HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND GORDON JJ

YAU MING MATTHEW MOK APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS (NSW) RESPONDENT

Mok v Director of Public Prosecutions (NSW)
[2016] HCA 13
6 April 2016
S246/2015

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

G R James QC with P D Lange for the appellant (instructed by Murphy's Lawyers)

N J Adams SC with B K Baker for the respondent (instructed by Solicitor for Public Prosections (NSW))

CATCHWORDS

Mok v Director of Public Prosecutions (NSW)

Federal jurisdiction – Application of State laws – *Service and Execution of Process Act* 1992 (Cth) ("SEPA"), s 89(4) – Where appellant arrested in Victoria pursuant to warrant issued in New South Wales – Where order made under s 83(8)(b) of SEPA to return appellant in custody to New South Wales – Where appellant charged with attempting to escape lawful custody under s 310D of *Crimes Act* 1900 (NSW) ("Crimes Act") – Whether s 89(4) of SEPA applied s 310D of Crimes Act as surrogate federal law – Whether content of applied State law altered – Whether prosecution required to prove all elements of offence under State law.

Words and phrases – "competent authority", "correctional centre", "court", "escape lawful custody", "inmate", "law of a State", "surrogate federal law".

Constitution, ss 51(xxiv), 52(i).
Commonwealth Places (Application of Laws) Act 1970 (Cth), s 4.
Judiciary Act 1903 (Cth), ss 68, 79.
Service and Execution of Process Act 1992 (Cth), ss 8(4), 81A, 82, 83, 89.
Children (Detention Centres) Act 1987 (NSW), s 33(1).
Crimes Act 1900 (NSW), Pt 1A, ss 310A, 310D.
Crimes (Administration of Sentences) Act 1999 (NSW), ss 3(1), 4.
Interpretation Act 1987 (NSW), ss 5, 12.

FRENCH CJ AND BELL J.

Introduction

1 The *Service and Execution of Process Act* 1992 (Cth) ("SEPA 1992") provides for the execution throughout Australia of warrants authorising the apprehension of persons under State laws[1]. Under SEPA 1992 a person named in a warrant issued in one State may be apprehended in another State[2] and taken before a magistrate in that State. Upon production of the warrant or a copy of it[3] the magistrate must make one of two orders under s 83(8) of the Act. The person must be remanded on bail to appear in the issuing State at a specified place and time[4] or, as in the present case, an order made under s 83(8)(b):

> "that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant."

In the latter event, the person must be returned in custody to the State in which the warrant was issued.

2 The appellant attempted to escape from lawful custody at Tullamarine Airport while being taken from Victoria to New South Wales pursuant to an order made under s 83(8)(b). As appears from a Court Attendance Notice later issued to him in New South Wales, he was charged under s 310D of the *Crimes Act* 1900 (NSW) that being an "inmate" he attempted to escape lawful custody[5]. Section 310D was said to apply to his escape in Victoria by operation of s 89(4) of SEPA 1992. Section 89(4) provides:

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1 SEPA 1992, s 3(1), definition of "warrant". Section 5(1) regards each Territory (except external Territories that are taken to be part of a State or another Territory by operation of s 7(2)) as a State for the purpose of SEPA 1992. Accordingly, in these reasons "State" should also be taken to refer to each Territory in the context of SEPA 1992.

2 SEPA 1992, s 82(1). A provision which does not apply to a person who is imprisoned: s 82(2).

3 SEPA 1992, s 83(1) and (2).

4 SEPA 1992, s 83(8)(a).

5 By s 310A of the *Crimes Act* the term "inmate" is defined to have the same meaning as it has in the *Crimes (Administration of Sentences) Act* 1999 (NSW). The relevant part of the definition appears at [22] of these reasons.

> "The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1)."

3 The formulation of the charge set out in the Court Attendance Notice[6] was faulty to the extent that it conveyed the impression that it relied upon a direct application of s 310D without reference to s 89(4) of SEPA 1992. However, the magistrate recognised that s 310D was applied by virtue of s 89(4) of SEPA 1992. He dismissed the charge on the basis that as a matter of law the prosecution had not established a necessary element of the offence under s 310D, namely the requirement that the appellant be an "inmate"[7].

4 An appeal against the magistrate's decision was allowed by Rothman J in the Supreme Court of New South Wales[8] and an appeal against his Honour's decision dismissed by the Court of Appeal of New South Wales[9]. Both Rothman J and the Court of Appeal held that s 89(4) creates a federal offence by picking up the content of the relevant State law relating to escaping lawful custody. The appeal to this Court, by special leave[10], concerns the way in which s 89(4) does that. The particular question in this appeal is whether for a conviction of that federal offence it was necessary to show that the appellant was an "inmate" for the purposes of s 310D of the *Crimes Act*. Rothman J held that it was and that the appellant was an inmate[11]. The Court of Appeal held that that element of the offence under s 310D was not picked up by s 89(4)[12].

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6 *Criminal Procedure Act* 1986 (NSW), s 47(1); see also s 50 regarding the required form of the Court Attendance Notice and description of the offence.

7 *Police v Mok* unreported, Local Court of New South Wales, 1 July 2013 at 14 [52] per Magistrate Buscombe.

8 *Director of Public Prosecutions (NSW) v Mok* (2014) 296 FLR 1.

9 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584.

10 [2015] HCATrans 301 (Bell and Gageler JJ).

11 (2014) 296 FLR 1 at 11 [40], 12–14 [48]–[58].

12 (2015) 320 ALR 584 at 587 [9], 589 [20], 595 [49]–[51].

Factual history

5 The factual history leading to this appeal stretches back over 10 years. In February 2003, the appellant was arrested and charged in New South Wales with fraud offences to which he pleaded guilty in the Local Court on 11 March 2004. He was committed to the District Court of New South Wales for sentence. Pursuant to that committal order he was ultimately required to appear before the District Court on 13 April 2006. The reasons for the delays between his charge and his guilty plea, and between the committal order and the sentencing date, do not appear from the record.

6 The appellant did not appear as required at the District Court on 13 April 2006. On 18 April 2006, Freeman DCJ issued a Bench Warrant to apprehend him. It took the form of a command to the Commissioner of Police for the State of New South Wales and to all police officers in that State:

> "to apprehend the said Offender and to bring him before me or some other Judge of the said Court or some Justice or Justices of the Peace, in and for the said State to be dealt with according to law."

7 The appellant next surfaced in Victoria when he was arrested on 14 December 2011 in Dandenong, and charged with two Commonwealth offences relating to the possession of a false Australian passport and money laundering. He was granted conditional bail. Another delay, unexplained in the record, ensued until 26 February 2013 when he appeared in the Melbourne Magistrates' Court on those charges. As he left the Court he was arrested by an officer of the Victorian Police pursuant to the warrant which had been issued in New South Wales by Freeman DCJ and which was given effect in Victoria by operation of s 82 of SEPA 1992.

8 The following day, on 27 February 2013 in the Melbourne Magistrates' Court, a magistrate issued a warrant headed "SERVICE AND EXECUTION OF PROCESS ACT 1992 WARRANT TO REMAND A PERSON TO ANOTHER STATE". The warrant commanded a named New South Wales police officer to take the appellant and safely convey him to the Sydney Police Centre in the State of New South Wales and take him before a magistrate for that State to answer the charges and be further dealt with according to law. That order, under s 83(8)(b) of SEPA 1992, was administrative in character[13]. Its validity was not in dispute[14].

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13 As with the like orders made under the *Service and Execution of Process Act* 1901 (Cth). See *Aston v Irvine* (1955) 92 CLR 353 at 365; [1955] HCA 53; *Ammann v Wegener* (1972) 129 CLR 415; [1972] HCA 58 which left open the question

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9 On 28 February 2013, the officer named in the Victorian warrant, and another New South Wales police officer, collected the appellant from the Melbourne Magistrates' Court and escorted him to Tullamarine Airport. At the airport, in the vicinity of the boarding gate for the flight to Sydney, the appellant tried to escape by running away from the officers. He ran about 100 metres before he was re-arrested. On his return to New South Wales he was charged under s 310D of the *Crimes Act*.

Statutory framework — SEPA 1992

10 SEPA 1992, like its predecessor, the *Service and Execution of Process Act* 1901 (Cth) ("SEPA 1901"), was enacted pursuant to s 51(xxiv) of the Constitution, which authorises the making of laws for:

> "the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States".

The necessity for such a power was recognised well before federation because of the difficulties which had been experienced in the extradition of offenders between the Australian colonies. Those difficulties had led to reliance upon Imperial statutes relating to extradition[15] and later laws made pursuant to the *Federal Council of Australasia Act* 1885 (Imp)[16]. The purpose of the power

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whether, although acting administratively, the magistrate was sitting as a court: at 436 per Gibbs J, Walsh J agreeing at 430, Stephen J agreeing at 439.

14 Unlike s 18 of the *Service and Execution of Process Act* 1901 (Cth), s 83 of SEPA 1992 imposes a duty on the magistrate to make one of the orders specified in s 83(8). The Court of Appeal held that its mandatory nature tended to confirm its administrative character: (2015) 320 ALR 584 at 590 [25]. Whether the imposition of that duty was valid in light of the question discussed and left open in *O'Donoghue v Ireland* (2008) 234 CLR 599 at 623–626 [48]–[57]; [2008] HCA 14 was not raised at any stage of the proceedings leading to this appeal.

15 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 617–620; and see *Ammann v Wegener* (1972) 129 CLR 415 at 443 per Mason J; *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490 at 500–502 [21]–[25]; [2006] HCA 17.

16 Which by s 15(f) conferred on the Federal Council legislative authority in respect of "[t]he enforcement of criminal process beyond the limits of the colony in which it is issued, and the extradition of offenders" and led to the enactment of the *Australasian Civil Process Act* 1886 (49 Vict No 3), the *Australasian Judgments Act* 1886 (49 Vict No 4) and the *Australasian Testamentary Process Act* 1897 (60

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conferred by s 51(xxiv), given effect in SEPA 1901 and SEPA 1992, as stated by this Court in *Aston v Irvine*[17], is:

> "securing the enforcement of the civil and criminal process of each State in every other State."

It was described as[18]:

> "a power to be exercised in aid of the functions of the States and [it] does not relate to what otherwise is a function of the Commonwealth."

Early in the life of SEPA 1901, an argument was put to this Court in *McGlew v New South Wales Malting Co Ltd*[19] that "the intention" of s 51(xxiv) was to enable the Parliament to enact a law which would merely "extend the arm of the State Courts so as to enable parties to be brought before them."[20] The Court took a broader view of Parliament's power to legislate with respect to service and execution of process throughout the Commonwealth, extending, for instance, to such incidental powers as enabling courts to protect against abuse of interstate process[21].

11 Following a report of the Law Reform Commission ("the Commission") on service and execution of process ("the Report")[22], SEPA 1901 was amended[23] and then replaced completely by SEPA 1992. An important difference between SEPA 1992 and SEPA 1901 is that SEPA 1992 provides for the exclusion of State laws which might otherwise operate concurrently with it. SEPA 1901 made

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Vict No 2), preserved by covering cl 7 of the Constitution, which repealed the 1885 Act. The statutes were all repealed by s 2 of SEPA 1901.

17 (1955) 92 CLR 353 at 364.

18 (1955) 92 CLR 353 at 364; *Flaherty v Girgis* (1987) 162 CLR 574 at 593 per Mason ACJ, Wilson and Dawson JJ; [1987] HCA 17.

19 (1918) 25 CLR 416; [1918] HCA 72.

20 An argument advanced by Knox KC in submissions: (1918) 25 CLR 416 at 418.

21 (1918) 25 CLR 416 at 420–421.

22 Law Reform Commission, *Service and Execution of Process*, Report No 40, (1987).

23 *Service and Execution of Process Amendment Act* 1991 (Cth).

no express provision for any such exclusion and, at least in its application to civil process, was held to be not exhaustive[24]. The Commission recommended that the new SEPA "express an intention to cover the field, that is, to provide the only law on the subject of service and execution of State and Territory process and judgments outside the State or Territory of issue or rendition and within Australia."[25] So it is that SEPA 1992 makes express provision for the exclusion of State laws in s 8[26]. Relevantly, s 8(4) provides:

> "Subject to this Act, this Act applies to the exclusion of a law of a State (the ***relevant State***) with respect to:
>
> (a) the service or execution in another State of process of the relevant State that is process to which this Act applies".

The subsection operates as an express exclusion by a Commonwealth law of the application of State law on a particular subject matter. It thereby renders any such State law inoperative not because it is directly invalidated by Commonwealth law but by operation of s 109 of the Constitution[27]. There was no suggestion that s 8(4) did not have that effect in relation to the class of laws it described and the Court of Appeal so held in its judgment[28].

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24 *Renton v Renton* (1918) 25 CLR 291 at 298 per Barton J; [1918] HCA 57; *Flaherty v Girgis* (1987) 162 CLR 574 at 588–598 per Mason ACJ, Wilson and Dawson JJ, 607 per Brennan J, 610 per Deane J.

25 Law Reform Commission, *Service and Execution of Process*, Report No 40, (1987) at 342 [721].

26 By s 8(3A) the exclusionary operation of s 8(4), and SEPA 1992 generally, does not affect the operation of the "cross-border laws", which are the cross-border laws of a participating jurisdiction within the meaning of s 8 of the *Cross-border Justice Act* 2008 (WA). Under that scheme, the participating jurisdictions of Western Australia, South Australia and the Northern Territory authorised the extension of each other's laws in cross-border regions with which an alleged offender has a connection: see *Cross-border Justice Act* 2008 (WA), *Cross-border Justice Act* 2009 (SA), *Cross-border Justice Act* (NT).

27 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 466 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1995] HCA 47.

28 (2015) 320 ALR 584 at 592 [35].

12 The term "law of a State" in s 8 is to be understood by reference to s 3(5) of SEPA 1992 which provides:

> "A reference in this Act to a law of the Commonwealth or a State is a reference to a law (whether written or unwritten) of or in force in the Commonwealth or the State, as the case may be."

The "unwritten law" of a State encompassed by that definition must be understood as a reference to "the principles of law and equity expounded from time to time in decisions respecting the common law of Australia."[29] That aspect of the definition of a "law of a State" encompasses the phrase "law in force in the place of issue of a warrant" in s 89(4). It allows for the application of s 89(4) to the common law offence of escaping lawful custody which, as appears below, continues in effect in New South Wales.

13 The appellant in written submissions to this Court argued that s 89(4) does not create an offence against Commonwealth law but operates as "merely an exception to the general exclusion, which is otherwise provided by s 8(4)(a) *SEPA*."[30] That argument was evidently not advanced in the Court of Appeal, which observed that[31]:

> "It was common ground that s 89(4) applied when [the appellant] was at Tullamarine Airport on 28 February 2013."

The argument is untenable. It assumes an extra-territorial operation for all State laws the subject of the propounded carve out from s 89(4). It cannot be supported by the text of s 89(4). In any event, counsel for the appellant presented his oral argument on the basis that s 89(4) creates a liability at federal law which derives its content from the unaltered text of the applicable State law.

14 Section 89(4) has been set out in the Introduction to these reasons. Similar provision is made in s 46(4) and s 74(4) of SEPA 1992 in relation to escapes by prisoners being taken in custody from one State to another pursuant to

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29 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 71 [38] per Gummow and Hayne JJ; [2003] HCA 18.

30 Although the appellant did contend in his written submissions that any offence he had committed by attempting to escape at Tullamarine Airport was an offence against a law of the Commonwealth by operation of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth).

31 (2015) 320 ALR 584 at 591 [28].

a subpoena issued by a court or tribunal, respectively, in the latter State[32]. Section 94C makes similar provision with respect to prisoners being taken from one part of an issuing State to another through a "transit State". SEPA 1901 contained no equivalents until 1991 when a precursor provision, s 19ZC(2), was inserted[33].

15 The Commission adverted to the lack of an "escape" provision in SEPA 1901. For prisoners in transit under a production order it recommended that proceedings, if any, in relation to an escape should be dealt with in the place in which the person was under lawful restraint and proposed[34]:

> "Therefore an escape while in transit or in attendance in compliance with an order should be dealt with as if the escape occurred in the State or Territory in which the person is under lawful restraint."

That recommendation was reflected in a new s 19W(5) inserted in 1991[35] and carried over into s 46(4) and s 74(4) of SEPA 1992. The Commission took a different approach to the law to be applied to persons in custody under an order giving effect to a warrant of apprehension. The Commission said[36]:

> "This situation has been discussed in the context of the production of persons under lawful restraint for the purpose of giving evidence in proceedings in other States or Territories and the recommendations there made should apply generally here also. However, rather than proceedings

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32 Those provisions do not apply to an escape from lawful custody in respect of an offence against a law of the Commonwealth: SEPA 1992, ss 89(5), 74(5) and 46(5).

33 Although the original provisions relating to warrants of apprehension and transfer of persons in SEPA 1901 were modelled in part on the *Indictable Offences Act* 1848 (11 & 12 Vict c 42) and the *Fugitive Offenders Act* 1881 (Imp), there was no equivalent of s 28 of the 1881 Act, which provided for the trial of a person who escaped from custody under an inter-jurisdictional warrant. Section 19ZC(2), in similar terms to s 89(4), was inserted into SEPA 1901 by the *Service and Execution of Process Amendment Act* 1991 (Cth).

34 Law Reform Commission, *Service and Execution of Process*, Report No 40, (1987) at 152–153 [319].

35 *Service and Execution of Process Amendment Act* 1991 (Cth).

36 Law Reform Commission, *Service and Execution of Process*, Report No 40, (1987) at 219 [438].

> in relation to an escape being taken in the State or Territory from which the person has come, in this context such proceedings should be taken in the State or Territory to which the person was being taken, that is, the State or Territory of issue of the apprehension process." (footnote omitted)

16 Clause 70(2) of the draft Bill annexed to the Report of the Commission gave effect to its recommendation in language prefiguring that of s 89(4), the proposed text being[37]:

> "The provisions of a law in force in the place of issue of a warrant that relate to the liability of a person who escapes from lawful custody apply to a person being taken to the place of issue in compliance with an order referred to in subsection (1)."

The Commission did not discuss the character of the law as applied pursuant to its proposal.

Statutory framework — *Commonwealth Places (Application of Laws) Act* 1970 (Cth)

17 Reference was made in argument to the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) ("the CPAL Act"). The relevant provisions of s 4 of that Act provide:

> "(1) The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time.
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> ...
>
> (2) This section does not:
>
> (a) extend to the provisions of a law of a State to the extent that, if that law applied, or had applied, in or in relation to a Commonwealth place, it would be, or have been, invalid or inoperative in its application in or in relation to that Commonwealth place otherwise than by reason of the

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37 Law Reform Commission, *Service and Execution of Process*, Report No 40, (1987) at 386.

> operation of section 52 of the Constitution in relation to Commonwealth places".

The preceding provisions are in terms directed to the laws of a State in force within that State. The application of those provisions is extended to the laws of a State having extra-territorial operation in another State by s 4(4), which provides:

> "In so far as a law of a State has effect in another State, subsection (1) of this section operates to make the provisions of that law applicable in or in relation to a Commonwealth place in that other State."

18 Section 4(4) of the CPAL Act has potential application in this case because of the arguable extra-territorial application of s 310D. Part 1A of the *Crimes Act*, entitled "Geographical jurisdiction", extends the application of a law of New South Wales that creates an offence beyond the territorial limits of the State if there is the nexus required by that Part between New South Wales and the offence[38]. A requisite geographical nexus exists between the State and offences committed wholly outside the State if "the offence has an effect in the State."[39]

19 Absent s 8(4) of SEPA 1992, s 310D would arguably have had a direct operation in States other than New South Wales by virtue of Pt 1A. However, as the Court of Appeal observed, Tullamarine Airport (where the attempted escape took place) was a place acquired by the Commonwealth for public purposes within the meaning of s 52(i) of the Constitution and therefore s 310D could not apply of its own force in that place even if it would otherwise have had extra-territorial application[40].

20 The appellant submitted that if he had committed an offence it would have been a Commonwealth offence owing its existence to the CPAL Act. That Act, he submitted, applied the applicable State law without rewriting it. That is to say, if s 310D were applied by the CPAL Act at Tullamarine Airport he would have to have been an "inmate" within the meaning of s 310D in order to offend

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38 *Crimes Act*, s 10A. Part 1A was inserted into the Act by the *Crimes Legislation Amendment Act* 2000 (NSW).

39 *Crimes Act*, s 10C(2)(b).

40 (2015) 320 ALR 584 at 589 [21], citing *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89; [1970] HCA 19; *R v Phillips* (1970) 125 CLR 93; [1970] HCA 50; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630; [1996] HCA 58; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388; [2004] HCA 53.

against it. His submission that the CPAL Act applies State laws unchanged relied upon the observation of Gleeson CJ and Gaudron J in *The Commonwealth v Western Australia* (*Mining Act Case*)[41] that "[s]ection 4(1) operates to apply State laws 'in accordance with their tenor', not to rewrite them." He also relied upon the judgment of Spigelman CJ (with whom Barr and Hoeben JJ agreed) in *R v Porter*[42] applying that dictum. In this case, however, the CPAL Act is not the only relevant Commonwealth law. By virtue of s 4(2)(a) it cannot apply a State law which, apart from s 52 of the Constitution, would be rendered inoperative, in its direct application, by s 8(4) of SEPA 1992. That provision applies to a law of New South Wales with respect to "the service or execution in another State of process of [New South Wales] that is process to which this Act applies". Section 310D in its extra-territorial operation would answer that description, as the Court of Appeal held[43]. Section 310D, however, has no relevant valid extra-territorial operation anywhere in Victoria because any such operation is displaced by s 8(4). It is therefore the construction of s 89(4), applying s 310D, that is in issue in this appeal.

The law of New South Wales — escaping from lawful custody

21 The law which was found, in the Supreme Court and the Court of Appeal of New South Wales, to "apply" to the appellant in this case, by operation of s 89(4) of SEPA 1992, was s 310D of the *Crimes Act*, which provides:

> "Any inmate:
>
> (a) who escapes or attempts to escape from lawful custody, or
>
> (b) who, having been temporarily released from lawful custody, fails to return to lawful custody at the end of the time for which the inmate has been released,
>
> is guilty of an offence.
>
> Maximum penalty: imprisonment for 10 years."[44]

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41 (1999) 196 CLR 392 at 415 [51]; [1999] HCA 5.

42 (2004) 61 NSWLR 384 at 388 [12].

43 (2015) 320 ALR 584 at 592 [35].

44 The other States and Territories have also enacted statutes providing for the offence of escaping from lawful custody: *Crimes Act* 1958 (Vic), s 479C; *Criminal Law Consolidation Act* 1935 (SA), s 254; *Criminal Code* (Q), s 142; *Criminal Code*

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Section 310D and associated provisions of the *Crimes Act* were enacted in 1999[45]. It reproduced the substance of s 34(1) of the *Correctional Centres Act* 1952 (NSW), which was repealed by the same legislation that enacted s 310D[46].

22 The term "inmate" used in s 310D has the same meaning as it has in the *Crimes (Administration of Sentences) Act* 1999 (NSW)[47]. In s 3(1) of that Act an inmate is defined as "a person to whom Part 2 applies." Section 4(1) sets out a large range of persons to whom Pt 2 applies, defined essentially by the processes which have led to their imprisonment, detention or custody. It includes in pars (d) and (e):

> "(d) any person the subject of a warrant or order by which a court has committed the person to a correctional centre on remand in connection with proceedings for an offence committed, or alleged to have been committed, by the person, and
>
> ...
>
> (e) any person the subject of a warrant or order by which a court or other competent authority has committed the person to a correctional centre otherwise than as referred to above".

Section 4(3) repeats that in Pt 2 "inmate" means "a person to whom this Part applies". The term "inmate" used in the predecessor provision, s 34 of the *Correctional Centres Act*, was similarly defined and included persons ordered to be imprisoned in or committed to a correctional centre by any court, judge or justice or other competent authority[48].

23 The term "court", used in pars (d) and (e) of the definition of "inmate", is defined by reference to various named State courts in New South Wales and to

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(WA), s 146; *Criminal Code* (Tas), s 107; *Criminal Code* (NT), s 112; *Crimes Act* 1900 (ACT), s 160.

45 *Crimes Legislation Amendment (Sentencing) Act* 1999 (NSW), Sched 3, commenced 3 April 2000.

46 *Crimes Legislation Amendment (Sentencing) Act* 1999 (NSW), Sched 1, commenced 3 April 2000.

47 *Crimes Act*, s 310A, definition of "inmate".

48 *Correctional Centres Act* 1952 (NSW), s 4(1), definition of "inmate".

"any other court that, or person who, exercises criminal jurisdiction"[49]. The term "correctional centre" means, inter alia[50]:

> "(b) any police station or court cell complex in which an offender is held in custody in accordance with this or any other Act."

24 In addition to s 310D of the *Crimes Act*, provision is made, by s 33(1) of the *Children (Detention Centres) Act* 1987 (NSW), for the liability of children escaping from lawful custody. That subsection provides:

> "A detainee who escapes or attempts to escape from lawful custody is guilty of an offence and liable to imprisonment for a period not exceeding 3 months."

In its application, the offence is limited to children.

25 There is a distinction which can be drawn between most if not all of the classes of persons defined as "inmate" for the purposes of s 310D and the class of persons defined as "detainees" for the purposes of the *Children (Detention Centres) Act*[51], which is relevant to the way in which s 89(4) applies s 310D. Most of the persons who are "inmates", for the purposes of s 310D, are relevantly persons who are in custody pursuant to a variety of legal processes including warrants or orders of the kind mentioned in pars (d) and (e) of s 4(1) of the *Crimes (Administration of Sentences) Act*. Those processes are not in terms limited in their application to a subset of the population. On the other hand, detainees to whom the escape provision of the *Children (Detention Centres) Act* applies are a subset of the population, namely children, to whom legal processes resulting in their detention have been applied. The application of s 89(4) of SEPA 1992 to a law of that kind would necessarily pick up the defining characteristic of the subset of persons to whom it applied. As explained later in these reasons, it does not pick up, by way of a condition on the criminal liability it imposes, the precise textual description in the law of the issuing State of the process by which a person escaping or attempting to escape lawful custody was taken into that custody. It suffices that the process of the law of the issuing State fits analogically with the process by which a person is taken into custody under s 89 of SEPA 1992 and that the offence created by the law of the issuing State serves the like purpose as that served by s 89(4).

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49 *Crimes (Administration of Sentences) Act*, s 3(1), definition of "court".

50 *Crimes (Administration of Sentences) Act*, s 3(1), definition of "correctional centre".

51 *Children (Detention Centres) Act*, s 3(1), definition of "detainee".

26 Reference must also be made to the common law offence of escape from lawful custody. It has been preserved in New South Wales notwithstanding the specific offence created by s 310D. By s 341 of the *Crimes Act*, which predated s 310D and appears in Div 5 of Pt 7, certain offences at common law were abolished[52]. A saving provision, s 343, provides:

> "To remove any doubt, it is declared that the following offences at common law are not abolished by this Division:
>
> (a) the offence of escaping from lawful custody"[53].

The common law offence of escape encompasses escaping from the lawful custody of a member of the police force pursuant to an order of the court[54]. It may be accepted that in States and Territories in which it exists, the common law offence can be picked up and applied by s 89(4) of SEPA 1992. That does not answer the question — how does s 89(4) apply s 310D?

The magistrate's decision

27 The magistrate treated s 310D of the *Crimes Act* as applicable to the appellant's attempted escape by virtue of s 89(4) of SEPA 1992. He held, however, that on its face the warrant issued in New South Wales by Freeman DCJ on 18 April 2006 did not commit the appellant to a "correctional centre" within the meaning of the *Crimes (Administration of Sentences) Act*. The appellant was therefore not an "inmate" under that Act and therefore not an "inmate" for the purposes of s 310D. Nor could the order made by the Melbourne Magistrates' Court pursuant to s 83(8)(b) of SEPA 1992 be relied

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52 Sections 340–343 were inserted by the *Crimes (Public Justice) Amendment Act* 1990 (NSW), which entered into force on 25 November 1990.

53 The effect of s 343 as preserving the common law offence was referred to in *R v Peehi* (1997) 41 NSWLR 476 at 480 per Hidden J, Gleeson CJ and Hunt CJ at CL agreeing at 477.

54 See generally *R v Scott* [1967] VR 276; *R v Dhillon* [2006] 1 WLR 1535. Examples of the application of the common law of escape in New South Wales include *R v Farlow* [1980] 2 NSWLR 166; *R v Gregory* [1983] 3 NSWLR 172; *R v Peehi* (1997) 41 NSWLR 476; *R v Bethune* [2001] NSWCCA 303; *R v Gordon* [2004] NSWCCA 45; *Petterson v The Queen* [2013] NSWCCA 133.

upon to support that characterisation of the appellant[55]. The charge against the appellant was accordingly dismissed on a no case submission.

The decision of Rothman J

28 The Director of Public Prosecutions (NSW) appealed against the Local Court's decision. The appeal was instituted under s 56 of the *Crimes (Appeal and Review) Act* 2001 (NSW).

29 Rothman J held that the order made by the Melbourne Magistrates' Court under s 83(8)(b) of SEPA 1992 attracted the application of s 89(4), which in turn applied s 310D of the *Crimes Act* to the appellant's conduct as an offence under federal law[56]. The issue on the appeal was whether the appellant had been, at the time of his attempted escape, an "inmate" within the meaning of s 310D and the definition of that term in the *Crimes Act*[57].

30 Rothman J held that both pars (d) and (e) of the definition of "inmate" in the *Crimes (Administration of Sentences) Act* were applicable because the term "court" used in that definition extended to the Melbourne Magistrates' Court[58]. He rejected a submission by the appellant that neither par (d) nor par (e) applied because the appellant had not been "committed" to a correctional centre[59]. His Honour set aside the order of the magistrate dismissing the proceedings and remitted the hearing of the charge to the Local Court to determine any issues associated with irregularity or necessity to amend the charge.

The decision of the Court of Appeal

31 The Court of Appeal held that Rothman J was correct to conclude that the appellant must be taken to have been charged with a federal offence, namely a contravention of s 310D of the *Crimes Act* as made applicable by operation of s 89(4) of SEPA 1992[60]. The Court held that the CPAL Act was inapplicable to

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55 *Police v Mok* unreported, Local Court of New South Wales, 1 July 2013 at 13 [45]–[46], 14 [52] per Magistrate Buscombe.

56 (2014) 296 FLR 1 at 10–11 [39]–[40].

57 (2014) 296 FLR 1 at 11 [40].

58 (2014) 296 FLR 1 at 14 [62]–[63].

59 (2014) 296 FLR 1 at 14–15 [64]–[68].

60 (2015) 320 ALR 584 at 585 [2].

the case because of s 8(4) of SEPA 1992, read with s 4(2)(a) of the CPAL Act[61]. Their Honours observed that it was "common ground that s 89(4) applied when [the appellant] was at Tullamarine Airport on 28 February 2013" and that "[t]he parties were correct to proceed on that basis"[62].

32 The Court of Appeal identified as a common premise in the submissions made to their Honours that it was a necessary condition of the application of s 310D to the appellant by operation of s 89(4) that the appellant was an "inmate" for the purpose of s 310D at the time of his attempted escape at Tullamarine Airport. That premise was rejected[63]. The operation of s 89(4) was distinguished from that of ss 68 and 79 of the *Judiciary Act* 1903 (Cth). Section 89(4) was characterised as taking a limited class of State laws, namely laws of the place of issue of a warrant of apprehension relating to the liability of a person who escapes or attempts to escape from lawful custody. It did not purport to apply that class of laws generally or "according to their tenor" or "in all cases to which they are applicable". Their Honours said[64]:

> "Subsection 89(4) does something far more focused. Its premise is that there is a person being taken to the place of issue in compliance with an order made under [SEPA 1992]. That order will at least ordinarily name the person. Subsection 89(4) applies that limited class of laws to that person — the person named in the order."

33 The Court of Appeal approached the construction of s 310D as applied by s 89(4) on a different basis from that adopted by the magistrate and by Rothman J. Their Honours said[65]:

> "the effect of s 89(4) applying s 310D to persons being returned to New South Wales was not merely confined to those persons who were being returned in accordance with [SEPA 1992] and who sought to escape *who happened to be 'inmates'*. Unlike s 79 [of the *Judiciary Act*], s 89(4) *does* contain an 'express provision which would enable [the court] to alter the language of a State statute and apply it in that altered form', to paraphrase what Mason J said in *John Robertson & Co.*"

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61 (2015) 320 ALR 584 at 591–592 [32]–[36].

62 (2015) 320 ALR 584 at 591 [28].

63 (2015) 320 ALR 584 at 589 [20].

64 (2015) 320 ALR 584 at 594 [47].

65 (2015) 320 ALR 584 at 595 [49] (emphasis in original).

Section 89(4) was treated as applying State law relating to the liability of a person escaping or attempting to escape from lawful custody as surrogate federal law "upon the assumption that escape from lawful custody imposed by an order made by a magistrate *in another state* is not outside their field."[66] The provision left no room for debate about whether or not the appellant was a person who "as an 'inmate'" was within the scope of s 310D in its ordinary operation as an offence under State law. The new federal offence created by s 89(4), acting upon s 310D, applied to all persons being taken to New South Wales in compliance with an order under SEPA 1992 mentioned in s 89(1) and the appellant was such a person[67]. The conclusion of the Court of Appeal was correct although it need not be supported by the proposition that s 89(4) "alters" the laws which it applies.

34 The Court of Appeal dismissed the appeal with costs. This left in place the remitter order made by Rothman J, there being unresolved issues about whether the Court Attendance Notice could be amended to define the offence charged by reference to s 89(4) of SEPA 1992.

The operation of s 89(4) on State laws

35 There is a variety of verbal formulae by which Commonwealth laws give effect to State laws as laws of the Commonwealth. Section 68(1) of the *Judiciary Act* provides that relevant State laws shall "apply and be applied so far as they are applicable". Section 79(1) of that Act provides that the relevant State laws shall "be binding on all Courts exercising federal jurisdiction in that State ... in all cases to which they are applicable." The CPAL Act provides that the laws of a State may "apply, or shall be deemed to have applied, in accordance with their tenor"[68].

36 As this Court observed in *Western Australia v The Commonwealth* (*Native Title Act Case*)[69], there can be no objection to the Commonwealth Parliament adopting as a law of the Commonwealth a text emanating from a source other than the Parliament:

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66 (2015) 320 ALR 584 at 595 [50] (emphasis in original).

67 (2015) 320 ALR 584 at 595 [51].

68 CPAL Act, s 4(1). See also *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth), s 6.

69 (1995) 183 CLR 373 at 484–485 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

> "In such a case the text becomes, by adoption, a law of the Commonwealth and operates as such."

It follows that there is no reason in principle which prevents the Commonwealth from adopting the text of a State law and applying it analogically or modifying it, for example by the addition or removal of conditions attaching to duties, liabilities or powers created by that law[70]. Whether the State law as picked up is applied analogically or modified depends upon the construction of the relevant Commonwealth law. In the case of s 79 of the *Judiciary Act*, the State laws which it makes "binding" on courts exercising federal jurisdiction are picked up with their meaning unchanged. They are binding only in cases "to which they are applicable"[71].

37 The construction of s 89(4) does not require a binary choice between picking up s 310D unaltered and picking it up altered so as to eliminate the requirement that the person attempting to escape be an "inmate". Analogical application does not strictly involve alteration. It is simply a way of describing how s 89(4) uses the text of the relevant State law. The first constructional question is — what is the content of the class of laws able to be applied by s 89(4) and defined by the term "law in force in the place of issue of a warrant"? The second constructional question is — what does it mean to "apply" a law in that class? Those questions are to be answered by reference to the text, context and purpose of s 89(4).

38 The context and purpose of s 89(4) limit the class of State laws capable of application under s 89(4). It does not include any conceivable law creating an offence of escaping or attempting to escape lawful custody. Before the law of the issuing State can be applied to a person being taken to the place of issue of a warrant of apprehension in compliance with an order made under s 83(8)(b), the law must be capable of application to such a person in those circumstances. That

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70 For example, s 4(6) of the CPAL Act authorises regulations providing that a State law applied by s 4 "shall be deemed to have so applied, with such modifications as are specified in the regulations."

71 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 94–95 per Mason J; [1973] HCA 21; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593–594 [72]–[74] per Gleeson CJ, Gaudron and Gummow JJ, 609–610 [129]–[130] per McHugh J; [2001] HCA 1; *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [22] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ; [2002] HCA 47; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 60 [67] per McHugh, Gummow and Hayne JJ; [2003] HCA 47.

is to say, the circumstances in which the law to be applied operates in the State of issue must be analogical to the circumstances in which it is to be applied by s 89(4).

39 A law creating an offence of escaping or attempting to escape lawful custody while serving a sentence of imprisonment would not answer that description. The words "law in force in the place of issue of a warrant" must be read in the context of the field of their application under s 89(4) and with regard to the purpose of that provision, which is to deter and punish the escape of persons being taken from one place to another under an order made pursuant to s 83(8)(b). A general law prohibiting escape or attempted escape from lawful custody, whatever the process by which that custody arose, would answer the requirements of analogical applicability and purposive fit. An example is the common law offence of escape. It is of general application. Another example appears in the *Criminal Codes* of States and Territories which have abolished the common law offence[72]. In Queensland, for example, s 142 of the Code provides:

"A person who escapes from lawful custody is guilty of a crime."[73]

40 Section 310D, read distributively across the multiple definitions of "inmate", might be seen as creating a number of laws relating to the liability of a person who escapes or attempts to escape from lawful custody. The content of each is defined by the class of "inmate" to which it relates — for the most part by the class of process which has led to the person being in custody. Those processes include sentence of imprisonment[74], detention under the *Fines Act* 1996 (NSW)[75], commitment by the Parole Authority to serve the balance of a sentence by way of fulltime detention[76], commitment by the Supreme Court of New South Wales to detention pursuant to the *Crimes (High Risk Offenders) Act* 2006 (NSW)[77], commitment to a correctional centre on remand[78], commitment to

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72 Common law offences generally, except contempt of court, have been abolished by the *Criminal Code Act* 1899 (Q), s 5; *Criminal Code Act Compilation Act* 1913 (WA), Appendix B, s 4; *Criminal Code Act* 1924 (Tas), s 6; *Criminal Code Act* (NT), s 6; *Criminal Code* 2002 (ACT), s 5.

73 See also *Criminal Code* (WA), s 146; *Criminal Code* (Tas), s 107; *Criminal Code* (NT), s 112; *Crimes Act* 1900 (ACT), s 160.

74 *Crimes (Administration of Sentences) Act*, s 4(1)(a).

75 *Crimes (Administration of Sentences) Act*, s 4(1)(b).

76 *Crimes (Administration of Sentences) Act*, s 4(1)(c).

77 *Crimes (Administration of Sentences) Act*, s 4(1)(c1).

the control of the Minister administering the *Crimes (Administration of Sentences) Act* under the *Children (Criminal Proceedings) Act* 1987 (NSW)[79], commitment to a correctional centre pursuant to punishment of imprisonment under the *Defence Force Discipline Act* 1982 (Cth)[80], detention under the *Migration Act* 1958 (Cth)[81], and commitment to a correctional centre otherwise than as referred to above[82].

41 Apart from the processes described in pars (d) and (e), none of those set out in s 4(1) of the *Crimes (Administration of Sentences) Act* is applicable to a person the subject of an order under s 83(8)(b) or serves the kind of purpose served by s 89(4).

42 The liability attaching to attempted escape from lawful custody under s 310D, derived from orders of the kind contemplated by pars (d) and (e), is plainly applicable by analogy to persons to whom s 89(4) applies. It serves the same purposes. Subject to those constraints, it is right to say, as the Court of Appeal said of s 89(4), that it treats the applicable aspects of s 310D as surrogate federal law "upon the assumption that escape from lawful custody imposed by an order made by a magistrate *in another state* is not outside their field."[83] A requirement that the person attempting to escape answer the description of an "inmate" by reference to close Victorian equivalents of "courts", "competent authorities" and "correctional centres" under New South Wales law would defeat the purpose of the federal law and is not required by the text of s 89(4).

Conclusion

43 The Court of Appeal was right to reach the conclusion that it did. The appeal should be dismissed with costs.

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78 *Crimes (Administration of Sentences) Act*, s 4(1)(d).

79 *Crimes (Administration of Sentences) Act*, s 4(1)(d1).

80 *Crimes (Administration of Sentences) Act*, s 4(1)(d2).

81 *Crimes (Administration of Sentences) Act*, s 4(1)(d3).

82 *Crimes (Administration of Sentences) Act*, s 4(1)(e).

83 (2015) 320 ALR 584 at 595 [50] (emphasis in original).

44 KIEFEL AND KEANE JJ. The factual background and the circumstances which have given rise to the issues in this appeal are summarised in the reasons of French CJ and Bell J. We gratefully adopt that summary and state only the following essential facts.

45 The appellant was in the custody of a New South Wales police officer at Tullamarine Airport, pursuant to a warrant of a magistrate in Victoria, when he escaped. The warrant directed the officer to take the appellant to the Sydney Police Centre in New South Wales to answer charges in relation to fraud offences, in respect of which a warrant for his arrest had issued from the District Court of New South Wales in 2006.

46 Section 89(4) of the *Service and Execution of Process Act* 1992 (Cth) ("the SEPA 1992") provides:

> "The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1)."

47 It is not in dispute that, for the purposes of s 89(4), the appellant was being taken to the place of issue of a warrant, New South Wales, in compliance with an order mentioned in s 89(1) when he escaped from lawful custody.

48 The appellant was apprehended a short while after he escaped. He was subsequently charged with an offence under s 310D of the *Crimes Act* 1900 (NSW) ("the Crimes Act"), which provides:

> "Any inmate:
>
> (a) who escapes or attempts to escape from lawful custody, or
>
> (b) who, having been temporarily released from lawful custody, fails to return to lawful custody at the end of the time for which the inmate has been released,
>
> is guilty of an offence."

49 "Inmate" is defined in s 310A of the Crimes Act as having the same meaning that it has in the *Crimes (Administration of Sentences) Act* 1999 (NSW). That Act provides a number of definitions of "inmate". The parties agree that the only definitions that are relevant are those that refer to a person who has been committed to a "correctional centre".

50 As French CJ and Bell J explain[84], the charge erroneously conveyed the impression that the offence arose directly from s 310D of the Crimes Act, rather than that section as it is applied by s 89(4) for the purposes of the SEPA 1992. No point was taken in the courts below about the error in the formulation of the charge, and the matter was dealt with on the basis of the true position (*viz*, s 310D applied by virtue of s 89(4) of the SEPA 1992). Nevertheless, the magistrate hearing the matter in New South Wales dismissed[85] the charge on the basis that the prosecution could not prove that the appellant was an "inmate", as s 310D requires.

51 The Court of Appeal of the Supreme Court of New South Wales held[86] that, by virtue of s 89(4) of the SEPA 1992, a person may be guilty of the offence of escape contrary to s 310D of the Crimes Act even if that person is not an "inmate" within the meaning of that Act. For the reasons which follow, the Court of Appeal was correct to so conclude.

52 As the Court of Appeal observed, a State law made applicable by a federal law operates as federal law[87]. Section 89(4) applied s 310D to the appellant as a federal law, s 310D being the law in force in New South Wales (the place of issue of the warrant) and being the law relating to the liability of a person who escapes from lawful custody. Section 89(4) applied that law to the appellant because he was a person being taken to the place of issue of the warrant in compliance with an order made under s 89(1) of the SEPA 1992.

53 Section 89(4) is, as the Court of Appeal observed[88], an example of what Mason J in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*[89] said s 79 of the *Judiciary Act* 1903 (Cth) was not, that is, an "express provision which would enable [the court] to alter the language of a State statute and apply it in that altered form." The Court of Appeal said[90]:

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84 At [3].

85 *Police v Mok* unreported, Local Court of New South Wales, 1 July 2013 at 14-15 [52]-[53] per Magistrate Buscombe.

86 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 595 [51].

87 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 592 [38].

88 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 595 [49].

89 (1973) 129 CLR 65 at 95; [1973] HCA 21.

90 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 595 [51].

> "Section 89(4) leaves no room for debate about whether or not Mr Mok is a person who, as an 'inmate', is within the scope of s 310D in its ordinary operation as an offence under state law. The new federal offence created by s 89(4) acting upon s 310D applies to all persons who are being taken to New South Wales in compliance with an order under the [SEPA 1992] mentioned in s 89(1). Mr Mok was such a person."

54 In challenging that conclusion in this Court, the appellant submitted that, even accepting that s 89(4) of the SEPA 1992 is apt to create a new federal offence, s 89(4) applies "[t]he law in force in the place of issue of [the] warrant" without modification or qualification. Accordingly, so it was said, the Court of Appeal erred in holding that s 89(4) of the SEPA 1992 contains an "express provision which would enable [the court] to alter the language of a State statute and apply it in that altered form"[91].

55 In this regard, the appellant referred to cases which have held that s 79(1) of the *Judiciary Act* applies State law in its "unaltered" form[92]. But s 79(1) provides:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

56 The authorities on s 79 are, as the Court of Appeal said[93], "of limited assistance" in this case. That is because s 79, in terms, makes the laws of each

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91 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 595 [49].

92 *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 170 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ; [1953] HCA 62; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 556 per Gummow and Kirby JJ; [1997] HCA 29; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 155 [54] per McHugh J; [2000] HCA 39, quoting *Maguire v Simpson* (1977) 139 CLR 362 at 376 per Gibbs J; [1977] HCA 63; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 611-612 [134]-[135] per McHugh J; [2001] HCA 1; *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 146 [60] per McHugh J; [2002] HCA 47, quoting *Pedersen v Young* (1964) 110 CLR 162 at 165 per Kitto J; [1964] HCA 28.

93 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 593 [44].

State or Territory "binding" in all cases to which those laws are applicable in their own terms. Section 89(4) does not apply laws in this way.

57 We agree with French CJ and Bell J that the question as to the application of s 89(4) is to be resolved as a question of construction of that provision. We agree that the words of s 89(4) must be read in the context of their application, to circumstances where a person escapes lawful custody whilst being taken to the place of issue of a warrant in accordance with an order under s 89(1) of the SEPA 1992. It follows that those words are not applicable to a law concerning an escape from a correctional centre. We also agree that the words must be read having regard to their purpose, to deter persons escaping whilst being taken to the place of issue of a warrant in accordance with the SEPA 1992. However, we are of the view that s 89(4) more directly answers the question as to how it is to apply.

58 In our view, the question as to the law which is to be applied should be answered by focusing upon the words in s 89(4), which describe the relevant State or Territory law in force as a "law relating to the liability of a person who escapes from lawful custody". Those words are referable to a law which makes it an offence to escape from lawful custody, without more. As such, they are capable of applying that law to the circumstances in which s 89(4) operates, namely the escape from lawful custody of a person who is being taken to the place of issue of a warrant pursuant to an order to which s 89(1) refers.

59 Section 89(4) does not pick up a State law's reference to persons who may be committed to a correctional centre, or any other "inmate". It would not be appropriate for the circumstances in which s 89(4) operates and it is not necessary. Section 89(4) itself identifies the person to whom it is directed and who may be guilty of the federal offence. Section 89(4) applies to a person who is in the process of being "taken to the place of issue [of the warrant] in compliance with an order mentioned in subsection (1)", who is in lawful custody by virtue of the order, and "who escapes from [that] lawful custody".

60 We agree that the appeal should be dismissed with costs.

61 GORDON J. A New South Wales District Court Judge issued a bench warrant for the apprehension of the appellant. The appellant was arrested in Victoria. Pursuant to s 83(8)(b) of the *Service and Execution of Process Act* 1992 (Cth) ("the SEP Act"), a Victorian magistrate ordered that the appellant be delivered into the custody of a New South Wales police officer for the purpose of taking him to New South Wales. Whilst the appellant was being taken to New South Wales, he escaped from custody at Tullamarine Airport in Victoria, but was apprehended a short time later.

62 Section 89(4) of the SEP Act provides that "[t]he law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1)". On his return to New South Wales, the appellant was charged with an offence of attempting to escape from lawful custody, contrary to s 310D(a) of the *Crimes Act* 1900 (NSW) ("the Crimes Act").

63 By reason of s 89(4) of the SEP Act, could the appellant be guilty of an offence contrary to s 310D of the Crimes Act? The answer is yes.

Facts

64 On 11 March 2004, the appellant pleaded guilty to a number of fraud offences contrary to New South Wales law before a magistrate at the Local Court of New South Wales. He was consequently committed to the District Court of New South Wales for sentence.

65 13 April 2006 was fixed for the purpose of sentencing the appellant. However, on that day, the appellant failed to appear. Freeman DCJ then issued a bench warrant for the apprehension of the appellant ("the NSW Bench Warrant"). The NSW Bench Warrant was directed to "the Commissioner of Police for the State of New South Wales, and to all Police Officers in the said State". The NSW Bench Warrant stated, in part:

> "AND WHEREAS the said Offender has not appeared at the said District Court on 13/04/2006[.] These are therefore to command you in Her Majesty's name forthwith to apprehend the said Offender and to bring him before me or some other Judge of the said Court or some Justice or Justices of the Peace, in and for the said State to be dealt with according to law."

66 Many years later, on 14 December 2011, the appellant was arrested and charged in Victoria with two unrelated offences. On 26 February 2013, the appellant was sentenced to a term of imprisonment at the Magistrates' Court of Victoria for those offences. On that day, a Victorian police officer executed the NSW Bench Warrant and arrested the appellant pursuant to s 82(1) and (3)(a)

of the SEP Act. Those provisions relevantly provide that the person "named in a warrant issued in a State may be apprehended in another State … [by] an officer of the police force of the State in which the person is found".

67 The next day, 27 February 2013, the appellant was brought before a Victorian magistrate pursuant to s 83(1) of the SEP Act. The magistrate ordered that the appellant be delivered into the custody of a New South Wales police officer for the purpose of taking him to New South Wales, in accordance with s 83(8)(b) of the SEP Act ("the SEPA Orders"). The SEPA Orders directed the return of the appellant to New South Wales. Section 83(8)(b) of the SEP Act authorised the magistrate to order "that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant".

68 The SEPA Orders were contained in a document headed "Service and Execution of Process Act 1992 Warrant to remand a person to another State". After setting out details of the NSW Bench Warrant, that document relevantly stated:

> "I order that the defendant be returned to SYDNEY POLICE CENTRE in the State of NSW in which the warrant was issued, and for that purpose to be delivered into the custody of DET SGT ROBERT MCLENNAN the person bringing the said warrant, or of the Members of the Police Force or persons to whom the warrant was originally directed, or any of them. These are therefore to command you DET SGT ROBERT MCLENNAN the person bringing the said warrant, and all members of the Police Force and persons to whom the warrant was originally directed, or any of you, to forthwith take the defendant and safely convey him to SYDNEY POLICE CENTRE in the State of NSW and take him before a Magistrate for the said State to answer the said charge and to be further dealt with according to law."

69 The next day, 28 February 2013, the officer named in the SEPA Orders and another New South Wales police officer accompanied the appellant to Tullamarine Airport. Whilst being escorted to the aircraft, the appellant escaped from the officers' custody but was apprehended a short time later.

70 The appellant was then transported, without further incident, to Redfern Police Station in New South Wales, where he was charged with an offence of attempting to escape from lawful custody, contrary to s 310D(a) of the Crimes Act ("the Charge").

71 The appellant did not and does not dispute that the SEPA Orders were validly made under s 83(8)(b) of the SEP Act, that he escaped lawful custody or that, at the time of the escape, he was being returned to New South Wales by

New South Wales police officers pursuant to the SEPA Orders. He did not and does not accept that he contravened s 310D(a) of the Crimes Act.

Legislative framework

72 Part 5 of the SEP Act deals with "Execution of warrants". As has been seen, the Victorian police officer executed the NSW Bench Warrant and arrested the appellant under s 82, which is in Pt 5 of the SEP Act. Section 82(1) of the SEP Act relevantly provides that the person "named in a *warrant* issued in a State may be apprehended in another State" (emphasis added). That person may be apprehended by "an officer of the police force of the State in which the person is found"[94].

73 For Pt 5[95], "warrant" is defined in s 81A of the SEP Act to include a "warrant issued by a body or person that is an authority for the purposes" of Pt 5. Also for Pt 5, "authority" is defined in s 81A to include a body or person that, "under a law of a State, may issue a warrant for the arrest and return to custody or detention of a person, following the revocation or cancellation of" certain identified orders[96].

74 After a person has been apprehended under s 82 of the SEP Act, the procedure in s 83 is to be adopted. The person must be brought before a magistrate of the State in which the person was apprehended as soon as practicable after being apprehended[97]. On production of the warrant (here, the NSW Bench Warrant), the magistrate must make an order of the kind provided by s 83(8)(a) or (b)[98]. Section 83(8)(b) relevantly provides that the order be "that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the *place of issue* of the warrant" (emphasis added). "[P]lace of issue" is relevantly defined in s 3(1) of the SEP Act to mean "the State in which the process was issued".

75 Next, s 89 of the SEP Act, also in Pt 5, must be addressed. It relevantly provides:

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94 s 82(3)(a) of the SEP Act. Section 82 does not apply to a person in prison: s 82(2) of the SEP Act.

95 cf definition of "warrant" in s 3(1) of the SEP Act.

96 cf definition of "authority" in s 3(1) of the SEP Act.

97 s 83(1) of the SEP Act.

98 Subject to ss 83(10) and (14) and 84 of the SEP Act, which are not presently relevant.

"(1) For the purpose of complying with an order made under paragraph 83(8)(b), … the person to whom the custody of the apprehended person has been committed may require that the person in charge of a prison in a State:

(a) receive the apprehended person and keep the apprehended person in custody for such time as the first-mentioned person requires; and

(b) surrender custody of the apprehended person to the first-mentioned person at the time and in the way that the first-mentioned person requires.

…

(4) *The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody,* applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1).

(5) Subsection (4) does not apply to lawful custody in respect of an offence against a law of the Commonwealth." (emphasis added)

76 There is no dispute that the NSW Bench Warrant was the relevant "warrant" for the purposes of s 89(4) of the SEP Act and that s 89(4) applied when the appellant was at Tullamarine Airport and escaped from lawful custody. Section 89(5) is not relevant to this appeal because the appellant was in lawful custody in respect of an offence against a law of New South Wales, namely the fraud offences from 2004.

77 The proper construction of s 89(4) of the SEP Act is the central issue in this appeal. Before turning to that question of construction, it is necessary to refer to s 310D(a) of the Crimes Act, the offence with which the appellant was charged at Redfern Police Station upon his return to New South Wales.

78 Section 310D relevantly provides:

"Any *inmate*:

(a) who escapes or attempts to escape from *lawful custody*, or

...

is guilty of an offence." (emphasis added)

79 In that section, "inmate" has the same meaning as it has in the *Crimes (Administration of Sentences) Act* 1999 (NSW) ("the CAS Act")[99]. For the purposes of this appeal, it was common ground that "inmate" was relevantly defined in s 4(1)(d) and (e) of the CAS Act:

> "(d) any person the subject of a warrant or order by which a *court* has committed the person to a *correctional centre* on remand in connection with proceedings for an offence committed, or alleged to have been committed, by the person, and
>
> …
>
> (e) any person the subject of a warrant or order by which a *court* or other *competent authority* has *committed the person to a correctional centre otherwise than as referred to above*". (emphasis added)

80 "[C]orrectional centre" is defined in s 3(1) of the CAS Act to include "any police station or court cell complex in which an offender is held in custody in accordance with this or any other Act".

Previous decisions

81 At the hearing of the Charge before the Local Court, the appellant argued that there was no prima facie case established by the evidence because, relevantly, the appellant was not an "inmate" as that term is used in s 310D of the Crimes Act. The Local Court Magistrate (Buscombe LCM) upheld that submission and dismissed the Charge.

82 The respondent, the New South Wales Director of Public Prosecutions, appealed to the Supreme Court of New South Wales pursuant to s 56(1)(c) of the *Crimes (Appeal and Review) Act* 2001 (NSW). Rothman J set aside the orders of Buscombe LCM and remitted the hearing of the Charge to be dealt with according to law[100].

83 The appellant then sought leave to appeal to the Court of Appeal of the Supreme Court of New South Wales against the decision of Rothman J. The Court of Appeal (Meagher, Hoeben and Leeming JJA) granted the appellant leave to appeal, but dismissed the appeal[101]. The Court of Appeal concluded that

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99 s 310A of the Crimes Act.

100 *Director of Public Prosecutions (NSW) v Mok* (2014) 296 FLR 1.

101 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584.

s 89(4) of the SEP Act (by applying s 310D of the Crimes Act) created a new federal offence which applied to all persons being taken to New South Wales in compliance with an order under the SEP Act mentioned in s 89(1)[102]. On that construction, it was not relevant whether the appellant was an "inmate" for the purposes of s 310D of the Crimes Act.

"Surrogate federal laws"

84 The Commonwealth Parliament, from time to time, passes legislation to "pick up" and apply State laws. Section 4 of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) ("the CPAL Act") is an example. Sections 68(1)[103] and 79(1)[104] of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") are two other examples. The form of these provisions is not fixed[105]. When State laws are applied by such provisions, the State laws made applicable are often called "surrogate federal laws"[106].

Contentions

85 Although in his written submissions the appellant contended that s 89(4) does not create a new federal offence, the appellant accepted in the course of oral argument in this Court that s 89(4) of the SEP Act creates a federal offence by applying "the law relating to the liability of a person who escapes from lawful custody" in New South Wales. However, the appellant maintained his contention that the prosecution is not relieved of the burden of proving all of the elements of the offence in s 310D of the Crimes Act, including, in particular, the element that the accused be an "inmate".

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102 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 595 [51].

103 *Hili v The Queen* (2010) 242 CLR 520 at 527 [21]; [2010] HCA 45.

104 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 352 [35]; [1999] HCA 9; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 406 [230]; [2005] HCA 44.

105 See, eg, *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16. See also s 136 of the *Excise Act* 1901 (Cth) and s 247 of the *Customs Act* 1901 (Cth), discussed in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; [2003] HCA 49.

106 See, eg, *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134-135 [20]-[24]; [2002] HCA 47; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149. See also *Pedersen v Young* (1964) 110 CLR 162 at 165; [1964] HCA 28; *Maguire v Simpson* (1977) 139 CLR 362 at 408; [1977] HCA 63; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 514, 554; [1997] HCA 29.

86 The respondent contended that s 89(4) of the SEP Act applied s 310D of the Crimes Act as surrogate federal law, thereby creating a federal offence. The respondent further contended that the elements of that offence under s 310D of the Crimes Act, as applied by s 89(4) of the SEP Act, were established in this appeal, either consistent with the reasoning of the Court of Appeal or because the appellant was an "inmate" for the purposes of s 310D[107].

87 There is thus no dispute that s 310D of the Crimes Act is a "law relating to the liability of a person who escapes from lawful custody" as that phrase is used in s 89(4) of the SEP Act. And the parties now accept that s 89(4) of the SEP Act creates a federal offence because s 310D of the Crimes Act applies as surrogate federal law. That offence is properly described as a federal offence[108]. The issues in dispute are narrow – is it necessary for all the elements of s 310D(a) to be proved for the appellant to be guilty of that offence? If so, was the appellant an inmate for the purposes of s 310D? Before turning to those issues, it is necessary to address how s 310D applies as "surrogate federal law" in this appeal.

Tullamarine Airport, a Commonwealth place

88 Tullamarine Airport is a Commonwealth place within the meaning of s 52(i) of the Constitution[109]. Section 52(i) precludes the laws of Victoria that would ordinarily apply to a geographical area in Victoria (such as Tullamarine Airport) from operating by their own force[110]. Instead, the laws of the State in which the Commonwealth place is located are applied, as in force at a time, "in accordance with their tenor" at that time, by s 4(1) of the CPAL Act.

89 Section 4(4) of the CPAL Act also makes provision for the application to Commonwealth places of the laws of a State which have extraterritorial effect in another State. In the present appeal, ss 10A to 10C of the Crimes Act extend the operation of s 310D beyond the territorial limits of New South Wales, if there is the required nexus.

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107 The second argument was raised by the respondent's amended notice of contention.

108 See *Pinkstone v The Queen* (2004) 219 CLR 444 at 458 [38]; [2004] HCA 23.

109 *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630; [1996] HCA 58.

110 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89; [1970] HCA 19; *R v Phillips* (1970) 125 CLR 93; [1970] HCA 50; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388; [2004] HCA 53.

90 However, s 4 of the CPAL Act may be put aside. Section 8(4)(a) of the SEP Act provides that:

> "Subject to this Act, this Act applies to the exclusion of a law of a State (the ***relevant State***) with respect to:
>
> (a) the service or execution in another State of process of the relevant State that is process to which this Act applies".

91 Section 310D of the Crimes Act is a law of New South Wales which may operate beyond the territorial limits of that State[111]. Section 310D of the Crimes Act is "a law of [New South Wales] with respect to … the ... execution in another State of [the NSW Bench Warrant]" that is caught by s 8(4)(a) of the SEP Act. The SEP Act therefore applies to exclude s 310D of the Crimes Act with respect to the execution of a process, to the extent that s 310D operates beyond the territorial limits of New South Wales[112]. Section 89(4) of the SEP Act is the provision of the SEP Act which applies. That provision is considered next.

Proper construction of s 89(4) of the SEP Act

92 Section 89(4) of the SEP Act provides that:

> "The law in force in the place of issue of a warrant, being the law relating to the *liability of a person* who escapes from lawful custody, *applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1)*." (emphasis added)

Preconditions to s 89(4)

93 Section 89(4) is subject to two relevant preconditions. First, it requires that an order has been made under s 83(8)(b)[113]. In this appeal, there was such an order[114]. The SEPA Orders required that the appellant be delivered into the custody of a New South Wales police officer for the purpose of taking him to New South Wales.

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111 ss 10A to 10C of the Crimes Act.

112 s 109 of the Constitution and, in relation to Tullamarine Airport, s 4(2)(a) of the CPAL Act.

113 s 89(1) of the SEP Act.

114 See [67]-[68] above.

94 Second, s 89(4) requires that the person is being taken to the place of issue of the warrant, in compliance with the order under s 83(8)(b)[115]. In this appeal, the appellant was being taken to New South Wales, the place of issue of the NSW Bench Warrant. As the Court of Appeal recognised, "[t]he place of issue [of the warrant] will often (as here) be different from the place where an escape takes place. The place of issue [of the warrant] will *always* be different from the place" where the order under s 83(8)(b) of the SEP Act that the person be taken into custody is made[116]. That is why the SEP Act has to be invoked.

95 If these preconditions are met, then s 89(4) in its terms provides that, in relation to that person, the law in force in the place of issue of the warrant (the State law) applies to that person insofar as "the law relat[es] to the liability of a person who escapes from lawful custody".

96 As both preconditions were met in this appeal, s 89(4) applied New South Wales law relating to the liability of a person who escapes from lawful custody to the appellant. A reference in the SEP Act to a law of a State is a reference to both the common law and statute[117]. Here, the appellant was charged with a contravention of s 310D(a) of the Crimes Act. However, he could have been charged with the common law offence of escaping from lawful custody[118].

Section 89(4) applies State laws as "surrogate federal law"

97 Section 89(4) puts to rest any doubt about whether the State law (the law in force in the place of issue of the warrant) applies to an escape from lawful custody occurring outside the State, where the order committing the person into the custody from which the escape occurs is an order made under s 83(8)(b) of the SEP Act. In terms, s 89(4) applies the State law as surrogate federal law.

98 Section 89(4) identifies that, in relation to a person in lawful custody under a State law (in the present appeal, in lawful custody under the law of New South Wales), the law in force in the place of issue of the warrant (the State law) applies to that person insofar as "the law relat[es] to the liability of a person who escapes from [that] lawful custody" when that might otherwise be unclear. Section 89(4) of the SEP Act takes a limited class of State laws: laws of the

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115 s 81A defines "warrant" for Pt 5 of the SEP Act: see [73] above.

116 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 595 [50] (emphasis in original).

117 s 3(5) of the SEP Act.

118 The common law offence of escaping from lawful custody is preserved by s 343(a) of the Crimes Act.

place of issue of the outstanding warrant which relate to the liability of a person who escapes from lawful custody. There is nothing to suggest that the wording of s 89(4) does not operate to apply State laws that meet the description of laws "relating to the liability of a person who escapes from lawful custody" as surrogate federal laws, as long as the preconditions are met.

99 A consequence of the State law being applied as "surrogate federal law" is that a prosecution for an offence against that law will be in federal jurisdiction because there is a matter "arising under" a law of the Commonwealth[119], namely s 89(4) of the SEP Act[120]. If there is a trial on indictment, that trial must comply with s 80 of the Constitution[121].

Section 89(4) applies State law according to its terms

100 That leaves the question as to whether, when s 89(4) applies State law as surrogate federal law, it does so according to the terms of the State law.

101 Section 89(4) does not purport to apply the relevant State laws "in accordance with their tenor"[122], or "in all cases to which they are applicable"[123]. Section 89(4) is in different terms. It does not contain any qualifying words of that kind. Or as Mason J explained in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*, it "contains no express provision which would enable a court ... to alter the language of a State statute and apply it in that altered form"[124]. It simply says that the State law "applies" to a person being taken to the place of issue in compliance with an order under s 83(8)(b). And while s 89(4) should apply the relevant State law in a way that is consistent with the purpose of s 89(4)[125], that purpose is achieved by applying the State law according to its own terms, as explained below.

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119 s 76(ii) of the Constitution.

120 In the criminal context, federal jurisdiction to resolve such matters is conferred on State courts by s 68(2) of the Judiciary Act.

121 *Pinkstone v The Queen* (2004) 219 CLR 444 at 458 [38].

122 cf s 4(1) of the CPAL Act.

123 cf s 79(1) of the Judiciary Act. See also s 68(1) of the Judiciary Act.

124 (1973) 129 CLR 65 at 95; [1973] HCA 21.

125 *John Robertson* (1973) 129 CLR 65 at 95.

Purpose, context and history of s 89(4)

102 The construction of s 89(4) of the SEP Act that has been described is consistent with, and reflects, its purpose, context and history[126].

103 The purpose of s 89(4) is both legal and practical. First, it fills a gap that might otherwise have been thought to exist in the law[127]. It removes any doubt about whether a person who escapes from lawful custody while subject to an order under s 83(8)(b) of the SEP Act might be criminally liable, but *only if* there is a State law which meets the description of a law "relating to the liability of a person who escapes from lawful custody". If there is no such law, then there can be no liability under s 89(4). This approach does not close the potential gap in the law completely, in the way that a specific federal offence could have.

104 Second, it determines *which* State law is to apply when a person subject to an order under s 83(8)(b) of the SEP Act escapes from lawful custody. It is the State law in force in the place of issue of the warrant that applies to that person. That avoids any confusion about whether, taking the present appeal as an example, it would be more appropriate for the person to be charged under Victorian or New South Wales law. The effect of s 89(4) is to exclude the operation of Victorian law relating to liability for escape from lawful custody. That is not surprising. Section 89(4) is in Pt 5 of the SEP Act, which deals with the execution of warrants under that Act, the purpose of which is to return a person to the State where there is an outstanding warrant for the arrest and return to custody or detention of that person[128]. Consistently with that purpose, s 89(4) ensures that "proceedings in relation to an escape … be taken in the State ... to which the person was being taken, that is, the State … of issue of the

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126 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

127 For example, under the *Service and Execution of Process Act* 1901 (Cth), there was originally no provision which addressed escape from custody while the person was under an order remanding them to the State of issue made under that Act: Law Reform Commission, *Service and Execution of Process*, Report No 40, (1987) at 219 [438]. In 1991, the *Service and Execution of Process Amendment Act* 1991 (Cth) was passed, which introduced a number of new provisions into the *Service and Execution of Process Act* 1901 (Cth), including s 19ZC(2), which can be seen to be the predecessor to s 89(4) of the SEP Act.

128 s 83(8)(b) of the SEP Act, read with the definitions of "warrant" and "authority" in s 81A.

apprehension process"[129]. Here, that State was New South Wales. It makes practical sense for a person who has escaped from lawful custody while subject to an order under s 83(8)(b) to be dealt with by the authorities of New South Wales under New South Wales law upon their return to New South Wales.

105 In enacting s 89(4) of the SEP Act, the Commonwealth Parliament made a deliberate decision to enact an "application" provision. It did so for the purpose of creating liability by reference to a State law and choosing which State law that should be. If s 89(4) applied State law otherwise than according to its terms, and without some of its elements, that purpose would be frustrated because it would no longer be applying the chosen State law. It would be creating a new and independent federal offence, the elements of which are unclear. That result would cause practical difficulties for the prosecution, the defence, and the trial judge alike.

106 In some circumstances, a person may not be liable under s 89(4) because they do not satisfy the elements of the applied State law on its own terms. But that consequence is not at odds with the purpose of s 89(4). As noted earlier, that is a consequence of the deliberate decision of the Commonwealth Parliament to apply State laws to create criminal liability rather than create or define a specific federal offence to achieve a similar result.

107 The New South Wales Parliament, in enacting s 310D of the Crimes Act, and unlike the common law offence of escaping lawful custody, has chosen to criminalise particular conduct by a particular class of persons – "inmates". The Commonwealth Parliament, through s 89(4) of the SEP Act, has chosen for that law to apply to create potential liability in particular circumstances to the exclusion of other potentially applicable laws. The substantive elements of s 310D do not need to be altered for the purpose of s 89(4) to be achieved.

Section 310D of the Crimes Act

108 The next question is whether the appellant could be guilty of the Charge, an offence contrary to s 310D(a) of the Crimes Act. Two issues arise. First, what elements must the prosecution prove and, second, are those elements capable of proof in relation to the appellant?

109 Throughout the history of these proceedings, the appellant has contended that he was not an "inmate", and is not capable of satisfying the definition of "inmate", within the meaning of s 310D of the Crimes Act. He has not

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129 Law Reform Commission, *Service and Execution of Process*, Report No 40, (1987) at 219 [438]. See also at 152-153 [319]. In relation to the legislative history, see [103] above.

contended, and does not contend, that the other elements of s 310D of the Crimes Act are not capable of being satisfied.

110 An "inmate" is relevantly a person who (a) is the subject of a warrant or order; (b) where the warrant or order committed the person to a "correctional centre"; and (c) the warrant or order was made by a "court" or "other competent authority"[130]. Each element must be satisfied.

111 First, as to (a), the appellant was the subject of orders validly made under s 83(8)(b) of the SEP Act – the SEPA Orders.

112 As to (b), the SEPA Orders required that the appellant be "returned to SYDNEY POLICE CENTRE in the State of NSW". In Pt 6A of the Crimes Act, entitled "Offences relating to escape from lawful custody" (which contains s 310D), s 310A relevantly provides that "[i]n this Part", "correctional centre" means "a correctional centre within the meaning of [the CAS Act]". Section 3(1) of the CAS Act defines "correctional centre" to include "any police station ... in which an offender is held in custody in accordance with this or any other Act". The Sydney Police Centre is a "correctional centre" within the meaning of the CAS Act. The SEPA Orders committed the appellant to a correctional centre.

113 As to (c), the SEPA Orders were made by a Victorian magistrate. "[C]ourt" is defined in s 3(1) of the CAS Act to mean a number of specific courts or "*any other court that, or person who, exercises criminal jurisdiction*" (emphasis added). The word "person" and the use of the word "exercises" (rather than "exercised") in that definition extend the definition of "court" to include persons who are capable of exercising criminal jurisdiction. The Victorian magistrate who made the SEPA Orders "exercises" criminal jurisdiction[131] and therefore satisfied the definition of "court" within the meaning of s 4(1)(d) and (e) of the CAS Act. Moreover, the Victorian magistrate was empowered by s 83(8)(b) of the SEP Act to commit the appellant to a correctional centre. The Victorian magistrate was therefore a "competent authority" within the meaning of s 4(1)(e) of the CAS Act[132].

114 It might be thought that the *Acts Interpretation Act* 1901 (Cth) would apply to the interpretation of surrogate federal laws such as s 310D of the Crimes Act as applied by s 89(4) of the SEP Act[133]. However, s 89(4) of the SEP Act

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130 See [79] above.

131 s 25 of the *Magistrates' Court Act* 1989 (Vic).

132 cf *Barnes v Kuser* (2007) 179 A Crim R 181 at 184-185 [19]-[25].

133 cf s 5(1) of the CPAL Act.

picks up "the law" relating to liability for escaping from lawful custody. That law, in New South Wales, includes the *Interpretation Act* 1987 (NSW). Section 12(1)(a) of the *Interpretation Act* 1987 (NSW) relevantly provides that "[i]n any Act … a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for New South Wales". However, s 12 must be read subject to s 5(2), which relevantly provides:

> "This Act applies to an Act or instrument *except in so far as the contrary intention appears ... in the Act or instrument concerned.*" (emphasis added)

115 The contrary intention appears in s 310D of the Crimes Act when "applied" by s 89(4) of the SEP Act to empower a Victorian magistrate to commit the appellant to a correctional centre in New South Wales. That limited alteration is necessary to ensure s 89(4) achieves its purpose[134]. However, it is *not* necessary to put "to one side the carefully crafted definitions of 'inmate'"[135] – an essential element of the relevant New South Wales offence – to ensure s 89(4) achieves its purpose.

116 The elements of s 310D are capable of proof in relation to the appellant. However, contrary to the conclusion reached by the Court of Appeal, all elements of s 310D(a) must be proved.

Orders

117 The appeal should be dismissed with costs. By reason of the application of s 89(4) of the SEP Act, the appellant could be guilty of an offence contrary to s 310D(a) of the Crimes Act.

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134 *John Robertson* (1973) 129 CLR 65 at 95.

135 *Mok v Director of Public Prosecutions (NSW)* (2015) 320 ALR 584 at 595 [51].