IMPRISONMENT FOR INFRINGEMENT OFFENCES: USING JUDICIAL REVIEW AND HUMAN RIGHTS LAW TO PROTECT PEOPLE FROM MODERN DAY DEBTORS PRISON

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All States and Territories have some form of infringements system through which low level offending is dealt with in an automated way. In the vast majority of cases, the process works well: a person puts his or her feet on the seat of a train, gets caught, is issued an infringement notice and pays the fine. This paper concerns what happens when fines are not paid and, as a result, the non-payer becomes at risk of being imprisoned without any of the procedural safeguards normally associated with deprivation of liberty at the hands of the state.

In Victoria, for example, a person can be imprisoned for – in some cases – hundreds of days where the underlying offences have never been proved, the process to the point of imprisonment has been essentially automated, there is no prosecutor, there is no disclosure regime, there is only one (often very short) hearing before a magistrate, the term of imprisonment is usually imposed by formula, there is no right of re-hearing and no right of appeal. In Queensland and New South Wales imprisonment for infringement offenders is imposed through a similarly automated system, although without a hearing before a judicial officer.

The catalyst to challenge the operation of this regime in Victoria was the 81 day imprisonment of a man with an intellectual disability. His intellectual disability was unknown to the court and, if known, it would be likely to have led to him not being imprisoned. In the absence of a rehearing or appeal right this obvious injustice was apparently incapable of remedy within the statutory framework. A similar case involving a mentally ill woman imprisoned under the regime emerged and was dealt with at the same time.

The successful judicial review of the magistrate's[1] decisions in *Taha v Broadmeadows Magistrates' Court & Ors; Brookes v Magistrates' Court of Victoria & Anor [2011] VSC 642* (*Taha*), upheld by the Court of Appeal in *Victorian Toll & Anor v Taha and Anor;* and *State of Victoria v Brookes & Anor* [2013] VSCA 37 (*Victorian Toll*), highlights two important issues explored further in this paper:

1. The use of human rights law – both by way of the principle of legality and through the Victorian *Charter of Human Rights and Responsibilities Act* 2006 (the *Charter*) – as an element of statutory construction to aid a finding of jurisdictional error.

2. The response of administrative law to the blurring of the line between administrative and judicial decision making. This case resulted in the imposition on a judicial officer of a duty to enquire without an express statutory basis. This raised – but did not answer – the question of where *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 takes the distinction between inferior courts and administrative decision makers, particularly in a State context.

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However, at its heart, this case illustrates the power of administrative law remedies to 'step in' to a system that profoundly – and apparently intentionally – abrogates both substantive and procedural due process rights yet can result in imprisonment.

The operation of the infringements system

Richard Fox, in *Criminal Justice on the Spot*, traces the development of infringements systems in Australia as far back as 1938, when the Parliament of South Australia passed the *Police Act Amendment Act 1938*, permitting some minor offences to be expiated by the making of a prescribed payment, described as 'expiation'.[2] The growth in the ownership of motor vehicles[3] and advances in detection of offences,[4] amongst other factors, led to the creation and development of an infringements system in Victoria, by way of the passage of legislation through the Victorian Parliament including the *Parking of Vehicles Act 1953* and the *Road Traffic Act 1956*.

The precursor to the current version of the Victorian infringements system was the Penalty Enforcement by Registration of Infringement Notice (PERIN) system, established in 1985.[5] As Tate JA noted in *Victorian Toll*, this system, until 2000, led 'ineluctably' and 'in the absence of any judicial determination' to the imprisonment of an infringer 'unless he or she actively took steps to avoid imprisonment'.[6]

The *Infringements Act* (*the Act*) overhauled the infringements system in 2006. The Act sets out a procedure for the enforcement of infringements offences, being any offence which:[7]

> may be the subject of an infringement notice under … any Act or statutory rule; or …under any local law; or … a by-law made under section 171 of the Water Act 1989 or a by-law made a prescribed Act; or … any Commonwealth Act or any Act of another State or Territory or any instrument under such an Act that applies as a law of Victoria.

Infringement Notices are served under Division 2 of Part 2 of the Act. The Notice requires payment of the penalty specified in the Notice within a nominated period. There is provision in the Act for reminder notices.[8] The person served may pay the fine or elect to have the matter dealt with in the Magistrates' Court as an ordinary summary criminal case.

If the person served does not pay, enter into a payment plan, or elect to have the matter heard in Court, then they are in default and the enforcement agency can lodge details of the infringement penalty with the Infringement Registrar at the Magistrates' Court under s 54 of the Act. The Infringements Registrar may then issue an Enforcement Order under s 59 of the Act. The Enforcement Order is an order of the Court.

If payment is not made under the Enforcement Order, then the Infringements Registrar must issue an Infringement Warrant under s 80 of the Act. Once an Infringement Warrant has been issued the person subject to it becomes an 'Infringement Offender'.

The Infringement Warrant authorises various forms of enforcement. Pursuant to an Infringement Warrant, the Sherriff may seize personal property or arrest the Infringement Offender and bring the person before the Court.[9] Once an Infringement Warrant has been executed, the Infringement Offender may not seek the revocation of an Enforcement Order.[10]

Where an Infringement Offender is brought before the Court, a magistrate can imprison an Infringement Offender. This is the first and only time that the infringements process involves a judicial officer.

Under s 160(1*)* the court may:

order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount.

A 'penalty unit' is currently $144.36.[11] The 'outstanding fines' include enforcement costs accrued to date.[12] In many cases the enforcement costs make up one third of the total amount converted into prison time. It is not unusual to see very large figures owing, often relating to repeated toll road infringements where the toll road operator is a private company.

Section 160 provides two ways to avoid the formula for imprisonment set out in s 160(1). First, under s 160(2), if the Court is satisfied that the offender '*has a mental or intellectual impairment, disorder, disease or illness*', or that '*special circumstances* [otherwise] *apply'*, the Court may:

- discharge the outstanding fines in full;
- discharge up to two thirds of the outstanding fines;
- discharge up to two thirds of the fines and order imprisonment in respect of the remaining amount; or
- adjourn the matter for up to six months.

Secondly, under s 160(3), if the Court is satisfied that 'having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh', the Court may:

- order the offender to be imprisoned for up to two thirds less than one day in respect of the number of penalty units to which the fines are equivalent;
- discharge the fines in full;
- discharge up to two thirds of the outstanding fines;
- discharge up to two thirds of the fines and order the offender to be imprisoned for up to two thirds less than one day in respect of the number of penalty units to which the fines are equivalent;
- adjourn the matter for up to six months; or
- make an unpaid community work order.

If the Court makes an order for imprisonment in default of payment of outstanding fines, under any of s 160(1), s 160(2) or s 160(3), a warrant to imprison may be issued, and the Court may make an instalment order for the payment of the fines (s 160(4*)*).

Any breach of an instalment order automatically activates the imprisonment warrant which is sent to the Sherriff for execution. There is no process in the Act to bring the person back before the court to test whether there was in fact a breach, whether the breach was reasonable, or whether the person's circumstances have changed thereby warranting a change to the instalment plan. In that sense the imprisonment order is apparently self-executing.[13]

In *Victorian Toll*, Justice Tate of the Court of Appeal described the non-adversarial nature of s 160 hearing:[14]

> The hearing that takes place under s 160 of the Act is not at all readily assimilated to a conventional criminal trial; rather, it is wholly different to such a proceeding given that it does not itself involve a contest on the infringement offences and it does not occur after there has been a trial on the merits.

> The hearing under s 160 is the first time an infringement offender will have appeared before the Court and nothing will be known by the Court of the circumstances of the conduct of the offence or the circumstances, financial, social or psychological, of the offender. The hearing is not adversarial. There is no prosecutor, nor anyone performing a quasi-prosecutorial role. As mentioned above, the infringements registrar does not appear. The 'basic information' is provided by staff of the registry of the Court. The only person to appear before the magistrate is the infringement offender, who may or may not be legally represented. The hearing consists in an exchange between the magistrate and the offender, or his or her legal representative. As I have observed, there is an absence of the substantive and procedural protections that would usually be expected from a process where a person is at risk of losing his or her liberty; namely, a disclosure regime; a right of appeal; or a process for re-hearing based on new material.

The Victorian system differs, to some degree, from that of other Australian jurisdictions. In NSW, the *Fines Act 1996* does not prevent applications for the annulment of enforcement orders after enforcement action has taken place.[15] The *Fines Act* also provides for 'work and development orders' for the expiation of infringements incurred by vulnerable persons, and provides for considerable flexibility in the making of these orders.[16] On the other hand, imprisonment orders are made by the State Debt Recovery Office, rather than by a magistrate.[17]

In Queensland, the *State Penalties Enforcement Act 1999* (Qld) does not prevent applications for the cancellation of enforcement orders after enforcement action is taken.[18] Similarly to New South Wales, imprisonment is imposed by order of a State Penalties Enforcement Registrar, not by a judicial officer.[19]

The infringements system in Victoria has expanded substantially in recent years. Reports by the Attorney-General on the system indicate that, from 2006/7 to 2011/12, the number of infringement notices issued increased from approximately 4.1 million to 4.79 million.[20] Over the same period, enforcement orders under s59 of the Act increased in number from 837,735 to 1,565,585.[21] Affidavit material filed by the appellants in the Court of Appeal in *Victorian Toll* indicated that, from 2006/7 to 2010/11, the number of imprisonment orders made under s 160 had increased from 93 such orders, to 917.

In order to reduce pressure on the more labour intensive summary criminal process, Victoria is currently piloting the use of infringement notices for 'mens rea' offences such as shop theft and disorderly conduct. The pressure to convert more summary offences into infringements offences is likely to be irresistible – for understandable reasons. The time taken for a Police Officer to issue an infringements notice is dramatically less than that required for a summary prosecution. It also eases pressure on an already over-burdened Magistrates' Court. Anecdotally, it seems that automatic detection of number plate technology is also having a significant impact.

Zacharia Taha and Tarni Brookes

Zacharia Taha was a disability support pensioner with an intellectual disability. He had a full-scale IQ of 61. He lived with his wife, three year old daughter, his parents and two brothers at his parents' house. He had been an in-patient at a psychiatric hospital, suffering from suicidal depression. His only income was his Centrelink payment. He had no savings and substantial debts. English was his second language.

On 11 September 2007 an infringement warrant was issued in relation to 30 unpaid fines incurred by Mr Taha between 2006 and 2008. Mr Taha could not read and was embarrassed to ask others to read letters about his fines to him. On 3 February 2009 he was arrested and bailed to appear at the Broadmeadows Magistrates' Court on 26 February 2009, in relation to $11,250.20 in outstanding fines (including costs).

Mr Taha was represented by a duty lawyer who, in accordance with s 2 of the *Legal Aid Act* 1978 (Vic) was seeing him 'other than by prior arrangement'. Mr Taha's intellectual disability

was not known or obvious and was not put as a result. An enquiry of his bench clerk to look at the plaintiff's history on 'CourtLink' would have revealed that Mr Taha had previously been placed on a Justice Plan pursuant to s 80 of the *Sentencing Act 1991* (Vic), a disposition only available to a person whom the Secretary for the Department of Human Services has certified has an intellectual disability. Mr Taha was on a disability pension, and thus an enquiry as to his income might have led to the disclosure of his disability.

In the absence of any submission about matters that could enliven s 160(2) or (3), exceptions to imprisonment, the magistrate did not consider or enquire into whether Mr Taha met the terms of those provisions. He simply imposed the level of imprisonment required by the s 160(1) formula with an instalment order of $80 per month. Had Mr Taha paid the $80 per month the debt would have taken 11 years to pay off. In the event of any default over that time he would be immediately imprisoned for one day in respect of each penalty unit owed.

Mr Taha paid $1,280 of the outstanding fines then stopped paying. He was then liable to be imprisoned for a period of 81 days. Mr Taha was an in-patient at Orygen Youth Health, as a result of severe depressive episodes, when the sherriff came to execute the imprisonment warrant. The sherriff agreed to defer execution of the warrant and Mr Taha telephoned Victoria Legal Aid, which commenced judicial review proceedings on his behalf.

Tarni Brookes was diagnosed as suffering from Post-Traumatic Stress Disorder arising from assaults on her during the course of a violent relationship.

Between 1999 and 2001, Ms Brookes incurred numerous fines associated with driving a motor vehicle. A high proportion of these infringements were for driving on a toll road without CityLink registration. She deposed that many of these offences were committed by her violent former partner.

On 2 September 2004, Ms Brookes was arrested on 68 warrants. She was bailed to appear before the Magistrates' Court at Broadmeadows on 13 October 2004. She did not appear on that day. On 10 May 2006, a warrant was issued for Ms Brooke's imprisonment. On 24 October 2008, she was arrested. A total of seventy five fines were outstanding at this time.

Ms Brookes was seen by a duty lawyer rostered to the police cells while being held at Broadmeadows Police Station. Ms Brookes deposed that communication with the duty lawyer was difficult as they were limited to speaking through a narrow opening in the cell door, that she was extremely anxious, and that she was asking the lawyer to get her out of the cells. She had little recollection of the conversation.

The duty lawyer took instructions relating to the circumstances of the infringements, the violence Ms Brookes had experienced, an attempted suicide, and her ongoing involvement with the mental health unit of the Northern Hospital. The duty lawyer submitted to the Court that her mental health and her circumstances generally activated s 160(2) of the Act. The magistrate stated that the only way the court could entertain the submission as to Ms Brookes' special circumstances was with the tender of appropriate written material.

The duty lawyer advised Ms Brookes that she could seek an adjournment to obtain the materials that the magistrate believed were necessary to support an application under s 160(2). Ms Brookes instructed the duty lawyer to deal with the matter that day and not to adjourn the case. This was in spite of the his advice that continuing without such materials would result in the Court making an instalment order and that the court would impose an order for imprisonment in default.

The magistrate, made orders that the total sum of $15,164.50 fines for the Infringement Warrants before him be paid in monthly instalments of $45.00 commencing 1 December

2008 and that in default of the unpaid amounts, Ms Brookes be imprisoned for 134 days. In November 2009, having defaulted on her payment plan, Ms Brookes sought legal advice.

The competing contentions and the result

Before Emerton J in the Supreme Court, Mr Taha argued that the magistrate had committed a jurisdictional error by making an imprisonment order under s160(1) without considering the availability of s 160(2) or s 160(3). Thus, it was submitted that the magistrate has misapprehended the limits of his powers.[22]

This 'unified' construction of the provision was at the core of Mr Taha's case.[23] It was contrasted with a 'stand alone' construction of s 160(1) in which imprisonment for all of the outstanding fines was the presumptive position and the power of the court in s 160(2) and (3) to impose a shorter term of imprisonment – or no term – were exceptions to be pressed by the Infringement Offender.

The 'unified' construction would treat the options in s160 as just that – options. A suite of responses all of which needed to be actively considered by a magistrate before imprisonment under s 160(1) was imposed, and which operated with no hierarchy. It was argued that the word 'may' in s 160(1) is given content by the options in s 160(2) and (3).

It was submitted that this 'unified' construction could only be given meaning if the magistrate had a positive duty to enquire as to whether the preconditions in s 160(2) and (3) existed. This followed from the absence of procedural and substantive protections for an Infringement Offender in a s 160 hearing.

The enforcement agencies submitted that s 160(1) was a stand alone provision and, even if it was not, any error was made within jurisdiction by an inferior court. They submitted that a duty to enquire stood profoundly at odds with the role of a judicial officer in what they steadfastly characterised as an adversarial proceeding. They also argued for determinative weight to be placed on the fact that both Mr Taha and Ms Brookes were represented by duty lawyers, rather than being self-represented.

In addition to the 'unified' construction argument, Ms Brookes submitted that the magistrate had failed to have regard to a relevant consideration, being her mental illness, in imposing imprisonment. She also argued that the failure to adjourn her matter was a denial of procedural fairness, and that the Court failed to fulfil a duty properly to enquire into her mental health – it having been put on notice of a mental health issue.[24]

The enforcement agencies submitted in response that the 'exceptions' to imprisonment in s 160(1) and (2) were for the infringement offender to prove and that because Ms Brookes had expressly not sought an adjournment, the magistrate was entitled to proceed.

Justice Emerton accepted the 'unified' construction and imposed a duty to enquire on the magistrate in Mr Taha's case because there were 'flags' that required an inquiry into the exceptions. In the absence of such an inquiry, the magistrate could not implement a 'unified' construction and thereby committed jurisdictional error. In Ms Brookes' case, the magistrate made the same error of construction. The error manifested in the decision to proceed to imprison when the magistrate was on notice of a mental health issue. Emerton J held that to properly implement a 'unified' construction the magistrate was obliged to be positively satisfied that the 'less draconian orders' were not available, before ordering imprisonment.[25]

The Court of Appeal refused the enforcement agencies leave to appeal, and in three concurring judgments, dismissed the appeal. All three judges held that the 'unified' construction was correct, that the Magistrate had not adopted such a construction, and that he thereby committed jurisdictional error. They were also unanimous that the magistrate was

obliged to enquire into Mr Taha's circumstances and was not entitled to adjourn Ms Brookes' case.

Justice Tate relied heavily on human rights considerations in arriving at the unified construction. In that regard she relied both on the principle of legality and the requirement to interpret statutes consistently with protected human rights in the *Charter*. She went further than both Emerton J and Nettle JA in holding that the duty to enquire was not case specific, but rather a universal duty applicable in all s 160 cases. In her view the liberty interests at stake, and the lack of procedural protections, warranted an essentially inquisitorial process.

Justice Nettle also drew support from the principle of legality and the *Charter*. He saw the duty to enquire (albeit a more limited duty that Tate JA found) as a necessary corollary of the unified construction in the particular context of s 160 hearings.

Justice Osborn, in a short concurring judgment, agreed with Tate JA's universal duty to enquire.

A 'unified' construction of s 160 – the impact of human rights

Because the decision maker under s 160 is an inferior court, a critical question was whether there had been truly a *jurisdictional* error. This turned on the construction of s 160.

All four judges considered that the text of s 160 permitted the 'unified' construction. Each judge also agreed that the purposes of s 160 told in favour of such a construction. Of particular importance was Emerton J's conclusion that s 160 was intended to deal with the 'particular circumstances' of individual infringement offenders, and thus should be seen as a 'package' of measures.[26]

With heavy reference to the Second Reading Speech and the Explanatory Memorandum for the *Infringements Bill 2005*[27] Emerton J concluded – and the Court of Appeal agreed – that three key purposes of the Act were:

1. that vulnerable people inappropriately caught up in the infringement system are to be filtered out of the system at various stages;

2. that where the filtering mechanisms in the Act have not succeeded or the fines have not otherwise been paid, the Court retains a range of options for dealing with the vulnerable offender; and

3. that imprisonment of the vulnerable offender for non-payment of fines is to be a measure of last resort.

Nonetheless, a stand-alone construction as pressed by the enforcement agencies was plainly available. Section 160(2) and (3) can reasonably be construed as exceptions to a general or default power of imprisonment. It is an uncontroversial proposition that a judicial officer is not usually obliged to deal with matters that are not put in issue – particularly where a person is represented. Thus, the deployment of human rights based propositions in support of the 'unified' construction became critical in this case.

The use of the principle of legality in particular will be important to any similar action taken in other jurisdictions where the relevant infringements legislation is not accompanied by extrinsic material as helpful as in Victoria.

Three human rights were said to be engaged in the question of how s160 should be construed:

1. the right to liberty;

2. the right to a fair hearing; and

3. the right to equality before the law.

The first two – the right to liberty and the right to a fair hearing – were deployed both under the rubric of the principle of legality and the interpretative mandate in s 32 of the *Charter*. The third – equality before the law – was deployed only on a *Charter* basis.

The principle of legality holds that 'in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities'.[28]

As Tate JA noted: 'Statutes are not to be construed as encroaching upon certain rights unless Parliament has made its intention to do so unequivocal' and 'where the intention to encroach upon rights is not manifest with 'irresistible clearness' a court must interpret the legislation, consistent with the principle of legality, as not abrogating or curtailing the rights in question'.[29]

Section 32 of the *Charter* provides that *'*so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

The approach to s 32 was notionally settled by the High Court in *Momcilovic v R* (2011) 245 CLR 1. It is widely considered to have rendered s 32 less influential than was previously thought to have been the case.[30] However, Tate JA's exegesis and application of *Momcilovic* breathes new life into the provision, by carefully examining the High Court's analogising of s 32 to the principle of legality.

Justice Tate started with French CJ's proposition that s 32 applies to interpretation of statutes in the same way as the principle of legality but with a wider field of application.[31] However, she eschewed the suggestion that s 32 was no more than a codification of the principle of legality:[32]

> Six members of the High Court made it plain that s 32 of the Charter was not analogous in its operation to s 3 of the Human Rights Act 1998 (UK), but rather required a court to apply the techniques of statutory construction set out in Project Blue Sky. Nevertheless, there was recognition that compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, might more stringently require that words be read in a manner 'that does not correspond with literal or grammatical meaning' than would be demanded, or countenanced, by the common law principle of legality. [footnotes omitted]

If Tate JA's approach becomes embedded – bearing in mind that Nettle and Osborn JJA were silent on the point – then s 32 will have greater impact on statutory construction in Victoria than has been assumed.[33] One only needs to highlight the existence of protected *Charter* rights well beyond those traditionally protected by the principle of legality, most significantly the right to equality before the law,[34] the right to privacy and reputation,[35], freedom of movement[36], freedom of expression[37] and the right to protection of the family.[38]

Tate JA accepted that both the right to liberty and the right to a fair trial were basic common law rights, freedoms and immunities to which the principle of legality applied.[39] She concluded, as Emerton J had, that a stand-alone construction of s 160 would abrogate both of those rights without the necessary explicit statutory authorisation for such abrogation.

Tate JA considered that the bare right to liberty was engaged by the subject matter of the proceeding, that being whether an infringement offender should be imprisoned.[40] Her Honour gave content to the right through the language of s 21(2) of the *Charter* that protects a person from arbitrary arrest and detention and by reference to the interpretation of Article 9 of the *International Convention on Civil and Political Rights* upon which s 32 is based.[41]

Thus, she concluded that she was obliged to adopt a construction of s 160 that was 'compatible with the rights of Mr Taha and Ms Brooke's not to be imprisoned in circumstances that were disproportionate or unjust'.[42]

The right to a fair hearing was deployed both in relation to the construction question and – as is discussed below – in relation to the existence of a duty to enquire. Justice Tate concluded that a construction that requires the magistrate actively to consider exceptions to imprisonment was consistent with the right to a fair hearing in s 21 and to the common law right not to be tried unfairly.

Justice Tate found that the right to equal protection under the law without discrimination (s 8(3) of *Charter*) was engaged:

> Mention has already been made of the fact that the impairment some infringement offenders suffer from may itself render them less capable than persons without such an impairment of informing the Court of (1) their impairment or (2) the effect of their impairment on the control they have over their conduct or (3) their ability to understand that their conduct constitutes an offence. A construction of s 160 which requires them to raise these issues with the Court before the Court is obliged to consider whether there are special circumstances in the case impose a requirement, condition or practice that is likely to have the effect of disadvantaging persons with an impairment which is not reasonable. The requirement is not reasonable because it imposes a condition before a person's impairment is taken into account that only those without that impairment are likely to be able to meet.
>
> A construction which has this as a consequence is incompatible with the right to equality under s 8(3) and s 32 compels its rejection in favour of a construction which is compatible with that right, namely the unified construction of s 160 and the duty on the Magistrate to inquire that it entails.

Thus, the 'unified' construction was required on every basis – text, context, purpose, and consistency with fundamental common law rights and those protected by the *Charter*. The question left unanswered by this construction alone was whether there were implicit protections in the s 160 process for a person in Mr Taha's or Ms Brookes' circumstances. Given that the 'unified' construction was required specifically to ensure that vulnerable people were not improperly imprisoned and that imprisonment was a sanction of last resort, the 'unified' construction was only important if it led to positive obligations being imposed on the magistrate which is what led to the imposition of the duty to enquire.

Imposition of a duty to enquire

It is not entirely clear from *Victorian Toll* on what juridical basis a duty to enquire was imposed.

Justice Nettle's conception of the duty to enquire has more in common with the approach taken to such a duty imposed on administrative tribunals. That is, Nettle JA saw the duty as arising on a case by case basis where there was sufficient material to warrant the inquiry.

Justice Nettle concluded that it was sufficient to demonstrate jurisdictional error that the magistrate had not given consideration to s 160 (2) & (3) and to consider whether enquiries were necessary in Mr Taha's case to determine how those provisions applied.[43] In the alternative, Justice Nettle considered that the absence of any reasoning as to the application of the s 160 (2) & (3) was itself an error of law on the face of the record and that such an error was reviewed under s 10 of the *Administrative Law Act*.[44]

In relation to Ms Brookes, Justice Nettle noted that it was indisputable that s 160(2) had been considered. Justice Nettle differed from Justice Tate in finding that the magistrate had not been in error in requiring written evidence of Ms Brookes' psychological impairment.[45] However, his Honour found that because this was essentially an administrative proceeding (not an adversarial one),[46] the magistrate was required to undertake the task of determining whether Ms Brookes had a relevant psychological impairment irrespective of the way in which Ms Brooks conducted her case.[47] The fact that Ms Brooks had chosen to proceed

without the written evidence of her psychological impairment did not excuse the magistrate from considering whether an adjournment was required. Such consideration was necessary in order for the magistrate's decision making power under s 160 to be properly informed and exercised.

In contrast, Tate JA (with whom Osborn JA agreed) conceived of the duty as universal on the basis that it is the necessary corollary of the 'unified' construction ie that the requirement to actively consider s 160(2) and (3) would only be meaningful if translated into a duty of inquisition. It was put in this way:

> To my mind it is not satisfactory to conclude, as the judge did, that a duty to inquire is only created in those cases in which there are 'flags' arising from the circumstances of the case that prompt the need for interrogation (for example, the fact that Mr Taha was in receipt of a disability pension). It is the statutory framework that determines the obligations imposed on the Court and these obligations must be universal, arising as they do from the overall statutory scheme and the role played in that scheme by the s 160 hearing. In my view, the unified construction of s 160, which obliges a magistrate to consider whether he or she should exercise alternative powers to imprisonment under sub-s (1), could be rendered nugatory were the magistrate not also under a duty to inquire whether there were any special or exceptional circumstances arising. As the judge observed, given the nature of the circumstances underlying the exceptions, especially those of mental illness and intellectual disability, the legislative intent to protect the vulnerable could be thwarted if it fell to the offenders whom the exceptions were designed to protect to raise their circumstances with the Court. The basic information provided to the Court, as set out in the Act, would be unlikely to provide the necessary factual material on which a magistrate could rely to discharge the obligation to consider the alternative powers under sub-ss (2) and (3). Thus, in my view, the unified construction entails that the Court in a s 160 hearing is always under a duty to inquire; that is, the duty to inquire is a necessary consequence of the unified construction. [footnotes omitted]48

Justice Tate also addressed the question of the content of the obligations arising under s 160:

> what is required to discharge the obligation to inquire will depend on the particular circumstances of the case. This is somewhat analogous to the obligation to accord procedural fairness, the content of which 'will depend on the facts and circumstances of the particular case'. Just as the content of the requirement on a decision-maker to provide an opportunity to be heard is variable and admits of a 'chameleon' quality, so too what is necessary for a magistrate to do to discharge the duty to inquire will vary from case to case. It is not the case that the magistrate must mechanically ask a series of ritualised questions of every infringement offender, a vice which the judge wished to avoid, but he or she should at least ask every infringement offender, or the offender's legal representative, if there are any special or exceptional circumstances relevant to the case and, if necessary, if the offender has a mental or intellectual impairment, or a serious addiction to drugs or is homeless. It may be necessary to adjourn the proceeding for a legal representative to obtain the relevant information. In some circumstances, it may also be necessary, if the material would be of central relevance and is readily available, to check the records or information systems of the Court to determine whether special or exceptional circumstances arise in the case. [footnotes omitted]49

Justice Tate rejected the argument that the imposition of the duty to enquire would create uncertainly in the system. She held that this concern was addressed in part by the fact that the content of the duty to enquire would depend on the facts and circumstances of a particular case.[50] Further, the fact that Mr Taha and Ms Brookes had been represented by duty lawyers did not mean that the magistrate was relieved of the duty to enquire. While Her Honour indicated that representation would be relevant to the question of the scope of this type of duty to enquire, she pointed out the pressures under which duty lawyers operate and the vulnerability of clients in this system who might not raise with the lawyers the existence of their mental illness or intellectual disability.[51] Her Honour also rejected an argument that the duty to enquire would put the magistrate in an impermissibly inquisitorial role. Her Honour pointed out that precedent indicating that the magistrate might not be put in such a position had been made in a criminal context, not in circumstances of a proceeding which is not adversarial.[52]

Yet, this justification does not seem to provide a satisfactory answer. If the effect of a 'unified' construction is to make s 160(2) and (3) mandatory considerations, then that does

not necessarily carry with it the requirement of inquisition. It is more likely simply to require consideration of the various statutory options for disposition.

In reality, it seems that the duty to enquire was imposed as an exceptional response to the exceptional conditions under which a s 160 hearing operates; that is, a single hearing without a prosecutor, without disclosure, and with minimal legal assistance the consequence of which can be lengthy terms of imprisonment without rights of re-hearing or review. One cannot escape the conclusion that remedies available in administrative law were here substituting for the – presumably deliberate – decision of the Parliament not to provide the procedural protections that exist even for minor summary criminal prosecutions.

It is otherwise difficult to rationalise the imposition of a duty to enquire in this context with the otherwise heavily qualified and limited duties to enquire imposed on administrative decision makers. The primary statement of the duty in Australia is in *Prasad v Minister for Immigration and Ethnic Affairs*,[53] in which Wilcox J supposed three models for the duty to enquire:[54]

(1) At one extreme, the court would consider unreasonableness only on the basis of material actually or constructively before the court;

(2) At the other extreme, the court could refer to all the evidence before the decision-maker, even if that includes material not readily available to him;

(3) An intermediate model was favoured by his honour, with reference to 'such additional facts as the decision-maker would have learned but for any unreasonable conduct by him'.

His Honour elaborated:[55]

> It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make enquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have exercised it.

The theoretical basis for review based on a breach of a duty to enquire has been elusive. *Prasad* itself appears to treat the breach of the duty as amounting to unreasonableness or irrationality, whereas cases arising in the migration field tend to focus on jurisdictional error by the failure to exercise a statutory obligation to review.[56] In *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at 559-560 the question of a duty to enquire was treated as a subset of procedural fairness. In *Goldie v Commonwealth*[57] it was characterised as a failure to take relevant considerations into account. In *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, the High Court sounded a caution about the use of the term 'duty to inquire', noting that the term 'is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error'. The Court pointed out that a failure to make 'an obvious inquiry' might be characterised as a jurisdictional error of one sort or another, but indicated that this would depend to a significant degree on the particular statutory context of the decision in question.[58]

Arising from *Prasad* are two threshold requirements,[59] before the duty can be said to exist:

a) that the information is centrally relevant;[60] and

b) that the information is readily available.

Whether information is 'readily available' depends on context.[61] Examples of information that satisfies this criterion include an accessible medical opinion on recidivism,[62] information

comparing educational standards in Australian and Chinese schools,[63] and further medical evidence from a General Practitioner.[64]

Smythe identifies a number of additional relevant but not determinative factors in establishing a duty to enquire:[65]

a) **the efficiency of the process** – a duty to enquire may not exist if to impose such a duty would impede the proper functioning of the tribunal in its statutory and procedural context.

b) **awareness of further information** – A factor telling in favour of the existence of a duty to enquire is knowledge (whether actual or constructive) of the information that the inquiry would reveal. In the cases of Mr Taha and Ms Brookes, the magistrate did not have actual knowledge of the relevant information. There was nothing particular about the circumstances known to the magistrate which indicated the existence of their conditions.

c) **the nature of the decision** – A heightened level of scrutiny is expected to be given to certain kinds of decisions. In *Goldie v Commonwealth*[66] it was noted that *'[g]iven that deprivation of liberty is at stake, [relevant] material will include that which is discoverable by efforts of search and inquiry that are reasonable'*.

Kirk and the difference between inferior courts and administrative tribunals

This case illustrates the increasingly blurred line between administrative decision makers and inferior courts. Although the decision maker in these cases was clearly a judicial officer of an inferior court, the nature of the process he engaged in had as many hallmarks of administrative power – as Nettle JA expressly noted – as it did of judicial power. As noted above, one of the major changes that the Act introduced was to bring in a judicial officer at the point at which a person could be imprisoned. However, these cases strongly suggest that this may be no more than window dressing if all that the magistrate usually does is to apply the formula in s 160(1).

This issue was important in this case with the enforcement agencies relying heavily on the distinction between inferior courts and administrative tribunals to submit that any errors the magistrate made were within jurisdiction and that he could not be fixed with a duty to enquire. They relied on the High Court decision in *Craig*,[67] which held that where judicial review is sought of an inferior court the grounds of judicial review are more limited.[68] Particularly, it noted that an inferior court:[69]

> falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.

In *Kirk*,[70] the High Court confirmed the difficulty in classifying errors as jurisdictional or otherwise:

> In Craig v South Australia, this Court recognised the difficulty of distinguishing between jurisdictional and non-jurisdictional errors, but maintained the distinction. As was pointed out in Re Refugee Review Tribunal; Ex parte Aala:
>
> 'The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.'
>
> As was also pointed out in Aala, there can be no automatic transposition to Australia of the principles that developed in England in relation to the availability of certiorari and prohibition. The constitutional

> context is too different to permit such a transposition. At the federal level, allowance must be made for the evident constitutional purposes of s 75(v) of the Constitution; at a State level, other constitutional considerations are engaged. As was pointed out by Gummow J in Gould v Brown, '[w]hen viewed against the Constitution in its entirety, Ch III presents a distinct appearance. Upon what had been the judicial structures of the Australian colonies and, upon federation, became the judicial structures of the States, the Constitution by its own force imposed significant changes.' [footnotes omitted]

Kirk thus affirms the distinction between jurisdictional error and error of law in Australian administrative law. In doing so, the majority judgment acknowledges the work of Jaffe and cites his assertion that denominating some questions as 'jurisdictional':

> is almost entirely functional: it is used to validate review when review is felt to be necessary ... If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified.71

Writing extra-judicially on the impact of *Kirk*, the Honourable JJ Spigelman AC said of the process of determining what matters are 'jurisdictional' that:

> The process of identifying what facts or opinions or procedural steps or judgments are jurisdictional is a matter which turns, primarily, on a process of statutory interpretation. All of the relevant principles of the law of statutory interpretation apply. The fact that different judges may reach different conclusions with respect to matters of this character is not surprising in view of the significant range of elements that must be taken into account.72

To put it another way, 'jurisdictional error' might best be seen as a functional post hoc classification, turning on pragmatic questions.[73] The upshot will be that 'intuitive assessments will need to be made of the extent to which a decision-making body is straying from its statutorily assigned functions'.[74]

The consequences of this conclusion have some importance in considering the use to which the concept of 'jurisdictional error' can be put. As one commentator noted:

> The evident doubt that the assumed distinction can always be clearly drawn, particularly in the State constitutional context, necessarily throws doubt upon the bifurcated approach to jurisdictional error that has been seen as flowing from, and based upon, that distinction. In short, the court would seem less willing to rely upon that distinction in the future and to be more prepared to engage in a frank assessment of the seriousness of the error made by the body under review, whether that body is a 'court' or a 'tribunal'.75

Following *Kirk,* and as illustrated by *Victorian Toll*, the limitations on the distinction in *Craig* between the narrow grounds of review available in respect of the decisions of inferior courts and the wider grounds of review available in respect of administrative tribunals, are becoming clearer. In *Kirk*, the High Court put it this way:[76]

> The drawing of a distinction between errors within jurisdiction and errors outside jurisdiction was held, in Craig, to require different application as between 'on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ.
>
> …
>
> The basis for the distinction thus drawn between courts and administrative tribunals was identified in the lack of authority of an administrative tribunal (at least in the absence of contrary intent in the statute or other instrument establishing it) 'either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law'. By contrast, it was said that 'the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine.
>
> Behind these conclusions lies an assumption that a distinction can readily be made between a court and an administrative tribunal. At a State level that distinction may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution. No less importantly, behind the conclusions expressed in Craig lie premises about what is meant by jurisdictional error. Unexpressed premises about what is

> meant by jurisdictional error give content to the notion of 'authoritative' when it is said, as it was in Craig, that tribunals cannot 'authoritatively' determine questions of law, but that courts can. [footnotes omitted]

Commentary on *Kirk* has pointed out that the High Court probably has a desire to retain a 'functional' view of jurisdictional error in order to afford itself flexibility in superintending other courts.[77] This is especially important in light of what the High Court identified as the difficulty in accurately identifying judicial, as opposed to administrative, decision making in a State context.

In any event, the application of *Kirk* was not determinative in these cases – perhaps surprisingly so. All of the judges on appeal held, like Emerton J, that the magistrate had fallen into an error within the scope of *Craig*, misconceiving the nature of his jurisdiction. Thus, it was of no final consequence whether the decision maker was, properly understood, exercising judicial or administrative power.

Conclusion

Victorian Toll is an important decision mainly because it will mean that people like Mr Taha and Ms Brookes do not go to prison without a judicial officer properly assessing whether or not they should. It also highlights the increasingly important role of administrative law remedies as the State increasingly seeks – for understandable policy reasons – to make the administration of high volume criminal offences more efficient. It vividly highlights the way in which human rights principles – whether deployed through the principle of legality or by way of the *Charter* – can be used to creative effect. Further, it is difficult to escape the conclusion that the willingness to impose inquisitorial obligations on a judicial officer was precisely because of the absence of the usual features of the exercise of judicial power – particularly where that exercise results in loss of liberty.

Taha has had the pleasing effect of being a catalyst for legislative change. Amendments to create a re-hearing right have passed the Victorian Parliament[78] and await commencement. However, it *remains* the case that an instalment order can operate – as in Mr Taha's case – for more than a decade with a self executing imprisonment order for the barest or most understandable of breaches. When imprisonment is imposed in this way for offences including non-payment of road tolls to private companies are we really far beyond the debtors prisons of past centuries?

Endnotes

1 It was the same Magistrate in each case.
2 Richard Fox, *Criminal Justice on the Spot* (Canberra: Australian Institute of Criminology, 1995), 3-4.
3 Fox, above n 2, 7-9.
4 Fox, above n 2, 9-10.
5 Fox, above n 2, 54.
6 *Victorian Toll,* [65]
7 *Infringements Act 2006* (Vic) *s 3*.
8 *Infringements Act 2006* (Vic) s 29.
9 *Infringements Act 2006* (Vic) s 82.
10 *Infringements Act 2006* (Vic) s 65(2).
11 See *Monetary Units Act 2004* (Vic), s 5; Victoria, *Government Gazette*, No G 16, 18 April 2013.
12 See *Infringements Act 2006* (Vic), ss 3, 59 and 81.
13 This at least has been assumed to be the position. VLA has developed an argument that s 160(4)(b) of the *Infringements Act* Incorporates the scheme under the *Sentencing Act 1991* (Vic) which would mean that imprisonment orders were not self executing on default. Instead, a person alleged to have breached an instalment order would need to be brought before the court to be further dealt with, and the instalment order could be varied.
14 *Victorian Toll* at [184].
15 See *Fines Act 1996* (NSW) s 48, cf *Infringements Act 2006* (Vic) s 65.
16 See *Fines Act 1996* (NSW) ss 99A-99J.
17 *Fines Act 1996* (NSW) s 87.

18 *State Penalties Enforcement Act 1999* (Qld) s 56.
19 *State Penalties Enforcement Act 1999* (Qld) s 119.
20 Data sourced from:
Attorney-General's annual report on the infringements system 2011–12.
Attorney-General's annual report on the infringements system 2011–12.
Attorney-General's annual report on the infringements system 2010–11.
Attorney-General's annual report on the infringements system 2009–10.
Attorney-General's annual report on the infringements system 2008–09.
Attorney-General's annual report on the infringements system 2007–08.
21 Ibid.
22 *Taha* at [23].
23 *Taha* at [24].
24 *Taha* at [90].
25 *Taha* at [66].
26 *Taha* at [49], [66].
27 *Taha* at [56], [57].
28 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 384 n 56 per McHugh, Gummow, Kirby and Hayne JJ. This is a canon of construction directed to the objective of giving words of a statutory provision the meaning which the legislature intended them to have: See *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573, 591-592 [43] (referring to *Project Blue Sky*); *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 437.
29 *Victorian Toll* at [191], [192], citing O'Connor J in *Potter v Minahan* (1908) 7 CLR 277.
30 See, for example, Stephen Tully *'Momcilovic v The Queen* (2011) 245 CLR 1' (2012) 19 *Australian International Law Journal* 279, 281.
31 *Victorian Toll* at [188] citing *Momcilovic* at [51].
32 *Victorian Toll* at [190].
33 Note, in this respect, the subsequent consideration of the operation of section 32 of the *Charter*, in *Nigro & Ors v Secretary to the Dept of Justice* [2013] VSCA 213, especially at [85] per Redlich, Osborn and Priest JA, which might be seen as advancing a narrower interpretation of the provision's effect.
34 *Charter,* section 8.
35 *Charter,* section 13.
36 *Charter,* section 12.
37 *Charter,* section 15.
38 *Charter,* section 17.
39 *Victorian Toll* at [201], [208].
40 *Victorian Toll* at [197].
41 *Victorian Toll* at [199], referring to *Minister for Immigration v Al Masri* (2003) 126 FCR 54.
42 *Victorian Toll* at [200].
43 *Victorian Toll* at [30].
44 *Victorian Toll* at [34].
45 *Victorian Toll* at [47].
46 Because it held that the Magistrate had misconceived his jurisdiction, the question of whether the s 160 process was a judicial or administrative process was not reached by the Court of Appeal. Justice Tate gave some consideration to the question of whether the power being exercised under *s160* should properly be characterised as judicial or administrative. She noted at [241] that, in circumstances where a court was imposing imprisonment, it had "many hallmarks of judicial power". Bodies other than Ch III courts cannot exercise the judicial power of the Commonwealth – see *New South Wales v Commonwealth* (the *Wheat Case*) (1915) 20 CLR 54. Punishment involving deprivation of liberty is generally considered to be a judicial function (see *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ; *Fardon v Attorney-General (Qld)* (2004) 219 CLR 562 at 611-13 per Gummow J). Thus, if the s 160 process were administrative, rather than judicial, there might be questions as to its constitutionality.
47 *Victorian Toll* at [50].
48 *Victorian Toll* at [167].
49 *Victorian Toll* at [168].
50 *Victorian Toll* at [168].
51 *Victorian Toll* at [173] – [177].
52 *Victorian Toll* at [184].
53 (1985) 6 FCR 155.
54 Id at169.
55 Id at 169-170.
56 Most notably *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429.
57 (2002) 117 FCR 566, 569 (Gray and Lee JJ).
58 At [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
59 Mark Smythe, 'Inquisitorial Adjudication: the Duty to Enquire in Merits Review Tribunals', [2010] 34 Melbourne University Law Review 230, 248.

60 *Luu v Renevier* (1989) 91 ALR 39, 49–50 (Davies, Wilcox and Pincus JJ); *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 119 (Wilcox J); *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220, 251 (Sackville J) (as cited in Smythe, above n 57, at n.154).
61 *MZXRS v Minister for Immigration and Citizenship* (2009) 106 ALD 305, 315 (Jessup J).
62 *Luu v Renevier* (1989) 91 ALR 39, 50 (Davies, Wilcox and Pincus JJ).
63 *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571, 578–9 (Ryan and Finkelstein JJ).
64 *Mustafay v Secretary, Department of Family and Community Services* [2004] AATA 819. (6 August 2004) [5] (Dr Christie).
65 Smythe, above n 57 at 254.
66 (2002) 117 FCR 566, 569 (Gray and Lee JJ).
67 *Craig v South Australia* (1995) 184 CLR 163 (*Craig*).
68 *Craig* at 176.
69 *Craig* at 177.
70 *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 (*Kirk*) at 571.
71 *Kirk* at 570.
72 James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 PLR 77, at 85.
73 Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 PLR 92, at 103.
74 Id at 103.
75 Id at 95.
76 *Kirk* at 572.
77 Wendy Lacey, '*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*' (2010) 34 MULR 641, at 660.
78 See Part 6 of the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).