IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S141 of 2018

BETWEEN:

Paul GRAJEWSKI
Appellant

and

The Director of Public Prosecutions (NSW)
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of the issues

2. Did the Court of Criminal Appeal in NSW (the "CCA") err in its construction of s195(1)(a) of the *Crimes Act 1900* NSW ("the *Act*")?

3. Does an offence contrary to s 195 of the *Act* require some physical derangement or change to the subject property?

4. Should the questions stated to the CCA have been answered "no"?

Part III: Notice

5. The appellant considers that no notice under s78B of the *Judiciary Act 1903* (Cth) is required.

THIS DOCUMENT IS FILED ON BEHALF OF THE APPELLANT
THIS DOCUMENT IS DATED: 5 JULY 2018
THE APPELLANT'S SOLICITOR IS: Mr Peter O'Brien

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Part IV: Citation

6. The internet citation of the reasons for judgment of the CCA is *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 (Core Appeal Book (**CAB**) at pp28-56).

7. The judgment of the primary judge, who referred the matter to CCA by way of stated case (**CAB p26**), is not reported and has not been published on the internet. It may be cited as *R v Grajewski* (Unreported, District Court of New South Wales, Bright DCJ, 21 June 2017) (**CAB pp21-25**).

Part V: Narrative statement of the facts

8. The appellant was convicted in the Local Court of NSW of an offence contrary to s195(1)(a) of the *Act*. Following his conviction he appealed to the District Court of NSW pursuant to s 11 of the *Crimes (Appeal and Review) Act 2001* (NSW), where his appeal was dismissed and the conviction confirmed by Bright DCJ.[1] The appellant then applied for a question of law to be submitted to the CCA pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW).

9. Granting that application, Bright DCJ submitted the following facts and questions of law (**CAB p26**):

> "FACTS
>
> In determining the appeal against conviction by Paul Olaf GRAJEWSKI on 29 May 2017 I was satisfied of the following beyond reasonable doubt.
>
> 1. Paul Olaf GRAJEWSKI was a protestor who attended the Carrington Coal Terminal on 8 May 2016.
>
> 2. At 7:50am a machine known as Ship Loader 2 was being used to load a vessel on Dyke 5.
>
> 3. Paul Olaf GRAJEWSKI climbed the stairs to the top of Ship Loader 2.

[1] *R v Grajewski* (Unreported, District Court of New South Wales, Bright DCJ, 21 June 2017) (**CAB pp21-25**).

4. As Paul Olaf GRAJEWSKI commenced to climb Ship Loader 2 the machine was shut down due to safety concerns.

5. He then used a harness and roping device to lock himself to Ship Loader 2.

6. He then lowered himself down to about 10 metres above the platform.

7. The actions of Paul Olaf GRAJEWSKI and his position posed a potential risk of serious harm to himself.

8. The machine was inoperable whilst he remained in that position.

9. NSW Police Rescue successfully removed Paul Olaf Grajewski from Ship Loader 2 at approximately 9:40am.

10. Carrington Coal Terminal Ship Loading Operations recommenced at 10:15am.

QUESTION OF LAW FOR DETERMINATION

The question I now submit is:

Can these facts support a finding of guilt for an offence contrary to section 195(1)(a), *Crimes Act,* 1900?

In particular, was the evidence capable of proving beyond reasonable doubt that Ship Loader 2 had been damaged by the conduct of Paul Olaf GRAJEWSKI."

10. The appellant was part of a protest at the Carrington Coal Terminal in Newcastle on 8 May 2016. A machine known as Ship Loader 2 was being used to load a ship with coal. As the appellant began to climb the stairs on that machine the operator shut it down. The reason cited for turning the machine off was the presence of the appellant and the safety concerns his presence posed.

11. The case against the appellant was that by his presence he temporarily impaired the operation of Ship Loader 2. The relevant acts relied upon by the prosecution commenced with the appellant climbing the stairs on the ship loader. After the ship loader ceased to operate, the appellant then tied himself to part of the structure using a rope and harness. With respect to the latter part of the appellant's conduct, Leeming JA stated (at [64]) (**CAB p55**) that, "the stated case establishes that Mr Grajewski's physical presence attached to Ship Loader 2 caused the machine to continue to be inoperable for some two hours." It is clear (from fact 8 in the case

stated (**CAB p27**)) that the machine was only inoperable while the appellant was present and that his removal meant the machine could thereafter resume its operation.

12. Writing for the Court, Leeming JA answered the above questions, "Yes", and "Inappropriate to answer" (at [65]) (**CAB p55, 57**). In doing so, the Court found that damage within the meaning of s 195 of the *Act* could be made out solely on the basis of temporary "physical interference" with functionality, where there was no physical derangement of the property in question.

Part VI: Argument

13. This appeal raises for determination the proper construction of s 195 of the *Crimes Act 1900* (NSW).

Section 195

14. Section 195(1) provides:

> **195 Destroying or damaging property**
>
> (1) A person who intentionally or recklessly destroys or damages property belonging to another or to that person and another is liable:
>
> a. to imprisonment for 5 years, or
>
> b. if the destruction or damage is caused by means of fire or explosives, to imprisonment for 10 years.

15. Section 194 includes a non-exhaustive definition of "damaging property". It provides:

> **194 Interpretation**
>
> (2) In this Part, a reference to property does not include a reference to property that is not of a tangible nature.
>
> ...
>
> (4) For the purposes of this Part, damaging property includes removing, obliterating, defacing or altering the unique identifier of the property. The unique identifier is any

numbers, letters or symbols that are marked on or attached to the property as a permanent record so as to enable the property to be distinguished from similar property.

16. "Damage" is not otherwise defined in the *Act*.[2]

17. It is uncontroversial that as a matter of principle, the task of statutory construction must begin with a consideration of the text itself. Conventional tools of statutory construction are engaged for the purpose of ascertainment of the actual meaning of words or phrases taken, of course, in context.[3] It is the appellant's case that consideration of "context, purpose and existing authority" by Leeming JA in his judgment (see at [54]) (**CAB p51**) led him not to a determination of the actual meaning of the words "destroys or damages" in context but rather to a determination (erroneous, it is put) of what he considered should be the appropriate reach of the provision.

18. It is the appellant's case that by contrast, Simpson J (as her Honour then was) in *Director of Public Prosecutions v Fraser & O'Donnell* [2008] NSWSC 244, correctly identified (at [25]) the Court's task as "the interpretation of the word "damages" as it appears in s 195". Having reviewed the authorities which addressed, as her Honour described it, "the concept of "damage" (as a noun) or "damage/s/d" (as a verb)", and having regard (inter alia) to the dictionary definitions of "damage",[4] her Honour concluded (at [38]) that "an essential element of "damage" for the purpose of s 195 is... "physical derangement" (though not necessarily permanent, or even lasting) to the property in question".

19. To the extent that Leeming JA did consider the natural and ordinary meaning of the

[2] A review of corresponding legislation in other States reveals provisions in largely the same terms as s 195. As noted by Leeming JA in the Court below (at [20]), legislation in NSW, Victoria and the Australian Capital Territory are all derived from the *Criminal Damage Act 1971* (UK) which created a simple offence of, "destroying or damaging any property belonging to another intending to destroy or damage any such property". Elsewhere, s 469 of the *Queensland Criminal Code* makes it an offence to, "wilfully and unlawfully destroy or damage any property". Similar provisions are found in the Criminal Codes of both Western Australia and Tasmania. In South Australia, it is an offence to, "damage another's property" without lawful excuse: s 85 *Criminal Law Consolidation Act 1935* (South Australia). As in NSW, no other State or Territory's legislature has sought to provide a statutory definition of "damage".

[3] See, for example, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].

[4] At [35] Simpson J set out the definition of "damage" from the *Macquarie Dictionary* ("1. Injury or harm that impairs value or usefulness") and from the *Shorter Oxford Dictionary* (1. Loss or detriment caused by hurt or injury affecting a state, condition or circumstances (*arch.*); 2. Injury, harm (ME).")

words of s 195, his Honour appears to have agreed with Simpson J. His Honour (at [54]) (**CAB p51**) found "force in the conclusion reached by Simpson J that the words "destroys or damages" in s 195(1) require a physical interference or alteration to the property." However, his Honour, (with whom Johnson and Adamson JJ agreed (at [68] and [69] respectively (**CAB p56**)), nonetheless rejected Simpson J's approach on the basis that to do so would put to one side "context, purpose and existing authority". It is the appellant's case that Simpson J in *Fraser & O'Donnell* was correct and the CCA erred in declining to follow her Honour.

The decision below

20. Prior to the decision under review in this appeal, there was a divergence in authority in NSW as to the meaning of "damage" in s 195 of the *Crimes Act*. In *Fraser & O'Donnell*, Simpson J held that some form of "physical derangement" (even temporary) was necessary for an offence to be made out. Later, in *Hammond v The Queen* [2013] NSWCCA 93, Slattery J, with Hoeben CJ at CL and Bellew J agreeing, rejected Simpson J's approach and stated (obiter) that on a review of the authorities, interference with "functionality" alone was sufficient to make out an offence under s 195.

21. Leeming JA in this case resolved the divergence in approach between *Fraser & O'Donnell* on the one hand, and *Hammond* on the other, by rejecting both. His Honour (at [62]) (**CAB p54**) accepted the appellant's submission that "damage" has, in the criminal context, never been previously understood as constituted by interference with functionality alone. His Honour held that it was "not necessary to go so far as [the CCA] stated, obiter, in *Hammond*, namely that interference with functionality of property even without physical harm or derangement is sufficient to satisfy s 195." His Honour went on to say that "there must be some physical interference with the property". As conceived by Leeming JA, "physical interference" does not actually require physical harm or derangement (as Simpson J held in *Fraser*): rather, it may be established by some *de minimus* physical interference only, such as a protester tying herself to a bulldozer as opposed to lying down in front of it – an example his Honour gave to demonstrate what would be required to establish his requirement of "physical interference".

22. On analysis, his Honor's conception of "physical interference" is not sustainable. Taking the example given, there is no material difference between a protestor who ties herself to the wheel or blade of a bulldozer, and the protestor who lies down in front of the bulldozer. In neither scenario is physical injury or derangement occasioned to the bulldozer: cf. *R v. Tacey* (1821) Russ. & Ry. 452; 168 E.R. 893, *Fisher* (1865) L.R. 1 C.C.R. 7, and *Getty v Antrim County Council* (1950) NIR 114.

23. Rather, in this example, the property in question, a bulldozer, is temporarily inoperable, but only because of a concern on the part of the operator to avoid injury to the protestor regardless of whether the person is in front of or on the bulldozer, and not as a result of the machine being rendered physically incapable of being operated until some remedial action or repair is undertaken (to reverse some physical change or derangement). While Leeming JA appears to have accepted the need for a connection between a physical act and the inoperability of the bulldozer, if that physical act causes no alteration or derangement of the machine, the relevance of the act in question is illusory: in both cases it is the presence of a person which is the cause of the inoperability. So understood, Leeming JA's approach suffers the same vice as that which he declined to follow in *Hammond.*

24. Moreover, this approach fails to address the distinctions carefully drawn in *Fraser & O'Donnell* between physical interference which alters or deranges the physical nature of the property in question, and physical interference which does not. In doing so, Simpson J also drew a distinction between civil notions of damage and damage in the criminal context (at [34]).

Fraser & O'Donnell

25. *Fraser & O'Donnell* concerned a Crown appeal against a decision by a Local Court Magistrate dismissing a charge pursuant to s 195(1)(a) of the *Act.* The facts of that case, summarised by Simpson J (at [4]), were very similar to the present. There, a number of environmental activists:

> ...scaled a mesh fence and entered the site of a coal loader in or near Newcastle operated by a corporation called Port Waratah Coal Services ("Port Waratah"). They activated a safety isolation switch on a conveyor belt, rendering the conveyor inoperable. They then chained themselves to the underside of the conveyor belt, using heavy metal chain and steel

clamps. As a consequence, the conveyor was out of operation for almost 2 hours, at a cost to the proprietor of approximately $27,000.

As with the present case, the prosecution in *Fraser & O'Donnell* did not allege any *physical* damage to the coal loader, but rather relied upon a temporary physical interference with the machine, which it was argued rendered it inoperable: *Fraser & O'Donnell* (at [11]).

26. After reviewing a number of authorities, Simpson J stated (at [36] – [38]):

> 36 To my mind, a common element to all of the authorities (with the possible exception of *Henderson v Battley*) is some physical change or alteration to the property, even though this may be temporary…
>
> 38 In my opinion, an essential element of "damage" for the purpose of s195 is, to use the words (or some of them) of Walters J in *Samuels v Stubbs*, "physical derangement" (though not necessarily permanent, or even lasting) to the property in question. It is the word "functional" that has given rise to the present argument. But I do not read his Honour's conclusion as meaning that temporary functional interference, without a physical interference with the property itself, could be sufficient to establish criminal damage. It is of some significance that in that case the evidence was that the policeman's cap had been jumped upon and crushed. That was ample evidence of physical derangement…

Hammond

27. As with the present matter, *Hammond* proceeded by way of a case stated pursuant to s 5B(2) of the *Criminal Appeal Act 1912* (NSW).

28. *Hammond* concerned a complaint that the defendant, while in custody, spat on a stainless steel seat situated within a holding cell at Warren police station. The defendant in that case sought to rely upon Simpson J's analysis of damage in *Fraser & O'Donnell* to require some form of physical derangement, even if impermanent. Conversely, the Crown contended that *Fraser & O'Donnell* represented an "unduly restrictive narrowing" of the interpretation of the word "damage" and argued it was at odds with previous authority which held that "functional interference" sufficed.

29. Slattery J ultimately came to the conclusion (at [68] and [70]) that it was not necessary to decide the correct approach because the facts did not support a conviction on either approach. Nonetheless, having reviewed the relevant

authorities his Honour said (at [69]) that "...were it necessary to decide the question I would respectfully differ from the approach that Simpson J took in *Fraser*."

30. His Honour disagreed with Simpson J on the basis that "the course of authority in both England and Australia now supports the conclusion that interference with functionality of the property in question alone, even without physical harm to or "derangement" of the property is sufficient to establish "damage" within *Crimes Act* s 195." However, his Honour erroneously placed determinative weight upon the decision in *"A" (a Juvenile) v The Queen* [1978] Crim LR 689, and *R v Zischke* (1982) Qd. R 240 which his Honour read as following it.

31. Slattery J summarised *"A" (a Juvenile)* in this way (at [50]):

> The *"A" (a Juvenile)* test requires the Court to look at the specific property in question and consider: (i) whether its physical appearance changed as a result of the act, despite reasonable attempts at cleaning, so that it may be described as "imperfect"; or (ii) whether as a result of the act the property was rendered "inoperative", or unable to be used for its ordinary functions for a period *whilst its imperfections were eliminated.* If the property can be described as either "imperfect" or "inoperative" in these senses, then the property has been "damaged" within the meaning of Crimes Act s 195 and cognate legislation in relation to malicious damage to property [emphasis added].

32. Contrary to his Honour's reasoning, there is no real distinction between the two limbs he identified as having been articulated in *"A" (a Juvenile)*. This is because the purported inoperability present in the second limb is necessarily derived from the altered state of the property in question. Accordingly, the duality suggested by Slattery J in *Hammond* (at [69]) as supporting "functional interference" as a standalone basis to establish liability under s 195 is illusory. In both circumstances, "physical derangement" of some kind must be present.

Existing authority

33. In all three of the cases *Fraser & O'Donnell*, *Hammond* and the instant decision below, the court undertook an extensive review of local and international authorities concerning criminal offences of damage to property. Contrary to the conclusions reached as to the effect of those decisions by Slattery J in *Hammond*

and Leeming JA below, the common thread of the authorities, as Simpson J identified in *Fraser & O'Donnell* (at [36] set out above), is "some physical change or alteration to the property, even though this may be temporary."

34. This is borne out by a brief consideration of the facts in the following cases.

35. In *R v. Tacey* (1821) Russ. & Ry. 452; 168 E.R. 893 a number of Luddites entered a shop where two frames were used to make knitted stockings. Tacey unscrewed and then carried away a part of each frame called the half-jack, rendering it useless. There was no suggestion that the frames were otherwise harmed. Tacey contended that removing the half-jack did not damage the frame within the meaning of the relevant provision because it "applied only to cases of breaking, bending, or straining, some part of the frame, and not to the removal of a part, though that part might be an essential part." The appeal court rejected that argument and confirmed Tacey's conviction, holding that removing the half-jack damaged the frame because it rendered it, "imperfect and inoperative".[5] Tacey was sentenced to seven years' transportation.

36. In *R v. Fisher* (1865) L.R. 1 C.C.R. 7, a disaffected employee plugged up the pipe of a steam engine, and displaced other parts so as to render it temporarily inoperable. The court held that the engine had been damaged with the intention of rendering it useless within the meaning of s 15 of the *Malicious Damage Act 1861* (UK). That section read as follows:

> Whoever should unlawfully and maliciously cut, break or destroy, or damage with intent to destroy, or to render useless, any machine or engine...shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under age of sixteen years, with or without whipping.

37. In *King v Lees* (1948) 65 TLR 21, it was alleged that L had urinated on a mat in a taxi-cab, thereby defacing or injuring it within the meaning of s 41 of the *London*

[5] 28th GEO. III. c 55, s. 4 created an offence of "wilfully and maliciously break, destroy, or damage any frame, machine, engine, tool, instrument, or utensil used in and for the working and making of any such frame-work knitted pieces, stockings, or other articles or goods in the hosiery or frame-work knitted manufactory, not having the consent of the owner to do..."

Hackney Carriage Act 1831 (UK). At first instance the Magistrate dismissed the information on the basis that the defacement was not permanent and could be put right quickly and easily. On appeal, impermanency was not considered relevant to the question of defacement and the matter was returned to the Magistrate with an intimation that the offence was proved.

38. In *Getty v Antrim County Council* (1950) NIR 114, the issue was whether the mere dismantling of a machine, without breaking or injuring any of its component parts, could constitute the offence of "damaging the machine with intent to render it useless", contrary to s 15 of the *Malicious Damage Act 1861* (UK). In *Getty*, the applicant's Ford Ferguson tractor ploughs had been unscrewed and taken to pieces, and the vital parts taken away. Nothing had been broken and no damage had been occasioned to the parts left behind, however the ploughs had been rendered useless. Following *Tacey* and *Fisher* the court answered the question in the affirmative, finding damage within the meaning of the provision was made out.

39. In *Samuels v Stubbs* (1972) 4 SASR 200, a protestor kicked and jumped on a police officer's cap which had fallen onto the ground. The cap was crushed. In a much cited judgment, overturning the Magistrate's dismissal of the charge,[6] Walters J held (at 203) that:

> It is my view, however, the word "damages", as it is used in s 43, is sufficiently wide in its meaning to embrace injury, mischief or harm done to property, and that in order to constitute "damage" it is unnecessary to establish such definite or actual damage as renders the property useless, or prevents it from serving its normal function – in this case, prevents the cap from being worn. In my opinion, it is sufficient proof of damage if the evidence proves a temporary functional derangement of the particular article of property.

40. In *"A" (a Juvenile) v R* [1978] Crim L Rev 689, the appellant spat at the back of a uniformed police sergeant, landing an amount of spittle on his raincoat. Beyond attempting to remove the spittle with a paper tissue, no further efforts to clean the raincoat were made and a faint mark could still be seen at the time of hearing. The

[6] The charge was brought under s 43 of the then *Police Offences Act 1953* (SA), which stated that: "Any person who wilfully and without lawful authority destroys or damages any property shall be guilty of an offence. Penalty: Fifty pounds or imprisonment for three months."

prosecution had argued that the raincoat required dry-cleaning and therefore must have been "damaged". In allowing the appeal against conviction, the court said:

> When interpreting the word "damage", the court must consider the use of an ordinary English word. Spitting at a garment could be an act capable of causing damage. However, one must consider the specific garment which has been allegedly damaged. If someone spat upon a wedding satin dress, for example, any attempt to remove the spittle may in itself leave a mark or stain. The court will find no difficulty in saying that an article had been rendered "imperfect" if, after a reasonable attempt at cleaning it, a stain remained. An article may also have been rendered "inoperative" if, as a result of what happened it had been taken to dry cleaners.
>
> However, in the present case, no attempt has been made, even with soap and water, to clean the raincoat, which was a service raincoat designed to withstand elements. Consequently, there was no likelihood that if wiped with a damp cloth, the first obvious remedy, there would be any trace or mark remaining on the raincoat requiring further cleaning. Furthermore, the raincoat was not rendered "inoperative" at the time; if it was "inoperative", it was solely on account of being kept as an exhibit.

41. In *R v Henderson & Battley* Court of Appeal (Crim Div) (Unrep 29/11/84), it was alleged that land on a development site had been damaged. The accused had dumped a large amount of material including soil and gravel onto the land. Removal of the material required significant expenditure to restore the site to its original condition. Cantley J said:

> Ultimately whether damage was done to this land was a question of fact and degree for the jury. Damage can be of various kinds. In the *Concise Oxford Dictionary* 'damage' is defined as 'injury impairing value or usefulness'. That is a definition which would fit in very well with doing something to a cleaned building site which at any rate for the time being impairs its usefulness as such. In addition, as it necessitates work and the expenditure of a large sum of money to restore it to its former state, it reduces its present value as a building site...

42. In *Hardman v Chief Constable of Avon & Somerset Constabulary* [1986] Crim LR 330, a number of members of the Campaign for Nuclear Disarmament painted human silhouettes on an asphalt footpath to represent vaporised human remains on the fortieth anniversary of the Hiroshima bombing. It was accepted that the water soluble whitewash used by the activists would be eventually washed away by rain. Before that could occur, the Local Authority employed persons to clean the footpath. After being convicted at first instance, the appellants sought to equate the

painting of the footpath with spitting on a raincoat, relying upon *"A" (a Juvenile)* to argue that no "damage" had been caused within the meaning of s 1 of the *Criminal Damage Act 1971* (UK). The court adopted the approach taken by Walters J in *Samuels v Stubbs* and dismissed the appeal.

43. In *Morphitis v Salmon* (1990) Crim Law Reports 48, the accused had been charged with damaging a scaffolding clip and bar that formed part of a barrier over a common access way. Whilst removing the clip and bar caused some physical derangement to the larger barrier as a whole, the barrier itself was not the subject of the charge: only the clip and bar. The accused was acquitted.

44. In *R v Heyne* [1998] NSWSC 429 (unreported, Court of Criminal Appeal, 18 September 1998), the accused was charged with the manslaughter of his wife, either by way of an unlawful and dangerous act or by criminal negligence. The act relied upon by the Crown was the pouring of petrol on the carpet of the living room, which subsequently ignited, killing Heyne's wife. The unlawful and dangerous act was particularised as "malicious damage to property". The trial judge had directed the jury that they could find the offence of damage made out on a number of different bases which included the "temporary functional derangement of the house because of the presence of the petrol." That direction was affirmed on appeal by Handley JA, with Levine and James JJ agreeing.

The existing authorities support a requirement of physical change or derangement

45. These decisions demonstrate that *"A" (a Juvenile)* does not represent a new approach to judicial analysis as Slattery J apprehended in *Hammond*, but rather a continuum in the long line of authorities dating back at least to *R v. Tacey* in 1821, where some physical change or alteration to the property occurred.

46. Leeming JA below placed considerable emphasis on the decision in *Heyne*, describing it (at [52] (**CAB p50**) and [57] (**CAB p52**)) as ratio for the proposition that "temporary functional derangement" forms a discrete basis upon which to found the offence of damage. It was also noted by his Honour (at [53] (**CAB p50**) and [57] (**CAB p52**)) that Simpson J did not have the benefit of the decision in *Heyne*.

47. There are several reasons which tell strongly against any reliance upon *Heyne* for the proposition advanced in the judgment below.

48. First, the weight which can be attributed to this decision is quite limited. That is because the question of what could amount to damage arose in the context of directions on unlawful and dangerous act of manslaughter to a jury and not where the nature of the damage relied upon by the Crown was particularised in the indictment.

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49. In addition, the jury direction in *Heyne* was taken directly from *Samuels v Stubbs*, where the accused had stamped on a policeman's hat, temporarily putting it out of shape. This was, as Simpson J said in *Fraser & O'Donnell*, "ample evidence of physical derangement".

50. Further and critically, the act in *Heyne* involved obvious physical derangement of

20 the carpet. The conduct of the appellant rendered the carpet completely unfit for purpose by saturating it in a toxic and highly flammable liquid. That act involved the physical derangement of the carpet; its consequence was to render the carpet unusable or worse.

51. Properly understood, *Heyne* is a case of no particular significance. It does not detract from the approach taken by Simpson J in *Fraser & O'Donnell*. Dousing a carpet with petrol renders the carpet unusable, toxic and dangerous. Unless some

30 substantive remedial work is performed on the carpet, it will stay that way.

52. On the basis of the decisions in *Samuels* and *Heyne*, it is apparent that "temporary functional derangement" is not, and cannot be, synonymous with Leeming JA's concept of "physical interference", which required only some *de minimis* contact with the subject property and not necessarily physical derangement. This was not the sense in which Simpson J used the expression in *Fraser & O'Donnell*.

Legislative history

53. In rejecting Simpson J's requirement of some "physical derangement", Leeming JA concluded (at [58]) (**CAB p52**) that "the legislative history confirms a construction whereby "destroys or damages" includes *physical interference* which obstructs the

working of a machine or renders it useless, either permanently or temporarily." (emphasis added)

54. It is the appellant's case that a fair reading of the legislative history does not support this conclusion.

55. Prior to the 1987 amendments, the *Act* as originally enacted contained within the former Chapter II an array of offences involving damage or injury to property. The former ss 209 and 210 were identified by Leeming JA (at [23]) (**CAB p40**) as the "offences most clearly comparable to Mr Grajewski's conduct".

56. It is apparent from Leeming JA's emphasis on the words "render useless" that his Honour considered that "render useless" could constitute a stand-alone ground from which to establish an offence contrary to those provisions where there was some "physical interference" with the property in question. However, the words "render useless" in ss 209 and 210 only supported a breach where the offender "maliciously, cuts, breaks, or destroys or damages" the relevant property. Those terms form the actus reus of the offence, while the words "intent to destroy or render useless" are the mens rea. An intent to "render useless" is thus sufficient to establish the mental element. Proof of the physical element, which is the matter at issue in this appeal lies elsewhere. By definition, the preconditions encapsulated by the different acts all require some form of physical derangement to the property in question.

57. Nor was there any other basis from which it could be said that "physical interference", as Leeming JA conceived it, might exist as a relevant act, distinct from the acts encapsulated by the words "cut", "break", "destroy" or "damage". Put another away, there was no legislative expression within the *Act* prior to the introduction of s 195 that founded "physical interference" as a relevant *act* capable of contravening the provisions located in Chapter II. Any confusion which may arise from the use of that term in *Fraser & O'Donnell* is resolved when it is appreciated that Simpson J's reference to "physical interference" required more than mere attachment to the relevant property. For these reasons, Leeming JA erred in stating (at [60]) (**CAB p53**) that the inclusion of "physical interference" as a means of establishing damage promoted the legislative purpose of s 195.

58. It is apparent (at [60]) (**CAB p53**) that his Honour based this conclusion on his reasoning that Mr Grajewski would have contravened ss 209 or 210, and that, because it was not intended that the 1987 amendment narrowed the scope of those provisions in any respect, s 195 must be construed in such a way as to arrive at the same result. This conclusion may be doubted. It is difficult to see how the appellant's conduct would have been caught by the earlier legislation. To conclude otherwise ignores the physical elements of the earlier offences, namely "cut", "break", "destroy" or "damage."

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59. Neither the text nor the legislative history of s 195 give support to Leeming JA's construction. Further, the language of s 195 itself does not invite a gloss on the words "destroy or damage" to mean "physical interference", where those words are being used to broaden (impermissibly it is submitted) the scope of the offence.

20 60. To broaden the definition, in the absence of clear legislative intent, is inconsistent with the legal principles relevant to the proper construction of penal provisions: see for example *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193; [2005] HCA 58 at [45].

Conclusion as to the proper construction of s 195

61. The plain words of s 195 read in their context bespeak clarity.

30 62. The meaning of "damages" in a penal provision which refers to "damage" and "destruction" of property, and which contains an explicitly articulated mental element, points strongly to a minimum physical element which is not satisfied by some *de minimus* act which amounts, at best, to operational interference by physical presence alone.

63. On the proper construction of s 195, for damage to be made out there must be some physical change, alteration or derangement to the subject property in the sense articulated by Simpson J in *Fraser & O'Donnell*, even if temporary as was the case in *Samuels v Stubbs*.

64. That construction is further supported by the fact that s 195 creates a criminal offence which is punishable by a (substantial) maximum penalty of 5 years imprisonment, indicating the gravamen of conduct to which the provision is

directed: *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39 at [178] per Gummow and Hayne JJ.

65. The answers to the stated case should have been "No".

Part VII: Orders sought

66. The following orders are sought:

i. Appeal allowed.

ii. The answers given by the NSW Court of Criminal Appeal to the questions stated be set aside.

iii. The questions stated to the NSW Court of Criminal Appeal be answered "No".

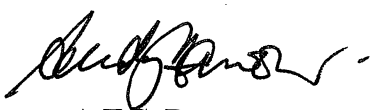
iv. The conviction of the appellant be quashed and a verdict of acquittal be entered.

v. The respondent pay the appellant's costs of the proceedings in this Court.

Part VIII: Estimate

67. It is estimated that the appellant's oral argument will take 1.5 hours to present.

Dated: 5 July 2018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