HIGH COURT OF AUSTRALIA

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

Matter No S162/2009

THE QUEEN — APPELLANT

AND

LK — RESPONDENT

Matter No S163/2009

THE QUEEN — APPELLANT

AND

RK — RESPONDENT

The Queen v LK
The Queen v RK
[2010] HCA 17
26 May 2010
S162/2009 & S163/2009

ORDER

In each matter:

1. *Appeal dismissed.*

2. *Appellant to pay the costs of the respondent except those occasioned by the respondent's notice of contention.*

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with H K Dhanji for the appellant in each matter (instructed by Commonwealth Director of Public Prosecutions)

J S Stratton SC with P G Hogan and A M Webb for the respondent in S162/2009 (instructed by Hanby & Associates)

T E F Hughes QC with M R Gracie and B C Kasep for the respondent in S163/2009 (instructed by instructed by Mee Ling Solicitors)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with G M Aitken and P McDonald intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

J G Renwick with G E Wright intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

CATCHWORDS

The Queen v LK
The Queen v RK

Criminal law – Conspiracy – Fault element – Where respondents charged with having conspired to commit offence against s 400.3(2) of *Criminal Code* (Cth) ("Code") – Whether s 11.5(2)(b) of Code required prosecution to prove intention in relation to each physical element of substantive offence particularised as subject of conspiracy, even if fault element prescribed for substantive offence was lesser fault element, such as recklessness – Whether elements of conspiracy wholly contained within s 11.5(1) of Code – Relevance of common law offence of conspiracy to interpretation of Code.

Constitutional law (Cth) – Federal judicature – Trial by jury – Appeal against directed verdict of acquittal – Application of State law – Section 107 of *Crimes (Appeal and Review) Act* 2001 (NSW) ("State Act") provided right of appeal by Crown against directed verdict of acquittal – Whether, as matter of construction, s 68(2) of *Judiciary Act* 1903 (Cth) ("Judiciary Act") picked up and conferred, in relation to Commonwealth offences, federal jurisdiction in terms created by s 107 of State Act – Whether guarantee of trial by jury in s 80 of Constitution infringed by appeal pursuant to s 107 of State Act as picked up by s 68(2) of Judiciary Act against directed verdict of acquittal of indictable offence against Commonwealth law where appeal turned solely on question of law.

Words and phrases – "conspiracy", "conspires", "intended that an offence would be committed", "recklessness", "trial by jury".

Constitution, s 80.
Criminal Code (Cth), ss 5.4, 11.5, 400.3(2).
Judiciary Act 1903 (Cth), s 68(2).
Crimes (Appeal and Review) Act 2001 (NSW), s 107.

FRENCH CJ.

Introduction

1 The offence of conspiracy created by the *Criminal Code* (Cth) ("the Code") is committed where there is an agreement between the offender and one or more other persons, coupled with an intention, on the part of the offender and at least one of the other persons, that an offence will be committed pursuant to the agreement[1]. Proof of commission of an overt act by the offender or another party to the agreement pursuant to the agreement is necessary[2]. The primary question in these Crown appeals is whether the offence of conspiracy is committed when there is an agreement to commit the offence of dealing with money the proceeds of crime where recklessness as to the fact that the money is proceeds of crime is an element of the substantive offence. The formulation of the question throws up the fault line in the Crown's argument, namely, the proposition that an agreement to deal with money the proceeds of crime does not require that the parties knew that the money in question was proceeds of crime[3]. It is said to be sufficient that the respondents contemplated recklessness as to that matter. That is insufficient and, for that insufficiency, the appeals should be dismissed.

2 Other questions were raised by the respondents about the availability of an appeal against a directed verdict of acquittal and whether a State law providing for such an appeal is inapplicable in the exercise of federal criminal jurisdiction because of the guarantee of trial by jury contained in s 80 of the Constitution. Such an appeal is available in respect of an offence tried on indictment and does not infringe the guarantee.

Factual and procedural history

3 On 19 May 2008 the respondents were jointly charged that:

> "between about 1 December 2003 and about 1 February 2004 at Sydney in the State of New South Wales and elsewhere [they] did conspire with each other, [RM] and with divers other persons to deal with money to the value of $1,000,000 or more being the proceeds of crime where those persons who were to deal with the money pursuant to the conspiracy were reckless as to the fact that the money was the proceeds of crime."

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1 Code, s 11.5(2)(a) and (b).

2 Code, s 11.5(2)(c).

3 Nor on the Crown's argument would their belief as to the fact be necessary.

4 The respondents had been arrested on 16 August 2005. On 18 October 2006 they were served with court attendance notices and on 17 July 2007 were committed to stand trial in the District Court of New South Wales in Sydney. A first indictment was filed with the District Court of New South Wales on 13 September 2007 but was substituted by the indictment quoted above, which was filed on 26 May 2008.

5 The respondents were tried together before Sweeney DCJ and a jury in the District Court of New South Wales. The trial commenced on 30 June 2008 and evidence was completed on 4 July 2008. On 8 July 2008, following no case submissions on behalf of the respondents, the trial judge directed the jury that as a matter of law they should acquit the respondents of the charge on the indictment. The direction was based not upon any insufficiency in the evidence adduced for the Crown but upon her Honour's conclusion that the indictment against the respondents did not disclose an offence known to the law. Her Honour said to the jury:

> "Now you do not need to go to the jury room and consider that decision, I will simply ask the foreman to stand. My associate will ask him questions in [respect] of each accused and the count on the indictment and Mr Foreman you will return a verdict of not guilty in respect of each accused. Do you understand that?"

The foreman replied in the affirmative. The transcript shows that at her Honour's direction the jury returned a verdict of not guilty in favour of each of the respondents. The respondents were then discharged.

6 In her reasons for directing the acquittals, her Honour observed that the indictment alleged that the respondents "intentionally agreed to commit an offence, the mental element of which was recklessness". The case advanced by the Crown committed it to proving that the respondents were reckless as to the money the subject of the conspiracy being proceeds of crime at the time they entered their agreement. The charge offended a "longstanding principle of criminal liability that an accused must know of all the facts that would make his conduct criminal". Her Honour referred to the decision of the Court of Criminal Appeal in *R v Ansari*[4]. She said that the Court held in that case that a person could be charged with conspiring to commit an offence the mental element of which was recklessness when the Crown relied upon intention or knowledge to prove the element of recklessness or where a third party was to commit the offence the object of the conspiracy. In her Honour's opinion, *Ansari* was not authority for the proposition that a person could be charged with conspiring to commit an offence the mental element of which was recklessness, simpliciter.

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4 (2007) 70 NSWLR 89.

7 An appeal by the Crown against the acquittals was brought in the Court of Criminal Appeal pursuant to s 107 of the *Crimes (Appeal and Review) Act* 2001 (NSW). The section provides for an appeal by the State Attorney-General or the Director of Public Prosecutions for the State against, inter alia, the acquittal of a person "by a jury at the direction of the trial Judge"[5]. The judgment of the Court dismissing the appeal was delivered by Spigelman CJ, with whom Grove and Fullerton JJ agreed[6]. The Court held that the reasoning in *Ansari* was not applicable to the charge against the respondents[7]. On the authority of *Ansari* it would have been open to the Crown to prove recklessness, in its extended statutory meaning under the Code, either by proving that the respondents were aware that there was a substantial risk that the money was proceeds of crime or by proving that they intended or knew that the money was proceeds of crime[8]. Spigelman CJ said[9]:

> "It is not the Crown case that either of the [respondents] knew that the money was proceeds of crime. As the Crown emphasised in its submissions in this Court the Crown case was that the [respondents] were reckless as to the fact whether the money was proceeds of crime. That allegation may have supported a substantive offence under s 400.3(2). It cannot support a charge of conspiracy where, in order to satisfy the test of intention with respect to the entry into an agreement to commit an offence, the accused must *know* the facts that constitute the offence." (emphasis in original)

The Chief Justice said that the trial judge had correctly distinguished *Ansari* and had correctly concluded that the Crown case disclosed no offence known to the law[10]. The Crown lodged applications to this Court for special leave to appeal on 19 January 2009. Special leave was granted on 19 June 2009.

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5 *Crimes (Appeal and Review) Act*, ss 107(1)(a) and 107(2).

6 *R v RK and LK* (2008) 73 NSWLR 80.

7 (2008) 73 NSWLR 80 at 93 [68].

8 (2008) 73 NSWLR 80 at 93 [67] adapting the words of Simpson J in *Ansari* (2007) 70 NSWLR 89 at 97 [28].

9 (2008) 73 NSWLR 80 at 93-94 [69].

10 (2008) 73 NSWLR 80 at 94 [70].

Grounds of appeal

8 The single ground of appeal in each case is that:

> "The Court of Criminal Appeal erred in interpreting s 11.5 of [the Code], such that to be guilty of conspiracy to commit an offence that has a physical element for which a fault element of recklessness is prescribed, it must be proved that the offender intended that physical element."

Notice of contention

9 Each of the respondents filed a notice of contention in substantially similar terms with the following grounds:

> "1. The Court below failed to decide that as a matter of law no appeal lay to it because s 107 of the Crimes (Appeal and Review) Act 2001 did not come into operation until 15 December 2006, after the proceedings against the respondent had commenced by court attendance notice served on the respondent on 18 October 2006. This point was taken in the Court below but not decided in the Court's reasons for judgement: see [76], [78] and [79].
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> 2. In their combined operation, sub-sections (1)(a), (2) and (5) of s 107 [of] that Act are invalid because, contrary to s 80 of the Commonwealth Constitution, they purport to empower the Court of Criminal Appeal to disregard an essential characteristic of a trial by jury of an indictable offence against a law of the Commonwealth, viz, the inviolability of a jury's verdict of acquittal. This point was also taken in the Court below but not decided in the Court's reasons for judgment: see paragraph (1) above."

It is convenient to deal first with the matters raised in the notices of contention, as they go to the jurisdiction of the Court of Criminal Appeal of New South Wales.

Statutory framework – s 107 of the *Crimes (Appeal and Review) Act*

10 Section 107, providing for appeals against directed acquittals and acquittals without juries, was introduced into the *Crimes (Appeal and Review) Act* by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act* 2006 (NSW). The amending legislation also made provision for the Court of Criminal Appeal to entertain appeals against acquittals in relation to offences punishable by life imprisonment or by imprisonment for a period of 15 years or more[11].

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11 Division 2 of Pt 8 of the *Crimes (Appeal and Review) Act*, comprising ss 99-106.

Those provisions apply to persons acquitted before the commencement of the amending Act[12]. In this respect they contrast with s 107, which does not apply to a person who was acquitted before the commencement of the section[13].

11 Section 107 applies to the acquittal of a person "by a jury at the direction of the trial Judge"[14]. The section provides that the Attorney-General or the Director of Public Prosecutions can appeal to the Court of Criminal Appeal "against any such acquittal on any ground that involves a question of law alone"[15]. The section also provides that, while the Court of Criminal Appeal can affirm an acquittal to which the section applies or quash such an acquittal and order a new trial[16], it cannot proceed to convict or sentence the person for the offence charged[17]. Nor can it direct the court conducting the new trial to do so[18].

A threshold jurisdictional question

12 The parties to the appeals proceeded upon the assumption that, subject to the matters set out in the notices of contention, the jurisdiction of the Court of Criminal Appeal to entertain an appeal against a directed verdict of acquittal derived from s 68(2) of the *Judiciary Act* 1903 (Cth), read with s 107 of the *Crimes (Appeal and Review) Act*. The interveners, the Commonwealth and the State of New South Wales, concerned only with issues raised on the notices of contention, also proceeded on that premise. The premise requires consideration, but is correct.

13 Sections 39 and 68 of the *Judiciary Act* confer federal jurisdiction upon State and Territory courts in ambulatory terms[19]. The focus in these appeals is on

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12 *Crimes (Appeal and Review) Act*, s 99(3).

13 *Crimes (Appeal and Review) Act*, s 107(8).

14 *Crimes (Appeal and Review) Act*, s 107(1)(a).

15 *Crimes (Appeal and Review) Act*, s 107(2).

16 *Crimes (Appeal and Review) Act*, s 107(5) and (6).

17 *Crimes (Appeal and Review) Act*, s 107(7).

18 *Crimes (Appeal and Review) Act*, s 107(7).

19 As to the ambulatory character of s 39, see *The Commonwealth v The District Court of the Metropolitan District* (1954) 90 CLR 13 at 22 per Dixon CJ, Kitto and Taylor JJ; [1954] HCA 13. As to s 68(2), see *R v Gee* (2003) 212 CLR 230 at 240-241 [6]-[7] per Gleeson CJ, 244 [24] per McHugh and Gummow JJ; [2003] HCA 12.

s 68. Section 68 reflects a legislative decision to rely upon State courts to administer criminal justice in relation to federal offences and to have uniformity within each State as to procedures for dealing with State and federal offences. As Gleeson CJ said in *R v Gee*[20]:

> "The federal legislation enacted to give effect to that choice, therefore, had to accommodate not only differences between State procedures at any given time, but also future changes to procedures in some States that might not be adopted in others. That explains the use of general and ambulatory language, and the desirability of giving that language a construction that enables it to pick up procedural changes and developments as they occur in particular States from time to time."

14 The statutory precursor of s 68 was the *Punishment of Offences Act* 1901 (Cth), a temporary measure conferring federal jurisdiction in criminal matters on State courts and applying State laws of a procedural character to the trial on indictment of persons charged with offences against the laws of the Commonwealth[21]. It was expressed to cease to have effect upon the establishment of the High Court[22]. Section 68 as first enacted substantially reproduced ss 2 and 3 of the *Punishment of Offences Act.* It contained no reference to appeals[23]. The only references to criminal appeals in the *Judiciary Act* as enacted were in ss 72 to 77, dealing with the reservation of questions of law and stated cases to the Full Courts of the High Court or the State Supreme Courts. They reflected procedures provided under various State laws[24]. There were no Courts of Criminal Appeal in existence at the time[25].

15 The question whether s 39 of the *Judiciary Act* conferred appellate, as well as original, federal criminal jurisdiction on State courts was answered in the

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20 (2003) 212 CLR 230 at 241 [7].

21 *Punishment of Offences Act*, ss 2 and 3.

22 *Punishment of Offences Act*, s 1.

23 Section 4 of the *Punishment of Offences Act* conferred appellate jurisdiction on State courts, an aspect not reproduced in s 68.

24 See as at 1903: *Crimes Act* 1900 (NSW), s 470; *Crimes Act* 1890 (Vic), s 481; *Criminal Law Consolidation Act* 1876 (SA), s 397; *Criminal Code* (Q), s 668; *Criminal Code* (WA), s 667; *Criminal Law Procedure Act* 1881 (Tas), s 7.

25 See the explanation by Attorney-General Latham in the Second Reading Speech for the Judiciary Bill 1932: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 November 1932 at 2608.

affirmative in *Ah Yick v Lehmert*[26]. The Court rejected Mr Harrison Moore's argument that s 39 was to be read down in light of the specific provisions made by s 68 in relation to criminal jurisdiction and the specific and limited provisions of ss 72 to 77[27]. Notwithstanding its lack of success in *Ah Yick*, a similar proposition underpinned the decision in *Seaegg v The King*[28] in 1932. This Court also expressed the opinion in that case that s 39(2) might be insufficient to effect the conversion of appellate jurisdiction conferred by the *Criminal Appeal Act* 1912 (NSW) into federal jurisdiction over the different subject matter of appeals against convictions on indictment under federal law[29].

16 As a result of *Seaegg*, s 68(1) and (2) were amended[30]. State courts with appellate criminal jurisdiction in relation to offences against State law were given the like jurisdiction in relation to federal offences. In the Second Reading Speech for the amending Bill, the Attorney-General, Mr Latham, observed that each of the States had by that time established Courts of Criminal Appeal, which had not existed in 1903[31]. He said[32]:

> "It appears only just that a person convicted under a federal law should have the same right of appeal as a person convicted under a State law."

There was no reference to appeals against acquittals, but, as appears below, the ambulatory character of the amended s 68 was able to pick up novel appellate jurisdictions created under State law.

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26 (1905) 2 CLR 593 at 605 per Griffith CJ, 614 per Barton J; [1905] HCA 22.

27 (1905) 2 CLR 593 at 595.

28 (1932) 48 CLR 251 at 256-257 per Rich, Dixon, Evatt and McTiernan JJ; [1932] HCA 47.

29 (1932) 48 CLR 251 at 256.

30 *Judiciary Act* 1932 (Cth), s 2.

31 *Criminal Code Amendment Act* 1911 (WA) (No 52 of 1911), s 10; *Criminal Appeal Act* 1912 (NSW), s 3; *Criminal Code Amendment Act* 1913 (Q), s 5; *Criminal Appeal Act* 1914 (Vic), s 3; *Criminal Code* (Tas), s 400 (introduced by the *Criminal Code Act* 1924 (Tas)); *Criminal Appeals Act* 1924 (SA), s 5. Appeals in Victoria and South Australia lay to a Full Court rather than a Court of Criminal Appeal.

32 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 November 1932 at 2608.

17 One novel jurisdiction was considered by this Court in *Williams v The King [No 2]*[33]. The question, on which the Court divided equally, was whether s 68, as amended, conferred federal jurisdiction in the terms of the *Criminal Appeal Act* 1912 (NSW) providing for a Crown appeal against sentence to the Court of Criminal Appeal[34]. In holding the jurisdiction to have been conferred, Dixon J conceded that such an appeal was "a marked departure from the principles theretofore governing the exercise of penal jurisdiction"[35]. He added, however, that it was "a departure sanctioned by State law, and it had already been made when the amendment in the provisions of sec 68(2) was introduced"[36]. Dixon J contrasted the operation of s 68(2) upon "existing and known provisions of a particular department of the statutory law of the States" with the *Appellate Jurisdiction Act* 1876 (UK)[37], which conferred general appellate jurisdiction upon the House of Lords but was held not to give a right of appeal against an order for discharge from custody made upon the return of the writ of habeas corpus[38].

18 The question was revisited in 1971 in *Peel v The Queen*[39]. The Court then held by majority that s 68(2) operated upon s 5D of the *Criminal Appeal Act* 1912 (NSW) to confer jurisdiction on the Court of Criminal Appeal of New South Wales to entertain an appeal by the Attorney-General of the Commonwealth against the inadequacy of a sentence imposed for an offence against a law of the Commonwealth. Owen and Gibbs JJ[40], with whom Windeyer J agreed[41], adopted the reasoning of those Justices in *Williams* who were in favour of the like conclusion. They particularly referred to the judgment

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33 (1934) 50 CLR 551; [1934] HCA 19.

34 (1934) 50 CLR 551 at 557 per Gavan Duffy CJ, 563-565 per Evatt and McTiernan JJ against the conferral of the right to appeal; and at 557-558 per Rich J, 558 per Starke J, 561 per Dixon J in favour of the existence of the right.

35 (1934) 50 CLR 551 at 561.

36 (1934) 50 CLR 551 at 561.

37 39 & 40 Vict c 59.

38 (1934) 50 CLR 551 at 561 citing *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 at 610 per Earl of Birkenhead.

39 (1971) 125 CLR 447; [1971] HCA 59.

40 (1971) 125 CLR 447 at 460 per Owen J, 467-469 per Gibbs J.

41 (1971) 125 CLR 447 at 457.

of Dixon J[42]. In his dissent, Barwick CJ observed that, at the time of the enactment of the *Judiciary Act* 1932 (Cth), the law of Tasmania[43] provided for an appeal by the State Attorney-General against an acquittal on a question of law. He said[44]:

> "[I]f a general ambulatory provision such as s 68(2) is apt to create such rights in the Attorney-General of the Commonwealth with respect to sentences imposed by State courts for offences against the laws of the Commonwealth and against an acquittal of a person charged with such an offence, neither the unusual nature of such rights nor the circumstance that they did not exist in 1932 in all the States of the Commonwealth with respect to State offences will require that effect should not be given to the expressed will of the Parliament. But, in considering whether general words of an enactment are so apt, that unusual nature and the singularity of the particular right of appeal ought, in my opinion, to be borne in mind."

The textual basis for Barwick CJ's dissent[45], which applied equally to appeals against sentence and appeals against acquittal, was undercut by the reasoning of the majority. Section 68 is not confined to conferring appellate jurisdiction in terms which existed under State laws in 1932. Nevertheless, the existence, at that time, of an appeal against acquittal on a question of law tends to detract from the proposition that s 68 could never have been intended to apply to such an appeal and, a fortiori, to an appeal against a directed verdict of acquittal.

19 *Peel* was applied by this Court in *Rohde v Director of Public Prosecutions*[46]. Deane J in dissent observed that the conferral upon the prosecution of a right to appeal against sentence[47]:

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42 (1971) 125 CLR 447 at 460 per Owen J, 467-469 per Gibbs J; see also at 457 per Menzies J.

43 *Criminal Code* (Tas), s 401(2)(ii).

44 (1971) 125 CLR 447 at 452.

45 See (1971) 125 CLR 447 at 454-455.

46 (1986) 161 CLR 119 at 124 per Gibbs CJ, Mason and Wilson JJ, 126-127 per Brennan J; [1986] HCA 50. See also *R v Carngham* (1978) 140 CLR 487; [1978] HCA 48.

47 (1986) 161 CLR 119 at 128.

> "infringes the essential rationale of the traditional common law rule against double jeopardy in the administration of criminal justice in a manner comparable to a conferral of a prosecution right of appeal against a trial acquittal".

20 No party to the present appeals contended that, as a matter of construction, s 68(2) could not confer the like jurisdiction to entertain an appeal against a directed verdict of acquittal as is conferred upon the Court of Criminal Appeal of New South Wales by s 107 of the *Crimes (Appeal and Review) Act*. There is no decision of this Court directly on the question so far as it relates to appeals against acquittal. However, the decisions of this Court in relation to Crown appeals against sentence and the implied rejection by separate majorities of the arguments of dissenters in relation to appeals against acquittals on questions of law suggest that s 68(2) can be construed to "pick up" and confer such jurisdiction. Subject therefore to the grounds set out in the notices of contention, the common premise of the parties and the interveners about the operation of s 68(2) should be regarded, in the light of the existing authority of the Court, as correct.

The operation of s 107 of the *Crimes (Appeal and Review) Act*

21 The respondents argued that no appeal lay to the Court of Criminal Appeal in relation to their acquittals because the commencement of the proceedings against them had predated the coming into effect of s 107 of the *Crimes (Appeal and Review) Act*. Their argument involved the following propositions:

1. The criminal proceedings against them began with the committal proceedings.

2. The commencement of the committal proceedings predated the coming into effect of s 107.

3. Absent clear words to the contrary, s 107 should not be construed as conferring jurisdiction on the Court of Criminal Appeal to entertain appeals in respect of acquittals arising out of trials following committal proceedings which commenced before s 107 came into effect.

22 Pursuant to the *Criminal Procedure Act* 1986 (NSW) ("the CPA"), as it stood in 2006, the committal proceeding against the respondents commenced upon the filing in the registry of the Local Court of a court attendance notice, which was served on them on 18 October 2006[48]. Section 107 came into effect on 15 December 2006. Section 130 of the CPA provided that the trial of an

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48 CPA, ss 47(1), 48, 52(4) and 53(1).

accused person on indictment in the Supreme Court or the District Court of New South Wales commenced upon the presentation of the indictment and the arraignment of the accused[49]. The respondents were arraigned on 24 June 2008, and their trial commenced on that date. The provisions of the CPA applied by virtue of s 68(1) of the *Judiciary Act* to the trial in the District Court of New South Wales of the charges upon which the respondents were arraigned.

23 Committal proceedings, including what used to be known as a "preliminary hearing", have been classified by this Court, with other pre-trial procedures, as "stages in [a] single process" and as part of a "continuous process" for bringing an accused person to trial "beginning with arrest … and ending with the trial"[50]. In *R v Murphy*[51] this Court said that "the relationship between committal proceedings and the trial of an indictable offence is such that they are part of the matter which the trial ultimately determines". They "traditionally constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury"[52]. Those observations do not assist the respondents in this case. Their directed acquittals were the outcome of their trial on indictment for conspiracy. That trial commenced with their arraignment in the District Court of New South Wales. It was then that issue was joined between the parties[53]. The appellate jurisdiction conferred by s 107 is a jurisdiction which relates to the outcome of a trial on indictment. The relationship between committal proceedings and trial has justified their classification together as the "one proceeding" in particular contexts. That classification has been used in cases involving contempt of court by publication of matters tending to prevent a fair trial[54] and attempting to pervert the course of

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49 Section 130(2) of the CPA commenced: "The court has jurisdiction with respect to the conduct of proceedings on indictment as soon as the indictment is presented and the accused person is arraigned". And see *R v Nicolaidis* (1994) 33 NSWLR 364 at 367 per Gleeson CJ; *R v Janceski* (2005) 64 NSWLR 10 at 20 [41] per Spigelman CJ, 40 [205] per Wood CJ at CL, 42 [219] per Howie J (with whom Hunt AJA and Johnson J agreed). Section 178 of the CPA provided that all proceedings commence upon filing of a notice of court attendance. Absent the requisite filing within time, summary proceedings which ensued were held in *Sharman v Director of Public Prosecutions (NSW)* (2006) 161 A Crim R 1 to be not validly commenced.

50 *Packer v Peacock* (1912) 13 CLR 577 at 586; [1912] HCA 8.

51 (1985) 158 CLR 596 at 614; [1985] HCA 50.

52 (1985) 158 CLR 596 at 616.

53 See *R v JS* (2007) 175 A Crim R 108 at 122 [47]-[48] per Spigelman CJ.

54 *Packer* (1912) 13 CLR 577.

justice[55]. But such a purposive classification does not eliminate the important distinction between the two processes. In the context of federal judicial power, the first is administrative; the second is a discrete judicial proceeding[56]. Section 107 is directed to the trial, providing, as it does, for an appeal against its outcome. The trial commenced after s 107 came into effect. The question of retrospectivity in the application of s 107 to the directed acquittals does not arise.

Section 80 of the Constitution and s 68 of the *Judiciary Act*

24 Section 80 of the Constitution requires, inter alia, that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury". It has been said to place "a limitation on judicial power"[57]. It also places a limitation on the legislative power of the Commonwealth. That limitation is enlivened when a law of the Commonwealth provides that the trial of an offence against a law of the Commonwealth shall be on indictment. When that condition (which lies in the discretion of the Commonwealth Parliament) is satisfied the law cannot provide for the trial to be other than trial by jury[58].

25 Notwithstanding the terms of the respondents' notices of contention, the validity of s 107 does not arise in this case. Section 107 is part of a law of the State of New South Wales. It has no application to Commonwealth offences. The constitutional question relates to the operation of s 68 of the *Judiciary Act*[59]. For the reasons set out above, that section is capable, as a matter of construction, of conferring, as federal jurisdiction, in relation to Commonwealth offences, a

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55 *Murphy* (1985) 158 CLR 596.

56 *Grassby v The Queen* (1989) 168 CLR 1 at 11 per Dawson J, with whom the other members of the Court agreed, including Deane J, who dissented on an unrelated point of construction; [1989] HCA 45.

57 *Cheng v The Queen* (2000) 203 CLR 248 at 277 [79] per Gaudron J; [2000] HCA 53.

58 *Kingswell v The Queen* (1985) 159 CLR 264 at 277 per Gibbs CJ, Wilson and Dawson JJ, 285 per Mason J; [1985] HCA 72; *Cheng v The Queen* (2000) 203 CLR 248 at 268-269 [53] per Gleeson CJ, Gummow and Hayne JJ, 295 [141]-[143] per McHugh J, 344 [283] per Callinan J.

59 Although the correctness of the result in *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44 is not in question, its analysis was erroneous in so far as the Court considered the effect of s 80 of the Constitution upon s 57 of the *Juries Act* 1927 (SA) in providing for majority verdicts and read the provision down pursuant to s 22a(1) of the *Acts Interpretation Act* 1915 (SA).

jurisdiction in terms of that created by s 107. The substance of the respondents' contention was that having regard to s 80 of the Constitution it cannot validly do so with respect to directed acquittals. If that contention be correct, then s 68 would have to be construed, as it could be construed, as not conferring that jurisdiction[60]. The question for determination reduces to whether the guarantee of trial by jury given by s 80 of the Constitution would be infringed by a law of the Commonwealth, having the same content as s 107, conferring a right of appeal from a directed acquittal of an indictable offence against a law of the Commonwealth. The answer to that question requires a consideration of the relationship between a directed verdict of acquittal and the concept of trial by jury.

The directed verdict of acquittal

26 The directed verdict of acquittal is a mechanism for taking a case away from the jury because, as a matter of law, a conviction is not open. Its oldest ancestor was the demurrer, which dates back to 15th century England[61]. That was a mechanism which left open only "questions of substantive law"[62]. Blackstone described the procedure as one which "draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court"[63]. The demurrer upon evidence fell into disuse[64]. The non-suit, which began as a procedure under which a plaintiff in civil proceedings could discontinue an action, became a means by which a defendant could apply to have a case withdrawn from the jury on the basis that the plaintiff had failed to bring evidence of an essential matter[65]. Historically, judicial acceptance of the defendant's non-suit application was followed by a recommendation that the plaintiff acquiesce on the basis that, as a matter of law, the action could not succeed. The plaintiff would then assent[66]. The plaintiff who refused to be non-

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60 See *Acts Interpretation Act* 1901 (Cth), s 15A.

61 King, "Trial Practice – Demurrer Upon Evidence as a Device for Taking a Case from the Jury", (1945) 44 *Michigan Law Review* 468.

62 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 236.

63 Blackstone, *Commentaries on the Laws of England*, (1768), bk 3, c 23 at 373.

64 As a result of the decision in *Gibson v Hunter* (1793) 2 H Bl 187 [126 ER 499].

65 *Jones v Dunkel* (1959) 101 CLR 298 at 324; [1959] HCA 8.

66 *Jones* (1959) 101 CLR 298 at 324 per Windeyer J.

suited took the risk that the judge might then direct a verdict for the defendant[67]. The non-suit evolved into a "peremptory" or "compulsory" non-suit bearing a close resemblance to a directed verdict. It was described in 1821 by Graham B thus[68]:

> "The Judge has certainly a right to put the party out of Court, wherever the case is once resolved into a pure question of law. On the other hand, it is the duty of the Judge who tries the cause, to leave the case, if it turns on a question of fact, to the Jury."

27 After the *Judicature Acts* the word "non-suit" disappeared from the Rules of Court. But as Windeyer J pointed out in *Jones v Dunkel*[69]:

> "The word continued to be used to describe the action of a judge withdrawing a case from the jury and entering judgment for the defendant."

Windeyer J, however, pointed to the clear distinction between "non-suit" and "verdict by direction" in trials at nisi prius in New South Wales[70].

28 The demurrer upon evidence persisted in American courts long after it had declined in English courts[71]. It was succeeded by the practice of the directed verdict, although there were apparently examples of directed acquittals in the American colonies as early as 1763[72]. The directed verdict in its modern form and in its application to civil jury trials was considered by the United States Supreme Court in 1850 and was approved on the basis that it served the same

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67 *Jones* (1959) 101 CLR 298 at 326 per Windeyer J. There are reported instances of this occurring in New South Wales as early as the 1840s. In *Lyons v Elyard* (1846) 1 Legge 328, at the close of the plaintiff's case in an action for trover Stephen CJ directed the jury to find for the defendant after the plaintiff refused to be non-suited. See also *Smith v Barton* (1848) 1 Legge 445.

68 *Ward v Mason* (1821) 9 Price 291 at 294 [147 ER 96 at 97].

69 (1959) 101 CLR 298 at 330.

70 (1959) 101 CLR 298 at 331.

71 King, "Trial Practice – Demurrer Upon Evidence as a Device for Taking a Case from the Jury", (1945) 44 *Michigan Law Review* 468 at 474-475.

72 Henderson, "The Background of the Seventh Amendment", (1966) 80 *Harvard Law Review* 289 at 326.

purpose as the demurrer upon evidence[73]. The power of federal courts to direct a verdict for insufficiency of evidence has been repeatedly affirmed by the Supreme Court[74]. The directed verdict has long been a feature of the criminal procedure of the Australian States and of the Commonwealth[75].

29 This Court has held that it is a trial judge's duty to direct a jury to return a not guilty verdict where there is no evidence upon which a jury could convict[76]. When that condition is satisfied it is sometimes said that there is no case to answer or that the prosecution has failed to make out a prima facie case. The generality of that proposition extends to the trial of offences against laws of the Commonwealth[77]. The question whether there is a "case to answer" or a "prima facie case" is a question of law[78]. The power and the duty of the judge to direct a verdict of not guilty where there is no case to answer is an expression of the judge's power and duty to decide questions of law. The position is the same where the direction is made upon the basis that the indictment does not disclose an offence known to the law.

30 The function of the judge as decision-maker on questions of law has been said, albeit in a rare case, to extend to directing a verdict of guilty. In *Yager v*

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73 *Parks v Ross* 52 US 362 (1850).

74 See, eg, *Galloway v United States* 319 US 372 at 389 fn 19 (1943).

75 See, eg, *R v Fogg* (1864) 3 SCR (L) (NSW) 33; *R v Bailey* (1864) 1 W W & A'B (L) 20; *R v Fischel* (1865) 2 W W & A'B (L) 11; *R v Tidemann* (1871) 5 SALR 15 at 18. There are also several reports from colonial New South Wales and Victoria of counsel for the accused, at the conclusion of the Crown case, seeking the withdrawal from the jury of the case against their client. Such requests were variously framed as no case submissions or motions for a directed verdict or acquittal: *R v Wood* (1862) 1 W & W (L) 371 at 372; *R v Ashford* (1863) 2 W & W (L) 171 at 172; *R v Hooper* (1864) 1 W W & A'B (L) 195 at 197; *R v Wilson* (1865) 2 W W & A'B (L) 22 at 23; *R v Hughes* (1865) 5 SCR (L) (NSW) 71 at 72-73; *R v Ryan* (1868) 8 SCR (L) (NSW) 22 at 23; *R v Flood* (1869) 8 SCR (L) (NSW) 299 at 300. And see Gurner, *The Practice of the Criminal Law of the Colony of Victoria*, (1871) at 166, which refers to the practice of entering a judgment of acquittal upon the return by the jury of a special verdict.

76 *Doney v The Queen* (1990) 171 CLR 207 at 212; [1990] HCA 51.

77 *Doney* (1990) 171 CLR 207 concerned an indictable offence against the *Customs Act* 1901 (Cth).

78 *May v O'Sullivan* (1955) 92 CLR 654 at 658; [1955] HCA 38; *Zanetti v Hill* (1962) 108 CLR 433 at 442 per Kitto J; [1962] HCA 62.

The Queen[79] formal admissions were made at trial which threw up for determination the construction of a provision of the *Customs Act* 1901 (Cth), under which the accused had been charged. Upon the constructional point being decided adversely to the accused, all elements of the offence were made out on the admissions. Barwick CJ held that in such a case the presiding judge could tell the jury that it was "their duty to return a verdict of guilty"[80]. The Chief Justice also agreed with the reasons of Mason J, who held that the trial judge was "entitled to direct the jury to return a verdict of guilty"[81]. Stephen J agreed with both the Chief Justice and Mason J[82]. The trial judge had not formally directed the jury to return a verdict of guilty but had told them it was "quite clearly" the "appropriate verdict"[83]. Gibbs and Murphy JJ disagreed with the majority and held that a trial judge was not entitled to direct the jury to convict. Gibbs J held that the judge had not gone that far and that what he had done was within his proper province[84]. Murphy J held that it was not[85]. The majority in *Yager* went further than the Court in *Jackson v The Queen*[86]. In the latter case, however, the power of the judge to direct a verdict of conviction was not in issue. There the Court held that, on the basis of answers to formal questions put to the jury, the judge was entitled to tell them, as a matter of law, that all elements of the charge had been proved[87].

31 *Yager* supports the proposition that a trial judge's power to direct a jury to return a particular verdict (whether it be guilty or not guilty) is an incident of the duty of the judge to decide questions of law and to direct the jury accordingly. The difference between the majority and the minority in substance turned upon the question whether the jury had the right to return a verdict of acquittal notwithstanding that all elements of the offence were made out upon formal

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79 (1977) 139 CLR 28; [1977] HCA 10.

80 (1977) 139 CLR 28 at 36.

81 (1977) 139 CLR 28 at 46.

82 (1977) 139 CLR 28 at 40.

83 (1977) 139 CLR 28 at 37.

84 (1977) 139 CLR 28 at 39.

85 (1977) 139 CLR 28 at 51-52.

86 (1976) 134 CLR 42; [1976] HCA 16.

87 (1976) 134 CLR 42 at 45 per Barwick CJ (Mason J agreeing), 45 per McTiernan J, 49 per Jacobs J, 53 per Murphy J.

admissions by the accused. While it might be argued that the majority conclusion in *Yager* was strictly obiter and that there is room for debate about it, the proposition that a jury should be at liberty to convict where the law requires acquittal is insupportable. It is no part of the function of a jury to do so even though the law may require their formal verdict of not guilty in such a case[88]. The fact that procedural difficulties may attend a perverse verdict of guilty in the face of a direction to acquit does not alter the position[89]. There is no normative principle to support such a verdict. A "perverse" verdict of not guilty on the other hand has traditionally been seen as a protection against oppressive laws or prosecutions. It not being part of the function of a jury to exercise any discretion in the face of a direction to acquit, it is no interference with their function, other than in a strictly formal sense, for the law to provide for an appeal against a verdict of acquittal where delivered in inevitable obedience to the judge's direction. That conclusion is consistent with the reasoning in *R v Weaver* that[90]:

> "the decision of the Court of Criminal Appeal quashing a conviction and entering judgment and verdict of acquittal is a determination of a Court of law, and not of a jury, and has been regarded in this Court as subject to the appellate power".

It is necessary in light of that conclusion to consider the operation of s 80 of the Constitution.

Section 80 of the Constitution

32 Andrew Inglis Clark's first draft Constitution, placed before the National Australasian Convention in Sydney in 1891, provided, inter alia, in cl 65 that "[t]he trial of all crimes cognisable by any Court established under the authority of this Act shall be by Jury"[91]. As adopted by the Convention, it became cl 11 of

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88 There are now provisions in Victoria, Western Australia and the Australian Capital Territory which authorise the trial judge to enter a verdict of acquittal upon a no case submission without requiring the jury to give their verdict: *Criminal Procedure Act* 2009 (Vic), s 241; *Criminal Procedure Act* 2004 (WA), s 108; *Crimes Act* 1900 (ACT), s 287.

89 For examples of procedural responses in such a case see Devlin, *Trial by Jury*, rev ed (1966) at 80.

90 (1931) 45 CLR 321 at 333 per Gavan Duffy CJ, Starke and McTiernan JJ; see also at 356 per Evatt J; [1931] HCA 23. And see *R v Wilkes* (1948) 77 CLR 511 at 516 per Dixon J; [1948] HCA 22.

91 Reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 89.

Ch III of the draft Constitution and relevantly followed the wording of Inglis Clark's draft save for the substitution of "indictable offences" for "crimes"[92]. There was no recorded debate about the provision. It embodied the form and substance of Art III §2 cl 3 of the United States Constitution.

33 An attempt at the 1898 Convention to delete the reference to trial by jury was defeated. Isaac Isaacs pointed out that the federal Parliament would not be fettered because it could, in creating an offence, "say it is not to be prosecuted by indictment, and immediately it does it is not within the protection of this clause of the Constitution"[93]. However, the words "on indictment of any offence" were substituted on Edmund Barton's motion for the words "of all indictable offences". The object was to avoid limiting the power of the Commonwealth Parliament to provide that certain offences could be tried summarily[94].

34 Although modelled upon Art III §2 cl 3 of the United States Constitution, s 80 did not incorporate a constitutional protection against double jeopardy as found in the Fifth and Seventh Amendments of the United States Constitution[95]. Nor was there any discussion at the Convention Debates about entrenching the finality of the verdict of the jury in trials to which s 80 applied. As Mason P correctly observed in *R v JS*[96]:

> "[T]he United States experience as at the commencement of the Australian Constitution located finality principles touching a verdict of guilt or innocence within the American constitutional rules about double jeopardy, not within their constitutional rules about trial by jury in criminal matters. The founders of the Australian Constitution, who had before them the American model, chose to adopt a constitutional guarantee of trial by jury and decline a constitutional entrenchment of double jeopardy principles."

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92 *Official Report of the National Australasian Convention Debates*, (Sydney), 9 April 1891 at 958.

93 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 352.

94 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1894-1895.

95 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 581 per Dixon and Evatt JJ; [1938] HCA 10; *Cheatle v The Queen* (1993) 177 CLR 541 at 556.

96 (2007) 175 A Crim R 108 at 140 [184].

35 In their commentary on s 80, Quick and Garran did not discuss the finality of the jury's verdict beyond stating that at common law the judge was "empowered to instruct [the jury] upon the law and to advise them upon the facts, and (except upon acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the evidence"[97]. The verdict of acquittal, which the judge could not set aside, clearly referred to an acquittal after trial.

36 The essential features of a trial by jury within the meaning of s 80 were encapsulated by O'Connor J in *Huddart, Parker & Co Pty Ltd v Moorehead*[98] in his definition of such a trial as "the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process". This Court in *Cheatle v The Queen* accepted that statement as correctly drawing attention to "the representative character of a jury and to the fact-finding function which a jury traditionally served in civil litigation and in criminal committal and trial processes"[99]. As the Court said in *Cheatle*, the guarantee of trial by jury in s 80 prima facie encompasses the essential features of the "institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England"[100]. In so saying, the Court was quoting the judgment of Griffith CJ in *R v Snow*[101].

37 *Snow* was invoked by the respondents for the proposition that the finality of a verdict of acquittal, even a directed verdict of acquittal, is an essential function of trial by jury protected by s 80.

38 The trial judge in that case had directed the jury to find the accused not guilty because the statute creating the offences did not have a retrospective operation[102]. The Crown applied for special leave to appeal against the judgment

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97 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 810. In so doing, the authors slightly misquoted a passage from *Capital Traction Co v Hof* 174 US 1 at 13-14 (1899).

98 (1909) 8 CLR 330 at 375; [1909] HCA 36. The definition he adopted was that preferred by Justice Miller in his *Lectures on the Constitution of the United States*, (1893) at 511. That definition originated in the authoritative 9th edition of the *Encyclopaedia Britannica*.

99 (1993) 177 CLR 541 at 549.

100 (1993) 177 CLR 541 at 557-558.

101 (1915) 20 CLR 315 at 323; [1915] HCA 90.

102 *Trading with the Enemy Act* 1914 (Cth).

discharging the accused. The question before this Court was whether s 73 of the Constitution conferred jurisdiction to entertain such an appeal. The Court answered it in the negative. The judgment discharging the accused, resting as it did upon a verdict of acquittal, could not be attacked.

39 This Court in *Snow* was not concerned with the question whether a law of the Commonwealth could validly authorise an appeal against a directed verdict of acquittal. The question was whether s 73 of the Constitution authorised such an appeal. Nevertheless, s 73 was construed by three of the Justices by reference to s 80. Griffith CJ, Gavan Duffy and Rich JJ held that no appeal lay directly to the High Court under s 73 of the Constitution in relation to a directed verdict of acquittal. Griffith CJ referred to the "absolute protection" which prior to Federation was "afforded by a verdict of not guilty under the common law of all the States"[103]. A similar view was expressed by Gavan Duffy and Rich JJ[104]. The other Justices, Isaacs, Higgins and Powers JJ, held that s 73 allowed for an appeal against an acquittal direct to the High Court[105]. Powers J, however, did not consider that the Court should exercise its discretion to grant special leave so that the application for special leave to appeal was dismissed by majority[106].

40 The case did not establish authoritatively that s 80 required s 73 to be read as excluding appeals against acquittals. A fortiori it did not determine the present case, which involves a question whether the Court of Criminal Appeal could validly exercise a statutory jurisdiction to hear and determine an appeal against a directed verdict of acquittal on an indictment for an offence against the Commonwealth. Such an appeal against a directed acquittal, turning, as it did in this case, solely upon questions of law, does not offend against s 80. Involving, as it did, only questions of law, it did not infringe upon any of the essential functions of trial by jury. The grounds set out in the notices of contention disclose no error by the Court of Criminal Appeal. It is now necessary to turn to the relevant provisions of the Code.

Statutory framework – criminal responsibility

41 Chapter 2 of the Code is entitled "General principles of criminal responsibility". The stated purpose of the chapter is the exhaustive codification

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103 (1915) 20 CLR 315 at 323.

104 (1915) 20 CLR 315 at 365.

105 (1915) 20 CLR 315 at 337-338, 351-352 per Isaacs J, 355 per Higgins J, 368, 373 per Powers J.

106 (1915) 20 CLR 315 at 373.

of "the general principles of criminal responsibility under laws of the Commonwealth"[107]. The chapter applies to all offences against the Code[108].

42 Part 2.2 deals with the elements of offences. The drafters of the Code adopted "the usual analytical division of criminal offences into the actus reus and the mens rea or physical elements and fault elements"[109]. Division 3 contains general provisions relating to the elements of an offence. The classification of the elements is set out in s 3.1:

> "**(1) An offence consists of physical elements and fault elements.**
>
> (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
>
> (3) The law that creates the offence may provide different fault elements for different physical elements."

Physical elements are dealt with in Div 4. A physical element of an offence, as defined in s 4.1(1), may be:

> "**(a) conduct; or**
>
> (b) a result of conduct; or
>
> (c) a circumstance in which conduct, or a result of conduct, occurs."

Conduct is broadly defined by s 4.1(2) to mean "an act, an omission to perform an act or a state of affairs". To "engage in conduct" means to "do an act" or to "omit to perform an act". The concept of engaging in conduct which is a state of affairs is not explained.

43 Fault elements are dealt with in Div 5. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence[110]. A person is said to have intention with respect to conduct if he or she means to

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107 Code, s 2.1.

108 Code, s 2.2(1).

109 Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility,* Final Report, (1992) at 9.

110 Code, s 5.1(1).

engage in that conduct[111]. A person has intention with respect to a circumstance if he or she believes that it exists or will exist[112]. A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events[113]. Knowledge of a circumstance or a result is defined in terms of awareness that the circumstance or result exists or will exist in the ordinary course of events[114].

44 Recklessness is defined in s 5.4 with respect to circumstances and results. Relevantly to the present appeals, s 5.4(1) provides that a person is reckless with respect to a circumstance if:

> "(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk."

The question whether taking a risk is unjustifiable is one of fact[115]. Where recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element[116]. That extended definition was relied upon by the Crown on appeal in *Ansari*[117]. It is not necessary for present purposes to refer to the definition of "negligence". Where offences do not specify fault elements then the fault elements which apply are set out in s 5.6 thus:

> "(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

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111 Code, s 5.2(1).

112 Code, s 5.2(2).

113 Code, s 5.2(3).

114 Code, s 5.3.

115 Code, s 5.4(3).

116 Code, s 5.4(4).

117 (2007) 70 NSWLR 89 at 96 [23] per Simpson J.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element."

45 Division 6 refers to offences of strict liability and absolute liability. They have the common feature that there are no fault elements for any of the physical elements of the offence. They differ in that the defence of mistake of fact is available in relation to an offence of strict liability, whereas it is unavailable in relation to an offence of absolute liability[118].

Statutory framework – conspiracy

46 Part 2.4 is entitled "Extensions of criminal responsibility". Division 11 deals variously with attempt[119], complicity and common purpose[120], innocent agency[121], incitement[122] and conspiracy[123]. This conjunction reflects the historical association of conspiracy with the law of attempts[124]. The relevant parts of s 11.5, relating to the offence of conspiracy, are as follows:

"**(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.**

(2) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

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118 Code, ss 6.1(1)(b) and 6.2(1)(b).

119 Code, s 11.1.

120 Code, s 11.2.

121 Code, s 11.3.

122 Code, s 11.4.

123 Code, s 11.5.

124 See Stephen, *A History of the Criminal Law of England*, (1883), vol 2 at 227.

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(2A) Subsection (2) has effect subject to subsection (7A).

…

(7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence."

47 Part 2.6 is entitled "Proof of criminal responsibility". By s 13.1(1) the prosecution bears a legal burden of proving "every element of an offence relevant to the guilt of the person charged". The standard of proof is "beyond reasonable doubt"[125].

Statutory framework – money laundering

48 The offence which was the subject of the conspiracy charge in this case is that created by s 400.3(2) of the Code, which appears in Pt 10.2, entitled "Money laundering", in Ch 10, which is entitled "National infrastructure". Section 400.3(2) provides:

"A person is guilty of an offence if:

(a) the person deals with money or other property; and

(b) either:

(i) the money or property is proceeds of crime; or

(ii) there is a risk that the money or property will become an instrument of crime; and

(c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and

(d) at the time of the dealing, the value of the money and other property is $1,000,000 or more."

Section 400.3(4) provides, inter alia, that absolute liability applies to par (2)(d).

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125 Code, s 13.2(1).

The overt acts relied upon

49 Particulars were supplied by the Crown of overt acts alleged. It would seem they were intended to support the inference that there was a conspiracy and to satisfy the condition of guilt that an overt act had been committed by each of the respondents. The acts alleged involved the transfer of a sum of money exceeding 24,800,000 Swiss francs into an account held at a Swiss bank in the name of RK at the request of his alleged co-conspirator RM. LK, RK and RM were said to have been in contact with each other by telephone over the relevant period. Subsequently, RK was instructed by RM to transfer in excess of 23,600,000 Swiss francs from his Swiss bank account to an account with a bank in New York. However, on 30 December 2003 the Swiss bank received a message from JP Morgan Sydney advising that the funds transferred into the account of RK had been paid fraudulently and should be returned. RK allegedly retained attorneys in Switzerland for the purpose of providing a power of attorney to the bank to effect the transfer of the funds. However, the funds were subsequently frozen.

The particulars of the indictment

50 Particulars of the indictment against RK were provided. The Crown identified those who it alleged were to deal with the money pursuant to the conspiracy as RK, LK and RM and the "divers other persons" referred to in the indictment and identified by name in the particulars. The Crown also alleged, as particularised, that RK was aware of a substantial risk that the money was proceeds of crime. It relied upon the facts and circumstances set out in the overt acts.

The development of the Code

51 The origins of the provisions of the Code relating to conspiracy date back to 1987 when the Commonwealth Attorney-General established a Committee chaired by Sir Harry Gibbs to undertake a review of Commonwealth criminal laws. The third of the Committee's interim reports, published in July 1990, was entitled *Principles of Criminal Responsibility and Other Matters*. It dealt, inter alia, with the offence of conspiracy.

52 At the time that the Gibbs Committee was set up it was an open question whether s 86 of the *Crimes Act* 1914 (Cth) was exhaustive of the common law[126].

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126 It substantially reflected the terms of s 568(5) and (6) of the Draft Code of Criminal Law prepared by Sir Samuel Griffith which became s 543(6) and (7) of the *Criminal Code* (Q) and s 538(6) and (7) of the *Criminal Code* (WA) (being the First Schedule to the *Criminal Code Act* 1902 (WA); the provisions were subsequently re-enacted as s 560(6) and (7) of the *Criminal Code* of that State,

(Footnote continues on next page)

The Committee assumed that it was not[127]. It also concluded that the word "conspires" in s 86 imported the common law[128]. The necessary mental element was seen as derived from the common law. An intention to carry out the relevant unlawful purpose was a necessary element of the offence "notwithstanding that the agreement is to commit a crime which may be committed recklessly or a crime of strict liability"[129]. The Committee did not regard the common law rule in relation to the mental element of conspiracy as having created any "particular difficulties"[130]. Nevertheless it took the view that "in a consolidating law it would be desirable to make it clear what mental element is required to constitute the crime of conspiracy"[131]. The Committee recommended that[132]:

> "(n) The consolidating law should make it clear that the mental element required to commit a crime of conspiracy is an intention on the part of the conspirators to agree to commit an offence and that the offence should be committed.
>
> (o) The consolidating law should provide that an agreement to commit an offence will amount to a conspiracy notwithstanding the existence of facts which render it impossible to commit the offence."

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being the Schedule to Appendix B of the *Criminal Code Act Compilation Act* 1913 (WA)). As appears from Griffith's 1897 letter forwarding his Draft Code to the Attorney-General the provisions were intended as "statements of unwritten law" and were referred to in the draft as "misdemeanours at common law": Griffith, *Draft of a Code of Criminal Law*, (1897) at xiii, 251-254.

127 Australia, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (1990) at 358 [34.7].

128 Australia, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (1990) at 361 [34.11]; cf *R v Cahill* (1978) 22 ALR 361 at 370 per Reynolds JA.

129 Australia, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (1990) at 393 [40.1].

130 Australia, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (1990) at 393 [40.2].

131 Australia, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (1990) at 394 [40.6].

132 Australia, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (1990) at 427-428.

53 In 1990 following the release of the Gibbs Committee report, the Standing Committee of Attorneys-General established a Criminal Law Officers Committee, later designated the Model Criminal Code Officers Committee (MCCOC), to advance the objective of uniformity in Australian criminal law. The MCCOC decided to draft a Model Code capable of adoption by all jurisdictions. The second chapter of the Model Code related to criminal responsibility. Conspiracy was dealt with under Pt 4, entitled "Extensions of criminal responsibility".

54 In the proposed s 405 of the Model Code, now reflected in s 11.5 of the Code, the provisions corresponding to s 11.5(2)(a) and (b) were drafted "to more clearly separate the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement"[133]. The fault element necessary for the offence of conspiracy was intention – that is to say, intention to make the agreement. Recklessness would not suffice[134]. It was "foreign to an offence based wholly on agreement"[135].

55 The requirement of an overt act, picked up in s 11.5(2)(c), was explained by the MCCOC on the basis that "the simple agreement to commit a criminal offence without any further action by any of those party to the agreement was insufficient to warrant the attention of the criminal law"[136].

56 Having regard to the assumption of the Gibbs Committee that the word "conspires" in s 86 of the *Crimes Act* imported the common law concept and the use of that word, without definition, in s 11.5 of the Code, it may be inferred that the drafters of the Code intended to retain the common law concept of conspiracy. The purpose of s 11.5(2) as explained by the report of the MCCOC

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133 Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (1992) at 99.

134 This was seen to accord with the proposals of the Gibbs Committee and the common law.

135 Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (1992) at 99. This reflects the common law: see *Giorgianni v The Queen* (1985) 156 CLR 473 at 506 per Wilson, Deane and Dawson JJ; [1985] HCA 29; *Peters v The Queen* (1998) 192 CLR 493 at 520-521 [66] per McHugh J (Gummow J agreeing at 533 [93]); [1998] HCA 7.

136 Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (1992) at 101.

was to operate on the common law by "more clearly" distinguishing the elements of agreement and intention to commit the offence the subject of the conspiracy.

57 There was debate on the hearing of these appeals on the question whether s 11.5(2) sets out all or some of the elements of the offence of conspiracy. Although the MCCOC report referred to "elements" in this context[137], s 11.5(2) cannot be read as defining the physical and fault elements of the offence of conspiracy for the purposes of Divs 3, 4 and 5 of the Code. That conclusion is required by the importation of the common law concept of conspiracy into s 11.5(1). The common law defines the elements of the offence by reference, albeit not without some difficulty, to the agreement as the actus reus and the intention to do an unlawful act pursuant to the agreement as the mens rea[138]. The text of s 11.5(2)(b) supports that conclusion. It requires, as a condition of a finding of guilt, an intention by the accused and at least one other party to the agreement to commit an offence pursuant to the agreement. That intention is not able to be described as a fault element of conspiracy as defined in Div 5. A fault element of intention must exist "with respect to" a physical element comprising conduct or a circumstance or a result. The intention referred to in s 11.5(2)(b) does not have such a relationship with any physical element of the offence of conspiracy. Moreover, the commission of an overt act was never an element of the offence of conspiracy at common law. It was a basis from which the criminal agreement could be inferred[139]. Here it is included, in effect, as a screening device to exclude from "the attention of the criminal law" conspiracies not manifested by any implementing conduct[140]. Section 11.5(2) therefore operates upon the common law concept of conspiracy but cannot be taken as defining elements of the offence.

58 The preceding conclusion directs attention to the crime of conspiracy at common law.

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137 Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (1992) at 99.

138 As to the inescapable mental element in the actus reus so defined, see the observation of McHugh J in *Peters* (1998) 192 CLR 493 at 516 [55] referred to below.

139 *R v Rogerson* (1992) 174 CLR 268 at 281 per Brennan and Toohey JJ; [1992] HCA 25.

140 Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility,* Final Report, (1992) at 101.

Conspiracy at common law

59 The Code provisions relating to the offence of conspiracy are written against the background of the common law, which, subject to their text, informs their content.

60 Conspiracy evolved as a common law offence in England, albeit with early statutory assistance[141]. Ordinances of the 13th and 14th centuries provided for civil remedies against persons who conspired to make false accusations against others, whether by way of so-called "false appeals" or "false indictments"[142]. Although incidental penalties of fine and imprisonment were available[143], it was not until 1330 that conspiracy was made readily amenable by statute to prosecution as a criminal offence[144].

61 The rule that a combination to commit or procure the commission of a crime would be prosecuted as a conspiracy was an extended application of the decision of the Star Chamber in the *Poulterers' Case*[145]. Following the abolition

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141 Wright, *The Law of Criminal Conspiracies and Agreements*, (1873) at 5, 15-18; Pollock and Maitland, *The History of English Law*, (1895), vol 2 at 538; Bryan, *The Development of the English Law of Conspiracy*, (1909) at 20-21; Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, (1921) at 37, 93-96; Harrison, *Conspiracy as a Crime and as a Tort in English Law*, (1924) at 10-13; Sayre, "Criminal Conspiracy", (1922) 35 *Harvard Law Review* 393 at 396-397; cf 2 Co Inst 561; *O'Connell v The Queen* (1844) 11 Cl & F 155 at 233 per Tindal CJ [8 ER 1061 at 1092]. See also *Peters* (1998) 192 CLR 493 at 513-522 [51]-[69] per McHugh J.

142 *Statute of Westminster the Second* 1285 (13 Edw I c 12); *Statute concerning Conspirators* (the text of which appears at 1 *Statutes of the Realm* 216, the year of enactment being uncertain); *Articles upon the Charters* 1300 (28 Edw I c 10); *Ordinance concerning Conspirators* 1305 (33 Edw I). Debate surrounds the dating of the *Statute concerning Conspirators*. Professor Winfield posits 21 Edw I (1292-1293) as the most likely regnal year, at least for the portion concerning conspirators: Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, (1921) at 22-28. The same is evidently assumed in Bryan, *The Development of the English Law of Conspiracy*, (1909) at 9, 11, 15.

143 Like other civil wrongs, conspiracy could be prosecuted on indictment at the suit of the King and punished under "the villain judgment": see Stephen, *A History of the Criminal Law of England*, (1883), vol 2 at 228-229.

144 *Statute of Westminster* 1330 (4 Edw III c 11).

145 (1610) 9 Co Rep 55b at 56b-57a [77 ER 813 at 814-815]. And see Wright, *The Law of Criminal Conspiracies and Agreements*, (1873) at 7.

of the Star Chamber the crime of conspiracy was developed by the Courts of King's Bench, which, "groping their way through unfamiliar paths, tried new legal adventures"[146]. It became "a crime at common law of general application" with "a close association with the law of principal and accessory"[147] and "capable of almost indefinite extension"[148]. The interaction between statute law and the common law is a feature of the history of conspiracy in England[149] and its statutory evolution in Australia[150].

62 A concise enunciation of the elements of conspiracy was given by the Court of Queen's Bench in *Mulcahy v The Queen*[151] in 1868 in answer to questions proposed by the Lord Chancellor in relation to a prosecution under the *Crown and Government Security Act*[152]. Willes J, delivering the opinion of the judges, said[153]:

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is

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146 Sayre, "Criminal Conspiracy", (1922) 35 *Harvard Law Review* 393 at 400; see also *Weaver* (1931) 45 CLR 321 at 339 per Evatt J.

147 See Turner, *Russell on Crime*, 12th ed (1964), vol 1 at 201; Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 204, where it was said to have been "inevitable therefore, as Stephen has said, that conspiracy should come to be regarded as a form of attempt to commit a wrong". See also *Board of Trade v Owen* [1957] AC 602 at 625-626; *Shaw v Director of Public Prosecutions* [1962] AC 220 at 272-273 per Lord Reid.

148 Stephen, *A History of the Criminal Law of England*, (1883), vol 2 at 229.

149 A draft Criminal Code proposed in 1879 by the Royal Commission Appointed to Consider the Law Relating to Indictable Offences made provision for the offence of conspiracy to commit indictable or other offences in ss 419, 420 and 421: Great Britain, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C 2345] at 157.

150 As to which see Gillies, *The Law of Criminal Conspiracy*, 2nd ed (1990), chs 6 and 7.

151 (1868) LR 3 HL 306.

152 11 & 12 Vict c 12. The *Short Titles Act* 1896 (UK) titled this enactment the *Treason Felony Act* 1848 (UK).

153 (1868) LR 3 HL 306 at 317.

> not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means."

The House of Lords concurred. Notwithstanding its statutory context, the statement of the common law in *Mulcahy* has been accepted and applied in this Court[154].

63 The requirement, which did not emerge expressly from *Mulcahy*, that an alleged conspirator intend to carry into effect the common design of the agreement was propounded by the Supreme Court of Canada in *R v O'Brien*[155]. It was not sufficient that the accused had intended *to agree* to commit the offence. He had to have intended to put the common design, the commission of the offence, into effect.

64 In *Churchill v Walton*[156] the House of Lords held that mens rea was only an essential element in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act[157]. The elements of the offence at common law were restated by the House of Lords in *Director of Public Prosecutions v Nock*[158]. It identified the intention to do the unlawful act as the mens rea of the offence and the fact of the agreement as the actus reus[159]. The difficulties of dividing the offence of conspiracy at common law into actus reus

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154 *R v Kidman* (1915) 20 CLR 425 at 446-447 per Isaacs J; [1915] HCA 58; *R v Boston* (1923) 33 CLR 386 at 396 per Isaacs and Rich JJ; [1923] HCA 59; *Rogerson* (1992) 174 CLR 268 at 281 per Brennan and Toohey JJ (Mason CJ agreeing at 279); *Peters* (1998) 192 CLR 493 at 513-514 [51]-[52] per McHugh J.

155 [1954] SCR 666 at 668 per Taschereau J, 670 per Rand J, 676-677 per Estey J, in connection with the offence, created by s 573 of the *Criminal Code* (Can), of conspiracy to commit an indictable offence.

156 [1967] 2 AC 224.

157 [1967] 2 AC 224 at 237 per Viscount Dilhorne, in whose speech Lords MacDermott, Pearce, Upjohn and Pearson concurred. *O'Brien* [1954] SCR 666 was not referred to in the reasons, nor was *R v Thomson* (1965) 50 Cr App R 1, in which Lawton J had applied *O'Brien.* The offence the subject of the conspiracy in *Churchill* was a strict liability offence under the *Customs and Excise Act* 1952 (UK).

158 [1978] AC 979.

159 [1978] AC 979 at 994 per Lord Scarman.

and mens rea was pointed out by McHugh J in *Peters v The Queen*[160]. As he said, the agreement which is the actus reus necessarily also includes a mental element[161]:

> "At the very least, there must be an intention to enter into the agreement, and the present state of the authorities suggests that there can be no conspiratorial agreement unless the accused and his or her co-conspirators also intend that the common design should be carried out."

65 The House of Lords in *Nock* rejected the proposition that the offence of conspiracy could be committed notwithstanding that the crime the subject of the conspiracy would be impossible of performance[162]. That rejection was linked to the association between conspiracy and attempt[163]. An agreement to do that which is impossible of performance is not a criminal conspiracy at common law, although it is under the Code[164].

66 The association between attempt and conspiracy assists in the consideration, relevant to these appeals, of whether conspiracy to commit an offence can be made out where the Crown does not propound as part of its case the existence of a physical element or circumstance of that offence as the subject of the agreement. Plainly a conspiracy cannot be made out in such a case. This leads to a consideration of the place of recklessness in relation to the elements of the offence which is the subject of the conspiracy.

67 At common law a reckless state of mind is not sufficient to constitute the mens rea for the offence of attempt. Knowledge of the likely consequences of an act may *evidence* the requisite intention to commit the relevant offence. But such knowledge is not to be equated with that intention[165]. Similarly, it is not

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160 (1998) 192 CLR 493.

161 (1998) 192 CLR 493 at 516 [55] (footnote omitted). See also *Churchill* [1967] 2 AC 224 at 237 per Viscount Dilhorne.

162 [1978] AC 979 at 996 per Lord Scarman. See also *R v Smith* [1975] AC 476.

163 *Nock* [1978] AC 979 at 996-998 per Lord Scarman. See also *Owen* [1957] AC 602 at 625-626 per Lord Tucker; *Giorgianni* (1985) 156 CLR 473 at 506 per Wilson, Deane and Dawson JJ; *Rogerson* (1992) 174 CLR 268 at 275 per Mason CJ, 297 per McHugh J; Wright, *The Law of Criminal Conspiracies and Agreements*, (1873) at 6, 9-10; Stephen, *A History of the Criminal Law of England*, (1883), vol 2 at 227; Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 203-205.

164 Code, s 11.5(3)(a).

165 *R v Mohan* [1976] QB 1 at 10-11.

sufficient that an alleged conspirator be reckless as to the existence of an element of the substantive offence – for that kind of recklessness would negate the very intention that is necessary to form the unlawful agreement. As was said in *Giorgianni v The Queen*[166]:

> "For the purposes of many offences it may be true to say that if an act is done with foresight of its probable consequences, there is sufficient intent in law even if such intent may more properly be described as a form of recklessness. There are, however, offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and conspiracy is another."

The trial judge's reasoning

68 The trial judge characterised the Crown case against the respondents thus:

> "The Crown has presented its case against the [respondents] on the basis that they agreed to deal with the money in [RK's] account, which was in fact the proceeds of crime, and that the [respondents] were reckless that the money in [RK's] account was the proceeds of crime."

The trial judge found that the evidence relied upon by the Crown was "overwhelmingly capable of proving that each [respondent] entered the conspiracy alleged and was reckless as to the money in [RK's] account being the proceeds of crime".

69 Her Honour then turned to the argument that the indictment did not charge an offence known to the law. Her Honour rejected a submission that the indictment alleged that the respondents recklessly entered into the agreement. Rather, it alleged that the respondents intentionally agreed to commit an offence the mental element of which was recklessness. Her Honour characterised the decision of the Court of Criminal Appeal of New South Wales in *Ansari* as holding that the Crown can charge a person with conspiring to commit an offence the mental element of which is recklessness where it relies on intention or knowledge to prove the element of recklessness or where a third party is to commit the relevant offence. Neither of these circumstances was alleged in the present case. Her Honour held that "an accused must know of all the facts that would make his conduct criminal". She observed that that proposition, as Howie J held in *Ansari*[167], had not been displaced by the Code. Following *Ansari*

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166 (1985) 156 CLR 473 at 506 per Wilson, Deane and Dawson JJ, also quoted and approved by McHugh J in *Peters* (1998) 192 CLR 493 at 520-521 [66].

167 (2007) 70 NSWLR 89 at 109 [78].

her Honour concluded that the offence with which the respondents were charged on the case the Crown had presented was bad at law or unknown to law.

The reasoning of the Court of Criminal Appeal

70 The trial judge's direction was upheld in the Court of Criminal Appeal by Spigelman CJ, with whom Grove and Fullerton JJ agreed. The Chief Justice characterised the Crown case thus[168]:

> "The Crown case did not allege that the respondents were parties to the fraud against the Commonwealth Superannuation Scheme, nor that they were specifically aware of the fraud. The Crown case was that the respondents were reckless as to the fact that the funds transferred into the account were the proceeds of crime. I emphasise this important aspect of the Crown case: it is alleged that the respondents, not a third party, were reckless about this fact."

71 His Honour noted that neither party suggested that the decision of the Court of Criminal Appeal in *Ansari* was incorrect. He characterised *Ansari* as providing an example of a factual situation in which persons could conspire to commit an offence with respect to which recklessness was the fault element attributed to a physical element of that offence. That could occur where the physical element was to be carried out by a person not a party to the agreement[169].

72 The Chief Justice proceeded correctly on the basis that the Code imported the common law concept of conspiracy[170]. So a person cannot enter into a conspiracy under the Code without knowing the facts that make the agreed conduct unlawful. It was not the Crown case that either of the respondents knew that the money was proceeds of crime. The Crown case was that the respondents were reckless as to whether the money was proceeds of crime[171]. On that basis, and consistently with *Ansari*, his Honour concluded that the trial judge was correct to find that the Crown case disclosed no offence known to the law.

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168 (2008) 73 NSWLR 80 at 84 [12].

169 (2008) 73 NSWLR 80 at 89 [32].

170 (2008) 73 NSWLR 80 at 91 [49].

171 (2008) 73 NSWLR 80 at 93-94 [69]: see above at [7].

The contentions

73 On the appeals before this Court senior counsel for the Crown sought to support the Crown case in the following way. Two or more persons will have conspired, contrary to s 11.5(1) of the Code, to commit an offence against s 400.3(2) if:

1. The persons agree that one of them will deal with money.

2. They each believe it to be equally likely that that money is proceeds of crime or is not proceeds of crime (and have no way of telling which is the more probable).

3. Their agreement is to the effect that one of them will deal with money even though it may be proceeds of crime.

4. They believe that, at the time of the dealing, they will not know whether it is proceeds of crime (but will, necessarily, be aware of a substantial risk that the money will be, at the time of the dealing, proceeds of crime, and know that it is unjustifiable to take that risk).

5. Their agreement is to the effect that they are each willing to commit the crime of dealing with money that is proceeds of crime reckless as to whether it is proceeds of crime (as they are aware of at least a 50 per cent chance that it will be proceeds of crime).

6. An overt act is committed.

Counsel submitted that s 11.5(1) uses conspiracy as "a term of art" and that s 11.5(2) gives meaning to conspiracy as used in s 11.5(1).

74 Senior counsel for the respondent LK, in reply, submitted, in an argument applicable to both respondents, that:

1. Where the Crown seeks to prove a conspiracy to commit an offence under s 400.3(2) it must prove that the accused intended each element of that offence.

2. An element of the offence under s 400.3(2) on the facts of the present case is that the money was proceeds of crime.

3. The fact that the money was proceeds of crime was a physical element in the nature of a circumstance.

4. Where the fault element in relation to a circumstance is intention, the Crown must establish that the accused believed that the circumstance

existed. Recklessness will not suffice because it is a different and lower fault element.

5. On the facts of this case, the Crown had to prove that the respondents believed that the money the subject of their agreement was proceeds of crime.

6. The Crown's argument was that it would be sufficient to obtain a conviction if it were established that the respondents were reckless as to the fact that the money was stolen, that is to say, aware of a substantial and unjustifiable risk that the money was stolen.

7. The Crown's argument is incorrect because the Crown must establish that the respondents intended to commit the offence, not that they were reckless as to its commission.

Conclusions

75 The charge of conspiracy to commit an offence, which is created by s 11.5(1) of the Code, requires proof of an agreement between the person charged and one or more other persons. Moreover, the person charged and at least one other person must have intended that the offence the subject of the conspiracy would be committed pursuant to the agreement. Intention to commit an offence can be taken to encompass all the elements of the offence (subject to the operation of s 11.5(7A) in relation to special liability provisions in the substantive offence). That intention extends to both physical and fault elements of the substantive offence.

76 In the case of an offence against s 400.3(2) its physical elements are:

(1) conduct of the offender by the act of dealing with money[172];

(2) the circumstance in which that conduct occurs, namely that the money is proceeds of crime[173]; and

(3) the further circumstance that the value of the money at the time of the dealing is $1,000,000 or more[174].

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172 Code, ss 400.3(2)(a) and 4.1(1)(a) (read with s 4.1(2)).

173 Code, ss 400.3(2)(b)(i) and 4.1(1)(c).

174 Code, s 400.3(2)(d).

77 It is the second element which is the stumbling block in the way of the Crown's argument. There cannot be a conspiracy in which the parties to the agreement are reckless as to the existence of a circumstance which is a necessary element of the offence said to be the subject of the conspiracy. Such recklessness would be inconsistent with the very intention that is necessary at common law and under the Code to form the agreement alleged. In this case that intention is an intention to deal with money which is proceeds of crime. Recklessness as to whether the money is proceeds of crime is recklessness about a term of the agreement constituting the conspiracy. This is what was referred to at the commencement of these reasons as the fault line in the Crown's argument.

78 Another way of analysing the difficulty, by reference to the provisions of the Code, is as follows:

1. Section 11.5(1) provides that the offence of conspiracy is committed by a person who conspires with another person to commit an offence of the requisite character.

2. Applying the requirement of s 5.6(1) in relation to the fault element of conspiracy leads to the proposition that a conspiracy is committed by a person who (having the fault element of intention) conspires with another to commit an offence.

3. When s 11.5(2) is applied to the preceding, that person commits a conspiracy if he or she:

    (a) (intentionally) enters an agreement with one or more others to commit an offence;

    (b) intends that an offence will be committed, and at least one other party to the agreement intends that an offence will be committed; and

    (c) (intentionally) commits an overt act pursuant to the agreement or, if that person does not, at least one other party to the agreement does.

4. When the offence the subject of the alleged conspiracy is an offence against s 400.3(2), step 3(b) will require that the person intends that someone will deal with money, the money is in fact proceeds of crime and the dealer is reckless as to the fact that it is proceeds of crime.

5. Bringing in the definition of recklessness from s 5.4, the preceding step requires that the person intend that:

    (a) someone will deal with money;

(b) the money is in fact proceeds of crime (s 400.3(2)(b)(i)); and

(c) the dealer will be aware of a substantial risk that it is proceeds of crime and objectively that risk is unjustifiable.

These necessary steps do not support the conclusion for which the Crown contends, namely that the alleged conspirator's intention that an offence against s 400.3(2) will be committed is satisfied if he or she is reckless as to whether the money the subject of the offence is proceeds of crime.

79 For the preceding reasons the trial judge's direction and the conclusions reached by the Court of Criminal Appeal were correct and the appeals should be dismissed. A question as to the appropriate order in respect of costs arises. On the first day of the hearing of these appeals, the Court was informed that the Crown would meet the costs of the appeal involving the respondent RK. After the hearing the Commonwealth Deputy Director of Public Prosecutions advised that the same offer applied in relation to the appeal involving the respondent LK. Neither offer extended to the costs of the respondents' notices of contention. The costs of the appeals, apart from those occasioned in respect of the notices of contention, should be borne by the Crown. No costs orders should be made in relation to the notices of contention.

GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ.

Introduction

80 On 24 December 2003 a fraudulent set of instructions purporting to be those of the Commonwealth Superannuation Scheme's Fund Manager was transmitted by facsimile to its banker, JP Morgan. The instructions directed JP Morgan to transfer a sum in the order of $150 million to four nominated overseas bank accounts. Acting on the instructions JP Morgan transferred an amount of approximately $25 million to a bank account in Switzerland which was operated by the respondent in the second appeal, RK. Before these events, the respondent in the first appeal, LK, who was acting at the request of a third man, RM, had approached RK and asked if his Swiss bank account could be used for the transfer of funds from Australia. RK had agreed to the proposal. Following the transfer of the money to RK's account there were frequent communications between the three men, which culminated on 30 December in a direction by RK to his Swiss banker to transfer 23 million Swiss francs to an account with a bank in New York. On the same day the Swiss bank received advice from JP Morgan that the funds in RK's account were the subject of a fraud and should be returned. The funds were not transferred in accordance with RK's instruction.

81 It is not said that either LK or RK was a party to the fraud or that either had knowledge of it. There is evidence upon which it is open to find that LK and RK were reckless as to the circumstance that the money transferred to RK's Swiss bank account was proceeds of crime.

82 It is an offence against s 400.3(2) of the *Criminal Code* (Cth) ("the Code")[175] for a person to deal with money that is proceeds of crime being reckless as to that circumstance. A person is reckless as to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances that are known to him or her, it is unjustifiable to take the risk[176]. Engaging in a banking transaction relating to money is a dealing with money for the purposes of the offences created in s 400.3[177].

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175 *Criminal Code Act* 1995 (Cth), s 3.

176 Code, s 5.4(1).

177 Code, s 400.2(1)(a)(iii).

83 Neither of the respondents was charged with the substantive offence under s 400.3(2). The Director of Public Prosecutions of the Commonwealth, who then prosecuted on behalf of the Queen, determined to charge them jointly with conspiring to commit such an offence. Conspiracy under the Code is an offence that is confined to the agreement of two or more persons to commit an offence[178]. The particular question raised by these prosecution appeals is whether an agreement to deal with money made by persons who are aware of a substantial and unjustifiable risk that the money is, or will be, proceeds of crime is an agreement to commit an offence.

The procedural history

84 Proceedings on indictment were brought in the District Court of New South Wales (Sweeney DCJ). The indictment jointly charged the respondents as follows:

> "… between about 1 December 2003 and about 1 February 2004 at Sydney in the State of New South Wales and elsewhere [they] did conspire with each other, [RM] and with divers other persons to deal with money to the value of $1,000,000 or more being the proceeds of crime where those persons who were to deal with the money pursuant to the conspiracy were reckless as to the fact that the money was the proceeds of crime."

85 Before the jury was sworn LK and RK demurred to the indictment, contending that it did not disclose an offence that was known to the law[179]. Sweeney DCJ dismissed the demurrer. At the close of the Crown case LK and RK each sought an acquittal by direction, submitting that there was no case to answer. Sweeney DCJ upheld these applications and directed the jury to acquit in each case. She held that, "on the case the Crown has presented", the offence charged in the indictment was "bad at law or unknown to law". Her reasons were delivered on the morning following the applications and this may explain some lack of clarity in the statement of them. The conclusion expressed in the second of the quotations set out above is qualified by the first. When the reasons are read as a whole, it appears that her Honour upheld the applications because the

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178 Code, s 11.5.

179 *Criminal Procedure Act* 1986 (NSW), s 17.

Crown did not establish, in its case against either respondent, that when he entered the agreement he knew or intended that the money the object of the conspiracy was, or would be, proceeds of crime. In so concluding, her Honour applied the decision of the New South Wales Court of Criminal Appeal in *R v Ansari*[180]. She correctly understood that case to hold that an indictment charging an accused under s 11.5 with conspiring to commit an offence which has recklessness as its fault element is not bad at law, on the basis that it was open to the prosecution to "rel[y] on intention or knowledge to prove the element of recklessness or where a third party is to commit the offence the object of the conspiracy".

Issues raised in the proceedings

86 The District Court had exercised federal jurisdiction. As the Chief Justice explains in his reasons, there was a threshold jurisdictional question respecting the appeals against the directed verdicts of acquittal. His Honour concludes, and we agree, that the jurisdiction of the Court of Criminal Appeal derived from s 68(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") read with s 107 of the *Crimes (Appeal and Review) Act* 2001 (NSW) ("the Crimes (Appeal and Review) Act") provides a right of appeal from a directed acquittal involving a question of law alone.

87 The Crimes (Appeal and Review) Act also provides (s 111(1)(b)) that a person must not publish any matter having the effect of identifying an acquitted person who is the subject of such an appeal. This has been taken to be a matter of procedure picked up by s 68(1) of the Judiciary Act in the appeal to the Court of Criminal Appeal. On this footing the respondents, and RM, were not referred to by name in the reasons of that Court. The same procedure, without any argument to the contrary, has been adopted in this Court and is followed in these reasons.

88 By notices of contention the respondents submitted that, as a matter of its construction, s 107 of the Crimes (Appeal and Review) Act was not picked up by s 68(2) of the Judiciary Act in respect of their acquittals because, given the chronology, s 107 lacked a necessary retrospective operation. They also contended that s 80 of the Constitution denied any operation of s 68(2), which picks up s 107, because to do so would be to deny an essential attribute of trial by

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180 (2007) 70 NSWLR 89 ("*Ansari*").

jury. The Chief Justice explains why the submissions by the respondents on these issues should not be accepted and we agree with his Honour's reasons.

89 There remain the appeals, which raise issues respecting the construction and operation of the Code. The appellant's case, on which it failed in the Court of Criminal Appeal, was that Sweeney DCJ erred in her interpretation of the decision in *Ansari*. Each of the parties before that Court appears to have accepted that *Ansari* correctly stated the law (save in one respect as contended by the respondents) and no application was made to re-open the decision. The Court of Criminal Appeal (Spigelman CJ, Grove and Fullerton JJ concurring) held that Sweeney DCJ's decision was correct[181].

90 The appeals are brought by special leave against the order of the New South Wales Court of Criminal Appeal upon a single ground, which contends that it fell into error in the interpretation of s 11.5 of the Code. In particular, the appeals are said to raise an issue as to whether s 11.5(2)(b) requires that the prosecution prove intention in relation to each physical element of the substantive offence, even if the fault element prescribed for that offence is a lesser fault element, such as recklessness. As these reasons will show, it was incumbent on the prosecution to prove intention in relation to each physical element of the offence particularised as the object of the conspiracy. It follows that the appeals must be dismissed.

An issue concerning the identification of the elements of the offence

91 The framing of the special leave question by reference to s 11.5(2)(b) reflects a controversy between the appellant and the respondents concerning the elements of the offence of conspiracy. The appellant contends that the elements of the offence are wholly contained in s 11.5(1), whereas the respondents contend that the elements are to be found in s 11.5(2). The resolution of this question is not determinative of the outcome of the appeals because on either view it was incumbent on the prosecution to prove that the respondents intended that the offence particularised in the indictment be committed. However, since the identification of the elements of the offence is of practical importance in the conduct of trials, and since the Court has had the benefit of full argument, the question is addressed later in these reasons. As will appear, the elements of the offence are found in s 11.5(1).

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181 *R v RK and LK* (2008) 73 NSWLR 80 at 94 [70] ("*RK and LK*").

92 It is convenient at this point to set out the provisions of s 11.5 in full.

"**11.5 Conspiracy**

(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the *Crimes Act* 1914.

(2) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(2A) Subsection (2) has effect subject to subsection (7A).

(3) A person may be found guilty of conspiracy to commit an offence even if:

(a) committing the offence is impossible; or

(b) the only other party to the agreement is a body corporate; or

(c) each other party to the agreement is at least one of the following:

(i) a person who is not criminally responsible;

(ii) a person for whose benefit or protection the offence exists; or

(d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(4) A person cannot be found guilty of conspiracy to commit an offence if:

(a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or

(b) he or she is a person for whose benefit or protection the offence exists.

(5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:

(a) withdrew from the agreement; and

(b) took all reasonable steps to prevent the commission of the offence.

(6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

(7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given."

The appellant's submissions

93 The appellant complains that Spigelman CJ wrongly elevated the requirement of s 11.5(2)(b) to the necessity of proof of intention in respect of

each physical element of the substantive offence regardless of the fault element that the law creating the substantive offence specifies. The submission misconceives his Honour's reasoning. Spigelman CJ held that the offence-creating provision is s 11.5(1)[182]. His Honour characterised ss 11.5(2), (3), (4) and (5) as "particular requirements of a finding of guilt"[183], which, together with the discretion that is conferred by s 11.5(6), are reflective of decisions and debates concerning the application of the offence of conspiracy at common law[184]. Spigelman CJ's analysis of the law creating the offence is consistent with the analysis in *Ansari*[185]. As these reasons will show, the analysis is correct.

94 Spigelman CJ's conclusion, that the Crown case as presented could not succeed, was based on his view that the words "to commit an offence" in s 11.5(1) and the words "intended that an offence would be committed" in s 11.5(2)(b) are to be interpreted by reference to the common law[186]. His Honour said that "[a] person cannot be found guilty of an offence under s 11.5(1) unless s/he knows the facts that make the act or acts unlawful"[187]. In coming to the latter conclusion his Honour took into account the decisions that are discussed in Howie J's judgment in *Ansari*[188]. These include *Churchill v Walton*[189] and

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182 *RK and LK* (2008) 73 NSWLR 80 at 91 [50].

183 *RK and LK* (2008) 73 NSWLR 80 at 91 [50].

184 *RK and LK* (2008) 73 NSWLR 80 at 91 [50].

185 (2007) 70 NSWLR 89 at 91 [1] per Simpson J, 105 [63] per Howie J, 124 [150] per Hislop J. Cf *United States of America v Griffiths* [2004] FCA 879 at [75]-[76] per Jacobson J, although the issue does not appear to have been raised in that case.

186 *RK and LK* (2008) 73 NSWLR 80 at 93 [60].

187 *RK and LK* (2008) 73 NSWLR 80 at 93 [60].

188 (2007) 70 NSWLR 89 at 106-108 [68]-[76].

189 [1967] 2 AC 224 ("*Churchill*").

Kamara v Director of Public Prosecutions[190]. In particular, Spigelman CJ relied on the statement of the principle in *Giorgianni v The Queen*[191]:

> "There are, however, offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and conspiracy is another. And we think the offences of aiding and abetting and counselling and procuring are others. … The necessary intent is absent if the person alleged to be a secondary participant does not know or believe that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence. He need not recognize the criminal offence as such, but his participation must be intentionally aimed at the commission of the acts which constitute it. … Intent is required and it is an intent which must be based upon knowledge or belief of the necessary facts."

95 In the appellant's written submissions it is said that Spigelman CJ's conclusion that the references to "conspiracy" in the Code were intended to be "fixed by the common law"[192] evidences a failure to analyse the provisions of s 11.5 in accordance with settled principle respecting the interpretation of codes.

The interpretation of the Code

96 Chapter 2 of the Code is expressed to codify the general principles of criminal responsibility under the laws of the Commonwealth and to contain all such principles that apply to any offence irrespective of how the offence is created[193]. Professors Pearce and Geddes in their book *Statutory Interpretation in Australia* comment that[194]:

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190 [1974] AC 104 ("*Kamara*").

191 *RK and LK* (2008) 73 NSWLR 80 at 92 [57]-[58], citing *Giorgianni v The Queen* (1985) 156 CLR 473 at 505, 506-507 per Wilson, Deane and Dawson JJ; [1985] HCA 29 ("*Giorgianni*").

192 *RK and LK* (2008) 73 NSWLR 80 at 91 [49].

193 Code, s 2.1.

194 Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 273-274 [8.8].

> "The main issue relating to the interpretation of codifying statutes is whether or not it is possible to have regard to either the case law or the prior statutes that have been superseded by the code. The theoretical idea of a code is that it replaces all existing law and becomes the sole source of the law on the particular topic. This theory assumes that the code is in no way ambiguous. It also fails to contemplate the notion that expressions may be used that have an accepted legal meaning and that meaning may not be specifically set out in the code."

97 It is the last-mentioned observation that is apt in considering this aspect of the appellant's complaint. The words "conspires", "conspiracy" and "overt act" each had an established meaning in the criminal law at the time of the enactment of the Code. None is defined within the Code. The principle that the appellant calls in aid, that a code should be construed according to its natural meaning and without any presumption that it was intended to do no more than to re-state the existing law[195], is qualified with respect to the adoption in a code of a word or expression having an established meaning under the pre-existing law[196]. A number of the relevant authorities are referred to by Spigelman CJ in his discussion of the topic[197]. To these may be added the observations of Brennan J in *Boughey v The Queen*[198]:

> "It is erroneous to approach the Code [the *Criminal Code* (Tas)] with the presumption that it was intended to do no more than restate the existing law but when the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the

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195 *Brennan v The King* (1936) 55 CLR 253 at 263 per Dixon and Evatt JJ; [1936] HCA 24.

196 *Vallance v The Queen* (1961) 108 CLR 56 at 75-76 per Windeyer J; [1961] HCA 42; *Mamote-Kulang v The Queen* (1964) 111 CLR 62 at 76 per Windeyer J; [1964] HCA 21; *Stuart v The Queen* (1974) 134 CLR 426 at 437 per Gibbs J; [1974] HCA 54; *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 22 per Mason J; [1975] HCA 6; *R v Barlow* (1997) 188 CLR 1 at 19 per McHugh J; [1997] HCA 19; *Bank of England v Vagliano Brothers* [1891] AC 107 at 145 per Lord Herschell.

197 *RK and LK* (2008) 73 NSWLR 80 at 90-91 [44]-[52].

198 (1986) 161 CLR 10 at 30-31; [1986] HCA 29.

> common law including decisions subsequent to the Code's enactment. The meaning of the words and phrases to be found in a Code is controlled by the context in which they are found but when the context does not exclude the common law principles which particular words and phrases impliedly import, reference to those common law principles is both permissible and required." (citations omitted)

98 Spigelman CJ's interpretation of s 11.5 was influenced by a consideration of the legislative history and extrinsic material[199]. It is appropriate to refer to both before returning to the appellant's further challenge to it.

The legislative history

99 The enactment of the Code followed a lengthy process of review of the criminal law of the Commonwealth and of the principles of criminal responsibility[200]. One impetus for this appears to have come from the growth of Commonwealth criminal law and an anomaly that this phenomenon produced in the prosecution of offences created under statutes other than the *Crimes Act* 1914 (Cth). Prior to the enactment of the *Criminal Code Act* 1995, the *Crimes Act* applied the principles of the common law with respect to criminal liability in relation to offences against that Act[201]. However, in the case of offences created by other Commonwealth statutes the principles governing criminal liability were those of the State or Territory in which the offence was prosecuted[202]. The general principles of criminal responsibility under the common law differ from the principles of criminal responsibility that are stated in Sir Samuel Griffith's

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199 *RK and LK* (2008) 73 NSWLR 80 at 89-90 [38]-[39], 91 [51]: see *Acts Interpretation Act* 1901 (Cth), s 15AB.

200 In June 1984 the then Attorney-General requested Justice Watson to undertake a comprehensive review of the criminal law of the Commonwealth. His Honour's preliminary report, delivered on 14 July 1986, contained a draft Criminal Code. Before the completion of the review, his Honour's work appears to have been overtaken by the establishment of a Committee chaired by Sir Harry Gibbs, of which Justice Watson was a member, which was requested by the then Attorney-General to review the criminal law of the Commonwealth.

201 *Crimes Act* 1914 (Cth), s 4.

202 *Judiciary Act* 1903 (Cth), s 80.

draft code ("the Griffith Code")[203], upon which the criminal codes of a number of Australian jurisdictions are based[204]. As a result, criminal liability for many Commonwealth offences was susceptible of varying application depending upon the jurisdiction in which the offence was prosecuted. The Committee chaired by Sir Harry Gibbs, which was charged with reviewing the criminal law of the Commonwealth, addressed this unsatisfactory state of affairs in its Interim Report dealing with the principles of criminal responsibility ("the Gibbs Committee Report")[205]. The Committee recommended the codification of all the relevant principles of criminal responsibility in order to achieve uniformity in the prosecution of Commonwealth offences throughout Australia. The Committee expressed the hope that codification of these principles would make the law more clear and certain[206]. It observed that codification need not involve "radical reform" and that its proposals were intended generally to re-state existing principles while at the same time filling gaps, removing obscurities and correcting anomalies[207].

100 The Gibbs Committee Report discussed the history of the offence of conspiracy under Commonwealth law. It noted that s 86 of the *Crimes Act* was expressed in terms that made it an offence for a person "who conspires with another" to effect a prescribed purpose[208]. The drafting mirrored that of the Griffith Code, which made it an offence for a person who "conspires with another" to commit any crime or to effect certain other purposes[209]. In neither the *Crimes Act* nor the Griffith Code was the word "conspires" defined. The Gibbs Committee concluded that the use of the word "conspires" in s 86 imported the

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203 Griffith, *Draft of a Code of Criminal Law*, (1897).

204 *Criminal Code Act* 1899 (Q); *Criminal Code Act Compilation Act* 1913 (WA); *Criminal Code Act* 1924 (Tas); *Criminal Code Act* 1983 (NT).

205 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990).

206 Gibbs Committee Report at 14 [3.12].

207 Gibbs Committee Report at 14 [3.12].

208 Gibbs Committee Report at 355 [34.1].

209 Griffith, *Draft of a Code of Criminal Law*, (1897), ss 565-568; *Criminal Code* (Q), ss 541-543.

common law, save in the respects that were expressly dealt with by the section[210]. The adoption of the words "conspires" and "conspiracy" in s 11.5(1), without definition, is to be understood against this background.

101 Following the publication of the Gibbs Committee Report the Standing Committee of Attorneys-General established a Criminal Law Officers Committee to advise on a model uniform criminal code[211]. The Committee, which later came to be known as the Model Criminal Code Officers Committee ("the MCCOC"), commenced its work by addressing the general principles of criminal responsibility. It reviewed the Gibbs Committee Report, the decisions of Australian and overseas courts, legislation in Australian and overseas common law jurisdictions and submissions received from interested individuals and organisations. Its final report ("the MCCOC Report")[212], which was published in December 1992, included a draft of a chapter for a criminal code stating the general principles of criminal responsibility. The statement of those principles reflected a preference for the analysis of criminal liability by reference to the subjective, fault-based, common law and not the conceptual framework of the Griffith Code[213].

102 Chapter 2 of the Code is based upon the draft in the MCCOC Report. The commentary in the MCCOC Report states[214]:

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210 Gibbs Committee Report at 361 [34.11]. Cf *R v Cahill* [1978] 2 NSWLR 453.

211 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at ii. The history of the reform process is set out in Wells, "Criminal Codes for the Commonwealth and States?", (Winter 1991) 62 *Reform* 108; Donovan, "The Committee for Review of the Commonwealth Criminal Law", (1992) 66 *Australian Law Journal* 732.

212 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992).

213 In certain respects the Griffith Code provided the model for the Code. See for example Div 8 of Pt 2.3, which deals with intoxication.

214 MCCOC Report at 3.

> "The Code … will also apply the general principles of criminal responsibility to offences both in the Code and in other statutes. This does not mean that all preceding law will be irrelevant to interpretation of the Code. For example, English courts have drawn on the pre-existing law of larceny to assist interpretation of the English Theft Act 1968. That will also be possible under this Code."

103 Section 11.5 is contained in Pt 2.4 of Ch 2, which deals with extensions of criminal liability, by which are grouped attempts, complicity, innocent agency, incitement and conspiracy. Part 2.4 generally follows the MCCOC draft. Section 11.5 follows draft cl 405 in the MCCOC Report. The commentary in the MCCOC Report suggests that the provisions of the draft corresponding to ss 11.5(2), (3), (4) and (5) were intended to clarify, and in some instances to modify, the common law. The draft clauses corresponding to ss 11.5(6) and (8) were intended to provide procedural restrictions in the light of a concern that prosecutions for the crime of conspiracy under the pre-existing law had been susceptible of abuse[215].

104 The commentary to cl 405.1, which corresponds to s 11.5(2), is expressed to refer to the "fault elements" of the proposed offence[216]. It records the MCCOC's view that "intention was required and that recklessness would not suffice"[217]. Recklessness was said to be "foreign to an offence based wholly on agreement"[218]. The MCCOC draft was understood by its authors to accord with the common law as stated in *Gerakiteys v The Queen*[219] and with the views of the Gibbs Committee.

105 The Gibbs Committee's understanding of the mental element of the common law offence is summarised in its Report as follows[220]:

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215 MCCOC Report at 97. See also *R v Hoar* (1981) 148 CLR 32 at 38 per Gibbs CJ, Mason, Aickin and Brennan JJ; [1981] HCA 67.

216 The MCCOC Report does not analyse the proposed offence by reference to its constituent physical element or elements and any accompanying fault element.

217 MCCOC Report at 99.

218 MCCOC Report at 99.

219 (1984) 153 CLR 317; [1984] HCA 8 ("*Gerakiteys*").

220 Gibbs Committee Report at 393 [40.1].

> "The mental element necessary to constitute the crime of conspiracy has been said to be the intention to do the unlawful act which was the subject of the agreement[221], *but it seems more accurate to say that what is required is an intention to be a party to an agreement to do an unlawful act*[222] *and that such an intention must involve also an intention to carry out the unlawful purpose*[223]. *Such an intention on the part of the alleged conspirator is required notwithstanding that the agreement is to commit a crime which may be committed recklessly or a crime of strict liability.* It is not necessary that the parties to the agreement should have known that what was agreed was unlawful. If on the facts known to them what they agreed to do was an unlawful act it is no excuse that they did not know that it was unlawful; on the other hand, if on the facts known to them what they agreed would have been lawful they are not rendered guilty by the existence of other facts, of which they did not know, that gave a criminal character to the act agreed upon[224]." (emphasis added)

106 It may also be noted that the Gibbs Committee recommended that the criminal law of the Commonwealth should make it clear that the mental element required to commit a crime of conspiracy is an intention on the part of the conspirators to agree to commit an offence and that the offence should be committed[225].

107 Spigelman CJ's conclusion that the words "conspires" and "conspiracy" in s 11.5(1) are to be understood as fixed by the common law subject to express statutory modification is to be accepted. Contrary to the appellant's written submission it involves no departure from principle. These are words that had an established meaning within the criminal law at the time the Code was enacted. Their use, without definition, in the statement of the Code offence was intended to be understood by reference to that legal meaning. On the hearing of the

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221 *Director of Public Prosecutions v Nock* [1978] AC 979.

222 *Churchill* [1967] 2 AC 224.

223 Cf Archbold, *Criminal Pleading, Evidence and Practice*, 43rd ed (1988) at [28-7].

224 *Churchill* [1967] 2 AC 224.

225 Proposed s 7D of the *Crimes Act* 1914: Gibbs Committee Report at 427-428 [49.1] and Pt IX.

appeals senior counsel for the appellant accepted so much. However, the appellant did not accept Spigelman CJ's application of the common law principles stated in the joint reasons in *Giorgianni* regarding proof of the fault element of conspiracy to commit an offence of recklessness under the Code.

Proof of the intention to commit an offence

108 The appellant's challenge is to the conclusion that a person cannot be found guilty of an offence under s 11.5(1) unless he or she knows the facts that make the act or acts unlawful[226]. The appellant points out that *Giorgianni* was concerned with derivative, accessorial, liability. The appellant submits that a more refined analysis of what constitutes knowledge of, or belief in, the "necessary facts" is required with respect to proof of the intention to conspire to commit an offence of recklessness[227]. Since the conspiratorial agreement is to engage in conduct in the future, the question of whether a person intends to commit an offence is said to require consideration of what was within the scope of the agreement. On this analysis, if two (or more) persons agree to deal with money and each has in contemplation that the carrying out of their agreement may involve dealing with money that is, or will be, proceeds of crime and nonetheless they agree to deal with the money, it is open to conclude that each possessed sufficient knowledge of, or belief in, the "necessary facts" to find as a fact that each intended that an offence be committed pursuant to the agreement.

109 In the appellant's submission, the reference in the joint reasons in *Giorgianni* to the intention required for liability in conspiracy does not address the issue presently raised. The same is said with respect to the decision in *Gerakiteys*. Conformably with these submissions, the appellant contends that the references in the Gibbs Committee Report and the MCCOC Report to the necessity for proof of intention are to the intentional entry into the conspiracy and not to the knowledge or belief that is required when the object of the conspiracy is an offence that has recklessness as its fault element. It is said to be "at least questionable" that the common law supports Spigelman CJ's conclusion with respect to conspiracies to commit offences of recklessness.

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226 *RK and LK* (2008) 73 NSWLR 80 at 93 [60].

227 *Giorgianni* (1985) 156 CLR 473 at 507.

110 The appellant's submission is unsupported by authority. As McHugh J observed in *Peters v The Queen*[228], it would seem to follow from *Gerakiteys* that, at common law, a person must intend to achieve the carrying out of the unlawful act and that it is not sufficient proof of a conspiracy that the person realised that the probable consequences of the agreed conduct might result in the performance of an unlawful act. His Honour referred to Professor Sir John Smith's view that "[r]ecklessness as to circumstances of the actus reus is not a sufficient mens rea on a charge of conspiracy to commit a crime even where it is a sufficient mens rea for the crime itself"[229].

111 The appellant's submissions referred to academic debate[230] and, in particular, to the opinion expressed by Professor Glanville Williams[231]:

> "Whether recklessness is sufficient for conspiracy probably varies with the result that is in view. Where an act when done would be criminally reckless, an agreement to do that act is probably a criminal conspiracy."

112 The only authority cited by Professor Williams in this connection is *R v Mawbey*[232], an old case concerning a conspiracy to pervert the course of justice. It provides little support for acceptance of the appellant's submission[233]. The

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228 (1998) 192 CLR 493 at 520 [66]; [1998] HCA 7.

229 Smith and Hogan, *Criminal Law*, 8th ed (1996) at 287.

230 Smith, "Conspiracy under the Criminal Law Act 1977 (2)", [1977] *Criminal Law Review* 638; Williams, "The New Statutory Offence of Conspiracy – I", (1977) 127 *New Law Journal* 1164; Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies", (2006) 59 *Current Legal Problems* 185.

231 Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 678 [216].

232 (1796) 6 TR 619 [101 ER 736].

233 In *Mawbey* the defendants, two justices of the peace, were charged with conspiracy to pervert justice. They had signed a certificate, for production in court, that a highway was in a state of sufficient repair. On a motion to arrest judgment the defendants submitted, inter alia, that the conspiracy was not properly charged because the averment in the indictment was that they knew that the road was out of repair at the time the certificate was produced in court but that the indictment was lacking an averment that they had such knowledge at the time they conspired to

(Footnote continues on next page)

decisions of the House of Lords in *Churchill*[234] and *Kamara*[235] are against acceptance of it. More recently the House of Lords considered the issue in *R v Saik*, a case having factual similarities to the present[236]. The accused was charged with the statutory offence of conspiracy under s 1 of the *Criminal Law Act* 1977 (UK). Section 1(2) provides that where liability for an offence may be incurred without knowledge of a fact or circumstance, a person shall not be guilty of conspiring to commit that offence unless he and at least one other party to the agreement intend or know that that fact or circumstance will exist at the time when the conduct the subject of the agreement is to take place. Accordingly, the decision does not afford direct assistance in resolving the issue raised by these appeals. However, in the context of the appellant's submission (as to the mental element of the common law offence of conspiracy to commit a crime of recklessness) it is to be observed that Lord Nicholls of Birkenhead described s 1(2) of the English statute as reflecting the common law enunciated in *Churchill*[237].

113 The suggestion that the Gibbs Committee and the MCCOC failed to address the issue of conspiracies to commit crimes of recklessness should be rejected. It is addressed in terms in the second part of the highlighted extract from the Gibbs Committee Report that is set out at [105] above. The Gibbs Committee was cognisant of the United Kingdom Law Commission draft Criminal Code, which proposed for the statutory offence of conspiracy that recklessness with respect to a circumstance suffice where it suffices for the offence itself. The relevant provisions of the English draft Criminal Code Bill

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produce it. Lord Kenyon CJ dismissed this challenge with the observation, "[b]ut I think that they should have known that the road was in repair before they agreed to certify that it was so": 6 TR 619 at 634 [101 ER 736 at 744]. The issue of the mens rea to support a charge of conspiracy was not addressed. In *R v Freeman* (1985) 3 NSWLR 303, it was held that conspiracy to pervert the course of justice requires that the intention to agree be accompanied by the intention to pervert justice.

234 [1967] 2 AC 224.

235 [1974] AC 104.

236 [2007] 1 AC 18.

237 [2007] 1 AC 18 at 33 [11], citing *Churchill* [1967] 2 AC 224. Lord Steyn agreed with Lord Nicholls of Birkenhead at 38 [38].

were set out in full in the Gibbs Committee Report[238]. The MCCOC noted that their draft differed with respect to the mental element of the offence from the draft Criminal Code Bill that was proposed by the United Kingdom Law Commission in 1989[239].

114 Spigelman CJ's analysis, that the common law offence of conspiracy requires that an accused person know the facts that make the proposed act or acts unlawful[240], should be accepted as an accurate statement of the law.

115 The appellant submits that, notwithstanding the position under the common law, textual and structural indications support its submission that, under the Code, the prosecution is not required to prove intention with respect to the physical element of the substantive offence where recklessness is the fault element for that offence. Firstly, the appellant notes that, while the Code specifically provides, with respect to attempts, that intention and knowledge are the fault elements in relation to each physical element of the offence

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238 Gibbs Committee Report at 364-365 [35.3], citing United Kingdom Law Commission, *A Criminal Code for England and Wales*, Law Com No 177, (1989), vol 1 at 63-64. Clause 48 of the draft Criminal Code Bill provided:

> "(1) A person is guilty of conspiracy to commit an offence or offences if –
>
> (a) he agrees with another or others that an act or acts shall be done which, if done, will involve the commission of the offence or offences by one or more of the parties to the agreement; and
>
> (b) he and at least one other party to the agreement intend that the offence or offences shall be committed.
>
> (2) For the purposes of subsection (1) an intention that an offence shall be committed is an intention with respect to all the elements of the offence (other than fault elements), except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.
>
> …"

239 MCCOC Report at 101.

240 *RK and LK* (2008) 73 NSWLR 80 at 92 [55].

attempted[241], it makes no such provision with respect to conspiracy. Understood against the context of the legislative history of the Code, this distinction does not support the appellant's contention. A discussion draft released by the MCCOC included recklessness as a fault element for the offence of attempt in cases in which recklessness would suffice as the fault element of the completed offence[242]. Several submissions received by the MCCOC opposed this aspect of the draft. The MCCOC accepted these criticisms and deleted recklessness with respect to attempt, complicity and incitement from its draft[243].

116 Secondly, the appellant identifies a number of provisions of the Code that create offences of tiered seriousness. Section 400.3 is such a provision. It creates three tiers of offences, with two offences in each tier. The most serious tier involves dealing with money or property believed to be proceeds of crime or intended to become an instrument of crime. The least serious involves dealing with money or property in circumstances in which the accused is negligent as to the fact that the money or property is proceeds of crime or that there is a risk that it will become an instrument of crime. The appellant submits that it is anomalous if, for practical purposes, only the most serious of such tiered offences is susceptible of successful prosecution as a conspiracy. This consideration does not provide a sound reason for holding that proof of the intent "to commit an offence" under s 11.5 embraces the intentional agreement that an act be done that may, or may not, be criminal. Beyond this observation, it is not useful to embark on a wider analysis of other offences under the Code, as the appellant's submissions invited the Court to do. The question raised by these appeals is the correctness of the ruling that, on the evidence adduced at the respondents' trial, the prosecution must fail because it was not able to establish that the respondents intended to commit the offence particularised in the indictment.

Resolution – proof of the intention to commit an offence

117 The offence of conspiracy under the Code is confined to agreements that *an* offence be committed. A person who conspires with another to commit an offence is guilty of conspiring to commit *that* offence. It was incumbent on the prosecution to prove that LK and RK intentionally entered an agreement to

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241 Code, s 11.1(3).

242 MCCOC Report at 77.

243 MCCOC Report at 77.

commit the offence that it averred was the subject of the conspiracy. This required proof that each meant to enter into an agreement to commit that offence[244]. As a matter of ordinary English it may be thought that a person does not agree to commit an offence without knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence (as distinct from having knowledge of, or belief in, the legal characterisation of the conduct). This is consistent with authority with respect to liability for the offence of conspiracy under the common law. Subject to one reservation, it is how the fault element of the offence created in s 11.5(1) operates. The reservation concerns the application of s 11.5(2)(b). As these reasons will show, this provision informs the meaning of "conspires" in sub-s (1) by making clear that at least one other party to the agreement must have intended that an offence be committed pursuant to the agreement. It also speaks to proof of the accused's intention. The reservation arises because s 11.5(2)(b) is subject to s 11.5(7A), which applies any special liability provisions of the substantive offence to the offence of conspiring to commit that offence[245]. A special liability provision includes a provision that absolute liability applies to one or more (but not all) of the physical elements of an offence[246]. Proof of the intention to commit an offence does not require proof of knowledge of, or belief in, a matter that is the subject of a special liability provision.

118 The respondents were charged with having conspired to commit the offence provided in par (b)(i) of s 400.3(2), which provides:

> "(2) A person is guilty of an offence if:
>
> (a) the person deals with money …; and
>
> (b) either:

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244 Code, s 5.2(1).

245 Sub-sections (2A) and (7A) were introduced into the Code by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth).

246 The Dictionary to the Code provides that a "special liability provision" is a provision that absolute liability applies to one or more (but not all) of the physical elements of an offence or that in a prosecution for an offence it is not necessary to prove that the defendant knew a particular thing or that the defendant knew or believed a particular thing.

(i) the money … is proceeds of crime; or

…

(c) the person is reckless as to the fact that the money … is proceeds of crime …; and

(d) at the time of the dealing, the value of the money … is $1,000,000 or more."

119 It was not necessary for the prosecution to prove that LK and RK knew or believed that the money with which they proposed to deal had a value of $1,000,000 or more[247]. Relevantly, the offence the object of the conspiracy is one that criminalises the reckless dealing with money that *is* proceeds of crime. It is the second of these two physical elements of the offence to which it is necessary to attend.

120 It may be accepted that on the evidence given in the Crown case at the respondents' trial it would have been open to the jury to find the following facts:

- the respondents agreed to deal with the money in RK's Swiss bank account;
- at the time of their agreement each respondent was aware of a substantial and unjustifiable risk that the money that had been transferred to RK's account was proceeds of crime; and
- their agreement was to deal with the money *even if* it was proceeds of crime.

121 Senior counsel for the appellant accepted that his argument is captured by the proposition that A and B commit the offence of conspiracy under s 11.5(1) if they intentionally agree that one or other of them, or a third party, C, will do acts, A and B taking the substantial and unjustifiable risk that the acts, if carried out, will be criminal. It is the intention that the acts will be done *even if* the doing of them is criminal that is central to the appellant's argument.

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247 Section 400.3(4) of the Code provides that "[a]bsolute liability applies to paragraphs … (2)(d) …".

122 The prosecution case at its highest was that the respondents intentionally entered an agreement to deal with money whether or not it was proceeds of crime. The matters upon which the appellant relies as providing the factual basis for the inference of intent, namely the respondents' awareness that the money may be proceeds of crime and their agreement to deal with it *even if* it was, expose the flaw in the analysis. At the time the agreement was made the money may, or may not, have been (or have become) proceeds of crime. The agreement, if carried out in accordance with LK's and RK's intention, may not have involved a dealing with money that is proceeds of crime. It follows that, on the evidence given at the trial, it was not open to find that either respondent intentionally entered an agreement to commit the offence that is said to have been the object of the conspiracy.

123 It may be that a different analysis applies if the offence the object of the conspiracy is an agreement to deal with money (or other property) that will become an instrument of crime[248]. This is because the factual element of the substantive offence is defined in terms of risk; there is no equivalent to the element in s 400.3(2)(b)(i) that the money *be* proceeds of crime. It is, however, not necessary to explore these questions here.

124 Before addressing the controversy concerning the elements of the offence of conspiracy it is appropriate to say something about the scheme of Pt 2.2.

The scheme of Pt 2.2

125 Part 2.2 of Ch 2 deals with the elements of offences. The analysis that it provides is generally consistent with the common law in that criminal liability is dependent upon proof of physical elements and accompanying subjective, fault, elements (subject to the provision for offences of absolute and strict liability in Div 6 of Pt 2.2).

126 A physical element of an offence may be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs[249]. A fault element for a particular physical element of an offence may be intention, knowledge, recklessness or negligence[250]. Each is defined in Div 5 of Pt 2.2. However, the

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248 Code, s 400.3(2)(b)(ii).

249 Code, s 4.1(1).

250 Code, s 5.1(1).

law creating an offence may specify a fault element for a physical element other than one of those that is defined in Div 5[251].

127 Under the common law, identification of the particular mental state that the prosecution is required to prove in order to establish mens rea (the fault element of the offence) may be the subject of controversy. The scheme of Pt 2.2 is intended to avoid uncertainty in this respect. Under the Code, default fault elements attach to physical elements of an offence where the law creating the offence does not specify a fault element for a physical element[252] (subject to express provision that there is no fault element for the physical element[253]). Intention is the default fault element for a physical element of conduct[254] and recklessness is the default fault element for a physical element consisting of a circumstance or a result[255].

The elements of the offence

128 LK submits that "the elements of an offence", as that expression is used in Ch 2, must be understood as including "the irreducible factual matters, which the prosecution must prove beyond reasonable doubt in order to sustain a conviction". RK adopts this submission. The respondents' submissions draw on the scheme of Ch 2 and, in particular, of ss 3.1 and 3.2. These sections relevantly provide:

> "**3.1 Elements**
>
> **(1) An offence consists of physical elements and fault elements.**
>
> …

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251 Code, s 5.1(2).

252 Code, s 5.6.

253 Code, s 3.1(2).

254 Code, s 5.6(1).

255 Code, s 5.6(2).

3.2 Establishing guilt in respect of offences

> In order for a person to be found guilty of committing an offence the following must be proved:
>
> (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
>
> (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element."

129 The provisions of Pt 2.6 of Ch 2 should also be noted. It is there provided that the legal burden of proof of every element of an offence that is relevant to the guilt of the accused is on the prosecution[256]. Discharge of that burden is beyond reasonable doubt[257] (subject to the law creating the offence specifying a different standard of proof[258]).

130 In the respondents' submission, the opening words of s 11.5(2) pick up those of s 3.2. The evident intent, so it is said, in s 11.5(2) is to state the elements of the offence: each paragraph specifies a factual matter that the prosecution is required to prove beyond reasonable doubt in order to establish guilt.

131 The identification of the elements of an offence directs attention to "the law creating the offence"[259]. In written submissions, LK acknowledges that the offence of conspiracy is created in s 11.5(1) but maintains that the elements of the offence are those stated in s 11.5(2). Section 11.5(1) makes it an offence to conspire with another person to commit an offence punishable by imprisonment for more than 12 months or by a fine of 200 penalty units or more ("a non-trivial offence"). It reads naturally as the law creating the offence. It is by the adoption of the word "conspires", with its established legal meaning, that the drafters of

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256 Code, s 13.1(1).

257 Code, s 13.2(1).

258 Code, s 13.2(2).

259 Code, ss 3.1, 3.2.

the Code chose to deal with questions that are not otherwise addressed in s 11.5. These may be taken to include the parties to the conspiracy and the sufficiency of their dealings to constitute the agreement[260]. Section 11.5(1) is the specification of a physical element of the offence, namely, conspiring with another person to commit a non-trivial offence. Central to the concept of conspiring is the agreement of the conspirators.

132 The reference in s 11.5(2)(a) to "an agreement" is to the agreement that is criminalised in s 11.5(1). Once this is understood, it is clear that s 11.5(2)(a) is not the specification of a physical element of the offence. The physical element of conduct involving entry into the agreement is specified in s 11.5(1). The "agreement" to which s 11.5(2)(b) refers is, again, the agreement that is criminalised in s 11.5(1). This reading, in relation to s 11.5(2)(b), is consistent with the general scheme of the Code. Under the Code, fault elements apply to physical elements of an offence. The fault elements of intention, knowledge and recklessness are defined by reference to particular physical elements whether of conduct, circumstance or result[261]. Part 2.2 makes no provision for the specification of a fault element that is not "for a physical element of [the] offence"[262]. Section 11.5(2)(b) does not specify a physical element to which the intention of which it speaks applies.

133 Paragraphs (a) and (b) of s 11.5(2) are epexegetical of what it is to "conspire" with another person to commit an offence within the meaning of s 11.5(1). Section 11.5(2)(b) looks to the time at which the agreement was entered, making clear that for a person to "conspire" under s 11.5(1) it is necessary that he or she and at least one other party to the agreement "must have intended" that an offence be committed pursuant to it. Together paragraphs (a) and (b) clarify, first, the two points made in the first sentence of the highlighted

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260 The agreement of the conspirators need not be attended by any formalities: *R v Orton* [1922] VLR 469 at 473 per Cussen J; *Gerakiteys* (1984) 153 CLR 317. See also Orchard, "'Agreement' in Criminal Conspiracy – 1", [1974] *Criminal Law Review* 297.

261 Code, ss 5.2, 5.3, 5.4. The fault element of negligence is defined in s 5.5 in terms that "[a] person is negligent with respect to a physical element of an offence …".

262 Code, ss 3.1, 3.2, 5.1, 5.6.

passage from the Gibbs Committee Report, extracted at [105] above[263], and, second, that the reach of the Code offence does not extend to an agreement to which the only parties are a single accused person and an agent provocateur[264]. Neither is the specification of an element of the offence within Pt 2.2.

134 Section 11.5(2)(c) more squarely raises the respondents' contention that a factual matter stated as a condition of guilt is necessarily an element of the offence under the Code. This paragraph requires, as a condition of a finding of guilt, proof of the doing of an act in furtherance of the conspiracy by at least one party to it. It reflects the legislature's acceptance of the MCCOC's view that a "simple agreement to commit a criminal offence without any further action by any of those party to the agreement [is] insufficient to warrant the attention of the criminal law"[265]. The MCCOC Report rejected criticism that requirement of proof of an overt act is too vague. It recorded its understanding that such a requirement works well in those American jurisdictions that have adopted it[266]. In this respect it noted the provisions of the United States Model Penal Code[267]. It may be observed that the like provision under the Model Penal Code conditions conviction as distinct from guilt. No reference is made to this distinction in the MCCOC Report. It does not appear that the authors intended anything by it.

135 The requirement of s 11.5(2)(c) is that the accused or at least one other party to the agreement must have committed an overt act and it follows that, if it is the specification of a physical element of the offence, it is an element of circumstance or, perhaps, result. In either case Pt 2.2 would operate to apply the fault element of recklessness for this physical element[268]. On this analysis it

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263 See the discussion in *Peters v The Queen* (1998) 192 CLR 493 at 515-521 [55]-[66] per McHugh J.

264 This probably represents the position at common law: *Peters v The Queen* (1998) 192 CLR 493 at 518-519 [62] per McHugh J; *R v O'Brien* [1954] SCR 666; *R v Thomson* (1965) 50 Cr App R 1; *R v Kotish* (1948) 93 CCC 138.

265 MCCOC Report at 101.

266 MCCOC Report at 101.

267 American Law Institute, *Model Penal Code*, (1962), §5.03(5).

268 Code, s 5.6(2).

would be necessary for the prosecution to prove that the accused intentionally entered the agreement to commit an offence (the fault element for the physical element that is specified in s 11.5(1)) and that he or she was aware of the substantial and unjustifiable risk that a party to the conspiracy would do an act in furtherance of it (the fault element for the physical element specified in s 11.5(2)(c)).

136 Intentional entry into an agreement to commit an offence contrary to s 11.5(1) exposes a person to liability for conspiring to commit that offence should any party to the agreement do an act in furtherance of it. Section 11.5(5) provides a "defence" of withdrawal and in this respect may depart from the common law. At common law it was considered that as the offence of conspiracy is complete upon agreement there could be no defence of withdrawal[269]. Whether this remains so does not require consideration in these appeals[270]. Of present relevance is that under the Code a person who conspires with another to commit an offence is only relieved from criminal liability in circumstances in which he or she withdraws from the agreement before the commission of an overt act, and has taken all reasonable steps to prevent the commission of the offence[271].

137 Proof of recklessness requires consideration of whether, in the circumstances known to the accused, it was unjustifiable to take the risk. The risk with which we are presently concerned is that a party to the conspiracy will do an act in furtherance of the agreement. However, as the foregoing analysis shows, it is a risk assumed by the accused at the time of his or her intentional entry into the agreement. It follows that proof of the accused's recklessness with respect to the commission of an overt act by a conspirator adds nothing to the analysis of criminal liability. This suggests that the condition stated in s 11.5(2)(c) is not intended to be an element of the offence to which the provisions of Pt 2.2 apply.

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269 *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1888) 21 QBD 544 at 549 per Lord Coleridge CJ.

270 *White v Ridley* (1978) 140 CLR 342 at 348-350 per Gibbs J; [1978] HCA 38. See also the discussion in *Howard's Criminal Law*, 5th ed (1990) at 382.

271 Code, s 11.5(5).

138 As the analysis of s 11.5(2)(c) demonstrates, acceptance of the respondents' submission, that the Code precludes the prescription of a factual matter as a condition of guilt distinct from being an element of the offence, is productive of highly technical and somewhat artificial "elements" of the offence. This may be thought to be the antithesis of the simplification of the law which the Code was intended to introduce[272].

139 In *Director of Public Prosecutions (NT) v WJI*, speaking of the *Criminal Code* (NT), Gummow and Heydon JJ observed[273]:

> "There is thus wisdom in the statement by Dixon CJ in *Vallance*[274], adopted by Gaudron J in *Murray v The Queen*[275], that the operation of those provisions of the Codes dealing with general principles can be worked out only by specific solutions of particular difficulties raised by the precise facts of given cases."

140 The provisions of Pt 2.2 read with those of Pt 2.6 do not require acceptance of the respondents' analysis. This is because it is an analysis that gives no work to the words "the law that creates the offence" in ss 3.1 and 3.2. The provisions of s 11.5(4) may be characterised as conditioning a finding of guilt, albeit that they are expressed in negative terms. The Code does not preclude the prescription of a matter as a condition of a finding of guilt outside

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272 In the second reading speech of the Criminal Code Bill 1995 (Cth), Duncan Kerr, Minister for Justice, described the Code as "the beginning of one of the most ambitious legal simplification programs ever attempted in this country": Australia, House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1995 at 1335. The Senate Legal and Constitutional Legislation Committee, in its report on the Criminal Code Bill 1994 (Cth) and the Crimes Amendment Bill 1994 (Cth), described the Criminal Code Bill as having been intended, inter alia, "to make criminal law easier to understand, easier to find, and, in theory, more easily obeyed": Parliament of Australia, Senate Legal and Constitutional Legislation Committee, *Criminal Code Bill 1994 and Crimes Amendment Bill 1994*, Report, (December 1994) at 3 [1.11].

273 (2004) 219 CLR 43 at 54 [31]; [2004] HCA 47.

274 (1961) 108 CLR 56 at 61.

275 (2002) 211 CLR 193 at 198 [12]; [2002] HCA 26.

the law creating the offence. The task must begin with the identification of the law creating the offence.

141 The Court of Criminal Appeal's conclusion that the law creating the offence of conspiracy is s 11.5(1) is correct[276]. The offence has a single physical element of conduct: conspiring with another person to commit a non-trivial offence. The (default) fault element for this physical element of conduct is intention[277]. At the trial of a person charged with conspiracy it is incumbent on the prosecution to prove that he or she meant to conspire with another person to commit the non-trivial offence particularised as being the object of the conspiracy. In charging a jury as to the meaning of "conspiring" with another person, it is necessary to direct that the prosecution must establish that the accused entered into an agreement with one or more other persons and that he or she and at least one other party to the agreement intended that the offence particularised as the object of the conspiracy be committed pursuant to the agreement. Proof of the commission of an overt act by a party to the agreement conditions guilt and is placed on the prosecution to the criminal standard. The Code does not evince an intention in the latter respect to depart from fundamental principle with respect to proof of criminal liability[278].

Conclusion and orders

142 The Court of Criminal Appeal was correct to uphold Sweeney DCJ's ruling on each of the no case applications.

143 On the hearing of the appeals senior counsel for the appellant informed the Court of his instructions that the appellant would meet RK's costs of the appeal. The offer did not extend to the costs of RK's notice of contention, in respect of which it was submitted no order for costs should be made. The Commonwealth Deputy Director of Public Prosecutions, in a letter addressed to the Senior Registrar of the Court, advised that the Director takes the same position with respect to the other respondent, LK.

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276 *RK and LK* (2008) 73 NSWLR 80 at 91 [50] per Spigelman CJ, 94 [78] per Grove J, 94 [79] per Fullerton J. See also *Ansari* (2007) 70 NSWLR 89 at 105 [63] per Howie J, 124 [150] per Hislop J.

277 Code, s 5.6(1).

278 *R v Mullen* (1938) 59 CLR 124; [1938] HCA 12.

Gummow J
Hayne J
Crennan J
Kiefel J
Bell J

144 The appeals should be dismissed with costs, save for the costs occasioned by the notices of contention.

145 HEYDON J. The appeals should be dismissed and the appellant's arguments against that course should be rejected because the reasoning of the Court of Criminal Appeal was correct for the reasons necessary to support it given by Gummow, Hayne, Crennan, Kiefel and Bell JJ[279]. It follows that there is no need to consider the contentions which the respondents advanced for the view that, even if the Court of Criminal Appeal's reasoning were wrong, their acquittal should be upheld on other grounds. The costs orders proposed by the plurality should be made.

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279 At [90] and [92]-[122].