# *Deemed Supply in Australian Drug Trafficking Laws: A Justifiable Legal Provision?*

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***Abstract***

In Australia, eight of the nine legal jurisdictions have enacted 'deemed supply' provisions for illicit drug trafficking offences that presume 'intent to supply' based on the quantity of a drug an alleged offender is found with and attach criminal liability for the offence of supply. Such laws have been enacted for more than 35 years. In this article we critically examine: the rationale for the widespread adoption of Australian deemed supply laws; and the justifiability and necessity of such laws in current legal practice. A legal and historical analysis was undertaken. Data were sourced from legislation, Parliamentary records (Hansard), case law, published research on international drug law, research on drug user behaviour and our own experience in the prosecution of drug offenders. Analysis shows that Australian deemed supply laws were introduced to overcome perceived difficulties in the prosecution and sanction of drug traffickers. Yet such laws conflict with the dominant international practice that sanctions trafficking *without* the use of deemed supply provisions. They contribute towards harms to users and miscarriages of justice and increase pressure to use police and prosecutorial discretion in ways that may ultimately adversely affect community confidence in the administration of the criminal law. We conclude that the laws should be subject to legislative review and/or, preferably, abolition from Australian drug trafficking law.

**Keywords:** drug trafficking – law – deemed supply **–** Australia – sentencing – law reform

## Introduction

The history of Australian drug control legislation has followed a 'tortuous path', characterised by 'ad hoc decisions and legislative eclecticism' rather than deliberate and considered review

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and decision-making (Carney 1981:204). Accordingly, as outlined by the historian Desmond Manderson drug laws were introduced as reactions to a combination of commercial pressures, international pressures, particularly from the United States ('US'), moral panics and political expediency with little consideration as to the necessity or desirability of such laws:

> There is no simple or overarching reason for the development of drug laws in Australia. But there is a clear message: no matter what we are told, 'drug laws' have not been about health or addiction at all. They have been an expression of bigotry, class and deep-rooted social fears, a function of Australia's international subservience to other powers, and a field in which politicians and bureaucrats have sought power. Drugs have been the subject of our laws, but not their object (Manderson 1993:12).

This history has enabled the development of drug laws that should be viewed as neither rational nor necessarily fit for purpose (Hamilton 2001; Carney 1981; Manderson 1993, 1995). It has also fostered the development of some laws with extraordinary powers, including laws that encroach on standard principles of criminal justice.

While there have been efforts since 1985 to reframe the Australian legislative and policy approach to illicit drugs in terms of harm minimisation (Hamilton 2001) and to focus laws on targeting illicit drug traffickers rather than the people who use drugs (Department of Health 1985; MCDS 2011), many of the original drug laws remain in use. This increases the potential that the drug laws will conflict with principles of harm minimisation or lead to other adverse consequences, including erroneous charge or imprisonment of people who use illicit drugs for an offence of drug trafficking. In this article we examine one aspect of Australian drug law: Australian deemed supply laws.

Eight of the nine Australian legal systems have enacted 'deemed supply' provisions for illicit drug trafficking offences that presume 'intent to supply' based on the quantity of a drug an alleged offender is found with. These provisions enable possessors to be charged with the more serious offence of supply. Such provisions eliminate the requirement for police, prosecutors and courts to identify evidence of actual trafficking or of trafficking intent, and increase the ease of delivering serious sanctions to such drug offenders. In so doing, they hold obvious appeal for law enforcement. Yet, while these provisions have been in place for more than 35 years, their necessity and worth, for Australian drug trafficking law or for Australian criminal justice more generally, have been seldom examined. This is a potentially important omission as analysis of other aspects of international and domestic drug law have challenged much of the efficacy, justifiability and benefits of the status quo (Babor et al 2010; Hughes and Stevens 2010; MacCoun and Reuter 2001).

The deemed supply laws have become subject to renewed attention in New South Wales ('NSW'). On 20 April 2015, the new NSW Attorney General, Gabrielle Upton MP, promised to introduce a 'hardline stance on suppliers of illicit drugs' (cited in Whitbourn 2015). She specifically contended that 'those who peddle the drugs need to be dealt with more harshly' and that the NSW Government would 'reduce the threshold at which people are considered to be suppliers and dealers in drugs'; that is, to reduce the legal threshold for deemed supply. While it is easy to dismiss such promises as another law and order threat or as a reform (if enacted) of little or no consequence (targeting only 'drug peddlers'), such a reform may have broader implications. In this article we therefore critically analyse Australian deemed supply laws with the goals of examining the history and the rationale for the widespread adoption of the laws and contributing towards debate about their justifiability, legitimacy and necessity in current Australian law. We also consider the implications, if any, of retaining and reducing current thresholds for deemed supply in NSW.

The legitimacy of laws to address drug trafficking is important to society for a number of reasons. First, drug trafficking constitutes the second–largest offence category in Australian higher courts (Australian Bureau of Statistics 2012). Second, Australia continues to have one of the highest rates of drug use and drug-related harm in in the world, which brings immeasurable costs to society (United Nations Office on Drugs and Crime 2014). Third, drugs more generally and drug trafficking specifically are areas where there are clear examples of punitive and unjust laws. The most notorious examples come from the US, where 'war on drugs' policies including 100:1 crack/powder cocaine sentence disparities and mandatory minimum sentences for drug trafficking have fuelled mass imprisonment, disenfranchisement of large numbers of young Black (especially) youth, destabilising effects on American communities (Reuter 2013; Babor et al 2010) and the need for past (US Congress 2010) and future 'sweeping' amendments of US drug laws (Wilkey and Reilly 2013; Holder 2013). Yet, to date, the legitimacy of Australian drug trafficking laws have attracted limited attention. This is unfortunate, since, as noted by Michael Kirby (1992:313), it would be remiss to think the US the only nation to adopt 'extraordinary strategies' for drug trafficking. Indeed, the example of deemed supply offences in Australia provides clear evidence of his claim.

## Australian laws on drug trafficking and the role of deemed supply

The cultivation, manufacture and trafficking (or supply) of specified drugs (such as heroin, methamphetamine, cocaine, ecstasy and cannabis) — as well as possession and personal use — are prohibited by all Australian states and territories and the Commonwealth. Reflecting the seriousness with which drug trafficking is viewed, the statutory maximum penalty available for drug trafficking offences is 21 to 25 years (Northern Territory, Queensland, Tasmania and Western Australia ('WA')) or life imprisonment (Australian Capital Territory ('ACT'), NSW, South Australia ('SA'), Victoria and Commonwealth). This is much higher than for simple possession (maximum penalty in most jurisdictions of two years imprisonment), particularly given most non-trafficking drug offenders in Australia are diverted away from the strict application of the criminal justice system (Hughes and Ritter 2008).

A key feature of Australian law is that penalty ranges for drug trafficking vary according to the quantity with which an offender is found (Hughes 2010). Most jurisdictions outline three drug trafficking thresholds — a trafficable, commercial and large commercial threshold — possession of which triggers an increasing penalty range that can be applied (see, for example, Table 1).

**Table 1: Threshold quantities and maximum penalties for trafficking in NSW, by drug type**

| Drug type/threshold | Quantity of drug | Maximum penalty |
|---|---|---|
| *Heroin, methamphetamine and cocaine* | | |
| Trafficable | 3 g | 15 years imprisonment |
| Commercial | 250 g | 25 years imprisonment |
| Large commercial | 1000 g | Life imprisonment |
| *MDMA (or 'ecstasy')* | | |
| Trafficable | 0.75 g | 15 years imprisonment |
| Commercial | 125 g | 25 years imprisonment |
| Large commercial | 500 g | Life imprisonment |

| **Drug type/threshold** | **Quantity of drug** | **Maximum penalty** |
|---|---|---|
| *Cannabis leaf* | | |
| Trafficable | 300 g | 10 years imprisonment |
| Commercial | 25 kg | 15 years imprisonment |
| Large commercial | 100 kg | 20 years imprisonment |

For details of all other threshold quantities, see *Drug Misuse and Trafficking Act 1985* (NSW) Sch 1.

Of importance for the current analysis is the issue of how criminal liability is established for an offence of drug trafficking in Australia. Proof of three essential facts is required:

1. there was a substance that was a prohibited drug;
2. the accused possessed that substance; and
3. the accused supplied that substance.

However, Australian drug trafficking law states that there are three different ways it can be alleged that someone has 'supplied' a prohibited drug. First, an accused may be charged on the basis of actual supply, for example, if he or she is caught selling (exchanging drug(s) for money or other benefit), or distributing (giving or providing drug(s) to someone else). Second, an accused may be charged if he or she is found to possess a drug *for the purpose of selling, giving or providing it*, for example, if he or she is caught concealing it in particular circumstances or with indicia of supply such as bags, scales, weights or records of supply. Third, by virtue of Australian deemed supply laws, if an accused possesses a trafficable threshold quantity or greater of drugs (for example, 0.75 g of MDMA ('ecstasy') or 3 g of heroin or cocaine in NSW), he or she can be charged with supply *on the basis of possession alone*. That is, the person can be charged with 'deemed supply' regardless of whether the drugs were intended for actual supply or for other purposes, such as personal consumption. Of particular note, the threshold that triggers deemed supply for MDMA in NSW is 0.75 g — this means that possession of as little as three pills (with an average weight of 0.29 g) can exceed the threshold for a charge of 'deemed supply' (Hughes et al 2014b).

By way of example, s 29 of the *Drug Misuse and Trafficking Act 1985* (NSW) states: 'A person who has in his or her possession an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug shall … be deemed to have the prohibited drug in his or her possession for supply'. Moreover, in such cases the onus is placed on the accused to prove the quantity possessed was *not* for the purposes of supply and not upon the prosecutor to prove that it was. For example, as s 29 of the NSW Act continues, the exception to deemed supply is if the accused 'proves that he or she had the prohibited drug in his or her possession otherwise than for supply'. See Table 2 for other Australian deemed supply provisions. Queensland is the only state that does not employ 'deemed supply' provisions.

**Table 2: Deemed supply laws on possession of more than a trafficable quantity, by jurisdiction**

| *Jurisdiction* | *Act* | *Rules (section)* |
|---|---|---|
| ACT | *Criminal Code 2002* | 604(1): If, in a prosecution for an offence against section 603, it is proved that the defendant — …<br>(d) possessed a trafficable quantity of a controlled drug; it is presumed, unless the contrary is proved, that the defendant had the intention or belief about the sale of the drug required for the offence. |

| *Jurisdiction* | *Act* | *Rules (section)* |
|---|---|---|
| NSW | *Drug Misuse and Trafficking Act 1985* | 29: A person who has in his or her possession an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug shall, for the purposes of this Division, be deemed to have the prohibited drug in his or her possession for supply, unless the person proves:<br>(a) that he or she had the prohibited drug in his or her possession otherwise than for supply, or<br>(b) that he or she obtained possession of the prohibited drug on and in accordance with the prescription of a medical practitioner. |
| NT | *Misuse of Drugs Act* | 37(6)(a): If the amount of the dangerous drugs to which the offence relates is a traffickable quantity — the person intended to supply the dangerous drugs |
| Qld | *Drugs Misuse Act 1986* | NA |
| SA | *Controlled Substances Act 1984* | 32(5): If … it is proved that the defendant had possession of a trafficable quantity of a controlled drug, it is presumed, in the absence of proof to the contrary —<br>(a) in a case where it is alleged that the defendant was taking part in the process of sale of the drug, that the defendant —<br>(i) was acting for the purpose of sale of the drug; and<br>(ii) had the relevant belief concerning the sale of the drug necessary to constitute the offence; or<br>(b) in any other case — that the defendant had the relevant intention concerning the sale of the drug necessary to constitute the offence. |
| Tas | *Misuse of Drugs Act 2001* | 12(2): [I]t is presumed, unless the accused on the balance of probabilities proves otherwise, that the accused had the relevant intention or belief concerning the sale of the controlled substance required to constitute the offence. |
| Vic | *Drugs, Poisons and Controlled Substances Act 1981* | 73(2): Where a person has in his possession … a drug of dependence in a quantity not less than the traffickable quantity applicable to that drug of dependence, the possession of that drug of dependence in that quantity is prima facie evidence of trafficking. |
| WA | *Misuse of Drugs Act 1981* | 11a: A person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V. |

In this article we examine two key issues: the reasons for the adoption of deemed supply laws in eight states of Australia (and for their absence in Queensland), and the implications

of their adoption, focusing in particular on consistency of deemed supply laws with other Australian law; with international drug trafficking laws; and the presence or absence of unintended negative consequences of the laws (such as the extent to which deemed supply provisions place drug users at risk of charge as drug traffickers and any instances of proven miscarriages of justice). Our goal is not to quantitatively assess their impacts, but to contribute to debate on the justifiability and legitimacy of such provisions for Australian drug trafficking law or for Australian criminal justice more generally.

## Methods

A critical legal and historical analysis was undertaken. Data were sourced from legislation, Parliamentary records (Hansard), case law, published research on international drug law, research on drug user behaviour and our own experiences in the prosecution of Australian drug offenders. We examined in particular the historical basis for the laws and the validity of the assumptions on which the laws were based.

## Results

### *Historical development and basis for laws*

The introduction of deemed supply laws into Australian Commonwealth and state/territory law can be traced to 1970–76 (Willis 1980). They were among the first recommendations of the newly established Australian National Standing Control Committee on Drugs of Dependence, which argued for the national introduction of specific and severe sanctions for drug traffickers, and legal presumptions allowing a new offence of drug trafficking whereby 'a person is to be deemed to be trafficking in drugs if he is found in possession of more than specified quantities of drugs' (National Standing Control Committee on Drugs of Dependence 1969 Attachment A). Deemed supply provisions were recognised as being 'a drastic procedure' that may be 'repugnant to fair-minded people' (NSW 1970a:5341). They were nevertheless justified on two main grounds. The first rationale was to overcome perceived difficulties in the prosecution and sanction of drug traffickers. Of particular note was the rarity of evidence of overt sale or commercial behaviour:

> [This] has been made necessary by the difficulty of proving that a person who had a large quantity of this type of drug in his possession had it for his use or for supply or sale (NSW 1970b:5347).

> At the present time, the police may apprehend known or suspected pedlars with drugs illegally in their possession, but they are unable to prove they are held for supply or sale and consequently can lay only a charge of illegal possession (NSW 1970a:5341).

The second rationale was to ensure sufficient armoury to address the perceived threat posed by drug trafficking to the Australian community. Evidence of the latter view is demonstrated by the remarks of the then NSW Minister for Health, Harry Jago and the then Commonwealth Minister for Customs and Excise, Donald Chipp on the introduction of respective amendments to the *Poisons and Therapeutic Goods Act 1966* (NSW) and the *Customs Act 1901* (Cth):

> That the onus of proof is reversed is undoubtedly so, and I make no bones about it. The problem of drug peddling is a desperate situation demanding desperate measures if it is to be remedied (NSW 1970a:5341).

> The danger signs have certainly been alarming enough to engender this Government's support of whatever prophylactic measures can be taken to afford the Australian community the maximum protection from those unscrupulous people who are prepared to sponsor drug abuse for their own personal gain (Commonwealth 1971:3420).

Significantly, in spite of the noted extreme measures, there was very little opposition raised to the measures either in NSW or in other parliaments or discussion about the potential adverse impacts of the laws, including upon drug users. This was exemplified by the comments of then NSW Minister for Health, Harry Jago:

> Only once during the debate was any reference made to the reverse onus of proof. … I am delighted that this dramatic departure from the usual procedure has been widely accepted because of the importance of taking punitive action against people who are operating in this field (NSW 1970c:5498).

The one exception to this was in Queensland.

Deemed supply provisions were first proposed in Queensland on 18 March 1971, alongside the first specific offence for drug trafficking (Queensland Legislative Assembly 1971). It was again argued that this would better equip police to deal with trafficking and follow the practice of other jurisdictions, most notably NSW, SA and WA, which had already made possession of prescribed quantities of drugs prima facie evidence of trafficking. For example, as argued by the then Minister for Health, SD Tooth:

> Evidence to substantiate a charge of trafficking is difficult to obtain. For these reasons, other countries and some Australian States have adopted in their legislation a departure from the usual approach. … Special cases demand special remedies and this Bill deals with special cases. Therefore, these provisions are incorporated in the Bill (Queensland 1971a:3582).

However, the proposal met resistance from the Opposition of the day and Queensland Bar Association. It was argued that deemed supply provisions conflicted with fundamental criminal justice principles; and that the measures were not necessary. For example, as outlined by Mr Bennett:

> The Opposition is irrevocably opposed to the principles contained in this clause which negates the very fundamentals of British jurisprudence. … The principle was and should still be that it is better that 99 guilty men go free than that one innocent man should be hanged (Queensland 1971b:3593).

> Obviously these are panic provisions written into the Bill to deal with a present-day trouble patch in the implementation of the law. … It is not the onus of proof that is causing the trouble, but the fact that we have not enough policemen to do the job. If we had more policemen, we would not need to invert the onus of proof provision in this or any other Bill (Queensland 1971b:3593).

The deemed supply provision was nevertheless enacted into the *Health Act Amendment Act 1971* (Qld):

> 130J. Matters of proof respecting possession of drugs. (1) In a proceeding brought for an offence in relation to possession of a dangerous drug, a person who, contrary to section 130 of this Act, has in possession a quantity of that drug in excess of a quantity prescribed under this Act in respect of that drug shall be deemed to have possession of that drug for a purpose specified in paragraph (c) of subsection (2) of section 130 of this Act (sell, give, or supply, or attempt to do, or offer to sell, give, or supply to another person or otherwise deal or trade in a dangerous drug, or a prohibited plant) unless he shows the contrary.

However, 14 years later, an overhaul of the Queensland drugs legislation via the Drugs Misuse Bill 1985 (Qld) (now the *Drugs Misuse Act 1986* (Qld)) led to a significant change: the development of drug trafficking laws that contain no deemed supply provisions. It is difficult to trace the exact reasons why because many submissions remain off the public record. That said, it is clear that the original drug bill retained deemed supply provisions (Queensland, 1985:3472). This bill met heated criticism from the Bar Association of Queensland, Queensland Council for Civil Liberties, Queensland Law Society and members of the Opposition, including raising specific and grave concerns that the deemed supply provisions would be unnecessary, unjust and impinge on the rights of the accused. For example, the Opposition contested: 'the quantity of drugs in one's possession should not decide the sentence; rather (it) should be the use to which the drug is to be put' (Queensland 1986b:357). The resulting bill was thus rewritten substantially 'to add even more safeguards to protect the public from abuses, whether real or imaginary' (Queensland 1986a:278). Of particular note, a submission from the President of the Bar Association of Queensland (cited in Hansard) stated that: 'no recent legislation has matched the universal disapproval of members of the association to the first Bill' (Queensland 1986c:365). It appears this is one key reason that Queensland ceased their use. Queensland remains the one exception. All other eight legal jurisdictions have retained and routinely apply deemed supply laws.

## *Implications of employing deemed supply laws*

### Inconsistency with Australian criminal law

In an analysis of deemed supply laws, the legal context is important to understand. The Australian legal system, including the prescription of actions that constitute crimes, procedural rules for establishing criminal liability and the importance of the rule of law, is largely derived from English common law (Findlay et al 2009). Fundamental to this system are three principles. The first is the requirement for *actus reus* and *mens rea.* This principle specifies that an accused person is not criminally liable unless there is proof of both a guilty act/conduct (*actus reus*) and (in almost all cases) a guilty state of mind (*mens rea*). The second principle is the presumption of innocence. A person charged with a criminal offence is presumed to be innocent unless and until a judge or jury or magistrate is persuaded beyond reasonable doubt that the person is guilty; that is, the person has committed all the elements of the offence. The presumption of innocence is even further emphasised in the two Australian jurisdictions that have human rights acts, Victoria and the ACT. For example, Section 22 of the *Human Rights Act 2004* (ACT) and s 25 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') note: 'A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'. It is a principle that dates at least from Magna Carta and has been reinforced in, *inter alia*, the International Covenant on Civil and Political Rights, to which Australia is a party. The third principle is the burden of proof. In criminal trials the onus of proving the accused's guilt lies on the prosecution. Accused persons are not required to prove their innocence.

These three principles are based on the recognition that efforts to control crime and sanction offenders need to be balanced against the power of the state and the cost from arbitrary and unjustified use of that power (including the denigration of democracy and human rights) (Cowdery 2011; Cowdery and Lipscomb 2000; Crispin 2010; Denning 1980; Findlay et al 2009). The procedural fairness and perceived legitimacy of the law and authorities who implement it are critical as perceived illegitimacy can undermine deference to and cooperation with authorities (Tyler 2003); the acceptance of the criminal justice process; and increase willingness to 'flout' not only the 'illegitimate' law, but also unrelated laws (Nadler 2005:1399).

However, the Australian deemed supply provisions do not appear consistent with any of these three principles of Australian law. An accused can be charged, prosecuted and sanctioned for drug trafficking in the absence of any proof of *actus reus* or *mens rea* (that is, without evidence of either actual supply or intent to supply). Also, an accused is presumed to have supplied, thereby abrogating the presumption of innocence. The traditional burden of proof is shifted, such that should the accused dispute the charge, the burden of proof is on him or her to prove the absence of actual supply and intent to supply: 'What [*the accused*] needs to prove is that [*he/she*] had the drug in [*his/her*] possession for some purpose other than to give it, or provide it, to somebody else' (Judicial Commission of New South Wales 2013:5-1840). All such features make deemed supply provisions an aberration in the Australian criminal justice system. While there are specific instances in Australian criminal law either where *mens rea* is not required (such as in cases of strict or absolute liability, for example, involving speeding/road traffic offences), and where the burden of proof is shifted (for example, asset confiscation laws), we know of no other area where all three principles are abrogated together, particularly not where the maximum penalty is so severe.

**Inconsistency with international drug trafficking law**

The Australian deemed supply provisions are also out of step with many other countries. While drug trafficking is a global problem, examination of international drug trafficking law shows that most nations explicitly avoid deemed supply provisions (Hughes 2003; Harris 2011; Walsh 2008). For example, in 2003 the use of thresholds and deeming provisions was reviewed across 14 European countries and it was revealed that none chose to consider the quantity itself as effectively proving the intention (or *mens rea*) of trafficking (Hughes 2003:19). Instead, possession of the threshold quantity is only indicative of an offence of drug trafficking (not presumptive), and prosecutions and sanctions for drug trafficking are based on consideration of the quantity as well as other indices of supply. This might include the presence or absence of drugs packaged into discrete quantities; scales; cutting agents; equipment for manufacturing or distribution; unexplained sums of money; and phone and other records. In addition, decisions are derived using prosecutorial or judicial discretion and knowledge of *all* of the surrounding circumstances including, in particular, whether an offender is a user or not (Hughes 2003).

Two pertinent examples for understanding the international opposition towards deemed supply laws are Italy and the United Kingdom ('UK'). In Italy, the introduction of deemed supply laws in 1990 fuelled a mass rise in imprisonment of drug users as traffickers, the suicides of three deemed suppliers (all of whom had no prior criminal record) and a backlash by the judiciary and the public (Zuffa 2011). As a consequence, the Italian law was abolished by referendum in April 1993 and the burden of proof placed back on the prosecutor to establish supply based on consideration of amount of drugs together with other indicia of supply. It must be acknowledged that 2006 saw a return to a deemed supply model, but with an increased threshold quantity. This has fuelled a further significant increase in imprisonment of predominantly minor drug offenders (with little increase in imprisonment of the intended target: high-level traffickers) and has been labelled the main reason for current Italian prison overcrowding (Zuffa 2012). Fresh calls for abolition remain as yet unheeded.

In 2005, the UK proposed to introduce a deemed supply provision. However, as outlined by Walsh (2008:482) the proposal was 'unceremoniously abandoned' after heated criticism that such an approach was unjust, impractical, perverse and arbitrary. For example, many opponents argued that it was impossible to set appropriate drug quantities that could distinguish between those who were 'trafficking' versus those who were 'carrying drugs for personal use'. This is because the amount that could be purchased by a user could vary

according to individual tolerance, drug purity, weight of deals, ease and frequency with which a dealer can be accessed and whether or not a user purchase(d) in bulk. All this means that any threshold quantity that triggered a deemed supply provision would always be arbitrary and unjust to some drug users. Equally importantly, deeming provisions foster neglect of other important factors beyond drug quantity, including offender culpability and role (such as whether an individual who is trafficking has instigated an offence or been coerced and the extent to which his or her actions are for profit). Deemed supply was ultimately seen as an unnecessary provision as the Home Office stated that the number of cases involving alleged drug trafficking that would rely on the presumption of deemed supply (that is, where there was no evidence of trafficking other than the quantity of drug possessed itself) would be negligible (Home Office 2006).

**Pressures on the design of Australian legal threshold quantities**

As outlined in the UK threshold debates, a significant problem for deemed supply provisions is that they assume it is possible for any legislators to establish prescribed amounts that are universally applicable and appropriate for distinguishing use/possess versus supply. While establishing any threshold quantities is always a challenge, there is an added pressure on governments when they are used to automatically trigger a charge of deemed supply: as done by eight of nine Australian governments (Hughes et al 2014b; MCCOC 1998). Key challenges include: what quantities could be used (for example, should the threshold quantity for heroin be set at three grams, four grams, five grams or more?) and should the quantities be set in pure drug or in mixed drug; that is, should they be based on the pure chemical composition alone, excluding any impurities or bulking agents or on a typical street sale (for example, two pills, regardless of the purity)? Further considerations for police are that pure weight assessments requires more detailed and lengthy laboratory testing of drugs, including establishing that there is a banned substance present and the purity of that substance, whereas a mixed-weight system provides easier establishment of liability. Moreover, from the perspective of users and traffickers, a system that is based on pure weight may be more precise but make the law less transparent, particularly for users. For example, under a purity-based system, 0.75 grams of MDMA could be equivalent to two strong pills or seven weak pills depending on market conditions.

Perhaps unsurprisingly, the design of appropriate threshold quantities has proven to be a real challenge for Australian legislators. Legislators and governments themselves have at various points recognised that the thresholds over which someone was deemed to supply were erroneously set. The most notable example was in NSW in 1988 when there was a complete overhaul of the thresholds for over 100 substances due to 'manifest problems in their original design' (NSW 1988:1281). Preceding the reform, court sentencing data showed a rapid and disproportionate increase in the number of minor drug offences being prosecuted in the higher courts and police expert opinion revealed that the thresholds were capturing users, rather than the intended target: 'drug traffickers'. This led the NSW legislators to increase many threshold limits, including increasing the trafficable threshold limit for heroin, cocaine and methamphetamine from two grams to three grams.

Our own more recent evaluations of drug trafficking thresholds in the ACT (Hughes and Ritter 2011) and in six states of Australia (Hughes et al 2014a) found that the Australian thresholds do *not* effectively differentiate traffickers from users. Data from different samples of drug users (regular ecstasy users, regular injecting drug users and the general population) was examined from across Australia, taking into account differences in using practices and in state laws. This showed that the quantity of drugs that an illicit drug user can reasonably be expected to consume or purchase for personal use alone often exceeds the current legal

thresholds for use/possess. For example, in NSW regular ecstasy users possess up to 19 times the current threshold for their personal use alone (0.75 grams) and, when buying their largest known quantity for their personal use, 78 per cent of ecstasy users exceed thresholds for deemed supply. This places such users at grave risk of receiving an unjustified charge and sanction for an offence of drug trafficking (Hughes et al 2014a). This problem was not unique to NSW. Regular users of MDMA in all states/territories examined purchased quantities exceeding the current thresholds. For example, in SA and WA the threshold limit that triggers deemed supply is set at two grams, but regular users of MDMA in SA and WA purchase quantities of up to 29 grams (Hughes et al 2014a). This is not surprising, as MDMA users often purchase pills in bulk, particularly at times when the purity of the drug is high. (For full details of risks to users of other illicit drugs exceeding thresholds see Hughes et al 2014b.)

This is not to say that Australian legal thresholds for drug trafficking cannot be better designed (see, for example, recent evidence-informed legal change in the ACT) (ACT Government Justice and Community Safety Directorate 2014), but evidence-informed threshold quantities are not the norm and the pressure on governments for well-designed threshold quantities would be lessened were they not tied to automatic deemed supply provisions. Indeed, the challenges of a well-designed threshold system for Australian governments is becoming even more challenging given the rapid growth in recent years in the number of substances, including new psychoactive substances (such as NBOMe and Kronic that mimic the design of traditional illicit drugs) under the control of contemporary drug laws. For example, as of 2 March 2015 there were 358 illicit drugs listed in NSW alone in the *Drug Misuse and Trafficking Act 1985* (NSW), all of which necessitate specification of an appropriate trafficable threshold quantity to trigger a charge of deemed supply (as at 2 March 2015). Equally importantly, given the scant and delayed evidence-base about the new psychoactive substances, including on tolerance levels and user practices (Griffiths et al 2013), the potential for error in establishing an appropriate threshold is high.

**Harmful consequences for illicit drug users**

The risk of deemed supply provisions leading to harm to drug users is not simply based on academic analysis. Unjustified convictions of drug users as suppliers have been clearly demonstrated in case law. Here we outline two such cases. In *R v Masri* the accused was arrested in possession of 13.2 grams of MDMA. Despite instructing his counsel (at all times) that he had possession of the drug only for his personal use, his counsel advised that 'this did not affect (the accused's) guilt of the charge of supply'. Masri therefore pleaded guilty to supply and was convicted and sentenced to imprisonment (one year nine months). In a second example, *Price v Davies*, the accused was arrested for cultivation of 47 cannabis plants, but instructed counsel that he grew the cannabis plants with the sole purpose of relieving pain from work-related spinal damage and to avoid the cost of purchasing three to four ounces per week. His counsel again advised this was irrelevant and that if he pleaded not guilty, 'It's going to cost a lot of money and you're still going to be found guilty because you had over the 25 plants (limit).' He thus pleaded guilty and was also convicted and imprisoned (18 months) and it was only once he was in prison that he was informed this advice was wrong. Both were clear examples of a miscarriage of justice.

**Conflict with principles of harm minimisation**

Ever since the adoption of the National Campaign against Drug Abuse in 1985, the goal of Australia's National Drug Strategy has been harm minimisation: reducing the harms from drug use, without necessarily reducing use (Department of Health 1985; MCDS 2011). Such an objective was described by Neal Blewett, the then Minister for Health: 'Its ambition is thus moderate and circumscribed. No utopian claims to eliminate drugs, or drug abuse, or remove

entirely the harmful effects of drugs, merely "to minimise" the effects of the abuse of drugs on a society permeated by drugs' (Blewett 1988:2).

One core principle underpinning harm minimisation is the need for a bifurcated criminal justice approach; that is, distinguishing traffickers from users and avoiding unreasonably serious sanction of users. The rationale for doing so is clear: 'an unjustified conviction for dealing will often impose social and individual harms which far exceed the harm associated with use of the drug in question' (MCCOC 1998:81). However, while Australia has been praised for the adoption of a number of policies that reduce serious or harmful sanction of users, most notably the widespread adoption of drug diversion programs that provide education, treatment or non-criminal sanctions for illicit drug use, possession and minor drug-related offences (Hughes and Ritter 2008; Ritter et al 2011; Wundersitz 2007), our analysis makes it hard to justify deemed supply laws as aligning with Australian policies of harm minimisation and of a bifurcated criminal justice approach. This is particularly when, as feared, it is users and minor dealers as opposed to the stated target of punitive drug trafficking laws (serious drug traffickers), who are placed most at risk from the deemed supply provisions:

> Like many deeming rules, reversal of the legal burden of proof results in the *highest likelihood of error in the most dubiously marginal area of useful application for the rule.* When major figures in the illicit trade are caught, quantities are large and the intentions of the offender are obvious from the circumstances of the case, reversals of the burden of proof are an unnecessary support for the prosecution case (MCCOC 1998:87, emphasis added).

**Deemed supply extension to other aspects of law**

Analysis of case law reveals deemed supply provisions and the reverse onus of proof have also been erroneously extended to other areas of drug trafficking law. Two notable areas are in regards to 'ongoing supply' and 'intent to supply'. For example, in *Tasmania v Spence* an offender had been charged with ongoing supply after importing small quantities of methylamphetamine into Tasmania by post over a period of weeks. While there was no evidence that she ever had a trafficable quantity in her possession at any one time or in any one postal article, the Crown alleged that, as the total quantity imported exceeded the threshold, this constituted deemed supply and the onus of disproving supply lay on the accused. The Tasmanian Supreme Court ruled that extensions of deemed supply to encompass possession beyond a single time point was invalid and dangerous: 'If every gram of a drug that a user imported, transported or concealed for his or her personal use over a period of time were able to be counted for the purposes of s 12(2), drug users who were not involved in trafficking at all would be caught by that subsection' (*Tasmania v Spence* at [12]).

In *Krakouer v The Queen* the appellant was convicted of attempting to possess drugs with intent to supply (involving attempted possession of 5.3 kg of methamphetamine). The trial judge directed that intent could be presumed since, if the accused's attempt to possess had succeeded, the appellant would have been deemed to have supplied. The High Court ruled, in effect, that extensions of deemed supply to cases involving no actual possession constitute a substantial miscarriage of justice as they increase the scope of criminal liability beyond that provided by the statute. McHugh J said:

> [Section] 11(a) only deems a person to have the relevant intent when that person 'has in his possession' a prescribed quantity of a drug. Possession of a drug is a precondition to the operation of s 11(a). Absent possession by the accused of a drug, s 11(a) has no work to do. By hypothesis, a person charged with attempt under s 33(1) does not have possession (*Krakouer v The Queen* at [55]).

While the appeal courts in these two cases recognised the potential for the laws to be extended beyond their legitimate scope and drew them back from the applications sanctioned at first instance, these cases serve to demonstrate how police, prosecutors and courts have misinterpreted and misapplied laws of this kind and may do so again in other ways.

**Perversities for prosecutors and courts**

The operation of deeming provisions in relation to drug offences has come under increased scrutiny by Australian courts in recent times, highlighting real perversities in some of the laws, particularly in Victoria, where not only have deemed supply provisions been enacted, but also deemed possession (*Drugs, Poisons and Controlled Substances Act 1981* (Vic)). 'Deemed possession' means that if an illicit drug is found on any land or premises occupied by a person (such as his or her house, unit or backyard), the accused will be presumed to have possessed the drug (unless the accused proves that he or she did not have physical control or custody of it).

A notable Victorian case, *R v Momcilovic*, highlighted the problem of deemed possession and deemed supply provisions in combination. In that case a trafficable quantity of methylamphetamine was found in an apartment owned by the accused and jointly occupied by Momcilovic and her partner. Both the accused and her partner testified that the drugs were not hers and were present without her knowledge. However, the Court ruled that the accused had to answer both deeming provisions: proving she did not know of the drugs in the apartment (and therefore could not be in possession of the drugs); and she did not have the drugs for the purposes of supply. Since she failed to do that, she was convicted of trafficking.[1] Momcilovic then argued that the reverse onus for deemed possession was contrary to s 25(1) of the *Victorian Charter*, which guaranteed the presumption of innocence. The Supreme Court concurred, ruling that the deemed possession provision conflicted with the presumption of innocence. The High Court by majority (6:1), while saying it did not conflict with the presumption of innocence, nevertheless ruled the two deeming provisions could not be combined in this way and set aside Momcilovic's conviction for drug trafficking (*Momcilovic v The Queen*).[2] The implications of this for Victorian drug laws are still being worked through, but Victorian law enforcement and the courts have had to adjust to the decision in *Momcilovic*, which excludes the use of deemed possession as a basis for deemed supply. The decision has also created considerable concern among legislators in this and other states, including about whether courts may in future rule the reverse onus for deemed supply incompatible with the presumption of innocence. It also created media attention that is undesirable for public confidence in drug trafficking laws and uncertainty in their enforcement. For example, it was reported that thousands of Victorian 'drug dealers may win freedom' (Campbell 2011).

Finally, while the exercise of prosecutorial discretion is an essential part of criminal justice proceedings in Australia and arises at all stages of the prosecution process (Cowdery 2013), one impact of deemed supply laws (at least from one author's experience in the NSW context) has been increased pressure to use prosecutorial discretion to not enforce them strictly. This

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1 The judges note that:

> 'The combined operation of [section 5 and section 73(2)] is very powerful ... The finding of drugs on premises occupied by the applicant meant that she was deemed (by section 5) to be in possession of the drugs unless she satisfied the court to the contrary. When she failed to discharge that burden, her deemed possession constituted (because of the quantity involved) prima facie evidence of trafficking by force of section 73(2)' (*R v Momcilovic* at 9).

2 This is because of the definition of 'traffick' for the purposes of s 71AC was the compound expression of 'possession for sale' in s 70(1) of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), and that s 5 does not speak to that compound expression but only to 'possession' per se. Therefore they said s 5 did not apply to the offence of trafficking contrary to s 71AC, and that the courts had erred.

may be done, for example, by dropping charges from deemed supply to possession for personal use where, despite the letter of the law, the prosecution is unlikely to be able to prove in a contested hearing that supply occurred. While it can be justified as not in the public interest to take cases to court where it is likely to waste court time or lead to miscarriages of justice, continued and active non-enforcement of the letter of the law by one key arm of the criminal justice system can reduce public confidence in and support for the criminal justice process. It also places prosecutors in an unenviable position where they can unfairly be called 'soft on crime' and irresponsible.

## Conclusion

Drug laws are one clear area where there are some highly punitive and unjust laws (Babor et al 2010); however, the justifiability or otherwise of Australian drug trafficking laws (or aspects thereof) has received far less scrutiny. This is particularly true of Australian deemed supply laws. The one exception to this was the Australian Model Criminal Code Officers' Committee ('MCCOC') which in 1998 originally recommended against the continuation of deemed supply laws on the grounds of the gravity of compromising the principle that individuals are innocent until proved guilty (MCCOC 1998:81) and consequential risks of unjustified sanction. This argument is consistent with our analysis. Yet, despite the recommendation of the MCCOC, the protests of police and prosecutors resulted in the model criminal code retaining deemed supply provisions:

> On publication of the discussion paper prosecutorial authorities and police were virtually unanimous in their protests that the presumptions *were essential to law enforcement.* Reconsideration of the issue, in the light of these representations, persuaded the Committee to the view that *reliance on the trafficable quantity presumption was an unavoidable element in effective law enforcement* (MCCOC 1998:81, emphasis added).

Accordingly, it could be argued it is not surprising that deemed supply provisions remain in place more than 35 years after their initial adoption.

While our analysis has not provided a full impact assessment of the laws, it has shown that the deemed supply provisions are inconsistent with Australian principles of law and the Australian national drug strategy objective of harm minimisation. They are also attached to threshold limits that are known to poorly distinguish users from traffickers, thereby placing many users at inadvertent risk of erroneous charge. They have contributed towards at least two unjustified sanctions of drug users as traffickers and led to perversities in the operation of the laws and to undue pressure on prosecutorial discretion to not apply the letter of the law. Equally importantly, our analysis has shown that Australian deemed supply provisions conflict with international practice, where in spite of the common threats of illicit drug trafficking and policing, other nations have avoided such provisions (Harris 2011; Home Office 2006; Hughes 2003) or adopted then abolished such measures (Zuffa 2011; Home Office 2006). On this basis, it is hard to not question the validity of arguments about the necessity of Australian deemed supply laws for successful arrest and sanction of Australian drug traffickers. Indeed, the immense growth in Australian police powers over the last 35-plus years — including search powers, drug detection dogs, data surveillance and analysis, and DNA and forensic analysis applicable to illicit drug crimes (Hughes 2015) — raises further grounds for questioning the continuation of deemed supply laws.

This analysis carries particular importance in light of the current proposals by the NSW Government to increase the punitiveness of the 'deemed supply' laws by reducing 'the

threshold at which people are considered to be suppliers and dealers in drugs' (cited in Whitbourn 2015). The potential implications of any reduction are hard to predict, as it would depend in part on the extent to which NSW prosecutors and the judiciary would be willing enforce the letter of the law. Nevertheless, history has shown (both in NSW and Italy) that reducing threshold quantities would be very unlikely to lead to any benefits in detecting and sanctioning drug traffickers (Zuffa 2011, 2012; NSW 1988). Instead, it could lead to further adverse consequences from deemed supply laws, including increasing the number of users at risk of erroneous charge or sanction for an offence of drug trafficking, increasing demands on courts and imprisonment of drug users, increasing questions about the justice and fairness of legal responses to minor drug offenders, and reducing public confidence in the criminal justice system. This creates strong grounds for arguing against any reduction in the thresholds that trigger the NSW deemed supply laws.

This analysis also raises a number of broader implications. First, it is a reminder of the dangers of eroding the rule of law, even when cast in terms of the pressing need to protect the community and preserve law and order (Cowdery 2011; Crispin 2010). In this vein, the evidence not only of miscarriages of justice but also the erroneous extensions of deeming provisions and reverse onus of proof into *other* aspects of drug trafficking law is of particular concern as it increases the capacity to undermine respect for and cooperation with the law and authorities (Cowdery 2011; Cowdery and Lipscomb 2000; Crispin 2010; Denning 1980; Findlay et al 2009; Tyler 2003; Nadler 2005:1399). Indeed, in addition to the unintended consequences and costs, the capacity to 'breed disrespect' was a key argument behind US Attorney General Eric Holder's call on 12 August 2013 for sweeping reforms of US federal drug laws. For example, he noted: '[W]hen applied indiscriminately, they do not serve public safety … applied inappropriately, they are ultimately counterproductive' (cited in Wilkey and Reilly 2013).

Second, it highlights the need to better understand the policy processes that enable exceptional laws to arise and be maintained. Former Justices Kirby and Crispin have noted particular pressures that can lead to exceptional powers surrounding drugs or other legal areas, including the role of high media profile, ideology and threat motifs (Kirby 1992; Crispin 2010). Illuminating these and ways they may be mitigated is thus important. Of particular note the rapid adoption of Australian deemed supply laws followed a national recommendation for their enactment (National Standing Control Committee on Drugs of Dependence 1969) (with only one state, Queensland, reversing their enactment). This raises the question as to whether the laws would have been so widely or uncritically employed were it not for pressures for a 'nationally consistent approach'? In a context where there continue to be calls for nationally consistent drug laws, often in cases for which the short- and long-term effects are not known (see, for example, bans on novel psychoactive substances) (Intergovernmental Committee on Drugs 2014), it is arguable that jurisdictional diversity as opposed to national promulgation may be preferable, and may ultimately reduce widespread enactment of laws that necessitate wholesale abolition.

In conclusion, while deemed supply provisions were once seen as essential in eight of nine Australian legislatures, we would argue that this position is increasingly tenuous, and that historical custom is not a sufficient reason to continue their use. We recommend that deemed supply provisions be subject to legislative review or preferably abolition from Australian drug trafficking law in favour of a system where charges for supply are based on proof of actual trafficking or preparation for trafficking, based on consideration of quantity possessed *and* all other indices of supply. This would mean, for example, that someone detected with three pills of MDMA in NSW would not automatically be presumed to have intent to traffic unless he or she had other indices of supply, such as large quantities of money, packaging and contact

lists (a much fairer approach). Viewed against the international experience, it is clear that change would be neither radical nor unfeasible, more a progressive move towards proportional and justifiable drug trafficking laws, rectifying what can be seen as a rather ill-advised policy decision. As summed up by former Supreme Court Justice Kenneth Crispin, failure to reform Australian deemed supply laws will come at great cost: 'In blindly adhering to our present policies, we are trampling on people's rights, endangering lives, and causing untold misery and hardship. This is making the problem worse rather than better. It is also morally unsustainable' (Crispin 2010:217).

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