

CASE NOTE

MIGRANT SMUGGLING, CRIMINAL FAULT AND THE LEGAL STATUS OF AUSTRALIA: *PJ v THE QUEEN**

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In PJ v The Queen, the Victorian Court of Appeal clarified the fault elements of the offence of ‘aggravated people smuggling’ in the Migration Act 1958 (Cth). The consequence of this case is that the prosecution is now required to prove that the defendant intended to arrive at a destination which he or she knew to be part of Australia. The Court emphasised that the offence calls for the defendant’s awareness of the ‘legal status’ of Australia. This finding rejected the submission of the Commonwealth Director of Public Prosecutions that the prosecution need only demonstrate an intention to reach ‘a place’ which had the legal status of Australia, regardless of whether the defendant actually knew that it was part of Australian territory. This case note examines two considerations relevant to the Court’s construction of the offence: rules of interpretation provided by the Criminal Code, and the distinction between mistakes of legal status and ignorance of the law. First, it suggests that the model of offence disaggregation embodied by the Criminal Code paradoxically complicated, rather than simplified, the Court’s analysis of the provision. Second, it notes that the Court’s analysis of the relationship between mistakes of ‘legal status’ and criminal fault placed greater emphasis on the role of absolute liability provisions than on the common law distinction between mistakes of fact and ignorance of the law.

I INTRODUCTION

The first people smuggling trial in Victoria concluded with the acquittal of two Indonesian men on 1 August 2012.¹ The accused, Mr Sore and Mr Rustam, were intercepted by federal authorities off the coast of Christmas Island in 2010 and subsequently charged with the crime of aggravated people smuggling.²

* (2012) 268 FLR 99.

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1 ‘Accused People Smugglers Cleared’, *ABC News* (online), 1 August 2012 <<http://www.abc.net.au/news/2012-08-01/accused-people-smugglers-cleared/4170110>>.

2 *Ibid*; Victoria Legal Aid, *Acquittal in First Victorian People Smuggling Trial* (8 August 2012) <<http://www.legalaid.vic.gov.au/about-us/news/acquittal-in-first-victorian-people-smuggling-trial>>; Victoria Legal Aid, *Boat Crew Acquitted in Victoria’s First People Smuggling Trial* (1 August 2010).

This offence carries a maximum penalty of twenty years' imprisonment,³ and a mandatory minimum penalty of five years' imprisonment.⁴ At trial, the defendants' case was framed by the powerful narrative that the accused did not actually understand they were heading towards Australia, and that they were not even seeking arrival in Australia.⁵ Since the recent rise in people smuggling prosecutions, a number of trials around the country have similarly turned on the question of the accused's understanding about their destination.⁶

This legal question coincides neatly with recent social and economic analysis about the nature of people smuggling operations, and specifically those which have Australia as their planned destination. Missbach and Sinanu suggest that the involvement in irregular maritime journeys of accused people smugglers, who allegedly guide their vessel in a particular direction, is often neither calculating nor deliberate: rather than acting as the 'mastermind' of the voyage, these defendants can be better viewed as boat crew who follow the instructions of the journey's organisers who remain overseas (for instance, in Indonesia).⁷ The authors point out that 'not all personnel within a [people smuggling] network are intimately connected with its operation' and comment specifically that '[t]he knowledge of minor handymen such [as] transporters, is most often limited'.⁸ This is supported by the work of Andreas Schloenhardt, to which the authors refer, which has categorised and drawn attention to the different organisational roles played by people involved with people smuggling.⁹ Of particular relevance here is Schloenhardt's distinction between 'transporters' and 'crew members'. Schloenhardt characterises a transporter as 'the person *in charge* of assisting the migrants in leaving the country of origin by whatever means (land, air or sea)¹⁰ and distinguishes this role from that of crew members, who are 'people *employed by the traffickers* to charter trafficking vessels and accompany migrants throughout the illegal passages'.¹¹ This description stands in even more contrast to the role of the 'arranger/investor', who Schloenhardt identifies as the person who 'oversees the whole criminal organisation and its activities' and yet often

3 *Migration Act 1958* (Cth) s 233C(1).

4 *Ibid* s 236B(3)(c).

5 Victoria Legal Aid, *Acquittal in First Victorian People Smuggling Trial*, above n 2.

6 See, eg, *Zamudin v The Queen* [2013] NSWCCA 120 (22 May 2013); *Alomalu v The Queen* [2012] NSWCCA 255 (26 November 2012).

7 Antje Missbach and Frieda Sinanu, "'The Scum of the Earth?'" Foreign People Smugglers and Their Local Counterparts in Indonesia' (2011) 30(4) *Journal of Current Southeast Asian Affairs* 57, 66. See also Loukas Founten, "'Tricked" People Smugglers Freed by Court', *ABC News* (online), 12 September 2012 <<http://www.abc.net.au/news/2012-09-11/people-smugglers-freed-by-court/4255236>>.

8 Missbach and Sinanu, above n 7, 66. The authors emphasise that the view of people smuggling networks in Indonesia as 'steep hierarchical structures' should be abandoned in favour of one that recognises them as 'loose, temporary and acephalous' — as 'decentralised configuration[s]'.⁸

9 Andreas Schloenhardt, 'Trafficking in Migrants: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region' (2001) 29 *International Journal of the Sociology of Law* 331, 341, cited in Missbach and Sinanu, above n 7, 66; Andreas Schloenhardt, 'The Business of Migration: Organised Crime and Illegal Migration in Australia and the Asia-Pacific Region' (1999) 21 *Adelaide Law Review* 81, 93–5.

10 Schloenhardt, 'The Business of Migration', above n 9, 93 (emphasis added).

11 *Ibid* 94 (emphasis added).

maintains anonymity with the ‘lower levels of employees’.¹² If this analysis is accurate, it is conceivable — if not in some cases probable — that intercepted boat crew would have limited knowledge, if any, about the intended destination. Even defendants who have conceded some knowledge about a people smuggling operation have been described by Australian courts as ‘middlemen’, rather than the ‘primary organisers’.¹³ This characterisation of the operational role played by such defendants on trial for people smuggling is clearly important for the question of their criminal responsibility. In an interview earlier this year, Victoria Legal Aid lawyer Sarah Westwood described the defendant in *PJ v The Queen* as someone who was ‘approached by a man who recruited him to work on a boat’ and ‘told very little about what it was that he was supposed to do’.¹⁴

In *PJ v The Queen*,¹⁵ the Victorian Court of Appeal clarified that these details are relevant to the requirements of people smuggling offences. In an extensive and convincing joint judgment, Maxwell P, Hansen and Redlich JJA held that the prosecution must prove beyond reasonable doubt that the accused understood Australia to be the intended end-point of the voyage. This finding overturned the decision of Judge Maidment at first instance in the County Court. The earlier ruling held that so long as the accused had a particular destination in mind which correlated with the geographical and legal status of Australia, the prosecution could demonstrate the fault elements of the offence.¹⁶ The decision of the County Court meant that, given the direction of the intercepted vessel, the fault requirement of people smuggling could be essentially reduced to the proposition that the accused intended to reach a destination; the accused need not be aware that this intended destination was part of Australia.

The consequence of the decision in *PJ v The Queen* is that the prosecution must now adduce evidence showing that the accused knew that his intended destination was part of Australian territory. To understand the implications of this finding for criminal trials, there is a preliminary need to distinguish between two factual possibilities. On one hand, the defendant might have no idea at all about the direction in which the boat is headed, in which case he or she could not be convicted. This view was effectively conceded by the Commonwealth Director of Public Prosecutions.¹⁷ On the other hand, the defendant might know that the boat

12 Ibid 93.

13 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3783, quoted in Andreas Schloenhardt and Charles Martin, ‘Prosecution and Punishment of People Smugglers in Australia 2008–2011’ (2012) 40 *Federal Law Review* 111, 125. See also Andreas Schloenhardt and Linley Ezzzy, ‘Hadi Ahmadi — and the Myth of the “People Smugglers’ Business Model”’ (2012) 38(3) *Monash University Law Review* 120.

14 ABC Radio National, ‘Another People Smuggling Case Falls Over, as Government Changes Approach’, *World Today*, 3 September 2012 (Simon Lauder) <<http://www.abc.net.au/worldtoday/content/2012/s3581534.htm>>.

15 (2012) 268 FLR 99.

16 Ibid 101.

17 The joint judgment recalled that ‘Senior counsel for the Director accepted in argument that ... the accused would need to be shown to have understood that he was “facilitating the bringing of persons to a particular destination”. That is, it would need to be established that the accused knew he was facilitating an enterprise of that character’: *PJ v The Queen* (2012) 268 FLR 99, 107 [25].

is heading towards the area known as Christmas Island, but might nonetheless be unaware that Christmas Island is part of Australia. It is this second possibility that was the matter of contention. The Court said that these facts would not satisfy the fault elements of the offence. Ultimately, then, a defendant who was unaware of his destination or who did not intend to reach Australia cannot properly be convicted of the offence of aggravated people smuggling and, by extension, other people smuggling offences under sub-div 12 of the *Migration Act 1958* (Cth) (*Migration Act*).

The Court's elemental analysis of the people smuggling provisions has had immediate ramifications for the conduct of people smuggling prosecutions across the country,¹⁸ perhaps best shown by the Commonwealth Director of Public Prosecutions' discretionary withdrawal of half of the people smuggling trials listed in Victoria.¹⁹ Although the Court's decision has not yet been the subject of appeal or judicial comment by the High Court, it has been recently followed as an authoritative interpretation of the relevant offence provision by appellate courts in both South Australia and New South Wales. In *R v Zainudin*,²⁰ the South Australian Court of Criminal Appeal held that

in order to prove the first fault element identified ... the prosecution must prove that a defendant knew that the intended destination of the five persons was Australia, *not merely that the defendant knew the destination and that destination happened to be Australia as a matter of law*.²¹

Similarly, the New South Wales Court of Criminal Appeal decided to follow the Victorian Court of Appeal's finding in the case of *Sunada v The Queen*,²² where the joint judgment of Macfarlan JA, Price and McCallum JJ commented that *PJ v The Queen* was a 'carefully reasoned decision dealing comprehensively with issues arising out of legislation which, for present purposes, we regard as materially indistinguishable'.²³

This case note confines itself to the Court's interpretive approach to resolving an alleged ambiguity in the people smuggling offence provisions. Of course, it is worth recognising the variety of legal policy matters relevant to Australia's criminalisation of people smuggling, including the prospect of mandatory

18 Their Honours identified the ramifications of the case by commenting that '[p]lainly enough, this is a question of considerable importance, with implications for trials to be conducted around Australia': *PJ v The Queen* (2012) 268 FLR 99, 101 [4].

19 Victoria Legal Aid, *Charges Dropped as Mandatory Sentencing for Low-Culpability People Smuggling Accused is Abandoned* (5 September 2012) <<http://www.legalaid.vic.gov.au/about-us/news/charges-dropped-mandatory-sentencing-for-low%E2%80%93culpability-people-smuggling-accused-is>>.

20 (2012) 115 SASR 165.

21 *Ibid* 174 [57] (emphasis added).

22 [2012] NSWCCA 187 (27 August 2012).

23 *Ibid* [7]. On this basis, the New South Wales Court of Criminal Appeal quashed the appellants' convictions. The Court referred to the proposition that it should not decline to follow the decision of 'another Australian intermediate appellate court on materially identical Commonwealth legislation' without being convinced that it is 'plainly wrong', citing the cases of *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150–1 [134]. It was not contended by the Commonwealth Director of Public Prosecutions that *PJ v The Queen* was wrongly decided.

sentencing,²⁴ allegations of the improper sentencing of young offenders and the retrospectivity of criminal offences.²⁵ There exists, furthermore, the broader issue of whether criminalisation is actually effective as a deterrent of irregular migration in the manner that the Federal Government has proposed.²⁶ Finally, the conformity of criminalisation with principles of international refugee law and Australia's international obligations, particularly in respect of art 5 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air*,²⁷ has been called into question.²⁸ This note, however, is concerned only with considerations relevant to an exercise of statutory interpretation.

Following a brief overview of the legislative and litigious background to the case in Part II, this note considers the Court of Appeal's interpretation of the *Migration Act* in accordance with the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'), and discusses its analysis of the distinction between mistakes of legal status and ignorance of the law. Part III concerns the Court's reliance on the 'internal coherence' of the offence provision as a reason for accepting the applicant's submissions, in accordance with the approach established in *Project Blue Sky Inc v Australian Broadcasting Authority*.²⁹ The 'coherence' for which the Court ultimately called was a consistent attachment of the fault element of intention to the disaggregated offence elements. The disaggregation model of statutory interpretation is required by the *Criminal Code*, which separates criminal conduct into distinct categories of physical and mental elements, and specifies the presumed relationship between them.

24 See Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36 *Melbourne University Law Review* 553.

25 See Victoria Legal Aid, Submission No 16 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, 9 November 2011, 5–7; Castan Centre for Human Rights Law, Submission No 6 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, 9 November 2011; Ben Saul, Submission No 1 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, 4 November 2011; Law Council of Australia, Submission No 11 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, 9 November 2011; Liberty Victoria, Submission No 13 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, November 2011. For a broader discussion of retrospective rule making, see Charles Sampford et al, *Retrospectivity and the Rule of Law* (Oxford University Press, 2006).

26 Explanatory Memorandum, Anti-People Smuggling and Other Measures Bill 2010 (Cth) 1. Schloenhardt and Martin argue that the imposition of harsh penalties for convicted people smugglers has had 'little success in deterring people smuggling': Schloenhardt and Martin, above n 13, 112, 127, 139. This is because most prosecutions do not target people 'higher up' in a people smuggling 'organisation': Schloenhardt and Ezzy, above n 13, 147. See further Schloenhardt, 'The Business of Migration', above n 9, 93.

27 *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004).

28 Andreas Schloenhardt and Hadley Hickson, 'Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air' (2013) 25 *International Journal of Refugee Law* 39; Andreas Schloenhardt and Kate L Stacey, 'Assistance and Protection of Smuggled Migrants: International Law and Australian Practice' (2013) 35 *Sydney Law Review* 53, 66–81.

29 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky*').

Part IV addresses the Court's dismissal of the prosecution's submission that ignorance of the legal status of a destination is tantamount to ignorance of the law. On this point, the Court appeared to endorse the broad statement of Spigelman CJ in *R v JS* that '[k]nowledge that a matter has a legal character is not equivalent to knowledge of the law'.³⁰ In this vein, the Court confirms that fault requirements can be validly attached to matters of legal status, which would be characterised as a physical element of the offence pursuant to the criteria of the *Criminal Code*. More importantly, however, the Court's interpretation of the offence suggests that it ascribed greater weight to the absence of an absolute liability provision in respect of Australia's legal status. It is suggested that the case offers the following guidance in elucidating a distinction between mistakes of legal status and ignorance of the law: where a question of legal status can be properly characterised as a *component* of a criminal offence, rather than wholly constitutive of a criminal offence, it is more likely to be viewed by the courts not as ignorance of the law, but as a matter relevant to the defendant's criminal fault.

II CONTEXT OF THE DECISION

A *The People Smuggling Offences*

1 *Criminalisation of People Smuggling*

The applicant, Mr Jeky Payara, was charged under s 233C of the *Migration Act*. This provision, which contains the offence of 'aggravated people smuggling (five people or more)', was inserted into the legislation by the *Anti-People Smuggling and Other Measures Act 2010* (Cth) (*'Anti-People-Smuggling Act'*) in May 2010. This offence is by no means new. Versions of people smuggling offences have existed in the *Migration Act* for over a decade. In 1999, the Federal Government criminalised people smuggling by passing the *Migration Legislation Amendment Act (No 1) 1999* (Cth), which contained the predecessor to the current aggravated people smuggling provision.³¹

The *Anti-People-Smuggling Act* made minor amendments to the people smuggling offence scheme. It restructured the earlier offences under new sections in subdiv A, div 12 of the *Migration Act* and added the new offences of '[a]ggravated offence of people smuggling (exploitation, or danger of death or serious harm etc)' and '[s]upporting the offence of people smuggling' in ss 233B and 233D respectively. Moreover, the *Anti-People-Smuggling Act* purported to 'harmonise' the people smuggling provisions with the *Criminal Code* by disaggregating the offences into their component parts.³²

30 (2007) 230 FLR 276, 304 [154], quoted in *PJ v The Queen* (2012) 268 FLR 99, 119 [86].

31 See *R v Zainudin* (2012) 115 SASR 165, 169 [25]–[27].

32 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2010, 1646 (Robert McClelland, Attorney-General). The Explanatory Memorandum says that the Bill was designed to restructure the offences 'for greater clarity in the structure of the offences': Explanatory Memorandum, *Anti-People Smuggling and Other Measures Bill 2010* (Cth), 9.

In its current form, the *Migration Act* provides for three principal offences of people smuggling, two of which are described as ‘aggravated’ offences (accordingly attracting higher penalties), and a further derivative offence of ‘supporting’ people smuggling. The difference between s 233A, which features the ‘[o]ffence of people smuggling’, and s 233C, the provision under which the applicant was charged, is that the latter concerns the ‘bringing or coming to Australia’ of *more than five people*, whereas the former is in respect of only ‘another person’. Both provisions are otherwise identical. The reality is that the vast majority, if not the entirety, of prosecutions are conceivably capable of being brought under s 233C because intercepted vessels are typically found carrying more than five passengers. It must be noted, however, that then Attorney-General Nicola Roxon issued a general direction on 27 August 2012 pursuant to the *Director of Public Prosecutions Act 1983* (Cth) s 8(1) for the Commonwealth Director of Public Prosecutions not to institute proceedings for ‘aggravated people smuggling’, but allowing for a charge of the lesser offence of ‘people smuggling’ under s 233A, in specific cases where the accused was a member of boat crew.³³ The lesser offence does not carry a mandatory sentence. However, the offence of ‘aggravated people smuggling’ still carries a mandatory sentence and this direction could be revoked in the future.³⁴ In any case, it stands to reason that the interpretive work of the Court of Appeal in respect of s 233C applies equally to s 233A and the other people smuggling offences, all of which contain mirror external requirements.

2 The Legislative Framework: Section 233C

The external requirements of aggravated people smuggling are covered in s 233C(1). The first hurdle is that the accused must organise or facilitate the ‘bringing or coming to Australia’ of at least five people.³⁵ The second is that the five (or more) people who are brought to Australia must be non-citizens.³⁶ The third and final element is that the non-citizens must have had no lawful right to come to Australia.³⁷ Although not the subject of argument or judicial consideration in *PJ v The Queen*, it has been confirmed by other courts that the offence does not call for the accused to actually reach Australia. That is, the interception of accused people smugglers outside Australian territorial waters will not preclude the feasibility of prosecution. In *R v Zainudin*, the South Australian Court of Criminal Appeal held simply that ‘[a] person might be “coming” or “being brought” to Australia without yet having reached, or ever reaching, Australia’.³⁸ Similarly, in *R v Mahendra*, the Northern Territory Court of Criminal Appeal held that s 233C has extraterritorial application due to express statutory provision

33 Attorney-General (Cth), *Director of Public Prosecutions — Attorney-General’s Direction 2012* (2012).

34 See UNSW Human Rights Clinic, *Human Rights and the Prosecution of Indonesian Boat Crew for ‘People Smuggling’ Offences in Australia* (23 October 2012) UNSW Law <<http://www.law.unsw.edu.au/hrclinic/peoplesmuggling>>; Victoria Legal Aid, *Charges Dropped*, above n 19.

35 *Migration Act* s 233C(1)(a).

36 *Ibid* s 233C(1)(b).

37 *Ibid* s 233C(1)(c).

38 (2012) 115 SASR 165, 173 [50].

in s 228A of the *Migration Act*.³⁹ In *R v Ahmad*, the same Court emphasised that the sub-div in which s 233C is contained expressly applies ‘in and outside Australia’.⁴⁰ The comments of Southwood and Martin JJ, quoted with approval in *R v Zainudin*, offer this clarification:

The purpose of s 4A of the [Migration] Act is to apply the general principles of criminal responsibility enunciated in the *Code* to the offences created by the Act, while s 14.1(1)(a) of the *Code* makes it clear that the territorial limitations imposed by s 14.1 of the *Code* only apply ‘unless the contrary intention appears’. A contrary intention appears by the express terms of s 228A of the Act. The specific provisions of s 228A of the Act prevail over the general provisions of s 14.1 of the *Code*.⁴¹

In any case, the extraterritorial scope of s 233C was common ground between the applicant and respondent in *PJ v The Queen*. This brief discussion serves only to note that the external requirements of the people smuggling offences were settled at the time of decision.

The subject of interpretive debate, rather, was the corresponding attachment of a fault element to the distinct physical requirements of the offence. The overall task is somewhat narrowed by the effect of s 233C(2), which says simply that absolute liability applies in respect of s 233C(1)(b),⁴² the provision dealing with the citizenship status of the ‘smuggled people’. The room for contentious statutory construction is accordingly confined to the fault element of the accused’s organisation or facilitation of other persons’ ‘coming to Australia’⁴³ and, furthermore, the absence of the other persons’ lawful right to come to Australia.⁴⁴

3 Earlier Challenge to the People Smuggling Offences

The appeal in *PJ v The Queen* marked not the first, but second, occasion on which Mr Payara brought proceedings in the Victorian Court of Appeal regarding the interpretation of the people smuggling provisions. His first legal challenge was considerably broader in scope. Previously, he sought to challenge the entire validity of the people smuggling provisions on the basis of the right to seek asylum in international refugee law. His argument was that if asylum seekers have a lawful right to seek asylum in Australia, then, by extension, people smugglers must have a lawful right to facilitate their arrival and claim making in Australia.⁴⁵ Though certainly a cleverly-put argument, a ruling on its correctness by the

39 (2011) 252 FLR 303, 306 [10]–[14] (Blokland J), citing *Rutu v Dalla Costa* (1997) 139 FLR 265, 271.

40 (2012) 31 NTLR 38, 48 [41], quoting *Migration Act* s 228A.

41 *R v Ahmad* (2012) 31 NTLR 38, 48 [41], quoted in *R v Zainudin* (2012) 115 SASR 165, 173–4 [52] (Blue J).

42 *Migration Act* s 233C(2).

43 *Ibid* s 233C(1)(a).

44 *Ibid* s 233C(1)(c).

45 ABC News, ‘People Smuggling Case Appears Doomed’, *PM*, 2 November 2011 (Mary Gearin) <<http://www.abc.net.au/pm/content/2011/s3354540.htm>>.

Court was rendered unfeasible by the Commonwealth Parliament's enactment of the *Deterring People Smuggling Act 2011* (Cth), which retrospectively altered the requirements of the provisions.⁴⁶ This was confirmed by the Court of Appeal in *R v Payara*, where Neave JA recalled that the Court 'declined to answer the questions raised on the case ... because the Amending Act made them moot'.⁴⁷ As Schloenhardt and Martin write, the Act ensures that people smugglers cannot 'evade a conviction based on arguments that the smuggled migrants they carry or otherwise organise are found to be refugees'.⁴⁸ The effect of this was to clarify that an asylum seeker, for the purpose of the legislation, would not have a lawful right to come to Australia.⁴⁹ The Court of Appeal accordingly dismissed the proceeding. This legislative intervention attracted criticism premised on the unfairness of retrospective criminal laws.⁵⁰

4 *The Rise of People Smuggling Prosecutions*

The prominence of people smuggling prosecutions has only recently become a feature of Australia's criminal courts. Although the unusually high cost of conducting the prosecutions was initially thought to be prohibitive of trials, the Federal Government's recent agenda and the increase in interceptions of irregular maritime vessels have sparked a marked growth in prosecutions since 2008.⁵¹ The recent initiation of prosecutions is surely best explained by the sensitivity of people smuggling as a core feature of the revived, although cyclical, political debate about irregular maritime arrivals, beginning with Prime Minister Kevin Rudd's scornful description of people smugglers as 'the scum of the Earth' and the 'vilest form of human life' in 2009.⁵² Since May 2012, over 300 matters have been listed for trial nationwide; the prosecution of defendants has been organised in many different states to distribute the heavy caseload evenly.⁵³ Although prosecutorial teams in other jurisdictions had previously conceded the applicant's ultimately

46 *Migration Act 1958* (Cth) s 288B(2)(a), inserted by *Deterring People Smuggling Act 2010* (Cth) sch 1. See Katina Curtis, 'Anti-People Smuggling Laws Strengthened', *Sydney Morning Herald* (online), 1 November 2011 <<http://news.smh.com.au/breaking-news-national/antipeople-smuggling-laws-strengthened-20111101-1mtt3.html>>; Human Rights Law Centre, *Retrospective Deterring People Smuggling Bill Violates Human Rights and the Rule of Law* (9 November 2011) <<http://www.hrlc.org.au/retrospective-deterring-people-smuggling-bill-violates-human-rights-and-the-rule-of-law>>.

47 [2012] VSCA 266 (2 November 2012) [15].

48 Schloenhardt and Martin, above n 13, 115.

49 *Migration Act 1958* (Cth) s 288B(2)(a), inserted by *Deterring People Smuggling Act 2010* (Cth) sch 1.

50 See generally above n 25.

51 Parthena Stavropoulos, 'Lawyers Gearing Up for People Smuggling Trials', *ABC News* (online), 11 April 2012 <<http://www.abc.net.au/news/2012-04-11/victorian-lawyers-gearing-up-for-people-smuggling-trials/3942974>>; Schloenhardt and Martin, above n 13, 112. Schloenhardt and Martin report that '[t]he cost per trial has been estimated at between AUD 450 000 and AUD 750 000, with an estimated total cost of over AUD 220 million to prosecute and goal the more than 300 individuals awaiting trial': at 113.

52 Missbach and Sinanu, above n 7, 58 n 1; Schloenhardt and Martin, above n 13.

53 Victorian Legal Aid, *First Trial in Victoria of Indonesian Boat Crew About to Start* (11 June 2012) <<http://www.legalaid.vic.gov.au/about-us/news/first-trial-in-victoria-of-indonesian-boat-crew-about-to-start>>.

successful argument in *PJ v The Queen*, the requirements of the legislation had remained untested in the courts.⁵⁴

Mr Payara was intercepted off the coast of Christmas Island in September 2010. His matter was listed as the first hearing of its kind in the Victorian County Court on 12 May 2012. In anticipation of pending prosecutions in Victoria, Mr Payara sought to clarify the fault elements for aggravated people smuggling in the County Court by way of an interlocutory appeal.⁵⁵ In a hearing before Judge Maidment, Mr Payara argued that the Prosecution had to prove beyond reasonable doubt that he intended to reach Australia in order to satisfy the requirements of s 233C.⁵⁶ Here, the Commonwealth Director of Public Prosecutions disagreed that it had to demonstrate a specific intention to arrive in Australia on the part of the accused.

B Application and Effect of the Criminal Code

The interpretation of the people smuggling offences is guided by ch 2 of the *Criminal Code*.⁵⁷ The joint judgment of Maxwell P, Redlich and Hansen JJA recalled that this chapter ‘codifies the general principles of criminal responsibility with respect to offences against the laws of the Commonwealth’ in accordance with s 2.1 of the *Criminal Code*, and noted its application to ‘all Commonwealth offences since 15 December 2001’.⁵⁸ It was properly conceded by both parties at first instance, and on appeal, that the fault elements of s 233C must be ascertained with reference to the principles of the *Code*. The application of the *Code* is reinforced by the deliberate design of the people smuggling offences, which are structured so as to disaggregate their physical elements into separate paragraphs. The Court commented that while the majority of criminal offences in state legislation consist ‘of a single sentence’,⁵⁹ provisions under the *Criminal Code* and the *Migration Act* separate criminal offences into component parts.⁶⁰ The Court describes the style of legislative drafting in this way:

Under the *Code*, an offence consists of physical elements and fault elements. The offence provision will specify the physical element(s) and, in relation to each physical element, whether there is a fault element and, if so, which fault element it is. The various physical elements are identified in Div 4 of Ch 2 of the *Code* ... The fault elements are specified in Div 5 of Ch 2 ...⁶¹

54 Ibid.

55 *PJ v The Queen* (2012) 268 FLR 99, 101 [3]. See also *R v Tang* (2009) 233 FLR 399, 400–1 [4]–[5].

56 *PJ v The Queen* (2012) 268 FLR 99, 100 [2].

57 *Migration Act* s 4A.

58 *PJ v The Queen* (2012) 268 FLR 99, 102 [10].

59 Ibid 108 [32].

60 Ibid 109 [33]. Leader-Elliott argues that ‘[c]hapter 2 is based on the fundamental premise that offences are constituted by their “elements”’: Ian Leader-Elliott, ‘Elements of Liability in the Commonwealth Criminal Code’ (2002) 26 *Criminal Law Journal* 28, 32.

61 *PJ v The Queen* (2012) 268 FLR 99, 102 [11]–[12].

The *Criminal Code* prescribes the relationship between different types of physical elements and mental elements by establishing a regime that matches certain physical elements with their corresponding fault elements. Leader-Elliott has noted the influence of Brennan J's analysis of criminal responsibility in *He Kaw Teh v The Queen*⁶² over the drafting of the *Code*'s rules connecting fault element and physical element provisions.⁶³ These rules apply *only* when the legislation does not specify a fault element in respect of a physical element in the offence provision.⁶⁴ However, this kind of omission is largely common in legislation where strict liability and absolute liability provisions are absent. The rationale for this approach to legislative drafting is that it makes a clear preliminary distinction between physical and fault elements and provides clarity in a later assessment of how fault requirements 'attach' to different physical elements.⁶⁵ At the same time, however, it creates an incentive for Parliament not to specify fault elements in relation to all physical elements of an offence, in favour of relying on the interpretive guidance of the *Code*.⁶⁶

The different types of physical elements are categorised by the *Criminal Code* as 'conduct',⁶⁷ 'a result of conduct'⁶⁸ or 'a circumstance in which conduct, or a result of conduct, occurs'.⁶⁹ These physical elements are expressly identified and, as Leader-Elliott writes, the *Code* requires that all physical elements be properly characterised as one of these three elemental types.⁷⁰ Section 5.1 of the *Code* provides that the fault element which aligns with a given physical element could be intention, knowledge, recklessness or negligence. The key interpretive provision is s 5.6, which clarifies the nature of fault elements where they are not specified in relation to a physical element. Relevantly, for our purposes, the *Code* provides that 'conduct' attracts the mental requirement of intention,⁷¹ while the physical element of 'circumstance or result' attracts the mental requirement of recklessness.⁷² The Court seemingly approved the Attorney-General's Department's characterisation in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that '[i]f no fault elements are specified, the fault element that applies automatically under section 5.6 of the *Criminal Code* depends on whether the physical element is conduct, a circumstance or a result'.⁷³ The Court's reliance on the *Guide* reflects the *Guide*'s nascent authority as a chief source of guidelines and principles for interpreting the *Criminal Code*, and may add further

62 (1985) 157 CLR 523 ('*He Kaw Teh*').

63 Leader-Elliott, 'Elements of Liability', above n 60, 33–4.

64 *Criminal Code* s 5.6.

65 Attorney-General's Department (Cth), *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 49.

66 See Criminal Justice Division, Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 34–5 [2.2.4].

67 *Criminal Code* s 4.1(1)(a).

68 *Ibid* s 4.1(1)(b).

69 *Ibid* s 4.1(1)(c).

70 Leader-Elliott, 'Elements of Liability', above n 60, 32; Ian Leader-Elliott, 'The Australian Criminal Code: Time for Some Changes' (2009) 37 *Federal Law Review* 205, 211.

71 *Criminal Code* s 5.6(1).

72 *Ibid* s 5.6(2).

73 Criminal Justice Division, *Guide to Framing Commonwealth Offences*, above n 66, 19.

weight to the proposition that the fundamental sections of the *Guide* ought to be ‘cast in legislative form’ and become as equally binding on courts as the statutory interpretation legislation.⁷⁴ The Court’s assessment of the fault requirements of people smuggling offences, therefore, hinged on two questions presented by the *Code*: first, the need to characterise the different physical elements of the offence; and, second, the need to identify their corresponding fault elements in accordance with s 5.6.

C First Instance Decision

At first instance, the Commonwealth Director of Public Prosecutions (DPP) argued that the defendant’s awareness of Australia was an irrelevant consideration for the purpose of the people smuggling offences.⁷⁵ The DPP submitted that it was only necessary to show that the accused had a particular destination in mind, and that the particular destination had the legal-geographical definition of Australia. This claim would appear to be an easy one to make, if not inherently possible, given the nature of maritime activity, especially if the defendant was intercepted within Australian territorial waters: surely any passenger on a boat would have a destination in mind. Taking a scenario close to the facts, by the DPP’s submission it would be enough for the prosecution to show that the accused intended to travel to Christmas Island *even if* he did not know the name of the destination or its legal status as part of Australia. The Court of Appeal characterised the Director’s argument in this way: ‘[p]arliament should not be taken to have made the efficacy of its people smuggling provisions contingent upon the accuracy or otherwise of the geographical understandings of those who engaged in the activity’.⁷⁶

This submission was upheld by the trial judge, Judge Maidment, who held that proof of the accused’s awareness of a particular destination, regardless of the accused’s appreciation of its legal and geographical character, satisfied the fault requirements of the offence. Judge Maidment construed s 233C(1)(a) to mean that the prosecution did not need to show ‘proof of knowledge or belief on the part of the accused that the immediate or ultimate and intended destination of what was clearly a people smuggling venture was Australia’.⁷⁷ In full, his Honour’s analysis of s 233C(1)(a) is that it

defines the first physical element of the offence. That physical element is conduct. The ‘conduct’ alleged is that the accused facilitated the bringing or coming of a group of at least 5 persons to a place, namely Christmas Island, which is deemed to be part of Australia. The subsection does not specify a fault element. The physical element consists only of conduct. By virtue of s 5.6(1) of the *Criminal Code* the relevant fault element is ‘intention’. The Prosecution must prove that the accused meant to facilitate the bringing of the group of at least 5 persons *to the place which is called Christmas Island. If the Prosecution can prove those facts, nothing more*

74 Leader-Elliott, ‘Time for Some Changes’, above n 70, 211, 216.

75 The relevant parts of the DPP’s submissions at first instance were extracted by the Court of Appeal in its judgment, and so this note will refer only to the decision on appeal.

76 *PJ v The Queen* (2012) 268 FLR 99, 110 [41].

77 *Ibid* 106 [21].

is required. The Prosecution would thereby prove that the *accused was aware of all of the facts which constitute that physical element of the offence.* Section 7 of the Act deems Christmas Island to be part of Australia for the purposes of the Act. That is a matter of law. Subsection 9.3 of the *Criminal Code* applies so that *it is not necessary for the Prosecution to prove that the accused was aware of the legal status of Christmas Island as part of Australia.*⁷⁸

At its core, this assessment means that the prosecution need only show that the accused knew what he was doing; that is, that the accused had a destination in mind and ‘was aware of all of the facts which constitute’ the physical requirements of the offence. It would seem that provided the prosecution could prove beyond reasonable doubt that the accused intended to ‘organise or facilitate’ the entry of people into Australia, it could prove the relevant mental requirement without much difficulty. It would mean that the defence would have to show that the accused did not have a destination in mind or, if he did, that this destination was not in Australia — the accused would have to identify a geographical destination that fell outside Australian territory and argue that he intended to reach that, rather than Australia.

At the core of the DPP’s submissions is a concern about providing the avenue for accused people smugglers to assert that they were unaware of their destination in order to escape conviction. The applicant, however, argued that such a construction could have a far worse consequence: the conviction of people — usually Indonesian fishermen — who were recruited by people smugglers and had no knowledge of their destination. This clash in narrative is concisely reflected by Victoria Legal Aid’s summary of Mr Payara’s personal circumstances, which posits that:

Jeky was living on the streets in northern Jakarta when he was recruited by people smugglers who offered him \$1000 AUD to crew a boat of asylum seekers. He was told all he needed to do was to steer the boat to an island, drop the people off and come back.⁷⁹

III STATUTORY INTERPRETATION, THE *CRIMINAL CODE* AND THE DISAGGREGATION OF CRIMINAL OFFENCES

A *Internal Coherence of Offence Provisions*

1 *General Principles of Statutory Interpretation*

The Court was cautious in approaching its task of statutory construction after completing a preliminary assessment of the physical elements contained in s 233C. Maxwell P, Redlich and Hansen JJA immediately acknowledged a perceived temptation to engage in a narrow interpretation on the basis that the offence

⁷⁸ Ibid (emphasis added).

⁷⁹ Victoria Legal Aid, *Charges Dropped*, above n 19.

provision was broken up into small constituent parts. Their Honours emphasised that the ‘risk’ with the disaggregated architecture of the *Criminal Code* and the design of the people smuggling offences is that it invites an interpretive debate which focuses on ‘only one part of an offence provision’, rather than about the entirety of the provision.⁸⁰ The Court noted that neither the DPP or Mr Payara made express submissions as to the effect of ss 233C(1)(b) and 233C(1)(c) on the construction of s 233C(1)(a) before the trial judge at first instance, although this approach ultimately became a persuasive tenet of Mr Payara’s appeal. The Court regularly recognised the settled proposition of statutory interpretation that ‘the provision must be read as a whole’⁸¹ and, in this context, held that a proper reading of any single constituent element of the offence demands a consideration of the entire provision.⁸²

The interaction between this principle and the design of the offence provision interestingly prompted the Court to write out the contents of s 233C(1) as if they were presented as a single sentence, in the conventional style of state crimes legislation. This invited the inference, the Court held, that a different wording would have been adopted by the legislature had it intended to require the construction favoured by the respondent. Their Honours reasoned that if the language of provision replaced the word ‘Australia’ with ‘a place’ and later qualified that an offence would be committed ‘provided that the place is part of Australia’, it would be clear that the accused need only intend to arrive at ‘a place’, regardless of whether he or she understood the destination to be Australia.

The Court consistently referred to propositions of interpretation expressed in *Project Blue Sky*,⁸³ which stands as one of the most authoritative cases on statutory interpretation in Australia. The issue before the High Court in *Project Blue Sky* was whether non-compliance with a procedural condition in the exercise of a statutory power had the effect of invalidating the exercise of that power. The High Court answered this question by saying that a breach of such a condition would only invalidate an administrative act if the purpose of the legislation was that a breach would have the effect of doing so.⁸⁴ The majority judgment of McHugh, Gummow, Kirby and Hayne JJ considered the specific language of the breached provision as well as the scope and purpose of the legislation. In doing so, their Honours held that the construction of a provision must involve a consideration of its legislative context.⁸⁵

80 *PJ v The Queen* (2012) 268 FLR 99, 109 [35].

81 *Ibid* 109 [36].

82 See further *Project Blue Sky* (1998) 194 CLR 355, in which the majority said that [t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all the provisions* of the statute’: at 381 [69] (emphasis added). See also *Commissioner for Railways (NSW) v Agalitanos* (1955) 92 CLR 390, 397, where Dixon CJ said that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’, quoted in *Project Blue Sky* (1998) 194 CLR 355, 381 [69].

83 (1998) 194 CLR 355, 381 [69].

84 *Ibid* 390–1 [93].

85 *Ibid* 381 [69].

Similarly, the case of *Taylor v Public Service Board (NSW)* stands for the proposition that the ‘final words of [a] sub-section’ can ‘have an impact upon what the sub-section as a whole provides’.⁸⁶ The nature of that impact, of course, will turn on the particulars of the provision in question. That case concerned the power of the Public Service Board of New South Wales to delegate its decision-making powers and functions to a single member of the Board pursuant to s 11(1) of the *Public Service Act 1902* (NSW). The appellant argued that the ‘concluding words’ of this provision, which stipulated that ‘the [final] decision of the case shall be determined by the Board’, favoured a narrow construction of the Board’s powers of delegation.⁸⁷ The High Court accepted that these words qualified the conduct of the Board, but held by majority that it did not go as far as requiring the Board to engage itself with all matters of ‘inquiry and investigation’, which it could validly delegate.⁸⁸ The sole proviso was that the entire Board was required to make the final decision, which it was held to have done. The significance of this case for our purposes is that it both endorses and cautions against the use of neighbouring sub-sections as signposts for the interpretation for the particular provision at hand. The ‘concluding words’ of s 11(1) most certainly affected the meaning of the powers of delegation in the same sub-section, but their effect was not so extensive as to import a strict qualification on every step of the decision-making process.

Barwick CJ in particular cautioned against the interpretation of a provision on the basis of its ‘final words’ in such a way that would render the earlier content inoperative.⁸⁹ He gave three criticisms. First, such an approach could introduce ‘practical inconvenience’ into the performance of statutory functions or the meaning of statutory language.⁹⁰ Second, it could frustrate the purpose of the provision.⁹¹ Third, and most importantly, it might have the effect of overturning the earlier words.⁹² The application of these criticisms to the statutory framework discussed in *PJ v The Queen* will be considered shortly. It is nonetheless useful to bear in mind that the conclusion of the Court in *Taylor* does not preclude the possibility, as the Court in *Project Blue Sky* noted, that the ‘context of the words’ may require a legislative provision ‘to be read in a way that does not correspond with [its] literal or grammatical meaning’.⁹³ The Hon Michael Kirby endorses this approach in his non-judicial commentary by saying that ‘it is a mistake to consider statutory words in isolation’ and that statutory interpretation requires proper consideration of ‘immediately surrounding provisions’.⁹⁴

86 *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208, 213 (Barwick CJ) (*‘Taylor’*).

87 *Ibid* 216 (Stephen J).

88 *Ibid* 217 (Stephen J).

89 *Ibid* 213–15 (Barwick CJ).

90 *Ibid* 214 (Barwick CJ).

91 *Ibid*.

92 *Ibid*.

93 *Project Blue Sky* (1998) 194 CLR 355, 384 [78]. See also Justice Susan Crennan, ‘Statutes and the Contemporary Search for Meaning’ (Speech delivered at the Statute Law Society, London, 1 February 2010).

94 Michael Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35 *Melbourne University Law Review* 113, 116.

2 Relationship between the Disaggregated Components

The Court therefore approached the task of ascertaining the fault element corresponding to the physical element provided in s 233C(1)(a) — the organisation or facilitation of the ‘bringing or coming to Australia ... of a group of at least 5 persons’ — with preliminary reference to the fault elements of the other physical elements provided by ss 233C(1)(b) and 233C(1)(c). The Court recognised that ‘[t]here was no dispute about the second and third elements’.⁹⁵ Section 233C(1)(b) requires at least 5 of the other persons to be non-citizens. As a matter of interpretation consistent with the *Criminal Code*, this physical element would be characterised as a ‘circumstance in which conduct ... occurs’ per s 4.1(1)(c), and thereby attract the corresponding fault element of recklessness pursuant to s 5.6(2). However, this line of inquiry was made unnecessary by s 233C(2), which expressly provides that absolute liability applies in respect of s 233C(1)(b). The effect of this is that the Prosecution need not show that the accused had any awareness of the persons’ status as non-citizens; it is required only to establish that those persons were non-citizens.⁹⁶

Similarly, the fault element in respect of s 233C(1)(c) could be identified without controversy. This provision provides that ‘the persons referred to in paragraph (b) had, or have, no lawful right to come to Australia’. This similarly describes a ‘circumstance in which conduct ... occurs’ in accordance with s 4.1(1)(c) of the *Code*. It would appear from both the Court’s reasoning and the submissions of the parties that physical elements regarding legal status are to be interpreted as ‘circumstances’ for the purposes of the *Code*. Section 5.6(2) of the *Code* again tells us that the mental element for this sub-section is recklessness. In accordance with the statutory definition of ‘recklessness’ pursuant to s 5.4 of the *Code*, the Court held that the fault element in respect of s 233C(1)(c) is two-fold: the accused must have been aware of a ‘substantial risk’ that the other people had no lawful right to come to Australia,⁹⁷ and it must have been unjustifiable to take the risk.⁹⁸

At this stage, although the Court did not do so expressly, it is helpful to conceive the second and third physical elements of s 233C(1)(c) as the ‘concluding words’ of the whole provision in line with the observations made in *Taylor*.⁹⁹ This approach allows us to consider whether the fault elements of ss 233C(1)(b) and 233C(1)(c) could qualify the nature of the fault element of s 233C(1)(a). It is submitted that, on this basis, two conclusions can be drawn instantly about the preferable interpretation of s 233C(1)(a). The first was identified by the Court at the beginning of its brief discussion about s 233C(1)(c). It said that s 233C ‘makes no provision for a fault element with respect to this physical element, *nor does it provide for the application to it of either strict liability or absolute liability*’.¹⁰⁰ The Court’s

95 *PJ v The Queen* (2012) 268 FLR 99, 104 [16].

96 *Ibid* 104–5 [17].

97 See *Criminal Code* s 5.4(1)(a).

98 *Ibid* s 5.4(1)(b); *PJ v The Queen* (2012) 268 FLR 99, 105 [19].

99 (1976) 137 CLR 208, 214–15 (Barwick CJ), 217 (Stephen J).

100 *PJ v The Queen* (2012) 268 FLR 99, 105 [19] (emphasis added).

inference here is clearly that the entire provision specifies that absolute liability should apply *exclusively* in respect of one physical element. If Parliament had intended to remove the need to establish a fault element in respect of s 233C(1)(a), it surely would have done so by way of inserting an absolute liability provision. The Court later applied the same analysis to s 233C(1)(a) by emphasising the specific and intended selectivity of the absolute liability provision — ‘[n]o such provision was made with respect to the para (a) element’¹⁰¹ — and maintaining that ‘[h]ad it been Parliament’s intention to relieve the prosecution of that obligation ... [the] provision could, and would, have been made’ in relation to s 233C(1)(a).¹⁰²

The second observation is that the offence already requires proof that the accused was reckless as to the persons’ lawful rights of entry into Australia. That is, s 233C(1)(c) requires that the accused was aware of, or at the very least had turned his mind to, the risk that the passengers had no lawful right to come to Australia, and Australia *specifically*. Put another way, as the respondent ultimately conceded, the recklessness fault requirement attached to s 233C(1)(c) does not concern the legal right of entry into ‘any place’, provided that that place falls within the territory of Australia. Rather, the accused must have had the specific legal-geographical concept of Australia in mind, and must have considered the legal status of the passengers in Australia. This construction is plainly preferable because, in order to have any awareness about a passenger’s right to enter a country, one needs the preliminary knowledge of the identity of that country. Therefore, the Court reached the conclusion that the provision as a whole envisages the accused’s awareness of a risk ‘in relation to [a] particular country’.¹⁰³ It helpfully clarified that the word ‘Australia’ in this sense is used with reference to ‘a place *known to the accused* as Australia’.¹⁰⁴ On this basis, the tentative, albeit impressionistic, conclusion could be drawn that the remainder of the provision — including, for our purposes, s 233C(1)(a) — would use the word ‘Australia’ in the same way. This has an obvious rationale which almost goes without saying: it would be curious if Parliament intentionally used similar language to convey different meanings. The DPP’s acceptance that the construction of s 233C(1)(c) required the prosecution to prove that the accused had identified Australia¹⁰⁵ created a hurdle to the persuasiveness of its argument in respect of s 233C(1)(a). The Court’s analysis that the paragraphs of the whole provision ‘link directly’ on the basis of ‘conduct directed at Australia’ reveals the difficulty in sustaining the respondent’s submission.¹⁰⁶

3 The Court’s Assessment of s 233C(1)(a) in Isolation

The Court accepted the submissions of both parties that the physical element in respect of s 233C(1)(a) ought to be characterised as ‘conduct’ for the purposes of

101 Ibid 114 [63].

102 Ibid 114 [64].

103 Ibid 110 [44].

104 Ibid (emphasis added).

105 Ibid 110–11 [44]–[45].

106 Ibid 111–12 [50].

the *Criminal Code*.¹⁰⁷ Pursuant to s 5.2(1) of the *Code*, the relevant fault element is intention.¹⁰⁸ Where the appellant and respondent differed, of course, was the conception of the limits of intention in relation to the conduct. The applicant put forward the simple case that the intention applied to every aspect of the physical element. The respondent, however, contended that the intention is directed only ‘at the conveyance of at least five persons to ... a place which is in fact (part of) Australia, whether or not the defendant knows or suspects that the destination is (part of) Australia’.¹⁰⁹ The applicant responded to this submission with the counter argument that intention imports an appreciation of the ‘nature and quality’ of the conduct, thereby requiring an intention to facilitate the conveyance of persons to Australia specifically.¹¹⁰ The applicant’s submission as to the primary interpretation of the fault element in respect of s 233C(1)(a), reproduced in the judgment, called for prosecutors to prove

an intention that the destination was ‘Australia’ ie an intention to leave one state and enter another ... The accused need not know the definition of ‘Australia’. However, the accused must know or appreciate the quality of the destination in a practical sense; that the place is not just ‘B’ on the map, but is the territory of another country whose territory is to be violated, namely Australia. That is, there must be proof that the accused knew/believed that the destination [Christmas Island] was part of another country namely Australia.¹¹¹

The Court upheld this reasoning. The respondent’s concern about the ‘nature and quality’ of the conduct was, importantly, premised on the characterisation of the destination of Australia as a matter of law. This argument is duly addressed in Part IV of this case note. That aside, however, the Court held that any construction which did not give effect to the ‘geographical understandings’ of the accused was rendered inappropriate by the ‘plain meaning of the language’ used throughout the entire provision.¹¹² The Court’s assessment relied heavily on the wording of s 233C(1)(c):

What is critical, in our view, is the requirement that the accused be shown to have been reckless with respect to the para (c) element, that is, that the non-citizens being conveyed ‘had, or have, no lawful right to come to Australia’ ... It follows, in our view, that by requiring proof of the defendant’s recklessness as to the absence of that lawful right, Parliament intended to require proof that the accused was ‘aware of a substantial risk’ that none of the relevant persons had a *lawful right to come to Australia*.¹¹³

107 Ibid 111 [47]–[48]; *Criminal Code* s 4.1.

108 The Court clarifies that intention in relation to conduct is made out ‘if he or she means to engage in that conduct’: *PJ v The Queen* (2012) 268 FLR 99, 103 [12], 105 [20].

109 *PJ v The Queen* (2012) 268 FLR 99, 105 [20].

110 Ibid 106 [22].

111 Ibid 107 [24].

112 Ibid 110 [41]–[42].

113 Ibid 110 [42], [44] (emphasis in original).

The Court acknowledged the principle of statutory interpretation that ‘where the same word is used more than once in a statute, Parliament intends it to have the same meaning each time’ and asked, accordingly, whether this presumption could be rebutted.¹¹⁴ Pearce and Geddes similarly note that this presumption is readily rebuttable by clear statutory expression and definition.¹¹⁵ However, the Court held that the language of the provision as a whole did not suggest that this presumption was rebutted. Its description of the intention element in respect of s 233C(1)(a) ultimately incorporated the recklessness element in respect of s 233C(1)(c).¹¹⁶ Its reasoning extends beyond the claim that the provision already envisaged the accused’s awareness of Australia. The Court said that if the fault element of recklessness — a *less stringent* requirement than the element of intention — requires the accused to have ‘adverted to the issue of rights of entry into Australia’, then, by extension, the more stringent intention element ought also to involve the specific identification of Australia.¹¹⁷ The untenable consequence of the respondent’s submission was revealed in a rewriting of the offence which inconsistently treated Australia both as a ‘place’ and a specific location. The Court said that this rewriting would mean that the offender

organised or facilitated the entry of the relevant persons into a *place* (which was in fact part of Australia), being reckless as to whether those persons had a lawful right to come to *Australia*.¹¹⁸

Moreover, the Court’s extensive consideration of the fault elements in ss 233C(1)(b) and 233C(1)(c) indirectly addresses the cautions of Barwick CJ in *Taylor*. First, its finding does not ‘overturn’ the meaning of s 233C(1)(a) — rather, it clarifies the attachment of fault to its plainly identifiable external requirement. Second, the finding does not frustrate the purpose of the legislation to prevent entry into Australia. Lastly, it does not introduce any practical inconvenience: although the prosecution is now required to adduce evidence regarding the defendant’s appreciation of Australia, this would surely not be so severe an inconvenience to satisfy Barwick CJ’s threshold in the *Taylor* test.

B Difficulties with Disaggregation and Statutory Interpretation

This note applauds the Court’s use of statutory principles as established in the case law and the *Acts Interpretation Act 1901* (Cth). The conclusion was thoroughly substantiated and responded carefully to the respondent’s submissions. Of some concern, though, is the extent to which the architecture of the *Criminal Code* made the task of construction more difficult than it might otherwise have been. An appreciation of the Court’s conclusion might suggest that the resolution to

¹¹⁴ Ibid 110–11 [45].

¹¹⁵ D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 121 [4.7], cited in *PJ v The Queen* (2012) 268 FLR 99, 111 [45].

¹¹⁶ *PJ v The Queen* (2012) 268 FLR 99, 111 [47].

¹¹⁷ Ibid 111–12 [50].

¹¹⁸ Ibid 112 [52] (emphasis added).

this alleged statutory ambiguity was actually quite simple. At the very least, the finding is clearly supported by ordinary principles of interpretation, which revealed a legislative intention to ‘criminalise conduct knowingly directed at the conveyance of persons to, or their entry into, Australia’.¹¹⁹ However, the fact that the Court was called upon to resolve an alleged ambiguity is reflective of a broader legal concern: the utility of the disaggregation approach to offence drafting. It is interesting that the Court found it helpful to rewrite the provision as if it were a single sentence, on two occasions.¹²⁰ This might simply reflect their Honours’ experience with state crimes provisions, but it could also say something about the cumbersome nature of the disaggregation approach. The *Criminal Code* was enacted to clarify the interpretation of offence provisions. While in the majority of cases it might satisfy this purpose, here it served as a complicating factor, rather than one of clarification.

1 The Applicant’s Alternative Submission: Further Disaggregation

The applicant made an alternative submission regarding the interpretation of s 233C(1)(a). It is significant because the Court did not expressly approve or reject it, but commented instead that its acceptance would yield the same interpretive result. This may have had no bearing on this particular decision, but it raises a doubt as to whether the legislature’s reliance on the disaggregation principles of the *Criminal Code* is appropriate. The applicant argued, with the caveat that this submission was ‘non-preferred’, that s 233C(1)(a) consisted of two physical elements, rather than one.¹²¹ This submission suggested that the provision contained a physical element of ‘conduct’ in respect of the organisation or facilitation and a separate physical element of ‘result of conduct’ in respect of the bringing or coming to Australia.¹²² The relevance of this distinction, of course, is that s 233C(1)(a) would also contain two different fault elements of intention and recklessness for the ‘conduct’ and the ‘result of conduct’ respectively. This submission is certainly a persuasive alternative.

The Court’s position, however, was inconclusive. It commented simply that ‘[i]f, contrary to [its] view, this is how para (a) is to be interpreted, our conclusion would be unchanged. Proof of the para (a) element would still require proof of the accused’s awareness (to the level required by the fault element of recklessness) of the legal status of the destination’.¹²³ The Court is of course correct to point out that the attachment of a fault element of recklessness to the ‘bringing or coming to Australia’ element of s 233C(1)(a) would nonetheless require the defendant to have awareness of Australia specifically. That is, in order to be aware of a substantial risk that the passengers would be brought to Australia, the accused

119 Ibid 111 [46].

120 Ibid 105 [18], 112 [52].

121 Ibid 106 [23], 119 [87].

122 Ibid 119 [87].

123 Ibid 118 [88].

would have to be well aware of the legal status of Australia. In theory, the difference is that this alternative would not call for the defendant to intend arrival in Australia. In practice, though, the difference for prosecutorial purposes would be slim: it would still require the prosecution to demonstrate the defendant's knowledge of Australia's legal status and the risk of entering Australia, coupled with an intention to organise or facilitate the journey.

2 *The Criminal Code and Disaggregation*

The introduction of ch 2 of the *Criminal Code* saw the displacement and codification of common law rules surrounding fault elements, most of which were comprehensively expressed in the High Court decision of *He Kaw Teh*.¹²⁴ Leader-Elliott comments that ch 2 purports to function as the guiding institution for the development of Australian criminal law theory in the same way that its closest ancestor, the US *Model Penal Code*, 'provides the template for criminal codes in the great majority of American states' and serves as the 'central point of departure for any serious consideration of criminal law theory or doctrinal development in the United States'.¹²⁵ Of course, ch 2 applies only in the absence of statutory direction.¹²⁶

The viability of the prosecution's submission that the accused need not have any knowledge about the legal status of Australia would be equally blocked by the alternative construction of the provision as outlined above.¹²⁷ But the Court's conclusion still fails to tell us which interpretation is to be preferred. Is it enough for the Court to say that it would make no practical difference? If our foremost concern is with the effect of disaggregation on the interpretation of fault elements, then arguably not. The applicant's arguments presented the Court with two feasible interpretations about the disaggregation of the offence, and neither was conclusively rejected. Given that the purpose of the *Criminal Code* is in part to clarify and guide the interpretation of the federal criminal law, the conclusion in *PJ v The Queen* offers us a basis on which to question whether it is achieving its aims as effectively as possible.¹²⁸

The Court refers to a comment of Brennan J in *He Kaw Teh*, quoted by Bell J in *R v Saengsai-Or*, that suggests '[i]t is impossible to divide the act involved in an offence ... into an act and circumstances attendant on its occurrence. The external elements of an offence ... cannot be divided'.¹²⁹ The Court earlier noted the DPP's concern that an approach requiring para (a) to include both conduct and a physical circumstance would "'significantly complicate" the jury's task',

124 Leader-Elliott, 'Time for Some Changes', above n 70, 209.

125 Ibid 206. He later adds that any '[e]xplicit statement of a principle, convention or rule in the *Code* bars recourse to the common law': at 209.

126 Ibid 210.

127 See Part III.A.1.

128 Ibid 209.

129 *He Kaw Teh* (1985) 157 CLR 523, 584 (Brennan J), quoted in *R v Saengsai-Or* (2004) 61 NSWLR 135, 145 [59] (Bell J) and also quoted in *PJ v The Queen* (2012) 268 FLR 99, 118 [82].

but did not conclusively accept this argument.¹³⁰ Nonetheless, it is a persuasive basis on which to prefer the primary, simpler construction. Another reason might have been that the elements of ‘organisation and facilitation’ and the ‘coming or bringing to Australia’ were grouped together in the same paragraph, suggesting a deliberate decision on the part of Parliament for the two expressions to constitute the same physical element. Indeed, the Attorney-General Department’s *Guide to Framing Commonwealth Offences* proposes that single paragraphs will tend to describe single physical elements.¹³¹ The *Guide*’s statement that ‘[t]he ability to distinguish physical elements is particularly important’ and proposal to position ‘each physical element in a separate paragraph’ show that its interpretive guidance might actually alleviate some of the concern about disaggregation raised in this case note.¹³²

The Court’s interpretive preference was surely a fair one, but its decision indicates that the *Criminal Code* did not, in this case, demonstrate a rule-like quality that immediately suggests the correct interpretation, carrying instead a much softer ‘dimension of weight’.¹³³ It is questionable whether the *Code* was designed to operate in this way, especially given the structure of ch 2. The application of the *Criminal Code* here seemingly made the exercise of statutory interpretation more cumbersome. Its role in governing federal criminal provisions gives Parliament an incentive to deliberately omit details regarding the fault elements of offences because it assumes the *Code* will neatly cover the situation. Certainly, in some scenarios, the offence components could be plausibly separated out as different *Code*-prescribed physical elements, in different ways.

IV THE ATTACHMENT OF FAULT TO MATTERS OF ‘LEGAL STATUS’

The contention upon which the DPP’s submissions inextricably hinged was whether the legal status of Australia could be properly characterised as a matter of law. The DPP submitted that the word ‘Australia’ in s 233C(1)(a) is used in a ‘geographical sense’, therefore only requiring that the accused intended to arrive at the ‘physical places that constitute “Australia”’.¹³⁴ The Court acknowledged that the use of the word ‘Australia’ in a ‘geographical sense’ is envisaged by s 2B of the *Acts Interpretation Act 1901* (Cth), which relevantly stipulates that the word ‘Australia’, ‘when used in a geographical sense, includes the Territory of Christmas Island’. This reliance on the *Acts Interpretation Act 1901* (Cth)

130 *PJ v The Queen* (2012) 268 FLR 99, 116 [74].

131 Criminal Justice Division, *Guide to Framing Commonwealth Offences*, above n 66, 18–19 [2.2.2].

132 *Ibid* 19 [2.2.2].

133 See further the debatable distinction between rules and principles in Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 24–8; H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 259–63; Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1978) 155; Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 *Yale Law Journal* 823, 836–8.

134 *PJ v The Queen* (2012) 268 FLR 99, 107 [26].

certainly gives foundation to the DPP's proposition that it is conceivable for statutory language to refer exclusively to the geographical nature of Australia, without importing identification of its legal status. The consequence of such a formulation would be the removal of the fault element in respect of Australia's legal status: an ignorance of it would not afford a valid excuse in the manner that a mistake about the facts which go towards the commission of an offence might provide a criminal defence.

For reasons already suggested, this line of argument was nonetheless problematic because the DPP had effectively conceded that the use of the term 'Australia' in the later provision of s 233C(1)(c) was *not* tantamount to a question of law. That is, by the DPP's own submissions, the accused must have specifically turned his mind to the passengers' rights of entry into Australia. The DPP's insistence on a kind of special treatment for s 233C(1)(a) which does not involve the legal status of Australia and merely encompasses its geographical location would deny the entire provision the 'internal coherence' that is presumed in accordance with *Project Blue Sky*¹³⁵ and *Taylor*.¹³⁶

A Ignorance of Law or Mistake of Fact?

1 Criminal Responsibility

The Court's analysis of this argument, however, went far further than a repetition of its preferred statutory construction. In a detailed portion of the joint judgment, the Court effectively approached s 233C(1)(a) in isolation from the other paragraphs in response to the DPP's contention in its submission that '[i]gnorance of the legal status of Place B does not negate an intention to bring people to that place'.¹³⁷ This argument revives one of the perennial preoccupations of criminal law and responsibility: the difference and overlap between ignorance of the law and mistakes of fact.¹³⁸ The established persistence of lawyers in attempting to develop a meaningful distinction between the two 'mistakes' is, of course, premised on the proposition that ignorance of the law is generally no defence to illegal behaviour.¹³⁹ In 1939, the American legal scholar Rollin M Perkins wrote:

135 (1998) 194 CLR 355.

136 (1976) 137 CLR 208.

137 *PJ v The Queen* (2012) 268 FLR 99, 107 [27]. See also Kenneth W Simons, 'Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact' (2012) 9 *Ohio State Journal of Criminal Law* 487; Kumaralingam Amirthalingam, 'Ignorance of Law, Criminal Culpability and Moral Innocence: Striking a Balance between Blame and Excuse' [2002] *Singapore Journal of Legal Studies* 302; Edwin Meese III and Paul J Larkin, 'Reconsidering the Mistake of Law Defense' (2012) 102 *Journal of Criminal Law and Criminology* 725; Jerome Hall, 'Ignorance and Mistake in Criminal Law' (1957) 33 *Indiana Law Journal* 1; Edwin R Keedy, 'Ignorance and Mistake in the Criminal Law' (1908) 22 *Harvard Law Review* 75.

138 See, eg, *Ostrowski v Palmer* (2004) 218 CLR 493; Simons, above n 138, 487; Rollin M Perkins, 'Ignorance and Mistake in Criminal Law' (1939) 88 *University of Pennsylvania Law Review* 35; Leader-Elliott, 'Time for Some Changes', above n 70, 216–7.

139 Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 2nd ed, 1983) 451, quoted in *Ostrowski v Palmer* (2004) 218 CLR 493, 500 [1] (Gleeson CJ and Kirby J); Simons, above n 137.

Ignorance of law is no excuse, but mistake of fact is sufficient for exculpation if what was done would have been lawful had the facts been as they were reasonably supposed to be. This, like any other statement which seeks to compress a large field of law into the confines of a single sentence, is entirely too broad for certain specific situations.¹⁴⁰

Leader-Elliott argues for a compromise position between the two propositions. He suggests instead that ‘when a fault element is in issue, a new defence of reasonable mistake of law should be available to the defendant’.¹⁴¹ This suggestion is made in deliberate consistency with the other common law principle that any kind of mistake or ignorance could ‘defeat an allegation of intention, knowledge or recklessness with respect to an element of an offence’.¹⁴² As the *Code* stands, though, this inquiry is not possible. The High Court authority of *Ostrowski v Palmer* also indicates that it is irrelevant that a person’s ignorance of the law was induced by government authorities or otherwise reasonably brought about.¹⁴³

The difficulty in maintaining a clear distinction between mistakes of fact and ignorance of the law in an alleged mistake of ‘legal status’ is familiar to the common law. An apt description of the problem and its related judicial frustration was provided by Windeyer J in *Iannella v French*, as quoted by McHugh J in *Ostrowski v Palmer*:

The distinction which our law makes for its purposes between law and fact, between questions of law and questions of fact, between mistakes of law and mistakes of fact, is thus by no means as easy as might at first be expected. That it is not absolute is illustrated by the many cases said to turn on a mixed question of law and fact. Then there is the choice between two propositions — on the one hand that of Dixon J in this Court in *Thomas v The King* that ‘a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law’ — on the other hand the rule that, when the facts are ascertained it is a question of law whether a thing or place answers a particular description in a statute.¹⁴⁴

Here, the DPP argued that an accused’s claimed ignorance of the legal status of Australia — which it considered to be a question of law — could not serve to excuse criminal conduct which relied on entry into Australia. If this were true, then s 233C(1)(a) could not properly be said to incorporate a requirement of knowledge about the legal character of Australia because it would conflict with an important principle of criminal responsibility. On the other hand, if Australia’s legal status were to be instead characterised as a matter of fact, about which an honest and reasonable mistake could be made, then a demonstrable ignorance about it could

140 Perkins, above n 138, 35.

141 Leader-Elliott, ‘Time for Some Changes’, above n 70, 217. Leader-Elliott applies the objective standard of a ‘mistaken but reasonable belief’ in his own proposed legislative drafting: at 234–5.

142 Ibid 219.

143 (2004) 218 CLR 493, 505 [16] (McHugh J).

144 *Iannella v French* (1968) 119 CLR 84, 114–5, quoted in *Ostrowski v Palmer* (2004) 218 CLR 493, 510–11 [37].

preclude an accused's criminal liability in respect of people smuggling. In div 9, the *Criminal Code* provides that a mistake of fact may result in the removal of criminal responsibility for certain offences. For instance, s 9.1 provides:

- (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:
 - (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and
 - (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.
- (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

The *Code* similarly provides that a mistake of fact will remove responsibility in respect of strict liability offences where the accused reasonably considered whether certain facts existed, was under a mistaken but reasonable belief about those facts and, had they existed, would not have committed the physical requirements of the offence.¹⁴⁵ However, a mistake of fact will not offer a defence in respect of absolute liability situations.¹⁴⁶ The *Code* also makes it clear that a mistake of law — in respect of statute law and subordinate legislation — may not negate criminal responsibility.¹⁴⁷ This coincides with the well-established principles of the common law.¹⁴⁸ The *Code* does this in an interesting fashion, though, by saying in s 9.3(1) that a person *can* be criminally responsible even where the person is mistaken about 'the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence'.¹⁴⁹ This point was emphasised by Spigelman CJ in *R v JS*, in which his Honour said that the provision is 'permissive' in nature: it does not provide that a person *must* be criminally responsible.¹⁵⁰ Spigelman CJ went further to say that 'it is also the case at common law that ignorance of the law may make it difficult for the prosecution to establish fault'.¹⁵¹ Leader-Elliott writes that the amended version is 'less hospitable to the permissive interpretation' than its predecessor,¹⁵² but ultimately concludes that the current legislative drafting is so ambiguous that it merits immediate reform.¹⁵³

145 Ibid s 9.2.

146 Ibid s 6.2.

147 Ibid ss 9.3–9.4.

148 See Leader-Elliott, 'Time for Some Changes', above n 70. See also *R v JS* (2007) 230 FLR 276, 304 [153] (Spigelman CJ).

149 *Criminal Code* s 9.3(1).

150 (2007) 230 FLR 276, 304–5 [155].

151 Ibid 304 [153].

152 Leader-Elliott, 'Time for Some Changes', above n 70, 223 n 73.

153 Ibid 224–8.

Interestingly, the Court's approach did not explicitly deal with whether Australia's legal status was to be classed either as a mistake of law or a mistake of fact. It also did not consider that mistakes of 'legal status' could be viewed as mistakes of 'mixed' fact and law.¹⁵⁴ These avenues of inquiry as established in the common law were conceivably available to it. Although it did heavily rely on Spigelman CJ's finding that '[k]nowledge that a matter has a legal character is not equivalent to knowledge of the law' in *R v JS*,¹⁵⁵ the Court's discussion of why this is so is altogether brief. Perhaps this is because, as Spigelman CJ acknowledged in *R v JS*, the *Code* does not actually draw a 'direct distinction between questions of law and questions of fact'.¹⁵⁶ Rather, instead of pointing to a conceptual difference, the *Code* simply says in s 9.3(2) that, where a person is mistaken about or ignorant of the law, the person is not criminally responsible 'if the Act is expressly to the contrary effect'.¹⁵⁷

As has been noted by Leader-Elliott, *R v JS* actually concerned an earlier version of this *Code* provision.¹⁵⁸ This version was conceivably broader in scope, allowing for criminal responsibility to be removed where the Act is 'expressly or implied[ly] to the contrary effect' or where the 'ignorance or mistake negates a fault element that applies to a physical element of the offence'.¹⁵⁹ The nature of this provision allowed Spigelman CJ to find that the relevant legislation in that case, ss 31 and 39 of the *Crimes Act 1900* (NSW), did 'provide to the contrary, probably expressly and, if not, then impliedly'.¹⁶⁰ The breadth of that reasoning was not available to the Court in *PJ v The Queen* because, now, the Act must 'expressly' provide to the contrary effect following an amendment to the *Criminal Code* in 2004. The narrower provision was introduced by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth).¹⁶¹ The difference between the *Code* provisions pertaining to the facts in *PJ v The Queen* and the facts in *R v JS*, however, does not undermine the Court's reliance on Spigelman CJ's reasoning for two reasons. First, the structure of s 233C and its provision of absolute liability for s 233C(1)(b) indicates that it specifically provides for fault elements in respect of ss 233C(1)(a) and (c). Second, the actual operation of s 9.3 of the *Criminal Code* — given its framing as a kind of enabling provision, rather than one that deems criminal fault — is still unclear.

The Court addressed the scope of criminal fault in respect of 'legal status' by pointing to the legislative practice of including absolute or strict liability provisions which negate the need for the prosecution to show an accused's knowledge of legal

154 See, eg, *Ostrowski v Palmer* (2004) 218 CLR 493.

155 (2007) 230 FLR 276, 304 [154].

156 *Ibid* 304 [152].

157 *Criminal Code* s 9.3(2).

158 Leader-Elliott, 'Time for Some Changes', above n 70, 217.

159 See the earlier version of the *Criminal Code* s 9.3(2) in *R v JS* (2007) 230 FLR 276, 282–3 [13] (Spigelman CJ) (emphasis added).

160 *R v JS* (2007) 230 FLR 276, 305 [156].

161 See, for a full comparison of the earlier version with the amended version, Leader-Elliott, 'Time for Some Changes', above n 70, 218. The events which gave rise to the proceedings in *R v JS* took place in 2003, thereby capturing the pre-2004 legislation.

matters.¹⁶² Again, the absence of a similar absolute liability clause in respect of Australia's legal status in s 233C(1)(a) was a decisive consideration. This inquiry seems to be consistent with Spigelman CJ's reasoning in *R v JS*, and it may now reflect the prevailing approach of Australian courts in respect of arguments which assert that ignorance of the law is no excuse.

2 Legal Status

The DPP's submission began with the general proposition that '[a] person can mean to engage in an act without knowing or appreciating the legal character of that act'.¹⁶³ From this principle it was suggested that 'if the prosecution can prove that the accused meant to steer a boat with 5 or more passengers from Place A to Place B, element (a) is satisfied if, as a matter of law, Place B is part of "Australia"'.¹⁶⁴ But it is the final sentence of the DPP's written submissions quoted in the Court's judgment that is most revealing about the scope of the DPP's argument. Referring again to s 9.3(1) of the *Code*, the DPP submitted that there is 'no requirement to prove that the accused appreciated that his conduct was unlawful or wrong'.¹⁶⁵ Without any statutory provision to the contrary,¹⁶⁶ this is obviously correct. But was this principle actually relevant to the task at hand? With respect, the DPP overstepped the scope of inquiry about the legal status of Australia. By the DPP's own argument, the Court should not have been at all concerned with the accused's appreciation of whether his conduct was unlawful or wrong. This is because that kind of appreciation — the accused's awareness of whether he or she breaks the law — is an entirely separate proposition to whether the accused appreciated the legal status of the destination. For the sake of clarity, the DPP's submissions posed, and ultimately conflated, two distinct questions:

1. Does the accused need to appreciate that his or her conduct had the legal status of being unlawful and wrong?
2. Does the accused need to appreciate that the geographical location of Place B has the legal status of Australia?

The DPP's attempt to answer these questions in exactly the same manner ignored, in the author's view, that the kind of 'legal status' to which each question refers is actually distinct. The DPP conflated the legal status of *having committed an offence* and a question of legal status *which was an element of an offence*. The DPP's reiteration of important principles of criminal responsibility was not helpful to the Court because the Court's concern was not about the accused's awareness of the legal nature of people smuggling: it was about the accused's

162 See, eg, s 132.4(8) of the *Criminal Code*, which clarifies that absolute liability applies to the status of a building as 'owned or occupied by a Commonwealth entity' in respect of the offence to enter a Commonwealth building with intent to commit an offence in s 132.4(6), cited in *PJ v The Queen* (2012) 268 FLR 99, 113 [58].

163 *PJ v The Queen* (2012) 268 FLR 99, 107 [27].

164 *Ibid.*

165 *PJ v The Queen* (2012) 268 FLR 99, 107 [27].

166 *Criminal Code* s 9.3(2). See also *PJ v The Queen* (2012) 268 FLR 99, 107 [27].

awareness of the nature of Australia. The answer to question one, of course, is no: the accused does not need to know that people smuggling is contrary to Australian law because ignorance of the law is no excuse. But, according to ordinary principles of criminal responsibility, the accused does need to be aware of all of the facts that constitute the offence or to intend to ‘to do the whole act which is prohibited’.¹⁶⁷ One of these ‘facts’ is actually a question of legal status. For that reason, question two might be answered in the affirmative.

This distinction was effectively adopted by the Court in its analysis of *R v Tang*,¹⁶⁸ the case upon which the respondent placed most reliance. This case concerned the interpretation of the offence of slavery under s 270.3(1)(a) of the *Criminal Code*.¹⁶⁹ The ‘common ground’ in this case was the proposition that the ‘prosecution did not need to prove that the defendant knew or believed that the victim was a slave, or even that she knew what a slave was’.¹⁷⁰ In full, s 270.3(1)(a) provides that a ‘slavery offence’ is committed when a person, ‘whether within or outside Australia, intentionally ... possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership’. In *Tang*, Gleeson CJ similarly commented that ‘[a]n accused does not have to know anything about the law in order to contravene s 270.3(1)(a)’.¹⁷¹ In the particular context, that meant that the ‘state of knowledge relevant to intention, and therefore intention itself, may be established regardless of whether the accused appreciates the legal significance of [the] qualities’ that make a person, in the eyes of a jury, a slave.¹⁷² The last part of this suggestion is significant for the purpose of interpreting the people smuggling offence provisions. Gleeson CJ’s reasoning is based on the idea that slavery is a ‘condition that *results* from the exercise of certain powers’.¹⁷³ He says that:

Whether the powers that are exercised over a person are ‘any or all of the powers attaching to the right of ownership’ is for a jury to decide in the light of a judge’s directions as to the nature and extent of the powers that are capable of satisfying that description.¹⁷⁴

Where the DPP heralded in *Tang* a direct analogy to the people smuggling provisions, the Court saw a clear difference. In *Tang*, the accused’s awareness of the conduct that constitutes slavery in a legal sense was not required because that conduct is *wholly constitutive* of the offence of slavery. Whether someone was being treated as a slave in one of the ways listed under s 273.3 is a question to be

167 *R v Reynhoudt* (1962) 107 CLR 381, 387 (Dixon CJ) quoted in *He Kaw Teh* (1985) 157 CLR 523, 584 (Brennan J). Jordan CJ in *R v Turnbull* said that the accused must know ‘that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing’: (1944) 44 SR (NSW) 108, 109 quoted in *He Kaw Teh* (1985) 157 CLR 523, 531. This description of criminal responsibility is accurate except for circumstances where there is an absolute or strict liability provision that provides otherwise.

168 (2008) 237 CLR 1 (*Tang*).

169 See Irina Kolodizner, ‘*R v Tang*: Developing an Australian Anti-Slavery Jurisprudence’ (2009) 31 *Sydney Law Review* 487.

170 *PJ v The Queen* (2012) 268 FLR 99, 108 [29].

171 (2008) 237 CLR 1, 25 [48].

172 *Ibid*.

173 *Ibid* 25 [49] (emphasis added).

174 *Ibid*.

answered by a jury with reference to all of the factors and considerations presented by the prosecution. In *PJ v The Queen*, however, the question of Australia's legal status is a *constituent element* of an offence: it is not the overall question of whether an offence had been committed. The Court in *PJ v The Queen*, although in slightly different terms, put it this way:

In relation to the offence of 'possessing a slave', the victim of the offence did not have the status or character of being a 'slave' *independently of the conduct* alleged to have been engaged in by the accused. As appears from the passage from the judgment of Gleeson CJ ... it was the intentional engagement of the accused in conduct of a particular character which constituted the victim a 'slave'. The victim could not, of course, have had that status independently of the accused's conduct because, as the judgments pointed out, Australian law recognises no such status. No question, therefore, arose of any necessity to prove that the accused was aware that the target of her conduct had any particular legal status.¹⁷⁵

The Court's emphasis is on the 'dependence' of the legal status of slavery on the alleged conduct of the accused. Another way of framing this proposition is that the legal status of slavery is *wholly defined* by the conduct of the accused. Section 270.2 of the *Code*, which says simply that slavery is unlawful, offers a clear difference to the statutory matrix in *PJ v The Queen*. The lawfulness of Australia's legal status is not — and obviously cannot be — prescribed by statute; rather, the lawfulness of *people smuggling*, which involves a consideration of Australia's legal status, is prescribed.

The distinction is better understood in terms of whether the question of law relates to whether the entire offence itself was committed, or whether an *individual element* of an offence was made out. Put another way, whether a matter of legal status could attract a fault element depends on the relationship between the legal status and the commission of the offence. If the legal status is constitutive of the offence — that is, it is a label given to conduct which entirely makes up the offence — it is equivalent to the law, and then it would be fair for the prosecution to assert that 'ignorance is no excuse'. However, if legal status is but one component of an offence, it cannot be treated in the same manner. The Court framed the distinction more clearly by saying that 'it is no answer for the Director to assert that the status of the destination as Australia is a question of law. That it has that status is an *ingredient* of the para (a) element, to which the fault element of intention applies'.¹⁷⁶ This approach does have its limitations, though its application to Commonwealth offences drafted in the style of the *Criminal Code* appears to have been adopted by the courts.

¹⁷⁵ *PJ v The Queen* (2012) 268 FLR 99, 119–20 [89] (emphasis added).

¹⁷⁶ *Ibid* 116 [75] (emphasis added).

3 Other Analogies

Putting the facts of *PJ v The Queen* and *Tang* alongside each other, the interpretive result could be framed in this way: Australia's legal status is not the accused's own doing, but it is relevant to whether the accused committed people smuggling; the legal status of a person's treatment as slavery *is* the accused's own doing. This distinction would accord with other common law and statutory considerations of legal status in the context of 'mistakes' and 'ignorance'. For instance, we can consider the offence of bigamy in s 94(1) of the *Marriage Act 1961* (Cth), in respect of which strict liability applies to the 'circumstance' that the accused was already married at the time of another marriage form or ceremony.¹⁷⁷ However, s 94(2) provides for the defence of mistake of fact:

- (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that:
 - (a) at the time of the alleged offence, the defendant believed that his or her spouse was dead; and
 - (b) the defendant's spouse had been absent from the defendant for such time and in such circumstances as to provide, at the time of the alleged offence, reasonable grounds for presuming that the defendant's spouse was dead.
- (3) For the purposes of subsection (2), proof by a defendant that the defendant's spouse had been continually absent from the defendant for the period of 7 years immediately preceding the date of the alleged offence and that, at the time of the alleged offence, the defendant had no reason to believe that the defendant's spouse had been alive at any time within that period is sufficient proof of the matters referred to in paragraph (2)(b).

A simple characterisation of this formulation is that the accused can be mistaken about his or her legal status as married pursuant to the *Marriage Act 1961* (Cth), based on reasonable grounds as established above, and thereby be relieved of criminal responsibility for the offence of bigamy. The accused's married status is obviously not wholly constitutive of the offence — it is a single 'ingredient' of the offence, coupled with the conduct of a 'marriage form or ceremony' — and therefore could not amount to ignorance of the law. This result is consistent with the finding of a majority in the High Court in *Thomas v The King* which upheld the defence of honest and reasonable mistake of fact.¹⁷⁸

However, this approach is conceivably limited in describing other matters of legal status. For instance, ignorance of the legal status of substances as 'controlled drugs' might provide an unsatisfactory basis on which to afford a defendant a legal defence. Leader-Elliott describes the following hypothetical, suggested as

¹⁷⁷ *Marriage Act 1961* (Cth) s 94(1A).

¹⁷⁸ (1937) 59 CLR 279, 286 (Latham CJ), cited with approval in *Ostrowski v Palmer* (2004) 218 CLR 493, 512–13 [44]–[45] (McHugh J).

the reason for the amendment of s 9.3 in 2004, as lending itself to the position of ‘ignorance of the law is no excuse’:

The *Code* offence of possession of a controlled drug refers to the definition of ‘controlled drug’ in s 300.2 *Definitions* which in turn refers to substances ‘listed or described as a controlled drug in s 314’. Suppose D is caught in possession of cocaine, which is listed as a controlled drug. The fact that the substance is cocaine and that it is a controlled drug is a circumstantial element of the offence. Let us also suppose that D is well aware that the substance is cocaine and equally well aware that it is unlawful to possess cocaine. D is unfamiliar, however, with the *Code* and does not know that it is s 314.1 of the *Code* which lists cocaine as a controlled drug. No fault element is specified for the circumstance that the substance is a controlled drug. As a consequence, s 5.6 *Offences that do not specify fault elements* applies and the prosecution must prove that D was reckless with respect to that circumstance. Since the circumstance is defined by reference to a statutory definition and table of substances, it [could be] feared that s 9.3(2)(b) would apply so that D would escape conviction unless the prosecution could prove knowledge of the terms of the statutory cross reference. It [is] an unacceptable possibility, however unlikely, that a court might take the view that Chapter 2 required the drug trafficker to know the statutory designation of cocaine as a prerequisite for conviction.¹⁷⁹

Leader-Elliott puts the view that the legal status of cocaine as a ‘controlled drug’ is unlikely to afford a defendant an excuse for the offence of possessing a controlled drug.¹⁸⁰ Of course, it must be shown that the defendant knew the drug was cocaine in the first place.¹⁸¹ But in line with the reasoning of the High Court in *Ostrowski v Palmer* it would be no excuse for the defendant to assert that, despite this knowledge, he or she honestly thought that cocaine was not a controlled drug. In this case, however, the ‘independence’ of legal status and the defendant’s conduct, to use the language of the Court in *PJ v The Queen*, is much clearer: the legal characterisation of the drug is independent from the defendant’s behaviour. So the elemental/constitutive distinction cannot be a comprehensive description of the difference between mistakes of legal fact and ignorance of the law. But this is only because the common law has traditionally approached the distinction with flexibility and entertained arguments as to the merits of providing a defence through mistake or ignorance on an individual basis.¹⁸² At least in the case of *Code* offences, as will be explored shortly, the most defining guidance can be found in whether the provision or its surrounding provisions contain absolute liability provisions in respect of other physical elements.

179 Leader-Elliott, ‘Time for Some Changes’, above n 70, 219 (emphasis in original) (citations omitted).

180 *Ibid.*

181 Brennan J has commented that ‘the state of mind required with reference to the object imported is knowledge that it is narcotic goods. If there were no mental element required with reference to the object imported but merely an intent to perform the physical movements involved in importation, many innocent persons could not escape conviction’: *He Kaw Teh* (1985) 157 CLR 523, 584.

182 Leader-Elliott, ‘Time for Some Changes’, above n 70, 224.

The Court did not clarify definitively that an accused's unawareness of Australia's legal status, in the context of the provision, would amount to a mistake of fact. Indeed, it seems that the Court preferred to consider mistakes of legal status as a special case. The Court reviewed the cases of *R v JS*¹⁸³ and *Kural v The Queen*,¹⁸⁴ which respectively concerned the accused's awareness of federal judicial proceedings and the accused's awareness of narcotic drugs. In both cases, awareness of legal status was held to be required.

B Legal Status and Absolute Liability Provisions

The Court insisted that an absolute liability provision would have been included in respect of Australia's legal status had the legislature intended a mistake of legal status to have the same effect as ignorance of the law. The effect of this might be said to be that mistakes of legal status can be assumed not to be mistakes of law unless the statute provides otherwise. The onus is firmly on Parliament to the extent that the courts will not likely equate a mistake of legal status with a mistake of law. Legal status is not equivalent to the law, and the legislature should 'make express provision *relieving the prosecution* of any obligation to establish any awareness on the part of the accused that the target or victim had that status or that the conduct had that character'.¹⁸⁵

Spigelman CJ's comment that '[t]he *Code* makes no direct distinction between questions of law and questions of fact' but that '[i]t does, however, make express provision for decoupling a specific physical element, relevantly a question of law, from any fault element' in *R v JS* is, on this point, particularly instructive.¹⁸⁶ There are two options under the *Code*: s 3.1(2) or, taken together, ss 6.1 and 6.2. The Court, for instance, points to the example of s 71.2(1), containing an offence against United Nations and associated personnel, which contains an absolute liability provision in respect of the accused's awareness of whether the victim was a United Nations or associated personnel.¹⁸⁷ Similarly, absolute liability applies in respect of whether a building is owned or occupied by a Commonwealth entity in the offence of burglary pursuant to s 132.5(5).

This analysis might suggest that, under the *Criminal Code*, identifying a distinction between mistakes of law and mistakes of fact is perhaps not entirely useful in the context of criminal responsibility. The Court could have undertaken analysis about 'mixed fact and law', but it refrained from this inquiry. Its decision tells us that the structure of offences in the *Criminal Code* is the most important consideration in clarifying the scope of criminal responsibility where an accused claims to be ignorant or mistaken about facts relevant to an offence.

183 (2007) 230 FLR 276.

184 (1987) 162 CLR 502.

185 *PJ v The Queen* (2012) 268 FLR 99, 113 [61] (emphasis added).

186 (2007) 230 FLR 276, 304 [152].

187 *PJ v The Queen* (2012) 268 FLR 99, 113 [57]; *Criminal Code* s 71.2(1).

V INTERLOCUTORY APPEALS

The interlocutory appeal procedure was introduced in Victoria by the *Criminal Procedure Act 2009* (Vic). Although there has been little academic commentary on the operation of interlocutory appeals to date, it seems that these appeals have been regularly used to resolve questions about the admissibility of evidence.¹⁸⁸ The particular success of *PJ v The Queen* in clarifying the requirements of offences suggests that this mechanism has proven valuable and efficient in Victoria, with repercussions for the interpretation of federal offences in other jurisdictions.¹⁸⁹ An analysis of how frequently, and how effectively, these appeals operate across the country would be both timely and welcome in understanding whether they have served the purposes of efficiency and clarity for which they were designed. It is beyond the scope of this case note to assess the effectiveness of this mechanism in any detail, but it nonetheless proposes that this area might soon merit academic attention and parliamentary review.

VI CONCLUSION

The Court's decision demonstrated a thorough but difficult exercise of statutory interpretation on the basis of principles in the *Criminal Code*. Its ultimate conclusion — that knowledge of the legal status of Australia was imported in the fault requirements of people smuggling — accorded neatly with well-established principles about the internal coherence of statutory provisions. However, its interpretive task was complicated by the architecture of the *Criminal Code* and the disaggregated design of the offence provision. The Court's preference for 'writing out' the offence provision as if it were a single sentence, rather than separate components, suggests that the approach to criminal responsibility in the *Code* is not necessarily as helpful as it was designed to be. The same interpretive conclusion could conceivably have been reached without recourse to the *Code* at all: the wording of s 233C is consistently concerned with the accused's appreciation of Australia. The Court's dismissal of the argument that a mistake of legal status is equivalent to ignorance of the law suggests that the nature of legal status as an 'ingredient' of a disaggregated offence is a helpful consideration in illuminating a distinction between mistakes of fact and ignorance of the law. The most important guidance, though, is whether an absolute liability provision forms part of the offence's structure.

Although this note has not explored the idea, the Court's decision surely has the desirable policy benefit that an accused who honestly did not intend to reach

188 See, eg, the following cases: *Singh v The Queen* [2011] VSCA 263 (2 September 2011); *UR v The Queen* [2011] VSCA 152 (19 May 2011); *ML v The Queen* [2011] VSCA 193 (23 June 2011); *FMJ v The Queen* [2011] VSCA 308 (11 October 2011); *Mokbel v The Queen* [2010] VSCA 354 (20 December 2010); *CEG v The Queen* [2012] VSCA 55 (27 March 2012); *DPP (Vic) v DJC* [2012] VSCA 132 (20 June 2012).

189 See, eg, *R v Zainudin* (2012) 115 SASR 165; *Sunada v The Queen* [2012] NSWCCA 187 (27 August 2012).

Australia and who honestly believed that an Australian territory ‘belonged to ... another nation altogether’ cannot be convicted of an indictable offence which carries significant penalties.¹⁹⁰ In any case, Mr Jeky Payara was never convicted of any Australian offences. Following the proceedings in the Court of Appeal, he was promptly released from immigration detention and the prosecution case against him was formally discontinued. He has now been successfully returned to Indonesia.¹⁹¹

190 *PJ v The Queen* (2012) 268 FLR 99, 112 [55].

191 Michael Gordon, ‘People-Smuggling Charges Dropped’, *Sydney Morning Herald* (online), 4 September 2012 <<http://www.smh.com.au/opinion/political-news/peoplesmuggling-charges-dropped-20120903-25ajy.html>>.