

# Drugs

## Criminalisation and Harm Minimisation 1049-1052; 1061-1072; 1075-1078; 1080-1082

### Introduction: p. 1049

The criminal law relating to drugs is found in legislation, not the common law, involving the following legislation:

- *Customs Act 1901 (Cth)*
- *Drug Misuse and Trafficking Act 1985 (NSW)*
- *Poisons and Therapeutic Goods Act 1966 (NSW)*

Drug legislation often seems to **abrogate or neglect the general principles of criminal law, evident particularly in the following:**

- **'Deemed drug'** provisions where a substance is **considered a drug when it is not.**
- **'Deemed trafficking'** provisions which **reverse the burden of proof by requiring those possessing more than a particular quantity of a drug to prove that they are not suppliers.**
- Provisions which impose liability for what should be regarded as mere acts of preparation, beyond the law of attempts.

### Identifying the Drug Problem

- The concept of harm is difficult to establish in terms of the drug problem, making it distinguishable from other criminal behaviour. When a person chooses to consume marijuana, what harm is there?
  - **social productivity'**
  - 'Harm to others' in the forms of the **costs of medical treatment** to drug users etc.
  - However, note that the above two points apply to the use of legal drugs such as alcohol and tobacco.
  - Other explanations do not justify them in any form of rational policy analysis, but instead in terms of Western cultural constructions (ie, drugs are 'immoral') (*Mugford*)

### *S Mugford, Policing Euphoria* → 3 explanations for drug laws

1. **Economic** - Western governments banned drugs which were mainly produced in third-world countries because the **Western governments were unlikely to profit from their decriminalisation.**
  - **In other words, Australia had no marijuana industry, but had an alcohol industry. Therefore alcohol was not criminalised but marijuana was.**
2. The second approach to explaining drug use focuses on **politics**. It presumes that **drug taking is a normal feature of society and suggests that laws reflect class interest or the interest of powerful pressure groups.**
  - The political approach emphasizes the connection between illegal drugs and minority status.
  - **The association between a given ethnic, class, or racial minority and particular drugs is declining in modern society, so the nexus on which discriminatory laws might focus is disappearing as well.**

3. The third possibility for analyzing drug laws is **cultural**. An important task, therefore, is **investigating how drug pleasures are socially constructed**. This raises the control issue, for **not all pleasures are acceptable**, so we need to know the **circumstances under which some pleasures are defined as acceptable or not, how and by whom**.

## **Harm Minimisation Policies p. 1061**

The focus on harm minimization has **challenged many of the orthodox approaches to the use of criminal prohibitions** and has **broadened** the range of policies now considered to be legitimate and potentially effective interventions.

### **The Drug Summit**

- In May **1999**, the NSW Government convened a drug summit at Parliament House.
- The overwhelming majority of the recommendations were accepted by the Government. Recommendations included:
  - The **expansion of the drug courts to juveniles**;
  - The expansion and creation of **new treatment facilities**;
  - The establishment of medically supervised **injecting rooms**;
  - Increasing the use of **police cautioning rather than prosecution for minor drug offences**;
  - The establishment of a **cannabis cautioning scheme**; and
  - An **increased** use of **compulsory treatment programs**
    - A budget of \$500 million over 4 yrs
    - However, some recommendations weren't accepted e.g. removal of gaol penalty for cannabis possession

### **Pharmacological Programs**

- The most widely used treatment programs for illicit drugs in Australia are the pharmacological treatments.
- **“Health interventions, such as methadone treatment and needle exchange programs have proved remarkably effective”**
- **CRIME**: Research estimated that **for every 100 persons in methadone treatment for one year, NSW had 12 fewer robberies, 57 fewer break and enters and 56 fewer vehicle thefts**
- Reduced morality, incarceration rates and hepatitis C infection

### ***ACT TRIAL***

- **A more controversial proposal considered for introduction in the ACT involving the supply of heroin to addicts on an experimental basis.**
- The initial 6 month pilot was to provide free heroin to 40 volunteer users who were both registered with the ACT methadone program and were resident in the ACT since 1993
- Safeguards were to be in place to ensure administration of the heroin occurred only under close supervision at the clinic and to prevent participants from driving while affected by the drug
- If successful, a second six month pilot study was to have been conducted with 250 dependent users

- **The trial was rejected by cabinet in August 1997** on the grounds that it would send the “wrong signal” to the community about drugs.
- The PM told cabinet that he would not countenance the trial because he was not convinced that the benefits outweighed the detriments
- One of the few trials of heroin dispensation in the world was conducted in **Switzerland in 1994**
  - There was 800 users in the heroin treatment study
  - **After 18 months, 69% had remained in treatment. General and psychiatric health had improved. Illicit heroin and cocaine use decreased. Social functioning, employment and homelessness all improved. There was a significant reduction in self-reported criminal activity, police contacts and convictions. After 1 year in the program, prevalence and incident rates for property offences and drug supply offences declined significantly**
- Needle exchange programs have been effective in the prevention of HIV and reducing injecting risk taking behaviour → approx 15 million syringes were distributed annually in the mid-1990s
- HIV prevalence among injecting users remains below 5%

## **Safe Injecting Rooms**

- **Arguments for:**
  - Potential to reduce fatal overdoses.
  - Reduce transmission of blood-borne viral infections.
  - Better access to primary medical care.
  - Improve likelihood of accessing drug-treatment programs.
- **Arguments against:**
  - Could lead to an increase in drug use.
  - Lead to the assumption that drug use is condoned.
  - Congregation of drug users.
  - Increase in dealing and opportunistic crime
- The Royal Commission recommended that “consideration be given to the establishment of safe, sanitary injecting rooms under the license or supervision of the Department of Health”.
- The Drug Summit endorsed a recommendation that the Government should not veto the establishment of a trial of medically supervised injecting rooms by non-government agencies.
- As a result, amendments were made to **the Drug Misuse and Trafficking Act 1985** to **allow for such rooms (where licensed) without persecution for possession etc.**
  - A license was given out and a trial was established.
  - There was some difficulty because the original applicants (a church organisation) withdrew on upon the request of the Pope, but eventually the trial was conducted.
  - **In 2010, the injecting room ceased to be 'on trial', and is now fully established.**

- Among the findings of the European evaluations were a **reduction in overdose deaths, improvements in the general health of users, and a reduction in the public order problems associated with the street or “open” drug scenes**

## **The Drug Court**

- A drug court is a court specifically **designed to administer cases referred for judicially supervised drug treatment and rehabilitation within a jurisdiction.**
- The NSW Drug Court commenced operation in February 1999. It is **governed by the provisions of the Drug Court Act 1998** (as amended by the *Drug Court Amendment Act 1999*).
- **The objects of the Act are stated in s 3:**
  - (1) The object of this Act is to reduce the level of criminal activity that results from drug dependency.**
  - (2) This Act achieves that goal by establishing a scheme under which drug dependent persons who are charged with criminal offences can be diverted into programs designed to eliminate, or at least reduce their dependency on drugs.**
  - (3) Reducing a person’s dependency on drugs should reduce the person’s need to resort to criminal activity to support that dependency and should also increase the person’s ability to function as a law abiding citizen.**
- The court aims to **replace custodial sentences with rehabilitation programs.**
  - **S5:Eligible persons** to be tried in the Drug Court are those **charged with an offence who are highly likely to be sentenced to full-time imprisonment, intend to plead guilty, and are dependent on the use of prohibited drugs.**
  - **S7:**Once eligibility is determined, the person is admitted to Drug Court. The judge sentences them, then suspends the sentence.
  - **S10**The Drug Court then sets out a **rehabilitation program** which is **closely monitored - sanctions apply to breaches of the program.**
  - **S10b** **If the defendant graduates successfully from the program, the court generally does not impose a custodial sentence.**
  - **S12:** **If the defendant breaches the program, the sentence is imposed**

## **Magistrates Early Referral into Treatment Program (MERIT)**

- The Magistrates Early Referral into Treatment Program (MERIT) provides adult offenders, whose drug dependence is a factor in criminal behaviour, with the **opportunity to work on a voluntary basis towards rehabilitation as part of the bail process**
- The **Bail Act** was amended to allow conditions to be granted which facilitate entry into **MERIT (s 36A)**
- **Eligibility criteria** → the accused is eligible and suitable to be released on bail, have a **demonstrable and treatable drug problem, and is charged with drug related offences (not indictable offences)**
- Referrals made by magistrates, police, defence lawyers and the accused in person. After referral, the person is assessed by the MERIT team.
- **Once accepted into MERIT, the magistrate grants bail and the person participates in the program over a minimum of 12 weeks**
- **At the conclusion of the program the accused enters a plea and is tried and sentenced**
- **The successful completion of MERIT would be treated as a factor in mitigation of penalty**

## **Cannabis Decriminalization**

- There has been a **call to decriminalise cannabis**, or at the least, discontinue convictions for simple, personal use or possession. **The rationale is as follows:**
  - Whilst not being a harm-free drug, the most probable **health risks of cannabis are considered to be small to moderate.**
  - **The negative consequences of applying the criminal law** against users **may objectively be greater than these health risks.**
    - **Convictions, even for minor offences, are likely to lead to further involvement in the criminal justice system, negative impact on employment, strain on family relationships etc.**
  - **The alternative is an infringement notice or expiation scheme for cannabis possession - an on-the-spot fine which does not include a criminal record.** These have been adopted in SA, ACT and NT. In **New South Wales**, the '**Cannabis Cautioning Scheme**' (CCS) has been adopted: - Totally dependent on police discretion.
    - **Eligibility requirements**
      - Adult.
      - Possession of **no more than 15 grams**, only for personal use.
      - **Must admit the offence** and have **no prior convictions** for drug offences or specific offences involving violence or sexual assault.
      - **Must not have been cautioned twice already**
      - Even if the defendant satisfied the requirements, it is **still the police's discretion.**
  - The Netherlands is the most common example of cannabis decriminalisation - it is in fact very similar to the expiation notices of SA.

## **Medical Use of Cannabis**

- **There is a long history of cannabis being used for medicinal, pain-killing purposes. Studies have shown it may be a better pain-killer than current (morphine-based) pain-killers.**
  - Recommendations have been made to issue '**medical certificates**' for certain sick people (particularly HIV and cancer patients, who really benefit from medicinal cannabis) **to allow them to acquire certain quantities of cannabis legally**
  - **However, no steps have been taken to implement this initiative, meaning cannabis is still completely illegal - even in medical use.**
  - **Medicinal cannabis is implemented in California**

## The Prosecution of Drug Offences p.1075

- Conflicting approaches of harm minimisation and war on drugs provides creates a number of issues for law enforcement of drug offences
- Significant scope for police discretion as to **when** to charge and **how severe the charge laid and prosecuted**
- **Division of use, possession and supply offences**
- **Overwhelming summary in nature -**
  - **Summary offence : most common possession** – criminalised despite concerns over overcriminalisation of personal use
  - **Indictable offence overwhelming number of smaller indictable amounts rather than large scale seizure**

### DRUG MISUSE AND TRAFFICKING ACT 1985 (NSW)

| <u>Sections:</u>                            | <u>Definitions:</u> | <u>Penalty</u> | <u>Notes/ Cases:</u> |
|---|---------------------|----------------|----------------------|
| <u>S 10 (1) possess a prohibited drug</u>   |                     |                |                      |
| <u>S 12 (1) use prohibited drug</u>         |                     |                |                      |
| <u>S 25 (1) supply etc. prohibited drug</u> |                     |                |                      |

### The Drugs Crime Tariff:p. 1077

#### H Packer, The Limits of the Criminal Sanction

- The tariff in question is the criminal law or, more precisely, the particular criminal statutes that make it illegal to do such things as traffic in narcotics.
- By making conduct criminal, what we are in effect doing is **limiting the supply of the commodity in question by increasing the risk to the seller, thereby driving up the price of what he sells**
- **Criminalising drugs by reducing supply does not reduce supply.** The price is driven up because the risk supplies have to undergo in order to supply the drugs is higher. **This leads to a monopoly for the willing few who supply drugs under risk of prosecution.**
  - Dealing with illicit drug market through criminal sanctions effectively imposes a ‘**crime tariff**’.
  - The demand for narcotics is regarded as **relatively price elastic**.

As such, there is a greater potential gain to the seller (in line with an increase in risk).

### THE HISTORICAL DIMENSION p.1080

- As mentioned before, **drugs legislation has its roots in statutory legislation, not the common law.** NSW legislation has two roots:
  - Provisions regulating access to **drugs for medical purposes** – namely the **licensing system**, with crim law playing only a background role: **Poisons and Therapeutic Goods Act 1966.**

- **General criminal prohibitions intended to discourage** non-medical use of drugs: **Drugs Misuse & Trafficking Act.**
- In the course of the first half of the 20th century, the **government assumed more and more control over drugs.**
  - Drugs became increasingly 'more illegal' and moved from being **considered health problems under 'poison' acts to actual criminal problems under drug acts.**
  - There is evidence that suggests that **initial bans were racially motivated.**
  - **International influence** played a key role.
- 1954: **ban on heroin occurred; cannabis in 1956 → note: these bans are very recent.**

# Drugs Offences: NSW Law pp. 1082-1104

## Introduction:

- Poison and Therapeutic Goods Act 1966- represented an implicit acknowledgment of absence of sharp distinction between medicinal drugs and drugs of abuse
- Drug Misuse and Trafficking Act 1985- attempt to segregate statutory provision on prohibition of drugs of misuse from those regulating the possession and supply of drugs for medicinal purposes
- Uneasy use side by side 1985 act- plenty of reference to the 1966 act – medical excuse to its general criminal prohibitions

## Poisons and therapeutic Goods Act 1966:

- Example of licensing approach to drug use
- Schedules 2-9 classification s p. 1083
- Drugs likely to be abused are listed under schedules **4 (prescription only medicine), 8 (controlled drug), 9 (prohibited substance)**
- Ss9 and 11 - criminal offence to wholesale supply of poisons without wholesaler licence- Max pen 15 penalty units and/or imprisonment six months
  - If prescribed substance - 20 penalty units/ 2 years imprisonment
- Prescribed restricted Substances
  - Includes Valium, serapax, anabolic steroids
  - Offences of possession or attempt to possess (other than by medical professional) only apply to Prescribed restricted substances (s16)
  - S 18 A Evidentiary provisions – possession of more than a specified quantity – presumption that possession is for the purposes of supply – increases maximum
    - Defendant Must prove to contrary
    - Defendant must otherwise prove possession obtained in accordance w/ prescription of medical practitioner ...
      - No mens rea requirement ( contrary to woolmington and HKT)
      - Became blue print of Drug Misuse ad Trafficking Act 1985



- S18 (2) - if person represents something to be a prescribed restricted substance even though it is not- with view to supply- = for legal purposes SUBSTANCE IS DEEMED TO BE THE PRESCRIBED RESTRICTED SUBSTANCE IT IS REPRESENTED TO BE
- **Drugs of addiction:**
  - **Sch 8 - further restrictions**
    - Large discretion to medical practitioner as to whether person is “drug dependent” – more restrictions

## **Drug Misuse and Trafficking Act 1985**

- **Schedule 1** to the Act specifies over **240 prohibited drugs or plants.**
- **S4 → A prohibited drug** refers to **any preparation, admixture or other substance containing the drug**
- **Little attempt to distinguish between different drugs in terms of the prohibited seriousness of their effects.**
  - **Ss32-33 → Only when it comes to the maximum penalties for the most serious offences (supply, cultivation and production) are cannabis plants and leaves treated with less severity**

**Offences next page**

## Summary Offences:p.1085

| Sections:   | Penalty  | Notes/ Cases:  |
|---|--|--|
| <p><b><u>s 10 (1) – possession of a prohibited drug. – most common - cannabis</u></b></p> <p>(1) A person who has a prohibited drug in his or her possession is guilty of an offence</p> <p>(2) Nothing in this section renders unlawful the possession of a prohibited drug by:</p> <p>(a) a person licensed or authorised to have possession under the Poisons and Therapeutic Goods Act 1966 ,</p> <p>(b) (b) a person acting in accordance with an authority granted by the Secretary of the Department of Health where the Secretary is satisfied that the possession of the prohibited drug is for the purpose of scientific research, instruction, analysis or study,</p> <p>(b1) a person acting in accordance with a direction given by the Commissioner of Police under section 39RA,</p> <p>(c) (c) a person for or to whom the prohibited drug has been lawfully prescribed or supplied, or</p> <p>(d) (d) a person who:</p> <p>(i) has the care of, or is assisting in the care of, another person for or to whom the prohibited drug has been lawfully prescribed or supplied, and</p> <p>(ii) has the prohibited drug in his or her possession for the sole purpose of administering, or assisting in the self-administration of, the prohibited drug to the other person in accordance with the prescription or supply.</p> | <p>Penalty for offence under this Division is 20 penalty units and/or imprisonment for 2 years</p> | <p><b><u>Requirements:</u></b></p> <p><b><u>Degree of Physical Control of item: AR</u></b></p> <p>- <b><u>Flipetti 1984 – chinese budhha sticks chair case-</u></b> could not be concluded beyond reasonable doubt (not enough evidence) that the drugs were in exclusive physical control of the accused.</p> <p>- <b><u>RATIO: to prove exclusive physical control the prosecution needs to eliminate the possibility that the drugs were in the possession of another</u></b></p> <p>- <b><u>Dib 1991 - – Kitchen family vase daughter:</u></b> For there to be physical control of a drug, the accused must have had the drug ‘in his manual possession or in a place to which he...may go without physical bar’.</p> <p>- <b><u>the accused must have the legal right to exclude all others (except partners in crime) from the premises (including vehicles etc.)</u></b></p> <p>- <b><u>Where there are alleged joint possessors (eg married couple), it must be established that they all had that legal right. – dibs- admitted ownership no issue</u></b></p> <p>- <b><u>Micallef – contravenes dib-</u></b> roof frequented by three people <b><u>can convict one of the persons</u></b></p> <p>- <b><u>Delon 1992 - hidden in laneway case:</u></b> possession is wide enough to include any case where the person alleged to be in possession has hidden the thing effectively so that he can take into his physical custody when he wishes and where others are unlikely to discover it except by accident</p> <p><b><u>Intention to control item + awareness of it being a drug both inferred through awareness of existence</u></b></p> <p>- <b><u>HKT 1985 -</u></b> requires <b><u>knowledge of the ‘existence and nature, or of the likely existence and likely nature, of good in question</u></b> . Beyond reasonable doubt</p> <p>- <b><u>Saad 1987- knowledge interpreted broadly,</u></b> awareness =</p> <ul style="list-style-type: none"> <li>o <b><u>Actual knowledge (intention).</u></b></li> <li>o <b><u>Belief (falling short of actual knowledge).</u></b></li> <li>o <b><u>A significant or real chance that the thing possessed was a narcotic substance (recklessness).</u></b> – Lau 1998 as well</li> </ul> <p>- <b><u>Amanatidis 2001- (most common approach) – have to show positive proof of knowledge – beyond reasonable doubt-</u></b></p> <p><b><u>Minute Quantities</u></b></p> <p><b><u>Williams 1978 Qld-</u></b> has to be ordinarily visible- naked eye</p> <p><b><u>Paul v Collins Jnr 2003 WA-</u></b> mental element- quantity/concentration not key sufficient knowledge of presence is sufficient</p> |

|   |  |  |
|---|--|--|
| <p><b>s 12 – Self-administration of prohibited drugs</b></p> <ol style="list-style-type: none"> <li>1) Administers or tempts to administer themselves</li> <li>2) Exception if lawfully prescribed or supplied to person</li> </ol>   | <p>Penalty for offence under this Division is 20 penalty units and/or imprisonment for 2 years</p> |  |
| <p><b>S13 – Administration to others of prohibited drugs</b></p> <ol style="list-style-type: none"> <li>1) attempts or administers to other</li> <li>2) exception if authorised <i>Poisons act or</i> Department of Health</li> <li>3) exception if person to whom the durg is administers is permitted to have the drugs - perscribed</li> </ol> | <p>Penalty for offence under this Division is 20 penalty units and/or imprisonment for 2 years</p> |  |
| <p><b>S 14- Permitting another to administer prohibited drugs:</b></p> <ol style="list-style-type: none"> <li>1) Person who permits///</li> <li>2) Lawful exception</li> </ol>  |  |  |

**Other Summary Offences:**

- S11 – Possession of equipment for administration
- S11A – Commercial supply or commercial display of waterpipes
- S11B – Possession of tablet press
- S11C – Possession of instruction for manufacture

**Summary offences for illegitimate procurement:**

- S 15 - Forging etc prescriptions
- s16. Obtaining etc prescription by false representation
- s17. Obtaining prohibited drug by false representation
- S 18 Obtaining prohibited drugs from medical practitioners, nurse practitioners or midwife practitioners

## Indictable Offences p.1093

- **Note:** in general, the penalties for offences involving cannabis are lower than for those involving other prohibited drugs.
- **Plants s 23**
  - **s 23 (1)(a) and (2)(a) - Cultivating** or knowingly taking part in cultivation of a plant.
    - **s 23 (1A)** - Higher penalties if done by 'enhanced indoor means'.
  - **s 23 (1)(b) and (2)(b) - Supplying** or knowingly taking part in supply of a prohibited plant.
  - **s 23 (1)(c) and (2)(c) - Possessing a prohibited plant** not less than the commercial quantity
    - **s 23(4): Exceptions** for authorised scientific research.
    - **s 39RA: Exception** for police controlled operation.
- **Prohibited drugs** (everything other than prohibited plants):
  - **s 24 (1) and (2) - Manufacturing or producing** prohibited drugs or knowingly taking part in these activities.
  - **s 24A (1) - Possessing precursors** with the intention to use them in the manufacture or production of a prohibited drug.
  - **S 25(1)-(2A) - Supplying** or knowingly taking part in the supply of a prohibited drug
  - **s 25A (1) - Supplying a prohibited drug on an ongoing basis** (ie, 3 or more separate occasions in 30 days)

## Supply Offences:

- **Drug trafficking offences require proof of supply** to have occurred, in one of three ways:
  1. Supply as per the general common meaning of **giving an item to someone** who wants or needs it.
  2. Supply as per the **extended meaning** given in **s 3 (1):**
    - 'Supply' includes **sell and distribute**, and also includes **agreeing** to supply, or **offering** to supply, or **keeping** or having in possession **for supply**, or **sending, forwarding, delivering** or **receiving** for supply, or **authorising, directing, causing, suffering, permitting** or **attempting** any of those acts or things.
    - **Sharing or giving away drugs is also supply.**
  3. Deemed supply as per **s 29**, where **possession of a traffickable quantity of a prohibited drug is deemed to amount to supply (unless you can prove otherwise)**

## Ordinary meaning of supply:

- **Carey 1990- sister given drugs, to be picked up wished to dispose of them** retains ordinary meaning as well as extended meaning – however extended definition and s 29 does not include the mere transfer of physical control of the drugs from a person who has had the drugs deposited with him to their owner or to the person reasonably believed to be such – as she intended to return drugs – not supply- still liable under s10 possession
- **Burden of proving the intention is to return the drug rests on the accused**
- **liberti 1991: Can often still be an accessory if person returned to wish then to supply**
- **Asim-** possession for leverage was possession for supply

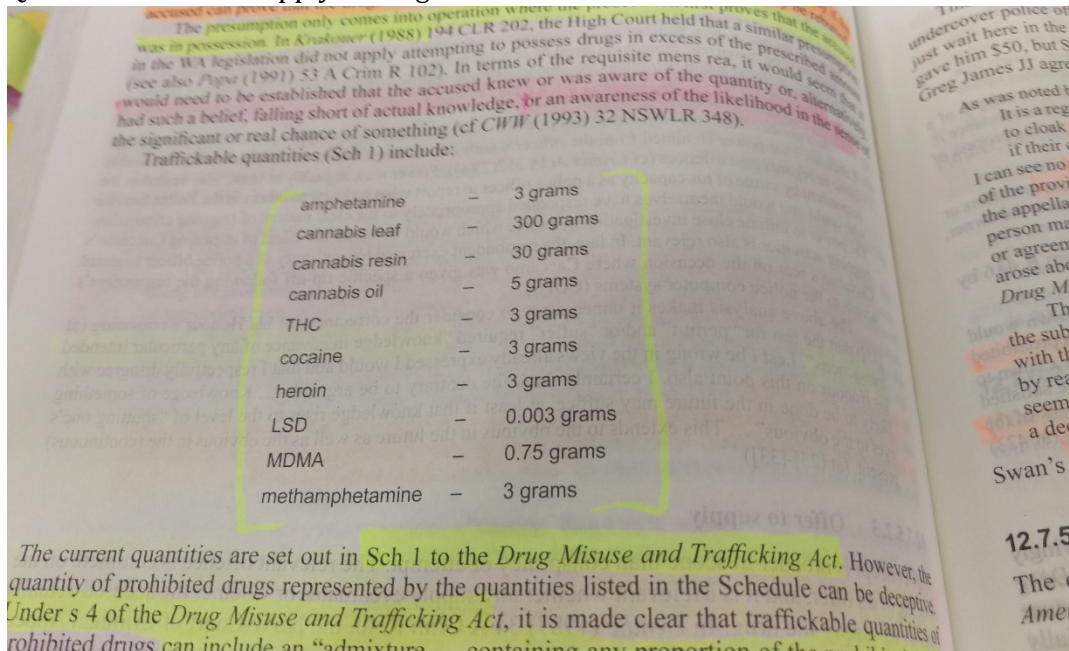
## Extended Definition of Supply:

- **Cause supply:**
  - *Castle v Olen 1985*- has to be more than a request – use some pressure/ authority/ more than opening an inquiry
- **Suffer or permit supply:**
  - *Jasper 2003*- NSW corrupt police officer- allowed drug dealer alerted dealer: **Ratio:** person has to have more than awareness of the act in question occurring –
    - Need ability to prevent the occurrence of the act by the person concerned-
    - prevention arises only if the person concerned does not exercise a power which he/she has or a right to stop the occurrence –
    - legal capacity to control a situation and the failure to do so with the requisite accompanying state of mind
- **Offer to supply:**
  - *Dendic 1987* – **only mens rea requirement** = intention inherent in the making of the offer –
    - **Needs to be able to be** regarded genuine by the offeree (reasonable person)
    - If one does not honour the agreement – not important (**Addison**)
- **Send**
  - *Pinkstone 2004* - Does not require the proof that the drugs are received by anyone

## **Deemed supply:**

- **S29** - Those in possession of a **trafficable quantity are presumed to be in possession for purposes of supply**
  - unless can convince court they were in possession for “other reason than supply” s 29a
    - Legal not an evidentiary burden
    - Must be established by accused on Balance of probabilities – *Carey 1990*
    - Only if the accused can prove the drugs were for personal use will the presumption of supply be rebutted
    - **AR - Presumption only comes into operation where the prosecution first proves that the accused was in possession**
    - **MR- need to be established that the accused knew or was aware of the quantity or, alternatively had such a belief, falling short of actual knowledge, or awareness of the likelihood in the sense of the significant or real chance of something cf CWW 1993**

- Quantities deemed supply in drug misuse act include mixtures unlike criminal code



## Deemed Drugs

- There is a **deemed drug** provision **in s 40** of the Act, reinforcing the **broad definition of supply**:
  - (1)** A substance which isn't actually a drug, but is being supplied on the representation that it is a drug, is considered a drug for the purposes of the act.
  - (2)** The same applies for plants.
- This prevents an accused who erroneously believes that they are supplying prohibited drugs from escaping liability.** Also, a person who knowingly supplies a victim with a legal substance but tricks them into thinking it is a prohibited drug is to be **labelled and punished as a drug supplier**. This was discussed in the following cases:
  - Dendic (1987)** → although this area has to do with fraud, this area is still dealt with drug laws rather than fraud laws.
  - Swan (2003)** → The accused took money from an undercover police officer to buy cocaine, but never actually supplied the cocaine. He was arrested months later. **Reaffirmed Dendic** that drug-related fraud still operates under **s 40 of deemed supply**

## Ongoing Supply

- There is a provision for **supplying prohibited drugs on an ongoing basis** in **s 25 of the Act**:
  - **(1)** The ongoing supply offence is the supply of drugs (other than cannabis) on 3 or more separate occasions during a 30 day period for financial or material reward is.
    - Maximum penalty: 3,500 penalty units or imprisonment for 20 years, or both.
  - **(2)** It is **not necessary for the drugs to be of the same nature** (ie, ongoing supply of different drugs still qualifies).
  - **(7)** rules against double jeopardy: convicted person/acquitted of supply offence is not liable under s25A for the same facts.
- This offence is particularly **harsh** as the **size of the quantities involved on each occasion are irrelevant**. The offence is most likely to be used against street dealers of heroin (goes against the 'Mr Bigs' concept).
  - While the maximum penalty is 20 years imprisonment, the **average prison term given by the courts is about 3 years**, suggesting the courts **recognise most instances to be of similar criminality to simple supply offences**.
    - **S 25 A 3 or more separate occasions during any period of 30 consecutive days (other than cannabis)- must be for their financial or material reward**

## Knowingly take part in manufacture, production or supply:

- Scope of indictable offences extended to person who **"knowingly takes part" in supply/manufacture of drugs** e.g. **s 25**
- Meaning of **"take part in"** **s 6**
  - Person **takes part** in the **cultivation or supply** of a prohibited plant or the manufacture, production or supply of a prohibited drug if:
    - a) The person takes, or participates in, any step, or causes any step to be taken, in the process of that cultivation, manufacture, production or supply,
    - b) The person provides or arranges finance for any such step in that process, or
    - c) The person provides the premises in which any such step in that process is taken, or suffers or permits any such step in that process to be taken in premises of which the person is the owner, lessee or occupier or in the management of which the person participates.
- **Karam (1995) → Degree of knowledge required: Crown establish that accused knew or was aware that commodity supplied was a prohibited drug. Alternatively, "knowingly" requires Crown to establish intention on accused to supply heroin.**
- This is satisfied by **proof** of either **actual knowledge** or a **belief (falling short of actual knowledge)**, or an **awareness of the likelihood**, in the sense of a **significant or real chance**, that he was dealing with a **prohibited drug**.

## Knowingly Take Part and the Expanded Definition of Supply

- Def of **supply** includes possession, offering, sending etc. **Knowingly taking part** has **"a degree of remoteness in point of time or place from the actual transaction"** **Deng (1996)**



- **Derbas (1969)** → person can be convicted even if they **only knowingly** took part in an action that fell within the extended definition of supply. So you can be **charged with supply for knowingly participating in step for supply** e.g. arranging finance, making phone call to arrange meeting
- **Zaiter [2005]** → Can be charged for offence of supply or knowingly taking part in supply – doesn't matter, the charge still stands if relevant to facts
- it is possible to **knowingly take part in one's own activities**

### Knowingly taking part in a step in the process of manufacture of drugs

- s6
- BD 2001 – must take steps that engage you in the process directly – must be more than preparatory to the process of manufacture
- Spicer 2003 sudaphed blister packs- has to more than part-way through refinement
- Spicer
- Inciting supply:
  - **S27 offence to aid, abet counsel, procure or incite a person to commit any of the indictable offence – same maximum offence of supply**
  - Eade 2002 - Incitement occurs when Supplier must be understood as the time to note be ready, willing and able to supply drugs forthwith to the acquirer; harassment – those who are intent on gaining possession for their own personal use can be punished as severely as if they were suppliers

### Offences Involving Prohibited Plants

- Plants prohibited under **s23** of the DMTA are specified in **s3**, and **include the cannabis, coca, opium poppy, oriental poppy or Persian poppy plants.**
  - It is an **offence to cultivate, supply or possess** these plants other than for authorised scientific research (s23(4)(b)) or as part of a police controlled operation (s39RA).
  - **Cultivate includes planting, nurturing and harvesting plants (s3)**
- Eager (1988) → watering seed in order to keep it alive until planted, with the intention of producing from it fully grown plants, amounts to cultivation.
- Ruiz-Avila (2003) → the storage of a crop may be seen as part of the harvesting process, based on the facts of the case.
- Supply and possession have the same meaning as in other parts of the Act.
- In terms of **mens rea** for offences concerning prohibited plants, it appears that the prosecution only has to prove that the **accused knew that a plant was involved.**
- A defence: **must prove did not know a prohibited plant, and could not reasonably have known/suspected prohibited plant s23(4)(a)**
- **Note:** possession of a single plant is indictable, but prosecution normally proceed summarily if five plants or less (s30 and Sch 1)