IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S119 of 2019

BETWEEN:

STATE OF NEW SOUTH WALES
Appellant

and

BRADFORD JAMES ROBINSON
Respondent

10

APPELLANT'S SUBMISSIONS

PART I: PUBLICATION

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

PART II: ISSUE

2. The issue in this case is whether it is an implied requirement of s 99(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (**LEPRA**) that, at the time of an arrest by a police officer under that provision, the officer must have decided and intend to charge the arrested person. The appellant (**the State**) asserts not; the respondent (**Mr Robinson**) asserts so.

20

PART III: SECTION 78B NOTICE

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: CITATIONS OF DECISIONS BELOW

4. Primary judge (**J**): [2017] NSWDC 289; (2017) 26 DCLR (NSW) 106.

5. Court of Appeal (**CA**): [2018] NSWCA 231.

PART V: FACTS

6. At 5pm on 22 December 2013, Mr Robinson was arrested, without warrant, by a New South Wales police officer, Constable Adam Smith, pursuant to s 99(1) of LEPRA. Mr Robinson was detained until 6.18pm, when he was released without charge following an interview with Constable Smith. Mr Robinson contended that the arrest and subsequent detention was unlawful. The State accepted that it was vicariously liable in the event that this was so (J [1] [**CAB 6**]).

30

McCabe Curwood Pty Ltd
Level 38, MLC Centre
19 Martin Place
Sydney NSW 2000
DX 145 SYDNEY

Telephone: 02 9261 1211
Fax: 02 9261 2336
Email: amanda.kmetyk@mccabecurwood.com.au
Ref: AJK:79407
Amanda Kmetyk

7. Section 99(1) relevantly provides:

> A police officer may, without a warrant, arrest a person if:
>
> (a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and
>
> (b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons …

There follow nine sub-paras of para (b) expressly enumerating various reasons.

10 8. Judge Taylor of the District Court rejected Mr Robinson's claim. The judge found that:

(a) Constable Smith suspected that Mr Robinson had committed an offence (breach of an apprehended violence order) (J [14] [**CAB 12**]);

(b) this suspicion was held on reasonable grounds (J [24] [**CAB 14**]);

(c) Constable Smith believed that the arrest was reasonably necessary to ensure Mr Robinson's appearance before a court (s 99(1)(b)(iv)) (J [44] [**CAB 19**]) and because of the nature and seriousness of the offence (s 99(1)(b)(ix)) (J [47]–[48] [**CAB 20**]);

(d) Constable Smith did not arrest Mr Robinson merely for the purpose of questioning him or investigating the suspected offence (J [50] [**CAB 21**]); and

20 (e) Constable Smith was not acting in bad faith (J [49]–[50] [**CAB 20–21**]).

Those findings were unchallenged.

9. However, a majority of the Court of Appeal (McColl and Basten JJA; Emmett AJA dissenting) allowed an appeal. The majority did so on the sole ground that, though not stated in s 99, it was an implied requirement that, at the time of the arrest, the arresting police officer must have formed a positive intention to "charge"[1] the arrested person with an offence. Because Constable Smith "had not determined at the time of the arrest whether he would charge Mr Robinson" (J [38] [**CAB 17**], also J [23] [**CAB 14**]), the majority concluded that the arrest was unlawful.

---

[1] This is a loose way of describing the process under the *Criminal Procedure Act 1986* (NSW) by which criminal proceedings are commenced against a person by a police officer, ie by the police officer issuing and then filing a court attendance notice (*Criminal Procedure Act*, ss 47(1), 48, 172(1), 173). A criminal proceeding may be commenced by the Attorney General or Director of Public Prosecutions by indictment without committal (*Criminal Procedure Act*, s 8(2)). That course is not open to a police officer.

10. Each member of the Court of Appeal gave separate reasons for judgment and there are significant differences within the reasons of the majority. The key features of the majority's reasons may be summarised as follows.

11. *First*, it is explicit in the reasons of McColl JA (CA [121] [**CAB 68**], see also [43]–[50] [**CAB 48–50**]) that her Honour approached the question of construction of s 99 through the prism of the principle of legality and her Honour's understanding of previous cases bearing upon other statutory arrest provisions. Without referring expressly to the principle of legality, Basten JA took a similar approach by reference to what his Honour concluded was the general meaning of the word "arrest" in "legal terminology" (CA [136]–[145] [**CAB 71–75**], [161]–[177] [**CAB 81–85**]). The majority's reasons thus proceeded on the basis that clear words were required for s 99 to be construed as permitting an arrest without the arresting officer having, at the time of the arrest, a positive intention to charge the arrested person.

12. *Secondly*, McColl JA emphasised "the common law requirement that the person arrested should be informed of the reason for the arrest" (CA [51] [**CAB 50**]). Her Honour said: "An obligation to inform the person arrested without warrant of the charge on which he or she is being arrested, presupposes that a decision has been made at the time of the arrest to so charge the person" (CA [58] [**CAB 52**]). In this regard, and unlike Basten JA (CA [141] [**CAB 73**], [158] [**CAB 80**]), her Honour appears to have had in mind a need to do more than convey to the arrested person the *conduct* in respect of which they are arrested. This may explain why her Honour said that Constable Smith "did not inform Mr Robinson of the reason for his arrest" (CA [128] [**CAB 69**]) when the evidence was that he did so.[2] Mr Robinson did not contend otherwise at trial.

13. *Thirdly*, both McColl JA and Basten JA referred to the incongruity which the State submitted would arise if, in addition to the state of mind expressly required by s 99(1)(a) — reasonable suspicion that an offence has been committed — there were an implied requirement that the arresting officer intend to charge the arrested person. This would arise because the state of mind necessary to prefer a charge without being at risk of damages for malicious prosecution is not reasonable suspicion but reasonable and probable cause. McColl JA concluded (CA [75]–[96] [**CAB 56–61**]) that there was no

---

[2] "Q. Did you tell him what he was being arrested for? A. Yes. Q Which was? A. Breaching the apprehended violence order." (T 38.15–19). A copy of the relevant page of transcript is annexed.

difference between the two states of mind. In contrast, Basten JA accepted that there was a "discrepancy" and noted the curiosity that this "potential anomaly" had not been squarely addressed in previous cases. The way in which his Honour thought that this incongruity was to be resolved is not clear (CA [146]–[153] [**CAB 75–78**], see also [160] [**CAB 80–81**]).

14. *Fourthly*, McColl JA (CA [55]–[57] [**CAB 51–52**]) and Basten JA (CA [186]–[187] [**CAB 88–89**]) considered that their conclusion was supported by what the Court of Appeal had said in *Dowse v New South Wales*.[3] They also considered it consistent with the previous decision of that Court in *R v Walsh*:[4] there, while the junior officers performing the arrest had no intention to charge, that intention was held by a senior officer (CA [98]–[105] per McColl JA [**CAB 62–64**], [155]–[156] per Basten JA [**CAB 78–79**]). In contrast, each considered that the previous decision of the Court in *Clyne v New South Wales*[5] should not be followed (CA [106]–[114] per McColl JA [**CAB 64–66**], [182]–[185] per Basten JA [**CAB 87–88**]). Basten JA also relied upon the reasons of this Court in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*[6] (***NAAJA***) (CA [178]–[181] [**CAB 85–87**], [187] [**CAB 89**]).

15. *Fifthly*, both McColl JA (CA [60]–[63] [**CAB 52–53**]) and Basten JA (CA [165]–[166] [**CAB 82–83**]) considered that the fact that s 99(3) imposes an obligation on the arresting officer to take the arrested person before an "authorised officer"[7] as soon as practicable supported their view.

16. *Sixthly*, neither McColl JA nor Basten JA considered that their conclusion was inconsistent with the terms of s 99(1)(b),[8] s 105[9] or Pt 9 of LEPRA;[10] nor with the amendments made to those provisions by the *Law Enforcement (Powers and*

---

3 (2012) 226 A Crim R 36.

4 Unreported, 18 October 1990.

5 [2012] NSWCA 265.

6 (2015) 256 CLR 569.

7 Defined in s 3(1) of LEPRA to mean a Magistrate or Children's Magistrate, a registrar of the Local Court, or an employee of the Attorney General's Department authorised by the Attorney General.

8 CA [66]–[70] per McColl JA [**CAB 54**], [174] per Basten JA [**CAB 84–85**].

9 CA [71] per McColl JA [**CAB 55**], [175]–[176] per Basten JA [**CAB 85**].

10 CA [72]–[74] per McColl JA [**CAB 55–56**], [169]–[173] per Basten JA [**CAB 83–84**].

Responsibilities) Amendment (Arrest without Warrant) Act 2013 (NSW) (**2013 Amendment Act**) or the extrinsic material relating to those amendments.[11]

PART VI: ARGUMENT

17. The question in this matter is, and is only, a question of construction of s 99 of LEPRA. It is therefore to be resolved, in the ordinary way, by reference to the text of the provision, considered in context — including the Act as a whole, the purpose of the provision and extrinsic material — and having regard to accepted presumptions of statutory interpretation where applicable.[12]

18. If, properly construed, the effect of the provision differs from previous provisions, or from provisions construed in previous cases, it must nonetheless be given effect on its terms. As explained further below, it is an error to approach s 99 on the assumption that it must operate in the same way as previous arrest provisions unless there is some clear indication to the contrary, especially in circumstances where it is clear that the form of s 99 at issue was introduced into LEPRA deliberately so as to broaden the powers of police to arrest without warrant. In any event, the previous case law does not support the proposition for which the majority of the Court of Appeal relied upon it.

(a) Text

19. The task of statutory construction must begin with the text.[13] It is convenient to consider the text not only of s 99(1) but of other relevant provisions of LEPRA, as it is, of course, necessary to construe s 99(1) as part of the Act as a whole.[14] There are at least six textual matters pointing away from the recognition of any implied requirement of the kind identified by the majority of the Court of Appeal.

20. *First*, the text of s 99(1) is to the contrary (CA [243] per Emmett AJA [**CAB 106**]). It specifies, with care, two requirements for the power of arrest without warrant to be available, both of which involve the state of mind that a police officer must hold. The

---

[11] CA [115]–[120] per McColl JA [**CAB 66–67**], [168] per Basten JA [**CAB 83**].

[12] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[13] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] per *curiam*.

[14] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]–[70] per McHugh, Gummow, Kirby and Hayne JJ.

officer "may, without a warrant, arrest a person" if those conditions are met. The conclusion of the majority of the Court of Appeal involves recognising a further, unexpressed, requirement as to the police officer's state of mind which could have been, but which was not, included in s 99(1).

21. *Secondly*, that unexpressed requirement is *inconsistent* with that for which express provision is made (CA [244]–[249] per Emmett AJA [**CAB 106–107**]). Section 99(1)(a) makes it a condition for a lawful arrest that "the police officer *suspects* on reasonable grounds that the person is committing or has committed an offence" (emphasis added). As Lord Devlin put it, in a passage quoted by this Court in *George v Rockett*,[15] suspicion means "a state of conjecture or surmise where proof is lacking". Or, to quote Kitto J's explanation, which was also quoted in *George v Rockett*:[16]

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as *Chambers's Dictionary* expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

Importantly, as noted in *George v Rockett*,[17] "[t]he facts which can reasonably ground a suspicion may be *quite insufficient reasonably to ground a belief*".

22. The mental state referred to in s 99(1)(a) is thus of a significantly less decided quality than that which is required in order to commence a prosecution against the arrested person. To avoid a potential malicious prosecution claim at common law — which continues to be part of the law of New South Wales — the police officer who commences the prosecution must have "reasonable and probable cause". While that expression cannot be defined exhaustively,[18] it encompasses notions such as that the prosecutor must "believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted",[19] and that the circumstances "would reasonably lead any ordinary prudent and cautious man, placed

---

[15] (1990) 170 CLR 104 at 115 per *curiam*, quoting *Hussien v Chong Fook Kam* [1970] AC 942 at 948.

[16] (1990) 170 CLR 104 at 115–116 per *curiam*, quoting *Queensland Bacon Pty Ltd v Reeves* (1966) 115 CLR 266 at 303.

[17] (1990) 170 CLR 104 at 115 per *curiam* (emphasis added).

[18] *A v New South Wales* (2007) 230 CLR 500 at [81] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

[19] *Sharp v Biggs* (1932) 48 CLR 81 at 106 per Dixon J, quoted in *A v New South Wales* (2007) 230 CLR 500 at [64] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".[20] If "the facts of the particular case are such that the prosecutor may be supposed to know where the truth lies ... the relevant state of persuasion will necessarily entail a conclusion (a belief of the prosecutor) about guilt".[21]

23. Contrary to the view of McColl JA (CA [75]–[96] [**CAB 56–61**]), the mental state in s 99(1)(a) is thus not the same as that required in order to commence a prosecution against the arrested person. Her Honour was in error to conclude that, in *Williams v The Queen*,[22] Mason and Brennan JJ assimilated the two mental states. Rather, their Honours considered that, in practice, a police officer who had the requisite reasonable suspicion to arrest would *ordinarily* have reasonable and probable cause to commence a prosecution.[23] However, as accepted by Basten JA (CA [149] [**CAB 76**]), this expressly recognises the difference between the mental states and the very tension upon which the State relies.

24. Further, as elaborated below, given the expansion of the grounds for arrest now included in s 99(1)(b), even if Mason and Brennan JJ's view that reasonable suspicion would ordinarily give reasonable and probable cause was correct in relation to the Tasmanian provisions with which their Honours were concerned, it is not in relation to s 99. And where the permissible time between arrest and charging has been expanded by statute — as it has been here by Pt 9 — there is a correlative increase in the chance of new evidence becoming available prior to charging, such as to affect what state of mind may reasonably be held with respect to an arrested person. As discussed below, enabling the gathering of further evidence is a key aim of Pt 9.

25. On the view of the majority of the Court of Appeal, a police officer must have formed an intention to charge in order to effect a lawful arrest without warrant. But that would mean that the mental state necessary to effect a lawful arrest without warrant is *not* that stated in s 99(1)(a), namely "suspicion on reasonable grounds". It is, in fact, the higher standard of "reasonable and probable cause". The majority's conclusion is thus

---

[20] *Hicks v Faulkner* (1878) 8 QBD 167 at 171 per Hawkins J, quoted in *A v New South Wales* (2007) 230 CLR 500 at [83] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

[21] *A v New South Wales* (2007) 230 CLR 500 at [71] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

[22] (1986) 161 CLR 278.

[23] (1986) 161 CLR 278 at 300.

inconsistent with the text of s 99(1)(a). No such difficulty arises if the police officer need only have reasonable and probable cause at the time of charging, as they may reach that state of satisfaction in the reasonable time allowed between arrest and charge (time which is subject to the regime in Pt 9); and if they do not, no charge will be preferred and the arrested person will be released (CA [251] per Emmett AJA [**CAB 108**]).

26. *Thirdly*, various of the reasons specified in s 99(1)(b) for which a police officer may arrest a person are inconsistent with the conclusion of the majority of the Court of Appeal — in particular, sub-paras (i)–(iii), (v)–(vi) and (viii)–(ix). The breadth of s 99(1)(b) was deliberately expanded by the 2013 Amendment Act. It includes a number of matters more directed to the investigation of an offence, or more generally to protection of the public, as opposed to preferring a charge (CA [265] per Emmett AJA [**CAB 112**]).

27. For example, where a police officer comes upon an apparent crime scene (eg an injured or dead person, or a break-in), and a person present seeks to flee upon seeing the officer, the officer may readily form a reasonable suspicion that the person committed an offence and be satisfied that arrest is necessary to stop the person's flight (sub-para (ii)). But, without further investigation, it is difficult to see how the officer could form a positive belief as to guilt, let alone have reasonable and probable cause to commence a prosecution. On the view of the majority of the Court of Appeal, such a person could not be arrested. The same may be said about arrest to establish a person's identity (sub-para (iii)) or obtain property in their possession (sub-para (v)). Likewise, an officer coming to a scene of domestic violence might readily form a reasonable suspicion that the apparent aggressor has committed an offence and that it is necessary to arrest them to protect the apparent victim (sub-paras (i), (viii), (ix)). Again, without further investigation, it is difficult to see how the officer could have reasonable and probable cause to commence a prosecution. McColl JA's view (CA [70] [**CAB 54–55**) that these grounds for arrest are necessary only where a charge is intended is unconvincing.

28. *Fourthly*, contrary to the majority's view (CA [60] per McColl JA [**CAB 52–53**], [165]–[166] per Basten JA [**CAB 82–83**]), the fact that s 99(3) imposes a duty on a police officer, as soon as reasonably practicable, to take the arrested person before an authorised officer to be dealt with according to law says nothing, on its face, about the officer's state of mind at the time of the arrest. Section 99(3) simply prescribes how the officer must *act*, *after* the arrest; it says nothing about a state of mind, let alone at the

time of arrest (CA [256] per Emmett AJA [**CAB 109–110**]). So much was held in relation to the predecessor provision by a differently constituted Court of Appeal in *Clyne*.[24] Conversely, if s 99(3) is said to support the implication accepted by the majority below, it is unclear how it fits with the possibility (recognised by the majority in their discussion of *Walsh*) that the intent to charge is possessed not by the arresting officer but a superior, for s 99(3) is directed only to the arresting officer.

29. Likewise, nothing turns on what must be said to an arrested person at the time of the arrest. At the relevant time, that was prescribed by s 201(1)(c) of LEPRA as being "the reason for the exercise of the power".[25] That reflected the common law requirement that the arrested person be informed of the "true ground" of the arrest, ie the *conduct* for which the person was arrested.[26] That does not presuppose a decision by the arresting officer as to whether a charge will be preferred (cf CA [58] per McColl JA [**CAB 52**]). So much is evidenced by the fact that, as explained in paragraph 12 above, contrary to what McColl JA said, Constable Smith complied with this requirement.

30. There is a note to s 99(3), inserted by the 2013 Amending Act, referring to s 105.[27] That leads to the *fifth* point. Section 105(1) provides that a police officer may discontinue an arrest at any time; s 105(2) makes it clear that this can be for any reason, including because it is more appropriate to deal with the matter in some other manner, including by issuing a warning or caution (ie without commencing proceedings); and s 105(3) — inserted by the 2013 Amendment Act — provides expressly that this may occur "despite any obligation under this Part to take the arrested person before an authorised officer to be dealt with according to law". The reference in s 105 to discontinuing an arrest recognises that arrest is a process, which commences at the moment an arrest begins and continues through the subsequent detention.[28] Section 105 makes clear that the subsequent detention may be discontinued.

---

[24] [2012] NSWCA 265 at [62]–[63].

[25] Section 201 was repealed and substituted by sched 2 of the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* (NSW) with effect from 1 November 2014: see Commencement Proclamation, 29 October 2014, published LW 31 October 2014 (2014 No 697).

[26] *Christie v Leachinsky* [1947] AC 573 at 591–593 per Lord Simonds. See also CA [141] per Basten JA [**CAB 73**].

[27] The words of s 99(3) had, prior to the 2013 Amendment Act, been in s 99(4), but without the note.

[28] *Michaels v The Queen* (1995) 184 CLR 117 at 126 per Brennan, Deane, Toohey and McHugh JJ. See also *Holgate-Mohammed v Duke* [1984] AC 437 at 441 per Lord Diplock.

31. Read together, ss 99 and 105 thus contemplate that an arrested person *might or might not* be brought before an authorised officer to be dealt with according to law, depending on the circumstances. That being so, it can hardly be a requirement that the arresting officer intend that the arrested person *will* be brought before an authorised officer (CA [253] per Emmett AJA [**CAB 109**]). The provisions recognise precisely the kind of uncertainty on this point on Constable Smith's mind at the time of the arrest. This is not answered by pointing to the fact that s 105 is premised on a prior lawful arrest (cf CA [71] per McColl JA [**CAB** 55]): the presence of s 105 sheds light on what a lawful arrest requires, for the scheme must be construed as a whole "on the prima facie basis that its provisions are intended to give effect to harmonious goals".[29]

32. *Sixthly*, these submissions are underscored by the fact that s 99(4) — also inserted by the 2013 Amendment Act — now provides that a person lawfully arrested under s 99(1) may be detained under Pt 9. Within Pt 9, s 114(1) permits the detention of the person for the "investigation period" in s 115 for the purpose specified in s 114(2), namely "for the purpose of investigating whether the person committed the offence for which the person was arrested". The investigation period specified in s 115(1) is that which is reasonable having regard to all the circumstances (specified in s 116), not exceeding the "maximum investigation period", defined in s 115(2) (as it stood at the relevant time)[30] to be four hours or such longer period as extended by a "detention warrant". Section 114(4) provides that a person detained under s 114(1) must be released (whether unconditionally or on bail) within the investigation period or brought before an authorised officer or court within that period or as soon as practicable after its end. As made clear by ss 109(b) and s 114(5), this qualifies the requirement of s 99(3). Part 9 sets out various other protections for a person detained pursuant to s 114(1).

33. It is inconsistent with the facility for which Pt 9 provides that an arresting officer must, at the time of arrest, have concluded already that the arrested person will be charged. The notion underlying Pt 9 is that, following arrest, further investigation may be required *before* the commencement of criminal proceedings, and that the period of

---

[29] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] per McHugh, Gummow Kirby and Hayne JJ.

[30] Aspects of Pt 9 were amended by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* (NSW) with effect from 1 September 2016: see Commencement Proclamation, 24 August 2016, published LW 26 August 2016 (2016 No 536). Among other things, the maximum investigation period without detention warrant was increased to six hours (sched 1 [9]).

detention may need to be prolonged to permit that to occur (CA [257] per Emmett AJA [**CAB 110**]). As with s 105, reference to Pt 9 is not answered by the fact that its engagement is premised on a prior lawful arrest (cf CA [72]–[73] per McColl JA [**CAB 55**], [170]–[172] per Basten JA [**CAB 84**]). The scheme must be construed as a whole and, accordingly, the terms of Pt 9 shed light on what a lawful arrest entails. Indeed, the equivalent provisions of the predecessor legislation were relied upon by a differently constituted Court of Appeal in *Clyne*.[31]

34. None of this is to suggest that an intent to investigate *per se* suffices as the basis for an arrest. The dual requirements of s 99(1) must be met. Further, consistently with the ordinary approach to statutory powers, it may be accepted that any exercise of s 99(1) must not be in bad faith (though this may add little to the express requirement of s 99(1)(a) that that state of mind be formed on *reasonable* grounds and the express requirement of s 99(1)(b) that the officer is satisfied that the arrest is *reasonably* necessary for one of the grounds referred to). Nor does any prospect of indefinite or punitive detention arise. An arrest is the start of a process, which process must end within a limited time either by the arrested person being taken before an authorised officer or released pursuant to s 105. That one of the two possible endings to the process is a charge does not mean that there must be a positive intent to charge at the start.

35. In light of these textual matters, even if the majority of the Court of Appeal was correct to begin with the principle of legality or a technical meaning of the word "arrest" supportive of the conclusion which the majority reached, the scheme of LEPRA manifests a clear contrary intention. In any event, for the following reasons, the majority's starting point was in error.

(b) Context: Previous cases

36. A critical starting point for the majority of the Court of Appeal was previous decisions relating to earlier statutory provisions empowering arrest by police officers without warrant. McColl JA derived from those cases a proposition that that a fundamental common law principle, which attracts the principle of legality, is that arrest must be for the purpose of charging a person (CA [121] [**CAB 68**], see also [43]–[50] [**CAB 48–50**]). Basten JA derived from those case a proposition that the word "arrest" has a

---

[31] [2012] NSWCA 265 at [62]–[63].

particular technical legal meaning to the same effect (CA [136]–[145] [**CAB 71–75**], [161]–[177] [**CAB 81–85**]). These starting points involve error.

(i) What the "arrest" cases actually decide

37. At common law, a constable could arrest, without a warrant, any person whom the constable suspected on reasonable grounds of having committed a felony.[32] Such a constable was required to take the arrested person before a justice to be examined as soon as the constable reasonably could.[33] The common law did not permit a constable to arrest a person without warrant on reasonable suspicion of having committed a misdemeanour.[34] In its original form, s 352(2)(a) of the *Crimes Act 1900* (NSW) was held by this Court in *Nolan v Clifford*[35] likewise to apply only to indictable offences. It was amended in 1924 to overcome this limitation.[36]

38. Accordingly, by 1933, s 352(2) stood in the following form:

> Any constable may without warrant apprehend,
>
> (a) any person whom he, with reasonable cause, suspects of having committed any such offence or crime,
>
> (b) any person lying, or loitering, in any highway, yard, or other place during the night, whom, he, with reasonable cause suspects of being about to commit any felony,
>
> and take him, and any property found upon him, before a justice to be dealt with according to law.

39. In this form, the provision was described by the Full Court of the Supreme Court of New South Wales in 1933 as being "merely to reinforce the common law principle" that a constable had to take the arrested person without delay before a justice.[37] No time being specified in the concluding words of the provision, and consistently with the common law, the arrested person had to be taken before a justice to be dealt with according to law without "unreasonable" delay.[38]

---

[32] *Nolan v Clifford* (1904) 1 CLR 429 at 444 per Griffith CJ.

[33] *Wright v Court* (1825) 4 B & C 596 [107 ER 1182].

[34] *Nolan v Clifford* (1904) 1 CLR 429 at 444 per Griffith CJ.

[35] (1904) 1 CLR 429.

[36] *Crimes (Amendment) Act 1924* (NSW), s 12.

[37] *Clarke v Bailey* (1933) 33 SR (NSW) 303 at 309 per Davidson J.

[38] *Bales v Parmeter* (1935) 35 SR (NSW) 182 at 189 per Jordan CJ.

40. In 1935, in *Bales v Parmeter*,[39] Jordan CJ (with whom the rest of the Full Court agreed) said of s 352(2) that "arrest and imprisonment cannot be justified merely for the purpose of asking questions" or "making investigations in order to see whether it would be proper or prudent to charge [the arrested person] with the crime", but could only be for the purpose "of taking [the arrested person] before a magistrate to be charged and dealt with according to law". An arrest for the former purposes was for an improper purpose and therefore unlawful.[40] Jordan CJ repeated those sentiments a decade later in *R v Jeffries*.[41] Similar views were expressed in subsequent years by other intermediate appellate courts on similarly expressed provisions.[42]

10 41. These cases provide some support for the view that the arrest provisions with which they were concerned required the arresting officer to have decided to charge the arrested person at the time of the arrest. However, in none was attention directed to the point identified in paragraphs 21–25 above, namely the differing mental states relevant to the decision to arrest and the decision to prosecute.

42. In this Court, in *Williams v The Queen*,[43] the issue was not that presented in this case but rather, in the context of a Tasmanian statute, whether bringing the arrested person before a justice could be delayed merely to allow further questioning. In this context, all members of the Court approved the proposition, stated in *Bales v Parmeter*, that arrest under the Tasmanian provisions could not be *merely* for the purpose of
20 questioning the arrested person.[44] However — unsurprisingly, given that the point was not in issue — the reasoning does not support the proposition that an arresting officer must have decided to charge the arrested person at the time of the arrest. Indeed, on close analysis, the reasons of the Court are to the contrary.

---

[39] *Bales v Parmeter* (1935) 35 SR (NSW) 182 at 188–190.

[40] See also *Ex parte Evers; Re Leary* (1945) 62 WN (NSW) 146.

[41] (1946) 47 SR (NSW) 284 at 287–8.

[42] See, eg, *Drymalik v Feldman* [1966] SASR 227 (FC); *R v Banner* [1970] VR 240 (FC).

[43] (1986) 161 CLR 278. The matter came before this Court obliquely in *McLachlan v Mesics* (1966) 116 CLR 340. The case concerned an allegation that an arrest under s 352(1) of the *Crimes Act* was unlawful because the arresting police officer had no intention of charging the arrested person (ie the alleged inference was not that the arresting police officer was unsure of whether or not to charge the arrested person, as here; rather, it was that the arresting police officer had decided not to charge the arrested person but arrested them in any event). The Court held that the evidence did not support this factual inference and did not analyse the legal position further.

[44] (1986) 161 CLR 278 at 283, 285 per Gibbs CJ, 295, 297, 299 per Mason and Brennan JJ, 305–306, 313 per Wilson and Dawson JJ.

43. Gibbs CJ said: "A police officer who has arrested a person reasonably suspected of having committed a crime must be allowed time to make such inquiries as are reasonably necessary either to confirm or dispel the suspicion upon which the arrest was based".[45] His Honour noted, without apparent disapproval, English cases supporting "the view that practicability is 'a slightly elastic concept' which has to take account of an unavoidable delay in obtaining sufficient evidence to charge the arrested person".[46]

44. Unlike Gibbs CJ, the other members of the Court disapproved the English cases.[47] However, in the course of doing so, Mason and Brennan JJ commented on *John Lewis & Co Ltd v Tims*,[48] which they described as holding "that suspected shoplifters might be detained for a reasonable time *until a superior official can decide whether to prosecute*".[49] In this context, Mason and Brennan JJ accepted that:[50]

> *Reasonable time must be allowed for making a decision to prefer a charge* and preferring it, but that case does not decide that time should be allowed for questioning a suspect or for investigating the available evidence.

Their Honours thus accepted, in terms, that a decision whether or not to prefer a charge may not have been made prior to arrest. Likewise, Wilson and Dawson JJ said: "Obviously there must be reasonable time to formulate and lay appropriate charges for the purpose of bringing a person before a justice. The common law allows time for this and it is covered by the words 'as soon as is practicable'."[51] What was impermissible was "that the police should be able to detain an arrested person to enable them, by further investigation, to gather the evidence necessary to support a charge".[52]

45. Accordingly, in *Williams* no member of the Court held that a decision to charge must have been made prior to arrest for an arrest under the Tasmanian provisions to be valid. To the contrary, while the purpose of the arrest could not be *merely* to make further inquiries or ask further questions, and the arrested person had to be brought before a justice as soon as reasonably practicable, within that time, a decision could be taken

---

45 (1986) 161 CLR 278 at 284.

46 (1986) 161 CLR 278 at 284.

47 (1986) 161 CLR 278 at 296–297, 299 per Mason and Brennan JJ, 308–311 per Wilson and Dawson JJ.

48 [1952] AC 676.

49 *Williams* (1986) 161 CLR 278 at 298 (emphasis added).

50 (1986) 161 CLR 278 at 298 (emphasis added).

51 (1986) 161 CLR 278 at 312.

52 (1986) 161 CLR 278 at 312–313.

whether or not to charge. This understanding also resolves the apparent tension between the mental state required for arrest and prosecution: reasonable suspicion is sufficient for arrest and, if reasonable and probable cause is not reached by the expiry of the time within which it is reasonably practicable to bring the arrested person before a justice (or such longer period as any statutory regime provides), the arrested person must be released without charge.

46. Finally, the point presently in issue was not considered in *NAAJA*. That case presented no question about the subjective mental state of the arresting officer at the time of arrest. The issue was whether the legislation at issue should be construed as displacing the requirement to bring an arrested person before a Justice of the Peace or a court as soon as reasonably practicable. The passage in *NAAJA* quoted by McColl JA at CA [121] [**CAB 68**] must be read in this context. Neither that passage, nor *NAAJA* as a whole, decides the point presently at issue (cf CA [187] per Basten JA [**CAB 187**]).

(ii) What is to be drawn from the "arrest" cases

47. Against this background, there is no basis to conclude that the word "arrest" when used in s 99(1) of LEPRA carries with it a technical legal meaning which requires that the subjective purpose of the arresting officer must, at the time of arrest, be to charge the arrested person. In its most basic sense, as a matter of both ordinary and legal language, "an arrest consists in the seizure or touching of a person's body with a view to his restraint".[53] There may also be an arrest by words and submission by the arrested person.[54] Lord Diplock said that "arrest" was a "term of art" that carried with it the notion of a continuing act and also a requirement that the person taken into custody knows the reason for their arrest.[55] But, as the analysis of the cases above shows, it is not a word which carries with it a subjective mental state on the part of the arresting officer of the kind identified by the majority of the Court of Appeal.

48. For the same reason, there is no basis in the "arrest" cases to identify a "fundamental freedom from arrest for a purpose other than charging", which attracts the principle of

---

[53] *Spicer v Holt* [1977] AC 987 at 999 per Viscount Dilhorne, 1005 per Lord Edmund-Davies; *Lewis v Norman* [1982] 2 NSWLR 649 at 655 per Enderby J.

[54] *Alderson v Booth* [1969] 2 QB 216 at 220–221 per Lord Parker; *Lewis v Norman* [1982] 2 NSWLR 649 at 655 per Enderby J; *R v O'Donoghue* (1988) 34 A Crim R 397 (NSWCCA) at 401 per Hunt J; *Eatts v Dawson* (1990) 21 FCR 166 (FC) at 176–177 per Morling and Gummow JJ; *Wilson v New South Wales* (2010) 278 ALR 74 (NSWCA) at [59]–[61] per Hodgson JA.

[55] *Holgate-Mohammed v Duke* [1984] AC 437 at 441.

legality. In any event, that would be to state the fundamental freedom, protected by the principle of legality, too specifically. The relevant fundamental freedom, protected by the principle of legality, is *liberty*.[56] It is for that reason that a provision permitting arrest will be construed, absent a clear indication to the contrary, as requiring the arrested person to be brought as soon as reasonably practicable before a person empowered to order their release. This does not mean that there is a fundamental freedom from arrest under a regime which does not provide for the arrested person to be brought as soon as reasonably practicable before a person empowered to order their release. Rather, the protection afforded by the principle of legality to liberty has the consequence that an arrest provision will be construed so as to minimise the encroachment on liberty by construing it as requiring, absent a clear indication to the contrary, that the arrested person be brought as soon as reasonably practicable before a person who can consider whether their liberty should be restored. This, not any further principle about the mandatory subjective purpose of an arresting officer, was the critical constructional consideration in *NAAJA*.[57] The issue of when an arrested person must be brought before an authorised officer is the subject of careful, express provision in LEPRA.

49. Thus, even if the arrest cases *were* properly to be understood as adopting a construction of the previous arrest provisions which required the arresting police officer to intend, at the time of the arrest, to charge the arrested person, that would not yield a rule that *any* arrest provision must be construed as subject to such a requirement absent a clear indication to the contrary. The particular construction, in a particular case, mandated by the principle of legality in order to protect the fundamental value of liberty does not itself become a fundamental value or principle that can be departed from in future cases only by clear words. Such an approach would fall into the error of treating cases on

---

[56] See, eg, *Williams* (1986) 161 CLR 278 at 292 per Mason and Brennan JJ; *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520 per Mason CJ, Wilson and Dawson JJ, 523 per Brennan J, 532 per Deane J; *NAAJA* (2015) 256 CLR 569 at [23] per French CJ, Kiefel and Bell JJ, [94]–[96] per Gageler J, [222] per Nettle and Gordon JJ.

[57] (2015) 256 CLR 569 at [21]–[28] per French CJ, Kiefel and Bell JJ, [222]–[223] per Nettle and Gordon JJ.

previous provisions as binding with respect to legislation in a different form,[58] substituting the decisions for the text of the legislation.[59]

50. Finally, even if the arrest cases *did* justify the proposition that an arrest provision must, as a result of the meaning of the word "arrest" or the principle of legality, be construed as requiring the arresting officer to intend at the time of the arrest to charge the arrested person absent a clear indication to the contrary, the statutory scheme here manifests such an indication. That is so not only from the textual matters identified in paragraphs 19–35 above; it is supported by the following further contextual matters.

(c) Context: The 2013 Amendment Act

51. As made clear in the relevant Second Reading Speech,[60] the 2013 Amendment Act gave effect to recommendations made in a report by former Shadow Attorney General Mr Andrew Tink and former Police Minister the Hon Paul Whelan[61] (**Tink/Whelan Report**). These extrinsic materials are legitimately to be taken into account in construing s 99(1) of LEPRA.[62]

52. The differences between ss 99 and 105 before and after the amendments are material for present purposes. The comparison assists to identify the mischief to which the changes were directed.[63]

53. *First*, the previous s 99(3), which was expressed as a limitation on the power of arrest "for the purpose of taking proceedings for an offence", was deleted and incorporated within s 99(2). That sub-section no longer makes any reference to the purpose of taking proceedings for an offence.[64] That immediately weakens the connection between the

---

[58] cf *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at [40] per McHugh, Gummow and Heydon JJ; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [25] per Crennan, Bell, Gageler and Keane JJ.

[59] cf *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [31] per *curiam*, quoting *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 at [62] per McHugh J.

[60] Second Reading Speech for the Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 October 2013, p 25093.

[61] *Review of the Law Enforcement (Powers and Responsibilities) 2002, Report Part 1 – Section 99*, 25 October 2013.

[62] *Interpretation of Act 1987* (NSW), s 34; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

[63] *CIC Insurance* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

[64] cf *Dowse v New South Wales* (2012) 226 A Crim R 36 (NSWCA) at [26]–[27] per Basten JA, commenting on the previous provision.

arrest and the taking of proceedings which lies at the heart of the conclusion of the majority of the Court of Appeal below.

54. *Secondly*, the reasons for which a police officer may consider arrest of a person to be reasonably necessary in the new s 99(2) were considerably expanded. It may be accepted that, as noted in the Tink/Whelan report, "[t]he intent of the legislation is not to allow police the power to arrest in order to investigate" (p 4). But that goes to the absence of a generic intent to that effect. At least some of the new grounds for arrest are more readily directed to the investigation of an offence, as opposed to its prosecution. Indeed, the very next paragraph of the report states, with respect to the sub-paragraph about arresting to obtain property, that the provision "has been drafted in such a way as to allow police to arrest to obtain property, without conferring a *wider* power allowing police to arrest for the purpose of investigation" (emphasis added). It is implicit that it was recognised that the power to arrest to obtain property could properly be used for the purpose of investigation.

55. *Thirdly*, the broadening of the grounds for arrest explains the introduction of sub-s (3) into s 105, and the insertion of the cross-referencing note into s 99(3). If the reason for an arrest is, say, to establish the identity of the arrested person, that may be achieved relatively swiftly and the arrest then discontinued without bringing the person before an authorised officer. So much was noted in the Tink/Whelan report at p 7 (CA [266] per Emmett AJA [**CAB 112–113**]; cf [116] per McColl JA [**CAB 66–67**], [168] per Basten JA [**CAB 83**]).

56. *Fourthly*, and consistently, new s 99(4) made clear the link between an arrest under s 99(1) and detention for the purposes of investigation under Pt 9, as explained in paragraphs 32–33 above. In this regard, it may be noted that the protections which Pt 9 affords are precisely the kinds of legislative innovations which, in *Williams*, Mason and Brennan JJ,[65] and Wilson and Dawson JJ,[66] thought were necessary if the power to arrest without warrant were to be held to permit delay in bringing the arrested person before a justice to allow further investigation.

---

[65] (1986) 161 CLR 278 at 296.

[66] (1986) 161 CLR 278 at 312–313.

57. These features of the new s 99, as compared to its predecessor, sit uneasily with an insistence that the purpose of arrest must be to bring the arrested person before an authorised officer as soon as reasonably practicable.

58. At a more general level, in the Second Reading Speech, the Premier said the purpose of the 2013 Amendment Act was "to ensure that police have clear, simple and effective powers of arrest to protect the community".[67] Section 99 should, if possible, be construed to give effect to this purpose.[68] The Premier continued:[69]

> The job of front-line police is already hard enough, without being made harder by having to deal with legal complexities. The legislation seeks to "uncuff" the police so they can handcuff criminals. Concerns with section 99 were also raised in a receipt decision by Judge Colon of the District Court.[70] In his judgement, Judge Conlon argued that section 99 was in urgent need of amendment. He stated:
>
> > The community would be entitled to be concerned that the provisions of this section do not take account of the extreme variables that confront police officers in dealing with aggressive, violent situations, especially when persons are under the influence of drugs and alcohol.
>
> Judge Conlon went on to state:
>
> > This section needs to be re-legislated by persons who have a realistic appreciation of the many volatile situations in which it is desirable for arrest to be effected by police officers.

59. The Tink/Whelan report had likewise observed that the then current terms of s 99 were "complicated and difficult to apply" and "lack ... clarity" (p 2), and that the recommended new s 99 was "clearer and simpler" and "more transparent" (p 3; see also p 6). Recognition of implied limitations, going beyond the terms of s 99, is anathema to these objects (CA [267] per Emmett AJA [**CAB 113**]).

(d) Conclusion

60. Just as the task of statutory construction must begin with the text, "[s]o must the task of statutory construction end".[71] The construction adopted by the majority of the Court of

---

[67] Second Reading Speech, Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 October 2013, p 25092.

[68] *Interpretation Act 1987* (NSW), s 33.

[69] Second Reading Speech, Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 October 2013, p 25093.

[70] *Johnson v The Queen*, unreported, Wollongong District Court, 27 September 2013.

[71] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] per *curiam*.

Appeal is not supported by, and is inconsistent with, the text of s 99 and LEPRA as a whole as it now stands. Further, on proper analysis, it is unsupported by the previous cases.

61. In 1823, Best J said: "I think we are bound to take care that the law relating to the duty of constables shall rest upon broad, plain, intelligible principles".[72] While that case concerned arrest under warrant, the sentiment is equally applicable to arrest without warrant. Section 99 of LEPRA sets out, carefully, the requirements for a lawful arrest without warrant in clear words. It does so following a deliberate broadening and simplification of those requirements by Parliament. Its plain words should not be cut down and complicated by the introduction of the implied limitation recognised by the majority of the Court of the Appeal. On the primary judge's findings, Constable Smith's arrest of Mr Robinson met all of the requirements stated in s 99(1). To be lawful, it did not need to meet the further requirement identified by the Court of Appeal.

PART VII: ORDERS

62. Orders should be made as set out in the State's notice of appeal [**CAB 121**], as follows:

(a) Appeal allowed, with costs.

(b) Set aside the orders made by the Court of Appeal and, in their place, order that the appeal to that Court be dismissed, with costs.

PART VIII: ORAL ARGUMENT

63. The State estimates that it requires some 2 hours for the presentation of its oral argument in chief, and some 20 minutes in reply.

Dated: 30 May 2019

J K Kirk
Eleven Wentworth
T: 02 9223 9477
kirk@elevenwentworth.com

P D Herzfeld
Eleven Wentworth
T: 02 8231 5057
pherzfeld@elevenwentworth.com

[72] *R v Weir* (1823) 1 B & C 287 at 295 [107 ER 108 at 111].

Q. Tell us about that?
A. I was back at Day Street Police Station doing another matter down in the charge room, and this was about 5pm, and someone told me that Mr Robinson was up at the front counter.

Q. Can you recall who told you that?
A. No.

Q. What did you do?
A. I walked up to the front counter and I walked out into the foyer area. I walked up to a gentleman that I now know as Mr Robinson, I introduced myself and placed him under arrest.

Q. Did you tell him what he was being arrested for?
A. Yes.

Q. Which was?
A. Breaching the apprehended violence order.

Q. Immediately before you placed him under arrest, could you tell the Court on what basis did you place him under arrest then?
A. Well obviously the same reasons as before, that he'd, after speaking with Senior Constable Colakides she stated that he was interstate, I had a further reason that I couldn't assure his appearance at court.

WOODBURY: Your Honour, I just formally object again if it's put on any other basis than what he was told.

HIS HONOUR: Well it's only in as evidence of what he's told, rather than as proof of the fact.

BATEMAN: Yes.

WOODBURY: Rather than me jumping up, your Honour, I think any, if he's told anything from Constable Colakides, I assume it's on that basis.

BATEMAN: Yes, it's only put on that basis.

HIS HONOUR: Very well.

BATEMAN

Q. Did you then invite Mr - sorry, you took Mr Robinson into the custody area, that's right?
A. That's correct.

Q. And the formal custody management records were prepared?
A. Correct.