10/13; [2013] VSCA 37

SUPREME COURT OF VICTORIA — COURT OF APPEAL

VICTORIA POLICE TOLL ENFORCEMENT & ORS v TAHA & ORS STATE of VICTORIA v BROOKES

Nettle, Tate and Osborn JJA

13 November 2012; 4 March 2013

ADMINISTRATIVE LAW – STATUTORY CONSTRUCTION – ORDERS MADE UNDER S160 OF THE *INFRINGEMENTS ACT* 2006 THAT RESPONDENTS BE IMPRISONED UPON FAILURE TO PAY FINES – WHETHER MAGISTRATE OBLIGED TO CONSIDER WHETHER THERE WERE SPECIAL CIRCUMSTANCES BEFORE DETERMINING WHETHER TO MAKE IMPRISONMENT ORDER – 'SPECIAL CIRCUMSTANCES' INCLUDE MENTAL ILLNESS OR INTELLECTUAL DISABILITY – DUTY TO INQUIRE – SECTION 160 SHOULD BE READ AS A UNIFIED WHOLE – JURISDICTION TO MAKE AN IMPRISONMENT ORDER CONDITIONAL UPON CONSIDERATION OF SPECIAL OR EXCEPTIONAL CIRCUMSTANCES – COURT MISCONSTRUED ITS STATUTORY FUNCTION AND COMMITTED JURISDICTIONAL ERROR – *PROJECT BLUE SKY v AUSTRALIAN BROADCASTING AUTHORITY* [1998] HCA 28; (1998) 194 CLR 355, APPLIED; *WHITEHORN v R* [1983] HCA 42; (1983) 152 CLR 657, REFERRED TO; *R v LANGLEY* [2008] VSCA 81; (2008) 19 VR 90, DISTINGUISHED: *INFRINGEMENTS ACT* 2006 (VIC), S160.

CHARTER – HUMAN RIGHTS – UNIFIED CONSTRUCTION SUPPORTED BY THE PRINCIPLE OF LEGALITY AND THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES – RIGHTS TO EQUAL PROTECTION OF THE LAW, LIBERTY, AND A FAIR HEARING – INTERPRETATIVE OBLIGATION TO FAVOUR CONSTRUCTION COMPATIBLE WITH HUMAN RIGHTS – DIRECT OBLIGATION ON MAGISTRATE TO GIVE EFFECT TO THE RIGHT TO A FAIR HEARING – *HOGAN v HINCH* [2011] HCA 4; (2011) 243 CLR 506, *MOMCILOVIC v R* [2011] HCA 34; (2011) 245 CLR 1, *NOONE v OPERATION SMILE (AUSTRALIA) INC* [2012] VSCA 91, CONSIDERED: *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT*, SS6(2)(b), 7(2), 8(3), 21, 24(1), 32.

Two persons, Taha (T.) and Brookes (B.) appeared before the Magistrates' Court in relation to orders for outstanding fines. Both persons were legally represented at the hearings. In T's case, he had an intellectual disability and B. was suffering from a mental illness. Under the *Infringements Act* 2006 ('Act') each of them would have been eligible to have had the fines waived or reduced or a lesser term of imprisonment imposed or measures other than imprisonment imposed. In T's case, his intellectual disability was not mentioned to the Magistrate and in B.'s case the Magistrate refused to entertain submissions concerning her mental health and personal circumstances as she had no supporting documents. The Magistrates made orders for imprisonment for non-payment of the fines without regard to the possibility that less draconian orders could have been made under ss160(2) or (3) of the Act. Upon applications to quash, Emerton J granted the applications, set aside the orders and remitted the matters to the Magistrates' Court for determination according to law. Upon appeal—

HELD: Appeal dismissed.
Nettle JA:

1. In the case of a s160 hearing, there is an obligation on a Magistrate to consider the application of ss160(2) and (3) of the Act regardless of whether the possibility of their application has been raised by the infringement offender.

2. The extent of inquiries which may need to be made in a given case is largely a matter for the Magistrate based on the facts and circumstances of the case. Because of the 'unified nature' of s160, a Magistrate must have regard to ss160(2) and (3) when exercising the discretion under s160(1); and so must at least make such inquiries as seem to the Magistrate to be reasonable in the circumstances of the case. Here, the Magistrate evidently failed to have any regard to ss160(2) and (3) and, as a result, apparently failed to consider whether any and if so what inquiries were required.

3. The jurisdiction of the Magistrate to make an imprisonment order was conditioned on consideration of the requirements of sub-ss160(2) and (3). Because of what Mr Houston told the Magistrate about the circumstances of Ms Brookes, there was sufficient before the Magistrate to raise the possible application of s160(2). In view of the obligations which would apply to an administrative decision maker in such circumstances, it was incumbent on the Magistrate to be satisfied that the exemption in s160(2) did not apply.

4. The obligation was upon the Magistrate to undertake his task, regardless of Ms Brookes'

submissions, and to that end to satisfy himself as best he was reasonably able that s160(2) did not apply. By ignoring the issue, the Magistrate made an error which went to the exercise of his jurisdiction.

Tate JA:

5. The interpretation adopted by the Magistrate of s160 of the Act was unfaithful to its intended meaning, as ascertained by ordinary principles of statutory interpretation and incompatible with the right to liberty, the right to a fair hearing and the right to equal protection of the law under the Charter.

6. There was nothing to suggest that in the case of Ms Brookes the Magistrate turned his mind to whether the requirements of sub-ss (2) or (3) were met. Nor was there anything to suggest that this was the case with respect to Mr Taha. Both Mr Taha and Ms Brookes were most likely to be eligible for orders made under sub-ss (2) or (3), alleviating the impact of their default in relation to the fines imposed upon them, yet the Magistrate did not make such orders but rather imposed on both the maximum period of imprisonment applicable. The judge's inference that the Magistrate had not considered whether to exercise his powers under sub-ss (2) or (3) of s160 was clearly open.

7. The circumstances were aggravated by the failure of the Magistrate to adjourn the proceeding of his own motion. If he was to insist upon documentary proof, which Tate JA considered he was wrong to do, he exacerbated his error by failing to make an order adjourning the hearing of his own motion so that Ms Brookes, about whose mental illness he had already been told, could gather the materials he (wrongly) considered were necessary. Having been put on notice from the duty lawyer that Ms Brookes might well be mentally ill and thus satisfy the conditions for a discharge of her fine, in whole or in part, and be eligible for a reduction in the period of imprisonment she might have to serve, the Magistrate should have allowed Ms Brookes the opportunity to obtain the evidence he required. He was wrong not to do so. The fact that Ms Brookes did not seek an adjournment did not detract from the errors committed by the Magistrate in wrongly inserting into the Act a requirement that did not exist, and in failing to provide an opportunity to Ms Brookes to satisfy him in the form of proof upon which he had wrongly insisted.

8. Accepting that the Magistrate was under a direct obligation, by reason of s6(2)(b) to give effect to the right to a fair hearing under s24(1), he acted incompatibly with the Charter in failing to consider, before making an order for the imprisonment of Mr Taha and Ms Brookes, whether there were special or exceptional circumstances which would justify the making of orders of less severity. The direct nature of the obligation imposed by s6(2)(b) reinforced the conclusion that the obligation did not fall upon Mr Taha or Ms Brookes to raise their circumstances in court before the Magistrate had a duty to consider whether alternative orders could be made.

Osborn JA:

9. Section 160 of the Act should be read as a unified whole and that it should be understood as conferring a set of optional powers, each of which must be taken into account before any order is made. The Magistrates' Court was obliged to inquire into the particular circumstances of Mr Taha and Ms Brookes to determine whether orders alternative to imprisonment should be made in their cases.

10. Once the issue of Ms Brookes's mental health was squarely before the Magistrate, the Magistrate owed a duty to ensure that the implications of her mental fitness were fully resolved before him before making an order adverse to Ms Brookes. The Court could properly call for documentary evidence before resolving its conclusions relating to the mental health issue, but it could not properly leave it to the penalty defaulter to decide whether the issue should be taken further or not before a self-executing order for imprisonment was made.

NETTLE JA:

1. These are appeals from judgments given in the Common Law Division. In each case, the judge made an order in the nature of *certiorari* to quash an order made in the Magistrates' Court at Broadmeadows that the respondent be imprisoned pursuant to s160(1) of the *Infringements Act* 2006 (Vic) ('the *Infringements Act*') for failure to make instalment order payments in respect of outstanding fines.

2. Section 160(1) of the *Infringements Act* provides that:

> 160. **Powers of the Court**
> (1) The Court may order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount.
>
> (2) If the Court is satisfied—
> (a) That an infringement offender has a mental or intellectual impairment, disorder, disease or illness; or

(b) Without limiting paragraph (a), that special circumstances apply to an infringement offender—
The Court may—
(c) Discharge the outstanding fines in full; or
(d) Discharge up to two thirds of the outstanding fines; or
(da) Discharge up to two thirds of the outstanding fines and order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the remaining undischarged amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount; or
(e) Adjourn the further hearing of the matter for a period of up to 6 months.

(3) If the Court is satisfied that, having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh the Court may—
(a) Order the infringement offender to be imprisoned for a period that is up to two thirds less than one day in respect of each penalty unit, or part of a penalty unit, of the penalty units to which the amount of the outstanding fines is an equivalent amount; or
(b) Discharge the outstanding fines in full; or
(c) Discharge up to two thirds of the outstanding fines; or
(ca) Discharge up to two thirds of the outstanding fines and order that the infringement offender be imprisoned for a period that is up to two thirds less than one day in respect of each penalty unit, or part of a penalty unit, of the penalty units to which the undischarged amount of the outstanding fines is an equivalent amount; or
(d) Adjourn the further hearing of the matter for a period of up to 6 months; or
(e) Make a fine default unpaid community work order under Division 3 of Part 3B of the *Sentencing Act* 1991.

(4) If the Court has made an order under subsection (1), (2)(da), (3)(a) or (3)(ca) for imprisonment in default of payment of outstanding fines-
(a) A warrant to imprison may be issued under section 68 of the *Magistrates' Court Act* 1989; and
(b) The Court may make an instalment order under the *Sentencing Act* 1991 in respect of the payment of the outstanding fines.

3. Each respondent is said to have an intellectual disability. The judge held that the Magistrate made a jurisdictional error by failing to make inquiries as to the respondent's circumstances, and thus in failing to consider whether to make an alternative order under sub-s160(2) or (3) on the basis of the respondent's intellectual disability. Her Honour remitted the matter to the Magistrate for further consideration according to law.

4. In my view, the judge was correct. My reasons are as follows.

The facts – Taha

5. On numerous occasions in 2006, 2007 and 2008, the first respondent, Zachariah Tasha, was issued with infringement notices for minor offences. One was for riding a bicycle without a helmet and the remainder were for making a journey on public transport without a ticket and failing to provide information to authorized officers.

6. The fines were not paid and consequently an Infringements Registrar made Enforcement Orders pursuant to s59 of the *Infringements Act*. The enforcement orders were not complied with and an Infringement Warrant issued, pursuant to s59 of the *Infringements Act*, for Mr Taha's arrest.

7. On 3 February 2009, Mr Taha was arrested pursuant to the warrant and bailed to appear before the Magistrates' Court at Broadmeadows on 26 February 2009 for a hearing pursuant to s160 of the *Infringements Act*.

8. As at 26 February 2009, Mr Taha was, and he remains, certified by the Secretary of the Department of Human Services as intellectually disabled. Prior to 26 February 2009, he had previously been placed on a Justice Plan in respect of his past offending. Although the Justice Plan was recorded in the Court Link system maintained by the Magistrates' Court, the Magistrate was not aware of it.

9. Mr Taha was represented at the hearing of 26 February 2009 by Mr Alan Munro of Victoria Legal Aid, a duty solicitor at the Broadmeadows Magistrates' Court. Mr Munro has only a limited recollection of the hearing but recalls that he was not aware that Mr Taha suffered from a psychiatric condition or disability. If he had known of that, he says, he would have applied for an adjournment in order to obtain appropriate evidence of Mr Taha's condition and, on the basis of that material, made an application for a waiver or reduction of the fines pursuant to s160(2) of the *Infringements Act*.

10. In the event, the Magistrate made orders that the total fines of $11,250.20 the subject of the 30 Infringement Warrants be paid by monthly instalments of $80.00 commencing on 1 April 2009 and that, in default, Mr Taha be imprisoned for 100 days. Mr Taha made payments totalling $1,280 but then stopped making payments.

11. In August 2010, police attended at Mr Taha's parents' home to arrest him. At that time, it was found that he was an inpatient at Orygen Youth Health, receiving treatment for a depressive condition. Consequently, he was not arrested.

12. Victoria Legal Aid instituted an appeal on his behalf to the County Court pursuant to s254 of the *Criminal Procedure Act* 2009 (Vic) but the appeal was dismissed as incompetent. Then, on 16 November 2010, a judicial review proceeding was instituted in the Common Law Division. It resulted in the judgment the subject of this appeal.

The judge's reasoning in Taha

13 In her reasons for judgment on Mr Taha's application for judicial review, the judge identified the issues as follows:

> (a) Did the Magistrate misconstrue s160 of the *Infringements Act* in purporting to exercise jurisdiction under s160(1) to make an imprisonment order without regard to sub-ss (2) and (3)?
> (b) If so, was the Magistrate required to inquire as to Mr Taha's particular circumstances before making an imprisonment order?
> (c) In the alternative, did the rules of procedural fairness or s24(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ('the Charter') impose on the Magistrate a duty to inquire as to Mr Taha's particular circumstances before making an imprisonment order?
> (d) In either case, did failure by the Magistrate to inquire into Mr Taha's particular circumstances before making an imprisonment order constitute jurisdictional error?
> (e) If the Magistrate thus committed a jurisdictional error, should an order in the nature of certiorari be made?

14. The judge held that the Magistrate had erred in failing to have regard to sub-ss160(2) and (3), and thus in failing to inquire as to Mr Taha's personal circumstances before making an order under s160(1), for reasons which her Honour expressed as follows:

> Having regard to the text of s160, the Act read as a whole so as to expose its underlying objects and purposes, and the requirement that s160 be interpreted, so far as it is possible to do so consistently with its purpose, in a way that is compatible with the rights to liberty, a fair hearing and to the equal protection of the law, s160 must be construed in a unified fashion so as to require the court, before making an imprisonment order under subs (1) to consider the availability of the less draconian orders under sub-ss (2) or (3) and, for that purpose, to have regard to the individual circumstances of the infringement offender. Because of the nature of the conditions or circumstances that sub-ss (2) and (3) seek to cater for, the court may be required to actively elicit the relevant information from the infringement offender.
>
> What steps must be taken will depend on the case before the Magistrate. A course of questioning will not be required in every case, least of all a standard course of questioning. In Mr Tasha's case, however, there were 'flags' that should have prompted the court to ask questions directed to ascertaining whether he had an intellectual disability, a mental health problem or some other condition that prevented him from successfully negotiating both the public transport and infringement systems. Mr Taha presented as a young person who had accumulated a very large number of fines over a long period for repeated offences of the same kind. The amount of money involved was significant, particularly for a person on a pension. The court placed Mr Taha on an instalment plan, so it must have inquired about his ability to meet payments. It is likely the court was told that he received a pension or allowance of some kind. It would not have been a large step for the court to have asked what kind of pension Mr Taha received. This would have revealed his disability. Moreover, the court's own records showed that Mr Taha was the subject of a Justice Plan, which told the court that Mr Taha had an intellectual disability. Although the Magistrate was not aware of the Justice Plan, and had no direct access to the relevant record while on the bench, it would not have been difficult for the court, through the Infringements Registrar or otherwise, to have made searches of its own records and to have informed the Magistrate of the results.
>
> In my view, given the circumstances of Mr Taha's offending and the level of fines outstanding, an inquiry as to whether Mr Taha qualified for orders under ss160(2) or (3) was required by s160 of the Act.[1]

15. The judge further held that, by failing to consider the possibility of making orders under sub-s (2) or (3) in lieu of an imprisonment order under sub-s (1), the Magistrate had misapprehended or misconceived the nature of the court's function under s160, and thus the nature of the court's jurisdiction to make an imprisonment order under sub-s(1). The result was to make an order which was beyond the court's powers and, therefore, an order which was infected by jurisdictional error. Her Honour added that she considered the Magistrate had also erred in failing to accord Mr Taha procedural fairness and that the lack of procedural fairness was itself a jurisdictional error.

16. It followed, as her Honour concluded, that the Magistrates' orders should be set aside and the matter should be remitted to the Magistrate for further consideration in accordance with s160.

The appellant's submissions

17. The appellant contends that the judge was in error in construing s160, as her Honour put it: 'in a unified fashion so as to require the Court, before making an imprisonment order under sub-s (1) to consider the availability of the less draconian orders under sub-ss (2) or (3) and, for that purpose, to have regard to the individual circumstances of the infringement offender'. Counsel for the appellant submitted that, upon its proper construction, s160(1) confers a power to make an order subject only to the exceptions provided for in sub-ss (2) and (3) and that, because sub-ss (2) and (3) are truly exceptions, the burden or onus is upon the offender to invoke them. It follows, counsel argued that, until and unless an offender identifies one of those exceptions and persuades the Magistrate of its application, there is no duty on the Magistrate to take either exception into account, still less to make inquiries *ex mero motu* as to the offender's personal circumstances.

The unified approach to s160

18. In my view, the judge was right to construe s160 as her Honour did. The considerations which lead me to that view are:

> (1) First, according to ordinary principles of statutory interpretation, a section of an Act of Parliament is to be read as a whole and, therefore, s160(1) is to be read in the context of ss160(2) and (3).[2]
>
> (2) Secondly, although s160(1) is cast in terms of discretion, it does not identify the criteria to which the Magistrate is to have regard in exercise of the discretion. It is improbable that Parliament intended the exercise of discretion to be unfettered and unguided. It is more likely that Parliament conceived of the discretion as being informed by the criteria prescribed by ss160(2) and (3).
>
> (3) Thirdly, ss160(2) and (3) provide for persons whom Parliament evidently intended should not be imprisoned or at least should not be punished to the same extent as others. Given that such persons may not be legally represented at s160 hearings or, if represented, may not be represented to any greater extent than by a duty solicitor on the basis of insufficient opportunity for conference and consideration of the person's circumstances, to construe s160(1) as requiring that the Magistrate give consideration of ss160(2) and (3) would tend to give effect to Parliament's intention whereas to construe it otherwise would tend to flout it.

19. Counsel for the appellant argued that, because the discretion is provided for in the first sub-section of s160, and the exceptions are provided for separately in the second and third sub-sections, Parliament should be taken to have meant that the onus be upon an infringement offender to bring himself or herself within one or other of the exceptions. To that extent, it was said, s160 is like a provision in which one sub-section prescribes an offence and then a following sub-section provides for a defence; in which case it is ordinarily taken that the onus is on the accused to bring himself or herself within the defence.

20. I do not accept the argument. Where a section is so structured with the intention of putting the onus on the accused, it is usual for it to be couched in terms of 'if the accused satisfies the court' of the application of the defence. Section 194(5) of the *Crimes Act* 1958 serves as an example. In contrast, there is no express statement within s160 that the infringer must satisfy the court of the application of ss160(2) or (3). Both sub-sections are drafted in terms of 'if the court is satisfied' thereby implying, as it seems to me, that the court may be satisfied howsoever, including by reason of the court's own inquiries.

21. Counsel for the appellant submitted that s160 is in some ways like sentencing provisions which identify considerations to which a judge is bound to have regard when fixing sentence and yet which are invariably understood as requiring the judge to take into account only such of the identified considerations as the prisoner invokes and establishes. Section 5(2)(g) of the *Sentencing Act* 1991 is an example. In terms, it requires a sentencing judge to have regard to the presence of any aggravating or mitigating factor concerning the offender and to any other relevant circumstance. Yet, in the way in which the provision has been interpreted, it certainly does not require the judge to have regard to every conceivable circumstance. So, while a prisoner's psychological condition might well be relevant to a sentence to be imposed, s5(2)(g) does not require a sentencing judge to take into account psychological considerations limiting the need for specific or general deterrence unless the prisoner identifies those considerations and adduces evidence of them.[3]

22. I do not accept that submission either. A sentencing hearing is very different to a s160 hearing in fundamental respects. The sentencing process is part of an adversarial contest in which the Crown is pitted against the subject but yet the Crown has an overriding obligation to put before the judge everything, subject to some exceptions, which is known to be relevant.[4] A s160 hearing is more in the nature of an administrative or investigative inquiry. There is no prosecutor as such. The Infringements Registrar is a clerical officer, stationed in offices remote from the court, whose task is limited to placing basic information before the Magistrate about the non-payment of fines and the maximum term for which the infringement offender can be imprisoned. No doubt the community is entitled to expect that Infringement Registrars will act fairly, honestly and impartially with proper regard to the infringement legislation.[5] But, plainly, clerical officers cannot be expected to act like Crown prosecutors. Nor is there any other party with overall

prosecutorial responsibility. It falls to the Magistrate to determine an appropriate order without the benefit of prosecutorial assistance. And so, in effect, the Magistrate is the subject's only protection against the risk of inappropriate imprisonment.

23. I agree with the judge that those differences dictate that, in the case of a s160 hearing, there is an obligation on a Magistrate to consider the application of ss160(2) and (3) regardless of whether the possibility of their application has been raised by the infringement offender. In my view, her Honour's analysis of the matter is in point and conclusive:

> The s160 hearing is thus conducted both like and unlike a criminal trial. The agency that has imposed the fine plays no role in the hearing. The Infringements Registrar appears in a quasi prosecutorial role in order to place before the court certain basic information about the payment or non-payment of fines and the amount of time the offender could be imprisoned for to expiate the fines. The court relies on any evidence about the offender's circumstances being adduced by or on behalf of the infringement offender. Unless the s160 hearing is adjourned, it is the first and last time the infringement offender comes before the court. There has been no prior determination in relation to the commission of the underlying offences or any other hearing in which the circumstances of the offender or the offending will have been exposed to the court.
>
> The Act contemplates that imprisonment orders be made in the restricted context described.[6]

Construction supported by Charter

24. The judge held that the unified construction of s160 which she favoured was also supported by the principle of legality and the *Charter of Human Rights and Responsibilities Act* 2006 ('the Charter'):

> A 'unified' construction is also supported by the Charter, which requires s160 to be interpreted compatibly with human rights, so far as it is possible to do so consistently with its purpose. Compliance with the interpretative obligation in s32 means exploring all 'possible interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights'. Where Charter rights are engaged, s32(1) elevates the common law presumption against interference with rights to a statutory requirement in interpreting Victorian statutes.
> ...
> The right to liberty (including the right not to be arbitrarily detained) and the right to a fair hearing are reflected in the objects and purposes of the Act that have been identified. In the context of s160 and the scheme of the Act generally, they require consideration of whether imprisonment is reasonable in all the circumstances, and a hearing in which regard is had to the infringement offender's particular circumstances. The right to equal protection of the law in s8(3) of the Charter is important, having regard to Mr Taha's intellectual disability and the recognition by the legislature that intellectually disabled people may be inappropriately caught up in the infringement system. The need for special treatment for persons with intellectual disabilities is reinforced by s8(3) of the Charter, which provides:
> Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
> **...**
> I accept that the interpretation of s160 that least infringes the rights in sub-ss21 and 24(1) of the Charter is one that requires the court to address the possibility that the alternative orders in sub-ss (2) or (3) may be available before making an imprisonment order under sub-s (1). This requires the court to consider the individual circumstances of the infringement offender.[7]

25. With respect, I agree with the judge. As French CJ explained in *Momcilovic v The Queen*:[8]

> The principle of legality has been applied on many occasions by [the High Court]. It is expressed as a presumption that parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law ... [9]
> Section 32(1) [of the Charter] ... requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.[10]

26. Counsel for the appellant argued, as she did below, that Charter rights may only be taken into account under ss160(2) and (3) when and if what counsel described as 'the jurisdiction of the Magistrate to contemplate making a decision under ss160(2) or (3)' is enlivened by an infringement offender invoking the exceptions for which those sub-sections provide.

27. The judge rejected that submission, and so do I. As the Commission put it, it is clear from the terms of s32)(1) of the *Charter of Human Rights and Responsibilities Act* 2006, as explained by French

CJ in *Momcilovic*,[11] that relevant Charter rights must be taken into account as part of the interpretative process mandated by s32(1) in determining the proper construction of any enactment and therefore in the interpretation of s160 as a whole.

The need to make inquiries

28. So to conclude does not necessarily mean that, whenever a Magistrate conducts a s160 hearing he or she is bound to make inquiries of the infringements offender or his or her legal representative as to whether the infringement offender's circumstances are such as to engage ss160(2) or (3). Axiomatically, each case turns on its own facts and circumstances and to a considerable extent depends on the Magistrate's reasonable assessment of what is required in those circumstances. It may be for example that, if an infringement offender were represented by Queen's Counsel, the Magistrate might safely proceed upon the assumption that everything which could be said in favour of the operation of ss160(2) and (3) would be said, and that the offender could be dealt with accordingly. On the other hand, if an infringement offender appeared unrepresented, the extent of inquiries required would be different, as if but even more so than where a prisoner appears unrepresented for sentencing.[12] And between those extremes lies a range of cases, including one like the present where, although an infringement offender is represented, the extent of the representation is manifestly limited. In such cases, the Magistrate's duty to inquire will ordinarily be greater.

29. As was earlier noted, the judge in this case held that there were indicators, or 'flags' as her Honour called them, which should have put the Magistrate upon inquiry. She identified those as being the fact that Mr Taha presented as a young person who had accumulated a very large number of fines over a long period for repeated offences of the same kind; the significant amount of money involved; the fact that the court had previously placed Mr Taha on an instalment plan, and so at least as an institution would have known something of his ability to meet payments; and that it was likely that someone in Mr Taha's position would be in receipt of a pension or allowance of some kind. Upon that basis, her Honour concluded that it was incumbent on the Magistrate to ask what kind of pension Mr Taha received (which would have disclosed the nature of his disability) and to have searches made through the Infringements Registrar or otherwise of the court's records (which, had they been searched, would have revealed that Mr Taha was the subject of a Justice Plan).

Disposition of the Taha appeal

30. For the purposes of this appeal, I do not find it necessary to go as far as the judge. As I have said, the extent of inquires which may need to be made in a given case is largely a matter for the Magistrate based on the facts and circumstances of the case. As at present advised, I am not disposed to prescribe the extent of inquiries which were warranted in this case. It is enough for the disposition of this appeal that, because of the 'unified nature' of s160, a Magistrate must have regard to ss160(2) and (3) when exercising the discretion under s160(1); and so must at least make such inquiries as seem to the Magistrate to be reasonable in the circumstances of the case. Here, the Magistrate evidently failed to have any regard to ss160(2) and (3) and, as a result, apparently failed to consider whether any and if so what inquiries were required.

31. As the judge concluded, that failure was a jurisdictional error because the exercise of the jurisdiction conferred by s160(1) is conditioned upon consideration of the requirements of ss160(2) and (3) and thus in effect the Magistrate misconceived the nature of the function which he was required to perform and the extent of his powers in the circumstances of the case.[13] In turn, as the judge rightly held, it was an error which warranted that the Magistrate's order be set aside and the matter remitted to the Magistrate for reconsideration having regard to ss160(2) and (3).

32. Counsel for the appellant argued that it was impossible to say that the Magistrate did not have regard to ss160(2) and (3); that the most that could be said on the evidence was that there was no material before the Magistrate sufficient to satisfy his Honour of the application of either provision.

33. I do not accept that submission. There is nothing which suggests that the Magistrate turned his mind to s160(2) or (3), still less to what if any inquiries were required, and indeed the mainstay of the appellant's case was that he was not required to make any inquiries. The logical inference is that the Magistrate never thought about either requirement at all.

34. Further, even if the Magistrate had turned his mind to the requirements of ss160(2) and (3), and concluded that it was unnecessary to make any inquiries, the Magistrate conspicuously failed to explain the reasoning which led him to that conclusion, and I would regard the absence of reasoning of that kind as an error of law on the face of the record by reason of s10 of the *Administrative Law Act* 1978 and therefore sufficient to sustain an order in the nature of *certiorari*.[14]

35. In the result, I would dismiss the appeal in the Taha matter.

The facts – Ms Brookes

36. The appeal in the Brookes matter raises a number of different considerations, not least because some reference was made to ss160(2) and (3) during the course of the s160 hearing.

37. On numerous occasions in 1999, 2000 and 2001, the first respondent, Ms Brookes, incurred fines associated with the driving of a motor vehicle. A large proportion of those were for driving on a toll road without CityLink registration. Ms Brookes says that many of those offences were committed by one Rick Dunstan with whom at relevant times she had a tempestuous and violent relationship.

38. On 19 April 2001, Mr Gerry Egan, a psychologist, prepared a written report in support of Ms Brookes' application to the Victims of Crime Assistance Tribunal. In his report, Mr Egan stated that he had diagnosed Ms Brookes as suffering from post-traumatic stress disorder (PTSD) arising from assaults on her by Dunstan.

39. On 2 September 2004, Ms Brookes was arrested on 68 warrants issued under the PERIN procedure applicable at that time. She was bailed to appear before the Magistrates' Court at Broadmeadows on 13 October 2004. But she did not appear on that day. Consequently, on 10 May 2006, a warrant was issued for her imprisonment and some two years later, on the morning of 24 October 2008, she was arrested. A total of seventy-five charges were outstanding at that time.

40. While being held in the cells at Broadmeadows Police Station, Ms Brookes was seen by Mr Paul Houston of Victoria Legal Aid, a duty solicitor rostered to the police cells to provide advice to prisoners with court appearances that day. Ms Brookes has deposed that communication with Mr Houston was difficult inasmuch as she had to speak to him through a narrow opening in the cell door, and because she was extremely anxious to get out of the cells. Otherwise, she has little recollection of the conversation.

41. Mr Houston has deposed that he obtained instructions from Ms Brookes which he noted in his Duty Lawyer Record. They included the circumstances of the infringements, the fact that Ms Brookes was the victim of domestic violence over many years, that she had attempted suicide and the fact of her ongoing involvement with the mental health unit of the Northern Hospital. He advised her that he would submit to the court that her mental health and her circumstances generally attracted the operation of s160(2) of the *Infringements Act*.

42. Mr Houston has also deposed that he related his instructions to the Magistrate as well as the fact that Ms Brookes believed that she was already paying the fines out of her Centrelink benefit at the rate of $40.00 per fortnight. The Magistrate responded to the effect that the only way the court could entertain a submission as to Ms Brooke's special circumstances was upon the tender of appropriate written material.

43. Mr Houston advised Ms Brookes that they could seek an adjournment to obtain the materials the Magistrate believed were necessary to support an application under s160(2) but that Ms Brookes instructed him to deal with the matter that day and not seek an adjournment. That led Mr Houston to advise Ms Brookes that, if the Magistrate would not entertain an application under s160(2), the only other option was an instalment order with a further order for imprisonment in default. Ms Brookes instructed Mr Houston to proceed on that basis.

44. In accordance with those instruction, Mr Houston submitted to the Magistrate that an instalment order of $45.00 per month should be made. The Magistrate accepted that submission. He made orders that the total sum of $15,164.50 for fines for the Infringement Warrants before him be paid by monthly instalments of $45.00 commencing 1 December 2008 and that, in default of payment, Ms Brookes be imprisoned for 134 days.

45. In November 2009, having defaulted in the payment of the instalments, Ms Brookes approached Victoria Legal Aid for assistance. She was referred to Messrs Matthew White & Associates, solicitors, who commenced an appeal to the County Court pursuant to s83 of the *Magistrates' Court Act* 1989. On 13 October 2010, that appeal was dismissed as incompetent and, on 16 November 2010, the proceeding which culminated in the orders the subject of this appeal was instituted in the Common Law Division. As part of the preparation for the County Court appeal, Ms Brooke's solicitors obtained a psychological report from Dr Kaylene Evers dated 9 August 2010, which confirmed Mr Egan's diagnosis of PTSD, and the judge below had both of those reports before her.

Failure to consider the application of ss160(2) and (3)

46. Given that Mr Houston specifically raised with the Magistrate the potential application to Ms Brookes' circumstances of s160(2), it cannot be said that the Magistrate failed to turn his mind to the possibility of its application. The difficulty here is that the Magistrate was not prepared to consider its application without evidence in written form.

47. Unlike Tate JA, whose reasons I have had the very considerable advantage of reading in draft, I do not accept that the Magistrate was in error in insisting upon written evidence. Within reason, it seems to me that it was up to the Magistrate to conduct the hearing in the manner which he considered appropriate. No doubt he might have heard oral evidence from Ms Brookes had he chosen to do so. But Mr Houston did not ask for that to be done. Like the Magistrate, he appears to have considered that, if evidence in support of the application of ss160(2) or (3) were to be adduced, it should be put on affidavit or at least provided in some sort of documentary form.

48. It does not present to me as unreasonable for the Magistrate to have required that to be done, or surprising that Mr Houston did not demur. For, as best one can say, there were no recording or transcription services; and so, if evidence in support of the application of ss160(2) or (3) had been given *viva voce*, any record would likely have been imperfect and very probably inadequate. More often that not in such circumstances, courts from the lowest to the highest level insist that evidence be adduced in written form.

49. It remains nonetheless that, although the Magistrate was on notice as to the possibility of facts which might engage the operation of s160(2), he allowed the manner in which Ms Brookes chose to conduct her case to eschew consideration of those facts.

50. Possibly, if the proceeding had been an adversarial proceeding, the way in which Ms Brookes chose to conduct her case would have been a sufficient basis to refuse to disturb the orders which were made.[15] For present purposes, however, that need not be decided. As I have explained, I do not consider that it was an adversarial proceeding. It was rather in the nature of an administrative or investigative proceeding and, therefore, consistently with the body of law in which the obligations of administrative tribunals have been essayed, I take the view that the Magistrate was required to undertake his task regardless of the way in which Ms Brookes conducted her case.

51. In *Kuswardana v Minister for Immigration and Ethnic Affairs*, Bowen CJ said that:[16]

> ... Rather, there was a clear statutory precondition upon which the [Commonwealth Administrative Appeals Tribunal] had to be satisfied and enough material and evidence before it to raise the issue independently of the parties' submissions ... it was an error of law not to consider and decide the issue...

In *Transport Accident Commission v Bausch*,[17] this Court applied the same approach to the Victorian Administrative Appeals Tribunal. Since the proceeding before the Magistrate in this case was in the nature of an administrative or investigative procedure, I consider that the same approach should have been followed here.[18]

52. As was earlier noted, the jurisdiction of the Magistrate to make an imprisonment order was conditioned on consideration of the requirements of sub-ss160(2) and (3). Because of what Mr Houston told the Magistrate about the circumstances of Ms Brookes, there was sufficient before the Magistrate to raise the possible application of s160(2). In view of the obligations which would apply to an administrative decision maker in such circumstances, I consider that it was incumbent on the Magistrate to be satisfied that the exemption in s160(2) did not apply.

53. In the result, it seems to me that, even though Mr Houston did not seek an adjournment in which to prepare evidence of the facts in written form, the Magistrate was bound to make such pertinent inquiries of his own motion as were reasonably open to be made and, if necessary, to adjourn the proceeding to enable not only that to be done but also to afford Mr Houston the opportunity of obtaining evidence in appropriate written form.

54. I do not overlook the possibility that, even if the Magistrate had ordered such an adjournment, Ms Brookes might still have said that she wanted the matter dealt with *instanter*. But I do not think that would change the situation. As I have endeavoured to explain, the obligation was upon the Magistrate to undertake his task, regardless of Ms Brookes' submissions, and to that end to satisfy himself as best he was reasonably able that s160(2) did not apply. By ignoring the issue, the Magistrate made an error which went to the exercise of his jurisdiction.

55. Perhaps, views might differ about the extent to which the Magistrate would be bound to go in making his own inquiries. In my view, it would depend on the records and administrative assistance available to the Magistrate and thus upon what the Infringements Registrar would be likely to have turned up if directed by the Magistrate to make some routine inquires. Possibly, a question might also have arisen if the Magistrate had directed an adjournment for Mr Houston to assemble appropriate written evidence and, for whatever reason, Ms Brookes had decided that nothing should be done. But those questions do not arise here and they cannot be answered in a vacuum. It is sufficient to say for present purposes that the Magistrate did nothing to determine whether sub-s160(2) applied in the manner which Mr Houston submitted it did and, therefore, that the Magistrate was in error.

Disposition of the Brookes appeal

56. It follows that I would also dismiss the appeal in the Brookes matter.

TATE JA: **Para. No.**

Introduction

57. An offender who has received an infringement notice for a public transport offence and has refused to pay the fine may be imprisoned by an order of the Magistrates' Court of Victoria ('the Court'), or the fine may be discharged in whole or in part where the Court is satisfied either that the offender has a mental or intellectual impairment or that imprisonment would, in the offender's situation, be excessive, disproportionate or unduly harsh. Zakaria Taha has an intellectual disability. Tarni Brookes suffers from a mental illness. They had each been issued with multiple infringement notices for public transport offences. They did not pay their fines. Was the Court obliged to consider whether Mr Taha or Ms Brookes was eligible to have the fines discharged before determining whether to make an order for imprisonment?

58. In my opinion, the Court was obliged to consider the eligibility of Mr Taha and Ms Brookes to a discharge of the whole or part of their fines by reason of their intellectual disability and mental illness respectively. In failing to do so, the Court misconstrued its functions under the statute that conferred the relevant power, s160 of the *Infringements Act* 2006 ('the Act'), thereby committing a jurisdictional error. In particular, the Court failed to understand that s160 should be read as a unified whole so that the powers it confers, to imprison for non-payment of fines or to discharge the fines in certain circumstances, are to be understood as a set of options, each of which must be taken into account before any order is made.

59. The judge in the trial division of the Supreme Court was correct to conclude that the *Charter of Human Rights and Responsibilities* 2006 ('the Charter'),[19] together with common law principles of interpretation, required s160 of the Act to be construed so as to ensure that those conditions which permit relief from imprisonment are considered before an order for imprisonment is made.[20] The judge was also correct to conclude that, in these proceedings, the Court was obliged to inquire about the particular circumstances of Mr Taha and Ms Brookes to determine whether alternative orders to imprisonment should be made.[21]

60. In my opinion, leave to appeal should be granted in each matter, if leave is necessary,[22] and the appeals should be dismissed. I set out my reasons.

The Legislative Framework

(1) The PERIN system

61. Infringement notices were first introduced in Victoria in the 1950's for parking fines. They provided a means by which minor criminal offences, typically contraventions of road and traffic laws, could be dealt with in 'a cost effective way ... without the need for a costly court prosecution'.[23] A largely bureaucratic process for the enforcement of penalties via an infringements system functioned as 'a diversionary mechanism in the justice system'[24] keeping the prosecution of minor driving and public transport offences out of the courts. Infringement notices served to impose fines on offenders unless the contraventions giving rise to the infringements were contested.

62. In 1986 a regime was introduced for the issuing and enforcement of infringement penalties known as the PERIN system; that is, 'Penalty Enforcement by Registration of Infringement Notice'.[25] The PERIN procedures were later provided in Schedule 7 to the *Magistrates' Court Act* 1989. The regime in Schedule 7 was the system that the Act replaced.

63. The PERIN system was a highly automated enforcement process whereby, as observed by Beach J in *Alpay v Hargreaves*,[26] at that time, 'in the State of Victoria a person can be imprisoned for non-payment of fines without such a penalty being imposed upon him or her by a court of law'.[27] In *Alpay* Beach J outlined the PERIN system by referring to the way in which Byrne J described its operation in Cameron v The Secretary to the Department of Justice.[28] Byrne J's account of the background to the introduction of the PERIN system was paraphrased by Beach J in *Alpay* in this way:[29]
I quote [from *Cameron*]:

> By 1985 it had become apparent to those concerned with the administration of justice in this State that a large proportion of proceedings in the Magistrates' Court for parking offences and certain traffic infringements were dealt with as undefended cases and involved relatively modest fines; the cost of the collection was such that it represented an inefficient application of the resources of the Court and of the prosecuting authorities. An administrative procedure called 'Procedure for Enforcement by Registration of Infringement Notices' (PERIN) was devised for these less serious cases where, for the most part, only a modest pecuniary penalty was provided. This procedure was first enacted in the *Magistrates' (Summary Proceedings) (Amendment) Act 1985* which inserted a new Pt VIIA in the *Magistrates (Summary Proceedings) Act 1975*. In due course, following the enactment of the *Magistrates' Court Act 1989*, the PERIN procedures are to be found in Schedule 7. Under the 1989 Act the PERIN procedure may be implemented as an alternative to the conventional summary criminal procedures of filing a charge under s26 and proceeding by a trial before the Court in accordance with Schedule 2, or by alternative procedure in accordance with Schedule 3: s99.

64. The staged operation of the system, including the formal registration of the infringement penalty, which activated the production of an enforcement order permitting the arrest and imprisonment of the infringer, was described, in a manner that emphasises the automated nature of the process, as follows:[30]

> In the summary which follows I confine myself to the PERIN procedure applicable to parking infringements ... and in respect of which a Parking Infringement Notice has been given under the *Road Safety Act* 1986 s81. I assume that the recipient of a Parking Infringement Notice has elected not to expiate the offence by payment of the penalty within the specified time: [he or] she has simply ignored that option.
>
> The appropriate officer of the prosecuting authority at this stage has two courses available: to commence a proceeding by charge in the appropriate Magistrates' Court pursuant to s26; or to set in train the PERIN procedure pursuant to s99. It is important to note that the PERIN procedure is not a 'proceeding', within the meaning of that term in the *Magistrates Court Act* 1989: s3(1). Further, unlike a proceeding by charge, it does not result in a conviction: Schedule 7, cl 9(1)(a). Before the appropriate officer may seek to have the infringement penalty registered there must be sent to the infringer a 'courtesy letter' in the form described in cl 3. This letter must state that the infringer has a further 28 days to pay the penalty plus costs and advise the infringer that if these be not paid he or she may be dealt with under the PERIN provisions: cl 3(2). The letter must also contain advice in the prescribed form as to the steps which the recipient might take if he or she was not in charge of the motor vehicle at the time of the infringement: Magistrates' Court General Regulations 1990, reg 1105(2). ... If the recipient of the courtesy letter elects to do nothing or ignores it, the process moves to the next stage.
>
> After the period for response to the courtesy letter has expired, the enforcement agency ... may seek to have the penalty registered by the Registrar of the PERIN Court. Cl 4(1) directs that the enforcement agency which seeks registration provide to the Registrar a document in the prescribed form containing the prescribed particulars and a certificate in the prescribed form to the effect that the previous steps required by the PERIN process had been followed. The prescribed form for the certificate is Form 2 in Schedule 5 to the *Magistrates' Court General Regulations* 1990. For present purposes, the prescribed form for the other document to be provided to the Registrar is of interest. It is Form 1 in Schedule 5 to the Regulations. It is there described not as a paper document but as a 'Data Record Format on magnetic tape' containing certain characteristics with specified fields and the description of the field position, nature, format and length of each field. The note to cl 4(1)(a) reminds the reader that such a record is intended to fall within the definition of 'document' in the *Interpretation of Legislation Act* 1984, s38. Where the request to register is formally in order, the Registrar may register the penalty: cl 4(3). It does not appear on what basis the Registrar is to exercise this discretion. Upon registration the Registrar must make an enforcement order: cl 5. An enforcement order which is deemed to be an order of the Magistrates' Court (cl 5(2)) is not discretionary in its issue or in its terms. It orders that the infringer pay to the Court the amount of the infringement penalty and the prescribed amount of costs and 'that in default of payment the person be imprisoned for a period of one day in respect of each $100 or part of $100 of the amount then remaining unpaid': cl 5(1)(a). At this stage, in the jargon of the PERIN Court, the matter is at 'valid status'.
>
> At this stage, too, the infringer receives a third communication, this time from the Registrar. This Notice of Enforcement Order must also be in a prescribed form, that is Form 4 in Schedule 5 to the Regulations. ... In it the infringer is required to pay the amount of the Enforcement Order within a further 28 days and is warned that if this be not done ...
> 'A warrant will be issued for your imprisonment for a period of (and the period is then to be inserted in the notice) a warrant to seize property will be issued.'

> Where it is intended to issue a warrant of imprisonment the reference to a warrant to seize property will be deleted. The notice contains the following note:
> 'You may apply to the registrar of the Magistrates' Court at (the location of the court is then to be inserted in the notice) for any of the following:
> (a) An order that the time within which the fine is to be paid be extended;
> (b) An order that the fine be paid by instalments;
> (c) The revocation of the enforcement order and the referral of the alleged offence to the Magistrates' Court for hearing and determination.'
> Then there are set out the infringement details in question.
> Where the recipient takes no action in response to the Notice of Enforcement Order[31] or does not pay the fine the process moves to the next stage.
> The Registrar must now issue a Penalty Enforcement Warrant ... : cl 8(1). The warrant may be directed to the Sheriff. ...
>
> The Registrar of the PERIN Court is ... given no discretion with respect to the issue of a Penalty Enforcement warrant ... cl 8(1). In particular, there is no statutory provision requiring or permitting the Registrar to inquire into the reason for non-payment or, for any reason, to mitigate the period of imprisonment calculated under cl 5(1)(a). Compare *Sentencing Act* 1991 s62. At this stage the matter is, in the jargon of the PERIN Court, at 'enforced status'.
>
> Before the final step of imprisonment is taken, the infringer receives a fourth communication advising him or her of one more chance to avoid this consequence of his or her default. A demand in the prescribed form must be made 'setting out a summary of the provisions of this Part [Schedule 7 Pt II] with respect to the allowance of time to pay and payment by instalments and with respect to applications for revocation of Enforcement Orders': cl 8(2). The form prescribed is Form 5 in Schedule 5 to the Regulations. If this notice is ignored for seven days the Penalty Enforcement Warrant ... may be executed: cl 8(3B).
> Once the warrant has been duly executed, the person detained pursuant to the warrant loses any right he may have had to apply to the Registrar for the revocation of the enforcement order ... cl 10(1)(a). He or she then commences to serve the appropriate term of imprisonment.

65. It is apparent that many of the critical steps in the staged process were non-discretionary, for example, the production of an enforcement order upon the registration of an infringement penalty, and the issuing of a penalty enforcement warrant for the arrest of the infringer if no action was taken by the infringer. In particular, there was no capacity for an investigation to be undertaken by the Registrar, before issuing a penalty enforcement warrant, for an explanation of why the infringer had defaulted, nor a power to reduce the period of imprisonment calculated according to an administrative formula. If an infringer chose not to pay the penalty, and did not respond to the 'courtesy letter' by declining to be dealt with under the PERIN system, preferring instead to be proceeded against by summons,[32] the PERIN process would begin. The system would ineluctably result in the infringer's imprisonment unless he or she actively took steps to avoid imprisonment by, for example, seeking revocation of the enforcement order or seeking an instalment order or an extension of time in which to pay. Imprisonment could thus occur in the absence of any judicial determination of the pre-existing liability of the infringer. Describing the system of registration of infringement penalties as involving a court, the 'PERIN court', could not detract from the administrative nature of the process.

(2) The *Magistrates' Court (Infringements) Act* 2000 amendments

66 The *Magistrates' Court (Infringements) Act* 2000 ('the Amending Act')[33] introduced a requirement for persons to be brought before a Magistrate before imprisonment was authorised. The Amending Act inserted Part 4 into Schedule 7 of the *Magistrates' Court Act* which applied whenever a person was arrested and delivered to the officer in charge of a prison or police gaol under a penalty enforcement warrant and was assessed as unsuitable for a custodial community permit,[34] or was not issued with such an order within 48 hours of being delivered to the officer in charge, or breached a condition that applied to the order and was arrested as a result of that breach.[35] In those circumstances, clause 22 applied. This provided:

> (1) The person must be brought before the Court as soon as is practicable.
> (2) If it is not practicable to bring the person before the Court within 48 hours of the person being delivered to the officer in charge of the prison or police gaol –
> (a) a date for the person to appear before the Court must be fixed; and
> (b) if the person is not being held in lawful custody for any other reason, the person must be released within 48 hours of being delivered to the officer in charge, and must be given a written notice requiring him or her to appear before the Court on that date.
> (3) Sub-clause (2) does not apply to a person who was arrested for breaching the conditions of a custodial community permit.
> (4) This clause ceases to apply if, while a person is held in custody, the penalty enforcement warrant is satisfied.

67. The Amending Act conferred powers upon the Court to discharge the fine, in whole or in part, or adjourn for up to six months, if it was satisfied that the offender had a mental disorder which was the main reason for the commission of an offence or the main reason for failing to pay the fine. Clause 23 provided:

> (1) After giving a person brought before it under clause 22 an opportunity to be heard, the Court may –
> (a) discharge the fine, either in whole or in part; or
> (b) adjourn the further hearing of the matter for a period of up to 6 months.
>
> (2) The Court may only act under sub-clause (1) if it is satisfied that the main reason the person committed the offence for which the infringement notice was issued, or the main reason why the person failed to pay the fine or comply with an instalment arrangement, is one or more of the following –
> (a) a mental disorder which the person has; or
> (b) an intellectual impairment, a brain injury or dementia which the person has.
>
> (3) The Court may make the granting of an adjournment subject to any conditions that it considers appropriate.
>
> (4) On resuming a hearing adjourned under sub-clause (1), the Court may discharge the fine, either in whole or in part, if it is satisfied that the person –
> (a) has complied with any conditions imposed in adjourning the hearing; and
> (b) has no means to pay the fine or has a reasonable excuse for paying the fine.

68. It was only if the Court was not satisfied that an offender had a mental disorder which was the main reason for the commission of the offence or for failing to pay the fine, or was so satisfied but discharged the fine in part only, or was not prepared to grant an adjournment, or granted an adjournment but on resumption was not prepared wholly to discharge the fine, that imprisonment could be ordered or, in exceptional circumstances, a community-based order made under the *Sentencing Act* 1991. These alternatives were provided for under clause 24:[36]

> (1) This clause applies if the Court, after giving a person brought before it under clause 22 an opportunity to be heard –
> (a) discharges a fine in part only under clause 23(1)(a); or
> (b) is not prepared to grant an adjournment under clause 23(1)(b); or
> (c) granted an adjournment under clause 23(1)(b), but is not prepared to wholly discharge the fine under clause 23(4).[37]
> (2) The Court may –
> (a) order that the person be imprisoned for a period of 1 day in respect of each penalty unit or part of a penalty unit of the amount of the fine then remaining unpaid or undischarged; or
> (b) order that the person be imprisoned for a period that is up to two thirds less than the period that may be specified under paragraph (a); or
> (c) if the Court is satisfied that there are exceptional circumstances, make a community-based order under the *Sentencing Act* 1991 in respect of the person.

69. The Amending Act was thus intended to prevent offenders being automatically taken to prison once arrested and to provide some safeguards for those suffering from a mental disorder or intellectual impairment. It sought to alleviate some of the perceived unfairness resulting from an automated enforcement process for infringement penalties. However, it expressly imposed upon the applicant the burden of satisfying the Magistrate, by providing in cl 25 that:

> A person brought before the Court under this Part bears the onus of satisfying the Court with respect to any matter before the Court.

70. Clause 25 was not reproduced in the Act.

71. In 2002 a pilot program was established at the Melbourne Magistrates' Court, the Enforcement Review Program, to assist members of the community who were in special circumstances by reason of being diagnosed with mental illnesses, neurological disorders or severe physical disabilities and who were incurring multiple infringements that were registered at the 'PERIN Court'.[38]

(3) The 'new infringements model' – the statutory scheme

72. It was against this background that in 2006 the Act came into operation. It was described as ushering in a 'new infringements model',[39] a model which repealed the PERIN scheme;[40] enhanced 'due process'[41] within the infringements system, maintained the requirement that there be a determination by a court of law before imprisonment was authorised, and which extended the protection for the vulnerable, including those with a mental or intellectual impairment, from becoming caught up in the system.

73. The objective of infringements systems generally, the Attorney-General said, was 'to be able to regulate community behaviour to achieve public order, safety and amenity in a way that maintains fair and due process in dealing with breaches of those standards'.[42] He identified two purposes of the Act, the primary purpose being, within the context of an infringements system, the improvement of rights of the community and the protection of the vulnerable:[43]

> Its primary purpose is to improve the community's rights and options in the process and *to better protect*

> *the vulnerable who are inappropriately caught up in the system.* A second objective is to provide additional enforcement sanctions to motivate people to pay their fines in order to maintain the integrity of the system.

74. He emphasised three features of the Act; first, that the Act was intended to continue and reinforce the policy, introduced by the Amending Act in 2000, of reducing the automatic imprisonment of offenders who defaulted on their infringement fines by requiring that offenders be brought before Magistrates in open court; secondly, that the hearings in open court would consider whether imprisonment should be ordered and determine the existence of extenuating circumstances; and thirdly, that imprisonment was to remain a sanction of 'last resort' for those offenders who were 'the most serious fine defaulters'.[44] He said:[45]

> In 2000 the Parliament passed amendments to the *Magistrates' Court Act* to prevent people being arrested on enforcement warrants and automatically taken to prison. Anyone arrested on a warrant must now appear before a Magistrate in open court. *The policy of avoiding people being imprisoned for infringement fine defaults is continued in this bill and enhanced.*
>
> The bill gives broader options to Magistrates in open court hearings which occur after the execution of an enforcement warrant.
>
> By this stage, other enforcement sanctions, instalment payment plans or community work will not have been successful in expiating the fines. *These hearings consider whether a person should be imprisoned, and will determine whether there are extenuating circumstances.*
>
> Currently, Magistrates' powers include being able to discharge the matter if the person has a mental or intellectual disability. If a person has exceptional circumstances, the court can place the person on community work. The term of imprisonment can also be reduced. The bill proposes that Magistrates also be able to approve instalment payment plans[46] and that where imprisonment would be 'excessive, disproportionate or unduly harsh' the Magistrate can discharge the fine in all or part, or reduce the imprisonment by two thirds.[47] These changes will ensure that *imprisonment is, and will remain, a sanction of last resort for the most serious fine defaulters.*

75. In particular, the Attorney-General said:[48]

> The proposed improvements to the infringements system will make the system fairer for the ordinary person and *will protect the vulnerable, minimising the degree to which their matters flow on to enforcement.*

76. These objectives were reinforced by the Guidelines made by the Attorney-General in relation to the administration of the Act.[49] Those Guidelines relevantly described the Act as:[50]

> [A]im[ing] to provide both a fairer system, particularly in addressing the needs of people in special circumstances and providing people with more information about infringements and more avenues by which to expiate (make amends without conviction) the matter. ...
>
> The principles on which the Act is based are:
> ... a requirement that individual circumstances be taken into account;
> a recognition of genuine special circumstances, both at the time the infringement notice issues and during the enforcement process...
>
> Using these principles, the improved infringements system seeks to achieve:
> improved protection for all individuals, as well as for people in special circumstances (ie. mental or intellectual disability, homelessness, serious addictions, those in genuine financial difficulty).

77. The Act provides for the issuing of infringement notices by enforcement agencies.[51] The scope of the regime has extended considerably beyond the enforcement of parking fines. Enforcement agencies include the police force of Victoria; local councils; and government departments.[52] Infringement offences include certain contraventions of the *Casino Control Act* 1991; the *City of Melbourne Act* 2001; *Conservation, Forests and Lands Act* 1987; *Control of Weapons Act* 1990; *Liquor Control Reform Act* 1998; as well as the *Road Management Act* 2004 and the *Road Safety Act* 1986.[53] These offences are called 'lodgeable infringement offences'.[54] Infringement penalties are 'fines'.[55] 'Fines' is defined to include also prescribed costs and certain prescribed fees.[56]

78. An infringement notice must specify, amongst other things, the particular infringement offence alleged to have been committed; the date and time of its commission; the infringement penalty; the manner in which the infringement penalty may be paid; that the infringement penalty must be paid by a specified due date; that failure to pay the infringement penalty by the specified due date may result in further enforcement action being taken; the name of the enforcement agency; the availability of internal review (where relevant); and the possible availability of a payment plan.[57] An infringement notice must also state that the person is entitled to elect to have the matter of the infringement offence heard and determined in the Court.[58]

79. A person served with an infringement notice by an enforcement agency must pay the infringement

penalty by the due date specified in the notice, being a period not less than 28 days after the date of service of the infringement notice.[59] Payment serves to 'expiate' the offence,[60] the effect of which is that no further proceedings may be taken in respect of the offence and no conviction is taken to have been recorded against the person in respect of the offence.[61]

80. Alternatively, the person may elect to have the infringement offence heard and determined in the Court[62] in which case the enforcement agency must lodge with the Court prescribed information in respect of the offender, the infringement offence and the enforcement agency,[63] that prescribed information being deemed to be a charge sheet charging the offence in respect of which the infringement notice was served.[64] The prescribed information includes the offender's name and address and the approximate date and time of the infringement offence; the relevant provision of the Act that creates the infringement offence; and a brief description of the infringement offence and the name of the enforcement agency.[65]

81. A second alternative is for the person to apply to the relevant enforcement agency for review of the decision to serve the infringement notice on the belief that the decision was contrary to law, or involved a mistake of identity, or that 'special circumstances' apply to the offence or the conduct should be excused having regard to any 'exceptional circumstances' relating to the infringement offence.[66] 'Special circumstances' are defined to mean:[67]

> (a) a mental or intellectual disability, disorder, disease or illness where the disability, disorder, disease or illness results in the person being unable –
> (i) to understand that conduct constitutes an offence; or
> (ii) to control conduct that constitutes an offence; or
> (b) a serious addition to drugs, alcohol or a volatile substance … where the serious addiction results in the person being unable –
> (i) to understand that conduct constitutes an offence; or
> (ii) to control conduct that constitutes an offence; or
> (c) homelessness determined in accordance with the prescribed criteria (if any) where the homelessness results in the person being unable to control conduct which constitutes an offence.

82. 'Exceptional circumstances' are not defined.

83. If an enforcement agency receives a request for internal review it must review the decision to serve the infringement notice, suspend the procedures for enforcement and serve the applicant with a written notice advising of the outcome of the review.[68] On a review in response to an application based on special circumstances, the enforcement agency may confirm the decision; withdraw the infringement notice and serve an official warning in its place; or withdraw the infringement notice.[69]

84. The inclusion of special circumstances as a ground for internal review is consistent with the stated primary purpose of the Act, protecting vulnerable people who are inappropriately caught up in the system. The Attorney-General said of the ground of special circumstances:[70]

> This is a critical change to filter the vulnerable in the community out of the infringements system. People with special circumstances are disproportionately, and often irrevocably, caught up in the system. In a just society, the response to people with special circumstances should not be to issue them with an infringement notice.
> …
> Where the person's circumstances are genuine, it should be possible for the person or, more likely, someone on their behalf, to provide evidence to the agency of the person's condition and seek to have the notice withdrawn. This provides benefits to all parties. Unnecessary matters are not prosecuted by the agency and, for the people involved, fines are avoided and matters do not escalate.

85. He emphasised that the ground of special circumstances served to ensure that persons with a mental impairment were kept out of any automated process of enforcement:[71]

> As an added protection, the bill provides that where a person has their application for review on special circumstances grounds rejected by the agency, the agency can only prosecute the matter to open court. … This is another filter *to prevent people with special circumstances being channelled into a highly automated enforcement process*.

86. There is a third alterative available to payment for someone who receives an infringement notice, namely to apply to an enforcement agency for a 'payment plan'[72] which the agency will be obliged to provide if the applicant satisfies the guidelines for eligibility, for example, by being in receipt of a Centrelink or Veterans Affairs pension, or the holder of a concession card or Centrelink health card.[73] Enforcement agencies also have a discretionary power to offer an applicant a payment plan.[74]

87. If a person does not pay the infringement penalty and does not pursue any of the other three options (contesting the penalty, applying for internal review, or applying for a payment plan), the enforcement agency may lodge details of any outstanding amount of an infringement penalty with an infringements registrar of

the Court[75] providing that a penalty reminder notice has been served on the person, the period specified in that notice has passed and full payment of the infringement penalty and any prescribed costs have not been paid.[76] An infringements registrar is entitled to rely on the accuracy of the material lodged.[77]

88. An infringements registrar may make an enforcement order that the person pay to the Court the outstanding amount of the infringement penalty and prescribed costs.[78] An enforcement order is deemed to be an order of the Court.[79] Upon the making of an enforcement order, an infringements registrar must send an enforcement order notice to the person against whom the order is made stating that an infringement warrant will be issued if the person against whom the enforcement order is made defaults for a period of more than 28 days in the payment of a fine or the payment of an instalment.[80] That notice must also summarise the options available.[81]

89. On receipt of notice of an enforcement order, one of the options is to apply for the revocation of the order. An application for revocation may be made by an enforcement agency; a person against whom an enforcement order has been made; or a person acting on behalf of a person with special circumstances against whom an enforcement order has been made. The application must set out in a written statement the grounds justifying why the enforcement order should be revoked.[82] The order must be revoked if the application for revocation is made by the enforcement agency.[83] Otherwise, if the infringement registrar is satisfied that there are sufficient grounds for revocation, he or she must revoke the enforcement order.[84] If the applicant is unsuccessful he or she can apply to have the application for revocation referred to the Court.[85]

90. Another option is for the person against whom an enforcement order is made to apply to an infringements registrar for a 'payment order'.[86] The application must include a statement setting out the financial circumstances of the applicant and the reasons for making the application.[87] In response, the infringements registrar may make a payment order that allows additional time for the payment of the fine, or directs payment of the fine to be made by instalments, or adjusts the total of the fine by varying the prescribed costs or fees.[88]

91. If the person to whom an enforcement notice is sent does not pay the outstanding amount of the fine within 28 days, or defaults under a payment order, the infringements registrar must issue an infringement warrant.[89] No step can be taken under the warrant unless a seven-day notice has been issued[90] which must include a warning of all the enforcement mechanisms available if the person served with the notice does not, within seven days, pay the outstanding amount of the fine, or apply for a payment order or the revocation of an enforcement order.[91] After the expiry of the seven-day period, a demand for payment is to be made.[92] If the fine or any part of it remains unpaid, any step may be taken in execution of the infringement warrant.[93]

92. The issuing of an infringement warrant authorises the person to whom it is directed, for example, the sheriff or any member of the police force,[94] to break, enter and search any residential or business property occupied by the person named in the infringement warrant for any personal property of that person and to seize the personal property of the person named.[95] If the amounts named in the warrant are not paid together with the costs of execution, he or she is authorised to sell the personal property seized.[96] If there is insufficient personal property found, he or she is authorised to arrest the person named in the infringement warrant.[97] A person who has been arrested under an infringement warrant is an 'infringement offender'.[98]

93. The authorisation to arrest is subject to any endorsement on the warrant comprising a direction that the infringement offender must be released on bail.[99] Alternatively, the offender may be released on a community work permit,[100] eligibility for which depends upon the total amount of the outstanding fines not exceeding an amount equivalent to the value of 100 penalty units.[101] If the offender refuses to enter into an undertaking of bail or cannot be dealt with by means of a community work permit, the offender may be taken to a prison or a police gaol for the purpose of being dealt with by the Court under Division 2 of Part 12 of the Act[102] which carries with it a risk of imprisonment. In those circumstances, the offender must be brought before the Court within 24 hours of being arrested to be dealt with according to law.[103] If it is not practicable to bring the offender before the Court within 24 hours of being arrested, a date for the offender to attend Court must be fixed and the offender must be discharged from custody on bail under s10 of the *Bail Act* 1977.[104]

94. When the infringement offender attends Court, the Court has the power, under s160, to order imprisonment by reference to a ratio of penalty units to days imprisoned. If satisfied that special circumstances apply to an infringement offender, it also has the power to discharge the fine, in full or in part, and, if satisfied that imprisonment would be excessive, disproportionate and unduly harsh, it may make a community based order. If an imprisonment order is made, the Court may also make an instalment order for the payment of the fines under the *Sentencing Act*. The construction of s160 lies at the heart of these appeals. It provides:

> (1) The Court may order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the amount of the outstanding fines under the

infringement warrant or warrants is an equivalent amount.
(2) If the Court is satisfied -
(a) that an infringement offender has a mental or intellectual impairment, disorder, disease or illness; or
(b) without limiting paragraph (a), that special circumstances apply to a infringement offender –
the Court may –
(c) discharge the outstanding fines in full; or
(d) discharge up to two thirds of the outstanding fines; or
(e) discharge up to two thirds of the outstanding fines and order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the remaining undischarged amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount; or
(f) adjourn the further hearing of the matter for a period of up to 6 months.
(3) If the Court is satisfied that, having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh the Court may -
(a) order the infringement offender to be imprisoned for a period that is up to two thirds less than one day in respect of each penalty unit, or part of a penalty unit, of the penalty units to which the amount of the outstanding fines is an equivalent amount; or
(b) discharge the outstanding fines in full; or
(c) discharge up to two thirds of the outstanding fines; or
(ca) discharge up to two thirds of the outstanding fines and order that the infringement offender be imprisoned for a period that is up to two thirds less than one day in respect of each penalty unit, or part of a penalty unit, of the penalty units to which the undischarged amount of the outstanding fines is an equivalent amount; or
(d) adjourn the further hearing of the matter for a period of up to 6 months; or
(e) make a community based order under Division 4 of Part 3 of the *Sentencing Act* 1991.
(4) If the Court has made an order under sub-s (1), (2)(da), (3)(a) or (3)(ca) for imprisonment in default of payment of outstanding fines-
(a) a warrant to imprison may be issued under section 68 of the *Magistrates' Court Act* 1989; and
(b) the Court may make an instalment order under the *Sentencing Act* 1991 in respect of the payment of the outstanding fines.

95. An infringement offender must be released from custody if the whole amount of the outstanding fines or the amount remaining to be paid is paid to the officer in charge of the prison or police goal and the offender is in custody for no other reason.[105]

96. It is plain from a reading of the Act, and the second reading speech, that the Act rejected the automatic imprisonment of infringement offenders and reflected the policy of imprisonment as the last resort. That is, the system intended to be established by the Act was of 'avoiding people being imprisoned for infringement fine defaults'[106] unless imprisonment was the final course of action and was ordered by a Magistrate after a hearing in open court in circumstances where the vulnerable, including the mentally ill, had been protected. The Act achieved this in three ways; first, by providing a system of internal review that could result in the withdrawal of unlawful or mistaken infringement notices, or notices issued where there were special or exceptional circumstances; secondly, by providing a range of alternative sanctions, including individual payment plans and community work orders; and thirdly, by ensuring that, when those alternative sanctions had not been taken up or had been exhausted, imprisonment could still be avoided for those offenders with a mental or intellectual impairment, or were otherwise in 'special circumstances', or where imprisonment would be excessive, disproportionate and unduly harsh. The specific powers in relation to offenders with a mental or intellectual impairment were thus logically an extension of the policy framework underpinning the whole of the Act, namely, that imprisonment should not be the automatic sanction for those who defaulted on penalty infringements but that appropriate measures should be available to suit the circumstances of individual offenders.

97. In particular, the requirement for a hearing in open court was intended as a means of eschewing the automated process associated with the PERIN system, and ensuring that in its place there would be a determination by a judicial officer of whether imprisonment should be ordered, or whether one of the other powers available to the Court, including the discharge of the fine, should be exercised by reason of special or exceptional circumstances relating to the offender, including the suffering of a mental illness or intellectual disability.

98. For the achievement of these policy objectives, much turned upon the conduct of hearings before the Court and the approach taken by Magistrates to the powers conferred by s160.

The enforcement process relating to Mr Taha

99. On numerous occasions in 2006, 2007 and 2008, Mr Taha was issued with infringement notices.[107] These related to 30 infringement offences. One offence was for riding a motorcycle without a helmet; two were for unlicensed driving; and the remainder were for the public transport offences of failing to produce a valid ticket on public transport and failing to give name and address or produce evidence of other information to authorised officers.

100. The fines relating to these offences were not paid and enforcement orders were made by an infringements registrar.[108] The infringement registrar issued an infringement warrant for Mr Taha's arrest in respect of 30 outstanding fines.[109] The fines totalled $11,250.20.

101. Mr Taha advised the sheriff he could not afford to pay the fines. He later contacted the sheriff and was told to arrange an instalment plan.

102. During 2008 Mr Taha had been certified as intellectually disabled by the Secretary of the Department of Human Services.[110] The certification stated that Mr Taha has 'significant sub-average general intellectual functioning and significant deficits in adaptive behavior, each of which became manifest before the age of 18 years'. He left school at the age of 13 having struggled with academic tasks, following instructions and maintaining working relationships with peers. He has an IQ of only 61 and was in receipt of a disability support pension by reason of his intellectual disability. Mr Taha had previously been placed on a Justice Plan[111] in respect of past offending which was recorded in the CourtLink system maintained by the Court; however, the Magistrate was not aware of Mr Taha's intellectual disability.

103. On 3 February 2009, Mr Taha was arrested and bailed to appear before the Magistrates' Court at Broadmeadows for a hearing pursuant to s160 of the Act.[112]

104. On 26 February 2009, Mr Taha was represented by a duty lawyer[113] from Victoria Legal Aid, Mr Munro. Mr Munro was not aware that Mr Taha has an intellectual disability. That being so, he did not raise the issue of Mr Taha's intellectual disability with the Court nor did he apply for the fines to be discharged in whole or in part, pursuant to ss160(2) or 160(3).

105. Mr Munro swore two affidavits,[114] which were before the judge in the proceedings below, in which he deposed that if he had been aware that Mr Taha had a mental disability the matter would not have proceeded in the manner in which it did and he would have applied for an adjournment for the purpose of obtaining appropriate evidence. It is likely he would have made an application under s160(2) for the discharge of the fines, in whole or in part.

106. The Magistrate made an order for imprisonment in default of payment of outstanding fines, under s160(1), combined with an instalment order, under s160(4), in respect of the payment of the outstanding fines of 80.00 per month:[115] In default of payment of unpaid amounts in this case being the total of $11,250.20, the offender is to be imprisoned for 100 days. Instalments of $80.00 each month – First payment 1/4/2009.

107. This had the effect that a failure to pay would result in immediate imprisonment without the need for a further order from the Court.

108. Mr Taha made payments to the sum of $1,280.00 and then stopped paying.

109. In August 2010, the police visited the home of Mr Taha's parents to arrest him. He was an inpatient at Orygen Youth Health for a depressive condition at this time and he was not arrested.

The enforcement process relating to Ms Brookes

110. During 1999, 2000, and 2001, Ms Brookes incurred fines associated with driving a motor vehicle. A high proportion of these fines were imposed for driving on a toll road without CityLink registration but some were speeding offences.

111. Ms Brookes was diagnosed in 2001 by Mr Gerry Egan, a psychologist, as suffering from post-traumatic stress disorder (PTSD) by reason of having been assaulted repeatedly and stalked over a considerable period of time by a partner with whom she had had a violent and tempestuous relationship.[116] In order to avoid this partner, Ms Brookes changed her name and frequently moved house. She had frequent panic attacks and nightmares about being assaulted or killed. On occasion she had harmed herself and attempted suicide three or four times by overdosing on medication. The diagnosis of PTSD was later confirmed in a psychological report from Dr Kaylene J Evers dated 9 August 2010, Ms Brookes' treating psychologist.

112. On 2 September 2004 Ms Brookes was arrested on numerous warrants issued under the PERIN system, as was applicable at the time. She was bailed to appear before the Court at Broadmeadows on 13 October 2004. She did not appear on that day.

113. On 10 May 2006, a warrant was issued for Ms Brookes' arrest because of her failure to appear in relation to the penalty enforcement warrants.

114. On 24 October 2008, Ms Brookes was arrested in respect of 75 unpaid fines.

115. Ms Brookes gave sworn evidence by affidavit,[117] which was before the judge below, that at Broadmeadows police station she was strip searched by two female police officers and put in a cell on her

own. She was confused and had an anxiety attack. While being held in the cell, she was seen by a duty lawyer from Victoria Legal Aid, Mr Houston. She said that communication between her and the duty lawyer was difficult due to having to speak through a narrow opening in the cell door, that she was extremely anxious and asked the duty lawyer just to get her out of the cells. She said she did not remember a great deal about her conversation with the duty lawyer, but that he did not ask her about her mental health or the circumstances surrounding the fines many of which, she claimed, were incurred by her former partner. She said she was told by her duty lawyer that she would have to come up with the money to pay the fines by instalments. When she was taken into court she was not really aware of what was going on around her and was primarily concerned about what would happen to her three children. She recalled the Magistrate telling her that she would have to pay the fines by instalments and she agreed to that. She recalled that the Magistrate said that if she did not pay the fines, she would go to gaol.

116. Mr Houston swore an affidavit,[118] which was before the judge below, in which he deposed that he obtained instructions from Ms Brookes in which she described the circumstances of the infringements; that she had been the victim of domestic violence over a 12 year relationship; that her former partner had stolen her car and incurred a number of the fines; that she had an ongoing involvement with the mental health unit of the Northern Hospital; that she had tried to commit suicide and took daily anti-depressant medication. He advised her about the relevance of special circumstances under s160. He advised her that, given what she had told him about her mental health and her personal circumstances more broadly, he would submit to the Court that the Magistrate should exercise his powers under s160(2) to discharge or reduce the fines, or order an adjournment. He explained Ms Brooke's personal circumstances to the Magistrate and also submitted that Ms Brookes believed that she was already paying the fines out of her Centrelink benefit at the rate of $40.00 per fortnight. He argued that Ms Brookes' case amounted to special circumstances and that the total fine owing should be reduced. The Magistrate responded that Mr Houston had 'no documentation to support what he was saying and that the only way the Court could entertain this submission was with appropriate written material tendered to the Court'.[119]

117. Mr Houston deposed that he told Ms Brookes that he could seek an adjournment to obtain the materials which the Magistrate indicated were necessary but that she instructed him to deal with the matter that day and not adjourn the case. He told her that the only other option was to ask the Court for an instalment order and that the Court would impose an order for imprisonment in default of payment if it made an instalment order. Ms Brookes instructed him to proceed.

118. Mr Houston made no application for an adjournment. He submitted that an instalment order of $45.00 per month be made and the Magistrate agreed with this proposed course.

119. Six of the charges in relation to unpaid fines were struck out as they had been paid in full. With respect to the remaining 69 charges, the Magistrate made an order for imprisonment in default of payment of outstanding fines combined with an instalment order in respect of the payment of the outstanding fines of $45.00 per month: In default of payment of unpaid amounts in this case being the total of $15164.50, [Ms Brookes] is to be imprisoned for 134 days. Instalments of $45.00 each month – First payment 1/12/2008.

120. Ms Brookes defaulted on the instalment order.

Judicial review

121. Mr Taha and Ms Brookes each commenced proceedings for judicial review in the Supreme Court.[120] The defendants to those proceedings were, in the case of Mr Taha, Broadmeadows' Magistrates' Court, the Department of Transport, Victoria Police Toll Enforcement and Victoria Police Infringements.[121] I will refer to the latter three defendants collectively as 'Vic Toll'. The Victorian Equal Opportunity and Human Rights Commission ('the Commission') intervened in these proceedings, in the exercise of its statutory right of intervention under the Charter.[122] With respect to Ms Brookes, the defendants to the proceedings were the Magistrates' Court of Victoria and the State of Victoria.[123] These defendants were represented on the appeals by the same counsel and it is convenient to refer to them also as 'Vic Toll'. The Magistrates' Court appeared in each proceeding largely to provide assistance with respect to the operation of its infringement procedures and agreed to abide by the decision of the Supreme Court.[124]

122. The judge emphasised that the Magistrate received only 'basic information' in the form of a paper file containing the details of the infringements, their monetary value, whether any payments had been made and, if so, what amounts had been paid, as well as the number of days' imprisonment corresponding to the unpaid infringements.[125] The Court relies on any evidence about the offender's circumstances being adduced by or on behalf of the infringement offender. As her Honour observed:[126]

> Unless the s160 hearing is adjourned, it is the first and last time the infringement offender comes before the Court. There has been no prior determination in relation to the commission of the underlying offences or any other hearing in which the circumstances of the offender or the offending will have been exposed to the Court.

123. The judge noted that it was common ground that the Court's attention was not drawn to Mr Taha's intellectual disability and that no material was placed before the Court about Ms Brookes' mental illness. She found, with respect to both Mr Taha and Ms Brookes that:[127]

> As a result, those matters were not taken into consideration when the Court exercised the power conferred by s160(1). Imprisonment orders were made without regard to the possibility that less draconian orders could be made under ss160(2) or (3).

124. This finding was called into question on the appeal in relation to Ms Brookes.[128]

125. The judge held that the Magistrate had misconstrued his statutory function in the case of both Mr Taha and Ms Brookes by failing to recognise that s160 required him to address the possibility that orders could be made under sub-s (2) or sub-s (3) in lieu of an imprisonment order under sub-s (1).[129] The Magistrate erred in failing to adopt what the judge described as a 'unified' construction of s160. As her Honour said:[130]

> [Section] 160 must be construed in a unified fashion, and … the power conferred by sub-s (1) must be exercised by reference to the powers contained in sub-ss (2) and (3). By enacting s160, the legislature has given the Court a variety of powers to make different kinds of imprisonment and related orders. Those powers give the Court a range of options to deal with the kinds of offenders who commonly come before the Court, having exhausted all the other possibilities for repayment or expiation of the fines. In my view, the powers in s160 comprise a 'package' of measures, to which the Court must have regard as a whole when deciding how best to deal with the individual infringement offender.
> …
> A 'unified' construction of s160 is supported by the objects and purposes of the Act read as a whole. The purpose or object underlying the Act must be discerned having regard to the Act as a whole and the various ways in which it makes provision for persons with mental illnesses and intellectual disabilities, and persons who suffer from addiction or homelessness. The Act contains a number of measures to remove such persons from the infringement system or to ameliorate its harshness, including processes for internal review of infringement notices and for the revocation of enforcement orders based on special circumstances, and provides alternatives to arrest and imprisonment once an infringement warrant has been issued. Importantly, the Act recognises in the definition of 'special circumstances' that an intellectual impairment, mental illness or addiction may prevent the person from understanding that conduct constitutes an offence or from being able to control such conduct. The definition of 'special circumstances' thereby recognises, in effect, that there are people in the community who, through disability, illness or addiction, lead lives that are chaotic and cannot manage their affairs in an organised and rational way. These people are highly vulnerable in the infringement system and should not be 'processed' through the system without regard to their special circumstances.

126. In support of the unified construction, the judge relied upon the second reading speech for the *Infringements Bill* and the Attorney-General's Guidelines, as described above.[131] She considered that these extrinsic materials revealed that the Act was directed, amongst other things, to ensuring that:[132]

> (a) vulnerable people inappropriately caught up in the infringement system are to be filtered out of the system at various stages;
> (b) where the filtering mechanisms in the Act have not succeeded or the fines have not otherwise been paid, the Court retains a range of options for dealing with the vulnerable offender; and
> (c) imprisonment of the vulnerable offender for non-payment of fines is to be a measure of last resort.

127. A construction of s160 that would promote those purposes or objects was to be preferred over one that did not. The unified construction promoted those purposes. That construction was thus consistent with s35(a) of the *Interpretation of Legislation Act* 1984[133] and with s32 of the Charter which requires s160 to be interpreted compatibly with human rights, most relevantly the right to liberty,[134] the right to a fair hearing,[135] and the right to equal protection of the law,[136] so far as is possible to do so consistently with its purpose.[137] Thus, the judge held that a construction of s160 should be adopted that requires the Court, before making an imprisonment order under sub-s (1), to consider the availability of making orders under sub-s (2) or sub-s (3); that is, orders that would intrude upon an offender's rights to a lesser degree.[138] This would require the Court to consider the individual circumstances of the infringement offender.[139]

128. The judge went further, however, to conclude that not only was it necessary for the Court to consider the individual circumstances of the infringement offender but also that this might entail the Court being required to adopt an active role in questioning the offender. She said:[140]

> Furthermore, in undertaking this task in a manner that least infringes the right to the equal protection of the law in s8(3) of the Charter, the Court may be required to make inquiries of the infringement offender aimed at ascertaining whether he or she answers one or more of the descriptions in sub-ss (2) or (3). It is in the nature of an intellectual disability or a mental illness that it may prevent the offender from triggering the operation of sub-ss (2) or (3) by raising the condition with the Court. It would defeat the purpose of sub-s (2), in particular, if it could only be enlivened by the actions of a person burdened by a condition that may disable them from forming and exercising the necessary judgement to do so.

> Hence, while sub-ss (2) and (3) require the Court to be 'satisfied' of the matters described therein before making any of the alternative orders, that does not mean that it is left to the infringement offender to satisfy the Court of those matters. The Court may reach the requisite state of satisfaction as a result of its own inquiries and from information that emerges during the course of s160 as a result.

129. This requirement upon the Court 'to actively elicit the relevant information from the infringement offender'[141] was described on appeal as a 'duty to inquire'. This duty was supported by the judge on the basis that 'an interpretation should be favoured that "produces the least infringement of common law rights"',[142] and that implying a duty to inquire would give s160 a meaning which least infringed rights.

130. Although the judge construed s160 as imposing a 'duty to inquire', she was loath, however, to regard that duty as obliging a Magistrate to interrogate every infringement offender who came before the Court about the possible existence of special or exceptional circumstances. Although the Magistrate was given only basic information, it was a matter of the Magistrate being alert to any cues in the individual circumstances of the case that would signify the existence of special or exceptional circumstances. Such cues ought to prompt the trigger to inquire. As the judge put it:[143]

> What steps must be taken will depend on the case before the Magistrate. A course of questioning will not be required in every case, least of all a standard course of questioning. In Mr Taha's case, however, there were 'flags' that should have prompted the Court to ask questions directed to ascertaining whether he had an intellectual disability, a mental health problem or some other condition that prevented him from successfully negotiating both the public transport and infringement systems. Mr Taha presented as a young person who had accumulated a very large number of fines over a long period for repeated offences of the same kind. The amount of money involved was significant, particularly for a person on a pension. The Court placed Mr Taha on an instalment plan, so it must have inquired about his ability to meet payments. It is likely the Court was told that he received a pension or allowance of some kind. It would not have been a large step for the Court to have asked what kind of pension Mr Taha received. This would have revealed his disability. Moreover, the Court's own records showed that Mr Taha was the subject of a Justice Plan, which told the Court that Mr Taha had an intellectual disability. Although the Magistrate was not aware of the Justice Plan, and had no direct access to the relevant record while on the bench, it would not have been difficult for the Court, through the Infringements Registrar or otherwise, to have made searches of its own records and to have informed the Magistrate of the results.

131. She found, given the circumstances of Mr Taha's offending and the level of fines outstanding, 'an inquiry as to whether Mr Taha qualified for orders under ss160(2) or (3) was required by the Act'.[144]

132. The issue of the construction of s160 and the question of whether there is a duty to inquire flowing from s160, and, if there is, in what circumstances is it enlivened, were the principal issues of the appeals. In particular, the question was addressed of whether the duty to inquire was dependent on what was 'flagged' before the Court.

133. The judge also concluded, in the case of Ms Brookes, that the Magistrate misconstrued his statutory function under s160 in that he proceeded to make an imprisonment order under sub-s (1) without addressing the possibility that it might be open to the Court to make the alternative orders under sub-ss (2) or (3) and without considering Ms Brookes' particular circumstances. Moreover, given that the Magistrate was told by way of submission from the duty lawyer that Ms Brookes had a mental illness, the Magistrate had an obligation to undertake inquiries as to whether there were special or exceptional circumstances, and, if necessary, to adjourn the matter of its own motion to permit evidence to be gathered. She said:[145]

> In this case, the Court was informed by the duty lawyer acting for Ms Brookes that sub-s (2) was – or might be – enlivened because Ms Brookes suffered from a mental illness. In those circumstances, the Court should have made inquiries to enable it to determine whether it was appropriate to make orders under sub-ss (2) or (3) before making an imprisonment order under sub-s (1). The requirement that the Court be 'satisfied' of one or more matters in sub-s (2)(a) or (b) or of the matter in sub-s (3) does not impose an obligation on the offender to provide proof in the conventional sense. The Court may satisfy itself through its own inquiries. If documentary evidence of Ms Brookes' mental illness was required by the Court, the s160 hearing should have been adjourned in order for that evidence to be obtained and put before the Court.

134. The judge concluded that the failure of the Court to make its own inquiries of Ms Brookes, or, if necessary, to adjourn of its own motion, was an error constituting a breach of natural justice.[146] So too, the error committed in the case of Mr Taha, of failing to inquire as to whether there were special or exceptional circumstances in the case, amounted to a breach of procedural fairness. This was because his intellectual disability, had it been known, would have led the s160 hearing to be conducted in a different way.[147] The breach of the duty to inquire denied Mr Taha the opportunity to avail himself of the protections in sub-ss (2) and (3).[148]

135. The judge found that the errors made by the Magistrate in each case, the misconstruing of his statutory functions and the breaches of natural justice, or procedural fairness, amounted to jurisdictional errors that vitiated the orders he made.[149]

The grounds of appeal

136. The grounds of appeal relied on by Vic Toll in the proceeding relating to Mr Taha are the following: The learned judge erred in law in:

> 1. holding that the Magistrate had misconstrued his function under s160 of the Act;
> 2. holding that the Magistrate had denied the Plaintiff [Mr Taha] procedural fairness;
> 3. holding that the Magistrates Court, when exercising power under s160 of the act, has a duty to inquire into whether an infringement offender falls within sub-ss (2) or (3) of s160 of the Act;
> 4. failing to identify whether it is the Court, the Infringements Registrar or the Magistrate (or all in combination) upon whom the duty to inquire is imposed;
> 5. construing s160 as only imposing two possible options, either a duty on the Court or on the disabled person and hence overlooking the role of legal representation;
> 6. drawing an inference that the Magistrate did not consider sub-ss (2) or (3) of s160 of the Act when such an inference was not open to her Honour on the evidence.

137. The grounds of appeal identified relied in the proceeding relating to Ms Brookes were identical to those relied on in the Taha proceeding, together with the following additional ground:

> 7. Interpreting sub-ss (2) or (3) of s160 of the Act as not imposing an obligation on the offender to provide proof in the conventional sense.

138. Ms Brookes filed a Notice of Contention in which she sought to contend that the judgment below should be affirmed on additional grounds to those expressed by the judge, namely:

> 1. In making an order under s160, the Magistrate is an administrative decision-maker in the Craig v South Australia[150] sense and that, accordingly, the Magistrate fell into jurisdictional error by failing to take account of a relevant consideration, namely Ms Brookes' mental illness; and
>
> 2. Alternatively, if the Court is properly classified as an inferior court in the Craig sense, the Magistrate's failure to take into account a relevant consideration nevertheless amounted to a jurisdictional error in light of the account of jurisdictional error given in the High Court's decision in *Kirk v Industrial Court of New South Wales*.[151]

139. The Commission filed a Notice of Contention[152] in the Taha appeal in which it sought to contend that the judgment below should be affirmed on grounds other than those relied on below, namely:

> 1. that at the hearing under s160 of the Act on 26 February 2009, the Court was obliged by s6(2)(b) of the Charter to act compatibly with the rights to equality before the law in s8(3) of the Charter and to a fair hearing under s24(1) of the Charter; and
>
> 2. that the Court failed to act compatibly with the rights to equality before the law in s8(3) of the Charter and to a fair hearing in s24(1) of the Charter in that it failed to inquire into the particular circumstances of Mr Taha and to consider the availability and appropriateness of an order under ss160(2) or (3) of the Act before making the order for imprisonment under s160(1) of the Act.

140. It is apparent that much turns upon the construction of s160. It is convenient to group the grounds of appeal as those directly raising the issue of construction (grounds 1, 3, 4, and 5), and treat separately the ground that raises the question of what evidence of disability is required (ground 7); the ground which relates to a finding about what the Magistrate did (ground 6); and the ground of procedural fairness (ground 2). I will deal with the grounds of appeal and then turn to the two grounds identified in the Notice of Contention filed by Ms Brookes and then to the Commission's Notice of Contention.

Construction of s160 – grounds 1, 3, 4 and 5

(1) Unified construction

141. Vic Toll submitted that s160(1) should be construed as a 'stand alone' power to order imprisonment, without necessitating reference to sub-ss (2) or (3). It was submitted that s160(1) would have to have been worded differently if it was necessary to have regard to sub-ss (2) or (3) before the power under s160(1) is enlivened. In particular, it was argued that if the Legislature had intended s160 to constitute a 'package of measures to which the Court must have regard as a whole when deciding how best to deal with the individual infringement offender',[153] as the judge concluded, s160 would have commenced with the words: 'Subject to sub-sections (2) and (3)' which were conspicuously absent.

142. In response, Mr Taha pointed to the context in which the power to imprison can be exercised.[154] The underlying infringement offences will never have been proved and the process to that point will have been 'highly automated'.[155] There is no disclosure regime. There will be no prosecutor. The busy Magistrate will have the assistance of registry staff and submissions made by a duty lawyer. There will be no power to re-hear the matter and there is no right of appeal (either *de novo*[156] or by way of appellate review for error of law[157]) against the imprisonment order.

143. Given that context, Mr Taha submitted that the exceptions to be found in sub-ss (2) and (3) are all-important. They allow the court to take a less punitive approach to people in special or exceptional circumstances. In particular, the bureaucratic nature of much of the process leading to the s160 hearing indicates that the exceptions provide the very flexibility Parliament intended to be imported into the system. The very purpose of the s160 hearing is to provide an opportunity, at a final stage immediately preceding the prospect of an imprisonment order, for persons who have a mental illness, intellectual disability or for whom there are other special or exceptional circumstances, to be identified. Consideration of the options under sub-s (2) and (3) is therefore central to the exercise of the power under sub-s (1).[158]

144. I agree. Indeed, it might be concluded that, without the exceptions provided for in sub-ss (2) and (3), or their precursors in the amendments made in 2000, the intention to insert notions of due process into an otherwise almost fully automated infringements system would have failed. This is supported by the legislative history of the Act, as described above,[159] one of its purposes being to protect persons with mental disorders and disabilities, set against the background of the earlier PERIN system. It was accepted by Vic Toll, at the hearing of the appeals, quite properly in my view, that the construction adopted by the judge was consistent with the purpose of the Act as supported by the extrinsic materials. However, it nevertheless maintained that the unified construction was inconsistent with the statutory language.

145. Mr Taha went further and submitted that sub-ss (2) and (3) 'give content' to the word 'may' in s160(1); that is, they provided guidance as to when the discretionary power in s160(1) should not be exercised. Without those exceptions, there is no guidance in the statutory scheme to indicate to a Magistrate the circumstances in which he or she should refuse to order imprisonment. Considered in isolation, the power under sub-s (1) would offer a Magistrate a stark choice, to imprison or not to imprison, without any indication of factors relevant to that choice. It contains no power to discharge the fines, in part or in full. Moreover, given that sub-ss (2) and (3) set out specific categories of people who can avoid imprisonment, it would be curious for that specificity to be undone by a broad and unfettered discretion not to imprison under sub-s (1).

146. Furthermore, it was submitted, a refusal by a Magistrate to order imprisonment under sub-s (1) would at least raise a query as to the continuing status of the offender and his or her liability to pay the fines. Mr Taha was correct to submit that sub-s (1) is silent on those matters. Vic Toll may also be correct to assert that the person would remain an infringement offender and would continue to be liable to pay the fines if no imprisonment order was made. However, given that the Court has no power to make orders for an instalment plan unless an imprisonment order is also made,[160] is it envisaged that the offender is to be brought back before the Magistrate at a later time for a further assessment, as though he or she had been granted an extension of time to pay?

147. All of these considerations indicate to me that in relation to the discretionary power to order imprisonment under sub-s (1), the content of that discretion is to be found elsewhere, namely, in sub-s (2) and (3). The content of the discretion includes those factors that guide the decision not to make the order. The sub-sections are thus inter-linked without the need for any such set expression as 'subject to sub-sections (2) and (3)'.

148. Furthermore, as was submitted on behalf of Mr Taha, it is important to pay close attention to the words that do appear in s160(1). Those words reveal that the term of imprisonment is to be determined by a formula. It is thus important to characterise s160(1) not simply as a power to order imprisonment but rather as a power to order imprisonment according to a specific formula. Sub-s (1) does not countenance the ordering of any 'lesser' term of imprisonment than that reflected in the formula, regardless of the circumstances. It is also important, yet obvious, to recognise that s160 does not confer only a single power to order imprisonment, to be found in sub-s (1). It is not the case that every imprisonment authorised under s160 will have its source in s160(1). Rather, s160 confers four separate powers of imprisonment: (i) the power to order imprisonment according to the formula of one day to each penalty unit, under sub-s (1); (ii) the power to order imprisonment consequent upon a discharge of up to two thirds of the outstanding fines, when satisfied that there are special circumstances, under sub-s (2)(da); (iii) the power to order imprisonment according to the formula of a period of up to two thirds less than one day for each penalty unit, when satisfied that there are exceptional circumstances, under sub-s (3)(a); and (iv) the power to order imprisonment, consequent upon the discharge of up to two thirds of the outstanding fines, according to the formula of a period of up to two thirds less than one day for each penalty unit, when satisfied that imprisonment would be excessive, disproportionate and unduly harsh, under sub-s (3)(ca). That is, s160 confers on the Court four separate powers of imprisonment, each according to a separate formula.

149. Three inferences can be drawn from this observation:

> (1) Sub-sections (1), (2) and (3) of s160 provide alternatives for the Court because the Court, even if it considers that it should order the offender to be imprisoned, must consider which of the range of powers of imprisonment to exercise; that is, which of the alternative formulae is appropriate to the circumstances. It cannot determine to order imprisonment without considering the question of imprisonment in accordance with which formula.

(2) The power to imprison according to the particular formula under s160(1) has no inherent primacy – being first in the sequence of the sub-sections has no particular import.

(3) The structure of the section suggests that if the Court is satisfied that there are special or exceptional circumstances, the power to order imprisonment under the formula in sub-s (1) is displaced. The only form of imprisonment that can be authorised, in those circumstances, is imprisonment according to the particular formula the Parliament has selected as appropriate to those set of circumstances. That is, the presence or absence of the factors in sub-s (2) and (3) indicate whether the power under sub-s (1) is available to be exercised or not. Clearly, this is critically important for a Magistrate to know before purporting to exercise that power.

150. In my view, the relationship between the sub-sections is best expressed by saying that sub-s (1) confers a power to impose imprisonment on the basis of the formula of one day to one penalty unit unless special or exceptional circumstances apply. As the judge found, the Court is thus required to consider whether special or exceptional circumstances do apply in each hearing under s160 that comes before it. Although sub-ss (2) and (3) are expressed by reference to the Court being 'satisfied', and not to the objective existence of special or exceptional circumstances, the context[161] of the statutory provision, as explained in *Project Blue Sky v Australian Broadcasting Authority*,[162] does not permit the power under s160(1) to be exercised by a Magistrate who has eschewed the opportunity of arriving at the relevant state of satisfaction by failing to consider the alternatives.

151. In this way, I consider that Mr Taha was correct to argue that the factors enumerated in sub-s (2) and (3) give content to the word 'may' in sub-s (1). This is not to accept, however, that the discretion conferred by sub-s (1) is only given content by reference to the other options in sub-ss (2) and (3), as was submitted. I do not read the judge's reasons as indicating that she accepted the proposition that the only means by which the Court can refuse to order imprisonment when faced with an infringement offender is to find special or exceptional circumstances.[163] The judge, quite correctly, did not view the unified construction as dependent upon a conclusion that there is no discretion under sub-s (1) to refuse to imprison unless the requirements of sub-s (2) or (3) have been met and that this is why a Magistrate must turn his or her attention to those sub-sections. Rather, the basis upon which she accepted the unified construction was that it was apparent from reading s160 as a whole that the section identified a range of options, a 'packet of measures' available to a Magistrate and, as the three sub-sections identified alternatives, it was necessary to consider, in every case, each of the alternatives to determine which of the three alternatives would be appropriate. It would be wrong for a Magistrate to single out one of the powers as though the other alternatives had not been provided for. This is especially so as the power to imprison according to the formula, or to discharge where there are special circumstances, or where there are exceptional circumstances, all occur within the same section tending to suggest that they have a relationship to each other.

152. The judge's emphasis upon the range of powers available to a Magistrate is supported by attention to the statutory language in sub-s (4) of s160. Sub-section (4) sets out in a linear and disjunctive fashion the orders which a Court may have made, each of which would provide the pre-condition for the making of an instalment payment plan and a warrant to imprison.[164] These include the imprisonment orders described above made under sub-ss (1) or under (2)(da), or under (3)(a) or under (3)(ca). They are referred to in the form of a range of orders the Court may have made under s160. It is apparent that the powers are inter-linked as alternatives.

153. Another line of attack adopted by Vic Toll was to argue that the unified construction was not necessary to protect the vulnerable. Such protection, it was argued, could be afforded by a system which, in the ordinary course, will bring the personal circumstances of the vulnerable person to the attention of the Court. For example, where a vulnerable person is represented by a lawyer, including a duty lawyer, one would expect that legal representative to make proper inquiries of his or her client and competently to articulate any relevant matters on the client's behalf to the Court.[165] It was submitted that, therefore, the filtering out of vulnerable persons from an infringements system that is in many ways highly automated does not require a unified construction of s160. Indeed, a unified construction, it was submitted, would not be commensurate with protecting vulnerable offenders as it would apply also to the 'common or garden variety infringement offender';[166] in other words, there would be a degree of over-reach in that the Court would be obliged to take into account the potential applicability of sub-ss (2) and (3) when they would be wholly irrelevant to the vast majority of cases. The judge erred, it was said, by 'assimilating' s160(1) with ss160(2) and (3) because this overlooked the fact that s160(1) is dealing with a wider class of persons than the comparatively small sub-set of infringement offenders who have mental or intellectual impairments; a unified construction was argued to be futile for the vast majority of offenders.

154. In a related submission, it was argued that the unified construction of s160 would impact adversely on the integrity and credibility of the infringements system, one of the purposes for which the Act was enacted.[167] This was argued to be so because of the unnecessary burden it would place on Magistrates to consider the availability of options under sub-ss (2) and (3) of s160, even where no material had been placed before the Court about the applicability of those options and regardless of whether the person was legally

represented. The implications were argued to be impractical, inconvenient and unjust to the community. In this respect, Vic Toll pointed to the increasing number of imprisonment orders being made under s160(1); 97 imprisonment orders were made in 2006, 302 imprisonment orders in 2010, and 913 in 2011.[168] The material relied on by Vic Toll also indicated that ordinarily orders for imprisonment are accompanied by an instalment payment plan which may or may not be complied with.

155. However, this material, while it might indicate that there has been an increasing number of matters under s160 coming before the Court, occupying an increased amount of court time, also reveals two aspects of the process that support the unified construction. The first is that, ordinarily, when imprisonment orders are made at a s160 hearing, the orders do not consist in an exercise of a stand-alone power under sub-s (1) but rather consist in an order made under sub-s (1) together with an instalment order made under sub-s (4). Indeed, this is precisely the form of the orders made in both the Taha and Brookes' proceedings. That is, an imprisonment order does not stand in isolation, as Vic Toll would suggest, but is made in the context of an appreciation of the other orders, or options, available to the Court, some of which are alternative orders and some of which are additional orders. The evidence would suggest that the Court is mindful that s160 constitutes, as the judge said, a 'package of measures'[169] to which it should have regard in the context of considering what are the appropriate orders to be made with respect to each individual offender.

156. The second aspect of the process which the material relied upon by Vic Toll suggests is that the avoidance of imprisonment for infringement offenders, which is one of the purposes of the Act, as described above,[170] is likely to have been achieved only by the use of one of the measures Parliament provided, namely, instalment plans, with a consistent failure to recognise the availability of the other measures for which Parliament provided, including the full or partial discharge of the fines where there are special or exceptional circumstances.

(2) Duty to inquire

157. Vic Toll challenged the judge's conclusion that what followed from the unified construction of s160 was an implied duty to inquire. The challenge was made, in effect, on four bases, namely, that the judge's approach: (i) failed to recognise that the onus lay on an applicant under s160 to raise with the Magistrate the existence of special or exceptional circumstances in the case and to persuade the Magistrate of those circumstances; (ii) led to uncertainty as to when interrogation was required (what 'flags' was the Court to be alert to?); what procedure was to be adopted to carry out the inquiry; and upon whom the obligation fell; (iii) overlooked the role of legal representation and counsel; and (iv) impermissibly placed the Magistrate in an inquisitorial role.

158. In response, Mr Taha emphasised that the issues of construction and obligation were linked and could not be sensibly separated. The principal conclusion of the judge's reasons was that the power under s160(1) cannot be exercised without first considering sub-ss (2) and (3). He submitted that the duty to inquire (where necessary) expands upon and explains what it takes for a Magistrate to 'consider' sub-ss (2) and (3). The duty was a corollary of the unified construction.

(i) Onus on applicant

159. Vic Toll argued that the judge wrongly converted a discretionary possibility that a Magistrate may inquire into an infringement offender's personal circumstances into a positive obligation to do so.

160. It argued that an analogy ought be drawn with a sentencing hearing which is conducted in accordance with well-established principles and where it falls to the person being sentenced to raise whatever factors in mitigation he or she seeks to rely upon. The flaw in the analogy is that there are more factors in relation to the hearing under s160 which render it dissimilar to a sentencing process rather than analogous. In particular, it is not the case that a s160 hearing occurs after a conventional criminal trial, where, if the circumstances make it apparent that a defendant may be suffering under a mental disability and may, for example, be unfit to plead, the judge is under an obligation to inquire of the mental capacity of the defendant.[171] Nor is it analogous to a sentencing hearing upon a plea. As mentioned above, there is no prosecutor and no evidence of the circumstances of the offending placed before the Court, nor is the hearing one in which the Court invites the offender to address any issues of mitigation in their personal circumstances. Indeed, it would be a consequence of the unified construction that offenders would be asked to address issues of that type.

161. It was submitted that recognising a positive obligation on the Magistrate is in direct contrast to the approach adopted by Hollingworth J in *Fernando* where her Honour, in considering the exception under s160(3), appeared to accept that the onus fell on the applicant. She said:[172]

> In order to enliven the discretion under s160(3), an applicant must persuade the Magistrate that, having regard to the applicant's situation, imprisonment would be 'excessive, disproportionate and unduly harsh'.

162. However, this observation was made by her Honour in the context of a case where the alternative constructions of s160 were not argued before her. The case rather turned on the status of the s160 hearing

and her Honour determined that it was not a 'criminal proceeding' within the meaning of the *Criminal Procedure Act* 2009 and it was thus was not a proceeding from which an appeal could be brought under s272 of that Act.[173]

163. In my opinion, the observation should not be read as determining that in every case it must fall to the offender to raise the question of whether imprisonment would be unduly harsh before a Magistrate is obliged to consider whether to make an alternative order under sub-s (3) to an imprisonment order under sub-s (1).

164. Furthermore, because the s160 hearing is non-adversarial the question of who has the burden to persuade, or an 'onus', is, to my mind, inappropriate. The absence of any relevant onus provision in the Act, comparable to the former clause 25 under the PERIN regime, supports this understanding. It is a matter of the Court arriving at the required state of satisfaction. I consider that the judge was correct to conclude that the Court might be satisfied that an infringement offender is mentally ill, or that imprisonment would be unduly harsh, as a result of its own inquiries.[174]

(ii) Uncertainty: 'flags'; procedures; obligee

165. The first aspect of uncertainty identified by Vic Toll was a criticism of the vague way in which the judge described the circumstances that should have prompted the Magistrate to ask questions of Mr Taha. What will amount to a 'flag' that questions should be asked? Being in receipt of a disability pension may be one example, but what are others? What range of things is a Magistrate to look for before being obliged to ask questions? Is there not a risk of circularity that a Magistrate will need to know something about an offender's circumstances before being required actively to elicit information about those circumstances? Does the duty to inquire require that more than the 'basic information' is to be placed before the Magistrate, that is, beyond that demanded by the Legislature, so that the Magistrate can determine whether questions need to be asked?

166. This was related to the complaint Vic Toll made of the uncertainty of the scope of the obligation on the Court; namely, what was required to discharge the obligation? There were no particular procedures mentioned by the judge and it was submitted it was unrealistic, unreasonable and impractical to impose a duty on the Court that it would be impossible to comply with because of the uncertainty surrounding the obligation. However, Vic Toll accepted at the hearing of the appeal, that if it became apparent during a s160 hearing that an offender had a mental impairment, the Court would be under a duty to inquire but it submitted that an inquiry of a legal representative would be sufficient.

167. To my mind it is not satisfactory to conclude, as the judge did,[175] that a duty to inquire is only created in those cases in which there are 'flags' arising from the circumstances of the case that prompt the need for interrogation (for example, the fact that Mr Taha was in receipt of a disability pension). It is the statutory framework that determines the obligations imposed on the Court and these obligations must be universal, arising as they do from the overall statutory scheme and the role played in that scheme by the s160 hearing. In my view, the unified construction of s160, which obliges a Magistrate to consider whether he or she should exercise alternative powers to imprisonment under sub-s (1), could be rendered nugatory were the Magistrate not also under a duty to inquire whether there were any special or exceptional circumstances arising. As the judge observed,[176] given the nature of the circumstances underlying the exceptions, especially those of mental illness and intellectual disability, the legislative intent to protect the vulnerable could be thwarted if it fell to the offenders whom the exceptions were designed to protect to raise their circumstances with the Court. The basic information provided to the Court, as set out in the Act, would be unlikely to provide the necessary factual material on which a Magistrate could rely to discharge the obligation to consider the alternative powers under sub-ss (2) and (3). Thus, in my view, the unified construction entails that the Court in a s160 hearing is always under a duty to inquire; that is, the duty to inquire is a necessary consequence of the unified construction.

168. However, what is required to discharge the obligation to inquire will depend on the particular circumstances of the case. This is somewhat analogous to the obligation to accord procedural fairness, the content of which 'will depend on the facts and circumstances of the particular case'.[177] Just as the content of the requirement on a decision-maker to provide an opportunity to be heard is variable and admits of a 'chameleon'[178] quality, so too what is necessary for a Magistrate to do to discharge the duty to inquire will vary from case to case.[179] It is not the case that the Magistrate must mechanically ask a series of ritualised questions of every infringement offender, a vice which the judge wished to avoid, but he or she should at least ask every infringement offender, or the offender's legal representative, if there are any special or exceptional circumstances relevant to the case and, if necessary, if the offender has a mental or intellectual impairment, or a serious addiction to drugs or is homeless.[180] It may be necessary to adjourn the proceeding for a legal representative to obtain the relevant information.[181] In some circumstances, it may also be necessary, if the material would be of central relevance and is readily available, to check the records or information systems of the Court to determine whether special or exceptional circumstances arise in the case.

169. The second aspect of uncertainty, Vic Toll submitted, was that the judge 'confused' the 'Court' with

the 'Magistrate' when determining upon whom the duty to inquire is imposed. That is to say, it argued that her Honour's observation[182] that 'the Court' should have been prompted to ask questions of Mr Taha created an uncertainty as to whether the Infringements Registrar, the Magistrate or 'the Court' (in an institutional sense), or all in combination, was the body upon whom the duty to inquire is imposed by the Act.

170. Under the Act 'Court' is defined to mean 'Magistrates' Court'.[183] Under s4 of the *Magistrates' Court Act* the Court is constituted by the Magistrates, Registrars and Judicial Registrars. It is clear from the nature of the power to order imprisonment under either sub-ss (1), or (2) or (3) of s160, that when the Legislature referred to 'the Court' as the repository of those powers, it intended the power to be exercised by a Magistrate. In the context of a hearing under s160, the obligation to inquire thus clearly falls on the Court as constituted by the presiding Magistrate.

171. Furthermore, if the judge's observations concerning the duty to inquire are read in context, it is also clear that her Honour was referring to the person who would need to be satisfied of the presence of special or exceptional circumstances before making an order under sub-ss (2) or (3) respectively, that is, the Magistrate. It was further clarified on the appeal that the infringements registrar played no part in a hearing under s160.

172. There is no merit in this second aspect of the alleged uncertainty.

(iii) Legal representation

173. It was submitted by Vic Toll that the judge wrongly understood there to be only two possible options as to who was obliged to raise the issue of an offender's mental or intellectual disability, disorder or illness, namely, the Court or the person with the disability. Yet in both the Taha and Brookes proceedings, the offenders were represented by a duty lawyer from Victoria Legal Aid. This revealed that there was a third option – namely, that the obligation fell on the legal representative of an infringement offender to raise with the Court, where relevant, the special or exceptional circumstances relating to the offender. Vic Toll argued that it fell to the lawyer representing Mr Taha to elicit any relevant information from him, and to raise the information with the Court, to enable Mr Taha to avail himself of the protection afforded by sub-ss (2) or (3) of s160. It was submitted that the judge had wrongly converted the failure of the duty lawyer to make inquiries, together with the failure by Mr Taha to disclose the relevant matters that would set the lawyer upon a relevant train of inquiry, into a failure by the Court to consider and inquire about material that was not placed before it. In doing so, it was submitted, the judge had effectively transferred the role properly played by legal representatives to the Court.

174. Mr Taha submitted that reliance on the presence of counsel fails to address the practical and realistic circumstances facing duty lawyers in a busy Magistrates' Court. It fails to reflect the circumstance that, under s2 of the *Legal Aid Act*, duty lawyer services are 'legal services provided by an Australian lawyer attending a court, being legal services consisting of appearing on behalf of a person or giving legal advice to a person at that court, otherwise than by prior arrangement with the person'. The absence of any prior arrangement means that the lawyer has limited time to take instructions. The duty lawyer who represented Mr Taha, Mr Munro, deposed that in his eight years' of experience as a duty lawyer at Magistrates' Courts the average time to take instructions from any one client was about 10 minutes in the context of seeing about 25 to 35 clients a day. Although he had represented many intellectually disabled persons he had never had a client who volunteered the fact that he or she was disabled. The people who fall within the scope of sub-ss (2) and (3) are likely to be those who struggle to disclose their condition, or circumstances of their lives, to a duty lawyer or otherwise. The limited time available means that the duty lawyer does not have the benefit of establishing any relationship of confidence or trust with a client in anything other than a cursory form. It was submitted that these factors limit the degree to which a Magistrate is entitled to rely on the presence of a lawyer as an assurance that, in the absence of the issues being raised, there are no circumstances falling under sub-ss (2) or (3).

175. I agree. Furthermore, while no doubt a Magistrate is justified in looking to a legal representative for assistance in a s160 hearing, the range of powers to be exercised under s160 have been conferred by Parliament on the Court. It is for the Court to determine which of the alternative powers is properly to be exercised in the circumstances of any particular case. The unified construction has the effect that the Magistrate is required to consider whether sub-s (2) or (3) is applicable. A Magistrate is not absolved from that requirement by seeking to impose on legal representatives of infringement offenders, most typically duty lawyers, an obligation to raise the issues under sub-ss (2) or (3). Far from her Honour transferring the burden that rests properly with counsel to the Court, as Vic Toll submitted, the statutory scheme imposes the burden on the Court in the context of the single opportunity on which an infringement offender will appear before a judicial officer. It may be that, where an infringement offender is legally represented, in some circumstances it will be sufficient for the Court to discharge its obligation by asking the legal representative to go and make inquiries but the primary obligation remains with the Court. Moreover, it is not the case that infringement offenders are invariably represented by duty lawyers; much depends on the availability of duty lawyers on any particular day.[184]

176. Nor is it sensible to suggest that those who suffer from a mental illness or intellectual disability are obliged to set their legal representatives on a train of enquiry, as Vic Toll submitted. This is for the very reason that the judge rejected the view that it fell to the offender to raise sub-ss (2) or (3) before the Court, because the condition they suffer from 'may disable them from forming and exercising the necessary judgment to do so'.[185] The notion that it falls to an intellectually disabled person to 'avail himself' of the protections in sub-s (2) or (3) betrays a failure to understand the nature of the conditions that deserve protection.

177. Vic Toll submitted that the proposition that responsibility to raise the issues lay with the legal representative was equally applicable to the Brookes matter. Yet in that matter the duty lawyer representing Ms Brookes did elicit the relevant information and he did raise that information with the Court. It could hardly be properly concluded that he ought to have sought an adjournment in order to gather documentary evidence, as the Magistrate required, in the face of his client's express contrary instructions.[186] Attempting to shift the duty from the Court to the legal representative leads to precisely this form of complication and potential conflict.

(iv) Inquisitorial role

178. Vic Toll sought to draw support from *Whitehorn v The Queen*[187] and *R v Langley*,[188] to submit that if a Magistrate were under a duty to inquire, the integrity of the system would be adversely affected because in all cases arising under s160, the Magistrate will be placed in a pro-active inquisitorial role which is undesirable in an adversarial system and is not a proper role for judicial officers.

179. Vic Toll's reliance on *Whitehorn* and Langley is misplaced. In *Whitehorn* the question was whether there were circumstances in which it was permissible for a judge in a criminal trial to call a witness of his or her own motion whom the prosecutor had declined to call. Dawson J reviewed the authorities in the area including the statement by Barwick CJ in *Ratten v The Queen*[189] to the effect that a trial judge is to take no part in the adversarial contest between the parties:[190]

> It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not.

180. He went on to comment upon the limited role to be adopted by a judge in ensuring that an accused has a fair trial:[191]

> The means by which a trial judge may ensure the propriety and fairness of a trial do not, however, extend to the assumption of responsibilities which are properly those of the parties.

181. This is because:[192]

> A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. If a prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel. He is not equipped to do so, particularly in making a decision whether a witness should be called.

182. In *Langley* a complaint was made that the trial judge had erred in proceeding to empanel a jury to determine the fitness of an accused to plead without having first conducted an investigation under Part 2 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 to satisfy herself, for example, that the accused's counsel was unable to be properly instructed. The jury determined that the accused was not fit to stand trial. Given the verdict and the evidence the trial judge had heard, she considered that the accused was not likely to be fit to stand trial within the next 12 months. She ordered that a special hearing proceed and empanelled a further jury who returned a verdict of guilty to one count of armed robbery. The judge ordered that the accused be liable to a custodial supervision order and committed him to the custody of the Victorian Institute of Mental Health. The accused sought leave to appeal his conviction and sentence.

183. In support of the application for leave in Langley it was argued that the trial judge was under a special obligation to take the initiative and conduct certain inquiries before opting for a course of displacing the conventional criminal trial with a special hearing. Lasry AJA[193] relied upon *Whitehorn* as authority for the proposition that the occasions on which a trial judge is required to intervene when a person is competently represented must be exceptional.[194] He held that none of the steps argued to be ones the judge should have carried out were mandatory and, although the procedure provided for under Part 2 'is significantly different

and intended to be more investigative than would be the case during a conventional criminal trial'[195] the lack of action by the judge did not represent appellable error although he did think 'it would have been desirable for them to be more carefully considered'.[196]

184. Once attention is paid to the context in which the observations were made by Dawson J in *Whitehorn*, about the limited non-inquisitorial role that a judge is expected to perform, it is apparent that the remarks were confined to the position of a judge in a conventional criminal trial taking place within an adversarial context. Indeed, it was acknowledged by Lasry AJA in *Langley* that there can be permissible departures from those constraints where the context requires it. The hearing that takes place under s160 of the Act is not at all readily assimilated to a conventional criminal trial; rather, it is wholly different to such a proceeding given that it does not itself involve a contest on the infringement offences and it does not occur after there has been a trial on the merits. The hearing under s160 is the first time an infringement offender will have appeared before the Court and nothing will be known by the Court of the circumstances of the conduct of the offence or the circumstances, financial, social or psychological, of the offender. The hearing is not adversarial. There is no prosecutor, nor anyone performing a quasi-prosecutorial role. As mentioned above, the infringements registrar does not appear. The 'basic information' is provided by staff of the registry of the Court. The only person to appear before the Magistrate is the infringement offender, who may or may not be legally represented. The hearing consists in an exchange between the Magistrate and the offender, or his or her legal representative. As I have observed, there is an absence of the substantive and procedural protections that would usually be expected from a process where a person is at risk of losing his or her liberty; namely, a disclosure regime; a right of appeal; or a process for re-hearing based on new material. The context is wholly removed from that of a conventional criminal trial in which the judge's role is confined to ensuring the propriety and fairness of the trial. It is a context in which the adoption of an inquisitorial role by the Court, not in relation to the circumstances of the offending but on the circumstances of the offender is, in my view, not only appropriate but necessary if the s160 hearing is to play its part in the infringements system which it was intended to play.

185. Thus, the objections made by Vic Toll to the judge's construction of s160, which imposes a duty on the Court to inquire, can all be met.

(3) The Charter

186. The judge partly based her adoption of the unified construction of s160 upon the Charter. The Commission focused its principal submissions on appeal upon the role played by the Charter in the judge's reasons on construction.[197]

187. The judge was obliged, as she recognised, to interpret s160 compatibly with human rights, if any of the rights protected by the Charter were relevantly engaged. This obligation flows from s32 of the Charter, which reads:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.[198]

188. As French CJ said in *Momcilovic v R*,[199] s32 requires statutes to be adopted in accordance with the principle of legality as extended to the range of rights protected under the Charter:[200]

> It requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights or freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.

189. However, the proposition that s32 applies to the interpretation of statutes in the same manner as the principle of legality but with a broader range of rights in its field of application should not be read as implying that s32 is no more than a 'codification' of the principle of legality.[201] To my mind this would be to misread the reasoning of the High Court. In particular, it would be to overlook the following observation made by Gummow J (with whom Hayne J relevantly agreed) when he said:[202]

> [T]he reference to 'purpose' in such a provision as s32(1) is to the legislative 'intention' revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation. There falls within the constitutional limits of that curial process the activity which was identified in the joint reasons in *Project Blue Sky* ... [where] McHugh, Gummow, Kirby and Hayne JJ, before setting out a lengthy passage from Bennion's work *Statutory Interpretation*, said:
>
> > 'The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

> That reasoning applies a fortiori where there is a canon of construction mandated, not by the common law, but by a specific provision such as s32(1).

190. Six members of the High Court made it plain that s32 of the Charter was not analogous in its operation to s3 of the *Human Rights Act* 1998 (UK),[203] but rather required a court to apply the techniques of statutory construction set out in *Project Blue Sky*.[204] Nevertheless, there was recognition that compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, might more stringently require that words be read in a manner 'that does not correspond with literal or grammatical meaning'[205] than would be demanded, or countenanced, by the common law principle of legality.

191. The question of the interaction between s32 and the principle of legality does not arise here. It is sufficient to treat s32, as the judge did, as at least reflecting the common law principle of legality. That principle directs that statutes are not to be construed as encroaching upon certain rights unless Parliament has made its intention to do so unequivocal.[206] In describing the principle, Gleeson CJ in *Al-Kateb v Godwin* said this:[207]

> In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases.[208] It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.
>
> A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.

192. Where the intention to encroach upon rights is not manifest with 'irresistible clearness'[209] a court must interpret the legislation, consistent with the principle of legality, as not abrogating or curtailing the rights in question. This may be seldom an all-or-nothing matter. Legislation may be enacted which unequivocally interferes with rights; the extent to which it permits such interference may remain a matter of constructional choice.

193. This was the case in *Hogan v Hinch*[210] where the High Court applied s32 of the Charter to adopt a narrow construction of s42(3) of the *Serious Sex Offenders Monitoring Act* 2005 which prohibited the publication of any material in contravention of a suppression order. The Court favoured a narrow construction that required as an element of the offence created by s42(3) that the defendant had knowledge of the suppression order in contravention of which the publication was made. A narrow construction was preferred as exhibiting greater compatibility with the right to freedom of expression under s15(2) of the Charter and with the recognition under s15(3) of the Charter that freedom of expression could be lawfully restricted where the restriction was 'reasonably necessary'.

194. It was noted that there was no provision in the *Serious Sex Offenders Monitoring Act* for the publication of suppression orders although they were directed to the world at large and 'the existence of the order is the *factum* upon which the offence provision in s42(3) operates'.[211] This consideration, along with others, prompted Gummow, Hayne, Heydon, Crennan, Keifel and Bell JJ to conclude that:[212]

> [T]he phrase in s42(3) 'publish or cause to be published ... in contravention of an order' indicates a requirement of knowledge of that order in contravention of which the publication is made. 'Contravention' is used in the sense of disputation or denial rather than mere failure to comply with an unknown requirement. Such a construction of s42(3) also better accommodates the provision in s15(3) of the [Charter[213]] respecting reasonably necessary restrictions upon the right to freedom of expression.[214]

195. Applying s32 as at least analogous to the principle of legality with an extended sphere of application invites close attention to the particular rights said to be engaged by the statutory provision that falls for interpretation. If a statutory provision is to be interpreted in a manner that does not abrogate or curtail a right, unless 'such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment',[215] it is necessary to determine the scope of any relevant right to ensure that the interpretation to be adopted does not intrude upon it. Unless the necessary intention to abrogate or curtail the right can be found, a construction must be adopted which is compatible with the continued enjoyment of the right.

196. The rights identified by the Commission as relevant were the rights recognised under s21, s24 and s8(3) of the Charter, the liberty right, the right to a fair hearing and the right to equal protection of the law. These are set out in the Charter relevantly as follows:

> Section 21[216]
> (1) Every person has the right to liberty and security.
> (2) A person must not be subjected to arbitrary arrest or detention.
> (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
>
> Section 24(1) [217]
> A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding determined by a competent, independent and impartial court or tribunal after a fair and public hearing.
>
> Section 8(3)[218]
> Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

(i) The right to liberty – s21

197. The right to liberty has long been recognised at common law as one of a person's most fundamental rights. It has been described as 'the most elementary and important of all common law rights.'[219] The right is engaged in any case in which a person is at risk of imprisonment.[220] The making of an imprisonment order under s160 clearly engages the right.

198. Moreover, s21 of the Charter extends to the right not to be arbitrarily deprived of liberty. In *WBM v Chief Commissioner of Police*[221] the Chief Justice expressed the view that the human rights meaning of the word 'arbitrary'[222] reflected the following considerations:[223]

> arbitrariness is concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.

199. It was unnecessary for the Court to decide in WBM whether the 'human rights meaning' applied in the context of the right not to have one's privacy arbitrarily interfered with,[224] or whether the narrower dictionary meaning applied, that is, an action 'not based on any identifiable criterion, but which stems from an act of caprice or whim'.[225] However, in the context of detention, an assessment of whether an encroachment upon one of the most elementary of all common law rights is 'arbitrary' in my view ought reflect the 'human rights meaning'. So much was understood by the Full Federal Court in *Minister for Immigration v Al Masri*,[226] in the context of considering the text and history of Article 9 of the ICCPR,[227] the model for s21 of the Charter:[228]

> In construing Art 9(1) it should first be noted that the right not to be subjected to arbitrary detention is, textually, in addition to the right not to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Professor Manfred Nowak, in his authoritative commentary on the ICCPR, *The UN Covenant on Civil and Political Rights: CCPR Commentary* ... notes this additional limitation and observes that it is not enough for the deprivation of liberty to be provided for by law; the law itself must not be arbitrary.
>
> The history of the second sentence of Art 9(1) supports the conclusion pointed to by the text and supports, as well, a broad view of what constitutes arbitrary detention for the purposes of Art 9. Professor Nowak reviews the *travaux préparatoires* ... and observes that the prohibition of arbitrariness was adopted as an alternative to an exhaustive listing of all the permissible cases of deprivation of liberty. It was based on an Australian proposal that was seen as highly controversial, and although some delegates were of the view that the word arbitrary ('arbitraries') meant nothing more than unlawful, the majority stressed that its meaning went beyond this and contained elements of injustice, unpredictability, unreasonableness and 'unproportionality'.
>
> Having considered the history of Art 9 Professor Nowak concludes that 'the prohibition of arbitrariness is to be interpreted broadly' and that '[c]ases of deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable'... Other commentators have expressed much the same view.[229] ... In applying Art 9 in the performance of its functions under the ICCPR, the Human Rights Committee (the Committee) established under Art 28 has also interpreted the provision broadly and as containing an important element additional to, and beyond, compliance with the law. ... The Committee concluded:
>
> 'The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances'.

200. It was thus necessary for the judge to adopt a construction of s160 that was compatible with the

rights of Mr Taha and Ms Brookes not to be imprisoned in circumstances that were disproportionate or unjust. The powers given under sub-ss (2) and (3) of s160 to avoid imprisoning an infringement offender with a mental illness or intellectual disability, or to imprison them according to a less draconian formula, had been included precisely to avoid the imprisonment of the vulnerable; that is, to avoid detaining, or detaining for longer than appropriate, an infringement offender where there were special circumstances that would render imprisonment according to the formula in sub-s (1) unjust, or where imprisonment would be excessive, disproportionate and unduly harsh. Adopting a construction, as the judge did, that required the Court, before ordering imprisonment according to the formula in sub-s (1), to consider the exceptions Parliament had included to avoid, or ameliorate, the detention for offenders in special or exceptional circumstances, was, in my view, to do exactly what s32 had intended.

201. The principle of legality supports the unified construction that will not authorise the intrusion into the right to liberty, or the right not to be arbitrarily detained, without a Magistrate first taking into account whether an alternative to imprisonment under sub-s (1) is available. Indeed, far from the Parliament stating with 'irresistible clearness' that imprisonment orders could be made under sub-s (1) without the need to consider the exceptions under sub-ss (2) and (3), it had enacted broad exceptions to the power under sub-s (1) to prevent infringement offenders with special or exceptional circumstances being imprisoned at a ratio of one day in respect of each penalty unit. Section 160 contains within it the means to ensure infringement offenders are not arbitrarily detained. An interpretation of s160 which allowed for orders to be made which abrogated or curtailed the right to liberty, or the right not to be arbitrarily detained, without consideration of the means provided by the Parliament to avoid such harshness, as was adopted here by the Magistrate, is incompatible with the right under s21.

202. Furthermore, as the judge stated and as noted above,[230] ordinary principles of construction indicate that 'an interpretation should be favoured that "produces the least infringement of common law rights"'.[231] For this, the judge relied on the reasoning of Maxwell P and Weinberg JA in *RJE v Secretary to the Department of Justice*.[232] An interpretation that requires a Magistrate to inquire of an infringement offender whether special or exceptional circumstances apply, or of his or her legal representative, meets this directive.

(ii) The right to a fair hearing – s24(1)

203. The Commission emphasised that the construction of s160 had also to be compatible with the right to a fair hearing and that this reinforced the need for a duty to inquire. The right to a fair hearing under s24(1) of the Charter reflects a fundamental principle of the common law.[233] As Isaacs J said in *R v McFarlane; ex parte O'Flanagan*:[234]

> [That] the elementary right of every accused person to a fair and impartial trial...exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilisation. It is only a variant of the maxim that every man is entitled to his personal liberty except so far as that is abridged by a due administration of the law. Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle.

204. The nature of the right was explored by Mason CJ and McHugh J in *Dietrich v the Queen* where they said:[235]

> As Deane J correctly pointed out in *Jago v District Court (NSW)*, the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial. The right is manifested in rules of law and of practice designed to regulate the course of the trial. However, the inherent jurisdiction of courts extends to a power to stay proceedings in order 'to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair'.

205. They recognised that what is required in a particular case to ensure that an accused has had a fair hearing will vary from case to case; there is no single exhaustive set of the aspects of a trial which will make it fair:[236]

> There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine ... whether something that was done or said in the course of the trial, or less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice. However, various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the E.C.H.R.') enshrines such basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence and the right to the free assistance of an interpreter when required. Article 14 of the International Covenant on Civil and Political Rights ('the I.C.C.P.R.'), to which instrument Australia is a party, contains similar minimum rights, as does s. 11 of the Canadian Charter of Rights and Freedoms. Similar rights have been discerned in the 'due process' clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

206. Here, the Commission submitted that the many of the features of the Act and the s160 hearing that were discussed above required the Magistrate, in order to conduct a fair hearing, to consider whether to exercise the alternative powers under sub-ss (2) or (3), and to engage in an inquiry as part of that consideration. These included the following features:

> (1) the interest at stake was the liberty of the individual;
> (2) a purpose of the Act was to ensure that the imprisonment of vulnerable offenders was a measure of last resort;
> (3) the highly automated nature of much of the process leading up to the s160 hearing could result in infringement offenders coming before the Court without anyone having considered whether it would be appropriate to exercise any of the earlier mechanisms provided for in the Act designed to filter them out of the system; for example, applications for revocation or payment plans;
> (4) the non-adversarial nature of the hearing, which is consistent with a somewhat more inquisitorial role for the Magistrate and may suggest that the duty of disclosure which falls upon a prosecutor in a conventional criminal trial is replaced by a more active role by the Magistrate, including the perusal of any relevant records held by, or accessible by, the Court;
> (5) the need to be alert to the individual circumstances of each case (for example, knowledge of Mr Taha's receipt of a disability pension should have revealed, upon inquiry, that he suffered from an intellectual disability).

207. The Commission submitted that all of these features supported the judge's construction of s160 which required a Magistrate to take an active role in considering whether the powers under sub-ss (2) and (3) might be available to be exercised.

208. I agree. I have already expressed my views as to the variable scope of the duty to inquire. It is plain that these features of the Act, relevant to the right to a fair hearing, support the unified construction of s160 and the duty to inquire which it entails. That duty is reinforced by considerations relating to the right to equal protection of the law.

(iii) The right to equal protection of the law – s8(3)

209. The right under s8(3) of the Charter has three limbs. The Commission relied on the second limb, namely, the recognition that everyone 'is entitled to the equal protection of the law without discrimination'.[237] 'Discrimination' is defined in s3(1) of the Charter to mean 'discrimination (within the meaning of the *Equal Opportunity Act* 2010) on the basis of an attribute set out in section 6 of that Act'. At the relevant time the list of attributes in s6 of the *Equal Opportunity Act* included 'impairment' which was defined in s 4 to include a 'mental or psychological disease or disorder'.[238]

210. The second limb of s8(3) protects substantive equality, one that accommodates difference.[239] This is a principle of equality that recognises that uniformity of treatment between different persons may not be appropriate or adequate but that disadvantaged or vulnerable persons may need to be treated differently to ensure they are treated equally.[240] This may have procedural implications for the way people are treated in court and tribunal proceedings.[241]

211. Section 160(2) recognises that people with 'special circumstances' may require different treatment from those without those characteristics. Both sub-ss (2) and (3) are premised on the need to accommodate difference. The legislative history confirms this. An interpretation of s160 which relied upon infringement offenders to raise the question of their circumstances before the Court, to 'enliven' the Court's powers to consider whether sub-ss (2) or (3) applies, as Vic Toll would have it, has the potential not only to defeat the purpose of the sub-sections, as the judge recognised,[242] but may also be incompatible with the right to equality under s8(3) because it may leave infringement offenders who have an impairment, such as Mr Taha and Ms Brookes, exposed to indirect discrimination. 'Indirect discrimination' is defined under s9(1) of the *Equal Opportunity Act* as follows:

> Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice –
> (a) that has, or is likely to have, the effect of disadvantaging person with an attribute; and
>
> (b) that is not reasonable.

212. Mention has already been made of the fact that the impairment some infringement offenders suffer from may itself render them less capable than persons without such an impairment of informing the Court of (1) their impairment or (2) the effect of their impairment on the control they have over their conduct or (3) their ability to understand that their conduct constitutes an offence. A construction of s160 which requires them to raise these issues with the Court before the Court is obliged to consider whether there are special circumstances in the case imposes a requirement, condition or practice that is likely to have the effect of disadvantaging persons with an impairment which is not reasonable. The requirement is not reasonable because it imposes a condition before a person's impairment is taken into account that only those without that impairment are likely to be able to meet.[243]

213. A construction which has this as a consequence is incompatible with the right to equality under s8(3) and s32 compels its rejection in favour of a construction which is compatible with that right, namely the unified construction of s160 and the duty on the Magistrate to inquire that it entails.

214. In these appeals, it has been possible to arrive at a conclusion about the compatibility of the interpretation adopted by the Magistrate without the need to consider s7(2) of the Charter.[244] It is thus unnecessary to consider the effect of the division in the High Court in *Momcilovic* on whether s 7(2) plays any role in the interpretative task under s32.[245] It is also unnecessary to consider whether, given the reversal by the High Court of the decision of the Court of Appeal in *R v Momcilovic*,[246] and the divided views expressed about the reasoning of the Court of Appeal in relation to the Charter, this Court is bound to follow its own decision unless satisfied that it is clearly wrong.[247] As Warren CJ and Cavanough AJA said in *Noone v Operation Smile (Australia) Inc*,[248] it is unclear whether the principle that an intermediate appellate court should follow its earlier judgments, unless satisfied that the earlier judgment is clearly wrong, applies where the earlier judgment has been overturned by the High Court on appeal and where there is a majority (albeit non-binding[249]) view in the High Court rejecting the earlier judgment. It is thus further unnecessary to consider here whether the approach adopted by the Court of Appeal in *Momcilovic* was clearly wrong.[250]

215. The response of Vic Toll to the Commission's Notice of Contention was to argue that the Charter rights relied on may be relevant to a Magistrate under s160 if he or she is already contemplating making an order under sub-ss (2) or (3) of s160, but they do not support a construction which generates a duty to inquire whether there are special or exceptional circumstances in a case. The analysis of the obligation under s32 above reveals why the judge rejected that approach and why she was correct to adopt the construction she did.

(4) Conclusion on construction of s160

216. I have concluded that the interpretation adopted by the Magistrate of s160 of the Act was unfaithful to its intended meaning, as ascertained by ordinary principles of statutory interpretation and incompatible with the right to liberty, the right to a fair hearing and the right to equal protection of the law under the Charter.

217. It follows that I reject grounds 1, 3, 4 and 5.

Did the Magistrate consider sub-s (2) and (3) of s160? – ground 6

218. It was submitted by Vic Toll, in the alternative to its principal submissions, that the judge had drawn an impermissible inference as to the reasoning engaged in by the Magistrate, to the effect that he had failed to consider sub-ss (2) and (3). It emphasised that there had been no appropriate written material before the Magistrate concerning Ms Brookes' post-traumatic stress disorder. However, this did not mean, it was argued, that the Magistrate did not consider the availability of the options under sub-s (2) or (3) of s160. All that could be said is that there was no material capable of satisfying the Magistrate that there were special or exceptional circumstances present in either case.

219. Mr Taha and Ms Brookes pointed to the nature and conduct of typical s160 hearings, both as evident from the statutory scheme and from the evidence of the duty lawyers who represented them, as indicating that the Magistrate failed to consider the availability of special or exceptional circumstances. The judge recognised that the statutory scheme is one whereby the s160 hearing is the first and last time the infringement offender comes before the Court in circumstances in which there has been no prior determination of the underlying offences or any other hearing in which the offender's individual circumstances have been revealed.

220. Moreover, the question of whether a decision-maker has considered a matter requires an evaluation of what the decision-maker said or wrote.[251] In neither the case of Ms Brookes, nor Mr Taha, did the Magistrate deliver written reasons. However, the evidence of Mr Houston, the duty lawyer representing Ms Brookes, was that the Magistrate said he would not 'entertain' a submission that he should exercise his powers under sub-ss (2) or (3) in the absence of 'appropriate written material'.[252] The meaning of 'entertain' relevantly includes that of admitting into consideration or receiving into the mind.[253] The evidence is thus that the Magistrate refused to take into account Ms Brookes' mental health, or a submission in relation thereto, in the absence of any documentary evidence.

221. I agree. There was nothing to suggest that in the case of Ms Brookes the Magistrate turned his mind to whether the requirements of sub-ss (2) or (3) were met. Nor is there anything to suggest that this was the case with respect to Mr Taha. Both Mr Taha and Ms Brookes were most likely to be eligible for orders made under sub-ss (2) or (3), alleviating the impact of their default in relation to the fines imposed upon them, yet the Magistrate did not make such orders but rather imposed on both the maximum period of imprisonment applicable. The judge's inference that the Magistrate had not considered whether to exercise his powers under sub-ss (2) or (3) of s160 was clearly open.

222. I reject Ground 6.

Evidence of disability – Ms Brookes - ground 7

223. With respect to the Brookes proceeding, Vic Toll submitted that the judge failed to identify any authority on the basis of which she was entitled to conclude that sub-ss (2) or (3) of s160 of the Act did not impose an obligation on the offender to provide proof in the conventional sense.

224. In examining this ground, it must be remembered that the Magistrate limited the type of proof he was prepared to accept before he would 'entertain' a submission concerning special or exceptional circumstances. He required that 'appropriate written material' be placed before him. Such a requirement has no textual support in s160. The Act provides only that the Magistrate must be 'satisfied' of relevant matters. It does not impose any requirement for a particular mode of proof in respect of those matters. In my view to exclude any mode of proof other than documentary evidence is to insert a restriction into the Act that is unsupported by the scheme of the Act, the statutory language, and is contrary to the history and purpose of the legislation.

225. In particular, there is no requirement under the Act that documentary evidence is to preferred to the oral evidence of the infringement offender. In the circumstances before the Magistrate, Ms Brookes could have been called to give evidence, been sworn, and been asked questions from her lawyer of the type he had asked when receiving instructions. Ms Brookes could have given oral evidence about the history of domestic violence she had suffered, the fear she had experienced, the reasons for her changing her name and moving house regularly, her need for treatment by a psychiatrist, the type of condition her psychiatrist had diagnosed and the medication she was prescribed. No doubt she could also have given evidence about the type of symptoms she experienced, including the panic attacks and the fear. Whether the Magistrate was 'satisfied' as a result of that evidence would depend on precisely what evidence was given but, in my view, the Magistrate was in error in requiring documentary proof of a condition when the applicant who experienced that condition was available in the body of the Court.

226. Furthermore, there was no need for Ms Brookes to give sworn evidence at all. The Magistrate could have arrived at the relevant state of satisfaction without there being any sworn oral evidence or documentary proof. The hearings under s160 are intended to be informal in nature. A Magistrate could well be 'satisfied' there were special or exceptional circumstances in a case where the satisfaction was founded upon the information given by an infringement offender from the body of the Court, or given by the offender's legal representative from the bar table, or, as noted,[254] from its own inquiries.

227. Moreover, to impose a blanket obligation on offenders to provide written proof of mental illness as a precondition to a Magistrate considering whether to exercise the powers under sub-ss (2) or (3) has the potential to work a significant injustice. Ms Brookes had written proof that she suffered from post-traumatic stress disorder but it was not with her on the day of the hearing. However, on the morning of the hearing she was arrested without warning and placed in a cell until the hearing.[255] It is not suggested that she knew, or was told, at the time of her arrest that written evidence of her illness would be required or that she was given any opportunity to collect anything before being taken to the cells. For imprisonment orders to be made against offenders as a result of their not having a medical report on their person at the time of arrest is plainly unjust.

228. The circumstances here were aggravated by the failure of the Magistrate to adjourn the proceeding of his own motion.[256] If he was to insist upon documentary proof, which I consider he was wrong to do, he exacerbated his error by failing to make an order adjourning the hearing of his own motion so that Ms Brookes, about whose mental illness he had already been told, could gather the materials he (wrongly) considered were necessary. Having been put on notice from the duty lawyer that Ms Brookes might well be mentally ill and thus satisfy the conditions for a discharge of her fine, in whole or in part, and be eligible for a reduction in the period of imprisonment she might have to serve, the Magistrate should have allowed Ms Brookes the opportunity to obtain the evidence he required. I consider that he was wrong not to do so. The fact that Ms Brookes did not seek an adjournment does not detract from the errors committed by the Magistrate in wrongly inserting into the Act a requirement that does not exist, and in failing to provide an opportunity to Ms Brookes to satisfy him in the form of proof upon which he had wrongly insisted.

229. I consider that there is no merit in Ground 7 and I reject it.

Procedural fairness – ground 2

230. Vic Toll made no written or oral submissions expressly directed to its ground of appeal that the judge had erred in finding that the Magistrate had breached his duty to accord procedural fairness. This was not surprising given that the denial of procedural fairness flowed from the failure to adopt a unified construction of s160. As the judge said, the Magistrate denied Mr Taha procedural fairness by:[257]

> dissociating the powers in sub-ss (2) and (3) from the power to make an imprisonment order in sub-s (1) and by purporting to exercise the power in sub-s (1) without addressing the possibility that sub-ss (2) or (3) may be enlivened ...

231. Accordingly, the question of the denial of procedural fairness has been dealt with in addressing the merits of adopting the unified construction of s160.

232. I reject Ground 2.

Ms Brookes' Notice of Contention – judicial or administrative power?

233. The question of whether the power being exercised by the Magistrate was judicial or administrative was raised in the context of a submission made by Vic Toll below, and repeated on appeal, that if the Court had made an error it was an error within its jurisdiction and it was therefore not reviewable.[258] As Hayne J said in *Re Refugee Tribunal; Ex parte Aala*:[259]

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

234. Vic Toll relied upon the distinction drawn between inferior courts and administrative tribunals in *Craig v South Australia*[260] where the High Court reaffirmed the view that the scope of jurisdictional error was narrower in the case of inferior courts as opposed to administrative tribunals.[261] The High Court said:[262]

> In considering what constitutes 'jurisdictional error', it is necessary to distinguish between, on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ.

235. In an oft-cited passage, the High Court went on to say:[263]

> If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake ... may, if an appeal is available ... be corrected by an appellate court .... [but] a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.

236. On the basis of this distinction, Vic Toll submitted that if the Magistrate made an error of law in the case of Mr Taha or Ms Brookes, in failing to take into account sub-ss (2) and (3) of s160, the error was one of ignoring relevant considerations. Such an error was immune from review because the Magistrate was an inferior court and not an administrative tribunal, and for an inferior court to ignore relevant considerations does not amount to jurisdictional error.

237. In response, Ms Brookes argued that the power exercised by a Magistrate under s160 is properly classified as administrative and not judicial in nature on the ground that judicial involvement in the infringements process is minimal; there is no dispute *inter partes*; there is no finding of antecedent facts; and there is no binding determination of rights and liabilities.[264]

238. It has become unnecessary to decide this issue because Vic Toll's submissions faced the fundamental difficulty that the error of law committed here by the Court was accurately characterised not as a failure to take into account relevant considerations but as a misconstruction of its statutory functions (as the judge correctly identified it) or as a failure to apply itself to the question which s160 prescribed.[265] It misconceived its duty by adopting an erroneous construction of the statutory provision which conferred upon it jurisdiction to conduct hearings before making orders for imprisonment. It thus misunderstood its jurisdiction. These are jurisdictional errors that may be made by an inferior court and, if made, are reviewable by the Supreme Court.

239. This understanding of the jurisdictional errors that can be made by an inferior court was confirmed by the High Court in *Kirk*:[266] The Court in *Craig* explained the ambit of jurisdictional error in the case of an inferior court in reasoning that it is convenient to summarise as follows:

> First, the Court stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error 'if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly

> recognises that jurisdiction does exist' (emphasis added). Secondly, the Court pointed out that jurisdictional error 'is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision* or order *of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers'* (emphasis added) ... Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples: (a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case. [267]

240. Against the background of those observations, the error committed here by the Magistrate would fall into either the first category, as a misapprehension of its functions or powers in a case where it correctly recognised that jurisdiction (under s160) did exist. It may also fall into the third category, either as an instance of the second example (as Ms Brookes submitted)[268] of failing to consider a matter that was a pre-condition of its authority to decide,[269] or an instance of the third example, misconstruction of the relevant statute, acknowledging that the summary of the jurisdictional errors recognised in *Craig* as capable of being committed by an inferior court 'is not to be seen as providing a rigid taxonomy of jurisdictional error'.[270]

241. At the hearing of the appeal Vic Toll conceded, appropriately, that if the Court committed the error of law contended for by Mr Taha and Ms Brookes (which it contested) that error involved a misconstruction of its statutory functions which was reviewable. That being so, the distinction between administrative tribunals and inferior courts was of no avail to it. That distinction need not be further explored here save to say that a body entrusted with the power to make an order for imprisonment by reason of a failure to pay a penalty for an infringement offence consequent upon the offender's arrest has many of the hallmarks of judicial power, even if the proceeding is summary in nature and the process leading up to it is largely administrative.

242. It is thus unnecessary to decide grounds 1 and 2 of Ms Brookes' Notice of Contention.[271]

Commission's Notice of Contention – s6(2)(b) of the Charter

243. The Notice of Contention filed by the Commission was supported by Mr Taha and Ms Brookes. It turned upon the operation of s6(2)(b) of the Charter. Section 6(2) provides as follows:

> This Charter applies to –
> (a) the Parliament ...
> (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and
> (c) public authorities ...

244. Part 2 sets out the human rights protected under the Charter.[272]

245. Division 3 of Part 3 relates to the interpretation of laws.[273]

246. The language of that limb of s6(2)(b) which relates to 'the extent [to which courts] have functions under Part 2' renders it susceptible to three alternative constructions:[274]

> (1) the broad construction, whereby the function of courts is to enforce directly any and all of the rights enacted in Part 2;[275]
> (2) the intermediate construction, whereby the function is to enforce directly only those rights enacted in Part 2 that relate to court proceedings;[276]
> (3) the narrow construction, whereby the function of courts is to enforce directly only those rights that are explicitly and exclusively addressed to the courts.[277]

247. The Commission submitted that the right to a fair hearing under s24(1) was one of the rights under Part 2 in respect of which the Court had functions. It was therefore directly bound, by reason s6(2)(b), to act compatibly with it.[278] I accept that this is so. It has been so held by Neave JA and Williams AJA in *De Simone v Bevnol Constructions*[279] where they said:[280]

> [Sections] 24 and 25 apply directly to courts and tribunals, when they exercise their [adjudicative] functions.

248. It is undeniable that the right to a fair hearing relates to the core functions courts perform and falls within the intermediate construction. I consider it otherwise unnecessary to determine if the intermediate construction is correct.[281]

249. The Commission also submitted that insofar as s8(3) had procedural implications for the conduct of a court hearing, courts were also directly bound, by reason of s6(2)(b), to act compatibly with it.[282] In my opinion, it is arguable that the Commission is correct in this submission but I consider this unnecessary to determine.

250. The Commission submitted that it was a consequence of accepting that the Charter imposed a direct

obligation on the Magistrate to give effect to s24(1), that in the conduct of the hearing under s160 of the Act, he was obliged to consider the availability and appropriateness of the alternatives provided under the Act in sub-ss (2) and (3) of s160, and was subject to a duty to inquire, before making an imprisonment order under sub-s (1). It submitted that the Magistrate, in failing to do so, acted incompatibly with his obligations under the Charter.[283]

251. At the hearing of the appeals, Vic Toll was somewhat hampered in its response to the Commission as it confined its submissions on the Charter to the argument that the rights had no part to play until the jurisdiction of a Magistrate to contemplate making a decision under sub-ss (2) or (3) was enlivened, and that jurisdiction was not enlivened here, the onus falling on those who were in special or exceptional circumstances to raise the issue.

252. In my opinion, accepting as I do that the Magistrate was under a direct obligation, by reason of s6(2)(b) to give effect to the right to a fair hearing under s24(1), I consider that he acted incompatibly with the Charter in failing to consider, before making an order for the imprisonment of Mr Taha and Ms Brookes, whether there were special or exceptional circumstances which would justify the making of orders of less severity. The direct nature of the obligation imposed by s6(2)(b) reinforces the conclusion, reached above on other grounds, that the obligation did not fall upon Mr Taha or Ms Brookes to raise their circumstances in court before the Magistrate had a duty to consider whether alternative orders could be made.

253. I accept that grounds one and two of the Commission's Notice of Contention have been made out with respect to the obligation on the Court under s160 of the Act to act compatibly with the right to a fair hearing under s24(1) of the Charter.

Conclusion

254. The judge was correct in the construction she adopted of s160 of the Act. She was also correct in finding that the Magistrate had committed an error of law in misconstruing his statutory functions. She was correct to set aside the orders of the Magistrate in each case and to remit the matters to the Court for determination according to law.

255. I would dismiss the appeal.

OSBORN JA:

256. I have had the considerable advantage of reading the judgment of Emerton J at first instance and the judgments in draft of Nettle and Tate JJA.

257. I respectfully agree with Nettle and Tate JJA and Emerton J that s160 of the *Infringements Act* 2006 ('the *Infringements Act*') should be read as a unified whole and that it should be understood as conferring a set of optional powers, each of which must be taken into account before any order is made.

258. I further agree that the Magistrates' Court was obliged to inquire into the particular circumstances of Mr Taha and Ms Brookes to determine whether orders alternative to imprisonment should be made in their cases.

259. I also agree with Tate JA for the reasons she gives as to the nature and incidents of the duty to inquire, subject only to the following observations.

260. Intellectual disability or mental illness may bear upon the Magistrate's exercise of discretion pursuant to s160 in at least one or more of three ways:

> (a) it may affect the culpability of the penalty defaulter with respect to the original offences or the subsequent failure to pay fines;
>
> (b) it may affect the penalty defaulter's probable capacity to pay instalments in compliance with a self-enforcing order for imprisonment in default of payment of fines by way of instalment thereafter; and
>
> (c) it may incidentally affect the penalty defaulter's capacity to participate in the hearing before the Magistrate or respond satisfactorily to enquiry.

261. In the first category of cases, the assessment of the intellectual capacity and mental fitness of the penalty defaulter and its consequences as a matter of history goes to an understanding of the underlying culpability of the penalty defaulter.

262. The second category is one where intellectual disability or mental fitness bears upon the practical consequences of any order the Court may make. It is illustrated by the case of Mr Taha. If a person suffers from a disability or illness which renders him subject to a real risk of institutionalisation (whether voluntary or involuntary) then that fact must count strongly against the making of a self-executing order for imprisonment in default of payment of instalments of fines.

263. The third category raises an incidental consideration which may be difficult to resolve procedurally. Nevertheless, if the Magistrate's duty to inquire into relevant special circumstances does not extend to taking into account the potential effects of intellectual disability or mental illness upon the capacity of a penalty defaulter to participate in the enquiry, the purpose of the enquiry may be defeated by the very mental condition which affects the underlying merits of the case.

264. In the present cases it seems probable that Mr Taha's ability to participate properly in his case must necessarily have been affected by his intellectual disability, and such disability would have to be taken into account upon a rehearing.

265. In the case of Brookes, a woman suffering from ongoing anxiety and depression, for which she was receiving medical treatment, was arrested, taken from her children, strip searched and placed in the cells. She was given the opportunity to speak to a Legal Aid solicitor through her cell door and deposes that she did so in a state of anxiety. Thereafter the details of her history of mental illness were placed before the Magistrate. She was told in effect that she could either have the matter finalised that day and go home to her children, or come back for a hearing on another day. It is inherently likely that in this situation her mental state may have affected her instructions.

266. In my view, once the issue of Ms Brookes's mental health was squarely before the Magistrate, the Magistrate owed a duty to ensure that the implications of her mental fitness were fully resolved before him before making an order adverse to Ms Brookes. The Court could properly call for documentary evidence before resolving its conclusions relating to the mental health issue, but it could not properly leave it to the penalty defaulter to decide whether the issue should be taken further or not before a self-executing order for imprisonment was made.

267. This is because the facts necessarily raised an issue as to whether Ms Brookes was affected by an anxiety state at the time she was before the Magistrate. In consequence, the Magistrate faced an issue analogous to that which arises when an issue of mental fitness to stand trial arises in a conventional criminal trial in respect of an indictable offence.[284]

268. The same considerations which Tate JA elucidates as supporting a purposive construction of s160 requiring the Magistrate to undertake an enquiry also require that that enquiry be independent and that once the issue of mental illness is properly raised before the Magistrate he or she must investigate it and assess its relevance to the exercise of the relevant discretion.

269. In the view I take:

(a) the Magistrate was bound to inquire as to the existence of special circumstances;

(b) once the real possibility of such circumstances by reason of mental illness was squarely identified, the Magistrate was bound to adopt a procedure which recognised the possibility that mental illness might also affect Ms Brookes's capacity to give instructions to her representative in the normal manner; and

(c) once the issue of mental illness was properly raised then, whatever view Ms Brookes expressed, thereafter it was for the Magistrate to independently investigate the implications of this issue before the exercise of his overall discretion to impose a very substantial term of imprisonment.

270. I agree with Emerton J:

> In this case, the Court was informed by the duty lawyer acting for Ms Brookes that sub-s (2) was – or might be – enlivened because Ms Brookes suffered from a mental illness. In those circumstances, the Court should have made inquiries to enable it to determine whether it was appropriate to make orders under sub-ss (2) or (3) before making an imprisonment order under sub-s (1). The requirement that the Court be 'satisfied' of one or more matters in sub-s (2)(a) and (b) or of the matter in sub-s (3) does not impose an obligation on the offender to provide proof in the conventional sense. The Court may satisfy itself through its own inquiries. If documentary evidence of Ms Brookes' mental illness was required by the Court, the s160 hearing should have been adjourned in order for that evidence to be obtained and put before the Court.[285]

271. For the above reasons, I would dismiss the appeal.

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[1] Reasons [66]–[68].
[2] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309, 315 (Mason J); (1985) 60 ALR 509; [1985] Aust Torts Reports 80-323; (1985) 3 ANZ Insurance Cases 60-653; (1985) 2 MVR 289; (1985) 59 ALJR 658; Pearce & Geddes, *Statutory Interpretation in Australia*, (7th Ed), [4.2].
[3] *R v Zander* [2009] VSCA 10 [33] (Dodds-Streeton JA) and [36] (Nettle JA); *R v White* [2009] VSCA 177 [16]–[17] (Lasry AJA Buchanan and Dodds-Streeton JJA concurring); *Vergados v R* [2011] VSCA 438 [33] (Warren CJ).
[4] *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657, 663–4 (Deane J); 49 ALR 448; (1983) 57 ALJR 809; 9 A Crim R 107; *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285, 292-3; 192 ALR 181; 76 ALJR 1552 [11]

(Gaudron and Hayne JJ).
[5] See and compare *Bausch v Transport Accident Commission* [1998] VSC 248; [1998] VICSC 20; [1998] 4 VR 249, 259 (Tadgell JA); (1998) 27 MVR 24; 13 VAR 61.
[6] Reasons [13]–[14].
[7] Reasons [61]–[63], citations omitted.
[8] [2011] HCA 34; (2011) 245 CLR 1; (2011) 280 ALR 221; (2011) 85 ALJR 957; (2011) 209 A Crim R 1 ('*Momcilovic*').
[9] Ibid 46 [43] (citations omitted).
[10] Ibid 50 [51].
[11] Ibid.
[12] *MacPherson v The Queen* [1981] HCA 46; (1981) 147 CLR 512, 546 (Brennan J); (1981) 37 ALR 81; (1981) 55 ALJR 594; *R v White and Piggin* [2003] VSCA 174; (2003) 7 VR 442, 454 (Chernov JA); (2003) 143 A Crim R 73; *R v Kerbatieh* [2005] VSCA 194; (2005) 155 A Crim R 367, 379-380 [52].
[13] *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531, 573-4 [71]–[72]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[14] *Kocak v Wingfoot* [2012] VSCA 259 [72].
[15] *Perpetual Trustee Co (Canberra) Ltd v Commissioner for Australian Capital Territory Revenue* [1994] FCA 1150; (1994) 50 FCR 405, 418–9 (Wilcox J); 28 ATR 307.
[16] *Transport Accident Commission v Bausch* [1998] VSC 248; [1998] VICSC 20; [1998] 4 VR 249, 263; (1998) 27 MVR 24; 13 VAR 61 (Tadgell JA) citing *inter alia Kuswardana v Minister for Immigration and Ethnic Affairs* [1981] FCA 66; (1981) 54 FLR 334, 343 (Bowen CJ), 348–9 (Fox J); [1981] FCA 66; (1981) 35 ALR 186, 193-4 (Bowen CJ) and 199 (Fox J).
[17] [1998] VSC 248; [1998] VICSC 20; [1998] 4 VR 249, 263; (1998) 27 MVR 24; 13 VAR 61.
[18] See and compare *NOM v DPP* [2012] VSCA 198 [80]-[84].
[19] Section 1(1) of the *Charter of Human Rights and Responsibilities* provides: 'This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act'. The convention is to refer to an Act by its short title (as expressed in the Charter by s1(1)) and there is thus no need to refer to the Charter as the *'Charter of Human Rights and Responsibilities Act'*: see *Interpretation of Legislation Act*, s10(1)(e); *Deming No 456 Pty Ltd v Brisbane United Development Corporation Pty Ltd* [1983] HCA 44; (1983) 155 CLR 129, 162 (Wilson J); (1983) 50 ALR 1; 58 ALJR 1.
[20] *Zakaria Taha v Broadmeadows Magistrates' Court; Brookes v Magistrates' Court of Victoria* [2011] VSC 642 (Emerton J) ('Reasons'), [4]. Even if an order for imprisonment is to be made, the Court is also obliged to consider which particular formula is to be used for determining the length of the sentence, the most severe formula or one which is less severe. I discuss this below, [147]-[150].
[21] Reasons [4].
[22] Vic Toll submitted that leave was required because the judge in the Supreme Court ordered that the matters be remitted to the Magistrates' Court for determination according to law. An order for remittal is interlocutory in nature: *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423, 443; [1966] ALR 705; (1966) 40 ALJR 102; *Sher v DPP* [2001] VSCA 110; (2001) 120 A Crim R 585, 586 [7]; (2001) 34 MVR 153. On 23 March 2012 the Court of Appeal (Mandie JA and Cavanough AJA) made orders that the applications for leave to appeal be referred to the Court listed to hear the appeals (if leave be granted). However, although the orders for remittal were interlocutory in nature, and leave is usually required to appeal to the Court of Appeal from the trial division of the Supreme Court, pursuant to s17A(4)(b), there are exceptions to that requirement including the exception under s17A(4)(b)(i), namely 'when the liberty of the subject ... is concerned'. The imprisonment orders against Mr Taha and Ms Brookes clearly concerned the liberty of the subject. In my view, leave to appeal was not required. In any event, the applications for leave to appeal were heard at the same time as the appeals and I would grant leave in both matters, if it was required.
[23] Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2186 (Mr Rob Hulls, Attorney-General) ('Second reading speech').
[24] Ibid 2186.
[25] The PERIN framework was originally introduced in Victoria in April 1986 by the *Magistrates (Summary Proceedings) (Amendment) Act* 1985 and the *Magistrates' Courts (Penalty Enforcement by Registration of Infringement Notices)* Rules 1986.
[26] (Unreported, Supreme Court of Victoria, Beach J, 29 October 1998) ('*Alpay*').
[27] Ibid 1. In *Alpay* the infringer sought leave to issue a writ of habeas corpus against the Registrar of the PERIN Court, Mr Hargreaves, who was also the Secretary to the Department of Justice. Mr Alpay had outstanding PERIN court fines of $30,748 and was arrested and taken into custody to serve 336 days in lieu of paying the outstanding fines. The application was brought while Mr Alpay was an inmate in Melbourne Assessment Prison. The application was refused.
[28] (Unreported, Supreme Court of Victoria, 28 October 1994) ('*Cameron*').
[29] See *Alpay*, 2. Beach J said (at 1-2): 'I shall delete from the passage ... any matters which were peculiar to the case before [Byrne J], and where they has been any relevant amendment to the legislation substitute the present legislative enactment for that referred to by his Honour. I shall also include any matter relevant to this case which would not have been relevant to the case of Cameron.'
[30] See *Alpay*, 2–5.
[31] Action could include seeking revocation of the enforcement order from the Registrar. A refusal could be referred to the Magistrates' Court. See *Alpay*, 12.
[32] *Magistrates' Court Act*, Schedule 7, clause 3(6). See *Alpay*, 11.
[33] Act No 99/2000.
[34] These permits were issued under s57 of the *Corrections Act* 1986.
[35] Clause 21 of Schedule 7.
[36] The heading to cl 24 was 'Other powers of the Court'.

[37] Section 8 of the *Courts Legislation (Amendment) Act* 2003 inserted an additional paragraph, paragraph (d), if the Court 'is not satisfied that it can act under clause 23(1)'.
[38] See Anne Condon and Annie Marinakis, 'The Enforcement Review Program', (2003) 12 *Journal of Judicial Administration* 225.
[39] Second reading speech, 2186. That the Act introduced a new model was reflected also in s1 of the Act which identified the main purposes of the Act as: '(a) to provide for a new framework for the issuing and serving of infringement notices for offences and the enforcement of infringement notices; (b) to amend the *Magistrates' Court Act* 1989, the *Road Safety Act* 1986 and the *Subordinate Legislation Act* 1994'. As the trial judge noted, the purposes section is of little assistance: Reasons, n 19.
[40] Section 176(2) of the Act, as originally enacted. Section 176(2) read: 'Schedule 7 to the *Magistrates' Court Act 1989* is repealed'. The repeal was subject to various transitional and savings provisions in relation to the PERIN system. In particular, s209 of the Act provides: 'Despite the repeal of clauses 28 and 29 of Schedule 7 to the *Magistrates' Court Act* 1989 by section 176(2), those clauses continue to have effect as if they had not been repealed.' Clause 28 related to validation of actions taken under the *Magistrates' Court Act* and clause 29 prohibited the bringing of any proceedings, including proceedings for habeas corpus, with respect to any action taken before validation.
[41] Second reading speech, 2186.
[42] Ibid.
[43] Ibid (emphasis added).
[44] Ibid 2189-90.
[45] Ibid 2190.
[46] This is reflected in s160(4)(b) of the Act.
[47] This is reflected in s160(3) of the Act.
[48] Second reading speech, 2188 (emphasis added).
[49] Pursuant to s5 of the Act.
[50] Attorney-General's Guidelines to the *Infringements Act* 2006. There were other principles identified including 'the balancing of fairness (Lower fine levels, convenience of payment, consistency of approach) with compliance and system efficiency (reduced administration costs, no need to appear in court, no conviction). '
[51] Through the use of 'issuing officers': s3.
[52] Enforcement agencies also include the heads of department; Consumer Affairs Victoria; Victorian Commission for Gambling and Liquor Regulation; Universities and TAFE institutes; Port Corporations; Parks Victoria; Energy Safe Victoria; Roads Corporation; the House Committee within the meaning of the *Parliamentary Committees Act 2003*; Victorian Arts Centre Trust; Victorian College of the Arts; and Victorian WorkCover Authority: *Infringements (General) Regulation*s 2006, regulation 6, Schedule 1.
[53] It also includes the contravention of Acts such as the *Crimes Act 1958*; *Domestic Animals Act* 1994; *Estate Agents Act* 1980; *Firearms Act* 1996; *Food Act* 1984; *Graffiti Prevention Act* 2007; *Heritage Act* 1995; *Plant Biosecurity Act* 2010; *Second-Hand Dealers and Pawnbrokers Act* 1989*; Transport Compliance and Miscellaneous Act* 1983; *Water Act* 1989. See s7 of the Act; *Infringements (General) Regulation*s 2006, regulations 12, 12A, Schedules 3 and 4.
[54] Section 3. A 'lodgeable infringement offence' is defined to mean an infringement offence that is prescribed to be enforceable under the Act. The term 'lodgeable' offence is presumably intended to reflect the fact that in the event of non-payment the enforcement agency may lodge details of any outstanding amount of an infringement penalty with the Court: s54. See further below [80]. As all the offences the subject of these proceedings are lodgeable infringement offences, the general term 'infringement offence' will be used.
[55] Section 3.
[56] These are the prescribed fees incurred in relation to infringement warrants under s81: s3.
[57] See *Infringements (Reporting and Prescribed Details and Forms) Regulation*s 2006 (Vic), regulation 8(1).
[58] Section 13(b)(i) of the Act. For some offences, an enforcement agency can refer the matter to the Court: s17.
[59] Section 14.
[60] Section 32.
[61] Section 33.
[62] Section 16.
[63] Section 40(1)(a).
[64] Section 40(1)(b).
[65] *Infringements (General) Regulation*s 2006, regulation 13.
[66] Section 22.
[67] Section 3.
[68] Section 24.
[69] Section 25(2).
[70] Second reading speech, 2187-8.
[71] Ibid 2188 (emphasis added).
[72] Pursuant to s46.
[73] See s46(3). An enforcement agency, on an internal review of an application made by someone who does not rely upon special circumstances, may also approve a payment plan: s25(1)(g).
[74] Section 46(4).
[75] Section 54. An 'infringements registrar' means a registrar of the Magistrates' Court on whom functions have been conferred in respect of proceedings under the Act.
[76] Section 54(2).
[77] Section 57.
[78] Section 59(1). This is providing the infringements registrar has not received a request under s58 not to make an enforcement order in respect of a lodgeable infringement offence lodged under s54.
[79] Section 59(2).
[80] Section 60.

[81] Ibid.
[82] Section 65(3)(b).
[83] Section 66(1).
[84] Section 66(2).
[85] Section 68.
[86] Section 76(1).
[87] Section 76(3)(b).
[88] Section 77. A 'payment order' is defined under s3 to be an order made under s77.
[89] Section 80.
[90] Section 88(1).
[91] Section 88(3).
[92] Section 90(1)(a). This applies if a demand has not previously been made, for example by the sheriff at the time of service of the seven-day notice: s88(1)(b).
[93] Section 90(1)(b). This applies unless the person named in the warrant has applied for or obtained a payment order, or applied for or been granted revocation of the enforcement order: s90(1)(b), s90(2).
[94] Section 84(1). An infringement warrant may also be directed to a named police member, or the Commissioner within the meaning of the *Corrections Act* 1986, or any other person authorised by law to execute an infringement warrant.
[95] Section 82(1)(a), (b)(i).
[96] Section 82(1)(b)(ii).
[97] Section 82(1)(c)(ii). He or she is also authorised to break, enter and search for the person in any place where that person is suspected to be: s82(c)(i).
[98] Section 3.
[99] Section 80(2). See also s82(1)(c)(ii); s83(1)(b).
[100] Section 83(1)(c). See also Section 82(1)(c)(ii)(A). The community work permit is issued pursuant to Division 1 of Part 12.
[101] Section 147(2). The value of penalty units under the *Sentencing Act* are fixed by the Treasurer under s5(3) of the *Monetary Units Act* 2004. Section 11 of the *Monetary Units Act* fixes one penalty unit at $140.84 for the 2012-2013 financial year. In February 2009 a penalty unit was $113.42. It is also necessary for the sheriff to be satisfied that the offender has the capacity to perform community work and is reasonably unlikely to breach the conditions of a community work permit: s147(3).
[102] Section 82(1)(c)(ii)(B). Division 2 of Part 12 applies to an infringement offender who is not eligible for a community work permit or is not issued with a community work permit within 48 hours of being arrested, or who fails to comply with a community work permit or has such a permit cancelled: s158.
[103] Section 83(1)(a); s159. There is an exception if the offender is already in custody: s161A(1).
[104] Section 159(2)(b).
[105] Section 161.
[106] Second reading speech, 2189.
[107] Mr Taha was born on 27 March 1986 and was thus almost 23 when the hearing took place at the Magistrates' Court at Broadmeadows.
[108] Pursuant to s59 of the Act.
[109] Pursuant to s80 of the Act.
[110] Reasons [21].
[111] Relevantly, a Justice Plan is a plan made under s80 of the *Sentencing Act* for people who have a statement from the Secretary of the Department of Human Services that they have an intellectual disability within the meaning of the *Disability Act* 2006. It recommends a plan of available services aimed at reducing the likelihood of re-offending.
[112] Mr Taha was not eligible for community work because his fine was over $10,000.
[113] As described in s2 of the *Legal Aid Act* 1978.
[114] Dated 29 November 2010 and 27 January 2011.
[115] The order was made on the day of the hearing, 26 February 2009.
[116] Ms Brookes was born on 5 December 1963 and was thus almost 45 when she appeared before the Magistrate on 24 October 2008. She has three children.
[117] Dated 28 February 2011.
[118] Dated 6 May 2011.
[119] Affidavit of Mr Houston, 6 May 2011, [11].
[120] Proceeding No SCI 2010 06192 and SCI 2010 05540 respectively. They each first sought to appeal to the County Court. Mr Taha then became aware that Chief Judge Rozenes had ruled that the County Court did not have jurisdiction to hear appeals against orders made pursuant to s160 of the Act. The County Court adjourned the proceeding and Mr Taha commenced his application for judicial review in the Supreme Court on 16 November 2010. He was granted leave to commence the proceedings for judicial review out of time by Zammit AsJ on 2 December 2010. Ms Brookes' appeal in the County Court was dismissed as incompetent on 13 October 2010. Her proceedings for judicial review were also commenced on 16 November 2010. The two judicial review proceedings were heard by the judge consecutively, over two days, 28 and 29 July 2011. The judge granted leave to Ms Brookes to bring her application for judicial review out of time.
[121] The first to fourth defendants respectively.
[122] Section 40.
[123] The first and second defendant respectively.
[124] Reasons n 8. That is, the Court largely adopted the *Hardiman* approach: *R v The Australian Broadcasting Corporation Tribunal; ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13; 29 ALR 289; (1980) 54 ALJR 314. However, it would seem that at the end of the *Brookes* matter, the *Taha* matter having been heard first, counsel for the Court submitted, in effect, that there was no material available to assist in whether the Magistrate actually

considered sub-ss (2) and (3) before making an order under s160(1). This submission was adopted by Vic Toll on the appeal. I deal with this submission, [218]–[222] below.

[125] Ibid [11], [13]. These observations were made on the basis of an affidavit sworn by Ms Sophie Delaney, a Senior Lawyer at Victoria Legal Aid, on 28 January 2011. Her Honour assumed that the infringements registrar provided the information and thus that the infringements registrar appeared in a 'quasi-prosecutorial' role. It was clarified at the hearing of the appeal that the infringements registrar made no appearance before the Court and that the information was prepared by staff of the registry of the Court.

[126] Reasons [13].

[127] Ibid [15].

[128] See [218]–[222] below.

[129] Ibid [79] (Mr Taha), [96] (Ms Brookes).

[130] Ibid [49]-[50].

[131] See [72]–[76], above. Her Honour also relied upon the Explanatory Memorandum as making reference to expanding the options available to the Court to consider the personal circumstances of infringement offenders brought before it under an infringement warrant. The Explanatory Memorandum relevantly reads: 'Clause 160 provides that the Court may order the imprisonment of an infringement offender for a period of 1 day for each fine unit, or part of a fine unit, of the amount outstanding under an infringement warrant. Where the court is satisfied either that the infringement offender has a mental or intellectual impairment, disorder, disease or illness or where 'special circumstances' apply, the Court may discharge all or part of the outstanding fines or adjourn the matter for a period up to 6 months. The term 'special circumstances' is defined under clause 3. The Court may discharge all or part of the outstanding fines or adjourn the matter for a period of up to 6 months or to reduce the term of imprisonment where it is satisfied that imprisonment of the infringement offender would be excessive, disproportionate and unduly harsh. Where the Court does make an order for imprisonment, a warrant to imprison may be issued and the Court make also make an instalment order or a community based order.'

[132] Reasons [56].

[133] Section 35 of the *Interpretation of Legislation Act* 1984 provides: 'In the interpretation of a provision of an Act … (a) a construction that would promote the purpose or object underlying the Act … (whether or not that purpose is expressly stated in the Act …) shall be preferred to a construction that would not promote that purpose or object'.

[134] Section 21 of the Charter.

[135] Section 24(1) of the Charter.

[136] Section 8(3) of the Charter.

[137] Reasons [59].

[138] Ibid [63], [66].

[139] Ibid.

[140] Ibid [64]-[65].

[141] Ibid [66].

[142] *RJE v Secretary to the Department of Justice* [2008] VSCA 265; (2008) 21 VR 526, 537 [37]; (2008) 192 A Crim R 156.

[143] Reasons [67].

[144] Ibid [68].

[145] Ibid [97].

[146] Ibid.

[147] Ibid [69].

[148] Ibid [74].

[149] Reasons [79]-[80] (Taha), [96]-[97] (Brookes). There was much discussion below about the difference in the scope of jurisdictional error between administrative tribunals and inferior courts. This was clarified on appeal. There was also much discussion of whether the powers exercised by the Magistrate in making the orders for imprisonment were judicial or administrative in character: see Reasons [95]. The judge found it unnecessary to decide the matter: Reasons [96]. The distinction was re-agitated on appeal.

[150] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.

[151] [2010] HCA 1; (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437 ('*Kirk*').

[152] Proposed Amended Notice of Contention, dated August 2012.

[153] Reasons [49].

[154] Ms Brookes adopted the submissions of Mr Taha on the issues of the unified construction of s160 and the duty to inquire.

[155] As described by the judge in the reasons at [10].

[156] Section 254 of the *Criminal Procedure Act* 2009 only permits appeals from the Court to the County Court against the conviction and sentence imposed by the Court, or sentence alone. An imprisonment order under s160 does not amount to a conviction (and there has been no finding of guilt of the offending) or a sentence.

[157] *Fernando v Port Phillip Council* [2011] VSC 592 ('*Fernando*').

[158] See also *Fernando,* [16], where Hollingworth J also applied a unified construction of s160 when she said: 'The exercise of the power in s160(1) is subject to the discretionary powers created by s160(2) and (3)'. However, the issue of the construction of s160 was not squarely before her Honour. See further below, [162].

[159] At paragraphs [66]–[76].

[160] Section 160(4).

[161] *CIC Insurance Ltd v Bankstown Football Club Limited* (1997) 187 CLR 384, 408; [1997] HCATrans 242; (1997) 141 ALR 618; *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642, 649 [5] (French CJ, Bell J); (2009) 259 ALR 595; (2009) 83 ALJR 1135; (2009) 111 ALD 30.

[162] [1998] HCA 28; (1998) 194 CLR 355, 389 [69]; 153 ALR 490; 72 ALJR 841 (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

[163] See respondent's submissions (Taha) [15] (a) and (b). Indeed, the judge says as much at [46]–[49]: 'However, if Mr Taha is correct and there is in fact *no* discretion *not* to make an imprisonment order if sub-ss (2) and (3) are inapplicable, this would lead to an unsatisfactory outcome. … it is unlikely in my view that the legislature intended to *require* the Court to send people to prison for one day in respect of each penalty unit, especially for relatively minor offences, unless they were able to invoke sub-ss (2) or (3). … Nonetheless, I agree that s160 must be construed in a unified fashion, and that the power conferred by sub-s (1) must be exercised by reference to the powers contained in sub-ss (2) and (3).' (Underlined emphasis added).
[164] The warrant being made under the *Magistrates Court Act*.
[165] This was related to a further submission that, if anyone had a duty to elicit relevant information from an offender, it was the offender's legal representative. This latter submission is considered below, [173]–[177].
[166] Reasons, [47].
[167] As mentioned above by reference to the second reading speech at [73]. See also *Fernando*, [51] (Hollingworth J).
[168] Vic Toll relied upon an affidavit sworn by Mr Adrian Castle on 22 March 2012 that exhibited a letter from Mr David Ryan of the Victorian Government Solicitor's Office dated 22 March 2012 setting out figures extracted from the Courtlink system of the Magistrates' Court. Those figures showed the following number of imprisonment orders made under s160 since 2006: 2006-2007: 97 imprisonment orders; 2007-2008: 188 imprisonment orders; 2008-2009: 228 imprisonment orders; 2009-2010: 302 imprisonment orders; and 2010-2011: 913 imprisonment orders.
[169] Reasons, [49].
[170] See [74].
[171] See *Kesavarajah v The Queen* [1994] HCA 41; (1994) 181 CLR 230, 244-5; 123 ALR 463; 74 A Crim R 100; 68 ALJR 670.
[172] *Fernando*, [56].
[173] Her Honour dismissed the appeal and found, in any event, that she was not persuaded that Mr Fernando's case had substantial merit. She was thus was not prepared to treat the appeal as if it were an application for judicial review.
[174] Reasons, [64]-[65]. See [168] below.
[175] Ibid [66]-[67].
[176] See [128] above.
[177] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152, 161 [26]; (2006) 231 ALR 592; (2006) 93 ALD 300; (2006) 81 ALJR 515.
[178] *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550, 612-3; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28, where Brennan J said: 'The principles of natural justice have a flexible quality which, chameleon-like, evoke a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.'
[179] This is not to suggest that the duty to inquire is an aspect of procedural fairness at common law; it has been held that it is not: *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 259 ALR 429, 436 [24]; (2009) 111 ALD 15; (2009) 83 ALJR 1123; *Minister for Immigration v Teoh* [1995] HCA 20; (1995) 183 CLR 273, 290; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) 39 ALD 206; [1995] EOC 92-696; [1996] 1 CHRLD 67; (1995) 7 Leg Rep 18. It may be an aspect of unreasonableness where the material is of central relevance and readily available: *Prasad v Minister for Immigration and Ethnic Affairs* [1985] FCA 47; (1985) 6 FCR 155, 169-70; 65 ALR 549; (1985) 7 ALN N79 (Wilcox J). See also *Minister for Immigration and Citizenship v Le* [2007] FCA 1318; (2007) 164 FCR 151, 172-6 [60]-[67]; (2007) 242 ALR 455; (2007) 97 ALD 112 (Kenny J). Here the duty to inquire comes from the unified construction of s160 but, analogously to the obligation to accord procedural fairness, the content of the duty may vary from case to case.
[180] See the definition of 'special circumstances' set out at [81] above.
[181] On the appeal Mr Taha relied on the affidavit of Vincenzo Caltabiano, affirmed 29 May 2012, with respect to the conduct of s160 hearings since the judgment was delivered at first instance. Mr Caltabiano is the Program Manager of Summary Crime for Victorian Legal Aid who is responsible for managing the whole of summary criminal law practice across the State. He deposed that many Magistrates are approaching s160 hearings differently in that they are engaging in more active questioning of lawyers and unrepresented accused about whether there are any special circumstances relevant to the case before them. The Magistrates are also more frequently sending self-represented parties out of court to consult with lawyers before being willing to proceed with the hearing of a matter. More care is being taken to determine whether there are special or exceptional circumstances. The affidavit sought to address the question of whether substantial injustice would occur if leave to appeal was not granted in accordance with the *Niemann* test: *Niemann v Electronic Industries Limited* [1978] VicRp 44; [1978] VR 431. Mr Caltabiano's affidavit was relied on to indicate that the dire consequences predicted by Vic Toll had not occurred. I have already indicated that I consider that it was not necessary for leave to appeal to be granted. However, the affidavit remains relevant to the issue of the duty of inquire but it was not, and did not purport to be, a formal empirical study of the current conduct of s160 hearings.
[182] For example, Reasons, [67].
[183] Section 3, as noted at the outset.
[184] Counsel for the Magistrates' Court clarified this on the hearing of the appeals.
[185] Reasons, [64].
[186] On the question of whether the magistrate ought to have ordered an adjournment of his own motion, see below, [228].
[187] [1983] HCA 42; (1983) 152 CLR 657, 675; 49 ALR 448; (1983) 57 ALJR 809; 9 A Crim R 107 ('*Whitehorn*').
[188] [2008] VSCA 81; (2008) 19 VR 90, 94-5; (2008) 184 A Crim R 410 ('*Langley*').
[189] [1974] HCA 35; (1974) 131 CLR 510, 517.
[190] Ibid 517. See *Whitehorn*, 675.
[191] *Whitehorn*, 675.
[192] Ibid 682.

[193] With whom Buchanan and Dodds-Streeton JJA agreed.
[194] *Langley*, 95 [21]-[23].
[195] Ibid 96 [24].
[196] Ibid.
[197] In addition to its Notice of Contention, which is considered below.
[198] The expression 'human rights' is defined in s3 of the Charter to mean the civil and political rights set out in Part 2.
[199] [2011] HCA 34; (2011) 245 CLR 1; (2011) 280 ALR 221; (2011) 85 ALJR 957; (2011) 209 A Crim R 1 ('*Momcilovic*').
[200] *Momcilovic*, 50 [51].
[201] The Commission, relying upon *Slaveski v Smith* [2012] VSCA 25, [23], treated the statement extracted above from French CJ in *Momcilovic* as reflecting the views of six members of the Court. As I explain, I do not consider that to be an accurate reading of the reasoning of the High Court. Nor do I consider the reference made in *Slaveski* to the statement of French CJ as implying that six members of the High Court saw the scope of s32 as requiring no more than an application of the common law principle of legality.
[202] *Momcilovic*, 92 [170] (citation omitted) (emphasis added). See *Momcilovic*, 123 [280] (Hayne J). See also Bell J, 250 [684].
[203] As understood in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All ER 411; 16 BHRC 671; [2004] UKHRR 827; [2004] Fam Law 641; [2004] 3 WLR 113; [2004] 2 P & CR DG17.
[204] *Momcilovic*: French CJ 37 [18], 50 [51]; Crennan and Keifel JJ 210 [544], 217 [565], [566]; Gummow J 92 [170]; Hayne J 123 [280]; Bell J 250 [684].
[205] *Momcilovic*, 92 [170].
[206] See Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' [2011] MelbULawRw 16; (2011) 35 *Melbourne University Law Review* 449.
[207] [2004] HCA 37; (2004) 219 CLR 562, 577 [19]-[20]; (2004) 208 ALR 124; (2004) 78 ALJR 1099; 79 ALD 233 ('*Al-Kateb*'), (citations omitted). See also *Momcilovic*, 46-7 [42]-[43].
[208] Gleeson CJ cited *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270; *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2; (2003) 211 CLR 476, 492 [30]; (2003) 195 ALR 24; (2003) 72 ALD 1; (2003) 77 ALJR 454; (2003) 24 Leg Rep 2.
[209] See O'Connor J in *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277, 304; 14 ALR 635, referring to the 4th edition of *Maxwell on Statutes*, cited by Gleeson CJ in *Al-Kateb*, above.
[210] [2011] HCA 4; (2011) 243 CLR 506; (2011) 275 ALR 408; (2011) 85 ALJR 398 ('*Hogan v Hinch*'). This decision preceded *Momcilovic*.
[211] *Hogan v Hinch*, 550 [76].
[212] Ibid 550-1, [78]. French CJ adopted a similar construction of the offence provision. He said (539, [39]): '[T]he words of s 42(3) "must not publish or cause to be published any material in contravention of an order" do not displace the presumption that the alleged contravenor must know of the existence of the suppression order which he or she is said to be contravening. The proposition that the offence is a strict liability offence is singularly unattractive. I do not accept that s42, properly construed, reflects any legislative intention to give effect to that proposition'.
[213] In *Hogan v Hinch* the plurality defined the Charter as 'the Human Rights Act' (548 [70]). In *Momcilovic* the Court referred to the Charter as 'the Charter'.
[214] The plurality also said (549 [72]): 'The phrase "reasonably necessary", which is used in s15 of the [Charter], supplies a criterion for judicial evaluation and decision-making in many fields. Examples from the common law, statute law and Australian constitutional law were collected and discussed by Gleeson CJ in *Thomas v Mowbray*. In an earlier decision, his Honour had pointed out that "necessary" does not always mean "essential" or "unavoidable". He also observed that, particularly in the field of human rights legislation, the term "proportionality" might be used to indicate what was involved in the judicial evaluation of competing interests which were rarely expressed in absolute terms.' See also *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91, where Nettle JA demonstrates the compatibility of a proscription on misleading and deceptive conduct in trade and commerce with the right to freedom of expression by reliance upon 15(3) and its recognition that freedom of expression is subject to reasonably necessary restrictions ([143]–[166]).
[215] *Al-Kateb*, 577 [19] (Gleeson CJ).
[216] Section 21 is modelled on article 9 of the *International Covenant on Civil and Political Rights* ('the ICCPR') that provides: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. It is in similar terms to article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, agreed by the Council of Rome on 4 November 1950 (the 'European Convention on Human Rights'), included in Schedule 1 to the *Human Rights Act 1998* (UK), namely: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law'. It is also similar to s22 of the *New Zealand Bill of Rights Act* 1990 ('NZBORA') which provides: 'Everyone has the right not to be arbitrarily arrested or detained' and somewhat similar to s 7 of the *Canadian Charter of Rights and Freedoms*: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.
[217] This reflects the right under Article 14(1) of the ICCPR that provides 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' It is in similar terms to Article 6 of the European Convention: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'; to s25 of NZBORA: 'Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public hearing by an independent and impartial court'; and to s11(d) of the *Canadian Charter of Rights and Freedoms*: 'Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.

[218] The Commission relied on the second of the three limbs of s8(3) (see [209]-[210] below). Section 8(3) reflects Article 26 of the ICCPR that provides: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. It is in somewhat similar terms to s15(1) of the *Canadian Charter of Rights and Freedoms*: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability', and to s 9(1) of the South African *Bill of Rights* (Ch 2 of the *Constitution of South Africa*): 'Everyone is equal before the law and has the right to equal protection and benefit of the law'.
[219] *Trobridge v Hardy* [1955] HCA 68; (1955) 94 CLR 147, 152; [1956] ALR 15 (Fullagar J).
[220] *R v Malmo-Levine* [2003] 3 SCR 571, [84]; [2003] SCC 74; [2003] SCJ No 79, in relation to s7 of the *Canadian Charter of Rights and Freedoms*.
[221] [2012] VSCA 159 ('*WBM*').
[222] *WBM*, [117], that is, the meaning adopted based on the understanding of the right at international and comparative law. See also *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327, [80]-[84].
[223] *WBM*, [114].
[224] Section 13(a) of the Charter.
[225] *WBM,* [99].
[226] [2003] FCAFC 70; (2003) 126 FCR 54; (2003) 197 ALR 241; 73 ALD 609.
[227] See above n [216].
[228] *Minister for Immigration v Al Masri* [2003] FCAFC 70; (2003) 126 FCR 54, 90 [143]–[146]; (2003) 197 ALR 241; 73 ALD 609 (Black CJ, Sundberg and Weinberg JJ). See also 90-2 [147]-[152]. The second reading speech for the Charter made it apparent that the rights under the Charter were modeled upon those protected under the ICCPR: Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006 (Attorney-General, Mr Hulls). So too did the report of the Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005), (Recommendations 6 and 7), which recommended the enactment of the Charter.
[229] Citing S Joseph, S Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2000) and M J Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, (Kluwer Law International, 1987) 193-202.
[230] At [128]-[129].
[231] Reasons, [58], [63].
[232] [2008] VSCA 265; (2008) 21 VR 526, 537 [37], adopting the strongest meaning of 'likely' (that is, more likely than not) in the context of s11(1) of the *Serious Sex Offenders Monitoring Act 2005* which relevantly provided that a court may only make an Extended Supervision Order in respect of an offender: 'if it is satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if released in the community on completion of the service of any custodial sentence that he or she is serving'. Maxwell P and Weinberg JA cited *Balog and Stait v Independent Commission against Corruption* [1990] HCA 28; (1990) 169 CLR 625, 635-6; (1990) 93 ALR 469; 20 ALD 298; 47 A Crim R 477; 64 ALJR 400 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[233] *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292, 299; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176 ('*Dietrich*'); *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307.
[234] [1923] HCA 39; (1923) 32 CLR 518, 541-2; 29 ALR 353.
[235] *Dietrich*, 299-300 (citations omitted).
[236] *Dietrich*, 300 (citations omitted).
[237] The first limb of s8(3) protects against arbitrary enforcement of laws and the third limb is the right not to be discriminated against. *Re Lifestyles Communities Ltd (No 3)* [2009] VCAT 1869, [135], [139] (Bell J) ('*Lifestyles*').
[238] Section 6 was relevantly amended in 2011 and the attribute of 'impairment' was replaced by the attribute of 'disability', with substantially the same meaning: *Equal Opportunity Amendment Act* 2011: Act No 26 of 2011.
[239] See The Hon Justice Mary Gaudron, 'Towards a Jurisprudence of Equality' (Address to the Bar Readers' Course, Brisbane) (20 July 1994), 16: 'It is now well established that there are two aspects to equality. The first requires that artificial and irrelevant distinctions be put aside; the second requires that distinctions which are genuine and relevant be brought to account.' See also *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436, 478; 90 ALR 371; 64 ALJR 145; *Street v Queensland Bar Association* [1989] HCA 53; (1989) 168 CLR 461, 569-574; 88 ALR 321; (1989) 63 ALJR 715.
[240] See *Lifestyles*, [137]. See also *South West Africa Cases (Second Phase)* [1966] ICJR 6, 305-6, where Judge Tanaka said: [T]he principle of equality... does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal'. See also *Lifestyles*, [105]-[165] and the materials there cited for an extensive analysis of the right to equality under s8.
[241] *Lifestyles*, [142].
[242] Reasons, [64] and, as mentioned above, [176]
[243] See *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56; (1989) 168 CLR 165, esp 177-81; (1989) 89 ALR 1; (1989) 29 IR 398; [1989] EOC 92-271; (1989) 64 ALJR 53 (Deane and Gaudron JJ), 185-191 (Dawson J).
[244] Section 7(2) provides: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including – (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'. It is an expression of the doctrine of proportionality.
[245] In *Momcilovic*, French CJ, (44 [35]), and Crennan and Keifel JJ (219-20 [572]-[574]) concluded that s7(2) does not inform the interpretative process, and the Court of Appeal was correct to so conclude. Gummow J held that s 7(2) does so inform the interpretative task. He held that s 7(2) was analogous to s 5 of the NZBORA ('Justified

Limitations') and s32(1) analogous to s6 ('Interpretation consistent with Bill of Rights to be Preferred') and that, as under the NZBORA, the interpretative task under the Charter will involve determining whether 'there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment' (91 [166]), relying on McGrath J in *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1, 65 [91], and Blanchard J (26-8 [57]-[2]) and Tipping J (36-7 [88]-92]) to the same effect. That is, the proper approach under s32(1) was to adopt an interpretation that was compatible with the relevant right, even if the interpretation placed a limit on that right, providing the limit or restriction was justified in the sense of being proportionate to the purpose that the restriction aimed to achieve. Hayne (123 [280]) agreed with Gummow J's analysis of the Charter and Bell JJ considered that the approach of the Court of Appeal had played insufficient regard to the place of s7 in the Charter (247 [648]). Heydon J held that in 'assessing under s32(1) whether a particular interpretation of a statutory provision is compatible with a human right, it is necessary to decide what a reasonable limit to that right is according to s 7(2) criteria' (164 [409]) but that this task rendered s32 invalid (175 [439]).

[246] [2010] VSCA 50; (2010) 25 VR 436; (2010) 265 ALR 751.

[247] See *Green v The Queen* [2011] HCA 49; (2011) 244 CLR 462, 490-491 [83]-[87]; (2011) 283 ALR 1; (2011) 86 ALJR 36 (Heydon J). It has also proved unnecessary to decide this issue in *Slaveski v Smith* [2012] VSCA 25, [22]; *DPP v Leys* [2012] VSCA 304, [138]; *WBM v Chief Commissioner of Police* [2012] VSCA 159 [122]; and *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91 [31] (Warren CJ and Cavanough AJA).

[248] [2012] VSCA 91, [30].

[249] The majority view was non-binding because of Heydon J's conclusion of invalidity. It may also have been relevant that Hayne J, while agreeing with Gummow J on this issue, dissented as to final orders.

[250] In *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91 Warren CJ and Cavanagh AJA left open the possibility that the fact that a majority of the High Court disagrees with the earlier judgment of the Court of Appeal may be enough to satisfy the intermediate appellate court that the earlier judgment was clearly wrong ([30]).

[251] *Anderson v Director-General, Department of Environment and Climate Change* [2008] NSWCA 337; (2008) 163 LGERA 400, 421 [58]; (2008) 251 ALR 633; (Tobias JA, with whom Spigelman CJ and Macfarlan JA agreed).

[252] See [116] above.

[253] See Angus Stevenson (ed) *Shorter Oxford English Dictionary on Historical Principles* (Oxford University Press, 6th ed, 2007) 841, 'admit to consideration; receive (an idea)'.

[254] At [168] above.

[255] See [115] above.

[256] In accordance with the general powers and procedures of the Court.

[257] Reasons, [74].

[258] A remedy in the nature of *certiorari*, quashing the Court's decision, would therefore not be available under Order 56 of the *Supreme Court Rules*.

[259] [2000] HCA 57; (2000) 204 CLR 82, 141 [163]; (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6. *Kirk*, 571-3 [66]-[70].

[260] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 ('*Craig*').

[261] In doing so it rejected the approach adopted in the United Kingdom whereby the distinction between jurisdictional error and error within jurisdiction has effectively been abolished: see *Craig*, 178-179, *Pearlman v Harrow School* [1978] EWCA Civ 5; [1979] QB 56, 69; *O'Reilly v Mackman* [1983] UKHL 1; [1983] 2 AC 237, 278; [1982] 3 All ER 1124; [1982] 3 WLR 1096; *In Re Racal Communications Ltd* [1980] UKHL 5; [1981] AC 374; [1980] 2 All ER 634; [1980] 3 WLR 181; *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 163.

[262] *Craig*, 176 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[263] Ibid 179-180. See also *Kirk*, 572-3 [67]-[68]; Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012), 58-60.

[264] *Nicholas v R* [1998] HCA 9; (1998) 193 CLR 173; (1998) 151 ALR 312; (1998) 72 ALJR 456; (1998) 99 A Crim R 57; [1998] 2 Leg Rep C1.

[265] *Kirk*, 573-4 [72]. See also *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194, 208-9 [31]; (2000) 174 ALR 585; (2000) 74 ALJR 1348; (2000) 21 Leg Rep 14; (2000) 99 IR 309: 'There would only have been jurisdictional error on the part of the Full Bench [of the Australian Industrial Relations Commission, the Presidential Members of which were Giudice and Munro JJ] if it had misconceived its role or if, in terms used by Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council* [(1947) 47 SR (NSW) 416, 420; (1947) 64 WN (NSW) 107; 16 LGR (NSW) 82], it 'misunder[stood] the nature of [its] jurisdiction ... or "misconceived its duty" or "[failed] to apply itself to the question which [s 45 of the Act] prescribes" ... or "[misunderstood] the nature of the opinion which it [was] to form"'. The Full Bench did none of those things.'

[266] *Kirk*, 573-4 [71]-[72] (original emphasis).

[267] The Court noted that in *Craig* this last example was seen to be one where it may be the most difficult to discern the line between jurisdictional error and error within jurisdiction (Ibid 574 [72]).

[268] Ms Brookes submitted that even if the Magistrate's failure to consider whether special circumstances existed in the case of Ms Brookes was viewed as a failure to take account of relevant considerations it was one of those instances where this would amount to a jurisdictional error for an inferior court because it would be a failing to take account of a matter which the statute makes a precondition of its jurisdiction. As the Court put it in *Craig*: '[J]urisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case' (177).

[269] As expressed earlier, [94], the unified construction can be understood as meaning that sub-s (1) of s160 confers a power to order imprisonment on the basis of the formula of one day to one penalty unit *unless* special or exceptional circumstances apply.

[270] *Kirk*, 574 [73].
[271] It should be noted, as the Commission observed, if the Court was exercising administrative power on a s160 hearing it would be acting as a 'public authority' for the purposes of the Charter and would therefore be bound by s38 of the Charter to *act* compatibly with the Charter; that is, it would be unlawful for it to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. See *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346; (2008) 20 VR 414, 432-3 [119]-[127].
[272] It also includes s7(2), the general proportionality requirement for any interference with the rights. However, as mentioned above, the role played by s 7(2) in the interpretative task is currently unclear.
[273] It also includes the power conferred on the Supreme Court to issue a declaration of inconsistent interpretation (s36(2)) if a statutory provision cannot be interpreted consistently with a human right.
[274] See Caroline Evans and Simon Evans, *Australian Bills of Rights* (LexisNexis, 2008), 12-14 [1.41]-[1.44]. The Court heard submissions on these alternative constructions in *RJE v Secretary to the Department of Justice* [2008] VSCA 265; (2008) 21 VR 526; (2008) 192 A Crim R 156, but found it unnecessary to decide the issue. See also Timothy Lau, *'Section 6(2)(b) of the Victorian Charter: A problematic provision'* (2012) 23 *Public Law Review* 181.
[275] The broad construction has the difficulty that it would in effect render courts public authorities and impose on them a direct obligation to act compatibly with the rights protected under the Charter, including in proceedings between private parties. This is not consistent with s 4(1)(j) which expressly excludes courts from the definition of 'public authorities' (except when acting in an administrative capacity, for example the issuing of warrants). It is also inconsistent with the words 'to the extent' in s6(2)(b) which are words of limitation.
[276] Evans and Evans (op cit), 13 [1.42]. They see the rights falling under the intermediate construction as those rights under ss21(5)(c), 21(6), 21(7), 21(8), 23(2), 23(3), 24-27 of the Charter.
[277] Evans and Evans (op cit), 13 [1.43]. They consider that the narrow construction may include only a handful of rights such as the right of someone deprived of his or her liberty to apply to a court for a declaration or order regarding the lawfulness of his or her detention (s21(7)), along with the rights under s21(5)(c), 21 (6)-(8), and 24(2)-(3) but may not include the right to a fair hearing (s24(1)) because it is not 'explicitly and exclusively' directed at the court, nor include the criminal process rights in ss25-27. They note that the attempt to restrict the rights directly enforceable by a court to those which are 'exclusively and explicitly' addressed to courts has no textual support in the Charter (at 14 [1.44]).
[278] See *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 [166]-[167], [204] where Bell J concluded that the Children's Court was under a direct obligation, by reason of s6(2)(b), to comply with the right to a fair hearing under s24(1) in its conduct of protection proceedings (that is, proceedings determining whether the child should be taken away from his or her parents, whether the child will be protected from physical and emotional harm; who will have custody of the child, and so on).
[279] [2009] VSCA 199; (2009) 25 VR 237 ('*De Simone*') as was noted in *Slaveski v Smith* [2012] VSCA 25, [54] n 27.
[280] *De Simone*, 247 [52]. The Court indicated that this involved a 'reading down' of s4(1)(j) of the Charter so that Part 2 (or some of it) would directly apply to courts and tribunals. With respect, there is no need for a reading down as s4(1)(j) is concerned with the way in which public authorities are bound to observe rights under the Charter. There are other alternative ways in which rights-compliant obligations are imposed under the Charter. One of those alternatives is the obligation to interpret legislation in a human rights-compatible way (s32); another is the obligation on Parliament to prepare statements of compatibility in respect of legislation (s30). A further alternative source of obligation is that which is imposed directly on courts (as courts), under s6(2)(b), to give effect to certain rights. Indeed, a primary reason for rejecting the broad construction of s6(2)(b) is that it would be tantamount to rendering the courts public authorities and this is clearly inconsistent with the intention of the Charter, read as a whole.
[281] However, I note the comments of Crennan and Keifel JJ in *Momcilovic* which appear to implicitly support the intermediate approach: 'Some of the rights identified and described in Pt 2 may require courts or tribunals to ensure that processes are complied with, for example to ensure a fair hearing [s24], and that the matters guaranteed by the Charter with respect to a criminal trial are provided [s25]' (204 [525]). See Lau (op cit), 195.
[282] *Lifestyles*, [142].
[283] The Commission recognised that before concluding that the Magistrate had acted incompatibly it would be necessary to determine whether the interference with the rights could be demonstrably justified under s 7(2) of the Charter. It noted that the party invoking s7(2) bears the onus of establishing that any limitation on rights is justified (*Major Crimes Act Case* [2009] VSC 381; (2009) 24 VR 415, 441-2 [115], [117]; (2009) 198 A Crim R 305). Vic Toll made no attempt to demonstrate any justification for any intrusion upon the rights of Mr Taha (or similarly those of Ms Brookes).
[284] *Kesavarajah v The Queen* [1994] HCA 41; (1994) 181 CLR 230, 244-5; 123 ALR 463; 74 A Crim R 100; 68 ALJR 670; *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic), ss9(1), (2) and (3).
[285] Reasons [97].

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