HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Rohan (a pseudonym)
Respondent

APPELLANT'S REPLY

Part I: Internet publication certificate

1. It is certified that this submission is in a form suitable for publication on the internet.

Part II: Reply

2. In essence, the respondent's case is that the legislature enacted a 'statutory scheme predicated wholly on derivative liability, adopting a single, shared fault element for ss 323(1)(a) and 323(1)(c).'[1] In other words, that there is no practical or functional difference between s 323(1)(a) and s 323(1)(c) of the *Crimes Act 1958* (Vic) (the Act). If that were correct, there would be no logical reason for the enactment of these two discrete provisions.

3. The legislature's intention to retain the key distinction that existed at common law between cases of aiding and abetting and cases of joint criminal enterprise – namely, one form of liability that was derivative, and one that was primary – is evident in the respective wording of these provisions. Had the legislature not intended to retain that distinction, a single all-encompassing form of complicity would have sufficed. Further, as the appellant has already

[1] Respondent's submissions, [5.28].

submitted,[2] the Explanatory Memorandum[3] makes the legislature's intention – to depart from the recommendation in the Weinberg Report with respect to s 323(1)(c) and retain the distinction at common law – clear and unambiguous.

4. The four factors submitted by the respondent in support of his contention – that all liability under s 323 and 324 is derivative – do not buttress his case.

5. As to the first factor outlined by the respondent,[4] the language adopted by the legislature for use in ss 323(1)(a) and 323(1)(c) is derived from, and is a product of, the common law. It does not, as the respondent submits, employ 'its own language' unrelated to the common law.

6. For example, in *Giorgianni v The Queen*,[5] Wilson, Deane and Dawson JJ explained that: 'Aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence.'[6] As can be seen in s 323(1)(a), the legislature adopted the plain words of 'assisting' and 'encouraging' and, as outlined in the appellant's submissions, the legislature retained the fault element of 'intentionally', in line with the principles expressed in *Giorgianni.*

7. Similarly, the words 'agreement,' 'arrangement,' and 'understanding,' have long been used at common law to explain the doctrine of joint criminal enterprise (and related doctrines of acting in concert and common purpose).[7] Again, the language used in s 323(1)(c), mirrors the plain language used at common law for this form of complicity.

8. As to the second factor outlined by the respondent,[8] ss 323(1) and 324(1) do not, as the respondent submits, make all forms of liability under Part II, Division 1 of the Act derivative.

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[2] Appellant's submissions, [35]-[37].

[3] Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014.

[4] Respondent's submissions, [5.11].

[5] (1985) 156 CLR 473 ('*Giorgianni*').

[6] Ibid at 505.

[7] See for example *R v Lowery and King* [No 2] [1972] VR 560, 560 per Smith J; *Matusevich v The Queen* (1977) 137 CLR 633, 636-637 per Gibbs J; *McAuliffe v The Queen* (1995) 183 CLR 108, 113–114 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ; *Osland v The Queen* (1998) 197 CLR 316, 343 [73] per McHugh J, citing *Tangye* (1997) 92 A Crim R 545 at 556-557; and *Gillard v The Queen* (2003) 219 CLR 1, 39 [124] per Hayne J.

[8] Respondent's submissions, [5.12].

9. Section 324(1) relevantly provides that 'if an offence (whether indictable or summary) is committed, a person who is involved in the commission of the offence is taken to have committed the offence and is liable to the maximum penalty for that offence'. Section 324(1) is therefore concerned with liability for *punishment* of an offence – in other words, the consequences for the completion of a criminal offence. This is no different to the position that existed, and continues to exist, at common law – an offence has to have been committed before a person can be liable to punishment for that offence. This is plainly distinct from concepts of derivative and primary liability which arise from the attribution of the acts (or omissions) of one actor to another. As outlined in the appellant's submissions – it is the *act or the omission*[9] of the actor that is attributed to another person (or other persons) by operation of the principles of complicity, not the *criminal responsibility* of the actor.[10]

10. As to the respondent's third factor,[11] the appellant maintains its submission that the implication by the Court below of the fault element of 'intentionally' into s 323(1)(c) involves a significant departure from the plain language of the provision, where no principle of statutory construction warrants such a departure.[12] The respondent has not identified a basis upon which the Court below was justified in reading the fault element of 'intentionally' into s 323(1)(c), beyond reference to the recommendation in the Weinberg Report, which, as already outlined in appellant's submissions,[13] was not adopted by the legislature upon enacting what is now s 323(1)(c).

11. Finally, as to the fourth factor outlined by the respondent,[14] the respondent appears to have misunderstood the appellant's submissions.[15] As set out in paragraphs [64]-[66] of the appellant's submissions, it is submitted, in respect of s 323(1) *only*, that the term 'offence' must be taken to mean the acts or omissions which constitute the offence, not the actual criminal offence charged. The appellant does not contend that the term 'offence' as it appears throughout ss 323 – 324B has that same meaning. As set out in the subsequent

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[9] And, for offences under s 323(1)(a), the relevant mens rea (if one exists).

[10] See for example *IL v The Queen* (2017) 262 CLR 268, 282 [29] per Kiefel CJ, Keane and Edelman JJ. See also *Osland v The Queen* (1998) 197 CLR 316, 343 [85]–[93] per McHugh J.

[11] Respondent's submissions, [5.13].

[12] Where the insertion is too big or too much at variance with the language used by the legislature, the implication is not justified – see *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38].

[13] Appellant's submissions, [28]–[39].

[14] Respondent's submissions, [5.14].

[15] In referring to the appellant's submissions at [64]–[66].

paragraphs of the appellant's submissions,[16] when the term 'offence' is used in ss 323(3) and 324(1), and also in ss 324A and 324B, the language of the text shifts to the 'concatenation of elements which constitute a particular offence'.

Dated: 21 August 2023

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[16] Appellant's submissions, [67]–[69].