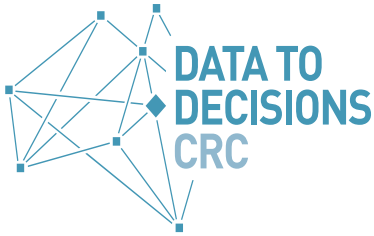

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Solutions to support automated information sharing.

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Deliverable DC3.7

Summary Legal and Technical Report on Spent Convictions

By Pompeu Casanovas, Louis de Koker, Patrick Keyzer, Danuta Mendelson, David Watts, Jeff Barnes, Suzanne O'Toole, Mira Stammers, Hon. David Parsons

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Independent research report commissioned by the Australian Criminal Intelligence Commission (NCIS Pilot Program)

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Acronyms

CbD	Compliance by Design
CtD	Compliance through Design
D2D CRC	Data to Decisions Cooperative Research Centre
NLP	Natural Language Processing

Executive Summary

This legal and technical report on Spent Convictions modelling summarises the findings and results already presented in Deliverables DC3.1 - DC3.6 and provides concluding perspectives. This report includes a brief overview of the preliminary conceptual work and notes on the Spent Convictions Scheme solution prior to its semi-automated modelling.

This report should ideally be read in conjunction with the earlier project deliverables: DC3.1 introduces the subject; DC3.2 presents the clustering for the survey on legal compliance; DC3.3 presents the roadmap towards publishing law as data using Natural Language Processing (NLP) tools; DC3.4 describes in more detail the Spent Convictions Scheme; DC3.5 elaborates on the potential interpretative issues and impact of Crimes Act 1914 (Cth) (Part VIIC – Division 3: Sections 85ZV, 85ZW and Associated Definitions); and DC3.6 analyses the case law perspective.

This report briefly discusses (i) the survey on legal compliance in which the difference between regulatory and legal compliance is grounded; (ii) the legal issues raised by the Spent Convictions Scheme (steps, interpretations, case law and privacy); (iii) the Spent Convictions Scheme modelling in defeasible semantic logic, (iv) and Natural Language Processing (NLP) techniques and applications. D3C.7 therefore summarises the results and findings of the Project and offers a proof of concept.

PART I

1 Part I. Introduction to Project C: Spent Convictions [Pompeu Casanovas and Louis de Koker]

Project C has been aimed at the development of (semi-)automated legal compliance solutions for information sharing related to the National Criminal Intelligence System. The project focused on the Spent Conviction Scheme and in particular on spent conviction use cases formulated by the Australian Criminal Intelligence Commission (ACIC). The Project utilised existing Data61 solutions and W3C tools (some of them drawn from two recent EU H2020 projects, i.e. LYNX and SPIRIT) to enhance Compliance by Design with more nuanced Compliance through Design solutions.

As discussed in Deliverables DC3.1 and DC3.3 a "spent conviction" is a conviction that becomes hidden from public view after a set period of time but, depending on certain factors, still remains accessible for specific (public) purposes by specific interested parties. These schemes are mainly focused convictions for less serious crimes and generally do not extend to convictions for violent sexual offences. The set period of time is also extended where the person has re-offended during the specified waiting period. Australia has a spent conviction scheme operating at a Commonwealth level and Territories and States also have schemes but the nature and rules of these schemes differ. Each regime has however exemptions which permit the lawful disclosure of spent convictions in certain limited circumstances. These exemptions usually relate to employment in particularly sensitive positions (e.g., police officials, teachers, childcare workers). In this sense, unless an ex-offender falls within an exemption, spent conviction schemes operate to encourage the rehabilitation of ex-offenders and to reduce the potential for ongoing punishment or discrimination against them. (Stammers, DC3.4; Paterson and Naylor, 2011). According to the National Crime Check:

> A "spent conviction" is a conviction of a Commonwealth, Territory, State or foreign offence that satisfies all of the following conditions: (i) it is 10 years since the date of the conviction (or 5 years for juvenile offenders); AND (ii) the individual was not sentenced to imprisonment or was not sentenced to imprisonment for more than 30 months; (iii) AND the individual has not re-offended during the 10 years (5 years for juvenile offenders) waiting period; (iv) AND a statutory or prescribed exclusion does not apply. (A full list of exclusions is available from the Office of the Australian Information Commissioner).[1]

Exchanges of criminal records data among the jurisdictions in Australia are coordinated by and through the Australian Criminal Intelligence Commission (ACIC). It manages the processes and provides the system through which Australian police

[1] https://www.nationalcrimecheck.com.au/resources/spent_convictions_information

agencies and accredited bodies submit nationally coordinated criminal history checks.

The ACIC operates the National Police Checking Service that assists organisations to screen and make informed decisions for example about prospective employees and volunteers, visa and citizenship applications and work-related due diligence relating to national security. The service is used by 244 accredited agencies and bodies. During the period 2016–17 4.75 million checks were processed, and 1.42 million checks were referred to police agencies for further assessment to determine whether the information may be disclosed in accordance with their spent convictions legislation and/or information release policies.

We discussed and explored the possibilities to automatize or, better, semi-automatize this service in Mayer et al. (2017), Stumptner et. al. (2018), and Casanovas et al. (2018, 2019). The extensive number of checks referred to police agencies is directly linked to the complexity of the regime and inconsistencies among the different jurisdictional schemes, as explained in several of our Deliverables. The objective of Project C was to produce a Proof of Concept to partially model project use case solutions relating to the Spent Convictions Scheme, to lessen the current pressure on officials who need to process the checks.

2 Methodology [Pompeu Casanovas, Mustafa Hashmi, Louis de Koker]

We formulated three research questions:

(i) Could some existing solutions of Compliance by Design (regulatory, business compliance) be applied to complex legal (criminal) cases?
(ii) Could we apply semantic tools to improve information browsing, searching and sharing (for all stakeholders, including officers, legal professionals and citizens)?
(iii) Could we address the issues (e.g. about the protection of rights) that may arise from the implementation of technlogy from a broader legal approach?

We answered these questions by (i) developing the ideas of *Compliance through Design* (CtD), *Law as Data*, and *Legal Governance*, (ii) combining different methodologies stemming from Legal Analysis, Natural Language Processing, and Non-standard Deontic Logic, and (iii) identifying some relevant constitutional and legal issues that are adding complexity to the formal modelling.

We developed a set of preparatory studies: (i) carrying out a preliminary survey of the literature and research projects on legal compliance -i.e. Compliance by Design (CbD); and (ii) clarifying the double process of (a) extending business managing techniques to other regulatory fields, and (b) converging trends in legal theory, legal technology and Artificial Intelligence (AI). We distinguished three different policy-driven types of CbD: (i) business, (ii) regulatory, (iii) and legal. The recent deployment of ethical views, and the implementation of general principles of privacy and data protection led to the

conclusion that, in order to appropriately define legal compliance, Compliance through Design (CtD) should be differentiated from CbD.

3 Compliance by Design (CbD) and Compliance through Design (CtD) [Pompeu Casanovas, Louis de Koker and Mustafa Hashmi]

We conceive legal Compliance through Design (CtD) not only as a refinement of regulatory and business compliance but as a specific category on its own. CtD requires additional elements to ensure that norms that are interpreted and turned into rules that are 'legal' in nature, i.e. pertaining to what constitutes 'valid' law in a broader context.

Legal CbD (LCbD) is a term that was introduced to focus on the legality of the whole business process. It became more prominent after the enactment of the Sarbanes-Oxley Act (2002), a US federal law that expanded and created new requirements for all public company boards and accounting firms. According to ISO/IEC 27002: "The organization must identify and document its obligations to external authorities and other third parties in relation to information security, including intellectual property, [business] records, privacy/personally identifiable information and cryptography".

Regulatory compliance is also a common notion, often referred in a broad sense to denote "the act and process of ensuring adherence to laws" and involving analysing, checking, enforcing, and "discovering, extracting and representing different requirements from laws and regulations that affect a business process" (Akhigbe et al. 2015).

We distinguished between LCbD approaches focused on business processes — e.g. through goal-oriented modelling—and those focused on legal knowledge, i.e. on requirements based on the properties of normative and legal systems (such as hierarchy, consistency, etc.). We focused on legal sources to select and define the requirements. Thus, we suggested the notion of Compliance through Design (CtD) *to explicitly encompass the social and institutional aspects that are not explicitly included by the regular way of approaching this subject (i.e. legal interpretation processes beyond the conversations between experts and computer scientists, institutionalisation, the interface between modelling and coordination, and the relation between citizens and the law).* (Casanovas et al. 2017).

4 Legal Quadrant [Pompeu Casanovas and Mustafa Hashmi]

We developed a conceptual clustering which is useful to analyse and differentiate between CbD and CtD approaches. Preliminary results have been also presented in Casanovas et al. (2017), and Hashmi et al. (2018). A comprehensive explanation of the legal quadrant can be found in Casanovas (2019) (in Poblet et al 2019, chapter 5). A

recent survey on business and regulatory compliance can be found in Hashmi et al. (2016 and esp. 2018).

We made a distinction between four types of regulations: hard law, policies, soft law, and ethics. *Hard law* refers to legally binding obligations, either in the national or international arena, under regulations that can lead to adjudication court processes. *Soft law*, on the contrary, is not mandatory. It consists of rules, best practices and principles that are not legally binding, but facilitate the governance of networks, social organizations, companies and institutions. Soft and hard law are not discrete categories, but they are placed on a *continuum* which allows the coordination of different powers and authorities to produce regulations across borders among citizens, organizations, and the different states.

We used the legal quadrant to produce the clustering and classification of concepts described in D3C.2.

We carried out a survey on legal compliance (i) to obtain a detailed understanding of the current literature, (ii) to investigate how legal compliance is perceived, (iii) and to identify the areas where legal compliance needed to be correctly understood. To achieve this, we addressed the following research question (and sub-questions):

- 1. What are the main characteristics of legal compliance through design (LCtD)?
- 1.a What are the differences and similarities of LCtD and regulatory compliance?
- 1.b Which is the gap in the existing compliance regime that must be filled to enable successful (semi-) automation of the compliance function?

We collected 632 articles on regulatory and legal compliance (1967-2019), and we looked for (i) associative relationships (items are in some way affiliated), (ii) one-way relationships (items which have a definite direction, an agent and a recipient), (iii) symmetrical relationships (two-way relationships). We completed the cluster analysis using the Pearson correlation coefficient, complemented with Sorensen and Jaccard coefficients. We concluded that many of the concepts in the literature have been discussed sparsely. Literature often focused on disparate elements and failed to provide a holistic view. Some related legal concepts have not been discussed at all. For example, human rights have a (direct) relation with civil rights. However, no reference to this relationship and the complexities it creates for automated compliance solutions was found. In summary, our extensive survey found that *the existing studies on legal compliance do not cover the entire legal field (including ethics and policies).*

As a result, business and regulatory compliance solutions are not yet adequately developed to address broader legal compliance challenges. Handling complex legal problems, such as the implementation of the Spent Conviction Scheme, require a combination of institutional, legal, and computational approaches to get acceptable results. This holds as one of the significant findings of this Project. CbD and CtD can only be bridged by combining several methodologies. Therefore we recommended a cautious exploration of the procedural, interpretative, constitutional and judicial dimensions of the Spent Conviction Scheme at the same time that the proof of concept was carried out. This also was extended to potential privacy issues.

5 Legal steps in the Spent Conviction Scheme [Mira Stammers]

Legislation relating to spent convictions in Australia is complex and inconsistent. Other than Victoria, which does not have a legislated Spent Conviction Scheme, each jurisdiction has a different legislative regime to determine whether a conviction becomes hidden from public view after a set period of time. The multifaceted and varying nature of these jurisdictional regimes weighs heavily on government resources. Currently, Australian police agencies and accredited bodies manually screen criminal records data and make decisions about whether to disclose spent convictions. During 2016-2017, 4.74 million checks were processed, of which 1.42 million were sent for further analysis. Importantly, automated technical solutions using Compliance through Design (CtD) modelling has the possibility of unburdening government agencies of this time-consuming responsibility.

In order to demonstrate the viability of an automated solution (via CtD modelling), it was necessary to first complete a proof of concept. For that purpose, a sample use case was selected and the legal analysis steps were determined. These steps then formed the basis of the computational modelling.

The purpose of the use case related to the vetting of Person A's appointment as a management consultant to the Australian Federal Police. Person A had two prior convictions for insider trading in 1998 and had been released on entering into a good behaviour bond for two years.

As the originating and co-ordinating jurisdictions of the use case was federal, the legal analysis required a review and application of the Commonwealth legislation pertaining to spent convictions. This deliverable identifies the steps to be followed to analyse the provisions contained in (i) Pt VIIC of the *Crimes Act 1914* (Cth) (the "Act") and (ii) Regulations 7A, 8 and Schedule 4 of the *Crimes Regulations 1990* (Cth) (the "Regulations") for the use case. It was designed to demonstrate the steps one would follow in determining whether a conviction is spent and/or whether it should be disclosed. The CtD modelling therefore replicates the human decision-making steps via an automated platform.

Specifically, for the sample use case (Person A), the legal steps were as follows:

Step 1 *– Has there been a conviction?*
The facts indicate that the first test is met. Person A was convicted of insider trading, and thus Section 85ZM(1)(a) of the Act applies.

Step 2 *– Is the conviction spent?*
Person A was convicted on 10 August 1998. Thus, the maximum waiting period has been served, being 10 years. Person A therefore meets the requirements of having a 'spent conviction'.

Step 3 *– Do any Division 6 exclusions apply?*
Yes, the exception pursuant to Section 85ZZH(a) of Div 6 of Pt VIIC of the Act applies.

Therefore, while the conviction is spent, disclosure to the Australian Federal Police for the purpose of assessing whether Person A should be engaged as a consultant is permitted.

6 Legal interpretation [Jeff Barnes]

The Spent Conviction Scheme in the Crimes Act appears to be well drafted. However, no legislative scheme is immune from potential interpretative issues, and the spent convictions scheme is no exception. But it is a misconception to see the potentiality for interpretative issues as necessarily evidence of a drafting mistake or a bad thing. And the very fact that some types of interpretative issue can be readily identified on the face of the legislation means that those mapping a legislative scheme are forewarned and can be forearmed.

Category A issues are deliberately built-in through the use of general principles drafting. The fact that this drafting can be identified on the face of the legislation means that, to some extent, issues falling within this category can be anticipated. A user of a provision drafted in the general principles style can manage a level of uncertainty associated with this style. By reading the provisions in context and particularly in the light of the purpose of the provision, the reader can clarify in advance examples of its operation (either side of the line). But the examples will not be exhaustive, will not have the force of law of course, and complete certainty cannot be achieved in the abstract.

In contrast, some interpretative issues are not deliberately created. These are category B issues. On the face of the legislation, they are difficult to predict and vary in their cogency. They are difficult to predict because the likelihood of the facts arising that would create an issue is often uncertain and in some cases may be remote. And even if facts arise to generate an issue, the weight of the interpretative arguments for one construction may vary from one provision to another. An argument for one construction may be weak. In other words, the 'issue' may be tenuous. Category B issues constitute the most problematic type of issue for the administrator.

Category C issues are like and unlike Category B issues. While they are also not deliberately created, they *can* be readily identified on the face of the legislation. They comprise 'issues' created by the reliance on Acts of general application, especially the *Acts Interpretation Act 1901* (Cth). In this report no issue of contrary intention was evident and no competing constructions could be formulated so as to create a full-blown problem. The interpretative significance of the AIA and other Acts of general application is that, while a reader who is aware of the Act of general application may read the provisions in this category one way, a lay reader who is unaware of the Act of general application may read it another way. However, the fact that, as regards the present scheme, a provision of an Act of general application can be readily identified as of relevance (and for which, as mentioned, there is no issue of contrary intention in the provision in question) means that those mapping the legislative scheme can build the effect of the relevant provisions of the AIA into their design. In short, like the category A issue, but more so, the Category C issue can be readily identified on the face of the legislation and can be factored in by an analyst of legislation.

7 Case law [Suzanne O'Toole and Patrick Keyzer]

D3C.6 is an examination of the practical operation of Commonwealth spent convictions provisions in the Crimes Act 1914 (Cth): ss 85ZV and 85ZW and associated definitions. It sets out the highlights of the reported case law and judicial consideration of those provisions. This report does not consider State or Territory spent convictions legislation.

Under federal legislation, if a person's conviction for a Commonwealth (or Territory) offence is more than ten years old, the person is not required to disclose to any person, the fact that the person has been charged with, or convicted of, the offence. The federal provisions reflect the limitations of the Commonwealth's constitutional power in this area: the Commonwealth can only regulate federal crimes (pursuant to s 51(xxxix) of the Constitution or crimes in the Territories (pursuant to s 122 of the Constitution).

However, if a person's conviction of a State (or foreign) offence is more than ten years old, the person is not required to disclose to any Commonwealth authority in a State (or in a foreign country), the fact that the person has been charged with, or convicted of, the offence. These provisions reflect the Commonwealth's constitutional power over matters external to Australia (s 51(xxix) of the Constitution) or matters relating to the public services of the Commonwealth (ss 51(xxxix) and 52 of the Constitution).

It is clear that federal legislation ensures that federal agencies cannot have regard to spent convictions when making a determination that a person is fit and proper. However it is equally clear that federal criminal law authorises appellate tribunals, such as the Administrative Appeals Tribunal, to have regard to any matter that they think is relevant when considering an appeal from an unsuccessful applicant, and, paradoxically, that can include a person's spent convictions. This position has been confirmed in a decision of the Federal Court and a decision of the Full Court of the Federal Court. Quite recently, a decision on *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16 (15 May 2019) has been reached by the High Court about the allowance of appeals (and the protection of constitutional rights):

"The appeal must be allowed. Orders 2 and 3 of the orders made by the Full Court of the Federal Court on 12 October 2017 must be set aside. In place of those orders, it is to be ordered that the appeal to that Court be allowed and that order 1 made by Bromberg J on 22 August 2016 and the order made by Bromberg J on 15 September 2016 be set aside. In place of the orders made by Bromberg J, it is to be ordered that the decision made by the AAT on 6 March 2015 be set aside and the matter remitted to the AAT for reconsideration in accordance with law. ASIC must pay the costs of Mr Frugtniet in this Court."

8 Spent Convictions and Privacy issues [David Watts]

8.1 Introduction

Australia's federal system of government consists of a national government, the Commonwealth, six States and two Territories. Under Australia's Constitution, the Commonwealth government is granted powers over specific and defined areas of responsibility, with the States having residual power over responsibilities that are not specifically conferred on the Commonwealth. Although the Territories have more limited powers than the States, they can be regarded, for the purposes of this project, as having equivalent powers and responsibilities as the States.

This divided configuration of roles and responsibilities has consequences, for each of law enforcement, spent convictions and information privacy law issues relevant to this project. These are set out in greater detail below.

It should also be emphasised that this short paper is designed as a high-level overview of the operation of Australian information privacy law in the context of Australian spent convictions schemes. It functions as a general description of the relevant rules and principles. It is not designed to be an exhaustive account of the operation of each jurisdiction's spent convictions and information privacy laws and the way in which each inter-operates.

8.2 Information Privacy Law

As this project focuses on the collection and handling of personal and sensitive information within and between public sector agencies, it is unnecessary to consider the private sector provisions of Australian information privacy law.

The Commonwealth *Privacy Act 1988* applies to the collection and handling of personal and sensitive information within the Commonwealth public sector.

Four of the States – New South Wales, Victoria, Queensland and Tasmania have also enacted public sector information privacy laws. These are:

- The *Privacy and Personal Information Protection Act 1998* (NSW)
- The *Privacy and Data Protection Act 2014* (Vic)
- The *Information Privacy Act 2009* (Qld)
- The *Personal Information and Protection Act 2004* (Tas)

There is no public sector information privacy legislation in either of South Australia or Western Australia, although South Australia has adopted a Cabinet Instruction, PC012, *Information Privacy Principles (IPPS) Instructions,* that regulates the collection and handling of personal information by South Australian public sector agencies on an

administrative basis. There is no independent oversight of the South Australian IPPS framework.

Both of the Territories, the Northern Territory and the Australian Capital Territory, have enacted public sector information privacy laws. These are:

- The *Information Privacy Act 2014* (ACT)
- The *Information Act 2002* (NT)

There are two main features shared by all of these enactments.

The first is that they function as *default* legislation. In other words, they apply except to the extent that more specific legislation applies. For example, where information privacy legislation prohibits the disclosure of personal or sensitive information for a purpose other than the purpose for which it was collected, more specific legislation such as a taxation law that permits or requires the disclosure of the income of a taxpayer to taxation authorities overrides the general restrictions or prohibitions in information privacy law.

The second is that, consistent with international instruments such as the *International Covenant on Civil and Political Rights* and the OECD's *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* both of which provide part of the Constitutional authority for the Commonwealth *Privacy Act 1988,* Commonwealth, State and Territory information privacy laws are designed so as to either:

- entirely or partially exempt law enforcement functions and activities from information privacy law, or;
- to exclude law enforcement functions and activities from complying with relevant privacy principles, such as the *Australian Privacy Principles* (APPs).

The expression 'law enforcement functions and activities' or similar is not generally defined in statutes. It is usually understood to cover the prevention, detection and prosecution of crimes but can extend to activities associated with the enforcement of laws relating to the confiscation of the proceeds of crime, the conduct of proceedings (including prosecutions) in courts or tribunals and community policing.

8.3 Spent Conviction Schemes

Each of the Commonwealth, States and Territories have enacted Spent Convictions Schemes (SCE) which operate so as to enable individuals not to disclose certain criminal convictions in particular circumstances, and to prohibit unauthorised use or disclosure of information about the conviction. These schemes apply to convictions for less serious Commonwealth, State and Territory and foreign offences. In general terms, pardons and quashed convictions are also covered.

The categories of information covered by these schemes would normally fall within the various definitions of 'personal information' and, depending on the nature of the offence,

'sensitive information' and thus engage the protections and remedies associated with information privacy legislation.

Although spent conviction schemes vary from jurisdiction to jurisdiction, as specific legislation, they override information privacy obligations *to the extent that they function as more specific legislation than information privacy law.*

Moreover, to the extent that personal information covered by spent convictions schemes falls within law enforcement exceptions to, or exemptions from, information privacy legislation, these constitute an additional 'layer' of removal from information privacy laws.

8.4 Conclusion

Spent convictions schemes can be regarded as specific information collection, use and disclosure regimes that operate to the exclusion of information privacy law *to the extent that they are inconsistent with it*. Almost invariably, when conviction information is relevant to law enforcement functions and activities, such information will be covered by law enforcement exclusions from compliance with information privacy law.

9 Potential constitutionally problematic aspects of the Commonwealth spent convictions scheme [Danuta Mendelson, commenting: Mirko Bagaric]

9.1 Introduction

This contribution to the "*DC25008: Compliance by Design (CbD) and Compliance through Design (CtD); Solutions to support automated information sharing"* report builds on the input provided by other members of the team. [2] Specifically, it examines some constitutional implications of the scheme, in particular, application of s 109, and possible infringement of the separation of powers. The outline below is really a preliminary draft that flags some matters of constitutional law concern to be discussed in depth at a later stage.

Under the Australian federal system, the *Constitution* provides for States under their residual legislative powers[3] and for the Commonwealth/Federal Parliaments to have

[2] Part VIIC of the *Crimes Act 1914* has been subject of considerable judicial scrutiny: *Toohey v Tax Agents Board of Victoria* [2007] FCA 431; (2007) 171 FCR 291;

[3] Residual legislative powers of the six States are powers which they had as each Colony the before Federation, and which stayed with them (ss 106-108 of the Australian *Constitution*), after they handed over to the Commonwealth powers expressly enumerated in s 51. Law and order are among residual legislative powers of States.

concurrent law-making authority within fields enumerated in s 51[4] For example, Parliaments of the Commonwealth, States and Territories[5] within the ambit of their jurisdictions, can create statutory offences based upon the same or very similar conduct, and validly enact statutory schemes.

The spent convictions scheme was inserted into the *Crimes Act 1914* as Part VIIC in 1989,[6] following the Australian Law Reform Commission Report[7] and the agreement of the Standing Committee of Attorneys-General[8] to enact (yet to be completed),[9] spent convictions legislation in all jurisdictions.[10] The scheme is messy, problematically drafted, involves complex cross-jurisdictional legislation with the ever-growing number of offences captured by Division 3, and a plethora of exceptions from the (Division 6) constantly added to either through Regulations or amendments by the Commonwealth, States and Territories.[11]

Part VIIC has been subject of many decisions, including *Frugtniet v Australian Securities & Investments Commission*.[12]

[4] For example, Interstate trade and commerce power' (with other countries, and among the States) s51(i); Taxation power': s51(ii); Military defence: s51(vi); Bankruptcy: s51(xvii); Banking (other than state banking) s51(xiii); Insurance other than state insurance s51(xiv); Corporations power 51(xx); Pensions (s51(xxiii) and s51(xxiiiA); Influx of criminals s51(xxviii); External affairs power' s51(xxix) as well as 'the referral power', which allows State parliaments to refer matters to the Commonwealth s51(xxxvii); and 'the incidental power' s51(xxxix) empowering the Commonwealth to legislate on matters 'incidental' to an enumerated head of power.

[5] The Northern Territory and the Australian Capital Territory have elected legislative assemblies and law making capacity, but the Federal Parliament can override territorial laws under s 122 of the *Constitution*.

[6] *Crimes Legislation Amendment Act 1989* (Cth).

[7] Report No 37.

[8] Commonwealth, Parliamentary Debates, House of Representatives, 11 May 1989, 2545 (Lionel Bowen, Attorney-General).

[9] Respondent's Submissions, *Rudy Frugtniet v Australian Securities & Investments Commission* High Court of Australia, 2 November 2018, p 2.

[10] The Australian Privacy Commissioner has been vested with conciliation and civil remedy powers to investigate and resolve breaches of the the Commonwealth scheme.

[11] By virtue of *Crimes Act 1914* s 85ZQ, Part VIIC binds the Crown in right of the Commonwealth, each of the States and of the Australian Capital Territory and Northern Territory.

[12] http://www.hcourt.gov.au/cases/case_m136-2018.

Spent convictions schemes in Australia are similar, but not identical,[13] and therein lays potential for constitutional inconsistency. In the case of inconsistency, s 109 of the Constitution[14] provides that:

> 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.[15]

Section 109 operates by (a) directly invalidating State law where it is impossible to obey both the State law and the Commonwealth law;[16] or (b) by indirectly invalidating State law where the Australian Parliament's has evinced legislative intent to "cover the field" in relation to a particular subject:[17]

> "The Parliament has the power to identify a field to be "covered" by federal laws in the sense that federal laws are to operate exclusively of State laws, making those State laws inconsistent with the federal laws and invalid to that extent under s 109 of the Constitution."[18]

In relation to legislative schemes, section 109 "may operate where the Parliament … [has enacted a law] – to provide a more detailed scheme than State law in some respects and a less detailed scheme in other respects".[19] Arguably, Spent Convictions Schemes would fall into this category.

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[13] *Criminal Records Act 1991* (NSW); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Spent Convictions Act 2009* (SA); *Spent Convictions Act 1988* (WA). As noted elsewhere, Victoria does not have its own spent convictions scheme; however, the Commonwealth spent convictions scheme applies to Victorian criminal offences that have a "federal aspect". The Victoria Police have adopted an informal practice for disclosure/non-disclosure of criminal convictions modelled broadly on the Commonwealth scheme.

[14] Section 109 of the Constitution only applies to States, with respect to the Territories, the Commonwealth could achieve the same outcome by acting under s 122 of the Constitution.

[15] Latham CJ stated in *Carter v Egg and Egg Pulp Marketing Board* (Vic) (1942) 66 CLR 557, at p 573 that the word "invalid" in s. 09 should be regarded as meaning "inoperative" while the federal law remains in force. Cited with approval by Fullagar J Butler v Attorney-General (Vic) (1961) 106 CLR 268; [1961] HCA 32, 274.

[16] *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 10 CLR 266; *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23.

[17] *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

[18] *State of NSW v Commonwealth (Work Choices Case)* [2006] HCA 52, at [365] Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; Kirby, Callinan, JJ in dissent.

[19] *State of NSW v Commonwealth (Work Choices Case)* [2006] HCA 52, at [370] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

9.2 Statutory cut-off criteria for spent convictions' scheme eligibility

Given that the schemes are not harmonised, there are differences in the length of sentences prescribed as statutory cut-off criteria for spent convictions' eligibility between the Commonwealth and State schemes.[20]

For example, *Crimes Act 1914* (Cth), s 85ZM (2)(b) provides that for the purposes of the scheme,

> "a person's conviction of an offence is spent if he or she … was not sentenced to imprisonment for the offence for more than *30 months*, and the waiting period [10 years] for the offence has ended".[21]

In contrast, the *Criminal Records Act 1991* (NSW), s 7(1) provides that following "not less than 10 consecutive [crime-free] years" after the date of … conviction,[22] "All convictions are capable of becoming spent in accordance with this Act, except the following:

> (a) convictions for which a prison sentence of more than *6 months* has been imposed"[23]

In his Second Reading Speech, the then Attorney-General stated that the subject of legislation were convictions for "minor" offences;[24] however, the final text of Part VIIC differs from the one proposed by the ALRC, the initial Bill and the Explanatory Memorandum, as well as the proposals contained in the 2nd Reading Speech. Hence, all these materials need to be treated with caution.

Arguably, the actual wording of s 85ZM (2)(b) implies that all offences with conviction range from naught to many number of years are covered by the Commonwealth legislation as long as the offender has been sentenced to no more than 30 months in prison.

Section 7(1) of the *Criminal Records Act 1991* (NSW) speaks in term of convictions rather than offences, and stipulates maximum prison sentence of no more than 6 months.

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[20] There are also other numerous and significant differences among States and the Commonwealth in exceptions to the spent convictions rules; however, their analysis is outside the scope of this project.

[21] The period of 10 years begins to run on the day on which the person was convicted of the offence: to *Crimes Act 1914* (Cth), s 85ZL. It should be noted that characterising of a conviction as "spent" does not automatically mean that the offence is not disclosable even after 10 years has elapsed. The conviction might be subject to the plethora of statutory exclusions contained in the *Crimes Act 1914* (Cth), Division 6, and Crimes Regulations 1990, reg 7A, reg 8, Schedule 4 Exclusions from Privacy Provisions.

[22] *Criminal Records Act 1991* (NSW), s 9(1).

[23] *Criminal Records Act 1991* (NSW), s 7(1) further excludes from the spent convictions scheme: "(b) convictions for sexual offences, (c) convictions imposed against bodies corporate, (d) convictions prescribed by the regulations".

[24] Commonwealth, Parliamentary Debates, House of Representatives, 11 May 1989,2545 (Lionel Bowen, Attorney-General).

This wording also has been construed as referring to "minor" offences.[25] However, given the 2 year (24 months) gap in the cut off criterion for the spent convictions eligibility between the two provisions, it appears that the notion of a "minor" offence is quite flexible. The term "minor" is not used in the legislation, and the issue will be discussed below.

9.3 State offences, Commonwealth offences, and State offences with federal aspect

Be that as it may, although s 85ZM (2)(b) is substantially more generous as criterion for the spent conviction scheme, as long as the offences in question are clearly demarcated as either Commonwealth or State (s 7), any risks of constitutional inconsistency would be minimal.

Also, subject to Division 6 (Exclusions), s 85ZV specifies that the Commonwealth spent convictions scheme is engaged in respect of:

- convictions of Commonwealth offences and Territory offences that are "spent" in accordance with s 85ZM [s 85ZV(1)];
- convictions of a State offence or a foreign offence that are spent in accordance with s 85ZM [s 85ZV(2)]; and
- convictions of a State offence that fall outside s 85ZV(2) (because they are not "spent" in accordance with s 85ZM), but which are the subject of a State law "dealing with the disclosure and taking into account of spent convictions" [s 85ZV(3)].

Section 85ZV(3) is drafted in a very woolly language, but it has been construed as applying to cases where a State allows an offence under its laws to be treated as spent in circumstances that are more favourable to the offender than s 85ZV(2). In *Fisk v Chief of the Defence Force* [2017] FCA 1489, Perry J at [32] stated that:

> "… the *Crimes Act* does not exclude the operation of State laws prohibiting the disclosure of spent convictions and authorities from taking into account spent convictions. To the contrary, Part VIIC provides that a person is entitled to the benefit of state laws dealing with the disclosure, or taking into account, of spent convictions under state laws, including against Commonwealth authorities, where such laws are more prescriptive and therefore more generous to the person convicted of the state offence."

As noted above, Part VIIC also vests Commonwealth jurisdiction over "State offences with federal aspect". Broadly, under the *Crimes Act 1914* (Cth), a State offence will have a federal aspect if the subject-matter of the offence is a subject on which the Commonwealth has constitutional power to legislate. A State offence will also have federal aspect in cases where the investigation of that State offence is incidental to an investigation of a Commonwealth or Territory offence. The relevant provisions of

[25] See *Kocic v Commissioner of Police, NSW Police Force* [2014] NSWCA 368; (2014) 88 NSWLR 159.

Division 3, though not yet challenged, appear iffy and potentially challengeable (Mirko, what do you think?)

The *Crimes Act 1914* (Cth), s 3AA (1A) identifies three prerequisites for classifying State offences as having a federal aspect:

> "(a) they *potentially* fall within Commonwealth legislative power because of the elements of the State offence; or
> (b) they *potentially* fall within Commonwealth legislative power because of the circumstances in which the State offence was committed (whether or not those circumstances are expressed to be acts or omissions involved in committing the offence); or
> (c) the Australian Federal Police investigating them is incidental to the Australian Federal Police investigating an offence against a law of the Commonwealth or a Territory."

Except for paragraph (c), the imbuing State offences with "federal aspect" in s 3AA (1A)(a) and (b) is framed in terms of potentiality. The enquiry whether either the elements of the offence or the acts or omissions involved in committing the offence potentially fall within Commonwealth legislative power, its jurisdictional competence, is a judicial function.

With the exception of s 3AA(1)(d), statutory conditions imposed by s 3AA(1) for deeming valid State offences – both primary and ancillary[26] – as having a federal aspect is to be undertaken by reference to the Commonwealth's jurisdictional competence (see below). However, this enquiry into constitutional validity, which is based on series of hypothetical the assumptions might infringe constitutional division of judicial and parliamentary powers.

Section 3AA(1) reads:

> (1) For the purposes of this Act, a State offence has a ***federal aspect*** if, and only if:
> (a) both:
> (i) the State offence is not an ancillary offence; and
> (ii) assuming that the provision creating the State offence had been enacted by the Parliament of the Commonwealth instead of by the Parliament of the State—the provision would have been a valid law of the Commonwealth; or
> (b) both:
> (i) the State offence is an ancillary offence that relates to a particular primary offence; and
> (ii) assuming that the provision creating the primary offence had been enacted by the Parliament of the Commonwealth instead of by the Parliament of the State—the

[26] Ancillary offences include "conspiring to commit the primary offence"; "aiding, abetting, counselling or procuring, or being in any way knowingly concerned in, the commission of the primary offence"; and "attempting to commit the primary offence" see *Crimes Act 1914* (Cth), s 3AA(5).

provision would have been a valid law of the Commonwealth; or

(c) assuming that the Parliament of the Commonwealth had enacted a provision that created an offence penalising the specific acts or omissions involved in committing the State offence—that provision would have been a valid law of the Commonwealth; or

(d) both:

(i) the Australian Federal Police is investigating an offence against a law of the Commonwealth or a Territory; and

(ii) if the Australian Federal Police is investigating, or were to investigate, the State offence—that investigation is, or would be, incidental to the investigation mentioned in subparagraph(i).

Conditions in paragraphs (a) and (b) are hypothetical, and direct the decision-maker to second guess what the Federal Parliament would do if it had been creating an enacted State offence (or an ancillary offence).[27] The implication is that (i) the Federal Parliament would create such offence, (ii) it would be identical to the State offence, and (iii) if these two preconditions were met, it "would have been a valid law of the Commonwealth". In other words, these provisions force a judge to divine what Parliament would do.

Condition contained in 3AA(1)(c) involves a second guessing of what the federal Parliament would do in terms of imposing valid hypothetical penalties on a hypothetically valid State-cum-Commonwealth offence.

Although the type of the conduct constituting the notional Commonwealth offence to be penalised is pretty open-ended, the acts or omissions involved in committing a State offence with federal aspect must fall within legislative competence of the Commonwealth.[28] This will occur when an aspect/consequence of the act or omission constituting State offence affects, among others, the interests of the Commonwealth under its exclusive powers contained in s 52 of the *Constitution* (the Commonwealth, an authority of the Commonwealth, Commonwealth place[29]).

Alternatively, the Federal Parliament must have a power under an appropriate head of s 51 of the *Constitution* to legislate with regards to the relevant acts and omissions. Section 3AA(3) stipulates that the conduct constituting State offence would need to involve, though does not have to be limited to,[30] any of the following:

a "constitutional corporation" as defined under s 51(xx); the use of a postal service or other like service or an electronic communication[31] covered by s 51(v); banking (other

[27] *Crimes Act 1914* (Cth), s 3AA(1)(b) State offences that have a federal aspect.

[28] "the specificity of the acts or omissions involved in committing a State offence is to be determined having regard to the circumstances in which the offence was committed (whether or not those circumstances are expressed to be elements of the offence)" *Crimes Act 1914* (Cth), s 3AA (2).

[29] Governed by in the *Commonwealth Places (Application of Laws) Act 1970* (Cth).

[30] *Crimes Act 1914* (Cth), s 3AA (4).

[31] The term "electronic communication " is defined as "a communication of information:

than State banking not extending beyond the limits of the State concerned, as provided for by s51(xiii); trade or commerce between Australia and other countries and among the States allowed by s 51(i), within a Territory, between a State and a Territory or between 2 Territories under Commonwealth powers in s 122; and by virtue of s 51(xiv), insurance other than State insurance. Since s 51(xxix) external affairs vests in the Commonwealth wide law making powers, it can impose penalties with respect to any wrongful conduct that relates to an overseas matter; or:

> "to a matter in respect of which an international agreement to which Australia is a party imposes obligations to which effect could be given by the creation of an offence against the domestic laws of the parties to the agreement"; or "a matter that affects the relations between Australia and another country or countries or is otherwise a subject of international concern".[32]

These provisions certainly cover the field, which means that just about all State offences might potentially be categorised as having a federal aspect.

Moreover, because the statutorily mandated process of categorisation that is inherently based on assumptions, it gives the decision-maker very wide ranging discretion.

9.4 Serious offences; do they come within the ambit of s 85ZM (2)(b)?

Section s 85ZM (2)(b) refers to "an offences" without a descriptor either minor or serious.

Serious Commonwealth offences and serious State offences that have a federal aspect are defined in s 15GE(1)(b) of the *Crimes Act 1914* as ones "punishable on conviction by imprisonment for a period of *3 years or more*", and involving any of the following matters listed in 15GE(2):

> "(a) theft; (b) fraud; (c) tax evasion; (d) currency violations; (e) controlled substances; (f) illegal gambling; (g) obtaining financial benefit by vice engaged in by others; (h) extortion; (i) money laundering; (j) perverting the course of justice; (k) bribery or corruption of, or by, an officer of the Commonwealth, of a State or of a Territory; (l) bankruptcy and company violations; (m) harbouring of criminals; (n) forgery (including forging of passports); (o) armament dealings; (p) illegal importation or exportation of fauna into or out of Australia; (q) espionage, sabotage or threats to national security; (r) misuse of a computer or electronic communications; (s) people smuggling; (t) slavery; (u) piracy; (v) the organisation, financing or perpetration of sexual servitude or a sexual offence against a person who is

(a)whether in the form of text; or (b)whether in the form of data; or (c)whether in the form of speech, music or other sounds; or (d)whether in the form of visual images (animated or otherwise); or (e)whether in any other form; or (f)whether in any combination of forms; by means of guided and/or unguided electromagnetic energy." *Crimes Act 1914* (Cth), s 3AA (5).

[32] *Crimes Act 1914* (Cth), s 3AA (3)(h0,(i),(j).

> under 18 outside Australia; (w) dealings in child pornography or material depicting child abuse; (x) importation of prohibited imports; (y) exportation of prohibited exports; (z) violence; (za) firearms; (zb) a matter that is of the same general nature as a matter mentioned in one of the preceding paragraphs; (zc) a matter that is prescribed by the regulations for the purposes of this paragraph".[33]

Any other "matter that is of the same general nature" as those specifically listed above or "is prescribed by the regulations" will fall also within the ambit of s 15GE(1).[34]

Section 15GE (3) adds also offences against the following provisions of the *Criminal Code:* (a) Terrorism;[35] (b) Use of postal or similar service for child pornography material or child abuse material;[36] (c) Use of postal or similar service involving sexual activity with person under 16;[37] (d) Use of carriage service for child pornography material or child abuse material;[38] (e) Use of carriage service involving sexual activity with person under 16.[39]

All "matters" and provisions listed in sections 15GE (2) and (3) are within the heads of Commonwealth power enumerated in s 51 of the *Constitution.* The Commonwealth has "covered the field" not only for the Commonwealth serious offences but also for any serious "State offence that has a federal aspect", as defined in s 15GE (4), namely "a serious State offence that has a federal aspect" [defined in s 3AA], and "that would be a serious Commonwealth offence if it were a Commonwealth offence".

10 Professional Comment [Hon. David Parsons, Senior Counsel]

My experience of the issue is related to two issues only:

1. The use and relevance of prior convictions in the sentencing process; and
2. The issue of spent convictions – from particular cases where I have been asked by persons about whether they need to disclose certain convictions.

As to the first issue it is something with which I have been concerned my entire professional life – as will be the case for all criminal lawyers and judges. Prior convictions (and the lack of them) play a significant role in the sentencing of any offender. As I understand it the various exceptions will always operate such that any previous charge, conviction and sentence will always be available to a criminal court. That should always be the case. Indeed it should extend to the administrative decision makers who are

[33] *Crimes Act 1914* (Cth), s 15GE(2).
[34] *Crimes Act 1914*, s 15GE(2)(zb) and (zc).
[35] *Criminal Code,* Part 5.3
[36] *Criminal Code,* Subdivision B of Division 471.
[37] *Criminal Code,* Subdivision C of Division 471.
[38] *Criminal Code,* Subdivision D of Division 474.
[39] *Criminal Code,* Subdivision F of Division 474.

charged with quasi criminal jurisdictions – such as those involving financial and migration matters.

The fact that a person has been previously charged with a criminal offence is prima facie always of relevance when that person is subsequently charged with another offence – whatever the period of time that has elapsed between the two charges. A detailed examination of the relevant circumstances may lead to the previous charge/conviction being given little or no weight in the sentencing process – or the reverse.

Of course, the analysis of the previous conviction and its relevance is determined in the context of the various matters normally considered by the sentencing judge after receiving submissions from counsel on behalf of the parties.

I can say in my 45 years practice as a criminal advocate and then as a judge I have never made nor received a submission that a judge should not know about a previous conviction in the context of a criminal hearing.

PART II

11 Part II: Proof of Concept. Semantic Modelling [Guido Governatori]

For the semantic modelling we selected Part VIIC (Pardons, Quashed Convictions and Spent Conviction) of the Crimes Act 1914, specifically Division 1 (Interpretation and application of part), Division 2 (Pardons for persons wrongly convicted and quashed convictions), Division 3 (Spent Convictions), Division 4 (Conviction of further Commonwealth or Territory offences) and Division 6 (Exclusions). Division 5 (Complaints to Information Commissioner) was not included in the modelling exercise since its focus is not on the requirements or effects of (pardoned, quashed or spent) convictions but on the procedures for complaints related to non-disclosable convictions. For the formal modelling of the Part of the Act we selected Defeasible Deontic Logic [40] (DDL), developed by CSIRO's Data61 in collaboration with international researchers and legal scholars, for its ability:

- to integrate reasoning with exceptions,
- to model deontic concepts such us obligations, permissions, prohibitions, and
- to represent both prescriptive norms and definitional norms.

All such elements are present in the (federal) legislation on spent conviction. The aim of the modelling was to understand to what extent formal models are suitable to represent legislation and if they offer suitable environment to support legal decision. The encoding

[40] Governatori G, Olivieri F, Rotolo A, Scannapieco S. Computing Strong and Weak Permissions in Defeasible Logic. *J Philos Logic*. 2013;42(6):799-829. doi:10.1007/s10992-013-9295-1.

of the selected section was done in the Data61's Turnip language and reasoner that implements DDL. The encoding was then tested with a few examples to provide an initial, small scale, validation of the approach.

The encoding of Part VIIC requires to extract the terms (or atoms in DDL parlance), corresponding to the concepts, used in the legislation. While, the Turnip language support different data types (e.g., Boolean, numeric, date and time, intervals, …) for the encoding of this part we only need to use Boolean, duration and date. The representation of each atom comes with its textual description proving the meaning in natural language of the term. The atoms encode either factual information relevant for a case (e.g., the date when a person was convicted for an offence, or the whether a person was convicted or found guilty of an offence) or for information that can be obtained based on the conditions defined in the Act (whether the waiting period for an offence ended). For example, we can create the following atoms

Date conviction.date "the date when the person was convicted"
Date case.date "the date when the current case is dealt with"
Atom minor "the person was a minor when the offence was dealt with"
Atom WaitingPeriodEnded "the waiting period for the offence has ended"

The terms are then composed to create rules. In DDL a rule is an IF… THEN … statement where the IF part encodes the condition of applicability of the rule (where in general a rule corresponds to a norm or a part of a norm), and the THEN part models the effect of the norm. Rules can then by divided in *constitutive rules* that can are used to provide the definitions of the terms used in a normative document, and *prescriptive rules* that give the conditions (IF part) under which legal requirements (i.e., obligations, permissions, prohibitions, …), THEN part, are in force. For instance, the following two rules

wp1: interval(case.date,conviction.date)>=5y & minor
=> WaitingPeriodEnded
wp2: interval(case.date,conviction.date)>=10y => WaitingPeriodEnded
are constitutive rules that encode the definition of waiting period given in Division 1 of Part VIIC, namely ***waiting period***, in relation to an offence, means:

(a) if the person convicted of the offence was dealt with as a minor in relation to the conviction—the period of 5 years beginning on the day on which the person was convicted of the offence; or
(b) in any other case—the period of 10 years beginning on the day on which the person was convicted of the offence.

Similarly, Section 85ZM defining the meaning of *conviction* and *spent* conviction, i.e.:

(1) For the purposes of this Part, a person shall be taken to have been convicted of an offence if:

(a) the person has been convicted, whether summarily or on indictment, of the offence;
(b) the person has been charged with, and found guilty of, the offence but discharged without conviction; or

(c) the person has not been found guilty of the offence, but a court has taken it into account in passing sentence on the person for another offence.

(2) For the purposes of this Part, a person's conviction of an offence is spent if:

(a) the person has been granted a pardon for a reason other than that the person was wrongly convicted of the offence; or

(b) the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months, and the waiting period for the offence has ended.

can be encoded by the following atoms and (constitutive) rules:
Atom Person "an individual not a body corporate" // see Section 85ZP(2)
Atom ConvictionVII "a conviction according to Part VII"
Atom Conviction "a person has been convicted for an offence"
Atom Guilty "a person has been charged with an offence and found guilty"
Atom Discharged "a person has been discharged without a conviction"
Atom OtherOffence "a person has not been found guilty, but the court has taken it into account (for the conviction) for another offence"

s85ZM_1a: Person & Conviction => ConvictionVII
s85ZM_1b: Person & Guilty & Discharged => ConvictionVII
s85ZM_1c: Person & OtherOffence => ConvictionVII
where the ConvictionVII atom corresponds to the "institutional" fact that an event counts as a conviction for the purpose of applying Part VIIC to that event.

Atom SpentConviction "a conviction is considered spent"
Atom Pardon "a person has been granted a pardon (not for being wrongly convicted"
Atom Imprisonment "a person was sentence to imprisonment"
Duration imprisonment_term "the length of the imprisonment for the offence"

s85ZM_2a: ConvictionVII & Pardon => SpentConviction
s85ZM_2b1: ConvictionVII & ~Imprisonment & WaitingPeriodEnded
=> SpentConviction
s85ZM_2b1: ConvictionVII & imprisonment_term <= 30m & WaitingPeriodEnded
=> SpentConviction
As one can notice the rules in DDL bear a close resemblance with the textual provisions they are meant to encode. For examples of prescriptive rules we can consider the rules encoding Section 85ZS(1a-b)

(1) Subject to Division 6, but despite any other Commonwealth law or any State law or Territory law, where, under section 85ZR, a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence:

(a) the person is not required, in those circumstances or for that purpose, to disclose the fact that the person was charged with, or convicted of, the offence;

(b) it is lawful for the person to claim, in those circumstances, or for that purpose, on oath or otherwise, that he or she was not charged with, or convicted of, the offence;

s85ZS_1a: Person & PardonOrWronglyConvicted
=> [E] Disclose.charged & [E] Disclose.conviction
s85ZS_1b: Person & PardonOrWronglyConvicted
=> [E] Oath.not_charged & [E] Oath.not_conviction
where [E] is the "exempt" modal operator (equivalent to "permitted not" or "not obligatory"), and Section 85ZZGB

85ZZGB Exclusion: disclosing information to a person or body

Divisions 2 and 3 do not apply in relation to the disclosure of information to a prescribed person or body if:

(a) the person or body is required or permitted by or under a prescribed Commonwealth law, a prescribed State law or a prescribed Territory law, to obtain and deal with information about persons who work, or seek to work, with children; and
(b) the disclosure is for the purpose of the person or body obtaining and dealing with such information in accordance with the prescribed law.

s85ZZGB: Person & [P] OtherEntityCollectInfoPersonSeekingWorkWithChildren & DisclosurePersonSeekingWorkingWithChildren => [O] Disclose.charged & [O] Disclose.conviction where [O] and [P] are, respectively the modalities for obligation and permission.

Given that the rules for Section 85ZS and Section 85ZZGB are in conflict with each other DDL provides a mechanism (called superiority relation) to solve the conflict. Specifically, rule s85ZZGB overrides rule s85ZS_1a. Thus, in case both rules apply, i.e., a person who received a pardon for an offence, seeking to work with children has to disclose the conviction to a body who is permitted by law to collect information about persons seeking to work with children.

The encoding for Part VIIC in Turnip, with examples, is available at https://turnipbox.netlify.com/fiddles/uGZAOs6VqbuTNySgkCyj.

12 Proof of Concept: Web of Data [Victor Rodriguez-Doncel, with the cooperation of Jorge Gonzalez-Conejero]

Information-retrieval algorithms ease the task of compliance checking both if carried out by humans assisted by computers or by humans alone. For algorithms to operate, information must be available in a collection of documents uniformly structured and readily accessible. However, in current settings, information is scattered in different sources, with heterogenous formats and non-direct accessibility.

The work reported in DC3.3 aimed at creating of a minimal collection of legal information related to spent-convictions. Documents had to be available in plain text format and also in an homogenous structured form, available on the web. This format is no other than RDF following a *law as data policy*, with the minimal structure as to demonstrate progress

over the standard legal information providers and aligned to law publication practices in Europe and other jurisdictions.

As a result of this task, a queryable web portal with the documents served as linked data was tested, including and SPARQL endpoint. In order to grant long-term preservation for the collection, the documents related to spent-convictions together with a collection of 884 Australian principal acts, were published in Zenodo[41] respecting the copyright notice of the Federal Register of Legislation and can be cited with a permanent DOI (Rodríguez-Doncel, 2018).

The portal is hosted in a IDT-UAB machine that runs with GNU/Linux ubuntu-server in a 64-bits platform. The machine contains: Intel i5 processor and 8 Gb of RAM memory. The main packages installed are OpenJDK and OpenJFX, moreover, the tomcat and apache server have been already installed. Querys go through port 8080 in the firewall. As a result, http://idt-skynet.uab.cat makes available the Data To Decisions CRC demo portal to the world. The domain name is provided by the UAB, therefore, there is no cost associated to the domain name. Moreover, the administration of the server is carried out by IDT-UAB staff that periodically runs different scripts that updates all the packages installed in the server. In addition, backup scripts runs periodically in an automated way.. This is the first collection of Australian law published as a dataset, up to the knowledge of the authors of this task.

In addition, early experimentation with text mining and NLP algorithms over this collection has been made. In particular: (i) keywords for every document were extracted using the TF-IDF algorithm and the IBM Watson Natural Language Understanding service; (ii) a cosine similarity measure between the documents based on the that information was used to recommend akin documents (e.g. judgments).

The early works made in DC3-3 deserve a continuation because publishing Australian legislation as data favours citizen access to law, enables advanced text-analytics systems to be used and aligns Australian law publication practices to the current global trends.

13 Findings and Outcomes [Pompeu Casanovas and Louis de Koker]

Project C focused on the development of (semi-)automated legal compliance solutions for ACIC-managed information-sharing relating to the Spent Conviction Scheme. In this project we investigated how best to bridge CbD and CtD using different methodologies and technologies to obtain a consistent result covering different dimensions (hard law, soft law, policies and ethics). Structured data (law as data), automated semantic rules (defeasible non-standard logic), and legal analyses have been carried out.

The Project produced the following general results:

[41] http://zenodo.org

(i) structured data to improve the generation of knowledge and to link relevant terms, concepts and documents;
(ii) a cluster of consistent non-contradictory rules to regulate the scope and implementation of the Spent Convictions Scheme;
(iii) a holistic view of the legal field to understand the protection of rights and the implementation of the rule of law and inform the development of CtD solutions; and
(iv) a proof of concept on Spent Convictions Scheme modelling.

We concluded that institution-building will be crucial to bridge CbD and CtD in this case, as the implementation of the Spent Conviction Scheme solution at the federal level would require a systemic (holistic) approach of multi-stakeholder governance. The web of data and logical semantics are essential components of such an institutional ecosystem.

13.1 Legal analysis

We also performed some legal analyses and some tests that went beyond purely doctrinal analysis.

The main findings can be listed as follows:

- Sources to build the cases are sparse, disperse and not necessarily consistent. This is a result of the existence of different jurisdictions (States, Territories and Commonwealth) agency and police cultures and practices all across Australia.
- There are some criminological questions regarding the impact and efficacy of the Spent Convictions Scheme.
- There also are also legal questions, e.g., the meaning of key terms, a number of which are detailed for practical application in in other legal documents. A key challenge is that CtD researchers do not really have linked legal data at this level of granularity.
- Interpretative considerations were mapped: (i) three steps to interpret the Spent Convictions Scheme, (ii) nineteen identified specific points (iii) and three categories (ABC) in which interpretations (human decisions on meaning) may arise.
- Potential Constitutional complexities relating to the Spent Convictions Scheme were identified, especially questions that may arise when the different schemes in operation are not consistent.
- Procedural issues may arise as shown by the Frugtniet case. When a federal agency is barred from considering spent convictions when making a determination that a person is fit and proper, a tribunal hearing an appeal against the decision of the agency is not entitled to consider it either.

13.2 Testing

From a linguistic point of view, we found evidence that information-retrieval algorithms ease the task of compliance checking. A minimal portal for the search of legal information related to spent-convictions through heterogeneous publication formats was created

according to the following purposes: (i) harvesting a small collection of heterogeneous documents enough as to test cross document-type search; (ii) turning the documents into a text form (TXT), so that homogeneous processing could be carried out; (iii) transforming the key metadata elements of the documents into a RDF format, following a *law as data* policy, with the minimal structure as to demonstrate progress over the standard legal information providers; (iv) creating a web portal where a text query could be made, and relevant documents be retrieved. The system was, for example, able to identify correctly the Frugtniet case. Applying cosine similarity between documents, "128 – Frugtniet" and "765 – Volonski" were automatically found as the most similar pairs (topic modelling).

From the rule-modelling point of view, we found evidence that at least some of the most frequent and simple spent conviction cases can be handled with the set of rules extracted from the relevant legal texts. Some normative inconsistencies were found and overcome at the rule level. We figured out three cases (See Annex 15) with a different degrees of difficulty to be solved by the system, and we then submitted these cases to Hon. Judge Anthony Parsons (and two more fellow judges). As expected, judges converged with the solution in the simpler case, but they asserted that they would need much more information to reach a decision for the remaining ones. Under the Common Law approach, judicial checks and balances follow an abductive way of reasoning that cannot simply be equated with the representation of legal rules. This will be properly considered when modelling the content of legal documents.

The project provided a proof of concept and a body of research that can now be used to inform the design of a semi-automated spent conviction information-sharing solution. The success of such a project will however depend on the level of access to spent conviction information-sharing data, current policy and procedural documents and access to the officials who are managing the current system. Their participation in a collaborative design process will be key to ensuring a solution that will operate effectively to relieve the administrative burden that is currently imposed on officials.

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15 Annex: three Spent Convictions Scheme cases (Patrick Keyzer)

Problem No 1

Ms Johnette Napolitano was registered as a tax agent on 15 April 2018 for a period of one year. On 1 April 2019, Ms Napolitano applied for re-registration as a tax agent, but her application was rejected when a search of the internet by a Commonwealth official revealed that Ms Napolitano had previously been critical of the Australian Taxation Office. Ms Napolitano has appealed the rejection to the Tax Agent Board of Review. What is the likely result of this appeal?

Problem No 2

On 1 January 2019 Mr Ziggy Pop applied for registration as a migration agent. On 30 January 2019 Migration Agents Registration Authority (MARA) rejected his application on the basis that he was not a fit and proper person to be a migration agent. This conclusion was based in part on evidence tendered to MARA by the Department of Home Affairs that Mr Pop had previously been found guilty on 2 January 2010 of people smuggling contrary to federal law. Mr Pop failed to disclose this prior offence in his application on 1 January 2019. His appeal has been rejected by the Migration Agents Registration Board of Appeal and he has now appealed to the Administrative Appeals Tribunal. What is the likely result of this appeal?

Problem No 3

On 1 February 2019, Mr Trevor Noah applied for registration as a migration agent. On 3 February 2019 this application was rejected on the basis that he was not a fit and proper person to be a migration agent. This conclusion was based in part on evidence tendered to MARA by the

Department of Home Affairs that Mr Noah had been convicted of murder in the United Kingdom in 1970 and had served a ten year sentence for that crime, and was later convicted of theft in 1990 in the United States, for which he served a term of five years, before being deported to Australia, his country of birth, on 1 April 2000. Since that time, Noah has been charged with intent to defraud the Commonwealth (on 1 February 2015) but he failed to disclose this charge in his application for registration. Mr Noah appealed the decision to the Administrative Appeals Tribunal and the appeal was allowed on 28 February 2019. MARA now appeals to the Federal Court. What is the likely result of this appeal?