SUPREME COURT OF QUEENSLAND

CITATION:	*Barkworth v Sidhu* [2009] QCA 356
PARTIES:	**JOANNE ELIZABETH BARKWORTH** (appellant/applicant) **v** **MAJOR SINGH SIDHU** (respondent/respondent)
FILE NO/S:	CA No 92 of 2009 DC No 3108 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2009
JUDGES:	Keane and Fraser JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the applicant leave to appeal from the decision of the District Court of 23 March 2009.** **2. Allow the appeal, set aside the order made in the District Court and order instead that the appeal to that Court be allowed, the order made in the Magistrates Court be set aside, and instead make the following orders.** **3. The defendant is convicted and fined $1,200.** **4. A conviction is not recorded.** **5. The proper officer give particulars of the fine to SPER for registration under s 34 *State Penalties Enforcement Act* 1999 (Qld).**
CATCHWORDS:	TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – STATUTORY REGULATION OF PARTICULAR MATTERS – MISCELLANEOUS STATUTORY REGULATION – where respondent was a blueberry farmer in New South Wales, whose products were sold at a market stall in Queensland – where a routine inspection at the stall in Queensland found that the respondent's product weighed less than the advertised weight – where the respondent was charged with 11 offences under s 32(1)(a) of the *Trade Measurement Act* 1990 (Qld) – where

	the product was packed in New South Wales, but the short measure was discovered in Queensland – whether s 32(1)(a) requires that the product be packed in Queensland *and* the short measure discovered in Queensland – whether the same result flows from application of s 12 of the *Criminal Code* 1899 (Qld) – whether the Magistrates Court had jurisdiction to hear the matter
	Acts Interpretation Act 1954 (Qld), s 4, s 14, s 35 *Criminal Code* 1899 (Qld), s 2, s 3, s 12 *Justices Act* 1886 (Qld), s 139 *Trade Measurement Act* 1990 (Qld), s 3, s 32, s 34
	ACI Operations Pty Ltd v Bawden [2002] QCA 286, cited *Dempster v National Companies & Securities Commission* (1993) 9 WAR 215; (1993) 10 ACSR 297, cited *DPP v Sutcliffe* [2001] VSC 43, cited *Lipohar v The Queen* (1999) 200 CLR 485; [1999] HCA 65, cited *R v Goulden* [1993] 2 Qd R 534, considered *R v WAF & SBN* [2009] QCA 144, cited *Renwick v Bell* [2002] 2 Qd R 326; [2001] QCA 316, applied *Thompson v The Queen* (1989) 169 CLR 1; [1989] HCA 30, cited *Treacy v Director of Public Prosecutions* [1971] AC 537, cited *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; [1988] HCA 55, cited
COUNSEL:	R J Byrnes for the applicant No appearance for the respondent
SOLICITORS:	Crown Law for the applicant No appearance for the respondent

[1] **KEANE JA:** I have had the advantage of reading in draft the reasons for judgment prepared by Fraser JA. I agree with his Honour's reasons and with the orders proposed by his Honour.

[2] **FRASER JA:** On 6 October 2008 the Magistrates Court at Holland Park dismissed the charge brought by the applicant, an officer in the Department of Fair Trading, that the respondent had committed 11 offences against s 32(1)(a) of the *Trade Measurement Act* 1990 (Qld) and discharged the respondent. The appellant's appeal to the District Court under s 222 of the *Justices Act* 1886 (Qld) was dismissed on 23 March 2009. The applicant has now applied for leave to appeal to this Court under s 118(3) of the *District Court of Queensland Act* 1967 (Qld). The applicant asked the Court to consider the application on the footing that if leave to appeal were granted the Court would also deal with the appeal, as is the Court's usual practice in such matters.

[3] The ground of the proposed appeal is that the District Court judge erred in law in affirming the decision in the Magistrates Court that it did not have jurisdiction to deal with the matter. The argument in support of that ground raises questions

concerning the interpretation of an important offence provision in consumer protection legislation. As will appear my view is that the proposed appeal has merit. It also raises a point of some general importance. The purpose of the *Trade Measurement Act* was to introduce a "uniform system of trade measurement to ensure that the wheels of commerce run smoothly".[1] Section 32(1) was enacted as part of that national scheme of legislation and it has an identical counterpart in every other State and Territory.[2] For these reasons this is an appropriate case for the grant of leave to appeal.[3]

The alleged offences

[4] Section 32(1) of the *Trade Measurement Act* provides:

> "(1) If the actual measurement of the quantity of a prepacked article is less than the measurement or minimum measurement marked on the package (whether or not marked for the purpose of complying with this Act)—
>
> (a) the person who packed the article is guilty of an offence; and
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> (b) a person who sells the article is guilty of an offence."

[5] The following are amongst the terms used in that provision which are defined in s 3 of the Act:

> "***article*** includes substance.
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> . . .
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> ***pack***, for the purpose of deciding who packs or has packed an article as a prepacked article, includes authorise, direct, cause or permit a person to pack an article as a prepacked article.
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> . . .
>
> ***prepacked article*** means an article that is packed in advance ready for sale."

[6] The complaint against the respondent alleged 11 breaches of s 32(1)(a) in that, in respect of each count, a pack of blueberries, being a prepacked article, had on 17 November 2007 been found to be of short measure and that, as the person who had packed the article, the respondent was guilty of an offence.

[7] The circumstances of the alleged offences are not contentious. On 17 November 2007 Trade Measurement Inspectors conducted a routine inspection of the produce market at the Brisbane Markets at Rocklea. At a stall in the markets the inspectors found punnets of blueberries labelled as containing 125 grams. The punnets were found to weigh less than that. The average shortfall of the 11 punnets was 6.5 per cent. Investigations traced the punnets to the respondent, a small scale blueberry farmer based in Woolgoolga in New South Wales. He carries on a farming business there in partnership with his wife and sons. He accepted responsibility for the matters the subject of the charge against him on the basis that he had engaged the people who had packed the blueberries on his behalf. The punnets in question

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1 Second reading speech on the Trade Measurement Bill, 1 August 1990, Queensland Parliamentary Debates at 2616.

2 The legislation is identified in *Halsbury's Laws of Australia* at [445-650].

3 See *ACI Operations Pty Ltd v Bawden* [2002] QCA 286.

formed part of a larger consignment of more than 2,400 punnets of blueberries. The respondent caused the berries to be packed in punnets and he sold them to a company in New South Wales. That company sold them to a Brisbane Market agent, who sold them to the owner of the stall at the Brisbane Markets.

[8] The controller of the company which bought the berries in New South Wales from the respondent provided an affidavit in which he deposed that after they arrived in Brisbane they may have been outside for some time before being put in cold storage, with the result that the shortfall in the weight might possibly have been due to loss of moisture content. Another possibility referred to by the respondent was that the 11 punnets had originally been intended to be given to friends rather than sold. It was not suggested that the evidence on these topics raised a viable defence to the charges.

The proceedings in the Magistrates Court and District Court

[9] At the hearing in the Magistrates Court the respondent appeared in response to the complaint, but his counsel raised as a preliminary point the question whether the Magistrates Court had jurisdiction to hear the matter. The Magistrate adopted a procedure suggested by the respondent's counsel under which the respondent entered “conditional pleas of guilty” subject to the determination that the Magistrate had jurisdiction. After receiving affidavit evidence and hearing submissions both about jurisdiction and sentence, the Magistrate indicated that if she determined that the Magistrates Court had jurisdiction an appropriate penalty was a fine of $1,200, with no conviction recorded. The Magistrate accepted that the respondent should be given time to pay the fine, but because the respondent sought more than one month to pay the fine the appropriate order was to refer the matter to SPER (State Penalties Enforcement Registry). Subsequently, in a carefully reasoned decision, the Magistrate concluded that the Magistrates Court lacked jurisdiction and dismissed the complaint for that reason.

[10] The Magistrate considered that s 35(1)(b) of the *Acts Interpretation Act* 1954 (Qld), which provides that a reference to a thing is a reference to a thing "in and of Queensland" and the common law presumption against the extraterritorial operation of legislation[4] required s 32(1)(a) to be read as if it included a requirement that the packing of the article occur in Queensland. The Magistrate concluded that because the respondent packed the blueberries in New South Wales the Magistrates Court did not have jurisdiction to deal with the charge.

[11] The Magistrate also referred to s 12 of the *Criminal Code*. So far as it is presently relevant that section provides:

> ". . .
>
> (2) Where acts or omissions occur which, if they all occurred in Queensland, would constitute an offence and any of the acts or omissions occur in Queensland, the person who does the acts or makes the omissions is guilty of an offence of the same kind and is liable to the same punishment as if all the acts or omissions had occurred in Queensland.
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> (3) Where an event occurs in Queensland caused by an act done or omission made out of Queensland which, if done or made

[4] The Magistrate referred to *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363.

in Queensland, would constitute an offence, the person who does the act or makes the omission is guilty of an offence of the same kind and is liable to the same punishment as if the act or omission had occurred in Queensland.

(3A) It is a defence to prove that the person did not intend that the act or omission should have effect in Queensland."

[12] The Magistrate observed that the only relevant act in Queensland was the discovery of the short measure by Trade Measurement Inspectors but that the act or omission relied on by the prosecution was only the packing of the blueberries: for that reason s 12 of the *Criminal Code* did not apply.

[13] It was essentially for those reasons that the Magistrate concluded that the court lacked jurisdiction and dismissed the complaint.

[14] In dismissing the applicant's appeal from that decision to the District Court Koppenol DCJ gave as his only reason that he agreed with the reasons given by the learned Magistrate.

The arguments in this application

[15] The applicant challenged the Magistrate's reasons for concluding that s 32(1) did not rebut the presumption against the extraterritorial application of statutes creating offences and that s 12 of the *Criminal Code* did not apply to extend the reach of the offence created by s 32(1)(a) to the circumstances of this case.

[16] The applicant argued it was necessary to exclude reference to the title of s 32 ("Offence of packing or selling short measure"), because the title does not form part of the Act.[5] The applicant then argued that reference to the text of the provision demonstrated that the offence in s 32(1)(a) included the distinct element of the existence of a "short measure", that is, the actual measurement of the quantity of the prepacked article being less than the measurement or minimum measurement marked on the package.

[17] The following provisions of the *Trade Measurement Act* were cited as providing confirmation that the presence of a short measure is an element of the offence which is separate from the other elements, including the element that the person charged packed the prepacked article:

"**32 Offence of packing or selling short measure**

. . .

(3) The marking of a measurement on a package must make such allowance for any likely reduction over time in the actual measurement of the article as may be necessary to prevent the commission of an offence under this section in relation to the article.

. . .

34 Defences concerning short measure

(1) It is a defence in proceedings under section 32 against a person who packs a prepacked article if it is established that the deficiency in measurement—

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5 *Acts Interpretation Act* 1954 (Qld), s 14: the Act was enacted before 1 July 1991 and the heading has not been amended since that time.

(a) arose after the packing of the article and the marking of the package and was attributable wholly to factors for which reasonable allowance was made in stating the measurement marked on the package; or

(b) resulted from something that the defendant could not reasonably have foreseen or for which the defendant could not reasonably have made allowance.

(2) It is a defence in proceedings under section 32 against a person who sells a prepacked article if it is established—

(a) that the defendant obtained the article from another person within Australia who packed the article or sold it to the defendant and the defendant identified that other person to an inspector; and

(b) that the package containing the article was marked apparently as required by this Act when the defendant received it; and

(c) that the defendant sold the article in the same state as it was in when the defendant obtained it.

. . .

(4) It is not a defence in proceedings under section 32 merely to establish that the deficiency in measurement did not exist when the article was packed or when the package was marked."

[18] The applicant's counsel argued that the gravamen of the offence under s 32(1) was that a prepacked article, which was by definition an article packed for sale, was of short measure. In this case such a short measure was present in Queensland. On that footing the Magistrates Court had jurisdiction either by the operation of s 12(2) or (3) of the *Criminal Code* or because the common law presumption against the extraterritorial operation of statutes was rebutted.

[19] No argument was presented for the respondent, who did not appear and was not represented in this Court or in the District Court.

Discussion

[20] The respondent appeared in the Magistrates Court in response to the complaint. It follows that the Magistrates Court did not lack jurisdiction in the sense of authority to hear the complaint. That proposition should perhaps be qualified by reference to s 139(1)(a) of the *Justices Act* 1886, which prima facie requires that a complaint of a simple offence shall be heard at a place appointed for holding Magistrates Courts within the district within which the offence was committed. But as we were informed that the Rocklea Markets are within the District for which the Magistrates Court sitting at Holland Park was appointed, the only real issue in the appeal

concerns the territorial ambit of the offence created by s 32(1)(a). If it applies where the person charged engaged in relevant conduct only outside Queensland but a short measure is found in Queensland the Magistrates Court at Holland Park had jurisdiction to hear and determine the complaint in this case.

[21] I should first note in that respect that it is not necessary for the disposition of this proceeding to decide whether the act of packing a prepacked article in the State is sufficient to found a charge under s 32(1)(a) where a short measure occurs only outside the State. The question for decision is whether the offence is committed when a short measure in a prepacked article occurs in the State but the person charged packed that article out of the State. The resolution of that issue turns upon the proper construction of the statute. [6]

[22] As the Magistrate recognised, there is a strong, rebuttable presumption of statutory interpretation that the legislature did not intend statutes creating offences to extend to conduct outside the State, but this rule may be overridden by statute.[7] The similar presumption in s 35 of the *Acts Interpretation Act* 1954 (Qld) to which the Magistrate referred also may be displaced by the expression of a contrary intention in the statute concerned.[8] I accept that the presumption applies so that there must be a local element for the offence to have been committed in Queensland, but in my opinion where there is a short measure in the State it is not necessary also to prove that the person charged under s 32(1)(a) packed the article in the State.

[23] The offence under s 32(1)(a) is not complete until there is a short measure, which may not arise until long after the person charged packs the article. So much is contemplated by the connotation of futurity in the definition of "prepacked article" as meaning an article that is packed "in advance ready for sale", the provision in s 34(4) that it is not a defence merely to establish that the deficiency in measurement did not exist when the article was packed or when the package was marked, and particularly the provision in s 32(3) that allowance must be made for any likely reduction over time in the actual measurement of the article as may be necessary "to prevent the commission of an offence under this section". The existence of a short measure is plainly a distinct element of the offence. Bearing that in mind, the preferable construction of the provision is that the offence is committed when there is a short measure in the State in a prepacked article which was packed by the person charged, whether that person packed the article in or out of the State. That construction is suggested by the text and structure of s 32(1), which commences with reference to a short measure and renders one or both of two categories of persons equally liable for the offence.

[24] The same construction is also indicated by the evident purpose of the provision. Section 14A of the *Acts Interpretation Act* 1954 requires that in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. The Act is a consumer protection

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6 *Thompson v The Queen* (1989) 169 CLR 1 per Brennan J at 25.

7 *R v WAF & SBN* [2010] 1 Qd R 370 per Margaret Wilson J at [36]. Margaret Wilson J referred to *DPP v Sutcliffe* [2001] VSC 43 at paras 29–53 and *Thompson v The Queen* (1989) 169 CLR 1 per Brennan J at 23–25. In *Dempster v National Companies & Securities Commission* (1993) 10 ACSR 297 at 320, Malcolm CJ concluded that the presumption may not be as strong within Australia as it is in relation to places outside Australia. See also *Lipohar v The Queen* (1999) 200 CLR 485 per Gleeson CJ at [37] but cf *Thompson v The Queen* (1989) 169 CLR 1 per Deane J at 33.

8 Section 4 of the *Acts Interpretation Act* 1954 provides that the application of that Act may be displaced, wholly or partly, by a contrary intention appearing in any Act.

measure and it forms part of a national scheme of legislation which was born out of the growth in national and international commerce. The mischief which this particular provision was intended to ameliorate was the presence of short measures in articles which would be offered for sale on the basis of representations as to their weight. It was no doubt thought insufficient merely to penalise the sellers, when in many cases the real responsibility for the offence would lie with the persons who packed the articles for sale. Under this scheme it is to be expected that the executive of each State and Territory which enacted the legislation would assume responsibility for detecting and bringing proceedings in relation to short measures found within that State or Territory. That is certainly so where the offence is charged against a seller under s 32(1)(b) and the same conclusion is implicit where the offence is charged under s 32(1)(a) against the person who packed the article. There is also the practical consideration that short measures may readily be found and proved by weighing articles offered for sale in marketplaces, but it would seem to be much more difficult, if not impractical, to adopt an effective system of detecting and proving that necessary element of the offence in the innumerable places in the State where articles are packed for sale. Furthermore, the construction preferred in the courts below would produce the result that proceedings against a person who had packed an article in one State which is found to be of short measure in a different State could be brought only in the first State, although it is the second State which ordinarily would have the most interest in bringing such proceedings. That construction would therefore provide an unwieldy system and one which is most unlikely to reflect the legislative intention.

[25] For these reasons, s 32(1)(a) should not be construed as if it included a requirement that the packing of the article occur in Queensland. I am inclined to the view that the provision extends to any case in which either the short measure or the packing of the article occurs in the State, but as I have mentioned it is not necessary here to decide that question. In my view, s 32(1)(a) creates a "result-crime":[9] that is to say, it punishes the harmful consequences in Queensland of conduct wherever it occurs. The offence is established where a short measure occurs in the State regardless of whether or not the other elements of the offence occur out of the State. (There is no reason to doubt that the Queensland legislature was empowered to legislate to that effect: the occurrence in Queensland of a short measure fulfils the undemanding constitutional requirement that there be a connection between the offence and the State of Queensland.[10])

[26] I conclude that, upon the proper construction of s 32(1)(a) of the *Trade Measurement Act*, the fact that all of the respondent's relevant conduct occurred out of Queensland does not preclude the respondent from being convicted and punished for an offence under that provision. There was no impediment to the conviction of the respondent upon his plea of guilty. The District Court judge therefore erred in upholding the Magistrate's decision that the complaint should be dismissed on the ground that the court lacked jurisdiction to hear and determine it.

[27] That conclusion means that it is not strictly necessary to consider whether the same result would flow from the application of s 12 of the *Criminal Code*. Furthermore, we do not have the benefit of argument on the point on behalf of the respondent. In

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9 *Treacy v Director of Public Prosecutions* [1971] AC 537 per Lord Diplock, quoted by Brennan J in *Thompson v The Queen* (1989) 169 CLR 1 at 24 – 25.

10 See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14.

these circumstances I prefer not to express a concluded view on that topic, but out of deference to counsel's argument on that issue I will express my tentative opinion.

[28] There may be a difficulty in regarding the mere existence of a short measure as an "act" or "omission" within the meaning of s 12(2) of the *Criminal Code*, but it seems right to regard it as an "event" for the purpose of s 12(3) of the *Criminal Code*.[11] The respondent's conduct out of Queensland in packing the punnets was a cause of that event, even if the reduction in the actual measure was directly attributable to evaporation or some other contributing cause outside the respondent's control. That being so, if s 32(1)(a) did not apply according to its own terms because the only relevant conduct of the respondent was that he packed the punnets in New South Wales, s 12(3) of the *Criminal Code* would render the respondent liable for an offence of the kind created by s 32(1)(a) as if he had packed the punnets in Queensland.

[29] That conclusion assumes that the word "offence" in s 12 of the *Criminal Code* comprehends an offence other than one created by the *Criminal Code* itself. Sections 2 and 3 of the *Criminal Code* provide:

> "**2 Definition of *offence***
>
> An act or omission which renders the person doing the act or making the omission liable to punishment is called an *offence*.
>
> **3 Division of offences**
>
> (1) Offences are of 2 kinds, namely, criminal offences and regulatory offences.
>
> (2) Criminal offences comprise crimes, misdemeanours and simple offences.
>
> (3) Crimes and misdemeanours are indictable offences; that is to say, the offenders can not, unless otherwise expressly stated, be prosecuted or convicted except upon indictment.
>
> (4) A person guilty of a regulatory offence or a simple offence may be summarily convicted by a Magistrates Court.
>
> (5) An offence not otherwise designated is a simple offence."

[30] In *R v Goulden*,[12] Thomas J, with whose reasons Mackenzie and Byrne JJ agreed, expressed the view that s 12(2) and (3) of the *Criminal Code* might be invoked in relation to offences other than those created by the *Criminal Code*, in that case offences under the *Drugs Misuse Act*. That conclusion was not necessary for the decision in that case but it is consistent with this Court's decision in *Renwick v Bell*[13] that s 7 of the *Criminal Code* applies to all offences against the statute law of Queensland. Some of the reasons for that decision given by Davies JA have no

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11 Definitions of "event" in the Oxford English Dictionary include "[t]he (actual or contemplated) fact of anything happening; the occurrence of" and "[t]hat which follows upon a course of proceedings; the outcome, issue; that which proceeds from the operation of a cause; a consequence, result."

12 [1993] 2 Qd R 534 at 535 – 536.

13 [2002] 2 Qd R 326.

application in relation to s 12, but one reason for the decision was Davies JA's conclusion that the term "simple offence" in s 3 of the *Criminal Code* bears the meaning given in the *Justices Act.*[14] Davies JA reached that conclusion after an extensive review of the relevant provisions of the *Criminal Code* and the authorities on the point. I would adopt the same view in relation to the term "offence" in s 12. As the offence against s 32(1)(a) of the *Trade Measurement Act* is a simple offence as that term is defined in the *Justices Act* there is no obstacle to the application of s 12(3). Accordingly, if s 32(1)(a) did not apply of its own force, I think that s 12(3) would render the respondent liable to conviction and the same punishment in any event. As I have indicated, however, I would not base my decision on this view but upon the proper construction of s 32(1)(a) itself.

Proposed orders

[31] The application and the draft notice of appeal sought orders for the remittal of the matter for further hearing. However, at the hearing the applicant's counsel informed the Court that, if the Court granted leave to appeal, the applicant was content for the Court immediately to dispose of the appeal and, if the appeal was allowed and the Court thought it appropriate, to convict the respondent and impose the penalty indicated by the Magistrate. That has the significant advantage for both parties that it would obviate the need for a further hearing where there have already been three hearings. After the hearing of the application had been stood down to enable the applicant to ascertain the respondent's attitude to that course, the applicant's counsel informed the Court of his instructions that the respondent and his solicitor had been contacted and the respondent had indicated that he was content for this court to adopt the course I have described.

[32] Accordingly, the appropriate orders are as follows:

(a) Grant the applicant leave to appeal from the decision of the District Court of 23 March 2009.

(b) Allow the appeal, set aside the order made in the District Court and order instead that the appeal to that court be allowed, the order made in the Magistrates Court be set aside, and instead make the following orders.

(c) The defendant is convicted and fined $1,200.

(d) A conviction is not recorded.

(e) The proper officer give particulars of the fine to SPER for registration under s 34 of the *State Penalties Enforcement Act* 1999 (Qld).

[33] **ATKINSON J:** I agree with the orders proposed by Fraser JA and with his Honour's reasons.

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[14] *Renwick v Bell* [2002] 2 Qd R 326 per Davies JA (McMurdo P and Thomas JA agreeing) at [27].