

Concurrent Criminal Offences After *Dickson v R*

Jeremy Gans*

INTRODUCTION

In a year of lengthy, fiercely argued and widely discussed High Court judgments on constitutional law, *Dickson v R* [2010] HCA 30 – a brief unanimous decision applying one of the federal Constitution’s more mundane provisions to invalidate a minor part of Victoria’s criminal law – seems eminently ignorable.¹ This paper warns that this short judgment is long on potential, mostly annoying consequences.

The first Part describes the case’s background and, through it, Australia’s system of concurrent (i.e. overlapping) criminal offences. The second Part explains how the High Court applied s. 109 of the Constitution to upset that system. The third Part explores the potential impact of the court’s ruling on Australian criminal law.

CONCURRENT CRIMINAL OFFENCES BEFORE *DICKSON*

Concurrent criminal offences

At 5.30 a.m. on 20th January 2004, 7.87 million Marlboro cigarettes sat in a padlocked cage in a locked and alarmed warehouse in Port Melbourne.² The cigarettes were owned by Feel Good Australia Pty Ltd. The cage and padlock were rented by the Australian Customs Service, which had seized the cigarettes two weeks earlier as part of Operation Rydalmer. The warehouse and alarm were run by Dominion Group (Vic.) Pty Ltd, which leased the storage space to Customs. Under both Victorian and federal criminal law, the cigarettes belonged to all three entities:³

[P]roperty shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

* Associate Professor, Melbourne Law School.

¹ In a recent survey of the last 30 years of s. 109 jurisprudence, Rumble briefly asserts that *Dickson* is consistent with continuing primacy of intention as a test of inconsistency: G Rumble, ‘Manufacturing and avoiding Constitution section 109 inconsistency: law and practice’ (2010) 38 *Federal LR* 445, 458. Also, a recent review of 2010 High Court criminal law rulings dismissed the case as having ‘little jurisprudential significance, in that the outcome simply turned on the application of clear existing legal principles’: M Bagaric, ‘The High Court on crime in 2010: analysis and jurisprudence’ (2011) 35 *Criminal Law Journal* 5. However, each paper focuses exclusively on what the Court said it was doing. This paper will argue that *Dickson* carries entirely different implications once you look what the Court actually did and what it said about why it did it. Bagaric does (at p. 17) note that ‘Given the expansion of Commonwealth criminal laws, it is likely that principles applied in *Dickson* will be tested in relation to other State charges.’ Indeed.

² These facts are largely taken from the Court of Appeal decision, *R v Dickson* [2008] VSCA 271. A little inconsequential colour (e.g. the name of the original owner of the goods, and the number of cigarettes) is added from the transcripts of argument before the High Court and contemporaneous media articles.

³ *Crimes Act 1958* (Vic), s. 71(2) c.f. *Criminal Code* (Cth), s. 130.2. Feel Good’s days as a stakeholder in the cigarettes were numbered due to *Customs Act 1901* (Cth), ss. 205C & 205G. The cigarettes were seized on 5th January 2004. Assuming Feel Good never filed a claim for their return, the Commonwealth became the exclusive rights holder on 5th February 2004. By then, legal claims to the cigarettes were a moot point.

Feel Good had a ‘proprietary right’ in the cartons, while Customs had ‘possession’ and Dominion had ‘control’.⁴ Criminal law’s concept of ‘property... belonging to any person’ is broadly defined in order to increase the reach of provisions that criminalise things that people do with other people’s property. For example, Feel Good would be guilty of theft if it stole its own cigarettes back from Customs. Likewise, if Dominion absconded with Feel Good’s goods or, indeed, if Customs snuck in and took back the cartons to avoid paying Dominion’s storage fee. More importantly, it means that a criminal trial concerning shared goods needn’t turn into a property law puzzle. This is (or was) one of the joys of Australia’s system of concurrent criminal law.

Alas, ‘possession or control’ of the cigarettes was just about to change hands. A week earlier, Dominion’s staff had received a call explaining that Customs wanted to save money on storage costs by destroying the cigarettes. As the relevant Customs officer was on holiday, the caller arranged for Dominion’s employees to disable the alarm and break the padlock. At 5.30 a.m. on the 20th, four men arrived in pick-up trucks with obscured logos and covered licence plates, citing the need to avoid surveillance by potential thieves. After presenting a fax of a Customs consignment order, they watched Dominion’s staff load 30,000 cartons of cigarettes onto their trucks. They then drove off, promising to return for the remaining cartons. The men’s actions more or less ran the gamut of an entire Division of Victoria’s *Crimes Act*: theft, burglary, aggravated burglary, obtaining by deception, falsification of documents, handling stolen goods, money laundering.⁵ And there is (or was) no legal bar to charging the thieves with each and every one of these offences. According to a 1998 High Court decision:⁶

The decision about what charges should be laid and prosecuted is for the prosecution. Ordinarily, prosecuting authorities will seek to ensure that all offences that are to be charged as arising out of one event or series of events are preferred and dealt with at the one time.

That is, in order to ensure that offenders’ full criminality can be both adjudicated and punished, Australian prosecutors are permitted, and even encouraged, to throw the book at them.⁷ More importantly, prosecutors aren’t forced to determine which charge is the ‘right’ one in advance of the trial (or, indeed, the verdict.) Again, this is (or was) a boon of the overlapping nature of Australian criminal law.

What made the cigarettes an especially hot item (and ultimately triggered a constitutional wet blanket) was the third aspect of Australia’s concurrent criminal law. The fact that Customs, by virtue of its forfeiture warrant, was one of the stakeholders in the cartons opened the way to the application of federal criminal law.⁸ The cigarettes, imported goods subject to customs duty, fell within the federal trade and taxation powers, and thus within the scope of offence provisions under both the federal *Customs Act* (moving goods subject to customs control, unlawful assembly, smuggling, evasion of duty) and the federal *Criminal Code* (theft, receiving or burglary of Commonwealth property, taking,

⁴ *Dickson v The Queen* [2010] HCA 30, [11]. Or maybe it was the other way around: *Dickson v The Queen* [2010] HCATrans 222. It doesn’t matter.

⁵ *Crimes Act 1958* (Vic), ss. 74, 76, 77(1)(b), 81, 82, 83A, 88, 181, 194, 197(3). See also the subsequently enacted s. 192B.

⁶ *Pearce v R* [1998] HCA 57, [30]. See also *Sentencing Act 1995* (WA), s. 11(1).

⁷ The reason why it is important to ensure that charges cover all aspects of an incident is the rule in *R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383, which bars sentencing courts from taking into account conduct committed in the course of a proven offence that would amount to another unproven offence. On the other hand, the Court added in *Pearce*, charging ‘unnecessarily’ may be an abuse of process.

⁸ C.f. *Criminal Code* (Cth), s. 131.9 and, in particular, its exemption of s. 131.1(b), defining federal theft.

obtaining, general dishonesty, conspiracy to defraud the Commonwealth, forgery, impersonation.)⁹ The federal *Crimes Act* expressly provides:¹⁰

Where an act or omission constitutes an offence:

- (a) under 2 or more laws of the Commonwealth; or
- (b) both under a law of the Commonwealth and at common law;

the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws of the Commonwealth or at common law, but shall not be liable to be punished twice for the same act or omission.

So, federal prosecutors could also throw the book at the thieves.

But can both the state and federal books be thrown? Federal law provides (extensively) for joint investigations,¹¹ and (tersely) against joint double jeopardy,¹² but omits any express endorsement of joint prosecutions. This issue became a live one in 1973, after Ken Blacklock smashed a glass door at a TAA office at Brisbane's airport. The resulting indictment for vandalism was so vague that the Barwick Court was asked to sort out whether he had actually been charged with the federal or state offence.¹³ It found an easy way out of the dilemma, holding that s. 109 prevented the state offence from being applied in a Commonwealth place, because its penalty differed from the identical federal offence that also applied. Although lower courts soon distinguished the ruling for non-identical offences,¹⁴ the Gibbs Committee commenced its review of federal criminal law in 1987 by broaching the possibility of the federal parliament vacating the field of theft law completely to avoid state courts being forced to apply federal criminal law to minor thefts touching on federal property.¹⁵ Fortunately, Constable Day had, by then, crashed his car at Enoggera Barracks. Two years later, he tried and failed to convince the Mason Court to quash his state drink driving conviction in favour of a defence drink driving offence. The Court unanimously declared that the *Blacklock* decision only applied to federal offences that were 'intended to be exhaustive statements of criminal liability'.¹⁶ Returning to the question of federal theft law in 1990, the Gibbs Committee resolved to retain the crime, in part because:¹⁷

inclusion of a provision on the lines of section 76F of the *Crimes Act* stating that the relevant provisions were not intended to exclude or limit the concurrent operation of a State or Territory would remove much of the doubt.

⁹ *Customs Act 1901* (Cth), ss. 33, 33C, 231, 232A, 233(1)(d), 234(1)(h); *Criminal Code* (Cth), ss. 131.1, 132.1, 132.4, 132.5, 132.7, 132.8, 134.1, 134.2, 135.1, 135.4, 137.1, 137.2, 148.1, 400.3, 474.14.

¹⁰ *Crimes Act 1914* (Cth), s. 4C(1).

¹¹ *Crimes Act 1914* (Cth), ss. 3AA, 3D and, more generally, Part IAA.

¹² *Crimes Act 1914* (Cth), s. 4C(2).

¹³ *R v Loeventhal; Ex parte Blacklock* [1974] HCA 36; (1974) 131 CLR 338

¹⁴ *R v Flanders* [1976] Qd R 153.

¹⁵ Review of Commonwealth Criminal Law, *Discussion Paper No. 6: What Offences Should Be Included in the Future Consolidating Law*, October 1987.

¹⁶ *McWaters v Day* [1989] HCA 59; (1989) 168 CLR 289.

¹⁷ Review of Commonwealth Criminal Law, *Fourth Interim Report*, November 1990, [19.12]. *Crimes Act 1914* (Cth), s76F provided that: 'Sections 76D and 76E are not intended to exclude or limit the concurrent operation of any law of a State or Territory.' The Gibbs Committee did not refer to *McWaters v Day*, but instead cited *R v Credit Tribunal ex parte GMAC* (1977) 137 CLR 545, 563; [1977] HCA 34, which concerned a similar provision in the Trade Practices Act and where Mason J referred back to his remark in *Blacklock* that the type of inconsistency discussed in that case could be avoided by a clear statement that there was no intention to cover the field.

After that, the Model Criminal Code Officers Committee took over the reform process and drafted an expansive federal code,¹⁸ replete with new property offences and myriad savings provisions for state laws, which became federal law in 2001.¹⁹ The issue of s. 109 faded, with courts repeatedly rejecting s. 109 challenges on the basis of the savings provisions²⁰, leaving state and federal prosecutors to sort out amongst themselves which jurisdiction's offences would be used. Most importantly, state prosecutors didn't have to worry about the many different ways conduct could be caught by a criminal offence or the possibility that a federal charge might be laid instead of or in addition to a state one.

Enter the French High Court.

Before *Dickson*

But first, enter Kevin Dickson, an ex-AFP officer (or, on some accounts, an-ex AFP shooting club secretary²¹) with sufficient inside knowledge of Customs operations to render the cigarette heist somewhat less of an embarrassment. According to one jury, Dickson was the man behind the men in the pick-up truck. Although it took two days for Dominion and Customs to even notice that they (and Feel Good) had been robbed, the money trail was still warm. The police's inquiries soon led them to Jian Peng Wang, who had just finished fencing millions of cigarettes (and who was complaining bitterly that they were only Marlboros, rather than the Benson and Hedges he'd be promised.) Police spent the next two months observing Wang meeting with others (including Dickson) across Melbourne. They listened in as various parties assured each other that everything was 'good' and how they would soon be 'happy', worried privately about their associates' *bona fides* and ultimately divvied out hundreds of thousands of dollars. But when they were all arrested in mid-March, only Wang and one other driver admitted to being involved in the cigarette heist.

The prosecution soon found itself struggling to make a case against Dickson and two of his associates. A disastrous first trial in 2006 saw the trio cleared of all but one charge: a single count that Dickson conspired to steal the cigarettes, where his jury hung. The inconvenient acquittal of all of Dickson's alleged co-conspirators forced the prosecution to recast the charges to cover a wider conspiracy, resulting in further delays but ultimately netting Dickson's conviction and six year sentence in 2008. Dickson's complaints about this tortured process were given short shrift by Victoria's Court of Appeal,²² but they attracted the High Court's interest in 2010. When Dickson's counsel, Tony Danos, sought special leave to argue points of evidence law raised by the repeat conspiracy charge, Hayne J instead encouraged him to attack the conspiracy indictment

¹⁸ Including a suite of federal property offences: Model Criminal Code Officers' Committee, *Report: Chapter 3: Theft, Fraud and Bribery Related Offences*, December 1995 c.f. *Criminal Code Amendment (Theft, Fraud and Bribery Related Offences) Act 2000* (Cth), inserting a new Chapter 7 into the *Criminal Code 1995* (Cth).

¹⁹ *Criminal Code Act 1995* (Cth).

²⁰ Most recently, *R v El Helou, El Helou v R* [2010] NSWCCA 11, [22]-[23]. Curiously, this case was cited in *Dickson*, but only in relation to its discussion of the distinction between direct and indirect inconsistency and Barwick's 'greater obligations' test, and not for its upholding of the federal drug laws: *Dickson v R* [2010] HCA 30, note 18.

²¹ S Milovanovic, 'ATO contacts suspected in tobacco-stealing ring', *The Age*, 17th March 2004.

²² *R v Dickson* [2008] VSCA 271

itself, which was arguably inconsistent with the earlier acquittals.²³ Ultimately, this new ground and several others were referred to an enlarged bench.²⁴

But a funny thing happened on the way to Dickson's full court hearing. Fronting up to argue the conspiracy point and hoping to get his client (who was nearing the end of his non-parole period) bailed, Danos was confronted by a seven-judge bench and an immediate query from the Chief Justice about 'questions' the Court had sent him about federal theft law.²⁵ Dickson and his colleagues had been prosecuted under Victorian law, with the prosecution relying on the simplest 'belonging to another' argument available, possession:²⁶

KEVIN JOHN DICKSON at Melbourne and divers other places in the said State between the 22nd day of December 2003 and the 20th day of January 2004 conspired with TROY DAMON HOLMES, ANTHONY PURDY, JIAN PENG WANG and/or person or persons to the Director unknown and agreed to pursue a course of conduct which would involve the commission of an offence by them namely to steal a quantity of cigarettes belonging to the Dominion Group (Vic.) Proprietary Limited.

However, six years after this decision was made, the High Court wanted to revisit it. The judges peppered Danos and his opponent, Victoria's Chief Crown Prosecutor Gavin Silbert, with queries about exactly who (other than, of course, anyone with a mobile phone and a pick-up truck) had access to the cage in the warehouse. Danos and Silbert seemed bemused by all the talk of padlocks, codes and perimeters. As Danos pointed out to the Court, the 'belonging to another' element of theft law is only important in cases where the property might belong to either the alleged thief or no-one at all. Given that the cigarettes in this case clearly fell within neither category, both defendant and prosecutor were at one that the Court's queries went nowhere:

...I spoke with my learned friend, Mr Silbert, last Friday in relation to the matter and we discussed that matter and they indicated that they would be putting in a response that would deal with the matter. I understood the nature of the response that was being put in and we did not have any issue with those matters, your Honour.

In response to Heydon J's suggestion that he was neglecting his client's interests, Danos explained that the s. 109 issue raised by federal theft law had been considered and discarded at the trial:

[P]art of the problem I would have faced if I had taken this point at the trial is that that may have dealt with that presentment but I would have then faced a presentment relating to a Commonwealth offence and simply adjourned the matter. As I say, it was never an issue from the defence of the applicant that there had been a theft of the cigarettes so that whether from a practical point of view as far as this applicant was concerned anything was achieved at that point in time, whereas obviously at this stage it would be a totally different position...

²³ This ground raises questions about the meaning of both the common law stated *R v Darby* [1982] HCA 32; (1982) 148 CLR 668 and *Crimes Act 1958* (Vic), s. 321B, including the possible application of Victoria's rights Charter.

²⁴ *Dickson v The Queen* [2010] HCATrans 105

²⁵ *Dickson v The Queen* [2010] HCATrans 181

²⁶ *R v Dickson* [2008] VSCA 271, [1]. This approach was not contested at trial. Indeed, the trial judge told the jury: 'In this case you have heard evidence that the subject cigarettes were in fact seized by Customs and placed in storage at their leased premises with the Dominion Group. I direct you as a matter of law, that for the purpose of the charge the cigarettes may be regarded as belonging to another and the reference to Dominion Group is encompassed within that expression.'; *Dickson v The Queen* [2010] HCATrans 181.

It is perhaps at this moment that Danos twigged that the High Court wasn't interested in whether or not Dickson's trial was actually fair, but was instead offering his client a completely unmeritorious 'get out of jail' free card. Nevertheless, Danos still sought fifteen minutes to think over whether to pursue the constitutional point. On his return, he said that he would take up the s. 109 ground but wanted to take a week to draft the application, citing the need for s. 78B notices. That was too slow for the High Court. After Gummow J declared that s. 78B didn't yet apply, Danos acquiesced to the Court's demand that he file the new application after lunch; however, French CJ instead proceeded to dictate the new special leave ground on the spot and – briefly interrupting his monologue to get Danos's assent – immediately granted special leave on that ground alone.

The way the Court later described all this in its judgment – that 'the appellant sought and obtained special leave to appeal on a ground based upon the operation of s 109 of the Constitution'²⁷ – is close to disingenuous. The real story of how Dickson's criminal appeal became a constitutional challenge is described here primarily because it shows that the challenge was entirely the High Court's own idea. Moreover, that wasn't because the Court picked up an issue that lesser institutions or mortals missed,²⁸ but rather because the defendant's lawyer considered the issue – at trial, in the lead-up to the High Court application and indeed during that application – and saw no merit in it, until the Court pressed him to change his mind. While the eventual result of the case may seem to confirm Heydon J's claim that Danos's lack of interest in the s. 109 argument served his client poorly, the barrister's reluctance can also be explained on a number of tactical bases: that a quashed conviction (via a constitutional challenge) isn't as good as an acquittal (via an appeal); that a fresh federal trial would give prosecutors a chance to avoid their earlier missteps (and, perhaps, state constraints like Victoria's rights Charter); that invalidity of Victoria's law of conspiracy to steal may diminish the force of the acquittals of Dickson's co-conspirators, thus allowing the Cth DPP to repeat its Victorian counterpart's conspiracy shenanigans with impunity; that pursuing a constitutional point would delay an already egregiously delayed case while his client remained in custody; and, perhaps, because Danos simply thought the High Court's proposed constitutional argument was silly. Whatever the reason, having arrived at the hearing expecting to argue a live criminal appeal, Danos left with his client's bail refused, some s. 109 reading set by Heydon J for homework²⁹ and an admonition from French CJ not to start counting his chickens.³⁰

(Having made this primary point, it is appropriate to make further observations not germane to the constitutional issue. As the High Court bar is notoriously loathe to make public criticisms of the Court, it seems important to note some questions raised by the Court's behaviour in this case:

- **Court initiation of legal arguments.** There is no doubt that it is appropriate for all courts, including the High Court, to raise legal points concerning the case

²⁷ *Dickson v The Queen* [2010] HCA 30, [7].

²⁸ E.g. *Fingleton v R* [2005] HCA 34, [4]; *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1, [50].

²⁹ The homework was *R v Credit Tribunal; Ex parte GMAC* [1977] HCA 34; 137 CLR 545, although the set reading (pp. 547-548) wasn't in the judgment itself but instead the summary of the unsuccessful argument of Malcolm McClelland QC for the plaintiff GMAC that 'It does not matter that the Commonwealth Parliament expressed an intention that the State law should remain operative. That intention must yield to s. 109.', which Mason rejected at pp. 562-564.

³⁰ Despite this admonition, Danos was told at the start of the next hearing to confine himself to the constitutional point: *Dickson v The Queen* [2010] HCATrans 222

before it that the parties didn't address. But is it appropriate for the Court to initiate a very general point in one criminal appeal that could have been but wasn't raised in earlier and later ones?³¹

- **Court pressure on parties.** Raising an issue is one thing. But is it ever appropriate for judges to push parties to adopt the points raised? If it is, when and how should this be done? In particular, is it appropriate to do so in circumstances where the parties have both clearly expressed their lack of interest after having been given timely notice of the Court's position?
- **Court drafting of applications.** Is it appropriate for any judge (let alone the Chief Justice of Australia), to literally dictate the content of an application by a party? And what are the consequences if the dictated ground is flawed?³²
- **Granting special leave on grounds not raised in lower courts.** It is settled law that the Court can hear appeals on fresh points, although it should only happen 'in exceptional circumstances'.³³ Should that power be exercised where the defendant admits that the point was considered and not raised at his trial? And is it appropriate for the Court to allow defendants a fresh appeal ground suggested by the Court itself, while simultaneously denying the same opportunity to similarly placed defendants raising their own arguments?³⁴
- **Section 78B notices in special leave applications.** Is it appropriate for the Court to grant special leave on a constitutional point where no s. 78B notices have been sent, in cases involving no urgency?³⁵ In particular, is such a course

³¹ An earlier example is *Taiapa v R* [2009] HCA 53, a drugs matter that could have been charged under Part 9.1 of the federal Code, and where the issue involved Queensland's duress defence, which is narrower than the federal Code's in several respects. A later example is *Momcilovic v The Queen & Ors* [2010] HCATrans 227, where special leave was granted four days after *Dickson's* final hearing and where the Court raised *Kable*, but not s. 109.

³² According to the transcript, French CJ's dictated special leave ground stated: 'That the Court of Appeal should have held that the cigarettes referred to in the presentment preferred against the applicant were Commonwealth property and that accordingly (a) theft of the cigarettes was not an offence against the law of Victoria, and (b) the presentment should have been quashed as not disclosing an offence'. However, *Dickson* was convicted of conspiracy to steal (not theft) and the eventual judgment turned on the federal and state definitions of conspiracy: *Dickson v The Queen* [2010] HCA 30, [8]. If this mistake was reflected in Danos's s. 78B notices, then that may explain why South Australia (the only other non-federal-code jurisdiction with a modern theft offence like Victoria's) was the sole state intervenor (even though all the states have conspiracy laws much like Victoria's).

³³ *Crampton v R* [2000] HCA 60.

³⁴ A recent example is another conspiracy appeal, where the defendant, who had already been granted special leave, belatedly raised a question about whether the offence of dealing in money that risked becoming an instrument of crime can apply when the crimes in question were structuring and evading tax on that very money. This question was significant both to the defendant's (upheld) convictions and more broadly, as this use of money laundering offences potentially implicated every instance of structuring or tax evasion in the country. The defendant candidly conceded that the point 'was not thought of' earlier: *Ansari v The Queen* [2009] HCATrans 315. The High Court refused special leave on the basis that 'the issue had not been raised below and this Court did not have the benefit of consideration by the Court of Criminal Appeal on the question': *Ansari v The Queen; Ansari v The Queen* [2010] HCA 18, [64]. The case could be perhaps distinguished from *Dickson* on the basis that the latter involved a constitutional point. But it is difficult to see why this makes a difference, especially as the Ansaris' point raised a fundamental flaw in their convictions.

³⁵ Justice Gummow told Danos: 'Well, you do not give the notices until you get a grant of special leave actually because there is no matter in the Court.' However, there was a surely 'cause pending in... the High Court' (i.e. *Dickson's* special leave application) that did seem to 'involve... a matter arising under the Constitution' (at least once Danos finally made his application, and perhaps when he indicated that he would pursue the argument the Court had raised), which would mean that it was actually 'the duty of the

appropriate when the point raised may be applicable to many other criminal convictions, so a precedent that permits all such defendants to belatedly challenge the legislative basis of their conviction in the High Court may well be of considerable concern to every Attorney-General in the country?

- **Court haste.** Is it appropriate to deny a party's request for a week to draft an application on a constitutional point that has only just been raised? Or to reject that party's offer to submit the application after lunch? Or, for that matter, to list a hearing on a constitutional point a mere month after it was first raised, when there is no urgency beyond those typical in criminal appeals?³⁶

Each of these points implicates not only the fairness of High Court processes, but also the quality of judicial decisions that arise as a consequence. It is hard to imagine that the flawed reasons for judgment the Court ultimately produced would have been the same if the Court had the benefit of lower court arguments or, at least, arguments by parties who felt some ownership of the points being debated.)

THE DECISION IN *DICKSON*

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail...

Only the Commonwealth and South Australia intervened in the relisted constitutional hearing, which was done and dusted in eighty-four minutes.³⁷ After that, the expanded bench of the Court took just three weeks to not only decide to quash Dickson's conviction, but to write, internally circulate, proofread and issue the reasons of seven judges for invalidating a long-standing Victorian law.³⁸ The Court's unanimous joint judgment came in at a little over 4300 words. Only half of those (roughly the same length as the first Part of this paper) were used to explain the Court's determinative holding.³⁹ Naturally, many of those words were simply extracts from earlier cases.

Because this paper's main purpose is to explore the ruling's impact, it will not review the earlier jurisprudence. What is important for present purposes is that the High Court took up Dixon J's test for direct inconsistency, stated in 1937's *The Kakariki*:⁴⁰

When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.

It then noted that the High Court in 1999, when it endorsed Dixon's test, also adopted Barwick CJ's gloss in 1968's *Blackley v Devondale Cream (Vic) Pty Ltd*:⁴¹

court not to proceed in the cause' (i.e. not to determine the application) unless the matter was both interlocutory and urgent (it was neither): *Judiciary Act 1903* (Cth), s. 78B. Indeed, French CJ took exactly that course in a special leave application just a month earlier, where he insisted that the court adjourn (and not determine) a special leave application raising s. 80's right to a jury trial (a section relied on by the High Court in *Dickson*) until the s. 78B notices were issued: *Ogawa v The Queen* [2010] HCATrans 168 c.f. *Ogawa v The Queen* [2010] HCASL 188, [7].

³⁶ The hearing where special leave was granted was on 27th July. The hearing of the appeal was on 31st August.

³⁷ *Dickson v The Queen* [2010] HCATrans 222. The hearing commenced at 10.17AM and ended at 11.41AM.

³⁸ *Dickson v The Queen* [2010] HCA 30. The hearing was held on 31st August. The judgment was released on 22nd September.

³⁹ *Dickson v The Queen* [2010] HCA 30, [11]-[30].

⁴⁰ *Victoria v Commonwealth* [1937] HCA 82; (1937) 58 CLR 618, 630 cited in *Telstra v Worthing* [1999] HCA 12, [28], and in turn in *Dickson v The Queen* [2010] HCA 30, [13].

Further, there will be what Barwick CJ identified as ‘direct collision’ where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided.

While Dixon’s formulation is unexceptional, Barwick’s carries the significant difficulty that most, if not all, state laws (and certainly nearly all state criminal laws) impose obligations additional to (and therefore greater than) those imposed by federal laws.⁴² While it’s correct that such further obligations could alter, impair or detract from a federal law, determining whether there actually is such an alteration, impairment or detraction requires a highly practical consideration of what would actually happen if both laws were ‘allowed to operate’.

However, the High Court in *Dickson* engaged in no such analysis. Indeed, its complete discussion of the two laws in issue took just 500 words⁴³ and consisted almost entirely of a list of differences between the two regimes (or, as the Court termed them ‘the exclusion by the federal law of significant aspects of conduct to which the State offence attaches.’⁴⁴) *Dickson* was convicted under s. 321(1) of the *Crimes Act 1958*, which provided:

Subject to this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will involve the commission of an offence by one or more of the parties to the agreement, he is guilty of the indictable offence of conspiracy to commit that offence.

Section 11.5 of the federal Code, the federal conspiracy offence, relevantly provided:

- (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.
- (2) For the person to be guilty:
 - ...(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
 - (a) withdrew from the agreement; and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

The Court spotted four ‘areas of liberty designedly left’⁴⁵ (using another Dixonian phrase) by s. 11.5: s. 11.5(1)’s limitation to offences carrying a 12 month or 200 unit penalty and

⁴¹ *Blackley v Devondale Cream (Vic) Pty Ltd* [1968] HCA 2; (1968) 117 CLR 253, 258-259, cited in *Telstra v Worthing* [1999] HCA 12, [27], and in turn in *Dickson v The Queen* [2010] HCA 30, [15].

⁴² Both *Blackley* and *Telstra* concerned overlapping obligations under federal and state employment law regimes.

⁴³ *Dickson v The Queen* [2010] HCA 30, [23]-[28].

⁴⁴ *Dickson v The Queen* [2010] HCA 30, [25].

⁴⁵ *Wenn v Attorney-General (Vic)* [1948] HCA 13; (1948) 77 CLR 84, 120, cited in *Dickson v The Queen* [2010] HCA 30, [25]. What Dixon actually said was: ‘To legislate upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up is, I think, an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise’. The discussion concerns the

the terms of each of ss. 11.5(2)(c) (overt acts), (5) (withdrawal) and (7) (offence-specific provisos).⁴⁶ This list merits four comments:

First, the Court's only analysis of the history, content, purpose or operation of these aspects of s. 11.5 was to refer back to one of its own judgments from four months earlier.⁴⁷

Section 11.5 of the Commonwealth Criminal Code received detailed consideration by this Court in *R v LK*. The extrinsic material considered in *R v LK* indicated that the narrower scope of s 11.5 reflects a deliberate legislative choice influenced by the work of what in *R v LK* were identified as the Gibbs Committee and the Model Criminal Code Officers Committee.

However, the cited discussion in *LK* was actually overwhelmingly to the effect that s. 11.5 as a whole intended no significant variation from the common law (something which the Dickson court noted was also true of s. 321.⁴⁸) In *LK*, the Court rejected the appellant's contention that the federal Code offence should be construed without reference to the earlier common law.⁴⁹ It relied on s. 11.5's history to show that the Gibbs Committee's 'proposals were intended generally to re-state existing principles while at the same time filling gaps, removing obscurities and correcting anomalies',⁵⁰ while MCCOC's draft provisions 'were intended to clarify, and in some instances to modify, the common law'.⁵¹ While it can scarcely be doubted that all aspects of s. 11.5 (and indeed the whole of Chapter 2 of the federal Code, or for that matter the entire federal statute book) were a 'deliberate legislative choice',⁵² there is nothing in *LK* to justify the assertion the listed matters were aimed at 'conferring a liberty'⁵³; indeed, only one of the listed matters was given any significant discussion, two were given a passing mention and one wasn't mentioned at all.⁵⁴

Second, none of the 'aspects of conduct' that are handled differently by s. 321 and s. 11.5 are remotely 'significant' in Australian criminal practice. Indeed, none of these matters has so far been the subject of any reported ruling in the decade s. 11.5 has been in operation. The restriction of federal conspiracy to 'non-trivial offences'⁵⁵ reflects bog-standard prosecution practice in all jurisdictions; no-one is ever charged with conspiring

limits of federal power., rather than the operation of s. 109. The term has been mentioned in only two other High Court judgments: *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* [1977] HCA 34; (1977) 137 CLR 545 (rejecting a s. 109 challenge) and *New South Wales v Commonwealth* [2006] HCA 52, [371] (upholding the validity of a federal law that expressly excluded state ones).

⁴⁶ *Dickson v The Queen* [2010] HCA 30, [26]-[28] c.f. [20].

⁴⁷ *Dickson v The Queen* [2010] HCA 30, [24], citing *The Queen v LK; The Queen v RK* [2010] HCA 1, [51]-[58] (French CJ), [96]-[107] (Gummow, Hayne, Crennan, Kiefel & Bell JJ).

⁴⁸ *Dickson v The Queen* [2010] HCA 30, [23].

⁴⁹ *The Queen v LK; The Queen v RK* [2010] HCA 1, [57], [107].

⁵⁰ *The Queen v LK; The Queen v RK* [2010] HCA 1, [99].

⁵¹ *The Queen v LK; The Queen v RK* [2010] HCA 1, [103].

⁵² But c.f. G Rumble, 'Manufacturing and avoiding Constitution section 109 inconsistency: law and practice' (2010) 38 Federal LR 445, 458, who assumes, without analysis, that the claim that the Commonwealth made a 'deliberate legislative choice' was actually a finding that the Commonwealth intended to override state laws.

⁵³ *Dickson v The Queen* [2010] HCA 30, [29]. Indeed, the Court expressly rejected an argument that these matters were elements of the offence and, therefore, attracted the Code's default fault and proof requirements: *The Queen v LK; The Queen v RK* [2010] HCA 1, [58], [131], [136].

⁵⁴ Only the overt act requirement is discussed in the paragraphs expressly cited by the High Court (at [55], [58] and, in passing, [97]). In other parts of the judgment, the exclusion of 'trivial offences' and the withdrawal defence are briefly mentioned respectively at [131] and [136]. The application of defences, provisos etc is not mentioned at all in *LK*.

⁵⁵ The description is the High Court's: *The Queen v LK; The Queen v RK* [2010] HCA 1, [131], [141].

to jay-walk or double park. The ‘overt act’ requirement (which can be satisfied by wholly innocuous conduct, like googling Dominion’s address,⁵⁶ by any party to the conspiracy) likewise simply reflects the practicalities of proving a conspiracy.⁵⁷ The ‘withdrawal defence’ (which, the High Court itself noted in *LK* may well be implicitly available as a defence to state conspiracy charges⁵⁸) is exceedingly narrow and onerous; to use it in this case, Dickson would have had to have unequivocally pulled out of the heist and tipped off Customs before any of the conspirators did a single positive act to further the plan. Finally, s. 11.5(7) is a technical provision that provides expressly for what will typically be implied by ordinary statutory interpretation.⁵⁹ None of this is surprising. As the Court itself ruled in *LK*, the heart of s. 11.5 is its first sub-section, which the Court held was intended to be and therefore was (apart from the exclusion of trivial offences) identical to the common law of conspiracy. The remaining subsections mainly reflect the federal drafters’ desire to say expressly what the common law and established practice said implicitly, much as you would expect in a contemporary reform statute.

Third, obviously, none of the listed items mattered at all in Dickson’s trial. The offence he allegedly conspired to commit – theft – carries a ten-year penalty under both state and federal law and, indeed, is probably the classic conspiracy offence. The parties to the conspiracy did all manner of ‘overt acts pursuant to the agreement’, including actually making off with the cigarettes. Dickson didn’t argue that he had withdrawn from the conspiracy (and such a claim, if nothing else, could be easily disproved by the police surveillance of his conduct after the theft.) And state and federal laws define theft entirely through definitions and elements, rather than the device of specific defences or provisos that is managed by s. 11.5(7). Of course, in all these respects, Dickson’s trial was probably like every other conspiracy trial in Australia, federal or state.

Finally, it is strange to rely on any of these differences to conclude, as the High Court did, that:

The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law.

For starters, at least two of the differences (s. 11.5’s exclusion of non-trivial offences and its picking up of offence-specific provisos) are totally inapplicable to ‘the presentment upon which the appellant was convicted’ and, indeed, to any charge of conspiracy to steal.⁶⁰ In terms of the remaining differences, the Court’s analysis of ‘the federal law’ addressed only a single federal provision – s. 11.5 – and totally ignored the many other federal provisions that could apply to the cigarette heist. Notably, all of s. 11.5’s other supposed protections for alleged conspirators could be side-stepped by charging Dickson

⁵⁶ The ‘overt act’ requirement is long-standing in the US, where a leading text observes: ‘For example, the act of writing a letter or making a telephone call pursuant to an unlawful agreement, the lawful purchase of an instrumentality to cover the offense, or attendance at a lawful meeting, can qualify as the overt act... [T]he allegation and proof of a single overt act by any party to a conspiracy is sufficient basis to prosecute every member of the conspiracy, including those who may have joined the agreement after the act was committed.’: J Dressler, *Understanding Criminal Law* (4th ed. LexisNexis, 2006.)

⁵⁷ Indeed, the ability to prove a crime by multiple people based on the pattern of conduct of one or more of the group is one of the chief reasons that prosecutors like charging conspiracy.

⁵⁸ *The Queen v LK; The Queen v RK* [2010] HCA 1, [136].

⁵⁹ Indeed, s. 11.5(7) and similar provisions potentially expand the criminal law, as they make it harder to argue that a particular offence provision excludes the operation of inchoate offences like attempt and conspiracy: c.f. *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569.

⁶⁰ That is, because theft attracts a 10 year-sentence and is defined exclusively through elements, not defences or other qualifying provisions.

with the federal Code's unique offence of general dishonesty, sometimes referred to as a 'conspiracy of one', which lacks any requirement of an 'overt' act or a withdrawal defence.⁶¹

In a separate, earlier part of its judgment, the High Court mentioned a further difference between the federal and state conspiracy laws:⁶²

[T]he case for inconsistency between the two conspiracy provisions with which this appeal is concerned is strengthened by the differing methods of trial the legislation stipulates for the federal and State offences, particularly because s 80 of the Constitution would be brought into operation. In the present case, the jury trial provided by the law of Victoria under s 46 of the *Juries Act* did not require the unanimity which, because s 4G of the Commonwealth *Crimes Act* would have stipulated an indictment for the federal conspiracy offence, s 80 then would have mandated at a trial of the appellant.

In contrast to the substantive differences between s. 11.5 and s. 321, this procedural distinction is certainly a practical point of contrast between federal and state conspiracy charges, albeit only in close, contested trials (and not in Dickson's trial, where the jury verdict was unanimous.⁶³) But it would simply be perverse to label this as an 'area of liberty designedly left' by federal law. The unanimity requirement in federal trials is not set by any federal law, but rather (contrary to the High Court's analysis) by s. 46 of the Victoria's *Juries Act*;⁶⁴ indeed, Victoria has consistently required unanimous verdicts in federal matters since Federation.⁶⁵ Of course, the Victorian parliament has no choice but to require unanimous verdicts for federal matters because, as *Cheatle* revealed in 1993, s. 80 of the Constitution (an imperial law) would otherwise invalidate a majority federal verdict.⁶⁶ Federal parliament has not spoken at all on whether majority verdicts are allowed. Rather, its sole role is to identify which prosecutions are tried by jury⁶⁷, a choice appallingly permitted it by the High Court itself⁶⁸ and one in which it and Victoria are in furious agreement when it comes to conspiracy.⁶⁹ The High Court's reliance on differing constitutional requirements between federal and state jurisdictions as a basis for discerning inconsistency under s. 109 seems to be an indirect and illegitimate way of expanding the reach of purely federal restrictions. What next? Will the federal bar on

⁶¹ *Criminal Code* (Cth), s. 135.1. Rather, all that is required is that the defendant 'engaged in conduct', which can include both an act or an omission (at least when there is a statutory duty to act: *Poniatowska v DPP* (Cth) [2010] SASCFC 19, special leave granted to the High Court.)

⁶² *Dickson v The Queen* [2010] HCA 30, [20]. This was part of a grab-bag of 'further points [that] should be made at this stage' but c.f. at [22]: 'No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury.'

⁶³ *Dickson v The Queen* [2010] HCA 30, [2].

⁶⁴ *Juries Act 2000* (Vic), s. 46(4): 'A verdict that the accused is guilty or not guilty of murder or treason or an offence against section 71 or 72 of the *Drugs, Poisons and Controlled Substances Act 1981* or an offence against a law of the Commonwealth must be unanimous.'

⁶⁵ Majority verdicts were introduced in Victoria shortly after *Cheatle* by the *Juries (Amendment) Act 1993* (Vic). New s. 47(4) of the *Juries Act 1967* (Vic) provided: 'A verdict that the accused is guilty of murder or treason or of an offence against the law of the Commonwealth must be unanimous.'

⁶⁶ *Cheatle v R* [1993] HCA 44; (1993) 177 CLR 541.

⁶⁷ *Crimes Act 1914* (Cth), s. 4G.

⁶⁸ *Cheng v R* [2000] HCA 53.

⁶⁹ *Crimes Act 1958*, s. 2B c.f. s. 321, which deems conspiracy to be an indictable offence even if the offence conspired towards is a summary one. By contrast, *Hume v Palmer* [1926] HCA 50; (1926) 38 CLR 441 concerned an offence (breach of the Collision Regulations) which was tried summarily in NSW and on indictment federally. The federal offence now has a savings clause for state offences (*Navigation Act 1912*, s. 258(2B)).

regulating state banking be recast as an ‘area of liberty designedly left’ by federal offences concerning banking,⁷⁰ upon which the state criminal laws cannot tread?

So, why did the Court find a constitutional level of inconsistency in run-of-the-mill local variations in drafting and procedures that are not only largely trivial in practice but also entirely irrelevant in the case (and in some instances, the entire offence) before it? The apparent answer is that the Court’s concerns were not federalism, but rather:⁷¹

the importance, stressed by Gaudron, McHugh and Gummow JJ in *Croome v Tasmania*, and earlier by Gibbs CJ and Deane J in *University of Wollongong v Metwally*, of s 109 not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies.

In this passage, the High Court stretches s. 109’s supposed non-federal purpose beyond either of the two previous cases that asserted it. The little-praised *Metwally* decision involved the retrospective restoration of concurrent state laws, which a narrow majority held to be constitutionally forbidden even though federal retrospective laws (including criminal laws) are permitted.⁷² And the Court’s feted *Croome* decision wasn’t about ‘concurrent and cumulative duties and liabilities’ at all, but rather opposing ones; the case involved a clash between a lone jurisdiction’s imposition of criminal liability on citizens’ intimate behaviour and a landmark federal statute that imposed a duty on the state to refrain from precisely such interference.⁷³

In any case, the Court’s unsupported, implicit assertion that the almost-but-not-quite overlap of two different provisions criminalising agreements to steal federal property somehow implicates human rights is simply absurd. Citizens who are subject to prospective and concurrent criminal laws face a burden of working out their duties and liabilities that is no different to that faced by any prospective criminal most anywhere in the world: the simultaneous application of multiple overlapping rules telling them what not to do and providing for procedures and punishments to deal with alleged breaches. The High Court, by needlessly recasting some federal criminal laws as both prohibitions and permissions, does the cause of making the criminal law accessible no favours. Instead, the sole boon for citizens offered by *Dickson* is to ease the burdens of people planning crimes directed at the federal government by freeing them of the need to worry about the potential application of general state laws against planning crimes against anyone. As will be seen, in seeking to avoid this hypothetical and unlikely chilling effect on prospective federal criminals, the High Court has created an all too real one on the investigation and prosecution of every state crime.

...and the former shall, to the extent of the inconsistency, be invalid.

For all of its stated desire to assist citizens in understanding their duties and liabilities under concurrent criminal laws, the High Court in *Dickson* neglected to identify the extent of the inoperability (or even the precise identity) of the state criminal law in the case before it. That is, the Court ignored the second half of s. 109. After concluding that

⁷⁰ E.g. *Criminal Code 1995* (Cth), i.e. ss. 104.5(k) (application of terrorism offences), 390.2(4)(g) (application of criminal association offences), 400.2A(4)(c) (application of money laundering offences).

⁷¹ *Dickson v The Queen* [2010] HCA 30, [19].

⁷² *University of Wollongong v Metwally* [1984] HCA 74; (1984) 158 CLR 447 c.f. *Polyukhovich v Commonwealth* [1991] HCA 32; (1991) 172 CLR 501

⁷³ *Croome v Tasmania* [1997] HCA 5; (1997) 191 CLR 119

the facts of *Dickson* were an instance of ‘direct collision’ (and adding some dicta on indirect inconsistency), the Court simply issued the following order:⁷⁴

The balance of the special leave application should be dismissed. The appeal should be allowed and the order of the Court of Appeal of the Supreme Court of Victoria made 18 December 2008 set aside. In place thereof, leave to appeal against conviction and sentence should be granted, the appeal allowed, the presentment preferred against the appellant and his conviction on 21 February 2008 quashed, and the sentence imposed on 17 April 2008 set aside.

Clearly, there is now a hole in Victoria’s criminal law. But where is it and how big is it and how long has it existed and what would close it? There are many possibilities.

One end of the spectrum is suggested by Dixon J’s test for inconsistency, which the *Dickson* court endorsed:

When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.

On this test, the hole in Victorian criminal law is precisely the size and shape of the five points of difference between state and federal laws identified by the High Court. If this is the test, then s. 321 would be inoperative only in its application to conspiracies to commit trivial offences, or that involve no overt acts by anyone, or to conspirators who withdrew prior to those acts, or whose conduct fell within offence-specific provisos, or who were found guilty by majority verdicts. Alas, this cannot be the test, as the correct outcome in *Dickson* itself would then have been to dismiss the constitutional argument the Court itself raised and proceed to hear Dickson’s application for special leave on the non-constitutional points (which would involve an implicit concession by the Court that it had wasted everyone’s time on an argument only the Court wanted to pursue.) Instead, the invalidity of Victorian law obviously extends beyond, possibly well beyond, its minor differences from federal criminal law.

The other end of the spectrum is that s. 321, which is after all the provision setting out the sole offence that Dickson was found to have committed, is now (and has, since the enactment of s. 11.5, been) invalid in its entirety. That is, every conspiracy conviction in Victoria (from murder to theft to jaywalking) in at least the past decade is invalid. This may seem ludicrous, but it is the only obvious way to account for the High Court’s express reliance on two differences between ss. 11.5 and 321 – the exclusion of ‘non-trivial offences’ and the application of offence-specific provisos – that have no relevance whatsoever to the particular sort of conspiracy Dickson was convicted of. Other than noting it as one possibility, this paper will rush on to (somewhat) less dire interpretations of Court’s reasons.

Alas, the middle of the spectrum is the murkiest part. Most of the main paragraph where the High Court actually discusses s. 109’s application to Victorian law is too wrongheaded to be of much assistance:⁷⁵

The direct inconsistency in the present case is presented by the circumstance that s 321 of the Victorian *Crimes Act* renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth *Criminal Code*. In the absence of the operation of s 109 of the *Constitution*, the Victorian *Crimes Act* will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon

⁷⁴ *Dickson v The Queen* [2010] HCA 30, [38].

⁷⁵ *Dickson v The Queen* [2010] HCA 30, [6].

which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*, the case is one of “direct collision” because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.

The second sentence of this extract wrongly implies that any aspect of Dickson’s alleged conspiring would have been ‘left untouched by federal law’; to the contrary, if Dickson had been tried under the supposedly different s. 11.5, his trial would have played out precisely the same as it did under the state law. The third sentence wrongly suggests that any aspect of the ‘presentment upon which the appellant was convicted’ would affect at all ‘the existence and adjudication of criminal liability adopted by the federal law’; the Court itself acknowledged (correctly) that Dickson’s presentment ‘was not particularised in terms referring to property belonging to the Commonwealth’ and ‘the prosecution was not conducted on any basis that there had been an offence against a law of the Commonwealth’.⁷⁶ As noted earlier, the different rules on majority jury verdicts for state and federal conspiracy charges were not ‘adopted by the federal law’, but are rather set by Victorian and imperial law. Finally, the uselessness of Barwick’s test in assessing inconsistency between criminal laws has already been noted.

We are left with just three non-gibberish sentences in *Dickson* that might set out a test for the validity of state criminal laws. The first and third sentences above:

The direct inconsistency in the present case is presented by the circumstance that s 321 of the Victorian *Crimes Act* renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth *Criminal Code*.... No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury.

and the conclusion of the determinative part of the judgment:⁷⁷

The result in the present case is that in its concurrent field of operation in respect of conduct, s 321 of the Victorian *Crimes Act* attaches criminal liability to conduct which falls outside s 11.5 of the Commonwealth *Criminal Code* and in that sense alters, impairs or detracts from the operation of the federal legislation and so directly collides with it.

So, let’s see: the hole occurs in a state law’s application to ‘conduct’ that is both within federal law (‘rendered criminal by’, ‘attach to the [federal] crime of’, ‘in its concurrent field of operation’) and outside federal law (‘not caught by, and indeed deliberately excluded from’, ‘more stringent criteria and a different mode of trial by jury’, ‘falls outside’). This only makes sense if you distinguish two sorts of ‘conduct’:

- the ‘concurrent’ conduct, i.e. the conduct both laws are ‘in respect of’ or is ‘rendered criminal by’ the federal law and is in the state law’s ‘concurrent field of operation’
- the ‘differently liable’ conduct, i.e. the ‘conduct’ that the state law ‘attaches criminal liability to’ but is ‘not caught by, and indeed deliberately excluded from’ the federal law or for which the state law imposes ‘more stringent criteria and a

⁷⁶ *Dickson v The Queen* [2010] HCA 30, [6].

⁷⁷ *Dickson v The Queen* [2010] HCA 30, [30].

different mode of trial by jury' than the federal one. ('Differently liable' conduct is obviously a subset of the 'concurrent conduct'.)

The result in *Dickson* can only be explained by the following rule: if a state law applies to 'differently liable' conduct, then it is invalid in its application to the 'concurrent conduct'. For example, s. 11.5 operates 'in respect of' agreements to steal federal property but doesn't attach 'criminal liability to' agreements to steal federal property without an overt act by someone; because s. 321 does attach criminal liability to the latter, it's invalid to the extent that it operates 'in respect of' the former. So, s. 321 is invalid in its application to any 'conduct' that consists of an agreement to steal federal property.⁷⁸

As will be seen, this tortured test for unconstitutionality, while capable of explaining the outcome of *Dickson* without invalidating all state conspiracy law, has many potentially grave effects for a lot of state criminal law. But it is useful first to tease out *Dickson's* practical effect on the Victorian law at issue: the law of conspiracy to steal.

For a Victorian police officer or prosecutor contemplating laying a state criminal charge, it's important not to be distracted by either by what has to be proved to get a conviction under the state law or the particular thing the defendant did. The former is not a safe guide to determining whether the state law applies to 'concurrent conduct', because the federal law's operation in respect of conduct may depend on facts that don't have to be proved to get a conviction under the state law, e.g. the fact that the cigarettes were controlled by a federal agency. The latter is not a safe guide in determining whether the prosecution may be derailed by invalidity due to 'differently liable conduct', because the potential hole in the state law (the 'concurrent' conduct) can be much bigger than the gap between them (the 'differently liable' conduct), e.g. the federal law's non-application to 'withdrawn' conspiracies to steal federal property stops the state law from applying to any conspiracies to steal federal property, including non-withdrawn ones (like *Dickson's* alleged role.)

Rather, in light of *Dickson*, any Victorian prosecutor who wishes to charge anyone with conspiracy to steal must now make at least four complex (and previously unnecessary) inquiries:

- a factual inquiry into all the potential persons who had a right, interest, possession or control of the property that was the subject of the conspiracy. Was a car targeted by a rebirthing ring part of the federal fleet? Was a laptop a couple of teenagers were eyeing at a coffee shop a federal public service computer?⁷⁹

⁷⁸ The invalidity is broader if you focus on the differences between s. 11.5 and s. 321 that are irrelevant to theft. For example, s. 11.5 operates in respect of agreements to commit federal offences, but doesn't attach criminal liability to agreements to commit trivial offences; assuming that s. 321 does attach criminal liability to the latter, it is invalid to the extent that it covers agreements to commit any federal offence. This assumes that there's a state offence that is concurrent with a federal offence that attracts less than a year in prison, something the High Court didn't discuss. It's easy enough to find an example, though, e.g. the federal code's offence of recklessly laundering any amount of money (s. 400.8(2) of the federal code, with a maximum six months in prison) which appears to have a lot of overlap with s. 194(3) of the *Crimes Act 1958*.

⁷⁹ Note that the problem is by no means limited to defendants (like *Dickson*) who were (presumably) aware that they were straying into federal territory. Many federal offences involving dealings with the Commonwealth expressly relieve prosecutors of any need to prove that the defendant knew or ought to have known about the federal aspects of the case, e.g. the federal theft offence itself: *Criminal Code 1995* (Cth), s. 131.1(3). Section 11.5 expressly picks up such pro-prosecution rules: s. 11.5(7A). The Code also picks up people who wrongly think that the property they are conspiring to steal is federal property: s. 11.5(3)(a).

- a legal inquiry into the outer boundaries of ‘belonging to any person’ as it applies to the Commonwealth. Does that concept cover a car in the High Court car park? Does it cover every Australian passport?⁸⁰ And every law textbook with extracts of federal legislation?⁸¹
- a legislative inquiry into whether there is any other federal law that might also apply to the ‘conduct’ of conspiring to steal. Could a group of shoplifters be charged with dishonestly depriving the Commonwealth of its GST?⁸² Do prospective bank robbers also by definition conspire to money launder?⁸³
- a constitutional inquiry into the precise meaning of the *Dickson* test for validity of state laws. Is a civil penalty procedure or a ‘customs prosecution’⁸⁴ (i.e. a *sui generis* quasi-criminal procedure to facilitate the recovery of penalties and forfeiting of goods pursuant to the *Customs Act*) for the offence of moving goods subject to customs control⁸⁵ in a ‘concurrent field of operation’ with a state prosecution for conspiracy to steal those goods? Do different federal and state sentencing laws,⁸⁶ procedures⁸⁷ or practices⁸⁸ mean that a state criminal law imposes ‘more stringent criteria’ or ‘different modes of trial’?

Even if the exact size and shape of the hole in Victorian law is determined with precision, the very existence of that hole would still be a significant practical burden in some otherwise simple Victorian cases. Whenever the federal stake (or lack of stake) in the property that is the subject of the conspiracy cannot be safely settled in advance of a trial, conspiracy defendants will have to be jointly charged with both the federal and state conspiracy offences and the jury will have to sort out the issue.⁸⁹

In short, *Dickson* not only fails to identify what parts of Victorian criminal law are now inoperative, but imposes new practical and legal burdens on every Victorian prosecution for conspiracy to steal. But wait, there’s more. Much much more.

⁸⁰ C.f. *Australian Passports Act 2005* (Cth), s. 54: ‘An Australian travel document remains the property of the Commonwealth at all times.’

⁸¹ C.f. *Copyright Act 1968* (Cth), ss. 8A, 182A.

⁸² *Criminal Code 1995* (Cth), s. 135.4

⁸³ *Criminal Code 1995* (Cth), ss. 400.3-400.8. It might seem strange that a single transaction may simultaneously be a crime and a dealing in its proceeds; however, such a charge was precisely what was before the High Court in *LK*. Such potential overuses of money laundering charges were questioned before the High Court in another conspiracy appeal last year, but the Court refused to grant special leave because it hadn’t been raised in the courts below: *Ansari v The Queen; Ansari v The Queen* [2010] HCA 18, [64].

⁸⁴ *Customs Act 1901* (Cth), Part XIV.

⁸⁵ *Customs Act 1901* (Cth), s. 33.

⁸⁶ Compare *Crimes Act 1914* (Cth), s. 16A and *Sentencing Act 1991* (Vic), s. 5.

⁸⁷ E.g. *Crimes Act 1914* (Cth), s. 17B, barring prison for first-time federal theft offenders (and, therefore, first-time federal conspiracy to steal offenders: *Criminal Code 1995* (Cth), s. 11.6(1)) except in ‘exceptional circumstances’. There is no equivalent provision in Victorian law (and, indeed, *Dickson*, who does not appear to have previously been sentenced to prison, got a hefty prison sentence for state conspiracy to steal.)

⁸⁸ E.g. the lack of a federal norm on the ratio between non-parole periods and head sentences (*Hili v The Queen; Jones v The Queen* [2010] HCA 45) c.f. the present Victorian government’s plans to introduce ‘baseline non-parole periods’.

⁸⁹ *Thompson v R* [1989] HCA 30; (1989) 169 CLR 1. If the outcome would be the same for both offences, then the choice will be on the balance of probabilities. If the outcome would be different, then the more onerous offence would require proof beyond reasonable doubt of whatever facts made a difference to the constitutionality of the provision. If the jury’s verdict is by majority, then my head starts hurting.

Federal criminal law

The facts of *Dickson* happen to involve the classic federal crime: a customs matter. But recent decades have seen an expansion of federal criminal law well beyond its traditional focus on trade and taxes. There are several reasons. First, there is the High Court's expansive reading of federal power generally, such as its external affairs power. Second, there is federal prosecutors' frustration and occasional embarrassment when a federal matter spills over the outer boundaries of federal offence provisions. Third, there is the major federal criminal law reform movement that followed the Gibbs Committee report, initially aimed at overcoming differential application of federal criminal law and later broadening to a (as yet largely unrealised) goal of unifying and modernising the entire national criminal justice system.⁹⁰

These developments have a number of consequences that were, until now, either benign or beneficial, but since *Dickson* are potentially disastrous. First, because the federal parliament's expansion of its criminal law was not accompanied by a state contraction, Australian criminal law's 'concurrent field of operation' has steadily grown in recent times. Second, because many of the new federal crimes are based on a model code (intended for uniform adoption) that is in turn partly an amalgam of the best of state criminal laws, the reach of many federal and state offences are now a close match. For example, it's no coincidence that Victoria's and the Commonwealth's theft laws were very similar, or that the Commonwealth shifted from a potentially narrow concept of 'Commonwealth property' to the much broader notion of 'property.... belonging to any person' used in state theft law. Third, because the model code is also intended as a model of contemporary drafting and principles, many of the new federal offences express matters left implicit or to the vagaries of trial tactics in state laws. So, the presence of array of minor 'areas of liberty designedly left' in the federal conspiracy provision is no coincidence either. In other crimes, federal laws are also softened by narrower definitions, broader defences or more conservative proof provisions, which can be easily traced back to deliberate design decisions by the committee that drafted the model code. For instance, federal theft adopts a definition of dishonesty that expressly protects people who subjectively see their conduct as honest by others' standards, reflecting the federal parliament's express rejection of the firm view of the High Court that a less protective test should apply.⁹¹

The ease with which the ruling in *Dickson* can apply to invalidate other areas of concurrent criminal law in Australia can be seen by contemplating the most important area of concurrency in contemporary practice: drug offences. In 2005, the Commonwealth Parliament shed the earlier (at times hypothetical) constraint of relying on its trade and commerce power to regulate Australian drug trafficking, instead drawing on its external affairs power to enact comprehensive laws on trafficking, possession and even local manufacture and cultivation of illicit drugs.⁹² Nevertheless, state drug laws, mostly drafted decades ago, continue to be routinely used in matters that could be

⁹⁰ See the reports of the Model Criminal Code Officers' Committee at <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_mclloc>.

⁹¹ *Criminal Code 1995* (Cth), s. 130.3, rejecting *Peters v R* [1998] HCA 7; 192 CLR 493. For some reason, the High Court in *Dickson* didn't identify this rejection of one of its own rulings as an 'area of liberty designedly left'.

⁹² *Law and Justice Legislation Amendment (Serious Drug Offences and Other Matters) Act 2005* (Cth), inserting a new Part 9.1 into the *Criminal Code 1995* (Cth).

prosecuted federally, notably for matters that were previously not reached by the federal laws or which touch on the regulation of medicinal drugs.⁹³

A straightforward – and, indeed, a feel-good – example of the potential application of *Dickson* to drug law can be seen in a case presently before the High Court. *Momcilovic v R* is well known in Victoria as a controversial landmark ruling on the state’s human rights Charter.⁹⁴ At its heart is a ‘deemed possession’ provision that the Victorian Parliament enacted in the early 1980s to facilitate state drug prosecutions.⁹⁵ Under this nasty law, Vera Momcilovic stands convicted of being unable to prove that drugs found in a flat she shared with her drug trafficker boyfriend weren’t hers. While she took her case to the High Court to argue the toss with the Victorian government on Charter matters like rights-compatible interpretation and declarations of inconsistent interpretation,⁹⁶ what appears now to be more important is a fluke of timing: the drugs were found her fridge just six weeks after the federal parliament’s new drug laws commenced.⁹⁷ Those laws have no deemed possession provision, with the model code’s drafters labelling them ‘inappropriate and illogical’.⁹⁸ Can there be any doubt that this omission was an ‘area of liberty designedly left’ by the federal parliament, which is in turn undermined by a concurrent state conviction that (in contrast to Kevin Dickson’s) would actually have failed if it was prosecuted federally? So, in a few months, opponents of the Charter may well have a perfect example of how Australia’s Constitution is more than a match for human rights statutes (albeit, inconveniently enough, in its capacity to allow unelected judges to apply vague and difficult-to-amend enactments to free criminals on technicalities.)

Alas, because the rule in *Dickson* is not actually concerned with rights or wrongs, its impact on Australia’s drug laws is unlikely to be limited to nasty state proof provisions or the odd defendant who should never have been prosecuted. Rather, it now threatens all state drug prosecutions in the event that there happen to be differences between the state laws and the new federal one. Except in the ACT, which has adopted identical drug laws to the federal model, such events are likely to be the norm. To take just one example, federal law targets distribution of drugs through the offence of trafficking,⁹⁹ whereas many state offences simply criminalise supply;¹⁰⁰ the difference is that the latter term does not require proof of commercial intent or effect.¹⁰¹ As the federal drafters preferred to restrict the criminalisation of non-commercial drug distribution to supply to children, this difference is an ‘area of liberty designedly left’. So, applying *Dickson*, the consequence is that state supply laws have been inoperative since 2005, not only in their application to non-commercial supply (the ‘differently liable’ conduct), but also in their (much more common) application to regular trafficking too (the ‘concurrent’ conduct.) Similar

⁹³ E.g. *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

⁹⁴ *Momcilovic v R* [2010] VSCA 50.

⁹⁵ *Drugs, Poisons and Controlled Substances Act 1981* (Vic), s. 5.

⁹⁶ *Momcilovic v The Queen & Ors* [2010] HCATrans 227

⁹⁷ Part 9.1 commenced on 6th December 2005. The drugs were found in Momcilovic’s fridge on 14th January 2006.

⁹⁸ Model Criminal Code Officers’ Committee, *Report: Chapter 6: Serious Drug Offences*, October 1998, p. 43. It might also be argued that Victoria’s deemed possession law is incompatible with s. 13.1 of the federal code (placing the burden of proof on the prosecution for all elements unless the law otherwise provides) in combination with the absence of a contrary provision in Part 9.1.

⁹⁹ *Criminal Code 1995* (Cth), Division 302.

¹⁰⁰ E.g. *Drugs Misuse and Trafficking Act 1985* (NSW), s. 25.

¹⁰¹ *Criminal Code 1995* (Cth), s. 302.1 which contains an extraordinarily nuanced definition of ‘traffics’ c.f. *Drugs Misuse and Trafficking Act 1985* (NSW), s. 3, defining supply as ‘including sells and distributes.’

arguments could be made about all manner of differences between state and federal laws, e.g.:

- only state laws criminalise drug use¹⁰²
- state laws reach some drugs (including drugs with medical uses) that federal laws do not regulate (or regulate differently)¹⁰³
- federal laws provide for defences to drug prosecutions that are not available in state law¹⁰⁴
- federal and state laws almost invariably differ in the highly detailed penalty regime for particular amounts of particular sorts of drug.¹⁰⁵
- federal drug offences are subject to the federal Code's innovative rules for identifying physical and fault elements and a raft of modernised general defences,¹⁰⁶ which differ in dramatic ways from the states' common law and traditional code systems (and naturally bristle with 'areas of liberty designedly left'.)
- All federal drug offences are subject to a requirement of jury unanimity, whereas most states allow most state drug offences to be dealt with by majority verdicts (if not summarily.) This was, of course, one of the five features relied on *Dickson* itself to partially invalidate Victoria's offence of conspiracy to steal.

Obviously, the latter items on this list will actually be common to nearly all concurrent criminal offences.

While the above discussion is more than enough to identify the potential scope of *Dickson*, one further feature of federal criminal law bears mentioning: the field of concurrent criminal law is not solely the province of reformed federal ones, but may also arise in older or obscure ones that are rarely, or even never, used. As the High Court pointed out in *Croome*, some such offences, even if not prosecuted, may still loom over some citizens.¹⁰⁷ Thanks to *Dickson*, they now all loom over all state prosecutors. A left-field example is the Commonwealth's 1994 statute implementing the international ban on chemical weapons, which contains the following offence:¹⁰⁸

A person must not intentionally:

- (a) develop, produce, otherwise acquire, stockpile or retain chemical weapons; or
- (b) transfer, directly or indirectly, chemical weapons to another person; or
- (c) use chemical weapons...

Notably, the Convention (and therefore the statute) defines 'chemical weapons' very broadly to include all 'toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention', with 'toxic chemicals' in turn defined to

¹⁰² E.g. *Drugs Misuse and Trafficking Act 1985* (NSW), s. 12.

¹⁰³ E.g. Pseudoephedrine, which is a 'prohibited drug' in NSW ('except where Schedule Two or Three of the Poisons List applies') but is a 'controlled precursor' under the federal code and is therefore dealt with under novel 'pre-trafficking' offences in Division 306 c.f. *R v El Helou, El Helou v R* [2010] NSWCCA 111, [20].

¹⁰⁴ E.g. *Criminal Code 1995* (Cth), s. 313.2, providing a defence of reasonable mistake of law!

¹⁰⁵ C.f. *R v El Helou, El Helou v R* [2010] NSWCCA 111, [16]-[18].

¹⁰⁶ *Criminal Code 1995* (Cth), Chapter 2.

¹⁰⁷ *Croome v Tasmania* [1997] HCA 5; (1997) 191 CLR 119.

¹⁰⁸ *Chemical Weapons (Prohibition) Act 1994* (Cth), s. 12.

cover ‘Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals’.¹⁰⁹ In short, it prohibits the possession or use of all poisons except for benign purposes. So, the identical offence in the United States has been used for unintended prosecutions, such as domestic poisoning cases.¹¹⁰ Thanks to *Dickson*, the mere potential for the Australian law to be used in this way (even if federal prosecutors wouldn’t dream of doing so) may be enough to actually invalidate similar state domestic presentments, including, for instance, the supply of a fatal overdose of an illicit drug.¹¹¹

There is, of course, a straightforward way to avoid the future application of *Dickson*: simply charge people with federal offences whenever possible. This outcome may well be precisely what the High Court intended to achieve. In some ways, of course, it would be a good outcome, given that federal laws are often (but not always) better drafted and thought through than state ones (although no-one can account for future federal parliaments.) But it also represents a very dramatic shift in Australian criminal practice, with obvious implications for each jurisdictions’ resources and also an unknown cost in the need for practitioners, prosecutors and courts to suddenly come to grips with a jurisdiction that is not widely studied, and whose many experimental features are yet to be properly explored or settled in the courts. For these reasons, an alternative outcome of *Dickson* may be that the federal parliament will hastily contract its criminal law¹¹² or, perhaps, repeal the many novel protections for defendants that the reform movement placed in the federal Code, or even the Code itself. Perhaps this different consequence is really what the Court wanted.

But surely the High Court did not intend the much more immediate potential result of *Dickson*: the pending invalidation of a sizeable number of past state criminal convictions that will now be belatedly recognised on appeal as based on inoperative offence provisions. While it is doubtful that convictions will be overturned for defendants whose appeals are fully exhausted,¹¹³ the precedent of *Dickson* leaves no doubt that this course will be open to all convicts who have or can still place applications for special leave in the High Court.¹¹⁴ Crucially, thanks to *Metvally*, the Mason court’s narrow ruling barring retrospective restoration of concurrency, this consequence of *Dickson* cannot be resolved by curative federal legislation.¹¹⁵ So, all defendants in this category have a get out of jail free card to play (or use to reach fresh deals with the Crown or parole boards), with their continued imprisonment dependant on hasty (and expensive) federal retrials.

New constitutional time bombs will continue to be set with every fresh state criminal trial in an area of concurrency until the federal government either takes over all concurrent prosecuting or abandons the concurrent field of criminal law. In the event of federal inaction, State governments have only one option to preserve their laws (and future prosecutions): they will need to alter their own laws to provide federal protections

¹⁰⁹ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Articles II.1 and II.2 c.f. *Chemical Weapons (Prohibition) Act 1994* (Cth), s. 7(2).

¹¹⁰ See *United States of America v Carole Anne Bond*, 581 F 3d 128 (2009). An appeal is presently awaiting judgment in the United States Supreme Court.

¹¹¹ E.g. *R v Wilhelm* [2010] NSWSC 378. In respect of this case, see also the possible application of *Criminal Code 1995* (Cth), ss. 115.2 & 115.4.

¹¹² As previously mooted by the Gibbs Committee: Review of Commonwealth Criminal Law, *Discussion Paper No. 6: What Offences Should Be Included in the Future Consolidating Law*, October 1987.

¹¹³ C.f. *A v The Governor of Arbour Hill Prison* [2006] IESC 45.

¹¹⁴ *Dickson* is also a specific precedent that s. 109 can also be raised by criminal appellants who have already been granted special leave on non-s. 109 matters, e.g. Vera Momcilovic.

¹¹⁵ *University of Wollongong v Metvally* [1984] HCA 74; (1984) 158 CLR 447.

to state defendants being prosecuted in areas of concurrency. A quick (but by no means easy) way to achieve this end would be for state parliaments to enact a general defence for people facing presentments for conduct that could have been charged federally that makes all limitations, defences, provisos or qualifications, and all beneficial modes of adjudication and penalties set out in the federal law available in the state trial. While such a '*Dickson* defence' might seem generous to defendants, it is actually less generous than the High Court's take on s. 109; for example, Kevin Dickson himself would not have qualified for the defence, but its mere availability would have protected Victoria's law from invalidation by the High Court. The downside, of course, is that the *Dickson* defence will still be just as onerous to interpret and apply as the *Dickson* doctrine.

After *Dickson*

All is quiet. Despite the obvious urgency of the potential problem it raised, *Dickson* hasn't merited a single press release or parliamentary question to date, much less a rush of changes to Australian criminal law or (at least in public) prosecutorial practice. At the December meeting of the Standing Committee of Attorneys-General, the following appears as the final item of the communiqué:¹¹⁶

Coverage of Commonwealth and State and Territory Criminal Offences

Ministers discussed the coverage of Commonwealth, State and Territory criminal laws.

Although a similar line item appeared in the (pre-*Dickson*) May 2010 discussion¹¹⁷, one can imagine that the December discussion went a little differently. The content and outcome of SCAG's deliberations have not been publicly revealed. But let me guess: it concluded with all of the Attorneys-General being asked to cross their fingers. That's because there is actually just one good way out of this mess: for the High Court itself to undo the damage. Of course, no-one could seriously expect that the Court to admit that it made a mistake. But the Court might resort to 'clarifying' its earlier ruling. Will *Dickson* be a dog that barks only once?

While I'm certainly one of those crossing his fingers, I have my doubts that the Court will save the day. There's nothing about *Dickson* other than its silliness that hints at a potential High Court back flip. Dickson's appeal was certainly no hard case that necessitated a bad law. Any sympathies the Court may somehow have had for Dickson himself could have been acted upon through his quite arguably regular appeal grounds (which, in contrast to the constitutional point, had virtually no consequences for other criminal cases.) By contrast, every aspect of the actual judgment suggests that the Court actually wanted to make the unfortunate constitutional point the case appears to stand for. As the first Part of this paper detailed, the Court not only raised the point itself but ensured that Dickson took it up. Also, as will be seen, the judges chose to apply s. 109 in a much broader way than it needed to. And, of course, they did so unanimously, which will complicate any attempt to backtrack. Nevertheless, the remainder of this paper will outline the two outs arguably left open in the judgment that the Court may rely on to forestall a crisis in Australian criminal law.

First, there's the threshold test of direct inconsistency. *Dickson* doesn't (expressly) equate concurrency with inconsistency, even when there is 'differently liable' conduct'. Rather,

¹¹⁶ Standing Committee of Attorneys-General, 'Communiqué', 10th December 2010, p. 5.

¹¹⁷ Standing Committee of Attorneys-General, 'Communiqué', 7th May 2010, p. 12. This earlier discussion may have been forward planning in case of an adverse result in *R v El Helou, El Helou v R* [2010] NSWCCA 11.

at least on one passing formulation, the difference has to be an ‘area of liberty designedly left’ open by the federal law. Indeed, the High Court seemed to identify one past case of concurrency as falling short of this threshold. In respect of *McWaters v Day*, the 1989 case where a soldier unsuccessfully raised s. 109 to get out of a state drink-driving charge, the *Dickson* court remarked:¹¹⁸

The situation in the present case may be contrasted to that presented in *McWaters v Day*. The Queensland legislation, s 16 of the *Traffic Act 1949* (Q), created an offence of driving a motor vehicle while under the influence of liquor. Section 40(2) of the *Defence Force Discipline Act 1982* (Cth) required for liability that the defence member drive a vehicle on service land whilst under the influence of intoxicating liquor “to such an extent as to be incapable of having proper control of the vehicle”. It was, as emphasised by the Attorney General for New South Wales in the course of his intervention in support of Queensland, difficult to construe s 40(2) as conferring a liberty on a drunken defence member to drive a vehicle on service land provided he or she was still capable of controlling the vehicle. Hence, perhaps, the emphasis in argument by the defence member, in the event unsuccessful, upon establishing that the defence discipline legislation was exclusive of, rather than supplementary to, the ordinary criminal law respecting traffic offences.

While this is by no means a heartfelt endorsement of the Court’s previous (unanimous) ruling on s. 109 and concurrent criminal laws – indeed, quite the contrary – it does seem to indicate that some differences between state and federal laws may not count as ‘area of liberty designedly left’. This apparently includes, for reasons that are not apparent, a federal drink-driving offence that requires the prosecutor to prove the actual impact of intoxication on driving, rather than to presume that fact from the mere fact of intoxication. Alas, this gloss on *Dickson* would only slightly blunt its impact. As already pointed out, it is difficult to conceive of a much slighter set of protections of liberty than the ones the Court identified in s. 11.5. Also, as discussed in the previous section, significant parts of contemporary federal criminal law are now accompanied by a paper trail of law reform reports that painstakingly identify the significance for liberty of their every variation from state comparators and in many instances the difference is wide by anyone’s standards.

What is most revealing about the Court’s discussion of *McWaters v Day* is that the previous Court’s straightforward ruling that the federal defence law was so obviously ‘supplementary to, and not exclusive of, the ordinary [i.e. state] criminal law’ is treated by the *Dickson* court as only determinative of the s. 109 point because the liberty threshold was not (or at least was not found to have been) crossed in that case. The Court’s reasons in *Dickson* repeatedly make it clear that all of the jurisprudence on ‘indirect inconsistency’ was irrelevant to its decision invalidating part of Victoria’s criminal law. For example, the High Court expressly started that its discussion of indirect inconsistency was *obiter*¹¹⁹ and clearly endorsed remarks on the lack of interaction between the two s. 109 doctrines by Dixon J in *Victoria v Commonwealth*.¹²⁰ Given the vagaries of the ‘covers the field’ test, the High Court could easily have relied on that ground to free *Dickson* if it wanted to. So, the fact that it didn’t was clearly deliberate.

Indeed, it is the *Dickson* Court’s apparent (but not explicitly stated) about face on the central holding of *McWaters* – that state criminal laws that the federal parliament obviously intended to operate concurrently with their own criminal laws are not

¹¹⁸ *Dickson v The Queen* [2010] HCA 30, [29].

¹¹⁹ *Dickson v The Queen* [2010] HCA 30, [31].

¹²⁰ *Dickson v The Queen* [2010] HCA 30, [13].

invalidated by s. 109 – that makes it such a dangerous decision.¹²¹ As already noted, *McWaters* was brought down just as the federal criminal law reform process kicked into high gear. In accordance with the recommendation of the Gibbs Committee one year later, the federal *Criminal Code* is replete with savings clauses in areas of concurrent operation disclaiming any intention to override state or territory (or indeed federal) law.¹²² For example, all the property offences in the Code (including the crime of stealing property belonging to the Commonwealth) were accompanied by the following savings clause:¹²³

This Chapter is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

In April 2010, the NSW Court of Criminal Appeal relied upon just such a clause to reject a s. 109 challenge to its drug laws, citing the central holding of *McWaters*.¹²⁴ Alas, this was four months before *Dickson* revealed that McWaters would have escaped his state drink-driving charge if the defence discipline offence had been characterised as containing any protection (however mild) for soldiers' liberty that wasn't available to lay Queensland drunks. In effect, *McWaters* appears to be a bait-and-switch stretching over two decades.

However, despite its clear rejection of the relevance of parliamentary intent to save state offences, the High Court's judgment nevertheless concluded with remarks apparently aimed at leaving the point open, despite the federal savings clause for state property offences:¹²⁵

In the Commonwealth Criminal Code, Ch 4 (ss 70.6, 71.19, 72.5), Ch 7 (s 261.1), Ch 8 (ss 268.120, 270.12), Ch 9 (s 360.4), and Ch 10 (ss 400.16, 472.1, 475.1, 476.4) , contained provisions so expressed as to deny for the Chapter in question, or particular portions of it, an “inten[tion] to exclude or limit” the operation of any other Commonwealth law, and also of any law of a State or Territory .

However, s 11.5 appeared in Ch 2, which did not contain any such statement. Those opposed to the appellant sought to rely upon the presence of such a provision (s 261.1) in Ch 7. The theft provision (s 131.1) appears in Ch 7. The presence of s 261.1, whatever else its effect in considering the application of s 109 to charges under State law of theft of the property of the Commonwealth, a matter upon which it is unnecessary to enter here, could not displace or avoid the direct collision between the conspiracy provisions with which the appeal is concerned.

The Court's rejection of the relevance of the theft savings clause to a charge of conspiracy to steal is very strained. It ignores a federal provision that applies all federal laws applicable to any offence to the offence of conspiracy to commit that same offence.¹²⁶ It also is questionable as an instance of ordinary statutory interpretation and, in particular, the federal requirement to prefer interpretations that achieve a federal law's

¹²¹ But c.f. G Rumble, 'Manufacturing and avoiding Constitution section 109 inconsistency: law and practice' (2010) 38 Federal LR 445, 549, who is willing to view *Dickson* as only casting doubt on the effectiveness of poorly drafted savings clauses, rather than all savings clauses.

¹²² Review of Commonwealth Criminal Law, *Fourth Interim Report*, November 1990, [19.12] c.f. *Dickson v The Queen* [2010] HCA 30, [36].

¹²³ *Criminal Code 1995* (Cth), s. 261.1.

¹²⁴ *R v El Helou, El Helou v R* [2010] NSWCCA 111, [22].

¹²⁵ *Dickson v The Queen* [2010] HCA 30, [36]-[37].

¹²⁶ *Criminal Code 1995* (Cth), s. 11.6(2) provides: 'A reference in a law of the Commonwealth (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.' Arguably, this provision could be distinguished on the basis that s. 261.1 refers to "This Chapter", rather than a 'particular' offence but c.f. *Acts Interpretation Act 1901* (Cth), s. 40(2).

purpose to interpretations that don't.¹²⁷ There is absolutely no rational reason why the federal parliament would intend to preserve state prosecutions for thefts of federal property, but not to preserve state prosecutions for conspiracies to steal federal property. Rather, the better approach is that any disclaimer in the special part of the federal criminal law also applies to the general law set out in the Code's Chapter 2, which has no effect at all independently of federal offence provisions like the federal theft offence.

But unconvincing distinguishing of cases and readings of statutory provisions is the very stuff of curial back flips. Alas, even if savings clauses will be allowed to save federal laws that significantly differ from state ones, the Court's reasons in *Dickson* make it doubtful that existing clauses will suffice.

First, the Court was at pains to note that relying on savings clauses in s. 109 cases demands 'some caution'.¹²⁸ It extracted judgments noting that intention is a 'fiction' or a 'metaphor' for a constitutional relationship, and then declared: 'That constitutional relationship is further informed by the operation of s 109 in the federal structure of government' and that the restriction of the role of intention to indirect inconsistency should be understood in that light.¹²⁹ Indeed, part of the eighty-minute hearing of the merits of the constitutional argument was taken up by Gummow J's criticism of the drafting of federal savings provisions in the Code, claiming that they are overly brief for their complex purpose.¹³⁰ The drafters of the federal drug laws appeared to anticipate this criticism, as they inserted an especially detailed savings clause for state drug laws:

300.4 Concurrent operation intended

- (1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
- (2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:
 - (a) an act or omission that is an offence against a provision of this Part; or
 - (b) a similar act or omission;
 an offence against the law of the State or Territory.
- (3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:
 - (a) provides for a penalty for the offence that differs from the penalty provided for in this Part;
 - (b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;
 - (c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part.

However, such detail carries dangers of its own, because of what is left out of the extended list. For instance, prosecutors defending nasty proof provisions in state drug

¹²⁷ *Acts Interpretation Act 1901* (Cth), s. 15AA.

¹²⁸ *Dickson v The Queen* [2010] HCA 30, [32].

¹²⁹ *Dickson v The Queen* [2010] HCA 30, [32].

¹³⁰ *Dickson v The Queen* [2010] HCATrans 222.

laws from potential inconsistency with the federal code may well find this expanded savings clause more a hindrance than a help.¹³¹

Second, as the Court expressly states in *Dickson*, ‘close attention is necessary to the place of such a statement in the particular statutory framework in which it is to be found’. The absence (for now) of a savings clause in Chapter 2 (a problem that, remember, cannot be retrospectively fixed) is enough to preserve most of the dramatic consequences for recent drug convictions (despite the federal savings clause for state drug offences) because Chapter 2 contains:

- the federal conspiracy offence.¹³² So, at the very least, *Dickson* stands for the (itself enormous) proposition that all recent state prosecutions for conspiracy to traffic or possess drugs are invalid.
- other general ancillary offences or expanding provisions.¹³³ So, it seems, the same consequence holds for all recent state prosecutions for attempt(!), incitement or complicity(!) to commit drug offences.
- the federal burden and standard of proof.¹³⁴ So, convictions that relied on nasty state reverse onuses or presumptions (such as Vera Momcilovic’s) will not be assisted by the savings clause for state drugs laws.
- the unique (and highly protective) federal scheme for identifying fault elements for all federal offences,¹³⁵ not to mention a bevy of general criminal law requirements relating to voluntariness, mental impairment, intoxication and general defences,¹³⁶ all clearly ‘areas of liberty deliberately left’ by the federal parliament.

Finally, one ‘federal’ area of liberty expressly relied on in *Dickson* itself also presently lacks a savings clause: the requirement of unanimous jury verdicts for federal indictable offences.¹³⁷ Neither s. 4G of the federal *Crimes Act*, much less Chapter 3 of the federal Constitution, has any savings clause for state criminal law. So, all state convictions for all offences (committed since at least late 1987) punishable by a year or more in prison or a hefty fine in areas of concurrent criminal law where state law permits majority verdicts (or, for that matter, non-jury trials) are vulnerable to a *Dickson* argument. Avoiding these problems will require a High Court back flip of an Olympic standard.¹³⁸

¹³¹ But c.f. the argument of NSW that proof requirements are implicitly caught by s. 300.4(3)(b) because they are somehow less important than fault requirements: *Momcilovic v The Queen & Ors* [2011] HCATrans 17

¹³² *Criminal Code 1995* (Cth), s. 11.5

¹³³ *Criminal Code 1995* (Cth), Part 2.4.

¹³⁴ *Criminal Code 1995* (Cth), Part 2.6.

¹³⁵ *Criminal Code 1995* (Cth), Part 2.2.

¹³⁶ *Criminal Code 1995* (Cth), Part 2.3.

¹³⁷ *Dickson v The Queen* [2010] HCA 30, [20].

¹³⁸ The recent *Momcilovic* hearing mooted many ways of distinguishing *Dickson*, including: that *Dickson* was concerned with ‘common law’ offences; that *Dickson* does not apply to reverse onuses, as they are neither conduct rules nor ‘modes’ of trial; that the presumption of innocence is not a ‘liberty’; that inconsistency only arises if the Commonwealth grants a right, rather than if a state takes one away; that *Dickson* doesn’t apply when the federal offence was enacted pursuant to a treaty obligation; and that more onerous federal rules will cancel out any inconsistency due to less onerous ones: see *Momcilovic v The Queen & Ors* [2011] HCATrans 15, 16 and 17. While I would give back-flips based on any of these grounds low scores indeed, the only judges who matter in this particular contest are, of course, the divers themselves.

In the recent *Momcilovic* hearing, the Commonwealth Solicitor-General recast the judgment in *Dickson* in the following terms:¹³⁹

Absent section 300.4, it would be necessary to engage in an inferential interpretative exercise of the kind that was engaged in, quite properly, in *Dickson*...

It is inconceivable that the Solicitor-General actually thinks that the High Court engaged in any sort of ‘interpretative exercise’ in *Dickson*, or that it was quite proper for the Court to infer that the Howard government, when it expanded federal property law in 2000, actually intended to shield prospective federal thieves from state criminal law. Nevertheless, it’s clear that he desperately wants the High Court to recast its identification of a grab-bag of minor drafting differences as an ‘inferential’ exercise in the hope that the Court will engage in the real thing in *Momcilovic*. And perhaps the Court will do so, given that there are at least some features of Part 9.1 that allow the inferring of a parliamentary intention that happens to be same as the explicit one in s. 300.4.¹⁴⁰ Such a step will save state and territory drug laws, and will reduce the threat posed to other concurrent laws. On the other hand, it will leave future federal drafters with the deathly chore of having to scatter subtle hints of the Commonwealth’s intention to leave state laws untouched, out of fear that an express savings clause will put the High Court off. For prosecutors, and even for prospective federal criminals, the uncertainty posed by *Dickson*, while perhaps diminished, will still remain in the post-*Momcilovic* world.

CONCLUSION

Imagine how Dominion’s employees felt when they belatedly discovered that they had not only let thieves into their premises, but had actually broken one of their own clients’ padlocks and helped the thieves to carry off the goods.

Alas, there are other, far worse ways to witlessly assist the nation’s criminals. In *Dickson v R* [2010] HCA 30, the High Court:

- both forced and rushed a decision and hearing on a previously undiscussed constitutional point that raised no questions of substantive fairness in the case before it
- deduced an inconsistency from minor local variations in a concurrent criminal offence without any analysis of those differences or their practical effect
- both failed to identify the extent of the invalidity and apparently adopted a bizarre and onerous-to-apply test for constitutionality of every state offence
- apparently narrowed a unanimous ruling from twenty years earlier that was relied upon by the federal government to dramatically expand the field of concurrent offences in Australia, notably to all drug prosecutions
- accordingly left a substantial number of state convictions open to a constitutional challenge that cannot be retrospectively avoided by federal legislation
- made orders and expressed its reasons in ways that make it difficult to distinguish the ruling in a vast set of future cases.

¹³⁹ *Momcilovic v The Queen & Ors* [2011] HCATrans 17.

¹⁴⁰ Notably, the provision of a lawful authority defence to acts authorised by state and territory drug law: *Criminal Code 1995* (Cth), ss. 313.1, 313.2.

And it did all of this unanimously! Having already busted open one cage, let's hope that at least some of the Court's judges give the paperwork a closer look when someone asks for the rest of loot.