15/13; [2013] VSC 120

SUPREME COURT OF VICTORIA

AA v BB

Bell J

25, 26 October 2012; 20 March 2013

FAMILY VIOLENCE – INTERVENTION ORDER MADE BY MAGISTRATE PROHIBITING FAMILY VIOLENCE OF ONE SPOUSE AGAINST ANOTHER – MAGISTRATE CONVICTED AND SENTENCED APPELLANT FOR CONTRAVENING ORDER – WHETHER MAGISTRATE COMMITTED ERROR OF LAW OR JURISDICTION – WHETHER ORDER INVALID FOR BEING INIMICAL TO PUBLIC POLICY AND FOR UNCERTAINTY – WHETHER TOTAL OR PARTIAL SUPPRESSION ORDER SHOULD BE MADE IN RESPECT OF PROCEEDING AND JUDGMENT: *CRIMINAL PROCEDURE ACT* 2009 (VIC) S272; *FAMILY VIOLENCE PROTECTION ACT* 2008 (VIC) PT 4, DIV 4; *SUPREME COURT ACT* 1986 (VIC) SS18, 19.

CONSTITUTIONAL LAW – INTERVENTION ORDER OF MAGISTRATES' COURT OF VICTORIA UNDER *FAMILY VIOLENCE PROTECTION ACT* 2008 (VIC) – WHETHER ORDER INVALID FOR INCONSISTENCY WITH PARENTING ORDER UNDER *FAMILY LAW ACT* 1975 (CTH) – RELATIONSHIP BETWEEN FAMILY VIOLENCE ORDERS UNDER STATE ACT AND PARENTING ORDERS UNDER FEDERAL ACT – INTERVENTION ORDER PROHIBITED APPELLANT FROM PUBLISHING MATERIAL ABOUT PROTECTED PERSON OR COMMUNICATING INFORMATION ABOUT THAT PERSON'S PERSONAL, FAMILY OR PROFESSIONAL INTERESTS TO THIRD PARTIES – PROTECTED PERSON A CANDIDATE FOR FEDERAL PARLIAMENT IN UPCOMING ELECTION – WHETHER ORDER AND ENABLING PROVISIONS OF STATE ACT INVALID FOR BREACHING IMPLIED CONSTITUTIONAL FREEDOM OF COMMUNICATION ABOUT GOVERNMENT OR POLITICAL MATTERS: *FAMILY VIOLENCE PROTECTION* ACT 2008 (VIC) PT 4, DIV 4; *FAMILY LAW ACT* 1975 (CTH) PT VII, DIV 11; *CONSTITUTION* S109.

The appellant was convicted and sentenced in the Magistrates' Court of Victoria to imprisonment for 19 days for contravening an intervention order under the *Family Violence Protection Act* 2008 (Vic). The appellant pleaded guilty to the 15 charges concerned. The intervention order prohibited the appellant from publishing material about the protected person (who was the appellant's former spouse) or providing information to third parties about the protected person's personal, family or professional interests. The order also prohibited the appellant from contacting, or communicating with, the protected person except through a lawyer to arrange mediation or discuss family law matters (including matters concerning their child). The appellant was charged with contravening the order by publishing information about the protected person and contacting that person directly.

In this appeal, the appellant contended that, despite the pleas of guilty to the charges, the magistrate committed errors of law and jurisdiction in convicting and sentencing the appellant. It was contended that the intervention order was invalid for being inconsistent with a parenting order made in respect of the appellant, the protected person and their child in the Family Court of Australia under the *Family Law Act* 1975 (Cth). It was alternatively contended that the provisions of the *Family Violence Protection Act* under which the intervention order was made were invalid under s109 of the *Constitution* for being inconsistent with the provisions of the *Family Law Act*. It was also contended that the intervention order and those provisions were invalid by reason of the implied constitutional freedom of communication about government and political matters. Upon appeal—

HELD: Appeal dismissed.

1. The intervention order under the Victorian *Family Violence Protection Act* which the appellant contravened was not invalid for being inconsistent with the parenting order under the federal *Family Law Act*. The State intervention order and the federal parenting order sat side by side and harmoniously dealt, on the one hand, with the protection of the protected person from family violence of the appellant and, on the other hand, with the relationship between the appellant and the protected person in relation to their child. Further, the *Family Violence Protection Act* and the *Family Law Act* have been carefully designed to operate compatibly together according to a common plan. There was no inconsistency between the State and federal Acts and the provisions of the State Act were not invalid under s109 of the *Constitution*.

2. Applying the tests stated by the High Court of Australia, the intervention order and the provisions of the *Family Violence Protection Act* under which it was made were not invalid by reason of the implied constitutional freedom of communication about governmental and political matters.

3. The intervention order limited the appellant's capacity to communicate about government and

political matters. The protected person was a candidate for election to the Australian Parliament in the upcoming federal election. Because the intervention orders prohibited the appellant from publishing any material about the protected person and from providing information about that person's personal, family or professional interests to third persons, the order prevented the appellant from commenting on the suitability of the protected person for election to federal Parliament. Public discussion of the suitability of a candidate for election to federal Parliament is a central feature of the democratically representative political system which is enshrined in the *Constitution*.

4. The intervention order was made for the legitimate purpose of protecting the protected person from family violence of the appellant. In limiting the appellant's capacity to publish material about the protected person and provide information about that person's personal, family and professional interests to third parties, the order was reasonably appropriate and adapted, and proportionate, to the achievement of that purpose. In making the order, it was necessary for the magistrate to balance, on the one hand, the appellant's right to free speech in the context of the upcoming federal election as protected by the implied constitutional freedom of communication about government or political matters and, on the other hand, the protected person's right to be protected from family violence of the appellant, which the protected person did not lose by reason of being a parliamentary candidate in that election. The magistrate properly carried out that balancing judgement and the appellant had not shown that his Honour erred in law in doing so. In making the order, the magistrate did not inhibit the capacity of the appellant publicly to discuss issues of policy or political matters not concerning the protected person or to provide information about such issues or matters to third parties.

5. The appellant's contention that the intervention order was invalid for being inimical to public policy and for uncertainty was rejected.

6. The magistrate did not err in law or jurisdiction in convicting and sentencing the appellant for contravening the intervention order. The appellant's appeal was dismissed.

7. The application of the respondent and the protected person, supported by the appellant, for complete suppression of the proceeding and this judgment as that would be contrary to the principle of open justice was rejected. However, it was appropriate to protect the identities of the appellant, the protected person and their child, as was the case under the *Family Violence Protection Act* in the substantive proceeding in the Magistrates' Court and under the *Family Law Act* in the related proceeding in the Family Court. Therefore this judgment has been produced in gender neutral and anonymous terms and the appellant and the respondent have been given pseudonyms. Under s18 of the *Supreme Court Act* 1986 (Vic), and consistently with s166 of the *Family Violence Protection Act* and s121 of the *Family Law Act*, orders were made prohibiting the publication of any account of the proceeding, or any part of the proceeding, that identified the appellant, the respondent, the protected person or the child or of any particulars likely to lead to the identification of those persons.

BELL J:

Introduction

1. The appellant pleaded guilty to, and was convicted of, 15 charges of contravening s123 of the *Family Violence Protection Act* 2008 (Vic) which were brought by the respondent, a leading senior constable of police. Each of the charges involved alleged contraventions of cll 3 and 4 of an intervention order which had been made by consent by the Magistrates' Court of Victoria. The order imposed severe restrictions upon the appellant's contact with the appellant's former spouse ('the protected person'). It was expressed to remain in force for two years unless extended, which it has been.

2. The appellant and the protected person are also parties to proceedings in the Family Court of Australia under the *Family Law Act* 1975 (Cth) in respect of their child. In those proceedings, that court made a parenting order which also imposed restrictions on the appellant's contact with the protected person. The Family Court made the parenting order before the Magistrates' Court made the intervention order.

3. The appellant was arrested by the police in relation to the alleged contraventions of the intervention order and spent a total of 19 days in custody on remand. The magistrate who convicted the appellant of the 15 charges imposed a total effective sentence of imprisonment for 19 days, that is, for the time already served.

4. Clause 3 of the intervention order prohibits the appellant from publishing on the internet, by email or any other means of communication any material about the protected person, including any recorded or unrecorded telephone calls and transcripts of same. The appellant was convicted

of 11 charges of contravening this clause by publishing by email material about the protected person. The appellant did not contend that the communications which gave rise to these convictions were necessary for parenting reasons.

5. Clause 4 of the intervention order prohibits the appellant from contacting or communicating with the protected person by any means except through a lawyer to arrange mediation and discuss family law matters. The appellant was convicted of three charges of contravening this clause by contacting the protected person by email and one charge of contravening this clause by contacting the protected person by telephone.

6. Three other charges against the appellant were struck out when the prosecution withdrew them as a result of the plea of guilty which the appellant entered to the other 15 charges.

7. Under s272(1) of the *Criminal Procedure Act* 2009 (Vic), the appellant now appeals to this court against the convictions and sentences. That provision limits an appeal to questions of law. The grounds of appeal relied upon by the appellant are so limited. Orders are sought setting aside the convictions and sentences.

8. Although the appellant pleaded guilty to the charges, the respondent does not argue that the appeal is incompetent. It is accepted that the grounds of the appeal advance, in different ways, the proposition that, on the matters admitted by the guilty pleas, the appellant could not in law have been convicted of the charges.

9. The grounds of the appeal are set out in the appellant's undated outline of submissions. These grounds refine the grounds set out in the appellant's earlier undated amended grounds of appeal. As specified in the outline of submissions, the grounds are:

> 1. Clauses 3 and 4 of the intervention order are invalid by reason of s68Q of the *Family Law Act*.
> 2. Clauses 3 and 4 of the intervention order are invalid by reason of s109 of the *Constitution*.
> 3. The intervention order is invalid as the exercise of the magistrate's discretion to make the order was invalid by reason of the implied freedom of political communication under the *Constitution*.
> 4. The intervention order is invalid because the enabling provisions of the *Family Violence Protection Act* are invalid by reason of the implied freedom of political communication under the *Constitution*.
> 5. Clauses 3, 8 and 11 of the intervention order are invalid for being inimical to public policy.
> 6. Clause 8 of the intervention order is void for uncertainty.

10. Grounds 1 and 2 arise because of alleged inconsistencies between the intervention order made under the State Act and the parenting order under the federal Act and between the provisions of the two Acts. Grounds 3 and 4 arise because the protected person is a candidate for election to federal Parliament in the upcoming election. The intervention order prevents the appellant from commenting publicly, and providing information about, the suitability of the protected person to be a member of parliament.

11. The appellant served notices of constitutional questions on the Attorneys-General of the Commonwealth and States as required by s78B of the *Judiciary Act* 1903 (Cth). No Attorney-General elected to participate in the proceeding.

GROUNDS 1 AND 2: STATUTORY AND *CONSTITUTIONA*L INCONSISTENCY

Clause 4 of intervention order

12. It is convenient first to determine the appeal with respect to the convictions based on the contravention of cl 4 of the intervention order.

13. The appellant contends that cl 4 is inconsistent with cl 4(g) of the parenting order (which I will set out below) and is therefore invalid pursuant to s68Q of the *Family Law Act* and s109 of the *Constitution*. In the appellant's submission, the inconsistency is direct and express because it is impossible to comply with cl 4(g) of the parenting order without contravening cl 4 of the intervention order.

14. Section 68Q(1) of the *Family Law Act* provides:

> To the extent to which:
> (a) an order or injunction mentioned in paragraph 68P(1)(a) is made or granted that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; and
>
> (b) the order or injunction is inconsistent with an existing family violence order;
> the family violence order is invalid.

Under this provision, an existing intervention order is invalid to the extent to which it is inconsistent with a later parenting order.[1] Section 68Q(1) operates with respect to the clauses of the intervention order, not the provisions of the *Family Violence Protection Act*.

15. Chronologically, the parenting order came first in the present case. When it was made, there was no 'existing' intervention order. Therefore, as it seems to me, s68Q(1) does not apply. However, even if it did, for the reasons I give below there is no inconsistency between the parenting order and the intervention order.

16. Section 109 of the *Constitution* provides:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Section 109 operates with respect to the provisions of the *Family Violence Protection Act* under which the intervention order was made, not the clauses of that order. The appellant submits that, by reason of s109, the provisions of the *Family Violence Protection Act* do not validly authorise the making of an order which is inconsistent with a parenting order under the *Family Violence Protection Act*. Such an order would bring the State enabling provisions into collision with the federal enabling provisions.

17. The appellant did not contend that the intervention order is wholly invalid by reason of the alleged inconsistency with the parenting order. The submission was that, once inconsistency between a clause of the intervention order and a clause of the parenting order is discovered, the clause of the intervention order is wholly invalid. This submission would appear to run counter to the terms of s68Q of the *Family Law Act* and s109 of the *Constitution*. These provisions would bring about the invalidity of the order and the State provisions respectively only to the extent of any inconsistency. However, it is not necessary for me to go into this aspect of the matter.

18. In relation to both s68Q of the *Family Law Act* and s109 of the *Constitution*, a dispositive question is whether, as the appellant contends, cl 4 of the intervention order is directly inconsistent with cl 4(g) of the parenting order. The answer to this question, which is no, turns of the interpretation of the two clauses.

19. Here is cl 4 of the intervention order:

> The Court orders that the [appellant] must not ... contact or communicate with [the] protected person by any means except through a lawyer to arrange mediation and discuss family law matters.

20. Now look at cl 4(g) of the parenting order:
> The time the [appellant] spends with [the child] in accordance with paragraph 3 herein is subject to the following conditions ... That the parties communicate through [the appellant's mother] in relation to any arrangements for the [the appellant's] time with [the child] and any issues relating to [the child's] health, welfare and education.

21. In the appellant's submission, cl 4 of the intervention order prohibits the appellant from contacting the protected person except through a lawyer to arrange mediation and discuss family law matters. On the other hand, cl 4(g) of the parenting order allows the appellant to communicate with the protected person through the appellant's mother in relation to any issues concerning the child's health, welfare and education. Therefore cl 4 the intervention order prohibits contact which would be permissible under cl 4(g) of the parenting order.

22. I reject the interpretation of the intervention order on which this submission is based. As submitted by the respondent, it does not take cll 8 and 11 properly into account.

23. Clauses 8 and 11 of the intervention order provide:

> 8. [T]he [appellant] is prohibited from providing by any means information to any third persons in relation to protected person's personal family and professional interests.
>
> 11. Exceptions to clause 8 as follows:
> (a) Police/Law enforcement agencies;
>
> (b) Court Officials;
>
> (c) Legal proceedings in which the [appellant] is a named party to the proceedings;
>
> (d) The [appellant's] mother, father and sister;
>
> (e) The [appellant's] legal representatives.

24. Although the matter is not entirely clear, I think the better interpretation of cll 4, 8 and 11 is that the appellant is permitted to contact the protected person through the appellant's mother in relation to any arrangements for spending time with the child and any issues in relation to the child's health, welfare and education. It is highly improbable in the circumstances that the intervention order would have been intended to confine contact about matters concerning the appellant's access to the child, and the child's health, welfare and education, to communication through a lawyer. I think cll 8 and 11 were intended to provide a framework within which communication about these matters could take place between the appellant's mother (on the appellant's behalf) and the protected person. Reading cll 4, 8 and 11 together, I conclude that the intervention order should be so interpreted.

25. It follows that there is no direct inconsistency between cl 4 of the intervention order and cl 4(g) of the parenting order. Clause 4 of the intervention order is not invalid under s68Q of the *Family Law Act* (even if it applies) or by reason of the application of s109 of the *Constitution* to the enabling provisions of the *Family Violence Protection Act*.

26. I stress that both the intervention order and the parenting order prohibit the appellant from contacting the protected person directly. Such contact must only be in the manner and for the purposes specified in the orders. In relation to the contraventions of cl 4 of the intervention order, the appellant pleaded guilty to and was convicted of the offence of contacting the protected person directly.

27. The appellant referred to an alleged 'broader' inconsistency between cl 4 of the intervention order and cl 4(g) of the parenting order (when read together with the provisions of the *Family Law Act*). This broader alleged inconsistency was that, under the *Family Law Act*, the appellant could not be found to have contravened the parenting order unless he had intentionally done so or made no reasonable attempt to comply (s70NAC(a)(i) and (ii)). There are no equivalent defences (as it were) under the *Family Violence Protection Act*. The appellant expressly disavowed any reliance on this 'broader notion of inconsistency' in relation to cl 4 of the intervention order.

28. Now to the appeal in relation to the convictions for contravening cl 3.

Clause 3 of intervention order
Appellant's submissions

29. Clause 3 of the intervention order provides that the appellant

> must not ... publish on the internet, by email or by any other means of communication or electronic communication any material about the protected person(s), including any recorded and unrecorded telephone calls and transcripts of the same.

30. Clause 8(c) of the parenting order was in almost identical terms. It provided that the appellant is

> restrained from ... publishing on the internet, by email or by other means of communication any material about the [protected person] including recorded or unrecorded telephone conversations and transcripts of same.

31. It was submitted that cl 3 of the intervention order is indirectly inconsistent with cl 8(c) of the parenting order. By reason of s68Q(1) of the *Family Law Act* and s109 of the *Constitution*, cl 3 is therefore invalid.

32. It can be seen that cl 8(c) of the parenting order (which was made first) was replicated in cl 3 of the intervention order. The appellant submitted that the two clauses injuncted the same conduct. Clause 8(c) is in the nature of a personal protection order under the *Family Law Act* whereas cl 3 is an intervention order under the *Family Violence Protection Act*. Inconsistency arises out of the different statutory consequences of contravening the clauses. There is a 'fundamental … inconsistency or incompatibility' between the penalty regime and enforcement processes in the *Family Law Act* and the *Family Violence Protection Act*.

33. The appellant submitted that there was inconsistency between the operation of cl 8(c) of the parenting order and cl 3 of the intervention order because it was not an offence to contravene the former, yet it was an offence to contravene the latter, where the appellant had made a reasonable attempt to comply, or had a reasonable excuse for not complying, with the order (see ss70NAC and 70NAE of the *Family Law Act*). These 'fundamental defences' were simply not available in relation to alleged contraventions of cl 3 of the intervention order.

34. Further, the appellant submitted that the purpose of the enforcement regime in the *Family Law Act* was to promote compliance with parenting orders whereas the purpose of the enforcement regime in the *Family Violence Protection Act* was the punishment of offenders. Parenting orders under the *Family Law Act*, but not intervention orders under the *Family Violence Protection Act*, could be varied by consent between the parties without the need for a court order.

35. The appellant relied on the jurisprudence under s109 of the *Constitution* to submit that the parenting order and the provisions of the *Family Law Act* gave him liberties, defences and protections which the intervention order and the provisions of the *Family Violence Protection Act* abrogated. That was because, under the former, the appellant had liberties, defences and protections which the appellant did not have under the latter.

36. These submissions were supported in a number of ways. Reliance was placed on the criminal nature of contravening an intervention order and the civil nature of contravening a parenting order. An offender could not be given a custodial sentence for contravening a parenting order. Further, the intervention order would be contravened, but the parenting order would not be contravened, where the protected person had actually sought or consented to the provision of information to a third party. Consent by the protected person was not a defence under the *Family Violence Protection Act*. Lastly, on the hearing of a contravention application, the Family Court had to determine whether to vary the orders but the Magistrates' Court did not.

37. Referring to *Colvin v Bradley Brothers Pty Ltd*,[2] *Dickson v The Queen*[3] and *McWaters v Day*,[4] the appellant submitted that the *Family Law Act* conferred certain legal rights, and provided for certain legal outcomes, which the *Family Violence Protection Act* varied, abrogated and denied. An analogy was drawn between this case and *Dickson* where the High Court took into account the inconsistency between the elements of the relevant offences, and the defences available, as between the applicable federal and State criminal laws. In this case, the defences of reasonable attempt and reasonable excuse were not available under the State law. In a prosecution under the *Family Violence Protection Act*, such matters were beyond the jurisdiction of the Magistrates' Court to consider. As in *Dickson*, in respect of the same conduct the appellant was more liable to be in substantive contravention of the State law than the federal law.

38. The appellant also submitted that cl 3 of the intervention order was inconsistent with s61C of the *Family Law Act*, which provides: 'Each of the parents of a child who is not 18 has parental responsibility for the child'. It was submitted that this principle of shared parental responsibility must necessarily be adopted as a relevant concept or implied term when interpreting a parenting order. Therefore cl 8(c) would be interpreted with s61C in mind. Yet this approach was not available in relation to the interpretation of the intervention order. It was submitted that cll 3 and 8 of the intervention order were fundamentally inconsistent with the principle expressed in s61C.

39. The appellant summarised these inconsistency submissions under two categories. The

first was that cl 3 of the intervention order was invalid because it purported to take away rights granted under the *Family Law Act*. The enabling provisions of the *Family Violence Protection Act* did not authorise such an order by reason of s109 of the *Constitution*. The second was that the *Family Law Act* was intended to cover the field and, by reason of s109, the *Family Violence Protection Act* could not validly create a more onerous enforcement regime than the *Family Law Act*.

40. These submissions must be rejected. In my view, applying the principles which I will now discuss, in neither of these two ways is cl 3 of the intervention order is inconsistent ways with cl 8(c) of the parenting order or the provisions of the *Family Law Act*.

41. In considering the appellant's submissions, it is sufficient to focus on the principles applicable under s109 of the *Constitution*. No different conclusion would be reached by reason of the application of the provisions of s68Q of the *Family Law Act*, even if it applied.

Inconsistency under s109 of the Constitution

42. Two propositions of general principle were advanced by Dixon J in *Victoria v Commonwealth*.[5] The propositions were taken up by the whole of the High Court in *Telstra Corporation Ltd v Worthing*[6] and *Dickson*[7] and more recently by French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd.*[8] This summary of the propositions was given in *Telstra*:

> In *Victoria v The Commonwealth*,[9] Dixon J stated two propositions which are presently material. The first was:
> 'When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.'
>
> The second, which followed immediately in the same passage, was:
> 'Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.'
> The second proposition may apply in a given case where the first does not, yet..., if the first proposition applies, then s109 of the *Constitution* operates even if, and without the occasion to consider whether, the second proposition applies.[10]

43. In *Jemena*, French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ held that the notions of 'altering', 'impairing' or 'detracting' all involved the common idea that the State law undermined the federal law.[11] Their Honours then went on to say:

> All tests of inconsistency which have been applied by this Court for the purpose of s109 are tests for discerning whether a 'real conflict'[12] exists between a Commonwealth law and a State law.[13]

44. The appellant did not submit that there was a direct collision between cl 3 of the intervention order and cl 8(c) of the parenting order and the provisions of the *Family Law Act*. I can appreciate why. Clause 3 of the intervention order does not appear to alter, impair or detract from the operation of cl 8(c) of the parenting order or the provisions of the *Family Law Act* in that sense. The question is, are the clauses inconsistent in some other sense?

45. In *Momcilovic v The Queen*,[14] Gummow J discussed the different classes of inconsistency which are embraced by s109 of the *Constitution*. By reference to the submissions of Mitchell KC and Starke for the respondents in *Australian Boot Trade Employés Federation v Whybrow & Co*,[15] his Honour identified these three:

> (1) Where two conflicting duties are imposed by the two legislatures; (2) Where there is something in the nature of a right or privilege conferred by the paramount legislature, and the other legislature seeks to impose some additional restrictions on the exercise of that right or privilege; and (3) Where the Court forms the view from the language of the paramount legislature that they intended their law to be the only law upon the particular point. [16]

46. Gummow J treated classes (1) and (2) as examples of direct inconsistency.[17] In *Dickson*, the High Court also treated circumstances coming within class (2) as an example of direct

inconsistency.[18] As I understand it, the appellant did not rely on direct inconsistency in relation to cl 3 of the intervention order. Yet the appellant did rely on the proposition embraced in class (2) and I do not think that it matters for present purposes whether one calls it direct or indirect inconsistency.

47. In relation to class (2) as it might apply in the present case, the following statement of the High Court in *Dickson* is pertinent:[19]

> What is immediately important is the exclusion by the federal law of significant aspects of conduct to which the State offence attaches. There are significant 'areas of liberty designedly left [and which] should not be closed up', to adapt remarks of Dixon J in *Wenn v Attorney General (Vic)*[20].

48. In *Dickson*, federal and State laws each provided for the offence of conspiracy but in different terms. The State law criminalised conduct which was not criminalised by the federal law. It was contended that the State law was invalid because the federal law had 'designedly left' the accused with a liberty which the State law had 'closed up'. That contention was accepted. The High Court held that the State law imposed criminal liability on persons who engaged in conduct which had deliberately been left untouched by the federal law. That was not constitutionally valid because the terms of the federal law left '[n]o room … for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury'.[21]

49. That is effectively what the appellant submits here. It is submitted that the provisions of the *Family Law Act* have 'designedly left' the appellant with a liberty to behave towards the protected person and the child as cl 8(c) of the parenting order and those provisions would permit. Yet cl 3 of the intervention order has 'closed up' that liberty.

50. It can be seen that the appellant's submissions go well beyond reliance on any direct inconsistency. The appellant's case involves 'indirect inconsistency'. Class (3) is an example of such indirect inconsistency.

51. In the words of French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ in *Jemena*, 'indirect inconsistency involves "more subtle … contrariety"[22] than any "textual"[23] or "direct collision"[24] between the provisions of a Commonwealth law and a State law'.[25] According to the classic formulation of Dixon J in *Ex parte McLean*,[26] it arises where the federal law 'shows an intention to cover the subject matter and provide what the law upon it shall be',[27] or where, according to his Honour's elaboration in *Stock Motor Ploughs Ltd v Forsyth*,[28] the Commonwealth Parliament 'appears to have intended that the Federal law shall be a complete statement of the law governing a particular relation or thing'.[29]

52. But, as was held in *McWaters*,[30] the mere fact that federal and State laws prescribe different penalties for and ways of prosecuting substantially the same conduct is insufficient to establish this kind of inconsistency. In *McWaters*, ordinary State laws allowing the prosecution of defence personnel for driving offences were not seen to be inconsistent with federal military laws allowing prosecution of the person in respect of the same conduct. The federal law contained certain protections for the alleged offender, including against double jeopardy. The joint judgment of the whole High Court took into account that the federal military law 'contemplates parallel systems of military and ordinary criminal law and does not evince any intention that defence force members enjoy an absolute immunity from liability under the ordinary criminal law'.[31] By the analysis which follows, the position is similar in the present case.

53. As Gummow J held in *Momcilovic*, 'the starting point in all cases must be an analysis of the laws in question and of their true construction'.[32] In that connection, later in the judgment his Honour made observations about the importance of statutory construction.[33] With that in mind, I turn to the provisions of the *Family Law Act* and *Family Violence Protection Act*.

The provisions of the Family Law Act

54. Part VII of the *Family Law Act* makes provision in relation to children. Section 60B specifies both the objects of that part and the principles underlying it.

55. These are the objects (s60B(1)):

> The objects of this Part are to ensure that the best interests of children are met by:
> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
> (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

56. As relevant here, these are the principles (s60B(2)):

> The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
> (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children ...

57. It can be seen from these objects and principles that the purpose of pt VII of the *Family Law Act* is (I summarise) to ensure the best interests of children in relation to their parents. Although this purpose overlaps with the purpose of protecting people from family violence, it is different to that purpose.

58. Division 5 makes provision in relation to parenting orders. Section 64B(2) specifies the matters with which a parenting order may deal, namely:

> (a) the person or persons with whom a child is to live;
> (b) the time a child is to spend with another person or other persons;
> (c) the allocation of parental responsibility for a child;
> (d) if 2 or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
> (e) the communication a child is to have with another person or other persons;
> (f) maintenance of a child;
> (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
> (i) a child to whom the order relates; or
> (ii) the parties to the proceedings in which the order is made;
> (h) the process to be used for resolving disputes about the terms or operation of the order;
> (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

As would be expected having regard to the purpose of pt VII, the focus of these matters is the child, not protecting people from family violence.

59. Division 9 of pt VII makes provision in relation to injunctions, both final and interlocutory (s68B(2)). The injunction must be 'for the welfare of the child', and may include (s68B(1)):

> (a) an injunction for the personal protection of the child; or
> (b) an injunction for the personal protection of:
> (i) a parent of the child; or
> (ii) a person with whom the child is to live under a parenting order; or
> (iii) a person with whom the child is to spend time under a parenting order; or
> (iv) a person with whom the child is to communicate under a parenting order; or
> (v) a person who has parental responsibility for the child; or
> (c) an injunction restraining a person from entering or remaining in:
> (i) a place of residence, employment or education of the child; or
> (ii) a specified area that contains a place of a kind referred to in subparagraph (i); or
> (d) an injunction restraining a person from entering or remaining in:
> (i) a place of residence, employment or education of a person referred to in paragraph (b); or
> (ii) a specified area that contains a place of a kind referred to in subparagraph (i).

60. These provisions allow injunctions to be issued with explicitly protective purposes, but 'for the welfare of the child'. Moreover, if warranted for that purpose, the provisions would allow an injunction to be issued in appropriate terms for the protection of a parent from conduct of a family member which, incidentally, might amount to family violence under a State law, such as the *Family Violence Protection Act*.

61. Recognising that possibility, div 11 of pt VII makes provision in relation to family violence orders. The express purposes of the division are (s68N):

> (a) to resolve inconsistencies between:
> (i) family violence orders; and
> (ii) certain orders, injunctions and arrangements made under this Act that provide for a child to spend time with a person or require or authorise a person to spend time with a child; and
> (aa) to ensure that orders, injunctions and arrangements of the kind referred to in subparagraph (a) (ii) do not expose people to family violence; and
> (b) to achieve the objects and principles in section 60B.

As can be seen, a purpose of the family violence provisions is to resolve inconsistencies between a family violence order and an order made under the *Family Law Act* (s68N(a)(i) and (ii)).

62. Section 68P (operating with s68Q) contains a scheme by which priority is afforded to orders under the *Family Law Act* over existing inconsistent family violence protection orders. The scheme applies where the court makes a parenting order or injunction permitting a person to spend time with a child which is inconsistent with such a family violence protection order (s68P(1)). In such a case, the court must specify that the order or injunction is inconsistent with the family violence protection order and give a detailed explanation of how the contact is to take place (s68P(2)(a)-(d)). The family violence protection order is then invalid to the extent of any inconsistency with the order or injunction of the Family Court (s68Q(1)). I will make later mention of these important provisions.

63. The obverse situation arises where a State court is invited to make or vary an intervention order when there is an existing parenting order. That is the situation which applied in the present case: the parenting order was made before the invention order. In such cases, s68R(1)(a) gives the courts of the States and Territories the jurisdiction to deal with the order or injunction of the Family Court so as to resolve any inconsistency. It provides:

> In proceedings to make or vary a family violence order, a court of a State or Territory that has jurisdiction in relation to this Part may revive, vary, discharge or suspend:
> (a) a parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child; ...

64. We will later see the provisions of the *Family Violence Protection Act* which, in the Victorian jurisdiction, confer this power.

65. Thus, under the federal and State provisions, the court dealing last in time with a relevant proceeding has the power to make orders resolving any inconsistency between State family violence protection orders and orders or injunctions of the Family Court. I cannot discern from these provisions any intention on the part of the Commonwealth Parliament that the provisions of the *Family Law Act* are to represent a complete statement of the law with respect to family violence involving parents and children or parenting orders in respect of conduct amounting to family violence. The regime for the resolution of inconsistencies between orders made under the *Family Law Act* and the *Family Violence Protection Act* is premised on the acceptance by the Commonwealth Parliament that orders pertaining to family violence might be made under both federal and State legislation.

66. Division 13A of pt VII makes provision in relation to the consequences of failing to comply with orders and obligations affecting children. As specified in s70NAA(3), the orders which the court can make in such circumstances will depend on whether a contravention has been established and, if so, whether there is, or is not, a reasonable excuse for it. As we have seen, the appellant relied on these provisions in his submissions.

67. Section 70NAC clarifies when a person is taken to have 'contravened' an order affecting children. By that provision, a person is taken to have contravened such an order:

> if, and only if:
> (a) where the person is bound by the order—he or she has:
> (i) intentionally failed to comply with the order; or
> (ii) made no reasonable attempt to comply with the order; or
> (b) otherwise—he or she has:
> (i) intentionally prevented compliance with the order by a person who is bound by it; or
> (ii) aided or abetted a contravention of the order by a person who is bound by it.

As conceded by the respondent, to establish that a party has contravened a relevant order under the *Family Law Act*, s70NAC requires an applicant for enforcement to establish more than would be the case with an intervention order under the *Family Violence Protection Act*.

68. Section 70NAE contains extensive provisions governing when a person is taken to have had 'a reasonable excuse for contravening' an order. There are two categories: cases where the person did not understand his or her obligations and cases involving the health and safety of persons (including the respondent or the child).

69. Section 70NAE(2) covers cases in the first category. It provides:

> A person (the *respondent*) is taken to have had a *reasonable excuse for contravening* an order under this Act affecting children if:
> (a) the respondent contravened the order because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order on the person who was bound by it; and
> (b) the court is satisfied that the respondent ought to be excused in respect of the contravention.

70. Section 70NAE(4)-(7) covers the several cases in the second category. By these provisions, the person is taken to have had a reasonable excuse in various situations where the contravention has occurred because the respondent 'believed on reasonable grounds' that it was necessary to protect the health or safety of a person (including the child) and it was not greater than necessary for that purpose.

71. In determining whether a person has a reasonable excuse for contravening an order affecting children, the standard of proof to be applied in most cases 'is proof on the balance of probabilities' (s70NAF(1)). In some specified cases which are not material here, satisfaction 'beyond reasonable doubt' is required (s70NAF(3)). By contrast, in enforcement proceedings under the *Family Violence Protection Act*, the standard of proof is the criminal standard of beyond reasonable doubt.

72. A court having jurisdiction under the *Family Law Act* may make an order varying a primary order in proceedings relating to that order where contravention is alleged, whether or not the court finds it to be established (s70NBA(1) and (2)).

73. In contravention proceedings, the court has power to make orders in relation to costs and compensating persons, depending on whether the contravention is established and, if so, was supported by a reasonable excuse (pt VII, div 13A, sub-divs C and D) There are extensive provisions in relation to the powers of the court where an established contravention was without reasonable excuse. The court's power depends on whether the contravention was in the less (pt VII, div 13A, sub-div E) or more (pt VII, div 13A, sub-div F) serious category.

74. Where no previous action or sanction has been taken or applied before the court in respect of a previous contravention, the contravention belongs to the lesser category (s70NEA(2) and (3)), unless the court is satisfied that the person 'has behaved in a way that showed a serious disregard for his or her obligations' under the order (s70NEA(4)). The power of the court reflects the less serious nature of such contravention. Among other things, the court may direct the person to attend a parenting program, make compensation orders, adjourn the proceedings, direct the person to enter a bond or to pay costs (s70NEB(1)).

75. Where the person has been the subject of previous contravention orders or the court is

satisfied that they have shown a serious disregard for their protection obligations, the contravention belongs to the more serious category (s70NFA(1)-(4)). The powers of the court reflect the more serious nature of the contravention. Among other things, the court can make a community service order, direct the person to enter into a bond and impose a fine and a sentence of imprisonment for up to 12 months (s70NFB(2)). There are specific provisions governing the making of particular orders.

76. On the basis of these provisions, it must be accepted that the appellant could not be found to have contravened the parenting order unless (for example) the appellant had intentionally failed to comply with it or had made no reasonable attempt to do so (s70NAC(a)(i) and (ii)). These defences (if that be the correct description) are specified in relation to the powers of the court concerning the enforcement of parenting orders generally. The enforcement provisions of the *Family Law Act* have been carefully designed to meet the particular demands of enforcing such orders having regard to the general purposes of pt VII, particularly the purpose of ensuring the best interests of the child. As we will see, the equally careful design of the enforcement provisions of the *Family Violence Protection Act* reflects the different demands of enforcing family violence protection orders having regard to the general purpose of that Act, particularly the purpose or protecting people from family violence.

77. Section 70NFH deals further with the relationship between contravention proceedings under the *Family Law Act* and other laws. It applies where the act or omission of a person constitutes both a contravention of an order under the *Family Law Act* affecting children and an offence against any law (s70NFH(1)). If the person is being prosecuted for the offence against that other law, any contravention proceeding under s70NFB of the *Family Law Act* must either be adjourned until the prosecution proceeding has been completed, or dismissed (s70NFH(2)). It is expressly stated that the person 'may be prosecuted for, and convicted of, the offence' (s70NFH(3)). However, the provisions do not render the person 'liable to be punished twice in respect of the same act or omission' (s70NFH(4)). These provisions ensure that, under the different regimes for the enforcement of parenting orders under the *Family Law Act* and intervention orders under the *Family Violence Protection Act*, there cannot be double punishment.

78. Now the provisions of the *Family Violence Protection Act*.

The provisions of the Family Violence Protection Act

79. The preamble to this Act stresses that family violence is unacceptable in any form. The purpose of the Act is to maximise the safety of children and adults, prevent and reduce family violence and bring perpetrators to account (s1(a), (b) and (c)). These purposes are to be achieved (among other things) by providing an effective and accessible system of family violence intervention orders and creating offences for contravening those orders (s2(a) and (b)).

80. 'Family violence' is defined to mean behaviour towards a family member which is physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive, controlling or dominating, as well as behaviour that causes a child to witness such behaviour (s5(1)(a) and (b)). It includes physical and sexual assaults, intentional damage of property, deprivation of liberty and causing death or injury to an animal (s5(2)). 'Economic abuse'[34] and 'emotional or psychological abuse'[35] are defined.

81. 'Family member' is defined to mean a present or past spouse or domestic partner, someone who has been in an intimate relationship with the person, a relative, a child who is or has resided with the person and a child of an intimate (s8(1)). By an extended definition, people 'like' a family member, and who are reasonably to be so regarded, are treated as family members (s8(3)).

82. It can be seen from these provisions that the main purpose of the *Family Violence Protection Act* is the protection of family members from family violence. This is a different albeit overlapping purpose to ensuring the bests interest of children in relation to their parents, which (in summary) is the purpose of pt VII of the *Family Law Act*.

83. The *Family Violence Protection Act* gives person-holding powers to the police (pt 3, div 1). It also gives the police power to issue family violence safety notices (pt 3, div 2).

84. The provisions in relation to family violence protection orders are in pt 4. Division 1 allows applications for such orders to be made to the Magistrates' Court or the Children's Court. Division 2 allows the court to make interim orders. Division 3 specifies how family violence intervention proceedings are to be conducted. Division 4 allows the court to make final orders and division 5 specifies the conditions which may be included in such orders. The appellant was convicted of contravening such a final order.

85. Under s74(1), a final order may be made:

> if the court is satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to continue to do so or do so again.

Where the final order is being made by consent, the court does not have to be so satisfied (s78(1)), unless the respondent is a child (s78(2)).

86. When determining what conditions should be included in a family violence protection order, 'the court must give paramount consideration to the safety of ... the affected family member ... and ... any children' (s80(a) and (b)). The court may include any conditions that appear to be necessary or desirable in the circumstances (s81(1)), including conditions (s82(2)),

> (a) prohibiting the respondent from committing family violence against the protected person; and
> (b) excluding the respondent from the protected person's residence in accordance with section 82 or 83; and
> (c) relating to the use of personal property in accordance with section 86; and
> (d) prohibiting the respondent from approaching, telephoning or otherwise contacting the protected person, unless in the company of a police officer or a specified person; and
>
> **Examples**
> 1. Emailing the protected person.
>
> 2. Sending text messages to the protected person.
> (e) prohibiting the respondent from being anywhere within a specified distance of the protected person or a specified place, including the place where the protected person lives; and
> (f) prohibiting the respondent from causing another person to engage in conduct prohibited by the order; and
> (g) revoking or suspending a weapons approval held by the respondent or a weapons exemption applying to the respondent as provided by section 95; and
> (h) cancelling or suspending the respondent's firearms authority as provided by section 95.

87. The general relationship between the *Family Law Act* and the *Family Violence Protection Act* is dealt with in s68Q of the former and s176 of the latter. As we have seen, s68Q(1) of the *Family Law Act* provides that an existing family violence order (such as one made under the *Family Violence Protection Act*) which is inconsistent with a later parenting order made under the *Family Law Act* is invalid to the extent of the inconsistency. Section 68Q(2) allows courts with jurisdiction under pt VII of the *Family Law Act* to make a declaration that there is such an inconsistency. Section 176 of the *Family Violence Protection Act* provides that an intervention order made under that Act operates subject to any such declaration. However, s68R of the *Family Law Act* provides that a court exercising jurisdiction under the *Family Violence Protection Act*, which includes the Magistrates' Court, may revive, vary, discharge or suspend certain orders under the *Family Law Act*, including parenting orders. The magistrate did not exercise this power in the present case. As the orders were not inconsistent, his Honour did not need to.

88. Section 87(1) and (2) of the *Family Violence Protection Act* deals with potential conflicts between family violence protection orders and Family Court orders with respect to personal property. By those provisions, the power of the court to include a condition relating to personal property is subject to any order to the contrary made by the Family Court (or another court or tribunal with relevant jurisdiction to adjust interest in property disputes) and the order of the Family Court (or other court or tribunal) prevails to the extent of any inconsistency.

89. In relation to orders affecting children, s89 provides that, if the court decides to make a family violence intervention order and the protected person or the respondent is the parent of a child, then the court must

> enquire as to whether there are any of the following orders in force in relation to the child—
> (a) a *Family Law Act* order;
> (b) a child protection order.

Only s89(a) is relevant here. The order to which it refers is a '*Family Law Act* order'. Section 4 defines such an order to mean 'an order, injunction, undertaking, plan or recognisance referred to in s68R of the *Family Law Act*'.

90. Section 90 of the *Family Violence Protection Act* applies where the court's enquiry reveals that there is a *Family Law Act* order in force in relation to the child and the proposed family violence intervention order would be inconsistent with that order (s90(1)(b)). In that situation, s90(2) of the *Family Violence Protection Act* required the court to exercise the special powers which are specified in s68R of the *Family Law Act*:

> The court must, to the extent of its powers under section 68R of the *Family Law Act*, revive, vary, discharge or suspend the *Family Law Act* order to the extent that it is inconsistent with the family violence intervention order.

I have already set out the provisions of s68R.

91. Section 92 applies where the enquiries of the court reveal that there is no *Family Law Act* order in force in relation to a child. In that situation, and subject to s91,[36] the court must include in the family violence intervention order conditions relating to the living and access arrangements for the child (s92(1)(a)).

92. These provisions of the *Family Violence Protection Act* do not appear to be directly or indirectly inconsistent with the provisions of the *Family Law Act*. The provisions reflect the scheme which is present in both Acts for the resolution of potential inconsistencies between family violence protection orders under the former and parenting orders and injunctions under the latter.

93. The duration of a final order depends on whether it has been made for a specified period. Section 97(1) of the *Family Violence Protection Act* permits but does not require such a specification. In determining whether to specify a duration period, s97(2) makes the safety of the protected person paramount and requires the risk from the respondent to be taken into account. A final order operates for any specified period, subject to revocation or appeal; an order for no specified period operates until revocation or appeal (s99).

94. In the present case, the order was made for the specified period of two years unless varied or extended. It has been extended but I was not told for how long. It was not put, however, that the order was to be in force for an indefinite period. An order for an indefinite period would have raised additional issues.

95. Parties and other persons may apply to vary, revoke or extend the family violence intervention order (s108(1)) and parties may appeal against such an order (s114(1)). The court also has a qualified power of rehearing (s122). In deciding whether to vary or revoke an order, the court must have regard to all the circumstances of the case, including the applicant's reason for making the application, the safety of the protected person and their views (s100(2)). The court must decide whether there has been a change in the need for protection, whether new family members need protection and whether there are *Family Law Act* orders in place (s108(2)(i)). The court may make interim orders (s101) and may determine the application substantively by refusing it or by varying or revoking the order in a way that differs from that which was sought (s100(3)).

96. Appeals may be brought and are by way of rehearing (s119(1)), usually in to the County Court of Victoria (s115(a)).

97. As the appellant submits, contravention of a family violence intervention order which has been served on the person is a criminal offence punishable by imprisonment for two years or a substantial fine, or both (s123(2)). By contrast with the enforcement provisions of the parenting order provisions of the *Family Law Act*, the *Family Violence Protection Act* specifies only limited statutory defences. In that connection, this is s123(3):

> In a proceeding for an offence against subsection (2) constituted by contravening a family violence intervention order, it is a defence to the charge for the accused to prove that—
> (a) the accused was the respondent under the family violence intervention order; and
> (b) a family violence safety notice in relation to the same protected person and respondent was also in force at the time the offence was alleged to have been committed; and
> (c) the accused's conduct was not in contravention of the family violence safety notice.

98. That brings me to the determination of the appellant's submissions on the inconsistency ground.

Inconsistency is not established

99. In my view, the provisions of the *Family Law Act* do not confer liberties, defences and protections on the appellant which are abrogated by the provisions of the *Family Violence Protection Act*. The provisions of the *Family Law Act* are not intended to operate as a complete statement of the law on the subject of family violence or parenting orders as they may relate to family violence such as to remove any scope for the operation of the provisions of the *Family Violence Protection Act*. The *Family Law Act* and the *Family Violence Protection Act* operate compatibly together according to a common plan for their respective purposes of ensuring the best interests of children in relation to their parents and protecting people from family violence.

100. As we have seen, the appellant contends that the *Family Law Act* confers certain fundamental liberties, defences and protections on individuals. One is to be free from liability for contravening a State intervention order unless (as under the *Family Law Act*) the offender has (for example) made no reasonable attempt to comply with the order. Another is to be free from liability for contravening a State intervention order unless (as under the *Family Law Act*) the offender had no reasonable excuse for contravening the order. Yet another is that State enforcement proceedings must be the equivalent of a proceeding for enforcing parenting orders under the *Family Law Act*.

101. The provisions of the *Family Law Act* confer no such liberty, defence or protection on the appellant. When it enacted the relevant provisions of pt VII of the *Family Law Act*, the federal Parliament included concepts which were relevant and appropriate for the administration and enforcement of parenting orders, including (for example) the concepts of 'no reasonable attempt to comply' and 'no reasonable excuse'. It did not thereby specify an irreducible minimum standard of liberties, defences and protections from which State family violence protection legislation could not derogate. In the words of Dixon J in *Wenn*,[37] these concepts were not 'designedly left' in the *Family Law Act*, never to be 'closed up' by such State legislation.

102. The particular purposes of parenting orders under the *Family Law Act* and intervention orders under the *Family Violence Protection Act* have importance in this connection. Because parenting orders are for ensuring the best interests of children in relation to their parents, it is easy to appreciate why (for example) the concepts of 'no reasonable attempt to comply' and 'no reasonable excuse', and a primarily civil enforcement mechanism, were adopted in the *Family Law Act*. Under this regime, contravention of a parenting order is not necessarily a criminal offence and the Family Court has a range of civil enforcement options which reflect the purpose of ensuring the best interests of children in relation to their parents.

103. The *Family Violence Protection Act* is different. The purpose of this Act is to protect people from family violence. With that purpose in mind, it is easy to appreciate why (for example) the concepts of 'no reasonable attempt to comply' and 'no reasonable excuse' were not adopted, at least not expressly,[38] and a criminal enforcement mechanism was adopted. Under this regime, contravention of an intervention order, if proved, and subject to the limited statutory defences, is a criminal offence. On conviction, the court has a range of sentencing options which reflect the protective purposes of the legislation.

104. To repeat, the appellant contends that the *Family Law Act* expresses the single and complete will of the federal Parliament with respect to parenting orders as such orders may apply to family violence. Just as the provisions of the *Family Law Act* specify defences, liberties and defences from which State legislation may not derogate, the enforcement provisions of the *Family Law Act* leave no scope for State enforcement provisions which are more rigorous.

105. These submissions of the appellant find no support in, and in several respects lie in the

teeth of, the provisions of the *Family Law Act*. I have looked in vain for indications in that Act that the federal Parliament intended to express the law of parenting and children so as to exclude State law with respect to family violence. On the contrary, there is a careful scheme in the *Family Law Act*, which is reflected in the provisions of State legislation such as the *Family Violence Protection Act*, for the resolution of inconsistencies between parenting orders and intervention orders. Far from indicating that the federal Parliament had exhaustive coverage in mind, these provisions indicate that the federal and State legislation were intended to operate side by side according to a common plan. Section 68Q of the *Family Law Act*, on which the appellant relied, is part of that scheme and is to be interpreted and applied accordingly.

106. On the appellant's submissions, the enactment of the provisions of pt VII of the *Family Law Act* for the making and civil enforcement of parenting orders has had the indirect consequence of preventing State Parliaments from (validly) enacting legislation for the prosecution of family violence as a crime. I reject those submissions. The enabling provisions of the *Family Violence Protection Act* under which cl 3 of the intervention order was made are not invalid under s109 of the *Constitution* for being inconsistent with the provisions of pt VII of the *Family Law Act*. Further, cl 3 is not invalid under s68Q of the *Family Law Act* (even if applied) because there is no inconsistency between that clause and cl 8(c) of the parenting order or between the federal and State legislative schemes under which the orders were made. The magistrate did not err in law on this ground in convicting and sentencing the appellant for contravening that clause.

GROUNDS 3 AND 4: IMPLIED CONSTITUTIONAL FREEDOM OF POLITICAL COMMUNICATION

107. Grounds 3 and 4 respectively are that the magistrate erred in law in convicting and sentencing the appellant in respect of the charges because the intervention order is invalid or, alternatively, the enabling provisions of the *Family Violence Protection Act* are invalid by reason of the implied constitutional freedom of communication about government or political matters.

108. Ground 3 is directed to the validity of the intervention order. Ground 4 is directed to the validity of the statutory provisions under which the order was made. I accept the appellant's submission that the magistrate would have erred in law in convicting and sentencing the appellant if the order was invalid or the provisions under which it was made were invalid. I also accept that such invalidity may be established on the ground of the implied constitutional freedom of political communication.

109. These grounds of the appeal are directed to cll 3 and 8 of the intervention order. As we have seen, cl 3 prohibits the appellant from publishing 'any material' about the protected person. Clause 8 prohibits the appellant from providing information in relation to the protected person's 'personal[,] family and professional interests' to 'any third person'. Clause 11 contains exceptions to cl 3, including the provision of information to police/law enforcement agencies and the appellant's legal representatives.

110. In the appellant's submission, cll 3 and 8 seriously burden freedom of communication about government and political matters and go well beyond anything which might be required to protect the protected person from family violence. In the appellant's words, the order amounts to 'gagging someone to protect a politician from family violence'.

111. It was common ground in the appeal that the question of law which is raised by these grounds is whether the making of the intervention order or the terms of the State statutory provisions offend the principle expounded in *Lange v Australian Broadcasting Corporation*.[39] As recently explained by French CJ, Gummow, Hayne, Crennan and Bell JJ in *Wotton v Queensland*,[40] the application of this principle requires the following two questions to be answered:

> The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government ...[41]

112. In my view, the first question should be answered in the affirmative as regards both the intervention order and, I will assume, the statutory provisions.

113. As regards the intervention order, the need to consider this issue arises out of the circumstance that the protected person is a candidate for election to federal Parliament in the upcoming federal election. While the terms of the intervention order do not prohibit the appellant from participating in public debate about any policy issues which are of concern (in that election or otherwise), the order does prohibit the appellant from publishing any material about the protected person and providing information to third persons about the protected person's personal, family and professional interests.

114. The appellant believes that information relating to the protected person's personal, family and professional interests which is in the appellant's possession bears upon the protected person's capacity to be a member of Parliament. The appellant wishes publicly to ventilate this information in the context of the election and more generally. Some of this information has already been provided by the appellant to officials of the protected person's political party and the appellant wishes to take the matter further.

115. I think the restrictions in the intervention order do burden freedom of communication about government and political matters. The personal, family and professional suitability of a person for election as a member of federal Parliament is a matter concerning government and politics. Indeed, as Mason CJ, Toohey and Gaudron JJ said in *Theophanous v Herald & Weekly Times Ltd*,[42]

> criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office, particularly when an election is in the offing, is at the very centre of the freedom of political discussion.[43]

116. The appellant is totally prohibited from publishing information about the protected person and from providing to anybody (except the person specified in cl 11) information about the protected person's personal, family and professional suitability interests. Therefore the appellant cannot provide information about or discuss such matters in the public domain in the context of the suitability of the protected person to be elected to the federal Parliament.

117. Contrary to the submissions of the respondent, the consent of the appellant to the making of the intervention order is not determinative of the question whether the terms of the order impose such a burden, although it is relevant to that question. Even taking into account that the appellant did give that consent, I think the order imposes a restricting burden. The principles in *Lange* protect fundamental constitutional principles, not an individual's personal interests; consideration of those fundamental constitutional principles cannot be foreclosed by an individual's consent to the burdens concerned.

118. Also contrary to the respondent's submissions, I do not accept that the burden is insignificant and immaterial because it does not threaten Australia's robust political system. [44] Public discussion of the suitability of a candidate for federal parliamentary office is a central feature of the democratically representative political system which is enshrined in the *Constitution*. [45] Substantially to restrict a person's capacity to publish or provide information about the suitability of a candidate for such office and discuss that matter in the public domain is, in my view, a serious burden upon freedom of communication about governmental or political matters. That is what the intervention order does in the present case.

119. The question whether the enabling provisions of the *Family Violence Protection Act* impose such a burden raises different considerations.

120. As regards the first *Lange* question, the appellant's submissions did not descend into much detail as to what statutory provisions were at issue, a matter which attracted justifiable criticism on the part of the respondent. However, I think it is tolerably clear that the provisions at issue are those which permit a final intervention order to be made by consent, being those to be found in s78, and the provisions relating to the conditions which might be imposed, being those to be found in s81. These provisions must be considered in the context of the Act as a whole, including s74 and the definition of family violence in s5.

121. The provisions of the *Family Violence Protection Act* which are at issue do not directly authorise the imposition of burdens upon freedom of communication about government or political

matters. Therefore, it cannot be concluded that the provisions are burdening in the constitutional sense *per se*. However, the provisions appear indirectly to impose such a burden because they have the capacity to authorise the making of intervention orders which are burdening in operation.

122. A similar situation was confronted by the High Court in *Wotton*.[46] There a question at issue was whether s200(2) of the *Corrective Services Act* 2006 (Qld) imposed a relevant burden. That provision authorised the parole board to grant parole on conditions which the board considered reasonably necessary to ensure the prisoner's good conduct and stop him or her from committing an offence. The board imposed conditions prohibiting a person from participating in political affairs in certain respects. The High Court assumed that the provisions burdened freedom of communication about government or political matters because they permitted conditions of that type to be imposed.[47]

123. I will adopt that same approach here. In my view, it is appropriate to consider the issues in the appeal on the assumption that, as regards the constitutional validity of the provisions, the first *Lange* question may be answered favourably to the appellant.

124. The second *Lange* question is whether the intervention order and the provisions are reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of Australia's constitutionally prescribed system of government. In *Wotton*, Kiefel J drew attention to those decisions of the High Court in which that question has been equated with the concept of proportionality.[48] Judgments in more recent cases applying Lange have employed proportionality analysis as appropriate to the constitutional context.[49]

125. Proportionality requires consideration of both the importance of the purposes of the provisions in issue and whether the scope of the burden goes beyond what could reasonably be justified by reference to those purposes.[50] In that connection, as mentioned by the whole High Court in *Lange*, it is relevant to consider whether there were 'other less drastic means by which the objectives of the law could be achieved'.[51]

126. There is a difference between 'direct' and 'indirect' or 'incidental' burdens[52] which is relevant under the second *Lange* question. As French CJ, Gummow, Hayne, Crennan and Bell JJ held in *Wotton*: 'The burden upon communication is more readily seen to satisfy [that question] if the law is of the former rather than the latter description'.[53] Here the burden is indirect.

127. As regards the intervention order, I think the restrictions imposed do not offend against the requirement that the burden be reasonably appropriate and adapted or proportionate to serve a legitimate end. There is very little evidence before the court about the matters which were before the magistrate when the order was made. Remember it was made by consent. It is clear, however, that the magistrate made the order and decided to include the conditions for the protection of the protected person from family violence, which is an important and legitimate purpose. The appellant's consent to the making of the order limited the matters which the magistrate had to consider. I do not accept the appellant's submission that the magistrate made the order, or convicted and sentenced the appellant for contravening the order, for the improper purpose of protecting the protected person's political career.

128. As the respondent conceded, an order like the one at issue in the present case is very unusual. However, from the scant evidence before this court about the circumstances in which the order was made, it seems to me that the order is a reasonable and proportionate response to the matters which were apparently before the magistrate having regard to the protective issues which the application for the order raised. Among other things, the order protects the protected person from family violence which is constituted by the appellant publishing information about the protected person or providing information to third parties about the protected person's personal, family and professional interests. Publishing and providing such information can plainly amount to family violence and that is no less so because, in the present case, the protected person is a candidate for election to federal Parliament.

129. As the order prohibits the appellant from publishing information about the protected person and providing information about the protected person's personal, family and professional interests to anybody (subject to the exceptions), it effectively restricts the appellant's capacity to

speak publicly about the protected person in all respects, including political respects. That is a significant consideration to take into account. Because the protected person is a candidate for federal parliamentary political office, restrictions of this kind on freedom of communication about government or political matters must be demonstrably justified and demonstrably justified. But it is easy to see how publishing and providing information about such matters could amount to family violence from which the protected person was entitled to seek protection and the magistrate was clearly of that view. That view of the magistrate appears to have been properly based on the evidence of the appellant's behaviour towards the protected person. There is no basis in this appeal for coming to a different conclusion.

130. The magistrate was required to weigh competing considerations in the balance. On the side of the appellant, the protected person was a candidate for election to federal Parliament and the appellant wished to make public comment about the suitability of the protected person to be elected to that office. That was important in terms of the implied constitutional freedom to communicate about government and political matters. But, on the other side, it was equally important to consider the need of the protected person for protection from family violence. The protected person did not lose an entitlement to protection from family violence of the appellant by virtue of that candidature. Both matters had to be balanced when determining whether to make an order and what the scope of the order should be. It has not been shown that the magistrate erred in law or exceeded his jurisdiction in performing this function in the present case.

131. It is significant that the order does not prevent the appellant from publicly discussing, or providing information about, issues of policy. The publication and communication prohibitions in the order are directed at information about the protected person, including that person's personal, family and professional interests. Therefore, in the upcoming federal election, and more generally, the appellant can publicly discuss, or provide information about, a range of matters. The order does not restrict the appellant's freedom of movement or capacity to communicate with, or publish or provide information about, people other than the protected person. The scope of the prohibitions in the order are closely connected with the purpose of protecting the protected person from family violence in the particular factual setting which was before the magistrate. The extent of the restrictions placed upon the appellant do not appear to go beyond what was reasonably necessary to ensure this protection. Nor has it been established that less drastic restrictions would have been adequate.

132. Further, by virtue of the exceptions in cl 11 of the order, the appellant is not totally prohibited from providing information about the protected person or that person's personal, family and professional interests to anybody. Among others, the appellant can provide such information to police and law enforcement agencies, court officials and the appellant's legal representatives. If the appellant provided such information in this way and it gave rise to legitimate concerns, it is to be expected that the issues raised would be investigated. As the respondent conceded, this might be a mediated process and therefore not ideal from the appellant's point of view. Nonetheless, it is a means by which any legitimate concerns about the protected person could be addressed.

133. In *Wainohu v New South Wales*,[54] it was held that a control order did not infringe the implied freedom of political communication because it was possible to seek exceptions to the operation of the order.[55] In the same way, the exceptions in cl 11 of the intervention order operate as a safeguard of the appellant's capacity to engage in communication about government and political matters and of the general freedom to communicate about such matters which is protected by the *Constitution*. The exceptions could be expanded on application, if warranted in the interests of protecting the implied freedom as it applies to the appellant. Of course, in considering any such application, it would be necessary to consider how varying the order would also be compatible with maintaining the protection from family violence which it gives the protected person.

134. For these reasons I have concluded that, in respect of the terms of the intervention order, the second *Lange* question should be answered in the negative. The terms of the intervention order are reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.

135. Turning to the enabling provisions of the *Family Violence Protection Act*, the analysis of the High Court in *Wotton* is directly applicable. The operation of the provisions must therefore

be approached on the basis that, when exercising the discretion to make an order and impose conditions, the magistrate must 'have regard to what [is] constitutionally permissible'.[56] The purpose of providing due protection of persons against family violence is a constitutionally legitimate end. The 'applicable law, including the *Constitution* itself',[57] requires the discretion to make an order to be exercised in a manner which is reasonably appropriate and adapted (and proportionate) to that end. While the definition of 'family violence' (s5) is, as the appellant submitted, 'very broad', the discretion to make an order and impose conditions must be exercised within this constitutional legal framework. Moreover, a number of features of the legislation provide important safeguards and limitations, including the discretion to target any conditions appropriately and vary or revoke an order. The appeal and review systems (including the appeal available under s272 of the *Criminal Procedure Act*) are also relevant in this regard. So understood, the enabling provisions of the *Family Violence Protection Act* are not invalid.

136. For these reasons I have concluded that the second *Lange* question should be answered against the appellant. The intervention order and the enabling provisions of the *Family Violence Protection Act* are not invalid by reason of the implied constitutional freedom of political communication.

VOID FOR PUBLIC POLICY REASONS (GROUND 5)

137. The appellant submitted that cl 8 (and cl 11) of the intervention order are void for being inimical to public policy. As a matter of interpretation, cl 3 must be severed from the order due to its relationship with cll 8 and 11.

138. Despite my doubts to the contrary, I will assume for the sake of argument that the validity of these clauses of the order can be attacked on the public policy grounds relied upon by the appellant. Despite the same doubts, I will assume that the clauses might be wholly invalid on those grounds even though the grounds do not appear to be connected with the manner in which the appellant contravened the order.

139. In the appellant's submission, cl 8 (and cll 3 and 11) are void on this ground because they purport to prohibit statements by the appellant in circumstances where 'there may be legal [and] ethical obligations to make the statements and/or where public policy demands that [the appellant] be able to make the statements'. An example given was that the appellant could not give evidence about the protected person in legal proceedings unless the appellant was a named party to those proceedings, which represented interference in the administration of justice. The appellant submitted that in this and other respects the list of exceptions in cl 11 was inadequate.

140. It is true that giving evidence in any legal proceedings is not an exception in cl 11 while '[l]egal proceedings in which [the appellant] is a named party' is an exception. However, as the order was made for the purpose of protecting the protected person from family violence, it is most unlikely that the order was intended to prevent the appellant from giving such evidence. I agree with the appellant's submission that a clause appearing to have that effect would raise a number of important legal issues. Not the least of those issues would be whether the *Family Violence Protection Act* authorised such an order. But I reject the appellant's submission that cl 8 (and cll 3 and 11) of the order are void for being inimical to public policy because these interpretative issues might arise.

141. The appellant also relied on the apparent prohibition in cll 8 and 11 on the appellant providing information about the protected person to their child. The child is not a person named in the exceptions in cl 11. The appellant submitted that this prohibition was 'fundamentally antithetical' to various legal norms and moral obligations arising out of the responsibilities which the appellant and the protected person have as the child's parents.

142. By reason of the width of the expression 'personal[,] family and professional interests', the operation of the prohibition on the appellant providing information of that kind to the child raises certain practical questions in the domestic setting. However, it is easy to see how family violence might be constituted by one parent giving information to a child about the other parent. I think the application and interpretation of the prohibition would take account of the practical reality that the appellant is a parent of the child and the protected person is the other parent and that the child spends time with the appellant. I note that cl 8(g) of the parenting order is in virtually

the same terms and, no doubt, would be interpreted in that sensible manner. So interpreted, I do not agree with the appellant's submission that the prohibition is inimical to public policy in this respect.

143. The appellant's public policy submissions do not address the operation of the order in relation to the conduct which constituted the contravention for which the appellant was convicted and sentenced. The examples which were given by the appellant address hypothetical situations which have not arisen. The order is not invalid on its face. Whatever may be the case in relation to the operation of the order in hypothetical situations which have not arisen, the order is not invalid in its operation in relation to the contravening conduct.

144. I reject this ground of the appeal. Clause 8 (and cll 3 and 11) of the intervention order are not void on grounds of public policy.

VOID FOR UNCERTAINTY (GROUND 6)

145. The appellant submitted that cl 8 of the intervention order lacked that certainty of meaning which is an indispensable ingredient of a valid order having criminal consequences. It was submitted that the terms of the order made it impossible for a court to delineate between prohibited and non-prohibited conduct and also made it impossible for persons bound by the order to determine whether their conduct would be contravening. As I understood the appellant's submissions, if cl 8 was invalid on this ground, the validity of other clauses of the order would also be affected.

146. In support of this submission, the appellant pointed to a number of respects in which the meaning of cl 8 of the order was uncertain. In particular, the appellant asked rhetorically whether, in referring to the protected person's 'personal[,] family and professional interests', was cl 8 referring to what the protected person was interested in or to interests in another sense? It was implicit in the appellant's submission that this question was incapable of a certain and definite answer.

147. There is high authority for the proposition that some uncertainty in an injunctive order of a court does not prevent a person being found guilty of contempt of the order. After reviewing the authorities, in *Universal Music Association Pty Ltd v Sharman Networks Ltd*,[58] Branson J (Lindgren and Finkelstein JJ agreeing) held:

> the authorities discussed ... reveal that an injunction is not rendered invalid, or incapable of founding a charge of contempt, merely because it leaves a respondent with room to wonder whether future conduct falls within it. At least where the true construction of the order is one which ought fairly to have been in the contemplation of the person to whom the order was directed ..., the Court which entertains the charge of contempt will be required to determine that construction. [59]

148. The respondent relied on this authority as an absolute answer to the appellant's submission under this ground of appeal. Despite my doubts about the viability of this ground, I am not comfortable with accepting the respondent's submission. An intervention order under the *Family Violence Protection Act* is different to an injunction; it is criminally enforceable and not by way of punishment for contempt. I will assume that this ground of appeal is open to the appellant and try to determine it on the merits.

149. My doubts about the viability of this ground of appeal are that the appellant does not point to any respect in which cl 8 is uncertain in meaning as regards the contravening conduct which (by the appellant's own admission) was committed. The prohibition in cl 8 clearly covers that conduct. Rather, the appellant points to hypothetical examples as reasons why the clause should be found to be wholly void for general uncertainty. I do not think a clause of even a criminally enforceable order is incapable of being enforced in respect of conduct to which it clearly applies because there is uncertainty about its application to other conduct which is not in question. However, in case that conclusion is incorrect, I will make the assumption to which I have referred and address the appellant's submissions on their merits.

150. The requirements for the drafting of injunctions and orders having injunctive effect are well established. As Lockhart J observed in *ICI Australia Operations Pty Limited v Trade Practices Commission*:[60]

> Plainly injunctions should be granted in clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the scope or boundaries of the injunction. Contempt proceedings are not appropriate for the determination of questions of construction of the injunction or the aptness of the language in which they are framed.[61]

These observations were approved by Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ in *Hogan v Hinch*.[62] There is good reason to think that intervention orders under the *Family Violence Protection Act* should be drafted according to the same principles.

151. To the extent that the appellant's submissions require me to consider the meaning of the intervention order, in my view cl 8 and its related clauses do not offend against those principles. Further, cl 8 and those clauses are not invalid for legal uncertainty on their face. Taking into account the protective purposes of the order and reading it as a whole, I think the terms of cl 8 and its related clauses are capable of being given a certain and definite meaning. Clause 8 and those clauses are not legally uncertain in that understood sense and, in particular, are not uncertain in their application to the appellant's contravening conduct.

152. This ground of appeal is also rejected. The relevant clauses of the intervention order are not void for uncertainty.

RESTRICTING PUBLICATION OF PROCEEDING AND JUDGMENT

153. The respondent and the protected person sought orders for complete suppression of the proceeding, including the judgment. Alternatively, they sought orders for partial suppression to protect the identity of the protected person and the child. The appellant supported the submissions of the protected person. The respondent and the protected person relied on the specific provisions of s166 of the *Family Violence Protection Act* and, alternatively, the general provisions of ss18 and 19 of the *Supreme Court Act* 1986 (Vic). Reference was also made to s121 of the *Family Law Act*.

154. Here is s166(2) of the *Family Violence Protection Act*:

> (2) A person must not publish, or cause to be published, a report of the proceeding or about the order that contains—
> (a) if a party to or a witness in the proceeding, or a person the subject of the order, is a child—
> (i) the locality or any particulars likely to lead to the identification of the particular venue of the court; or
> (ii) any particulars likely to lead to the identification of the child or any other person involved in the proceeding, either as a party to the proceeding or as a witness in the proceeding, or the subject of the order; and
> (b) if paragraph (a) does not apply—any particulars likely to lead to the identification of any person involved in the proceeding or the subject of the order, unless the court orders under section 169 that the particulars may be published; or
> (c) a picture of or including a person concerned in a proceeding for a family violence intervention order, unless the court orders under section 169 that the picture may be published.
> Penalty: In the case of a natural person, 100 penalty units or 2 years imprisonment or both;
> In the case of a body corporate—500 penalty units.

155. These provisions restrict but do not absolutely prohibit the publication of reports of proceedings or about orders. They are directed at protecting the identity of parties, witnesses, children and other persons involved in a proceeding under the *Family Violence Protection Act*. I have already referred to the purposes of the Act. As the appellant submitted, it was intended to create a regime where people needing protection from family violence could feel empowered to seek that protection with minimal procedural formality and complexity and where family violence was defined to include conduct falling outside the traditional legal conceptions of violence but still devastating in its impact on victims and their families. An important purpose of the Act was ensuring that a victim of family violence would not fear being traumatised by publicity which might reveal their identity. It was also intended that other persons who may need to be involved in proceedings would not experience the same fear. The non-publication provisions try to remove or minimise this fear so that people needing protection will not be deterred from going to the police or the court and other persons will not be discouraged from participating in a proceeding.

156. The statutory policy of protecting the confidentiality of the identity of persons involved in proceedings under the *Family Violence Protection Act* is an important consideration when this court is determining whether to make a non-publication order in the exercise of its powers under

the *Supreme Court Act* in a subsequent proceeding by way of appeal under the *Criminal Procedure Act*. But the policy does not necessarily extend to complete suppression of the appeal proceeding or judgment or support the exercise of this court's powers to that extreme extent.

157. Section 166(2) refers to particulars likely to lead to the identification of person involved. Section 168 contains a detailed but non-exhaustive list of those particulars. The list includes:

> (a) the person's name, title, pseudonym or alias;
>
> (b) the address of any premises at which the person lives or works, or the locality in which the premises are situated;
> (c) the address of a school attended by the person or the locality in which the school is situated;
> (d) the physical description or the style of dress of the person;
> (e) any employment or occupation engaged in, profession practised or calling pursued by, the person or any official or honorary position held by the person;
> (f) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;
> (g) the recreational interests or the political, philosophical or religious beliefs or interests of the person; ...

These particulars provide useful assistance when determining how a judgment of this court might be anonymised or a non-publication order may be framed so as to avoid identifying persons involved in proceedings under the Act.

158. Section 169 empowers the court to make an order allowing the publication of particulars or a picture only if 'it is in the public interest' (par (a)), 'it is just ... in the circumstances' (par (b)) and, for a picture, it does not include a child and would not be likely to allow the identification of a child (par (c)).

159. But, according to s166(1), s166 only applies to:

> (a) a proceeding under this Act, other than in the Children's Court; or
> (b) an order made under this Act, other than by the Children's Court.

160. The present appeal has been brought pursuant to s272 of the *Criminal Procedure Act*. Section 272(1) provides:

> A party to a criminal proceeding ... in the Magistrates' Court may appeal to the Supreme Court on a question of law, from a final order of the Magistrates' Court in that proceeding.

161. It is a nice question whether the appeal is a proceeding 'under' the *Family Violence Protection Act* for the purposes of s166(1)(a) of that Act. As the subject matter of the appeal is the question of law arising out of the final order in the criminal proceeding which was conducted under the *Family Violence Protection Act*,[63] it is arguable that an appeal is made 'under' that Act for the purposes of s166(1). It would defeat the intended purpose of the publication restrictions if they were not to apply in such an appeal.

162. Admitting the force of that argument, I doubt that the appeal is a proceeding of that kind. The subject matter of the appeal certainly represents a point of connection between the proceeding under the *Family Violence Protection Act* and the appeal. But s166(1)(a) depends not on such a connection but on the appeal being a proceeding 'under' that Act. In this context, 'under' would appear to refer to the provisions enabling or authorising the proceeding in question.[64] An appeal proceeding is enabled or authorised by s272(1) of the *Criminal Procedure Act*, not by any provision of the *Family Violence Protection Act*.

163. In the end, it is not necessary finally to decide the point because I think the general powers of the court under ss18 and 19 of the *Supreme Court Act* should be exercised in a manner which takes account of the policy of s166 of the *Family Violence Protection Act*, and the analogous provisions of the *Family Law Act*.

164. Section 121(1) of the *Family Law Act* provides:

> A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:

> (a) a party to the proceedings;
> (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
> (c) a witness in the proceedings;
> is guilty of an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

Section 121(3) contains a list of identifying particulars which a person must not publish if they are 'sufficient to identify th[e] person to a member of the public, or to a member of the section of the public to which the account is disseminated'. Section 121(9) contains a list of exceptions to the application of the restrictions in s121(1), none of which are directly relevant.

165. These provisions of the *Family Law Act* contain similar publication restrictions (but not complete prohibition), and reflect similar privacy concerns, to the provisions of s166 of the *Family Violence Protection Act*. Because the proceeding in this court has dealt, and this judgment does deal, with the proceeding in the Family Court between the appellant and the protected person with respect to the child, unrestricted publication of the proceeding and the judgment would lead to the identification of the parties to the proceeding in the Family Court, and the child, contrary to the provisions and policy of s121 of the *Family Law Act*. This too is an important consideration when determining whether to make non-publication orders under ss18 and 19 of the *Supreme Court Act*. However, just as s166 of the *Family Violence Protection Act* does not necessarily support complete suppression of the proceeding and judgment, neither does s121 of the *Family Law Act* do so.

166. That brings me to whether and what non-publication orders should be made under ss18 and 19 of the *Supreme Court Act* in this proceeding.

167. Section 18(1) allows the court to make orders closing proceedings to the public and restricting the publication of reports of proceedings. Under this provision, the court may —

> (a) order that the whole or any part of a proceeding be heard in closed court; or
> (b) order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding; or
> (c) make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding.

By s18(2), the power to make such orders is available in 'any proceeding, whether civil or criminal'. The present appeal is a proceeding to which s18(1) applies.

168. Orders under s18(1) may only be made 'in the circumstances mentioned in section 19'. It is provided in s19 that the court may only make orders under s18 'if in its opinion it is necessary to do so in order not to — ... (b) prejudice the administration of justice ...' Other circumstances are specified but they are not relevant to the present appeal.

169. The primary submission of the parties to the appeal and the protected person was that, in the exercise of these powers, the court should make orders for complete suppression of the proceeding and the judgment. Without denying the capacity of the court so to do, it would be extraordinary to make such orders in the circumstances.

170. Consideration of the question should begin with recognition of the principle that it is constitutionally necessary for a Supreme Court of a State to possess certain defining characteristics. In Assistant *Commissioner Michael James Condon v Pompano Pty Ltd*,[65] French CJ said that those defining characteristics of courts include:[66]

- the reality and appearance of decisional independence and impartiality;[67]
- the application of procedural fairness;
- adherence as a general rule to the open court principle;[68]
- the provision of reasons for the courts' decisions.[69]

171. As can be seen, one of the defining characteristics is adherence to the open court principle as a general rule. After referring to that general rule, French CJ referred to those circumstances, which I will discuss below, in which that rule might be displaced.[70] However, the starting point for the exercise of the powers in ss18 and 19 of the *Supreme Court Act* must be that a constitutionally defining characteristic of this court is adherence to the open court principle as a general rule.

172. As can also be seen, another defining characteristic of the court is the provision of reasons for decision, especially of final decisions and important interlocutory rulings.[71] A Supreme Court of a State must ordinarily give a statement in public of its reasons for making final decisions and important interlocutory rulings because it promotes good decision-making and comprehension and acceptance of the judgment, public confidence in the legal system generally and the judiciary in particular, the institutional accountability of judges and the court and the administration and development of the law.[72]

173. Parties have an important private interest in obtaining a statement of the reasons for a judgment or ruling. Without losing sight of that interest, it is important to appreciate that the rationale for requiring public reasons to be given is much wider. Provision of confidential reasons for decision might satisfy the private interest of the parties in obtaining those reasons but it does not satisfy in full the wider rationale for the provision of reasons which are publicly available.

174. There is a connection between making a public statement of reasons for decision and the open court principle, as explained by French CJ and Kiefel J in *Wainohu*:

> The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion.[73]

175. Although the conduct of proceedings in open court and making a public statement of reasons for decision have this fundamental constitutional importance, it is recognised that in some cases it may be necessary in the interests of justice to adopt a different course. Sections 18 and 19 of the *Supreme Court Act* confer powers on the court to adopt that course and I turn now to the principles governing the exercise of those powers.

176. Drawing on the discussion of Nettle J in *BK v ADB*,[74] J Forrest J in *ABC v D1; Ex parte The Herald & Weekly Times Ltd*[75] and Davies J in *Lew v Priester [No 2]*,[76] I would summarise the principles as follows.

177. The principle that legal proceedings are usually conducted and determined in open public is fundamental to the administration of justice and the maintenance of public confidence in the judiciary and the legal system. The rationale for the principle was explained by Gibbs J in *Russell v Russell*:[77]

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view'.[78] This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'.[79] To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.[80]

178. Non-publication orders under ss18 and 19 of the *Supreme Court Act* operate as an exception to this principle and therefore should only be made in exceptional circumstances.[81]

179. As a corollary of the open justice principle, in the absence of a non-publication order anybody (including media organisations) without needing to seek permission may publish a fair and accurate report of a proceeding (including the names of the parties and witnesses), the evidence (including documentary evidence and exhibits) and the judgment.[82]

180. Non-publication orders may only be made if 'necessary' by reference to the matters set out in s19, including the need to avoid prejudicing the administration of justice (s19(b)), which reflects the position at common law.[83]

181. 'Necessary' is a 'strong'[84] word, suggesting that 'Parliament was not dealing with trivialities'.[85] An order is not 'necessary' simply because a party wishes to avoid publicity or media scrutiny

or to keep matters private and confidential.[86] The making of an order is not justified simply because it is convenient, reasonable or sensible, or serves some generalised notion of the public interest.[87] The making of an order is not justified simply to save a party or a witness from public embarrassment.[88] The requirement is that the order must be 'necessary in order to serve the ends of justice',[89] 'necessary to secure the proper administration of justice in proceedings'[90] or necessary to avoid a course which would 'destroy the attainment of justice in the particular case'.[91] As McHugh JA explained in *John Fairfax & Sons v Police Tribunal (NSW)*:[92]

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. [93]

A real risk of serious interference with the administration of justice must be demonstrated.[94] A mere belief that the order is necessary is not sufficient.[95]

182. Making a non-publication order may be necessary in cases where, in the absence of an order, parties would be deterred from bringing proceedings for the vindication of their legal rights,[96] such as cases involving victims of blackmail,[97] negligence[98] or sexual assault[99] where the person would suffer public ridicule or acute personal embarrassment if his or her identity were to be disclosed in legal proceedings. An order may be made in proceedings involving people with a mental illness, wards of the state or children in the *parens patriae* jurisdiction[100] and in proceedings involving trade secrets.[101] It may be necessary to make an order for the avoidance of prejudice to the administration of justice where publicity would destroy or imperil the subject matter of the proceeding.[102] The categories of proceeding in which an order may be made are not closed.[103]

183. In determining whether it is necessary to make an order to avoid prejudicing the administration of justice, it is permissible to take into account a particular 'public interest for whose protection Parliament has made some statutory derogation from the rule'.[104] In my view, that consideration is important in the present case in relation to the relevance of the policy of s166 of the *Family Violence Protection Act* and s121 of the *Family Law Act* to the exercise of the court powers in ss18 and 19 of the *Supreme Court Act*.

184. It follows from general principles that, before determining whether non-publication orders should be made, there must be cogent evidence before the court reasonably justifying the conclusion that it is necessary to make such orders; the onus is on the applicant for the orders to demonstrate that they should be made.

185. Any orders of the court under ss18 and 19 of the *Supreme Court Act* should be case-sensitive. Without intending to be exhaustive, the proceeding may be conducted *in camera* (closed to the public) in whole or in part, the names of some or all of the parties or witnesses may be suppressed or the use of pseudonyms may be ordered, publication of the evidence (including the oral and documentary evidence and the exhibits) and any transcript may be prohibited in whole or in part[105] and the judgment may be published or suppressed wholly or in part, with or without the use of pseudonyms or other appropriate non-identifying (for example, gender neutral) terms. Any non-publication order must be justified by reference to the considerations specified in s19 and that course which is most compatible, and involves least interference, with the open justice principle should be adopted.

186. Applying these principles to the present case, orders for partial but not complete suppression should be made.

187. I accept that it is necessary to avoid prejudicing the administration of justice for orders to be made prohibiting the publication of any account of the proceeding which identifies the appellant, the respondent, the protected person or the child and which contains any particulars likely to lead to the identification of those persons. That consideration does not require the suppression of a judgment in which the parties are identified by pseudonyms and which is expressed in anonymous

and gender neutral terms, as is the case with this judgment. The pseudonyms will be 'AA' (the appellant) and 'BB' (the respondent).

188. It is necessary to adopt this course because this is an appeal from a proceeding under the *Family Violence Protection Act* in which the persons involved had statutory privacy protection. In my view, that protection which the persons involved had in the substantive proceeding under the *Family Violence Protection Act* should also be provided in this appeal proceeding under the *Criminal Procedure Act*. It would defeat the purpose of the statutory privacy protections which were applicable in the proceeding in the Magistrates' Court if those protections were not to be applicable in the appeal proceeding in this court.

189. The rationale for the publication restrictions in the substantive proceeding in the Magistrates' Court apply equally in an appeal proceeding in this court. People needing protection from family violence should not fear the loss of their privacy in an appeal. It would deter people from seeking that protection if privacy protection was not to be provided in a subsequent appeal proceeding. The same consideration applies to the other persons involved in a substantive proceeding in the Magistrates' Court, such as respondents, witnesses and children. They should not be discouraged from participation in such proceedings by a fear of being identified in an appeal to this court.

190. The family privacy protections in the *Family Law Act* should also be taken into account. The evidence in this proceeding and the analysis in the judgment frequently refer to the proceeding between the appellant and the protected person in the Family Court in relation to their child. That protection which they had under the *Family Law Act* in the substantive proceeding in the Family Court should also be provided in the appeal proceeding in this court. Due to the relationship between the Magistrates' Court and the Family Court in the discharge of their overlapping functions, it would not be unusual, as in the present case, for issues dealt with in a proceeding in the Family Court to later arise in a proceeding in the Magistrates' Court and later again in an appeal proceeding in this court. A common approach to protecting privacy is necessary to avoid prejudicing the administration of justice.

191. This case falls into categories in which it is acknowledged that non-publication orders might be made. Unless orders were to be made, people – especially vulnerable women and children – would be deterred from seeking legal protection which they need and to which they are entitled. Others would be discouraged from becoming involved in proceedings. Unless orders were to be made, the subject matter of the proceeding would be destroyed. The subject matter of a family violence proceeding is the protection of the safety and wellbeing of the protected person, children and other family members. It would be destroyed or imperilled by loss of privacy in an appeal. Unless orders were to be made, the privacy protections in the *Family Violence Protection Act* and the *Family Law Act* would be undermined or lost. It would prejudice the administration of justice in all of these respects for orders not to be made.

192. This court has an independent discretion to exercise under ss18 and 19 of the *Supreme Court Act*. When exercising this discretion, the court must consider whether making an order under s18 would be justified (in this case) under s19(b). In forming the view in this case that the exercise of the discretion is necessary in order to avoid prejudicing the administration of justice, I take into the account the privacy protections in the *Family Violence Protection Act* and the *Family Law Act*. I am not suggesting that consideration of these protections leads me automatically to conclude that orders should be made under the *Supreme Court Act*. In a particular case there may be reasons why orders should not be made. But nothing said in the submissions in the present case suggests that the privacy protections under the *Family Violence Protection Act* and the *Family Law Act* in the Magistrates' Court and the Family Court respectively should not be equally provided in the appeal proceeding in this court.

193. I reject the application for complete suppression of the proceeding and the judgment because it goes beyond what is necessary for the avoidance of prejudice to the administration of justice. Adequate protection of the privacy of the appellant, the protected person and the child is provided by prohibiting the publication of their identities or of identifying particulars. Complete suppression would involve a high degree of departure from the open court principle in circumstances where this was not necessary to avoid prejudicing the administration of justice. An order for complete suppression would not be the most compatible, and would not involve the least interference, with the principle of open justice.

194. In the interests of protecting the identities of the protected person and the child, the identities of the appellant and the respondent should not be revealed and they should be known by pseudonyms. The appellant is not really seeking privacy protection, but on the principles I have discussed should have it. It would undermine the operation of the non-publication order with respect to the protected person and the child if the appellant or the respondent were to be identified or identifiable. Also in the interests of achieving adequate privacy protection for the protected person and the child, I have expressed the judgment in gender neutral terms. Place names, dates and other identifying particulars are not referred to in the judgment. The status of the protected person as an endorsed candidate for election to federal Parliament in the upcoming election is referred to as this is a material fact. But that fact, taken alone or with the other matters considered in the judgment, would not lead to the identification of the protected person, the respondent or the child.

CONCLUSION

195. The appellant was convicted and sentenced in the Magistrates' Court of Victoria to imprisonment for 19 days for contravening an intervention order under the *Family Violence Protection Act* 2008 (Vic). The appellant pleaded guilty to the 15 charges concerned.

196. The intervention order prohibited the appellant from publishing material about the protected person (who is the appellant's former spouse) or providing information to third parties about the protected person's personal, family or professional interests. The order also prohibited the appellant from contacting, or communicating with, the protected person except through a lawyer to arrange mediation or discuss family law matters (including matters concerning their child). The appellant was charged with contravening the order by publishing information about the protected person and contacting that person directly.

197. In this appeal, the appellant contended that, despite the pleas of guilty to the charges, the magistrate committed errors of law and jurisdiction in convicting and sentencing the appellant. It was contended that the intervention order was invalid for being inconsistent with a parenting order made in respect of the appellant, the protected person and their child in the Family Court of Australia under the *Family Law Act* 1975 (Cth). It was alternatively contended that the provisions of the *Family Violence Protection Act* under which the intervention order was made were invalid under s109 of the *Constitution* for being inconsistent with the provisions of the *Family Law Act*. It was also contended that the intervention order and those provisions were invalid by reason of the implied constitutional freedom of communication about government and political matters. I have rejected these contentions.

198. The intervention order under the Victorian *Family Violence Protection Act* which the appellant contravened is not invalid for being inconsistent with the parenting order under the federal *Family Law Act*. The State intervention order and the federal parenting order sit side by side and harmoniously deal, on the one hand, with the protection of the protected person from family violence of the appellant and, on the other hand, with the relationship between the appellant and the protected person in relation to their child. Further, the *Family Violence Protection Act* and the *Family Law Act* have been carefully designed to operate compatibly together according to a common plan. There is no inconsistency between the State and federal Acts and the provisions of the State Act are not invalid under s109 of the *Constitution*.

199. Applying the tests stated by the High Court of Australia in cases to which I refer in the judgment, the intervention order and the provisions of the *Family Violence Protection Act* under which it was made are not invalid by reason of the implied constitutional freedom of communication about governmental and political matters.

200. Contrary to the submissions of the respondent, I have accepted that the intervention order limits the appellant's capacity to communicate about government and political matters. The protected person is a candidate for election to the Australian Parliament in the upcoming federal election. Because the intervention orders prohibit the appellant from publishing any material about the protected person and from providing information about that person's personal, family or professional interests to third persons, the order prevents the appellant from commenting on the suitability of the protected person for election to federal Parliament. Public discussion of the suitability of a candidate for election to federal Parliament is a central feature of the democratically representative political system which is enshrined in the *Constitution*.

201. However, the intervention order was made for the legitimate purpose of protecting the protected person from family violence of the appellant. In limiting the appellant's capacity to publish material about the protected person and provide information about that person's personal, family and professional interests to third parties, the order is reasonably appropriate and adapted, and proportionate, to the achievement of that purpose. In making the order, it was necessary for the magistrate to balance, on the one hand, the appellant's right to free speech in the context of the upcoming federal election as protected by the implied constitutional freedom of communication about government or political matters and, on the other hand, the protected person's right to be protected from family violence of the appellant, which the protected person did not lose by reason of being a parliamentary candidate in that election. The magistrate properly carried out that balancing judgement and the appellant has not shown that his Honour erred in law in doing so. I note that, in making the order, the magistrate did not inhibit the capacity of the appellant publicly to discuss issues of policy or political matters not concerning the protected person or to provide information about such issues or matters to third parties.

202. I have also rejected the appellant's contention that the intervention order was invalid for being inimical to public policy and for uncertainty.

203. In conclusion, the magistrate did not err in law or jurisdiction in convicting and sentencing the appellant for contravening the intervention order. The appellant's appeal will be dismissed.

204. I have rejected the application of the respondent and the protected person, supported by the appellant, for complete suppression of the proceeding and this judgment as that would be contrary to the principle of open justice. However, it is appropriate to protect the identities of the appellant, the protected person and their child, as was the case under the *Family Violence Protection Act* in the substantive proceeding in the Magistrates' Court and under the *Family Law Act* in the related proceeding in the Family Court. Therefore this judgment has been produced in gender neutral and anonymous terms and the appellant and the respondent have been given pseudonyms. Under s18 of the *Supreme Court Act* 1986 (Vic), and consistently with s166 of the *Family Violence Protection Act* and s121 of the *Family Law Act*, I have made orders prohibiting the publication of any account of the proceeding, or any part of the proceeding, that identifies the appellant, the respondent, the protected person or the child or of any particulars likely to lead to the identification of those persons.

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[1] An intervention order under the *Family Violence Protection Act* is a 'family violence order' for the purposes of this provision: *Family Law Act* 1975 (Cth) s4(1) (definition of 'family violence order'); *Family Law Regulations* 1984 (Cth) reg 12BB, sch 8, item 3.
[2] [1943] HCA 41; (1943) 68 CLR 151; [1944] ALR 35.
[3] [2010] HCA 30; (2010) 241 CLR 491; (2010) 270 ALR 1; (2010) 84 ALJR 635 ('*Dickson*').
[4] [1989] HCA 59; (1989) 168 CLR 289; (1989) 89 ALR 83; (1989) 64 ALJR 41; (1989) 10 MVR 1 ('*McWaters*').
[5] [1937] HCA 82; (1937) 58 CLR 618, 630; [1938] ALR 97.
[6] [1999] HCA 12; (1999) 197 CLR 61, 76-77 [28]; (1999) 161 ALR 489; (1999) 73 ALJR 565 ('*Telstra*').
[7] [2010] HCA 30; (2010) 241 CLR 491, 502 [13]; (2010) 270 ALR 1; (2010) 84 ALJR 635.
[8] [2011] HCA 33; (2011) 244 CLR 508, 524 [39]; (2011) 280 ALR 206; (2011) 85 ALJR 945; (2011) 209 IR 437 ('*Jemena*').
[9] [1937] HCA 82; (1937) 58 CLR 618, 630; [1938] ALR 97.
[10] *Telstra* [1999] HCA 12; (1999) 197 CLR 61, 76-77 [28]; (1999) 161 ALR 489; (1999) 73 ALJR 565.
[11] [2011] HCA 33; (2011) 244 CLR 508, 525 [41]; (2011) 280 ALR 206; (2011) 85 ALJR 945; (2011) 209 IR 437.
[12] See, eg, *Collins v Charles Marshall Pty Ltd* [1955] HCA 44; (1955) 92 CLR 529, 553; [1955] ALR 715.
[13] *Jemena* [2011] HCA 33; (2011) 244 CLR 508, 525 [42]; (2011) 280 ALR 206; (2011) 85 ALJR 945; (2011) 209 IR 437.
[14] [2011] HCA 34; (2011) 245 CLR 1; (2011) 280 ALR 221; (2011) 85 ALJR 957; (2011) 209 A Crim R 1 ('*Momcilovic*').
[15] [1910] HCA 8; (1910) 10 CLR 266, 272.
[16] *Momcilovic* [2011] HCA 34; (2011) 245 CLR 1, 110 [240]; (2011) 280 ALR 221; (2011) 85 ALJR 957; (2011) 209 A Crim R 1.
[17] Ibid 111 [243].
[18] *Dickson* [2010] HCA 30; (2010) 241 CLR 491, 504 [22]; (2010) 270 ALR 1; (2010) 84 ALJR 635.
[19] Ibid 505 [25].
[20] [1948] HCA 13; (1948) 77 CLR 84, 120; [1948] 2 ALR 293 ('*Wenn*').
[21] [2010] HCA 30; (2010) 241 CLR 491, 504 [22]; (2010) 270 ALR 1; (2010) 84 ALJR 635.
[22] *Australian Broadcasting Commission v Industrial Court (SA)* [1977] HCA 51; (1977) 138 CLR 399, 406 (Stephen J).

[23] *Miller v Miller* [1978] HCA 44; (1978) 141 CLR 269, 275; (1978) 22 ALR 119; [1978] FLC 90-506; (1978) 53 ALJR 59; 4 Fam LR 474 (Barwick CJ).
[24] *Blackley v Devondale Cream (Vic) Pty Ltd* [1968] HCA 2; (1968) 117 CLR 253, 258; [1968] ALR 307; (1967-1968) 41 ALJR 299 (Barwick CJ).
[25] *Jemena* [2011] HCA 33; (2011) 244 CLR 508, 524 [40]; (2011) 280 ALR 206; (2011) 85 ALJR 945; (2011) 209 IR 437.
[26] [1930] HCA 12; (1930) 43 CLR 472; 36 ALR 377 ('*McLean*').
[27] Ibid 483.
[28] [1932] HCA 40; (1932) 48 CLR 128.
[29] Ibid 136. This kind of inconsistency has been called 'covering the field', a description which has attracted some criticism: see *Momcilovic* [2011] HCA 34; (2011) 245 CLR 1, 118 [264]; (2011) 280 ALR 221; (2011) 85 ALJR 957; (2011) 209 A Crim R 1 (Gummow J).
[30] [1989] HCA 59; (1989) 168 CLR 289; (1989) 89 ALR 83; (1989) 64 ALJR 41; (1989) 10 MVR 1.
[31] Ibid 298 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[32] [2011] HCA 34; (2011) 245 CLR 1, 111 [242]; (2011) 280 ALR 221; (2011) 85 ALJR 957; (2011) 209 A Crim R 1.
[33] Ibid 115-16 [258]-[261].
[34] 'Economic abuse' is defined in s6 to mean:
For the purposes of this Act, *economic abuse* is behaviour by a person (the *first person*) that is coercive, deceptive or unreasonably controls another person (the *second person*), without the second person's consent—
(a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
(b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.
[35] 'Emotional or psychological abuse' is defined in s 7 to mean:
For the purposes of this Act, *emotional or psychological abuse* means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.
[36] Section 91(1) provides that, if the court decides to make a family violence protection order and the protected person or the respondent is the parent of the child, then the court must decide whether or not it will or may jeopardise the safety of the protected person or child for the child to live with, spend time with or communicate with the respondent. By s93, if the court is of the view that the circumstances do give rise to that jeopardy, it must include a condition in the family violence intervention order prohibiting the respondent from living with, spending time with or communicating with the child.
[37] [1948] HCA 13; (1948) 77 CLR 84, 120; [1948] 2 ALR 293.
[38] The question whether an accused has reasonably attempted to comply with an order or has a reasonable excuse may become subsumed in the question whether he or she is criminally liable for contravening the order.
[39] [1997] HCA 25; (1997) 189 CLR 520; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2 ('*Lange*').
[40] [2012] HCA 2; (2012) 246 CLR 1; (2012) 285 ALR 1; (2012) 86 ALJR 246 ('*Wotton*').
[41] Ibid 15 [25].
[42] [1994] HCA 46; (1994) 182 CLR 104, 123; (1994) 124 ALR 1; (1994) 68 ALJR 713; [1994] Aust Torts Reports 81-297; 34 ALD 1 ('*Theophanous*').
[43] See *Nationwide News Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 72; (1992) 108 ALR 681; 66 ALJR 652; (1992) 44 IR 282 (Deane and Toohey JJ).
[44] Cf *Wotton* (2012) 246 CLR 1, 23-4 [54] (Heydon J).
[45] *Theophanous* [1994] HCA 46; (1994) 182 CLR 104, 123; (1994) 124 ALR 1; (1994) 68 ALJR 713; [1994] Aust Torts Reports 81-297; 34 ALD 1 (Mason CJ, Toohey and Gaudron JJ).
[46] [2012] HCA 2; (2012) 246 CLR 1; (2012) 285 ALR 1; (2012) 86 ALJR 246.
[47] Ibid 15 [28]-[29].
[48] Ibid 30 [77], 32-4 [83]-[91].
[49] See *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) [202]-[208] (Crennan and Kiefel JJ); [224] (Bell J); cf [68] (French J: 'high threshold proportionality test'); [141] (Hayne J: 'reasonably appropriate and adapted'); *Monis v The Queen; Droudis v The Queen* [2013] HCA 4 (27 February 2013) [345]-[353] (Crennan, Kiefel and Bell JJ); see also [144]-[145] (Hayne J) ('*Monis* and *Droudis*').
[50] See *Monis* and *Droudis* [2013] HCA 4 (27 February 2013) [344]-[353] and the authorities cited therein (Crennan, Kiefel and Bell JJ).
[51] *Lange* [1997] HCA 25; (1997) 189 CLR 520, 568; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (in mentioning this consideration, their Honours referred *to Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106; 108 ALR 577; (1992) 66 ALJR 695); see also *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, 50-51 ([92]-[96]; (2004) 209 ALR 182; (2004) 78 ALJR 1166 (McHugh J); *Wotton* [2012] HCA 2; (2012) 246 CLR 1, 31-2 [81]-[83]; (2012) 285 ALR 1; (2012) 86 ALJR 246 (Kiefel J)) and *Monis* and *Droudis* [2013] HCA 4 (27 February 2013) [347] and the authorities cited therein (Crennan, Kiefel and Bell JJ).
[52] *Hogan* v *Hinch* [2011] HCA 4; (2011) 243 CLR 506, 555-56 [95]-[96]; (2011) 275 ALR 408; (2011) 85 ALJR 398 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Hinch*'); *Wotton* [2012] HCA 2; (2012) 246 CLR

1, 15-16 [28]-[30]; (2012) 285 ALR 1; (2012) 86 ALJR 246 (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Monis* and *Droudis* [2013] HCA 4 (27 February 2013) [64] (French CJ), [342] (Crennan, Kiefel and Bell JJ).
[53] *Wotton* [2012] HCA 2; (2012) 246 CLR 1, 16 [30]; (2012) 285 ALR 1; (2012) 86 ALJR 246 (French CJ, Gummow, Hayne, Crennan and Bell JJ); see also
[54] [2011] HCA 24; (2011) 243 CLR 181; (2011) 278 ALR 1; (2011) 85 ALJR 746; (2011) 210 A Crim R 45 ('*Wainohu*').
[55] Ibid 231 [113] (Gummow, Hayne, Crennan and Bell JJ),
[56] (2012) 246 CLR 1, 16 [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ); see also *Wainohu* [2011] HCA 24; (2011) 243 CLR 181, 231 [113]; (2011) 278 ALR 1; (2011) 85 ALJR 746; (2011) 210 A Crim R 45 (Gummow, Hayne, Crennan and Bell JJ).
[57] *Wotton* [2012] HCA 2; (2012) 246 CLR 1, 9 [9]; (2012) 285 ALR 1; (2012) 86 ALJR 246.
[58] [2006] FCAFC 41; (2006) 150 FCR 110.
[59] Ibid 119-20 [38].
[60] [1992] FCA 474; (1992) 38 FCR 248; (1992) 110 ALR 47; [1992] ATPR 41-185.
[61] Ibid 259.
[62] [2011] HCA 4; (2011) 243 CLR 506, 546 [58]; (2011) 275 ALR 408; (2011) 85 ALJR 398.
[63] *Osland v Secretary, Department of Justice [No 2]* [2010] HCA 24; (2010) 241 CLR 320, 333 [21]; (2010) 267 ALR 231; (2010) 84 ALJR 528; (2010) 116 ALD 1 (French CJ, Gummow and Bell JJ).
[64] Cf *Griffith University v Tang* [2005] HCA 7; (2005) 221 CLR 99 130 [99]; (2005) 213 ALR 724; (2005) 79 ALJR 627; (2005) 82 ALD 289] (Gummow, Callinan and Heydon JJ).
[65] [2013] HCA 7 (14 March 2013) [67] ('*Condon*').
[66] *Wainohu* [2011] HCA 24; (2011) 243 CLR 181, 208-209; (2011) 278 ALR 1; (2011) 85 ALJR 746; (2011) 210 A Crim R 45 [44] (French CJ and Kiefel J) and authorities there cited.
[67] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, 343 [3]; (2000) 176 ALR 644; 63 ALD 577; 75 ALJR 277; (2000) 21 Leg Rep 13 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 373 [116] (Kirby J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31; (2004) 218 CLR 146, 152 [3]; 206 ALR 315; 78 ALJR 977 (Gleeson CJ), 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45, 77 [66]; (2006) 229 ALR 223; 59 ACSR 1; 80 ALJR 1606 (Gummow, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532, 553 [10]; (2008) 242 ALR 191; (2008) 82 ALJR 454; 180 A Crim R 455 (Gummow, Hayne, Heydon and Kiefel JJ) ('*Gypsy Jokers*').
[68] *Dickason v Dickason* [1913] HCA 77; (1913) 17 CLR 50; 19 ALR 400; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520; 9 ALR 103; [1976] FLC 90-039; 50 ALJR 594 (Gibbs J); *Scott v Scott* [1913] AC 417; [1911-1913] All ER 1.
[69] *Wainohu* [2011] HCA 24; (2011) 243 CLR 181, 213-215 [54]-[56]; (2011) 278 ALR 1; (2011) 85 ALJR 746; (2011) 210 A Crim R 45 (French CJ and Kiefel J).
[70] *Condon* [2013] HCA 7 (14 March 2013) [70].
[71] See further *Wainohu* [2011] HCA 24; (2011) 243 CLR 181, 213-215 [54]-[56]; (2011) 278 ALR 1; (2011) 85 ALJR 746; (2011) 210 A Crim R 45 (French CJ and Kiefel J).
[72] Ibid (and see the authorities there cited).
[73] Ibid 215 [58].
[74] [2003] VSC 129 (19 February 2003) ('*BK*').
[75] [2007] VSC 480 (30 November 2007) ('*ABC*').
[76] [2012] VSC 153 (24 April 2012).
[77] [1976] HCA 23; (1976) 134 CLR 495; 9 ALR 103; [1976] FLC 90-039; 50 ALJR 594 ('*Russell*').
[78] *Scott v Scott* [1913] AC 417, 441; [1911-1913] All ER 1.
[79] *McPherson v McPherson* [1936] AC 177, 200.
[80] *Russell* [1976] HCA 23; (1976) 134 CLR 495, 520; 9 ALR 103; [1976] FLC 90-039; 50 ALJR 594.
[81] Ibid; *R v Robert Scott Pomeroy* [2002] VSC 178 (20 May 2002) [11] (Teague J); *R v White* [2007] VSC 471; (2007) 17 VR 308, 312 [21] (Whelan J) ('*White*').
[82] *Hinch* [2011] HCA 4; (2011) 243 CLR 506, 532 [22]; (2011) 275 ALR 408; (2011) 85 ALJR 398 (French CJ); *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 457; [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342 (Viscount Dilhorne) ('*Leveller Magazine'*); *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476 (McHugh JA) ('*John Fairfax & Sons*').
[83] *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651, 664; (2010) 267 ALR 12; (2010) 75 ATR 794; (2010) 84 ALJR 479 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) ('*Hogan*').
[84] *Hogan* [2010] HCA 21; (2010) 240 CLR 651, 664 [30]; (2010) 267 ALR 12; (2010) 75 ATR 794; (2010) 84 ALJR 479 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).
[85] Ibid, citing *Australian Broadcasting Commission v Parish* [1980] FCA 33; (1980) 43 FLR 129, 133; (1980) 29 ALR 228 (Bowen CJ) ('*Parish*').
[86] Ibid 667 [43].
[87] Ibid 664 [31].
[88] *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227, 235; [1984] 2 All ER 27; [1984] 2 WLR 370 (Sir John Donaldson MR); *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131,142-43; 26 ALD 471 (Kirby P) ('*Local Court of New South Wales*').
[89] *Leveller Magazine* [1979] AC 440, 450; [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342

(Diplock LJ).
[90] *John Fairfax & Sons* (1986) 5 NSWLR 465, 477 (McHugh JA).
[91] *Local Court of New South Wales* (1991) 26 NSWLR 131, 141; 26 ALD 471 (Kirby P).
[92] (1986) 5 NSWLR 465.
[93] Ibid 476-477.
[94] *Hogan* [2010] HCA 21; (2010) 240 CLR 651, 664 [30]-[31]; (2010) 267 ALR 12; (2010) 75 ATR 794; (2010) 84 ALJR 479 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [27]-[31] (Bathurst CJ and McColl JA), [102]-[107] (Young JA).
[95] *Ex parte the Queensland Law Society Inc* [1984] 1 Qd R 166, 171 (McPherson J); *John Fairfax & Sons* (1986) 5 NSWLR 465, 476-477 (McHugh JA); see also *Hinch* [2011] HCA 4; (2011) 243 CLR 506, 534 [26]; (2011) 275 ALR 408; (2011) 85 ALJR 398 (French CJ).
[96] *White* [2007] VSC 471; (2007) 17 VR 308, 313 [21] (Whelan J).
[97] *Local Court of New South Wales* (1991) 26 NSWLR 131, 141; 26 ALD 471 (Kirby P).
[98] *TK v Australian Red Cross Society* (1989) 1 WAR 335, 341; 1989] Aust Torts Reports 80-273 (Malcolm CJ).
[99] *ABC v D1* [2007] VSC 480 (30 November 2007) [44] (J Forrest J); *PPP v QQQ as the representative of the Estate of RRR (deceased)* [2011] VSC 186 (6 May 2011) [34] (Dixon J). Section 4(1A) of the *Judicial Proceedings Reports Act* 1958 (Vic) makes it an offence to publish a report of a judicial proceeding identifying a victim sexual assault.
[100] *Scott v Scott* [1913] AC 417, 437; [1911-1913] All ER 1 (Viscount Haldane LC).
[101] Ibid 438.
[102] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532, 560–561 [41]; (2008) 242 ALR 191; (2008) 82 ALJR 454; 180 A Crim R 455 (Gummow, Hayne, Heydon and Kiefel JJ) citing *Australian Broadcasting Commission v Parish* [1980] FCA 33; (1980) 43 FLR 129, 157; (1980) 29 ALR 228 (Deane J); *Condon* [2013] HCA 7 (14 March 2013) [70] (French CJ).
[103] *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520; 9 ALR 103; [1976] FLC 90-039; 50 ALJR 594 (Gibbs J); *Hinch* [2011] HCA 4; (2011) 243 CLR 506, 553-54 [90]; (2011) 275 ALR 408; (2011) 85 ALJR 398 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Condon* [2013] HCA 7 (14 March 2013) [69] (French CJ).
[104] *Leveller Magazine* [1979] AC 440, 450; [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342 (Diplock LJ).
[105] See *ABC* [2007] VSC 480 (30 November 2007) [35]-[36] (J Forrest J).

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