

Constitutionally Protecting the Presumption of Innocence

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I INTRODUCTION

In recent years there has been exponential growth in the use of so-called reverse onus provisions, placing the burden of proof in an unconventional way, particularly placing such a burden on a person who is accused of wrongdoing, rather than on the prosecution. Such laws are often thought necessary because, otherwise, it might be extremely difficult for the prosecutor to meet the required burden, sometimes because the person accused of wrongdoing has better access to relevant information in this regard. The purpose of this paper is to consider the extent to which reverse onus provisions are consistent with the presumption of innocence, and how an Australian court should deal with such provisions. In that regard, it will be useful to consider how overseas courts have approached such provisions, mindful as always of the different statutory and constitutional context in which different regimes operate. A recent High Court of Australia decision¹ considered the presumption of innocence in the context of one of the few statutory human rights instruments existing in Australia, and that case will be critically considered.

The classic statement of the importance of the presumption of innocence appears in the House of Lords decision in *Woolmington v Director of Public Prosecutions*² where the court referred to it as the ‘golden thread’ running through English criminal law, subject to the defence of insanity and ‘subject to any statutory exception’.³ The House went on to conclude that ‘no attempt to whittle it down can be entertained’. Whilst this is a sound affirmation of the importance of such a right, it perhaps elides the fact that during earlier times when trial by ordeal or compurgation occurred, particularly prior to the use of juries, there was no such presumption.⁴ More importantly for present purposes, while it allows

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¹ *Momcilovic v The Queen* [2011] HCA 34; for discussion see Julie Debeljak ‘Who is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It to Have’ (2011) 22 *Public Law Review* 15.

² [1935] UKHL 1.

³ *Ibid* [7].

⁴ Theodore Plunknett, *A Concise History of the Common Law* (Lawbook Exchange, 1956), Barbara Hanwalt, *Crime and Conflict in English Communities 1300-1348* (1979), Melville

that statutory exceptions might be made to the presumption, this was in the context of general common law acceptance of the doctrine of Parliamentary supremacy, by virtue of which no legal rights were sacred, and any were liable to be taken away by Parliament.⁵ This must be at least tempered now in the United Kingdom by the requirements of the *Human Rights Act 1998* (UK),⁶ about which more is said below. Further, in Australia, as I have written elsewhere, it is a mistake to apply the concept of Parliamentary supremacy in the same way as in the United Kingdom, given our written constitution and entrenchment of judicial review.⁷

Bigelow *History of Procedure in England From the Norman Conquest* (Harvard University Press, 1880) 322; Karl Kunert 'Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure' (1959) 29 *Buffalo Law Review* 122; George Fletcher 'Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases' (1968) 77 *Yale Law Journal* 880; William Laufer 'The Rhetoric of Innocence' (1995) 70 *Washington Law Review* 329. Sir William Blackstone Commentaries on the Laws of England: Book the Fourth (Clarendon, 1769) 352; Hobson's Case (1823) 1 Lew CC 261, 261 ('It is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer'); Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart, 2010) 1-4. It has clear links with the concept of 'reasonable doubt'; some see the two as essentially one and the same doctrine; others see them as distinct doctrines. This debate need not be amplified for present purposes.

⁵ Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty Fund, 8th ed, 1926) 38; Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999).

⁶ In *Jackson v Attorney-General* [2006] 1 AC 262, three members of the House of Lords openly questioned in obiter the parliamentary supremacy principle in its application to the United Kingdom ('but Parliamentary sovereignty is no longer, if it ever was, absolute' ([104], Lord Hope), 'the courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers' ([159], Baroness Hale), and Lord Steyn, who referring to the principle as a creature of the common law, concluded 'it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism' ([102]); Lord Bingham 'The Rule of Law and the Sovereignty of Parliament' (2008) 19 *Kings College Law Journal* 223; Jeffrey Jowell 'Parliamentary Sovereignty under the New Constitutional Hypothesis' [2006] *Public Law* 562.

⁷ Anthony Gray 'The Common Law and the Constitution as Protectors of Rights in Australia' (2010) 39(2) *Common Law World Review* 119. The High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) could not have been clearer on this: 'The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature'. Gummow J recently made the same point, indirectly, in *Momcilovic v The Queen* [2011] HCA 34, [146], referring to the debate in the United Kingdom about how the discussion in the United Kingdom about the *Human Rights Act 1998* (UK) being designed to preserve Parliamentary sovereignty 'speak[ing] to a non-Australian universe of constitutional discourse'.

There is a vast literature on the importance and theoretical underpinnings of the presumption. This includes judicial assertions that the public interest in ensuring that innocent people are not convicted greatly outweighs the public interest in ensuring that a particular criminal is brought to justice, in order to ensure public confidence in the judicial system.⁸ It includes claims that an onus on the defendant to disprove an accusation is ‘repugnant to ordinary notions of fairness’.⁹ Ashworth, a leading criminal law academic, defends the presumption on several bases. These include that (a) given the possible sanction of removing someone’s liberty, it is right that a high threshold is needed for that to happen; (b) there is always a risk of error in fact-finding in trials, and it is better that the Crown bear this risk;¹⁰ (c) police have far-reaching powers to conduct investigations and that these powers must be exercised in a way that properly respects human rights and freedoms; (d) typically the state’s resources far exceed that of any individual; and (e) the presumption of innocence is logically coherent with¹¹ the principle of proof of a criminal charge beyond reasonable doubt.¹²

The presumption of innocence appears in many international human rights instruments, including Article 14(2) of the *International Covenant on Civil and Political Rights*, Article 6(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, s11(d) of the *Canadian Charter of Rights and Freedoms*, s25(c) of the *New Zealand Bill of Rights Act 1990*, s35(3)(h) of the *Constitution of the Republic of South Africa* and Article 11 of the *Universal Declaration of Human Rights*. An important limit on these provisions is that they

⁸ *The State v Coetzee and Others* [1997] 2 LRC 593, 677 (Sachs J, Constitutional Court of South Africa); *In Re Winship* 397 US 358, 364 (Brennan, for five members of the Court), 372 (Harlan J).

⁹ *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [9]; or a ‘fundamental principle of the common law’: *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501, 503 (Mason CJ and Toohey J), 527 (Deane, Dawson and Gaudron JJ), 550 (McHugh J).

¹⁰ See also *In Re Winship* 397 US 358, 375 (1970) (Brennan J, for five members of the Court).

¹¹ There is debate about whether it is possible to have one without the other: Andrew Ashworth says that it is possible: ‘Four Threats to the Presumption of Innocence’ (2006) 10 *International Journal of Evidence and Proof* 241, 250; French CJ in *Momcilovic v The Queen* [2011] HCA 34, [54] concludes that the presumption has not generally been regarded (in Australia) as logically distinct from the requirement that the prosecutor must prove an allegation beyond reasonable doubt.

¹² Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 *International Journal of Evidence and Proof* 241, 246-250; reverse legal onuses are ‘anathema to the principles of the criminal law, which place a high premium on the value of a fair trial’: Andrew Geddis and Bridget Fenton ‘Which is to be Master? – Rights Friendly Statutory Interpretation in New Zealand and the United Kingdom’ (2008) 25(3) *Arizona Journal of International and Comparative Law* 733, 752; Ian Dennis ‘The *Human Rights Act* and the Law of Criminal Evidence: Ten Years On’ (2011) 33 *Sydney Law Review* 333, 354.

typically only apply when a person has been ‘charged with a criminal offence’. Sometimes, reverse onus issues have arisen in the context of ‘civil forfeiture’ proceedings, under which the person who owns property is suspected of acquiring the property through unlawful means. Sometimes, such provisions require the owner of the property to prove, on the civil standard, the lawful means by which they acquired the property, and if they cannot do so, the property is forfeited to the Crown. This can occur although the person is not charged with any particular crime. I have argued elsewhere my belief that such proceedings are, in substance, criminal in nature, and so the protections that typically apply in criminal proceedings should apply to those proceedings, regardless of the ‘clothing’ in which those proceedings appear.¹³

Although these are highly important debates, I will not re-visit that ground here. In this article, my focus will be on the presumption of innocence, in the context of the increasing number of provisions requiring the person affected to prove something in order to escape culpability. This is not an argument in the abstract. Specific current Australian examples include the unexplained wealth provisions in Part 2-6 of the *Proceeds of Crime Act 2002 (Cth)*¹⁴ and equivalent state regimes.¹⁵ Essentially, these provisions require that a person suspected of owning property acquired other than through lawful activity to prove the lawfulness by which they acquired the property, on the civil standard of proof. This requirement applies, in the case of the federal act, once there are reasonable grounds for suspecting the property was acquired other than through lawful means.

¹³ Anthony Gray, ‘Forfeiture Provisions and the Criminal/Civil Divide’ (2012) 15(1) *New Criminal Law Review* 32; see also Kenneth Mann, ‘Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law’ (1992) 101 *Yale Law Journal* 1795; Carol Steiker, ‘Punishment and Procedure: Punishment Theory and the Civil-Criminal Procedure Divide’ (1997) 85 *Georgetown Law Journal* 775; Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2 *Criminal Law and Philosophy* 21; Peter Wright, ‘Criminal Punishment Without Civil Rights: The Criminal Proceeds and Instrument Bill’s Punitive Civil Sanctions’ (2006) 37 *Victoria University of Wellington Law Review* 623.

¹⁴ Section 179E(3) contains the reverse onus provision. The Act provides that a court may make an unexplained wealth order if a preliminary order has been made (based on some evidence provided by the prosecutor), and the court is not satisfied that the person’s wealth was not derived from commission of an offence. Section 179E(3) confirms that the onus is on the person to prove the lawfulness by which they acquired property, not the prosecutor to prove the unlawfulness by which the property was acquired. The person need not have been charged or convicted of any offence.

¹⁵ *Criminal Assets Recovery Act 1990* (NSW) s 28B(3); *Confiscation Act 1997* (Vic); *Criminal Proceeds Confiscation Act 2002* (Qld) s 83; *Criminal Assets Confiscation Act 2005* (SA) s 47(5); *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) (‘SA Act Two’); *Criminal Property Confiscation Act 2000* (WA) ss 12(2) and s16(3); *Criminal Property Forfeiture Act* (NT) s 71(2); and *Confiscation of Criminal Assets Act 2003* (ACT).

Such provisions typically allow forfeiture of the asset although the person who owns the asset has not been proven at the criminal standard to have committed a crime by which the asset was directly or indirectly obtained. Such provisions can be applied although the person has not been charged with any offence, has been charged and acquitted, or whether their conviction for an offence has been overturned on appeal.¹⁶ No specific offence need be identified by the Crown. Another example is the type of provision considered in the recent High Court decision in *Momcilovic*,¹⁷ presuming that a person who occupies premises where drugs are found is actually in 'possession' of the drug, unless they prove otherwise.¹⁸ The offence of trafficking included, in that case, someone in possession of a prohibited drug, depending on quantity.

A *Consideration of Reverse Onus Schemes Elsewhere*

These kinds of reverse onus provisions, whilst they have grown exponentially in Australia in recent times, are not new or unique to Australia. They have been considered in substantial detail in other nations. Australia should at least consider how such provisions have been balanced against fundamental principles like presumption of innocence and fair trial in other legal systems.¹⁹ The volume of cases in other jurisdictions means that the courts elsewhere have had to grapple with many different contexts in which these issues arise. In the common law tradition, this has allowed courts in other jurisdictions to fine tune their principles in light of the sheer volume of cases and contexts in which authorities might seek to use these kinds of provisions.²⁰

¹⁶ References are to the Acts named in footnote 8: s80 (Cth), ss 6, 22(7) and 28C(4) (NSW), s 106(b) and (c) and 148 (WA), ss 12 and 140(b) and (c) (NT), s 61 (Qld), and ss 47(2)(b) and 63 (SA).

¹⁷ *Momcilovic v The Queen* [2011] HCA 34.

¹⁸ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC. I do not deal in detail with *Momcilovic* in this article because most of the issues with which it dealt are not considered directly relevant to the present discussion.

¹⁹ It is true that in many cases the High Court has not used international materials, however this practice seems to be slowly changing. For instance, in *Dietrich v The Queen* (1992) 177 CLR 292, particularly important in the current context, the majority made extensive use of international materials to support their view. Other recent examples include *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 318; Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, *No Country is an Island: Australia and International Law* (University of New South Wales Press, 2006).

²⁰ The High Court recently made this point, in denying the applicability of United Kingdom precedent concerning interpretation of its *Human Rights Act 1998* (UK) to Australian charter provisions: *Momcilovic v The Queen* [2011] HCA 34.

1 Canada

The *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be presumed innocent until proven guilty.²¹ Section 1 of the Charter guarantees such right, and others, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Similar facts to the *Momcilovic* case were considered in the leading Canadian decision of *R v Oakes*.²² The relevant section stated that if the Supreme Court found that the accused was in possession of a drug, they were presumed to be in possession for the purposes of trafficking, and unless the accused could convince the court of the contrary, they would be convicted of trafficking. The accused successfully argued that the provision was contrary to the presumption of innocence provided for by section 11(d). The Supreme Court of Canada was satisfied that the relevant provisions were not one of the 'statutory exceptions' provided for in *Woolmington* given the fact that Canada had 'tempered' parliamentary supremacy.²³ As read, the provision allowed the possibility that a person could be convicted despite the existence of reasonable doubt, because the accused bore the burden of disproving an essential element of the offence.²⁴ A conviction in such cases would be 'radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse'.²⁵ The court rejected application of the s 1 saving provision;²⁶ and the mere fact that someone had a small quantity of drugs did not necessarily mean they were traffickers.²⁷ Such issues have also arisen in the context of using an accused's silence as evidence of guilt, with the Supreme Court in *R v Noble* concluding that such an approach violates the presumption of innocence protected by s 11.²⁸

²¹ Section 11(d).

²² [1986] 1 SCR 103.

²³ *Ibid* [39].

²⁴ *Ibid* [57].

²⁵ *Ibid* [61].

²⁶ The court said three factors were relevant to s 1 considerations: (a) whether the relevant measures were of sufficient importance to justify overriding a constitutionally protected right or freedom, (b) if the first element exists, whether the means chosen are reasonable and demonstrably justified (proportionality test), taking into account whether the measures chosen were carefully designed to achieve the object in question or whether they were arbitrary, unfair or based on irrational considerations, and whether, if rationally connected to the objective, they impair as little as possible the right or freedom in question. Thirdly, there had to be proportionality between the effect of the measures responsible for limiting the Charter right or freedom, and the object identified as of sufficient importance.

²⁷ In contrast, the court was satisfied in *R v Whyte* [1988] 2 SCR that a rational connection existed between the thing presumed and the act prohibited.

²⁸ [1997] 1 SCR 874; Lamer CJ (dissenting) in that case drew a distinction between provisions presuming the offence itself (offensive to the Charter), and provisions presuming a key element of an offence (presumably, valid) [34].

In *R v Schwartz* the Supreme Court considered provisions criminalising possession of a restricted weapon without a registration certificate.²⁹ The onus was expressly placed on the accused to prove on the civil standard that they held such a certificate. A majority of the court found that the provision did not create a reverse onus provision because the accused was not required to prove or disprove any element of the offence. There was no possibility that the accused could be found guilty of a crime, despite the existence of a reasonable doubt as to guilt.³⁰ The dissenters, reinforcing the fundamental importance of the presumption of innocence, applied the *Oakes* approach, and found that the provision relieved the Crown of the onus of proving an essential element of the offence charged; the Act did not merely impose an evidentiary burden on the accused but a legal burden, and although the Act was designed to meet a legitimate objective, it failed the proportionality test – its burden on a fundamental freedom was significant, in the context where it would not be difficult for the Crown to prove whether or not the accused had a certificate.³¹

In essence, the Canadian court has been concerned that there be no interference with the Crown's obligation to prove that the accused committed each of the elements of the alleged crime beyond reasonable doubt.³²

2 Europe

Most of the discussion here has related to Article 6 of the European Convention on Human Rights, subsection (2) of which requires that every person charged with a criminal offence be presumed innocent until proven guilty according to law, and subsection (1) of which requires that in the determination of a criminal charge, everyone is entitled to a fair hearing.³³ How have these provisions been applied to reverse onus provisions?

²⁹ [1988] 2 SCR 443.

³⁰ Ibid [79]-[80] (McIntyre, La Forest and L'Heureux-Dube JJ).

³¹ Ibid [32]-[34] (Dickson CJ and Lamer J).

³² For a critique, see Ian Laing 'R v Noble: The Supreme Court and the Permissible Use of Silence' (1998) 43 *McGill Law Journal* 638. It is considered to be beyond the scope of this article to critique the Canadian jurisprudence here; rather I am using the case law as examples of how the courts elsewhere have reconciled the presumption of innocence with other interests.

³³ Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010); David Hamer 'A Dynamic Reconstruction of the Presumption of Innocence' (2011) 31(2) *Oxford Journal of Legal Studies* 417; Victor Tadros and Stephen Tierney 'The Presumption of Innocence and the *Human Rights Act*' (2004) 67(3) *Modern Law Review* 402. It is considered to be beyond the scope of this article to critique the European jurisprudence here; rather, I am using the case law as examples of how the courts elsewhere have reconciled the presumption of innocence with other interests.

The starting point is the proposition from the European Court that presumptions of fact or law are not necessarily incompatible with the requirements of Article 6; as with most of the Convention rights, intrusions are permissible where they are confined within 'reasonable limits'. The European Court has specifically required that during such an analysis in the context of a reverse onus provision, the court must 'take into account the importance of what is at stake and maintain the rights of the defence'.³⁴ This has translated in some cases to the position that the more serious the offence in terms of its nature and attendant penalty, the stronger the justification for intrusion needed.³⁵ Proportionality between the extent of interference and the legitimate aim sought to be achieved is important.³⁶ Evidentiary onuses may be more likely to be compatible with the requirements of Article 6(2) than legal or persuasive onuses.³⁷ The Court has read the presumption of innocence in Article 6(2) as being encompassed within the right to a fair trial in Article 6(1),³⁸ such that Art 6(2) could technically be seen as redundant.

One case very close in facts to the kinds of laws considered here is *Geerings v The Netherlands*.³⁹ The case concerned an accused charged with theft. He was originally convicted, but on appeal, most of his convictions were overturned. The government commenced confiscation proceedings against him, in respect both of property acquired from the offence with which he had been finally convicted, and in respect of property acquired from offences where the appellant's conviction had been overturned. The domestic law specifically allowed a confiscation order to be made if there were 'sufficient indications' that the applicant had committed offences. The government was required to provide a prima facie case; the accused was then required to rebut it. In this way, there are strong similarities with regimes currently operating in Australian states, allowing the government to apply for a forfeiture order although the person was acquitted of a relevant criminal offence, or had a relevant conviction quashed on appeal.⁴⁰

³⁴ *Salabiaku v France* [1988] ECHR 19.

³⁵ *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [6].

³⁶ *Principal Reporter v K and Others* [2010] UKSC 56, [43]; in *R v Johnstone* [2003] UKHL 28, [49], the court spoke of the need for a 'compelling reason'; *Mayor of Hounslow v Powell* [2011] UKSC 8, [73].

³⁷ *R v Lambert* [2001] UKHL 37; *R v Kebeline* [2000] 2 AC 326.

³⁸ *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [9]; *Phillips v United Kingdom* (Application No. 41087/98) (5 July 2001), [40]; *Heaney and McGuinness v Ireland* [2000] ECHR 684.

³⁹ [2007] ECHR 191.

⁴⁰ See references in footnotes 14-16. There are also some analogies with *Momcilovic*, where a presumption of guilt was made in relation to 'possession' of drugs found on premises, subject to the occupier of the premises disproving guilt.

The accused successfully argued in the European Court of Human Rights that such provisions were incompatible with the right to presumption of innocence provided for in Article 6(2):

The Court reiterates that the presumption of innocence, guaranteed by Article 6(2), will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law⁴¹ ... confiscation ... is a measure inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage ... was actually obtained, such a measure can only be based on a presumption of guilt.⁴²

Another case very similar in fact is *McIntosh v Her Majesty's Advocate*.⁴³ There the litigation involved provisions dealing with the forfeiture of assets held by a person convicted of a drug trafficking offence. It provided that property acquired or held by that person at certain times prior to and following their conviction *could* be presumed by the court (if it wished) to have been unlawfully acquired, unless the offender could show otherwise.

A majority of the Scottish High Court found the provisions to be incompatible with the requirements of Article 6(2). Lord Prosser concluded:

By asking the court to make a confiscation order, the prosecutor is asking it to assess the value of the proceeds of the petitioner's drug trafficking. It is therefore asking the court to reach the stage of saying that he has trafficked in drugs. If that is criminal, that seems to be to be closely analogous to an actual charge of an actual crime ... There is of course no indictment or complaint and no conviction ... a complaint or indictment would have to be specific, and would require evidence, whereas this particular allegation was inspecific and based upon no evidence. But the suggestion that there is less need for a presumption of innocence in the latter situation appears to me to be somewhat Kafkaesque, and to portray a vice as a virtue. With no notice of what he is supposed to have done, or of any basis which there might be for treating him as having done it, the accused's need for the presumption of innocence is in my opinion all the greater.⁴⁴

⁴¹ *Geerings v The Netherlands* [2007] ECHR 191, [41].

⁴² *Ibid* [47].

⁴³ [2000] ScotHC 97; *Her Majesty's Advocate v McIntosh (Scotland)* [2001] UKPC D1.

⁴⁴ *Ibid* [30], with whom Lord Allanbridge agreed.

Lord Prosser claimed that the legislation allowed for confiscation although the person affected had not been convicted of any offence, and found that the confiscation proceedings amounted to a 'charge' within the meaning of Article 6(2).⁴⁵ It is true that the finding of incompatibility was overturned by the Privy Council, but this was on the basis that the confiscation proceedings followed a finding in a criminal trial, beyond reasonable doubt, that the person had committed a drug trafficking offence. This meant that the confiscation proceeding did not amount to the bringing of a 'charge' within the meaning of Article 6(2).⁴⁶ This Privy Council decision is thus consistent with other European decisions confirming the validity of confiscation proceedings following conviction, and the general non-application of Article 6(2) to such proceedings.⁴⁷ It does not detract from the argument made here, which is with the use of reverse onus provisions in forfeiture proceedings in the absence of a conviction against the person affected.

3 *United States*

The United States *Bill of Rights* does not expressly contain an enshrined right to presumption of innocence, but it has been held that the Fifth and Fourteenth Amendments, guaranteeing a right not to be deprived of life, liberty *or property* (emphasis added, given the context of this article) ('due process rights') include the presumption of innocence.⁴⁸ This jurisprudence is considered to be applicable to the present discussion of the Australian position, given the explicit acceptance by members of the High Court that the Australian *Constitution* provides for protection of some kind of 'due process'.⁴⁹ It is considered to be a reasonable assumption that 'due process' in the context of the United States is not materially different from due process in Australia.⁵⁰

⁴⁵ Ibid [9].

⁴⁶ *Her Majesty's Advocate and Anor v McIntosh* [2001] UKPC D1.

⁴⁷ *Grayson and Barnham v United Kingdom* (Application Nos. 19955/05 and 15085/06)[2008] ECHR 8; *R v Briggs-Price* [2009] UKHL 19.

⁴⁸ *In Re Winship* 397 US 358 (1970).

⁴⁹ For example, Deane J refers to s 71 as the *Constitution's* 'only general guarantee of due process': *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 580. Members of the Court have made reference to Chapter III not permitting a court to be given functions which are inconsistent with the nature of judicial power or the essential requirements of a court: *Polyukovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J), 685, 689 (Toohey J) and 703-704 (Gaudron J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1.

⁵⁰ This is given the fact that the founding fathers drew heavily on the *American Constitution* and greatly admired it: Owen Dixon *Jesting Pilate* (Hein, 1965) 102, 104. Specific examples of the application of United States constitutional principles to the Australian constitutional context are too numerous to mention; fundamental examples include the acceptance of judicial review: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 263, citing *Marbury v Madison* (1803) 5 US 137, and the use of the

The Court has been mindful of the fact that legislatures may resort to indirect means to subvert the guarantee of presumption of innocence,⁵¹ and recognised the threat to due process constitutional rights more generally posed by the use of presumptions:

The use of presumptions and inferences to prove an element of a crime is indeed treacherous, for it allows men to go to jail without any evidence on one essential ingredient of the offense. It thus implicates the integrity of the judicial system ... In practical effect, the use of these presumptions often means that the great barriers to the protection of procedural due process contained in the bill of rights are subtly diluted.⁵²

In *In Re Winship*, a majority of the Supreme Court dismissed an argument that criminal due process rights should not apply there because the proceedings, against a juvenile, were said to be protective and remedial rather than punitive. The majority considered the substance of the proceedings were criminal, despite the label. It has confirmed that anything that affects the penalty for a criminal offence must be proven at the standard of beyond reasonable doubt.⁵³ It has not permitted transfers of a legal burden of proof to the defence to show that a partial defence to the charge exists.⁵⁴ Sometimes, a distinction is drawn between presumptions that must be made, and presumptions that may be made. It

'reasonably appropriate and adapted' test of determining the constitutional validity of federal law: *McCullough v Maryland* (1819) 4 Wheat 316, 321 (Marshall CJ), applied in many Australian cases, including *Commonwealth v Tasmania* (1983) 158 CLR 1. On Australian due process, see Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, Michael McHugh, 'Does Chapter III of the *Constitution* Protect Substantive as Well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235.

⁵¹ *Estelle v Williams* 425 US 501, 503 (1976); *Mullaney v Wilbur* 421 US 684, 698 (1975).

⁵² *Barnes v United States* 412 US 837, 850 (1973) (Brennan J, with whom Marshall J agreed).

⁵³ *Apprendi v New Jersey* 530 US 466 (2000).

⁵⁴ *Mullaney v Wilbur* 421 US 684 (1975) (on due process grounds); the court has also debated the extent to which lawmakers might be able to reclassify what might in the past have been elements of an offence to affirmative defences, in order to effect a transfer of the burden of proof: *Patterson v New York* 432 US 197 (1977); the majority there acknowledged simply that in this regard, there were 'obviously' constitutional limits beyond which the states may not go in that regard (without specifying them) (210); see the criticism by Powell J (with whom Brennan and Marshall JJ agreed) (223); Kenneth Campbell wrote about this, arguing that a substantive view needed to be taken, and that in substance an offence included things against which the law said there was a prima facie reason, while a defence in substance related to exonerating conditions: *Criminal Law and Justice: Essays from the W G Hart Workshop* (Sweet and Maxwell, 1987) 73; Richard Glover, 'Regulatory Offences and Reverse Burdens: The 'Licensing Approach'' (2007) 71 *Criminal Law Journal* 259; Glanville Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233; Glanville Williams, 'The Logic of Exceptions' (1988) *Cambridge Law Journal* 261 agreed that a substantive view needed to be taken. See Andrew Stumer, *The Presumption of Innocence: Evidence and Human Rights Perspectives* (Hart Publishing, 2010) ch 3.

is much more likely to accept the latter than the former:⁵⁵ ‘a mandatory presumption is a far more troublesome evidentiary device’.⁵⁶ The Court has insisted, at the very least, on a rational connection between the fact proved and the ultimate fact presumed; it is concerned that arbitrary presumptions not be made.⁵⁷ The Court has not been impressed with purported justifications for reverse onus provisions based on the fact that the relevant evidence is more easily obtainable by the ‘accused’ person.⁵⁸ It has acknowledged that these kinds of presumption provisions might also violate the right to silence.⁵⁹ In essence, the American Supreme Court has robustly defended the presumption of innocence against legislative incursion, including by the use of presumptions against the accused.⁶⁰

⁵⁵ *County Court of Ulster County v Allen* 442 US 140 (1979); *United States v Gainey* 380 US 63 (1965). When the court refers to a permissive inference, it means one that the fact finder may, but need not, make, and which imposes no burden of any kind on the defendant. When the court refers to a mandatory presumption, it means the fact finder must make the presumption of the new fact based on the existence of the old fact, at least unless the person affected can rebut the presumption. This is explained in *Allen* (157).

⁵⁶ *County Court of Ulster County v Allen* 442 US 140, 157 (1979).

⁵⁷ *United States v Romano* 382 US 136 (1965); this principle has caused significant fracturing amongst the Supreme Court in application to statutes that allow (or require) a court to presume from the fact that a person is at an illegal distilling premises that they are guilty of possession/production/conspiracy to produce offences, or that from the fact that a person has possession of something unlawful, that they are guilty of doing so knowingly: *County Court of Ulster County v Allen* 442 US 140 (1979) (presumption that occupants of a vehicle in which firearms were present were in illegal possession unless they could prove otherwise, presumption was voluntary – validity upheld); inferring from unexplained possession of stolen mail that the possessor knew it was stolen upheld (*Barnes v United States* 412 US 837 (1973)); presumption that unexplained possession meant person knew drugs were unlawfully imported upheld but presumption that possession of a certain quantity meant that possessor was intending to supply struck out (*Turner v United States* 396 US 398 (1970)); presumption that presence at an illegal ‘still’ was sufficient to authorise conviction for possession/control/production/conspiracy to produce overturned in *United States v Romano* 382 US 136 (1965); possession of marijuana deemed sufficient for conviction on offence of receiving the drug knowing it had been imported illegally, unless the defendant could explain otherwise overturned in *Leary v United States* 395 US 6 (1969); in a statute making it an offence for a convict to receive a gun in an interstate transaction, the court was to presume that possession was in breach of the Act – overturned on due process grounds (*Tot v United States* 319 US 463 (1943)).

⁵⁸ *Tot v United States* 319 US 463, 469 (1943)(unanimous). The American cases are discussed in more detail in John Jeffries and Paul Stephan ‘Defenses, Presumptions and Burden of Proof in the Criminal Law’ (1979) 88 *Yale Law Journal* 1325, Scott Sundby ‘The Reasonable Doubt Rule and the Meaning of Innocence’ (1989) 40 *Hastings Law Journal* 457, and Theodore Gottfried and Peter Baroni ‘Presumptions, Inferences and Strict Liability in Illinois Criminal Law: Pre-empting the Presumption of Innocence’ (2008) 41 *John Marshall Law Review* 715.

⁵⁹ *Turner v United States* 396 US 398, 433 (1970) (Black J, dissenting on other grounds).

⁶⁰ There is a vast jurisprudence: see, eg, William Laufer ‘The Rhetoric of Innocence’ (1995) 70 *Washington Law Review* 329; John Jeffries and Paul Stephan ‘Defenses, Presumptions and Burden of Proof in the Criminal Law’ (1979) 88 *Yale Law Journal* 1325;

II AUSTRALIAN JURISPRUDENCE REGARDING REVERSE ONUS PROVISIONS

Australian courts have generally taken a laissez-faire approach when questions of the constitutional validity of reverse onus provisions have been raised.⁶¹ For example, in the early case of *Williamson v Ah On*,⁶² the High Court validated a provision requiring a person charged with being an illegal immigrant to prove that they were not within the provisions of the Act. Those members of the court who justified such a provision in the face of arguments about the presumption of innocence did so on the basis that the reverse onus requirement was needed to enforce immigration laws,⁶³ or that the general principle was subject to exceptions, particularly where the subject matter of the allegation lies ‘peculiarly within the knowledge of one of the parties’,⁶⁴ or that within heads of power Commonwealth law was ‘omnipotent’.⁶⁵ In cases like *Milicevic v Campbell*⁶⁶ and *Leask v Commonwealth*,⁶⁷ the High Court again confirmed that there was no constitutional difficulty where an Act, otherwise within a head of power, included a reverse onus provision.

Peter Baroni ‘Presumptions, Inferences and Strict Liability in Illinois Criminal Law: Preempting the Presumption of Innocence’ (2008) 41 *John Marshall Law Review* 715. It is considered to be beyond the scope of this article to critique the American jurisprudence here; rather I am using the case law as examples of how the courts elsewhere have reconciled the presumption of innocence with other interests.

⁶¹ Of course, principles of statutory interpretation can be utilised, such as that where provisions of an Act are ambiguous, they should be interpreted so as not to interfere with established common law rights, and/or a presumption that statutes are not intended to trample on established common law rights: *Potter v Minahan* (1908) 7 CLR 277; *Melbourne Corporation v Barry* (1922) 31 CLR 174.

⁶² (1926) 39 CLR 95.

⁶³ *Ibid* 104 (Isaacs J); see also *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12: ‘A law does not usurp judicial power because it regulates the method or burden of proving facts’ (Knox CJ, Gavan Duffy and Starke JJ).

⁶⁴ *Ibid* 113 (Isaacs J), citing United Kingdom authorities for this principle; 127 (Powers J) (‘those within the personal knowledge of the person charged’); David Hamer, ‘A Dynamic Reconstruction of the Presumption of Innocence’ (2011) 31(2) *Oxford Journal of Legal Studies* 417, 432.

⁶⁵ *Ibid* 302 (Knox CJ and Gavan Duffy JJ), dissenting in the result because they did not think Parliament had power to define for itself the very word that gave them the constitutional power, ‘immigrant’; 127 (Rich and Starke JJ), claiming that just as the United Kingdom Parliament could pass whatever laws of evidence it deems expedient, including burden of proof, so too could the Commonwealth, provided they had a head of power.

⁶⁶ (1975) 132 CLR 307.

⁶⁷ (1996) 187 CLR 579; in this case, subject to dicta comments of Kirby J, who claimed that in an extreme case, a reverse onus provision could mean there was not sufficient connection between the law and the head of power, or the law may be so disproportionate to the legitimate attainment of the subject matter of that head as to lead to constitutional invalidity (636).

The same attitude appears in the recent High Court decision of *Momcilovic v The Queen*.⁶⁸ The case involved, among other things, questions about the validity of a reverse onus provision (s 5 of the Act), deeming that something found on the premises of a person was in that person's possession (for the purposes of the Act), unless they proved to the contrary. French CJ was in no doubt that displacement of the common law presumption of innocence was contemplated by the regime, and had no constitutional difficulty with such a finding:

The concept of the presumption of innocence is part of the common law of Australia, subject to its statutory qualification or displacement in particular cases ... that protective operation (of the common law) is ineffective against the clear language of s 5.⁶⁹

This Australian jurisprudence, such as it is, should be challenged. I believe that Australian courts have been too submissive to Parliament, in allowing it to take away fundamental rights such as the presumption of innocence.

For instance, to accept, as some High Court judges did in *Williamson*,⁷⁰ and members of the House of Lords did in *Johnstone*⁷¹ and *Lambert*,⁷² that difficulties for the prosecution in proving a matter that is often within the means of knowledge of the accused justify a departure from the general principle is to undermine that principle. Of course, it will often, if not usually, be the case that a person accused of a crime would be in a

⁶⁸ [2011] HCA 34. The *Williamson* decision was not cited in *Momcilovic*, but the argument accepted in the former case, that the reverse onus approach was necessary to effectively enforce the law, might also have used in the *Momcilovic* case in relation to drug law enforcement. However, the counter-argument is the 'slippery slope'; one could often, if not always, argue, that crime investigation would be better facilitated with a reverse onus. If we accept that justification for relaxation of the presumption of innocence in some contexts, it becomes difficult to draw the line between others.

⁶⁹ *Momcilovic v The Queen* [2011] HCA 34, [53], [55]; other judges did not need to address this issue in order to decide the issues raised, so this discussion cannot be amplified further; cf the United States Supreme Court's finding in *Bozza v United States* 330 US 160 that it was not permissible to presume 'possession' from presence; see also *United States v Romano* 382 US 136, 141: 'presence tells us only that the defendant was there ... but tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialised functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt'. For a thorough recent review of the *Momcilovic* litigation, see Julie Debeljak, 'Who is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It to Have' (2011) 22 *Public Law Review* 15.

⁷⁰ (1926) 39 CLR 95, 113 (Isaacs J), 127 (Powers J).

⁷¹ *R v Johnstone* [2003] UKHL 28, [52]-[53].

⁷² *R v Lambert* [2001] UKHL 37, [36].

good position to lead evidence of what actually happened, since they may have been there. This argument about convenience and ease of proof was not thought to outweigh the dangers of a presumption of guilt when presumption of innocence was eventually settled in the common law; it should not be sufficient now. Acceptance of that argument could justify departure from the principle in the most serious cases, including alleged murder and rape. The accused may well have been there and have firsthand knowledge of events; this does not justify a presumption of guilt because the prosecution was not there and finds it harder to show what happened. Of course, this would have flow-on implications for the notion of proof beyond reasonable doubt and the right to silence.⁷³ The result could well be, as Sachs J said in *The State v Coetzee and Others*,⁷⁴ that ‘nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases’. The United States Supreme Court expressly rejected this justification for departing from the presumption of innocence in *Tor*,⁷⁵ so should an Australian court.

Further, the idea, expressed by members of the High Court in *Williamson* (and perhaps implicit in the words of French CJ above in *Momcilovic*) that within given heads of power, the power of the Commonwealth Parliament to pass laws is ‘omnipotent’ does not withstand serious scrutiny, at least with what we know today. Today, we know that implications have been drawn from the text of the constitution, and that laws inconsistent with such implications have been declared by the High Court to be constitutionally invalid. Examples include the so-called *Melbourne Corporation* doctrine,⁷⁶ limiting the extent to which the Commonwealth can legislate to affect the States, the implied freedom of political communication,⁷⁷ and implied limits imposed by Chapter III of the *Constitution*.⁷⁸ So with due respect to judges in earlier cases (particularly in *Williamson*, at which time the idea of implications in the *Constitution* must have seemed peculiar given the *Engineers*⁷⁹ decision), laws that interfere with fundamental rights like presumption of innocence should not (must not) be countenanced on the idea that Parliament, within

⁷³ This is a separate topic of its own, though there are clear links between presumption of innocence and the right to silence. Abrogation of the presumption of innocence amounts also, in effect, to abrogation of the right to silence. I intend to write separately about the right to silence in a future article.

⁷⁴ [1997] 2 LRC 593, 677.

⁷⁵ 319 US 463, 469 (1943): ‘Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution’ (Roberts J, for the court).

⁷⁶ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

⁷⁷ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁷⁸ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁷⁹ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

given heads of power, is ‘omnipotent’, and to the extent that such an idea is derived from the British principle of parliamentary sovereignty, such a concept is not applicable, as a unanimous High Court said in *Lange*,⁸⁰ and as Gummow J acknowledged recently in *Momcilovic*, in the Australian context of a written *Constitution* and judicial review.⁸¹

I will now consider the jurisprudential basis upon which an Australian court might strike out as constitutionally invalid a law overturning the presumption of innocence. Of course, this occurs in a context where there is no bill of rights in Australia, and no express protection of a presumption of innocence in a national bill of rights.⁸² Accordingly, the discussion will necessarily be limited to relevant implications in the *Constitution* that might pertain to the issues.

A *Constitutional Arguments- The Right to a Fair Trial and the Kable Principle*

I will argue in this section of the paper that, despite the absence of an express bill of rights in the *Australian Constitution*, aspects of Australian constitutional law may be utilised in defending the fundamental

⁸⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Gleeson CJ, Gummow, Hayne and Heydon JJ): ‘The *Constitution* displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature’; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570: ‘constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty’.

⁸¹ *Momcilovic v The Queen* [2011] HCA 34, [145]; in support of Gummow J’s statements, according to Dicey, the leading academic advocate of parliamentary supremacy, the three criteria of a sovereign law-making body are (a) there is no law which Parliament cannot change; (b) there is no distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional; and (c) there is no body which can pronounce void any enactment passed by parliament on the ground that the enactment is contrary to the constitution: Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 1885) 170. At the very least, neither (a) nor (c) applies in Australia. The first requirement is not applicable because we have accepted the validity of manner and form provisions (eg s 128 of the *Commonwealth Constitution*, s6 of the *Australia Act 1986* (UK) in relation to the states); the third requirement is not satisfied because the Australian High Court has accepted the doctrine of judicial review implicit in a written constitution. Dicey himself, observing the American constitutional system but in terms equally applicable to Australia, spoke of the United States Supreme Court as being the sovereign law-making body, not the ‘parliament’ of the United States or individual states (170-171). In *Jesting Pilate* (Hein, 1965) 200, Sir Owen Dixon stated that the doctrine of parliamentary supremacy related (only) to the Parliament at Westminster.

⁸² The presumption of innocence is referred to in state rights instruments, but these instruments, at their strongest, permit only a declaration of incompatibility, rather than a finding of constitutional invalidity. Some judges in the recent High Court decision in *Momcilovic v The Queen* [2011] HCA 34 suggested that the state rights instruments merely reflect the common law principle of legality, that a statute was presumed not to be intended to interfere with common law rights and freedoms (eg French CJ [43], Crennan and Kiefel JJ [565]).

presumption of innocence.⁸³ These constitutional arguments concern, alternatively, (a) the right to a fair trial; and (b) the so-called *Kable* principle.

1 *Right to a Fair Trial*

Five members of the High Court of Australia in the landmark decision of *Dietrich v The Queen*⁸⁴ found that the right to a fair trial was fundamental to the Australian legal system.⁸⁵ Some of them based this right on the implicit requirements of Chapter III of the *Constitution* which established the judicial branch of government.⁸⁶ Members of the court also alluded to the court's inherent power to stay proceedings to prevent what would otherwise be an abuse of process.⁸⁷ If confirmation is needed that a presumption of innocence is part of the right to a fair trial, it appears in some of the European cases, and in dicta comments in one Australian case.⁸⁸ According to the European Court of Human Rights in *The Case of Phillips v United Kingdom*:

A person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing.⁸⁹

⁸³ Rather than the concept of a 'fair trial', some might use the (related) principle of 'due process'. *Re Nolan; Ex Parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J) refer to the exercise of judicial power in accordance with the 'judicial process'; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; Will Bateman, 'Procedural Due Process Under the *Australian Constitution*' (2009) 31 *Sydney Law Review* 411. However, note the suggestions in *Thomas v Mowbray* (2007) 233 CLR 307 that the requirement that courts not be asked to exercise functions that are inconsistent with the nature of judicial process or judicial power may be narrower than a requirement of 'due process' (355)(Gummow and Crennan JJ); French CJ also expressed some hesitancy about a 'due process' requirement in *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319, 353.

⁸⁴ (1992) 177 CLR 292; see also *Jago v District Court (NSW)*(1989) 168 CLR 23, per Mason CJ (29), Deane J (56), Toohey J (72) and Gaudron J (75).

⁸⁵ *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J), 362 (Gaudron J).

⁸⁶ *Ibid* 326 (Deane J), 362 (Gaudron J).

⁸⁷ *Ibid* 293 (Mason CJ and McHugh J).

⁸⁸ Kirby J (dissenting) in *Carr v Western Australia* (2007) 232 CLR 138, 172, referring to the need for the prosecution to prove the guilt of the accused, rather than for the accused to prove their innocence, stated this principle was 'deeply embedded in the procedures of criminal justice in Australia ... It may even be implied in the assumption about fair trial in the *Australian Constitution*'.

⁸⁹ (2001) Application No. 41087/98, 12/12/2001, [40]; see also *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, where Lord Bingham, with whom Lords Steyn and Phillips agreed, confirmed that 'the presumption of innocence is one of the elements of the fair criminal trial provided by Article 6(1)': [9].

It is acknowledged that the right to a fair trial comprises a bundle of rights, one of which is the presumption of innocence, and these rights can be ranked according to derogability. However, amongst these rights, the presumption of innocence is fundamental.⁹⁰

My argument is that reverse onus provisions, of the kind that appear in proceeds of crime law like the *Proceeds of Crime Act* 2002 (Cth)⁹¹ and state equivalents,⁹² and of the kind that appeared in the drug laws considered by the High Court in *Momcilovic*, fall foul (or may fall foul) of the constitutional right to a fair trial.⁹³ In my opinion, these provisions are contrary to the requirement of a fair trial implicit in Chapter III of the *Constitution*. This view is supported by relevant European authorities, and by a substantive approach rather than a procedural approach to rights.⁹⁴ In terms of Campbell's substance-based distinction between offences and defences – the former being things against which the law says there is a prima facie reason, the latter being 'exonerating conditions' – the question of whether property has been acquired lawfully or not is surely *in substance* of the former category, not the latter.⁹⁵ I also

⁹⁰ *Gridin v Russian Federation*, Communication No770/1997 (UNHRC); UNHRC *General Comment* No. 29, (2001) [11], UNHRC *General Comment* No. 13 (1987) [7].

⁹¹ Section 179E(4).

⁹² Above, n 13.

⁹³ Wheeler made this argument in an important article, suggesting that if Parliament placed the burden of proof on a defendant in a federal context, 'this is prima facie to ask a court ... to conduct an unfair criminal trial because of the risk that under such circumstances a defendant will be convicted despite the existence of a reasonable doubt as to his or her guilt': Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23(2) *Monash University Law Review* 248, 272. On whether the right to a fair trial is 'constitutional' or not, two members of the High Court in *Dietrich*, Deane (326) and Gaudron J (362), said it was implicit in Chapter III of the *Constitution*.

⁹⁴ Kenneth Campbell argued that a substantive view needed to be taken, and that in substance an offence included things against which the law said there was a prima facie reason, while a defence in substance related to exonerating conditions: *Criminal Law and Justice: Essays from the W G Hart Workshop* (1987) p73; Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 *Modern Law Review* 402; Victor Tadros, 'Rethinking the Presumption of Innocence' (2007) 1 *Criminal Law and Philosophy* 193; Richard Glover, 'Regulatory Offences and Reverse Burdens: The 'Licensing Approach'' (2007) 71 *Criminal Law Journal* 259; Glanville Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233; Glanville Williams, 'The Logic of Exceptions' (1988) 47(2) *Cambridge Law Journal* 261 agreed that a substantive view needed to be taken. See Andrew Stumer, *The Presumption of Innocence: Evidence and Human Rights Perspectives* (Hart, 2010) ch 3. Some support for this view appears in dicta comments of Gummow J in *Nicholas v The Queen* (1998) 242 CLR 1, 64, who suggested in obiter that a law that deems to exist a fact that is an element of the offence with which the accused is charged might be a breach of Chapter III requirements.

⁹⁵ This is relevant because sometimes, authorities are tempted to place what are really, in substance, elements of the offence into a defence, so placing the burden of proving them on the accused. The court must circumvent such attempts by taking a substantive approach to what truly is an element of the offence, and what is truly a defence.

draw some support from extra-judicial writings of McHugh J. His Honour muses:

What of matters that straddle the borders of substance and procedure such as the right to a fair trial, the presumption of innocence, ... the onus and standard of proof in civil and criminal cases and the use of deeming provisions and presumptions of fact? Can the parliament abolish or change these rights and matters? Would legislation purporting to do so be an invalid attempt by parliament to dictate and control the manner of exercising the judicial power of the Commonwealth? ... (T)he power of parliament to affect these procedural and quasi-substantial matters in significant ways is open to serious doubt.⁹⁶

In relation to the proceeds of crime context where a person is asked to explain the lawfulness by which they acquired assets in the absence of a conviction against them, I do not deal here with the argument that such provisions are ‘civil’ such that references to Article 6 of the European Convention, *Phillips* and *Sheldrake* (or, arguably, references to *Dietrich*, since that decision occurred in a criminal context), are not applicable. This is because I have canvassed these arguments in an earlier article, and I take it as a given here that, in substance, such proceedings are criminal in nature, however they are described. There is substantial precedent in other jurisdictions for finding that such proceedings are in fact criminal and deserving of criminal due process protections, despite the label placed on them by the legislator.⁹⁷ Specifically in the case of *United States v United States Leasehold Interest in 121 Nostrand Avenue*, the Court found that a person affected by a forfeiture proceeding was entitled to presumption of innocence and proof beyond reasonable doubt.⁹⁸

⁹⁶ Michael McHugh, ‘Does Chapter III Protect Substantive as well as Procedural Rights?’ (2001) 21 *Australian Bar Review* 235, 239.

⁹⁷ *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974); *Johnson v Attorney-General of Alberta* [1954] SCR 127; *Boyd v United States* 116 US 616 (1886); Frank La Salle, ‘The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture’ (1995) 28 *Akron Law Review* 497; Peter Wright, ‘Criminal Punishment Without Civil Rights: The Criminal Proceeds and Instrument Bill’s Punitive Civil Sanctions’ (2006) 37 *Victoria University of Wellington Law Review* 623; Kenneth Mann, ‘Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law’ (1992) 101 *Yale Law Journal* 1795; Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2 *Criminal Law and Philosophy* 21; Anthony Gray, ‘Forfeiture Provisions and the Criminal/Civil Divide’ (2012) 15(1) *New Criminal Law Review* 32.

⁹⁸ 760 F. Supp. 1015, 1032 (E.D.N.Y., 1991); in the context of proceedings against a juvenile that were said to be remedial and protective, rather than punitive, the United States Supreme Court insisted that criminal due process, including presumption of innocence, apply to the proceedings: *In Re Winship* 397 US 358 (1970).

2 *Kable Principle*

Alternatively, in many quite recent cases the High Court has insisted that a court cannot be asked to exercise judicial power in a way that is inconsistent with the essential character of a court or the nature of judicial power.⁹⁹ (For ease of convenience, I will refer to this as the ‘*Kable* principle’). There are related considerations about not undermining public confidence in the judiciary by asking courts to exercise powers that are incompatible with the nature of courts, or creating a perception that the court is acting at the direction of the executive.

The suggestion is that asking a court at the final hearing stage, as in the case of the *Proceeds of Crime Act 2002* (Cth), to begin with a presumption that assets were acquired other than through lawful means, and requiring the person about whom an order is sought to prove otherwise, is asking the court to exercise power in a way that is contrary to the essential nature of judicial proceedings and the *Kable* principle. A typical feature of judicial proceedings is that the onus is on the accuser to prove the truth of their accusation, not for the person (in effect) accused to disprove the accusation made against them.¹⁰⁰ It is true that Parliament’s ability to make rules of evidence is well-established.¹⁰¹ However, there are limits. Of some support here is the recent High Court decision in *International Finance Trust v New South Wales Crime Commission*.¹⁰² In that case a majority of the High Court invalidated

⁹⁹ *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 185 (Brennan CJ), 202 (Toohey J), 207 (Gaudron J), 232 (Gummow J); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 352 (French CJ), 366-367 (Gummow and Bell JJ), 378 (Hayne Crennan and Kiefel JJ), 379 (Heydon J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *South Australia v Totani* (2010) 242 CLR 1, 47 (French CJ), 63 (Gummow J), 81 (Hayne J), 157 (Crennan and Bell JJ), 162 (Kiefel J); *Wainohu v New South Wales* (2011) 243 CLR 181; *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

¹⁰⁰ The option of reading the burden of proof in circumstances like the *Commonwealth Proceeds of Crime Act* as an evidentiary burden, rather than a persuasive burden, as the English courts did in some cases (*R v Lambert* [2001] UKHL 37; *R v Kebede* [2000] 2 AC 326) may not be open in the Australian context. Those English developments took place in the context of the Courts’ interpretation of the *Human Rights Act 1998* (UK) and its requirements in terms of statutory interpretation in light of the European Convention. The High Court made clear in *Momcilovic* that the approach in Australia differed in the context of the existing state/territory charters (eg French CJ, [56]-[61]), and although the context of that case was Charter requirements rather than what the *Commonwealth Constitution* might implicitly require, reinforced the importance of the intent of Parliament in giving meaning to a provision.

¹⁰¹ *Nicholas v The Queen* (1998) 193 CLR 173; in an early (pre-*Boilermakers* case), three members of the High Court stated ‘a law does not usurp judicial power merely because it regulates the method or burden of proving facts’: *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12 (Knox CJ, Gavan Duffy and Starke JJ).

¹⁰² (2009) 240 CLR 319.

aspects of New South Wales' civil forfeiture regime. While the majority decision was based on reasons not directly relevant to the current discussion,¹⁰³ members of the Court also noted that the legislation contained a reverse onus provision, requiring the court to make the forfeiture order (s 10) if the prosecutor showed reasonable grounds for suspecting the person affected owned property acquired other than through lawful means, with the person affected bearing the onus of proof under s 25 to show the lawfulness by which they obtained property, in order to get that property excluded from the order. Gummow and Bell JJ expressed their concern, in terms with which Heydon J agreed:

The result is that the effect of the suspicion by an authorised officer of the Commission ... which founds a restraining order possibly may be of considerable scope and may be displaced only ... upon application under s 25. But that application cannot succeed unless the applicant proves to the Supreme Court that it is more probable than not that the interest in property for which exclusion is sought is not 'illegally obtained property'. The making of that proof by the applicant for an exclusion order requires the negating of an extremely widely drawn range of possibilities of contravention of the criminal law found in the common law, and State and Federal statute law ... The Supreme Court is conscripted for a process which requires in substance the mandatory ex parte sequestration of property upon suspicion of wrongdoing, for an indeterminate period ... In addition the possibility of release from that sequestration is conditional upon proof of a negative proposition of considerable legal and factual complexity. Section 10 engages the Supreme Court in activity which is repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia.¹⁰⁴

Clearly, the reverse onus provision was part, at least, of the reason why Gummow and Bell JJ concluded that the provisions offended against the so-called *Kable* principle.

This position is supported by the European cases discussed above like *Geerings* and *McIntosh* which have required that the presumption of innocence be applied in cases where forfeiture proceedings have been taken against a person in the absence of a conviction against them for an offence relating to the particular property sought to be confiscated. The American cases have confirmed that anything affecting a 'penalty' must be proven beyond reasonable doubt,¹⁰⁵ and I have argued that

¹⁰³ A majority of the Court found that the regime was invalid in that it, in effect, allowed the New South Wales Crime Commission to determine whether the court would hear the application for forfeiture in an ex parte fashion. A majority found that way because of the Commission commenced proceedings in a certain way, the Court was required to hear the matter in an ex parte manner. The majority found this was inconsistent with the requirements of Chapter III of the *Constitution*: French CJ (354-355), Gummow and Bell JJ (366), and Heydon J (386).

¹⁰⁴ Ibid 386 (Heydon J).

¹⁰⁵ *Apprendi v United States* 530 US 466 (2000).

confiscation of property is in substance a penalty, regardless of how it might be described. The United States Supreme Court is much less likely to uphold presumptions in proceedings where it is mandatory rather than an option for the fact-finder.¹⁰⁶ In the Australian context, these presumptions are mandatory, requiring the court to make the order based on the presumption, unless the person affected can prove their innocence. The American and Canadian Courts have consistently insisted on a rational connection, at the very least, between the actual fact and the thing presumed, to guard against arbitrary exercise of power, or to preside over a loosening of due process rights. In the Australian context, the provision requires a court to presume, from the fact that a preliminary wealth order has been made (which is itself based essentially on the fact that the law enforcement authority has ‘reasonable grounds’ to suspect the property was unlawfully acquired)¹⁰⁷, that the property was in fact unlawfully acquired, unless the person affected proves otherwise. In my opinion, this fails the test created by the United States Supreme Court – it is not rational to conclude from the fact that a judge is satisfied that a law enforcement authority has a ‘reasonable suspicion’ that property was unlawfully acquired, that the property was in fact unlawfully acquired. In the Australian context, this is asking the court to proceed in an arbitrary manner incompatible with the nature of judicial power, contrary to the *Kable* principle.

III CONCLUSION

The High Court of Australia has been too timid in the protection afforded to fundamental human rights like the presumption of innocence. It has not upheld such a right in the face of attempts by Parliament to circumvent difficulties in the prosecution obtaining evidence or proving its suspicions. It should do so. Constitutionally, the way for it to do so would be to re-assert that Chapter III requires that trials be fair, and that trials proceeding on an assumption of wrongdoing are liable not to be fair, as courts in other countries have found. It can rely on its *Kable* principle jurisprudence to disallow reverse onus provisions on the basis that they require a court to act in a non-judicial manner, undermining public confidence in the judiciary. There is no necessary rational connection between the fact that a prosecutor has a ‘reasonable suspicion’ that a person has acquired property unlawfully, and the fact that the person has done so. Leaps in logic such as this create a very dangerous precedent.

¹⁰⁶ *County Court of Ulster County v Allen* 442 US 140, 157 (1979).

¹⁰⁷ Section 179B sets out all of the requirements.