HIGH COURT OF AUSTRALIA

BRENNAN CJ,
TOOHEY, GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

NICHOLAS APPELLANT

AND

THE QUEEN RESPONDENT

Nicholas v The Queen (M60-1996) [1998] HCA 9
2 February 1998

ORDER

1. *Declare that s 15X of the* Crimes Act *1914 (Cth) is a valid law of the Commonwealth.*

2. *Remit the matter to the County Court of Victoria for further hearing according to law.*

Representation:

J L Sher QC with S A Shirrefs for the appellant (instructed by Galbally & O'Bryan)

M S Weinberg QC with J G Morrish for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Intervener:

G Griffith QC with M K Moshinsky and G R Kennett intervening on behalf of the Attorney-General for the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Nicholas v The Queen

Constitutional law – Separation of judicial power of the Commonwealth – Legislative response to *Ridgeway v The Queen* – Whether Parliament usurping judicial power – Whether legislation impermissibly specific in application – Integrity of judicial process – Retrospective operation of statute.

Evidence – Importation of prohibited drugs – "Controlled delivery" by law enforcement officer – Rationale for *Ridgeway* discretion to exclude evidence – Public policy.

The Constitution, Ch III.

Crimes Act 1914 (Cth), s 15X.

Crimes Amendment (Controlled Operations) Act 1996 (Cth).

Customs Act 1901 (Cth), s 233B.

1 BRENNAN CJ. The accused, David Michael Nicholas, was charged on indictment in the County Court of Victoria on four counts to which he pleaded not guilty. The first two counts alleged the commission of offences against s 233B of the *Customs Act* 1901 (Cth); the last two counts alleged offences against s 73(1) of the *Drugs Poisons and Controlled Substances Act* 1981 (Vic). The prohibited imports to which the Commonwealth offences allegedly related were heroin of a traffickable quantity which had been imported into Australia by Australian and Thai law enforcement officers in contravention of s 233B of the *Customs Act*.

2 On 27 May 1996 Judge Crossley, in accordance with the judgment of this Court in *Ridgeway v The Queen*[1], granted an application on behalf of the accused that his trial on counts 1 and 2 be permanently stayed. Subsequently the Parliament enacted the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) ("the Amending Act") which inserted Pt 1AB into the *Crimes Act* 1914 (Cth). That Act is intended to reverse the effect of this Court's decision in *Ridgeway*. On 5 August 1996 the prosecution applied to Judge Crossley to vacate the order permanently staying the trial of the accused on counts 1 and 2, basing the application solely upon the fact that the Amending Act had come into force since the making of the order of 27 May 1996. The cause pending in the County Court between the accused and the Crown was removed into this Court pursuant to s 40(1) of the *Judiciary Act* 1903 (Cth) in order to determine whether Div 3 of Pt 1AB of the *Crimes Act* (as inserted by the Amending Act) is a valid law.

The Amending Act

3 Section 15G in Div 1 of Pt 1AB defines the objects of that Part. Sub-section (1) of s 15G provides, inter alia:

> " The objects of this Part are:
>
> (a) to exempt from criminal liability law enforcement officers who, in the course of controlled operations authorised as provided under this Part:
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> (i) take an active part, or are otherwise involved, in the importation or exportation of narcotic goods; or
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> (ii) are involved in activities relating to the possession of narcotic goods; and
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> (b) ...

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1 (1995) 184 CLR 19.

(c) to provide that evidence of importation of narcotic goods obtained through a controlled operation:

(i) started before the commencement of this Act; and

(ii) in which the Australian Federal Police and the Australian Customs Service acted in concert to allow the narcotic goods to pass through the Customs;

is not to be rejected because of the unlawful conduct of law enforcement officers who took an active part, or were otherwise involved, in the importation of the narcotic goods."

4 Division 2 of Pt 1AB contains a series of provisions which exempt law enforcement officers and members of the police force of a State from criminal liability for a "narcotic goods offence" if the conduct that would otherwise constitute that offence is engaged in in the course of duty for the purposes of a "controlled operation" provided "there is in force a certificate given under section 15M that authorises the controlled operation": s 15I. A "controlled operation" is defined by s 15H as an operation which, inter alia, "is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for an offence against section 233B of the *Customs Act 1901*". Section 15M prescribes the criteria which govern the issuing of a certificate by an "authorising officer"[2]. Although sub-ss (1) and (3) of s 15I exempt law enforcement officers and State police officers from criminal liability for a narcotics offence in the circumstances to which those sub-sections respectively apply, s 15I(6) provides as follows:

"If, because of subsection (1) or (3), a person who has imported narcotic goods into Australia is not liable for an offence under paragraph 233B(1)(b) of the *Customs Act 1901*, the narcotic goods are, nevertheless, for the purposes of section 233B of that Act, taken to be goods imported into Australia in contravention of that Act."

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2 s 15J defines authorising officer in these terms:

"The Australian law enforcement officer who is in charge of a controlled operation may apply to:

(a) the Commissioner, a Deputy Commissioner or an Assistant Commissioner; or

(b) a member of the National Crime Authority;

for a certificate authorising the controlled operation."

The provisions of Div 2 of Pt 1AB can relate only to controlled operations that start after Pt 1AB commenced.

Division 3 of Pt 1AB, which is the division relevant to the present case, applies only to controlled operations that started before the commencement of Pt 1AB: s 15V(1). That Division covers prosecutions which were pending and which would otherwise have been affected by the judgment in *Ridgeway* at the time when Pt 1AB came into force. Division 3 affects the exercise of a trial judge's discretion to exclude evidence in a prosecution for an offence against s 233B or an associated offence[3]. The relevant provision is s 15X which reads as follows:

> " **Evidence of illegal importation etc. of narcotic goods not to be rejected on ground of unlawful conduct by law enforcement officer**
>
> In determining, for the purposes of a prosecution for an offence against section 233B of the *Customs Act 1901* or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the *Customs Act 1901* should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation is to be disregarded, if:
>
> (a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a controlled operation; and
>
> (b) for the purposes of the operation:
>
> (i) the Australian Federal Police, by written request signed by one of its members and purported to be made in accordance with the Ministerial Agreement, asked a Regional Director for a State or Territory that the narcotic goods, while subject to the control of the Customs (within the meaning of the *Customs Act*

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3 An "associated offence" in relation to s 233B of the *Customs Act* is defined to mean:

> "(i) an offence under section 236 or 237 of that Act that relates to the offence; or
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> (ii) an offence under section 7A or subsection 86(1) of this Act that relates to the offence".

1901), be exempted from detailed scrutiny by officers of the Australian Customs Service; and

(ii) the request for exemption was granted."

6 In the Explanatory Memorandum which accompanied the Bill for the Amending Act, the purpose of s 15X was stated to be "to alter the rule of evidence laid down in *Ridgeway v R* (1995) 129 ALR 41, where certain circumstances relating to the involvement of law enforcement officers in the importation of narcotic goods in the course of a controlled operation can be shown to have existed".

7 Counsel for the accused submits that s 15X is an invalid attempt by the Parliament to interfere with or derogate from the judicial power of the Commonwealth, to interfere with the judicial process and to direct a court as to the manner and outcome of the exercise of its jurisdiction.

The operation and effect of s 15X

8 To appreciate the effect of s 15X, it is necessary to go back to the principle which emerges from the judgments of this Court in *Ridgeway*[4]. Ridgeway had been convicted in the Supreme Court of South Australia of having in his possession without reasonable excuse a traffickable quantity of heroin to which s 233B of the *Customs Act* applied and which had been imported into Australia in contravention of that Act. He appealed against his conviction, contending that the trial judge ought to have stayed permanently the proceedings against him or ought to have excluded evidence of the importation on discretionary grounds. The discretion was said[5] to arise because the heroin had been illegally imported under the auspices of, and with the active involvement of, the Australian Federal Police so that it could be supplied to Ridgeway.

9 Mason CJ, Deane and Dawson JJ noted[6] that:

"The illegal importation of the heroin which members of the Australian Police Force organised and in which they were involved was the very conduct against which the legislative provision creating the offence of which the appellant was convicted was primarily directed."

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4 (1995) 184 CLR 19.

5 (1995) 184 CLR 19 at 25.

6 (1995) 184 CLR 19 at 42.

The factors warranting rejection of the evidence of importation on public policy grounds were found to be extremely strong. Their Honours identified those factors as "grave and calculated police criminality; the creation of an actual element of the charged offence; selective prosecution; absence of any real indication of official disapproval or retribution; the achievement of the objective of the criminal conduct if evidence be admitted". Toohey J and I each agreed[7] that evidence of the importation should have been excluded for substantially the same reasons as those advanced in the joint judgment. Gaudron J held that the proceedings ought to have been stayed because public confidence in the courts is necessarily diminished where the illegal actions of law enforcement agents culminate in the prosecution of an offence resulting from their own criminal acts. Such proceedings, her Honour held, were an abuse of process[8]. McHugh J dissented. Mason CJ, Deane and Dawson JJ favoured an order permanently staying the proceedings on the ground that, once evidence of illegal importation was excluded, the proceedings would inevitably fail[9]. Gaudron J also favoured a stay to remedy the abuse of process. Toohey J and I, holding that once the evidence was excluded, there was no evidence to support an element of the offence for which Ridgeway had been convicted, favoured an order substituting a verdict of acquittal for Ridgeway's conviction.

10 Division 2 of Pt 1AB exempts from criminal liability law enforcement officers and State police officers who take part in controlled operations that are authorised by an authorising officer. Consequently, evidence of their conduct in importing narcotic goods or otherwise taking part in authorised controlled operations is no longer to be excluded on the footing that such conduct is an intentional flouting of a law designed to suppress the supply of narcotic goods, committed in execution of a settled and deliberate official policy[10]. In cases to which Div 2 applies, at the trial of a person charged with an offence under s 233B of the *Customs Act* or an associated offence, conduct to which sub-ss (1) and (3) of s 15I apply can no longer weigh against admission of evidence of that conduct in proof of an element in the offence charged.

11 But sub-ss (1) and (3) of s 15I do not apply to conduct in which law enforcement officers or State police officers engaged before Pt 1AB commenced. The consequences of that conduct are left to s 15X. That section relates to the exercise of the *Ridgeway* discretion in respect of the illegal importation of narcotic goods by law enforcement officers in a controlled operation that started before s 15X commenced. Where evidence of such conduct is tendered against an

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7 (1995) 184 CLR 19 at 64 and 53 respectively.

8 (1995) 184 CLR 19 at 77-78.

9 (1995) 184 CLR 19 at 43.

10 See *Ridgeway v The Queen* (1995) 184 CLR 19 at 53.

accused in proof of an element of an offence under s 233B of the *Customs Act* or an associated offence, evidence of that conduct will be rejected in accordance with *Ridgeway* unless s 15X applies. Section 15X applies when the narcotic goods were imported in the course of duty for the purpose of a controlled operation certified[11] to have been engaged in pursuant to the consent of a Regional Director of Customs that the imported narcotic goods be exempted from detailed scrutiny by officers of the Australian Customs Service while those goods were subject to the control of Customs (hereafter an "authorised controlled operation"). In exercising a court's discretion to decide whether evidence of the importation of narcotic goods in an authorised controlled operation should be admitted or rejected, the court is directed to disregard the fact that a law enforcement officer committed an offence in importing those narcotic goods. If that fact had been disregarded in *Ridgeway*, evidence of the illegal importation of the heroin of which Ridgeway was found to have been in possession would have been admitted, there being no other reason for rejecting evidence relevant to prove one of the elements of the offence. In the present case, if s 15X is valid, if the heroin referred to in the indictment was imported in an authorised controlled operation and if there is no other reason for rejecting evidence of its illegal importation, that evidence would be admitted on a trial of the accused.

12 The accused submits that s 15X is invalid. The argument proceeds on three grounds. First, the accused contends that s 15X invalidly purports to direct a court to exercise its discretionary power in a manner or to produce an outcome which is inconsistent with the essential character of a court or with the nature of judicial power. Secondly, the accused argues that, as s 15X applies to identifiable cases and is directed specifically to the accused in those cases rather than to the public generally, s 15X purports to usurp judicial power. Thirdly, the accused submits that an attempt to sterilise the *Ridgeway* discretion invalidly undermines the integrity of the court's processes and public confidence in the administration of justice. Alternatively to these arguments, it is submitted that s 15X on its true construction does not apply to the accused whose trial had already been permanently stayed. The section, it is said, applies only to future trials and does not purport to affect orders that have been made to stay a trial. It is convenient to consider these arguments seriatim.

1. <u>Consistency with the essential character of a court or with the nature of judicial power</u>

13 In *Chu Kheng Lim v Minister for Immigration*[12], Brennan, Deane and Dawson JJ pointed out that the grants of legislative power contained in s 51 of the Constitution do not "extend to the making of a law which requires or authorizes

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11 s 15W.

12 (1992) 176 CLR 1 at 27.

the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".

14 The nature of judicial power and the essential character of the courts which are charged with its exercise can be ascertained in part from the Constitution, in part from the common law. The common law informs the institutions of government[13] - Parliament, the Executive and the Judicature - in which the legislative, executive and judicial powers of the Commonwealth are reposed respectively by ss 1, 61 and 71 of the Constitution.

15 The judicial power of the Commonwealth is vested in a court when the Constitution or a law of the Commonwealth confers jurisdiction to exercise judicial power in specified matters. Having heard and determined a matter in which it has jurisdiction, the court exercises the judicial power of the Commonwealth by the making of its judgment or order. Subject to the Constitution, the Parliament can prescribe the jurisdiction to be conferred on a court but it cannot direct the court as to the judgment or order which it might make in exercise of a jurisdiction conferred upon it. So much appears from a passage in the joint judgment in *Chu Kheng Lim*[14] in which s 54R of the *Migration Act* 1958 (Cth) was held by Brennan, Deane and Dawson JJ to be invalid for the following reason, inter alia:

> "In terms, s 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates."

16 One of the exclusively judicial functions of government is the adjudgment and punishment of criminal guilt as the joint judgment in *Chu Kheng Lim* pointed out[15]:

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13 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Cheatle v The Queen* (1993) 177 CLR 541 at 552.

14 (1992) 176 CLR 1 at 36-37.

15 (1992) 176 CLR 1 at 27.

> " There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to[16] and 'could not be excluded from'[17] the judicial power of the Commonwealth[18]. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive."

The function of adjudication and punishment of criminal guilt under a law of the Commonwealth can be exercised only by those courts in which the necessary jurisdiction is vested pursuant to Ch III of the Constitution[19]. Those courts include, relevantly for present purposes, the County Court of Victoria[20].

17 A court in which criminal jurisdiction under a law of the Commonwealth is vested pursuant to Ch III of the Constitution exercises the judicial power of the Commonwealth when it adjudges and punishes criminal guilt. Judicial power, though never exhaustively defined, was described in a familiar passage in the judgment of Griffith CJ in *Huddart, Parker & Co Proprietary Ltd v Moorehead*[21]:

> "[T]he words 'judicial power' as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

18 As the exercise of judicial power results in the making of a "binding and authoritative" decision, that decision itself becomes the charter for the future of the rights and liabilities with which it deals and the lawful authority for the taking of

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16 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

17 *R v Davison* (1954) 90 CLR 353 at 368, 383.

18 See, also, *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536-539, 608-610, 613-614, 632, 647, 649, 685, 705-707, 721.

19 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

20 *Judiciary Act* 1903 (Cth) s 68.

21 (1909) 8 CLR 330 at 357.

action in accordance with its terms. In the criminal jurisdiction, an adjudication of guilt and the imposition of sentence become the authority for, and the duty of, the Executive government to carry the sentence into execution.

19 To exercise judicial power, a court is bound to take the essential steps identified by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller*[22]. Referring to *Huddart, Parker* their Honours said:

> "The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."

As the rights and liabilities prescribed by a court's judgment (including a liability to undergo punishment in accordance with a sentence imposed by a criminal court) declare or are founded on the antecedent rights and liabilities of the parties (including a right or liability to the exercise of a judicial discretion), the court must find the facts and apply the law which, at the relevant time[23], prescribe those antecedent rights and liabilities. The finding of facts is a curial determination of the actual existence or occurrence of the acts, matters and things on which criminal liability for the offence charged depends. It is a function which, on the trial on indictment of a person charged with an offence against a law of the Commonwealth, is reposed in a jury[24]. In finding facts, the jury is restricted to the evidence laid before them supplemented by facts commonly known that need no proof.

20 Some characteristics of a court flow from a consideration of this function, including the duty to act and to be seen to be acting impartially[25]. We are not concerned with these characteristics in the present case, except in so far as the duty to act impartially is inconsistent with the acceptance of instructions from the legislature to find or not to find a fact or otherwise to exercise judicial power in a particular way. A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid[26]. However, a law which merely

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22 (1983) 152 CLR 570 at 608; see also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743 at 747; 138 ALR 220 at 226.

23 *Attorney-General v Vernazza* [1960] AC 965 at 977; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 503-504, 579-580; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250.

24 Section 80 of the Constitution.

25 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248.

26 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37; and see *Liyanage v The Queen* [1967] 1 AC 259 at 290.

prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion. For the purposes of the accused's first submission, the function of a court to which s 15X relates is the finding of facts on which the adjudication and punishment of criminal guilt depend.

21 Section 15X does not impede or otherwise affect the finding of facts by a jury. Indeed, it removes the barrier which *Ridgeway* placed against tendering to the jury evidence of an illegal importation of narcotic goods where such an importation had in fact occurred. Far from being inconsistent with the nature of the judicial power to adjudicate and punish criminal guilt, s 15X facilitates the admission of evidence of material facts in aid of correct fact finding.

22 However, to identify the adjudication of criminal guilt as the relevant exercise of judicial power is not to deal with the effect of s 15X on which the accused relies to challenge its validity. The accused's argument is not that the adjudication by the jury of criminal guilt is affected by s 15X but that s 15X governs the determination by the trial judge of the challenge to the admission of evidence of an illegal importation. The argument assumes that the exercise of discretion to admit or reject evidence is itself an exercise of judicial power distinct from a step in the practice or procedure which governs the exercise of judicial power.

23 The judicial power of a court is defined by the matters in which jurisdiction has been conferred upon it. The conferral of jurisdiction prima facie carries the power to do whatever is necessary or convenient to effect its exercise. The practice and procedure of a court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction[27] but subject to overriding legislative provision governing that practice or procedure. The rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription. A law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power. E S Roscoe[28], observing that the common law had produced a law of evidence of such high technicality as "justly merited the wholesale condemnation of Bentham" credits Lord Denman with the initiation of the move for legislative reform. The preamble to the *Evidence Act* 1843 (Imp)[29] shows the need which was perceived to warrant legislative intervention:

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27 See *Grassby v The Queen* (1989) 168 CLR 1 at 16.

28 *The Growth of English Law*, (1911) at 151.

29 6 & 7 Vict c 85.

> "Whereas the Inquiry after Truth in Courts of Justice is often obstructed by Incapacities created by the present Law, and it is desirable that full Information as to the Facts in Issue, both in Criminal and in Civil Cases, should be laid before the Persons who are appointed to decide upon them"

it was enacted that certain evidentiary rules be changed. Even though judicial opinion was opposed to the enactment of the *Criminal Evidence Act* 1898 (Imp)[30], it would not have occurred to the Imperial Parliament that a legislative power to prescribe rules of evidence might be regarded as a usurpation of judicial power.

24 In *The Commonwealth v Melbourne Harbour Trust Commissioners*[31], Knox CJ, Gavan Duffy and Starke JJ said:

> "A law does not usurp judicial power because it regulates the method or burden of proving facts."

And in *Williamson v Ah On*[32], Higgins J said that "the evidence by which an offence may be proved is a matter of mere procedure". He added:

> " The argument that it is a usurpation of the *judicial* power of the Commonwealth if Parliament prescribe what evidence may or may not be used in legal proceedings as to offences created or provisions made by Parliament under its legitimate powers is, to my mind, destitute of foundation."

However, Isaacs J pointed out a difference between a rule of evidence and a provision which, though in the form of a rule of evidence, is in truth an impairment of the curial function of finding the facts and hence an usurpation of judicial power. He said[33]:

> "It is one thing to say, for instance, in an Act of Parliament, that a man found in possession of stolen goods shall be conclusively deemed to have stolen them, and quite another to say that he shall be deemed to have stolen them unless he personally proves that he got them honestly."

If a court could be directed by the legislature to find that an accused, being found in possession of stolen goods, had stolen them, the legislature would have reduced the judicial function of fact finding to the merest formality. The legislative

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30 Stone and Wells, *Evidence: Its History and Policies*, (1991) at 46-47.

31 (1922) 31 CLR 1 at 12.

32 (1926) 39 CLR 95 at 122.

33 (1926) 39 CLR 95 at 108.

instruction to find that the accused stole the goods might prove not to be the fact. The legislature itself would have found the fact of stealing. Isaacs J continued:

> "The first is a parliamentary arbitrary creation of a new offence of theft, leaving no room for judicial inquiry as to the ordinary offence; the second is only an evidentiary section, altering the burden of proof in the ordinary case of theft, and requiring certain pre-appointed evidence to fit the special circumstances in the interests of justice, because the accused best knows the facts, and leaving the Court with these provisions to examine the facts and determine the matter."

The reversal of an onus of proof affects the manner in which a court approaches the finding of facts but is not open to constitutional objection provided it prescribes a reasonable approach to the assessment of the kind of evidence to which it relates. Rich and Starke JJ held[34] that a grant of power to make laws for the peace, order and good government of a territory carried the power "to enact whatever laws of evidence it thinks expedient, and in particular justifies laws regulating the burden of proof, both in civil and criminal cases ... and it is not for the Courts of law to say whether the power has been exercised wisely or not". The same view was taken by Gibbs and Mason JJ in *Milicevic v Campbell*[35] and by Gibbs CJ in *Sorby v The Commonwealth*[36].

25 In *Rodway v The Queen*[37], the Court held that a provision which changed the law relating to the necessity for corroboration of the evidence of a victim of crime was a provision governing practice and procedure. As a procedural law, it was to be applied on the trial of an offender for an offence committed prior to the legislative change. This decision accords with the view expressed in *Wigmore on Evidence*[38]:

> "Rules of evidence are merely methods for ascertaining facts. It must be supposed that a change of the law merely makes it more likely that the fact will be truly ascertained, either by admitting evidence whose former suppression - or by suppressing evidence whose former admission - helped to conceal the truth. In either case no fact has been taken away from the

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34 (1926) 39 CLR 95 at 127.

35 (1975) 132 CLR 307 at 316-317, 318-319.

36 (1983) 152 CLR 281 at 298.

37 (1990) 169 CLR 515 at 521.

38 Tillers' review, (1983) par 7 at 474.

party; it is merely that good evidence has been given the one or bad evidence been taken from the other."

26 If s 15X had simply declared that evidence of an illegal importation should be admitted, denying any discretion in the trial judge to exclude the evidence, the provision would simply have enlarged the evidentiary material available to a jury to assist it to find the facts truly. It would have been a mere procedural law assisting in the court's finding of material facts. No exception could be taken to such a law consistently with the authorities cited above. But s 15X leaves the trial judge with a discretion to reject evidence of importation of narcotic goods in an authorised controlled operation, requiring only that in exercising the discretion, the illegal conduct of law enforcement officers should be disregarded. The existence of the judicial discretion does not alter the classification of the law as a law governing the admission of evidence and therefore a law governing procedure. The procedure for determining the admission of evidence of illegal importation is affected, but the judicial function of fact finding is unchanged and the judicial power to be exercised in determining guilt remains unaffected. The first ground of objection to the validity of s 15X fails.

2. Application of s 15X only to identifiable cases

27 At the time when Div 3 of Pt 1AB commenced to operate, there was a finite number of cases in which an authorised controlled operation for the illegal importing of narcotic goods had occurred. The number of prosecutions which had been instituted in respect of such goods was necessarily limited and the identity of those against whom charges had been laid were known by the prosecuting authorities. When the present proceedings were removed into this Court, counsel for the Crown stated that there were "half a dozen in New South Wales and Victoria". It was possible that further charges would be laid for offences committed after Div 3 commenced in respect of narcotic goods illegally imported in an authorised controlled operation before Div 3 commenced.

28 Relying on the limited number of cases to which Div 3 might apply, the accused argues that s 15X targets a limited group of alleged offenders and, by removing the linch-pin on which the *Ridgeway* discretion to exclude evidence depends, attempts to secure their conviction. This was said to attract the invalidating principle which the Privy Council expressed in *Liyanage v The Queen*[39]. In that case, legislation which had been enacted by the Parliament of Ceylon to deal with the trial of those who had been arrested after an attempted *coup d'êtat* was held to be invalid. The Privy Council said[40]:

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39 [1967] 1 AC 259.

40 [1967] 1 AC 259 at 290.

> " Mr Gratiaen succinctly summarises his attack on the Acts in question as follows. The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable ... and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered ex post facto the punishment to be imposed on them.
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> In their Lordships' view that cogent summary fairly describes the effect of the Acts. As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity."

The principle to be derived from *Liyanage* applies only to legislation that can properly be seen to be directed ad hominem. It was so held by Mason CJ, Dawson and McHugh JJ in *Leeth v Commonwealth*[41]:

> "[L]egislation may amount to a usurpation of judicial power, particularly in a criminal case, if it prejudges an issue with respect to a particular individual and requires a court to exercise its function accordingly (see *Liyanage v The Queen*). It is upon this principle that bills of attainder may offend against the separation of judicial power (see *Polyukhovich v The Commonwealth*). But a law of general application which seeks in some respect to govern the exercise of a jurisdiction which it confers does not trespass upon the judicial function."

The cases to which s 15X applies are not only those in which prosecutions were pending when it came into force but any prosecution which thereafter required proof of illegal importation in an authorised controlled operation started before Div 2 commenced. Section 15X is the key provision of Div 3 which complements Div 2 by ensuring that in no case where the relevant narcotic goods are imported in an authorised controlled operation should evidence of the importation be excluded by reason of the illegality of the conduct of the law enforcement officers who were involved in the importation. The provisions of Pt 1AB bear no resemblance to the provisions of the Acts which were held invalid in *Liyanage*. In that case, the legislation was directed specifically to the conviction and punishment of the offenders who had been arrested and were to be tried for their part in the

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41 (1992) 174 CLR 455 at 469-470.

attempted *coup d'êtat*. In this case, Pt 1AB is directed to all cases of alleged offences against s 233B of the *Customs Act* and associated offences, whether committed before or after Pt 1AB commenced. The distinction between Div 2 and Div 3 is accounted for by the different ways chosen by the Parliament to achieve a reversal of the *Ridgeway* decision. In one way or the other, the Parliament ensured that the conduct of law enforcement officers in importing narcotic goods in an authorised controlled operation should not prevent the laying before the jury of evidence of the importation of the narcotic goods in respect of which other offenders were charged with an offence against s 233B of the *Customs Act* or an associated offence.

29 It is erroneous to suggest that Div 3 seeks to secure the conviction of those other offenders for the offences with which they were or will be charged. Division 3 is concerned with the effect of illegality on the part of law enforcement officers, not with the offences committed by others. Section 15G(2) leaves the court with its general power to exclude evidence of an importation in an authorised controlled operation if there should be reasons for rejecting the evidence other than the illegality of the conduct of the law enforcement officers. It remains for the court in each case in which an alleged offender is charged with an offence against s 233B or with an associated offence to determine whether the elements of the offence charged have been proved. In making its finding, the court will not be deprived of evidence of the importation of narcotic goods which have been imported in an authorised controlled operation merely because the law enforcement officers acting in the course of their duty were involved in the importation in circumstances covered by Div 2 or Div 3 (as the case may be).

30 The second ground of attack on the validity of s 15X also fails.

3. <u>Undermining the integrity of the court's processes and public confidence in the administration of justice</u>

31 The accused submits that *Ridgeway*[42] does not merely prescribe a rule of evidence but is an assertion of judicial power to exclude evidence in order to protect the public interest and to preserve public confidence in the administration of justice. To appreciate the nature of the *Ridgeway* discretion, it is necessary to trace briefly the development in Australian law of the public policy discretion to exclude evidence that is otherwise relevant and admissible.

32 In *R v Ireland*[43], photographs of the right hand of an accused person were taken by police officers without any power to do so, the police having told the

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42 (1995) 184 CLR 19.

43 (1970) 126 CLR 321.

accused that he had to have his hand photographed. Barwick CJ observed[44] that "the trial judge would have had a discretion to reject [the photographs] because of the manner in which they had been obtained." Speaking of evidence of facts or things procured by means that are unlawful at common law or by statute, he said[45]:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

In *Bunning v Cross*, Stephen and Aickin JJ said[46]:

> "What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. ... [T]he discretionary process called for by *Ireland* ... [is] concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration."

Their Honours, emphasising that the police forces should not be free to disregard statutory safeguards for the individual, said[47]:

> "Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in *the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm.* This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty. ... [I]t may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when of their very nature they involve *no overt defiance of the will of the*

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44 (1970) 126 CLR 321 at 334.

45 (1970) 126 CLR 321 at 335.

46 (1978) 141 CLR 54 at 74-75.

47 (1978) 141 CLR 54 at 77-78.

> *legislature or calculated disregard of the common law* and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law." (Emphasis added.)

33 In *Cleland v The Queen*[48], Deane J stressed the balance which had to be struck in exercising the public policy discretion, adding "impropriety" to "unlawfulness" as a factor to be weighed. Referring to the principle endorsed in *Ireland* and *Bunning v Cross*, his Honour said[49]:

> "The rationale of this principle is to be found in considerations of public policy, namely, the undesirability that such unlawful or improper conduct should be encouraged either by the appearance of judicial approval or toleration of it or by allowing curial advantage to be derived from it. Its application involves a weighing, in the particular circumstances of each case, of the requirement of public policy that the wrongdoer be brought to conviction and the competing requirement of public policy referred to above, namely, that the citizen should be protected from unlawfulness or impropriety in the conduct of those entrusted with the enforcement of the law."

In *Pollard v The Queen*[50], Deane J returned to the problem, citing what Stephen and Aickin JJ had said in *Bunning v Cross* and proceeding:

> "As that passage makes plain, the principal considerations of 'high public policy' which favour exclusion of evidence procured by unlawful conduct on the part of investigating police transcend any question of unfairness to the particular accused. In their forefront is the *threat which calculated disregard of the law by those empowered to enforce it represents to the legal structure of our society and the integrity of the administration of criminal justice.* It is the duty of the courts to be vigilant to ensure that unlawful conduct on the part of the police is not encouraged by an appearance of judicial acquiescence. In some circumstances, the discharge of that duty requires the discretionary exclusion, in the public interest, of evidence obtained by such unlawful conduct. In part, this is necessary to prevent statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct. In part it is necessary to ensure that the courts are not themselves demeaned by the

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48 (1982) 151 CLR 1.

49 (1982) 151 CLR 1 at 20.

50 (1992) 176 CLR 177 at 202-203.

> uncontrolled use of the fruits of illegality in the judicial process." (Emphasis added.)

34 *Ridgeway* was an extension of the public policy discretion. The unlawfulness in that case was not in the conduct of police who were engaged in the collection of evidence of a crime committed, but in the conduct of law enforcement officers of the Executive Government who themselves committed a crime in order to establish an element of a further offence which they anticipated would be committed by another party. However, the underlying principle was that evidence needed for the conviction of the other party could be bought at "too high a price" and it was therefore necessary to balance the bringing of the other party to conviction and the "undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law"[51]. In *Ridgeway*[52], Mason CJ, Deane and Dawson JJ said:

> "The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of 'high public policy'[53] relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty."

35 It is clear that, in exercising the *Ridgeway* discretion, the court is balancing two competing public interests: the public interest in bringing to conviction an offender who has committed a crime and the public interest in upholding the law when law enforcement officers, the agents of the Executive Government, have deliberately flouted the law laid down by the Parliament or the common law. If the court were to disregard the illegal conduct of law enforcement officers and to admit evidence of that conduct, albeit the conduct was in flagrant and deliberate breach of the Parliament's statutory command, the unlawful conduct would itself have conferred a "curial advantage"[54] on the law enforcement officers and the reception of evidence of the illegal conduct would "demean the court as a tribunal whose concern is in upholding the law"[55].

36 But it is a mistake to see the *Ridgeway* discretion as a device calculated to protect the reputation of the courts. It simply reflects the court's duty to ensure

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51 *Bunning v Cross* (1978) 141 CLR 54 at 74.

52 (1995) 184 CLR 19 at 31.

53 *Bunning v Cross* (1978) 141 CLR 54 at 74 per Stephen and Aickin JJ.

54 *Pollard v The Queen* (1992) 176 CLR 177 at 203 per Deane J.

55 *Bunning v Cross* (1978) 141 CLR 54 at 78 per Stephen and Aickin JJ.

that it does not exercise its discretionary powers to achieve an objective which flagrant and deliberate breaches of the law are designed to achieve, especially when the breaches are committed by agents of the Executive Government whose duty is to uphold the law. By weighing the competing public interest factors, the court seeks to strike the right balance between them. It is by a proper balancing of the interests served by the general criminal law - the law which governs the conduct of law enforcement officers as well as the general public - against the interests served by the law relating to the admission of evidence of guilt in a criminal prosecution that the integrity of the court's processes are preserved and the repute of the courts as the administrators of criminal justice is protected.

37 To suggest that the statutory will of the Parliament, expressed in s 15X, is to be held invalid because its application would impair the integrity of the court's processes or bring the administration of criminal justice into disrepute is, in my respectful opinion, to misconceive both the duty of a court and the factors which contribute to public confidence in the administration of criminal justice by the courts. It is for the Parliament to prescribe the law to be applied by a court and, if the law is otherwise valid, the court's opinion as to the justice, propriety or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests. To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court's opinion about its own repute to the level of a constitutional imperative. It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice.

38 The fact that, s 15X apart, on the trial of an offender for an offence against s 233B of the *Customs Act* or for an associated offence, the courts would reject evidence of the illegal importation of the relevant narcotic goods by a law enforcement officer does not establish that s 15X is beyond the legislative power of the Parliament. Once the Parliament has enacted s 15X, it is the duty of the courts to apply it. In doing so, the courts defer to the legislative competence of the Parliament and affirm their own adherence to the rule of law. In striking a balance between the factors relevant to the *Ridgeway* discretion, subject to the conditions prescribed by Div 3 of Pt 1AB, the Parliament expresses where the balance of public interest lies. The declaration of the balance of public interest devolves on the court when the Parliament is silent, but once the Parliament has spoken, it is the voice of the Parliament that declares where the balance of the public interest lies.

39 No attack on the validity of s 15X succeeds.

Does s 15X apply to the present case?

40 The accused submits that s 15X is clearly intended to operate in the future, without prejudice to a right which he acquired by the making of the permanent stay order. Section 15X, so the argument runs, is not dealing with mere matters of procedure but is directed to the exercise of the public policy discretion which determines rights and obligations. The argument mistakes the effect of a stay order and raises a false dichotomy between matters of procedure and the public policy discretion.

41 An order staying a criminal trial is not a judicial decree conferring an immunity from punishment for a criminal offence. It is not the equivalent of a verdict and judgment of acquittal. It confers no vested right. A stay does not determine the matter charged in the indictment. There is concededly power to lift a stay and, if the stay be lifted, the trial on the indictment can proceed. Further, for reasons earlier stated, s 15X bears the character of a procedural law. Like the statute considered in *Rodway*[56], s 15X is a "statute which prescribes the manner in which the trial of a past offence is to be conducted". It applies to the proceeding between the Crown and the accused which, though stayed, is still pending. Section 15X destroys the basis on which the permanent stay was ordered. The stay is no longer appropriate. The issues raised on the indictment between the Crown and the accused must now be determined, either by plea or by verdict.

42 Accordingly, the order staying the trial should be lifted and the matter remitted for trial to the County Court of Victoria. As the question raised is one that affects the admissibility of evidence in a pending criminal proceeding, there should be no order for costs.

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56 (1990) 169 CLR 515 at 518.

43 TOOHEY J. The circumstances in which this matter was removed into the High Court and the operative legislative regime are detailed in the judgment of Hayne J. I shall avoid unnecessary repetition.

44 The applicant contends that Div 3 of Pt 1AB of the *Crimes Act* 1914 (Cth) ("the Act") is invalid. Part 1AB was introduced by the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) ("the Amending Act"), following the decision of this Court in *Ridgeway v The Queen*[57]. In *Ridgeway* the Court held that evidence of the illegal importation of heroin by law enforcement officers should have been excluded on the grounds of public policy, with the consequence that the prosecution was unable to prove a necessary element of the offence charged. The main provision under attack is s 15X. The key words of that section provide that in determining whether evidence that narcotic goods were imported into Australia in contravention of the *Customs Act* 1901 (Cth) should be admitted:

> "the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation is to be disregarded".

Certain conditions must be fulfilled before the section can operate[58]; it is not in issue that the conditions were met.

45 Division 3 deals only with controlled operations[59] that began before Pt 1AB commenced[60]. This is such a case. The division stands in contrast to Div 2 of Pt 1AB which is concerned with controlled operations that took place after the part commenced. Section 15I, which is part of Div 2, provides in effect that a law enforcement officer who, in the course of duty, engages in conduct that would otherwise constitute a narcotic goods offence, is not liable for that offence if there is in existence a certificate which authorises the controlled operation.

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57 (1995) 184 CLR 19.

58 The law enforcement officer must be acting in the course of duty and a request for exemption from scrutiny of the narcotic goods by Customs must have been granted. See pars (a) and (b) of s 15X.

59 A controlled operation is defined by s 15H as an operation that involves the participation of law enforcement officers; is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for an offence against s 233B of the *Customs Act* or an associated offence; and may involve an officer engaging in conduct that would, apart from s 15I(1) or (3), constitute a narcotic goods offence.

60 The Amending Act commenced on 8 July 1996. Judgment in *Ridgeway* was delivered on 19 April 1995.

46 Thus s 15I has no direct evidentiary effect. Rather, it obliges a court relevantly to treat the officer as someone who is not liable for any narcotic goods offence that the officer would otherwise have committed. The application of "the *Ridgeway* discretion" must be assessed accordingly. On the other hand s 15X does have a direct evidentiary effect. In determining whether evidence of a particular character should be admitted, a court must disregard the fact that an officer committed an offence. The application of the *Ridgeway* discretion must be assessed on that footing. The court remains free to have regard to any other relevant evidence. This is put beyond doubt by s 15G(2) which reads:

> "Subject to section 15X, this Part is not intended to limit a discretion that a court has:
>
> (a) to exclude evidence in criminal proceedings; or
>
> (b) to stay criminal proceedings in the interests of justice".

Thus, a court may exclude evidence obtained from a controlled operation falling within Div 3 on the basis of unfairness to the accused or because the prejudicial effect of the evidence outweighs its probative value. In particular, nothing in Pt 1AB affects s 138(1) of the *Evidence Act* 1995 (Cth) which reads:

> "Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law;
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained."

Of course, in the application of s 138 a court must proceed in accordance with s 15X.

47 The applicant was charged with offences under s 233B of the *Customs Act*. Relying upon *Ridgeway*, the County Court made an order permanently staying the proceedings against him. Thereafter the Amending Act came into effect. The respondent then sought to have the order vacated. The proceedings were adjourned and subsequently the matter was removed into this Court. It is common ground that if s 15X is invalid, the application to vacate the stay order cannot succeed.

48 The attack on the validity of s 15X was expressed in terms that the section "infringes or usurps the judicial power of the Commonwealth contrary to the doctrine of separation of powers mandated by Chapter III of the *Constitution*".

Some refinement of that formulation is necessary in order to understand precisely what the attack involves. As I understand the applicant's argument, it begins with the proposition that Ch III separates the judicial power of the Commonwealth from legislative and executive powers and directs that judicial power may be exercised only by courts which are established, or are invested with federal jurisdiction, by the sections that comprise Ch III. There is no difficulty in accepting the applicant's argument thus far. It is the next step that the applicant seeks to take that calls for closer consideration. The proposition is that the legislature cannot direct a court exercising the judicial power of the Commonwealth as to the manner in which the power is exercised. If necessary, this is further refined to say, at least not in such a way as is inconsistent with the essential powers of a court or with the nature of judicial process.

49 The argument was expressed in two different ways. The first focused on the discretion which a judge has to exclude evidence in certain circumstances and contended that s 15X unduly interfered with that discretion. The second way the argument was put was that Div 3 of Pt 1AB necessarily relates to a small, identifiable group of persons and in that context it directs a judge to deal in a particular way with the evidence, a requirement that does not exist in other cases. At times the two submissions tended to merge.

50 The doctrine of separation of powers serves "both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government' ... and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government'"[61].

51 It is apparent from the decision of the Supreme Court of the United States in *Plaut v Spendthrift Farm Inc*[62] that the limits of legislative encroachment on judicial power can give rise to considerable debate. There the Court, by majority, held legislation unconstitutional to the extent that it required federal courts to re-open final judgments entered before its enactment. But underlying the debate is an acceptance of the proposition that the power to resolve conclusively and to dispose of litigation is a judicial power[63]. A similar debate has taken place in Canada from time to time. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of*

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61 *Commodity Futures Trading Commission v Schor* 478 US 833 at 848 (1986), quoted in *Harris v Caladine* (1991) 172 CLR 84 at 135. See also *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 70 ALJR 743 at 747; 138 ALR 220 at 226.

62 131 L Ed 2d 328 (1995).

63 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27, 36-37, 49-50.

Judges of the Provincial Court of Prince Edward Island[64] is a recent example. The underlying principle remains the same.

52 Because of the form the argument took, it is convenient to say something first about the discretion (more accurately, the power) to exclude evidence sought to be adduced against an accused person[65]. Consideration can, in this respect, be confined to the exclusion of evidence on grounds of public policy[66]. The discretion to exclude evidence on those grounds is part of the settled law in this country[67]. The source of the discretion is not to be found in statute law[68]; it "is properly to be seen as an incident of the judicial powers vested in the courts in relation to criminal matters"[69]. In the same way, courts have developed over many years the concept of a discretion to exclude confessional statements where the reception of the evidence might result in unfairness to an accused. In even broader terms the courts speak of a discretion to exclude evidence, the probative value of which is outweighed by the likely prejudice to an accused. But these aspects of discretion are outside the scope of the present application[70].

53 It is a considerable step to reason that legislation may not affect the way in which judicial power is exercised. It is an even bigger step to contend that the legislature may not provide that evidence possessing a certain character must be treated in a certain way or that evidence of a particular character must be rejected or, for that matter, admitted. It might be necessary, in a particular situation, to look closely at the consequences of rejecting or admitting the evidence. Those consequences may, for instance, be so inimical to the idea of a fair trial that a question arises as to the power of the legislature, at any rate where the judicial power of the Commonwealth is involved. In *Polyukhovich v The Commonwealth*

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64 Unreported judgment of Supreme Court of Canada, 18 September 1997.

65 Courts are called upon to exercise a discretion in a variety of situations. See generally Hawkins, *The Uses of Discretion*, (1992). But in the evidentiary context the emphasis is upon the power to exclude evidence consequent upon the exercise of a discretion.

66 See generally *R v Swaffield*; *Pavic v The Queen* [1998] HCA 1.

67 *Bunning v Cross* (1978) 141 CLR 54 at 69; *Ridgeway* (1995) 184 CLR 19 at 30-31.

68 But see now *Evidence Act* 1995 (Cth), s 138(1); *Evidence Act* 1995 (NSW), s 138(1).

69 *Ridgeway* (1995) 184 CLR 19 at 33.

70 They are discussed in *R v Swaffield; Pavic v The Queen* [1998] HCA 1.

(*War Crimes Act Case*), where the operation of a law retroactively was one of the issues, I said[71]:

> "It is only if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power that a contravention of Ch III may be involved."

The operation of s 15X falls far short of that situation. It postulates a particular evidentiary footing upon which a court may then proceed where the admissibility of evidence that narcotic goods were imported into Australia is at issue. Section 15X is an evidentiary provision. It does not determine whether a charge of an offence against the *Customs Act* will succeed or fail. In no sensible way can the section, or for that matter Div 3 generally, be described as a bill of attainder. A closer analogy is with a statutory provision removing a requirement for corroboration. Such a provision was upheld in *Rodway v The Queen*[72] as not falling within the presumption against the retrospective operation of a statute.

54 In its broadest form, the argument of the applicant would seem to invalidate any legislative provision that bore on the exercise of the judicial power of the Commonwealth. And why would it not strike down even provisions designed to ensure due process? Clearly the argument must be expressed much more narrowly. What is at stake here is not the reputation of the courts. It may be that the reputation of the courts will suffer if compelled to admit or to exclude certain evidence, but only if as a consequence the chances of an accused receiving a fair trial are seriously diminished. Even then it is not the reputation of the courts which calls for protection; it is the judicial process itself.

55 Evidence has traditionally been a subject for legislative regulation. The *Evidence Act* 1995 (Cth) is a recent illustration. To take an example closer to home, averment provisions have been upheld as within constitutional power[73]. In so far as areas of public policy are involved, the identification of matters which are contrary to public policy is not the sole prerogative of the courts. The legislature may, by the proscription of conduct, spell out areas of public policy.

56 Faced with these hurdles in the way of the first limb of his argument, the applicant was, in a sense, driven to the second limb.

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71 (1991) 172 CLR 501 at 689.

72 (1990) 169 CLR 515.

73 *Milicevic v Campbell* (1975) 132 CLR 307. See generally *Cross on Evidence*, 5th Aust ed (1996) at 204-205.

57 The second limb related to the relatively few persons upon whom it was said s 15X might operate, that is where a controlled operation had started before the commencement of Pt 1AB[74]. Just how many persons cannot be known. Even though the existence of controlled operations may be ascertainable, identifying the persons affected by a controlled operation is another matter. There is nothing in the relevant provisions which singles out an individual, as in *Kable v Director of Public Prosecutions (NSW)*[75], or which singles out a particular category of persons. It is simply the fact that by applying to controlled operations commenced before Pt 1AB, s 15X necessarily operates only by reference to accused persons to whom those operations related. In the same way, it might be said that the *War Crimes Act* 1945 (Cth) necessarily applied only to the conduct of a limited number of persons. But that did not lead to any declaration of invalidity[76]. The legislation held invalid in *Liyanage v The Queen*[77] went a great deal further by purporting to legislate *ex post facto* the detention of particular persons charged with particular offences on a particular occasion.

58 The applicant had a further submission which did not involve the validity of Div 3 of the Act. The submission was that the division had a prospective operation only and that, the County Court having ordered a stay of proceedings before the Amending Act took effect, s 15X could not apply to any trial of the applicant.

59 It is an established principle that, absent a clear statement of legislative intention, a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation. Once it is understood that s 15X operates only to affect rights to be determined at trial, as in *Rodway*, the principle is not offended. In any event Div 3 contains a clear statement of its intention to operate in the future. There is nothing to support the argument that, a stay having been granted before the Amending Act came into operation, the stay cannot be lifted thereafter.

60 It follows that Div 3 of Pt 1AB is a valid law of the Commonwealth. The matter should be remitted to the County Court to be dealt with according to law.

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74 s 15V(1).

75 (1996) 70 ALJR 814; 138 ALR 577.

76 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

77 [1967] 1 AC 259.

61 GAUDRON J. In *Ridgeway v The Queen* this Court held, by majority, that there is a discretion "to exclude, on public policy grounds, all evidence of an offence or an element of an offence procured by unlawful conduct on the part of law enforcement officers."[78] That case involved heroin imported into Australia in breach of the *Customs Act* 1901 (Cth) by law enforcement officers who sold it to Ridgeway as part of a plan to catch him "red-handed". The majority held that evidence of its importation should have been excluded in exercise of the discretion identified in that case[79]. And, in the result, Ridgeway's conviction for possession of illegally imported heroin was set aside and an order made staying his further prosecution[80].

62 Following the decision in *Ridgeway*, the *Crimes Act* 1914 (Cth) ("the Act") was amended by the insertion of Pt 1AB[81]. That Part deals with controlled operations in which law enforcement officers engage in what is or otherwise would be illegal conduct "for the purpose of obtaining evidence that [might] lead to the prosecution of a person for an offence against section 233B of the *Customs Act* 1901[82] or an associated offence"[83].

63 So far as concerns controlled operations carried out after Pt 1AB came into force, s 15I(1) relevantly provides that "a law enforcement officer ... who, in the course of duty, for the purposes of a controlled operation, engages in conduct that, apart from this subsection, would constitute a narcotic goods offence is not liable for that offence if ... there is in force a certificate given under section 15M"[84]. However, that exemption does not apply if:

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78 (1995) 184 CLR 19 at 33 per Mason CJ, Deane and Dawson JJ. See also at 52-53 per Brennan J and 64-65 per Toohey J.

79 *Ridgeway v The Queen* (1995) 184 CLR 19 at 43 per Mason CJ, Deane and Dawson JJ, 52-53 per Brennan J, 64 per Toohey J.

80 Note that the stay did not extend to the prosecution of alternative offences under State law. Note also that Brennan and Toohey JJ would have entered a verdict of not guilty.

81 The *Crimes Amendment (Controlled Operations) Act* 1996 (Cth).

82 Section 233B prescribes a range of offences relating to the importation and possession of narcotic goods.

83 Section 15H of the Act.

84 Section 15M sets out the grounds upon which the authorising officer must be satisfied in order to issue a certificate authorising a controlled operation.

"(a) the conduct of the [relevant law enforcement officer] involves intentionally inducing the person targeted by the operation to commit an offence against section 233B of the *Customs Act 1901* or an associated offence; and

(b) the person would not otherwise have had the intent to commit that offence or an offence of that kind."[85]

64 No provision is made in Pt 1AB of the Act with respect to the admission or exclusion of evidence in cases involving controlled operations carried out after it came into force. Rather, it seems to be assumed that, by exempting law enforcement officers from criminal liability for offences committed in the course of those operations, their conduct is rendered lawful and, thus, the discretion identified in *Ridgeway* is not enlivened. Certainly, that assumption is consistent with s 15G(2) which provides that subject to s 15X, that that Part:

"is not intended to limit a discretion that a court has:

(a) to exclude evidence in criminal proceedings; or

(b) to stay criminal proceedings in the interests of justice."

Section 15X applies only to controlled operations commenced before Pt 1AB came into force.

65 There is nothing in Pt 1AB conferring immunity from criminal liability for offences committed in controlled operations started before that Part came into force. Instead, s 15X provides, in the case of a controlled operation undertaken by a law enforcement officer in the course of duty and purportedly in accordance with previous arrangements[86], that:

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85 Sections 15I(2) and (5).

86 Prior to the enactment of the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth), each controlled operation was conducted in accordance with a Ministerial Agreement made by the Minister for Industry, Technology and Commerce and the Special Minister of State on 3 June 1987. The Ministerial Agreement provided that a written request could be made to the Australian Customs Service:

"where certain persons, goods, ships or aircraft, suspected or known to be carrying or having an involvement in drugs, are required by the Australian Federal Police or the National Crime Authority to be exempted from detailed customs scrutiny and control and in cases where there is to be substitution of imported goods."

(Footnote continues on next page)

> "In determining, for the purposes of a prosecution for an offence against section 233B of the *Customs Act 1901* or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the *Customs Act 1901* should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation is to be disregarded".

The question in this case is whether s 15X is valid.

66 The validity of s 15X was brought into issue in proceedings against the applicant, David Michael Nicholas, in the County Court, Melbourne. He was presented in that Court on an indictment charging four narcotic drug offences. Two of the charges were for offences under s 233B(1)(c) of the *Customs Act* ("the federal offences") and the other two were for offences under State law. The offences were allegedly committed in September 1994 and involved drugs which were illegally imported into Australia by a law enforcement officer. Before Pt 1AB of the Act came into force, an order was made staying the prosecution of the federal offences. The order was made on the basis that, so far as the drugs in question were illegally imported by a law enforcement officer, the facts were not relevantly distinguishable from those in *Ridgeway* and, thus, evidence of their importation should be excluded. When Pt 1AB came into force, the prosecution applied to have the stay lifted. In the course of that application, a question arose as to the validity of s 15X and, to the extent that the proceedings raise that question, they were removed into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth).

67 The applicant contends that s 15X is invalid on the basis that it "usurps the judicial power of the Commonwealth". It is also said that s 15X infringes Ch III of the Constitution in that it impermissibly "directs the manner in which [a] Court is to consider an application ... for evidence to be excluded ... [and] also directs the outcome as [the] application ... must inevitably fail when the very basis for the application cannot be taken into account." Additionally, it is put that it infringes Ch III because it is selective rather than general in its operation. In this last regard, it is not in issue that, apart from the applicant, only five or six people whose identities are known to the relevant law enforcement authorities will be affected by s 15X. Finally, it is argued that s 15X does not apply where, as here, a stay has already been granted.

Where the request for exemption was granted, the controlled operation would be conducted in accordance with detailed Australian Federal Police Guidelines governing such operations. See Second Reading Speech to the Crimes Amendment (Controlled Operations) Bill 1995, House of Representatives, *Parliamentary Debates* (Hansard), 22 August 1995 at 6.

68 In order to understand the arguments advanced on behalf of the applicant, it is necessary to say something of Ch III of the Constitution. It is settled constitutional doctrine that the provisions of that Chapter, particularly s 71, operate so that the judicial power of the Commonwealth can only be exercised by the courts mentioned in that section, namely, this Court, federal courts created by the Parliament and courts invested with federal jurisdiction[87], the latter relevantly consisting of State Courts invested with federal jurisdiction pursuant to ss 39 and 39A of the *Judiciary Act*[88]. It is also settled constitutional doctrine that they operate so that the Parliament cannot confer any power other than judicial power and powers ancillary to the exercise of judicial power on those courts[89].

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87 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97-98 per Dixon J; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 538; [1957] AC 288 at 312-313; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580-581 per Deane J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 per Mason CJ, Dawson and McHugh JJ, 487 per Deane and Toohey JJ.

88 As to the position of Territory Courts see *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 602 per McTiernan J, 606 per Menzies J, 613 per Owen J, 623 per Walsh J, 627 per Gibbs J. But cf *Gould v Brown* [1998] HCA 6 at 41-42 per Gaudron J.

89 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Victorian Stevedoring and General Contracting Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97-98 per Dixon J; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 586-587 per Dixon and Evatt JJ; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 538; [1957] AC 288 at 312-313; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 606-607 per Deane J, 703 per Gaudron J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 per Mason CJ, Dawson and McHugh JJ, 487 per Deane and Toohey JJ. See also *Harris v Caladine* (1991) 172 CLR 84. As to the position of State courts, see *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 236 per Latham J; *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152; *R v Murphy* (1985) 158 CLR 596 at 613-614; *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 830 per Dawson J, 846 per McHugh J, 858 per Gummow J; 138 ALR 577 at 599, 622, 638. As to the position of State courts invested with Territory jurisdiction, see *Gould v Brown* [1998] HCA 6 at 41 per Gaudron J.

69 The argument that s 15X "usurps" the judicial power of the Commonwealth is, in effect, an argument that Parliament has attempted to engage in an exercise of judicial power by itself deciding that evidence as to the illegal importation of the narcotic drugs the subject of the federal offences with which the applicant is charged must be admitted at his trial. As will later appear, I do not think s 15X operates in that way. For present purposes, however, it may be assumed that it does. Even so, it does not follow, in my view, that Parliament has "usurped" judicial power.

70 The difficulties involved in defining "judicial power" are well known[90]. In general terms, however, it is that power which is brought to bear in making binding determinations as to guilt or innocence, in making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and, in making binding adjustments of rights and interests in accordance with legal standards[91]. It is a power which is exercised in accordance with the judicial process and, in that process, many specific and ancillary powers are also exercised. One ancillary power which may be exercised in that process is the power to exclude evidence in the exercise of a discretion which permits that course. Other ancillary powers which are or may be brought to bear include the power to grant an adjournment, to make procedural rulings and to rule on the admissibility of evidence.

71 The various ancillary powers which are or may be brought to bear in the exercise of judicial power are not, themselves, ultimate powers of the kind involved in the making of binding determinations as to guilt or innocence or as to existing rights, liabilities, powers, duties, or status, or, in making binding adjustments of rights and interests. And they are not properly identified as judicial power for the purposes of Ch III of the Constitution. Accordingly, the argument that, in enacting s 15X of the Act, the Parliament purported to exercise the judicial power of the Commonwealth must be rejected.

72 The argument that s 15X infringes Ch III of the Constitution because it directs the manner in which the *Ridgeway* discretion is to be exercised and because it is specific and not general in its operation is, in effect, an argument that s 15X transforms the power to determine guilt or innocence in any case in which that

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90 See, for example, *R v Davison* (1954) 90 CLR 353 at 366 per Dixon CJ and McTiernan J; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 per Windeyer J; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257 per Mason CJ, Brennan and Toohey JJ, 267 per Deane, Dawson, Gaudron and McHugh JJ.

91 See *Gould v Brown* [1998] HCA 6 at 43-44 per Gaudron J and the references there cited.

section applies with the result that that power is not then properly characterised as judicial power. To understand that argument, it is necessary to say something as to the nature of judicial power.

73 Judicial power is not adequately defined solely in terms of the nature and subject-matter of determinations made in exercise of that power. It must also be defined in terms that recognise it is a power exercised by courts and exercised by them in accordance with the judicial process[92]. Thus, as was said in *Chu Kheng Lim v Minister for Immigration*, the Parliament cannot make "a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power."[93]

74 In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.

75 The argument that s 15X transforms the power to be exercised in determining guilt or innocence is based on two distinct premises. The first is that s 15X prevents the independent determination of the matter in controversy. The second is that it requires the court to proceed in circumstances which bring or tend to bring the administration of justice into disrepute. Those premises must be examined. And, in the view I take as to what is required for consistency with the nature of judicial power, it is also necessary to consider whether s 15X offends against the requirement of equality before the law. The examination of those issues requires

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92 *Harris v Caladine* (1991) 172 CLR 84 at 150 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 per Gaudron J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 703-704 per Gaudron J.

93 (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ. See also *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 607, 613 per Deane J and 704 per Gaudron J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470 per Mason CJ, Dawson and McHugh JJ.

a consideration of the rationale which underpins the discretion identified in *Ridgeway*. And it also requires an analysis of the precise operation of s 15X.

76 In *Ridgeway*, Brennan J took the view that the evidence in issue in that case was to be excluded because its admission "would be too high a price to pay"[94]. A similar view was taken by Toohey J, his Honour adopting the view that "the seriousness of the unlawful conduct ... was such that considerations of public policy precluded its reception"[95]. Mason CJ, Deane and Dawson JJ were more specific in their identification of the public interest involved. Their Honours clearly regarded the discretion as born of considerations relating to the integrity of the administration of justice. In this regard, they expressed the view that in cases where police conduct induces the commission of an offence, it was unlikely that evidence would be excluded except in "the rare and exceptional case where the illegality or impropriety ... is grave and either so calculated or so entrenched that it is clear that considerations of public policy relating to the administration of criminal justice require ... [its] exclusion"[96]. And in cases where "illegal police conduct is itself the principal offence ... or itself constitutes an essential ingredient of the charged offence"[97], their Honours observed that "police illegality and the threat to the rule of law ... assume a particularly malignant aspect"[98], but allowed that, if the action where disowned by those in higher authority and appropriate action taken, it would be unlikely that "considerations of public policy relating to the integrity of the administration of criminal justice" would require exclusion of the evidence in question[99].

77 Although Mason CJ, Deane and Dawson JJ anchored the public policy considerations which underpin the *Ridgeway* discretion in "the integrity of the administration of criminal justice"[100], they stopped short of the view which I took, namely that the prosecution of an offence, which is the culmination of illegal action on the part of law enforcement authorities, is an abuse of process because its "inevitable consequence ... is to weaken public confidence in the administration of

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94 *Ridgeway v The Queen* (1995) 184 CLR 19 at 52.

95 *Ridgeway v The Queen* (1995) 184 CLR 19 at 64, citing *Foster v The Queen* (1993) 67 ALJR 550 at 557; 113 ALR 1 at 10.

96 *Ridgeway v The Queen* (1995) 184 CLR 19 at 39.

97 *Ridgeway v The Queen* (1995) 184 CLR 19 at 39.

98 *Ridgeway v The Queen* (1995) 184 CLR 19 at 39.

99 *Ridgeway v The Queen* (1995) 184 CLR 19 at 39.

100 *Ridgeway v The Queen* (1995) 184 CLR 19 at 39.

justice."[101] Accordingly, it follows from what was said by Mason CJ, Deane and Dawson JJ in *Ridgeway* and, also, from the fact that *Ridgeway* identified a discretion rather than a rule of general application that it cannot be said that every prosecution for an offence induced by the illegal action of law enforcement officers weakens confidence in the judicial process.

78 It is necessary now to consider s 15X. Given that s 15G(2) expressly provides that "[s]ubject to section 15X, [Pt 1AB] is not intended to limit a discretion ... to exclude evidence ... or ... to stay criminal proceedings", s 15X must be construed strictly in accordance with its terms. And when so construed, two matters emerge. The first is that it does not purport to negate the existence of the *Ridgeway* discretion. Rather, s 15X necessarily acknowledges its existence by directing that "[i]n determining ... whether evidence that narcotic goods were imported into Australia in contravention of the *Customs Act 1901* should be admitted, the fact that a law enforcement officer committed an offence ... is to be disregarded".

79 The second matter which emerges when s 15X is construed according to its terms is that the only matter it excludes from consideration is the fact that a law enforcement officer committed an offence. It does not, for example, direct that the consequences of the unlawful conduct be disregarded: thus, it does not require a court to disregard resultant unfairness to an accused or to the trial process. Nor does it direct that the consequences of the admission of the evidence in question be disregarded: thus, it does not require a court to ignore the tendency of the evidence to bring the administration of justice into disrepute, if that be the case. Nor does it direct a court to disregard associated conduct, such as intentionally inducing the accused to commit an offence which he or she would not otherwise have the intention to commit. That is a matter which the Parliament clearly intended should deprive law enforcement officers of immunity from criminal liability in relation to controlled operations conducted after Pt 1AB came into force and it would be contrary to all canons of construction to treat s 15X as requiring it to be disregarded in cases involving controlled operations started before then.

80 Properly construed, s 15X does no more than exclude the bare fact of illegality on the part of law enforcement officers from consideration when determining whether the *Ridgeway* discretion should be exercised in favour of an accused person. So construed, it is clear that it does not prevent independent determination of the question whether that evidence should be excluded or, more to the point, independent determination of guilt or innocence. And so construed, it is also clear that it neither authorises nor requires a court to proceed in circumstances which bring or tend to bring the administration of justice into

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101 *Ridgeway v The Queen* (1995) 184 CLR 19 at 78.

disrepute. And although it is perhaps not quite so clear, it does not offend against the requirements of equal justice.

81 As already indicated, s 15X does not negate the *Ridgeway* discretion. It leaves the discretion to be exercised in any case in which it is invoked and, in that respect, the applicant's situation is no different from that which obtained in *Ridgeway*. And the principle of equality before the law is not infringed simply because, in the exercise of a discretion of the kind identified in *Ridgeway*, evidence is or may be excluded in one case and not in another. Indeed, it is the very essence of a discretion of that kind that the result of its exercise may vary according to the circumstances of the case. And, in my view, the principle of equality before the law is not infringed simply because s 15X directs that the fact that a law enforcement officer engaged in unlawful conduct is to be disregarded in any case in which that section applies.

82 Cases which arise after Pt 1AB came into force involve a circumstance not present in *Ridgeway*. When *Ridgeway* was decided, it was necessarily to be taken that Parliament had set its face against the importation of narcotic drugs by law enforcement officers, even where importation was part of a controlled operation. Parliament has now made plain its view that drug offenders should not escape prosecution simply because law enforcement officers have broken the law by importing the drugs involved in the offences with which they are charged. That consideration might properly result in the *Ridgeway* discretion being exercised differently, even if the facts are not otherwise distinguishable from those of that case. However, it is a matter for the trial judge whether that consideration has that consequence in this case.

83 It is necessary to say something of the argument that s 15X is directed to a limited number of persons who are known to law enforcement authorities. That argument was developed by reference to the decision of the Privy Council in *Liyanage v The Queen*[102], a case concerned with legislation which was "clearly aimed at particular known individuals"[103] and involved a "legislative plan ex post facto to secure the conviction ... of those ... individuals"[104]. It was held in that case that the legislation infringed the independence of the judiciary as mandated by the Constitution of Ceylon. In reaching its decision, the Privy Council emphasised that the legislation lacked generality but said that "not ... every enactment ... which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power."[105] I agree. If legislation which is

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102 [1967] 1 AC 259.

103 [1967] 1 AC 259 at 289.

104 [1967] 1 AC 259 at 290.

105 [1967] 1 AC 259 at 289.

specific rather than general is such that, nevertheless, it neither infringes the requirements of equal justice nor prevents the independent determination of the matter in issue, it is not, in my view, invalid. And as already indicated, s 15X does not offend in either respect.

84 The argument that s 15X is invalid fails. And in my view, the argument that s 15X does not apply in cases in which a stay has already been granted should be rejected for the reasons given by Hayne J. The matter should be remitted to the County Court to be determined in accordance with law.

85 McHUGH J. The principal questions in this cause removed under s 40 of the *Judiciary Act* 1903 (Cth) are:

(1) whether s 15X of the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) is invalid because it infringes or usurps the judicial power of the Commonwealth; and

(2) whether, if valid, s 15X has any application to an accused person who has the benefit of an order permanently staying proceedings against him if the order was made prior to the commencement of s 15X.

86 The first question should be answered, Yes. It is therefore unnecessary to answer the second question.

The history of the proceedings

87 By an indictment presented in the County Court of Victoria in Melbourne on 10 October 1995, David Michael Nicholas ("the accused") was charged with four drug-related offences. The first two charges alleged the possession of prohibited imports contrary to s 233B(1)(c) of the *Customs Act* 1901 (Cth). The remaining two charges alleged contraventions of s 73(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic). The *Customs Act* is a law of the Commonwealth within the meaning of s 76(ii) of the Constitution. Upon the presentment of the indictment, therefore, s 68 of the *Judiciary Act* invested the County Court with federal jurisdiction pursuant to s 77(iii) of the Constitution. Consequently, the trial of the indictment involved an exercise by a State court of the judicial power of the Commonwealth.

88 Uncontested evidence at the accused's committal established that the relevant prohibited imports had been imported into Australia by Australian and Thai law enforcement officers in contravention of s 233B(1)(b) of the *Customs Act*. The accused pleaded not guilty to all charges in the indictment at his initial arraignment and at his re-arraignment on 27 March 1996.

89 On 20 May 1996, the accused applied to Crossley J for a permanent stay of the proceedings against him in respect of the first two charges in the indictment. In support of his application, he relied on *Ridgeway v The Queen*[106], a decision in which this Court held that evidence of an importation contrary to s 233B should have been excluded because Australian Federal Police officers had committed offences against that section in arranging for the importation. On 27 May 1996, his Honour granted the application.

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106 (1995) 184 CLR 19.

90 The *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) ("the Act") came into effect on 8 July 1996. If s 15X of the Act is valid, it arguably prevents the accused from relying on *Ridgeway*. On 31 July 1996 the Crown relied on the Act in support of an application to vacate the stay of proceedings ordered by Crossley J. The accused subsequently gave notice of his intention to challenge the constitutional validity of the Act. The proceedings were adjourned *sine die* on 5 August 1996 after Crossley J was informed of the necessity for notices of a constitutional matter to be served pursuant to s 78B of the *Judiciary Act*. On 13 December 1996, the cause pending against the accused, in so far as it concerned the validity of the Act, was removed into this Court pursuant to s 40 of the *Judiciary Act*.

The scheme of the Act

91 The long title of the Act is "An Act to amend the *Crimes Act 1914*[107] to exempt from criminal liability certain law enforcement officers who engage in unlawful conduct to obtain evidence of offences relating to narcotic goods, and for related purposes". The effect of the Act is to insert a new Pt 1AB into the *Crimes Act*. The new Pt 1AB contains three Divisions. Division 1 sets out the objects of Pt 1AB, which include[108]:

> "to exempt from criminal liability law enforcement officers who, in the course of controlled operations authorised as provided under this Part:
>
> (i) take an active part, or are otherwise involved, in the importation or exportation of narcotic goods; or
>
> (ii) are involved in activities relating to the possession of narcotic goods".

92 Section 15G(2) provides that "[s]ubject to section 15X, this Part is not intended to limit a discretion that a court has: (a) to exclude evidence in criminal proceedings; or (b) to stay criminal proceedings in the interests of justice".

93 Division 2 of the new Pt 1AB operates in relation to controlled operations[109] that were not started prior to the commencement of Pt 1AB. The key provision in

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107 That is, the *Crimes Act* 1914 (Cth).

108 s 15G(1)(a).

109 A "controlled operation" is defined in s 15H as an operation that:

> "(a) involves the participation of law enforcement officers; and

(Footnote continues on next page)

Div 2 is s 15I. Section 15I(1) provides that law enforcement officers will not be liable for narcotic goods offences committed for the purposes of a controlled operation if at the time when the officers engage in the conduct that would otherwise constitute the offences, there is in force a certificate given under s 15M[110] authorising the controlled operation. Section 15I(3) sets out a similar exemption from liability for members of State police forces. However, s 15I(1) and (3) do not apply where the law enforcement or police officer's conduct "involves intentionally inducing the person targeted by the operation to commit an offence against section 233B of the *Customs Act 1901* or an associated offence" or "the person would not otherwise have had the intent to commit that offence or an offence of that kind"[111].

94 Significantly, sub-s 15I(6) provides:

> "If, because of subsection (1) or (3), a person who has imported narcotic goods into Australia is not liable for an offence under paragraph 233B(1)(b) of the *Customs Act 1901*, the narcotic goods are, nevertheless, for the purposes of section 233B of that Act, taken to be goods imported into Australia in contravention of that Act."

95 Division 3 of the new Pt 1AB, which is the crucial Division for present purposes, operates in relation to controlled operations started prior to the commencement of Pt 1AB[112]. The key provision in Div 3 is s 15X, which, as I have said, is expressed in s 15G(2) to be an exception to the Act's intention not to

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(b) is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for an offence against section 233B of the *Customs Act 1901* or an associated offence; and

(c) may involve a law enforcement officer engaging in conduct that would, apart from subsection 15I(1) or (3), constitute a narcotic goods offence."

110 Section 15M sets out the grounds on which a certificate authorising a controlled operation may be given. An authorising officer must be satisfied that the applicant has provided all the information available to the applicant about the nature and quantity of the narcotic goods to which the operation relates, that the person targeted by the operation is likely to commit an offence against s 233B of the *Customs Act* or an associated offence, that the operation will make it easier to obtain evidence for the prosecution of this person and that the narcotic goods involved will be under the control of an Australian law enforcement officer.

111 s 15I(2) and (5).

112 s 15V(1).

exclude a court's discretion to exclude evidence in criminal proceedings or to stay criminal proceedings. Section 15X provides:

> "In determining, for the purposes of a prosecution for an offence against section 233B of the *Customs Act 1901* or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the *Customs Act 1901* should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation is to be disregarded, if:
>
> (a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a controlled operation; and
>
> (b) for the purposes of the operation:
>
> (i) the Australian Federal Police, by written request signed by one of its members and purported to be made in accordance with the Ministerial agreement, asked a Regional Director for a State or Territory that the narcotic goods, while subject to the control of the Customs (within the meaning of the *Customs Act 1901*), be exempted from detailed scrutiny by officers of the Australian Customs Service; and
>
> (ii) the request for exemption was granted."

96 The plain effect of s 15X is to direct courts exercising the judicial power of the Commonwealth to disregard a fact that in *Ridgeway* was determinative of a decision to exclude evidence.

The decision in Ridgeway v The Queen

97 In *Ridgeway*, this Court held that there is a judicial discretion to exclude evidence proving an element of a criminal offence where the existence of the element is the result of illegal and perhaps improper conduct on the part of law enforcement officers. In *Ridgeway*, a case involving a prosecution in a State Court of an offence against the *Customs Act* and therefore involving the exercise of the judicial power of the Commonwealth, Australian Federal Police officers had imported heroin into Australia for the purpose of selling it to Ridgeway. A majority of the Court[113] found that the importation was illegal and that the public interest required that evidence of the importation be excluded. Because the offence

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113 Mason CJ, Brennan, Deane, Dawson and Toohey JJ, McHugh J dissenting. Gaudron J held that the incitement or participation of the officers in the commission of the offence rendered the proceedings an abuse of process.

could not be proved without evidence concerning the illegal importation, Mason CJ, Deane and Dawson JJ concluded that a permanent stay of the proceedings was necessary[114]. Brennan and Toohey JJ held that Ridgeway was entitled to be acquitted of the charge founded on s 233B of the *Customs Act*.

The basis of the *Ridgeway* discretion

98 Undoubtedly, s 15X has a significant effect on the manner in which a court is entitled to exercise the *Ridgeway* discretion in specific circumstances. The accused submits that this effect is impermissible given the fundamental purpose that the discretion serves. He relies strongly on the statement of Mason CJ, Deane and Dawson JJ in *Ridgeway*[115] that "[t]he basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes".

99 The *Ridgeway* discretion to exclude evidence of an illegally procured offence is a development of the so-called *Bunning v Cross*[116] discretion which hitherto had been confined to excluding unlawfully obtained evidence. In *Bunning v Cross*, this Court said that the following statement of Barwick CJ in *R v Ireland*[117] represented the law in Australia:

> "[w]henever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

100 Although the *Bunning v Cross* discretion was originally established in relation to "real" (non-confessional) evidence which had been obtained unlawfully[118], in the light of subsequent decisions of this Court, including

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114 Gaudron J also held that a stay of the proceedings was necessary.

115 (1995) 184 CLR 19 at 31.

116 (1978) 141 CLR 54.

117 (1970) 126 CLR 321 at 335.

118 For example, photographs taken against the will of an accused (*Ireland* (1970) 126 CLR 321) and the results of a breathalyser test administered in contravention of statutory requirements (*Bunning v Cross* (1978) 141 CLR 54).

Ridgeway, the discretion now extends to the exclusion of confessional evidence[119] and to evidence which has been improperly obtained[120] or unlawfully or improperly created.

101 *Ridgeway* did more, however, than extend the *Bunning v Cross* discretion to cases where the illegal or improper conduct of law enforcement officers has created one of the elements of an offence. The joint judgment of Mason CJ, Deane and Dawson JJ and the judgment of Gaudron J make it clear that this discretion depends on the necessity to preserve the integrity of the administration of justice and to protect the processes of the courts of justice. Thus, Mason CJ, Deane and Dawson JJ, after noting[121] that the considerations of "high public policy" which justify the existence of the discretion in the traditional *Bunning v Cross* type of case apply equally to *Ridgeway* type cases, went on to say[122]:

> "In both categories of case, circumstances can arise in which the need to discourage unlawful conduct on the part of law enforcement officers and *to preserve the integrity of the administration of criminal justice* outweighs the public interest in the conviction of those guilty of crime … If, in relation to either category, no judicial discretion existed to prevent the curial advantage being derived from the unlawful conduct, statements of judicial disapproval would be likely to be hollow and unavailing *and the administration of justice would be likely to be 'demeaned by the uncontrolled use of the fruits of illegality in the judicial process*'." (my emphasis)

102 Later their Honours said[123] that the "discretion is properly to be seen as an incident of the judicial powers vested in the courts in relation to criminal matters". When their Honours came to exercise the discretion in the circumstances of the case, they said[124]:

> "The critical question was whether, in all the circumstances of the case, the considerations of public policy favouring exclusion of the evidence of the appellant's offence, namely, *the public interest in maintaining the integrity*

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119 *Cleland v The Queen* (1982) 151 CLR 1 at 16, 23, 36; *Pollard v The Queen* (1992) 176 CLR 177 at 196-197, 201; *Ridgeway* (1995) 184 CLR 19 at 30-31.

120 *Cleland* (1982) 151 CLR 1 at 16-17, 19-20, 31-32; *Pollard* (1992) 176 CLR 177 at 196-197; *Ridgeway* (1995) 184 CLR 19 at 37.

121 *Ridgeway* (1995) 184 CLR 19 at 31-32.

122 (1995) 184 CLR 19 at 32.

123 (1995) 184 CLR 19 at 33.

124 (1995) 184 CLR 19 at 41-42.

of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime against s 233B(1)(c) of the Act of which he was guilty." (my emphasis)

103 Gaudron J said[125]:

"But what is more important is that the administration of justice is inevitably brought into question, and public confidence in the courts is necessarily diminished, where the illegal actions of law enforcement agents culminate in the prosecution of an offence which results from their own criminal acts. Public confidence could not be maintained if, in those circumstances, the courts were to allow themselves to be used to effectuate the illegal stratagems of law enforcement agents or persons acting on their behalf.

So far as public confidence in the administration of justice is concerned, the position is even worse if, as is usually the case, the law enforcement agents or those acting on their behalf are not brought to account for their criminal acts."

104 These passages make it plain that, so far as four of the six majority judges were concerned, the discretion exists, inter alia, because it is necessary to protect the processes of the courts of law in administering the criminal justice system. For that reason, it is "an incident of the judicial powers vested in the courts in relation to criminal matters"[126].

105 The *Bunning v Cross* and *Ridgeway* discretions must therefore be distinguished from the judicial discretion that enables judges to exclude evidence on the basis of unfairness to the accused if that evidence was admitted[127]. Unlike Scotland and New Zealand, where the courts exercise a similar judicial discretion, the *Bunning v Cross* discretion is not rooted in notions of ensuring a fair trial to the accused[128]. The rationale for the *Bunning v Cross* discretion and the variant of that discretion developed in *Ridgeway* is wider. Indeed, the element of fairness to the accused is almost irrelevant. Irrespective of any question of fairness to the accused, the *Bunning v Cross* discretion will be exercised where "considerations

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125 (1995) 184 CLR 19 at 77.

126 (1995) 184 CLR 19 at 33 per Mason CJ, Deane and Dawson JJ.

127 (1995) 184 CLR 19 at 48-49, 82.

128 See *Bunning v Cross* (1978) 141 CLR 54 at 74-75.

of 'high public policy' relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty"[129].

The contentions of the parties

106 The accused contends that the exercise of the judicial discretion enunciated in *Ridgeway* requires an exercise of judicial power[130]. He contends that, in requiring a court exercising federal jurisdiction to disregard "the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation"[131], Parliament has infringed or usurped the judicial power of the Commonwealth in the trial of offences against s 233B of the *Customs Act* and associated offences. The Crown responds by contending that s 15X is merely a legislative limitation on the operation of an evidentiary rule and does not infringe or usurp Commonwealth judicial power. The resolution of these contentions requires consideration of the constitutional doctrine of the separation of powers and of the nature of the judicial power of the Commonwealth.

Judicial power and the constitutional doctrine of the separation of powers

107 Section 71 of the Constitution provides that "[t]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". In *Huddart, Parker & Co Pty Ltd v Moorehead*[132], Griffith CJ defined judicial power as:

> "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

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129 *Ridgeway* (1995) 184 CLR 19 at 31.

130 The Crown concedes that the discretion involves an exercise of judicial power although it is perhaps more correct to say that the exercise of the discretion occurs in the course of exercising judicial power.

131 s 15X of the Act.

132 (1909) 8 CLR 330 at 357.

108 In *Fencott v Muller*[133], this Court said that:

> "The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."

109 These definitions are not exhaustive. They are simply descriptive of factors that are usually present when a tribunal is called on to exercise judicial power. Thus, although much emphasis has been given to the need for judicial power to involve binding and authoritative decisions between subjects or between subjects and the Crown, it is clear that not every binding and authoritative decision made in the determination of a dispute between such parties will constitute the exercise of judicial power[134]. Similarly, although judicial power requires a determination of existing rights and duties according to law, an exercise of an administrative or arbitral power may also involve a determination of existing rights and duties[135]. It is also probably necessary for a decision to be enforceable before it can be said to have been given in the exercise of judicial power[136] although the enforcement need not be undertaken by the Court responsible for the exercise of the power[137]. For present purposes, however, it is unnecessary to attempt any more precise definition of judicial power than that which appears in *Huddart, Parker* and *Fencott.*

110 Section 71 and Ch III of the Constitution give effect to the doctrine of the separation of powers by divorcing judicial from executive and legislative power[138]. Chapter III is "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested … No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the

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133 (1983) 152 CLR 570 at 608.

134 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 268.

135 See, for example, *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 149, cited in *Brandy* (1995) 183 CLR 245 at 268.

136 *Brandy* (1995) 183 CLR 245 at 268. See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 198-199.

137 *Brandy* (1995) 183 CLR 245 at 257, 269, citing *R v Davison* (1954) 90 CLR 353 at 368.

138 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

provisions of Chap III"[139]. Moreover, as I pointed out in *Kable v Director of Public Prosecutions (NSW)*[140], a basic principle which underlies the distinction between judicial and legislative or executive power and the doctrine of the separation of powers premised on that distinction "is that the judges of the federal courts must be, and must be perceived to be, independent of the legislature and the executive government".

111 If the doctrine of the separation of powers is to be effective, the exercise of judicial power needs to be more than separate from the exercise of legislative and executive power. To be fully effective, it must also be free of legislative or executive interference in its exercise. As a result, legislation that is properly characterised as an interference with or infringement of judicial power, as well as legislation that purports to usurp judicial power, contravenes the Constitution's mandate of a separation of judicial from legislative and executive power.

Infringements and usurpations of judicial power

112 The distinction between an infringement and a usurpation of judicial power is of little, if any, practical importance but, speaking generally, an infringement occurs when the legislature has interfered with the exercise of judicial power by the courts and an usurpation occurs when the legislature has exercised judicial power on its own behalf. Legislation that removes from the courts their exclusive function "of the adjudgment and punishment of criminal guilt under a law of the Commonwealth"[141] will be invalidated as a usurpation of judicial power. In *Chu Kheng Lim v Minister for Immigration*[142], a majority of this Court declared s 54R of the *Migration Act* 1958 (Cth) to be invalid because, in enacting this section, the Parliament of the Commonwealth had usurped the judicial power of the Commonwealth. Section 54R provided that courts were not to order the release from custody of a "designated person", a term that was defined in the legislation by reference to, inter alia, non-citizenship and illegal entry into Australia. Brennan, Deane and Dawson JJ, with whom Gaudron J was in general agreement, construed s 54R as purporting to prevent a court from ordering the release from

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139 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26 per Brennan, Deane and Dawson JJ, citing *Boilermakers* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

140 (1996) 70 ALJR 814 at 847; 138 ALR 577 at 622 and see the cases cited therein.

141 *Chu Kheng Lim* (1992) 176 CLR 1 at 27.

142 (1992) 176 CLR 1.

custody of a person being held unlawfully[143]. Their Honours stated[144] that where Parliament purports to direct the courts as to the manner and outcome of the exercise of their jurisdiction, this will constitute "an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates". Brennan, Deane and Dawson JJ said[145]:

> "A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid."

113 A legislature clearly usurps judicial power when it brings down a "legislative judgment" directed against specific individuals. In *Liyanage v The Queen*[146], the Judicial Committee of the Privy Council held that the *Criminal Law (Special Provisions) Act* 1962 (Ceylon) usurped and infringed judicial power and was therefore invalid. This Act modified the Criminal Procedure Code applicable in Ceylon by purporting to legalise ex post facto the detention of persons imprisoned in respect of an attempted coup, to widen the class of offences for which trial by three judges nominated by the Minister of Justice sitting without a jury could be ordered, to validate retrospectively arrests for certain offences made without warrant and to prescribe new minimum penalties for the offence of waging war against the Queen. The legislation was held to involve "a grave and deliberate incursion into the judicial sphere"[147] which was inconsistent with the separation of judicial from legislative power required by the Constitution of Ceylon. Professor Lane has said that judicial power is usurped according to *Liyanage* when there is "(a) legislative interference 'in *specific* proceedings'; (b) the interference 'affect[s] … *pending* litigation' ... (c) the interference affects the judicial process itself, that

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143 (1992) 176 CLR 1 at 35-36.

144 (1992) 176 CLR 1 at 37.

145 (1992) 176 CLR 1 at 36. Mason CJ, Toohey J and I did not dissent from the general principle outlined by Brennan, Deane and Dawson JJ, but found that s 54R could be read down so that it only prevented courts from releasing persons lawfully held in custody: see (1992) 176 CLR 1 at 13-14, 50-51, 69.

146 [1967] 1 AC 259.

147 [1967] 1 AC 259 at 290.

is, 'the discretion or judgment of the judiciary', or 'the rights, authority or jurisdiction of [the] court'"[148].

114 Similarly, in *Polyukhovich v The Commonwealth (War Crimes Act Case)*[149], members of this Court[150] said that there would be a usurpation of judicial power if a law inflicted punishment on specified persons without a judicial trial. However, the majority of the Court[151] held that s 9 of the *War Crimes Act* 1945 (Cth), which had been amended in 1988 to declare certain acts committed in Europe between 1939 and 1945 to be indictable offences against the Act, did not usurp the judicial power of the Commonwealth. Because s 9 of the *War Crimes Act* allowed the courts to determine whether a person engaged in conduct contrary to the Act, it was a valid law of the Commonwealth, despite the retrospectivity of its operation.

The present case

115 The present case is not covered by the factual situations involved in any of the cases outlined above. Section 15X does not contemplate a "legislative judgment" against specified individuals, nor does it serve to inflict punishment on specified persons without a judicial trial or to adjudge criminal guilt. Nor does it direct the federal courts not to make a finding concerning rights or duties that an accused person would otherwise be entitled to under the existing law or to change the direction or outcome of *pending* judicial proceedings. It does, however, direct courts exercising federal jurisdiction to disregard a fact that is critical in exercising a discretion that is necessary to protect the integrity of Ch III courts and to maintain public confidence in the administration of criminal justice. That being so, s 15X infringes the judicial power of the Commonwealth just as effectively as if it purported to change the direction or outcome of *pending* proceedings.

116 The Act was expressed[152] to be a direct response to a call for legislative intervention made by members of this Court in *Ridgeway*. In that case, Mason CJ, Deane and Dawson JJ responded to the argument that deceit and infiltration are of

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148 *The Australian Constitution*, 2nd ed, (1997) at 484 (footnotes omitted).

149 (1991) 172 CLR 501.

150 Mason CJ, Dawson, Toohey and McHugh JJ.

151 Mason CJ, Dawson, Toohey and McHugh JJ, Deane and Gaudron JJ dissenting.

152 Second Reading Speech to the Crimes Amendment (Controlled Operations) Bill 1996, House of Representatives, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2510.

particular importance to the effective investigation and punishment of drug trafficking by saying[153]:

> "Such an argument must, however, be addressed to the Legislature and not to the courts. It if be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements. In the absence of such a legislative regime, the courts have no choice but to set their face firmly against grave criminality on the part of anyone, regardless of whether he or she be government officer or ordinary citizen. To do otherwise would be to undermine the rule of law itself."

117 The explanatory memorandum to the 1996 Bill[154] that became the Act gives the following explanation of the intended operation of the Act:

> "By exempting law enforcement officers from criminal liability for certain conduct related to importation, exportation or possession of narcotic goods, the Bill will ensure that evidence resulting from such conduct is not excluded from evidence under the principles enunciated in *Ridgeway*. The transitional provisions of the Bill *directly* reverse the discretionary principles laid down in *Ridgeway* in the case of certain importations carried out under conditions agreed by the Australian Federal Police and Australian Customs Service." (my emphasis)

118 When the 1996 Bill was read for a second time on 20 June 1996, the Attorney-General for the Commonwealth stressed that the Bill was not intended to decriminalise prohibited importations by law enforcement officers[155]:

> "It should be noted that the bill, whilst protecting the law enforcement officers from criminal responsibility, will still preserve the essential criminality or unlawfulness of the importation – or exportation – of the prohibited narcotics. This will ensure that the importation or exportation itself is not made lawful, thereby exonerating the targets of the operation who planned the conspiracy."

119 Read literally, s 15X of the Act seeks to do no more than exclude evidence of "the fact that a law enforcement officer committed an offence in importing the

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153 (1995) 184 CLR 19 at 44.

154 Crimes Amendment (Controlled Operations) Bill 1996.

155 Second Reading Speech to the Crimes Amendment (Controlled Operations) Bill 1996, House of Representatives, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2514.

narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation". Despite the statements in the Explanatory Memorandum, it does not in terms abolish the *Ridgeway* discretion. Indeed, it does not even direct the court to disregard whether the conduct of the law enforcement officers brings the administration of criminal justice into disrepute. Read literally, the section excludes from consideration only the illegal quality of a law enforcement officer's conduct. On that view, an accused person can still prove that a person acting on behalf of the law enforcement officers committed an offence against s 233B and can still prove the bare fact that a law enforcement officer was responsible for the importation of the goods.

120 If this construction of s 15X is correct, it may be possible to exclude the evidence in a *Ridgeway* situation even though the criminality of the law enforcement officers cannot be taken into account. In addition, the accused arguably may be able to prove that a law enforcement officer has committed an offence against s 233B of the *Customs Act* in so far as the commission of the offence is relevant to the credibility of the officer's evidence. But, even if s 15X does no more than exclude the bare fact of a law officer's criminality from consideration in the exercise of the discretion to exclude evidence that the goods were imported into Australia, the section does strike at the core of a Ch III court's power to protect the integrity of its processes. As a result, it makes it more difficult to maintain public confidence in the administration of criminal justice by those courts.

121 Section 15X operates on the hypothesis that law enforcement officers have committed an offence against s 233B and that it is their criminal conduct that has brought into existence an essential element of the charge against the accused. Yet the section then directs courts exercising the judicial power of the Commonwealth to disregard the critical fact that the offence by the accused exists as a result of the criminal conduct of a law enforcement officer. That is to say, s 15X directs those courts to shut their eyes to a fact that, according to *Ridgeway*, is crucial in determining whether the integrity of the processes of federal courts are being demeaned. Expressly and by implication, the Parliament is saying to courts exercising federal jurisdiction in respect of importations occurring before s 15X was enacted: "Although the evidence may convincingly demonstrate to you that a law enforcement officer has committed a crime in order to establish an essential element of the crime for which he or she has prosecuted the accused, you must disregard the fact that that officer has committed that crime. You must disregard that fact even though the High Court of Australia in *Ridgeway* regarded that fact as crucial in holding[156] that 'the public interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement' outweighed the

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156 (1995) 184 CLR 19 at 41.

public interest in convicting the guilty." I cannot accept the claim that such a direction does not infringe the judicial power of the Commonwealth.

122 Section 15X in my opinion is not comparable with those enactments, commonly found in the statutes of the Parliament and the legislatures of the States, that regulate judicial discretions by requiring this or that matter to be taken into account. Such enactments are in the same category as legislative definitions. They give definition to some standard that governs the rights and duties of the parties - for example, by directing a court to take into account various matters in determining whether conduct is fair or reasonable or whether it is just and equitable to make some determination affecting the rights and duties of the parties. Section 15X is not of that order. It is a direction to a court exercising federal jurisdiction that it cannot have regard to a fact that is relevant and often critical in determining whether the court's processes are being demeaned. It is true that under *Ridgeway* the ultimate issue is whether evidence establishing an element of a criminal charge should be rejected. But if that evidence is rejected, it is partly, perhaps wholly, because the processes of the court would be demeaned if the evidence was admitted. What s 15X does is to prevent a court exercising federal jurisdiction from considering a fact which is a relevant step in determining whether its process is being demeaned. Its effect is to hamper, and in some cases to prevent, such a court from protecting its processes and thereby maintaining public confidence in courts exercising the judicial power of the Commonwealth.

123 Nor is s 15X comparable with those enactments regulating the admission of evidence or governing the practice and procedures of courts exercising federal jurisdiction. It is clear that Parliament can enact evidentiary rules[157] relating to proof of the offences that it creates. No constitutional reason exists to prevent the Parliament from altering the common law rules of evidence or the rules of practice and procedure enshrined in Rules of Court. In *Williamson v Ah On*[158], Higgins J said:

> "The argument that it is a usurpation of the *judicial* power of the Commonwealth if Parliament prescribe what evidence may or may not be used in legal proceedings as to offences created or provisions made by Parliament under its legitimate powers is, to my mind, destitute of foundation."

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157 *Williamson v Ah On* (1926) 39 CLR 95 at 108, 126-127, 128; *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 259-260, 262-263, 264; *Milicevic v Campbell* (1975) 132 CLR 307 at 316.

158 (1926) 39 CLR 95 at 122.

124 The New South Wales Court of Appeal expressed similar sentiments in *Chau v Director of Public Prosecutions*[159] in dealing with a law relating to bail applications. The Court rejected a challenge to a provision of the *Bail Act* 1978 (NSW) which reversed the presumption of bail. Kirby P dismissed the argument that s 8A of the *Bail Act* intruded on the judicial function, finding it to be merely "an extension and adaptation of what was the previous common law position as judged to be necessary for the effective functioning of criminal justice in cases such as this"[160]. His Honour said[161] that statutory guidance for the judiciary would not necessarily usurp the powers of Ch III courts and that statutory guidance for judicial discretions was "clearly acceptable so long as it does not amount to a purported usurpation of the judicial function".

125 However, s 15X is no mere evidentiary rule or rule of practice. It strikes at the capacity of a court, exercising federal jurisdiction, to protect its processes. True it is that the section does not take that power away from such a court. But it does direct that court to disregard a fact that in *Ridgeway* was, and in other cases might be, critical to the exercise of the power.

126 Nor is s 15X comparable with an enactment which merely reverses the conclusion of a federal court as to what the public interest requires. Leaving aside cases concerned with Ch III, nothing in the Constitution prevents the Parliament of the Commonwealth, otherwise acting within its powers, from altering a federal court's finding concerning the public interest or what it requires in particular circumstances. So far as Ch III is concerned, however, the power of the Parliament of the Commonwealth to determine whether or not the public interest requires certain conduct to be characterised as an abuse of a federal court's process is limited by the Constitution's separation of judicial from legislative power. Consistently with maintaining the independence of the federal judiciary which Ch III of the Constitution guarantees to the nation, the federal courts cannot transfer to the Parliament of the Commonwealth the power or responsibility for defining what is an abuse of their process[162]. Parliament, for example, cannot prevent a litigant from invoking the jurisdiction of this Court by declaring conduct to be an abuse of process when it is not. Similarly, Parliament cannot prevent this Court from protecting its process by declaring conduct not to be an abuse of process when it is an abuse of process. It is a necessary corollary of the last proposition that Parliament cannot hamper this Court or other federal courts in

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159 (1995) 37 NSWLR 639.

160 (1995) 37 NSWLR 639 at 658.

161 (1995) 37 NSWLR 639 at 657.

162 cf *Sorrells v United States* 287 US 435 at 457 (1932).

determining whether conduct is an abuse of process or has a tendency to undermine public confidence in their administration of justice.

127 The capacity of the federal courts to protect themselves from abuse of their processes and the necessity for those courts to maintain public confidence in the administration of justice is of the highest constitutional importance. It is to the courts exercising federal jurisdiction - particularly to this Court and the courts created under s 71 of the Constitution - that the governments and citizens of Australia look to protect them from contraventions of federal law and the Constitution. If the processes of those courts are demeaned, loss of public confidence in the impartiality and integrity of the federal courts is likely to ensue. If that occurs, the Australian federation must inevitably be damaged.

128 Section 15X is invalid[163].

Order

129 The matter should be remitted to the County Court to be determined according to law.

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163 It may seem ironic that, after dissenting in *Ridgeway*, I should hold invalid a section whose effect is to undermine, if not defeat, the consequences of that decision. In *Ridgeway*, however, I held on the facts that that prosecution did not "bring the administration of justice into disrepute" ((1995) 184 CLR 19 at 92). Earlier, I had said (at 92) that "[t]he ultimate question must always be whether the administration of justice will be brought into disrepute because the processes of the court are being used to prosecute an offence that was artificially created by the misconduct of law enforcement authorities". Holding s 15X invalid is therefore in accord with my dissent in that case although unlike Mason CJ, Deane and Dawson JJ I thought that it was unsatisfactory to simply apply the *Bunning v Cross* discretion to the *Ridgeway* type of case.

GUMMOW J

The jurisdiction of the County Court

130 The accused, David Michael Nicholas, was presented in the County Court of Victoria on an indictment, two of the four counts in which allege offences against s 233B of the *Customs Act* 1901 (Cth) ("the Customs Act"). The County Court thus was seized of a matter arising under a law of the Commonwealth within the meaning of s 76(ii) of the Constitution. The County Court was invested with federal jurisdiction, pursuant to s 77(iii) of the Constitution, by s 68 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

131 A further operation of the Judiciary Act is that, at the trial, the laws of the State of Victoria relating to evidence will be binding on the County Court, except as otherwise provided by the Constitution or the laws of the Commonwealth (s 79), and that so far as the laws of the Commonwealth are inapplicable or their provisions are insufficient to carry them into effect, the common law in Australia as modified by the Constitution and by the statute law in force in Victoria will govern the exercise of federal jurisdiction by the County Court (s 80). No Victorian statute law is in question in this case. The *Evidence Act* 1995 (Cth) does not apply to State courts (s 4(1)), with the exception of certain provisions which have an extended application in all proceedings in an "Australian court" (s 5)[164]. Rather, the question is whether another, and particular, law of the Commonwealth with respect to certain evidence is applicable in the County Court to displace what otherwise would be the operation of s 80 of the Judiciary Act which would "pick up" the common law.

132 The two counts alleging offences against s 233B(1)(c) of the Customs Act concern the accused's alleged possession or attempt to obtain possession of heroin on 24 September 1994[165]. This was before the commencement on 8 July 1996 of

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164 The term "Australian court" is defined in the "Dictionary" to the statute so as to include a court of a State.

165 So far as presently relevant, s 233B provides:

> "(1) Any person who:
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> ...
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> (b) imports, or attempts to import, into Australia any prohibited imports to which this section applies ...; or
>
> (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited

(Footnote continues on next page)

the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) ("the 1996 Act"). The 1996 Act inserted a new Pt 1AB into the *Crimes Act* 1914 (Cth) ("the Crimes Act"). This comprises ss 15G-15X. Part 1AB is headed "Controlled operations for obtaining evidence about certain offences relating to narcotic goods". Division 3 (ss 15V-15X) is headed "Controlled operations started before commencement of this Part". Section 15G(1)(c) states as one of the objects of Pt 1AB:

> "to provide that evidence of importation of narcotic goods obtained through a controlled operation:
>
> (i) started before the commencement of this Act; and

> imports to which this section applies which have been imported into Australia in contravention of this Act; ...
>
> shall be guilty of an offence.
>
> (1A) On the prosecution of a person for an offence against the last preceding subsection, being an offence to which paragraph (c) of that subsection applies, it is not necessary for the prosecution to prove that the person knew that the goods in his possession or of which he attempted to obtain possession had been imported into Australia in contravention of this Act, but it is a defence if the person proves that he did not know that the goods in his possession or of which he attempted to obtain possession had been imported into Australia in contravention of this Act.
>
> ...
>
> (1C) Any defence for which provision is made under either of the last 2 preceding subsections in relation to an offence does not limit any defence otherwise available to the person charged.
>
> (2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods and the prohibited exports to which this section applies are prohibited exports that are narcotic goods.
>
> (3) A person who is guilty of an offence against subsection (1) of this section is punishable upon conviction as provided by section 235.
>
> (4) This section shall not prevent any person from being proceeded against for an offence against any other section of this Act, but he shall not be liable to be punished twice in respect of any one offence."

(ii) in which the Australian Federal Police and the Australian Customs Service acted in concert to allow the narcotic goods to pass through the Customs;

is not to be rejected because of the unlawful conduct of law enforcement officers who took an active part, or were otherwise involved, in the importation of the narcotic goods."

133 The uncontested evidence given at the accused's committal established that the heroin the subject of the charges against the accused was imported into Australia by law enforcement officers in contravention of s 233B of the Customs Act. The Crown alleges that this was part of a "controlled operation" to which pars (a) and (b) of s 15X apply[166]. So far as is presently material, a "controlled operation" is an operation that is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for an offence against s 233B of the Customs Act or an "associated offence" and may involve law enforcement officers engaging in conduct that would constitute an offence (s 15H)[167].

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166 Section 15X states:

"In determining, for the purposes of a prosecution for an offence against section 233B of the [Customs Act] or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the [Customs Act] should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation is to be disregarded, if:

(a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a controlled operation; and

(b) for the purposes of the operation:

(i) the Australian Federal Police, by written request signed by one of its members and purported to be made in accordance with the Ministerial Agreement, asked a Regional Director for a State or Territory that the narcotic goods, while subject to the control of the Customs (within the meaning of the [Customs Act]), be exempted from detailed scrutiny by officers of the Australian Customs Service; and

(ii) the request for exemption was granted."

167 "[A]ssociated offence" was inserted into s 3(1) of the Crimes Act by the 1996 Act as follows:

(Footnote continues on next page)

134 It would follow from s 15X that at the trial of the accused, in determining whether evidence that the heroin was imported into Australia in contravention of the Customs Act should be admitted, the County Court would be obliged to disregard the fact that law enforcement officers committed offences in importing the heroin.

135 Were it not for s 15X, s 80 of the Judiciary Act would operate to make applicable the common law principle propounded by the majority in *Ridgeway v The Queen*[168]. This is that the discretion (or perhaps, more accurately, the power) to exclude evidence on the ground of public policy extends to the exclusion of evidence of an offence, or an element of an offence, procured by unlawful conduct on the part of law enforcement officers.

136 However, s 80 applies only "[s]o far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect". Section 15X is expressed to apply "for the purposes of a prosecution for an offence against section 233B" of the Customs Act. These terms are apt to embrace a prosecution in a State court exercising federal jurisdiction invested, pursuant to s 77(iii) of the Constitution, by s 68 of the Judiciary Act. The consequence is that the common law principle explained in *Ridgeway* is displaced by s 15X of the Crimes Act in relation to certain prosecutions.

"***associated offence*** means:

(a) in relation to an offence against section 233B of the *Customs Act 1901*:

(i) an offence under section 236 or 237 of that Act that relates to the offence; or

(ii) an offence under section 7A or subsection 86(1) of this Act that relates to the offence; or

(b) in relation to an offence against section 10, 11, 12, 13 or 14 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* - an offence under section 5, 7 or 7A or subsection 86(1) of this Act that relates to the offence; or

(c) in relation to an offence against a law of a State or Territory - an offence:

(i) under a provision of a law of that State or Territory that corresponds to section 5, 7 or 7A or subsection 86(1) of this Act; and

(ii) that relates to the offence."

168 (1995) 184 CLR 19.

The constitutional question

137 The accused contends that s 15X is invalid. It was to resolve that question that this Court, acting pursuant to s 40 of the Judiciary Act, removed into this Court the cause pending in the County Court.

138 The accused takes as his starting point the separation of judicial power from the legislative and executive powers of the Commonwealth established by Ch III of the Constitution. He referred to the statement by five members of the Court in *Wilson v The Minister for Aboriginal & Torres Strait Islander Affairs*[169]:

> "The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government."

The next step in the argument reflects what was said by Latham CJ in *British Medical Association v The Commonwealth*[170], which was approved in *Queen Victoria Memorial Hospital v Thornton*[171] and in *R v Murphy*[172]. Latham CJ said[173]:

> "There is no provision in the Constitution which enables the Commonwealth Parliament to require State courts to exercise any form of non-judicial power."

139 Later, in *R v Murphy*, six members of the Court observed[174]:

> "According to the authorities, the power conferred by s 77(iii) is limited by the principle, which has been distilled from Ch III and the dispositions it makes with respect to the judicial power, that only judicial functions and functions incidental thereto may be invested in a State court."

140 Section 15G(2)(a) of the Crimes Act states that, subject to s 15X, Pt 1AB of the Crimes Act is not intended to limit a discretion that a court has to exclude

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169 (1996) 70 ALJR 743 at 747; 138 ALR 220 at 226.

170 (1949) 79 CLR 201.

171 (1953) 87 CLR 144 at 151-152.

172 (1985) 158 CLR 596 at 614-615.

173 (1949) 79 CLR 201 at 236.

174 (1985) 158 CLR 596 at 614.

evidence in criminal proceedings. The effect of the submissions for the accused is that, in its application to the prosecution of the accused in the County Court, s 15X imposes a constitutionally invalid stricture upon what otherwise, pursuant to s 80 of the Judiciary Act, would be that Court's common law power to exclude evidence. The accused contends that, were the trial of the accused to be conducted in conformity with s 15X, the result would be that the State court would go beyond the exercise of those judicial functions and functions incidental thereto which mark the limits of the judicial power of the Commonwealth. That power is vested by s 71 of the Constitution in this Court, such other federal courts as are created by the Parliament, and in such other courts as the Parliament invests with federal jurisdiction.

141 The constitutional question does not arise by reason of the nature of the subject-matter for the exercise of the judicial power or the consequences of that exercise of power. An example of such a situation which would not involve the exercise of the judicial power would be the declaration of what thereafter ought to be the respective rights and liabilities of parties to a civil dispute[175]. The dispute does not turn upon the alteration or abrogation by statute of antecedent private substantive rights or status which are at stake in, or which provide the foundation for, particular pending civil litigation. Indeed, the validity of such a law has been upheld[176]. Nor, in contrast to the position in *R v Humby; Ex parte Rooney*[177], does the accused complain of the termination by legislation of a civil status following an ineffective attempt to do so in the purported exercise of judicial power. In *Humby*, such a law relating to marriage was upheld.

142 Rather, the accused founds his case upon the traditional right to judicial determination of criminal guilt. What this involves appears from remarks by

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175 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463.

176 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88; cf *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328 (1995), in which the United States Supreme Court held invalid as a legislative encroachment upon the judicial branch, a federal law which instructed Art III courts to entertain on their merits claims previously dismissed by those courts on procedural grounds. The decision has been criticised: "Leading Cases", (1995) 111 *Harvard Law Review* 229.

177 (1973) 129 CLR 231.

Jacobs J in *R v Quinn; Ex parte Consolidated Food Corporation*[178]. His Honour said[179]:

> "The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example."

In short, as Griffith CJ had earlier remarked, "convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to [the judicial] power"[180].

143 Implicit in the submissions for the accused is the notion that the basic right to which Jacobs J referred in *Quinn* would be satisfied by the determination of criminal guilt through the application of the common law rules of evidence. However, caution is required in accepting any proposition which so exalts the common law. Many aspects of criminal procedure which now loosely would be considered as based in "the common law" are the result of extensive changes made in England by statute in the course of the last century. For example, counsel was not allowed to prisoners on charges of felony until as late as *The Trials for Felony Act* 1836 (UK)[181]. The accused only became a competent witness as a result of a

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178 (1977) 138 CLR 1.

179 (1977) 138 CLR 1 at 11. Barwick CJ (at 6), Gibbs J (at 6), Stephen J (at 7) and Mason J (at 7) agreed with the reasons given by Jacobs J.

180 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444. See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175; *R v Davison* (1954) 90 CLR 353 at 382-383; *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 608-609, 685, 706; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258-259, 269.

181 6 & 7 Will IV, c 114, s 1.

series of statutes commencing in 1872 and culminating in the *Criminal Evidence Act* 1898 (UK)[182].

Usurpation of the judicial power

144 The present dispute does not turn upon the nature of the liabilities of the accused under s 233B of the Customs Act which are subjected to determination by the exercise of judicial power, nor upon the consequences of that determination. The accused is liable to the determination of criminal guilt and the consequent infliction of punishment. There is a correlative right of the accused to the determination of that guilt and the infliction of punishment by the exercise of judicial power. What is at the heart of the complaint by the accused is legislative prescription as to the manner of the exercise of the judicial power at his trial.

145 The essential question concerns the limitation imposed by s 15X upon the discretion which the trial court otherwise would enjoy to exclude evidence that the heroin in question was imported into Australia in contravention of the Customs Act. Is this such an interference with the governance of the trial and a distortion of its predominant characteristics as to involve the trial court in the determination of the criminal guilt of the accused otherwise than by the exercise of the judicial power of the Commonwealth?

146 The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature[183]. Thus, a legislative direction requiring a court not to release a person held in unlawful custody is a direction as to the manner (and outcome) of the exercise of its jurisdiction and is an impermissible intrusion into the exercise of the judicial power[184]. Nor would a legislative direction be valid if it required a court in exercise of the judicial power of the Commonwealth to order imprisonment, not on the basis that the persons in question had breached any criminal law, but upon an opinion formed by reference to material, not necessarily admissible in legal proceedings, that, on the balance of probabilities, they might breach such a law[185].

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182 *Maxwell v The Director of Public Prosecutions* [1935] AC 309 at 316-317; Sir Harry Poland QC, "Changes in Criminal Law and Procedure since 1800" in *A Century of Law Reform*, (1901) 43 at 54.

183 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27, 53.

184 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37, 53.

185 See *Kable v DPP (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

147 The "pith and substance"[186] of the legislation which gave rise to *Liyanage v The Queen*[187] was an attempt by the legislature of Ceylon "to circumscribe the judicial process on the trial of particular prisoners charged with particular offences on a particular occasion and to affect the way in which judicial discretion as to sentence was to be exercised so as to enhance the punishment of those prisoners"[188]. That legislation was held to be invalid. There was "a marked interference with the judicial process and [the legislation] circumscribed the judicial function and the discretions incidental to it"[189]. The changes made by the legislation included the denial to the particular accused persons of the benefit of laws that no confession made to a police officer was admissible against them and that a confession by one of several co-accused was inadmissible against the others[190].

148 *Liyanage* illustrates two propositions of relevance in the present case. The first is that the concern of the Court in construing Ch III of the Constitution is with substance, not merely form. The second is a corollary of the first and was expressed by Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[191]. His Honour said that the concept of judicial power (and, one should add, that of impermissible intrusions upon the manner and outcome of its exercise) transcends "purely abstract conceptual analysis" and "inevitably attracts consideration of predominant characteristics", together with "comparison with the historic functions and processes of courts of law". Later, in *R v Humby; Ex parte Rooney*[192], Mason J said of the notion of "[u]surpation of the judicial power" by infringement of Ch III that it was a concept "which is not susceptible of precise and comprehensive definition".

"Retrospective" legislation

149 The accused sought to impugn s 15X on the basis that it was applicable to past events in respect of a number of identifiable cases. However, *Polyukhovich v*

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186 *Liyanage v The Queen* [1967] 1 AC 259 at 290.

187 [1967] 1 AC 259.

188 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96.

189 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250.

190 *Liyanage v The Queen* [1967] 1 AC 259 at 280.

191 (1970) 123 CLR 361 at 394.

192 (1973) 129 CLR 231 at 249-250.

The Commonwealth (*War Crimes Act Case*)[193] decides that even a law, on its face imposing criminal liability in respect of past conduct which, at the time of its commission, did not contravene a law of the Commonwealth, does not, for that reason alone, usurp the exercise of the judicial power of the Commonwealth. The law will be valid if it leaves for determination by a court the issues which would arise at a trial under the law in question[194].

150 Section 15X is not a law which imposes criminal liability. Section 233B does so and has been in the same form at all material times. Section 15X is not a "retrospective" law. While the accused is alleged to have possessed or attempted to possess heroin on 24 September 1994, the 1996 Act commenced on 8 July 1996 and the accused was to be tried thereafter. In *Rodway v The Queen*[195], Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ said:

> "Indeed, strictly speaking, where procedure alone is involved, a statute will invariably operate prospectively and there is no room for the application of such a presumption. It will operate prospectively because it will prescribe the manner in which something may or must be done in the future, even if what is to be done relates to, or is based upon, past events. A statute which prescribes the manner in which the trial of a past offence is to be conducted is one instance."

As Isaacs J put it, a law which, on its true construction, is merely evidentiary and operates only to regulate future curial procedure is not retrospective[196].

151 Section 15X limits what otherwise would be the discretion of the court to exclude evidence as to the importation of the heroin in question by certain law enforcement officers. It does not alter with retrospective effect the substantive law by, for example, changing the elements of the offences under s 233B of the Customs Act with effect at the date of the commission of the alleged offences by the accused on 24 September 1994.

Procedural laws

152 In addition, there is a lengthy history of laws of the Commonwealth, particularly with respect to restrictive trade practices, immigration and customs

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193 (1991) 172 CLR 501.

194 *War Crimes Act Case* (1991) 172 CLR 501 at 533-540, 643-651, 689-690, 717-722.

195 (1990) 169 CLR 515 at 518.

196 *Williamson v Ah On* (1926) 39 CLR 95 at 106-107.

(including s 233B(1)(c) itself), which create civil liabilities or criminal offences and reverse the traditional onus of proof[197].

153 Section 15A of the *Australian Industries Preservation Act* 1906 (Cth) provided that in certain prosecutions for offences under that statute the averments of the prosecutor were to be deemed to be proved in the absence of proof to the contrary, but so that an averment of intent was not to be deemed sufficient to prove intent, and in respect of an indictable offence the guilt of the defendant was to be established by evidence. The validity of the section was considered by Isaacs J in *The King and the Attorney-General of the Commonwealth v Associated Northern Collieries*[198] but not upon appeal[199]. Isaacs J said of s 15A[200]:

> "It is a stringent provision casting the initial burden of proof upon the defendants in certain cases, but as I read the section that is all. It still leaves it to the judicial tribunal to determine on recognised principles the issue of guilt or innocence upon any evidence that may be adduced. Indeed I am acting in the present instance upon the basis of that interpretation, by disregarding the provisions of the section altogether.
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> Similar enactments have been held valid in America as for instance by *Marshall* CJ, in the case of *'The Thomas and Henry' v US*[201], and by *Gray* CJ, in *Holmes v Hunt*[202], where a number of authorities are collected. See also

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197 *The King and the Attorney-General of the Commonwealth v Associated Northern Collieries* (1911) 14 CLR 387, reversed on other grounds by the Full Court: *Adelaide Steamship Co Ltd v The King and the Attorney-General of the Commonwealth* (1912) 15 CLR 65, which decision was upheld by the Privy Council: *Attorney-General of the Commonwealth v Adelaide Steamship Co Ltd* (1913) 18 CLR 30, [1913] AC 781; *The Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1; *Williamson v Ah On* (1926) 39 CLR 95; *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254; *Milicevic v Campbell* (1975) 132 CLR 307; see also *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 545-546, 587-588; *Leask v The Commonwealth* (1996) 70 ALJR 995 at 1018-1019; 140 ALR 1 at 33-34.

198 (1911) 14 CLR 387 at 404.

199 (1912) 15 CLR 65 at 102 (Full Court); (1913) 18 CLR 30, [1913] AC 781 (PC).

200 (1911) 14 CLR 387 at 404. See also *Jones v Sterling* (1982) 63 FLR 216 at 221-222.

201 23 Fed Cas 988 at 990 (1818).

202 122 Mass 505 at 519 (1877).

> *Li Sing v United States*[203], citing with approval *Holmes v Hunt*[204] and applying the rule of competency to a very strongly worded section; and again *Ah How v US*[205], see also *Craies on Statutory Law*[206] and *Cooley's Constitutional Limitations*[207]."

154 In *The Commonwealth v Melbourne Harbour Trust Commissioners*[208], the Court upheld the validity of s 48 of the Customs Act. Knox CJ, Gavan Duffy and Starke JJ said[209]:

> "An argument was also made that sec 48 of the Act is not a law relating to Customs, and is also a usurpation of the judicial power of the Commonwealth. Neither of these contentions can be sustained. The section makes provision for the enforcement of a Customs security, and in effect casts upon the party who purports to have given the security the burden of proving either that he has not executed it or that he has complied with its conditions or that the security has been released or satisfied. A law does not usurp judicial power because it regulates the method or burden of proving facts. And the mere statement of the purpose and operation of sec 48 establishes it as a law relating to Customs."

Isaacs J[210] said there was no substance in the objection that s 48 was invalid because it was an attempt by the legislature to exercise judicial power; the provision was "a mere evidentiary section and of a class well known in Customs Acts".

155 In *Williamson v Ah On*[211], Higgins J described as "destitute of foundation" the argument that it was "a usurpation of the *judicial* power of the Commonwealth if Parliament prescribe what evidence may or may not be used in legal proceedings

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203 180 US 486 (1901).

204 122 Mass 505 (1877).

205 193 US 65 (1904).

206 *A Treatise on Statute Law*, 2nd ed (1911) at 471.

207 *A Treatise on the Constitutional Limitations*, 6th ed (1890) at 452.

208 (1922) 31 CLR 1.

209 (1922) 31 CLR 1 at 12.

210 (1922) 31 CLR 1 at 17.

211 (1926) 39 CLR 95 at 122.

as to offences created or provisions made by Parliament under its legitimate powers". Higgins J went on[212] to say that he doubted the validity, in a case where there was no actual evidence on the subject of a person's immigration, of an enactment that the mere averment of the prosecutor was to be proof that the person "is an immigrant". But this was on the footing that the fact to be proved was a constitutional fact "touching the power of Parliament itself to legislate"[213].

156 No such question arises with respect to s 15X of the Crimes Act. Nor does s 15X deem to exist, or to have been proved to the satisfaction of the tribunal of fact, any ultimate fact, being an element of the offences with which the accused is charged. A law of that nature, albeit procedural in form, might well usurp the constitutionally mandated exercise of the judicial power for the determination of criminal guilt[214]. Section 15X is quite different in form and operation.

The United States authorities

157 As I have indicated above, "by simply labeling a law 'procedural', [the] legislature does not thereby immunize it from scrutiny"[215] under Ch III. However, the limitations that are involved in such an analysis may be seen by reference to the course of decisions in the United States. The earlier decisions were referred to by Isaacs J in the passage, set out earlier in these reasons, in *The King and the Attorney-General of the Commonwealth v Associated Northern Collieries*[216]. More recently, issues of the nature of those in the present case largely have been determined not by reference to Art III but to express guarantees. The United States Constitution contains two provisions (Art I, §9, cl 3 and Art I, §10, cl 1), the first

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212 (1926) 39 CLR 95 at 122-123. See also *Milicevic v Campbell* (1975) 132 CLR 307 at 315-316, 318-319, 321.

213 *Williamson v Ah On* (1926) 39 CLR 95 at 123.

214 cf *Ulster County Court v Allen* 442 US 140 at 156 (1979). There, speaking of the Due Process Clause, the Supreme Court said:

"[I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt".

215 *Collins v Youngblood* 497 US 37 at 46 (1990).

216 (1911) 14 CLR 387 at 404.

directed to Congress and the other to the States, each of which, as interpreted by the Supreme Court, "flatly prohibits retroactive application of penal legislation"[217].

158 A law which is "procedural" may, as a matter of substance, offend these *Ex Post Facto* clauses. This will be so if the law, whatever its form, "make[s] innocent acts criminal, alter[s] the nature of the offense, or increase[s] the punishment"[218]. Nevertheless, a change to the procedural law which alters the situation to the disadvantage of the accused will not, on that account alone, offend the *Ex Post Facto* clauses[219]. The result is that only in limited circumstances will procedural changes offend the express guarantees in the United States Constitution.

The balance between competing interests

159 One element in the offences under s 233B(1)(c) alleged against the accused is that the heroin was imported into Australia in contravention of the Customs Act. The prosecution in this respect would prove importation by law enforcement officers who committed offences in doing so. *Ridgeway* held that there was a discretion in the court to exclude such evidence. In reaching that conclusion, the Court weighed the competing legitimate public interests involved[220]. These were the interest in securing a conviction of wrongdoers and the interest in the courts

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217 *Landgraf v USI Film Products* 128 L Ed 2d 229 at 253 (1994). The same passage in the judgment of the Court goes on to state:

"Article I, §10, cl 1 prohibits States from passing another type of retroactive legislation, laws 'impairing the Obligation of Contracts.' The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.' The prohibitions on 'Bills of Attainder' in Art I, §§9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. See, *eg, United States v Brown* 381 US 437 at 456-462 (1965). The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application. *Usery v Turner Elkhorn Mining Co* 428 US 1 at 17 (1976)."

218 *Collins v Youngblood* 497 US 37 at 46 (1990). See also *Beazell v Ohio* 269 US 167 at 170-171 (1925).

219 *Collins v Youngblood* 497 US 37 at 49-50 (1990).

220 (1995) 184 CLR 19 at 42-43, 49, 64, 73-74.

not being seen to lend approval to unlawful conduct by law enforcement authorities.

160 The legislature has now, in the newly inserted Pt 1AB of the Crimes Act, struck a different balance between these competing interests. Division 2 of Pt 1AB (ss 15H-15U) sets up for the future a new regime under which, in certain circumstances, law enforcement officers are rendered "not liable"[221] for offences committed for the purposes of a "controlled operation". This Court is here concerned with Div 3 (ss 15V-15X), which deals with controlled operations started before 8 July 1996.

161 With respect to the accused, s 15X will require the County Court to disregard facts which otherwise, at common law, would enliven a discretion to exclude evidence tendered to prove that importation of the heroin in question was by law enforcement officers who committed an offence in doing so. In other respects, s 15G(2) preserves the discretion of the court to exclude evidence.

162 The section in its operation, if not necessarily on its face, deals not with proof but with a discretion to exclude evidence of facts. It operates to facilitate the proof by the prosecution of its case by the admission of evidence that otherwise was liable to exclusion. The case for the accused is made that much more difficult than it would have been if s 15X had not been enacted. However, the section does not deem any ultimate fact to exist, or to have been proved. It leaves untouched the elements of the crimes for which the accused is to be tried. Nor does s 15X change the amount or degree of proof essential to convict him from that required when the alleged offences were committed.

A law of limited application?

163 It is not significant that s 15X will have an operation in respect of a numerically limited class of persons presented for trial. Both s 15**I** and s 15X operate in respect of prosecutions for offences against s 233B of the Customs Act and associated offences. Before the commencement of the 1996 Act on 8 July 1996 an ascertainable number of "controlled operations" had been started. However, given the scope of s 233B and the associated offence provisions, the identity of all those who were liable to prosecution under those provisions, and at whose trial the *Ridgeway* discretion otherwise would apply, might not be established for some time after 8 July 1996.

164 Section 15X is part of a legislative scheme designed to strike a balance between competing interests and to give effect with respect to these prosecutions to a perception of the public interest which differs from that expressed in the common law in Australia. That is a matter for the Parliament. The legislation is

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221 The expression used in s 15**I**(1).

not designed to achieve any particular outcome upon the determination by judicial process of the criminal guilt of any particular individuals by reason of their identity or their conduct on particular occasions.

165 Further, this is not a case where the Executive purports to dispense with laws made by the legislature. The Parliament has left untouched s 233B and the laws creating "associated offences". What it has done is to change the application of s 80 of the Judiciary Act by, in a limited respect, providing a legislative, not a common law, prescription as to the exercise of the court's power to reject certain evidence.

166 In various areas of criminal law procedure, the legislature has required the courts to exercise a power in a particular way, upon satisfaction of conditions stipulated by the legislature. *Mitchell v The Queen*[222] provides a recent example with respect to sentencing.

167 The new legislation empowers the Crown to rely upon an act of importation which was illegal and remains so, and requires the court to disregard the illegality. To some, that may offend views as to what should be public policy in such matters. But views of public policy may differ, as the judgments in the divided Court in *Ridgeway* demonstrate. For the legislature to prefer one such view to another is not, of itself, to undermine, in a constitutionally impermissible manner, the integrity of the judicial process in the exercise of the judicial power of the Commonwealth.

Conclusions

168 Section 15X does not operate so to prescribe the manner of exercise of the judicial power upon trials of offences against s 233B of the Customs Act or associated offences as to deny the basic rights referred to by Jacobs J in *Quinn*[223]. The courts are left with the determination of the facts in the light of the law which created the offence, as a matter of form and substance.

169 I agree with the reasons for judgment of Hayne J with respect to the construction of Div 3 of Pt 1AB.

170 I agree also with the orders proposed by his Honour.

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222 (1996) 184 CLR 333 at 345-346.

223 (1977) 138 CLR 1 at 11.

171 KIRBY J. A cause pending in the County Court of Victoria between the Crown and Mr David Nicholas (the applicant) was removed into this Court[224]. The removal was ordered to permit the determination of the constitutional validity of s 15X in Div 3 of Pt 1AB of the *Crimes Act* 1914 (Cth). That Part was inserted in the *Crimes Act* by the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) ("the Act")[225]. The purpose of the amendment was to respond to the decision of this Court in *Ridgeway v The Queen*[226].

172 The applicant contends that s 15X is unconstitutional. Put broadly, the ground of invalidity asserted is that the section amounts to an impermissible invasion by the Parliament of the judicial power of the Commonwealth reserved to the judicature[227]. Alternatively, if the section is constitutionally valid, the applicant argues that, having regard to its terms and in the events which have occurred, its provisions have no application to his case.

Background facts

173 For the purpose of the proceedings, this Court has not been concerned with the detailed circumstances giving rise to the prosecution. The facts necessary to present for decision the constitutional and statutory questions were agreed. The applicant was charged with two offences against the *Customs Act* 1901 (Cth)[228] of having in possession, and attempting to obtain possession of, prohibited imports. It was an ingredient of each alleged offence that the drugs had been imported into Australia "in contravention of [the *Customs Act*]". The Court was informed that the imports in question were of a trafficable quantity of narcotic goods, namely heroin[229]. In addition to the two federal offences stated, the applicant was also presented for trial on two breaches of State law[230].

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224 By order of the Court made on 13 December 1996 by Gaudron, McHugh and Gummow JJ acting pursuant to the *Judiciary Act* 1903 (Cth), s 40(1).

225 s 3 and Sched 1, cl 2.

226 (1995) 184 CLR 19.

227 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

228 s 233B(1)(c).

229 *Customs Act* 1901 (Cth), s 4 (definitions). The quantity of the prohibited imports was not agreed and the applicant contested his guilt of the offences charged.

230 *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), s 73(1) ("has or attempts to have in his possession a drug of dependence" [heroin]).

174 The applicant was arraigned in October 1995 and rearraigned in March 1996. On each occasion he pleaded not guilty to all counts. At the committal hearing it was the uncontested evidence of the prosecution that the prohibited goods were imported into Australia by Australian and Thai law enforcement officers. It may be accepted that those officers were acting under the Ministerial Agreement relating to a "controlled delivery" such as is described in *Ridgeway*[231]. Although in the County Court, some points of distinction between the facts of *Ridgeway* and of this case were argued, before this Court it was not contested that, at the time of the importation of the goods in question, the Australian and Thai law enforcement officers had acted in contravention of s 233B of the *Customs Act*. They were not excused or exempted from the application of that Act by the Ministerial Agreement or anything else.

175 The decision in *Ridgeway* was given in April 1995. When, in May 1996, a pre-trial hearing took place in the County Court before Judge Crossley, the applicant, relying on that decision, sought a permanent stay of the proceedings against him contained in the first two counts of the presentment. The prosecution, foreshadowing the passage of legislation to overcome *Ridgeway*, asked the judge to postpone a ruling on this application until the commencement of the applicant's trial. Judge Crossley was at first disposed to agree to this course. However, on 27 May 1996, in the exercise of his discretion and conforming to *Ridgeway,* his Honour ordered that the trial of the applicant upon the first two counts be permanently stayed. His order left the counts based on State law unaffected.

176 The Act came into effect on 8 July 1996. Promptly, the Director of Public Prosecutions for the Commonwealth applied to Judge Crossley to vacate the stay order in respect of counts 1 and 2. This application caused the applicant to raise his challenge to the constitutional validity of the new legislation[232]. Notices of the constitutional matter were given[233]. They were followed by a hearing and the order removing the cause into this Court. Because the entire cause was removed, the applicant was heard to argue both his constitutional and statutory points.

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231 *Ridgeway v The Queen* (1995) 184 CLR 19 at 26.

232 On the application for removal, the applicant challenged the validity of the entire Act. However, during argument, it was made clear that the applicant confined his challenge to the validity of s 15X.

233 Pursuant to the *Judiciary Act* 1903 (Cth), s 78B.

Controlled delivery and *Ridgeway*

177 The procedure of "controlled delivery" of narcotic goods appears to have arisen both from international[234] and domestic[235] initiatives which recognised that an effective response by law enforcement agencies to the problem of the large scale trade in narcotics required the provision of new powers such as would permit "the infiltration of criminal groups"[236]. The Convention against Illegal Traffic in Narcotic Drugs and Psychotropic Substances, which came into force in relation to Australia on 14 February 1993[237], provides for so-called "controlled delivery" procedures in Art 11(1):

> "If permitted by the basic principles of their respective domestic legal systems, the parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to take legal action against them."

178 The initiative of the Federal Executive, pursuant to the Ministerial Agreement described in *Ridgeway*[238]*,* failed to conform to the opening words of Art 11. The persons involved in the importation in *Ridgeway* (a member of the Royal Malaysian Police Force and a "registered informer", both operating as under-cover agents in cooperation with the Australian Federal Police), acted in clear contravention of the *Customs Act* s 233B(1). Indeed, it was an essential element of the prosecution case against Mr Ridgeway (as of that against the applicant) that the importations in question were made "in contravention of [the *Customs Act*]".

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234 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

235 Queensland, *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Fitzgerald Report) (1989) at 177. See House of Representatives, Main Committee, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2513-2514.

236 Second Reading Speech of Attorney-General (Mr Williams), House of Representatives, Main Committee, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2514.

237 *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act* 1990 (Cth), Sched 1.

238 *Ridgeway v The Queen* (1995) 184 CLR 19 at 26.

179 Because the Executive had no authority to exempt or excuse either the local or foreign police agents from complying with the *Customs Act*, it was demonstrated in *Ridgeway*, and initially before Judge Crossley in this case that, for the prosecution to succeed in the counts based on the *Customs Act*, it would be essential for the Crown to rely on the conduct of the law enforcement officers which was unlawful, indeed seriously criminal.

180 In *Ridgeway*, a majority of this Court[239] held that these facts gave rise to an entitlement in Mr Ridgeway to have his conviction quashed. Most of the members of the Court explained the order on the footing that the illegality of the law enforcement officers' conduct enlivened a judicial discretion (or power) to exclude evidence on the ground of public policy as explained in *R v Ireland*[240] and accepted as the settled law of this country following *Bunning v Cross*[241]. The purity of the motives of the law enforcement officers, their close compliance with the procedures laid down in the Ministerial Agreement, the need to infiltrate criminal groups to catch large-scale offenders and the status of the officials as law enforcement officers did not excuse what had happened. Such considerations did not require an exculpatory exercise of the judicial discretion. Nor did they deny the accused relief. On the contrary, the fact that an element of the contravention of the law was performed by law enforcement officers added to the gravity of the unlawful conduct and demanded the provision of relief by this Court[242]. Although the members of the majority in *Ridgeway* differed as to the conceptual foundation for the provision of relief[243] and as to the precise form of the relief which was appropriate[244], the majority considered that the relief required was the quashing of Mr Ridgeway's conviction and the provision of a permanent stay of further

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239 Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ; McHugh J dissenting.

240 (1970) 126 CLR 321.

241 (1978) 141 CLR 54. See also *Cleland v The Queen* (1982) 151 CLR 1; *Pollard v The Queen* (1992) 176 CLR 177; *Foster v The Queen* (1993) 67 ALJR 550; 113 ALR 1.

242 *Ridgeway v The Queen* (1995) 184 CLR 19 at 51.

243 Justice Gaudron was of the view that, by illegally importing the heroin, the Australian Federal Police had incited and participated in the commission of the offence with which Mr Ridgeway was charged and hence that the proceedings were an abuse of process. See (1995) 184 CLR 19 at 74-78.

244 Justice Brennan was of the view that a verdict and judgment of acquittal should be entered ((1995) 184 CLR 19 at 54). Justice Toohey considered that a verdict of not guilty should be entered ((1995) 184 CLR 19 at 65).

proceedings in relation to the alleged offences against s 233B(1) of the *Customs Act*[245]. Such was the order which this Court made.

181 A number of the Justices in *Ridgeway* acknowledged the unsatisfactory result to which they were driven because of the absence of a legal foundation for the "controlled delivery" procedure disclosed by the case. Mason CJ, Deane and Dawson JJ observed[246]:

> "If it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements. In the absence of such a legislative regime, the courts have no choice but to set their face firmly against grave criminality on the part of anyone, regardless of whether he or she be government officer or ordinary citizen. To do otherwise would be to undermine the rule of law itself."

182 The remarks of Brennan J[247] were to similar effect. His Honour pointed out that it would be expected that the Parliament might consider that "controls should be legislatively prescribed"[248]. He foreshadowed a number of considerations which were later to find their way into the Act in respect of future operations. No member of the Court referred specifically to the possibility of retrospective sanctioning of the controlled deliveries which had, to that time, been performed without the authority of statute. By inference, those members of the Court[249] who favoured the substitution of a verdict of acquittal or of not guilty of the charges under the *Customs Act* did not contemplate such a possibility, at least in Mr Ridgeway's case.

183 A Bill was promptly introduced into the Parliament to regulate "controlled deliveries". As introduced, it dealt not only with future operations. It also purported to deal with those of the past which were relevantly indistinguishable from that which in *Ridgeway* had given rise to the order permanently staying the proceedings in that case.

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245 This was the view of Mason CJ, Deane and Dawson JJ ((1995) 184 CLR 19 at 44) and of Gaudron J ((1995) 184 CLR 19 at 78).

246 *Ridgeway v The Queen* (1995) 184 CLR 19 at 44.

247 *Ridgeway v The Queen* (1995) 184 CLR 19 at 53-54.

248 *Ridgeway v The Queen* (1995) 184 CLR 19 at 54.

249 Brennan J and Toohey J.

Legislative amendments

184 The Act incorporates into the *Crimes Act* a new Pt 1AB ("Controlled operations for obtaining evidence about certain offences relating to narcotic goods"). The amendments appear in three Divisions. Division 1 ("Objects of Part") contains one section, s 15G, expressing the objects of Pt 1AB. Division 2 ("General") deals prospectively with authorisation procedures for law enforcement officers engaged in an authorised controlled operation. Division 3 ("Controlled operations started before commencement of this Part") has retrospective consequences for a controlled operation "started before the commencement of this Part"[250]. The Part commenced on the day on which the Act received the Royal Assent. Thus Div 3 by its terms applies to the importation relevant to the first two counts on which the applicant is charged. It is important to examine the entire Act in order to contrast the way in which the Parliament dealt with controlled operations occurring after the Act commenced and those which it describes as "started" before the Act was in force.

185 The stated purpose of the Act, as its long title shows, is "to exempt from criminal liability certain law enforcement officers who engage in unlawful conduct to obtain evidence of offences relating to narcotic goods, and for related purposes". The objects of Pt 1AB are stated in s 15G(1). Sub-sections 15G(1)(a) and (c) are set out in the reasons of Brennan CJ. The other stated object, in s 15G(1)(b), is to require the Commissioner of the Australian Federal Police and the Chairperson of the National Crime Authority to "report to the Minister on requests to authorise controlled operations" and the Minister to report thereon to Parliament[251].

186 The second sub-section of s 15G provides expressly for the preservation of the power of courts relevant to the issues argued in this case:

> "(2) Subject to section 15X, this Part is not intended to limit a discretion that a court has:
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> (a) to exclude evidence in criminal proceedings; or
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> (b) to stay criminal proceedings in the interests of justice."

As will be seen, s 15X, which the applicant attacks, is the principal operative provision of Div 3.

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250 s 15V(1).

251 s 15G(1)(b).

187 Division 2 contains a definition of a "controlled operation". Both by its place in Div 2, and by its reference to s 15I, it appears that the definition is intended to have a prospective operation[252].

188 The key provision for the exemption of law enforcement officers from liability for offences, provided they conform to the authorisation procedures for controlled operations, is s 15I. The terms of that section are set out in the reasons of Hayne J. The remainder of Div 2 consists of provisions that establish the preconditions for authorisation of a controlled operation[253]; provisions for the notification of the issue of certificates[254]; evidentiary provisions[255]; and provisions dealing with reports to[256] and by[257] the Minister on the use made of such certificates.

189 I now reach Div 3. In the interpretation provision there is no separate definition of "controlled operation". The definition provided in s 15H does not, on its face, apply because of its incorporation of reference to s 15I which provides for prospective authorisation of controlled operations after the Act. However, the definition section repeats the statement in the objects, to the effect that in the Division, a reference to a "controlled operation" is a reference "to a controlled

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252 Section 15H defines a "controlled operation" as an operation that:

"(a) involves the participation of law enforcement officers; and

(b) is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for an offence against section 233B of the *Customs Act 1901* or an associated offence; and

(c) may involve a law enforcement officer engaging in conduct that would, apart from subsection 15I(1) or (3), constitute a narcotic goods offence."

253 Application for certificate (s 15J); the form and content of applications (s 15K); urgent applications (s 15L); the grounds on which a certificate may be granted (s 15M); the form and content of certificates (s 15N); surrender of certificates (s 15O); and the period for which certificates are in force (s 15P).

254 The Chief Executive Officer of Customs (s 15Q) and the Minister administering the Act (s 15R).

255 s 15U.

256 s 15S.

257 s 15T.

operation started before the commencement of this Part"[258]. The word "started" is Orwellian. So far as the legal consequences for the applicant are concerned, the relevant activities of the "controlled operation" in question in this case were the acts of importation into Australia of prohibited imports in contravention of the *Customs Act.* They were not only "started" before the commencement of the Part. They were completed before it came into effect. It must be assumed that controlled deliveries pursuant to the Ministerial Agreement ceased after *Ridgeway* so that all past such cases were not only "started" but completed by the time the Act became law.

190 A definition is given[259] of the Ministerial Agreement, being that made on 3 June 1987 referred to in *Ridgeway*. Provision is then made for the Minister to give a certificate about a controlled operation that involved unlawful importation of narcotic goods by a law enforcement officer[260]. There then follows the crucial provision which the applicant challenges in these proceedings. It appears as s 15X ("Evidence of illegal importation etc. of narcotic goods not to be rejected on ground of unlawful conduct by law enforcement officer"). As the section is reproduced in the reasons of several members of the Court, it would be tedious to repeat it.

Parliamentary consideration of the legislation

191 The Court was taken to the Parliamentary debates and background materials on the Bill which ultimately became the Act. The applicant cautioned that such materials should not be used to put a gloss on the meaning of the legislation as appearing in its language[261]. This is true enough. However, to understand the purpose of the Parliament in this case, it is legitimate to have regard to the background information[262].

192 The first attempt to overcome the consequences of the decision in *Ridgeway* was by the Crimes Amendment (Controlled Operations) Bill 1995 (Cth). When this was introduced into the Parliament in August 1995 by the then Minister for Justice (Mr D Kerr), he made it clear that the government was attempting to respond to the decision in *Ridgeway.* He described the crucial holding in that case as being that a public policy ground "triggers the discretion to exclude evidence ...

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258 s 15V(1).

259 s 15V(2).

260 s 15W.

261 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518, 532, 547.

262 *Acts Interpretation Act* 1901 (Cth), s 15AB; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 71 ALJR 312 at 324; 141 ALR 618 at 634-635.

where illegal police conduct is an essential ingredient of the charged offence"[263]. He stated[264]:

> "The enactment of the bill now before the House will ensure that the actions of law enforcement officials engaged in a controlled operation will not incur criminal responsibility and, as a result, the trigger for the exclusion of evidence will not arise."

193 In this statement, the Minister recognised, correctly in my view, the need to remove from the conduct of the law enforcement officials, involved in the importation, the character of "criminal responsibility" which this Court regarded as "triggering" the judicial discretion on public policy grounds to exclude the evidence thereby procured. It will be important to contrast the Minister's statement and the Act's stated objects with the legislation as ultimately enacted and to see the different ways in which the Parliament dealt with future and with past controlled operations.

194 The Minister went on to refer to past controlled operations, of which that involving the applicant was clearly one. He said[265]:

> "It is important to describe the effect of the bill upon prosecutions that are current at the time the bill commences operation. There are a number of investigations which are affected by the decision in Ridgeway. They all involve very significant participation in trafficing in narcotics; for example:
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> * conspiracy to import 7 kg of cocaine (one individual);
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> * being knowingly concerned in the importation of 3.8 kg of cocaine (two individuals);
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> * conspiracy to import 7 kg of cocaine (one individual); and * being knowingly concerned in the importation of, and possession of, 2 kg of heroin (two individuals).
>
> Controlled operations were employed in each of these matters. These operations were strictly regulated and rigorously controlled covert

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263 Second Reading Speech, House of Representatives, *Parliamentary Debates* (Hansard), 22 August 1995 at 6.

264 Second Reading Speech, House of Representatives, *Parliamentary Debates* (Hansard), 22 August 1995 at 6.

265 Second Reading Speech, House of Representatives, *Parliamentary Debates* (Hansard), 22 August 1995 at 6.

> operations. They were not operations involving out of control cowboys riding roughshod over our laws. In each case they were conducted in purported accordance with the terms of a Ministerial Agreement relating to such operations and the detailed requirements of Australian Federal Police guidelines on the conduct of controlled operations."

The Minister recognised that, without the passage of the Bill "those trials will have to be abandoned"[266]. He suggested that the community would not see that as a just outcome.

195 The Bill lapsed with the prorogation and dissolution of the Parliament in 1995. A new measure, the Crimes Amendment (Controlled Operations) Bill 1996 (Cth) was introduced into the new Parliament. It took into account a supervening report of the Senate Legal and Constitutional Legislation Committee[267]. An examination of the Committee report makes it plain that the Senators concerned were aware of the technical difficulty of preserving the illegality of the importation (so as to apply the terms of s 233B of the *Customs Act* to the applicant) whilst at the same time exempting the law enforcement officers involved of criminal liability (and thus of the stain of involvement in criminality which had attracted the judicial discretion on public policy grounds in *Ridgeway*[268]). The Committee report recorded objections to the retrospective application of the Bill and questions raised as to its constitutional validity[269]. However, the Committee expressed its satisfaction with assurances that "the transitional provision only regulates the prospective evidentiary effect of certain prior conduct"[270]. No substantive change was made to the provisions of Div 3.

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266 Second Reading Speech, House of Representatives, *Parliamentary Debates* (Hansard), 22 August 1995 at 7.

267 Senate Legal and Constitutional Legislation Committee, *Crimes Amendment (Controlled Operations) Bill 1995* (1995) at 13.

268 Senate Legal and Constitutional Legislation Committee, *Crimes Amendment (Controlled Operations) Bill 1995* (1995) at 13.

269 Senate Legal and Constitutional Legislation Committee, *Crimes Amendment (Controlled Operations) Bill 1995* (1995) at 19-21.

270 Senate Legal and Constitutional Legislation Committee, *Crimes Amendment (Controlled Operations) Bill 1995* (1995) at 21. The report contained the statement (at 21) that the Senate Committee had been informed that there were seven cases before the courts involving facts similar to those in *Ridgeway,* with five of those defendants in custody. There were apparently four cases where appeals had been lodged seeking to challenge convictions for offences under s 233B(1) of the *Customs Act* on the basis of the decision in *Ridgeway.* Three of the four appellants were

(Footnote continues on next page)

196 When the new Bill was read a second time in the House of Representatives in June 1996, the Attorney-General (Mr D Williams QC) referred to the several public policies which the legislation addressed[271]: effective law enforcement, protection of fundamental rights and the particular needs to combat clandestine criminal activity and organised crime but in the context of "strengthened" "accountability mechanisms"[272]. He said[273]:

> "It should be noted that the bill, whilst protecting the law enforcement officers from criminal responsibility, will still preserve the essential criminality or unlawfulness of the importation - or exportation - of the prohibited narcotics. This will ensure that the importation or exportation itself is not made lawful, thereby exonerating the targets of the operation who planned the conspiracy."

He went on to describe a number of investigations affected by the decision in *Ridgeway*. Those mentioned by him were the same as those previously mentioned by Mr Kerr, except that one reference to an individual said to have been involved in "conspiracy to import 7 kg of cocaine" was deleted[274]. Only five individuals were identified as affected by Div 3. The Bill was duly enacted.

Uncontested matters

197 There was much common ground between the parties both as to the issues for decision and as to the principles applicable. In order to see the remaining differences in sharper focus, it is helpful to indicate the extent of the common ground:

1. It was accepted for the Crown that the successful prosecution of the applicant on the first two counts of the presentment depended entirely on the validity

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reported to be in custody. This information was based upon a submission given to the Committee by Mr J McCarthy of the Commonwealth DPP's office.

271 House of Representatives, Main Committee, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2512.

272 House of Representatives, Main Committee, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2510.

273 House of Representatives, Main Committee, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2514.

274 From the confusing format in the Hansard of the investigations listed by Mr Kerr (see House of Representatives, *Parliamentary Debates* (Hansard), 22 August 1995 at 6, quoted at pp 17-18), it is possible that this was a mistake in the speech given by Mr Kerr.

of s 15X of the Act. If the section were invalid, there would be no basis for the application to Judge Crossley to vacate the stay. The applicant disclaimed any attack on Div 2 of the Act. It had no application to his case, being wholly prospective in operation. On the contrary, the applicant relied on the differentiation of the treatment of illegality on the part of law enforcement officers in Div 2 and Div 3 as an important step in his argument. It was conceded for the Crown that a different mode of drafting had been adopted in the two Divisions. Neither Division removed the illegality of the act of importation. However, in the case of Div 2, so long as the controlled operation was authorised in accordance with the Act, the Parliament declared that the law enforcement officers so engaged were "not liable for that offence"[275]. No attempt was made in Div 3 (assuming it to be possible) retrospectively to provide in a similar way for the removal of criminal liability in the law enforcement officers who had engaged in offences in the past. Instead, the legislative technique adopted by s 15X was to address the admission of evidence relevant to the public policy discretion explained in *Bunning v Cross*.

2. It was accepted for the applicant that members of this Court in *Ridgeway* had contemplated legislative repair of the defect in the law which that case had demonstrated[276]. Clearly enough the Parliament was endeavouring to respond to the Court's suggestions. The motivation of the Parliament or the fact that it might have gone about the legislation in Div 3 in a different way is irrelevant. The only duty of the Court is to measure Div 3, and specifically s 15X, against the requirements of the Constitution.

3. The applicant did not contest the jurisdiction of the County Court to lift the stay ordered in his favour. That stay, like the one ordered in *Ridgeway* itself, is described as a "permanent stay of ... proceedings"[277] but it was accepted that the Crown was entitled, in the changed circumstances brought about by the enactment of the Act, to apply for the lifting of the stay so long as the applicable provision of the Act was constitutionally valid. There is a dearth of authority on the power to vacate an order permanently staying criminal proceedings. In one of the preliminary rulings made in the Supreme Court of South Australia in the prosecution of Mr Polyukhovich, Cox J held that the power to lift a permanent stay existed[278]. It being conceded that no res

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275 s 15I.

276 *Ridgeway v The Queen* (1995) 184 CLR 19 at 43-44 per Mason CJ, Deane and Dawson JJ, at 53-54 per Brennan J.

277 *Ridgeway v The Queen* (1995) 184 CLR 19 at 94.

278 *Director of Public Prosecutions v Polyukhovich (No 2)* unreported, Supreme Court of South Australia, 4 March 1993 per Cox J at 2.

judicata (or issue estoppel) was effected by the stay order the power of the Court to lift the order in the changed circumstances would seem clear enough[279]. In light of the applicant's concession, I am content to proceed on that basis. It would be otherwise if the procedural course favoured by Brennan J and Toohey J in *Ridgeway* had been followed in the applicant's case, namely the entry of an order of acquittal or a verdict of not guilty[280]. The Crown did not argue that the stay granted to the applicant was other than a valuable legal right secured by him by the application of the applicable law. It is a serious step to remove a permanent stay. This Court is not concerned with any discretionary considerations but only with the constitutional and construction points argued.

4. It was conceded that one indication of an invasion by the Parliament of the judicial power reserved to courts was the enactment of *ad hominem* legislation having application only to an identified person or persons[281] or to a limited number of persons readily identifiable[282]. Although the character of the Act here in question was in dispute, it was not contested that Div 3 was applicable to an extremely small number of cases. Only five were identified by the Attorney-General explaining the Bill to the House of Representatives. By inference, it is likely that only five cases are involved. That inference arises from the following facts: The controlled operations performed under the Ministerial Agreement were carefully monitored by Australian authorities. The passage of time since *Ridgeway* would suggest that if any more cases had been relevant, they would have been disclosed to the Parliament when the new Bill was introduced. A controlled operation is a major activity of law enforcement: reported to the Minister, formerly under the Ministerial Agreement and now under the Act. Had there been more cases to justify the retrospective operation of Div 3, it is inconceivable that they would not have been specified by the Attorney-General in support of the Bill. Accordingly, although the exact number is not proved, it seems extremely unlikely that there would be more than the five or six disclosed to the Parliament by the successive Ministers.

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279 cf *CSIRO v Perry (No 2)* (1988) 53 SASR 538 at 557 per King CJ applying *United States v Swift & Co* 286 US 106 at 114 (1932) per Cardozo J for the Court; *System Federation v Wright* 364 US 642 (1961); *Quin v Mercury Bay Timber Co* (1885) 3 NZLR (SC) 352.

280 *Ridgeway v The Queen* (1995) 184 CLR 19 at 54, 65.

281 Such as the *Community Protection Act* 1994 (NSW) dealt with in *Kable v DPP (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

282 Such as the *Criminal Law (Special Provisions) Act*, No 1 of 1962 (Ceylon), considered in *Liyanage v The Queen* [1967] 1 AC 259.

5. During argument, a question arose as to the meaning of s 15X. The question was whether, notwithstanding its terms, some part of the judicial discretion in *Bunning v Cross* was preserved to the court being made aware of the past involvement of law enforcement officers in contravention of the *Customs Act* s 233B. In terms, s 15X does no more than to require the court to disregard the fact that the law enforcement officers "*committed an offence* in importing the narcotic goods [etc]" (emphasis added). Did this mean that everything save the fact of the offence remained for consideration? Neither the Crown, nor the Attorney-General for the Commonwealth intervening, embraced this narrow construction of s 15X of the Act. The applicant was also doubtful about it. Rightly so, in my view. Amongst the stated objects of the Part, introduced by the Act, is the intention not to limit the discretion that a court has to exclude evidence in criminal proceedings or to stay such proceedings in the interests of justice[283]. However, that object is stated in the Act to be "[s]ubject to section 15X". By inference, s 15X is intended to limit the *Bunning v Cross* discretion and the power to stay criminal proceedings in the interests of justice on the basis of its exercise. Given the history, language and obvious purposes of the Act, I do not consider that s 15X, if valid, could be interpreted to preserve any residual discretion based upon the *fact* that narcotic goods were illegally imported as distinct from the *offence* thereby committed. Such a construction would also contradict the materials placed before the Court relevant to the purposes of the Parliament in enacting the provision[284].

6. In April 1995, several months before the events giving rise to the charges against the applicant, the *Evidence Act* 1995 (Cth)[285] came into operation. Section 138 of that Act contains a legislative attempt to re-express the substance of the discretion in *Bunning v Cross.* There are some apparent differences[286]. It was common ground that the section would not apply to the trial of the applicant. That trial is being conducted in a State court in Victoria

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283 s 15G(2).

284 House of Representatives, *Crimes Amendment (Controlled Operations) Bill 1996, Explanatory Memorandum* (1996, taking account of Senate amendments) at 2, at 6 (with reference to s 15X), at 18 (with reference to proposed section 15X).

285 The *Evidence Act* 1995 (NSW), in substantially identical terms, came into force in September 1995.

286 The onus of proof is changed (s 138(1)); it applies to derivative evidence (s 138(1)(b)); it includes confessional evidence (s 138(2)); it enumerates certain matters which must be taken into account in the exercise of the discretion (s 138(3)) and it applies both to civil and criminal proceedings (s 138(1)).

within a jurisdiction vested in it under the Constitution[287] and pursuant to the *Judiciary Act* 1903 (Cth)[288]. Accordingly, Victorian law as to evidence and procedure will be applied[289]. However, both parties sought to gain assistance from the passage of this provision of the *Evidence Act.* For the Crown, supported by the Commonwealth, s 138 indicated what has long been established, namely that Parliaments may enact laws of evidence of general application to govern the trial of matters in the courts, including with retroactive operation, without being regarded as impermissibly invading the courts' domain or the judicial power. On the other hand, the applicant pointed to the care that had been taken in the *Evidence Act*[290] to exclude the operation of that Act even in a trial for a federal offence for which it might otherwise have been applied. Moreover, the *Evidence Act* had expressly preserved the powers of a court with respect to "abuse of process"[291]. By including a provision akin to *Bunning v Cross*, it was argued, the Parliament had acknowledged that any general provision in a law of evidence which purported completely to abolish or restrictively to control the power of courts to exclude evidence obtained unlawfully, would run into a constitutional problem.

7. In all other respects, it was accepted for the applicant that the conditions for the application of s 15X of the Act were fulfilled. For the Crown it was accepted that the exercise of the discretion described in *Bunning v Cross* was an exercise of the judicial power by courts, for public policy reasons. It was doubted that it would be competent for the Parliament to abolish that discretion entirely so far, at least, as the judicial power of the Commonwealth was concerned. But it was argued for the Crown, supported by the Commonwealth, that, as in the *Evidence Act,* it was competent for the Federal Parliament, in a law of general application, to affect the way in which, and the facts by reference to which, the discretion would be exercised by the courts. This, they submitted, was all that had been done by s 15X.

8. Finally, it was common ground that this Court was not concerned with the two State offences contained in the indictment. As in *Ridgeway*[292], if the federal offences were to remain permanently stayed, it would be a matter for

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287 ss 71, 77.

288 ss 39(2) and 68.

289 *Judiciary Act* 1903 (Cth), ss 79, 80.

290 ss 4, 8 and 9; cf s 5.

291 *Evidence Act* 1995 (Cth), s 11(2).

292 (1995) 184 CLR 19 at 44.

the prosecuting authorities to determine whether the State offences (being unaffected by the constitutional point) should be prosecuted or not.

Arguments of the parties

198 The applicant argued that s 15X impermissibly intruded upon an important judicial discretion and invalidly directed the courts on the way in which that discretion was to be exercised. This was impermissible because it amounted to a pre-judgment of an issue of high public policy properly belonging to the courts alone. It was for the courts, ultimately, to protect the integrity of their processes and to withhold curial approval (or the appearance of approval) to acts of criminal wrongdoing by law enforcement officers[293]. The Parliament had preserved precisely the same defect as had occasioned the strong response of this Court in *Ridgeway*. Although *Ridgeway* was not itself a case concerning the requirements and implications of Ch III of the Constitution, it was an illustration of the way in which the Court would insist that federal judicial power should be administered in the courts of this country so as to avoid bringing the judicature into disrepute and so as to maintain public confidence in the courts[294]. At least where, as here, no attempt had been made (assuming that to be possible) to remove or excuse the unlawfulness of the past conduct of the law enforcement officers, that unlawfulness remained completely unrepaired. They were not even afforded (as authorised controlled operations will in future provide) an exemption from personal liability for their part in the offence. Instead, the court concerned was simply instructed to disregard the offence and this notwithstanding the fact that the basis for the permanent stay provided to Mr Ridgeway, and granted to the applicant, was the very fact that condoning and rewarding unlawful conduct by law enforcement officers was incompatible with the integrity of courts and the maintenance of public confidence in their processes.

199 In support of his arguments, the applicant also stressed the selective and limited operation of Div 3 in respect of identifiable individuals, including himself. The proper characterisation of s 15X was not that of a law of general application but one which was selective, particular and *ad hominem*. It was not that of a general law of evidence to provide guidance to courts for every like case, such as the *Evidence Act* or even the alteration of particular evidentiary requirements for corroboration[295]. It was *ad hoc* and specific legislation of retroactive operation

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293 *Bunning v Cross* (1978) 141 CLR 54 at 74; *Ridgeway v The Queen* (1995) 184 CLR 19 at 31, 49, 77; *R v D'Arrigo* [1994] 1 Qd R 603 at 605.

294 *Bunning v Cross* (1978) 141 CLR 54 at 78; *Pollard v The Queen* (1992) 176 CLR 177 at 202-203; *Ridgeway v The Queen* (1995) 184 CLR 19 at 60-62, 77, 84.

295 *Rodway v The Queen* (1990) 169 CLR 515; cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470; *Chau v DPP* (1995) 37 NSWLR 639 at 647, 654-655.

designed effectively to dictate the outcome of the exercise of a judicial discretion in five or so cases and thereby, in effect, to require courts to do precisely what in *Ridgeway* was held to be alien to the courts' functions.

200 The Crown, supported by the Commonwealth, contested these submissions. It argued that Div 3, although affecting a relatively small number of persons, was in legal terms general in its application. Although it affected the rights of parties in pending litigation (including the right of the applicant to maintain a permanent stay), this did not involve interference with the exercise of the judicial power[296]. It was simply the provision of statutory guidance to the exercise of a general judicial discretion. This was something which had long been regarded as a proper function of legislation. Far from impairing public confidence in the courts, engendering a belief that they are thereby rendered subservient to the Parliament or the Executive, s 15X left unaffected the courts' power and discretion under *Bunning v Cross*. The section merely substituted the Parliament's judgment of the public policy involved. It was intended to repair the "technical" default of the law enforcement officers who had acted in good faith under the Ministerial Agreement before *Ridgeway.* There would be a greater damage to public confidence in the courts, it was suggested, if the persons accused of the serious crimes against the *Customs Act*, such as the applicant, could walk away from having their guilt of the federal offences determined at a trial by jury on the basis that the law enforcement officers, engaged in the importation in their cases, did not have the sanction of statute to breach the provisions of the *Customs Act*.

Non-interference in the exercise of judicial power

201 A number of principles, established by authority, assist in the resolution of the constitutional question:

1. Origins and scope of the judicial power The separation of the judicial power from the other powers of government derives from the language and structure of the Australian Constitution. It is reinforced by the history which preceded and which has followed its adoption. It is strengthened by the necessity of giving effect to the purpose of Ch III to create a judicature for Australia independent of the legislative and executive branches of government[297] and as a "bulwark of freedom"[298]. In terms of the Constitution, the judicial power of the Commonwealth may be exercised only by courts constituted or

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296 cf *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96.

297 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 applying *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

298 *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11.

invested with jurisdiction as the Constitution permits. This basic principle has many consequences. Relevantly to the present matter, one is that the Parliament may not enter into the activities properly belonging to the judicial power in a way inconsistent with its exercise by the courts[299]. The most obvious derogation would be if the Parliament were to purport to constitute itself or some other non-court body, a tribunal to perform functions reserved by the Constitution to the courts. An equal offence against the principle of separation would be an attempt by the Parliament to prejudge an issue which is before a court affecting a particular individual and which required that court to exercise its functions in accordance with such pre-judgment[300]. Particularly in criminal cases, but also in civil, such a usurpation of essential judicial functions is inconsistent with the requirements of the Constitution[301].

2. The judicial power in a federal system The separation and integrity of the judicial power, universally regarded as essential to the independence of the judicial function generally[302], is specially important in a federal system of government. There the judiciary, especially in the courts constituted or invested with jurisdiction under the Constitution, must regularly determine disputed questions concerning constitutional power and large questions affecting the life of the nation as a whole. This is why the separation of the judicial power has been described as "a vital constitutional safeguard"[303]. In *Harris v Caladine*[304], McHugh J pointed out tellingly that:

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299 cf *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328 at 342 (1995).

300 *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328 at 342, 346-347 (1995); cf *Kable v DPP (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

301 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470 applying *Liyanage v The Queen* [1967] 1 AC 259; cf *Hayburn's Case,* 2 US 408 at 411-412 (1792); *United States v O'Grady* 89 US 641 at 647-648 (1874); *C & S Air Lines v Waterman Corp* 333 US 103 at 113 (1948). See also Roberts, "Retrospective Criminal Laws and the Separation of Judicial Power" (1997) 8 *Public Law Review* 170.

302 *International Covenant on Civil and Political Rights,* Art 14.1 ("... In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...")

303 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 541; [1957] AC 288 at 315 applied in *Wilson v The Minister* (1996) 70 ALJR 743 at 748; 138 ALR 220 at 227.

304 (1991) 172 CLR 84 at 159. See also at 139.

> "Those who framed the Constitution were aware of the need to insulate the federal judiciary from the pressures of the Executive Government of the Commonwealth and the Parliament of the Commonwealth so that litigants in federal courts could have their cases decided by judges who were free from potential domination by the legislative and executive branches of government."

It is the duty of this Court to maintain this postulate of the Constitution intact. One danger to it lies in the pretended conferral of judicial functions on tribunals and other bodies lacking the independence and constitutional protections of the courts[305]. Another lies in attempts by the legislature, pursuing policies recommending themselves to it, to enact what the Supreme Court of the United States has described as laws which have the effect of "nullifying prior, authoritative judicial action"[306]. I do not agree with the view of that Court that this factor is decisive, no matter how general the law in question[307]. Whether a law has the effect of nullifying prior authoritative judicial action is but one factor, albeit an important one, to be taken into account when determining invalidity.

3. General indicia of invalidity Where a complaint of interference with the judicial power is made, a judgment is invoked upon which, quite often, minds will reasonably differ. The judicial power under the Australian Constitution has long been accepted to be "an elusive concept"[308]. No definition of it has ever been framed which is "at once exclusive and exhaustive"[309]. Those definitions which have been attempted have generally resorted to explanations in terms of the powers which are necessary to deciding controversies affecting life, liberty and property[310]. However, such

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305 *Wilson v The Minister* (1996) 70 ALJR 743; 138 ALR 220.

306 *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328 at 355 (1995) per Scalia J, joined by Rehnquist CJ, O'Connor, Kennedy, Souter and Thomas JJ, Breyer J concurring.

307 *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328 at 354-355 (1995). But see at 356-358 per Breyer J.

308 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 532; cf *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 249-250 per Mason J.

309 *R v Davison* (1954) 90 CLR 353 at 366 per Dixon CJ and McTiernan J.

310 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ. See also *R v Davison* (1954) 90 CLR 353 at 380-381; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 390-393 per Windeyer J. The latter lays emphasis upon Montesquieu's proposition that the performance of the judicial power by people different from those constituting

(Footnote continues on next page)

generalities give scant guidance when, as here, a particular statutory provision is challenged and is said to be an impermissible legislative intrusion upon, or derogation from, the judicial power. In such cases, regard has typically been had to *indicia* of invalidity which are themselves expressed in very broad terms. Between a Bill of Attainder (which amounts to a parliamentary finding of guilt and is thus offensive to the separation of powers[311]) and a law of general application (which in some particular respects permissibly affects pending cases) lie a myriad of instances which fall on one side of the line of constitutional validity or the other. Recent decisions of this Court illustrate the extent to which the Court will go to uphold and safeguard the independence and integrity of the federal[312] and State[313] courts so that they may continue to perform their judicial functions as the Constitution encourages and thereby to maintain public confidence for their impartiality. Such performance and such confidence would be lost if courts were seen to be no more than subservient agents bending to the will either of the Executive or the Parliament[314]. Maintaining public confidence in the independence of the courts is a common theme running through the majority opinions in *Wilson v The Minister*[315]*, Kable v DPP (NSW)*[316] and many other cases, recent and long in the past. Involved is no self-interested presumption on the part of the judges to maintain an uncontrollable judicial veto over the actions of the other branches of government. Still less is it a judicial caprice invoked in an impermissible departure from the judges' legal duty. What is involved is nothing less than a defence by the judiciary of the integrity of the branch of government which by the Constitution is placed in their charge. The history of invasions of the judicial power in less fortunate

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the legislature or the executive is vital to the independent performance of the judicial function.

311 *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501; *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 837; 138 ALR 577 at 608 per Toohey J citing *Liyanage v The Queen* [1967] 1 AC 259 at 291.

312 *Wilson v The Minister* (1996) 70 ALJR 743 at 747; 138 ALR 220 at 226.

313 *Kable v DPP (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

314 *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 851; 138 ALR 577 at 628-629 per McHugh J; cf *Williams v Spautz* (1992) 174 CLR 509 at 519-520; *Walton v Gardiner* (1993) 177 CLR 378 at 395-396; *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481-482 where "public confidence" in the courts is repeatedly referred to.

315 (1996) 70 ALJR 743 at 750; 138 ALR 220 at 229-230.

316 (1996) 70 ALJR 814 at 836-837, 848-851; 138 ALR 577 at 608, 624-629.

countries has seen too many instances where the judges supinely accepted the invasions, doing so silently and meekly. In Australia such incursions as there have been have been more modest and sometimes well intentioned. But it is the duty of the judiciary to defend the judicial branch of government as much against the latter as against the former.

4. Particularised legislation One criterion frequently applied to distinguish legislation which permissibly guides the exercise of a judicial power or discretion from that which impermissibly seeks to dictate how the power or discretion will operate in a particular case is whether the legislation is general or particular in its application. If it is highly selective and clearly directed at a particular individual or individuals, it is much more likely that it will amount to an impermissible intrusion upon, or usurpation of, the judicial power[317]. The position is clearer where the legislation in question names the individual or individuals affected[318]. However, such express identification is not required[319]. In judging whether the legislation impermissibly infringes the judicial power, regard will always be had to its substance rather than its form[320].

5. Preventing the administration of justice falling into disrepute The Parliament may enact laws of general application to govern the acceptance and rejection of evidence by courts, as indeed it has often done. But the mere fact that, for some purposes, the rule in *Bunning v Cross* might be classified as a law of evidence, and might even be modified by the Parliament for future and general application, cannot mean that it is susceptible to such a modification as would remove the power essential to courts to protect the integrity of their own processes. Various explanations have been given as to the ultimate conceptual foundation of the rule in *Bunning v Cross.* They include the protection of the individual accused from improper or unlawful treatment[321]; the right of society to insist that those who enforce the law

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317 *Liyanage v The Queen* [1967] 1 AC 259 at 267; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 650. But cf *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328 at 355, footnote 9 (1995) per Scalia J, joined by Rehnquist CJ, O'Connor, Kennedy, Souter and Thomas JJ, Breyer J concurring, and at 357-358 per Breyer J.

318 As it did in *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 816; 138 ALR 577 at 580.

319 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-29.

320 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; *Liyanage v The Queen* [1967] 1 AC 259 at 289-290.

321 *Bunning v Cross* (1978) 141 CLR 54 at 77-78; *Cleland v The Queen* (1982) 151 CLR 1 at 20.

themselves respect it[322]; and the discouragement of criminality on the part of law enforcement officers by depriving them of the fruits of their unlawful conduct and thus of the incentive to act in a way neglectful of the law[323].

However, there is another and more fundamental reason which sustains the judicial discretion or power in question. It is a reason that is relevant to the nature of the judicial power itself. It charts the limits upon any legislative modification of that rule. I refer to the many judicial expressions explaining the rule in terms of the right and duty of the courts to protect the integrity of their own processes[324] and to prevent the administration of justice being brought into disrepute with consequent loss of public confidence[325]. In the United States of America, where the separation of the judicial power under the Constitution bears many similarities to the position in Australia, the obligation of courts to "set their face against enforcement of the law by lawless means"[326] is often expressed in constitutional terms. Those terms received endorsement from the opinion of Mason CJ, Deane and Dawson JJ in this Court in *Ridgeway*[327]. Their Honours there cited with approval the well known passage in the opinion of Roberts J in *Sorrells v United States*[328], in turn endorsed by Frankfurter J in *Sherman v United States*[329]:

> "The doctrine [ie of entrapment] rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court.

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322 *Bunning v Cross* (1978) 141 CLR 54 at 75; *Pollard v The Queen* (1992) 176 CLR 177 at 203; *Foster v The Queen* (1993) 67 ALJR 550 at 557; 113 ALR 1 at 10.

323 cf *Olmstead v United States* 277 US 438 at 470 (1928) per Holmes J (dissenting), at 484-485 per Brandeis J (dissenting). See also *Katz v United States* 389 US 347 at 357-359 (1967) per Stewart J for the Court.

324 *Ridgeway v The Queen* (1995) 184 CLR 19 at 31; see also *Bunning v Cross* (1978) 141 CLR 54 at 78.

325 *Bunning v Cross* (1978) 141 CLR 54 at 78; *Pollard v The Queen* (1992) 176 CLR 177 at 202-203; *Ridgeway v The Queen* (1995) 184 CLR 19 at 60-61, 76, 84.

326 *Sherman v United States* 356 US 369 at 380 (1958) per Frankfurter J.

327 *Ridgeway v The Queen* (1995) 184 CLR 19 at 34.

328 287 US 435 at 457 (1932).

329 356 US 369 at 385 (1958).

> It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law."

In Canada, the Supreme Court has expressed the same idea[330]:

> "[T]he essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law."

In *Ridgeway*, Mason CJ, Deane and Dawson JJ considered that the reasoning in *Sorrells* and *Sherman* and other statements to similar effect[331] provided "persuasive support for the recognition in this country of a judicial discretion to exclude evidence of an illegally procured offence analogous to the *Bunning v Cross* discretion to exclude illegally procured evidence"[332]. This is the essence of the *Ridgeway* discretion. Its foundation is not, as such, fairness to the accused person. It is rather a principle of public policy bound up in the self-regard of the courts constituted or invested with the judicial power of the Commonwealth. By the terms of the Act in question here, the Parliament appears to have recognised[333] the limits on its entitlement to intrude upon, or to derogate from, this self-protective discretion reserved to the courts. However, that recognition appears in a provision which is stated to be subject to s 15X. That section is thus exceptional to the general scheme of the Act. The applicant says impermissibly so.

6. Retrospective legislation A law of general application may apply to facts which occurred before the enactment and yet be valid, causing no offence to

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330 *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at 749-750 per Lamer CJ, quoting from Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 27.

331 *United States v Russell* 411 US 423 at 437-439 (1973) per Douglas J dissenting (Brennan J concurring) and at 439-445 per Stewart J dissenting (Brennan and Marshall JJ joining).

332 (1995) 184 CLR 19 at 34.

333 s 15G(2).

the exercise of the judicial power[334]. Although the judicial power assumes the existence of a pre-existing legal rule or standard which the courts must apply, it does not require that the rule or standard should have been ascertained or precisely defined before the determination is made, applying the rule in the exercise of the judicial power[335]. Thus, an amended rule regarding corroboration might apply to the trial of an accused person for offences which allegedly took place prior to the amendment[336]. The strictures on the judicial power do not freeze in time rules as to practice and procedure (including the general law of evidence) in such a way as to afford an accused an immunity from supervening changes in laws of general application.

7. Enactment of laws of evidence The Parliament has undoubted power to make and amend rules of evidence to be applied in the exercise of the judicial power[337]. Similarly, the Parliament has full power to make and amend laws governing the importation of prohibited goods. The general defect in the law revealed by *Ridgeway* was one which this Court contemplated could and would be corrected. The Parliament, having twice had a Bill before it, and having committed the draft to public and expert commentary, has enacted the law with a view to permitting controlled operations as conduct essential to effective law enforcement in relation to the importation of narcotic goods. This is a matter treated as extremely serious by federal law. If convicted of the offences of which he stands charged, the applicant would be liable to a substantial period of imprisonment, or a heavy fine, or both[338]. In the circumstances of such a deliberate, considered and reconsidered legislative reform for the purposes of a public policy deemed important to the Parliament, this Court would not lightly conclude that, in s 15X, the legislation had offended against the constitutional separation of powers. On the other hand, the applicant having raised his objection, the Court has no option but to determine that objection according to established principles.

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334 *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 503; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 533.

335 *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 532.

336 *Rodway v The Queen* (1990) 169 CLR 515 at 521.

337 *Williamson v Ah On* (1926) 39 CLR 95 at 108-109, 122, 127; *Milicevic v Campbell* (1975) 132 CLR 307 at 316; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298-299.

338 *Customs Act* 1901 (Cth), s 235(2).

The high particularity of the challenged legislation

202 There are two features of s 15X which must be considered in judging whether the section represents an impermissible intrusion upon, or usurpation of, the judicial power. The first is the high particularity of the application of the section. The second is the way in which the Parliament has gone about the attempt to validate past illegal conduct not by exempting such conduct from criminal liability but by purportedly directing the courts to disregard the illegality, in other words, by a statutory fiction, to pretend, in effect, that the facts are otherwise than they truly were.

203 The first feature might not, standing alone, be sufficient to invalidate the section. On its face, s 15X appears to be a law of general application attaching itself to a controlled operation "started before the commencement of this Part"[339]. In that sense, it appears to partake more of the character of the war crimes legislation upheld in *Polyukhovich*[340] than of the section added to the *Migration Act* 1958 (Cth)[341] which was held to be invalid in *Chu Kheng Lim v Minister for Immigration*[342]. However, when (as authority dictates) regard is had to substance rather than form, it is clear both from commonsense and from the repeated Ministerial statements that the actual targets of s 15X are not the generality of potential offenders against the *Customs Act* but a handful of identified persons. They are the individuals who were the beneficiaries of the decision in *Ridgeway* obliging a permanent stay of proceedings for offences against s 233B of the *Customs Act* dependent on an act of importation performed by a law enforcement officer relying only on the Ministerial Agreement.

204 The number of persons who would be affected by s 15X can be no mystery. It is not as if "controlled operations" pursuant to the Ministerial Agreement were a daily affair. By this time, the number would be conclusively ascertained. Almost certainly, only five individuals are involved. The fact must therefore be faced that this is very special legislation addressed to the courts directly affecting five or so particular persons already charged and awaiting trial in those courts. In their cases, and theirs alone, the law governing their pending trials has been changed in a way that seriously affects them. There could be few more significant changes of substance to the law affecting a person awaiting trial on criminal charges than the passage of particular provisions which, in effect, deprive that person of a permanent stay of proceedings. From a position effectively free of the risk of trial

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339 s 15V(1).

340 *War Crimes Amendment Act* 1988 (Cth) considered in *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501.

341 s 54R.

342 (1992) 176 CLR 1.

and punishment the accused is, by legislative *fiat* directed specifically and particularly at him or her, deprived of the legal protection which, until then, he or she enjoyed. The legislature has nullified prior authoritative judicial action affecting the accused[343] - at least in the case of the applicant who had secured a judicial order for a permanent stay.

205 The high particularity of the legislation is a very relevant consideration in judging whether a law amounts to an invalid legislative intrusion into the judicial domain. In *Liyanage v The Queen*[344], the legislation in question was, on its face, like s 15X, general in its application. It named no individual. It refrained from specifically identifying those targeted, for example by including their names in a schedule. But the clear purpose of the Ceylon statute was to attach new substantive and procedural consequences to a group of persons already in custody whose identity could be ascertained readily enough. In fact, the Act was designed to facilitate the conviction of a group of individuals allegedly involved in an abortive *coup d'état* in Ceylon. Although in particular respects, the then Constitution of Ceylon was different from the Australian Constitution, notably in its silence as to the vesting of the judicial power exclusively in the judicature, the Privy Council held that such silence was immaterial. The constitution was consistent with the judicial power being vested exclusively in the judiciary of Ceylon. It was inconsistent with any intention that the judicial power should pass to, or be shared with, the executive or the legislature of that country[345]. Having established that foundation (which renders the decision in *Liyanage* applicable, by analogy, to cases under the Australian Constitution) their Lordships held that because the legislative amendments under attack were directed to the trial of particular prisoners, they involved a usurpation and infringement by the legislature of the judicial powers. They were thus inconsistent with the Constitution of Ceylon. They were *ultra vires*. Lord Pearce, who delivered the reasons of the Privy Council, explained[346]:

> "The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction.

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343 *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328 at 355 (1995).

344 [1967] 1 AC 259.

345 [1967] 1 AC 259 at 287-288, 290-292.

346 [1967] 1 AC 259 at 290.

> And finally it altered ex post facto the punishment to be imposed on them. ... [L]egislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere."

Later, his Lordship went on[347]:

> "If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution."

206 It is true that, in the present case, s 15X of the Act falls short of the offensive provisions struck down in *Liyanage.* Yet in material respects there are close parallels. The section is addressed to particular offences on particular and identifiable occasions in the past. It is designed to make admissible evidence which, at the time it was gathered, and until the Act came into effect, was likely to be held inadmissible as illegally obtained. More importantly, it was designed to direct the court of trial to disregard illegality on the part of law enforcement officers although no defence, immunity or excuse was provided by the Act to such officers to exempt them from the illegality which, in the case of the applicant, *Ridgeway* holds otherwise to require orders for a permanent stay. Although prospective in the sense that it applies to trials held in the future, the effect of the direction to the courts in s 15X is undoubtedly retrospective in operation. That is its substance. It requires courts to disregard past illegality on the part of law enforcement officers although such illegality is admitted and, indeed, is a pre-condition to the operation of the section. In *Liyanage*, the Privy Council looked to substance not form. So should we.

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347 [1967] 1 AC 259 at 291-292.

207 In *Chu Kheng Lim v Minister for Immigration*[348] McHugh J observed, in words which I accept:

> "The line between judicial power and executive power in particular is very blurred. Prescriptively separating the three powers has proved impossible. ... The application of analytical tests and descriptions does not always determine the correct classification. Historical practice plays an important, sometimes decisive, part in determining whether the exercise of a particular power is legislative, executive or judicial in character."

208 "Value judgments" are inescapably involved in such questions. The boundary of the judicial power defies, or transcends, purely abstract conceptual analysis[349]. However, in the present context the high particularity of s 15X and its application to a mere handful of cases, treated differently from those which in the future will fall into Div 2, raise a serious concern that what has been attempted is an impermissible Parliamentary invasion of the judicial power. Yet were this the only basis of the applicant's attack on the constitutional validity of s 15X, I might be inclined to withhold relief on the footing acknowledged in *Liyanage* that legislation *ad hominem*, directed to particular proceedings, "may not always amount to an interference with the functions of the judiciary" obliging the provision of a constitutional remedy[350].

The unrepaired affront of condoning unexcused criminality

209 Particularity is not all. There is a further ground. In my view it requires the provision of relief to the applicant.

210 As has been demonstrated, the Parliament approached the problem presented by *Ridgeway* in a different manner in relation to future controlled operations from those already "started". Whereas in the former the Parliament expressly provided that the law enforcement officer is "not liable for that offence"[351], being relevantly the offence of importing prohibited imports in contravention of s 233B of the *Customs Act*, no such exemption was enacted in relation to past illegal importations. On the contrary, the Act[352] acknowledges that, in such a case, "a law

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348 (1992) 176 CLR 1 at 67.

349 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394.

350 [1967] 1 AC 259 at 290; cf *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328 at 355 (1995).

351 s 15I(1).

352 s 15X.

enforcement officer committed an offence in importing the narcotic goods ...". Allowing that the Parliament needed to preserve the illegality of the act of importation in order to render those allegedly involved, such as the applicant, guilty of the offences against s 233B, the fact remains that nothing has been done to meet the essential objection which this Court identified in *Ridgeway.* That is the objection to the spectacle of the courts being involved in apparently condoning by the judicial process seriously illegal conduct on the part of law enforcement officers. Although the stated objects of the Part include a general object to exempt from criminal liability law enforcement officers acting as provided under the Part[353], the only operative provision to give effect to such exemption appears in Div 2[354]. There is none in Div 3. On this point, s 15X is completely silent.

211 The result is that the offence to public policy which was identified by this Court in *Ridgeway* remains wholly unrepaired. The conduct of the law enforcement officers remains seriously illegal. They are not, by law, exempted from liability. All that has happened is that the courts have been directed by the Parliament to disregard the illegality.

212 Such a direction might be given by the Parliament if all that was involved were a consideration of fairness to the particular accused. However, as the majority were at pains to stress in *Ridgeway,* that consideration is, if relevant at all, a minor one. The governing consideration is not the public policy in securing the fair trial of the applicant. It is the public interest "in the conviction and punishment of those guilty of crime" and the public interest "in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement"[355].

213 This aspect of public policy, and the power and duty of the courts to defend it, belong, ultimately, to the judicial power. They can be enhanced, but not diminished, by the legislature or the executive. The central entitlement, and duty, of courts to ensure that the process of the law is not abused is recognised in common law countries even without the particular constitutional protections afforded to Australians by Ch III of the Australian Constitution[356]. Upholding the

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353 s 15G(1)(a).

354 s 15I(1).

355 (1995) 184 CLR 19 at 38.

356 See eg *Ridgeway v The Queen* (1995) 184 CLR 19 at 60, 87; *Connelly v DPP* [1964] AC 1254 at 1354 per Lord Devlin; *Hunter v Chief Constable* [1982] AC 529 at 536 per Lord Diplock; *Moevao v Department of Labour* [1980] 1 NZLR 464 at 482 per Richardson J.

integrity of the judicial system is the unavoidable obligation of courts[357]. It cannot be surrendered to the other branches of government. They cannot be permitted to direct the courts to act in ways which would undermine the integrity of the judicial process and thereby run the risk of imperilling public confidence in the courts.

214 In *Wilson v The Minister*[358] the majority of this Court held that public perception of the institutional separation of the judicial power from the other powers of government was "central to the system of government" established by the Constitution. I agree. Saying this does not lay claim to an uncontrolled and uncontrollable veto over the exercise of legislative power. It is rather the performance by the Court of its constitutional duty to defend the judicial branch from impermissible incursions by the other branches of government. Judgment and characterisation of laws are involved. They cannot be avoided in constitutional decisions of this kind. The Constitution knows no other doctrine than that, ultimately, this Court will say where the line is drawn. It will be guided by the text, structure and purposes of the Constitution and by past authority. The fact that the task is not susceptible to undisputed outcomes has never been a reason for declining protection of the judicial power.

215 There is a large difference between exempting a law enforcement officer from liability for an established and serious breach of the criminal law (as has been done in the Act by Div 2) and simply acknowledging that breach but purportedly telling the courts to disregard it (as s 15X in Div 3 enacts). If one asks what has changed since *Ridgeway* in respect of the offence to public policy which caused this Court to quash the convictions and order a permanent stay in that case, the answer is nothing of substance. The Crown, which invokes the jurisdiction of the trial court, must still rely on an act of importation which was illegal and remains so, and which has never been exempted or excused from such illegality.

216 In these circumstances, the inherent power of the court to prevent an abuse of its own process remains unaffected. It arises at a point anterior to the hearing of the evidence in a trial of an accused person. It is an obstacle to invoking the judicial process before any determination of the admission of particular evidence. The fundamental question is whether the court may be subjected to such a proceeding or whether, to preserve "the purity of its own temple"[359], it will decline, on public policy grounds, to become involved in the proof of an offence where the commission of that very offence has been brought about by avowedly unlawful

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357 *R v Mack* (1984) 44 CCC (3rd) 513 at 539 per Lamer J for the Court.

358 (1996) 70 ALJR 743 at 747; 138 ALR 220 at 226. See also *Maxwell v The Queen* (1996) 184 CLR 501 at 534.

359 *Sherman v United States* 356 US 369 at 380 (1958) per Frankfurter J.

conduct on the part of law enforcement officers[360]. This is a circumstance doubly objectionable. It is not simply a case where law enforcement officers have engaged in clearly improper conduct. It is a case where such conduct has actually procured the commission of the very offence with which the applicant stands charged[361]. Nothing in Div 3 of the Act alters that situation in the slightest.

217 The Parliament cannot give a direction to a court obliging it to disregard such a fact. Least of all can it do so in a law addressed in substance to a very small number of particular accused already before the courts and by a direction of limited application confined to their particular cases. It follows that s 15X of the Act amounts to an impermissible legislative intrusion upon, or derogation from, the judicial power committed by the Constitution to the courts. The law is therefore of no effect. It being clear that the only basis for the application of the Crown to lift the permanent stay earlier provided by Judge Crossley was s 15X, that application was bound to fail. It should therefore be dismissed. As in *Ridgeway,* it should be left to the appropriate authorities to determine whether the proceedings brought against the applicant for offences under the law of Victoria should be continued[362].

The construction point

218 In light of this conclusion it is strictly unnecessary for me to decide the alternative argument which the applicant advanced should his constitutional submissions fail. He argued that, in its terms, s 15X was intended to have, and to have only, a prospective operation. Accordingly, where the section spoke of "determining ... whether evidence ... should be admitted" the Act was intended to apply to future applications for the admission of tainted evidence and not to a case already determined against the prosecution in accordance with *Ridgeway.* There was no substance in this point. Once it was accepted that the permanent stay provided to the applicant could be lifted it would have been open to the Crown to re-tender its evidence for there was no impediment forbidding its admission. Division 3 would then apply and any "determination" by the trial judge made after the Act came into effect would, had s 15X been valid, necessarily have to be made in accordance with its terms. However, s 15X being invalid, the question is not, in the view which I take, presented for decision.

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360 *Ridgeway v The Queen* (1995) 184 CLR 19 at 35-36.

361 *Ridgeway v The Queen* (1995) 184 CLR 19 at 37.

362 cf *Ridgeway v The Queen* (1995) 184 CLR 19 at 44.

Orders

219 I favour the following orders:

1. Declare that s 15X of the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) is invalid as contrary to the Constitution.

2. Remit the cause to the County Court of Victoria to be determined according to law.

220 HAYNE J. David Michael Nicholas was presented in the County Court of Victoria on an indictment alleging four counts - two alleging offences against s 233B(1)(c) of the *Customs Act* 1901 (Cth) and two alleging offences against s 73(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic). Each count concerned Nicholas' alleged possession or attempted possession of heroin on 24 September 1994. The heroin the subject of these charges was imported into Australia by Australian and Thai law enforcement officers in contravention of s 233B of the *Customs Act* but, so the Crown alleges, as part of a "controlled operation" undertaken under the terms of the Ministerial Agreement of June 1987 which is mentioned in *Ridgeway v The Queen*[363].

221 After Nicholas had been committed for trial, but before he was arraigned, this Court decided *Ridgeway*. After Nicholas had been arraigned and had pleaded not guilty to all four counts, he applied to the trial judge to exclude evidence of the importation of the heroin the subject of the charges and to stay the prosecution of the two counts alleging offences against the *Customs Act*. On 27 May 1996, the trial judge ordered that further proceedings on the two *Customs Act* offences should be stayed permanently[364].

222 On 8 July 1996, the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) came into operation. That Act introduced Pt 1AB into the *Crimes Act* 1914 (Cth), the object of that Part being (among other things) "to exempt from criminal liability law enforcement officers who, in the course of controlled operations" authorised under that Part of the Act "take an active part, or are otherwise involved, in the importation or exportation of narcotic goods"[365] and "to provide that evidence of importation of narcotic goods obtained through a controlled operation" that had been started before the commencement of the Act and in which the Australian Federal Police and the Australian Customs Service acted in concert to allow the narcotic goods to pass through the Customs is not to be rejected because of the unlawful conduct of law enforcement officers who took an active part, or were otherwise involved, in the importation of those goods[366]. Division 2 of Pt 1AB (ss 15H to 15U) makes provision for controlled operations that may take place after the coming into effect of the Act. Thus, provision is made for the

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363 (1995) 184 CLR 19 at 26.

364 Although we have no record of the form of the order, and its form is not recorded in the transcript of the judge's reasons, it is clear from those reasons that the judge intended to make, and did make, an order in the same form as the order that was made in *Ridgeway*.

365 s 15G(1)(a).

366 s 15G(1)(c).

making of an application for a certificate authorising a controlled operation[367], for the grounds on which a certificate authorising a controlled operation may be given[368], for notification to the Minister of applications for certificates[369] and for the tabling by the Minister before each House of the Parliament of reports about controlled operations[370]. Section 15I provides:

> "(1) Subject to subsection (2), a law enforcement officer (other than a member of the police force of a State) who, in the course of duty, for the purposes of a controlled operation, engages in conduct that, apart from this subsection, would constitute a narcotic goods offence is not liable for that offence if, at the time when he or she engages in that conduct, there is in force a certificate given under section 15M that authorises the controlled operation.
>
> (2) Subsection (1) does not apply if:
>
> (a) the conduct of the officer involves intentionally inducing the person targeted by the operation to commit an offence against section 233B of the *Customs Act 1901* or an associated offence; and
>
> (b) the person would not otherwise have had the intent to commit that offence or an offence of that kind.
>
> (3) Subject to subsection (5), a member of the police force of a State who, in the course of duty, for the purposes of a controlled operation, engages in conduct that, apart from this subsection, would constitute a narcotic goods offence is not liable for that offence if, at the time when he or she engages in that conduct, there is in force a certificate given under section 15M that authorises the controlled operation.
>
> ...
>
> (6) If, because of subsection (1) or (3), a person who has imported narcotic goods into Australia is not liable for an offence under paragraph 233B(1)(b) of the *Customs Act 1901*, the narcotic goods are, nevertheless, for the purposes of section 233B of that Act, taken to be goods imported into Australia in contravention of that Act.

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367 s 15J.

368 s 15M.

369 s 15R.

370 s 15T.

..."

223 Division 3 of Pt 1AB deals with controlled operations that were started before the commencement of the Part. The central provision of the Division is s 15X which reads:

> **"Evidence of illegal importation etc. of narcotic goods not to be rejected on ground of unlawful conduct by law enforcement officer**
>
> In determining, for the purposes of a prosecution for an offence against section 233B of the *Customs Act 1901* or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the *Customs Act 1901* should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation is to be disregarded, if:
>
> (a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a controlled operation; and
>
> (b) for the purposes of the operation:
>
> (i) the Australian Federal Police, by written request signed by one of its members and purported to be made in accordance with the Ministerial Agreement, asked a Regional Director for a State or Territory that the narcotic goods, while subject to the control of the Customs (within the meaning of the *Customs Act 1901*), be exempted from detailed scrutiny by officers of the Australian Customs Service; and
>
> (ii) the request for exemption was granted."

224 After the 1996 amending Act came into operation, the prosecution applied to the trial judge who had ordered a permanent stay of further proceedings in relation to the two *Customs Act* offences alleged against Nicholas for an order lifting that stay. Counsel for Nicholas contended that Div 3 of Pt 1AB of the *Crimes Act* is invalid on the ground that it "infringes or usurps" the exercise of the judicial power of the Commonwealth. The whole of the cause (and thus, so far as presently relevant, the application for an order lifting the stay) was then removed into this Court.

225 The trial judge had ordered that proceedings on the two *Customs Act* offences should be stayed permanently. It was, however, accepted before us that it would be open to the judge, in a proper case, to lift that stay. No doubt that concession proceeded from an acceptance of two propositions - that an order staying further proceedings did not constitute any final determination of issues joined and that there was not, in the circumstances of this case, any abuse of process in applying for a lifting of the stay or if the stay were to be lifted[371].

226 As is apparent from the chronology I have given, Pt 1AB was introduced into the *Crimes Act* in response to the Court's decision in *Ridgeway*. The legislative debates make plain that that is so[372].

227 The discretion of the trial judge to exclude prosecution evidence which has been obtained by unlawful conduct on the part of the police is well established[373]. It is equally well established that that discretion is distinct from the discretion of a trial judge to exclude admissible evidence when to admit it would be unfair to the accused. The discretion to exclude illegally procured evidence is not primarily concerned with questions of fairness to the accused but rather with "society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired"[374].

228 The rule is not a rule of absolute exclusion; a discretion must be exercised. And the exercise of that discretion must be informed by consideration of two competing requirements: that those guilty of crime be detected and punished and that those whose task it is to enforce the law obey it. Reference is made in *Bunning v Cross*, and elsewhere, to various considerations that might bear upon the resolution of that tension and thus upon the exercise of the discretion in individual cases. In particular, reference is made in *Bunning v Cross* to the importance of identifying whether there was some "isolated and merely accidental non-compliance with statutory safeguards"[375] as opposed to deliberate breach of the law on the part of those who are duty bound to uphold it. Since *Bunning v*

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371 cf *Rogers v The Queen* (1994) 181 CLR 251; see also *Director of Public Prosecutions (Cth) v Polyukhovich* unreported, Supreme Court of South Australia, 4 March 1993 per Cox J.

372 Second Reading Speech of the Attorney-General: House of Representatives, Main Committee, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2510, 2512, 2514.

373 *Bunning v Cross* (1978) 141 CLR 54.

374 *Bunning v Cross* (1978) 141 CLR 54 at 75 per Stephen and Aickin JJ.

375 *Bunning v Cross* (1978) 141 CLR 54 at 78 per Stephen and Aickin JJ.

Cross there have been many cases in which that balancing exercise has been undertaken[376].

229 *Ridgeway* was not a case concerning illegally procured evidence. Rather, one of the elements of the offence with which Ridgeway was charged was constituted by the illegal conduct of law enforcement officers: it was law enforcement officers who had imported the prohibited narcotic goods. Again, however, it is important to note that the Court did not hold in *Ridgeway* that evidence of the unlawful conduct of the law enforcement officers said to constitute one element of the charged offence could never be received; it was held that the trial judge had a discretion to exclude that evidence. As Mason CJ, Deane and Dawson JJ said[377]:

> "... the considerations of 'high public policy' which justify the existence of the discretion to exclude particular evidence in the case where it has been unlawfully obtained are likewise applicable to support the recognition of a more general discretion to exclude any evidence of guilt in the case where the actual commission of the offence was procured by unlawful conduct on the part of law enforcement officers for the purpose of obtaining a conviction. In both categories of case, circumstances can arise in which the need to discourage unlawful conduct on the part of law enforcement officers and to preserve the integrity of the administration of criminal justice outweighs the public interest in the conviction of those guilty of crime."

As this passage makes plain, the exercise of the discretion calls, once more, for resolution of the tension between the competing principles that have earlier been mentioned. It may be, then, as their Honours suggest[378], that the discretion to reject illegally procured evidence and the discretion to exclude evidence of an illegally procured offence are not distinct and independent but are complementary aspects of a single discretion encompassing both. I need not decide whether that is so.

230 Whether or not the discretion to exclude evidence of an illegally procured offence is separate from the discretion discussed in *Bunning v Cross*, it is a discretion the exercise of which is to be informed by similar considerations, although, as *Ridgeway* also makes plain, the relative weight to be given to those considerations will vary according to the circumstances of each particular case.

> "Thus, the weight to be given to the public interest in the conviction and punishment of those guilty of crime will vary according to the degree of

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376 See, eg, in this Court *Cleland v The Queen* (1982) 151 CLR 1; *Pollard v The Queen* (1992) 176 CLR 177; *Foster v The Queen* (1993) 67 ALJR 550; 113 ALR 1.

377 *Ridgeway* (1995) 184 CLR 19 at 31-32.

378 *Ridgeway* (1995) 184 CLR 19 at 37-38 per Mason CJ, Deane and Dawson JJ.

> criminality involved. The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence - the public interest in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement - will vary according to other factors of which the most important will ordinarily be the nature, the seriousness and the effect of the illegal or improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings. When assessing the effect of the illegal or improper conduct, the relevance and importance of any unfairness either to a particular accused or to suspected or accused persons generally will likewise depend upon the particular circumstances[379]. Ordinarily, however, any unfairness to the particular accused will be of no more than peripheral importance."[380]

231 It is against that background that the challenge to the validity of Div 3 of Pt 1AB must be judged.

> Nicholas' contentions had three strands -
>
> First, that the nature and basis of the discretion to reject evidence of an offence or element of an offence procured by unlawful conduct on the part of law enforcement officers are of such a kind that it is only the courts that can determine in what circumstances the discretion is to be applied;
>
> Secondly, that Div 3 of Pt 1AB deals only with a small and identifiable group of persons and is, on that account, an impermissible interference with the exercise of judicial power; and
>
> Thirdly, that on its true construction, Div 3 of Pt 1AB does not apply to a case, such as the present matter, in which a stay has previously been ordered.

These strands were not always treated as separate threads in the argument but it is convenient to deal with them as if they were.

232 It was submitted that the discretion to reject evidence of illegally procured offences is a common law (as opposed to statutory) discretion which is exercised by the courts to protect the integrity of their processes. No doubt this is so. Equally there is no doubt that a court which exercises the discretion is exercising judicial

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379 See, eg, *Bunning v Cross* (1978) 141 CLR 54 at 77-78; *Pollard v The Queen* (1992) 176 CLR 177 at 202-203.

380 *Ridgeway* (1995) 184 CLR 19 at 38 per Mason CJ, Deane and Dawson JJ.

power. Thus, when the trial judge ruled that the evidence which the prosecution proposed to lead of the importation of the heroin which it was alleged that Nicholas had, or had attempted to have, in his possession should be excluded, the trial judge was exercising the judicial power of the Commonwealth. But it by no means follows from these considerations that Parliament may make no law touching the discretion.

233 At the outset it is necessary to recall that the discretion is one which is rooted in public policy and requires the balancing of competing considerations. Part 1AB seeks to have the courts strike that balance differently in some kinds of cases, presumably because the Parliament considers that the public interest requires it. The effect of Nicholas' contentions is that only the courts may determine what the public interest requires. I do not accept that that is so.

234 The facts that the discretion is a creature of the common law and is concerned with the protection of the integrity of the courts' processes do not mean that the discretion cannot be affected by legislation. There are many rules which have been developed by the common law which have been changed or even abolished by legislation and yet it is not suggested that such legislation intrudes upon the separation of judicial and legislative powers. Nor do the facts that the discretion is designed to protect the integrity of the courts and that the discretion is "an incident of the judicial powers vested in the courts"[381] take the discretion altogether beyond the reach of the legislature. Whether other considerations would arise if Parliament attempted to abolish the discretion altogether is a question I need not, and do not, address. The legislation now in question does not abolish the discretion - it affects only some kinds of prosecutions and then only in the limited circumstances that are prescribed in the legislation.

235 Moreover, Pt 1AB is concerned with a rule about the reception or rejection of certain evidence. That Parliament may make laws prescribing rules of evidence is clear and was not disputed. Plainly, Parliament may make laws (as it has) on subjects as diverse as the circumstances in which hearsay may be received[382] or the circumstances in which confessional statements by accused persons may be admitted in evidence[383] and it may do so to the exclusion of the previous common law rules[384].

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381 *Ridgeway* (1995) 184 CLR 19 at 33 per Mason CJ, Deane and Dawson JJ.

382 See, eg, *Evidence Act* 1995 (Cth), Pt 3.2.

383 *Crimes Act*, Pt 1C.

384 *Crimes Act*, s 23A(1). "Any law of the Commonwealth in force immediately before the commencement of this Part, *and any rule of the common law*, has no effect so far as it is inconsistent with this Part." (emphasis added)

236 The common law rules that were developed in these areas were often, if not always, developed with questions such as reliability of evidence or fairness to the accused at the forefront of consideration and thus, at least to that extent, with questions of the integrity of the curial process and its results well in mind. And yet such legislation does not infringe the separation of powers.

237 It may be accepted that the judicial power of the Commonwealth is an "elusive concept"[385] difficult, if not impossible, of comprehensive definition. At its core it concerns what Griffith CJ described in *Huddart, Parker & Co Pty Ltd v Moorehead*[386] as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property". As Kitto J pointed out in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[387] the judicial power involves "as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation" and that decision will be based upon identifiable legal principles[388]. But that is far from saying that the legal principles to be applied are to be formulated only by those in whom judicial power is properly invested. Indeed to state the proposition is to reveal its error.

238 Once it is accepted that the legislature may make or change the rules of evidence it is clear that it may make or change the rules governing the discretionary exclusion of evidence. In particular, it may make or change rules governing the factors which a court is to take into account in exercising that discretion. In the case of this particular discretion, the exercise of which depends upon the balancing of competing considerations, I see no intrusion on the judicial power by the legislature saying that in some kinds of case, one consideration (that of preserving the reputation of the courts by their not being seen to condone law breaking) is to be put to one side in favour of the consideration that persons committing a particular kind of crime should be convicted and punished.

239 It is said that if the courts do that, their reputation is harmed because they are seen to condone the breaking of the law by law enforcement officers. But that is to ignore a fundamentally important consideration - that the courts would receive evidence which otherwise may have been rejected because that is the effect of the statutory injunction to disregard the fact that the law was broken by the law enforcement officers. There would, in these circumstances, be no harm to the

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385 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 532 per Mason CJ.

386 (1909) 8 CLR 330 at 357.

387 (1970) 123 CLR 361 at 374.

388 *War Crimes Act Case* (1991) 172 CLR 501 at 532-533 per Mason CJ.

reputation or integrity of the judicial process if the courts were to follow the law and there would be no harm to the reputation of the courts if, applying the law, a court received the evidence in the course of trying the issues joined between prosecution and accused. Moreover, it is always necessary to recall that not every breach of the law by those who should enforce it led to rejection of their evidence at common law; a discretion was exercised. Harm to the courts has not been seen, in Australia or elsewhere, as the inevitable consequence of the reception of such evidence.

240 As was noted in *Bunning v Cross*[389] there was a marked contrast between the approach manifest in *R v Ireland*[390] (and in *Bunning v Cross*) and the approach that had, until then, been taken in the English and Canadian courts. Since then, the general effect of English cases has been to favour the reception of evidence even though it has been illegally obtained[391]. (The question in England has also now been affected by legislation[392].) In Canada the matter is controlled by s 24(2) of the Charter of Rights and Freedoms which provides, in effect, that if evidence is obtained in breach of the Charter, the evidence is excluded if it is established that, having regard to all of the circumstances "the admission of it in the proceedings would bring the administration of justice into disrepute"[393]. In the United States, the view that appears to have prevailed is not that a defence of entrapment is necessary to "preserve the institutional integrity of the system of federal criminal justice"[394] but that the relevant question is whether the accused would have committed the offence but for the actions of the law enforcement officers[395]. In none of these jurisdictions, then, has the reception of evidence obtained illegally been seen as presenting such a threat to the integrity of the judicial process, or the reputation of the courts, as to require its rejection in all cases. Nor is there any reason to consider that the factors affecting the decision whether to admit evidence

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389 (1978) 141 CLR 54 at 73 per Stephen and Aickin JJ.

390 (1970) 126 CLR 321.

391 *R v Sang* [1980] AC 402; *R v Khan* [1996] 3 WLR 162; [1996] 3 All ER 289.

392 *Police and Criminal Evidence Act* 1984 (UK), s 78.

393 This provision has given rise to much litigation in the Supreme Court. See, eg, *R v Collins* [1987] 1 SCR 265; *R v Wijesinha* [1995] 3 SCR 422; *R v Stillman* (1997) 144 DLR (4th) 193.

394 *United States v Russell* 411 US 423 at 445 (1973) per Stewart J (dissenting).

395 *Hampton v United States* 425 US 484 at 488-489 (1976) per Rehnquist J, at 492 n 2 per Powell J. Both the majority and dissenting judgments in *Jacobson v United States* 503 US 540 (1992) appear to accept that the relevant question is whether government agents' conduct caused the accused to commit the offence.

that one element of an offence charged against an accused which has been constituted by the illegal conduct of law enforcement officers are so different from those that bear on whether to receive evidence obtained illegally that a different conclusion should be reached.

241 No doubt the conduct of law enforcement officers who participated in controlled operations involving the importation of drugs into this country was a deliberate and serious breach of the law (a breach ordinarily attracting condign punishment) but the choice made by the legislature is that these facts are to be disregarded in deciding whether to receive evidence of their conduct. That choice is, as I have said, the choice of the legislature, not the courts and is not a choice which leads to damage to the reputation of the courts.

242 It may be accepted that the discretion to reject evidence of illegally procured offences is a discretion stemming from "the inherent powers of the courts to protect the integrity of their own processes"[396]. But the fact that the discretion is based in the inherent powers of the courts does not take the discretion beyond the reach of legislative change. Nor does the fact that the discretion is intended to protect the reputation of the courts. The courts' opinion of what is necessary, or desirable, to preserve their reputation is not a sound test of constitutional validity. As Brennan CJ points out in his reasons: "To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power."[397]

243 I need not, and do not, decide whether there are some inherent powers of the courts which cannot be abolished[398]. The legislation now in question does not purport to abolish any power of the court. Section 15G(2), which applies to both Div 2 and Div 3 of the Part, and thus applies both to controlled operations taking place after the Act came into effect and those that had taken place earlier, expressly denies any such general intention. It provides:

> "(2) Subject to section 15X, this Part is not intended to limit a discretion that a court has:
>
> (a) to exclude evidence in criminal proceedings; or
>
> (b) to stay criminal proceedings in the interests of justice."

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396 *Ridgeway* (1995) 184 CLR 19 at 34 per Mason CJ, Deane and Dawson JJ.

397 [1998] HCA 9 at 37.

398 cf *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725.

As counsel for Nicholas emphasised, s 15X may, on its true construction, require a court to disregard the very fact that enlivens the discretion spoken of in *Ridgeway* - that a law enforcement officer committed an offence in importing the narcotic goods. It may be, then, that s 15X is properly described as removing the discretion to exclude evidence of illegally procured offences in the cases to which it applies. At the least it very much limits the discretion in such cases. But on its widest construction, s 15X says no more than that in the limited circumstances in which that section has operation the discretion to reject evidence is not to be exercised.

244 If the rejection of evidence of illegally procured offences had been held to be inevitably required in all cases because *only* in that way could the reputation of the courts be protected, the question whether Parliament might change or abolish that rule might (I do not say would) have arisen. But that is not the case with this rule. The courts have recognised that a difficult balancing exercise must be undertaken and that no single answer applies to all cases in which the question might arise. In my view the fact that the discretion is based in the inherent powers of the courts does not mean that Pt 1AB, or Div 3 in particular, intrudes on the judicial power of the Commonwealth.

245 I turn then to the other two strands in the argument.

246 Section 15X applies to only a small group of cases: those arising out of controlled operations started before the commencement of Pt 1AB[399] and in which a request was made and granted under the Ministerial Agreement for exemption of the goods from detailed scrutiny by customs officers[400]. No doubt the number of those controlled operations is known; it seems that there may have been very few such cases[401].

247 For present purposes, then, I am prepared to assume that not only are the controlled operations to which s 15X may apply known but also that all offenders who were concerned in crimes committed after those importations have been

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399 s 15V(1).

400 s 15X(b). A certificate may be given by the Minister that such a request was made and granted and in a prosecution for an offence against s 233B of the *Customs Act* or an associated offence, that certificate is, upon mere production, prima facie evidence of the facts stated in it: s 15W.

401 In his Second Reading Speech the Attorney-General gave three cases as examples: House of Representatives, Main Committee, *Parliamentary Debates* (Hansard), 20 June 1996 at MC 2514. See also the Second Reading Speech of the Minister for Justice when a similar Bill was introduced in 1995: House of Representatives, *Parliamentary Debates* (Hansard), 22 August 1995 at 6. That Bill lapsed when Parliament was dissolved. The Minister for Justice then gave four cases as examples.

identified by police. If the cases described in the second reading speeches were the only cases to which s 15X might apply, it would seem that there are no more than about five or six persons concerned.

248 It was said that Div 3 of Pt 1AB can therefore be seen as legislation directed to the disposition of particular identifiable prosecutions and is, for that reason, an infringement upon judicial power.

249 First, however, it is to be noted that the legislation deals only with the reception of evidence; it does not deal directly with issues of guilt or innocence of any offence charged against those in whose prosecutions the evidence may be led. Secondly, the mere fact that it may be possible to identify all the persons in relation to whom s 15X applies does not mean that the legislation interferes with judicial power. Where legislation deals only with events which have happened before the legislation comes into effect, it must always be possible, at least theoretically, to identify all cases to which the legislation may apply; the events have happened and can, in theory, be identified. That has not hitherto been seen as sufficient reason to conclude that the legislation is invalid[402]. The number of cases affected may be a relevant consideration but I doubt that it is a sure guide to validity and I do not rest my decision only on whether the provisions which are now under consideration affect 5 or 6 persons rather than 1 or 2 (or 5 or 6 rather than 500 or 600). For present purposes it is enough to say that because the legislation does not deal directly with ultimate issues of guilt or innocence but only with whether evidence of only one of several elements of an offence can be received and deals not with a single identified, or identifiable, prosecution but with several prosecutions (albeit prosecutions which I assume can be identified and are relatively few) it does not have the character of a bill of attainder or like impermissible interference in the judicial process. Rather, it is legislation of a kind much more closely resembling the legislation concerning corroboration warnings considered in *Rodway v The Queen*[403] - legislation which was held to affect only the procedures to be followed in litigation, not the rights of the parties.

250 The distinction between legislation dealing only with questions of evidence or procedure and legislation dealing with questions of guilt or innocence is, of course, concerned with substance, not form[404], and will not always be easy to draw,

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402 *War Crimes Act Case* (1991) 172 CLR 501 at 533-534 per Mason CJ, 649 per Dawson J, 689 per Toohey J, 721 per McHugh J; cf 631 per Deane J, 704-705 per Gaudron J.

403 (1990) 169 CLR 515.

404 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

but it is a distinction of great importance. As Brennan, Deane and Dawson JJ said in *Chu Kheng Lim v Minister for Immigration*[405]:

> "There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to[406] and 'could not be excluded from'[407] the judicial power of the Commonwealth[408]. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive."

251 Nothing in Pt 1AB purports to take any question of adjudging or punishing criminal guilt under a law of the Commonwealth away from the courts which exercise the judicial power of the Commonwealth. Even if s 15X is construed as entirely removing (in cases to which it applies) the discretion to exclude evidence of the illegal conduct of law enforcement officers who were concerned in the importation of narcotic goods, the issue of guilt or innocence of the crime charged in cases to which that section applies is left to the courts to decide.

252 I have said that the distinction between legislation dealing only with questions of evidence or procedure and legislation dealing with questions of guilt or innocence will not always be easy to draw. It is possible to imagine changes to evidence or procedure which would be so radical and so pointed in their application to identified or identifiable cases then pending in the courts that they could be seen, in substance, to deal with ultimate issues of guilt or innocence. The legislation dealt with by the Privy Council in *Liyanage v The Queen*[409] might be seen to have been of that kind.

253 It was submitted that s 15X can be seen to be of the same kind as the legislation considered in *Liyanage* because of its application to a limited group of identifiable cases, because it deals with proof of an essential element of an offence charged and because its application in this case deprives Nicholas of the benefit of

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405 (1992) 176 CLR 1 at 27.

406 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

407 *R v Davison* (1954) 90 CLR 353 at 368, 383.

408 See, also, the *War Crimes Act Case* (1991) 172 CLR 501 at 536-539, 608-610, 613-614, 632, 647, 649, 685, 705-707, 721.

409 [1967] 1 AC 259.

an order staying proceedings on the *Customs Act* offences permanently. I have dealt with the first of these three considerations. It is convenient to deal with the other two together.

254 Before Pt 1AB came into operation, the trial judge concluded, following *Ridgeway*, that because evidence of the illegal importation of the narcotic goods should not be received, the charges under the *Customs Act* that were alleged against Nicholas would fail and that therefore the further prosecution of those charges would be an abuse of process and should be permanently stayed.

255 There is, in my view, nothing in s 15X or Pt 1AB more generally, which suggests that s 15X applies only to cases in which no application for stay has been granted before the Part came into force. Nicholas' contention that the section was limited in this way should be rejected. Further, once it is accepted, as it was in this case, that the trial judge has power, in a proper case, to lift a permanent stay that has been granted, there is no reason to conclude that the change in the law worked by Pt 1AB is not a sufficient reason to consider lifting the stay. (Indeed the contrary was not contended.) Inevitably then, the application of Div 3 of Pt 1AB (and s 15X in particular) in the circumstances of this case may mean that evidence of an essential element of the alleged offences which was previously excluded may now be admitted. But that should not be permitted to obscure two very important facts: first, that the proof of the matter alleged against the accused must still be undertaken by the prosecution and judged by the court in the ordinary way and second, that the discretion to reject evidence of illegally procured conduct is a discretion that is not focused upon the need to ensure a fair trial for the accused. It is a discretion that is based on other, different, considerations.

256 The legislation does not intrude on the judicial power of the Commonwealth. Accordingly, I would declare s 15X of the *Crimes Act* to be a valid law of the Commonwealth and remit the cause to the County Court to be dealt with according to law.