SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robinson* [2012] QCA 309
PARTIES:	**R** **v** **ROBINSON, Robert Raymond Lloyd** (appellant)
FILE NO/S:	CA No 106 of 2011 DC No 806 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	13 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2012
JUDGES:	Margaret McMurdo P and Muir JA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – where, at relevant times, appellant was a Commissioner of the Aboriginal and Torres Strait Islander Commission ("ATSIC") – where appellant initially charged with two counts of contravening s 26(1) of the *Commonwealth Authorities and Companies Act* ("the Act") and convicted after trial – where appellant appealed convictions – where appeal successful – where convictions set aside and new trial ordered – where new indictment presented charging appellant with two counts of contravening s 26(2)(a) of the Act – where appellant applied for indictment to be permanently stayed – where application denied – where appellant applied for certain evidence to be excluded from his trial – where application denied – where appellant convicted at trial of two counts of using his position as an officer of the Commonwealth dishonestly with the intention of obtaining an advantage for himself – where ATSIC provided grants to two service providers for the purchase of particular motor vehicles – where the appellant wrote two letters to facilitate the sale of these vehicles for the purpose of raising funds for his personal legal expenses – where appellant signed these

letters as the Commissioner of ATSIC – where crown contended that under the conditions of grant the providers were not entitled to sell the vehicles without the permission of ATSIC – where crown submitted appellant had knowledge of this condition – where correspondence was exchanged between the AGS, the appellant, and others with respect to the disposal of the vehicles – where appellant submitted that there was no impediment to the sale of the vehicles because the conditions of grant had been "acquitted" – where appellant submitted acquittal took place when the vehicles were purchased and paid for – where appellant gave evidence at trial that he did not believe the grant conditions applied to the subject vehicles – where appellant gave evidence that money paid to his lawyers was money which was lent to him by one of the providers – where appellant submitted trial judge erred in not ordering that the new indictment be stayed as an abuse of process – where appellant submitted trial judge erred in not excluding from evidence an agreement entered into by the then Minister for Immigration, Multicultural and Indigenous Affairs on behalf of the Commonwealth and the Chairman of ATSIC – where appellant submits trial judge erred in ruling at the conclusion of the prosecution case that there was a case to answer – where appellant submitted verdict unsafe and unsatisfactory – whether trial judged erred in not staying new indictment – whether trial judge erred in not excluding agreement from evidence – whether trial judge erred in ruling there was a case to answer – whether verdict unsafe and unsatisfactory

Aboriginal and Torres Strait Islanders Commission Act 1989 (Cth), s 7(1A), s 10(2)(f)
Commonwealth Authorities and Companies Act 1997 (Cth), s 26
Criminal Code 1899 (Qld), s 668E(1)
Public Service Act 1999 (Cth), s 65

Doney v The Queen (1990) 171 CLR 207; [1990] HCA 51, cited
Island Maritime Ltd v Filipowski (2006) 226 CLR 328; [2006] HCA 30, considered
Jiminez v The Queen (1992) 173 CLR 572; [1992] HCA 14, considered
King v The Queen (1986) 161 CLR 423; [1986] HCA 59, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Parker v The Queen (1997) 186 CLR 494; [1997] HCA 15, considered
Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7, considered
R v Koolmatrie (1989) 52 SASR 482, cited
R v Robinson [2010] 2 Qd R 446; [2009] QCA 250, considered

R v Taufahema (2007) 228 CLR 232; [2007] HCA 11, considered
R v Wilkes (1948) 77 CLR 511; [1948] HCA 22, considered
Williams v Commonwealth of Australia (2012) 86 ALJR 713; [2012] HCA 23, cited

COUNSEL: P J Callaghan SC, with T D Gardiner, for the appellant
A MacSporran SC, with D Kent, for the respondent

SOLICITORS: Creevey Russell for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MARGARET McMURDO P**: The appellant, Robert Raymond Robinson, was convicted in the District Court at Toowoomba on 13 April 2011 of two counts of dishonest use of position under s 26(2)(a) *Commonwealth Authorities and Companies Act* 1997 (Cth) ("the Act"). He has appealed against those convictions on five grounds. The first is that the primary judge erred in not staying the indictment as an abuse of process. The second is not pursued. The third is that the primary judge should have excluded evidence of an agreement between the Aboriginal and Torres Strait Islander Commission ("ATSIC") and the Commonwealth of Australia in June 2003, establishing the Aboriginal and Torres Strait Islander Services (ATSIS) as an executive agency. The fourth is that the judge erred in ruling at the completion of the prosecution evidence that the appellant had a case to answer. The fifth is that the guilty verdicts were unreasonable, that is, that they should be set aside as unreasonable or not supported having regard to the evidence: s 668E(1) *Criminal Code* 1899 (Qld).

The particularised case

[2] The prosecution particulars in respect of both counts were as follows. On 5 November 2004 (count 1) and 11 November 2004 (count 2) at Charleville the appellant was an officer of a Commonwealth authority, namely, a commissioner of ATSIC. He used this position to write letters on ATSIC letterhead, signing them as "Commissioner" (count 1) and "Commissioner Queensland South Zone" (count 2).

[3] In respect of count 1, he used his position dishonestly in that in the letter of 5 November:

> "(i) The assertion 'ATSIC does not have the ''Bill of Sale" over the vehicles or any other legal encumbrance' is dishonest in that the grant conditions, to [the appellant's] knowledge, did amount to a legal encumbrance and it was dishonest of him to falsely assert the contrary;
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> (ii) The assertion that 'the advertisements by the Australian Government Solicitor are illegal and total nonsense' was dishonest in that, to [the appellant's] knowledge, the advertisements were neither of these things;
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> (iii) The assertion that 'Please note, the sales of these vehicles are not subject to any grant terms and conditions' was, to [the appellant's] knowledge dishonest. He was aware that the vehicles were subject to grant terms and conditions, in particular, condition 17.4."

[4] In respect of count 2, he used his position dishonestly in that in the letter of 11 November:

> "(i) The assertion in the second paragraph that 'there are no legal encumbrances whatsoever, the vehicles listed are not subject to any grant or conditions of grant and may be deposed of (sic) in the normal course of business' was dishonest in that [the appellant] was aware that there were legal encumbrances in the form of the grant conditions (in particular 17.4) which did apply;
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> (ii) The assertion that 'the Board of ATSIC gives authority to Bidjara CDEP and Bidjara Legal Service to dispose of these vehicles' was dishonest. [The appellant] knew that this statement was untrue."

[5] In respect of both counts 1 and 2 the prosecution particularised that the appellant "had the intention of directly or indirectly gaining an advantage for himself by using some of the proceeds of the sales of the vehicles for his own private legal expenses, which in fact occurred".[1]

Ground 1: the refusal of the stay

[6] I agree with Muir JA that the first ground of appeal is not made out.

[7] The charges relate to events in 2004, almost seven years before the trial the subject of this appeal. The appellant has had three trials. The first two concerned charges under s 26(1) of the Act. The first trial was aborted. Only after the appellant's successful appeal against his convictions on the second trial,[2] when this Court noted that the more appropriate charges may be under s 26(2),[3] did the prosecution bring the present charges under s 26(2). The appellant contends that, as a result, the primary judge should have stayed the indictment.

[8] The history of the prosecution of the appellant is therefore far from satisfactory. But the fact that the prosecution path is a long way from best practice does not mean it is an abuse of process warranting a stay. In support of his contention, the appellant emphasised the relatively minor nature of the charges: see *Island Maritime Ltd v Filipowski*.[4] It is true that the counts are far from the most serious of criminal charges. The community, however, has a significant interest in ensuring that public office holders do not use their positions dishonestly. The nature of the charges does not favour the granting of a stay. The decisive factor, however, is that the evidence in all three trials was essentially the same, and the distinction between the charges brought under s 26(1) and those later brought under s 26(2) did not create a significantly different prosecution case amounting to an abuse of process: see *R v Taufahema*.[5]

[9] The combination of the nature of the charges, their age and the course of the prosecution case did not warrant the staying of the indictment. For these reasons, as well as those of Muir JA, ground 1 is not made out.

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1 AB 2322–2323.
2 *R v Robinson* [2010] 2 Qd R 446; [2009] QCA 250.
3 Above, 459 [39], 460 [42].
4 (2006) 226 CLR 328, 355–356 [83(1)] (Kirby J).
5 (2007) 228 CLR 232.

Ground 3: the admissibility of the agreement establishing ATSIS

[10] I also agree with Muir JA that the third ground of appeal is not made out.

[11] Evidence showed that at the time of the alleged offences the relationship between the appellant (a director of ATSIC) and its then executive agency, ATSIS, was dysfunctional. ATSIC had obtained legal advice, which the appellant accepted, that ATSIS was not lawfully established. On the basis of this advice, ATSIC commenced proceedings in the High Court of Australia on 2 April 2004 seeking a declaration to this effect.[6]

[12] The appellant contended that, as ATSIS could not be lawfully established without specific legislation, the judge erred in allowing evidence to be given of an agreement between ATSIC and the Commonwealth purportedly establishing ATSIS.

[13] Despite the appellant's contrary, strongly held belief, apparently supported by legal advice, I consider that ATSIS appears to have been validly established by way of s 7(1A) and s 10(2)(f) *ATSIC Act* 1989 (Cth) and the interrelation of those provisions with s 65 *Public Service Act* 1999 (Cth). The appellant submitted that his contentions on this ground were supported by the recent High Court decision of *Williams v The Commonwealth*.[7] I reject that submission. In *Williams*, the funding of the National School Chaplaincy Program ("NSCP") was found to be beyond the Commonwealth's executive power under s 61 of the Constitution as there was no Commonwealth legislative power underpinning the establishment of the NSCP. By contrast, s 7(1A) and s 10(2)(f) of the *ATSIC Act* under which ATSIS was established, were enacted under the legislative powers of the Commonwealth pursuant to s 51(xxvi) of the Constitution, so that the powers under s 65 *Public Service Act* could be enlivened.

[14] Evidence of the agreement establishing ATSIS was admissible. It was relevant on each count as part of the chain of facts to establish that ATSIC through its agent ATSIS did not consent to the sale of the relevant vehicles. Although ultimately the appellant did not claim that ATSIC consented to the sales, he did not formally admit this during the prosecution case. In this way the agreement was also capable of relevance to the essential question on each count, namely, whether the appellant was acting dishonestly when he wrote the letters of 5 and 11 November.

[15] For these reasons, as well as those given by Muir JA, the third ground of appeal is not made out.

Grounds 4 and 5: were the jury verdicts unreasonable?

[16] In respect of grounds 4 and 5, I gratefully adopt Muir JA's recitation of the relevant facts and issues. In determining ground 4, the question is whether there is any evidence capable of supporting the guilty verdicts, even if that evidence is tenuous, inherently weak or vague. If so, the case must be left for the jury's consideration: *Doney v The Queen*.[8] By contrast, in determining ground 5, the question is whether, notwithstanding that as a matter of law there is evidence to sustain the guilty

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6 AB 2332.

7 [2012] HCA 23; (2012) 288 ALR 410; (2012) 86 ALJR 713.

8 (1990) 171 CLR 207.

verdicts, an appellate court after reviewing the whole of the evidence finds it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt: *M v The Queen*.[9] In answering that question, in most cases any doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced.[10] As the question to be answered in ground 5 has a lower threshold for the appellant than that in ground 4, in the circumstances of this case my consideration of ground 4 can be subsumed in my consideration of ground 5.

[17] As the primary judge made crystal clear to the jury in her final directions, at the end of the trial there were but two disputed issues on each count. The first was whether the appellant used his position dishonestly when he wrote the letters on 5 November (count 1) and 11 November (count 2) to car dealer, Mr Stuart Mitchell, who purchased the vehicles from Bidjara CDEP (count 1) and Bidjara Legal Service (count 2). The second was whether, at the time the appellant wrote each letter, he intended to directly or indirectly gain a personal advantage.[11]

[18] I will deal firstly with whether it was open to the jury to conclude on the evidence on count 1 that when the appellant wrote the letter on 5 November, he intended to directly or indirectly gain a personal advantage. It was common ground that the appellant initiated the contact between Bidjara CDEP and Mr Mitchell which culminated in the sale of the Bidjara CDEP vehicles and was actively involved in negotiating the sale price. It was uncontentious that he used part of the proceeds from the sale of the vehicles to pay his private legal expenses.[12] The appellant and Ms Miranda Mailman from the Bidjara Legal Service gave evidence that once the appellant became aware of the controversy as to the authority of Bidjara CDEP and Bidjara Legal Service to sell the vehicles, he insisted on borrowing the money for his legal expenses from the Legal Service. He and the Legal Service drew up a loan agreement but this had been misplaced and was not produced.[13] He expected to be able to repay the loan from a termination payout from ATSIC and from money expected from the appeal costs fund resulting from an earlier aborted trial.[14] It was, however, irrelevant to this aspect of count 1 whether the appellant intended to repay the money. To obtain a loan to pay personal legal expenses is to obtain a personal advantage. Even on the appellant's case, there was, therefore, ample evidence for the jury to be satisfied that the appellant wrote the letter of 5 November with the intention of gaining the particularised personal advantage.

[19] I turn next to consider whether, in respect of both counts 1 and 2, it was open to the jury to conclude from the evidence that when the appellant wrote each letter he was acting dishonestly as particularised.

[20] The fact that Bidjara CDEP and Bidjara Legal Service had title to the vehicles and consented to their sale did not mean the appellant was acting honestly when he wrote the letters. Clause 17.4 of the grant under which ATSIC provided the vehicles to Bidjara CDEP and Bidjara Legal Service required grantee organisations like Bidjara CDEP and Bidjara Legal Service to obtain ATSIC's written approval

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9 (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).

10 Above, 494.

11 The terms of the letters are extracted from *R v Robinson* [2010] 2 Qd R 446, 452 [8] and 453 [10] and in Muir JA's reasons at [37].

12 See Muir JA's reasons at [44].

13 Transcript 516 (8 April 2011).

14 The expected payments from the appeal costs fund were supported by the evidence from the appellant's former solicitor in a defamation action, Mr Douglas Spence.

before disposing of the vehicles.[15] Certainly, there was a considerable body of credible evidence from the appellant and others that, for some time prior to 5 November, despite the terms of cl 17.4 it was common practice to sell such vehicles without obtaining ATSIC consent. The appellant and others considered that the terms and conditions of the ATSIC grant were "acquitted" once the grantee organisations purchased vehicles and title passed to them. They claimed to have had legal advice to this effect. This aspect of the appellant's evidence as to his belief was supported by the evidence of a Bidjara CDEP director in October and November 2004, John Maris, and by the evidence of the appellant's counsel in another matter, Mr Angelo Vasta QC. If the jury could not be persuaded beyond reasonable doubt that the appellant did not honestly hold this belief at the time he wrote each letter, he must be acquitted on that count.

[21] There was, however, contrary evidence. A letter dated 7 November 2003 (almost a year before the alleged offences) from Mr Garry Kiniven (then the CDEP manager) to Ms Kathy Skuse, a field officer employed by ATSIS, requested Ms Skuse to approve the dispersal of listed vehicles "as per section 17.4 of the General Terms and Conditions relating to grants" on vehicles being traded for new vehicles. Ms Skuse's evidence about this matter was a little confusing. The letter of 7 November 2003 suggested the practice was not as the appellant believed. But, in cross-examination she agreed that once ATSIC grants were "acquitted" the assets became the property of the grantee organisation which was relieved of any further obligations in respect of the grant terms and conditions, unless the vehicles were required for further top up money for trade-ins. And in re-examination, she stated that cl 17.4 required the grantee organisation to request permission for disposal of assets over $5,000, a practice which continued to apply for future years.

[22] The appellant drew a distinction between the disposal of vehicles being traded-in (to which the letter of 7 November 2003 related) and those simply sold (to which counts 1 and 2 related). But Mr Watson, the chief executive officer of ATSIS at the relevant time,[16] and Ms Judith McNamara and Mr Ashok Kumar, both managers in grant administration under ATSIC and later ATSIS, each gave evidence that in November 2004 organisations receiving ATSIC grants had to apply for approval to dispose of assets acquired with ATSIC or ATSIS funds. The process they explained seemed more consistent with the clear terms of cl 17.4 of the grant than the appellant's construction.

[23] In support of the honesty of his belief, the appellant emphasised that the vehicles were given to Bidjara CDEP and Bidjara Legal Service under the grant and they had title. But so much was contemplated by the terms of cl 17.2 of the grant which commences "Ownership of Grant Assets will vest in you", that is, in the grantee organisation.

[24] To establish dishonesty, the prosecution had to prove beyond reasonable doubt that, at the time the appellant wrote each letter, he acted dishonestly by the standards of ordinary honest people and that he knew that what he did was dishonest. It therefore does not matter if his construction of cl 17.4 was inaccurate if it was honestly held. A wrong, pig-headed or irrational belief may be an honest one. The evidence established that at some point prior to 5 November the appellant may well have believed that Bidjara CDEP and Bidjara Legal Service were entitled to sell the relevant vehicles and that cl 17.4 had no application to the sales.

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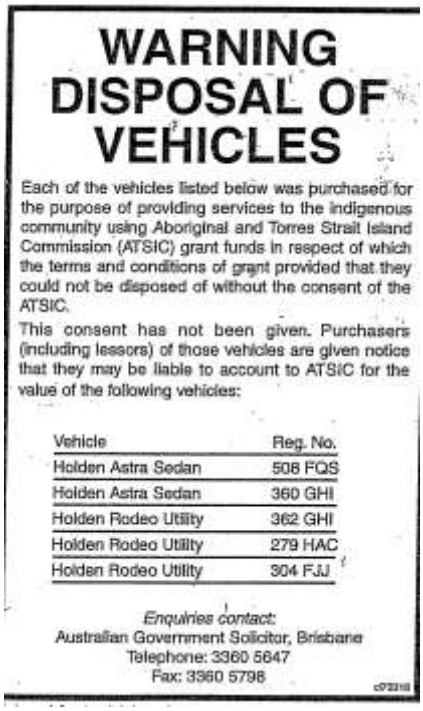
15 Set out at [35] of Muir JA's reasons.

16 Mr Watson's evidence is summarised in Muir JA's reasons at [139] – [145].

[25] But at 6.00 pm on 28 October 2004 an Australian Federal Police officer handed Mr Maris a letter from Mr Robert Powrie, a senior lawyer with the Australian Government Solicitor ("AGS"). It stated that Mr Powrie was acting for ATSIC, that ATSIC had not given consent in terms of the grant for the sale of specified vehicles (not those relevant to counts 1 and 2) and to "cease any attempts to dispose of these or any other vehicles".[17] Mr Maris discussed this letter with the appellant who telephoned Mr Powrie and told him that Mr Powrie did not act for ATSIC and must cease to threaten Bidjara CDEP. Shortly after 29 October 2004 Mr Maris received another letter, this time by registered post, signed by Mr Barry Cosgrove, a senior lawyer for the AGS. The letter listed vehicles, including some of those concerned in counts 1 and 2, and repeated the assertion that under the grant these vehicles could not be disposed of without ATSIC's consent which had not been given. Mr Maris discussed this letter, too, with the appellant who contacted others, including the chair of ATSIC, Mr Geoff Clark, and lawyers who, according to Mr Maris and the appellant, confirmed that ATSIC's consent was not required. Those who were said to have given that advice were not called at trial.

[26] Mr Cosgrove then placed the advertisements referred to in the particulars in the Charleville Star on the Wednesday after 29 October 2004, and in the Brisbane Courier-Mail on the Saturday after 29 October, that is, prior to 5 November when the appellant sent the first of the letters. The advertisements[18] were in these terms:



WARNING
DISPOSAL OF VEHICLES

Each of the vehicles listed below was purchased for the purpose of providing services to the indigenous community using Aboriginal and Torres Strait Island Commission (ATSIC) grant funds in respect of which the terms and conditions of grant provided that they could not be disposed of without the consent of the ATSIC.

This consent has not been given. Purchasers (including lessors) of those vehicles are given notice that they may be liable to account to ATSIC for the value of the following vehicles:

Vehicle	Reg. No.
Holden Astra Sedan	508 FQS
Holden Astra Sedan	360 GHI
Holden Rodeo Utility	362 GHI
Holden Rodeo Utility	279 HAC
Holden Rodeo Utility	304 FJJ

Enquiries contact:
Australian Government Solicitor, Brisbane
Telephone: 3360 5647
Fax: 3360 5798

[27] The first listed vehicle related only to count 2 and the remainder to both counts 1 and 2. The appellant knew of these letters and advertisements prior to writing the letters the subject of counts 1 and 2. In the absence of independent evidence from the lawyers whom he claimed advised that ATSIC's consent was not required, his letter writing was either courageous, foolish, arrogant, desperate or dishonest, or perhaps a combination of two or more of those. The appellant rightly points out that he brought the advertisements to the attention of Mr Mitchell. But the jury were

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17 Ex 5.

18 AB 1406.

entitled to conclude that he did so dishonestly, making the most of an increasing difficult situation. I reject the appellant's contention that, as different conclusions were open, the jury must have been left in doubt on this issue. After reviewing the evidence I am satisfied the jury could rightly have found beyond reasonable doubt that when he wrote both letters he was acting dishonestly. They may have considered that he knew that his earlier apprehension of the terms of cl 17.4 may be wrong and that he wrote and sent the letters so as to ensure the vehicle sales were finalised with some of the proceeds to be used for his personal legal expenses. The jury could have reached a contrary conclusion, but they were certainly entitled to conclude his actions in these circumstances were dishonest by the standards of ordinary honest people.

[28] I further note in respect of the dishonesty element in count 2 that the appellant wrote in the final paragraph of the letter of 11 November: "The Board of ATSIC gives authority to Bidjara CDEP & Bidjara Legal Service to dispose of these vehicles". The jury may have considered that this statement was consistent with him knowing that ATSIC's consent to dispose of the vehicles was required before sale. They were not obliged to accept his evidence purporting to explain the circumstances leading to the insertion of that paragraph, that is, that Mr Mitchell requested the sentence be included and the appellant meant to express it differently. His explanation did not have the ring of truth and was not unequivocally supported by Mr Mitchell who, perhaps conveniently, could not recall details of their dealings concerning this paragraph. The jury were entitled to also consider this subsequent suspicious conduct in assessing the appellant's alleged dishonesty on count 1.

[29] Finally, I turn to consider whether it was open to the jury to find beyond reasonable doubt that the appellant intended to gain a personal advantage when he wrote the letter of 11 November (count 2). As for count 1, it is not contentious that the appellant introduced Mr Mitchell to Bidjara Legal Service and was actively involved in the sale of the vehicles. Part of the proceeds was used to pay his private legal expenses. It was irrelevant that he may have been borrowing their money. The appellant contended the evidence did not establish he gained an advantage in count 2 as the 11 November letter may have been written after Mr Mitchell had paid the sale price into the trust account of the Bidjara Legal Services' solicitor and the appellant's legal representatives had been paid. There was no evidence as to whether the appellant knew when he wrote and sent the letter of 11 November both that Mr Mitchell had already paid for the vehicles and that the appellant's legal fees had been paid. The question for the jury was not whether the appellant in fact gained a personal advantage by writing the letter but whether he intended so to do. It was open to the jury to conclude from the appellant's conduct, clearly aimed at accommodating Mr Mitchell, that when the appellant wrote the letter of 11 November he did not know whether Mr Mitchell had paid for the vehicles or whether the appellant's private legal expenses had been met.[19] For these reasons, the jury were entitled to conclude that the appellant's intention in writing and sending the letter of 11 November (count 2) was to gain the particularised advantage.

[30] After reviewing the whole of the evidence, I am satisfied the jury were entitled to be satisfied beyond reasonable doubt of the guilt of the appellant on each count. The judge correctly ordered there was a case to answer at the close of the prosecution

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19 *R v Robinson* [2010] 2 Qd R 446, 454 [16], Muir JA agreeing at 463 [62].

evidence. It follows that grounds 4 and 5 are not made out. I agree with Muir JA that the appeal should be dismissed.

[31] ORDER: The appeal against conviction be dismissed.

[32] **MUIR JA**: **Introduction** The appellant successfully appealed against his convictions after a trial by jury in the District Court of two counts of contravening s 26(1) of the *Commonwealth Authorities and Companies Act* 1997 (Cth) ("the Act"). On 1 September 2009, the Court of Appeal set aside the convictions and ordered a re-trial.[20] There had been a previous trial in which, on 13 March 2008, the jury was discharged, having been unable to reach verdicts.

[33] On 22 October 2009, the respondent presented a new indictment in the District Court at Toowoomba, charging the appellant with two counts of contravening s 26(2)(a) of the Act. The appellant applied for an order that the indictment be stayed permanently. That application was dismissed by the trial judge on 21 June 2010. The appellant brought another application pursuant to s 590AA of the *Criminal Code* seeking orders that certain evidence not be admitted in his trial. That application was dismissed on 26 November 2010.

[34] On 13 April 2011, the appellant was convicted of both counts on the new indictment. He appeals against his convictions on the grounds discussed below.

The factual background

[35] Before discussing those grounds, it is desirable to outline briefly some of the facts. At relevant times the appellant was a Commissioner of the Aboriginal and Torres Strait Islander Commission ("ATSIC"). ATSIC provided grants to "'service providers', the Bidjara CDEP Company Ltd ('Bidjara CDEP') and the Bidjara and Southwest Qld Aboriginal Legal Services Limited ('BSWQALS'), or ('the Legal Service')". The grants which are relevant for present purposes were issued to Bidjara CDEP and the Legal Service for the purchase of particular motor vehicles. Clause 17.4 of the grant terms and conditions provided:

> "**You must obtain our written approval:**
>
> a. before disposing of or giving security [over] any Grant Asset (other than trading stock of a commercial project) having a current market value over $5,000; and
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> b. before using the proceeds from such disposal."

[36] It was not in dispute on the trial or on appeal that each of the motor vehicles in question was a "Grant Asset" for the purposes of this provision.

[37] It is useful now to quote the recitation of facts contained in the reasons of Keane JA on the first appeal:[21]

> "[6] Each of the two charges against the appellant was based on a letter written by him to facilitate the sale of assets owned by

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20 *R v Robinson* [2009] QCA 250.

21 *R v Robinson* [2009] QCA 250 at [6] – [10].

entities associated with the appellant for the improper purpose of raising funds for his own legal expenses. The letters were written on 5 November and 11 November 2004 respectively. The first letter was written on the letterhead of a Commissioner of the now defunct Aboriginal and Torres Strait Islander Commission ('ATSIC'). Both letters were signed by the appellant as a Commissioner of ATSIC. It is not in dispute that ATSIC was a Commonwealth authority and that the appellant was an officer of that authority.

[7] The Crown case asserted that the letters falsely stated that ATSIC's General Terms and Conditions Relating to Grants ('the Conditions') did not apply to certain motor vehicles which had been acquired by entities associated with the appellant and which were being sold by those entities ('the vendors') to the person to whom each letter was addressed. The second letter asserted, falsely, that 'the Board of ATSIC gives authority … to dispose of these vehicles'. The Crown contended that, under the Conditions, the entities associated with the appellant were not permitted to sell the vehicles without ATSIC's permission, and that the appellant knew that that was the case.

[8] The letter of 5 November 2004 was in the following terms:

'Mr Stuart Mitchell
PO Box 519
Nerang Q

Attention: Stuart

Further to our telephone conversation of this morning concerning the advertisement in the Courier Mail (04.11.04) regarding the vehicles sold to you by the Bidjara CDEP Aboriginal Corporation.

These vehicles as listed below are wholly and solely the property of the Bidjara CDEP Aboriginal Corporation, ATSIC does not have the "Bill of Sale" over the vehicles or any other legal encumbrance.

- Holden Dual Cab Rodeo (304 FJJ)
- Holden Dual Cab Rodeo (362 GHI)
- Holden Dual Cab Rodeo (279 HAC)
- Holden Rodeo Utility (941 GBJ)
- Holden Astra Sedan (360 GHI)

The advertisements by the Australian Government Solicitor are illegal and total nonsense.

The Bidjara CDEP has instructed their solicitors should these scaremongering attics [sic] continue the necessary legal action will be taken.

Stuart if any person you are dealing with in regards to the above-mentioned vehicles have any concerns I suggest you refer them to this letter or [they] may contact either myself as the Commissioner or the Chairperson of Bidjara CDEP.

Yours faithfully

Ray Robinson
Commissioner

Please Note: the sales of these vehicles are not subject to any Grant Terms and Conditions.'

[9] It may be noted here that the advertisements by the Australian Government Solicitor ('AGS') to which reference was made in this letter asserted that ATSIC's consent to the sale of these motor vehicles was required and that ATSIC did not consent to the sale.

[10] The letter of 11 November 2004 was in the following terms:

'Mr Stuart Mitchell
Riokate Pty Ltd
PO Box 519
Nerang Q 4211

To Whom It May Concern:

The vehicles listed below plus all vehicles owned and registered in the name of Bidjara CDEP Company Limited and [Bidjara] and South-West Queensland Aboriginal Legal Services Limited are the sole property of the above named companies.

There are no legal encumbrances what so ever, the vehicles listed are not subject to any grant or conditions of grant and may be deposed of [sic] in the normal course of business.

HOLDEN ASTRA 508 FQS	HOLDEN COMMODORE 268 HAC
HOLDEN ASTRA 360 GHI	HOLDEN COMMODORE 955 GBJ
HOLDEN RODEO 362 GHI	HOLDEN JACKAROO 277 HAC
HOLDEN RODEO 297 HAC	HOLDEN RODEO 941 GBJ
HOLDEN RODEO 304 FJJ	FORD FALCON 599 GYS

The Board of ATSIC gives authority to Bidjara CDEP & Bidjara Legal Service to dispose of these vehicles.

Yours faithfully,
Ray Robinson
Commissioner
Qld South Zone'"

[38] On 29 October 2004, the AGS wrote to Mr Maris, a member of a committee formed with a view to taking Bidjara CDEP out of administration, stating that: the AGS acted for ATSIC; that the vehicles listed in the letter, including the subject vehicles, had been purchased using ATSIC grant funds and could not be disposed of without the consent of ATSIC; and that no such consent had been given. The letter requested the cooperation of Mr Maris' company in securing the return of the motor vehicles to Indigenous Employment Projects Pty Ltd ("IEP"), a company controlled by a Mr Carter, and cooperation with ATSIC to secure the transfer of the vehicles to IEP so that Community Development Employment Project ("CDEP") services "can be delivered without interruption".

[39] In his evidence-in-chief the appellant admitted being shown a copy of the letter by Mr Maris. He swore that after seeing it he telephoned Mr Powrie, a senior lawyer in the office of the AGS, and said:[22]

> "I wish you'd stop going around sending these letters to the board of directors. You do not act for ATSIC, you've never acted for ATSIC, and Australian Government Solicitors do not act for ATSIC."

[40] Mr Powrie did not deny that words to this effect were spoken by the appellant.

[41] The appellant's explanation for his understanding that there was no impediment to the sale of the vehicles was that the terms and conditions of the grant had been "acquitted". Acquittal, he explained, took place when grant monies had been expended for the purpose for which they had been provided by ATSIC in accordance with the grant terms and conditions.[23] In this case, acquittal took place when the subject vehicles were initially purchased and paid for.

[42] Mr Mitchell, a motor vehicle dealer, went to Charleville at the request of Bidjara CDEP on 28 October 2004 where, in the presence of the appellant and others, he inspected vehicles the corporation was proposing to sell. He agreed to purchase five vehicles for $53,500 and was given a letter on the corporation's letterhead signed by two directors stating that the directors gave authority for the sale of the vehicles and that they were owned by the CDEP "free and unencumbered". He was also given a receipt for $53,500 dated 28 October 2004 signed by both directors and a letter signed by them dated 28 October 2004 directing him to pay the $53,500 into the Frank Jongkind and Co Trust Account.

[43] Shortly afterwards, the appellant telephoned Mr Mitchell about the AGS advertisement. After he had obtained a copy, Mr Mitchell telephoned the appellant who said he was sending him a letter to say "it was a load of codswallop" and that "they were all free and unencumbered".

[44] Mr Jongkind's trust account receipt recorded the deposit on 2 November 2004 of $53,500 received from Riokate Pty Ltd: the company through which Mr Mitchell acted. The trust account ledger card for Bidjara Aboriginal Housing and Land Company also recorded a payment of $25,000 to Thynne & Macartney on 10 November 2004 and one on the same date of $20,000 to Mr Vasta QC. The payments were for legal expenses incurred on behalf of the appellant.

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22 AB 683.

23 AB 686.

[45] The Legal Service subsequently contacted Mr Mitchell with a view to selling five of its vehicles. Mr Mitchell went back to Charleville on 8 or 9 November to inspect the vehicles. The appellant was present at the inspection and at a meeting of the Board of the Legal Service on 9 November 2004 at which the Board resolved to sell four vehicles for $47,000 to Riokate. There was also one other vehicle which Mr Mitchell agreed to purchase for $10,000 and a tractor for $4,000, making a total of $61,000.[24] A payment from Riokate of $61,000 was recorded in Mr Jongkind's trust account receipt as having been made on 16 November 2004. However, Mr Jongkind's bank records show the receipt of this deposit on 11 November 2004. The cheque to Thynne & Macartney was cleared on 12 November 2004. The cheque to Mr Vasta was dated 10 November 2011.

[46] The appellant gave and called evidence. In his oral evidence he said that he did not believe that the grant terms and conditions applied to the subject motor vehicles. He also swore that the money transferred to the lawyers was money which he had been lent by the Legal Service.

[47] It is now convenient to consider the grounds of appeal pursued on the hearing of the appeal.

Ground 1 – The trial judge erred in not ordering that the indictment presented on 22 October 2009 be stayed as an abuse of process

[48] The appellant's argument commenced by identifying four errors allegedly made by the trial judge which were said to have vitiated the exercise of her discretion:

1. treating the situation as one which did not involve error by the prosecution;
2. failing to appreciate the significance of Keane JA's remarks in his reasons in the first appeal that the evidence was more properly supportive of charges under s 26(2) of the Act than s 26(1);
3. failing to have regard to the fact that an order for a stay did not mean the end of the prosecution; and
4. failing to acknowledge that the case to be run by the prosecution was a "new case".

[49] It is unnecessary for present purposes to pursue all of these points. In order to succeed, the appellant must show that the trial judge's discretion should have been exercised in favour of the grant of the stay. In that regard, the appellant argued that the respondent used the second trial as a "dry run" from which to obtain an advisory opinion as to the manner in which the case might actually succeed. The appellant submitted that it should not be open for the Crown to use the judicial process in this fashion as it trivialises the significance of a trial upon indictment and "blurs the separation of powers to an uncomfortable degree". The appellant should not have to face repeated prosecution until the Crown formulates a viable case.[25]

[50] The other major limb of the appellant's argument was that the respondent should not be permitted to prosecute "a new case" at the third trial after the verdicts of the jury on the second trial had been set aside on appeal.[26] Attention was drawn to an observation by the majority in *R v Taufahema*[27] that the difference between the case

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24 AB 436.

25 See *R v Koolmatrie* (1989) 52 SASR 482 at 496.

26 *R v Taufahema* (2007) 228 CLR 232.

27 (2007) 228 CLR 232.

relied on in the first trial and the case to be relied on in the second trial must be "substantial" if it is to stand as a bar to a second trial. It was submitted that the difference here was substantial as the first and second trials were concerned with the exercise of powers or the breach of duties whereas the third trial was not, giving it a very different "quality". The second trial was run on a fresh rather than an amended indictment grounded on another part of the Act. Consequently, it was urged, the case mounted on the second indictment was substantially different to that based on the first.

[51] In *Taufahema* an accused was charged with the murder of a police officer on the basis of secondary liability. The officer had been killed by shots fired by a passenger in a car driven by the accused after it was pulled over by the officer. The prosecution originally contended that the accused was party to a joint criminal enterprise involving the use of a firearm to prevent the lawful arrest by police of himself and the passengers in the car. The case was put in the summing up as an allegation by the prosecution of a joint enterprise to evade apprehension, involving the shooting of a police officer as a foreseen possibility. On the hearing of an application for special leave to appeal from the judgment of the Court of Criminal Appeal, the Crown, for the first time, characterised the joint enterprise as the commission of an armed robbery in which a fatal shooting was foreseen as a possible incident. It was held, by a majority, that there was no substantial difference between the case relied on at the trial and that sought to be relied on if a new trial were ordered.

[52] In the course of their reasons, Gummow, Hayne, Heydon and Crennan JJ implicitly approved of a statement of Dawson J in *King v The Queen*,[28] that "… the Crown should not be given an opportunity to make a new case which was not made at the first trial". Reference was made to a submission by counsel for the accused that the case sought to be advanced by the respondent was a "new case" because it was a case based on a radically different particularisation of the joint criminal enterprise. Their Honours observed:[29]

> "The authorities on whether appellate courts should order a new trial or an acquittal offer very little explicit exposition of what is meant, conceptually, by a 'new case which was not made at the first trial'. However, the way the authorities have been decided tends to show that the 'new case' test is not easy for accused persons to satisfy. It is proposed to examine four of those authorities."

[53] After reviewing the authorities, their Honours said:[30]

> "These authorities suggest that the difference between the case relied on in a first trial and the case to be relied on in a second trial must be substantial if the difference is to stand as a bar to an order for a second trial."

[54] Their Honours then discussed the similarities and differences between the case advanced on the first trial and that intended to be advanced on the second trial, noting that what the prosecution proposed to do at the second trial was "not to advance any factual allegation inconsistent with what the jury or the Court of Criminal Appeal have already found, and not to advance any factual allegation

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28 (1986) 161 CLR 423 at 433.

29 *R v Taufahema* (2007) 228 CLR 232 at 258.

30 At 262.

inconsistent with the case advanced at the first trial".[31] It was said that what the prosecution was proposing was to rely on the evidence called at the first trial, but to characterise the facts "which that evidence may establish in a different way, but not a radically different way" and to "rely on an inference which could have been drawn in the first trial".

[55] Their Honours observed:[32]

> "As for tactical considerations, no doubt it was easier for the prosecution to seek to establish the case left to the jury than the case opened at the first trial at a factual level, and possibly the 'new case', had it occurred to counsel for the prosecution, was originally not run because of its perceived difficulty. In the circumstances as they have unfolded, however, it is hard to see why it is unfair for the prosecution to be allowed to remould its case in the manner proposed. What has happened may be regrettable and undesirable, but it is not sinister."

[56] The authorities discussed in the joint reasons were *R v Wilkes*,[33] *King v The Queen*,[34] *Jiminez v The Queen*[35] and *Parker v The Queen*.[36]

[57] The decision in *Wilkes* turned on very distinctive facts and does not shed a great deal of light on the principle under consideration.

[58] *King*, like *Wilkes*, was a case involving inconsistent verdicts. King and another were charged with murdering King's wife. King was convicted and the co-offender, Matthews, was acquitted. The Court of Criminal Appeal directed that King be retried on the basis that King's trial had miscarried as a result of the content of the trial judge's summing up. Dawson J concluded that:[37]

> "If the verdict against King in this case was inconsistent with the verdict in favour of Matthews, then the Crown could properly succeed against King upon a retrial only by putting a new case. It certainly ought not be allowed to proceed in any retrial upon a basis inconsistent with the jury's verdict of acquittal of Matthews."

[59] In *Jiminez*, the only judge who relied on the principle under consideration was McHugh J. He concluded that a new trial should not be ordered because "… a second trial would allow the Crown to make a case different from that which it put to the jury at the first trial".[38]

[60] In *Island Maritime Limited v Filipowski*,[39] the owner and the master of a ship which allegedly discharged oil were both charged by summons with contraventions of provisions of the *Marine Pollution Act* 1987 (NSW). At the conclusion of the prosecution case, it was found that the defendants had no case to answer on the basis that the provisions of the Act relied on by the prosecution had no application.

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31 At 262.
32 At 263.
33 (1948) 77 CLR 511.
34 (1986) 161 CLR 423.
35 (1992) 173 CLR 572.
36 (1997) 186 CLR 494.
37 *King v The Queen* (1986) 161 CLR 423 at 433.
38 (1992) 173 CLR 572 at 590.
39 (2006) 226 CLR 328.

The prosecutor subsequently filed summonses in the same Court charging the defendants with contraventions of other provisions of the Act relating to the same discharge. The defendant sought a permanent stay of the later proceedings on grounds that they were bound by the principle of *autrefois acquit* or constituted an abuse of process. Gleeson CJ, Heydon and Crennan JJ concluded:[40]

> "The error by the prosecution in filing the first set of summonses as it did is regrettable but not oppressive. The appellants are not being prosecuted for the same offence, or overlapping offences: originally they were prosecuted for the wrong offence and now they are being prosecuted for the right one. The Court of Criminal Appeal rightly said that the delays that have taken place reveal a desultory approach which is to be deplored, but the delays, partly unexplained though they are, have not been of extraordinary length. The filing of the second set of summonses was not in substance anything more than a belated amendment of the first set. The problem with which the Convention, the Commonwealth Act and the *Marine Pollution Act* are attempting to deal is a very serious one. Depending on the circumstances eventually established, the crimes alleged against the appellants are serious. There is a high public interest in having the allegations disposed of, one way or the other, on the merits. Nothing has been pointed to which prevails over that interest, and no appellable error has been demonstrated in the handling of this question in the courts below."

[61] It is now necessary to consider the application of the principles discussed above to the facts and circumstances of this case.

[62] Section 26 of the Act was in the following terms:

> "**Good faith, use of position and use of information–criminal offences**
>
> *Good faith–officers*
>
> (1) An officer of a Commonwealth authority commits an offence if he or she:
>
> (a) is reckless; or
>
> (b) is intentionally dishonest;
>
> and fails to exercise his or her powers and discharge his or her duties:
>
> (c) in good faith in what he or she believes to be in the best interests of the Commonwealth authority; or
>
> (d) for a proper purpose.
>
> …
>
> (2) An officer or employee of a Commonwealth authority commits an offence if he or she uses his or her position dishonestly:

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40 At [32].

(a) with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the Commonwealth authority or to another person;

…"

[63] The indictment at the time of the second trial alleged that the appellant being an ATSIC Commissioner on or about 5 November 2004 at Charleville "was intentionally dishonest and failed to exercise his powers and discharge his duties for a proper purpose"; and on or about 11 November 2004 at Charleville "was intentionally dishonest and failed to exercise his powers and discharge his duties for a proper purpose".

[64] The indictment for the third trial alleged:

"Count 1. Commonwealth Authorities and Companies Act Section 26(2)(a)	On or about the fifth day of November 2004 at Charleville in the State of Queensland, ROBERT RAYMOND LLOYD ROBINSON being an officer of a Commonwealth authority, namely a Commissioner of the Aboriginal and Torres Strait Islander Commission, used his position dishonestly with the intention of directly or indirectly gaining an advantage for himself
Count 2 Commonwealth Authorities and Companies Act Section 26(2)(a)	On or about the eleventh day of November 2004 at Charleville in the State of Queensland, ROBERT RAYMOND LLOYD ROBINSON being an officer of a Commonwealth authority, namely a Commissioner of the Aboriginal and Torres Strait Islander Commission, used his position dishonestly with the intention of directly or indirectly gaining an advantage for himself"

[65] Section 26(1), as was held in *R v Robinson*,[41] "creates an offence where there is a failure to exercise a power and discharge a duty the existence of which is assumed by the provision". The powers and duties are ones "held by or imposed on the officer in question as aspects of his or her particular office".[42] Section 26(2) is concerned relevantly with the dishonest use of an officer's position "with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else".

[66] In summing up the case to the jury, the trial judge in the second trial directed the jury by reference to a sheet of paper provided to them which provided:[43]

"Charge One

The prosecution must satisfy you beyond reasonable doubt:–

1. On or about the 5th day of November 2004;

2. At Charleville in the State of Queensland;

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41 [2009] QCA 250 at [29].
42 At [35].
43 At [22].

3. Robert Raymond Lloyd Robinson being an officer of [a] Commonwealth Authority namely a Commissioner of the Aboriginal and Torres Strait Islander Commission;

4. Was intentionally dishonest;

5. And failed to exercise his powers and discharge his duties for a proper purpose.

Charge Two

The prosecution must satisfy you beyond reasonable doubt:–

1. On or about the 11th day of November 2004;

2. At Charleville in the State of Queensland;

3. Robert Raymond Lloyd Robinson being an officer of [a] Commonwealth Authority namely a Commissioner of the Aboriginal and Torres Strait Islander Commission;

4. Was intentionally dishonest;

5. And failed to exercise his powers and discharge his duties for a proper purpose."

[67] As an aid to her summing up in the third trial, the trial judge provided the jury with a one page document which commenced:[44]

"**Major issues in dispute:**

1. Whether the defendant used his position as a Commissioner of the Aboriginal and Torres Strait Islander Commission (ATSIC) *dishonestly* when he wrote the letters to Stuart Mitchell on or about 5 and 11 November 2004?

2. Whether the defendant had the *intention* (at the time he wrote each letter) of directly or indirectly gaining an advantage for himself?

Both of these issues relate to the defendant's state of mind at the time he wrote each of the letters.

To prove the defendant acted ***dishonestly***, the prosecution must satisfy you:

1. That what the defendant did was dishonest by the standards of ordinary honest people;

and:

2. That the defendant knew that what he did was dishonest by those standards.

Intention is an element of the offences…"

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44 AB 2330.

[68] Each count on both indictments required proof that:

- the appellant was a Commissioner of ATSIC;
- being a Commissioner of ATSIC, the appellant was intentionally dishonest;
- the dishonesty concerned the contents of and the sending of a particular letter;
- in the letter the appellant falsely stated that the grant terms and conditions did not apply; and
- the appellant had the intention at the time of writing the letter of dishonestly gaining an advantage for himself.

[69] The focus in the third trial was on whether; the appellant actually believed when writing and/or sending the 5 November and 11 November letters that the vehicles listed in the letters were not "subject to any grant terms and conditions" such as to pose a legal impediment to their sale; and additionally in respect of count 2, whether the appellant believed the assertion in the 11 November letter that the Board of ATSIC gave authority to Bidjara CDEP and the Legal Service to dispose of the vehicles. It was not suggested that there was a different focus on the second trial.

[70] In determining whether the prosecution was presenting "a new case" in the new indictment, the substance of the case presented at the second and third trials is more important than the theoretical possibilities open on the wording of the indictment. In determining rights, duties and obligations, the law generally looks to substance rather than form.[45] It is significant that on the s 590AA application and on appeal, the appellant did not identify or seek to identify any respect in which the evidence relied on by the prosecution in the two trials, or the general thrust of the prosecution case, differed. Nor did the appellant identify any way in which he had been prejudiced in presenting his defence or otherwise in relation to the conduct of the second trial, apart from the prejudice inherent in his having to face a further trial.

[71] In my view, the appellant failed to demonstrate that the case presented on the new indictment differed substantially from that presented on the first indictment or that the new case occasioned any oppression or unfairness. The verdicts on the second trial were set aside because the jury's attention was not directed by the trial judge to whether the appellant failed to exercise a power and discharge a duty to prevent the sales: "the jury's attention was not drawn to consider what act or omission on the appellant's part could give rise to an offence".[46] The misdirection no doubt resulted, in part at least, from the way the prosecution case was conducted, but assertions of abuse of the judicial process by the prosecution are unfounded. The prosecution, rightly or wrongly, concluded after having regard to Keane JA's reasons that it was preferable to base its case on s 26(2) rather than s 26(1), while retaining not only the same evidentiary base but also the same central arguments. Some emphasis was placed on the fact that the original charges had been carefully

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45 See e.g. *Commissioner of Taxation v BHP Billiton Minerals Pty Ltd* (2011) 244 CLR 325 (taxation); *City of Brisbane v Commissioner of Stamps* [1923] St R Qd 54 at 58; *Oughtred v Inland Revenue Commissioners* [1960] AC 206 (stamp duty); *Ha v State of New South Wales* (1997) 189 CLR 465 at 498; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 466 – 467; *Cole v Whitfield* (1988) 165 CLR 360 at 408 (statutory construction / constitutional law); *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 368; *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514 at 520 (contract law).

46 *R v Robinson* [2009] QCA 250 at [42].

selected by the prosecution. It may be accepted that they were, but that is as it should be. This may be a relevant factor, but as was the case in *R v Taufahema*,[47] it does not outweigh the considerations addressed above.

[72] The exercise of the trial judge's discretion in refusing a stay was not shown to have miscarried. This ground was not made out.

Ground 3 – The trial judge erred in not excluding from evidence an agreement entered into by Mr Philip Ruddock, the then Minister for Immigration, Multicultural and Indigenous Affairs, on behalf of the Commonwealth and Mr Geoff Clark, as Chairman of ATSIC, in or about June 2003

[73] In June 2003, an agreement ("the agreement") was signed by Mr Philip Ruddock, as Minister for Immigration, Multicultural and Indigenous Affairs, on behalf of the Commonwealth of Australia and by Mr Geoff Clark, purportedly on behalf of ATSIC. It was stated in the agreement that it was made between and bound the:[48]

> "1 Commonwealth of Australia represented by Aboriginal & Torres Strait Islander Services (ATSIS)
>
> 2 Aboriginal & Torres Strait Islander Commission (ATSIC)"

[74] The document then provided:[49]

> "**PREAMBLE**
>
> In implementing this Agreement, both ATSIC and ATSIS are committed to working together in the best interests of all Aboriginal and Torres Strait Islander peoples. This will be done to assist ATSIC to achieve its goal of self-determination and empowerment of all the indigenous peoples of Australia.
>
> **BACKGROUND**
>
> A. By notice in the Gazette of 30 May 2003, Aboriginal and Torres Strait Islander Services was established as an executive agency as from 1 July 2003.
>
> B. ATSIS has been given a number of functions including, delivering programs for Aboriginal and Torres Strait Islanders and providing policy advice and advocacy support to ATSIC.
>
> C. ATSIC was established by Section 6 of the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth.) (the Act).
>
> D. Some of the functions that ATSIC has to date carried out will from 1 July be performed by ATSIS and ATSIS will act as agent for ATSIC in relation to certain other functions of ATSIC.
>
> E. Certain employees of ATSIC will also be transferred to ATSIS pursuant to s.72 of the Public Service Act 1999.

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47 (2007) 228 CLR 232 at 258 [58].

48 AB 1529.

49 AB 1529.

> F. In order to enable these arrangements to be put into place smoothly and co-operatively, the parties have agreed to enter into this agreement which will set out both transitional arrangements and interim arrangements for the long term co-operation of both parties in relation to their functions.
>
> …"

[75] The effect of the agreement was to vest the great bulk of ATSIC's functions in ATSIS.

[76] At a hearing before the trial judge under s 590AA of the *Criminal Code*, the appellant sought a determination that the agreement was inadmissible. On appeal it was alleged that the trial judge erred in not excluding the agreement on the basis that it was:

> "… unlawfully, improperly or unfairly obtained because by necessary implication it was beyond the power of the Executive Government:
>
> (i) to establish ATSIS to engage in activities which parallel the functions hitherto performed by ATSIC and conferred on ATSIC by the ATSIC Act 1989;
>
> (ii) by operation of the ATSIC Act 1989 to expend money appropriated to ATSIS."

[77] It was contended also that the trial judge erred in finding that ATSIC had power to delegate the performance of its obligations to ATSIS and in finding that ATSIC's then Chairman, Mr Clark, had been authorised to sign the agreement on behalf of ATSIC.

[78] The challenge to the admissibility of the agreement was mounted because the prosecution intended to call Mr Watson, the Chief Executive Officer of ATSIS, to say that at the time the two letters to Mr Mitchell were written, he was the person with the authority to give consent on behalf of ATSIC to the sale of the vehicles and that no such consent was sought or obtained. In this regard, the role of the agreement was to establish that ATSIS had assumed the relevant duties and powers of ATSIC.

[79] It is difficult to see why the pre-trial hearing in respect of the relationship between ATSIC and ATSIS and the validity of the agreement consumed five hearing days. These matters went only to the question of the admissibility of the agreement for the purpose identified above. If the appellant's contentions as to the invalidity of the agreement are correct, ATSIC's consent could be given only by ATSIC itself and not by ATSIS as its agent. It was never part of the defence case that the Board of ATSIC had given consent. The appellant, as an ATSIC director, was in a position to know whether such consent had been given and never suggested that it had. Moreover, it could have been safely predicted that the jury would be able to conclude from the evidence to be led by the prosecution that ATSIC had not consented.

[80] In my view, the trial judge was correct in finding that the agreement was admissible. Even if it was invalid and ATSIS had no authority to act as ATSIC's agent, the

evidence was that it purported to do so. ATSIC's functions in relation to grant monies were in fact taken over by ATSIS on 1 July 2003. What happened, in fact rather than in terms of legal principle or theory, in relation to the operations which ATSIC had formerly undertaken, bore on the question whether ATSIC had consented to the disposition of the subject vehicles. If ATSIC's role in respect of such consents had been assumed by ATSIS, it would tend to follow that ATSIC itself would not have given consent. Whether ATSIC had given its consent was a live issue during the pre-trial hearing and at the time the agreement was admitted into evidence. The defence did not formally admit that ATSIC's consent had not been given.

[81] Another alleged error on the part of the trial judge in relation to her decision not to exclude the agreement was her finding that the Board of ATSIC approved the signing of the transitional agreement. Minutes of a meeting of the Board of ATSIC held on 16, 17 and 19 June 2003 contain a resolution approving the draft agreement "subject to the changes made by the Board, for signature by the ATSIC Chairman on behalf of ATSIC and the Minister… on behalf of the Commonwealth". Minutes of the Board meeting held on 18 – 20 August 2003 record the acceptance of the minutes of the previous meeting as a true and correct record of that meeting. The appellant contended that the trial judge erred in accepting the evidence of three board members who confirmed the accuracy of the minutes over the evidence of five other board members to the effect that the Board had not agreed to the signing of the agreement. It was submitted that the evidence of the latter board members was supported by:

1. the ATSIC Board minutes of June 2004 which contained details of discussions that cast doubt on the accuracy of the earlier minutes; and

2. the fact that the ATSIC Board initiated a High Court challenge to the validity of the agreement.

[82] A number of other criticisms were made of the trial judge's findings, but it is unnecessary to discuss them because, for the reasons advanced above, the question of the validity of the agreement did not make its existence and what had been done in purported performance of it irrelevant. I note that both the prosecution and the defence accepted on the trial that the "real issue" in relation to the validity of the agreement and the operation of cl 17.4 of the grant terms and conditions concerned the state of mind of the appellant.

[83] Accordingly, ground 3 was not made out.

Ground 4 – the trial judge erred in ruling at the conclusion of the prosecution case that there was a case to answer

[84] The appellant contended that the trial judge should have held that there was no case to answer as the prosecution had failed:

1. to prove that consent had not been obtained in accordance with the grant terms and conditions; and

2. to show that the appellant could have had the dishonest intention alleged.

[85] The appellant's argument in relation to the first of these contentions was to the following effect. The prosecution's case was that the appellant knew that the vehicles were owned subject to grant terms and conditions which required ATSIC's consent to dispose of the vehicles and that consent had not been obtained. It was further part of the prosecution case that, as a result of the agreement, any such consent needed to be obtained from ATSIS via Mr Watson. The trial judge erred in concluding that there was credible evidence that Mr Watson was the person from whom consent should have been obtained and that otherwise lack of consent was not something the Crown needed to prove as the prosecution case was always that, contrary to the terms and conditions of the grant of monies by ATSIC, the vehicles were sold without consent. Section 45(1) of the ATSIC Act makes it clear that only ATSIC can delegate its functions and powers. Such a delegation must be in writing under the Commission's seal. The delegation held by the former Chief Executive Officer of ATSIC was revoked in March 2004 and not reissued and Mr Watson held no such authority from ATSIC.

[86] The appellant's argument in this regard suffers from the defects identified in ground 3. Whether Mr Watson had authority to act as ATSIC's agent for relevant purposes did not need to be determined in order to enable the prosecution to prove that ATSIC had not consented to the sale of the vehicles. The evidence established that: Mr Watson did not give consent; no local officers of ATSIS gave consent; the Board of ATSIC gave no relevant consent; and that it was not part of the Board's normal role to give such consent.

[87] It was not suggested to Mr Watson that anyone else may have given consent on behalf of ATSIC, whether directly or via ATSIS. It was open to the jury to conclude that if Mr Watson and the ATSIC officers, referred to later, had not provided any relevant consent, no one else on behalf of ATSIC had done so. It was not suggested in cross-examination of the ATSIC officers that anyone on behalf of ATSIC itself or ATSIS had given consent. Moreover, it was plainly implicit in the stance adopted by the appellant, Bidjara CDEP and the Legal Service that neither ATSIC nor ATSIS had been requested to give any consent. The conduct of the AGS also made it plain that they had been instructed by ATSIS that no consent had been given.

[88] I now turn to the second limb of this ground.

[89] The chronology of sale of the Bidjara CDEP vehicles was:

- 26.10.04 – inspection and agreement of price $61,000
- 28.10.04 – exclusion of one vehicle and price reduced to $53,000
- 29.10.04 – vehicles delivered
- 02.11.04 – Mr Mitchell paid $53,000 for the vehicles
- 05.11.04 – appellant sent the 5 November letter

[90] The transaction was complete prior to the letter being sent.

[91] The chronology of the sale of the BSWQALS vehicles was:

- 03.11.04 – authority to disburse trust funds
- 04.11.04 – authority to disburse to Thynne & Macartney
- 09.11.04 – inspection and agreement of price
- Mitchell sought the 11 November letter from appellant
- 10.11.04 – Appellant's direction to Jongkind to apply funds held in trust to Vasta and Thynne & Macartney
- Jongkind drew cheques to Mr Vasta QC and Thynne & Macartney
- 11.11.04 – Mitchell paid $61,000 for the vehicles
- Appellant sent the 11 November letter
- 12.11.04 – Mr Vasta QC and Thynne & Macartney cheques cleared

[92] Each of the cheques in favour of Mr Vasta QC and Thynne & Macartney was drawn by Mr Jongkind on 10 November prior to the sending of the 11 November letter.

[93] Further submissions were made to the following effect. In the opening of the prosecution case, the prosecutor contended that the assertions in the 5 November letter that "the advertisements by the Australian Government solicitor were illegal and nonsense and the cars were not subject to grant terms and conditions"[50] were "dishonest statements made to ensure sales went through". In relation to the second letter, it was opined by the prosecutor that the assertions in the letter that "the listed vehicles were the property of [Bidjara] CDEP or the Legal Service and there were no encumbrances, nor were they subject to any grant or conditions of grant" were dishonest. The prosecutor said,[51] "He knew the contrary to be true … The Crown says that was all done to make sure the sales would go through."

[94] A little later, the prosecutor said:[52]

> "Secondly, $25,000 went to fund the defamation action, that is the one being conducted by Thynne & Macartney. Those legal expenses, so says the prosecution, were Mr Robinson's purpose in ensuring the sale of the cars, that is securing a fund of money which he could arrange to be partially used for his own purposes."

[95] The trial judge was criticised for stating in her reasons for dismissing the no case application that there was only a slight difference between the written particulars provided by the prosecution and the case advanced on trial. The written particulars relevantly stated:[53]

> "[The appellant] had the intention of directly or indirectly gaining an advantage for himself by using some of the proceeds of the sales of the vehicles for his own private legal expenses, which in fact occurred."

[96] The trial judge also concluded that any difference in the particulars was "not so significant as to amount to a different case for the [appellant] to answer, or to

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50 AB 393.
51 AB 394.
52 AB 395.
53 AB 2323.

disadvantage the [appellant] in any way".[54] These findings were not criticised by the appellant.

[97] The argument advanced was that as count 2 related to the conduct of the appellant in sending the letter on or about 11 November 2004, the appellant could not have had the intention of making sure the sales would go through. This conclusion, it was argued, was able to be drawn from the chronology. It was submitted that if, as was the case, the appellant directed Mr Jongkind to apply funds held in trust to Mr Vasta and Thynne & Macartney on 10 November 2004 and Mr Jongkind drew the cheques on that day, the "obligation to the legal representatives [was] discharged" and it was not possible for the letter to have been written with the intention of using money for something that had already been done.

[98] Keane JA said in his reasons in the earlier appeal,[55] that:

> "There was evidence from which it could be inferred that $45,000 of the proceeds of sale was paid to lawyers who were acting for the appellant in other matters for their fees. Mr Callaghan SC, who appeared with Mr Gardiner for the appellant, pointed out that these moneys were received by the lawyers in question before the letter of 11 November 2004 was written by the appellant so that this letter could not have been written with that purpose. But it was open to the jury to conclude that the appellant did not know that his indebtedness to his lawyers had been satisfied by the time he wrote the second letter and to infer that the appellant's purpose in writing both letters was to facilitate the completion of the sale of the motor vehicles, to raise sufficient funds for his own private purposes rather than to raise funds for the benefit of ATSIC."

[99] Counsel for the appellant disputed that reasoning, noting that the evidence showed that the appellant had directed Mr Jongkind to apply funds "held in trust" and that cheques were drawn on 10 November. It was asked, rhetorically:

> "… how is it open for the jury to conclude that on the 11th the appellant did not know that he had dealt with a situation on the 10th, and even if there was some basis in the evidence for inferring that, as opposed to speculating along those lines, this would be something that has to be proved beyond reasonable doubt."

[100] On 4 November 2004, Bidjara Aboriginal Housing and Land Co Limited had given written authority to Mr Jongkind to apply "funds held in trust for the directors of [that company] towards costs and disbursements including counsel's fees and witness expenses in relation to the case of Raymond Robert Lloyd Robinson ats Thompson".[56] In a document dated 10 November 2004 addressed to Mr Jongkind, the appellant authorised and directed Mr Jongkind to apply funds held in trust (pursuant to the authority given by the directors of Bidjara Aboriginal Housing and Land Co Limited) towards satisfaction of Mr Jongkind's costs and outlays in relation to the appellant's criminal trial in the District Court in Brisbane and his defamation proceedings commenced by Mr Thompson. Although the cheques to

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54 AB 649.

55 *R v Robinson* [2009] QCA 250 at [16].

56 AB 1433.

Mr Vasta and Thynne & Macartney were drawn on 10 November, the trust account bank statement shows the deposit of $61,000 paid by Mr Mitchell on 11 November and the debiting of the payments to Mr Vasta and Thynne & Macartney on 12 November.

[101] Having regard to the way in which the transactions progressed and the appellant's enthusiastic and aggressive support for the sale of the vehicles from as early as 5 November 2004, it was open for the jury to conclude that the appellant's intention in writing and sending the letters was to gain an advantage as particularised. The 11 November letter cannot be looked at in isolation from the 5 November letter and the other conduct of the appellant in respect of the vehicle sales and the payment of his legal fees. It was open also for the jury to infer that there was a continuing course of conduct which included the sending of the letters and that it was the intention of the appellant in sending the letters to ensure that Mr Mitchell, the purchaser, did not renege on the sales, or attempt to obtain a refund or return of his money. The evidence discussed under the next heading in relation to the appellant's protracted, close and forceful involvement in the vehicle sales even though he was not a director of either the Bidjara CDEP or the Legal Service also assisted the drawing of the inference contended for by the prosecution.

[102] As the respondent correctly submitted, the elements of the charges did not require the prosecution to prove any causative link between the letters and the payments of fees on the appellant's behalf. Rather, the prosecution had to prove that the appellant used his position dishonestly with the intention of directly or indirectly gaining an advantage.

[103] For these reasons, this ground was not made out.

The verdict was unsafe and unsatisfactory

[104] The appellant relied on a combination of matters to establish that the jury could not have been satisfied beyond reasonable doubt that:

1. the appellant used his position dishonestly with the intention of directly or indirectly gaining an advantage for himself in respect of either of the counts;

2. what the appellant did by way of sending each letter was dishonest by the standards of ordinary honest people; and

3. at the time of sending the two letters the appellant knew that what he did was dishonest by the standards of ordinary honest people.

[105] It is now proposed to refer to each of the matters relied on by the appellant to support these contentions. My discussion of such matters is in plain type:

The vehicles sold by each of the Aboriginal corporations were owned by the vendor.

The Aboriginal corporations were distinct and separate entities from the appellant.

There was no registered encumbrance over the vehicles.

The appellant played no part in the decision by the companies to sell the vehicles.

[106] Ms Mailman, who at relevant times was a director of the Legal Service, gave evidence that a service provider was using the cars without paying rent and that the cars were not being looked after. She said that the Board resolved to sell the cars

and obtained advice from Mr Jongkind that this was legally permissible. Asked if the appellant was involved in any way with the decision of the Board to sell the assets, she responded, "No. Mr Robinson wasn't on our committee".

[107] Ms Mailman was shown a copy of minutes of the meeting of the Board of the Legal Service of 9 November 2004 which noted discussion of the sale of the vehicles and contained a resolution that they be sold for $47,000. The minutes recorded the presence of Mr Mitchell and the appellant. Ms Mailman, however, said that the appellant was not in the room when there was discussion about "the actual sale of the cars or selling them… because he went to get something to eat". Counsel for the respondent drew attention to the fact that the minutes do not record that the appellant left the meeting at any stage, although they do record the arrival at the meeting of Mr Mitchell "to discuss vehicle".[57]

[108] Mr Maris agreed in cross-examination that the appellant excused himself from "any discussion about the decisions that were to take place" at a meeting of the Board of Bidjara CDEP concerning the sale of the vehicles.[58] Mr Maris recalled, however, that it was Mr Robinson who brought Mr Mitchell to be introduced to the Board.[59]

[109] Mr Mitchell's evidence was to this effect. In response to an invitation from the Legal Service he went to Charleville on 8 or 9 November and inspected the subject vehicles outside the Legal Service's premises. The appellant was one of the people present during the inspection. When agreement was reached as to price, the appellant "… was at the head of the table, and he was throwing questions. The others were throwing questions backwards and forwards". The appellant agreed with Mr Mitchell's evidence in this regard, but nevertheless asserted that he did not take part in the negotiations.

[110] Mr Kinivan managed the CDEP program at Charleville in 2004. He answered to the Board of the Bidjara CDEP before the functions of the Board were replaced by IEP. He said that the Bidjara CDEP lost its ATSIC grant funding in 2004 and that the funding was then given to IEP. He recalled being telephoned by the appellant in 2004 and being told by the appellant that the Bidjara Board had decided to sell "the vehicles, because Ron Carter refused to pay rent on them".[60] He was subsequently informed of a meeting of the Bidjara Board at which a decision was made to sell the vehicles. After that the appellant spoke to him and told him that "he was selling the vehicles because there was no rent paid on them".[61] This evidence was not challenged in cross-examination. It also suggests the appellant had a close interest and involvement in the vehicle sales.

[111] Even if the jury accepted that the appellant did not participate in the actual decisions to sell the vehicles, it was open to them to conclude that the appellant had a strong interest in the sales of the vehicles at relevant times. The evidence of Messrs Kinivan and Mitchell shows that such interest was not merely transient in nature. The telephone call to Mr Powrie and the tone of the appellant's letters indicate that the appellant felt strongly about the sales of the vehicles and was prepared to take action, including involving his legal advisors, to ensure that they were completed.

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57 AB 1419.
58 AB 425.
59 AB 408.
60 AB 479.
61 AB 480.

The money advanced to the appellant from the proceeds of sale of the vehicles was by loan.

[112] Ms Mailman gave evidence to that effect. Counsel for the respondent submitted, however, that no loan agreement was referred to in any minutes of the Legal Service meetings and no such agreement was ever produced. There is no evidence that any loan agreement was prepared and the Federal Agent who gathered up all relevant documents pursuant to search warrants did not find, and was not directed to, any such document. It was submitted also, and I accept, that even if the money had been provided to the appellant by way of loan, that would not prevent the writing of the letters with the intention of gaining an advantage. The loan could not have been made unless the proceeds of sale of the vehicles had been received.[62]

The appellant had other sources of monies available to meet his outstanding legal obligations apart from the proceeds of sale of the vehicles. He could have borrowed the money from others – for example Mr Kells as was done when Mr Vasta returned the $20,000 cheque and the funds from the appeal costs fund in relation to his defamation trial.

[113] The respondent's counsel's contention was that whether the appellant could have made other arrangements to pay his legal fees is irrelevant to the issues in the case. The question is whether by writing the letters he used his position dishonestly with the intention of advantaging himself.

The prosecution failed to prove that any person from ATSIS had the authority to approve the sale of the vehicles.

[114] For the reasons given above, even if this contention is correct, it is of no consequence.

The appellant honestly believed that Mr Watson held no lawful delegation or authority to act on behalf of ATSIC in approving the disposal of ATSIC funded assets, particularly vehicles.

[115] The respondent submitted that whether the appellant's evidence in this regard should be accepted was a matter for the jury. That is so, but there was strong corroboration for the appellant's evidence in this regard. The appellant's belief, however, says little about his belief in relation to there being no necessity to obtain ATSIC's consent to the sales and the giving of ATSIC board approval.

The appellant was not a member of the Board of either of the Aboriginal corporations which sold the vehicles.

[116] This contention was discussed in paragraphs [106] – [111] above.

The appellant did not have or claim to have authority to determine where the proceeds of sale were to be deposited by Mr Mitchell.

The Aboriginal corporations, and only the Aboriginal corporations, could have directed and authorised the use of the proceeds of sale.

[117] The prosecution case was that the appellant influenced the corporations and utilised part of the proceeds of sale of the vehicles.

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62 AB 1426.

The proceeds of sale were paid by Mr Mitchell's company to the Aboriginal corporations.

[118] The respondent submitted that although the above statement is accurate, part of the monies were paid out to the appellant forthwith on the written authorisation, inter alia, of the appellant. He provided a trust account authority signed by him for the release of the funds for his purposes. Moreover, the use of some of the proceeds of sale of the vehicles to meet the appellant's legal expenses was in contemplation at least as early as 4 November 2004.[63] It appears from the solicitor's ledger cards that there was insufficient money in the trust account to pay the $45,000 on account of legal fees before receipt of the first tranche of the proceeds of sale.

The appellant could have only obtained the use of the monies by the authority of each of the Aboriginal corporations.

[119] The respondent contended, accurately, that this point does not prevent a conclusion that the appellant dishonestly used his position to gain an advantage.

Notwithstanding the grant terms and conditions, there was a widespread practice of unfunded, stand alone organisations selling ATSIC funded assets without obtaining the consent of ATSIC or ATSIS prior to disposal.

[120] The respondent contended that if such a practice did exist it was simply a feature to be considered by the jury. Moreover, it was contended that the alleged wrongful practices of other organisations had no relevance compared to what the appellant clearly knew of the grant terms and conditions.

[121] The evidence concerning the existence or otherwise of such a widespread practice is referred to under the next heading.

The appellant's belief as to the lawfulness of and practice of selling ATSIC funded assets and his understanding of the "acquittal" process was informed by what he had been told by Mr Clark, Mr Wanganeen, Mr Vasta QC, Mr Atkinson and Mr Power.

[122] Mr Vasta gave evidence of having been retained as in-house counsel for many years by the Queensland Aboriginal and Islander Legal Service Secretariat ("QAILSS") and the National Aboriginal and Islanders Legal Service Secretariat ("NAILSS"). In that capacity, he said, in effect, that he became aware of a practice among such organisations "where acquitted ATSIC funded vehicles were resold without obtaining the consent of ATSIC".[64] He said that in the 10 years he worked with QAILSS "there was never ever any occasion where QAILSS sought the permission of ATSIC to either purchase or to [dispose] … of their vehicles" bought with "ATSIC funded money". Mr Vasta said that the appellant had been Chairman of the Board of NAILSS. However, he gave no evidence as to the terms of any grants to QAILSS and NAILSS or the financial arrangements which existed between such bodies and ATSIC. Nor did it seem that he was involved in the administration of either of these bodies.

[123] The appellant gave evidence of having been advised some years before the events in question by Mr Vasta and by Mr Power, a solicitor working with NAILSS and

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63 AB 1433.

64 AB 467 – 468.

QAILSS, that those bodies, of which the appellant had been chairman at the time of the advice, did not need ATSIC's consent to sell vehicles in respect of which the grant monies had been "acquitted".[65] That evidence, although hearsay, was admissible as evidence of the appellant's state of mind.

[124] The appellant said in evidence-in-chief that he and Mr Maris participated in a conference call to Mr Wanganeen (the ATSIC commissioner for South Australia) who said that "their grants were acquitted, they were a standalone organisation and the vehicle belonged to them". Mr Maris gave evidence of having had a conversation with Mr Wanganeen in which he was told by Mr Wanganeen "that there was no difficulties in selling the cars".[66]

[125] The appellant said that in a telephone conversation with Mr Clark, the ATSIC commissioner for Victoria, that Mr Clark told him and Mr Maris that ATSIC's consent was not required. There was no objection to the admissibility of this evidence. Nor was there any objection to Mr Maris' evidence to the effect that he spoke to his own board members, previous committee members and committee members of other organisations who all told him that it was in order for the vehicles to be sold.[67] He said that this was his understanding also as the assets belonged "to the communities".

[126] A letter dated 7 November 2003 on the letterhead of Bidjara CDEP from Mr Kinivan, as CDEP Manager, to Ms Skuse, a project officer for ATSIS in Roma, "seeking … approval to disperse of the Vehicles … as per section 17.4 of the General Terms and Conditions relating to grants" was tendered through Mr Kinivan. Asked if the letter was an example of "the kind of thing that was done when the vehicles are being changed over", Mr Kinivan responded, "That's right. We … would've obtained three quotes".[68]

[127] Mr Levinge, who in the "second half" of 2004 was managing a section of ATSIC which provided administrative support to the Board of ATSIC, gave evidence to the following effect. The Board of ATSIC held formal meetings approximately eight times per year, normally in Canberra. Minutes were always taken by Mr Levinge or by one of his staff members under his supervision. There was no discussion of the sale or proposed sale of vehicles belonging to Bidjara CDEP or the Legal Service in the meetings of the Board of ATSIC in 2004.

[128] Mr Levinge said that the agreement came into administrative effect on 1 July 2003. There was then a dispute raging between commissioners as to its legality. The Board of Commissioners of ATSIC "weren't in the business of giving any approval for the particular sale of … capital items" such as cars. The allocation of individual grants to Aboriginal or indigenous organisations was attended to by regional councils of ATSIC. Approval for the disposal of a grant acquired asset was the responsibility of:[69]

> "The project officer concerned with a particular organisation's grant. Depending on the level of delegation that project officer had, the project officer may be able to approve the disposal. If it was above a

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65 AB 689.
66 AB 427.
67 AB 428.
68 AB 478.
69 AB 509.

certain amount, it would have gone to the regional manager. Above another level, it could have gone to a State manager."

[129] Ms Skuse was employed by ATSIS in Roma in 2004 and 2005 as a field officer in relation to community development employment projects. Prior to that she had been an ATSIC field officer. It was one of her responsibilities to process ATSIC grants to aboriginal and indigenous organisations.[70] ATSIC funding to Bidjara CDEP terminated in 2004 as a result of that body breaching the terms of a grant or grants and not accounting for grant monies. IEP took over the role of Bidjara CDEP. Tendered through Ms Skuse were a number of documents relating to the disposal by Bidjara CDEP of motor vehicles. In an email from Ms Skuse to Bidjara CDEP of 2 February 2001, she advised that if the value of the vehicles wished to be replaced was over $5,000, approval for the disposal and use of the income from the disposal would be required because of the "Terms & Conditions of Grant – Clause 20.4". Clause 20.4 provides:[71]

> "**20.4 Financial information must be accompanied by your certification, stating that:**
>
> a. the Grant Funds have been used for the Approved Activity as outlined in the Letter of Offer;
>
> b. the financial information is presented fairly in accordance with ATSIC's financial reporting framework detailed in Grant Condition 20.3;
>
> c. all terms and conditions have been complied with; and
>
> d. where an Asset with a replacement value of over $2,000 has been acquired with the Grant Funds:
>
> i. adequate insurance cover has been arranged with an approved insurer; and
>
> ii. the Asset has been included on an asset register."

[130] In an email to Bidjara CDEP of 7 February 2001, Ms Skuse advised:[72]

> "Bidjara CDEP Company need to seek approval from ATSIC for the disposal of vehicles, as they were purchased from ATSIC grant funds. It has been done in the past, and is a requirement to be completed in the future."

[131] She requested that the person with whom she was communicating read the "Letter of Offer: Terms & Conditions of Grant – Clause 20.4".[73]

[132] The representative of Bidjara CDEP responded the same day, saying:[74]

> "Bidjara Housing Co has given CDEP authorisation to transfer assets into CDEP company. So whom do we need to seek approval from now as far as I aware we have never had to obtain approval in the past."

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70 AB 530.
71 AB 1559.
72 AB 1649.
73 AB 1649.
74 AB 1650.

[133] Ms Skuse was not questioned further in evidence-in-chief or in cross-examination about the emails or the topics which they raised. She swore in cross-examination that the funding and grants for Bidjara CDEP "for 2002/3 through to 2003/4 were not fully acquitted. The status was unknown".

[134] After she had given this evidence, Ms Skuse was asked:[75]

> "Well, if we talk about the funding grants; I'm talking about the cars?-- Without the information and documents in front of me relating to the last vehicle and the dates, I cannot answer that question."

[135] Ms Skuse then, having been referred to a vehicle schedule listing, inter alia, the six vehicles sold by Bidjara CDEP, said:[76]

> "The one for identification, thanks?-- The vehicles relating to the schedule and for the funding for those years, 2000/2001, through to the end of 2001/2, yes, you are correct, they are acquitted."

[136] Ms Skuse confirmed that the vehicles in question were the six vehicles sold by Bidjara CDEP. She accepted that she had received advice from the ATSIC legal branch "not to take any action in regards to the sale of the vehicles because the CDEP organisation owned the vehicles".[77]

[137] Shortly after she had finished her initial evidence, Ms Skuse was recalled and this exchange then occurred:[78]

> "DEFENCE COUNSEL: Ms Skuse, I just wanted to put something to you in relation to the grant terms and conditions. My suggestion to you is that the - once the grants were acquitted, as they were in respect of these vehicles, the assets became the property of the organisation, and that was the practice?-- Yes.
>
> And when I say that, they were relieved of any further obligations in respect of the grant terms and conditions, unless they were currently being funded for - and required further top up money for trade-ins?-- If the financial year had been completed financially, operationally and they had acquitted that, yes, it's correct. It was all finalised. Future years - they applied for future years whether they were funded or not concerned future years.
>
> Thank you, your Honour.
>
> HER HONOUR: So you're saying that assets that were purchased with grants during a particular financial year, if those grants or that grant had been acquitted, the property purchased, or the assets purchase became the property of the organisation?-- Yes."

[138] In further re-examination, the prosecutor questioned Ms Skuse as to the practice in relation to cl 17.4 once a grant had been acquitted. Ms Skuse said, "Clause 17.4

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75 AB 548.
76 AB 548.
77 AB 549.
78 AB 553.

requires the organisation to request disposal of an asset over the value of $5,000". She was asked whether "it was the practice that that continued to apply". Ms Skuse responded, "… for future years for grants there would have been that clause in the offers, yes".[79]

[139] Ms McNamara, who was employed by ATSIC and ATSIS in the office of Indigenous Policy Coordination in Roma as manager, was involved in ATSIC and ATSIS grant administration. She said that the Regional Manager had responsibility for giving approval for the disposal of (grant acquired) assets and that she had acted in that role at times. She defined "acquittance" as "Basically it is to demonstrate … to government, that the funds were used for the purposes by which they were granted, and this can be demonstrated and supported by financial documentation".

[140] Ms McNamara said that she was aware of many examples of organisations which had ceased to obtain ATSIC funding applying for approval to dispose of assets acquired with ATSIC or ATSIS funds.[80] That permission, according to Ms McNamara, could have come from the "delegate in ATSIC or ATSIS" which may be "the regional council" or the "ATSIS regional manager".

[141] In re-examination, Ms McNamara spoke of making recommendations to "the delegate" who would have been the regional manager or the regional council in respect of an application for permission to dispose of assets. It was implicit that such assets had been acquired with grant monies. She also spoke of action being taken against bodies who disposed of grant acquired assets without consent.

[142] Mr Kumar, a senior program officer to whom Ms Skuse and Ms McNamara answered, worked for ATSIC and ATSIS between 1998 and 1 July 2004. His work with ATSIS commenced on 1 July 2003. He explained:[81]

> "An acquit status basically means that once we have provided funds to an organisations [sic] they give us reports. And if we are happy that the funds have been spent in accordance with the approved budgeting and the approved activity we would acquit those grants in the system."

[143] Mr Kumar was referred to a record from which he deduced that the grants in respect of the Legal Service vehicles had not yet been acquitted.[82] Mr Kumar accepted in cross-examination that if grant monies had been spent in the purchase of vehicles in accordance with the terms of a grant, then the grants would have been acquitted "in the sense that the vehicles had been purchased". He added that although "the activity" was acquitted, the obligation to maintain that asset continued and the terms and conditions had to be adhered to in respect of any disposal.

[144] In cross-examination, Mr Kumar denied telling Mr Alexander, when the latter was acting Chief Executive Officer of the Bidjara Housing Company, that ATSIC permission was not required for the sale of grant acquired assets.[83] He also denied that there was a practice whereby no permission was necessary for grant acquired

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79 AB 554.
80 AB 563 – 564.
81 AB 584.
82 AB 584 – 585.
83 AB 589 – 590.

assets to be sold after the grant had been acquitted. He said that he advised Mr Alexander that ATSIC's consent was required for the sale of such assets which exceeded $5,000 in value.

[145] Mr Watson was the Chief Executive Officer of ATSIS from July 2004 to June 2005. The role of approving the disposal of assets acquired by use of ATSIC grant monies was delegated by ATSIS to Mr Watson.[84] Where an asset acquired through a grant was to be transferred or disposed of he said that the practice was that an application would be made to a regional indigenous coordination centre which would consider it and then forward the application to the appropriate delegate for a decision. "[N]ot a lot" of such applications reached Mr Watson as "the last ATSIC grants were probably in the 2002/2003 financial year".[85] He described the acquittal process as one under which the grantee provided documentary proof that grant monies had been spent in accordance with the terms and conditions of grant. If the grantee was not to continue to provide the services for which assets were acquired by the use of grant monies, the assets would normally be transferred to the new service provider. That was also part of the acquittal process.[86] The grant terms and conditions, particularly cl 17.4, did not cease to apply.

[146] Mr Alexander said that he commenced to run the Legal Service in February 2002 and subsequently became the senior officer in the Bidjara Housing and Land Company. The Legal Service and the Bidjara CDEP were described as coming under its "umbrella". He spoke of being told by Mr Kumar, sometime prior to the events in question, that consent was not required for the sale of some grant assets of the Housing and Land Company because the grant funds had been acquitted.[87] The assets in question had been acquired in 1995 or even before that and he had no direct knowledge of the monies used in acquisition. Moreover, one of the pieces of equipment had been purchased under a contract for the purchase of a parcel of real estate. Mr Alexander's evidence was thus of doubtful probative value.

[147] Mr Jongkind, according to Ms Mailman, advised that grant acquired vehicles could be sold without ATSIC's consent. There was no objection to this evidence, but Mr Jongkind did not give evidence and the basis for his opinion is unknown.

[148] Counsel for the respondent submitted that all of this evidence was before the jury and does not establish that the verdict was unreasonable.

The appellant's belief as to the lawfulness and practice of selling ATSIC funded assets had also been informed by information he had obtained from others including Mr Harding via Mr Maris, Mr Jongkind via Ms Mailman and Mr Kumar via Mr Alexander.

[149] This point is an extension of the previous one and requires no further comment.

In writing the letters, the appellant was doing no more than expressing the view he honestly held, which view had been expressed by others who had informed his belief.

[150] Counsel for the respondent's response was that this proposition is no more than a repetition of the defence case which was rejected by the jury.

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84 AB 572.
85 AB 572.
86 AB 580.
87 AB 738.

[151] The appellant professed the belief that an ATSIC grant was "acquitted" in respect of property acquired with the grant monies if there had been compliance with the terms and conditions of the grant and that the grantee was then free to dispose of grant acquired assets regardless of the terms of cl 17.4 of the grant conditions. On its face, that would appear to be a rather remarkable construction of cl 17.4 as the purpose of granting money to acquire assets, such as motor vehicles, was to enable them to be used for particular purposes. Yet, on the appellant's professed understanding, once the assets were acquired for the intended purposes, condition 17.4 of the grant terms and conditions would cease to apply. On this interpretation, the clause could never apply according to its terms.

[152] The appellant's understanding, however, on the evidence before the jury, was shared by Mr Vasta, Mr Maris, Mr Wanganeen, Mr Clark, Ms Mailman and Mr Jongkind. The fact that a contrary view was being expressed by the AGS, which was actively attempting to thwart the sale of the vehicles, in normal circumstances, would tend to suggest that the appellant would not have had reasonable grounds for his belief. However, the potency of these considerations was diminished somewhat by the appellant's antagonism to ATSIS and what appeared to be a genuine belief that ATSIS was not the duly appointed agent of ATSIC with the consequence that the AGS had no legitimate role in the matters in question. It also appears to be the case that the appellant has a tendency to behave aggressively and is not of a disposition which shrinks from confrontation. The fact that the appellant made no secret of his views and was willing to convey them to the AGS also arguably provides some support for the conclusion that the views were genuinely held.

[153] However, there were other reasons why it was open to the jury to find that the belief under discussion was not genuinely held.

[154] The evidence was that ATSIC commissioners had no role to play in the giving or refusing of consent to the disposition of grant acquired assets. Nothing is known of the experience of Mr Clark and Mr Wanganeen which may have informed their opinions. They did not give evidence and nor did Mr Power or Mr Jongkind. Mr Maris did not appear to base his relevant belief on any study of the terms of grant or of his own knowledge of any practice, but on what he said he was told by the appellant and the other two ATSIC commissioners.

[155] The correspondence in 2001 and 2003 tendered through Mr Kinivan and Ms Skuse established conduct in respect of the Bidjara CDEP which was inconsistent with the practice alleged by the defence whereby ATSIC funded organisations were free to dispose of acquitted assets without ATSIC's consent.

[156] Ms Skuse, Mr Kumar and Ms McNamara were officers directly concerned at relevant times in dealing with ATSIC and/or ATSIS grants and the giving of approvals for the disposition of grant acquired assets. Their evidence was against the existence of the practice alleged by the defence. The jury would have been entitled to conclude that these officers were in a significantly better position to know whether the alleged practice existed than were the appellant, the other ATSIC commissioners, Mr Jongkind, Mr Vasta, Mr Atkinson, Mr Alexander and Mr Maris. The ATSIC/ATSIS officers received a degree of support from the documentary evidence and their evidence also had the benefit of being consistent with a more literal, practical and obvious construction of cl 17.4.

[157] The issue for the jury, though, was not whether despite the terms of the grants through which the subject vehicles were purchased, Bidjara CDEP and the Legal Service could dispose of them without ATSIC's consent under the terms of the grant (through the acquittal process) or as a result of the alleged acquittal practice it was whether the appellant honestly so believed.

[158] In reaching their conclusions in this regard, the jury would obviously have had regard to their perceptions of the appellant's credibility. If they did not find him a credible witness, as must have been the case, they need not have accepted his evidence about having been informed of relevant matters by Messrs Clark, Wanganeen, Vasta, Atkinson and Power. There was only fleeting reference to Mr Atkinson in the evidence. Mr Vasta identified him as a solicitor who worked with Mr Power and who briefed him from time to time. Mr Vasta, who unlike the other men just mentioned, did give evidence on the trial, gave no evidence of having discussed with the appellant the question of an ATSIC funded body's right to dispose of "acquitted" assets without ATSIC's consent. The jury were also entitled to reject some or all of Mr Maris' evidence which differed in one significant respect from that of Mr Kinivan.

[159] I now turn to a consideration of the case presented in respect of the final paragraph of the 11 November letter.

[160] The prosecutor dealt with the matter in his closing address as follows:[88]

> "In respect of the second letter, the one undated, but sent about the 11th of November - it's asserted in the second paragraph that, 'There are no legal encumbrances whatever, the vehicles listed are not subject to any grant or conditions of grant, and may be [disposed] of in the normal course of business.' That is, in my submission, dishonest, because he was aware there were legal encumbrances in the form of the grant conditions to which I've referred. The assertion that the board of ATSIC gives authority to Bidjara CDP and Bidjara Legal Service to dispose of these vehicles was dishonest. He knew that they didn't give that authority, and frankly ladies and gentlemen, if you can understand the semantic exercise that was attempted to be gone through with Mr Mitchell about some different meaning about 'gave authority', or something, you're better than me. I couldn't understand what the distinction was. It's dishonest to assert that someone had given authority because they hadn't."

[161] In his address, defence counsel informed the jury that:[89]

> "The real issue in the case is whether the prosecution have proved beyond reasonable doubt that Mr Robinson used his position dishonestly with the intention of directly or indirectly gaining an advantage for himself."

[162] Counsel submitted that when the two letters were written his client's "intention was no more than to restate what he honestly believed to be true".[90] Counsel said that the jury could not decide the charges:[91]

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88 AB 792.
89 AB 768.
90 AB 768.
91 AB 768.

> "…without giving full weight to the context of the issues that led to the sale of the cars in the first place.
>
> Those issues are Mr Robinson's belief as to the authenticity of the transitional agreement. It's Mr Robinson's belief as to whether Mr Watson had any authority to approve the disposal of ATSIC funded cars."

[163] In his address, defence counsel referred to the letter of 11 November and to the statement in it that the Board of ATSIC "gives authority". He said that the words came from Mr Mitchell's handwritten draft and that the appellant telephoned Mr Mitchell with a view to altering the words. He then dealt with Mr Mitchell's evidence of being contacted by the appellant to correct the letter to state, as defence counsel put it, that "ATSIC allows the sale of the cars". Defence counsel did not expand on what was meant by the appellant's preferred terminology. He submitted:[92]

> "So that last paragraph in the second letter can be put to bed quickly, because it was a sentence drafted by Mitchell and it was identified by Robinson as being incorrect. He did what he reasonably could have and should have done to correct it after he read it, and there is no doubt about his evidence upon that and there's no doubt about Mr Mitchell's evidence on that issue."

[164] The appellant gave the following evidence in respect of the letter of 11 November 2004. Mr Mitchell sent him a handwritten document in terms of the letter. The appellant's secretary typed it, he signed it and it was sent back to Mr Mitchell. After it was sent, the appellant contacted Mr Mitchell to correct it so that it read "the Board of ATSIC 'permits' or 'allows' Bidjara CDEP and Bidjara Legal Service to dispose of these vehicles". Mr Mitchell told him that the letter had already been sent to the AGS.

[165] The following exchanges occurred in the cross-examination of the appellant by the prosecutor:[93]

> "I take you then to the last paragraph?-- Mmm.
>
> 'The Board of ATSIC gives authority to Bidjara CDEP and Bidjara Legal Service to dispose of these vehicles.' I'm putting to you, that was quite dishonest, you knew that was the case?-- No. Well, it is the case, Mr Kent.
>
> When did the Board of ATSIC give authority for that?-- No. It - I never said - the Board of ATSIC gives authority, I never said 'gave authority'. It gives authority.
>
> Well, what do you mean about - what do you mean? I don't understand?-- Well, it allows, it permits, it gives.
>
> Well, in order to give authority, Mr Robinson?-- Mmm. Mmm.

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92 AB 782.

93 AB 704 – 705.

Doesn't the Board have to indicate or tell someone that it's giving authority?-- Yeah. It gives authority in a - in a wider range, like, when - when - see, the - the - just let me explain this to you; when you get a vehicle - when you get a vehicle or get vehicles, you get them off the regional council's budget, right? And the regional council budget - and the regional council has got sole discretionary powers over their budget. The Board of Commissioners, they got nothing to do with vehicles. But if someone does the wrong thing, they can take a section 20 out and claim those vehicles back. But that can only be done by the Board of Commissioners. Do you understand? So it gives, it allows, it permits.

Are you saying that it somehow gives it, by meaning of the - what, an interpretation that you're placing on the conditions or something?-- Yeah. It's a - you see - if you - if - say *if I didn't acquit my grant* and I wanted to go and sell those vehicles - *I was an organisation, I wanted to go and sell those vehicles, I would have to then, under this grant terms and conditions, I would then have to go back,* not the staff - not to the staff, not to with anyone with a delegation, I would have to go back *to the regional council to get permission to sell that vehicle, because it's how come that vehicle is purchased under the regional council budget*. And when the regional council gets their budget, they got sole discretionary power over that budget. Even if the Board of Commissioners said, 'No, you can't sell that vehicle.' The Board of Commissioner has got nothing to do with it. It's - it's the regional council. And if the - if the regional council - if for some reason someone goes and starts selling their vehicles without - without getting that consent of the regional council if they haven't acquitted that - that grant, then it goes to the - it goes the - the regional council for section 20. That section 20 then goes on to the Board of Commissioners and the Board of Commissioners pass the section 20 and say, 'Look, you can't - you can't - you can't - we're taking that asset back off you.' Like we did with Warwick. Like we did with SWACAs. Like we done with the organisation in Gympie. It takes that back under section 20. But this - and then occasion - and this occasion these - these vehicles were acquitted and - they were acquitted and the grant terms and conditions no longer apply therefore they can go and sell those vehicles.

What I'm putting to you-----?-- There - because they own them. Hmm?

What I'm putting to you is that you were perfectly well aware that there had been no ATSIC board meeting giving any authority to anyone to dispose of these vehicles?-- I never said-----

That's the truth, is it not, Mr Robinson?-- I - no - look, I never said that, Mr Kent.

Well, the letter does, Mr Robinson?-- No. No, I didn't say that. The letter doesn't read like that. The - the letter reads that it gives - gives permission. It might not have been - as I said, it could have been

> worded better. It could have been worded 'allows' or 'permits' but I didn't realise what it read until after I signed it, and then I got on to Stuart Mitchell, as he's gave you in evidence, I got on to him and I said, 'Listen, that should be allows or permits.' He says, 'Too late. I've sent it off to the Australian Government Solicitor.' Which I'd give it to him to do anyway. And he said, 'I sent it off.' I say, 'Okay, that's all right.'" (emphasis added)

[166] It may be noted that the situation discussed by the appellant in the passage highlighted above could never arise if the appellant's understanding of the acquittal process and its consequences was correct. Once the vehicles were purchased with grant monies, they would be the property of the grantee and free of the grant terms and conditions.

[167] In cross-examination defence counsel suggested to Mr Mitchell that he had been contacted by the appellant after he received the 11 November letter and told that the letter should have read "the ATSIC Board allows [Bidjara] and other organisations to sell the assets". Mr Mitchell responded:[94]

> "Yeah. Look, it's a vague recollection, but there was a recollection that - that his secretary or whoever was there was - typed - typed it up. And I also note that when - that the conversation went, to my thoughts going back, and it's quite a few years, is that - that the letter was - that it was something to do with ATSIC and I was - the reason I say that is because in the paper, it says that, 'You could be liable to ATSIC.' Now, he is - he was, and was at the time, the Commissioner for ATSIC. Now, that was - that was - that was one of the things that I wanted a letter from him - another letter."

[168] Mr Mitchell said that he remembered telling the appellant "It's too late, the letter's gone to the solicitors". The primary judge said that she "didn't quite follow that last exchange". It was clarified that what was being referred to was the last paragraph of the 11 November letter and, in particular, "the Board gives authority". This was then said:[95]

> "DEFENCE COUNSEL: The conversation was along the lines that it should have read, 'The Board allows [Bidjara] and other organisations to sell their assets.'
>
> HER HONOUR: Rather than, 'Gives authority.'
>
> DEFENCE COUNSEL: That's correct.
>
> HER HONOUR: Okay.
>
> DEFENCE COUNSEL: And it was a correction by Mr Robinson, I suggested, as to the language that was used.
>
> HER HONOUR: Yes. But Mr Mitchell - that was purely an exchange - a verbal exchange, it was never corrected-----?-- It was never corrected.
>
> -----in writing?-- No. The first letter - the letters had already gone. The first two - unless it was too late.

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94 AB 446.

95 AB 447 – 448.

> Yes?-- And he was meaning that - and I do - now, when you recollected that the original letter states that, the people have the authority to sell.
>
> Yes?-- And this one, then the ATSIC Board gives the letter.
>
> Gives them authority?-- It was - it was play on words."

[169] In re-examination, Mr Mitchell said he could not remember the exact words used in his conversation with the appellant about the letter and he accepted that he could not be precise about what words were used.[96] He recalled the appellant saying it was "worded wrong".

[170] It is plain from the appellant's own evidence that he had no belief when providing Mr Mitchell with the letter of 11 November that the Board of ATSIC had given authority or was, by the letter, giving authority to Bidjara CDEP and the Legal Service to dispose of the vehicles. No such authority had been given or was conveyed by the letter. The defence did not contend to the contrary. However, the prosecutor's submission to the jury that the "semantic exercise" involved in the discussion which the appellant said he had with Mr Mitchell was incomprehensible was, perhaps, too harsh.

[171] What the appellant appeared to be saying was to the effect that the grant procedure permitted or contemplated the sale of grant acquired assets without consent where the grant had been acquitted in respect of such assets. But the jury did not have to accept that the explanation embodied the appellant's genuine belief. Even the proposed changed wording referred to the Board of ATSIC, suggesting board involvement. Moreover, although the appellant was aware that he was dealing with a serious dispute in which the AGS was involved on behalf of ATSIS, he made no attempt to inform the AGS of the error he later asserted.

Conclusion

[172] With respect to the first letter, the conviction can be sustained only if it was open to the jury to conclude that the appellant did not believe on 5 November 2004 that Bidjara CDEP and the Legal Service were entitled to dispose of the vehicles without ATSIC's consent. For the reasons given above, I am of the view that it was open to the jury to so conclude.

[173] In respect of the second letter, the prosecution also relied on the assertion in the 11 November letter that "the Board of ATSIC gives authority…". For the reasons given earlier, the jury were entitled to conclude that the appellant made that statement dishonestly "according to ordinary notions".[97]

[174] For the above reasons, I have concluded that it was open to the jury acting reasonably to be satisfied beyond reasonable doubt of the appellant's guilt. In so concluding, I have had regard to the jury's advantage in seeing the witnesses and hearing the evidence.

[175] Accordingly, I would order that the appeal be dismissed.

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96 AB 450.

97 *Peters v The Queen* (1998) 192 CLR 493 at 504.

[176] **NORTH J:** I have read the reasons for judgment of Muir JA and agree, for the reasons given, that the appeal should be dismissed.

[177] I wish to make brief reference to two arguments that were advanced by Senior Counsel for the appellant in argument in support of ground 3. Both submissions concerned the lawfulness of the June 2003 agreement[98] which, it was submitted, if unlawful was inadmissible.

[178] The first argument was that ATSIC could not vest in an executive agency (in this case ATSIS) the responsibility and power to perform the functions required of ATSIC under the *Aboriginal and Torres Strait Islander Commission Act* 1989 (the *Act*). In argument Senior Counsel developed this submission based upon an examination of sections of the Act. He submitted that the terms of the Act did not permit ATSIC to resolve (assuming it had by resolution authorised or ratified the 2003 agreement) to delegate the performance of its functions to another entity.

[179] The second argument, which was only expressly advanced in reply, was that it was beyond the power of the Commonwealth Executive under section 61 of the Constitution to establish an agency by the exercise of executive power (ATSIS) and to enter into the 2003 agreement with ATSIC to vest in ATSIS the power to perform the functions the 2003 Act vested in ATSIC.[99]

[180] It is not necessary for this Court to consider these particular contentions. As Muir JA has pointed out the issue at trial concerned the state of mind of the appellant when he wrote the letters in question as to whether clause 17.4 of the grant terms required the prior approval of ATSIC before the motor vehicles could be sold. At the trial the appellant did not formally admit that ATSIC's consent had not been given. When he gave evidence he did not contend that it had been given, in fact he was at pains to make it clear that was not his belief. But until the defendant gave evidence it was a live issue at the trial whether the consent of ATSIC had been obtained. Whether or not ATSIS acting on behalf of ATSIC could give that consent or whether that consent had to be given by ATSIC may be an interesting point but at the trial until the appellant gave evidence, the evidence of Mr Watson and other witnesses was relevant as to whether any consent had been given.

[181] In his evidence at trial the appellant said that he believed the "acquittal" of the grant funds at the time the grants were made and the vehicles purchased satisfied all terms of the grant and that it was his belief that the approval of ATSIC was not required if the vehicles were to be sold. The issues squarely raised for the jury was whether that belief was honestly held at the time the letters of 5 November and 11 November were written. When confronted in cross-examination with the letters (particularly that of 11 November) his explanation was incoherent.[100]

[182] The jury was entitled to disbelieve the appellant. On the evidence the verdict of the jury was open.

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98 Exhibit 38, AB 1526.

99 The submission was not developed at length in argument but counsel referred to *Williams v Commonwealth of Australia* (2012) 86 ALJR 317; [2012] HCA 23.

100 See for example the evidence in cross-examination in the reasons of Muir JA at [165].