HIGH COURT OF AUSTRALIA

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File Number:	D2/2020
File Title:	Roy v. O'Neill
Registry:	Darwin
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	05 Jun 2020

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN: **AILEEN ROY**
Appellant

and

JULIE O'NEILL
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of the issues

2. The issues in this appeal should be framed in the context of the statement of principle by the majority in *Halliday v Nevill* (1984) 155 CLR 1 at 7-8, noting that the appellant does not seek to overturn that decision, nor satisfy the conditions[1] for reopening it (Appellant's Submissions (**AS**) [26]-[29]).

3. The principle is that the common law recognises, as a matter of law, absent any indication to the contrary, an implied licence by the occupier of a private dwelling 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 dwelling; or for any other legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier or his or her guests or property.

4. The first issue is then: is the common law implied licence so confined[2] as to exclude from its scope a police officer who goes upon the path or driveway for the purpose of communicating with an occupier of the premises on a "proactive policing" matter.[3]

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[1] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; *Williams v Commonwealth* (2014) 252 CLR 416 at [58]-[67].

[2] Framing the issue in the terms of asserted "confinement" of the undoubted licence, or the identification of its outer reaches or ancillary scope, matches the precise way that the majority framed the ultimate issue in *Halliday* at page 8.9.

[3] A term explained at [9]-[10] below.

5. The second issue is then: does the posited exclusion apply where there are multiple occupiers; one may be committing criminal activity against the other; and the purpose is to "proactively police" one occupant for the protection of the other?

Part III: Section 78B certification

6. Notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of the facts

7. There are several relevant facts in addition to those contained in the appellant's recitation of facts at AS [6]-[17]. *First*, the unit complex was a public housing complex (Appeal Book (**AB**) p8 line 27).[4] Although fenced, there were no restrictions on entering the common area (Appellant's Book of Further Materials (**ABFM**) p10 line 15). An unobstructed footpath led through the common area directly to the front door of each unit. There were no fences or obstructions of any kind between each unit and the common area (ABFM p10 lines 11-12).

8. *Secondly*, there was no evidence of any challenge by the appellant or Mr Johnson to police entry on this occasion, nor indeed on any of the prior occasions of police attendance at 41 Victoria Highway about which Constable Elliot gave evidence. That included two weeks earlier when he observed the appellant intoxicated at that address and, as an earlier incident of proactive policing, took her to a sobering up shelter to avoid a contravention of her domestic violence order (ABFM p10 lines 20-23, 32-33, p11 lines 33-37); and when Constable Elliot gave Mr Johnson "a notice of direction" (ABFM p12 line 43), presumably under s 28E of the *Housing Act 1982* (NT) in his capacity as a public housing safety officer.[5]

9. More generally, the concept of "proactive policing", which was the stated purpose of police attendance (ABFM p9 lines 36-40, p16 lines 23-26, p18 lines 22-29), should be explained. It is not a novel police function. Proactive policing aims through intelligence-led targeted police efforts, often coordinated with other agencies, to prevent or deter criminal behavior, or at least to detect it sooner, thereby protecting victims; whereas "reactive policing" following a complaint or observed criminal behavior deals only with the consequences of criminal conduct. Proactive policing has

[4] The respondent uses the bold pagination at the top of the pages of the AB and the ABFM.

[5] The definition of "public housing safety officer" includes police in s 5 of the *Housing Act 1982* (NT).

particular work to do in the area of domestic violence[6] where underreporting to police is notorious.[7]

10. In communicating with community members in a proactive way, police may bring about a range of valuable interventions. They may find that the law is being observed and encourage or commend the person in question to continue to do so. Or they may observe a possible or threatened breach and be able to intervene, counsel or guide the person to remain within the law. In other cases, they may find the law is actually being breached but may be able to mitigate the harm the breach is causing to other persons, potentially but not always leading to an arrest (see [8] above). The appellant's concept of "proactive investigation" (AS [34]) fails to capture the wide range of communications which may occur between the police and the community under proactive policing and wrongly assumes that all communications under it necessarily occur within the accusatorial system of criminal justice.

Part V: Argument

A. SUMMARY OF CONTENTIONS

11. After certain introductory matters, the respondent makes six main contentions in response to the appellant's argument.

12. *First*, once the generality of the statement of principle by the majority in *Halliday* is properly understood, the law has *never* excluded from the scope of the licence investigation, "proactive" or otherwise, of an occupier for a possible criminal offence: see **Section D below**.

13. *Secondly*, a strong body of Australian authority since *Halliday* has applied it in the same manner as the court below and should not be overruled: see **Section E below**.

14. *Thirdly*, the appellant's various appeals to principle in support of a new exception to the implied licence should be rejected: see **Section F below**.

15. *Fourthly*, the appellant's argument that revocation is an insufficient protection for an occupier against proactive policing of the occupier should be rejected: see **Section G below**.

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[6] Australian Government, Australian Institute of Criminology, 'Policing Repeat Domestic Violence: Would Focussed Deterrence Work in Australia' (2020) 593 *Trends & Issues in Crime and Criminal Justice*; NSW Ombudsman, *Domestic Violence: Improving Police Practice* (December 2006), 11.6. See generally Northern Territory, Parliamentary Debates, Legislative Assembly, 17 October 2007, 4846-4847 (Syd Stirling, Minister for Justice and Attorney-General).

[7] Australian Government, Australian Institute of Criminology, 'Reporting Crime to the Police' (1997) 3 *Trends & Issues in Crime and Criminal Justice*; Australian Government, Australian Institute of Health and Welfare, 'Family, Domestic and Sexual Violence in Australia: Continuing the National Story' (2019), p6.

16. *Fifthly*, overseas authority from comparable common law jurisdictions is stongly against the appellant and confirms that the common law of Australia should not be restated as sought by the appellant: see **Section H below**.

17. *Sixthly*, as to Ground 2 of the Appeal, the appellant should fail in any event. By application of the appellant's own reasoning, police entered by implied licence from Mr Johnson to investigate suspected offending in which he was the victim, bringing the case comfortably within the implied licence: see **Section I below**.

B. JUDGMENT BELOW

18. The Court of Appeal found (*O'Neill v Roy* (2019) 345 FLR 29 (**CoA Reasons**) at [38] AB p76), on the basis of well-established principles of the common law that Constables Elliot and Dowie had an implied licence from the occupiers of 6/41 Victoria Highway when they walked up the unobstructed footpath to the front door and knocked in order to communicate with the occupants inside as part of an ordinary police function. The Court correctly concluded that they were not trespassing and so evidence of their observations at the doorway and subsequent events were not excluded under s 138 of the *Evidence (National Uniform Legislation) Act 2011* (NT).

C. THE NATURE OF THE APPELLANT'S CHALLENGE

19. The appellant contends that "where a public authority enters onto property within the occupier's possession for a purpose of investigating the occupier for a criminal offence" they do so for a purpose which is outside the scope of the implied licence and trespassory unless authorised on other grounds (AS [20]).

20. Two aspects of that contention should be noted. *First*, the appellant accepts that the licence is *not* excluded across a whole range of other ordinary police functions, including some which engage the criminal justice system; rather the appellant contends that there is something special about proactively investigating an occupier for possible criminal activity that takes that circumstance outside the licence (AS [33]).

21. *Secondly*, the contention does not depend on, and the appellant does not complain about, any particular *conduct* of the police as distinct from the *purpose* for their conduct. Specifically, the appellant does not separately complain about the direction given to the appellant that she submit to a breath test, or its administration at her doorway. This appears to be in recognition (AS [37]) of the fact that within moments of their arrival at the appellant's door, and before any action was taken by them, police had reasonable grounds to believe that the appellant was in contravention of the domestic violence order enlivening statutory rights of entry under both ss 126(2A) and

123 of the *Police Administration Act 1978* (NT) (*Dinan v Brereton* [1960] SASR 101 at 104-105; *McDowell v Newchurch* (1981) 9 NTR 15 at 18).

22. The only issue is whether police were lawfully at the doorway in the first place. In the present context, this is an argument about the legality of police stepping from the common "footpath straight to the door" (ABFM p10 lines 11-12) into the "alcove within which was the front door" (SC Reasons at [3] AB p18) in order to knock.

D. *HALLIDAY V NEVILL* – WHAT DOES IT STAND FOR?

23. ***Background:*** The appellant's approach to *Halliday* may be summarised: it should not be reopened (AS [26]); the majority did not approve *Robson v Hallett* [1967] 2 QB 939 as to the correctness of that case on its own facts (AS [27]); even if the majority did, they did so without full argument (AS [28]); the difference between the majority and Brennan J was little more than a disagreement about the implication available on the objective facts (AS 29]); and this Court thus has a clean slate to decide if proactive policing is "legitimate" so as to fall within the licence (AS [30]).

24. That approach is unfaithful, both to the precise issue in *Halliday* and to how the majority constructed their reasons. The case concerned an entry by police which was at the margins of the implied licence because entry was exclusively to communicate with, and ultimately to arrest, an invitee or trespasser (the Court didn't decide which),[8] and not to engage in any business with the occupier as such.

25. ***In the court below:*** The argument put successfully on behalf of Mr Halliday before Brooking J in the Supreme Court of Victoria (*Neville v Halliday* [1983] 2 VR 553 at 557) was that the established common law rule referred to by Brooking J (at 556), as developed in *Robson v Hallett* and *Lambert v Roberts* (1980) 72 Cr App R 223, was confined to where the entrant had business with the *occupier*. On this view, the police could have entered to investigate or arrest the occupier but not where they sought to engage with a *trespasser or guest*. The exact opposite of the appellant's contention here succeeded before Brooking J.[9]

26. ***The majority on appeal:*** On appeal, between page 7.2 and 8.3, the majority three times offered a general statement of the existence, scope and rationale for the implied licence. They started by identifying that "the most common instance" of an implied

[8] The known facts were that Mr Halliday had gone to a residence at which Mr Power resided (although it was not decided whether Mr Power was the occupier) to "get even with him" because Mr Power had been "fixing up" his girlfriend. Instead of carrying out a threat made to Mr Power, Mr Halliday instead took Mr Power's car to "burn some rubber up and down the driveway": *Neville v Halliday* [1983] 2 VR 553 at 556.

[9] The point was then agued on that same basis in the High Court: *Halliday* at 3-4.

licence, as a matter of law, relates to "means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling house". If that means of access is left unobstructed and there is no notice that entry by visitors generally or particularly designated is forbidden, 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*". [emphasis added].

27. The majority went on to say that the occupier cannot negate the licence by later saying they subjectively did not intend to give it; negation must be by overt act or statement. At that point, *Robson v Hallett* is cited, with particular page references: 950, 952, 953-954.

28. The majority here stated at a level of generality the facts giving rise, as a matter of law, to the implied licence: a licence is implied in favour of *any* member of the public who has a *lawful reason to communicate* with *any* person in the house.

29. Thus the licence does not depend on what the occupier knows in advance about the *particular* purpose of the entrant, or upon what the occupier's attitude is or would be if that purpose were known. It stands or falls at a more general level: by leaving the ordinary means of access unobstructed, the occupier is holding out an invitation to *any* member of the public having *lawful* business with *any* person in the house to come onto the property and reveal what their business is; at which point the occupier can say whether the entrant is permitted to remain to carry it out or whether they must leave. If the occupier does not wish their unlocked gate or unobstructed path to be understood in this usual manner, they need to signify overtly that entry by all persons, or all persons of a particular class or with a particular purpose, is prohibited.

30. When the majority stated this general principle and cited *Robson v Hallett* as authority for it, it is hardly to be supposed that what they meant to convey was that *Robson v Hallett* correctly stated the general principle but wrongly applied it on the facts of that case. The very precise page citations to the separate judgments of Lord Parker CJ and Diplock LJ show that the majority were approving the *ratio* of *Robson v Hallett*, a *ratio* that can only be understood as governing a factual case where the police went up and knocked on the front door to make enquiries about a possible offence by one of the persons living on the premises (in that case the son of the tenant).

31. The majority reasons continue at p7 instancing situations where the licence extends beyond use of the open driveway or path; and again cite Lord Parker CJ in *Robson v Hallett*; before then stating the general principle for the second time, in somewhat

wider terms: "The path or driveway is, in such circumstances, *held out* by the occupier *as the bridge* between the public thoroughfare and his or her private dwelling upon which *a passer-by* may go for *a 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*. [emphasis added].

32. Again, the licence stands or falls upon the facts viewed at a level of generality. The unobstructed path/driveway is an objective representation to *all* persons passing by that they may come up to the door to carry out their *legitimate* i.e. lawful business; allowing the occupier then to decide whether to permit its dispatch upon their property.

33. At page 8.2, the majority turn to the evidence and observe that the two conditions for the implication of the licence were met: the driveway to the house was open and there was no notice forbidding all or certain visitors. The majority then gave a third, and again wide, statement of the general principle: "That being so, *a variety of persons with a variety of legitimate purposes*, had, as a matter of law, an implied licence from the occupier to go upon the driveway" [emphasis added].

34. Finally, having established that the licence existed the majority turned to its outer limits on the facts of the case. The purpose for which the police went onto the unobstructed driveway was one step removed from the core of the licence. They were not going up to the entrance to speak with persons in the house on any form of police business, including – as in *Robson v Hallett* or the present case – seeking to speak to persons in the house about compliance with the criminal law. Rather, they were chasing a person who might, or might not, have committed an offence.

35. The majority held that this matter did not take the police outside the scope of the implied licence. Common sense, reinforced by considerations of public policy, dictated that "the implied or tacit licence … is not so confined as to exclude from its scope a member of the police force who goes upon the driveway in the ordinary course of his duty for the purpose of questioning or arresting a trespasser or a lawful visitor".

36. Reference to "common sense" and "public policy" should be understood against the majority's further statement that an occupier who was in fact desirous of converting his or her path or driveway "into a haven for minor miscreants" could take appropriate steps to negate the licence.

37. In summary, the majority in *Halliday* did not "merely assume…without argument" (AS [28]) the operation of the implied licence at its *locus classicus* where police are investigating possible criminal conduct by an occupier. The decision involved careful consideration of the scope of the principle in the decided cases and more generally, an

analysis of its justification, and ultimately a conclusion that the same principle, applied in *Robson v Hallett*, governed the facts before their Honours.

38. ***Brennan J in dissent:*** The dissenting judgment of Brennan J in *Halliday* does not assist the appellant either. Brennan J did not doubt that the common law recognised that police may enter onto private property with implied licence from the occupier in order to approach the front door (at page 19 approving statements of Lord Parker CJ in *Robson v Hallett* [1967] 2 QB 939 at 951 and Widgery CJ in *Brunner v Williams* (1975) 73 LGR 266 at 272). For his Honour, there were two distinguishing circumstances. The first (at page 11) was that "[a] police officer who has grounds for arresting a person on a criminal charge needs to be armed with more than leave and licence". The issue for his Honour was that the act of arrest could not be executed by police whose only right of entry was a bare licence. This reasoning conflates the authority to arrest with the authority to enter and, in any event, does not assist the appellant. The second issue (at page 19) was that police made no attempt to use the driveway to approach the residence such that the presence of the police on the driveway was not for any purpose with which the occupier was concerned. This reasoning again does not assist the appellant. In sum, in *Halliday* the Court was unanimously against what is urged by the appellant here.

E. SUBSEQUENT AUSTRALIAN AUTHORITY IS AGAINST THE APPELLANT

39. *Halliday v Neville* has been recognised and applied subsequently in intermediate appellate and lower courts of this country as affirming recognition in the common law of Australia of the wide and general implied licence principle described above.

40. In Western Australia, the Court of Appeal in *Pitt v Baxter* (2006) 159 A Crim R 293 proceeded on the basis that it was "well established" that police have the same rights as ordinary citizens to enter onto premises by implied licence for *any* legitimate purpose. On the facts of that case, those purposes included investigating for traffic offending a person who police thought (erroneously) to be an occupier.

41. In South Australia, the Court of Criminal Appeal in *R v Daka* [2019] SASCFC 80 found that the circumstances of an officer going up to the front door of a residence to knock on the door to speak to the occupants who were suspected of drug offences were "indistinguishable from those considered by the High Court in *Halliday v Neville*" (at [76]) and fell squarely within the scope of the implied licence (at [73]-[77]).

42. In New South Wales, the Court of Appeal in *New South Wales v Dargin* [2019] NSWCA 47 allowed an appeal by the State from a decision of a District Court judge which found that proactive bail compliance checks by police (involving entry onto

private property to confirm curfew compliance) were unlawful. In that part of the reasons dealing with the implied licence, Leeming JA (with whom Basten JA and Sackville AJA agreed) said (at [15]): "it is one thing for a landowner impliedly to permit a person to enter land and knock on the front door to make an inquiry; it is another to walk around the curtilage of a building making noise and shining lights in the middle of the night". The majority reasons in *Halliday* and *Lincoln Hunt Australia Pty Ltd v Willessee* (1986) 4 NSWLR 457 at 460E were cited for the conclusion that the former may be lawful and the latter not. The Court did not need to finally decide the issues which turned on contested matters of fact save to reject a generalised argument of the kind made here that police cannot ever rely on the implied licence where they attend to investigate criminal conduct by an occupier.[10]

43. The law, as developed in these cases concerning police entry onto private residential property, is substantially the same as that applied to business premises, although different factual considerations may arise (*Slaveski v State of Victoria* [2010] VSC 441 at [289]-[290], [760] (Kyrou J); *Barker v the Queen* (1983) 153 CLR 338; *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 582). And the same law is applied to non-police entrants (*Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457; *Byrne v Kinematograph Renters Society Ltd* [1958] 1 WLR 762).

44. The above authorities reflect a very substantial body of jurisprudence[11] which would have to be displaced if the appellant's argument were to now be accepted. Irrespective of whether *Halliday* has to be overturned, or may be distinguished and confined to its facts (AS [26]), the appellant's argument necessitates a re-drawing of the boundaries of legality which have been accepted as the common law over many years in a substantial body of authority. There is little to commend charting a new course now for the very reasons given by the appellant (AS [50]).

F. THE APPELLANT'S APPEALS TO PRINCIPLE SHOULD BE REJECTED

45. The appellant summarises (AS [19]) and then develops a number of arguments from principle for the asserted limitation to the implied licence. None are sustainable.

46. ***The argument from purpose (AS [21]-[25]):*** The appellant accepts that the licence is there to facilitate "lawful communication" with persons in the residence, which can

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[10] See also *New South Wales v Koumdjiev* (2005) 63 NSWLR 353 at [51] (Hodgson JA, Beazley JA and Hislop J agreeing).

[11] See also the position in Tasmania: *Tasmania v Crane* (2004) 148 A Crim R 346 at [10], [13]. In Queensland, s 19 of the *Police Powers and Responsibilities Act 2000* (Qld) confers a statutory power of entry for inquiries and investigations: *R v Hammond* (2016) 258 A Crim R 323 at [49].

include a wide variety of communications of a social, familial, political, commercial or religious nature (AS [23]). She seeks to argue, however, that the scope of the licence should be limited to where the purposes of entry are "so obviously limited and benign" that irrespective of any benefit to the occupier the entry is one "most Australian householders would consent to" (AS [24]).

47. Such a limitation should be rejected. The implied licence is a necessary starting hypothesis in a complex world of human interactions in which potential entrants may have a wide range of purposes for entry, all of them lawful, and it is not feasible for the public or any individual member of it to know in advance what the subjective views of an occupier (or occupiers where there are more than one) might be towards particular purposes of entry. Some ingress without express permission is necessary to allow for the ordinary functioning of society and the business of those who live within it. The "licence to knock" (*R v Evans* [1996] 1 SCR 5 at 18) runs up to the door so that an entrant can make their lawful business known, whatever be its character, and the occupier can then decide whether to permit or refuse the entrant to remain.

48. The licence exists so that interests in real property and the law of trespass which protects them are "not an ass" (*Robson v Hallett* [1967] 2 QB 939 at 950), and do not run counter to "the habits of the country", or "general understanding and practice" (*McKee v Gratz* 260 US 127 (1922) at 17), or "the known habits of city life" (*Lipman v Clendinnen* (1932) 46 CLR 550 at 557). As noted, the licence reflects "common sense, reinforced by considerations of public policy" (*Halliday* at 8).

49. The licence is implied in favour of any entrant who comes "for the purpose of lawful communication" (*Halliday* at 7), "on his lawful business" (*Robson v Hallett* at 951), or having or reasonably thinking that they have "legitimate business with the occupier" (*Lambert v Roberts* (1980) 72 Cr App R 223 at 230).

50. This functional constraint may be described as a purposive limitation provided that description does not obscure the issue. "Of necessity the consent [which arises by implied licence is] general" (*Lipman v Clendinnen* (1932) 46 CLR 550 at 557 (Dixon J)). It should "not require fine-grained legal knowledge" to apply (*Florida v Jardines* 133 SCt 1409 (2013) at [13]).

51. These statements of principle do not permit of distinctions which place some lawful communications within the licence and some without, based on perceived notions of legitimate or illegitimate purposes or motivations for communication. In *Halliday* this Court did not consider whether Mr Power (a resident and perhaps the occupier), or a reasonable person similarly circumstanced, was likely to consent to the police

interactions with Mr Halliday; nor whether Mr Halliday was trespassing or an invitee which would have been a necessary step in any such analysis.

52. Whether or not an entrant holds a purpose or motivation adverse to the occupier's own interests is irrelevant if entry is otherwise within the scope of the licence (*Barker v The Queen* (1983) 153 CLR 338 at 247 (Mason J) 358-360 (Brennan and Deane JJ); 352 (Murphy J)),[12] that is, if entry is for the purpose of lawful communication (*Halliday* at 7). And so in *Byrne v Kinematograph Renters Society Ltd* [1958] 1 WLR 762 inspectors attending a cinema to investigate the business occupier for fraud were within the licence notwithstanding their subjective purpose and motivation.

53. The statement of principle derived by Brennan and Deane JJ in *Barker* at 357-358 is apposite here:

> If it is a general permission to enter in the sense that it is not limited, either expressly or by necessary implication, by reference to the purpose for which entry may be effected, it is not legitimate to cut back the generality of the permission to enter merely because it is probable that the grantor would, if the matter had been raised, have qualified it by excluding from its scope any entry for the purpose of committing an unauthorized act.

54. This is not to say that the implied licence is unconfined by any reference to purpose. Purposes which contradict the core rationale for the licence, which is to facilitate communication or exchange with persons on the premises, fall outside the licence. Thus it cannot authorise an entry for covert surveillance purposes (*R v Rockford* [2014] SADC 199 at [58]-[61]), for the purpose of obtaining video footage to be used in a television report (*TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [11], [47], [62]), or to search backyards for escaped suspects (*Police (SA) v Williams* (2014) 246 A Crim R 317). "[A]s a matter of substance and fact" (*Barker* at 364 (Brennan and Deane JJ)) such purposes travel beyond the scope of the implied licence. But this is an objective inquiry in which the particular content of the proposed lawful communication with the occupier or other resident is irrelevant.

55. Similarly, an entrant who goes onto property within the scope of the implied licence, but subsequently engages in conduct wholly unrelated to communication, will trespass at that point (*Barker* at 345-346 (Mason J); *Tasmania v Crane* (2004) 148 A Crim R 346 at [10]-[13]). An entrant who "sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser" (*Hillen v ICI (Alkali) Ltd* [1936] AC 65 at 69 (Lord Atkin)).

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[12] See also *Barker v The Queen* (1994) 54 FCR 451 at 473 (note: this case is unrelated to the High Court decision of the same name cited above); *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [42]; *Florida v Jardines* 133 SCt 1409 (2013) at [15].

56. Applying these principles specifically to entry by police: police have a range of functions, both within and without the criminal justice system, the exercise of which may take them to the front door of a residence to speak with one or more residents. Any attempt to confine the licence to some purposes but not to others is bound to defeat its underlying rationale and lead to grave uncertainty. If one were to deny the benefit of the licence to *any* policy entry, or to *any police entry for a purpose connected to the criminal justice system,* at least there would be a clear, even if unprincipled, line to be drawn. But the appellant's line is neither clear, principled nor practically workable.

57. ***The argument that a public authority seeking to enter to investigate an occupier raises different considerations (AS [30]-[43]):*** The appellant accepts that the licence covers police when they enter property for a wide range of purposes in the course of their duty, including at least some purposes which engage the accusatorial system of criminal justice (AS [33]). Specifically, the appellant accepts that the licence covers police entering on the driveway to arrest a person other than the occupant, or knocking on the door to ask the occupant to provide information about potential criminal activity in which they are not concerned (AS [33]). Presumably this means that it is "legitimate" within the purposes of the licence to knock to ask an occupant about possible criminal activity by other residents of the premises as long as the occupier is not suspected of involvement in such activity.

58. It follows that, on the appellant's view, a great bulk of all police business with persons in a dwelling is "legitimate" for the purpose of the licence. Where the appellant would draw the line is if the police wish to speak with an occupant about the *occupant's own possible criminal activity* (AS [34]).

59. There is an immediate incongruence between that which the appellant sets up as the *reason* to limit the licence – recognition of the accusatorial system of criminal justice – and the scope of the *resulting limitation*. On the appellant's view, police are entitled to take from an unobstructed accessway to the house, absent express negation, an invitation to come up to the door to perform any lawful function within the criminal justice system including the investigation of possible offences, provided that they only ask questions of or about persons in the residence who do not qualify as occupiers.

60. The considerations of "common sense" and "public policy" referred to in *Halliday* could hardly support such a distinction.

61. *First*, it would require the police, before entry, to determine which of the residents on the premises is or are the occupant(s). Identifying whether one person or another is

the occupant is a notoriously difficult question.[13] It is one thing to know that there is a good reason to seek to speak with a person believed to be on certain premises; it is another to work out if that person is or is not the occupier in law of the premises.[14] It would defy common sense to expect or require these sorts of enquiries to be made in advance. And it would defeat the purposes for the recognition of the licence for the police, left in a state of uncertainty, to be obligated to telephone ahead and make enquiries whether their person of interest qualifies as an occupier.

62. *Secondly*, where police seek entry to speak with persons on premises about possible criminal offences, all persons have the same "right to silence" under the criminal justice system, whether they are occupiers or not. The occupier (whomever that may be) has a *superadded ability* to negate the licence – either in advance by public notice or by withdrawing permission after the police have stated their business – either in respect to all persons on the premises or only some of them. That does not detract from the equal enjoyment by all persons on the premises of the protections under the accusatorial system.

63. *Thirdly*, it falls within the fundamental duties of the police (see [9] and [10] above) that they should, within lawful limits, seek to investigate and where possible caution and advise people so as to prevent criminal activity occurring, wherever and by whomever it may occur. Persons do not have some special protection or immunity from the criminal justice system by reason that they have managed to become occupiers of a relevant home. The appellant's suggested limitation on the scope of the licence thus offends fundamental considerations of public policy. It would significantly fetter an important aspect of the police's basic duty for no purpose required to ensure equal treatment of persons before the criminal law.

64. *Fourthly*, the appellant purports to derive support for this limitation from an observation made by Brennan J in *Halliday* at page 9 that police entry involves a "contest between public authority and the security of private dwellings" (AS [32]).

65. This framework of analysis is of doubtful assistance. Framing police entry by reference to a contest between public interests does not naturally lend itself to a conclusion that (some) police rights of entry should be more circumscribed than those

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[13] *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at [73]; *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 659 (Aikin J); *Commissioner of Land Tax v Christie* [1973] 2 NSWLR 526 at 533-534; *Newcastle City Council v Royal Newcastle Hospital* (1959) 100 CLR 1 at 4.

[14] See, eg, *Neville v Halliday* [1983] 2 VR 553 at 556; *Pitt v Baxter* (2006) 159 A Crim R 293.

of visitors generally. The framework only highlights the important public interest in the effective detection, investigation and prevention of crime by police. Recognising a legitimate and compelling public interest in support of police entry, an interest which does not exist in the case of, say, a salesperson, is an unpersuasive argument for *restricting* police entry to a greater extent than that of the salesperson. The more natural conclusion might be thought to run against the appellant's case (*Tararo v The Queen* (2010) 1 NZLR 145 at [41]).

66. That the frame of reference of a "contest between public authority and the security of private dwellings" has been approved in other contexts (*Kuru v New South Wales* (2008) 236 CLR 1 at [45]) says nothing about its suitability in the implied licence context to identify some proposed police communications but not others as falling within the scope of the licence.

67. The majority in *Halliday* at pages 6 and 8 expressly rejected this frame of reference in the implied licence context. In part, the reason for that rejection is that police entry by implied licence is as "any member of the public". Police are to be neither privileged, nor disadvantaged, in their enjoyment of the implied licence. And so police cannot assert that the public interest in effective law enforcement gives them licence to go beyond the general communicative scope of the licence (*Tasmania v Crane* (2004) 148 A Crim R 346 at [13]) nor to remain after the licence has been revoked.

G. INSUFFICENCY OF REVOCATION IS NO ANSWER

68. Whoever be the entrant, entry by implied licence involves no derogation from property rights since the implied licence is inherently susceptible to qualification, negation or revocation by the occupier. The occupier need only assert their rights for those rights to prevail. The appellant acknowledges this in general (AS [40]) but argues that the majority reasons in *Halliday*, as reflected in the CoA Reasons at [37] AB 75-76, are "seriously undermine[d]" (AS [38]) in the circumstance of entry for proactive policing of an occupier. Two reasons for this are given: police exercise of the implied licence the same as other members of the public may give rise to grounds for the exercise of "extraordinary" or coercive police powers which may cut across any subsequent revocation of the licence (AS [38]); and "as a matter of practical reality" many occupiers may not know of, or feel confident in asserting their right of revocation against police (AS [39]). Neither reason is compelling.

69. *First*, there is again an immediately apparent incongruence between these suggested *reasons* and the scope of the *limitation* they are said to support.

70. Police do not require their own observations to establish reasonable grounds for the exercise of statutory powers dependent on a state of satisfaction. Nor do police require any initial suspicion to make observations establishing reasonable grounds. Thus, any sufficiently reliable member of the public, who observed the appellant from the alcove, could, by reporting those observations to police, enliven s 126(2A) of the *Police Administration Act 1978* (NT). Equally, if police were attending to return a missing pet or engaged in another "legitimate" purpose of entry (AS [33]) and observed the appellant committing an offence, s 126(2A) would be engaged. Neither police nor any particular subjective purpose are necessary.

71. And neither is it established in evidence or a matter of accepted or legislative fact that, faced with police attendance, occupiers have any less knowledge of, or capacity to assert, their right of revocation than in other contexts. Or that this phenomenon is confined to where police are engaged in proactive policing of the occupier rather than some other purpose for entry. Thus, in both respects, the appellant's limitation is both under- and over-inclusive of its purported justification.

72. *Secondly*, insofar as the appellant's own circumstances here are relied on to support a limitation of general application, caution is needed. The appellant was engaged in criminal conduct in a publicly visible manner. Although in her home, she took no steps to maintain her privacy. Her conduct was visible through the flyscreen door to anyone standing at her door. That her conduct attracted consequences is neither surprising nor unattractive. The fact that an occupier may open their door to investigating police is not an argument against police being permitted to knock (*Kentucky v King* 131 SCt 1849 (2011) at [16]).

73. *Thirdly*, privacy considerations are only of indirect significance. The implied licence is not a principle of privacy law but a principle of the law of real property. Privacy is relevant only as an incident of the right of occupation. The point can be demonstrated by observing that, had police stopped on the path just before stepping into the alcove and called to the appellant and Mr Johnson in otherwise identical circumstances, and with otherwise identical consequences, they could not have been trespassing and no issue would arise.

74. *Fourthly*, the asserted practical difficulties concerned with knowledge and assertion of the right of revocation were not matters developed in evidence or argument below. It has never been the appellant's case they she did not know that she could tell police to leave or that, in the face of police assertiveness, she was unable to do so. She did not give evidence nor cross-examine the police to this effect. The appellant's invoking

by analogy (AS [36], [39]) of the principle of voluntariness of admissions to police (see: *Macpherson v The Queen* (1981) 147 CLR 512 at 522; s 84 of the *Evidence (National Uniform Legislation) Act 2011* (NT)) only highlights the significance of this deficiency. There is no general limitation against the admissibility of *all* admissions on grounds that *some* of them might be given involuntarily. An accused relying on lack of voluntariness as a ground of challenge must develop a case on the evidence.

75. *Fifthly*, that leaves only the appellant's bare assertion (AS [43]) that most householders would object to police entry onto their property to investigate possible wrongdoing by themselves (although apparently not by other residents, including even relatives). The assertion is highly contestable, and asks this Court to reach a conclusion going well beyond the particular facts and evidence of this case.

76. It is contestable in the first place because it assumes that instead those householders would prefer to be confronted by police in public, whether ambushed on the street, at their workplace, or even at a friend or neighbor's house, or to have police shouting at them from the street the nature of their investigation and requesting permission to come to the front door. It remains the duty of police, generally, to investigate suspected criminal conduct and specifically to enforce domestic violence orders.[15] It cannot be assumed that police will have telephone access to a person of interest or suspect. Nor can it be assumed that householders would prefer to speak to police over the telephone. And if police cannot speak to persons of interest or suspects at an early point in their investigations they may ultimately be forced to resort to more invasive information gathering powers at a later point. Many persons might appreciate the opportunity to set the record straight and have police suspicions lifted.

77. Many more still might appreciate the importance of the work police do and would see nothing objectionable in the use by police to perform their work by the same powers exercised routinely by children, neighbors, delivery persons, proselytisers and salespeople.

78. The assertion is also not readily supported by the "common behavior of citizens" or the "habits of city life". Since at least *Davis v Lisle* [1936] 2 KB 434 the common law has recognised that police may enter onto private property to make inquiries and conduct investigations, including of and in relation to the occupier. That position was confirmed in *Robson v Hallett* where Diplock LJ observed disparagingly (at 953) that

[15] See ss 36(b), 40(b), and 46(b) of the *Domestic and Family Violence Act 2007* (NT) requiring that notice of a domestic violence order once made be provided to the Commissioner of Police for enforcement.

the proposition was "so simple" that no one had "thought it plausible up till now" to question it. There is no reason to think that these cases did not similarly reflect the pre-*Halliday* common law of Australia (*Dobbie v Pinker* [1983] WAR 48 at 53). Both majority and dissenting judgments in *Halliday* proceed on acceptance of those earlier English authorities. More recently, as noted above, intermediate appellate courts in the Northern Territory, Western Australia (*Pitt v Baxter* (2006) 159 A Crim R 293), New South Wales (*New South Wales v Dargin* [2019] NSWCA 47) and South Australia (*R v Daka* [2019] SASCFC 80) have endorsed or proceeded on this same basis. And yet, despite the law standing this way for the better part of the last century, signage or communications revoking the implied licence for police are not commonplace. Police have entered onto private property and occupiers have acquiesced in that over generations.

H. OVERSEAS AUTHORITY AGAINST THE APPELLANT

79. The law in the United Kingdom (*Robson v Hallett*), New Zealand (*Tararo v The Queen* (2010) 1 NZLR 145 at [18]-[19]), and the United States (*Florida v Jardines* 133 S Ct 1409 (2013) at 1416) is that, absent countervailing factual considerations or unauthorised conduct, police may enter onto private property and proceed directly to the front door to communicate with an occupier including where they suspect, or are investigating whether, the occupier has or may be committing an offence.

80. The law in Canada, in so far as it does not reflect the well-established principles described above, should not be adopted by this Court. The implied licence principles have been examined and applied there in a constitutional context having no analogue in Australia. Section 8 of the *Canadian Charter of Rights and Freedoms*, like the *Fourth Amendment to the United States' Constitution*, prohibits unreasonable searches. And an unreasonable search is one which "intrudes upon some reasonable privacy interest" (*Evans v the Queen* [1996] 1 SCR 8 at [12] (Sopinka, Cory and Iacobucci JJ, [39] Major and Gonthier JJ with whom L'Heureux-Dube J agreed). It is in that context that the Supreme Court of Canada has examined and applied the implied licence, as a tool of analysis for determining the scope of reasonable privacy interests.

81. Applying the implied licence within an exclusively privacy rather than proprietary driven framework distorts principle as it loses sight of the fundamental question: whether entry is as a trespasser or by leave or licence (*Coco v The Queen* (1994) 179 CLR 427 at 435-436 (Mason CJ, Brennan, Gaudron and McHugh JJ). Consequently, some members of the Supreme Court of Canada have preferred a constrained view of

the implied licence, deriving from a waiver of privacy framework (*Evans* at [16] Sopinka, Cory and Iacobucci JJ).

82. For those judges, police entry onto private property and approaching the door and knocking with the intention of "sniffing for marijuana" when the door was opened constituted a search. La Forest J arrived at the same conclusion that police conduct involved a search but did not consider the implied licence in his reasons. For Sopinka, Cory and Iacobucci JJ, "only those activities that are reasonably associated with the purpose of communicating with the occupant are authorized by the implied licence to knock" where "approaching [a] home for the purpose of substantiating a criminal charge against [the occupier]" is not reasonably associated with that purpose (at [16]). That reasoning is inconsistent with earlier English authority, such as *Byrne v Kinematograph Renters Society Ltd* [1958] 1 WLR 762, accepted by this Court in *Barker* at 247 (Mason J), 358-360 (Brennan and Deane JJ); 352 (Murphy J). An entrant's subjective purpose or motivation being adverse to the occupier does not result in an entry otherwise within the scope of the licence being trespassory.

83. The result is also directly inconsistent with *Robson v Hallett* and with two intermediate appellate court decisions (*R v Bushman* (1968) 4 CRNS 13; *R v Tricker* (1995) 21 OR (3d) 575) from which their Honour's purported to derive the statements of principle they applied (at [13], [15]). The reasons offer no explanation for this.

84. An equal number of judges in *Evans* (Major and Gonthier JJ, with whom L'Heureux-Dube J agreed) found that police entry was within the scope of the implied licence. Their reasons (at [40]-[42]) are to be preferred as they better accord with established principle.

85. The principle in *Evans* was refined in *Macdonald v The Queen* [2014] 1 SCR 37. The majority, comprising McLachlin CJ, LeBel, Fish and Abella JJ accepted (at [27]) that police had an implied licence to attend at a residence in response to a noise complaint in order to speak to the occupier. When the occupant presented at the door, holding what appeared to be a firearm, the police sergeant questioned what the occupant was holding and, after no response was given, pushed the door open to confirm his suspicions. The majority found that the act of pushing the door open constituted a search beyond the scope of the implied licence: "Speaking or shouting through the door or knocking on it falls within the waiver; pushing it open further does not". Although still framed in terms of privacy and waiver, the statement of principle otherwise accords with established principles. The implied licence will only rarely

permit entry inside a residence and holding the door partly closed is an overt act inconsistent with licence to look behind it.

86. The approach of the majority in *Macdonald v The Queen* does not assist the appellant and the rest of the Court did not deal with the implied licence.

I. THE APPELLANT FAILS ON GROUND 2 IN ANY EVENT

87. Special leave was granted on the basis that the facts were uncontroversial. However the framing of Ground 2, and the argument at AS [45]-[48], suggest that the appellant seeks to cavil with the finding of the Court of Appeal (CoA Reasons at [37] AB 75) that "the dual purpose of the visit by the police was to determine whether the terms of a DVO were being honoured and to check on the well-being of the protected person under the order [viz, Mr Johnson]".

88. Specifically, the appellant seeks to marginalise the protection of Mr Johnson to either a mere concern or motive for the exclusive purpose of investigating the appellant's compliance with her domestic violence order (AS [45), or alternatively to a subsidiary and non-actuating purpose of the entry (AS [48]).

89. The appellant should not be permitted to raise this challenge to the evaluation of the facts. In any event, the evidence cannot support this narrow and cramped view of the proactive policing in which police were engaged. It was not suggested to either Constables Elliot or Dowie that Operation Haven was exclusively, or even predominantly, concerned with prosecuting domestic violence offenders. And Constable Elliot was unchallenged when he said that "our main job is to intervene" (ABFM p9 line 41).

90. It is artificial in the extreme, whether legally or factually, to separate compliance from welfare and safety. Checking whether the appellant was complying with the domestic violence order and ensuring Mr Johnson's safety from domestic violence were *one and the same inquiry*. Under the *Domestic and Family Violence Act 2007* (NT) the object of "ensur[ing] the safety and protection of all persons … who experience or are exposed to domestic violence" (s 3(1)(a)) is "achieved by … the making of domestic violence orders … [and] the enforcement of those orders" (s 3(2)(a) and (c)). Put another way, these are purposes linked in series not parallel and so one purpose is not to the exclusion of another (D Bennett, 'The Ascertainment of Purpose when Bona Fides are in Issue: Some Logical Problems' (1989) *Sydney Law Review* 5).

91. The issue then becomes the following. Here, as is common, there was no single occupier of the residence. Mr Johnson was a leaseholder and resident of 6/41 Victoria Highway. Neither Constable Elliot nor Constable Dowie were investigating Mr

Johnson for any criminal activity. As far as Mr Johnson was concerned, police entry onto his private property was to investigate possible criminal conduct by another person (the appellant) in which he was the possible victim. From Mr Johnson's point of view, on the appellant's own analysis, the circumstances here were as, or more, conducive to the existence of an implied licence than those in *Halliday*.

92. Would the implied licence which would otherwise flow from Mr Johnson to the police be somehow negated by the fact that the person who was the possible offender against him (the appellant) happened to be a co-occupier of the property? We submit not.

93. A closely analogous question was answered adversely to the appellant by the New South Wales Court of Appeal in *New South Wales v Koumdjiev* (2005) 63 NSWLR 353 at [51] (Hodgson JA, Beazley JA and Hislop J agreeing) and by the Western Australian Court of Appeal in *Pitt v Baxter* (2007) 34 WAR 102 at [16] (Wheeler JA, Buss JA and Miller AJA agreeing). In each case the Court rejected an argument that one occupier of a unit could *expressly* revoke an implied licence conferred on police by another occupier or occupiers in relation to common areas of the unit complex held as tenants in common by each of the unit occupier. *A fortiori* in the absence of any purported express revocation by the appellant, the licence for police to enter will be implied.

Part VI: Notice of Contention

94. Inapplicable.

Part VII: Time estimate

95. The respondent estimates that it will require 2.5 hours for the presentation of oral argument.

Dated: 5 June 2020

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN: **AILEEN ROY**
Appellant

and

JULIE O'NEILL
Respondent

ANNEXURE
RESPONDENT'S LIST OF STATUTES

1. *Domestic and Family Violence Act 2007* (NT) ss 3, 36, 40, 46 (as in force 25 Nov 17 to 1 Dec 18).

2. *Police Administration Act 1978* (NT) ss 123, 126 (as in force 1 Sept 17 to 20 June 2018).