SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of Taxation v Price* [2006] QCA 108
PARTIES:	**COMMISSIONER OF TAXATION** (plaintiff/respondent) **v** **CHARLES JOSEPH PRICE** (defendant/appellant)
FILE NO/S:	Appeal No 4874 of 2005 Appeal No 7817 of 2005 DC No 152 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	13 April 2006
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2006
JUDGES:	McMurdo P, Keane JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed to the extent of setting aside the declarations and convictions in respect of s 119 of the *Excise Act* 1901 (Cth) and reducing by one half the total penalties imposed on the appellant; otherwise the appeal is dismissed** **2. The respondent to pay one half of the appellant's costs of the appeal**
CATCHWORDS:	TAXES AND DUTIES - CUSTOMS AND EXCISE - JURISDICTION AND PROCEDURE IN CUSTOMS PROSECUTIONS - HOW INSTITUTED AND IN GENERAL - where appellant found to have contravened each of s 117 and s 119 *Excise Act* 1901 (Cth) by possessing and unlawfully conveying manufactured excisable tobacco on which excise duty had not been paid - where procedure adopted before learned trial judge was that under the *Uniform Civil Procedure Rules* 1999 (Qld) - where appellant argued that this procedure denied him common law rights and privileges in relation to self-incrimination and self-exposure to penalty - whether appellant suffered miscarriage of justice due to procedure adopted at first instance

CONSTITUTIONAL LAW - OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION - GENERAL MATTERS - NATURE AND SCOPE OF COMMONWEALTH POWERS - SEPARATION OF POWERS - where appellant argued that s 136 *Excise Act* 1901 (Cth) and the *Uniform Civil Procedure Rules* 1999 (Qld) constituted a usurpation of or impediment to the exercise of the judicial power of the Commonwealth - whether these provisions are inconsistent with the unimpeded exercise by the federal judiciary of the power to resolve controversies by applying the law to the facts as found by the court

TAXES AND DUTIES - CUSTOMS AND EXCISE - PENAL PROVISIONS - OFFENCES - SMUGGLING AND UNLAWFUL IMPORTATION, EXPORTATION AND POSSESSION - where s 119 *Excise Act* 1901 (Cth) requires a conveyance to be unlawful - where appellant argued respondent was obliged to negative the existence of any permissions under the *Excise Act* which might make conveyance lawful - where no evidence led as to the existence or otherwise of permissions granted under s 61C - whether the respondent bore the burden of establishing unlawfulness on a charge of a contravention of s 119

CRIMINAL LAW - CRIMINAL LIABILITY AND CAPACITY - DOUBLE JEOPARDY - where appellant argued that the same act was alleged to constitute the contravention of both s 117 and s 119 *Excise Act* 1901 (Cth) - where appellant argued s 4C *Crimes Act* 1914 (Cth) precluded imposition of penalty - whether the act relied on to establish possession and the act relied on to establish conveyance were separate and distinct acts

STATUTES - ACTS OF PARLIAMENT - REPEAL - SAVING CLAUSES - RIGHTS, PRIVILEGES AND LIABILITIES - where s 129 *Excise Act* 1901 (Cth) was repealed after commission of offences and s 117 and s 119 were replaced by amending legislation - whether new penalty provisions should be regarded as taking effect in respect of offences committed before the commencement of amendments but in respect of which no sentence has been imposed

Crimes Act 1914 (Cth), s 4C, s 4F
Excise Act 1901 (Cth), s 61, s 61C, s 117, s 119, s 129, s 136, s 143, s 144, s 145A, s 146
Excise Amendment (Compliance Improvement) Act 2000 (Cth)
Uniform Civil Procedure Rules 1999 (Qld), r 137, r 139, r 166

Attorney-General's Reference No 1 of 2004 [2005] TASSC 10; CCA No 80 of 2004, 8 March 2005, cited
CEO of Customs v Camile Trading Pty Ltd [2004] NSWSC 1256; No 20859 of 1997, 21 December 2004, cited
CEO of Customs v El Hajje [2005] HCA 35; (2005) 218 ALR 457, considered

CEO of Customs v Labrador Liquor Wholesale Pty Ltd [2003] HCA 49; (2003) 216 CLR 161, cited
Chugg v Pacific Dunlop Limited (1990) 170 CLR 249, cited
Nicholas v The Queen [1998] HCA 9; (1998) 193 CLR 173, applied
R v Ronen & Ors [2005] NSWSC 991; Nos 70032, 70222 and 70223 of 2003, 7 October 2005, cited
Vines v Djordjevitch (1955) 91 CLR 512, cited

COUNSEL: M P Amerena, with M A Jonsson, for the appellant
H Burmester QC, with K J Priestly, for the respondent

SOLICITORS: Macrossans Lawyers (Brisbane) acting as Town Agent for Mellick Smith & Associates (Cairns) for the appellant
Australian Government Solicitor for the respondent

[1] **McMURDO P:** I agree with Keane JA's conclusions and orders and with his reasons.

[2] **KEANE JA:** The appellant was found by the learned trial judge to have contravened each of s 117 and s 119 of the *Excise Act* 1901 (Cth) ("the Act") as the result of the possession and unlawful conveyance respectively of manufactured excisable tobacco on which excise duty had not been paid. The appellant was found to have contravened each section on 50 separate occasions in 1997 and 1998. The learned primary judge imposed penalties totalling $1,199,618.06 pursuant to s 129 of the Act.

[3] The proceedings against the appellant were commenced on 15 September 2000 when the respondent's claim and statement of claim were filed in the District Court of Queensland at Cairns. The penalties which were imposed on the appellant were imposed pursuant to s 129 of the Act which had been repealed by the *Excise Amendment (Compliance Improvement) Act* 2000 (Cth), Sch 1, item 58, which commenced operation on 7 September 2000.

[4] The proceedings at trial, and initially on appeal, were conducted on the basis that the repeal of s 129 of the Act does not bear upon the issues for determination in this case. When this Court raised with the parties the circumstance that s 129 of the Act had been repealed before the proceedings were commenced, the parties made submissions in relation to the ramifications of that repeal for the proper disposition of the appeal. It is convenient to consider the issues initially agitated by the parties before turning to consider the ramifications of the repeal of s 129 of the Act.

[5] The appellant initially raised four broad grounds of appeal. They were:

(a) that the procedure at first instance was unfair;
(b) that the rules which regulated the procedure at trial were invalid by reason of their incompatibility with Ch III of the *Commonwealth Constitution*;
(c) that the respondent had failed to prove beyond reasonable doubt the unlawfulness of the conveyance in respect of the contraventions of s 119 of the Act; and
(d) that, contrary to s 4C of the *Crimes Act* 1914 (Cth), the quantum of penalties imposed reflects double punishment for the same acts.

[6] I shall address these grounds of appeal in turn, but before I do so it is desirable first to set out the material provisions of the Act, as they were at the time the offences were said to have been committed. I will then summarise the course of proceedings below and the findings of the learned trial judge. I will then discuss the appellant's grounds of appeal, and finally I will deal with the ramifications of the repeal of s 129 of the Act.

The Act

[7] Prior to 7 September 2000, the Act prohibited certain dealings with excisable goods while they were under the control of the Customs. Section 61 of the Act provided relevantly:

> "All excisable goods are, until delivered for home consumption … subject to the control of Customs and must not be moved, altered or interfered with except as authorised by the Act. Penalty: $20,000.00."

[8] The Act provided for the giving of the authority contemplated by s 61 of the Act, by inter alia, s 61C of the Act, which provided relevantly:

> "(1) A Collector may give permission in writing to a person specified in the permission to deliver for home consumption from a place specified in the permission goods of a kind so specified that are subject to the control of the Customs, and, until the permission is revoked, the permission is authority for that person to deliver for home consumption from that place goods of that kind that are subject to the control of the Customs (other than goods that a Collector has directed are not to be delivered for home consumption under this section) notwithstanding that an entry of the goods for home consumption has not been made and passed under this Act.
>
> (2) Goods delivered for home consumption by authority of subsection (1) shall, for the purposes of this Act, be deemed to be entered for home consumption on the day on which they are so delivered.
>
> (3) Permission under subsection (1) may be given subject to the condition that the person to whom the permission is given complies with such requirements as are specified in the permission, being requirements that, in the opinion of the Collector, are necessary for the purpose of ensuring compliance with the Excise Acts …"

[9] Section 117 of the Act provided relevantly:

> "(1) No person other than a manufacturer shall, except by authority, have in his possession custody or control any manufactured or partly manufactured excisable goods upon which excise duty has not been paid …
>
> (2) A person who contravenes subsection (1) is guilty of an offence punishable upon conviction as provided by section 129."

[10] Section 119 of the Act provided relevantly:

> "(1) A person shall not unlawfully convey any excisable goods upon which excise duty has not been paid …
>
> (2) A person who contravenes subsection (1) is guilty of an offence punishable upon conviction as provided by section 129."

[11] Section 129 of the Act provided relevantly:

> "Where an offence is punishable as provided by this [section], the penalty applicable to the offence is -
>
> (a) where the Court can determine the amount of the duty that would have been payable on the goods to which the offence relates if those goods had been entered for home consumption on:
>
> (i) where the date on which the offence was committed is known to the Court - that date; or
>
> (ii) where that date is not known to the Court - the date on which the prosecution for the offence was instituted;
>
> a fine not exceeding 5 times the amount of that duty and not less than 2 times that amount."

[12] Section 136 of the Act provided that proceedings being excise prosecutions may be brought by action in the District Court of Queensland. In that regard, s 136 of the Act provides relevantly:

> "Every Excise prosecution in a court referred to in subsection 134(1) may be commenced prosecuted and proceeded with in accordance with any rules of practice (if any) established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or a Judge."

[13] Section 143 provided relevantly that:

> "(2) In every Excise prosecution except for an indictable offence or for an offence directly punishable by imprisonment the defendant shall be compellable to give evidence."

It may be noted that while the defendant may, therefore, be a compellable witness in a case such as the present, s 143(2) discloses no intention to override the privilege against self-incrimination.

[14] Section 144 provides for the use by the prosecution of averments. It was relevantly as follows:

> "(1) In any Excise prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter or matters averred.
>
> (2) This section shall apply to any matter so averred although:
>
> (a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or
>
> (b) the matter averred is a mixed question of law and fact but in that case the averment shall be *prima facie* evidence of the fact only."

[15] Section 145A(4) of the Act provided relevantly:

> "Any conduct engaged in on behalf of a person other than a body corporate:
>
> (a) by a servant or agent of the person within the scope of the actual or apparent authority of the servant or agent; … shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person."

[16] In relation to penalty, s 146 of the Act provided relevantly that "[n]o minimum penalty imposed by this Act shall be liable to reduction under any power of mitigation which would but for this section be possessed by the Court".

The proceedings at first instance

[17] The respondent claimed declarations that the appellant, between June 1997 and June 1998, on 50 occasions identified in the statement of claim:

(a) unlawfully conveyed excisable goods; and

(b) had in his possession at Cairns manufactured excisable goods on which excise duty had not been paid

in contravention of s 119 and s 117 of the Act respectively. The respondent also sought the entry of convictions against the appellant in respect of these offences and the imposition of pecuniary penalties.

[18] The *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR") prescribes the usual practice and procedure of the District Court in civil cases. Thus the UCPR constituted the practice and procedure to be observed by the parties to the proceedings at first instance.

[19] In accordance with the UCPR, the respondent proceeded by a claim and statement of claim. The respondent took advantage of s 144 of the Act to aver the allegations of fact made in the statement of claim. In conformity with r 137 and r 139 of the UCPR, the appellant responded by pleading to the allegations of the offences in the respondent's statement of claim.

[20] It may be noted here that the appellant's first two grounds of appeal are focused upon the requirements of r 166. That rule obliges a party to plead responsively to allegations made in a pleading by the opposite party. The provisions of r 166 limit the extent to which a party may put the other party to proof of a material allegation. By virtue of subrules 166(4) and (5), a non-admission or denial, which is not accompanied by a direct explanation of the non-admission or denial, is taken to be an admission of the allegation.

[21] The appellant in his defence admitted a number of allegations in the respondent's statement of claim. In particular, the appellant admitted sending 50 separate consignments of packages of a specific gross weight on specified dates by his agent, McCafferty's Transport, from Cairns to consignees within Queensland.

[22] It was alleged by the respondent that each of these packages contained excisable goods, namely tobacco. It may be that the description of excisable goods as "tobacco" was not a sufficient identification of a class of excisable goods[1], but no point was taken about that. The appellant, in the amended pleading on which he proceeded to trial, denied this allegation and asserted that the packages contained dried fruit. This factual issue was resolved against the appellant. The learned trial judge accepted the evidence of the consignees which was to the effect that the packages sent to them by the appellant contained tobacco. There is no challenge to this aspect of the learned trial judge's decision.

[23] In relation to the alleged contravention of s 117 of the Act, counsel for the appellant contended at trial that the respondent had failed to establish an essential element of the offence, namely that the tobacco was "manufactured or partly manufactured".

---

1 *CEO of Customs v El Hajje* [2005] HCA 35; (2005) 218 ALR 457 at 459 - 460 [8] - [12].

Indeed, the respondent's statement of claim had not alleged this necessary element of the charge. The learned trial judge gave the respondent leave to amend the statement of claim to make the necessary allegation, and found that he was satisfied that the tobacco was "manufactured or at least partly manufactured"[2] on the basis of evidence from the consignees of the tobacco that it was of a texture "the same as an ordinary packet of ready-rubbed tobacco you buy in a shop", and that it was "[r]eady to smoke, nicely fine, chopped up, ready to roll and smoke".[3] His Honour took judicial notice of the appearance of tobacco in its raw, unmanufactured state in order to conclude that the tobacco in question had been at least partly manufactured. There is no challenge to this aspect of the learned trial judge's decision.

[24] The appellant also contended at trial that the respondent had failed to prove that the appellant had had the tobacco in his possession, custody or control so as to contravene s 117 of the Act. The learned trial judge found that the appellant must have had the tobacco in his possession immediately before giving it into the possession of the carriers for the purpose of transporting the tobacco to the consignees, in that it was either in his physical possession or the physical possession of his agent before the packages were handed over to the carrier.[4]

[25] The learned trial judge found that no excise duty had been paid in respect of any of the packages of tobacco.[5] There is no challenge to this finding; nor could there be. That is because the respondent alleged and averred in its statement of claim that no excise duty has been paid on the consignments of tobacco. That averment was sufficient prima facie evidence that duty had not been paid. That allegation was denied in the appellant's defence, but only on the limited basis that the consignments were not excisable goods. That limited denial was pregnant with the admission that excise had not been paid on the goods. That limited denial was found to be false, and that finding is not challenged.

[26] For the purposes of the alleged contraventions of s 119 of the Act, the learned trial judge held that the conveying of the tobacco was "unlawful" on the footing that there was no evidence which might give rise to an issue as to whether the conveying of the tobacco was authorised, justified or excused by law.[6] His Honour plainly proceeded upon the footing that there was an evidential onus on the appellant to raise the issue as to whether he was authorised by law to convey the tobacco. His Honour's approach in this regard is the subject of the appellant's third ground of appeal.

[27] His Honour imposed a penalty of four times the excise payable on the tobacco in respect of each contravention. His Honour took into account the appellant's prolonged and deliberate offending, his motivation for financial gain and his lack of remorse. The significant mitigating factor referred to by his Honour was that the appellant and his family were in a situation of financial hardship. There is no challenge to this aspect of his Honour's decision.

---

2 *CEO of Customs v Price*, unreported, DC No 152 of 2000, 20 May 2005 at [22].

3 *CEO of Customs v Price*, unreported, DC No 152 of 2000, 20 May 2005 at [20].

4 *CEO of Customs v Price*, unreported, DC No 152 of 2000, 20 May 2005 at [23] - [25]. See also s 145A(4) of the Act.

5 *CEO of Customs v Price*, unreported, DC No 152 of 2000, 20 May 2005 at [26].

6 *CEO of Customs v Price*, unreported, DC No 152 of 2000, 20 May 2005 at [27].

[28] In fixing the penalties in relation to these contraventions, the learned primary judge was troubled by the prospect of imposing a penalty in respect of each of the 50 contraventions of each of s 117 and s 119 of the Act. His Honour would have been disposed, had he not felt constrained by s 129 of the Act, to impose a penalty of three times the excise payable (subject to the maximum penalty of $20,000) where applicable. The effect of s 129 of the Act was, in his Honour's view, such as to involve the imposition of four times the excise payable as the minimum total penalty.

[29] In this regard, the appellant sought to rely upon s 4C(1) of the *Crimes Act* 1914 (Cth) which relevantly provides:

> "Where an act or omission constitutes an offence:
>
> > (a) under two or more laws of the Commonwealth; … the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws of the Commonwealth … but shall not be liable to be punished twice for the same act or omission."

[30] His Honour concluded that different acts constituted the offences under s 117 and s 119 of the Act, in that the gravamen of the offence under s 117 was "the act of possession, either personally or by an agent at Cairns immediately before the packages of tobacco were handed over to McCafferty's for transport", whereas under s 119 the offences were "constituted" by the conveying of the excisable goods.[7] As a result, his Honour concluded that s 4C(1) of the *Crimes Act* had no relevant application. This conclusion is the subject of the appellant's fourth ground of appeal.

The appellant's contentions on appeal

Unfair procedure

[31] The appellant's first ground of appeal is that the procedure below was fundamentally unfair, so that the order made by the learned trial judge should be set aside. There are two reasons why, in my view, this ground of appeal should be rejected. First, the agitation of this ground of appeal is an attempt to resile from the appellant's conduct of the case both prior to and at trial. The appellant at no stage sought to be relieved from the obligations imposed by r 166 of the UCPR. Such an application could have been made under r 367(1) of the UCPR which empowers the court to make "any order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with another provision of these rules". Section 136 of the Act itself also contemplates the making of judicial directions, and there can be no doubt that the fair trial of an excise prosecution may be ensured by such judicial directions as are necessary either under r 166 and r 367 of the UCPR or s 136 of the Act. The appellant made no such application. Whether or not the appellant is able to establish a miscarriage of justice by reason of the failure by the prosecution to seek directions to preserve his right to silence and his privilege against exposing himself to penalties, is a matter to which I shall return. It is sufficient for present purposes to say that it is simply wrong to contend that either s 136 of the Act or the UCPR operate inevitably to deny a defendant the benefit of these common law rights and privileges.[8]

---

7 *CEO of Customs v Price*, unreported, DC No 152 of 2000, 25 August 2005 at p 5.

8 Cf *CEO of Customs v Camile Trading Pty Ltd* [2004] NSWSC 1256; No 20859 of 1997, 21 December 2004 at [36].

[32] Secondly, even taking full account of the circumstance that the burden of proof borne by the respondent was proof beyond reasonable doubt,[9] the application of the provisions of the UCPR did not occasion any unfairness to the appellant. As to the admissions which he actually made, the allegations which were admitted would have been sufficiently established in the absence of evidence to the contrary by the operation of s 144 of the Act. Thus, the proof of the respondent's case did not require reliance upon any admission deemed to have been made by reason of r 166(4) and r 166(5) of the UCPR.

[33] At this point, it is necessary to mention that the appellant sought to have the respondent's action struck out in reliance upon the constitutional issue which is the second ground agitated on appeal. The learned trial judge did not determine that application immediately, but proceeded to a hearing of the evidence in the case. The appellant's counsel intimated that his client wished to consider applying to withdraw the admissions which had been made. It is not clear that this application was pressed when the learned primary judge made clear his intention to proceed to hear the evidence; but it is clear that if the admissions had been withdrawn, the respondent would have been entitled to rely upon the averments to establish its case. It is true, as the appellant's counsel contend, that the burden of proof on the prosecution required proof beyond reasonable doubt, but the withdrawal of the admissions would have left the respondent's case unchallenged; and the appellant's counsel did not identify any specific basis for thinking that the averments should or would not have been sufficient to establish the prosecution's case.

[34] In summary, the appellant might have sought to protect his rights and privileges in relation to self-incrimination and self-exposure to penalty by invoking a procedure different from that which was adopted, but had that occurred, it would not have given rise to a fair chance that he would have been acquitted of the charges. Had the appellant remained silent, the respondent's averments would have been unchallenged. There was, therefore, no miscarriage of justice as a result of the procedure which was adopted at first instance.[10]

[35] As I have mentioned, it was argued by the appellant that the onus was on the respondent to seek directions to put in place a regime which would preserve the appellant's common law rights and privileges. One of the more remarkable aspects of this argument was the contention that the prosecution should have realised that the appellant's lawyers were so incompetent that it was necessary for the prosecution to seek directions from the court in accordance with the third procedural possibility contemplated by s 136 of the Act.

[36] While the obligation of a prosecutor to act fairly in the conduct of a prosecution is well established,[11] there is no authority which supports casting upon the prosecutor the burden of "second-guessing" decisions deliberately made in the conduct of a case by a defendant and his or her lawyers. Further, there was in this case no reason for the respondent to apprehend that the appellant required legal assistance from the prosecution in order to be given the benefit of a fair trial. The appellant had his own legal advice. His pleadings were drawn and delivered with the benefit of legal advice. The making of the admissions was not obviously incompetent. The making of the admissions may have been thought to be of little moment having regard to

---

9 *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49; (2003) 216 CLR 161.

10 See UCPR r 770(2).

11 *Whitehorn v The Queen* (1983) 152 CLR 657 at 663 - 664, 675.

s 144 of the Act, and it may even have been thought to be tactically desirable having regard to the principal thrust of the appellant's defence which was that he had not been in possession of, or conveyed, unexcised tobacco,[12] to make sensible admissions of allegations which were readily proven so as to present himself as an honest person "with nothing to hide" who should, therefore, be believed when he said that he was conveying "dried fruit".

[37] The appellant's submission in this regard also included an argument to the effect that, in a case where convictions were sought, there was an obligation on the prosecution or the court to ensure that the third procedural possibility contemplated by s 136 of the Act was applied to the proceedings. This argument must be rejected. It has no support in the language of the statute or in any decision of any court. It requires one to construe the language of s 136 as if it was expressed in terms which included the words "in the case where convictions are sought" before the words "in accordance with the directions of the Court or a Judge". It is not for a court effectively to amend legislation in this way.

The Constitutional argument

[38] The appellant contends that, to the extent that s 136 of the Act and the UCPR are apt to abrogate the appellant's rights under the common law not to speak where to do so would result in exposure to a penalty, they are inconsistent with Ch III of the *Commonwealth Constitution.*

[39] This argument cannot be accepted. It is contrary to authority which binds this Court. In the light of that authority, it can be seen that, neither s 136 of the Act, nor the UCPR are inconsistent with the unimpeded exercise by the federal judiciary of the power to resolve controversies by applying the law to the facts as found by the Court. They do not purport to interfere with the exercise of the judicial power of the Commonwealth. They do not operate conclusively to deem the elements of the offence to be made out.[13] Nor do they purport to make a legislative judgment of guilt.[14] They do not impede:

> "equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law".[15]

[40] Neither s 136 of the Act, nor the UCPR was apt to prevent the appellant from meeting the case made against him, nor did either of them prevent the facts of the case from being ascertained.

[41] It should also be said that, because of r 367(1) of the UCPR, it cannot fairly be said that the UCPR purports to effect an abrogation of either the privilege against self-incrimination or self-exposure to a penalty via r 166. But even if the combination of the UCPR and s 136 of the Act were apt to abrogate those privileges, that result would not be inconsistent with the untrammelled exercise by the court below of the

---

12 Cf *Ali v The Queen* [2005] HCA 8; (2005) 79 ALJR 662 at 664 [7], 666 [25], 677 - 678 [98] - [100].

13 Cf *Williamson v Ah On* (1926) 39 CLR 95 at 122.

14 Cf *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at 192 [28], 277 - 278 [249] - [252].

15 *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at 208 - 209 [74].

judicial power of the Commonwealth. The maintenance of such privileges has never been held to be a defining characteristic of judicial power.[16]

[42] Next, it is necessary to acknowledge that it is well established that procedural provisions that alter the burden of proof at common law do not thereby impede the exercise of the judicial power of the Commonwealth. The appellant's submission to the contrary cannot stand with the authorities surveyed in the judgments of the High Court in *Nicholas v The Queen*.[17] In that case, Brennan CJ said:[18]

> "The judicial power of a court is defined by the matters in which jurisdiction has been conferred upon it. The conferral of jurisdiction prima facie carries the power to do whatever is necessary or convenient to effect its exercise. The practice and procedure of a court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction (See *Grassby v The Queen* (1989) 168 CLR 1 at 16) but subject to overriding legislative provision governing that practice or procedure. The rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription. A law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power. E S Roscoe (*The Growth of English Law* (1911), p 151), observing that the common law had produced a law of evidence of such high technicality as 'justly merited the wholesale condemnation of Bentham' credits Lord Denman with the initiation of the move for legislative reform. The preamble to the *Evidence Act* 1843 (Imp) (6 & 7 Vict c 85) shows the need which was perceived to warrant legislative intervention:
>
> > 'Whereas the Inquiry after Truth in Courts of Justice is often obstructed by Incapacities created by the present Law, and it is desirable that full Information as to the Facts in Issue, both in Criminal and in Civil Cases, should be laid before the Persons who are appointed to decide upon them'
>
> it was enacted that certain evidentiary rules be changed. Even though judicial opinion was opposed to the enactment of the *Criminal Evidence Act* 1898 (Imp) (Stone and Wells, *Evidence: Its History and Policies* (1991), pp 46 - 47), it would not have occurred to the Imperial Parliament that a legislative power to prescribe rules of evidence might be regarded as a usurpation of judicial power.
>
> In *The Commonwealth v Melbourne Harbour Trust Commissioners* ((1922) 31 CLR 1 at 12), Knox CJ, Gavan Duffy and Starke JJ said:
>
> > 'A law does not usurp judicial power because it regulates the method or burden of proving facts.'
>
> And in *Williamson v Ah On* ((1926) 39 CLR 95 at 122), Higgins J said that 'the evidence by which an offence may be proved is a matter of mere procedure'. He added:

---

16 Cf *Milicevic v Campbell* (1975) 132 CLR 307.

17 [1998] HCA 9; (1998) 193 CLR 173.

18 [1998] HCA 9; (1998) 193 CLR 173 at 188 - 190 [23] - [24] (citations footnoted in original).

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

However, Isaacs J pointed out a difference between a rule of evidence and a provision which, though in the form of a rule of evidence, is in truth an impairment of the curial function of finding the facts and hence an usurpation of judicial power. He said (*Williamson* (1926) 39 CLR 95 at 108):

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

If a court could be directed by the legislature to find that an accused, being found in possession of stolen goods, had stolen them, the legislature would have reduced the judicial function of fact finding to the merest formality. The legislative instruction to find that the accused stole the goods might prove not to be the fact. The legislature itself would have found the fact of stealing. Isaacs J continued:

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

The reversal of an onus of proof affects the manner in which a court approaches the finding of facts but is not open to constitutional objection provided it prescribes a reasonable approach to the assessment of the kind of evidence to which it relates. Rich and Starke JJ held (*Williamson* (1926) 39 CLR 95 at 127) that a grant of power to make laws for the peace, order and good government of a territory carried the power 'to enact whatever laws of evidence it thinks expedient, and in particular justifies laws regulating the burden of proof, both in civil and criminal cases ... and it is not for the Courts of law to say whether the power has been exercised wisely or not'. The same view was taken by Gibbs and Mason JJ in *Milicevic v Campbell* ((1975) 132 CLR 307 at 316 - 317, 318 - 319) and by Gibbs CJ in *Sorby v The Commonwealth* ((1983) 152 CLR 281 at 298)."

[43] In the same case, Gummow J said:[19]

---

[19] [1998] HCA 9; (1998) 193 CLR 173 at 234 - 236 [152] - [156] (citations footnoted in original).

"… there is a lengthy history of laws of the Commonwealth, particularly with respect to restrictive trade practices, immigration and customs (including s 233B(1)(c) itself), which create civil liabilities or criminal offences and reverse the traditional onus of proof (*R and Attorney-General (Cth) v Associated Northern Collieries* (1911) 14 CLR 387, reversed on other grounds by the Full Court: *Adelaide Steamship Co Ltd v The King and Attorney-General (Cth)* (1912) 15 CLR 65, which decision was upheld by the Privy Council: *Attorney-General (Cth) v Adelaide Steamship Co Ltd* (1913) 18 CLR 30; [1913] AC 781; *The Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1; *Williamson v Ah On* (1926) 39 CLR 95; *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254; *Milicevic v Campbell* (1975) 132 CLR 307; see also *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 545-546, 587-588; *Leask v The Commonwealth* (1996) 187 CLR 579 at 625-626).

Section 15A of the *Australian Industries Preservation Act* 1906 (Cth) provided that in certain prosecutions for offences under that statute the averments of the prosecutor were to be deemed to be proved in the absence of proof to the contrary, but so that an averment of intent was not to be deemed sufficient to prove intent, and in respect of an indictable offence the guilt of the defendant was to be established by evidence. The validity of the section was considered by Isaacs J in *R and Attorney-General (Cth) v Associated Northern Collieries* ((1911) 14 CLR 387 at 404) but not upon appeal (*Adelaide Steamship* (1912) 15 CLR 65 at 102 (Full Court); (1913) 18 CLR 30; [1913] AC 781 (PC)). Isaacs J said of s 15A (*Associated Northern Collieries* (1911) 14 CLR 387 at 404. See also *Jones v Sterling* (1982) 63 FLR 216 at 221-222):

> 'It is a stringent provision casting the initial burden of proof upon the defendants in certain cases, but as I read the section that is all. It still leaves it to the judicial tribunal to determine on recognised principles the issue of guilt or innocence upon any evidence that may be adduced. Indeed I am acting in the present instance upon the basis of that interpretation, by disregarding the provisions of the section altogether.
>
> Similar enactments have been held valid in America as for instance by Marshall CJ, in the case of *'The Thomas and Henry' v US* ((1818) 23 Fed Cas 988 at 990), and by Gray CJ, in *Holmes v Hunt* ((1877) 122 Mass 505 at 519), where a number of authorities are collected. See also *Li Sing v United States* ((1901) 180 US 486), citing with approval *Holmes v Hunt* ((1877) 122 Mass 505) and applying the rule of competency to a very strongly worded section; and again *Ah How v US* ((1904) 193 US 65), see also *Craies on Statutory Law* (*A Treatise on Statute Law*, 2nd ed (1911), p 471) and *Cooley's Constitutional Limitations* (*A Treatise on the Constitutional Limitations*, 6th ed (1890), p 452).'

In *The Commonwealth v Melbourne Harbour Trust Commissioners* ((1922) 31 CLR 1), the Court upheld the validity of s 48 of the

Customs Act. Knox CJ, Gavan Duffy and Starke JJ said (*Melbourne Harbour Trust* (1922) 31 CLR 1 at 12):

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

Isaacs J (*Melbourne Harbour Trust* (1922) 31 CLR 1 at 17) said there was no substance in the objection that s 48 was invalid because it was an attempt by the legislature to exercise judicial power; the provision was 'a mere evidentiary section and of a class well known in Customs Acts'.

In *Williamson v Ah On* ((1926) 39 CLR 95 at 122), Higgins J described as 'destitute of foundation' the argument that it was 'a usurpation of the *judicial* power of the Commonwealth if Parliament prescribe what evidence may or may not be used in legal proceedings as to offences created or provisions made by Parliament under its legitimate powers'. Higgins J went on (*Williamson* (1926) 39 CLR 95 at 122-123. See also *Milicevic v Campbell* (1975) 132 CLR 307 at 315-316, 318-319, 321) to say that he doubted the validity, in a case where there was no actual evidence on the subject of a person's immigration, of an enactment that the mere averment of the prosecutor was to be proof that the person 'is an immigrant'. But this was on the footing that the fact to be proved was a constitutional fact 'touching the power of Parliament itself to legislate' (*Williamson v Ah On* (1926) 39 CLR 95 at 123).

No such question arises with respect to s 15X of the *Crimes Act*. Nor does s 15X deem to exist, or to have been proved to the satisfaction of the tribunal of fact, any ultimate fact, being an element of the offences with which the accused is charged. A law of that nature, albeit procedural in form, might well usurp the constitutionally mandated exercise of the judicial power for the determination of criminal guilt (cf *Ulster County Court v Allen* (1979) 442 US 140 at 156. There, speaking of the Due Process Clause, the Supreme Court said: '[I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt'.) Section 15X is quite different in form and operation."

[44] It is thus securely established that legislative provisions, such as those in s 144 of the Act and the UCPR, may regulate modes of proof, and may affect the burden of

proof, even in the case of a prosecution for an offence, without being held to usurp, or impede the exercise of, the judicial power of the Commonwealth.

[45] For these reasons the appellant's argument in relation to the second ground of appeal must be rejected.

Unlawful conveyance

[46] The appellant's third ground of appeal is that, in order for a contravention of s 119 to be established, the respondent was required to prove that the conveying of the tobacco was unlawful. The appellant's argument continues to the effect, that insofar as the Act contained provisions such as s 61A and s 61C which contemplate the lawful movement of goods pursuant to specific permission, the respondent was obliged to negative the existence of any such permission.

[47] At trial, the respondent relied upon a statement of Mr Rodney Hedrick which negatived the grant to the appellant of any grant of permission pursuant to s 61A of the Act. There was not, however, any evidence which negatived the existence of a permission under s 61C.

[48] As has been seen, the learned trial judge treated the existence of a permission as a matter of defence, in relation to which the appellant had not advanced sufficient evidence to raise an issue requiring rebuttal by the prosecution.[20] The appellant argues that his Honour erred in this regard, in that his Honour failed to appreciate that proof of the absence of each and every possible ground of lawful authority was essential to establish that the conveying of the goods was unlawful for the purposes of s 119 of the Act.

[49] Section 61C of the Act provided for a form of permission which would render the conveying of excisable goods lawful. The respondent contended, in its written submissions, that it had established that there was no occasion for the grant of permission under s 61C because the relevant duty had not been paid. It may be accepted that it was sufficiently established that duty had not been paid. It does not appear, however, from the language of s 61C that the grant of permission under s 61C is conditional upon the duty having been paid. Indeed, one would think that the very case contemplated by s 61C(3) is one where duty has not been paid when the permission is granted. During the course of oral argument, the respondent (properly in my respectful opinion) did not press its reliance on this contention.

[50] The crucial question, therefore, is whether the respondent bore the burden of establishing unlawfulness on a charge of a contravention of s 119 of the Act.

[51] The text of s 119 of the Act identified the unlawfulness of the conveying as an element of the offence created thereby. As a matter of grammar, the proscription in s 119 of the Act was not absolute in that it did not proscribe any conveying of excisable goods upon which excise duty has not been paid.[21] The whole of the section "amounts to a statement of the complete factual situation which must be found to exist before anybody … incurs a liability under the provision".[22] The

---

20 *CEO of Customs v Price*, unreported, DC No 152 of 2000, 20 May 2005 at [27].

21 Cf *Chugg v Pacific Dunlop Limited* (1990) 170 CLR 249 at 251.

22 *Vines v Djordjevitch* (1955) 91 CLR 512 at 519; *Chugg v Pacific Dunlop Limited* (1990) 170 CLR 249 at 257. See also *R v Edwards* [1975] QB 27 at 40, *R v Hunt* [1987] AC 352 at 375; *DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 600-601; *Stevenson v Yasso* [2006] QCA 40; CA No 96 of 2005, 24 February 2006 at [45] - [46], [95] - [96], [148].

substance of the offence created by s 119 of the Act was "unlawful conveyance". Section 119 of the Act was congruent with s 61 of the Act, which rendered unlawful the movement of excisable goods which have not been delivered from home consumption "except as authorised by this Act"; but the charge to be proved by the respondent required proof of unlawfulness.

[52] It has been said that the circumstance that where "a matter [is] peculiarly within the knowledge of the defendant, then that may provide a strong indication that it is a matter of exception upon which the defendant bears the onus of proof".[23] In the present case, this consideration may be said to favour the appellant's submission. The respondent could readily prove the absence of a permission under s 61C by evidence of a search of its own records. Moreover, the respondent could aver that fact under s 144 of the Act.

[53] Next, it is necessary to note that the Act did not contain any express provision regulating the burden of proof. At the time when the offences were alleged to have been committed, however, s 15D of the *Crimes Act* provided:

> "Where under any law of the Commonwealth any act, if done without lawful authority, or without lawful authority or excuse, or without permission, is an offence against that law, the burden of proving that the act was done with lawful authority, or with lawful authority or excuse, or with permission (as the case may be), shall be on the person accused."

[54] It may be that the existence of s 15D of the *Crimes Act* explains the curious circumstance that the respondent did not aver in its statement of claim the absence of, inter alia, a permission under s 61C of the Act for the conveying of goods with which the appellant was charged. Absent a provision such as s 15D of the *Crimes Act*, a provision such as s 119 of the Act would usually be held to cast the onus of proof of the absence of lawful permission to convey on the prosecution. Indeed, one would think that the reason for the existence of s 15D of the *Crimes Act* was to provide those charged with the prosecution of offences against the laws of the Commonwealth with the forensic advantage of not being required to negative the existence of lawful authority.

[55] In any event, on 15 December 2001, s 15D of the *Crimes Act* was repealed by s 3 and Sch 1, cl 1 of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth). The repeal took place after the offences were alleged to have been committed and after the claim had been filed in the Cairns Registry of the District Court of Queensland.

[56] The respondent argued, however, that s 8 of the *Acts Interpretation Act* 1901 (Cth) operates to preserve the burden cast upon the appellant for offences committed before the repeal of s 15D of the *Crimes Act*. This submission was made in the respondent's written submissions on the basis that legislation which alters the burden of proof affects the substantive rights of a party.[24] The submission was not pressed in oral argument on the hearing of the appeal. In my respectful opinion, this submission could not, in any event, be accepted. I will set out my reasons for that

---

23 *Chugg v Pacific Dunlop Limited* (1990) 170 CLR 249 at 258 - 259.

24 *Ah Hing v Hough* (1926) 28 WALR 95; *Richardson v Shipp* [1970] Tas SR 105; *MCP Muswellbrook Pty Ltd v Deutsche Bank (Asia) AG* (1988) 80 ALR 53.

opinion because they have some bearing on the significance of the repeal of s 129 of the Act.

[57] Section 8 of the *Acts Interpretation Act* provided relevantly:

> "Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not -
>
> …
>
> (b) affect the previous operation of any Act so repealed, or anything duly done or suffered under any Act so repealed; or
>
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or
>
> (d) affect any penalty forfeiture or punishment incurred in respect of any offence committed against any Act so repealed; or
>
> (e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;
>
> and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

[58] In considering the language of s 8(d) and (e) of the *Acts Interpretation Act*, the authorities make it plain that, in a "proceeding" related to a "penalty", there is no requirement that a penalty must have already been **imposed** by a court or other authority in order for s 8(d) and (e) to operate: it is sufficient that a penalty has been **incurred**. In the case of a criminal or quasi-criminal offence, a penalty is incurred at the time at which the offence takes place.[25]

[59] Therefore, if an offence has occurred, s 8 of the *Acts Interpretation Act* would operate to ensure that the "proceeding" in relation to a "penalty" continued "as if the repealing Act had not been passed". In this case, that would mean that s 8 of the *Acts Interpretation Act* extended the operation of s 15D of the *Crimes Act* so as to require that the appellant meet the burden of proving the lawfulness of the conveyance. This analysis, however, presupposes that a penalty has actually been incurred; and that is the fundamental problem.

[60] In this case, a conclusion as to whether an offence has been committed - and thus whether a penalty has been incurred - depends upon a conclusion on the anterior issue of whether the conveyance was unlawful. The reaching of a conclusion on this anterior issue itself turns upon a consideration of the issue of burden of proof. If the appellant bore the onus of proving the existence of a permission under s 61C, then the absence of evidence of a permission would establish the unlawfulness of the conveyance of the tobacco. On the other hand, if the respondent bore the onus on this issue, the absence of evidence would mean that no contravention had been established.

[61] Thus to attempt to apply s 15D to this case would beg the question. One cannot resolve the question as to the incidence of the burden of proof by applying s 15D

---

[25] See *R v Scarlett & Anor; Ex parte McMillan* (1972) 20 FLR 349 esp at 351 - 352; *Byrne v Garrisson* [1965] VR 523 esp at 527 - 531; *Samuels v Songaila* (1977) 16 SASR 397.

where the application of that provision presupposes an answer to the very question it is being used to answer.

[62] No evidence was led as to the existence or otherwise of permissions under s 61C. In the absence of explicit statutory instruction, the common law rule is that the prosecuting authority bore the burden of proof in regard to the question of unlawfulness.[26] Accordingly, the absence of evidence of unlawfulness means that the appellant cannot be held to have committed offences against s 119 of the Act.

[63] In light of the conclusion which I have reached on this issue and the respondent's concession, it is not necessary to devote further consideration to the authorities cited by the respondent in support of the proposition that legislation which alters the burden of proof affects the substantive rights of a party.[27] It should be noted, however, that the decision of the Tasmanian Court of Criminal Appeal in *Attorney-General's Reference No 1 of 2004*[28] expressly questioned the correctness of the decisions in *Ah Hing* and *Richardson v Shipp*.

Section 4C(1)(a) of the *Crimes Act*

[64] At the hearing of the appeal, a question emerged as to whether s 4C(1)(a) of the *Crimes Act* should be regarded as a provision which prevented the inclusion of more than one offence covering the same act or omission in an indictment or, as in this case, in the statement of claim. The parties were given leave to make written submissions on the point.

[65] The respondent contends that s 4C(1) is directed at ensuring that a person is not punished twice for the same act or omission. In support of this contention, the respondent relies, inter alia, upon the decision of the Victorian Court of Appeal in *R v Langdon*[29] upon what is said to be an identical provision of the relevant Victorian statute. The respondent's submission is flawed by reason of the circumstance, pointed out by the appellant, that the Victorian analogue of s 4C(1)(a) of the *Crimes Act* authorises prosecution "under either or any **or all** of those laws". The absence of the words "or all" from s 4C(1)(a) is clearly a matter of significance for the proper construction of s 4C(1)(a) of the *Crimes Act*.

[66] However that may be, the appellant does not seek to suggest that he could, in this case, have sought to raise a plea in bar of the respondent's claims or one set of them. The appellant accepts that there is not sufficient commonality in the elements of the offences under s 117 and s 119 to argue that the respondent was seeking to prosecute the same offence twice.[30]

[67] The appellant contends, however, that the case pleaded by the respondent was that the act of the appellant in consigning the tobacco to its several destinations was the only act or omission which was alleged to constitute the contravention of both s 117 and s 119 of the Act. Accordingly, so it is submitted, s 4C(1)(a) of the *Crimes Act*

---

26 *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49; (2003) 216 CLR 161 at 166 [23], 204 - 207 [132] - [139].

27 *Ah Hing v Hough* (1926) 28 WALR 95; *Richardson v Shipp* [1970] Tas SR 105; *MCP Muswellbrook Pty Ltd v Deutsche Bank (Asia) AG* (1988) 80 ALR 53.

28 [2005] TASSC 10; CCA No 80 of 2004, 8 March 2005.

29 [2004] VSCA 205 esp at [36].

30 See *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610; *R v Langdon* [2004] VSCA 205 at [41] - [47].

operated to preclude the imposition of penalties in respect of both sets of contraventions.

[68] In support of its contention, the appellant points to paragraphs 2 and 6 of the respondent's statement of claim. Each of these paragraphs alleges the "consignment" of tobacco. In the respondent's statement of claim paragraph 15 alleged, in the premises of, inter alia, paragraphs 2 and 6, the appellant contravened s 119 of the Act. Paragraph 16 of the respondent's statement of claim pleaded:

> "Further, or in the alternative, the Defendant did, contrary to section 117 of the *Excise Act* 1901, as amended, have in his possession, at Cairns in the said State, manufactured excisable goods upon which Excise Duty had not been paid …"

[69] It does not appear that the appellant sought particulars of the respondent's allegation of possession in paragraph 16 of the statement of claim. The respondent argued that, in the absence of particularisation which tied the respondent's case of possession to the constructive possession involved in conveying the goods by an agent, the respondent's pleaded case was wide enough to comprehend a case of possession based on possession preliminary to the act of consignment. As has been seen, the learned trial judge approached this issue on the basis that it could rationally be inferred that, prior to the appellant's entrusting the packages to the carrier, the goods must have been under the control of the appellant, even if it could not be inferred that they were necessarily in his physical possession.

[70] It may be arguable by the appellant that the respondent has not excluded beyond reasonable doubt the hypothesis that the act of notional or constructive possession involved in conveying the goods through the medium of his agent (the carrier) was not a separate and distinct act from the notional or constructive possession exercised in bringing the goods to their departure from Cairns.

[71] On the other hand, the respondent is able to argue that the act or omission for which the appellant was liable to be prosecuted in respect of s 119 of the Act was the actual carriage of the goods by his agent. This liability was vicarious, by reason of the operation of s 145A of the Act. It did not arise because of the act of the appellant in consigning the goods to be conveyed to other parts of the State, but rather because the goods were carried by the appellant's agent. On this view, the appellant's liability for possession of the goods was direct rather than derivative, and was founded upon the acts of control of the goods up to the point of their carriage.

[72] While I have some misgivings as to the adequacy of the respondent's pleading, I would be inclined to accept that this argument of the respondent is correct. Having regard, however, to the conclusion which I have reached in relation to the third ground of appeal, it is not necessary to resolve these arguments.

The repeal of s 129 of the Act

[73] The respondent contends that the repeal of s 129 of the Act after the commission of the offences in question does not affect the continuing application of its provisions. The respondent relies in this regard upon s 8(d) of the *Acts Interpretation Act*.

[74] It will be apparent from what I have written in paragraphs [56] to [61] above that the logical difficulty in applying s 8(d) of the *Acts Interpretation Act* to determine whether an offence has been committed and a penalty thereby incurred, does not

arise here. Upon a contravention of s 117 or s 119 of the Act, the offender was liable to the imposition of the penalty for which s 129 of the Act provided.

[75] The appellant contends that the operation of s 8(d) of the *Acts Interpretation Act* was excluded by the terms of s 4F of the *Crimes Act* which provided:

> "(1) Where a provision of a law of the Commonwealth increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of that provision.
>
> (2) Where a provision of a law of the Commonwealth reduces the penalty or maximum penalty for an offence, the penalty or maximum penalty as reduced extends to offences committed before the commencement of that provision, but the reduction does not affect any penalty imposed before that commencement."

[76] Further, the appellant contends that the penalty provisions of the amended Act should be regarded as procedural, and, therefore, as taking effect in respect of offences committed before the commencement of the new legislation, but in respect of which no sentence has been imposed.[31]

[77] In my opinion, the appellant's contentions must be rejected.

[78] Not only s 129 but also s 117 and s 119 of the Act were repealed by the *Excise Amendment (Compliance Improvement) Act* 2000.[32] They were replaced by the new s 117 and s 117A which are in the following terms:

> "**117 Unlawful possession of excisable goods**
>
> (1) A person (other than a licensed manufacturer) must not, without permission, intentionally possess, or have custody or control of, manufactured or partly manufactured excisable goods on which duty has not been paid knowing, or being reckless as to whether, the goods are excisable goods on which duty has not been paid.
>
> Penalty: 2 years imprisonment or the greater of:
>
> (a) 500 penalty units; and
>
> (b) 5 times the amount of duty that would be payable if the goods had been entered for home consumption on the penalty day.
>
> Note: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.
>
> (2) A person (other than a licensed manufacturer) must not, without permission, possess, or have custody or control of, manufactured or partly manufactured excisable goods on which duty has not been paid.
>
> Penalty: 100 penalty units.
>
> Note: An infringement notice may be issued for an offence against this subsection, see Part XA.
>
> (3) Strict liability applies to subsection (2).
>
> **117A Unlawfully moving excisable goods**
>
> (1) A person must not, without permission, intentionally move any excisable goods on which excise duty has not been paid from

---

31 See *Siganto v The Queen* (1998) 194 CLR 656 at 662 - 663; *R v Truong* (1999) 105 A Crim R 345 at 349 - 351.

32 As to s 117, see item 52 of Sch 1 and as to s 119, see item 53.

one place to another knowing, or being reckless as to whether, the goods are excisable goods on which excise duty has not been paid.

Penalty: 2 years imprisonment or the greater of:

(a) 500 penalty units; and

(b) 5 times the amount of duty that would be payable if the goods had been entered for home consumption on the penalty day.

Note: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

(2) A person must not, without permission, move any excisable goods on which excise duty has not been paid from one place to another.

Penalty: 100 penalty units.

(3) Strict liability applies to subsection (2)."

[79] As to whether s 4F of the *Crimes Act* excluded the operation of s 8(d) of the *Acts Interpretation Act*, in the High Court in *CEO of Customs v El Hajje*,[33] the majority judgment records a concession on the part of the Customs that s 4F(2) of the *Crimes Act*, in conjunction with the amendments to the Act by the *Excise Amendment (Compliance Improvement) Act*, operates to reduce the penalty that could otherwise be lawfully imposed pursuant to s 129 of the Act. The respondent here argues that this concession was wrongly made.

[80] The respondent's argument is that s 4F of the *Crimes Act* applies only on the occasion when a Commonwealth Act reduces the penalty component of an offence provision, which may include the removal of a penalty;[34] but in this case the amending legislation repealed the offence provisions and substituted different provisions. As Whealy J said in *R v Ronen & Ors*,[35] s 4F(2) of the *Crimes Act* "is concerned with the reduction of the maximum penalty for an offence contained within the legislation rather than with the situation arising following the repeal of legislation".

[81] The respondent's submission must be accepted. The situation wrought by the amendments to the Act is not sensibly described as effecting a reduction of penalty for offences which remain on the statute books. There has been a repeal of those offences and the replacement of those provisions by offences with different elements.

[82] The provisions which were substituted for the repealed provisions create a different range of offences constituted by different elements. Each new proscription contains its own penalty provision which specifies only a maximum penalty. That means that, contrary to the appellant's further contention, it is not possible to apply the new penalty provisions to offences involving different elements committed before the new provisions took effect.

[83] In my view, s 4F(2) of the *Crimes Act* has no relevant operation. Rather, the case is governed by s 8(d) of the *Acts Interpretation Act*.

---

33 [2005] HCA 35; (2005) 218 ALR 457 at 466 [41].

34 *CEO of Customs v Astawa* [2001] VSC 303 at [11].

35 [2005] NSWSC 991 at [54].

Conclusion and orders

[84] The appellant is, in my view, entitled to succeed in relation to the charges under s 119 of the Act.

[85] Accordingly, the appeal should be allowed to the extent of setting aside the declarations and the convictions in respect of s 119 of the Act and reducing by one half the total penalties imposed on the appellant. Otherwise the appeal should be dismissed.

[86] As to the issue of costs, the appellant has enjoyed a substantial success on the appeal in that the penalties imposed upon him have been halved. On the other hand, most of the arguments advanced on his behalf have been resolved in favour of the respondent. An appropriate order as to the costs of the appeal would be that the respondent pay one half of the appellant's costs of the appeal.

[87] There is, in my view, no reason to vary the orders made at first instance in relation to the costs of the trial. The respondent enjoyed greater success than it was lawfully entitled to, but it is unlikely that substantial costs were wasted in relation to the issue on which it should not have succeeded.

[88] **HOLMES J:** I agree with the reasons of Keane JA and with the orders proposed.