STATE OF NEW SOUTH WALES ..... APPELLANT;
DEFENDANT,

AND

ROBINSON ..... RESPONDENT.
PLAINTIFF,

[2019] HCA 46

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

*Police — Arrest without warrant — Police officer had not formed intention to charge arrested person with offence at time of arrest — Police officer had not formed intention to bring arrested person before authorised officer to be dealt with according to law at time of arrest — Whether arrest unlawful — Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 4, 99, 105, 109, 113, 114, 115, 116.*

HC of A
2019

*Sept* 3;
*Dec* 4
2019

Kiefel CJ,
Bell,
Gageler,
Keane,
Nettle,
Gordon and
Edelman JJ

Section 99(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) relevantly provided that "a police officer may, without a warrant, arrest a person if: (a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and (b) the police officer is satisfied that the arrest is reasonably necessary for any one or more …" of a number of specified reasons, including "… (iv) to ensure that the person appears before a court in relation to the offence". Section 99(3) provided that a police officer who arrested a person under that section must, as soon as was reasonably practicable, take the person before an authorised officer to be dealt with according to law. Section 105 provided that a police officer may discontinue an arrest at any time, including if the arrested person was no longer a suspect or the reason for the arrest no longer existed, or if it was more appropriate to deal with the matter in some other manner. Section 114 provided that a police officer may in accordance with that section detain a person, who is under arrest, for the "investigation period" for the purpose of investigating whether the person committed the offence for which the person was arrested. Section 114 further provided that a police oficer may also investigate any other offence in respect of which the police officer formed a reasonable suspicion as to the person's involvement while the person was so detained. Section 115 provided that the "investigation period" was a period that begins when a person is arrested and ends at a time that is reasonable having regard to all the circumstances, but did not exceed the "maximum investigation period", being four hours or such longer period as the maximum investigation period may be extended to by a detention warrant.

R was subject to an apprehended violence order ("AVO") restraining him from contacting S "by any means whatsoever" except by way of R's lawyer. An email was subsequently sent to an employee of S from an email address associated with R. After being informed that police at the Sydney City Police Station wished to speak to him, R attended the station and was arrested. An interview was conducted, following which R was released without charge. R brought proceedings in the District Court of New South Wales claiming damages for wrongful arrest and false imprisonment constituted by his arrest. The arresting officer conceded in his evidence at the trial that, at the time of the arrest, he did not believe that he had enough evidence to charge R, and that the decision whether to charge R depended on what he said in his interview. R contended that an arrest under s 99 of the Act was unlawful unless the arresting officer had an intention at the time of arrest to charge the arrested person.

*Held*, by Bell, Gageler, Gordon and Edelman JJ, Kiefel CJ, Keane and Nettle JJ dissenting, that R's arrest was unlawful. The arresting officer did not have the power to arrest R, without warrant, under s 99 of the Act when, at the time of the arrest, the officer had not formed the intention to charge R with an offence.

*Bales v Parmeter* (1935) 35 SR (NSW) 182 and *Williams v The Queen* (1986) 161 CLR 278, applied.

*Per* Bell, Gageler, Gordon and Edelman JJ. A police officer who arrests a person under s 99 must, as soon as reasonably practicable, take the person before an authorised officer to be dealt with according to law: s 99(3). That is a requirement that takes effect immediately upon arrest. To comply with the requirement in s 99(3) immediately upon arrest, a police officer must at the time of arrest have an *intention* to take the person, as soon as reasonably practicable, before an authorised officer to be dealt with according to law to answer a charge for that offence. If there is no intention to comply with the requirement in s 99(3), the arrest is unlawful. And a requirement for the police officer to have an intention to bring a person before an authorised officer means, as a matter of substance, a requirement to have an intention to charge that person.

Decision of the Supreme Court of New South Wales (Court of Appeal): *Robinson v New South Wales* (2018) 100 NSWLR 782, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 8 October 2013, Roselyn Singh reported that she had received threatening phone calls and been blackmailed by Bradford James Robinson. On 9 October 2013, an apprehended violence order ("AVO") was made in her favour against Mr Robinson. The AVO restrained Mr Robinson from, amongst other things, harassing Ms Singh, engaging in conduct that intimidated her, deliberately damaging or interfering with her property, or contacting her "by any means whatsoever" except by Mr Robinson's lawyer. On 16 October 2013, the AVO was extended until further order. Mr Robinson ran a

website with an associated email address, "brad@datatheft.com.au", which had been used to contact Ms Singh. Ms Singh had blocked receipt of emails from the address but, on 18 December 2013, one of her employees informed her that he had received an email from it. Ms Singh checked her computer and found the email in her junk box. On 20 December 2013, Ms Singh attended the Town Hall Police Station in Sydney and signed a statement in which she deposed that Mr Robinson had attempted to contact her, and her employees, colleagues, business partners and others, by email from the "brad@datatheft.com.au" email address. On 22 December 2013, Constable Smith of the Sydney City Police Station formed the opinion that Mr Robinson had breached the AVO. At 11.15 am that day police, including Constable Smith, attended what they believed was Mr Robinson's address but were told by neighbours that he no longer lived there. At midday Mr Robinson telephoned police and told Constable Colakides that he had been informed that the Sydney City police wished to speak to him regarding a breach of an AVO. Mr Robinson further stated that he was homeless and currently interstate but that he would be in Sydney the next day. He refused, however, to say where he would be staying, and he said he would not be attending any police station before seeking legal representation. Constable Colakides advised Mr Robinson to attend the Sydney City Police Station the next day but Mr Robinson did not agree to do so. At 5 pm the same day, Mr Robinson entered the Sydney City Police Station. He was arrested by Constable Smith in connection with the alleged breach of the AVO. Constable Smith offered Mr Robinson the opportunity of an interview, which Mr Robinson accepted. An interview was conducted and at 6.18 pm, at the conclusion of the interview, Mr Robinson was released without charge. Mr Robinson brought proceedings in the District Court of New South Wales against the State of New South Wales claiming damages for false imprisonment constituted by his arrest. The State defended the claim on the basis that the arrest was lawfully effected pursuant to ss 99(1)(a) and 99(1)(b)(i), (iv) and (ix) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). Constable Smith gave evidence at the hearing that he believed it had been necessary to arrest Mr Robinson for the alleged breach of the AVO because of the seriousness of the alleged offence and because he believed that it should be dealt with; to prevent a repetition of the offence; and to ensure Mr Robinson's appearance in court. Constable Smith conceded that he did not believe at the time of the arrest that he had enough evidence to charge Mr Robinson. He said that whether he would, ultimately, have been able to charge Mr Robinson depended on what, if anything, Mr Robinson might say in his record of interview.

The primary judge (Judge P Taylor SC) found that Constable Smith had suspected that Mr Robinson had committed an offence of breaching the AVO and believed that it should be dealt with; had reasonable grounds for that suspicion; had been satisfied that it was reasonably necessary to arrest Mr Robinson to ensure that he appeared before court; and had been satisfied that it was reasonably necessary to arrest Mr Robinson because of the nature and seriousness of the offence. It was not established, the judge found, that Constable Smith was satisfied that arrest was reasonably necessary to prevent a repetition of the offence or that a purpose of the arrest was to investigate the offence or question Mr Robinson. The primary judge held that a period of one hour and 18 minutes for which Mr Robinson had been detained after being arrested was a reasonable period in all the circumstances. Finally, the judge rejected Mr Robinson's contention that, in substance, an arrest under s 99 was unlawful unless the arresting officer had determined at the time of arrest that the arrested person would be charged. Mr Robinson's claim was dismissed. He appealed to the New South Wales Court of Appeal on the sole ground that the trial judge erred in failing to hold that the arrest and subsequent detention of Mr Robinson was unlawful because, at the time of the arrest, Constable Smith had not formed an intention to charge him with any offence. The Court of Appeal (McColl and Basten JJA, Emmett A-JA dissenting) allowed the appeal. On 12 April 2019, Gageler, Gordon and Edelman JJ granted the State of New South Wales special leave to appeal.

*J K Kirk* SC (with him *P D Herzfeld*), for the appellant. It is an error to approach s 99 on the assumption that it must operate in the same way as previous arrest provisions unless there is some clear indication to the contrary, especially in circumstances where it is clear that the form of s 99 at issue was introduced into the *Law Enforcement (Powers and Responsibilities) Act* deliberately so as to broaden the powers of police to arrest without warrant. In any event, the previous case law does not support the proposition for which the majority of the Court of Appeal relied upon it. Contrary to the view of McColl JA (1), the mental state in s 99(1)(a) is not the same as that required in order to commence a prosecution against the arrested person. Her Honour was in error to conclude that, in *Williams v The Queen* (2), Mason and Brennan JJ assimilated the two mental states. Rather, their Honours considered that, in practice, a police officer who had the requisite reasonable suspicion to arrest would *ordinarily* have reasonable and

(1) (2018) 100 NSWLR 782 at 798-802 [75]-[96].
(2) (1986) 161 CLR 278.

probable cause to commence a prosecution (3). However, as accepted by Basten JA (4), this expressly recognises the difference between the mental states and the very tension upon which the State relies. Further, given the expansion of the grounds for arrest now included in s 99(1)(b), even if Mason and Brennan JJ's view that reasonable suspicion would ordinarily give reasonable and probable cause was correct in relation to the Tasmanian provisions with which their Honours were concerned, it is not correct in relation to s 99. Where the permissible time between arrest and charging has been expanded by statute – as it has been here by Pt 9 – there is a correlative increase in the chance of new evidence becoming available prior to charging, such as to affect what state of mind may reasonably be held with respect to an arrested person. Enabling the gathering of further evidence is a key aim of Pt 9. On the view of the majority of the Court of Appeal, a police officer must have formed an intention to charge in order to effect a lawful arrest without warrant. But that would mean that the mental state necessary to effect a lawful arrest without warrant is not that stated in s 99(1)(a), namely "suspicion on reasonable grounds". It is, in fact, the higher standard of "reasonable and probable cause". The majority's conclusion is thus inconsistent with the text of s 99(1)(a). The fact that s 99(3) imposes a duty on a police officer, as soon as reasonably practicable, to take the arrested person before an authorised officer to be dealt with according to law says nothing, on its face, about the officer's state of mind at the time of the arrest. The provision simply prescribes how the officer must act, *after* the arrest. There is a note to s 99(3), inserted by the 2013 amendments, referring to s 105. Section 105(2) makes clear that a police officer may discontinue an arrest at any time for any reason whilst s 105(3) provides expressly that this may occur "despite any obligation under this Part to take the arrested person before an authorised officer to be dealt with according to law". Read together, ss 99 and 105 thus contemplate that a person might or might not be brought before an authorised officer to be dealt with according to law, depending on the circumstances. That being so, it can hardly be a requirement that the arresting officer intend that the arrested person *will* be brought before an authorised officer (5). The provisions recognise precisely the kind of uncertainty on this point in Constable Smith's mind at the time of the arrest. These submissions are underscored by the fact that s 99(4) – also inserted by the 2013 amendments – now provides that a person lawfully arrested under s 99(1) may be detained under Pt 9. [BELL J. As I understand your

(3) (1986) 161 CLR 278 at 300.
(4) (2018) 100 NSWLR 782 at 813 [149].
(5) (2018) 100 NSWLR 782 at 835 [253] per Emmett A-JA.

argument, at all times it has accepted that the power conferred by s 99 is not to arrest for the purpose of investigation?] Simpliciter. That is right. [He also referred to *Nolan v Clifford* (6); *Bales v Parmeter* (7); *George v Rockett* (8); *Project Blue Sky Inc v Australian Broadcasting Authority* (9); *Zaravinos v New South Wales* (10); *McNamara v Consumer Tribunal* (11); *A v New South Wales* (12); and *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (13).]

*D R J Toomey* SC (with him *D C Morgan* and *D J Woodbury*), for the respondent. The task of construing s 99 of the *Law Enforcement (Powers and Responsibilities) Act* cannot be properly undertaken without a consideration of the common law context and its legislative history, including consideration of the cases that construed its statutory predecessor in s 352 of the *Crimes Act 1900* (NSW). That section provided for, inter alia, arrest without warrant of any person whom the police officer suspected, with reasonable cause, of having committed an offence. Section 352 expanded the common law power of a constable to arrest in respect of both felonies and summary offences, but has also been regarded as embodying it or reinforcing it. [He referred to *Clarke v Bailey* (14).] In *Bales v Parmeter* (15), Jordan CJ (with whom Stephen and Street JJ agreed), in considering whether the arrest in that case was unlawful because the person had been held against her will at her home and then at the police station, held that a restraint of the plaintiff's liberty under s 352 of the *Crimes Act* had, as its *only* purpose, that of taking the arrested person before a magistrate to be charged and dealt with according to law (16). The Court held that a purpose of asking the person questions or making investigations "in order to see whether it would be proper or prudent to charge her with the crime" was an extraneous one, rendering the arrest unlawful. To similar effect, s 352 of the *Crimes Act* was held, in *Zaravinos v New South Wales* (17), not to displace general principles with respect to arrest. In its submissions concerning the text of s 99, the appellant pays insufficient heed to the mandate contained in s 99(3). The statutory

(6) (1904) 1 CLR 429.
(7) (1935) 35 SR (NSW) 182.
(8) (1990) 170 CLR 104.
(9) (1998) 194 CLR 555.
(10) (2004) 62 NSWLR 58.
(11) (2005) 221 CLR 646.
(12) (2007) 230 CLR 500.
(13) (2014) 255 CLR 179.
(14) (1933) 33 SR (NSW) 303 at 309.
(15) (1935) 35 SR (NSW) 182.
(16) (1935) 35 SR (NSW) 182 at 190.
(17) (2004) 62 NSWLR 58.

presumption contained there that, upon being taken before an "authorised officer" the arrested person will be "dealt with according to law", continues to reflect the common law and necessarily presupposes that that authorised officer will have jurisdiction to so deal with the person. In the absence of a charge, no such jurisdiction will exist. [KIEFEL CJ. That might be so, but the point taken against you is that that does not tell you anything about the time at which a decision is made to charge.] Once it is accepted and understood that the purpose of an arrest is to take the person before a court and make him or her answerable under the criminal law, the "reasons" contained in s 99(1)(b) operate as a constraint on the power of arrest (18), rather than a broadening of its purpose. [KEANE J. So when s 99(1) gives reasons for an arrest, police officers cannot treat them seriously?] The reasons in s 99(1)(b) act as discriminators between circumstances where a person will be charged alone, or circumstances where that person will be arrested and then charged, keeping in mind that it is not necessary to arrest the person to charge them. Were it otherwise, and the s 99(1)(b) "reasons" were to be regarded as independent purposes of the arrest, a police officer could, for example, arrest a person merely to establish her identity (19), even though he does not intend to charge her, then or ever, with the suspected offence. To find such an arrest to be lawful, by a "literal fulfilment" of the conditions imposed by s 99(1) would, we submit, be to recognise a radical encroachment on the subject's liberty, and to favour an interpretation of s 99 which offends the principle of legality. [EDELMAN J. So the removal of the words "for the purpose of taking proceedings for an offence" from the old provision had no effect?] It had no effect. [KIEFEL CJ. But if the arrest is discontinued, which s 105 expressly recognises, the person is not charged and would never be brought before a court.] That is quite so, but that does not address what the actuating purpose of the arrest must be at the time the arrest is effected. The extended detention provisions in s 99(4) and Pt 9 of the Act provide a power to detain a person *following* a lawful arrest to enable investigation of the person's involvement in the suspected offence. That power does not, and could not, detract from the purpose of taking the person before a court to conduct a prosecution. Section 113(1) provides not only that Pt 9 does not confer any power to detain a person who has not been lawfully arrested but also, importantly, that it does not "confer any power to arrest a person". The second of those stipulations makes clear that an arrest *to* investigate remains unlawful. The arrest in this case was performed in circumstances where Constable Smith did not have an

(18) (2018) 100 NSWLR 782 at 816-817 [163]-[164] per Basten JA.
(19) Section 99(1)(b)(iii).

intention to charge the respondent because he did not have sufficient evidence. It is difficult to see, in that case, how the arrest could have been carried out for any purpose other than to investigate. [He also referred to *John Lewis & Co Ltd v Tims* (20); *Drymalik v Feldman* (21); *Lake v Dobson* (22); *Williams v The Queen* (23); *Foster v The Queen* (24); *Dowse v New South Wales* (25); and *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (26).]

*J K Kirk* SC, in reply.

*Cur adv vult*

4 December 2019

The following written judgments were delivered: —

1 KIEFEL CJ, KEANE AND NETTLE JJ. This is an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales (McColl and Basten JJA, Emmett A-JA dissenting) that the power of arrest without warrant under s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("LEPRA") is conditional upon the arresting police officer having determined by the time of arrest that the person to be arrested will be charged with the offence of which he or she is reasonably suspected.

2 For the reasons which follow, the appeal should be allowed. Although the only permissible purpose of arrest under s 99 of LEPRA is to take the arrested person before an "authorised officer" (27) to be dealt with according to law, it is not necessary that the arresting police officer have determined at the time of arrest that the arrested person will definitely be taken before an authorised officer to be dealt with according to law or, therefore, charged.

**The facts**

3 On 8 October 2013, Roselyn Singh reported that she had received threatening telephone calls and been blackmailed by the respondent ("Mr Robinson"). On 9 October 2013, an apprehended violence order ("AVO") was made in her favour against Mr Robinson. The order restrained Mr Robinson from, among other things, harassing Ms Singh, engaging in conduct that intimidated her, deliberately damaging or interfering with her property, or contacting her "by any means

(20) [1952] AC 676.
(21) [1966] SASR 227.
(22) Unreported, Court of Appeal, NSW, 19 December 1980.
(23) (1986) 161 CLR 278.
(24) (1993) 67 ALJR 550; 113 ALR 1.
(25) (2012) 226 A Crim R 36.
(26) (2015) 256 CLR 569.
(27) LEPRA, s 3(1) (definition of "authorised officer").

whatsoever" except by Mr Robinson's lawyer. On 16 October 2013, the AVO was extended until further order.

4 At the relevant times, Mr Robinson ran a website with an associated email address: "brad@datatheft.com.au". That email address had been used to contact Ms Singh. Ms Singh had blocked receipt of emails from the address but, on 18 December 2013, one of her employees informed her that he had received an email from it. Ms Singh checked her computer and found the email in her junk box. After reading the email, Ms Singh replied to the employee to the effect that she would "forward to detective – this is a breach of his [Mr Robinson's] Bail conditions".

5 On 20 December 2013, Ms Singh attended the Town Hall Police Station and reported her concerns. She made a signed statement in which she deposed that Mr Robinson had attempted to contact her, and her employees, colleagues, business partners and others, to "inform them I [Ms Singh] have been defrauding people and am under police investigation". She stated that she had "blocked this email address". Ms Singh named the employee who had contacted her regarding the email from the "brad@datatheft.com.au" email address, and stated that on finding it in her junk box she had opened it and found it to be as follows:

> "Hi, Everybody,
>
> Hope you are all well. Thought you might like to know Ms Singh and her company UTSG Consortium Pty Ltd (Sydney City Medical) are being wound up.
>
> She finally tried to rip off somebody who had the financial clout to fight back.
>
> [Link to a web address at creditorwatch.com.au]
>
> You will notice in the article, Singh registered my blog name 'Data Theft Australian' as a business names [sic]. This is another scam Singh uses to convince victims she owns certain businesses or organisations. She did the same with City Clinic and other competitor businesses in the Sydney CBD.
>
> Kind regards
>
> Brad."

6 So far as appeared from the email, Ms Singh's employee had received it from "Brad Robinson" and it had, presumably, been sent to the employee's email address and other unidentified email addresses.

7 Ms Singh further stated:

> "As soon as I read the email I felt really frightened and my heart started beating really fast. I began crying as I could not control the fear I was feeling. I am worried about Brad's future actions as I believe he has an unstable state of mind. Brad has previously

attended my home addresses and I am afraid he will go to my home again and this has caused me to be in a permanent state of anxiousness and stress which is causing me to become paranoid that he is following me."

8 On the morning of Sunday, 22 December 2013, Constable Smith of the Sydney City Police Station read the file relating to Ms Singh's complaint. He formed the opinion that Mr Robinson had breached the AVO and he determined to go to Mr Robinson's residence and arrest him. At 11.15 am that day, police officers, including Constable Smith, went to what they believed to be Mr Robinson's residence but were there informed by neighbours that Mr Robinson no longer lived at that address. Further preliminary inquiries failed to reveal a forwarding address.

9 At noon the same day, Mr Robinson telephoned the police and told Constable Colakides that he had been informed by police at North Sydney that the Sydney City police wished to speak to him regarding a breach of an AVO. Mr Robinson further stated that he was homeless and currently interstate but that he would be in Sydney the next day. He refused, however, to provide the address where he would be the next day, and he said that he would not be attending any police station before seeking legal representation. Constable Colakides advised Mr Robinson to attend the Sydney City Police Station the next day, but Mr Robinson was argumentative and did not agree to do so. Constable Colakides made a note of the conversation on the New South Wales Police Force's Computerised Operational Policing System and informed Constable Smith of what had occurred.

10 At 5 pm the same day, Mr Robinson entered the Sydney City Police Station. Thereupon, Constable Smith arrested him in connection with the breach of the AVO. Constable Smith offered Mr Robinson the opportunity of an interview, which Mr Robinson accepted, and an interview was then conducted. At the conclusion of the interview, at 6.18 pm, Mr Robinson was released without charge.

**Relevant statutory provisions**

11 At the time of Mr Robinson's arrest, s 99 of LEPRA provided that:

"**Power of police officers to arrest without warrant** (cf Crimes Act 1900, s 352, Cth Act, s 3W)

(1) A police officer may, without a warrant, arrest a person if:

(a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and

(b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:

(i) to stop the person committing or repeating the offence or committing another offence,

(ii) to stop the person fleeing from a police officer or from the location of the offence,

(iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,

(iv) to ensure that the person appears before a court in relation to the offence,

(v) to obtain property in the possession of the person that is connected with the offence,

(vi) to preserve evidence of the offence or prevent the fabrication of evidence,

(vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,

(viii) to protect the safety or welfare of any person (including the person arrested),

(ix) because of the nature and seriousness of the offence.

(2) A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.

(3) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.

**Note.** The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer – see section 105.

(4) A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other purpose authorised by that Part.

(5) This section does not authorise a person to be arrested for an offence for which the person has already been tried.

(6) For the purposes of this section, property is connected with an offence if it is connected with the offence within the meaning of Part 5."

12 Section 105 of LEPRA provided that:

"**Arrest may be discontinued**

(1) A police officer may discontinue an arrest at any time.

(2) Without limiting subsection (1), a police officer may discontinue an arrest in any of the following circumstances:

(a) if the arrested person is no longer a suspect or the reason for the arrest no longer exists for any other reason,

(b) if it is more appropriate to deal with the matter in some other manner, including, for example, by issuing a warning or caution or a penalty notice or court attendance notice or, in the case of a child, dealing with the matter under the *Young Offenders Act 1997*.

(3) A police officer may discontinue an arrest despite any obligation under this Part to take the arrested person before an authorised officer to be dealt with according to law."

13 Section 107 of LEPRA provided that:

"**Part does not affect alternatives to arrest**

(1) Nothing in this Part affects the power of a police officer to commence proceedings for an offence against a person otherwise than by arresting the person.

(2) Nothing in this Part affects the power of a police officer to issue a warning or a caution or a penalty notice to a person."

14 Part 9 of LEPRA was entitled "Investigations and questioning". The objects of Pt 9 were set out in s 109 of LEPRA as follows:

"(a) to provide for the period of time that a person who is under arrest may be detained by a police officer to enable the investigation of the person's involvement in the commission of an offence, and

(b) to authorise the detention of a person who is under arrest for such a period despite any requirement imposed by law to bring the person before a Magistrate or other authorised officer or court without delay or within a specified period, and

(c) to provide for the rights of a person so detained."

15 Section 113(1) of LEPRA provided that Pt 9 of LEPRA did not:

> "(a) confer any power to arrest a person, or to detain a person who has not been lawfully arrested, or
>
> (b) prevent a police officer from asking or causing a person to do a particular thing that the police officer is authorised by law to ask or cause the person to do (for example, the power to require a person to submit to a breath analysis under Division 2 of Part 2 of Schedule 3 to the *Road Transport Act 2013*), or
>
> (c) independently confer power to carry out an investigative procedure."

16 Division 2 of Pt 9 of LEPRA, which was entitled "Investigation and questioning powers", was comprised of ss 114 to 121. Section 114 provided that:

> "**Detention after arrest for purposes of investigation** (cf Crimes Act 1900, s 356C)
>
> (1) A police officer may in accordance with this section detain a person, who is under arrest, for the investigation period provided for by section 115.
>
> (2) A police officer may so detain a person for the purpose of investigating whether the person committed the offence for which the person is arrested.
>
> (3) If, while a person is so detained, the police officer forms a reasonable suspicion as to the person's involvement in the commission of any other offence, the police officer may also investigate the person's involvement in that other offence during the investigation period for the arrest. It is immaterial whether that other offence was committed before or after the commencement of this Part or within or outside the State.
>
> (4) The person must be:
>
> (a) released (whether unconditionally or on bail) within the investigation period, or
>
> (b) brought before an authorised officer or court within that period, or, if it is not practicable to do so within that period, as soon as practicable after the end of that period.
>
> (5) A requirement in another Part of this Act, the *Bail Act 1978* or any other relevant law that a person who is under arrest be taken before a Magistrate or other authorised officer or court, without delay, or within a specified period, is affected by this Part only to the extent that the extension of the period within which the person is to be brought before such a Magistrate or officer or court is authorised by this Part.

(6) If a person is arrested more than once within any period of 48 hours, the investigation period for each arrest, other than the first, is reduced by so much of any earlier investigation period or periods as occurred within that 48 hour period.

(7) The investigation period for an arrest (the *earlier arrest*) is not to reduce the investigation period for a later arrest if the later arrest relates to an offence that the person is suspected of having committed after the person was released, or taken before a Magistrate or other authorised officer or court, in respect of the earlier arrest."

17 Section 115 provided in substance that the "investigation period" is a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period; and that the "maximum investigation period" is four hours or such longer period as the maximum investigation period may be extended to by a detention warrant.

18 Section 116(1) provided in substance that, in determining what is a reasonable time for the purposes of s 115(1), all the relevant circumstances of the particular case must be taken into account; and s 116(2) provided that, without limiting the relevant circumstances that must be taken into account, the following circumstances (if relevant) were to be taken into account:

"(a) the person's age, physical capacity and condition and mental capacity and condition,

(b) whether the presence of the person is necessary for the investigation,

(c) the number, seriousness and complexity of the offences under investigation,

(d) whether the person has indicated a willingness to make a statement or to answer any questions,

(e) the time taken for police officers connected with the investigation (other than police officers whose particular knowledge of the investigation, or whose particular skills, are necessary to the investigation) to attend at the place where the person is being detained,

(f) whether a police officer reasonably requires time to prepare for any questioning of the person,

(g) the time required for facilities for conducting investigative procedures in which the person is to participate (other than facilities for complying with section 281 of the *Criminal Procedure Act 1986*) to become available,

(h) the number and availability of other persons who need to be questioned or from whom statements need to be obtained,

(i) the need to visit the place where any offence concerned is believed to have been committed or any other place reasonably connected with the investigation of any such offence,

(j) the time during which the person is in the company of a police officer before and after the person is arrested,

(k) the time taken to complete any searches or other investigative procedures that are reasonably necessary to the investigation (including any search of the person or any other investigative procedure in which the person is to participate),

(l) the time required to carry out any other activity that is reasonably necessary for the proper conduct of the investigation."

**The District Court proceedings**

19 Mr Robinson brought proceedings in the District Court of New South Wales against the State of New South Wales claiming damages for false imprisonment constituted by his arrest. The State of New South Wales defended the claim on the basis that the arrest was lawfully effected pursuant to ss 99(1)(a) and 99(1)(b)(i), (iv) and (ix) of LEPRA. Although the pleadings are not before the Court, in his reasons for judgment the trial judge (Judge P Taylor SC) identified the issues at trial as being:

(1) Did Constable Smith suspect that Mr Robinson had committed an offence?

(2) Did Constable Smith have reasonable grounds for suspecting that Mr Robinson had committed an offence?

(3) Was Constable Smith satisfied that the arrest was reasonably necessary to stop Mr Robinson repeating the offence?

(4) Was Constable Smith satisfied that the arrest was reasonably necessary to ensure that Mr Robinson appeared before the court in relation to the offence?

(5) Was Constable Smith satisfied that the arrest was reasonably necessary because of the nature and seriousness of the offence?

(6) Was the arrest made in good faith for the purpose of conducting the prosecution and not for some extraneous purpose such as investigation?

(7) Was Mr Robinson's continued detention after the arrest, in any event, unlawful?

20 At trial, Constable Smith gave evidence that he believed it had been necessary to arrest Mr Robinson for the alleged breach of the AVO because of the seriousness of the alleged offence and because he believed that it should be dealt with; to prevent a repetition of the

offence; and to ensure Mr Robinson's appearance in court. As to the last of those reasons, the trial judge noted that, when Constable Smith had gone to Mr Robinson's last listed address to arrest him, he had found that Mr Robinson was no longer living there, and that Constable Colakides had informed Constable Smith that Mr Robinson had said that he was interstate and "[h]e wouldn't tell us where he was living over the telephone". Constable Smith conceded that he did not believe at the time of arrest that he had enough evidence to charge Mr Robinson. He said that whether he would, ultimately, have been able to charge Mr Robinson depended on what, if anything, Mr Robinson might say in his record of interview.

21 The trial judge found that:

(1) Constable Smith had suspected that Mr Robinson had committed an offence of breaching the AVO and believed that it should be dealt with;

(2) Constable Smith had reasonable grounds for that suspicion;

(3) Constable Smith had been satisfied that it was reasonably necessary to arrest Mr Robinson to ensure that he appeared before the court;

(4) Constable Smith had been satisfied that it was reasonably necessary to arrest Mr Robinson because of the nature and seriousness of the offence;

(5) it was *not* established that Constable Smith was satisfied that arrest was reasonably necessary to prevent a repetition of the offence;

(6) it had *not* been put to Constable Smith, and, there being no other evidence of the fact, it was thus *not* established, that a purpose of the arrest was to investigate the offence or question Mr Robinson; and

(7) the period of one hour and 18 minutes for which Mr Robinson had been detained after being arrested was a reasonable period in all the circumstances.

22 The trial judge rejected Mr Robinson's contention that, in substance, an arrest under s 99 was unlawful unless the arresting officer had determined at the time of arrest that the arrested person would be charged. His Honour reasoned (28) that:

> "If Mr Robinson's construction of s 99(1)(b)(iv) were adopted, a person who was a known flight risk could not be arrested in reliance upon s 99(1)(b)(iv) unless the police officer was already persuaded that the person should be charged (or that the arrest would not be withdrawn under s 105). But a charge requires reasonable and

(28) *Robinson v New South Wales* (2017) 26 DCLR(NSW) 106 at 116 [42].

probable cause, namely a positive belief and a sufficient (or reasonable) basis for the belief (see *A v New South Wales* (29)), a higher obligation on the police officer to that imposed by s 99(1)(a), which requires only a *suspicion* on reasonable grounds." (Emphasis added.)

23 On those bases, his Honour dismissed the claim.

**Proceedings before the Court of Appeal**

24 Mr Robinson appealed to the Court of Appeal on the sole ground that the trial judge erred in failing to hold that the arrest and subsequent detention of Mr Robinson was unlawful because, at the time of arrest, Constable Smith had not formed an intention to charge him with any offence. The factual premise of this complaint was said by Mr Robinson to follow from the fact that, at the time of arrest, Constable Smith "did not believe there was enough to charge him" and thus must have contemplated the possibility that Mr Robinson would be released without charge. So characterised, it is apparent that Mr Robinson's complaint was that any intention which Constable Smith may have had to charge Mr Robinson at the time of arrest was not an unqualified intention. Mr Robinson contended that such an intention was an essential precondition to lawful arrest. The State of New South Wales responded that the essential preconditions of a lawful arrest are those found in s 99(1) of LEPRA and that they do not include an intention to charge.

25 McColl JA held (30) that s 99(1)(a) upon its proper construction was to be understood as requiring that an arresting officer must at the time of arresting a person have formed the intention to charge that person and advise the arrested person of that charge. This was, in her Honour's view, the result of construing the provision against the background of the common law requirement reflected in s 99(3) of LEPRA that an arrested person must be taken before a justice "as soon as is reasonably practicable", which permits of no more than reasonable time to formulate and lay charges for the purpose of bringing the arrested person before a justice; the implication which her Honour derived from s 107 of LEPRA that the power to arrest without warrant is to be exercised only in order to commence proceedings against the arrested person; and the requirement in s 201(1)(c) of LEPRA that an arresting officer must inform the person arrested of the reason for the exercise of the power of arrest (in the sense of conveying to the person arrested the charge to be preferred against the

(29) (2007) 230 CLR 500 at 527 [77] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

(30) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 794-795 [51], 796 [61], [63], [64].

person (31)) and so, therefore, must have an intention so to charge the arrested person at the time of arrest. In her Honour's view (32), it was notable that the power to detain a suspect for the purpose of investigating the offence for which the person is arrested is conferred by Pt 9 of LEPRA, given that Pt 9 was relevantly beside the point because it proceeded "via the express requirement in both Pt 8 (s 99(4)) and Pt 9 (s 113(1)(a)) that such further investigation may only be undertaken if there has been a lawful arrest" and "a lawful arrest can only be effected pursuant to s 99 if both s 99(1)(a) and (b) are satisfied".

26 McColl JA expressly rejected (33) the trial judge's reasoning that, if that were so, it would be at odds with the fact that the requisite state of mind for an arresting officer to effect an arrest under s 99(1) of LEPRA is reasonable grounds to suspect the commission of an offence, which falls well short of the state of mind of reasonable and probable cause necessary to prosecute and, therefore, to charge. In her Honour's view (34), it was apparent from the judgment of Jordan CJ in *Bales v Parmeter* (35), and the joint judgment of Mason and Brennan JJ in *Williams v The Queen* (36), that:

> "There are not two states of mind. Rather, on this approach the state of mind of the arresting officer which justifies the arrest of a person without warrant is also sufficient to found a finding that the arresting officer who charges the person arrested had 'reasonable and probable cause' to do so."

27 Basten JA likewise reasoned from the general law that an arrest without warrant must be for the purpose of taking the arrested person before a court or justice as soon as reasonably practicable, which, his Honour considered (37), implied that an arresting officer or his or her superior must, at the time of arrest, "have the state of mind necessary to lay charges". Basten JA observed (38) that the position had been altered by statute, inasmuch as s 99(1)(b) imposed an additional constraint on the use of the power of arrest without warrant. But in his Honour's view, there was "no reason to derive from the existence of [that] additional constraint an implied variation of the long standing

(31) *Christie v Leachinsky* [1947] AC 573 at 586-587 per Viscount Simon; at 592-594 per Lord Simonds; at 598-599 per Lord du Parcq; *Adams v Kennedy* (2000) 49 NSWLR 78 at 84 [24] per Priestley JA.

(32) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 798 [73].

(33) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 802 [96].

(34) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 799 [81].

(35) (1935) 35 SR (NSW) 182 at 186.

(36) (1986) 161 CLR 278 at 300.

(37) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 815 [157].

(38) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 816-817 [164].

requirement that an arrest must be a preliminary step in invoking the criminal process" (39). Nor, in his Honour's view, did s 99(3) suggest any change in the law "in this regard" (40), for, as his Honour reasoned (41), if the effect of the new form of s 99(3) were to remove the conventional purpose underlying a valid arrest, it had been done without any indication as to any alternative purpose or rationale, and the extrinsic materials lent support to the view that the amendment to s 99(3) was not intended to vary that requirement. Basten JA considered it to be immaterial that Pt 9 expressly contemplated that an arrested person may be released before being taken before an authorised officer to be dealt with according to law. As his Honour put it, it was "unclear why the conferral of an additional power to release following an arrest should be read as allowing an arrest for a purpose other than the conventional purpose" (42). And, like McColl JA, Basten JA rejected the trial judge's reasoning that so to conclude would be to ignore that the state of mind necessary to arrest is merely reasonable grounds to suspect and that that falls well short of the degree of certainty of guilt necessary to prosecute and therefore to charge. Basten JA observed (43) that,

> "[a]t least in a formal sense, the incoherence of a dual test of intention for a lawful arrest may be resolved by treating the obligation to take the person as soon as practicable before a justice as a separate obligation imposed by law once an arrest has taken place".

But, his Honour said, to do so would be inconsistent with *Bales v Parmeter* and *Drymalik v Feldman* (44), which he understood (45) to stand for the proposition that the purpose of commencing the criminal process attaches at the moment of arrest.

28 By contrast, Emmett A-JA accepted that there is a clear distinction between reasonable grounds to suspect – as his Honour put it, "a state of conjecture or surmise where proof is lacking and the facts [only] reasonably ground a suspicion" – and the degree of reasonable and probable cause necessary to prosecute and, therefore, to charge (46). As Emmett A-JA reasoned (47), if an arresting officer were required to

(39) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 816-817 [164].
(40) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 817 [166].
(41) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 817 [167], 817-818 [169].
(42) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 819 [176].
(43) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 815-816 [160].
(44) [1966] SASR 227.
(45) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 815-816 [160].
(46) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 833-834 [247].
(47) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 834 [249].

reach the higher standard of reasonable and probable cause before effecting a lawful arrest without warrant, the mental state required to effect a lawful arrest without warrant would be different from the mental state of suspicion on reasonable grounds expressly provided for in s 99(1)(a). Additionally, as Emmett A-JA observed (48), it is clear from s 105(1) that a police officer may discontinue an arrest at any time; s 105(2) demonstrated that the discontinuance may be for any reason, including that it may be considered more appropriate to deal with the matter by other means; and s 105(3) expressly provided that discontinuance may occur despite any obligation to bring the arrested person before an authorised officer, leading to the conclusion that arrest is a process which commences at the time when an arrest begins and continues through subsequent detention. Consequently, as Emmett A-JA reasoned (49), when s 99 and s 105 are read together, it is apparent that an arrested person might or might not be brought before an authorised officer, and hence it must be that, while an arresting officer must intend that the arrested person will be brought before an authorised officer, the arresting officer is not required to have "decided" at the time of arrest that he or she will bring the arrested person before an authorised officer.

29 Finally, Emmett A-JA observed (50) that it is apparent from s 99(4) that a person who has been lawfully arrested under s 99(1) may be detained under Pt 9 for the purpose of investigating whether the person committed the offence for which he or she has been arrested, and thus it would be inconsistent with Pt 9 if an arresting officer were required at the time of arrest to have "concluded" or "decided" that the arrested person will be taken before an authorised officer and charged.

**Legislative history of s 99 of LEPRA**

30 At common law, in order to justify an arrest without warrant it was necessary for the arresting constable to show that he had taken the arrested person without delay and by the most direct route before a justice unless some circumstance reasonably justified a departure from those requirements (51). There was no power to detain the subject in order to assemble sufficient evidence in support of the intended charge – to do so was a trespass to person – which meant that an arresting constable had only a limited period of time between arresting the

(48) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 834-835 [252].
(49) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 835 [253].
(50) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 835 [257].
(51) *Wright v Court* (1825) 4 B & C 596 at 598 [107 ER 1182 at 1182]; *Clarke v Bailey* (1933) 33 SR (NSW) 303 at 309 per Davidson J.

person and bringing the subject before a justice to be charged (52). For that reason, it was desirable that an arresting constable have assembled sufficient evidence to support the intended charge before arresting the subject. But it was recognised (53) that there are cases in which, if police are prevented from arresting a suspect before assembling sufficient admissible evidence to mount a prima facie case, the work of the police can be seriously hampered: for example, because the suspect might flee, evidence might be destroyed, or further offending might occur. Consequently, under the common law, a constable had a discretion (54) to arrest a person on reasonable suspicion that the person had committed an offence.

31 Reasonable suspicion required an arresting constable to have reasonable grounds for suspicion of guilt. It did not, however, require anything like reasonable and probable cause for prosecution or, in other words, a prima facie case for conviction. Consequently, as was recognised by Lord Devlin in delivering the opinion of the Privy Council in *Hussien v Chong Fook Kam* (55), where under common law an arresting constable arrested a person on the basis of reasonable suspicion, the constable had to act promptly to verify his suspicions or otherwise release the subject without charge: for, if the constable proceeded to charge the subject without prima facie proof of the offence charged, the constable would be at risk of an action for malicious prosecution.

32 The origins of s 99 of LEPRA lie in s 429 of the *Criminal Law Amendment Act 1883* (NSW) (46 Vic No 17). It provided that:

> "Every constable or other person may without a warrant apprehend any person in the act of committing or immediately after having committed an offence punishable whether by indictment or on summary conviction under this or any other Act and take such person together with any property found upon him before a Justice to be dealt with according to law – And may in like manner apprehend and deal with any offender who has committed a crime punishable by death or penal servitude and for which he has not been tried – And every constable may without warrant apprehend

(52) *Williams v The Queen* (1986) 161 CLR 278 at 295-296 per Mason and Brennan JJ; at 306 per Wilson and Dawson JJ.

(53) *Dumbell v Roberts* [1944] 1 All ER 326 at 329 per Scott LJ; *Hussien v Chong Fook Kam* [1970] AC 942 at 948-949 per Lord Devlin for the Board.

(54) See *Holgate-Mohammed v Duke* [1984] AC 437 at 443 per Lord Diplock.

(55) [1970] AC 942 at 948.

and in like manner deal with any person whom he with reasonable cause suspects of having committed any such crime".

As Basten JA observed (56) in the Court of Appeal, that provision in some respects expanded the powers of arrest of constables and other persons but it did not codify the law relating to arrest. In large part the power of arrest without warrant continued to be governed by the common law.

33 Section 352 of the *Crimes Act 1900* (NSW) recast the form of s 429 of the *Criminal Law Amendment Act 1883* but with little substantive change. When enacted, it was as follows:

"(1) Any constable or other person may without warrant apprehend,

(a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,

(b) any person who has committed a felony for which he has not been tried,

and take him, and any property found upon him, before a Justice to be dealt with according to law.

(2) Any constable may without warrant apprehend,

(a) any person whom he, with reasonable cause, suspects of having committed any such crime,

(b) any person lying, or loitering, in any highway, yard, or other place during the night, whom he, with reasonable cause, suspects of being about to commit any felony,

and take him, and any property found upon him, before a Justice to be dealt with according to law."

34 In *Clarke v Bailey* (57), Davidson J (with whom Street CJ and James J agreed) observed that the effect of s 352 of the *Crimes Act* as it appeared in that form reinforced the common law principle that a constable was required to take an arrested person without delay and by the most direct route before a justice unless circumstances reasonably justified a departure from those requirements, and that the section did not give an arresting constable any discretion in the matter except to the extent that existed before. It remained, as it had been at common law, that there was no power to detain a suspect for longer than was

(56) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 809-810 [140].

(57) (1933) 33 SR (NSW) 303 at 309, citing *Wright v Court* (1825) 4 B & C 596 [107 ER 1182].

reasonably practicable to bring the suspect before a magistrate to be dealt with according to law.

35 Similarly, as Jordan CJ later concluded in *Bales v Parmeter* (58), the only legitimate purpose for which the power of arrest could be exercised under s 352 was to take the arrested person before a magistrate as soon as reasonably practicable to be dealt with according to law, and s 352 gave no power to restrain a person for any other purpose:

> "[S]uspicion that a person has committed a crime cannot justify an arrest except for a purpose which that suspicion justifies; and arrest and imprisonment cannot be justified merely for the purpose of asking questions. … Where the imposition of physical restraint is authorised by law it may be imposed only for the purpose for which it is authorised. … [I]t may be imposed by a police officer in the course of arresting and bringing before a magistrate a person for whose arrest no warrant has issued, but whom the officer, with reasonable cause, suspects of having committed a crime or an offence punishable whether by indictment or summarily under any Act. … *But the statute, like the common law, authorises him only to take the person so arrested before a justice to be dealt with according to law, and to do so without unreasonable delay and by the most reasonably direct route*". (Emphasis added.)

36 Over the years following *Bales v Parmeter*, a practice grew up among police forces throughout Australia, as it did in England, of treating the concept of "as soon as is reasonably practicable" as sufficiently flexible to enable police officers to detain an arrested person for some time for investigation of the person's involvement in the offence for which he or she had been arrested before taking the person before an authorised officer to be dealt with according to law. That practice was sanctioned by English courts (59). But in *Williams v The Queen*, Mason and Brennan JJ (60) and Wilson and Dawson JJ (61) concluded that, without a clear legislative warrant, the practice was unlawful under the common law of Australia (62). Hence, in *Williams v The Queen*, it was held (63) that neither the power of a police officer under s 27 of the *Criminal Code* (Tas) to arrest a person on reasonable grounds to suspect he or she had committed an offence,

(58) (1935) 35 SR (NSW) 182 at 188-189.
(59) *Dallison v Caffery* [1965] 1 QB 348 at 366-367 per Lord Denning MR; *Holgate-Mohammed v Duke* [1984] AC 437 at 445 per Lord Diplock.
(60) *Williams v The Queen* (1986) 161 CLR 278 at 299.
(61) *Williams v The Queen* (1986) 161 CLR 278 at 311.
(62) cf *Williams v The Queen* (1986) 161 CLR 278 at 284 per Gibbs CJ.
(63) *Williams v The Queen* (1986) 161 CLR 278 at 295, 299-300 per Mason and Brennan JJ; at 305-306, 313 per Wilson and Dawson JJ.

nor the obligation under s 34A(1) of the *Justices Act 1959* (Tas) to bring that person before a justice as soon as was reasonably practicable after the person had been brought into custody, gave any power to delay bringing the person before a justice in order to take the opportunity to question the person.

37 In reasoning to that conclusion, Mason and Brennan JJ emphasised the passage from Jordan CJ's judgment in *Bales v Parmeter* earlier set out and expressly rejected the holding of the House of Lords in *Holgate-Mohammed v Duke* (64) that a person may be arrested on reasonable suspicion of guilt for the purpose of using the ensuing period of detention to dispel or confirm the suspicion by questioning of the suspect or seeking further evidence with his assistance (65). As their Honours explained (66):

> "That proposition [that a person may be arrested on reasonable suspicion of guilt for the purpose of using the ensuing period of detention to dispel or confirm the suspicion by questioning of the suspect or seeking further evidence with his or her assistance] is opposed to the view which has been taken of the common law in this country. The jealous protection of personal liberty accorded by the common law of Australia requires police so to conduct their investigation as not to infringe the arrested person's right to seek to regain his personal liberty as soon as practicable. Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished."

38 Mason and Brennan JJ acknowledged (67) that it was open to question where should lie the balance between personal liberty and the exigencies of criminal investigation. But their Honours stated that the striking of any different balance was a task for the legislature, which would be able to prescribe safeguards to ameliorate the risk of unconscionable pressure being applied to persons under interrogation while being kept in custody. Their Honours added in obiter dictum that "in general" there was also no reason to think that an arresting police officer would be unable properly to make a complaint or to lay an oral information until he had had an opportunity to question the person arrested (68):

> "In the ordinary case of an arrest on suspicion, the arresting officer must have satisfied himself at the time of the arrest that there

(64) [1984] AC 437.
(65) *Williams v The Queen* (1986) 161 CLR 278 at 299.
(66) *Williams v The Queen* (1986) 161 CLR 278 at 299.
(67) *Williams v The Queen* (1986) 161 CLR 278 at 296.
(68) *Williams v The Queen* (1986) 161 CLR 278 at 300 per Mason and Brennan JJ.

> are reasonable grounds for suspecting the guilt of the person arrested (69), although the grounds of suspicion need not consist of admissible evidence (70). If the arresting officer believes the information in his possession to be true, if the information reasonably points to the guilt of the arrested person and if the arresting officer thus believes that the arrested person is so likely to be guilty of the offence for which he has been arrested that on general grounds of justice a charge is warranted, he has reasonable and probable cause for commencing a prosecution (71). There is no practical necessity to construe the words 'as soon as is practicable' in s 34A(1) [of the *Justices Act*] so as to authorize the detention by the police of the person arrested for the purpose of questioning him or conducting inquiries with his assistance."

39 Wilson and Dawson JJ accepted (72) that it would be unrealistic not to recognise that the restrictions which the common law placed on the purpose for which an arrested person may be held in custody had on occasions hampered the police, sometimes seriously, in their investigation of crime and the institution of proceedings for its prosecution. But like Mason and Brennan JJ, their Honours concluded that, if the law were to be modified, it was appropriate that it be done by legislation, as they observed it had been modified in Victoria by amendments to s 460 of the *Crimes Act 1958* (Vic) (73).

**Legislative history of Pt 9 of LEPRA**

40 Despite the decision in *Williams v The Queen*, some police forces (including the New South Wales Police Force) continued to detain arrested persons for investigation for substantial periods of time prior to taking them before a duly authorised officer (74). Evidently, they did so with relative confidence that, although evidence obtained as a result of the process would be considered as improperly obtained, criminal courts would be disposed to admit it (75). Increasingly, however, that situation came to be regarded as unacceptable (76). In 1990, the New

(69) *Dumbell v Roberts* [1944] 1 All ER 326 at 329.
(70) See *Hussien v Chong Fook Kam* [1970] AC 942 at 948-949.
(71) See *Mitchell v John Heine & Son Ltd* (1938) 38 SR (NSW) 466 at 469; *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343 at 382; *Glinski v McIver* [1962] AC 726 at 766-767.
(72) *Williams v The Queen* (1986) 161 CLR 278 at 312.
(73) *Williams v The Queen* (1986) 161 CLR 278 at 311-313.
(74) New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation after Arrest*, Report No 66 (1990) at [1.51]-[1.54].
(75) In accordance with the common law discretion to exclude illegally or improperly obtained evidence, discussed in *Bunning v Cross* (1978) 141 CLR 54.
(76) Australia, Law Reform Commission, *An Interim Report: Criminal Investigation*, Report No 2 (1975), pp 40 [90], 147 [328].

South Wales Law Reform Commission concluded (77) that the common law imposed artificial constraints on police, who were obliged, in their own view, regularly to skirt the law in order properly to investigate allegations of criminal activity, and the Law Reform Commission recommended (78) replacement of the common law regarding arrest without warrant with a comprehensive legislative regime "addressing the needs of the police for adequate power to conduct criminal investigations while offering proper and realisable safeguards for persons in police custody".

41 The New South Wales Parliament responded to the Law Reform Commission's recommendations with the enactment of the *Crimes Amendment (Detention after Arrest) Act 1997* (NSW), which relevantly created a new Pt 10A of the *Crimes Act* similar in form to what now appears in Pt 9 of LEPRA. As was explained (79) in the Second Reading Speech for the *Crimes Amendment (Detention after Arrest) Bill 1997*, the new Pt 10A was intended to make the law accord with practice by responding to the need which had been identified in *Williams v The Queen* for legislation to enable police to detain an arrested person for the purpose of investigation, subject to controls to protect the person:

> "The decision in Williams' case has been very much honoured in the breach over the years. … That is a problem that must be remedied.
>
> The Crimes Amendment (Detention [a]fter Arrest) Bill addresses the problem. It does so by creating a regime whereby police are empowered to detain persons in custody after arrest for the completion of investigatory procedures, but only for strictly limited periods. A detailed system is set out whereby police and citizens will know precisely their rights and obligations. In short, the bill strikes a proper balance between allowing the police to make legitimate investigations of alleged offences on the one hand, and, on the other hand, safeguarding the rights of ordinary citizens suspected of having committed those offences.
>
> The need for legislation of this sort was of course raised by the High Court in Williams' case. That need was subsequently affirmed by the New South Wales Law Reform Commission in its 1990 report on police powers of detention and investigation after arrest.

(77) New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation after Arrest*, Report No 66 (1990) at [1.48].

(78) New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation after Arrest*, Report No 66 (1990) at [1.72].

(79) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 26 June 1997, pp 11234-11235.

> The recommendations of that report have guided the preparation of this bill. Some months ago, the royal commission [into the New South Wales Police Service] was provided with a draft version of the bill similar to that which was circulated more widely in April 1997. In his interim report … Justice Wood affirmed that the bill 'will clarify an area of the common law that is currently fraught with uncertainty and difficulty in its application'. More recently, [his] final report … has recommended the enactment of the bill 'as speedily as possible'."

42 It was emphasised (80) in the Second Reading Speech, as it was provided in s 356B in the new Pt 10A of the *Crimes Act* following the enactment of the *Crimes Amendment (Detention after Arrest) Act 1997* (NSW), that Pt 10A was not intended to confer any new power of arrest, and, in particular, that it was not intended to confer any power of arrest simply for the purpose of making inquiries. But it was also stated that, although it would remain that a person could not be arrested without warrant unless he or she were suspected on reasonable grounds of having committed an offence, the new Pt 10A would have the effect that the arrested person could be detained for the investigation period for the purpose of investigating the person's involvement in the alleged offence before being either brought before an authorised officer to be dealt with according to law or released:

> "[T]his bill confers no new power of arrest. Police will not be able to arrest a person in any circumstance where the law does not otherwise already allow them to do so [and] the bill does not in itself authorise any new investigative procedures or powers. Rather, it merely allows police, during the investigation period, to carry out investigative procedures that are otherwise authorised in relation to persons who are lawfully under arrest. … [T]he period for which police may detain a person is 'a reasonable time'. However, pursuant to proposed section 356D(2), that reasonable time may not be more than four hours unless a detention warrant is granted."

43 In 2002, the New South Wales Government introduced the *Law Enforcement (Powers and Responsibilities) Bill 2002* to give effect to the recommendations of the Royal Commission into the New South Wales Police Service (81). As appears from the Second Reading Speech for that Bill, it was intended substantially to re-enact the existing legislation but with amendments more accurately to reflect some areas of common law and to address other areas in the existing

(80) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 26 June 1997, p 11235.

(81) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2002, p 4846.

law where gaps had been identified (82). Part 8 of LEPRA in substance re-enacted the arrest provisions of Pt 10 of the *Crimes Act* and Pt 9 of LEPRA in substance re-enacted the investigation and questioning provisions of Pt 10A of the *Crimes Act*.

44 As first enacted, s 99 of LEPRA appeared as follows:

"**Power of police officers to arrest without warrant** (cf Crimes Act 1900, s 352, Cth Act, s 3W)

(1) A police officer may, without a warrant, arrest a person if:

(a) the person is in the act of committing an offence under any Act or statutory instrument, or

(b) the person has just committed any such offence, or

(c) the person has committed a serious indictable offence for which the person has not been tried.

(2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.

(3) A police officer must not arrest a person *for the purpose of taking proceedings for an offence against the person* unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:

(a) to ensure the appearance of the person before a court in respect of the offence,

(b) to prevent a repetition or continuation of the offence or the commission of another offence,

(c) to prevent the concealment, loss or destruction of evidence relating to the offence,

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

(4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law."

(Emphasis added.)

(82) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2002, p 4846.

45 As is apparent, s 99(1) and (2) as first enacted thus substantially restated the power of arrest without warrant previously conferred under s 352 of the *Crimes Act*. But whereas the power of arrest under s 352 (like the power of arrest at common law) had been unguided – in that it was left to the unguided discretion of the arresting police officer to determine the circumstances in which it was appropriate to arrest a suspect rather than proceed by other means (83) – s 99(3) of LEPRA as first enacted expressly provided for six situations in which a police officer would be justified in exercising the discretion to arrest and, in effect, provided that the power of arrest without warrant was not to be exercised in any other circumstances.

46 Clearly enough, s 99(3) was designed to assist police by making more certain when it was appropriate to arrest a suspect rather than proceeding by other means. Just as clearly, however, the new provision was also designed to guard against the risk of the power of arrest being exercised in inappropriate circumstances by providing that the power was not to be exercised in any other than the six specified circumstances.

47 It is to be observed that, as first enacted, s 99(3) referred to the exercise of the power of arrest as being "for the purpose of taking proceedings for an offence against the person": presumably, in order to emphasise that the only permissible purpose of arrest was to take the arrested person before an authorised officer to be dealt with according to law in accordance with s 99(4). But it should also be noticed that, as enacted, s 105 – located in Pt 8 of LEPRA – formed part of the context in which Pt 9 sat. Section 105 expressly provided for the discontinuance of an arrest at any time, including when and if an arrested person ceased to be a suspect or it was determined that it was more appropriate to deal with the matter by other means.

48 Part 9 of LEPRA (ss 109 to 132) as first enacted was similar to Pt 10A of the *Crimes Act* (ss 354 to 356Y) following the enactment of the *Crimes Amendment (Detention after Arrest) Act 1997* (NSW), with two significant differences. The first was the introduction of s 105, into Pt 8 of LEPRA, which expressly conferred the power of discontinuance of an arrest at any time, to which reference has just been made. The *Crimes Act* did not contain an express provision to that effect. The second was that Pt 9 of LEPRA did not include a provision like s 356Y of the *Crimes Act* providing for review of Pt 10A of the *Crimes Act* as soon as possible after 12 months from its commencement.

(83) See and compare *Zaravinos v New South Wales* (2004) 62 NSWLR 58 at 66 [24], 71-72 [37] per Bryson JA.

49 The form of s 99 of LEPRA at the time of Mr Robinson's arrest was introduced by the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013* (NSW) ("the 2013 LEPRA amendments"). As is apparent from comparison of the form of s 99 as first enacted with the form of s 99 as it appeared following the 2013 LEPRA amendments (84), the 2013 LEPRA amendments in substance consolidated into s 99(1)(a) the several powers of arrest previously provided for separately in s 99(1) and (2); relocated from s 99(3) to s 99(1)(b) the list of circumstances in which the power of arrest may be exercised; added three new situations to the list of circumstances in which the power of arrest may be exercised (making a total list of nine such circumstances); relocated from s 99(4) to s 99(3) the requirement to take an arrested person before an authorised officer as soon as reasonably practicable; added to s 99(3) the cross-referencing note that an arresting officer may, under s 105, discontinue an arrest at any time without taking the arrested person before an authorised officer; removed the reference previously contained in s 99(3) to the exercise of the power of arrest being "for the purpose of taking proceedings for an offence against the person"; and added, in the form of s 99(4), an express provision, linking s 99 to Pt 9, that a person who has been lawfully arrested under s 99 may be detained under Pt 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested or for any other purpose authorised by that Part.

**The effect of s 99 of LEPRA**

50 Contrary to the State of New South Wales' submissions, s 99(1)(b) of LEPRA did not change the purpose or add to the purposes for which a person may be arrested without warrant. As s 99(3) makes clear, a police officer who arrests a person under s 99(1) on reasonable suspicion of committing or having committed an offence must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law. Consequently, the only purpose for which a person may be arrested under s 99(1) remains as it was under s 352 of the *Crimes Act* (85): to take him or her before an authorised officer to be dealt with according to law.

51 What did change, however, as a result of LEPRA or, more accurately, as a result of the enactment of Pt 10A of the *Crimes Act* and now appears more pellucidly from the cross-referencing note since added to s 99(3); the deletion from s 99(3) as first enacted of the stipulation that arrest be "for the purpose of taking proceedings for an

(84) See [11].

(85) See *Bales v Parmeter* (1935) 35 SR (NSW) 182 at 189 per Jordan CJ.

offence against the person"; and the addition of the express power of discontinuance of arrest in s 105, is that, once a person has been lawfully arrested under s 99 for the purpose of taking him or her before an authorised officer to be dealt with according to law, the person may be detained for the investigation period (86) for the purpose of investigating whether he or she committed the offence for which he or she has been arrested, and only then be taken before an authorised officer to be dealt with according to law or alternatively dealt with by other means or released (87).

52 Furthermore, although it remains that the only purpose for which a police officer may arrest a person under s 99 is the purpose of taking the person before an authorised officer to be dealt with according to law, and only if one or more of the circumstances adumbrated in s 99(1)(b)(i) to (ix) is applicable, a police officer contemplating the exercise of the power of arrest under s 99(1) may now properly take into account that, if the person is lawfully arrested on the basis of reasonable grounds to suspect that the person is committing or has committed an offence, the person may then be detained for up to the investigation period for the investigation of the person's involvement in the offence for which the person has been arrested, at which point a final decision can then be made whether to proceed to take the person before the authorised officer to be dealt with according to law, to proceed by other means, or to release the person. The purpose of the power to arrest under s 99, being to take the person before an authorised officer to be dealt with according to law, is, therefore, a purpose subject to defeasance in accordance with the proper exercise of the decision-making power conferred by ss 105 and 114 in respect of the person detained under Pt 9.

53 This is not to say that every person who is lawfully arrested under s 99 of LEPRA may lawfully be detained under Pt 9 for the purposes of investigating the person's involvement in the commission of the offence. As was earlier set out, the "investigation period" is defined as such period of time not exceeding the maximum investigation period as is reasonable having regard to all the circumstances (88). In some cases, possibly many – for example, cases of relatively minor offences where the facts are clear – it might not be reasonable to detain the person for any significant period of time at all. There is no power to detain a person under Pt 9 for any purpose other than investigating the

(86) As defined by LEPRA, s 115.

(87) See and compare *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 586-588 [22]-[25] per French CJ, Kiefel and Bell JJ.

(88) LEPRA, s 115.

person's involvement in the offence for which he or she has been arrested, or for investigation in accordance with s 114(3), and, if the facts are clear, there is nothing to be gained by further investigating the person's involvement in the offence. In such a case, s 115 would curtail or preclude any investigation period. Equally, however, there are cases, particularly those involving serious offences where the facts are not clear – for example, a case of homicide where the arresting officer has reason to suspect that it might be a case of self-defence or of excessive self-defence manslaughter – where there is likely to be very good reason for the arresting officer to exercise the power under Pt 9 to detain the arrested person for the investigation period in order to investigate the person's involvement in the offence, and only then make a final decision whether to take the person before an authorised officer to be dealt with according to law, to deal with the person by other means, or to release the person.

54 Contrary to the majority's reasoning (89) in the Court of Appeal, the fact that an arresting officer has not at the time of arrest definitely determined that the arrested person will be charged with the offence for which the person is arrested does not mean that the arrest is not for the purpose of taking the person before an authorised officer to be dealt with according to law. Generally speaking, the fact that the purpose of an act is defeasible does not mean that it is not the purpose of the act. As Joseph Raz remarks (90), "[t]he notion of one reason overriding another should be carefully distinguished from that of a reason being cancelled by a cancelling condition". Hence, just as a reservation of funds for the purpose of discharging a designated liability does not cease to be for that purpose by reason only that it is recognised at the time of reservation that events might later occur which result in the liability being discharged by other means, an arrest for the purpose of taking the arrested person before an authorised officer does not cease to be for that purpose by reason only that it is recognised at the time of arrest that, following investigation of the person's involvement in the offence for which the person is arrested, it may emerge that the arresting officer's suspicion of the person's involvement in the offence is not sufficiently borne out for the person to be charged, or that the person should be dealt with by other means, or that the person should be released (91). So long as an arresting officer's state of mind at the time of arrest is that the person will be taken before an authorised officer to be dealt with according to law unless, by reason of

(89) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 796-797 [60]-[65] per McColl JA; at 816-817 [164]-[167] per Basten JA.

(90) Raz, *Practical Reason and Norms* (1975), p 27.

(91) LEPRA, s 105(2).

investigation of the person's involvement in the offence during the investigation period, it emerges that the arresting officer's suspicion is not sufficiently borne out to charge the person or that the person should be dealt with by some other means or released, the arrest is for the purpose of taking the person before an authorised officer to be dealt with according to law. As Emmett A-JA rightly concluded (92):

> "While s 99 does not modify the common law principle to the extent contended by [the State of New South Wales], it has modified the common law to the extent that there is no longer a requirement that the person be charged. It is clear that, by amending s 99, the legislature intended to introduce a second step in the arresting process, the first being to satisfy ss 99(1)(a) and 99(1)(b), and the second being the exercise of discretion by a police officer when [finally] deciding to charge. In that way, the ultimate purpose of arrest is still to bring the arrested person before an authorised officer, by laying a charge, and the arrest cannot be for the purpose of investigation."

**The degree of certainty of guilt required to charge**

55 It is true, as has been noticed, that, in *Williams v The Queen*, Mason and Brennan JJ observed (93) in obiter dictum that there was no reason to think that, "in general", an arresting police officer would be unable to make a complaint or to lay an oral information until he had had an opportunity to question the person arrested. But contrary to the majority's reasoning in the Court of Appeal (94), Mason and Brennan JJ are not to be taken thereby to have represented that what suffices to constitute reasonable grounds to suspect must necessarily be enough to lead an arresting officer to believe that the arrested person is so likely to be guilty of the offence for which he or she has been arrested that a charge is warranted. The essential point of both *Dumbell v Roberts* (95) and *Hussien* (96) – which Mason and Brennan JJ cited (97) with evident approval in support of their analysis of reasonable grounds to suspect – was that the requirement of reasonable grounds to suspect is "very limited" and nothing like as much as a prima facie case. As Lord Devlin stated (98) in *Hussien*:

(92) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 839 [273].
(93) *Williams v The Queen* (1986) 161 CLR 278 at 300.
(94) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 799-802 [79]-[94] per McColl JA; at 812-816 [148]-[160] per Basten JA.
(95) [1944] 1 All ER 326.
(96) [1970] AC 942.
(97) *Williams v The Queen* (1986) 161 CLR 278 at 300.
(98) *Hussien v Chong Fook Kam* [1970] AC 942 at 948.

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end."

Likewise, as this Court observed (99) in *George v Rockett*:

> "Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam* (100), 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees* (101), a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s 95(4) of the *Bankruptcy Act 1924* (Cth). Kitto J said (102):
>
> > 'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which "reason to suspect" expresses in sub-s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.'"

56 That Mason and Brennan JJ cannot have intended to equate reasonable grounds to suspect with the state of belief required to charge is further borne out by their Honours' observation (103) that:

> "Whatever a police officer should do before making a complaint or preferring an oral information, s 34A casts no obligation on him to make the complaint or prefer the information when an arrested person is brought before a justice pursuant to that section."

57 At common law, and under s 352 of the *Crimes Act* as it was before the enactment of Pt 10A, there was no statutory warrant to delay taking

(99) *George v Rockett* (1990) 170 CLR 104 at 115-116.
(100) [1970] AC 942 at 948.
(101) (1966) 115 CLR 266.
(102) *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303.
(103) *Williams v The Queen* (1986) 161 CLR 278 at 299.

an arrested person before an authorised officer. Hence, as Lord Devlin observed (104) in *Hussien*, it was desirable "as a general rule" that an arrest should not be made "until the case is complete". But, as has been seen, that did not mean that an arrest could not be effected until the arresting officer was satisfied of the existence of a prima facie case. At common law, and under s 352 of the *Crimes Act*, an arresting officer had a discretion to arrest on reasonable suspicion when the case demanded it. What it meant was that the arrested person had to be brought before an authorised officer forthwith, and if the arrested person were so brought before an authorised officer, *and charged*, before the arresting officer was satisfied that the arrested person was so likely guilty of the offence for which he or she had been arrested that a charge was warranted, the arresting officer would be at risk of a claim for malicious prosecution (105). That is the significance of Mason and Brennan JJ's observation that s 34A of the *Justices Act* cast no obligation on an arresting officer to make a complaint or prefer an information when an arrested person was brought before a justice pursuant to that section: the requirement was one to take the arrested person before the authorised officer as soon as practicable, not charge the arrested person (106). In that sense, Basten JA was correct in observing (107) that the "incoherence" between what is required to comprise reasonable grounds to suspect and reasonable and probable cause to charge may be resolved by treating the obligation to take an arrested person as soon as practicable before an authorised officer as a separate obligation imposed by law once an arrest has taken place. But his Honour was not correct that so to reason would be inconsistent with *Bales v Parmeter* and *Drymalik v Feldman*.

**Contextual construction**

58 In any event, and ultimately more importantly, even if *Bales v Parmeter*, *Drymalik v Feldman* or *Williams v The Queen* were properly to be understood as requiring that, before effecting an arrest, an arresting officer had to make an unqualified decision to charge the person arrested (and to repeat, for the reasons given that is not a correct understanding of those decisions), each of them was decided on the basis of legislative provisions that, in marked contradistinction to the cross-referencing note to s 99(3) of LEPRA following the 2013 LEPRA amendments, the provisions of s 99(4) and the provisions of Pt 9 of LEPRA that have been identified, did not expressly authorise the arresting officer to detain the arrested person for the investigation

(104) *Hussien v Chong Fook Kam* [1970] AC 942 at 948.
(105) See [31] above.
(106) See *Williams v The Queen* (1986) 161 CLR 278 at 289 per Mason and Brennan JJ.
(107) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 815-816 [160].

period for the purpose of inquiring into that person's involvement in the offence for which he or she has been arrested; discontinue the arrest at any time; or within the investigation period either take the person before an authorised officer to be dealt with according to law, deal with the person by other means, or release the person.

59 Granted, s 99(1)(a) as it has appeared since the 2013 LEPRA amendments is not relevantly different from the form of s 352 of the *Crimes Act* considered in *Bales v Parmeter* or the form of s 27 of the *Criminal Code* (Tas) considered in *Williams v The Queen*. And as has been seen, s 99(1)(b) says nothing as to the purpose for which a person may be arrested as opposed to circumstances in which arrest may be regarded as appropriate. But s 99(1) of LEPRA presents in a very different context from s 352 of the *Crimes Act* or s 27 of the *Criminal Code* (Tas), and it is in the context in which s 99 now appears that it must be construed "so that it is consistent with the language and purpose of all the provisions of the statute" (108).

60 Given that context, and given in particular as part of that context that s 105 expressly provides for each of the several possible ways in which an arrest may now be finalised (as opposed to the sole outcome of taking an arrested person before a proper officer that applied under s 352 of the *Crimes Act* and kindred provisions the subject of consideration in *Bales v Parmeter* and *Williams v The Queen*), a construction of s 99(1) which requires an arresting officer to have made an unqualified decision at the time of arrest to take the arrested person before an authorised officer to be dealt with according to law is, as Emmett A-JA reasoned (109), necessarily precluded. To treat *Bales v Parmeter*, *Drymalik v Feldman* and *Williams v The Queen* as determinative of the correct construction of the current form of s 99 would not only fly in the face of the express terms of s 99 as amended by the 2013 LEPRA amendments, but run directly counter to the clear legislative purpose of Pt 9 of LEPRA of providing a regime "whereby

(108) *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ. See also *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ; at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [24], 391 [30]-[31] per French CJ and Hayne J; at 411-412 [88]-[89] per Kiefel J; *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at 465 [19] per Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] per Kiefel CJ, Nettle and Gordon JJ.

(109) *Robinson v New South Wales* (2018) 100 NSWLR 782 at 835 [253].

police are empowered to detain persons in custody after arrest for the completion of investigatory procedures" (110).

**Conclusion and orders**

61 It follows that the trial judge was right to hold that Mr Robinson's arrest under s 99 of LEPRA was not rendered unlawful by reason of Constable Smith not having formed an unqualified intention to charge Mr Robinson at the time of arrest. The appeal should be allowed. The orders of the Court of Appeal should be set aside and in their place it should be ordered that Mr Robinson's appeal to the Court of Appeal be dismissed with costs. Mr Robinson should pay the State of New South Wales' costs of the appeal to this Court.

62 BELL, GAGELER, GORDON AND EDELMAN JJ. This appeal concerns whether a police officer has the power to arrest a person, without warrant, under s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("LEPRA") when, at the time of the arrest, the officer had not formed the intention to charge the arrested person. The answer is "no".

63 In *Bales v Parmeter* (111), Jordan CJ provided a clear statement of the law in New South Wales: an arrest can only be for the purpose of taking the arrested person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for an offence. An arrest merely for the purpose of asking questions or making investigations in order to see whether it would be proper or prudent to charge the arrested person with a crime is an arrest for an improper purpose and is unlawful. That straightforward, single criterion has been repeatedly cited with approval in New South Wales and elsewhere (112). In making that statement, Jordan CJ was expressing the effect of s 352 of the *Crimes Act 1900* (NSW) (113). Nothing done in LEPRA (in its original or amended form), or for that matter in any of the intervening legislative amendments which will be examined, has displaced that single criterion.

(110) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 26 June 1997, p 11234.

(111) (1935) 35 SR (NSW) 182 at 188-190.

(112) *Ex parte Evers* (1945) 62 WN (NSW) 146 at 147; *R v Jeffries* (1946) 47 SR (NSW) 284 at 287-288; *Drymalik v Feldman* [1966] SASR 227 at 233-234; *R v Banner* [1970] VR 240 at 249-250; *R v Clune* [1982] VR 1 at 10-11, 18; *Williams v The Queen* (1986) 161 CLR 278 at 283, 293-294, 306-307. See also *R v Stafford* (1976) 13 SASR 392 at 400-401; *R v Larson* [1984] VR 559 at 568-569; *Dowse v New South Wales* (2012) 226 A Crim R 36 at 46 [27].

(113) *Bales v Parmeter* (1935) 35 SR (NSW) 182 at 189.

**Facts**

64 On 9 October 2013, Mr Robinson was served with a Provisional Order (ex parte) Apprehended Personal Violence Order after a complaint by Ms Singh. The order restrained Mr Robinson from, among other things, harassing Ms Singh, engaging in conduct that intimidated her, deliberately damaging or interfering with her property, or contacting her "by any means whatsoever" except by way of Mr Robinson's lawyer. On 16 October 2013, the Local Court of New South Wales made an Apprehended Violence Order ("AVO") against Mr Robinson in terms equivalent to the initial order, with additional orders that he must not approach or contact or enter the premises at which Ms Singh lived or worked.

65 On 20 December 2013, Ms Singh reported to police that Mr Robinson had sent an email to one of her employees, making false allegations. Ms Singh made a signed statement.

66 Constable Smith of Sydney City Police Station read the police file concerning the complaint on the morning of Sunday 22 December 2013. He formed the opinion that Mr Robinson had breached the AVO and that he would go to Mr Robinson's address and arrest him. At 11.15 am, police officers, including Constable Smith, went to what they believed to be Mr Robinson's residence but were told by neighbours that Mr Robinson no longer lived there. They were unable to locate him.

67 At noon, Mr Robinson telephoned the police and told Constable Colakides that he had been told that the Sydney City police wished to speak to him regarding a breach of an AVO. Mr Robinson said he was homeless and currently interstate but that he would be in Sydney the next day. He refused to provide the address where he would be the next day. He said that he would not be attending any police station before seeking legal representation. Constable Colakides told Mr Robinson to attend Sydney City Police Station the next day regarding breaching an AVO. Mr Robinson was argumentative and did not agree to do so. Constable Colakides made a note of the conversation on the New South Wales Police Force's Computerised Operational Policing System and told Constable Smith of what had occurred.

68 At 5 pm on the same day, Mr Robinson voluntarily entered Sydney City Police Station. Constable Smith immediately arrested Mr Robinson and told him he was being arrested for breaching an AVO. Constable Smith offered Mr Robinson the opportunity of an interview, which Mr Robinson accepted. At the end of the interview, at 6.18 pm, Mr Robinson was released without charge.

69 Mr Robinson brought proceedings in the District Court of New South Wales against the State of New South Wales claiming damages for wrongful arrest and false imprisonment constituted by his arrest. The State of New South Wales defended the claim on the basis that the arrest was lawfully effected pursuant to ss 99(1)(a) and 99(1)(b)(i), (iv) and (ix) of LEPRA.

70 At first instance, Constable Smith gave evidence that he believed it had been necessary to arrest Mr Robinson for the alleged breach of the AVO because of the seriousness of the alleged offence, because he believed that it should be "dealt with", to prevent a repetition of the offence, and to ensure Mr Robinson's appearance in court.

71 At the time Constable Smith arrested Mr Robinson, he had not decided to charge him with any offence. Constable Smith conceded that at the time of the arrest he "did not believe there was enough [evidence] to charge him". He said the decision whether to charge Mr Robinson depended on what Mr Robinson said in his interview. Constable Smith said he did not charge Mr Robinson after the interview as Mr Robinson had given an explanation during the interview which led Constable Smith to believe further evidence would be needed.

**Legislative framework**

72 At the time of Mr Robinson's arrest, Pt 8 of LEPRA set out the powers relating to arrest. Section 99, headed "[p]ower of police officers to arrest without warrant (cf Crimes Act 1900, s 352, Cth Act, s 3W)", was the first section in Pt 8 and it relevantly provided:

> "(1) A police officer may, without a warrant, arrest a person if:
>
> (a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and
>
> (b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:
>
> (i) to stop the person committing or repeating the offence or committing another offence,
>
> (ii) to stop the person fleeing from a police officer or from the location of the offence,
>
> (iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,
>
> (iv) to ensure that the person appears before a court in relation to the offence,

(v) to obtain property in the possession of the person that is connected with the offence,

(vi) to preserve evidence of the offence or prevent the fabrication of evidence,

(vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,

(viii) to protect the safety or welfare of any person (including the person arrested),

(ix) because of the nature and seriousness of the offence.

(2) A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.

(3) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.

**Note.** The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer – see section 105.

(4) A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other purpose authorised by that Part.

(5) This section does not authorise a person to be arrested for an offence for which the person has already been tried. …"

73 Section 105, to which reference was made in the note to s 99(3), was also in Pt 8. It provided:

"(1) A police officer may discontinue an arrest at any time.

(2) Without limiting subsection (1), a police officer may discontinue an arrest in any of the following circumstances:

(a) if the arrested person is no longer a suspect or the reason for the arrest no longer exists for any other reason,

(b) if it is more appropriate to deal with the matter in some other manner, including, for example, by issuing a warning or caution or a penalty notice or court attendance notice or, in the case of a child, dealing with the matter under the *Young Offenders Act 1997*.

(3) A police officer may discontinue an arrest despite any obligation under this Part to take the arrested person before an authorised officer to be dealt with according to law."

74 Section 107, headed "[p]art does not affect alternatives to arrest", provided:

"(1) Nothing in this Part affects the power of a police officer to commence proceedings for an offence against a person otherwise than by arresting the person.

(2) Nothing in this Part affects the power of a police officer to issue a warning or a caution or a penalty notice to a person."

75 Part 9, to which reference was made in s 99(4), was headed "[i]nvestigations and questioning". Section 111(1) provided that Pt 9 applied to a person who was "under arrest by a police officer for an offence". The objects of Pt 9 were set out in s 109 as follows:

"(a) to provide for the period of time that a person who is under arrest may be detained by a police officer to enable the investigation of the person's involvement in the commission of an offence, and

(b) to authorise the detention of a person who is under arrest for such a period despite any requirement imposed by law to bring the person before a Magistrate or other authorised officer or court without delay or within a specified period, and

(c) to provide for the rights of a person so detained."

76 Significantly, s 113(1) provided, relevantly, that Pt 9 did not:

"(a) *confer any power to arrest a person, or to detain a person who has not been lawfully arrested*, or

(b) prevent a police officer from asking or causing a person to do a particular thing that the police officer is authorised by law to ask or cause the person to do (for example, the power to require a person to submit to a breath analysis under Division 2 of Part 2 of Schedule 3 to the *Road Transport Act 2013*), or

(c) independently confer power to carry out an investigative procedure." (Emphasis added.)

77 Division 2 of Pt 9 was headed "[i]nvestigation and questioning powers". It comprised ss 114 to 121. Section 114, entitled "[d]etention after arrest for purposes of investigation (cf Crimes Act 1900, s 356C)", provided:

"(1) *A police officer may in accordance with this section detain a person, who is under arrest, for the investigation period provided for by section 115.*

(2) *A police officer may so detain a person for the purpose of investigating whether the person committed the offence for which the person is arrested.*

(3) If, while a person is so detained, the police officer forms a reasonable suspicion as to the person's involvement in the commission of any other offence, the police officer may also investigate the person's involvement in that other offence during the investigation period for the arrest. It is immaterial whether that other offence was committed before or after the commencement of this Part or within or outside the State.

(4) The person must be:

(a) released (whether unconditionally or on bail) within the investigation period, or

(b) brought before an authorised officer or court within that period, or, if it is not practicable to do so within that period, as soon as practicable after the end of that period.

(5) A requirement in another Part of this Act, the *Bail Act 1978* or any other relevant law that a person who is under arrest be taken before a Magistrate or other authorised officer or court, without delay, or within a specified period, is affected by this Part only to the extent that the extension of the period within which the person is to be brought before such a Magistrate or officer or court is authorised by this Part.

(6) If a person is arrested more than once within any period of 48 hours, the investigation period for each arrest, other than the first, is reduced by so much of any earlier investigation period or periods as occurred within that 48 hour period.

(7) The investigation period for an arrest (the **earlier arrest**) is not to reduce the investigation period for a later arrest if the later arrest relates to an offence that the person is suspected of having committed after the person was released, or taken before a Magistrate or other authorised officer or court, in respect of the earlier arrest."

(Emphasis added.)

78 Section 115 provided that the "investigation period" was "a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period"; and that "[t]he maximum investigation period is 4 hours or such longer period as the maximum investigation period may be extended to by a detention warrant".

79 Section 116(1) provided that, "[i]n determining what is a reasonable time for the purposes of section 115(1), all the relevant circumstances

of the particular case must be taken into account". Section 116(2) provided that, without limiting the relevant circumstances that must be taken into account, the following circumstances (if relevant) were to be taken into account:

"(a) the person's age, physical capacity and condition and mental capacity and condition,

(b) whether the presence of the person is necessary for the investigation,

(c) the number, seriousness and complexity of the offences under investigation,

(d) whether the person has indicated a willingness to make a statement or to answer any questions,

(e) the time taken for police officers connected with the investigation (other than police officers whose particular knowledge of the investigation, or whose particular skills, are necessary to the investigation) to attend at the place where the person is being detained,

(f) whether a police officer reasonably requires time to prepare for any questioning of the person,

(g) the time required for facilities for conducting investigative procedures in which the person is to participate (other than facilities for complying with section 281 of the *Criminal Procedure Act 1986* [ (114)]) to become available,

(h) the number and availability of other persons who need to be questioned or from whom statements need to be obtained,

(i) the need to visit the place where any offence concerned is believed to have been committed or any other place reasonably connected with the investigation of any such offence,

(j) the time during which the person is in the company of a police officer before and after the person is arrested,

(k) the time taken to complete any searches or other investigative procedures that are reasonably necessary to the investigation (including any search of the person or any other investigative procedure in which the person is to participate),

(l) the time required to carry out any other activity that is reasonably necessary for the proper conduct of the investigation."

80 Section 4 of LEPRA, headed "[r]elationship to common law and other matters", provided:

(114) Section 281 of the *Criminal Procedure Act 1986* (NSW) addresses the admissibility of admissions by suspects. It is not presently relevant.

"(1) Unless this Act otherwise provides expressly or by implication, this Act does not limit:

(a) *the functions, obligations and liabilities that a police officer has as a constable at common law*, or

(b) the functions that a police officer may lawfully exercise, whether under an Act or any other law as an individual (otherwise than as a police officer) including, for example, powers for protecting property.

(2) Without limiting subsection (1) and subject to section 9, nothing in this Act affects the powers conferred by the common law on police officers to deal with breaches of the peace."

(Emphasis added.)

**Earlier decisions**

*First instance*

81 The primary judge, Judge P Taylor SC, dismissed Mr Robinson's claim for damages for false imprisonment. His Honour noted that Mr Robinson "accepted that Constable Smith had suspected a breach of the AVO" and thus the commission of an offence. Further, his Honour held that Constable Smith had reasonable grounds for that suspicion given information from Ms Singh about the email sent by Mr Robinson. His Honour then turned to the requirement of s 99(1)(b) (that the police officer needs to be satisfied that the arrest is reasonably necessary for any one or more of the specified reasons), by considering three possible reasons for the arrest.

82 First, s 99(1)(b)(i) required that "the police officer is satisfied that the arrest is reasonably necessary … to stop the person committing or repeating the offence or committing another offence". His Honour found, on Constable Smith's evidence (including that he did not have any reason to suspect that another breach of the AVO by Mr Robinson may occur), that it was not established that Constable Smith was satisfied that an arrest was reasonably necessary to prevent repetition of the offence.

83 Next, the primary judge considered s 99(1)(b)(iv), which required that "the police officer is satisfied that the arrest is reasonably necessary … to ensure that the person appears before a court in relation to the offence". The primary judge found that s 99(1)(b)(iv) was satisfied because:

"Constable Smith was informed that Mr Robinson would not agree to attend the police station as requested, had refused to provide his place of residence, had indicated that he was homeless and that he was no longer at his noted residence. These matters all

support a belief in Constable Smith of a concern about whether the person, Mr Robinson, would attend court and whether arrest was necessary for that purpose. I accept that this belief of Constable Smith was not displaced by the circumstance that Mr Robinson voluntarily attended the police station."

84 Finally, the primary judge considered s 99(1)(b)(ix), which required that "the police officer is satisfied that the arrest is reasonably necessary … because of the nature and seriousness of the offence". Quoting an earlier decision of the Court of Appeal of the Supreme Court of New South Wales in relation to Mr Robinson (115), the primary judge found that the requirement was met as "breach of an AVO is a serious offence" and "social media harassment is not to be lightly dismissed", social media harassment evidently being considered similar to Mr Robinson's email in the circumstances.

85 Accordingly, the arrest was held to be lawful, and the claim for wrongful imprisonment was dismissed.

*Court of Appeal*

86 The only appeal ground was that "the primary judge erred in finding that [Mr Robinson's] arrest and subsequent detention were lawful in circumstances where, at the time of the arrest, Constable Smith had not formed an intention to charge him with any offence". The Court of Appeal of the Supreme Court of New South Wales (McColl and Basten JJA and Emmett A-JA) allowed the appeal, by majority. Each member of the Court of Appeal gave separate reasons for judgment.

87 The majority (McColl and Basten JJA) allowed the appeal on the basis that it was a requirement under s 99 that, at the time of the arrest, the arresting police officer must have formed a positive intention to charge the arrested person with an offence and, because Constable Smith "had not determined at the time of the arrest whether he would charge Mr Robinson", the arrest was unlawful.

**Powers of arrest without warrant**

88 The starting point is the decision of Jordan CJ in *Bales* (116) (with whom the rest of the Full Court of the Supreme Court of New South Wales agreed (117)), which has frequently been cited with approval (118).

(115) *New South Wales v Robinson* (2016) 93 NSWLR 280 at 290 [69].
(116) (1935) 35 SR (NSW) 182.
(117) (1935) 35 SR (NSW) 182 at 191 per Stephen J; at 192 per Street J.
(118) *Ex parte Evers* (1945) 62 WN (NSW) 146 at 147; *R v Jeffries* (1946) 47 SR (NSW) 284 at 287-288; *Drymalik v Feldman* [1966] SASR 227 at 234; *R v Banner* [1970] VR 240 at 249; *Williams v The Queen* (1986) 161 CLR 278 at 306.

89 The effect of the provision in issue, s 352 of the *Crimes Act 1900* (NSW), was "merely to reinforce the common law principle" that a constable had to take an arrested person without delay, and by the most direct route, before a justice unless some circumstances reasonably justified a departure from those requirements (119). The provision was relevantly as follows:

> "(1) Any constable or other person may without warrant apprehend,
>
> (a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,
>
> (b) any person who has committed a felony for which he has not been tried,
>
> and take him, and any property found upon him, before a Justice to be dealt with according to law.
>
> (2) Any constable may without warrant apprehend,
>
> (a) any person whom he, with reasonable cause, suspects of having committed any such offence or crime,
>
> (b) any person lying, or loitering, in any highway, yard, or other place during the night, whom he, with reasonable cause, suspects of being about to commit any felony,
>
> and take him, and any property found upon him, before a Justice to be dealt with according to law."

90 In *Bales*, Jordan CJ explained the relevant principles in these terms (120):

> "[S]uspicion that a person has committed a crime cannot justify an arrest except for a purpose which that suspicion justifies; and arrest and imprisonment cannot be justified merely for the purpose of asking questions. … Where the imposition of physical restraint is authorised by law it may be imposed only for the purpose for which it is authorised. … [I]t may be imposed by a police officer in the course of arresting and bringing before a magistrate a person for whose arrest no warrant has issued, but whom the officer, with reasonable cause, suspects of having committed a crime or an offence punishable whether by indictment or summarily under any Act. … *But the statute* [*Crimes Act 1900* (NSW), s 352], *like the common law, authorises him only to take the person so arrested*

(119) *Clarke v Bailey* (1933) 33 SR (NSW) 303 at 309.
(120) *Bales* (1935) 35 SR (NSW) 182 at 188-189.

*before a justice to be dealt with according to law, and to do so without unreasonable delay and by the most reasonably direct route: Clarke v Bailey* (121)." (Emphasis added.)

91 Jordan CJ went on to state (122):

"If a person has been arrested, and is in process of being brought before a magistrate questioning within limits is regarded as proper in New South Wales … but a police officer has no more authority to restrain the liberty of a suspected person for the purpose, not of taking him before a magistrate, but of interrogating him, than he has of restraining the liberty of a person who may be supposed to be capable of supplying information as a witness."

92 The single criterion set out by Jordan CJ was approved by this Court in *Williams v The Queen* (123). There, "bringing [an arrested person] before a justice (or nowadays before some other person with power to deal with him) to be dealt with according to law" was described as the "true purpose" of arrest (124).

93 Police officers have, in New South Wales, a power to arrest and detain a person where they suspect on reasonable grounds that an offence has been committed or is being committed, and that the person has committed or is committing the offence (125), and the arrest is reasonably necessary for any one or more of specified reasons (126). But that power is exercisable only for the purpose of taking the person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for that offence. Arrest cannot be justified where it is merely for the purpose of questioning (127).

94 As will be seen, nothing in LEPRA (in its original or amended form) has displaced the single criterion identified in *Bales* and confirmed in *Williams*.

95 In *Williams*, Mason and Brennan JJ, as well as Wilson and Dawson JJ, acknowledged that the "jealousy with which the common law protect[ed] the personal liberty of the subject [did] nothing to assist the police in the investigation of criminal offences" (128). Their Honours recognised that the duties of an arresting officer were by no means incompatible with efficient investigation but that "the balance

(121) (1933) 33 SR (NSW) 303.
(122) *Bales* (1935) 35 SR (NSW) 182 at 190.
(123) (1986) 161 CLR 278 at 283, 293-294, 306-307. See also *McLachlan v Mesics* (1966) 116 CLR 340; *Foster v The Queen* (1993) 67 ALJR 550 at 552; 113 ALR 1 at 4.
(124) *Williams* (1986) 161 CLR 278 at 305-306.
(125) LEPRA, s 99(1)(a). See also *Williams* (1986) 161 CLR 278 at 303.
(126) LEPRA, s 99(1)(b).
(127) *Williams* (1986) 161 CLR 278 at 295-296, 298.
(128) *Williams* (1986) 161 CLR 278 at 296; see also at 312.

between personal liberty and the exigencies of criminal investigation [had] been thought by some to be wrongly struck" (129). But their Honours concluded that if the law was to be modified it was a task for the legislature, not the courts (130). As Mason and Brennan JJ said, it was the legislature that was able to "prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody" (131).

96 In 1990, the New South Wales Law Reform Commission published its report into police powers of detention and investigation after arrest and concluded that the common law imposed "artificial constraints" on police (132). The report recommended replacing the common law regarding arrest without warrant with a comprehensive legislative regime "addressing the needs of the police for adequate power to conduct criminal investigations while offering proper and realisable safeguards for persons in police custody" (133).

97 The New South Wales Parliament responded with the enactment of the *Crimes Amendment (Detention after Arrest) Act 1997* (NSW), which relevantly created a new Pt 10A of the *Crimes Act 1900* (NSW) similar in form to what now appears in Pt 9 of LEPRA.

98 The new Part was described in the Second Reading Speech as addressing the problem identified in *Williams* (134):

> "by creating a regime whereby police are empowered to detain persons in custody after arrest for the completion of investigatory procedures, but only for strictly limited periods. A detailed system is set out whereby police and citizens will know precisely their rights and obligations. In short, the bill strikes a proper balance between allowing the police to make legitimate investigations of alleged offences on the one hand, and, on the other hand, safeguarding the rights of ordinary citizens suspected of having committed those offences."

99 Following the enactment of this amending legislation, s 356B(1) of the *Crimes Act 1900* (NSW) provided that:

(129) *Williams* (1986) 161 CLR 278 at 296; see also at 311-313.
(130) *Williams* (1986) 161 CLR 278 at 296; see also at 313.
(131) *Williams* (1986) 161 CLR 278 at 296; see also at 313.
(132) New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation after Arrest*, Report No 66 (1990) at [1.48].
(133) New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation after Arrest*, Report No 66 (1990) at [1.72].
(134) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 26 June 1997, pp 11234-11235.

"This Part does not:

(a) *confer any power to arrest a person, or to detain a person who has not been lawfully arrested*, or

(b) prevent a police officer from asking or causing a person to do a particular thing that the police officer is authorised by law to ask or cause the person to do (for example, the power to require a person to submit to a breath analysis under section 4E of the *Traffic Act 1909*), or

(c) independently confer power to carry out an investigative procedure." (Emphasis added.)

100 The purpose and extent of the amendments were clear. The single criterion for a lawful arrest had not changed. As was said in the Second Reading Speech (135):

"[T]his bill confers no new power of arrest. Police will not be able to arrest a person in any circumstance where the law does not otherwise already allow them to do so … [and] the bill does not itself authorise any new investigative procedures or powers. Rather, it merely allows police, during the investigation period, to carry out investigative procedures that are otherwise authorised in relation to *persons who are lawfully under arrest*. … [T]he period for which police may detain a person is 'a reasonable time'. However, pursuant to proposed section 356D(2), that reasonable time may not be more than four hours unless a detention warrant is granted." (Emphasis added.)

101 Subsequently, in 2002, the *Law Enforcement (Powers and Responsibilities) Bill 2002* (NSW) was introduced to give effect to the recommendations of the Royal Commission into the New South Wales Police Service (136). The Bill substantially re-enacted the existing legislation but with some amendments intended to "more accurately reflect areas of the common law" and "to address areas in the existing law where gaps [had] been identified" (137). Unless "expressly stated", the Bill was "not intended to change the common law" (138).

(135) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 26 June 1997, p 11235.

(136) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2002, p 4846.

(137) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2002, p 4846.

(138) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2002, p 4846.

102 Part 8 of the Bill, headed "[p]owers relating to arrest", contained cll 99-108. What became s 99 of LEPRA, headed "[p]ower of police officers to arrest without warrant (cf Crimes Act 1900, s 352, Cth Act, s 3W)", was in the following terms:

"(1) A police officer may, without a warrant, arrest a person if:

(a) the person is in the act of committing an offence under any Act or statutory instrument, or

(b) the person has just committed any such offence, or

(c) the person has committed a serious indictable offence for which the person has not been tried.

(2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.

(3) A police officer must not arrest a person *for the purpose of taking proceedings for an offence against the person* unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:

(a) to ensure the appearance of the person before a court in respect of the offence,

(b) to prevent a repetition or continuation of the offence or the commission of another offence,

(c) to prevent the concealment, loss or destruction of evidence relating to the offence,

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

(4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law."

(Emphasis added.)

103 In the Second Reading Speech, Pt 8 of the Bill was described in these terms (139):

(139) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2002, pp 4848-4849. Clauses 99, 107 and 108 of the Bill became ss 99, 107 and 108 of LEPRA, respectively.

> "Part 8 of the bill substantially re-enacts arrest provisions of the *Crimes Act 1900* and codifies the common law. The provisions of part 8 reflect that arrest is a measure that is to be exercised only when necessary. *An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court*. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purposes, such as preventing the continuance of the offence. Failure to comply with this clause would not, of itself, invalidate the charge. Clauses 107 and 108 make it clear that nothing in the part affects the power of a police officer to exercise the discretion to commence proceedings for an offence other than by arresting the person, for example, by way of caution or summons or another alternative to arrest. Arrest is a measure of last resort. The part clarifies that police have the power to discontinue arrest at any time." (Emphasis added.)

104 A number of points need to be made. Section 99(1) and (2) substantially restated the power of arrest without warrant previously existing under s 352 of the *Crimes Act 1900* (NSW). The single criterion for arrest was not changed. Section 99(3) was new. It had two distinct parts. First, it reinforced that the only permissible purpose of arrest was to take the arrested person before an authorised officer to be dealt with according to law pursuant to s 99(4). Second, it narrowed rather than expanded the circumstances in which the arrest powers in s 99(1) and (2) could be exercised by providing that a police officer would not be justified in exercising the discretion to arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspected on reasonable grounds that it was necessary to arrest the person to achieve one or more of six identified purposes. Section 105 was also new and clarified that the police had the power to discontinue arrest at any time (140). It expressly provided that a police officer could discontinue an arrest at any time, including if an arrested person was no longer a suspect or it was more appropriate to deal with the matter in some other manner.

105 Section 99 was then amended by the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013* (NSW). It has remained in this form and was the section that applied when Mr Robinson was arrested (141).

(140) See New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2002, p 4849.

(141) See [72]-[80] above.

106 The Second Reading Speech identified a number of important points about the amendments to s 99 (142):

> "The bill will clarify that police can arrest without a warrant for any offence they reasonably suspect a person is committing or has committed.
>
> …
>
> New section 99(1)(a) makes it abundantly clear that police can arrest without a warrant for any offence, whether in the act of being committed or having been committed in the past. Having formed a reasonable suspicion that an offence is being or has been committed, under new section 99(1)(b) a police officer can place a person under arrest if satisfied it is reasonably necessary to do so for one of the reasons set out in the section. New section 99(1)(b) replicates and simplifies the existing reasons for arrest contained in section 99(3) of the Act. It also introduces new reasons to arrest without a warrant that better reflect the circumstances in which police are called on to act in order to keep the community safe.
>
> …
>
> Section 99 will also be amended to make clear to the arresting police officer that an arrest may be discontinued and the person released without requiring the suspect be brought before an authorised officer. This may occur when inquiries reveal the reasons for arrest no longer exist or if police decide it is more appropriate to deal with the matter in some other manner – for example, by issuing a caution, penalty notice or court attendance notice. *Finally, section 99 will be amended to make clear that a person who is lawfully arrested under this section may be detained for the purpose of an investigation in accordance with* part 9 of the Act. This amendment is intended to remove uncertainty about whether a person who is otherwise lawfully arrested can be detained for questioning under part 9." (Emphasis added.)

107 The Explanatory Note relevantly explained that the (143):

> "substituted section extends the reasons for arrest without warrant to include additional reasons in line with section 365 of the *Police Powers and Responsibilities Act 2000* of Queensland. Those additional reasons include to stop the person fleeing, to make inquiries to establish the identity of the person, to obtain property in the possession of the person connected with the offence, to preserve

(142) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 October 2013, pp 25093-25094.

(143) New South Wales, *Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013*, Explanatory Note, p 2.

the safety or welfare of any person or because of the nature and seriousness of the offence."

108 However, significantly, the substituted section did not adopt the text of s 365 of the *Police Powers and Responsibilities Act 2000* (Qld), which expressly provides that it is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for one or more specified reasons *and* makes it lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for *questioning* the person about the offence, or investigating the offence, under Ch 15 of that Act (144).

**Construction of s 99**

109 Section 99(1) stipulates conditions for arrest without a warrant, namely that "the police officer suspects on reasonable grounds that the person is committing or has committed an offence" (145) and that "the police officer is satisfied that the arrest is reasonably necessary for any one or more" of specified reasons (146). And a police officer who arrests a person under s 99 must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law (147). That is a requirement that takes effect immediately upon arrest. To comply with the requirement in s 99(3) immediately upon arrest, a police officer must at the time of arrest have an *intention* to take the person, as soon as is reasonably practicable, before an authorised officer to be dealt with according to law to answer a charge for that offence. If there is no intention to comply with the requirement in s 99(3), the arrest is unlawful. And a requirement for the police officer to have an intention to bring a person before an authorised officer means, as a matter of substance, a requirement to have an intention to charge that person.

110 Thus, an arrest under s 99 can only be for the purpose, as soon as is reasonably practicable, of taking the arrested person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for that offence. An arrest merely for the purpose of asking questions or making investigations in order to see whether it would be proper or prudent to charge the arrested person with the crime is an arrest for an improper purpose and is unlawful.

111 Section 99(1)-(3), in its terms, does not alter that single criterion for a lawful arrest that has been the law in New South Wales since at least

(144) *Police Powers and Responsibilities Act 2000* (Qld), s 365(1) and (2).
(145) LEPRA, s 99(1)(a).
(146) LEPRA, s 99(1)(b).
(147) LEPRA, s 99(3).

1933 (148). The note to s 99(3), which states that, under s 105, a police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer, says nothing about the necessary mental state of the police officer at the time of the arrest. Instead, s 105 (and the note to s 99(3)) underscores the possibility that while there must be at the time of arrest an intention to bring the person who is arrested before an authorised officer to answer a charge for the offence, that intention may be *negated* (and instead the arrest discontinued) if the circumstances after arrest are not sufficient to justify a decision to charge. The intention required at the time of arrest is an intention to charge *unless* it emerges after the arrest that the circumstances do not justify such a decision. As s 105 provides, discontinuing the arrest may mean that the person is dealt with in some other manner pursuant to s 105(2)(b).

112 This is reinforced by the terms of Pt 9, which concerns investigations and questioning. The Part applies to a person who is under lawful arrest by a police officer for an offence (149). It expressly provides that it does not confer any power to arrest, or detain, a person who has not been lawfully arrested (150). Put in different terms, absent a lawful arrest under s 99, Pt 9 has no operation. If there is a lawful arrest, a police officer may "detain" a person for the investigation period. Part 9 has operation only when there has been a lawful arrest and, then, subject to the protective procedures and provisions in Pt 9. Section 114(4) provides that the person must be released within the investigation period or brought before an authorised officer or court within that period, or, if it is not practicable to do so within that period, as soon as practicable after the end of that period. That protection is in addition to that provided for under s 99(3), which, subject to the investigation period, remains a duty of the police officer – that is, as soon as practicable, to take the person before an authorised officer to be dealt with according to law.

113 Part 9, specifically ss 114 and 115, provided at the relevant time for a police officer to detain a person who was under arrest for an investigation period of up to four hours (151) (or such longer period as the maximum period may have been extended to by a detention

(148) See [88]-[108] above.

(149) LEPRA, s 111(1).

(150) LEPRA, ss 113(1)(a), 114(1).

(151) LEPRA, ss 114(1), 115(2). The maximum investigation period is now six hours (or such longer period as the maximum period may be extended to by a detention warrant): see *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* (NSW), Sch 1 [9].

warrant). However, the Second Reading Speech (152) for the *Crimes Amendment (Detention after Arrest) Bill 1997* (NSW) (153) indicates that the original introduction of the investigation period (as Pt 10A of the *Crimes Act 1900* (NSW)) was not intended to alter the conditions of arrest – indeed, it was said that "[p]olice will not be able to arrest a person in any circumstance where the law does not otherwise already allow them to do so" (154). That investigation period is therefore not to be taken into account by a police officer at the time of the arrest. Taking it into account at the time of arrest may lead to consideration, subconsciously or consciously, of the possibility of questioning *as a reason for the arrest*, which is impermissible. Moreover, it may lead to an arrest being made in the knowledge that the relevant level of persuasion of guilt required for charging might be formed *as a result of the investigation period*. It may therefore in substance *lower* the threshold for arrest and dilute the required purpose of arrest, which is to take a person before an authorised officer to be dealt with in accordance with law to answer a charge for the offence.

114 Thus, if "the police officer suspects on reasonable grounds that the person is committing or has committed an offence" (155) and "the police officer is satisfied that the arrest is reasonably necessary for any one or more" of the specified reasons (156), then the police officer who makes the arrest under s 99 must intend, as soon as is reasonably practicable, to take the person before an authorised officer to be dealt with according to law to answer a charge for that offence (157). And they must have that intention without taking into account at the time of arrest the existence of the investigation period.

115 Reasonable suspicion requires an arresting constable to have reasonable grounds for suspicion of guilt. This is less than reasonable and probable cause for prosecution (158). The former is the necessary intention at the time of arrest. The latter is the necessary intention when making a decision to prefer a charge and then preferring it (159). Contrary to the submissions of the State of New South Wales, the requirement of an intention to charge at the time of arrest does not import, *to the time of arrest*, a requirement to have the mental state

(152) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 26 June 1997, pp 11234-11235.
(153) See [98] above.
(154) New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 26 June 1997, p 11235.
(155) LEPRA, s 99(1)(a).
(156) LEPRA, s 99(1)(b).
(157) LEPRA, s 99(3).
(158) *A v New South Wales* (2007) 230 CLR 500 at 525 [71].
(159) *Williams* (1986) 161 CLR 278 at 300.

required at the time of charging. All that it means is that there is an intention to meet the requirements for charging *at the time of charging*, which is to take place as soon as is practicable after the arrest, unless it emerges after the arrest that there is not sufficient basis to bring a charge. And in that circumstance, the arrest should be discontinued pursuant to s 105.

**Mr Robinson's arrest was unlawful**

116 On the evidence, Constable Smith had no intention, at the time of the arrest, of bringing Mr Robinson before an authorised officer to be dealt with according to law unless it emerged subsequent to the arrest that there was sufficient reason to charge him. Constable Smith did not have the power to arrest Mr Robinson, without warrant, under s 99 of LEPRA when, at the time of the arrest, Constable Smith had not formed the intention to charge Mr Robinson. The arrest was unlawful.

**Conclusion and orders**

117 For those reasons, the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant, *McCabe Curwood Pty Ltd*.

Solicitors for the respondent, *Foott, Law & Co Solicitors*.

PTV