

ORIGINAL

**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

NO A5 OF 2015

BETWEEN:

POLICE
Appellant

AND:

JASON ANDREW DUNSTALL
Respondent

**ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**



Filed on behalf of the Attorney-General of the Commonwealth
(intervening) by:

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth). The Commonwealth intervenes in support of neither party.
3. The Commonwealth has been granted an extension of time to file these submissions by 12 noon on 5 May 2015.

PART IV LEGISLATIVE PROVISIONS

- 10 4. The relevant provisions are set out in the annexure to the Appellant's submissions (**AS**), supplemented by the annexure to the Respondent's submissions (**RS**).

PART V ISSUES PRESENTED BY THE APPEAL

A. Introduction

5. The Commonwealth only seeks to put submissions on the issue raised in the Appellant's notice of constitutional matter dated 20 April 2015 (**s 78B notice**). In summary the Commonwealth submits as follows.
6. It is settled that the Court does not decide constitutional issues unless it is necessary to do justice in the case and determine the rights of the parties.
- 20 7. The issue raised in the s 78B notice does not give rise to any constitutional issue that it is necessary to decide.
 - 7.1. The position of both parties is that the *Road Traffic Act 1961* (SA) (the **SA Act**) does not exclude the residual discretion to exclude evidence on unfairness grounds, or modify that discretion in any material way.
 - 7.2. Although the Respondent has suggested that the SA Act could not validly exclude the "unfairness" discretion, that suggestion is hypothetical given that no party contends that the SA Act has this effect.
 - 7.3. The fact that the Appellant nominates the Constitution as one possible
30 source of power for the "unfairness" discretion does not give rise to any constitutional issue requiring determination. That is because there is no suggestion from either party that the source of this power would dictate or influence the way that the "unfairness" discretion should be exercised in this case.

B. The Court does not decide a constitutional issue unless it is necessary for the decision of the case

8. The settled practice of the Court is not to decide a constitutional issue unless it is necessary for resolving the case;¹ that is, when it is necessary “to do justice in the given case and to determine the rights of the parties”.²
9. This case does not involve a challenge to the validity of a legislative provision, but rather involves a question as to the appropriate exercise of a common law discretion. The practice of the Court should be the same.
10. Of necessity, the common law must conform with the Constitution. However, a revision in common law doctrine has a “different significance” from a statement of constitutional law principle.³ The Court would only attribute constitutional significance to a common law principle if that were necessary to resolve the issues in a case.⁴

C. The s 78B notice does not raise any issue that is necessary to decide

11. For the following reasons, the Commonwealth contends that the s 78B notice does not raise any issue that is necessary to decide.

C.1 Issue between the parties is the scope of a common law discretion

12. The issue in the appeal is whether evidence obtained from a breathalyser can be given the presumptive effect provided for by s 47K(1) of the SA Act, when the facility to obtain rebutting evidence provided for in s 47K(1a)(a) of that Act is not available by reason of an error by a medical practitioner.

12.1. In the Court below, the majority held that the evidence should be excluded under a residual discretion to prevent “unfairness” to an accused in a criminal trial: Reasons below, [86]-[88] (Gray J), [171]-[174] (Sulan J) [AB 109, 129].

12.2. Kourakis CJ, in dissent, accepted that a residual “unfairness” discretion existed, but held that this discretion did not permit the breathalyser evidence to be excluded: Reasons below, [51] [AB 96-97].

13. The general discretion to exclude otherwise admissible evidence to prevent unfairness to an accused derives from the common law.⁵ The difference in the

¹ *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159, 171 [28] (McHugh, Gummow, Hayne and Heydon JJ).

² *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ, quoting *Lambert v Weichalt* (1954) 28 ALJR 282, 283 (the Court)) and the cases there cited.

³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (the Court).

⁴ For example, in a Ch III context, see *Cesan v The Queen* (2008) 236 CLR 358, esp at 382 [76] (French CJ), 389 [101] (Gummow J).

⁵ See *Stephens v The Queen* (1985) 156 CLR 664, 669 (the Court): “the judge presiding at a criminal trial always has a discretion to exclude evidence if the strict rules of admissibility would operate unfairly against the accused”. This is a common law discretion: *Haddara v The Queen* [2014] VSCA 100 (*Haddara*), [12], [49]-[50] (Redlich and Weinberg JJA). In *Haddara*, their Honours held that the

Court below turned on a difference of approach to the scope of this common law discretion. The majority Justices did not suggest that their understanding of the discretion was required by the Constitution, and Kourakis CJ did not suggest that the “unfairness” discretion was either excluded or modified by the SA Act in any material way.⁶

- 10 14. The Appellant accepts that there is a residual common law discretion to exclude evidence in a criminal trial on the grounds of “unfairness” to an accused: AS, [3(i)], [14]. The Appellant does not suggest that s 47K of the SA Act abrogates the “unfairness” discretion. The Respondent does not submit that the approach of the majority in the Court below is dictated by constitutional requirements.⁷
15. The Respondent has suggested that the SA Act could not validly exclude the “unfairness” discretion: RS, [44.3]. However, in the absence of any argument by the Appellant that the unfairness discretion is excluded, this does not arise as an issue for determination.
16. Any contention, if one were to be advanced, that a State Act could not validly require that breathalyser evidence be admitted when the facility for rebuttal evidence is not available on the facts would face a number of difficulties.⁸
- 20 16.1. No basis is apparent upon which it could be contended that such a law would substantially impair, or be repugnant to or incompatible with, the institutional integrity of State courts.⁹ “Institutional integrity” refers to the defining characteristics of courts, which set them apart from other decision-makers.¹⁰

specific discretions to exclude evidence (or limit its use) in ss 135–138 of the *Evidence Act 2008* (Vic) do not exclude this general common law discretion: [51] ff. Section 34KD of the *Evidence Act 1929* (SA) confers a discretion that operates in more confined circumstances than those in the uniform Evidence Acts. That provision applies in proceedings for a criminal offence or in proceedings under the *Serious and Organised Crime (Control) Act 2008* (SA): s 34KD(3). The Court may to refuse to admit an out of court statement as evidence of the matter, if the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence. Note that s 130 of the *Evidence Act 1977* (Qld) “confirms the operation of what is sometimes referred to as a ‘residual discretion’ at common law, which is directed to prevent unfairness to an accused”: *Roach v The Queen* (2011) 242 CLR 610 at [11] (French CJ, Hayne, Crennan and Kiefel JJ); see also at [60] (Heydon J). Section 112 of the *Evidence Act 1906* (WA) also appears to preserve a general discretion to prevent unfairness to an accused in a criminal trial. (These provisions are set out in the Annexure to these submissions.)

⁶ The Commonwealth submits that the statements in Reasons below at [22] and [51] [AB 88, 96] are concerned with the proper scope of common law reasoning, not constitutional doctrines.

⁷ See Appellant’s reply, [5].

⁸ See Appellant’s reply, [6].

⁹ See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 591 [15] (Gleeson CJ), 598 [35] (McHugh J), 617 [101] (Gummow J, with Hayne J agreeing on this point); *Momcilovic v The Queen* (2011) 245 CLR 1, 66 [93] (French CJ), 93 [175] (Gummow J), 224 [593] (Crennan and Kiefel JJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (*Pompano*), 88–9 [123] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁰ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 46 [68] (French CJ), 157 [428] (Crennan and Bell JJ), 162 [443] (Kiefel J); see also at 103 [263] (Heydon J, dissenting in the result).

16.2. For present purposes, it is sufficient to note that the States' power to enact a provision providing for the reception of breathalyser evidence would be at least as broad as the Commonwealth's power to do so.¹¹ It is well established that a Commonwealth law may alter the rules of evidence by reversing the onus of proof.¹² Indeed, a Commonwealth law may prescribe how that onus is to be discharged.¹³

C.2 A live constitutional issue would only arise if a law were to require unfairness

10 17. The Appellant has identified Ch III of the Constitution as a possible source of the courts' power to exclude evidence in the exercise of the residual "unfairness" discretion: AS, [27]-[28]; s 78B notice, [3]. However, merely to identify the Constitution as a possible source of the power to exclude evidence does not, in itself, give rise to any constitutional issue requiring determination. The source of the power to exclude "unfair" evidence would only be significant if that source were to dictate or influence how the power should be exercised in the particular case.

18. The relevant constitutional requirement is said to be the right to a fair trial: see AS, [27]-[28]. Two preliminary points should be noted about that "right".

20 18.1. First, there is no decision of this Court that establishes a right to a fair trial as a free-standing right derived from Ch III of the Constitution¹⁴ (as distinct from a common law right¹⁵). The statements by Deane J in *Dietrich v The Queen*¹⁶ and by Gageler J in *Pompano*¹⁷ have not been accepted by a majority of the Court. The observations by French CJ and Crennan J in *X7 v Australian Crime Commission*¹⁸ were made in the context of the courts'

¹¹ If a law in a particular form would be valid, if it were enacted by the Commonwealth to apply to the exercise of federal judicial power, a law in that form will also be valid if enacted by a State to apply to the exercise of State judicial power: *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561–2 [14] (the Court).

¹² See eg *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12 (Knox CJ, Gavan Duffy and Starke JJ), 17 (Isaacs J); *Williamson v Ah On* (1926) 39 CLR 95, 122 (Higgins J); *Milicevic v Campbell* (1975) 132 CLR 307, 316–17 (Gibbs J), 318–19 (Mason J), 321 (Jacobs J); *Sorby v The Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ).

¹³ See *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254, 263 (Dixon J): "If the Parliament may place the burden of proof on the defendant, it may do so upon any contingency which it chooses to select".

¹⁴ See *Lodhi v The Queen* (2007) 179 A Crim R 470, 488 [74] (Spigelman CJ). To the contrary, a right to "due process" was rejected by Dawson J in *Kruger v Commonwealth* (1997) 190 CLR 1, 61.

¹⁵ Cf the cases cited in AS, [26] fn 34.

¹⁶ (1992) 177 CLR 292 (*Dietrich*), 326. In *Dietrich*, Gaudron J stated (at 362) that the requirement that a trial be fair is entrenched in the implicit Ch III requirement that judicial power be exercised in accordance with the judicial process: see AS, [28]. A Commonwealth law cannot require a court to exercise federal judicial power in a manner that is inconsistent with the essential character of a court or with the nature of judicial power, and cannot direct a court exercising federal jurisdiction as to the manner or outcome of the exercise of its jurisdiction: *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27, 36 (Brennan, Deane and Dawson JJ). While fairness may be relevant in answering those questions, that is different from a constitutional right to a fair trial per se.

¹⁷ (2013) 252 CLR 38, 108 [188]; AS, [27]. The other members of the Court in *Pompano* observed that the rules of procedural fairness do not have immutably fixed content: see at 99 [156] (Hayne, Crennan, Kiefel and Bell JJ), cf at 72 [68] (French CJ).

¹⁸ (2013) 248 CLR 92 (*X7*), 116–17 [38]; AS, [28].

power to punish for contempt and to prevent an abuse of process, neither of which is applicable here.

- 10 18.2. Second, any right of this kind would be more accurately described as an immunity from a trial that is unfair.¹⁹ That is in part because the features of a “fair” trial cannot be described in any comprehensive way.²⁰ Moreover, subject to constitutional considerations, the relevant right of an accused is a trial according to law.²¹ The fact that a common law principle has been developed to promote “fairness” does not render it immune from legislative modification.²² In the case of State laws, the validity of a law that restricted or excluded the general discretion to exclude evidence to prevent unfairness to an accused would depend on whether that law was contrary to the *Kable* principle. Although considerations of fairness may be relevant in determining whether a State law impairs the courts’ institutional integrity, that does not mean there is any constitutional right to a trial that is “fair” per se.
- 20 19. The significance of this second point is that any constitutional issue about the “right” to a fair trial would only arise if there were a statute, or a common law principle, that was said to create unfairness. In this case, there is no statute that does so – as noted, no party argues that s 47K of the SA Act excludes or modifies in any relevant way the residual “unfairness” discretion.²³ Equally, there is no common law principle here that is said to mandate a result that could be described as “unfair” – no party argues that the approach of Kourakis CJ is inconsistent with the Constitution, or that the approach of the majority is required by the Constitution.
- 30 20. In the absence of any such argument, there is no constitutional dimension to the issues before the Court. The only question is how the trial judge should have exercised the discretion, given the general powers of a trial judge to ensure a fair trial of an accused.²⁴ This question can be answered without any reference to constitutional doctrine. Notably, the Appellant’s submissions in reply do not raise any constitutional doctrine as a reason for exercising the “unfairness” discretion in the manner contended for by the Appellant.

¹⁹ *Dietrich* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J); X7 (2013) 248 CLR 92, 116 [37] (French CJ and Crennan J, dissenting in the result).

²⁰ See eg *Dietrich* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J), 353 (Toohey J).

²¹ See X7 (2013) 248 CLR 92, 133 [89] (Hayne and Bell JJ).

²² See *Nicholas v The Queen* (1998) 193 CLR 173, 273 [235]–[236] (Hayne J).

²³ Cf *Haddara* [2014] VSCA 100, [72] (Redlich and Weinberg JJA): “it may be that if the requirements of fairness can be traced to implicit guarantees in Ch III of the Constitution, as [Gaudron J suggests in *Dietrich* (1992) 177 CLR 292, 363], any attempt to exclude the power of a judge to remedy unfairness by excluding evidence may also founder on constitutional grounds” (emphasis added).

²⁴ See *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174, 191 [63] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ): “the fact that criminal proceedings in Australia are adversarial in character, and accusatorial by nature, obliges the maintenance of those standards of fairness. That maintenance has long rested on the powers of a trial judge, and appellate courts, in discharging their responsibilities to ensure that an accused has a fair trial and to prevent an abuse of the court’s process in criminal proceedings” (citations omitted).

PART VI ESTIMATED HOURS

21. It is estimated that no more than 10 minutes will be required for the presentation of the oral argument of the Attorney-General.

Dated: 5 May 2015

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ANNEXURE: STATUTORY DISCRETIONS TO EXCLUDE EVIDENCE OR PRESERVING THE EXISTENCE OF A DISCRETION (FOOTNOTE 5 ABOVE)

Evidence Act 2008 (Vic)

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time; or
- (d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence.

Note: This section does not limit evidence of family violence that may be adduced under Part IC of the *Crimes Act 1958*.

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

138 Exclusion of improperly or illegally obtained evidence

(1) 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.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—

- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that

the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

- 10
- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—
- (a) the probative value of the evidence; and
 - (b) the importance of the evidence in the proceeding; and
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
 - (d) the gravity of the impropriety or contravention; and
 - (e) whether the impropriety or contravention was deliberate or reckless; and
 - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
 - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
 - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.
- 20

Note: The *International Covenant on Civil and Political Rights* is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth.

Evidence Act 1929 (SA)

34KD—Court's general discretion to exclude evidence

- 30
- (1) In prescribed proceedings the court may refuse to admit a statement as evidence of a matter stated if—
- (a) the statement was made otherwise than in oral evidence in the proceedings; and
 - (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.
- (2) Nothing in this section derogates from any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise).
- (3) In this section—
- 40 **"prescribed proceedings"** means—
- (a) proceedings for a criminal offence; or
 - (b) proceedings under the *Serious and Organised Crime (Control) Act 2008*.

Evidence Act 1977 (Qld)

130 Rejection of evidence in criminal proceedings

Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.

Evidence Act 1906 (WA)

112 Exclusion of evidence in criminal proceeding

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Sections 109 to 114 [*examination of witnesses outside the State*] do not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the accused.