, *Search and Seizure in Australia and New Zealand* (1996), particularly Ch 3.

81 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 February 1985 at 3859.

82 See, for example, *Crimes Act* 1914 (Cth); *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW); *Police Powers and Responsibilities Act* 2000 (Q); *Police Offences Act* 1935 (Tas); *Search Warrants Act* 1997 (Tas); *Crimes Act* 1958 (Vic); *Police Act* 1892 (WA); *Misuse of Drugs Act* 1981 (WA); *Crimes Act* 1900 (ACT); *Police Administration Act* (NT).

83 (1937) 59 CLR 467 at 489.

> "[A] defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge."

98 The requirement for strict particularity in addition to a statement of the nature of the offence is imposed so as to define the issues with which the defendant must contend at trial; it also has the procedural consequence of avoiding duplicity in a charge or conviction thereon[84]. Similar considerations apply in respect of indictments which could not be amended at common law[85] although surplusage which did not mislead an accused did not necessarily invalidate an indictment or lead to duplicity[86].

99 In *Beneficial Finance Corporation v Commissioner of Australian Federal Police*[87] ("*Beneficial Finance*"), Burchett J said of the degree of particularity required of a reference to an offence in a search warrant[88]:

> "The authorities make it clear that the statement of the offence in a search warrant need not be made with the precision of an indictment. That would be impossible, and indeed to attempt it would be irrational, bearing in mind the stage of the investigation at which a search warrant may issue. The purpose of the statement of the offence in the warrant is not to define the issues for trial; but to set bounds to the area of search which the execution of the warrant will involve, as part of an investigation into a suspected crime. The appropriate contrast is not with the sort of error which might vitiate an indictment, but with the failure to focus the statutory suspicion and belief upon any particular crime, with the result that a condition of the issue of the warrant is not fulfilled, and it purports to be a general warrant of the kind the law decisively rejected in the 18th century."

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84 *Johnson v Miller* (1937) 59 CLR 467 at 489-491 per Dixon J.

85 *Maher v The Queen* (1987) 163 CLR 221 at 230 per Mason CJ, Wilson, Brennan, Dawson and Toohey JJ.

86 *Kingswell v The Queen* (1985) 159 CLR 264 at 287 per Brennan J. See also *Smith & Kirton* (1990) 47 A Crim R 43; *R v McKinney & Judge*, unreported, New South Wales Court of Criminal Appeal, 6 September 1993; *R v Kaldor* (2004) 150 A Crim R 271 at 293 [84] per Howie J.

87 (1991) 31 FCR 523.

88 (1991) 31 FCR 523 at 533.

100 A similar approach to the construction of the requirements in s 5(1)(b) should be followed here.

101 In *R v Tillett; Ex parte Newton*[89], Fox J construed s 10(a) of the *Crimes Act* 1914 (Cth) as it then applied. It authorised search for, and seizure of, "anything" related to "any offence"[90]. In concluding that this meant that a warrant should refer to a particular offence and authorise seizure by reference to that particular offence, Fox J said[91]:

> "[F]orms of search warrant, whether or not prescribed by statute, but subject always to a contrary statutory intention, have always, since the famous debates and decisions of the eighteenth century in relation to general warrants … disclosed the nature of the particular offence relied upon". (references omitted)

102 That approach has been relied upon and followed in numerous subsequent decisions of Full Courts of the Federal Court of Australia[92].

103 One such decision, *Parker v Churchill*[93], concerned warrants containing a description of an offence which included an incorrect reference to a section in a statute. It was contended at first instance that the warrants in question did not disclose an offence known to the law[94]. On appeal to the Full Court of the

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89 (1969) 14 FLR 101.

90 Section 10 provided:

> "If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel, or place –
>
> (a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been committed; ...
>
> he may grant a search warrant ... to seize any such thing".

91 (1969) 14 FLR 101 at 113-114. Fox J referred to Holdsworth, *A History of English Law*, (1938), vol 10 at 659, 660, 667-672 and Burn, *Justice of the Peace and Parish Officer*, 27th ed (1836), vol 3 at 799.

92 *Crowley v Murphy* (1981) 34 ALR 496; *Parker v Churchill* (1986) 9 FCR 334; *Beneficial Finance* (1991) 31 FCR 523; *Dunesky v Elder* (1994) 54 FCR 540.

93 (1986) 9 FCR 334.

94 (1985) 9 FCR 316 at 319.

Federal Court, Jackson J (with whom Bowen CJ and Lockhart J agreed on this point) said that unless a "reference to an incorrect section [of legislation] has the result that the warrant does not specify *any* offence, or makes the warrant ambiguous so that it is not possible to tell what offence is referred to,"[95] such a reference does not invalidate an otherwise intelligible warrant. Subsequently, in *Beneficial Finance*[96] Burchett J (with whom Sheppard J agreed and Pincus J substantially agreed) said of the question of the sufficiency of the statement of an offence in a search warrant[97]:

> "The question should not be answered by the bare application of a verbal formula, but in accordance with the principle that the warrant should disclose the nature of the offence so as to indicate the area of search."

104 Obviously each statutory requirement or condition needs to be construed on its own terms and by reference to the statute in which it is to be found. However, common requirements for "reasonable grounds for believing" (or suspecting) imposed on an applicant (as here under s 5(1)(b)), or upon an issuing justice (as in *Rockett*[98] or *Beneficial Finance*[99]) have a common derivation. The concern of the common law courts to avoid general warrants and to strictly confine any exception to the principle that a person's home was inviolable is the original source of common, although differently expressed, statutory requirements. These requirements have as their purpose the proper identification of the object of a search by reference to a particular offence. This in turn limits the scope of the search authorised by the search warrant. As stated in the judgment of this Court in *Rockett*[100]:

> "[T]he description of the object of the search is a reference point for delimiting the scope of the warrant. ... [T]he requirement of 'reasonable grounds for believing' ... performs the important function of preventing the authority to search and seize which a warrant confers from being worded in unjustifiably wide terms."

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95 (1986) 9 FCR 334 at 340.

96 (1991) 31 FCR 523.

97 (1991) 31 FCR 523 at 543.

98 (1990) 170 CLR 104, dealing with s 679 of the *Criminal Code* (Q).

99 (1991) 31 FCR 523, dealing with s 10 of the *Crimes Act* 1914 (Cth).

100 (1990) 170 CLR 104 at 118.

105 Section 5(1)(b) should be construed by reference to the principle that the applicant is required to state reasonable grounds for believing in a particular offence so as to ensure that the issuing justice knows the specific object of the search warrant and accordingly limits its scope. Strict compliance, in the sense described in *Rockett*[101], is achieved when that purpose is fulfilled. To invalidate the warrant here because of the incorrect reference in the application would not serve that purpose.

106 Here, the application stated an intelligible offence, namely "possession of firearm", an offence which had been well known in New South Wales for decades. Prior to the Act, successive firearms legislation contained provisions for obtaining search warrants in respect of firearms[102]. The reasonable belief, which the applicant was required by the statute to have, and state, was a reasonable belief that there was "a thing" (here, "unspecified firearms") connected with "a particular firearms offence" (here, "possession of firearm"). It was the nature of the offence which was critical, not the reference to the section of repealed legislation which had been replaced with cognate legislation. The nature of the offence had to be stated sufficiently to enable the issuing justice to understand the object of the search and to appreciate the boundaries of the authorisation to enter, search and seize.

107 Here there could be no mistake about the object of the search or about the boundaries of the search warrant. Given the construction of s 5(1)(b) stated above, the Court of Appeal erred in its approach. The reference to the repealed Act in the application form was mere surplusage, which did not detract from the statement of the nature of the offence or render the description of the object of the search unintelligible or ambiguous. Accordingly, the applicant complied with the statutory requirements and the warrant is not invalidated by the description of the offence in the application form.

108 The respondents' submissions concerning the issuing justice's obligations under ss 6 and 12A(2)(b) equally fail because they depended on the respondents' arguments in relation to s 5(1)(b) which have been rejected. Accordingly the appeal should be upheld.

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101 (1990) 170 CLR 104 at 111.

102 See, for example: *Gun License Act* 1920 (NSW), s 14; *Pistol License Act* 1927 (NSW), s 14; *Firearms Act* 1936 (NSW), s 2, which inserted Pt IIA containing s 41I into the *Police Offences Act* 1901 (NSW); and *Firearms and Dangerous Weapons Act* 1973 (NSW), s 76.

109 It is unnecessary to consider the appellant's alternative arguments directed to validating the search warrant, if it were found to be defective.

Reasonable grounds

110 As mentioned already, the respondents supported their Notice of Contention with the submission that Acting Inspector Jago's statement in the application was not reasonable, because the identified offence did not technically exist.

111 In respect of whether Acting Inspector Jago had reasonable grounds for believing that there would be a firearm connected with the offence of unauthorised possession of a firearm, the primary judge made the following finding concerning Inspector Hines:

> "Taking into account his own knowledge of the two suicide attempts, the most recent suicide note, his conversations with Detective Smart and information he had received that Mr Corbett was mentally unwell, Inspector Hines formed the view that the situation raised the potential of a 'suicidal homicide' by Mr Corbett … [Inspector Hines] decided it was necessary to apply for a search warrant so as to ensure there were no firearms upon the property of Mr Corbett knowing that he was, in due course, to be discharged from hospital."

112 The primary judge also observed that, in evidence, Mr Corbett had conceded that:

> "the police action to suspend his shooter's licence and conduct a search of his residence for weapons was 'possibly' motivated by a desire on the part of police officers to protect him as well as his family and the public."

113 His Honour concluded:

> "There was sufficient reason for police to be alarmed at the time by the terms of the suicide note. Although there is nothing clearer than the window of hindsight, at the time of reading the suicide note it was clearly open to the police to conclude that the suicide note contained veiled threats."

114 The Court of Appeal acknowledged that the relevant police inspectors "were concerned that Mr Corbett had a firearm and, in his fraught mental health,

might cause harm, including to himself"[103]. The Court of Appeal further noted that "Acting Inspector Jago gave evidence that he believed that the suspension of the licence 'created what [he] believed to be an offence'" – that is unauthorised possession of a firearm[104]. Accordingly, the Court of Appeal rejected the respondents' contention that there were no reasonable grounds for belief that there would be firearms connected with an offence, located on the property. Given the conclusion stated earlier that s 5(1)(b) required Acting Inspector Jago to have a reasonable belief in an offence of a particular nature and his evidence relevant to that requirement, the Court of Appeal's conclusion should be upheld.

Conclusions and orders

115 For the reasons set out above, the statutory requirements were complied with and the search warrant was valid. In executing the search warrant, no trespass to the respondents' property was committed.

116 The appeal to this Court should be allowed, and the notice of contention dismissed. Orders 2 – 5 of the Court of Appeal, dated 13 June 2006, should be set aside and in place thereof the appeal to that Court should be dismissed. In accordance with the undertaking given by the appellant upon the grant of special leave to appeal, the costs order made by the Court of Appeal should not be disturbed, and the appellant should pay the costs of the respondents of the appeal to this Court.

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103 [2006] NSWCA 138 at [71].

104 [2006] NSWCA 138 at [83].