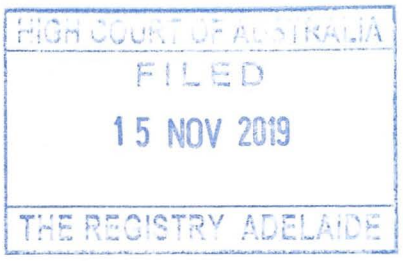
IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A20 of 2019**



BETWEEN: **KMC**
Applicant

and

10 **DIRECTOR OF PUBLIC PROSECUTIONS (SA)**
Respondent

APPLICANT'S REPLY

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I Certification

1. This submission is in a form suitable for publication on the internet.

II Reply to arguments of respondent and interveners

Retrospective alteration to the substantive "sentencing law" that applied to the applicant?

2. The respondent's essential answer to the applicant's argument as to impermissible legislative direction is that s 9(1) is not to be characterised as a legislative direction to treat an erroneous judgment as not erroneous, but rather as a retrospective change to the body of law governing sentencing for offences against s 50(1) and as retrospectively modifying the sentencing principle enunciated by the Court in *Chiro*.[1]

3. In so contending, considerable reliance is placed upon a comparison made with *Duncan v Independent Commissioner against Corruption*.[2] There are, however, important differences in text and context between the provision considered in *Duncan* and s 9(1).

   (1) A critical plank in the argument in *Duncan*, rejected in that case, was that the relevant provisions[3] were predicated on and accepted the continuing invalidity of the original act, whilst effectively directing a court not to make a declaration of invalidity.[4] A difficulty with that submission was that cl 35 in terms spoke to the validity of any act done "*as if* corrupt conduct for the purposes of the Act included relevant conduct". As a matter of the ordinary use of language, the construction was not sustainable.[5]

   (2) That which was validated (authorised) retrospectively in *Duncan* was an administrative or executive act, not a judicial decision.

   (3) Effectively, cl 35 was a retrospective expansion in ICAC's remit: in terms it crisply identified the retrospective substantive alteration to the law by prescribing a new and expanded definition of "conduct". By contrast, in the present context, the retrospective substantive change to the law for which the respondent contends is elusive. On the respondent's case the effect was not to *require* an approach to sentencing that differed

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1 Respondent's Written Submissions ("**RS**") at [21]-[22], and adopted by the interveners. The respondent does not advance an argument that if s 9(1) is a legislative direction as to the manner of disposition of an appeal in respect of what is a demonstrable error of law, the provision would be valid. Indeed, by founding upon s 22A(1) of the *Acts Interpretation Act* 1915 (SA), the respondent implicitly accepts the premise that if its characterisation of the provision is wrong, invalidity follows: RS [43], where the entire burden of the respondent's argument is the characterisation or construction of s 9(1).

2 (2015) 256 CLR 83 ("***Duncan***").

3 Part 14 (comprising cll 34 and 35) to Schedule 4 to the *Independent Commission Against Corruption Amendment (Validation) Act* 2015 (NSW).

4 *Duncan* (2015) 256 CLR 83 at 85 (Hutley SC), at [9] (plurality).

5 *Duncan* (2015) 256 CLR 83 at [10]-[11] (plurality). Indeed, in order to deny the plain words, the applicant was driven to contend that validation of the acts could not have been intended because they had no independent legal consequences. This was described by the plurality at [13] as an "elusive suggestion that the invalid findings in the Report had no legal consequences".

from the approach identified in *Chiro*, but merely to *authorise* it. The respondent must therefore be contending for a retrospective alteration which is in the nature of a conferral of a sentencing choice or discretion.

(4) Not only does this find no clear expression in the language of s 9(1), it produces a conceptual conundrum. The respondent would have it that the means chosen by Parliament to "negate the effect of the determination of the High Court in *Chiro*" was to treat identified sentences as having been the product of a retrospectively conferred discretion (which in reality was never in fact exercised[6]) and therefore as having never been erroneous. But that would raise the spectre of a different error: if there was such a *discretion*, the sentencing judge will have failed to consider *how* that discretion should be exercised, and will, of necessity, have exercised the "discretion" arbitrarily, and on the wrong assumption that they were *required* to proceed in the way they did.

(5) It follows that, on the respondent's construction, the *sentencing court* is authorised (retrospectively) to proceed in a distinctly non-judicial manner, exercising a discretion or choice as to how it acts, without reference to any ascertainable criteria and for the sole reason that it had incorrectly considered that it was inappropriate to ask questions of the jury and that it must sentence on the basis of its own findings of fact, while the *appellate court* is being required to treat, as a proper exercise of a judicial discretion, something that was not in fact an exercise of that kind at all.

4. There are other difficulties attending the respondent's contention that s 9(1) works a retrospective change to the previously applicable substantive sentencing law.

(1) First, s 9(1) is cast by reference to *sentences imposed* (of a particular kind), and is not addressed to a court that is *sentencing*.[7]

(2) Secondly, s 9(1) appears only to speak to and operate upon a situation where a sentence is erroneous or manifestly excessive "*merely because*" of the presence of the two circumstances in paragraphs (a) and (b) (one of which explicitly refers to what "the sentencing court" did). What then of a situation where the sentence is erroneous for other reasons, necessitating that the appellate court consider what would have been the appropriate sentence? It is difficult to see how the terms of s 9(1) can be construed as fixing the substantive law to be applied by the appellate court on re-sentencing.[8]

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6 If the substantive alteration to the law was to permit but not require sentence judges to adopt an approach that did not conform with *Chiro* then according to ordinary precepts that discretion ought to have been exercised judicially, and it is difficult to see how that could be taken to have been done when there was in reality no such discretion.

7 This is not a case of a general change in sentencing law given *both prospective and retrospective* effect. Indeed, s 6 of the Amending Act repealed and replaced the old s 50 offence provision, and s 9(2) prescribed a *different* substantive sentencing law for persons who are in future to be sentenced for offences against the old s 50 offence.

8 If the retrospective substantive alternation does apply, how would the appellate court decide, judicially, whether it should apply the *Chiro* approach or the newly-"authorised"-but-not-required approach?

(3) Thirdly, s 9 does not in terms appear to apply to sentences not affected by the error in *Chiro*, nor does it apply to Mr Chiro's case itself. If there was a retrospective alteration of the substantive law, it appears not to have been uniform.[9]

5. Given these problems, which arise only on the respondent's construction of s 9(1), it is respectfully submitted that, unlike in *Duncan*, it is the respondent's construction which is distinctly implausible. True it clearly is that s 9 was designed to negate the effect of *Chiro*. But, unlike in *Duncan*, that does not advance the question of characterisation and validity. The issue is, *how* did the Parliament set about so doing, and whether that impairs the court's institutional integrity. There is a relevant difference between a validating law that actually articulates a retrospective change to the applicable law (as in *Duncan*) and legislation that just says a sentence is taken not to be affected by error or manifestly excessive. The contrast between s 9(2) of the Amending Act and the new s 50(11) of the CLC Act, on the one hand, and s 9(1), on the other, is stark. The former two provisions do change the substantive law of sentencing, by articulating the law to be applied; the latter identifies no sentencing law.

6. It would have been radical, but may have been legally permissible, to provide that defendants serving judicially imposed sentences now shown to be affected by the error identified in *Chiro* should instead be punished but under legislative fiat. If such an approach had been taken, and a parliamentary sentence substituted for a judicial one, there would be similarities[10] with *R v Humby; Ex parte Rooney*, where it was expressly concluded that, properly construed, the provisions did *not* purport to "validate" decisions of a Master of a Supreme Court made beyond jurisdiction, and where the provisions *ex facie* meant that "as attempts at judicial power they remain ineffective".[11] It may often be open to a legislature to alter the law so that persons' rights are fixed, by legislation, by reference to the terms of an invalid or erroneous past administrative or judicial decision.[12] In that case, the invalidity of the original decision is not interfered with by the legislature and the amenability of the invalid decision to judicial review is not precluded. The new law may mean that there is little utility in invoking the entrenched jurisdiction because the new law, and not the original decision, now determines the legal position of the parties.

7. But that plainly is not what s 9 did. The evident scheme and purpose of s 9 was to deal with what was perceived to be the "*Chiro* problem" by reference to two classes of persons. For

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9 Further, in the case of defendants who had been tried but not sentenced before the Amending Act came into force, the respondent's construction would appear to involve that there was one substantive sentencing law (retrospectively taken to have been applying) during the first part of their trial, and a different suite of provisions (that in s 9(2)) applying from the enactment of the Amending Act.

10 It should be noted, however, that the matter in issue in that case was not one within the exclusive province of judicial power, as is the case with the adjudication and punishment of criminal guilt.

11 (1973) 129 CLR 231 ("***Humby***") at 242-243 (Stephen J, with whom Menzies and Gibbs JJ agreed).

12 *Humby* (1973) 129 CLR 231 provides a clear example of such a law.

those already tried but not yet sentenced, the problem was addressed by purporting to direct the sentencing judge to treat the jury's verdict in a particular way and then to proceed to sentence in a manner that diverged from *Chiro*. For those already sentenced on a basis not conforming with *Chiro*, the perceived mischief was the existence of error and/or manifest excess in respect of sentences liable to lead to a successful appeal or action for judicial review. The solution chosen was to require that the error or manifest excess be ignored or treated as non-existent. The whole concept of "manifest excess", in particular, is redolent of appellate intervention. It is not a concept that speaks to first instance sentencing. To deem a sentence not to be "manifestly excessive" is to deem it incapable of successful review on a recognised ground of review; it is not to alter the law that produced the sentence so as to pre-empt and negate the premise for a conclusion of excess. The whole point was to keep the judiciary as the apparent source of the punishment imposed and confirmed.

8. As was pointed out at AS [37], s 9(1) of the Amending Act leaves the original sentence in place *as a sentence*, capable of being the subject of an appeal. On the respondent's construction, the appeal court is required to treat the sentence under appeal as the product of an exercise of judicial power reached by applying law that did not exist when the sentence was imposed.

9. The submission at RS [28] concerning the significance of the expression "taken to be, *and always to have been*" should not be accepted. It is a simply compound expression making clear that an appeal court is to treat the sentence as being unaffected by error. Further, if the respondent's construction were correct, and the intended operation of s 9(1) was actually to change the substantive law applicable at the point in the past when sentencing occurred, the words "taken *to be*" could equally be said to be redundant.

10. The respondent's submission must be that s 9(1) of the Amending Act on its true construction alters the "sentencing law" applicable to s 50 offences, *from some date earlier than the date of its enactment*. Yet s 9(1) — like s 9(2) and the rest of the Amending Act — came into force upon its enactment, and no other commencement date for s 9(1) is specified. If the relevant date it is supposed to have come into operation is the date of the particular "sentence imposed" then it has a different operation in respect of each sentence; a strong indication that s 9(1) is, in reality, concerned with the exercise of the appellate function and not with any alteration of the substantive law applicable to sentencing.

11. The Attorney-General for Queensland appears to contend that the effect of s 9(1) is to attach a new "legal status" or "legal consequences" to the existing sentence; *viz*, the "legal status" of being "not affected by error or otherwise manifestly excessive".[13] But whether a

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[13] Written Submissions of the Attorney-General for Queensland ("**QS**") at [30]-[31].

particular sentence was affected by error or was manifestly excessive is not itself a matter of substantive law; it is the expression of a *conclusion* reached by an appellate court following a judicial comparison of the substantive law applicable to sentencing and the sentence imposed.[14] So much seems to be recognised and accepted by the respondent — hence it is driven to advance an artificial construction framing s 9(1) as retrospectively altering the law of sentencing to be applied by a court which has already completed its task, by giving it a discretionary choice which was not, and thus never can be, exercised.

Kirk and jurisdictional error

12. At QS [9], [12], [13] and [16], it is emphasised that acting on a "wrong principle" or imposing a sentence that is "manifestly excessive" will not itself constitute jurisdictional error for a sentencing court. Those are concepts taken from the appellate review of sentences. However, the applicant has never contended that the error in the present case was jurisdictional merely because it could be described in those terms. Rather, the error was jurisdictional because it falls within each of the particular categories of jurisdictional error identified in *Craig* and *Kirk*, set out at AS [45].

13. The applicant does not contend that it was a "defining characteristic" of State Supreme Courts at federation "to grant certiorari whenever a judge acted on a wrong principle and imposed a manifestly inadequate sentence": cf QS [12]. The relevant "defining characteristic" is that Supreme Courts must retain their jurisdiction to supervise, and correct jurisdictional errors of, inferior courts and tribunals. What constitutes jurisdictional error is not itself "entrenched" but may vary as the common law of judicial review develops. In particular, concepts of jurisdictional error are not frozen in an era when the (now long discredited) "original jurisdiction fallacy" prevailed.[15] Any suggestion that the analysis of the concept of jurisdictional error unanimously accepted in *Kirk* — itself a case involving an offence punishable by imprisonment, where a departure from the rules of evidence was held to be jurisdictional error — does not apply to "sentencing courts" should be rejected.[16]

Dated: 15 November 2019

S A McDonald per **B J Doyle**

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[14] See the Written Submissions of the Applicant ("**AS**") at [35] and [38].

[15] See, eg, *R v Bolton* (1841) 1 QB 66, and the discussion in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 569-70 [60]-[62].

[16] If that conception of jurisdictional error is thought to have undesirable consequences then those consequences have been manifest at least since the decision in *Kirk*. If those consequences are inconvenient then it may one day be necessary to consider whether the status of jurisdictionally-flawed decisions of inferior courts of records should be assimilated to that of superior courts of record. However, that is a large question and no issue arises in the present case as to the consequences of the sentencing judge's error.