HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

S53/2022

PETER LEONARD STEPHENS

Appellant

- and -

THE QUEEN

Respondent

APPELLANT'S REPLY

Part I: Certification

1. These Submissions are in a form suitable for publication on the Internet.

Part II: Argument in Reply

Section 80AF is a substantive (and not merely procedural) provision

2. The central premise of the Respondent's submissions — that s 80AF is a 'procedural' provision (RS [55]) which concerns a specific, more liberal 'mode of proof' (RS [33]), and so the section can affect only a 'substantive right to a specific mode of proof…' (RS [55], see also RS [40]) — misconceives the effect of s 80AF and the nature of the Appellant's right that is affected by s 80AF.

3. Immediately before s 80AF commenced on 1 December 2018, the Appellant could not have been convicted of an offence contrary to s 81 of the *Crimes Act 1900* (NSW) unless it was proven, beyond reasonable doubt, that the alleged offending conduct occurred at a time when that section was in force. The chronological uncertainty inherent in the complainant's account, together with the temporal proximity of the alleged offending conduct to the repeal of s 81 on 8 June 1984, meant that the date of the offending was an essential element of the offences charged relating to the alleged

offending conduct the subject of what became counts 6, 7 and 13 on the indictment as finally amended.[1]

4. The relevant fact which had to be proven beyond reasonable doubt was that the alleged offending conduct took place on or before 7 June 1984. Section 80AF contains no *procedural* mechanism for a prosecutor to prove that fact at trial. It does not contain any rules relating to that proof 'which are directed to governing or regulating the mode or conduct of court proceedings'.[2] For example, it does not state when, or how, a complainant may give evidence as to the timing of the alleged conduct, or even concern 'the admissibility of evidence and the effect to be given to evidence'.[3] Because it is not a provision which governs or regulates 'the mode or conduct of court proceedings', s 80AF is 'to be classified as substantive'[4] and cannot be classified as 'procedural' or as 'merely procedural'.

5. Instead of 'governing or regulating the mode or conduct' of the trial, the effect of s 80AF(2)(a) is that, once the preconditions in s 80AF(1) are satisfied, 'any requirement to establish that the offence charged was in force is satisfied if the prosecution can establish that the offence was in force at some time during [the relevant period referred to in s 80AF(1)(a)]'. The requirement to prove the date of the offending — an *essential element* of counts 6, 7 and 13 charged against the Appellant — is thereby taken to be 'satisfied', in substance as a result of a legislative 'deeming', rather than any forensic efforts of the prosecutor in accordance with the procedural rules in place at the time of trial. A prosecution case which is inadequate to prove the essential element of date (because of lack of proof that the conduct occurred on or before 7 June 1984) is, by s 80AF(2)(a), taken to be sufficient to satisfy that element if a different fact exists (s 81 was in force *at some time* during the charge period).

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[1] As a 'general rule', the date of offending is not a material fact. However, that proposition is subject to a number of exceptions. See *WGC v The Queen* (2007) 233 CLR 66, [43] (Kirby J); *R v Dossi* (1918) 13 Cr App R 158. See also *R v C* [2005] EWCA Crim 3533, [22]–[23] in the context of a change in the law relating to sexual offences where it could not be proven that the alleged offending conduct occurred before, or after, the relevant legislative amendment.

[2] *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 26–7 (Mason CJ), adopted in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also *Stevens v Head* (1993) 176 CLR 433, 445 (Mason CJ).

[3] *Rodway v The Queen* (1990) 169 CLR 515, 521 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) ('*Rodway*').

[4] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

6. Indeed, the effect of s 80AF is to allow accused persons in the position of the Appellant to be convicted of an offence against s 81 even if it is never proven, and cannot be proven, that the conduct alleged occurred on or before 7 June 1984. Thus, s 80AF is not concerned merely with the *procedures* for proof of the elements of an offence contrary to s 81. Rather, the section significantly alters the elements required to be proven by the prosecutor to establish guilt of an offence contrary to s 81 in a way that expands the scope of that offence-creating provision.

7. Therefore, it is an error to describe s 80AF merely as a 'mode of proof', or as providing a '*procedural* means by which previously criminal behaviour may be prosecuted': RS [55] (emphasis added). Section 80AF is properly classified as substantive and it affects the pre-existing right of the Appellant described within AS [3]. The right arises out of the basic proposition that for the prosecution to obtain a conviction, the alleged offending conduct must coincide with (or fall within) the period during which the relevant offence-creating provision was in force.

Parliament has not expressly, or by necessary implication, provided for s 80AF to apply retrospectively to pending trials

8. In *Rodway*, this Court stated the common law rule that 'a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute *expressly or by necessary implication requires such construction*'.[5] As to what is meant by the phrase 'necessary implication', or 'necessary intendment', the Respondent refers to, and quotes from (at RS [41]), *Worrall v Commercial Banking Co of Sydney Ltd*[6] and *Sunshine Porcelain Potteries Ltd v Nash*.[7] The stringency of the phrase in assessing whether the legislature has necessarily determined to abrogate a right, freedom or immunity, was, however, more recently emphasised in the judgment of Kiefel J in *Lee v New South Wales Crime Commission*:[8]

> The applicable rule of construction recognises that legislation may be taken necessarily to intend that a fundamental right, freedom or immunity be abrogated. As was pointed out in *X7*, it is not sufficient for such a conclusion that an implication be available or somehow thought to be desirable. The emphasis must be on the condition that the intendment is "necessary", which suggests that it is compelled by a reading of the statute. Assumptions

[5] (1990) 169 CLR 515, 518 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added).
[6] (1917) 24 CLR 28, 32.
[7] (1961) 104 CLR 639, 642–3 (a decision of the Privy Council).
[8] (2013) 251 CLR 196.

> cannot be made. It will not suffice that a statute's language and purpose might permit of such a construction, given what was said in *Coco v The Queen*.[9]

9. As noted at AS [37], the text of both s 80AF and the amending Act which inserted s 80AF, is entirely silent on the question of whether the section applies retrospectively to pending proceedings. In assessing whether a 'necessary intendment' or 'necessary implication' can be drawn from the text that the section was intended to have such retrospective effect, it is not enough that it might 'somehow [be] thought to be desirable', having regard to the purpose of s 80AF, for that section to apply to proceedings pending at the time of its commencement: cf RS [62]–[68].

10. Further, the fact that s 20(1) of the *Criminal Procedure Act 1986* (NSW) requires the leave of the court or the consent of the accused before a prosecutor may amend an indictment after it is presented does not assist in determining whether s 80AF has retrospective application to pending trials: cf RS [67]–[68]. The assessment of whether s 80AF has such application is logically anterior to the question whether s 20 might in some way prevent the amendment of an indictment to allow the prosecutor to rely on s 80AF, if that section applies to the trial.[10] It cannot be said that Parliament 'necessarily intended' that s 80AF have retrospective effect to pending trials because a judge determining an application under s 20 might somehow ameliorate the effect of the section by refusing leave to amend an indictment. There is no textual support for that proposition at all in either the text of s 80AF or the extrinsic materials.

Orders

11. The Respondent 'does not press for an order for a retrial on any of counts 6, 7 or 13' in the event that the appeal is successful: RS [70].

12. As this Court held in *R v A2*,[11] it is not open to quash an appellant's convictions 'but neither order a new trial nor enter verdicts of acquittal'.[12] Therefore, the Respondent

[9] (2013) 251 CLR 196, [173] (footnote omitted).
[10] Further, defence counsel cannot, by consenting to the amendment of the indictment under s 20(1)(b), give s 80AF a retrospective application to a pending trial which it does not in fact have as a matter of statutory construction.
[11] (2019) 269 CLR 507, [68]–[83] (Kiefel CJ and Keane J), [148] (Nettle and Gordon JJ), [176] (Edelman J).
[12] (2019) 269 CLR 507, [83] (Kiefel CJ and Keane J).

must necessarily accept that the appropriate order is that verdicts of acquittal be entered on counts 6, 7 and 13.

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