HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	D2/2020
File Title:	Roy v. O'Neill
Registry:	Darwin
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	08 May 2020

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY No. D2 of 2020

BETWEEN: Aileen Roy
Appellant

and

Julie O'Neill
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issue

2. The issue is whether the common law recognises an implied licence which, save where negated or revoked, permits a police officer who has no other relevant statutory or common law authority to enter upon the curtilage of private residential premises for the purpose of proactively investigating an occupier of those premises for a criminal offence.

Part III: Section 78B notices

3. No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations of decisions below

4. The citations of the decisions below are:

    a. Transcript of Proceedings, *O'Neill v Roy* (Local Court of the Northern Territory, 21815687, Judge Woodcock, 16 November 2018).

b. *O'Neill v Roy* [2019] NTSC 23.

c. *O'Neill v Roy* (2019) 345 FLR 29.

5. As at the date of filing the first of the decisions has not been published, there is no report of the second of the decisions and there is no authorised report of the third of the decisions.

Part V: Facts

6. On 1 June 2017 the Local Court of the Northern Territory, sitting at Katherine, made an order (the **DVO**) under the *Domestic and Family Violence Act 2007* (NT) (the **DVO Act**). The DVO named the appellant, Aileen Roy, as the defendant, and her partner, Toby Johnson, as the protected person.[1] The applicant was a Harold Glenn Calma.

7. By force of the order the appellant was relevantly prohibited for a period of 12 months from approaching, contacting or remaining in the company of Mr Johnson, or any place where he was living, working, staying, visiting or located, while under the influence of alcohol.[2]

8. On 6 April 2018 Constable James Elliott, Constable Alexander Dowie and Sergeant Jackson Evans were on duty in the Katherine area. The officers were "perform[ing] proactive domestic violence prevention duties" as a part of an ongoing Northern Territory Police Force operation, codenamed "Operation Haven". As a part of that operation, the police were "encouraged … to conduct proactive DVO compliance checks", including by "going to a person's house to check whether they were complying with the DVO".[3]

9. The appellant and Toby Johnson resided together at 6/41 Victoria Highway, Katherine. The appellant was known to at least one of the officers, Constable Elliott, as someone who, from time to time, had engaged in "antisocial behavior" in or around Unit 6. Constable Elliott had regularly seen the appellant intoxicated in Katherine. On one occasion, two weeks prior to 6 April 2018, he had observed the appellant "intoxicated

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[1] *O'Neill v Roy* (2019) 345 FLR 29 at 30 [2] (CAB 58).
[2] *O'Neill* (2019) 345 FLR 29 at 30 [2] (CAB 58).
[3] Transcript of Proceedings, *O'Neill v Roy* (Local Court of the Northern Territory, 21815687, Judge Woodcock, 13 November 2018) at 12 and 13 (AFM 15–16).

and … possibly about to breach her domestic violence order".[4] He had not seen the appellant since then.[5]

10. Mr Johnson was also known to at least Constable Elliott. On a number of occasions, Constable Elliott had encountered Mr Johnson at the bottleshop. On at least one such occasion Mr Johnson asked for a bottle of water because he did not have his BasicsCard or any money on his person. Constable Elliott believed the appellant had "been in control" of the BasicsCard. He gave evidence that he believed that Mr Johnson "may be the victim of economic – domestic violence."[6]

11. At 1:22pm on 6 April 2018, the police officers attended at 6/41 Victoria Highway. No complaint had been received by police regarding the appellant's compliance with her DVO.[7] On Constable Dowie's evidence, the "only reason why [the police officers] had attended that address" was "to conduct proactive domestic violence order compliance checks".[8] Constable Elliott gave similar evidence that they attended at Unit 6 to "check on" the appellant, who was, the Local Court Judge found, "merely a person of interest to him",[9] and require her to undergo a breath test.[10] Constable Elliott also gave evidence of a concern for Mr Johnson's welfare.

12. Unit 6 was one of a number of units located at 41 Victoria Highway. The property was surrounded by a large perimeter fence. Individual units on the property were not surrounded by individual fences. Each unit was accessed by a footpath. On the evidence it appeared, though was not entirely clear, that a central footpath ran past all units, which were accessible by individual footpaths which branched off it.

13. The officers entered onto the common property of 41 Victoria Highway and walked along the concrete footpath to Unit 6. When they reached the unit, they stepped into what was described as an "alcove where the front door [was]".[11] Whatever the nature and status of the path leading up to Unit 6, it was conceded by the respondent before

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[4] Transcript of Proceedings (13 November 2018) at 7 (AFM 10).
[5] Transcript of Proceedings (13 November 2018) at 11 (AFM 14).
[6] Transcript of Proceedings (13 November 2018) at 7-8 (AFM 10-11).
[7] Transcript of Proceedings (13 November 2018) at 15 (AFM 18).
[8] Transcript of Proceedings (13 November 2018) at 15 (AFM 18).
[9] Transcript of Proceedings, *O'Neill v Roy* (Local Court of the Northern Territory, 21815687, Judge Woodcock, 16 November 2018) at 3 (CAB 9).
[10] Transcript of Proceedings (13 November 2018) at 9 (AFM 12).
[11] Transcript of Proceedings (13 November 2018) at 12 (AFM 15).

the Supreme Court[12] and the Court of Appeal[13] that the alcove formed a part of the specific tenancy of the unit.

14. Once there, Constable Elliott knocked on the flyscreen door. Constable Elliott could see through the flyscreen door into the loungeroom, where Mr Johnson was sitting "sort of, at the back."[14] Constable Dowie, who was positioned immediately behind Constable Elliott and Sergeant Evans, could also see Mr Johnson in the loungeroom.[15]

15. Constable Elliott "called upon [the appellant] to come to the door, for the purpose of a domestic violence order check."[16] The appellant got up and walked to the door where Constable Elliott informed her that he would like to conduct a domestic violence check and reminded her that the conditions of the DVO required her to submit to such a test if requested to do so.[17]

16. Constable Elliott observed the appellant to be lethargic when she got up and approached the door. Her eyes were bloodshot, her speech was slurred and Constable Elliott could smell liquor on her breath.[18] Constable Elliott required the appellant to submit to a breath test, which she did.[19] The result was positive for alcohol.[20] The appellant was then taken to the watch-house.[21] There was no evidence of any attempt by the police officers to communicate with Mr Johnson.[22]

17. On 11 April 2018 the appellant was charged with the offence of engaging in conduct that resulted in a contravention of her DVO, contrary to s 120(1) of the DVO Act.[23]

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[12] *O'Neill v Roy* [2019] NTSC 23 at 11 [21] (CAB 27); Transcript of Proceedings, *O'Neill v Roy* (Supreme Court of the Northern Territory, 21815687, Mildren AJ, 29 March 2019) at 5.
[13] In the Court of Appeal, the respondent at first submitted in writing that he should not be bound by the concession of fact he had made in the Supreme Court. This submission was opposed, in writing, by the appellant. Ultimately, at the hearing of the appeal, the respondent indicated that he did not press the submission: Transcript of Proceedings, *O'Neill v Roy* (Court of Appeal of the Northern Territory, 21815687, Southwood ACJ, Kelly J, Riley AJ, 30 August 2019) at 5.
[14] Transcript of Proceedings (13 November 2018) at 9 (AFM 12).
[15] Transcript of Proceedings (13 November 2018) at 14 (AFM 17).
[16] Transcript of Proceedings (13 November 2018) at 9 (AFM 12).
[17] Transcript of Proceedings (13 November 2018) at 14 (AFM 17).
[18] Transcript of Proceedings (13 November 2018) at 9 (AFM 12).
[19] Transcript of Proceedings (13 November 2018) at 10 (AFM 13).
[20] Transcript of Proceedings (13 November 2018) at 10 (AFM 13).
[21] Transcript of Proceedings (13 November 2018) at 10 (AFM 13).
[22] *O'Neill* [2019] NTSC 23 at 29 [45] (CAB 45).
[23] The maximum penalty for which is two years' imprisonment: DVO Act, s 121(1). Subject to exception, the mandatory minimum term of imprisonment for a subsequent offence against s 120(1) is seven days' imprisonment: s 121(2).

Part VI: Argument

a) Contention

18. At "this late stage in the development of the common law",[24] this Court should not recognise an implied licence which, save where negated or revoked, would permit a police officer having no other relevant statutory or common law authority to enter upon the curtilage of private residential premises for the purpose of proactively investigating an occupier of those premises for a criminal offence.

19. To recognise such a licence would be contrary to the purpose for which the common law implies licences; "contrary to the inference ordinarily to be drawn from [the] facts"[25] where an occupier leaves unimpeded the path from public property to the threshold of their private premises; would fail to recognise the significant practical and legal differences between orthodox cases of entry pursuant to an implied licence and that of a public authority which enters for the purpose of investigating an occupier for a criminal offence; undermine protections ordinarily enjoyed by persons the subject of police investigation; derogate significantly from rights bound up in possession; and would be inconsistent with, or otherwise undermining of, the "common law's … strict[] confine[ment of] any exception to the principle that a person's home is inviolable."[26]

20. Contrary to the holding below, where a public authority enters onto property within the occupier's possession for the purpose of investigating the occupier for a criminal offence they do so for an illegitimate purpose, irrespective of whether that investigation may involve "communication" with the occupier or another person. Entry for this illegitimate purpose is not authorised by the implied licence. There may be cases in which the existence of a secondary purpose authorises entry, notwithstanding that the police also enter for the purpose of investigating the occupier. The Court of Appeal were, however, wrong to conclude that, in this case, any concern for the well-being of the protected person amounted to a secondary purpose that authorised the police entry. It follows that the police were trespassers and that the appeal should be allowed.

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[24] *Plenty v Dillon* (1991) 171 CLR 635 at 653 per Gaudron and McHugh JJ.
[25] See, *Halliday v Nevill* (1984) 155 CLR 1 at 19 per Brennan J.
[26] *Smethurst v Commissioner of Police* [2020] HCA 14 at 7 [22] per Kiefel CJ, Bell and Keane JJ, citing *New South Wales v Corbett* (2007) 230 CLR 606 at 632 [104] per Callinan and Crennan JJ.

b) The purpose of the implied licence

21. The policy of the common law is "to protect the possession of property and the privacy and security of its occupier".[27] This is the "gist" of the common law cause of action in trespass, which vindicates a wrong to the right to possession.[28] Central to that right is the right "to control access by others and thereby to exclude others from access."[29] Thus, in "protecting the right to possession, the policy of the common law is to protect the right to exclude others which is bound up in possession."[30] It is in this way that the common law "maintain[s] the right to exclusive possession … free from uninvited physical intrusion by strangers."[31] Why, then, does the common law imply licences in favour of uninvited persons at all?

22. The common law implies licences because the strictest insistence upon the privacy and security of residential premises would, "in the generality of cases",[32] impede rather than promote an occupier's enjoyment of and control over those premises. Although the licence is implied in favour of the entrant, it serves the occupier by allowing to be done on an occupier's land things that it may comfortably be implied from the objective facts the majority of occupiers would encourage or permit to be done upon it, irrespective of any "benefit"[33] it confers upon them. Conversely, the licence protects from tortious liability persons who use the land in ways in which it has, objectively, been "held out"[34] for use by the occupier.

23. In its "most common instance … the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house."[35] The

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[27] *Plenty* (1991) 171 CLR 635 at 647 per Gaudron and McHugh JJ, citing *Semayne's Case* (1604) 5 Co Rep 91a at 91b [77 ER 194 at 195]; *Entick v Carrington* (1765) 19 St Tr 1029; *Southam v Smout* [1964] 1 QB 308 at 320; *Eccles v Bourque* [1975] 2 SCR 739 at 742-742; *Morris v Beardmore* [1981] AC 446 at 464.
[28] *Smethurst* [2020] HCA 14 at 42 [120] per Gageler J, citing *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 227 per Dixon J; *New South Wales v Ibbett* (2006) 229 CLR 638 at 646 [29] per Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ; see also, *Plenty* (1991) 171 CLR 635 at 645 per Mason CJ, Brennan and Toohey JJ, 654-655 per Gaudron and McHugh JJ.
[29] *Smethurst* [2020] HCA 14 at 42 [120] per Gageler J.
[30] *Smethurst* [2020] HCA 14 at 42 [120] per Gageler J, citing *Plenty v Dillon* (1991) 171 CLR 635 at 647, 654-655 per Gaudron and McHugh JJ.
[31] *Ibbett* (2006) 229 CLR 638 at 646 [29] per Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ.
[32] *Halliday* (1984) 155 CLR 1 at 19 per Brennan J.
[33] Cf *Halliday* (1984) 155 CLR 1 at 19 per Brennan J. It is hard to say whether Brennan J's reference to "benefit" was intended as a statement of principle or whether his Honour was simply identifying the absence of a circumstance that might have weighed in favour of the implication of a licence on the facts in *Halliday*.
[34] *Halliday* (1984) 155 CLR 1 at 7 per Gibbs CJ, Mason, Wilson and Deane JJ.
[35] *Halliday* (1984) 155 CLR 1 at 7 per Gibbs CJ, Mason, Wilson and Deane JJ.

ambit of "lawful communication" is, admittedly, broad, and as a matter of common sense must countenance at least certain communications of a social, familial, political, commercial or religious nature. In the generality of cases, the implication of the licence for this "legitimate"[36] purpose is justifiable because to require ordinary visitors to seek an express invitation or licence from an occupier prior to stepping onto the curtilage – for instance, by phoning ahead – would be so contrary to the way people are "known"[37] to live in and enjoy their homes as to make "an ass"[38] of the law. This is what it means to say that the licence "is fairly to be implied … as an incident of living in society"[39] or that the licence "arise[s] from the known habits of city life."[40]

24. The analysis holds in the case of the person who does not attempt to communicate with the occupier but rather "goes upon [the land] to recover some item of his or her property which has fallen or blown upon it or to lead away an errant child."[41] Ultimately, the licence is implied because the purpose of the entry is so obviously limited and benign that, irrespective of any "benefit" it confers on the occupier, the entry is one "most [Australian] householders would consent to".[42]

25. Significantly, the licence is not implied so as to strike a balance between the right to possession and other public interests. To the extent that some courts, such as those in New Zealand, have asserted[43] that the "scope of the licence is partly defined by reasonable expectations of privacy (objectively assessed) and *partly by the public interest in the investigation of crime*", they confuse the licence for a right or power. Because what is implied is the "leave and licence",[44] or consent, of the occupier and not a right or power of entry that derogates from the right to possession, public interest can justify the implication of a licence only insofar as the existence of such an interest bears upon the objective likelihood that, in the generality of cases, an occupier would give such leave and licence. Understood in this way, the statement in *Halliday* that the licence is ascertained by reference to "common sense, reinforced by considerations of

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[36] *Halliday* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson and Deane JJ.
[37] *Lipman* (1932) 46 CLR 550 at 557 per Dixon J.
[38] *Halliday* (1984) 155 CLR 1 at 7 per Gibbs CJ, Mason, Wilson and Deane JJ, citing *Robson v Hallett* [1967] QBD 407 at 411 per Lord Parker CJ.
[39] *Halliday* (1984) 155 CLR 1 at 19 per Brennan J.
[40] *Lipman* (1932) 46 CLR 550 at 557 per Dixon J.
[41] *Halliday* (1984) 155 CLR 1 at 7 per Gibbs CJ, Mason, Wilson and Deane JJ.
[42] *Howden v Minister for Transport* [1987] 2 NZLR 747 (CA) at 751.
[43] See eg, *Tararo v The Queen* [2012] 1 NZLR 145 at 156 [41] per O'Regan J (for the Court).
[44] *Barker v The Queen* (1983) 153 CLR 338 at 357 per Brennan and Deane JJ; *Plenty* (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ.

public policy"[45] was not a direct appeal to public policy but rather explained the inference the majority evidently drew from the objective facts: that, in the "absence of any indication to the contrary", it was not to be expected that an occupier of residential premises would "desire[] to convert his path or driveway adjoining the road into a haven for minor miscreants".[46]

c) The Court does not need to reopen Halliday

26. *Halliday* does not stand in the way of the appellant's contention that this Court should not recognise a licence which, save where negated or revoked, would permit a police officer to enter upon the curtilage of private residential premises for the purpose of investigating the occupier of those premises. This is because "the question which ar[ose]" in that case was whether "the implied … licence" [was] so confined as to exclude from its scope a member of the police force who goes upon the driveway … for the purpose of questioning or arresting a *trespasser* or a *lawful visitor upon it*" and "whom he had *observed committing an offence*" moments earlier.[47] That is, as the respondent concedes,[48] not this case.

27. Nor, as the respondent appeared at special leave to suggest,[49] does the fact that the majority cited[50] *Robson v Hallett*[51] and *Lambert v Roberts*[52] as authority for uncontroversial propositions regarding the nature and existence of the implied licence require the Court to reopen *Halliday*. The majority did not identify the facts in *Robson* and expressed no view about the correctness of the case on those facts. Only Brennan J, in dissent, considered[53] the issue that arose on the facts in *Robson*, and which now arises, of a police officer entering onto an occupier's "home ground". His Honour did so in terms that strongly imply a view that *Robson* was wrong in the result.

28. In any event, as the Court reiterated[54] most recently in *Bell Lawyers v Pentelow*, "where a proposition of law is incorporated into the reasoning of a particular court, that

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[45] *Halliday* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson and Deane JJ.
[46] *Halliday* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson and Deane JJ.
[47] *Halliday* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson and Deane JJ.
[48] Transcript of Proceedings, *Roy v O'Neill* [2020] HCATrans 43 at 9.
[49] Transcript of Proceedings, *Roy v O'Neill* [2020] HCATrans 43 at 8, 10.
[50] *Halliday* (1984) 155 CLR 1 at 7 per Gibbs CJ, Mason, Wilson and Deane JJ.
[51] [1967] QB 407.
[52] [1980] QB 15.
[53] *Halliday* (1984) 155 CLR 1 at 19 per Brennan J.
[54] (2019) 93 ALJR 1007 at 1016 [26]-[27] per Kiefel CJ, Bell, Keane and Gordon JJ.

proposition, even if it forms part of the ratio decidendi, is not binding on later courts if the particular court merely assumed its correctness without argument."[55] The proposition for which *Robson* stands was not, the respondent concedes,[56] challenged in *Halliday* and appears instead to have been tacitly accepted by counsel for Mr Halliday.[57] Nor even does the proposition appear to have been challenged in *Lambert*, where the two questions posed on a case stated were, first, whether the magistrates had been correct to conclude that any implied licence had been revoked, and, second, if it had, whether they had been correct to conclude that a subsequent request by a police officer to require the occupier to undergo a breath-test had been unlawful.[58]

10 29. The difference between the judgments in *Halliday* reduces to little more than a disagreement about the implication available on the objective facts: for Brennan J, there was "no ground for inferring that the police had a licence from [the occupier] to come on to his driveway without his permission for the purpose of arresting a suspected offender";[59] for the majority, there was, as the appellant submits at [25], such a ground. Appreciating the appropriately limited nature of the question the majority posed for itself,[60] and recognising the confined terms in which it stated its conclusion,[61] nothing in the majority's reasons speaks against the general statements in Brennan J's judgment recognising the "common law privileges that secure the privacy of individuals in their own homes, gardens and yards" and cautioning against "too ready
20 an implication of a licence to police officers to enter on private property."[62] If there is to be criticism of Brennan J's reasons, it is that his Honour's requirement that the entry "benefit" the occupier does not explain why, *on the facts* in *Halliday*, the police entry should have been unlawful but the entry of a mother who walks onto private property to collect an errant child should not. Nor, *on the facts* in *Halliday*, does his Honour's

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[55] *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13] per Gleeson CJ, Gummow and Heydon JJ; see also, *Spence v Queensland* (2019) 93 ALJR 643 at 711 [294] per Edelman J; *Coleman v Power* (2004) 220 CLR 1 at 44-45 [79] per McHugh J.
[56] Transcript of Proceedings, *Roy v O'Neill* [2020] HCATrans 43 at 10.
[57] *Halliday* (1984) 155 CLR 1 at 3 per Mr Merkel QC (during argument): "In the absence of a locked gate or some other notice, the occupier of a dwelling-house gives an implied licence to any member of the public, *including a police officer*, who has *any lawful reason* for doing so, to go through the gate and up to the door in order to enquired whether he may be admitted to the house or may perform some act on the land".
[58] *Lambert* [1980] QB 15 at 18-19 per Donaldson LJ.
[59] *Halliday* (1984) 155 CLR 1 at 20 per Brennan J.
[60] *Halliday* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson and Deane JJ.
[61] *Halliday* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson, Deane JJ, commencing with the words, "[a]ll that that conclusion involves".
[62] *Halliday* (1984) 155 CLR 1 at 20 per Brennan J.

identification of the "tension" between the interests of the occupier and those of the entrant assist in drawing that distinction. This is, however, just to acknowledge that Brennan J's cautionary observations might have been inapt on the facts in *Halliday*. They are apt here.

d) No implied licence for a public authority to investigate an occupier for a criminal offence

30. In *Halliday* the majority stated that "the law will imply a licence in favour of any member of the public to go on that path or driveway for any legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property."[63] These words are necessarily general and were not directed to the issue that arises on the facts in this case. What is, however, clear is that the word "legitimate", like the word "proper" ,[64] qualifies the purposes for which a person may enter pursuant to the implied licence.

31. Where a person is not a police officer, and their purpose is not that of investigating the occupier, it may be that a finding that the entry is for the purpose of "lawful communication" will conclude the law's interrogation of the legitimacy of the entrant's purpose. When a person traverses the curtilage of residential premises for this purpose the licence consists, in practical terms, of a very general invitation to enter onto the property to treat with the occupier. In such a case, the licence "is fairly to be implied … as an incident of living in society"[65] irrespective of the nature of the entrant's business, and irrespective of the occupier's subjective views of that business.

32. But, as the majority observed[66] in *Kuru v New South Wales*, by reference to Brennan J's "dissenting opinion in *Halliday*, there are cases in which it is necessary to recognise that when it is police officers who seek to enter the land of another there is "a contest between public authority and the security of private dwellings." Such recognition supports the contention that, whatever meaning may given to the nebulous expression "lawful communication", and whatever its application to other persons and purposes of entry, the entry by a police officer onto private property for the purpose of investigating

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[63] *Halliday* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson and Deane JJ.
[64] See eg, *Lipman* (1932) 46 CLR 550 at 557 per Dixon J.
[65] *Halliday* (1984) 155 CLR 1 at 19 per Brennan J.
[66] (2008) 236 CLR 1 at 15 per Gleeson CJ, Gummow, Kirby and Hayne JJ, citing *Halliday* (1984) 155 CLR 1 at 9 per Brennan J (emphasis in original).

the occupier of premises on that property for a criminal offence is an illegitimate purpose, notwithstanding that the entry may involve communication with the occupier and notwithstanding that that communication may not otherwise be unlawful.

33. As *Halliday* and other cases demonstrate, the circumstance that the entrant is a police officer will by itself seldom preclude the implication of a licence. When a police officer steps onto a private driveway to arrest a trespasser,[67] or attends at the threshold of a residence to inform an occupier that a family dog has been located, or to ask whether the occupier would make a donation to a public appeal, or to ask whether the occupier would provide information in relation to matters in which they are not criminally concerned, the law justifiably implies a licence in favour of the police officer, as if they were "any person". Their purpose, in this instance, does not require further scrutiny; it is plainly legitimate.

34. When, however, a police officer enters onto land for what is proven to be the purpose of investigating the occupier of a residence on that land for a criminal offence, they enter in a way that is materially different to entries by other persons for other purposes. As a matter of practical and legal reality, a police officer does not enter onto private property for the purpose of investigating an occupier as if he or she were a door-to-door salesperson, or a Jehovah 's Witness, or a social visitor or a child chasing a ball. When the police officer enters for the purpose of investigating an occupier he or she enters for a purpose that is recognised in Australian law to constitute, along with committal, trial and sentence, a part of the accusatorial process of criminal justice.[68] In such a case, there is, where there was not in *Halliday*, a substantial conflict between the interests of the occupier, a natural person, and that of the police, an emanation of the State.

35. A recognition of this conflict, and the need to strike a "balance … between the power of the State to prosecute and the position of an individual who stands accused",[69] lies at the heart of the Australian system of criminal justice. It explains why, as a general rule, no person can be compelled to "communicate" with an investigating authority,[70] and no adverse inference may be drawn from the choice of a person, who later becomes an

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[67] See eg, *Halliday* (1984) 155 CLR 1.
[68] *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 136 [101] per Hayne and Bell JJ; see also, *Strbak v The Queen* [2020] HCA 10 at 12 [31] per Kiefel CJ, Bell, Keane, Nettle and Edelman JJ.
[69] *Lee v The Queen* (2014) 253 CLR 455 at 466-467 [32]-[33] per French CJ, Crennan, Kiefel, Bell and Keane JJ.
[70] *Lee* (2014) 253 CLR 455 at 466-467 [32]-[33] per French CJ, Crennan, Kiefel, Bell and Keane JJ.

accused, not to do so.[71] Though these fundamental principles derive in part from the accusatorial nature of criminal justice in this country, they also reflect the relative vulnerability of a natural person in the face of investigation by the State.[72]

36. Where they later become a criminal accused, so too do the common law of evidence[73] and the Uniform Evidence Law[74] recognise the special nature of "communications" between a person of interest and investigating officials, especially where the latter's purpose by the communication is to investigate the possible commission of an offence by the former. Common law guidelines of police practice, such as those originating in the Judges' Rules,[75] recognise the dangers and potential for unfairness associated with such communications. As a direct legislative response to "problems perceived by both the courts and other observers" with these kinds of police communications,[76] the guidelines are now expressed as legally binding rules in State and Territory statutes[77] and their content extends well beyond that of the Judges' Rules.[78]

37. Most importantly, police have a wide array of powers that distinguish them in their investigative capacities from ordinary citizens who enter for the purpose of "lawful

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[71] *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34] per Gaudron, Gummow, Kirby and Hayne JJ.
[72] This explains, in part, why the privilege against self-incrimination does not extend to a corporate accused: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 500-501 per Mason CJ and Toohey J.
[73] The common law rules relating to inducements, for example, were either limited in their application to, or acknowledged a very special place for, statements induced by "persons in authority": see, *McDermott v The King* (1948) 76 CLR 501 at 511-512 per Dixon J, citing *R v Thompson* [1893] 2 QB 12 per Cave J; see also, *R v Dixon* (1992) 28 NSWLR 215 at 220-223 per Wood J; *Deokinanan v The Queen* [1969] 1 AC 20 (PC) at 30-31 per Viscount Dilhorn for the Board.
[74] In Victoria, New South Wales, Tasmania, the Australian Capital Territory, the Northern Territory and the Commonwealth, parliaments have now uniformly legislated to create special tests of admissibility for statements made by an accused, adverse to their interests at trial, where those statements are made "to … an *investigating official* who at that time was performing functions in connection with the investigation of the commission, *or possible commission*, of an offence": *Evidence Act 2008* (Vic), s 85; *Evidence Act 1995* (NSW), s 85; *Evidence Act 2001* (Tas), s 85; *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 1995* (Cth), s 85.
[75] See generally, *Kelly v The Queen* (2004) 218 CLR 216 at 246 [87] per McHugh J; *McDermott v The King* (1948) 76 CLR 501 at 512-513 per Dixon J; *R v Voisin* [1918] 1 KB 531 at 539 per Lawrence J.
[76] *Kelly* (2004) 218 CLR 216 at 233 [42] per Gleeson CJ, Hayne and Heydon JJ; see for judicial statements of those concerns, *Burns v The Queen* (1975) 132 CLR 258 at 265 per Murphy J; *Driscoll v The Queen* (1977) 132 CLR 258; *McKinney v The Queen* (1991) 171 CLR 468 at 474-476.
[77] See eg, *Police Powers and Responsibilities Act 2000* (Qld), s 437; *Summary Offences Act 1953* (SA), s 74D; *Criminal Investigation Act 2006* (WA), s 118.
[78] In many jurisdictions, evidence of admissions made by a suspect in response to questioning by "a member of the Police Force" or an "investigating official" are prima facie inadmissible on a prosecution for an indictable offence where they have not been audio-visually recorded: see eg, *Police Administration Act* (NT), s 142; *Crimes Act 1958* (Vic), s 464H.

communication". Although now conventional, the statutory power[79] conferred on a police officer to arrest a person reasonably suspected of having committed an offence is extraordinary when compared with the limited statutory[80] and common law powers of citizen's arrest.[81] General statutory powers of arrest may also imply an incidental power to enter or remain upon private property to effect the arrest of a person reasonably suspected of committing an offence.[82] So too may such powers imply an incidental power, when police execute an arrest, to search persons and premises and seize material for evidentiary purposes.[83] Beyond implied powers, parliaments in many jurisdictions have seen fit to arm police with explicit, though often particular and strictly confined, powers of entry without warrant.[84] One such power, at issue at an earlier stage in these proceedings, is the extraordinary power granted to a police officer under s 126(2A) of the *Police Administration Act 1978* (NT) to enter a place,[85] by reasonable force if necessary, for certain purposes if he or she believes, on reasonable grounds, that a person has suffered or is in imminent danger of suffering personal injury at the hands of another person, or that a contravention of an order under the DVO Act has occurred, is occurring or is about to occur at the place.

38. Significantly, these powers may accrue as a direct result of investigations carried out on private property pursuant to an implied licence. Once they have accrued, many

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[79] See eg, *Police Administration Act 1978* (NT), s 123; *Crimes Act 1958* (Vic), s 459; *Law Enforcement (Powers and Responsibilities) Act* (NSW), s 99; *Summary Offences Act* 1953 (SA), s 75*; Police Powers and Responsibilities Act 2000* (Qld), s 365(1).
[80] See eg, *Crimes Act 1958* (Vic), s 458; *Criminal Law Consolidation Act 1935* (SA), s 271; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 100; *Criminal Code Act 1899* (Qld), s 546(c).
[81] In respect of felonies, a citizen was required to have personal knowledge of the offending whereas a peace officer could arrest on reasonable suspicion based on reports provided to him by others: *Samuel v Payne* (1780) 1 Dougl 359; 99 ER 230. Moreover, no person, including a peace officer, was permitted at common law to "arrest a person guilty or suspected of misdemeanours except where an actual breach of the peace by an affray or by personal violence occurs and the offender is arrested while committing the misdemeanor or immediately after its commission": *Halliday* (1984) 155 CLR 1 at 12 per Brennan J, citing Stephen, *History of the Criminal Law of England* (1883) vol 1 at 193; *Hale's Pleas of the Crown* (1800) vol 2 at 85.
[82] *Halliday* (1984) 155 CLR 1 at 14-17 per Brennan J; see and compare, *Eccles v Bourque* (1974) 50 DLR (3d) 753; *Dinan v Brereton* (1960) SASR 101; *Kennedy v Pagura* (1977) 2 NSWLR 810; *McDowell v Newchurch* (1981) 9 NTR 15.
[83] *Field v Sullivan* [1923] VLR 12; *Reeves (a Pseudonym) v The Queen* [2017] VSCA 291.
[84] See eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 9; *Police Powers and Responsibilities Act 2000* (QLD), s 609; *Criminal Investigation Act 2006* (WA), s 35; *Police Administration Act 1978* (NT), s 126(2)
[85] Which is defined, relevantly, to include "premises", "a building or structure" and "land on which a building or structure is situated": *Police Administration Act 1978* (NT), s 116.

authorise[86] police presence on private property beyond a revocation of the licence. This seriously undermines the Court of Appeal's claim that it was "open to one or other occupier to revoke … the implied license (sic) by telling the police to leave."[87] While standing in the alcove that constituted a part of the tenancy, Constable Elliott very quickly made observations of the appellant's physical movements, demeanor, speech and odour that plainly gave rise to reasonable grounds for a belief that the appellant was contravening a condition of the DVO and thus to a *power* of entry under s 126(2A) of the *Police Administration Act*. What consolation is it to an occupier that they may revoke an implied licence if, as a direct result of investigations carried out in reliance on the licence, the police have accrued a non-revocable power to remain on the property and, in certain circumstances, forcibly to enter premises situated on it?

39. There are other, obvious, difficulties with the doctrine of revocation as applied to police entries for the purpose of investigating an occupier. As a matter of practical reality, many, perhaps most, non-lawyers[88] do not know of, or are not confident in, their rights in the face of assertive police investigations. This is why the common law requirement that confessions be voluntary recognises the importance of the standard police caution; when an accused is not cautioned, they "may feel bound to answer questions put to him [or her]",[89] particularly when they are in custody. When police enter onto private property and direct a person to come to the door of their residence, there is an equal, if not greater, risk that the occupier will not be sufficiently aware of, or confident in, their right of revocation to assert it. In these cases, it might be thought that the interplay between the private rights bound up in possession and public power is far more complex, and dependent on jurisdiction, than in the case of the right to silence. Cases such as *Morris v Beardmore*[90] and *Lambert*,[91] in which occupiers *have* asserted their right of revocation, do not detract from the proposition that many occupiers will not be aware of the right.[92] Rather, what *Morris* and *Beardmore* do

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[86] Others, such as novel statutory powers to administer a breath-test, do not: see eg, *Lambert* [1980] QB 15 at 19-20 per Donaldson LJ; *Morris v Beardmore* [1981] AC 446; *Halliday* (1984) 155 CLR 1 at 17 per Brennan J.
[87] *O'Neill v Roy* (2019) 345 FLR 29 at 39 [37] (CAB 75-76).
[88] It can hardly be said they are always well understood by lawyers or police themselves.
[89] *Van Der Meer v The Queen* (1988) 62 ALJR 656 at 660 per Mason CJ.
[90] [1981] AC 446.
[91] [1980] QB 15.
[92] Or they do so no more than the fact that some persons may assert their right to silence in the absence of a caution.

demonstrate is that police, too, may struggle to appreciate the limits of their powers in this context.

40. Revocation and negation are critical to the legitimacy of the implied licence. That a licence may, with relative ease, be negated or revoked explains why, without significantly derogating from rights bound up in possession, the common law implies a licence from general, but not uniform, experience. Negation leaves the occupier's right to control access to their property more or less intact, but changes the manner in which it is exercised: essentially, and in practical terms, from "opt in" to "opt out". Revocation defers the point at which control is exercised: ordinarily, to the point at which the entrant's business has been made known to the occupier. In the ordinary case, changing the manner, or deferring the timing, of the exercise of this control does not derogate from the occupier's quiet enjoyment of their premises or the right to exclude others from those premises. This is because the rights are effective and easily asserted and because there is little if any cost to a person who, for example, erects a sign that reads "No hawkers", or "No soliciting or salespeople". Nor, in the overwhelming majority of cases, does the revocation of a licence come at any significantly greater cost to the occupier than embarrassment.

41. As the analysis at [37]-[39] demonstrates, in the case of entries by police for the purpose of investigating an occupier, the capacity to revoke a licence does *not* avoid significant derogations from the quiet enjoyment of an occupier's premises or the right to exclude others from access to those premises. In a case of such entry, negation may, too, come at a significant cost to the occupier in possession. In order to negate the licence, the occupier's first of two options is to erect a sign that effects a limited negation of the implied licence: for instance, a sign that reads, "Police who wish to investigate those who live in these premises for criminal offences are not welcome on the property". An occupier of private residential premises who, innocently, wishes to exclude police from attending on their property for the purpose of investigating them should not be required to do so in a way that is likely to *increase* police interest in them or their premises. The second option is to negate the licence generally, in which case the police may not attend on the premises without an express invitation or a power, but neither may any other member of the public; thus negation would inhibit the occupier's enjoyment of the property.

42. There are other, significant, practical differences between orthodox instances of "lawful communication" and police entry for the purpose of investigating an occupier. In the latter case, the descriptor "lawful communication" is, at best, awkward or artificial; at worst it is a foil for the real and investigative purpose of the entry. If police entry for the purpose of requiring a person of interest to submit to a procedure is to be framed as an instance of "lawful communication", what other police activities would be within its ambit? Would "lawful communication" countenance police attendance at a person's front door in order to engage them in conversation in the hope of making observations of injuries, particular clothing, or other potentially incriminating indicia? Or to engage them in conversation and audio-visually record them to obtain an image for subsequent biometric facial mapping or subsequent voice identification? To "sniff" them?[93] To run a drug dog over their porch?[94]

43. Ultimately, a licence to enter upon private property for the purpose of investigating the occupier of premises on that property is not "fairly to be implied … as an incident of living in society"[95] and does not "arise from the known habits of city life"[96]. It is not to the point that *some* people might encourage or permit the entry for this purpose.[97] In view of the special nature of its purpose, the point is that the entry is not founded on "the common behavior of citizens of our community",[98] or "*known* habits",[99] or a conclusion that the entry for such a purpose is something "most [Australian] householders would consent to".[100]

e) Application and the purpose(s) of entry in this case

44. The purpose of the police entry onto the tenancy occupied by the appellant and Mr Johnson was that of proactively investigating whether the appellant had committed a criminal offence. Describing the police purpose as that of checking whether the appellant was "complying" with the conditions of the DVO, or whether they were

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[93] See eg, *R v Evans* (1996) 1 SCR 8.
[94] See eg, *Florida v Jardines* (2013) 569 US 1.
[95] *Halliday* (1984) 155 CLR 1 at 19 per Brennan J.
[96] *Lipman* (1932) 46 CLR 550 at 557 per Dixon J.
[97] For instance, because they "have nothing to hide", or in the interest of "clearing their names".
[98] *Munnings v Barrett* [1987] Tas R 80 at 87.
[99] *Lipman* (1932) 46 CLR 550 at 557 per Dixon J.
[100] See, *Howden* [1987] 2 NZLR 747 (CA) at 751; see also, *Evans* (1996) 1 SCR 8 at 19 [16] per Sopinka J (for Cory and Iacobucci JJ), at 12 [1] per La Forest J (in substantial agreement).

"being honoured",[101] obscures but does not alter the investigative purpose of the entry. That purpose was not a legitimate purpose for entry pursuant to the implied licence and was thus outside, alien or unrelated to, the limited scope of the authority granted by it.[102] Because that purpose was outside the scope of the authority to enter, the entry was a trespass.[103]

45. There was evidence that a concern for Mr Johnson's welfare was bound up in this illegitimate purpose. The appellant did not dispute the genuineness of this concern at the hearing in the Local Court, and does not do so now. But, as Mildren JA noted,[104] the evidence did not support an inference that a "dual"[105] or "subsidiary" purpose of the entry was that of lawfully communicating with Mr Johnson about his welfare or otherwise checking upon it. Constable Elliott's concern was no more than a concern that the appellant might not have been complying with her DVO. It was a motive that explained – at least from his perspective – the ultimate purpose or end of the attendance which was to investigate the appellant's compliance with her domestic violence order. Motive is, however, different to purpose.[106] That is why there is no inconsistency between Constable Elliott's evidence – which acknowledged the investigative purpose but also made reference to the concern for Mr Johnson – and the evidence of Constable Dowie – which was that the "*only* reason why [the police officers] had attended" at Unit 6 was "to conduct proactive domestic violence order compliance checks".[107] It is to be noted that, following this apparently categorical statement, the Local Court judge asked the prosecutor whether there was anything he wished to ask in reply. The prosecutor answered that there was not.[108]

46. Quite apart from Constable Dowie's evidence, there was also, as Mildren AJ observed[109] in the Supreme Court,

> no evidence that when the police knocked on Ms Roy's door that they even spoke to Mr Johnson, even though they could see him sitting in a lounge chair

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[101] *O'Neill* (2019) 345 FLR 29 at 39 [37] (CAB 75).
[102] *Barker* (1983) 153 CLR 338 at 342, 346 per Mason J.
[103] *Barker* (1983) 153 CLR 338 at 342 per Mason J.
[104] *O'Neill* [2019] NTSC 23 at 28-29 [45] (CAB 44-45).
[105] Cf, *O'Neill* (2019) 345 FLR 29 at 39 [37] (CAB 75).
[106] See, *Commissioner of Taxation v Sharpcan Pty Ltd* (2019) 93 ALJR 1147 at 1162 [49] per Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ, citing *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 573 [18] per Gleeson CJ.
[107] Transcript of Proceedings (13 November 2018) at 15 (AFM 18).
[108] Transcript of Proceedings (13 November 2018) at 15 (AFM 18).
[109] *O'Neill* [2019] NTSC 23 at 29 [45] (CAB 45).

> inside the unit. Nor is there any evidence that he (sic) did speak to him or try to speak to him at any other time that day. If Constable Elliott had the subsidiary purpose of checking on Mr Johnson's welfare, one would have expected that at the very least, he might have enquired about his welfare.

47. The conclusion that any "concern" for Mr Johnson did not amount to a purpose which authorised the entry is appropriately confined to the facts of this case. Its acceptance does not require the Court to recognise or endorse a general principle applicable to cases of dual purpose or dual occupation. To the extent that its foundation is in principle, these are basic principles of evidence and proof: first, the principle in *Entick v Carrington* that, because the investigative purpose did not authorise the entry, it fell to the entrants to demonstrate some additional and legitimate purpose for the entry;[110] second, the "ordinary principle that conduct after entry is evidence of the purpose with which entry was effected";[111] third, the principle that, where a litigant fails to adduce evidence, especially when it fails to ask questions of a friendly witness called by it, in the absence of an explanation for the failure a court may be justified in inferring that the evidence not adduced would not have assisted the party.[112]

48. In the alternative, the appellant contends that it would not matter, on the facts of this case, that the "concern" might be characterised as a "purpose" of the entry. This is because the unauthorised purpose of investigating the appellant's compliance with her DVO was the "substantial [or dominant] purpose" of the entry "in the sense that", on the basis of Constable Dowie's categorical statement, and in the absence of any evidence of an attempt by the police to engage with Mr Johnson following appellant's arrest, it is more probable than not that "no attempt would have been made to [enter] the land if it had not been desired to achieve the unauthorised purpose."[113]

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[110] See *Halliday* (1984) 155 CLR 1 at 19 per Brennan J, citing *Entick v Carrington* (1765) 10 St Tr 1029.
[111] *Barker* (1983) 153 CLR 338 at 363 per Brennan and Deane JJ.
[112] *Jones v Dunkel* (1959) 101 CLR 298. As JD Heydon notes, "it has been said that the omission to ask questions of a friendly witness is more significant than the failure to call the witness, and that the presumption that the testimony would not have been favourable to the party's case is stronger than the presumption arising from the failure to call him" or her: JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th Aus Ed, 2020) at [1215], citing *Milliman v Rochester Railway Co* (1896) 39 NYS 274 at 276 per Follett J, approved in *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 419 per Handley JA; see also, *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169 at 228 per Goldberg J. The principle applies to witnesses called or questions asked in a party's case in reply: *Ta Ho Ma Pty Ltd v Allen* (1999) 47 NSWLR 1 at 4 per Handley JA.
[113] See, *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 41 ALJR 467 at 468-469 per Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ; *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106 per Williams, Webb and Kitto JJ.

f) Public policy, parliament and the implied licence

49. There may be arguments in public policy for recognising a general, or particular, right or licence of police to enter onto the curtilage of private residential premises for the purpose of investigating the occupier of those premises. Public policy is, however, inherently contestable and what is from time to time perceived to be justified in the public interest is changeable.[114] At "this late stage in the development of the common law", and, in the face of, at best, inconsistent statements by courts in other common law jurisdictions,[115] it is not appropriate that the common law pursue or attempt to balance any such interests with rights, such as those bound up in possession, which are recognised as being fundamental in Australian law.

50. Myriad "forensic and social considerations"[116] bear upon whether and subject to what limitations police should, as a matter of policy, be permitted to enter upon the curtilage of private premises for the purpose of investigating its occupier. Many of those considerations will depend on matters best known to and able to be balanced by government.[117] Balancing them will require "fine tuning".[118] Moreover, because "the legislature *has* carefully defined the rights of the police to enter" it is all the more "not for the courts to alter the balance between individual privacy and public authority."[119] Because the forensic and social considerations at issue in these cases will inevitably depend upon the existence or non-existence of other rights, duties and powers which inhere in the police, and because those rights, duties and powers are extensively but far from uniformly provided in State, Territory and Commonwealth statutes, it should not

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[114] *R v Young* (1999) 46 NSWLR 681 at 700-702 [93]-[110] per Spigelman CJ; *Re Morris* (1943) SR (NSW) 352 at 355-356 per Jordan CJ, cited with approval in *A v Hayden* (1984) 156 CLR 532 at 558 per Mason J.

[115] See, in Canada, where the licence has been held not to apply so as to authorise police entry to proactively investigate an occupier, *R v Evans* (1996) 1 SCR 8 at 16-21 [12]-[20] per Sopinka J (Cory and Iacobucci JJ concurring), at 12-14 [1]-[4] per La Forest J (in substantial agreement), applied in *R v MacDonald* (2014) 1 SCR 37 at 52 [26]-[27] per LeBel J (McLachlin CJ, Fish and Abella JJ concurring), and in *R v Le* [2019] SCC 34 at [127] per Brown and Martin JJ (Karakatsanis J concurring); see, in the United States, where the Supreme Court has held to similar effect, *Florida v Jardines* (2013) 569 US 1 esp at 6-9 per Scalia J (Kagan, Ginsberg and Sotomayor JJ joining, and concurring at 12-16; compare, in New Zealand, *Tararo* [2012] NZLR 145 at 171 [11]; *R v Meyer and Woods* [2010] NZAR 41 at [12]; *Hamed v The Queen* [2012] 2 NZLR 305 at [7], [157]-158], [219]; *Gerrard-Smith v New Zealand Police* [2016] NZHC 2543.

[116] *Bell Lawyers* (2019) 93 ALJR 1007 at 1024 [75] per Nettle J.

[117] See eg, *Cachia v Hanes* (1994) 179 CLR 403 at 416 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ. Not least, in this context, is this because judges "deal with specific cases that ordinarily involve people who have broken the law, a fact that does not encourage the broader perspective that should be brought to the issue": *Evans* (1996) 1 SCR 8 at 13 per La Forest J.

[118] *Young* (1999) 46 NSWLR 681 at 702 [106] per Spigelman CJ.

[119] *Halliday* (1984) 155 CLR 1 at 20 per Brennan J; see also, *Young* (1999) 46 NSWLR 681 at 702 [105] per Spigelman CJ.

be thought that the "solvent" for any perceived "social, political or economic problem"[120] with the general law of implied licences would or could be uniform as between the State, Territory and Commonwealth parliaments.

Part VII: Orders sought

51. The appellant seeks an order that the appeal be allowed. She seeks neither costs nor any other consequential order.

Part VIII: Appellant's estimate

52. The appellant estimates that she will require 2 hours for the presentation of oral argument, including time for a reply.

10 Dated: 8 May 2020

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[120] *Breen v Williams* (1996) 186 CLR 71 at 115 per Gaudron and McHugh JJ, citing *Tucker v US Department of Commerce* (1992) 958 F 2d 1411 at 1413.