HIGH COURT OF AUSTRALIA

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

Matter No M102/2010

KEVIN JOHN DICKSON — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No M11/2009

KEVIN JOHN DICKSON — APPLICANT

AND

THE QUEEN — RESPONDENT

Dickson v The Queen [2010] HCA 30
22 September 2010
M102/2010 & M11/2009

ORDER

Matter No M102/2010

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 18 December 2008 and, in lieu thereof, order that:

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

(b) the appeal to that Court be allowed; and

(c) the presentment preferred against the appellant and his conviction entered on 21 February 2008 be quashed, and the sentence imposed on 17 April 2008 be set aside.

Matter No M11/2009

Application for special leave to appeal dismissed in relation to the remaining proposed grounds of appeal.

On appeal from the Supreme Court of Victoria

Representation

T F Danos with J E McLoughlin for the applicant (instructed by Tony Danos Solicitor) at the hearing on 27 July 2010

T F Danos with P D Herzfeld for the appellant/applicant (instructed by Tony Danos Solicitor) at the hearing on 31 August 2010

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

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with K C Morgan intervening on behalf of the Attorney-General of the Commonwealth in M102/2010 (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with S A McDonald intervening on behalf of the Attorney-General for the State of South Australia in M102/2010 (instructed by Crown Solicitor (SA))

CATCHWORDS

Dickson v The Queen

Constitutional law – Inconsistency between Commonwealth and State laws – Direct inconsistency – Appellant convicted under State law of conspiracy to steal property belonging to a company – Commonwealth law made conspiracy to steal property belonging to Commonwealth an offence – Property stolen belonged to Commonwealth within meaning of Commonwealth law – Whether State law inconsistent with Commonwealth law – Whether State law altered, impaired or detracted from operation of Commonwealth law – Discussion of indirect inconsistency and intention to cover the field.

Words and phrases – "conspiracy".

Constitution, s 109.
Crimes Act 1914 (Cth), s 4C.
Criminal Code (Cth), ss 11.5, 131.1, 261.1.
Crimes Act 1958 (Vic), ss 72, 321.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. On 21 February 2008 the appellant was convicted at a trial in the County Court of Victoria upon a presentment by the Director of Public Prosecutions of Victoria ("the Director"), who prosecuted on behalf of the Crown in right of Victoria[1]. The presentment stated the offence as conspiracy to steal contrary to s 321(1) of the *Crimes Act* 1958 (Vic) ("the Victorian Crimes Act"). Section 321(1) states:

> "Subject to this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will involve the commission of an offence by one or more of the parties to the agreement, he is guilty of the indictable offence of conspiracy to commit that offence."

2 A jury of 15 had been empanelled on 30 January 2008 but a jury of 12 had retired to consider their verdict, two jurors having been balloted off and one discharged for reason of illness. The *Juries Act* 2000 (Vic) ("the Juries Act") provides for the continuation of criminal trials with a reduced jury of no less than 10 jurors (s 44). It also provides in certain circumstances for a majority verdict where there has been failure to reach a unanimous verdict (s 46). In the events that happened, there was no occasion to invoke the provisions of s 46 at the trial of the appellant. But, as will appear, they have a significance for the issues on this appeal, given the unanimity required by s 80 of the Constitution in respect of trials upon indictment for offences against Commonwealth law[2].

3 The appellant had been a member of the Australian Federal Police and had worked as an excise officer in the Australian Taxation Office. The particulars of the offence stated that at Melbourne and divers other places in Victoria between 22 December 2003 and 20 January 2004 the appellant had conspired with three named persons "and/or" a person or persons unknown to the Director, and that they had agreed to pursue a course of conduct which would involve the commission by them of an offence, "namely to steal a quantity of cigarettes belonging to the Dominion Group (Vic.) Proprietary Limited". Section 72 of the

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1 *Public Prosecutions Act* 1994 (Vic), s 22(1); *Interpretation of Legislation Act* 1984 (Vic), s 38.

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

Victorian Crimes Act contains what the heading describes as the "Basic definition of theft". The section states:

> "(1) A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.
>
> (2) A person who steals is guilty of theft; and 'thief' shall be construed accordingly."

The term "property" includes money and all other real or personal property including things in action and other intangible property (s 71(1)). The phrase "belonging to" in s 72(1) is to be read with s 71(2), which stipulates that:

> "property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest)".

A person guilty of theft is liable to a maximum of 10 years imprisonment (s 74(1))[3]. This also is the maximum penalty upon conviction for a conspiracy to commit theft (s 321C(1)(a)). On 17 April 2008 the appellant was sentenced to imprisonment for five years and six months with a non-parole period of four years and six months.

4 The relevant and unchallenged evidence at the trial included the following. The Australian Customs Service was defined in s 4(1) of the *Customs Act* 1901 (Cth) ("the Customs Act")[4] as "Customs". It had a storage facility in Port Melbourne within the warehouse of Dominion Group (Vic) Pty Ltd ("Dominion"). The storage area was "leased by Customs", which paid storage fees. The storage area was padlocked and was not shared by Customs with anyone else. The keys were held in safekeeping at the investigations branch of Customs at other premises. The personnel of Dominion went into the storage area only with the authorisation of officers of Customs and to assist them. The warehouse itself was locked at night by a security gate accessible by a security

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3 See *Sentencing Act* 1991 (Vic), s 109(1).

4 The references to the Customs Act that follow are to Reprint No 14, dated 25 September 2002.

company and certain Dominion personnel. If Customs wished to have access out of hours it was necessary to pre-arrange a time with the personnel of Dominion.

5 On 24 December 2003 some 7,870,000 cigarettes were seized by Customs upon a warrant issued under s 203 of the Customs Act. One requisite ground for the issue of such a warrant was that there were reasonable grounds for suspicion that the goods were forfeited goods under that statute (s 203(1)(a)(i)). The cigarettes were located at a container x-ray facility. Section 204 of the Customs Act required that as soon as practicable the goods be taken to a place approved by a Collector of Customs as a place for storage of goods of that kind. After seizure the goods were transferred to the Dominion storage facility. Dominion issued a receipt dated 30 December 2003 for the receipt of 40 pallets in storage. On the morning of 20 January 2004 the cigarettes were removed from the storage area by cutting the padlock which secured it.

6 The trial judge directed the jury that they could assume that the cigarettes had been under the control of and thus belonged to Dominion. Importantly, the count upon which the appellant was convicted was not particularised in terms referring to property belonging to the Commonwealth. The respondent accepts that the prosecution was not conducted on any basis that there had been an offence against a law of the Commonwealth rather than, or as well as, the law of Victoria.

7 On 18 December 2008 the appellant's application for leave to appeal against his conviction and sentence was refused by the Court of Appeal of the Supreme Court of Victoria. In this Court, the appellant sought special leave to appeal upon the ground that the Court of Appeal erred in refusing him leave to appeal against the conviction and sentence. On 23 April 2010 the application, as to several of the proposed grounds, was dismissed by Gummow, Hayne and Crennan JJ. However, the remaining grounds were referred for further consideration by an enlarged Bench of this Court. Upon these grounds coming on for hearing, the appellant sought and obtained special leave to appeal on a ground based upon the operation of s 109 of the Constitution. The appeal was fully argued in advance of any further consideration of the balance of the special leave application. The balance of the special leave application must be dismissed if the appeal upon the constitutional point is successful.

8 Shortly expressed, the appeal to this Court is brought on the ground that conspiracy to steal the cigarettes was not an offence against the law of Victoria so that the presentment preferred against the appellant should have been quashed.

This conclusion is said to follow because (a) the cigarettes referred to in the presentment were property belonging to the Commonwealth to which the theft provision in s 131.1 of the *Criminal Code* (Cth) ("the Commonwealth Criminal Code")[5] applied, in respect of which the conspiracy provision in s 11.5 attached; and (b) by operation of s 109 of the Constitution, the relevant provisions of the Victorian Crimes Act were *pro tanto* invalid in the sense of "suspended, inoperative and ineffective"[6]. This issue was not raised at trial or in the Court of Appeal but, it being a constitutional point going to whether the appellant was charged with an offence known to law, no party or intervener suggested that it could not be taken for the first time on appeal to this Court[7].

9 Submissions in support of the respondent, asserting the lack of inconsistency, were presented by the Attorneys-General of the Commonwealth and for South Australia upon their interventions under s 78A of the *Judiciary Act* 1903 (Cth).

10 For the reasons which follow the submissions as to "direct inconsistency" which were made by the appellant should be accepted and the appeal allowed.

11 Chapter 2 of the Commonwealth Criminal Code, which includes s 11.5, is headed "General principles of criminal responsibility". Chapter 7, which includes s 131.1, is headed "The proper administration of Government". For the offence of theft, the maximum penalty is imprisonment for 10 years (s 131.1(1)). The property in question must be property which "belongs to" a "Commonwealth entity" (s 131.1(1)(b)), an expression which is defined in the Dictionary as including the Commonwealth itself and bodies established by a law of the Commonwealth, Customs being one such body[8]. The cigarettes in question in this prosecution belonged to the Commonwealth if, on 20 January 2004, they were in the "possession" of Customs (s 130.2(1)(a)). In this Court, the

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5 The references to the Commonwealth Criminal Code which follow are to Reprint No 3, dated 1 November 2004.

6 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 464-465; [1995] HCA 47.

7 *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60.

8 See *Customs Administration Act* 1985 (Cth), s 4(1).

respondent accepts that to have been the case. Further, for the purposes of the theft provisions in the Victorian Crimes Act, property is regarded as "belonging to" any person having "possession" of it (s 71(2)). Thus, if the Victorian provisions had a relevant valid operation, for those purposes the Commonwealth also had possession of the cigarettes on 20 January 2004.

12 The effect of s 11.5 of the Commonwealth Criminal Code is that the offence of conspiracy is committed by a person who conspires with another person to commit the offence under s 131.1, and the conspiracy offence is punishable as if the offence to which the conspiracy relates had been committed. Section 4G of the *Crimes Act* 1914 (Cth) ("the Commonwealth Crimes Act")[9] so operates that the offence of conspiracy in such a case is an indictable offence, to the trial of which s 80 of the Constitution attaches.

13 The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v The Commonwealth*[10] was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing*[11] as follows:

> "In *Victoria v The Commonwealth*[12], Dixon J stated two propositions which are presently material. The first was:
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> > 'When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.'
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> The second, which followed immediately in the same passage, was:

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9 The references to the Commonwealth Crimes Act that follow are to Reprint No 9, dated 1 January 2004.

10 (1937) 58 CLR 618 at 630; [1937] HCA 82.

11 (1999) 197 CLR 61 at 76-77 [28]; [1999] HCA 12. See also *Local Government Association of Queensland (Incorporated) v State of Queensland* [2003] 2 Qd R 354 at 373 [51]; *Loo v Director of Public Prosecutions* (2005) 12 VR 665 at 688 [40].

12 (1937) 58 CLR 618 at 630.

> 'Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.'
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> The second proposition may apply in a given case where the first does not, yet, contrary to the approach taken in the Court of Appeal, if the first proposition applies, then s 109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies."

14 The first proposition is often associated with the description "direct inconsistency", and the second with the expressions "covering the field" and "indirect inconsistency". The primary submission of the appellant is that the first proposition applies to the interaction in the present case between the State and Commonwealth conspiracy laws so that this is an instance of "direct inconsistency".

15 The passage in *Telstra* which is set out above was introduced by a discussion of earlier authorities which included the following[13]:

> "Further, there will be what Barwick CJ identified as 'direct collision' where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided[14]. Thus, in *Australian Mutual Provident Society v Goulden*[15], in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the *Life Insurance Act* 1945

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13 (1999) 197 CLR 61 at 76 [27].

14 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258-259; see also at 270 per Taylor J, 272 per Menzies J; [1968] HCA 2; *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 406; [1977] HCA 51; *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 335, 338-339; [1987] HCA 13.

15 (1986) 160 CLR 330 at 339; [1986] HCA 24.

(Cth)'. A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question[16]. But that is not this case."

16 It was held in *Telstra* that because the compensation payable to an injured worker under State legislation differed in a number of respects from that payable to the worker under federal law, the State law had the effect of qualifying, impairing and, in some respects, negating the effect of the federal law and that s 109 of the Constitution operated to the extent of that inconsistency.

17 In *Blackley v Devondale Cream (Vic) Pty Ltd*[17], where Barwick CJ referred to "direct collision", it may be noted that the litigation had been instituted by way of a charge upon information laid by Blackley, an inspector, that the employer had failed to pay an employee at the appropriate rates under the *Labour and Industry Act* 1958 (Vic); the issue in the High Court turned upon the effect to be given by s 109 to an award made under the *Conciliation and Arbitration Act* 1904 (Cth) which imposed lesser obligations on the employer and made these enforceable both civilly and criminally under Pt VI of the federal statute[18].

18 Three further points should be made at this stage.

19 The first is the importance, stressed by Gaudron, McHugh and Gummow JJ in *Croome v Tasmania*[19], and earlier by Gibbs CJ and Deane J in *University of Wollongong v Metwally*[20], of s 109 not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies.

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16 *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12; *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 at 57-58; [1986] HCA 42.

17 (1968) 117 CLR 253.

18 See (1968) 117 CLR 253 at 258. Cf *R v El Helou* (2010) 267 ALR 734 at 738-739 [24]-[28].

19 (1997) 191 CLR 119 at 129-130; [1997] HCA 5.

20 (1984) 158 CLR 447 at 457-458 and 476-477 respectively; [1984] HCA 74.

20 The second point is that, as Isaacs J indicated in *Hume v Palmer*[21], the case for inconsistency between the two conspiracy provisions with which this appeal is concerned is strengthened by the differing methods of trial the legislation stipulates for the federal and State offences, particularly because s 80 of the Constitution would be brought into operation. In the present case, the jury trial provided by the law of Victoria under s 46 of the Juries Act did not require the unanimity which, because s 4G of the Commonwealth Crimes Act would have stipulated an indictment for the federal conspiracy offence, s 80 then would have mandated at a trial of the appellant.

21 The third point concerns the significance of s 4C(2) of the Commonwealth Crimes Act. This provision provides that where an act or omission constitutes an offence under both a law of the Commonwealth and that of a State, and the offender has been punished for that offence under the State law, the offender shall not be liable to be punished for the Commonwealth offence. Of such a provision, Mason J (with the concurrence of Barwick CJ and Jacobs J) observed in *R v Loewenthal; Ex parte Blacklock*[22] that it:

> "plainly speaks to a situation in which the State law is not inoperative under s 109, as for example when there is an absence of conflict between the provisions of the two laws and the Commonwealth law is not intended to be exclusive and exhaustive".

22 The direct inconsistency in the present case is presented by the circumstance that s 321 of the Victorian Crimes Act renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth Criminal Code. In the absence of the operation of s 109 of the Constitution, the Victorian Crimes Act will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for

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21 (1926) 38 CLR 441 at 450-451; [1926] HCA 50.

22 (1974) 131 CLR 338 at 347; [1974] HCA 36.

the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*[23], the case is one of "direct collision" because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.

23 To explain why this is so it is necessary to say something more respecting certain aspects of the common law crime of conspiracy which are picked up without alteration by s 321 of the Victorian Crimes Act. In *R v Caldwell*[24] Weinberg JA said:

> "The criminal law is ordinarily concerned with conduct, usually prohibited acts, but sometimes the failure to perform required acts. At common law, conspiracy differs in that the prohibited act is the entry into an unlawful agreement, which need never be implemented[25]. Nothing need be done in pursuit of the agreement. The offence of conspiracy is complete the moment that the offenders have entered into the agreement. Repentance, lack of opportunity and failure are all immaterial, and withdrawal goes to mitigation only[26].
>
> Accordingly, an overt act performed in implementing that agreement is not an ingredient, or element, of the offence itself. Evidence of overt acts is admissible to prove the existence of the conspiracy, and sometimes to assist in the identification of the participants. However, it must always be borne in mind that particulars of overt acts, and indeed particulars in general, are not elements of the offence[27]."

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23 (1968) 117 CLR 253 at 258. See also at 272 per Menzies J.

24 (2009) 22 VR 93 at 99-100 [62]-[63].

25 *Meyrick* (1929) 21 Cr App R 94.

26 *R v Aspinall* (1876) 2 QBD 48.

27 *R v Theophanous* (2003) 141 A Crim R 216 at 249.

24 Section 11.5 of the Commonwealth Criminal Code received detailed consideration by this Court in *R v LK*[28]. The extrinsic material considered in *R v LK*[29] indicated that the narrower scope of s 11.5 reflects a deliberate legislative choice influenced by the work of what in *R v LK* were identified as the Gibbs Committee and the Model Criminal Code Officers Committee.

25 What is immediately important is the exclusion by the federal law of significant aspects of conduct to which the State offence attaches. There are significant "areas of liberty designedly left [and which] should not be closed up", to adapt remarks of Dixon J in *Wenn v Attorney-General (Vict)*[30].

26 First, the effect of s 11.5(1) is that the Commonwealth conspiracy provision applies only where there is a primary offence which is punishable by imprisonment for more than 12 months or by a fine of 200 penalty units or more[31], whereas s 321 of the Victorian Crimes Act applies to agreements which will involve "the commission of an offence".

27 Secondly, in accordance with the settled principles explained by Weinberg JA in *Caldwell*, the offence under s 321 is complete upon the making of the agreement without proof of overt acts, whereas par (c) of s 11.5(2) requires that for the person to be guilty that person, or at least one other party to the agreement, must have committed an overt act pursuant to the agreement.

28 Thirdly, a person cannot be found guilty of conspiracy under s 11.5 if, before the commission of an overt act pursuant to the agreement, that person has withdrawn from the agreement and taken all reasonable steps to prevent the commission of the primary offence (s 11.5(5)). There is no such provision in s 321. Further, sub-s (7) of s 11.5 states:

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28 (2010) 84 ALJR 395; 266 ALR 399; [2010] HCA 17.

29 (2010) 84 ALJR 395 at 412-413 [51]-[58], 421-424 [96]-[107]; 266 ALR 399 at 418-420, 431-435.

30 (1948) 77 CLR 84 at 120; [1948] HCA 13.

31 A penalty unit means $110: Commonwealth Crimes Act, s 4AA(1).

> "Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence."

There is no equivalent provision in Victoria.

29 The situation in the present case may be contrasted to that presented in *McWaters v Day*[32]. The Queensland legislation, s 16 of the *Traffic Act* 1949 (Q), created an offence of driving a motor vehicle while under the influence of liquor. Section 40(2) of the *Defence Force Discipline Act* 1982 (Cth) required for liability that the defence member drive a vehicle on service land whilst under the influence of intoxicating liquor "to such an extent as to be incapable of having proper control of the vehicle". It was, as emphasised by the Attorney-General for New South Wales in the course of his intervention in support of Queensland[33], difficult to construe s 40(2) as conferring a liberty on a drunken defence member to drive a vehicle on service land provided he or she was still capable of controlling the vehicle. Hence, perhaps, the emphasis in argument by the defence member, in the event unsuccessful[34], upon establishing that the defence discipline legislation was exclusive of, rather than supplementary to, the ordinary criminal law respecting traffic offences.

30 The result in the present case is that in its concurrent field of operation in respect of conduct, s 321 of the Victorian Crimes Act attaches criminal liability to conduct which falls outside s 11.5 of the Commonwealth Criminal Code and in that sense alters, impairs or detracts from the operation of the federal legislation and so directly collides with it.

31 In reaching that conclusion it is unnecessary to have regard to notions expressed in terms of "covering the field" and "indirect inconsistency". In particular it is unnecessary to determine the appeal on the footing, which the appellant also advances, that s 11.5 of the Commonwealth Criminal Code is an

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32 (1989) 168 CLR 289; [1989] HCA 59.

33 (1989) 168 CLR 289 at 292.

34 (1989) 168 CLR 289 at 299.

"exhaustive" provision for the law of conspiracy to commit offences injurious to the proprietary and other governmental interests of the Commonwealth[35].

32 When deciding questions of "indirect inconsistency" it often has been said that the "intention" of the Parliament is determinative, or at least indicative, of the characterisation of the federal law as one which "covers the field" in question or does not do so. Some caution is required here, with regard to what was said in *Zheng v Cai*[36] as follows:

> "It has been said that to attribute an intention to the legislature is to apply something of a fiction[37]. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor[38]. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[39], the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy."

That constitutional relationship is further informed by the operation of s 109 in the federal structure of government.

33 It is with this in mind that there are to be read the references to "intention" in a well-known passage in the reasons of Mason J in *R v Credit Tribunal;*

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35 Cf *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338; *Kelly v Shanahan* [1975] Qd R 215.

36 (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52.

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

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

39 (2002) 123 FCR 298 at 410-412.

Ex parte General Motors Acceptance Corporation[40], recently repeated in *John Holland Pty Ltd v Victorian Workcover Authority*[41]. Mason J said:

> "[A]lthough a provision in a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object, it may nevertheless validly evince an intention on the part of the statute to make exhaustive or exclusive provision on the subject with which it deals, thereby bringing s 109 into play. Equally a Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law."

34 The federal legislation considered in *John Holland* was an example of the first class which Mason J had described in *General Motors*. It contained a statement that in certain specified respects it was to apply to the exclusion of State laws. Other examples of federal laws of that character were discussed in *Bayside City Council v Telstra Corporation Ltd*[42]. More difficult questions of statutory construction arise in cases where an identified "field" is said to be "covered" by reason of no more than implications found in the text of the federal law[43]. But the issue here must turn upon the proper interpretation of the federal law in question, having regard to its subject, scope and evident purpose.

35 It is this form of "indirect inconsistency" upon which the appellant relies for his alternative argument respecting s 11.5 of the Commonwealth Criminal Code. The respondent and the interveners would counter the case for "indirect

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40 (1977) 137 CLR 545 at 563; [1977] HCA 34.

41 (2009) 239 CLR 518 at 527-528 [21]; [2009] HCA 45.

42 (2004) 216 CLR 595 at 627-629 [35]-[39]; [2004] HCA 19.

43 See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 433; [1997] HCA 36.

inconsistency" by reference to the second class of express statement identified by Mason J in *General Motors*. This involves an express form of words to pull back from what otherwise might be an implication that the federal law was an exhaustive statement upon a particular subject or "field". But, as will now appear, close attention is necessary to the place of such a statement in the particular statutory framework in which it is to be found.

36 In the Commonwealth Criminal Code, Ch 4 (ss 70.6, 71.19, 72.5), Ch 7 (s 261.1), Ch 8 (ss 268.120, 270.12), Ch 9 (s 360.4), and Ch 10 (ss 400.16, 472.1, 475.1, 476.4)[44], contained provisions so expressed as to deny for the Chapter in question, or particular portions of it, an "inten[tion] to exclude or limit" the operation of any other Commonwealth law, and also of any law of a State or Territory[45].

37 However, s 11.5 appeared in Ch 2, which did not contain any such statement. Those opposed to the appellant sought to rely upon the presence of such a provision (s 261.1) in Ch 7. The theft provision (s 131.1) appears in Ch 7. The presence of s 261.1, whatever else its effect in considering the application of s 109 to charges under State law of theft of the property of the Commonwealth, a matter upon which it is unnecessary to enter here, could not displace or avoid the direct collision between the conspiracy provisions with which the appeal is concerned.

38 The balance of the special leave application should be dismissed. The appeal should be allowed and the order of the Court of Appeal of the Supreme Court of Victoria made 18 December 2008 set aside. In place thereof, leave to appeal against conviction and sentence should be granted, the appeal allowed, the

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44 The Commonwealth Criminal Code in its current form additionally contains such provisions in Ch 4 (s 72.32), Ch 5 (ss 80.6, 115.5), Ch 8 (ss 271.12, 272.7, 273.4, 274.6), and Ch 9 (s 300.4).

45 Chapter 4 is headed "The integrity and security of the international community and foreign governments", Ch 8 "Offences against humanity and related offences", Ch 9 "Dangers to the community" and Ch 10 "National infrastructure". Chapter 5, headed "The security of the Commonwealth", contained its own complex concurrent operation provision (s 100.6).

presentment preferred against the appellant and his conviction on 21 February 2008 quashed, and the sentence imposed on 17 April 2008 set aside.