

**Eastern Suburbs Law Society CLE Dinner –29 June 2016**

**Statutory construction case examples**

**Case 1 - statutory interpretation by 'canons' of construction**

An accused was charged that between certain dates at Sydney he made a 'publication' in contravention of a direction given at a hearing of the Police Integrity Commission (**PIC**).

Police Integrity Commission Act 1996 ("the Act") provides:

**52 Restriction on publication of evidence**

**(1) Direction regarding publication**

*(cf ICAC Act s 112 (1); RC (PS) Act s 27 (1))*

*The Commission may direct that:*

- (a) any evidence given before the Commission, or*
- (b) the contents of any document, or a description of any thing, produced to the Commission, or seized under a search warrant issued under this Act, or*
- (c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located, or*
- (d) the fact that any person has given or may be about to give evidence before the Commission,*

*must not be published except in such manner, and to such persons, as the Commission specifies.*

**(2) Public interest**

*(cf RC (PS) Act s 27 (2))*

*The Commission is not to give a direction under this section unless satisfied that the direction is necessary or desirable in the public interest.*

**(3) Offence**

*(cf ICAC Act s 112 (2); RC (PS) Act s 27 (3))*

*A person must not make a publication in contravention of a direction given under this section.*

*Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.*

It was submitted that the plain and ordinary meaning of 'publication' in s 52(3) is to be preferred over an interpretation that offends several canons of statutory construction.

Four significant rules of statutory construction support the conclusion that the offence of "publication" under s 52(3) is not to be construed as having been committed where there is a dissemination to a single individual:

1. The comparative language rule;
2. The principle of legality;
3. The consistency with international law principle; and
4. The penal statute rule.

Each will be shortly considered after considering the **purposive approach** to statutory construction

**Kingston v Ke prose** (1987) 11 NSWLR 404 at 423 and see **Bropho v Western Australia** (1990) 171 CLR 1.

*A purposive and not a literal approach is the method of statutory construction which now prevails: cf Fothergill v Monarch Airlines Ltd [1981] AC 251 at 272-273, 275, 280, 291. In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act. The Acts Interpretation Act 1901 (Cth), s 15AA, and the Interpretation Act 1987 (NSW), s 33, both require this approach to statutory construction.*

*But first and last the function of the court remains one of construction and not legislation. As Lord Diplock has pointed out "the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it": Jones v Wrotham Park Estates Ltd (at 105).*

*Purposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgment as to where the boundary of construction ends and legislation begins.*

*If the objects and purposes of a statute and the means of their achievements are not declared, they can only be determined by examining the statute as a whole. The ordinary meanings of the individual words together with any statutory definitions will invariably indicate what those objects, purposes and means are. The cumulative weight of their core meanings will indicate the general purpose or purposes of the statute. But when the statute has been read as a whole and its purpose determined, the prima facie meaning of a provision must, if necessary, give way to the construction which gives effect to the statutory object or purpose.*

*Once the object or purpose of the legislation is delineated, the duty of the Court is to give effect to it in so far as, by addition or omission or clarification, the relevant provision is capable of achieving that purpose or object.*

*Where the court can see the purpose of a provision from an examination of its terms, little difficulty should be met in giving effect to that purpose.*

The statutory purpose of the offence provision can be seen in the context of Part 3 of the Act 'Functions of the Commission', Division 8 - 'Protection of witnesses and evidence' – ss 51-55 inclusive. That purpose is to provide a mechanism for the PIC to make binding *non-publication* orders for both PIC private and public hearings and make it an offence for breach. No exceptions are provided. There are many and varied reasons why such a power is given to tribunals – both judicial and inquisitorial.

The prosecution of the accused was predicated on the assumption that a discussion between private citizens constituted the act of “publication”.

The following facts were admitted for the purposes of demonstrating there is no *prima facie* case:

- (a) on a certain date the accused was served with a Summons to give evidence at a private PIC hearing as part of Operation XXX (“the **investigation**”);
- (b) the Summons contained a reference to sub-s 54(2) of the Act and stated, *inter alia*, that no disclosure of the Summons or the investigation could be made;

- (c) on a certain date the accused attended the PIC to give evidence at a private hearing as part of the investigation;
- (d) on a certain date the PIC Commissioner (the Hon Bruce James QC), directed that there be a non-publication order pursuant to s52(2) of the Act, while also noting the applicability of s 53 of the Act which automatically made a non-publication order for such private hearings;
- (e) between certain dates on more than one occasion the accused spoke to another person (a person not connected with the PIC investigation) during which the accused “had a chat” about giving his evidence at PIC;
- (f) on a later date the accused gave evidence at a public hearing of the investigation – he admitted having “had a chat”
- (g) afterwards counsel assisting asked the Commissioner to lift “the suppression order” made earlier in respect of the accused's evidence. The Commissioner revoked “the non-publication” order.

### **The offence creating provision**

s 52(3) of the *PIC Act* provides that:

A person must not make a publication in contravention of a direction given under this section.

A direction may be given pursuant to sub-s (1), which relevantly provides that the PIC may direct that any evidence given before the Commission must not be published except in such manner, and to such persons, as the Commission specifies. A failure to follow such a direction becomes punishable as a form of statutory sub-judice contempt pursuant to the offence created by sub-s (3).

The terms ‘publish’, ‘publication’ and ‘publishing’ are not defined in the *PIC Act*. The sub-section is found in identical terms in *Independent Commission Against Corruption Act 1988* s 112(2) and the *Royal Commission (Police Service) Act 1994* s 27(3). None have been the subject of prior judicial consideration.

### **The correct statutory construction of “publication” in s 52(3)**

A correct understanding of the term “publication” may be reached by application of the established principles of statutory interpretation.

The rules of statutory construction mandate that where a term is left undefined by a statutory instrument, it is to be given its plain and ordinary meaning: *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 647 per Dixon J; *Maunsell v Olins* [1975] AC 373 at 382 per Lord Reid.

Publication is the act of publishing. The term “publish” as defined in the Macquarie Dictionary (4<sup>th</sup> ed) is as follows:

1. *To issue, or cause to be issued, in copies made by printing or other processes, for sale or distribution to the public, as a book, periodical, map, piece of music, engraving, or the like.*
2. *To issue to the public the works of (an author).*
3. *To announce formally or officially; proclaim; promulgate.*
4. *To make publicly or generally known.*

In other words 'to publish' is to make content available to the general public. Indeed, the stem of the words 'publish' and 'publication' is 'public'. 'Publication' is a noun of action from the past participle stem of the Latin *publicare*: "make public," from *publicus*: "of the people".

The ordinary meaning of 'publication' is one which comprehends the public dissemination of material - as are typically involved in media publications. At common law publication of court proceedings may attract contempt action as publication to a sufficiently wide class of people may have the requisite tendency to prejudice particular legal proceedings.

This is the vice that ss 52 and 53 are directed at – automatically prohibited for private hearings of the PIC under s 53 and where directed and if in the public interest, for both private and public hearings.

Whereas s 54 provides for binding *non-disclosure* orders for a specific and mandatory reason – where the disclosure may prejudice an investigation to which it relates. A number of exceptions are provided. Importantly, the accused was not charged with breaching a non-disclosure order and no doubt as there is no evidence there was any prejudice to the investigation by any disclosure.

Parliament could not have intended the provisions of s 52 to import more restrictive controls than s 54 over a communication to a single person, particularly as s 52 has no exceptions.

The *Interpretation Act 1987 (NSW)* provides that in ascertaining the correct interpretation of a provision of an Act resort may be made to extrinsic material for the purpose of confirming the ordinary meaning of a text of a provision: s 34(1)(a), including the report of a Law Reform Commission: s 34(2)(b).

A thorough search of the relevant second reading speeches and explanatory memoranda casts no light on the specific legislative intention of s 52 or its analogues in the *ICAC Act* or *RC(PS) Act*.

The ordinary meaning, as set out above is consistent with conclusions of the New South Wales Law Reform Commission (**LRC**). In '*Report 100 (2003) – Contempt by publication*', under the heading 'The meaning of "publication" (at para. 3.4) the LRC concluded that "publication" of material typically arises from the dissemination of matter by media organisations' through newspapers, radio stations, or television channels. The LRC relevantly noted at para 3.3 that:

*“At the least, a ‘publication’ in the context of sub-judice contempt must usually involve a communication to more than a single individual.”*

### **The construction errors in the approach adopted by the prosecutor**

In *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at 591-592 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ provided a useful and apposite summary of the principles which should be applied in an exercise of statutory construction:

*“ The objective of statutory construction was defined in Project Blue Sky Inc v Australian Broadcasting Authority as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. An example of a canon of construction directed to that objective and given in Project Blue Sky is “the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities”. That is frequently called **the principle of legality**. The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts...*

*The application of the rules will properly involve the **identification of a statutory purpose**, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.” (emphasis added)*

The identification of the statutory purpose in ss 52 and 53 is set out above – to prevent publication to a sufficiently wide class of people as may have the requisite tendency to prejudice particular PIC investigations – if in the public interest in s 52 and automatically where private hearings under s 53.

The principal objects of the PIC Act are in s 3 and include:

*(b) to provide special mechanisms for the detection, investigation and prevention of serious officer misconduct and other officer misconduct.*

### Comparative language rule

Where a legislature could have used the same word throughout an Act, but chose to use different words, the intention of Parliament was to change the meaning: *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452 per Hodges J.

In this regard the language of s 54 of the *PIC Act* is instructive. It provides that a person must not “disclose” any information about a Notice or Summons or the investigation to which it relates that is “likely to prejudice the investigation to which it

relates". The act of making a "disclosure" where that would prejudice an investigation is punishable as an offence.

The use of the term "disclose" in s 54 it is significant, and should be contrasted with the use of the term "publish".

The term "disclose" is similarly undefined in the *PIC Act*, but is defined in the Macquarie Dictionary in the following terms:

1. *To cause to appear; allow to be seen; make known; reveal: to disclose a plot.*
2. *To uncover; lay open to view.*

The act of making a 'disclosure' would likely entail conduct which involves the dissemination of information to a single person, but such conduct is only punishable where there is an additional feature of that communication – the likely prejudice of an investigation.

Finally, the contention that any action of "speaking" about a PIC related matter constituting an offence may be dispelled by reference to the Second Reading speech for the Police Integrity Commission Bill 1996: s 34(2)(f) of the *Interpretation Act 1987*. The speech given by the Honourable Tony Whelan, then Minister of Police, reveals that police officers needed to be able to discuss an inquiry in which they were involved:

*"The Police Association noted that no provision was made for disclosure in the context of seeking assistance other than legal advice. The association was particularly concerned that [s 54(3)] not act as a disincentive to officers seeking counselling and other welfare assistance".*

It was submitted that where a police officer is entitled to have discussions about a matter without contravening the more restrictive provisions of s 54, Parliament could not have intended the provisions of s 52 to import more restrictive controls over a communication to a single person, particularly as s 52 has no exceptions. Such an outcome would be not only counter-intuitive but also draconian.



Principle of legality

It was submitted that the presumption against the invasion of common law rights operates to favour an interpretation that does not limit the liberty of a person to communicate.

It is a perennial rule of construction that an interpretation which does not remove existing common law rights is to be preferred to one that does. The rule was succinctly stated in *Sargood Bros v Commonwealth* (1910) 11 CLR 258 where O'Connor J explained at 279:

*“ It is a well-recognised rule in the interpretation of statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction.”*

In *Pyneboard Pty Ltd v Trade Practices Commn* (1983) 152 CLR 328 at 341; 45 ALR 609 at 617 Mason ACJ, Wilson and Dawson JJ referred to ‘the general principle that a statute will not be construed to take away a common law right unless the legislative right to do so clearly emerges, whether by express words or by necessary implication’.

In *Brown v Classification Review Board* (1998) 82 FCR 225, the Full Federal Court of Australia stated at FCR 234:

*“ The value currently given to freedom of expression will support a conservative approach to the construction of statutes which would impair or abrogate it. This is no more than a particular application of the general point made very early in the life of the High Court in Potter v Minahan (1908) 7 CLR 277 at 304, affirmed in Bropho v Western Australia (1990) 171 CLR 1 at 18 and recently restated in Coco v The Queen (1994) 179 CLR 427 (at 437).*

This rule was affirmed in *Plaintiff S157/2000 v Commonwealth of Australia* (2003) 211 CLR 476 at 492; 195 ALR 24 wherein the High Court explained at 34:

*“ ... courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and ambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment... for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the*

*most general words are taken to be 'subject to the basic rights of the individual.'*

### International law

International conventions to which Australia is a party can supply content to a rule of construction that Parliament intended statutes are to be interpreted and applied, as far as their language permits, in accordance with its international obligations: *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69; *Dietrich v The Queen* (1992) 177 CLR 292 at 306; *Mabo v Queensland (No.2)*(1992) 175 CLR 1 at 42.

In the decision of *Brown v Classification Review Board, supra*, the court considered [at 236] the effect of various international instruments, including the Article 19 of the *Universal Declaration of Human Rights* (ratified by the Commonwealth Government of Australia in 1980), and later replicated in the *International Covenant on Civil and Political Rights*, which provides:

*“ Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of the frontiers.”*

### Penal statute rule

Finally and fundamentally, it is a settled rule in the construction of penal statutes that where there are two reasonable constructions, the more lenient must be preferred: *Ex parte Zietch*; *Re Craig* (1944) 44 SR (NSW) 360 at 365 per Jordan CJ. If there is a reasonable interpretation which will avoid the penalty in any particular case, that construction must be adopted: *Ex parte Purcell* (1907) 7 SR (NSW) per Cohen J.

It is submitted that although a court must be primarily guided by the fair meaning of the language of the enactment, when that language is capable of more than one meaning, or is vague or cloudy so that its denotation is uncertain and no sure conclusion can be reached by consideration of the provisions and subject matter of the legislation, then it ought to be construed as not extending any penal category: *R v Adams* (1935) 53 CLR 563 at 567-8; See also *Director-General Department of Land and Water Conservation v Bailey* [2003] NSWCCA 361 at [24].

This 'rule of last resort' was reiterated in *Beckwith v R* (1976) 135 CLR 569 at 576; 12 ALR 333 at 339 wherein Gibbs J explained:

*“ In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences.”*

## **Conclusion**

The plain and ordinary meaning of 'publication' in s 52(3) is to be preferred over an interpretation that offends several canons of statutory construction. For the reasons stated the prosecution of the accused on the facts alleged did not establish that he committed the act of “publication”.

Accordingly, the accused had no case to answer.

## **Case 2 – statutory interpretation by facts**

An accused was charged that between certain dates in NSW he knowingly took part in the supply of a prohibited drug, namely 'methorphan' in an amount of xxxx grams, being an amount not less than the large commercial quantity for that drug – contrary to s 25(2) *Drug Misuse and Trafficking Act* 1985 (NSW) (the **Act**).

There was a s 43 'Certificate of Analysis' from an authorised analyst under s 37A of the *Poisons and Therapeutic Goods Act* 1966, that on a certain date they conducted analysis on white powder and determined that it contained 73% dextromethorphan (the **finding**). Another expert, a 'forensic chemist', put on evidence that 'methorphan' is the common term that *can* be used to describe the compounds dextromethorphan and levomethorphan.

Assuming the Crown can otherwise prove the elements of the charge – is dextromethorphan a prohibited drug for the purposes of the Act? Or perhaps more pertinently is dextromethorphan an 'analogue' of methorphan?

### **The legislative context**

The Act (Historical version for 11 January 2013 to 26 September 2013)

Section 25 of the Act is headed 'Supply of prohibited drugs'.

Sub-section 2 states:

*(2) A person who supplies, or who knowingly takes part in the supply of, an amount of a prohibited drug which is not less than the commercial quantity applicable to the prohibited drug is guilty of an offence.*

Section 3 of the Act defines 'prohibited drug'

*prohibited drug means any substance, other than a prohibited plant, specified in Schedule 1.*

Schedule 1, (the **Schedule**) under the column headed “*Prohibited plant or prohibited drug*” includes “Methorphan” and “Levomethorphan” and “Racemethorphan”. Note, it does not contain “dextromethorphan”.

The 'key' to the columns in Schedule 1 notes that under the column “*Prohibited plant or prohibited drug*”:

*Any substance that is an analogue of a drug prescribed in this Schedule, being a substance that has psychotropic properties, is not separately specified in this Schedule and is, in relation to the drug, any of the following: :*

*(a) a structural isomer having the same constituent groups as the drug,*

*(b) a structural modification obtained in one or more of the following ways:*

*(i) the replacement of up to 2 carbocyclic or heterocyclic ring structures with different carbocyclic or heterocyclic ring structures,*

*(ii) the addition of hydrogen atoms to 1 or more unsaturated bonds,*

*(iii) the addition of 1 or more of the following groups having up to 6 carbon atoms in any alkyl residue, namely, alkoxy, cyclic*

*diether, acyl, acyloxy, monoalkylamino and dialkylamino groups,*

*(iv) the addition of 1 or more of the following groups having up to 6 carbon atoms in the group and being attached to oxygen, namely, alkyl, alkenyl and alkynyl groups (for example, ester groups and ether groups),*

*(v) the addition of 1 or more of the following groups having up to 6 carbon atoms in the group and being attached to nitrogen, sulphur or carbon, namely, alkyl, alkenyl and alkynyl groups,*

*(vi) the addition of 1 or more of the following groups, namely, halogen, hydroxy, nitro and amino groups,*

*(vii) the replacement of 1 or more of the groups specified in subparagraphs (iii)–(vi) with 1 or more other groups so specified,*

*(viii) the conversion of a carboxyl or an ester group into an amide group.*

Note the words, “..being a substance that has psychotropic properties..”, in the Schedule were repealed by the *Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013 Assented on 24/09/2013 - Act No 70 of 2013 (GG. No. 118, 27/09/2013, p. 4190).*

'psychotropic' used as an adjective would include.

“relating to or denoting drugs that affect a person's mental state.”

### The Poisons Standard

The Standard for the Uniform Scheduling of Medicines and Poisons (abbreviated SUSMP) or the Poisons Standard (its legal title), is a legislative instrument used in the regulation of drugs and poisons in Australia. It is produced by the Australian Committee for Chemicals Scheduling (ACCS), a committee of the Therapeutic Goods Administration (TGA). The SUSMP contains the decisions of the ACCS delegate in the aim of standardising the scheduling and packaging/labelling of substances throughout Australia, where such regulation lies within the jurisdiction of

the individual state governments. The SUSMP is only a recommendation to the states, however, and differences still exist in the regulation of drugs and poisons between Australian states.

Dextromethorphan (excluding its stereoisomers) is listed on both Schedules 2 and 4 of the Poisons Standard. Schedule 2 (S2) drugs and poisons, otherwise known as Pharmacy Medicines, are substances and preparations for therapeutic use that:

- Are substantially safe in use but where advice or counselling is available if necessary; and
- Are for minor ailments or symptoms that:
  - Can be easily recognised by the consumer
  - Do not require medical diagnosis or management

Dextromethorphan (excluding its stereoisomers) is listed on S4 when supplied in a pack containing 600 mg or less of dextromethorphan and with a recommended daily dose of 120 mg or less of dextromethorphan. S4 drugs can only be provided on a written prescription.

Schedule 9 (S9) drugs and poisons are substances and preparations that, by law, may only be used for research purposes. The sale, distribution, use, and manufacture of such substances without a permit is strictly prohibited by law. Permits for research uses on humans must be approved by a recognized ethics committee on human research.

Note, Levomethorphan (excluding its stereoisomers) and Racemethorphan are S9 drugs.

The fact that both dextromethorphan and levomethorphan exclude their stereoisomers is highly relevant – as referenced below.

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#### Poisons and Therapeutic Goods Act 1966

The NSW Poisons List, which is proclaimed under Section 8 of the Poisons and Therapeutic Goods Act 1966, is based on the Standard for the Uniform Scheduling of

Medicines and Poisons (SUSMP) as in force at any time, except for a small number of variations.

“dextromethorphan”, “Methorphan”, “Levomethorphan” and “Racemethorphan” are contained on the same schedule as the Poisons Standard above.

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## **Discussion**

Assuming that “dextromethorphan” is strictly not “Methorphan”, “Levomethorphan” or “Racemethorphan” then it does not appear on the Schedule, arguably is not a prohibited drug for the purposes of the Act and, hence the finding is not evidence substantiating the charge.

However, the Crown forensic chemist suggests dextromethorphan *is* methorphan by stating that 'methorphan' is the common term that *can* be used to describe the compounds dextromethorphan and levomethorphan.

Two questions remain: 1. is dextromethorphan an analogue of methorphan for the purposes of the Schedule and if so, 2. as a matter of statutory construction do the words in the 'key' to the Schedule “.. *is not separately specified in this Schedule..*” mean that dextromethorphan is nevertheless a prohibited drug for the purposes of the Act? i.e. has Parliament intended that something answering the description of “an analogue” is intended to be prohibited as its isomer form is on the Schedule? Each may be discussed in turn.

### *is dextromethorphan an analogue of methorphan?*

According to drugs.com: *Dextromethorphan is a cough suppressant. It affects the signals in the brain that trigger cough reflex. And: Suppresses cough by central action on cough center in the medulla.* When exceeding label-specified maximum dosages, dextromethorphan acts as a dissociative hallucinogen.

It appears to be used in a number of commercial cough medicines: *Babee Cof, Benylin DM Pediatric, Buckleys Mixture, Creomulsion, Creo-Terpin, DayQuil Cough, Delsym, Delsym 12 Hour Cough Relief, Elixsure Cough, Robafen Cough Liquidgels,*

*Robitussin CoughGels, Scot-Tussin Diabetic, Silphen DM, St. Joseph Cough Suppressant, Sucrets DM Cough, Theraflu Thin Strips Cough, Triaminic Long Acting Cough.* Consistent with the Poisons Standard, some appear to be available without prescription in Australia: <http://robitussin.com.au/>

Methorphan comes in two isomeric forms, each with differing pharmacology and effects:

- Dextromethorphan - An over-the-counter cough suppressant, as well as dissociative hallucinogen.
- Levomethorphan - A potent opioid analgesic that was never clinically developed.

Racemethorphan refers to the racemic mixture of both of these stereoisomers.

In chemistry, a racemic mixture, or racemate /reɪˈsɪmeɪt/, is one that has equal amounts of left- and right-handed enantiomers of a chiral molecule.

Chemically, dextromethorphan is (<https://en.wikipedia.org/wiki/Dextromethorphan>) the dextrorotatory enantiomer of levomethorphan, which is the methyl ether of levorphanol, both opioid analgesics. It would seem then, although I am not an expert, that the finding precludes a charge based on racemethorphan – there is no levomethorphan, let alone equal amounts.

Stereoisomers are isomeric molecules that have the same molecular formula and sequence of bonded atoms (constitution), but differ in the three-dimensional orientations of their atoms in space. This contrasts with structural isomers, which share the same molecular formula, but the bond connections or their order differs. By definition, molecules that are stereoisomers of each other represent the same structural isomer.

It would seem the answer to this first question - *is dextromethorphan an analogue of methorphan?* turns on whether dextromethorphan is *a structural isomer having the same constituent groups as the drug.*

It would appear to be that stereoisomers and structural isomers are two different things – they may share the same molecular formula, in this case of methorphan but



they act differently. This appears consistent with the forensic chemist's evidence. Here there are two isomers of methorphan – dextromethorphan and levomethorphan and these are stereoisomers, not structural isomers. Dextromethorphan is not then caught by the Schedule.

This view is strengthened by the fact that in both the Federal Poisons Standard and in the NSW Poisons List dextromethorphan and levomethorphan exclude their stereoisomers. This makes sense as they appear to be quite different drugs and are contained in starkly different schedules.

It does not appear necessary then to answer the second question: 2. as a matter of statutory construction do the words in the 'key' to the Schedule “.. *is not separately specified in this Schedule..*” mean that dextromethorphan is nevertheless a prohibited drug for the purposes of the Act? As this arose only if the answer to question 1 was positive. It was raised as it seems the use of the words “.. *is not separately specified in this Schedule..*” to mean analogues are prohibited is rather sloppy drafting and might be the subject of submissions based on the strict interpretation approach to criminal statutes should the expert advice not support the view that dextromethorphan, being a stereoisomer, and not structural isomer of methorphan or levomethorphan, is not an analogue for the purposes of the Schedule

Finally, 'substance' is defined as:

**substance** includes preparation and admixture and all salts, isomers, esters or ethers of any substance and all salts of those isomers, esters and ethers.

Any *substance* that is an analogue of a drug prescribed in this Schedule,...

So the larger, general definition of 'substance' may be used as a 'catch all' – however that begs the questions why such detail has been gone into in the rest of the Schedule and why some stereoisomers are included and not others? This point takes the argument back to canons of construction.

## **Conclusion**

The factual circumstances point to dextromethorphan not being a prohibited drug for the purposes of the *Drug Misuse and Trafficking Act 1985* (NSW)

29 June 2016

Michael McHugh SC

Sixteenth Floor Wardell Chambers