HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

EDWARD POLLENTINE & ANOR PLAINTIFFS

AND

THE HONOURABLE JARROD PIETER BLEIJIE
ATTORNEY-GENERAL FOR THE STATE OF
QUEENSLAND & ORS DEFENDANTS

Pollentine v Bleijie
[2014] HCA 30
14 August 2014
B39/2013

ORDER

The questions referred on 28 February 2014 for the consideration of the Full Court be answered as follows:

Question 1

Is s 18 of the Criminal Law Amendment Act 1945 *(Qld) invalid on the ground that it is contrary to Chapter III of the Constitution, by way of infringing the principle identified in* Kable v Director of Public Prosecutions (NSW) *(1996) 189 CLR 51, or otherwise?*

Answer

No.

Question 2

Who should pay the costs of the case stated?

Answer

The plaintiffs.

Representation

S P Donaghue QC with K L Walker and R W Haddrick for the plaintiffs (instructed by Prisoners' Legal Service Inc)

P J Dunning QC, Solicitor-General of the State of Queensland with G J D del Villar and J A Kapeleris for the first and second defendants (instructed by Crown Law (Qld))

Submitting appearance for the third defendant

Interveners

M G Sexton SC, Solicitor-General for the State of New South Wales with N L Sharp for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

M G Hinton QC, Solicitor-General for the State of South Australia with N M Schwarz for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

G R Donaldson SC, Solicitor-General for the State of Western Australia with J D Berson for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

CATCHWORDS

Pollentine v Bleijie

Constitutional law – Constitution, Ch III – Institutional integrity of State courts – Section 18(1) of *Criminal Law Amendment Act* 1945 (Q) allowed trial judge to direct two or more medical practitioners to inquire as to mental condition of person found guilty of offence of sexual nature committed upon or in relation to child – Where medical practitioners report that offender is incapable of exercising proper control over offender's sexual instincts, s 18(3) allowed trial judge to declare offender to be so incapable and to direct offender to be detained in institution during Her Majesty's pleasure – Section 18(5) required offender to be detained and not to be released until Governor in Council satisfied on report of two legally qualified medical practitioners that it is expedient to release offender – Plaintiffs found guilty of committing sexual offences against children – Plaintiffs declared to be incapable of exercising proper control over sexual instincts – Plaintiffs detained in institution at Her Majesty's pleasure – Whether s 18 repugnant to or incompatible with institutional integrity of State courts.

Words and phrases – "during Her Majesty's pleasure", "expedient to release", "institutional integrity", "is incapable of exercising proper control over ... sexual instincts".

Constitution, Ch III.
Criminal Law Amendment Act 1945 (Q), ss 18, 18A-18H.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. The long title of the *Criminal Law Amendment Act* 1945 (Q) ("the CLA Act") described it as an Act to amend the Criminal Code (Q) and the Justices Acts 1886-1942 (Q) "in certain particulars in respect of, and to make further provision for, the Treatment and Punishment of Offenders convicted of Sexual Offences" and for other purposes. Part IV of the CLA Act (ss 17-18) was entitled "Indeterminate Detention and Probation of Offenders Convicted of Sexual Offences".

2 Each of the plaintiffs (Edward Pollentine and Errol George Radan) is detained under the CLA Act "during Her Majesty's pleasure"[1]. Each alleges that s 18 of the CLA Act, which purports to authorise his indeterminate detention, is beyond the legislative power of the Parliament of Queensland and invalid.

3 The plaintiffs' challenge to validity fails.

The CLA Act

4 In 1984, when each plaintiff was ordered to be detained under the CLA Act, s 18(1)(a) provided[2] that, if a person was found guilty on indictment of "an offence of a sexual nature" committed upon or in relation to a child under the age of 17 years, the judge "may at his discretion" direct that two or more legally qualified medical practitioners (of whom one was to be specially qualified in psychiatry, if the services of such a person were reasonably available) "inquire as to the mental condition of the offender, and in particular whether his mental condition is such that he is incapable of exercising proper control over his sexual instincts". Section 2A of the CLA Act provided that the term "offence of a sexual nature" included "any offence constituted wholly or partly by an act whereby the offender has exhibited a failure to exercise proper control over his sexual instincts and any offence in the circumstances associated with the

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1 s 18(3).

2 Since 1984, s 18(1) and other relevant provisions of the CLA Act have been amended. Nothing was said to turn on those amendments. Argument proceeded, and these reasons proceed, on the footing that the relevant provisions of the CLA Act, as that Act stood when orders were first made against each plaintiff, remain in force in a form which for present purposes is of no relevantly different substantive effect.

committal whereof" the offender exhibited a failure of that kind and includes "an assault of a sexual nature".

5 Section 18(3)(a) provided that, if the medical practitioners "report to the judge that the offender is incapable of exercising proper control over his sexual instincts", the judge may "in addition to or in lieu of imposing any other sentence ... declare that the offender is so incapable and direct that he be detained in an institution during Her Majesty's pleasure". This power was subject to the express proviso to s 18(3)(a) (now found in s 18(3A)) that the offender may cross-examine the medical practitioners and call evidence in rebuttal of a report, "and no such order shall be made unless the judge shall consider the matters reported to be proved".

6 These provisions of the CLA Act were not, and are not, confined in their operation to persons found guilty on indictment. Section 18(1)(b) of the CLA Act further provided that, if a person is convicted summarily of an offence of a sexual nature upon or in relation to a child, the court of petty sessions (now Magistrates Court) may order the person to be brought before a judge of the Supreme Court to be dealt with in accordance with s 18(1)(a). In addition, an application for a declaration and direction under s 18(3) could, and may now, be made[3] in a case where an offender is serving a sentence of imprisonment for an offence of a sexual nature (whether or not committed upon or in relation to a child). In this last kind of case, two medical practitioners (of whom one is specially qualified in psychiatry) must report[4] to the Attorney-General not only that the offender is incapable of exercising proper control over his sexual instincts but also that two further conditions are met: that "such incapacity is capable of being cured by continued treatment"[5] and that "for the purposes of such treatment it is desirable that such person be detained in an institution after the expiration of his sentence of imprisonment"[6].

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3 s 18(4).

4 s 18(4).

5 s 18(4)(ii) (now s 18(4)(b)).

6 s 18(4)(iii) (now s 18(4)(c)).

7 Every person in respect of whom a direction for detention is given under s 18(3) or s 18(4) must[7] be detained in such institution as the Governor in Council directs. In 1984, an "institution" included[8] not only any institution proclaimed by the Governor in Council for the purposes of s 18 of the CLA Act but also any prison or police gaol. (An "institution" is now defined[9] to mean "a corrective services facility or watch-house" or other institution prescribed by regulation.) An offender detained under s 18(3) or s 18(4) was not (and is not) to be released[10] "until the Governor in Council is satisfied on the report of two legally qualified medical practitioners that it is expedient to release him".

8 An offender detained under s 18 of the CLA Act must[11] be examined at least once in every three months by the Director of Mental Health[12] (formerly the Director of Mental Hygiene) or a legally qualified medical practitioner appointed by the Director.

9 When the plaintiffs were ordered to be detained, an offender detained under s 18 of the CLA Act could be conditionally released[13] on parole or leave of absence. Until the commencement in 2002 of s 547 of the *Mental Health Act* 2000 (Q), the *Mental Health Act* 1974 (Q) also provided[14] for detainees under s 18 of the CLA Act to be released on leave of absence. Since 2002, and amendments made chiefly by the *Criminal Law Amendment Act* 2002 (Q), Pt 3A

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7 s 18(5)(a).

8 s 18(10).

9 s 18(14).

10 s 18(5)(b).

11 s 18(8).

12 Appointed under s 488 of the *Mental Health Act* 2000 (Q).

13 Prisons Regulations 1959 (Q), reg 447.

14 First by s 39, then, after the commencement of the *Mental Health Services Act Amendment Act* 1987 (Q), by s 46A. It is not necessary to identify more precisely the various provisions which, from time to time over the last 30 years, have governed the conditional release of offenders detained under s 18 of the CLA Act.

of the CLA Act (ss 18A-18H) has provided for the conditional release of offenders detained under s 18. Part 3A does this by applying, with some modifications, the general provisions made by Ch 5 of the *Corrective Services Act* 2006 (Q), which govern the release of prisoners on parole.

10 Section 18B(1) of the CLA Act applies the parole provisions made by Ch 5 of the *Corrective Services Act* to a person detained under s 18 of the CLA Act as if that person were a prisoner serving a term of life imprisonment. By the combined operation of s 18B(2) of the CLA Act and s 181(2)(d) of the *Corrective Services Act*, each plaintiff, having committed the relevant offences before 1 July 1997 and having served more than 13 years' detention, is eligible to apply for parole. But under s 18E of the CLA Act, an offender detained under s 18 may not be granted parole unless the Queensland Parole Board is satisfied not only of any other matter of which the Board must be satisfied under the *Corrective Services Act* but also that "the detainee does not represent an unacceptable risk to the safety of others". The material before this Court does not suggest that either plaintiff has ever applied for parole but, as will later be explained, the first plaintiff, Mr Pollentine, has twice challenged decisions by the Governor in Council that his detention should not be terminated.

11 The plaintiffs pointed to a number of issues about how some of the relevant provisions of the CLA Act are to be construed. Before noticing those issues, it is desirable to describe how each plaintiff came to be made subject to an order under s 18.

The making of detention orders and subsequent proceedings

12 In July 1984, Mr Pollentine pleaded guilty in the District Court of Queensland to 14 counts of sexual offences committed against four different children at various times between January and April of that year. During the sentencing proceedings, the prosecution called two medical practitioners, each a specialist psychiatrist, to give evidence about whether Mr Pollentine was incapable of exercising proper control over his sexual instincts. Each witness expressed the opinion that Mr Pollentine was not capable of exercising proper control. There was no cross-examination challenging the opinion the witnesses expressed. No question was put to either witness, whether by the sentencing judge or by counsel for the prosecution or prisoner, about what the witness meant when he said that Mr Pollentine was "incapable of exercising proper control over his sexual instincts".

13 The sentencing judge declared that Mr Pollentine "is incapable of exercising proper control over his sexual instincts" and directed that he be detained in an institution during Her Majesty's pleasure. No other sentence was passed. Mr Pollentine did not appeal against the orders made by the sentencing judge.

14 In the 30 years that have passed since these orders were made, Mr Pollentine has twice sought judicial review of decisions made by the Governor in Council that he not be released from detention. In 1994, Thomas J set aside[15] a decision not to release Mr Pollentine on the ground that Mr Pollentine had been denied procedural fairness. On reconsideration, however, the Governor in Council again decided that Mr Pollentine should not be released.

15 In 1996, Mr Pollentine sought judicial review of a further decision that he not be released. The application failed, both at first instance and on appeal to the Court of Appeal[16].

16 In May 1984, the second plaintiff, Mr Radan, pleaded guilty in the District Court of Queensland to eight counts of sexual offences committed against two children between February 1982 and October 1983. Mr Radan actively sought the making of a declaration under s 18 of the CLA Act so that he might "be given treatment that would be available in a mental institution". One of the specialist psychiatrists required to report on Mr Radan's capacity to control his sexual instincts initially gave evidence to the effect that she considered that he was able to exercise proper control. Upon further examination, however, the doctor concluded that it was "highly likely that without some form of intervention [Mr Radan] would re-offend" and that he was "unable to control his sexual impulses".

17 The sentencing judge sentenced Mr Radan to a total effective sentence of 12 years' imprisonment, made the declaration required by s 18(3) and directed that, at the expiration of the sentence of imprisonment, Mr Radan be detained in an institution during Her Majesty's pleasure. Mr Radan appealed to the Court of Criminal Appeal against the sentences imposed. He alleged that, if indefinite detention was directed, only "a light" sentence should be imposed for the

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15 *Pollentine v Attorney-General* [1995] 2 Qd R 412.

16 *Pollentine v Attorney-General* [1998] 1 Qd R 82.

offences. The Court of Criminal Appeal concluded[17] that, because the period of indefinite detention has "a reformatory purpose", it should begin as soon as practicable. To that end, the Court varied the sentence to a total effective sentence of three years' imprisonment but left the declaration and direction made under s 18 undisturbed.

The challenge to validity

18 The plaintiffs have brought proceedings in the original jurisdiction of this Court claiming relief including a declaration that s 18 of the CLA Act is invalid and orders setting aside the District Court orders directing the indeterminate detention of the plaintiffs. The parties have joined in stating questions of law for the opinion of the Full Court. The principal question is:

> "Is s 18 of the *Criminal Law Amendment Act 1945* (Qld) invalid on the ground that it is contrary to Chapter III of the Constitution, by way of infringing the principle identified in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, or otherwise?"

They also ask who should pay the costs of the special case.

Some preliminary considerations

19 Two points should be made before considering the substantive issues.

20 First, because the plaintiffs' challenge to validity fails, it will not be necessary to consider whether a decision that s 18 is invalid would permit or require the grant of relief quashing the relevant orders requiring continued detention of the plaintiffs. In particular, it will not be necessary to examine what consequences, if any, follow from Mr Radan's appeal to the Supreme Court of Queensland against sentence, or whether he is now to be regarded as detained in accordance with an order of the District Court or an order of the Supreme Court (a superior court of record[18]).

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17 *R v Radan* [1984] 2 Qd R 554 at 557 per McPherson J; see also at 556-557 per Campbell CJ (Sheahan J agreeing).

18 cf *New South Wales v Kable* (2013) 87 ALJR 737; 298 ALR 144; [2013] HCA 26.

21 Second, lying behind the plaintiffs' submissions in this case can be seen two propositions, both of which were recorded by Gummow J in *Fardon v Attorney-General (Qld)*[19]. One, made by Professor Norval Morris in 1951[20], is that, in the absence of legal control of punishments (especially indeterminate punishments), there is the risk of administrative arbitrariness. The other, related, point was made[21] by Sir Leon Radzinowicz in 1945, the same year the CLA Act was passed:

> "Unless indeterminate sentences are awarded with great care, there is a grave risk that this measure, designed to ensure the better protection of society, may become an instrument of social aggression and weaken the basic principle of individual liberty."

22 This Court has said[22] that great care must be exercised in seeking and considering the making of an order for indefinite imprisonment. But it is notions of the kind identified by Professor Morris and the consequences that follow from lack of care in awarding indeterminate sentences which may be seen as animating the plaintiffs' challenge to validity. Whether, or to what extent, the CLA Act lawfully admits of "administrative arbitrariness" depends first and foremost upon its proper construction.

Some construction questions

23 The expression "incapable of exercising proper control over ... sexual instincts" is used in s 18 to identify the question to be answered by medical practitioners appointed to report to a court and to identify the content of the declaration a court must make if indeterminate detention is to be directed. It is the statutory criterion critical to the operation of s 18. The expression is cast in

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19 (2004) 223 CLR 575 at 606-607 [62]; [2004] HCA 46.

20 Morris, *The Habitual Criminal*, (1951) at 22; reprinted in (1967) 13 *McGill Law Journal* 534 at 552.

21 "The Persistent Offender", in Radzinowicz and Turner (eds), *The Modern Approach to Criminal Law*, (1945) 162 at 167 (footnote omitted).

22 *McGarry v The Queen* (2001) 207 CLR 121 at 132 [29]-[31]; [2001] HCA 62. See also *Chester v The Queen* (1988) 165 CLR 611; [1988] HCA 62; *Lowndes v The Queen* (1999) 195 CLR 665; [1999] HCA 29.

terms suggesting an inquiry about the present existence of some objective fact: about whether the offender can or cannot now exercise "proper control". But the inquiry required by s 18(3) of the CLA Act is more complex than that binary description suggests.

24 First, the inquiry is about future human behaviour: about the offender's (future) control of sexual instincts. Second, it is an inquiry about the exercise of "proper control", and some content must be given to the adjective "proper". Third, the Act's requirements that medical practitioners report their opinion about the question, and that the court may direct indefinite detention only if two medical practitioners report that the offender is incapable of exercising proper control, suggest that the provisions assume that "capacity to control" is connected with matters discernible principally, perhaps even only, by a medical practitioner. And if that is so, what those underlying matters are, as well as what consequences follow from them, appear to be matters of opinion rather than objectively demonstrable fact.

25 Whether, as was suggested in argument, these considerations point to the conclusion that the statutory criterion for directing indeterminate detention requires a court to make some assessment of whether the risk that the offender will reoffend is "acceptable" or "unacceptable" need not be decided. There are evident dangers in attempting to capture the whole of the operation of any statutory criterion by choosing some different collocation of words. And in this case, using notions of "risk" and what is "acceptable" or "unacceptable" to describe the content given to the statutory criterion may be thought to do no more than shift debate about the meaning of the statutory language to a debate about the meaning of the substituted expressions. But because the decision whether a person is "incapable of exercising proper control over his sexual instincts" requires consideration of what that person would do if not detained, predictions must be made. It is unsurprising, then, that the *result* of the inquiry can be described in terms of "risk" and "likelihood".

26 It remains important, however, to emphasise two points about the statutory criterion. First, the consequences for an offender of a court making a direction for detention under s 18 are very large. Second, the use of the word "incapable" suggests that, absent some intervening fact or circumstance, reoffending is well-nigh inevitable.

27 Applying the statutory criterion in any particular case may be difficult. That difficulty may reveal issues about the proper construction of the expression. As has been noted earlier, some issues of this kind were touched on in the course

of the proceedings against Mr Radan in the District Court. A court must decide whether to order detention in addition to or in lieu of imposing any other sentence. There may well be room for debate about what matters inform the proper exercise of that discretion. It is not necessary in this case, however, to attempt to identify, let alone resolve, all disputable questions of construction or discretionary considerations in order to decide the validity of s 18. If s 18 does present issues of these kinds in a particular case, they are issues which can and will be resolved in the ordinary way. Observing that the criterion for engagement of s 18 may be difficult to construe and apply, or that the discretion given by s 18 may be difficult to exercise, does not, in this case, bear upon the question of validity. To the extent to which the plaintiffs' arguments assumed or implied the contrary, the submission should not be accepted.

28 It is to be observed that s 18 can be engaged only in cases where the offender is fit to stand trial and is found criminally responsible for the offences charged. Yet s 18 is directed to an offender whose "mental condition is such that he is incapable of exercising proper control over his sexual instincts"[23]. And that "mental condition" may, or may not, be "capable of being cured by continued treatment"[24]. And whether or not the offender's "mental condition" can be "cured", s 18 has what McPherson J called[25] a "reformatory purpose". This purpose may be effected[26] by incarceration in a prison rather than a place of treatment; it may be pursued[27] by way of punishment "in addition to or in lieu of imposing any *other* sentence" (emphasis added).

29 If a court directs indeterminate detention under s 18, neither the court which makes the direction nor any other court plays any part in deciding where the offender will be detained[28] or whether the offender will be given any "treatment" for his "mental condition". It will be recalled that the stated basis for

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23 s 18(1)(a).

24 s 18(4)(ii) (now s 18(4)(b)).

25 *Radan* [1984] 2 Qd R 554 at 557.

26 See the definition of "institution" in what was s 18(10) but is now s 18(14).

27 s 18(3).

28 s 18(5)(a).

Mr Radan seeking an order for detention was so that he might be treated. Although s 18(4) speaks of the possibility of curing an incapacity properly to control sexual instincts, opinions about what is meant by "cure", and about how that might be achieved, may differ. And it may be that the CLA Act proceeds from premises about causes and prevention of sexual offending which, if accepted at the time of the passing of the Act, may now be disputed.

30 Again, however, any differences in opinion or disputes about the validity of the premises for the operation of s 18 do not touch the question of the validity of s 18. If, as there may appear to be, there is some tension between notions, on the one hand, of mental condition, incapacity to control and "cure", and, on the other, of punishment for crime and community protection from crime, those tensions are relevant, if at all, only because they may bear upon the proper construction and application of s 18. Whether and how these apparent tensions in legislative purpose affect the proper construction or application of s 18 need not be decided. The section's validity does not turn upon whether it is a provision for punishment, reform, or both punishment and reform.

31 It is necessary to say something more about the CLA Act's provisions for release.

Criteria for release

32 The plaintiffs submitted that the CLA Act provides different criteria for directing detention from those which govern release from detention. In this branch of their argument, the plaintiffs directed chief attention to s 18(5)(b) of the CLA Act and, in particular, what is meant by the phrase "it is expedient to release him". It is important to notice, however, that the provisions governing release from detention must be understood in the context of the Act as a whole. In particular, what is meant by "it is expedient to release him" must be understood in light of not only the Act's provisions authorising a direction for detention but also the provisions made for conditional release of a detainee. All of these considerations inform the meaning that is to be given to the word "expedient".

33 The Governor in Council must[29] be satisfied *on the report of two medical practitioners* that "it is expedient to release" the offender. The required state of

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29 s 18(5)(b).

satisfaction must thus draw upon the reports and, in the context of this Act, those reports must be directed to whether, at the time of the report, the detainee remains a person whose "mental condition is such that he is incapable of exercising proper control over his sexual instincts"[30]. Section 18(5) makes no mention of any other source of material which may inform the formation of the required state of satisfaction.

34 Because s 18(5) provides for the termination of detention, it should not be construed as conferring an unfettered discretion to grant or refuse a detainee's release. On the contrary, by identifying the report of the medical practitioners as the foundation for the decision about what is "expedient", the provision should be read as confining the matters which the decision maker may lawfully take into account to the matter with which those reports should deal: whether the detainee remains a person whose mental condition is such that he is incapable of exercising proper control over his sexual instincts. Whether the decision maker may be informed on that subject by reference to more than the reports provided is a question which need not be decided. But what is "expedient" turns only on whether the detainee remains incapable of exercising proper control.

35 In the course of oral argument, the plaintiffs emphasised some passages[31] from the reasons for judgment of Fitzgerald P in Mr Pollentine's second application for judicial review of a decision that he not be released. These passages, they submitted, suggested that "anticipated adverse community reaction" to release could properly be taken into account in deciding whether it is expedient to release a detainee. If that were so, there would indeed be a marked disparity between the matters which bear upon making a direction for indefinite detention under s 18 and those which bear upon the decision to terminate detention.

36 It is not profitable to examine whether the reasons of Fitzgerald P are properly to be read as adopting a proposition of the kind suggested. It is enough to say that, for the reasons which have already been stated, neither "anticipated adverse community reaction" nor other forms of political consequence, whether assumed to be well founded or not, are relevant to whether it is expedient to release a person detained under s 18. As has been explained, whether it is

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30 s 18(1)(a).

31 [1998] 1 Qd R 82 at 92.

expedient to release must depend upon the assessment that is made of the risk of reoffending and the nature of the offences that the detainee might commit if released from detention without conditions or supervision. To take into account "anticipated adverse community reaction" or "public opinion", even if those expressions could be and were given some legally sufficient meaning, would be to fall into legal error.

37 The conclusions which have been stated follow from construing the expression "it is expedient" in the context in which it appears in s 18(5) and by reference to the subject matter, scope and purpose of the detention provisions made by s 18 and the CLA Act as a whole. They are conclusions which are consistent with, and reinforced by, the conditional release provisions now set out in Pt 3A of the CLA Act. The substance of those provisions has been described earlier in these reasons. For present purposes the observation of central importance is that, as noted earlier, s 18E requires that there be no release on parole unless the Parole Board "is satisfied the detainee does not represent an unacceptable risk to the safety of others".

38 What is an "unacceptable" risk may, probably will, differ according to the conditions on which a detainee is released into the community. If detention is terminated under s 18(5), the detainee is released without condition. The risks that are to be considered are to be identified by reference to those circumstances. By contrast, if released on parole, a detainee may be released on conditions including, for example, continued compliance with medication or other forms of treatment. The risks to be considered in that case would be considered against a background where the detainee would risk return to detention for breach of those conditions, regardless of whether the detainee had committed any offence.

39 It is not necessary to explore these aspects of the matter further. For the purposes of this case, the important observation to make is that there is no relevant difference between the basis on which a court will act in ordering indefinite detention under s 18(3) and the basis on which the Executive must act in deciding whether it is expedient to terminate the detention.

Invalidity

40 The plaintiffs identified three bases for their attack on the validity of s 18. Those bases of attack can be described under the following headings: "Impermissible delegation of the sentencing task?", "Different criteria for directing detention and release?" and "Want of sufficient safeguards?"

41 Each basis of attack was directed to the ultimate submission that s 18 infringes the principles first stated in *Kable v Director of Public Prosecutions (NSW)*[32].

42 As the plurality recorded[33] in *Assistant Commissioner Condon v Pompano Pty Ltd*, the principles first stated in *Kable* have since been considered and applied in several cases in this Court. The principles have their roots in Ch III of the Constitution and limit State legislative power. "[T]he Parliaments of the States [may] not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth."[34] And it is now the accepted doctrine of the Court that, as Gummow J said[35] in *Fardon*, "the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system". But, as the plurality in *Pompano* also pointed out[36], the repugnancy doctrine "does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III"[37]. Hence, "the notions of repugnancy to and incompatibility with the continued institutional integrity of the State courts are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth"[38].

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32 (1996) 189 CLR 51; [1996] HCA 24.

33 (2013) 87 ALJR 458 at 487 [122] per Hayne, Crennan, Kiefel and Bell JJ; 295 ALR 638 at 673; [2013] HCA 7.

34 *Kable* (1996) 189 CLR 51 at 103 per Gaudron J.

35 (2004) 223 CLR 575 at 617 [101].

36 (2013) 87 ALJR 458 at 488 [124] per Hayne, Crennan, Kiefel and Bell JJ; 295 ALR 638 at 673.

37 *Fardon* (2004) 223 CLR 575 at 614 [86] per Gummow J.

38 *Pompano* (2013) 87 ALJR 458 at 488 [125] per Hayne, Crennan, Kiefel and Bell JJ; 295 ALR 638 at 674.

Impermissible delegation of the sentencing task?

43 The plaintiffs submitted that an order for indefinite detention made under s 18 "delegates to the Executive the power to determine the period in which an offender will be deprived of his or her liberty". In oral argument, this was described as "outsourcing" sentencing to the Executive. There is, so the plaintiffs submitted, a radical difference between a sentence of life imprisonment (even where subject to release by the Executive on parole or licence) and an order for detention during Her Majesty's pleasure. The duration of the former kind of sentence is, they submitted, fixed by the sentencing court; the duration of the latter order is wholly determined by the Executive[39].

44 The delegation submission must be rejected for two related reasons: one concerning how a direction for indeterminate detention is made; the other about how detention is terminated. First, a sentencing court must decide, according to the ordinary processes of the criminal law, applying ordinary principles of statutory construction and judicial decision making, whether s 18 may be engaged in the case of the offender concerned. The court dealing with that offender, if satisfied that s 18 is engaged, then may, but need not, direct indefinite detention in addition to or instead of fixing a determinate sentence. The court is not bound[40] to direct detention terminable only by executive decision. A direction for indefinite detention will serve purposes of punishment and community protection. According to what happens to the offender during the detention, the direction may serve some reformative purpose. None of these features of the matter points in any way to repugnancy to or incompatibility with the institutional integrity of the court that makes the direction or of State courts more generally.

45 Second, once it is recognised that release is not at the unconfined discretion of the Executive, but dependent upon demonstration by medical

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39 cf *Hinds v The Queen* [1977] AC 195 at 225-227; *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407 at 498; *Browne v The Queen* [2000] 1 AC 45 at 47-48; *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 at 428 [20].

40 cf *Hinds* [1977] AC 195; *Venables* [1998] AC 407 at 498; *Browne* [2000] 1 AC 45 at 47; *Mollison* [2003] 2 AC 411 at 418 [3]. In all of those cases the only order that a court could make was for detention at pleasure.

opinion of the abatement of the risk of reoffending, the notion that a court has delegated the fixing of the extent of *punishment* loses most, if not all, of its force. The continuation of detention depends upon danger to the community, not upon retribution for what the offender has done. And because an inquiry under s 18(1)(a) is into whether the offender's "mental condition is such that he is incapable of exercising proper control", there is an evident similarity between a court's power to order indeterminate detention on this account and the powers courts have long had[41] not only to decide whether an offender is fit to stand trial or was criminally responsible for an alleged crime but also, on proof of unfitness or insanity, to direct the indeterminate detention of that offender.

Different criteria for directing detention and release?

46 The plaintiffs submitted that the criteria a court must apply when determining whether to direct indefinite detention are different from those the Executive must apply in deciding whether a detainee may be released. The consequence, they submitted, is that a political decision to allow detention to continue is cloaked "in the neutral colors of judicial action"[42].

47 The decision to release a person detained under s 18 is made by the Governor in Council and thus on the advice of the Minister. It is a decision which is, and is seen to be, made by a political branch of government. The decision is not, in any way, made to appear as if it were made by a court. And contrary to the plaintiffs' submissions, despite the decision being made on the advice of a political branch of government, the decision to release a detainee is not properly described as a "political decision". The decision to terminate or not to terminate detention is to be made according to a criterion which admits of judicial review. Indeed Mr Pollentine has twice sought judicial review of such a decision.

48 And as has been noted, an offender can be released on parole according to a Parole Board determination of whether statutory conditions for release on parole are met, including, in particular, whether the detainee represents an unacceptable risk to the safety of others. Again, this decision is, and is seen to

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41 Based on the *Criminal Lunatics Act* 1800 (UK) (39 & 40 Geo III c 94), ss 1 and 2.

42 *Mistretta v United States* 488 US 361 at 407 (1989); *Fardon* (2004) 223 CLR 575 at 615 [91] per Gummow J.

be, made by the Executive. It is a decision which is to be made by reference to stated statutory criteria.

49 For these reasons, the *Mistretta* metaphor, which the plaintiffs adopted, of cloaking political decisions "in the neutral colors of judicial action", is wholly inapplicable. It is, therefore, unnecessary to do more than point out that even if the metaphor could be applied to this case (and it cannot), its use could be no substitute for consideration of the principles of repugnancy and incompatibility.

Want of sufficient safeguards?

50 Finally, the plaintiffs submitted that a State court may form part of a regime for preventive detention only if that regime contains safeguards to preserve the institutional integrity of the court. They submitted that the CLA Act provides safeguards to preserve the institutional integrity of State courts which are different from, and less effective than, those provided by the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) considered in *Fardon*.

51 It is right to say, as the plaintiffs did, that decisions about absolute or conditional release of a person detained under s 18 are made by the Executive and not by a court whereas generally similar decisions under the *Dangerous Prisoners (Sexual Offenders) Act* (examined in *Fardon*) are made by the Supreme Court. It by no means follows, however, that the provisions of s 18 are incompatible with or repugnant to the institutional integrity of the State courts. And, in the end, the plaintiffs pointed to no feature of the CLA Act, beyond those already dealt with, which they submitted had that effect. Giving the Executive the power to make decisions about absolute or conditional release of persons detained under s 18 is not shown to be incompatible with or repugnant to the institutional integrity of the State courts.

Conclusion and orders

52 For these reasons, the plaintiffs' arguments for invalidity must fail. Section 18 of the CLA Act is not repugnant to or incompatible with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system.

53 The principal question stated in the special case should be answered "No". The plaintiffs should pay the costs of the special case and the second question be answered accordingly.

GAGELER J.

Introduction

54 In separate proceedings in the District Court of Queensland in 1984, each plaintiff pleaded guilty on indictment to multiple offences of a sexual nature committed on or in relation to children under the age of seventeen years. The District Court declared each plaintiff to be incapable of exercising proper control over his sexual instincts and directed that he be detained in an institution during Her Majesty's pleasure. There each plaintiff remains.

55 In a proceeding commenced in the original jurisdiction of this Court, the plaintiffs now claim that the conferral of power on the District Court to make those declarations and directions, by s 18 of the *Criminal Law Amendment Act* 1945 (Q) ("the CLAA"), is and was in 1984 incompatible with the status of the District Court as a State court able to be invested with federal jurisdiction under s 77(iii) of the Constitution.

56 A special case in that proceeding reserves a single substantive question for the consideration of the Full Court: is s 18 of the CLAA invalid?

Construction

57 Section 18 of the CLAA was modelled on s 77a of the *Criminal Law Consolidation Act* 1935 (SA). In terms equally applicable to s 18, Mason CJ in *South Australia v O'Shea* described s 77a as providing "for a regime of preventive detention by means of the imposition of an indeterminate sentence on a person who is found guilty of one of a specified class of sexual offences and is declared by the court or judge to be incapable of exercising proper control over his sexual instincts"[43].

58 Given the nature of the plaintiffs' claim, it is sufficient to refer in detail only to those provisions of s 18 of the CLAA which bore on the declarations made and directions given in respect of the plaintiffs in the form in which those provisions stood in 1984. Conformably with the framing of the question reserved, it is convenient to refer to those provisions as they stood in 1984 using the present tense.

59 The starting point is s 18(1)(a), which is expressed to confer a discretion on the judge presiding at the trial of a person found guilty on indictment of an offence of a sexual nature committed on or in relation to a child under the age of seventeen years. That discretion is to direct that two or more qualified medical practitioners named by the judge "inquire as to the mental condition of the

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43 (1987) 163 CLR 378 at 383; [1987] HCA 39. See also at 396.

offender, and in particular whether his mental condition is such that he is incapable of exercising proper control over his sexual instincts". It has been held, and is not in dispute, that an offender is incapable of exercising "proper" control over his sexual instincts if he is incapable of exercising that degree of self-control which would prevent him from committing a further offence of a sexual nature[44].

60 Section 18(3)(a) then provides:

> "If the medical practitioners report to the judge that the offender is incapable of exercising proper control over his sexual instincts the judge may, either in addition to or in lieu of imposing any other sentence ... declare that the offender is so incapable and direct that he be detained in an institution during His Majesty's pleasure:
>
> Provided that the offender shall be entitled to cross-examine such medical practitioners in relation to and to call evidence in rebuttal of such report, and no such order shall be made unless the judge shall consider the matters reported to be proved."

61 Three features of s 18(3)(a) in its application to a case falling within s 18(1)(a) are significant. The first is that the declaration can be made and the direction can be given only in respect of a person who has been found guilty of an offence. The declaration can then be made and the direction can then be given by the trial judge "either in addition to or in lieu of imposing any *other* sentence" (emphasis added). The direction itself is continuing authority for detaining the person[45], and the direction is specifically deemed by s 18(13)(a) to be a sentence for the purpose of appeal.

62 The second significant feature of s 18(3)(a) in its application to a case falling within s 18(1)(a) is that the authority it confers on the trial judge is discretionary. Having received the medical practitioners' report that the person is incapable of exercising proper control over his sexual instincts and having found on the whole of the evidence that the person is in fact incapable of exercising proper control over his sexual instincts[46], the judge may but need not make the declaration and give the direction.

63 The third significant feature is that the direction in the form prescribed by s 18(3)(a), that the person "be detained in an institution during His Majesty's

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44 *R v Kiltie* (1986) 41 SASR 52 at 65.

45 *South Australia v O'Shea* (1987) 163 CLR 378 at 405.

46 *R v Waghorn* [1993] 1 Qd R 563.

pleasure", is given a precise content by s 18(5) and s 18(8). Section 18(5)(a) provides that a person in respect of whom the direction is given "[s]hall be detained in such institution as the Governor in Council directs". Section 18(8) provides that the person "shall be [medically] examined at least once in every three months". Section 18(5)(b) provides that the person "[s]hall not be released until the Governor in Council is satisfied on the report of two legally qualified medical practitioners that it is expedient to release him". It has been held, and it is not in dispute, that the Governor in Council has a duty to consider a request for release where justified by evidence, and is obliged to afford procedural fairness in the performance of that duty[47].

64 The combination of the second and third of those features makes plain that although making a declaration and giving a direction under s 18(3)(a) are appropriately described as resulting in the imposition of a sentence of indeterminate duration, their purpose is not punitive. Their purpose is wholly protective. The declaration is to be made and the direction is to be given on the basis of a judicial assessment that detention of the person in such institution as the Governor in Council directs – where he is to be examined medically at least every three months and from where he is not to be released until the Governor in Council is satisfied on the report of two legally qualified medical practitioners that it is expedient to release him – is warranted to protect society from an unacceptable risk of physical harm arising from that person being incapable of exercising that degree of self-control which would prevent him from committing a further offence of a sexual nature.

65 The same combination of features also makes plain that the power conferred on the Governor in Council by s 18(5)(b) to release a person who has been made the subject of a declaration and direction under s 18(3)(a) is integral to the protective character of the detention. It is satisfaction on the part of the Governor in Council that it is expedient to release the person which alone triggers the person's release from detention. Release follows automatically if, but only if, the requisite satisfaction is formed. There is no superadded executive discretion either to shorten or to prolong detention.

66 Satisfaction on the part of the Governor in Council that it is expedient to release a person is satisfaction that continued detention of the person is no longer warranted to protect society from unacceptable risk of physical harm. That satisfaction must be formed on the basis of executive assessment of a report of two medical practitioners. The content of such a report is (by implication) to be directed to the ability of the person to exercise proper control over his sexual instincts.

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47 *Pollentine v Attorney-General* [1995] 2 Qd R 412.

67 Risk being inherently a question of degree and the acceptability of a given level of risk being inherently a question of judgment, it is left by s 18(5)(b) to the Governor in Council to determine from time to time the level of risk of physical harm that is acceptable. Ministers who are members of the Executive Council advising the Governor are politically accountable to the Parliament and to the electorate for such determination as is made. It is open to them in formulating their advice to take public opinion into account[48]. Yet the decision to be made remains one bounded by statute. Beyond such bearing as they may rationally have on determining the level of risk of physical harm that is acceptable, "political considerations" are foreign to the protective purpose of detention, and are for that reason irrelevant to the formation of the statutory satisfaction on the part of the Governor in Council necessary to trigger release from detention.

Validity

68 Legislative regimes for the preventive detention of convicted persons by means of the imposition of indeterminate sentences have a long history in Australia[49], have withstood constitutional challenge in State Supreme Courts[50], and have been assumed to be valid in a number of decisions of the High Court[51]. Against that unpromising background, counsel for the plaintiffs support their claim that s 18 of the CLAA is incompatible with the status of the District Court as a court capable of being invested with federal jurisdiction by advancing what have been refined in oral submissions into three distinct arguments. Each argument focuses on a different way in which the precise form of preventive detention for which s 18 provides is said by the plaintiffs to undermine the District Court's integrity as an institution exercising judicial power independently of State executive government.

69 The first argument invokes the observation in the joint reasons for judgment in *Chu Kheng Lim v Minister for Immigration* that, "exceptional cases"

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48 *South Australia v O'Shea* (1987) 163 CLR 378 at 388; *Pollentine v Attorney-General* [1998] 1 Qd R 82 at 92.

49 Eg *Habitual Criminals Act* 1905 (NSW); *Indeterminate Sentences Act* 1907 (Vic); *Criminal Code Amendment Act* 1911 (WA), s 9; *Crimes Act* 1914 (Cth), s 17; *Criminal Law Amendment Act* 1917 (SA), s 7.

50 *R v Moffatt* [1998] 2 VR 229; *R v England* (2004) 89 SASR 316; *McGarry v Western Australia* (2005) 31 WAR 69.

51 *South Australia v O'Shea* (1987) 163 CLR 378; *Chester v The Queen* (1988) 165 CLR 611; [1988] HCA 62; *Lowndes v The Queen* (1999) 195 CLR 665; [1999] HCA 29; *McGarry v The Queen* (2001) 207 CLR 121; [2001] HCA 62; *Buckley v The Queen* (2006) 80 ALJR 605; 224 ALR 416; [2006] HCA 7.

aside, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[52]. The plaintiffs argue that s 18 permits a court to outsource to the executive part of the intrinsically judicial function of quelling the controversy between the citizen and the State represented by the prosecution of a criminal charge. The section does so, they argue, by permitting the judge presiding at the trial of a person found guilty of an offence of a sexual nature to transfer to the Governor in Council the function of determining the severity of punishment for that offence.

70 In *Re Woolley; Ex parte Applicants M276/2003*[53] Gleeson CJ said of *Lim* that "[t]he proposition that, ordinarily, the involuntary detention of a citizen by the State is penal or punitive in character was not based upon the idea that all hardship or distress inflicted upon a citizen by the State constitutes a form of punishment". His Honour went on to point out that the form of involuntary detention upheld in *Lim* itself bore a different character "because of the legal characteristics of the persons upon whom it was imposed, and the purpose for which it was imposed"[54].

71 The plaintiffs are correct that the judicial function of quelling the controversy between the citizen and the State represented by the prosecution of a criminal charge encompasses the imposition of a sentence[55]. The plaintiffs are also correct that the making of a declaration and the giving of a direction under s 18(3)(a) is the imposition of an indeterminate sentence[56] which, alone or in combination with another sentence, brings such a controversy between a person and the State to an end.

72 Where the plaintiffs are wrong is to characterise the detention which results from the making of a declaration and the giving of a direction under s 18(3)(a) as punishment of criminal guilt. The plaintiffs are wrong, in particular, to analogise s 18(3)(a) to legislative requirements for courts to

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52 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; [1992] HCA 64.

53 (2004) 225 CLR 1 at 12 [17]; [2004] HCA 49.

54 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17].

55 *Crump v New South Wales* (2012) 247 CLR 1 at 26 [58]; [2012] HCA 20; *Magaming v The Queen* (2013) 87 ALJR 1060 at 1073 [67]; 302 ALR 461 at 475; [2013] HCA 40.

56 *South Australia v O'Shea* (1987) 163 CLR 378 at 383.

sentence convicted persons to detention during royal or vice-regal "pleasure" which have been interpreted elsewhere to permit the continuation of detention for punitive purposes and on that basis to transfer discretion to determine the severity of punishment to be inflicted on offenders from a court to the executive[57]. The legislative authorisation of the making of a judicial order for detention during royal or vice-regal "pleasure" derives from the *Criminal Lunatics Act* 1800 (UK). The formulation in that original conception was "purely preventative and therapeutic"[58]. The formulation when used in a particular statute must always depend on its context.

73 It follows, from the second and third of the features already highlighted in addressing construction, that the detention which results from the making of a declaration and the giving of a direction under s 18(3)(a) is properly characterised as wholly protective. The declaration can be made and the direction given in the exercise of judicial discretion only on proof that the person concerned (having already been found guilty of an offence of a sexual nature committed on or in relation to a child under the age of seventeen years) is incapable of exercising that degree of self-control which would prevent him from committing a further offence of a sexual nature and on the basis that the resultant detention is warranted to protect society from such unacceptable risk of physical harm as might be determined to arise from that person being incapable of exercising proper control over his sexual instincts. The incidents of the resultant detention are not left to executive fiat; they are statutorily prescribed. The person: is to be detained in such institution as the Governor in Council directs; is to be medically examined at least once in every three months; and under s 18(5)(b) is to be released if, but only if, the Governor in Council is satisfied on the report of two legally qualified medical practitioners (directed to the ability of the person to exercise proper control over his sexual instincts) that continued detention of the person is not warranted to protect society from unacceptable risk of physical harm. The power conferred on the executive by s 18(5)(b) complements that conferred on the judiciary by s 18(3)(a). They share a common purpose and have a combined effect: one which has no punitive element.

74 The plaintiffs' second argument invokes the often-quoted statement in *Mistretta v United States* that the legislative and executive branches of government cannot "borrow" the reputation of the judicial branch "to cloak their

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57 Cf *Hinds v The Queen* [1977] AC 195; *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407; *Browne v The Queen* [2000] 1 AC 45; *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411.

58 *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407 at 514. See also *R v Sullivan* [1984] AC 156 at 172.

work in the neutral colors of judicial action"[59]. The plaintiffs contrast the circumscribed criterion governing the judicial exercise of power triggering detention with what they argue to be an absence of criteria governing the formation of executive satisfaction triggering release. That contrast is so stark, they argue, as to render the order of the judge no more than the formal authority for what is in substance an unconstrained executive power of detention.

75 The answer to that second argument begins with recognition that the commonality of purpose of the powers conferred respectively on the judiciary and the executive by s 18(3)(a) and s 18(5)(b) is reflected in a complementarity in the decision-making criteria which properly inform their exercise: the former involving judicial assessment at a particular point in time of whether detention of a person found guilty on indictment of an offence of a sexual nature committed on or in relation to a child under the age of seventeen years is warranted to protect society from such unacceptable risk of physical harm as might be determined to arise from that person being incapable of exercising proper control over his sexual instincts; the latter involving executive assessment from time to time of whether continued detention of that person is warranted to protect society from unacceptable risk of physical harm. There are differences in the two forms of assessment to be performed in that the Governor in Council is not bound by the same curial procedures as was the judge, is not bound to apply the same tolerance for risk as did the judge, and may take public opinion into account in determining that level of risk of physical harm which is acceptable. Neither alone nor in combination do those differences result in the role of the Governor in Council under s 18(5)(b) being properly characterised as involving an unconstrained executive power of detention.

76 Finally, the plaintiffs advance the proposition that a State court may form part of a regime for preventive detention only if that regime contains "safeguards" to preserve the integrity of the court. Pointing to the lack of any mechanism for a court either to vary or revoke a declaration or direction, or to "supervise" the continuation of a person's detention, they argue that the requisite safeguards are lacking from s 18. The argument is sufficiently answered by pointing out that both the duty imposed by s 18(8) and the power conferred by s 18(5)(b) (together with the attendant duty to consider a request for release, and the attendant obligation to afford procedural fairness in the performance of that duty) are subject to judicial review by the Supreme Court of Queensland. Judicial review of the power conferred by s 18(5)(b) is not rendered ineffective

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59 488 US 361 at 407 (1989).

merely because the Governor is not required to give reasons for the non-exercise of that power[60].

Conclusion

77 For these reasons, the question whether s 18 of the CLAA is invalid should be answered "No". The plaintiffs should pay the costs of the special case.

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60 Cf *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; [1949] HCA 26.