HIGH COURT OF AUSTRALIA

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **PETER LEONARD STEPHENS**
Appellant

and

**THE QUEEN**
Respondent

# RESPONDENT'S SUBMISSIONS

## Part I: Certification

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

## Part II: Statement of Issues

2. The following issues arise:

   (i) Does s 80AF of the *Crimes Act 1900* (NSW) (***Crimes Act***) have retrospective effect because it impacts a substantive right vested in the appellant?

   (ii) If so, did s 80AF have application to the appellant's trial in circumstances where the trial had commenced prior to the enactment of s 80AF?

   (iii) Did the NSW Court of Criminal Appeal (**CCA**) correctly apply the principles applying to the presumption against retrospectivity?

## Part III: Notice under s 78B of the Judiciary Act 1903 (Cth)

3. The respondent considers that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

## Part IV: Statement of Facts

4. Save as to matters of emphasis in the paragraphs that follow, the facts are sufficiently summarised in the appellant's written submissions (**AS**) at [6]-[14]. With respect to AS [10]-[11], it may be noted that on 5 February 2019 and 19 February 2019 leave to amend the indictment was not opposed: **CAB 16** T14.31; **CAB 51** (Judgment on application to amend four counts on the indictment, 19 February 2019, 2).

## Part V: Argument

### Section 80AF

5. The appellant's trial commenced with his arraignment on 29 November 2018. On 1 December 2018, s 80AF of the *Crimes Act* came into force.[1] On 5 February 2019, s 80AF was relied upon by the prosecution as the basis for an application to amend counts 6 and 7 of the indictment by way of substitution under s 20 of the *Criminal Procedure Act 1986* (NSW) (***CPA***). The indictment was further amended on 19 February 2019 to amend count 13. At the time, s 80AF provided:

> "**80AF Uncertainty about time when sexual offence against child occurred**
>
> (1) This section applies if:
>
> (a) it is uncertain as to when during a period conduct is alleged to have occurred, and
>
> (b) the victim of the alleged conduct was for the whole of that period a child, and
>
> (c) there was no time during that period that the alleged conduct, if proven, would not have constituted a sexual offence, and
>
> (d) because of a change in the law or a change in the age of the child during that period, the alleged conduct, if proven, would have constituted more than one sexual offence during that period.
>
> (2) In such a case, a person may be prosecuted in respect of the conduct under whichever of those sexual offences has the lesser maximum penalty regardless of when during that period the conduct actually occurred, and in prosecuting that offence:
>
> (a) 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 that period, and
>
> (b) any requirement to establish that the victim was of a particular age is satisfied if the prosecution can establish that the victim was of that age at some time during that period."

6. Section 80AF(3) defines "sexual offence" and a "child" for the purposes of s 80AF.

### *The problem of proof addressed by s 80AF*

7. Section 80AF is directed towards a specific problem of proof that arises in the context of the prosecutions of historic child sex offences. The provision arises out of the Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (2017) and the work of the NSW Department of Justice (discussed further at [12] to [14] below). The relevant history is described at **CAB 296-300** CCA [1]-[14].

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[1] *Crimes Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW); Proclamation 2018 No 671.

As summarised at **CAB 296** CCA [1], the Royal Commission found that because "it commonly takes many years for individuals who have been sexually abused as children to come forward with their complaints … it may be extremely difficult for a complainant, who was a child at the time of the events in question, to pinpoint a date on which the asserted events took place."[2]

8. This phenomenon is recognised as creating a problem in the prosecution of historic child sex offending because of the continual process of law reform in the field of sexual offences. The effect of that process was that offence-creating provisions changed in particular respects, even if, in substance, they were intended to and did capture the same conduct. In the result, it may be capable of being proved beyond reasonable doubt that an accused has engaged in conduct that, at all relevant times, satisfies the essential elements of sexual offences in force during the range of dates in which the conduct is considered to have occurred, but uncertainty may remain about the precise statutory offence that applies to criminalise the conduct: **CAB 299** CCA [12]. Section 80AF responds to this problem, being one of proof of the offence in force when sexual offending took place, by providing a "more liberal means of proof of historic allegations by children of sexual misconduct": **CAB 305** CCA [30].

9. Section 80AF "applies" when the criteria in sub-ss (1)(a)-(d) are met. In effect, the criteria require that it be "uncertain" as to when, within a "period" of time, conduct always constituting a "sexual offence" against a child under multiple provisions is alleged to have occurred. If satisfied, the criteria establish that "if the appellant committed the conduct alleged against him at any time during the period encompassed by the charges in the indictment, he was guilty of a criminal offence and liable to be convicted and subjected to criminal punishment": **CAB 309** CCA [41]. No opposition was advanced, before the trial judge or in the CCA, to the criteria in s 80AF(1) being satisfied and it was not submitted at trial that the application of s 80AF was unfair for the purposes of s 20 of the *CPA*; see further at [67] below.[3]

10. When present, per s 80AF(2)(a) these criteria enable the prosecution to establish that an offence was in force by proving that the offence was in force at some time during that period. However, s 80AF(2) also requires that the offence charged be the offence with the lesser maximum penalty.

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[2] See further Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Vol 4: Identifying and Disclosing Child Sexual Abuse* (2017), at [2.3] 31: **RFM 22**.

[3] See also **CAB 53**, Judgment on application to amend four counts on the indictment, 19 February 2019.

11. In effect, therefore, s 80AF requires that when it is "uncertain" as to which sexual offence criminalised the behaviour of an accused within the "period" the accused be prosecuted for the offence with the lesser maximum penalty.

***The legislative history***

12. As the legislative history reveals, the decision in *Gilson v The Queen* (1991) 172 CLR 353 (***Gilson***) was influential in the formation of s 80AF. The Second Reading Speech relevantly describes s 80AF as a "procedural reform[] … to facilitate prosecutions for child sexual offences" that was "based on the work" of the NSW Department of Justice's Child Sexual Offences Review (the **Review**),[4] which itself acted, in part, on the research and recommendations of the Royal Commission.[5]

13. A product of the Review was a Discussion Paper (the **Review Paper**) which explained the need for a legislative provision to clarify how the "prosecution should proceed" in dealing with "historic offences" where a "date range can coincide with a change of legislation and the same elements may constitute different offences."[6] This difficulty arises "during a trial", where it is "common" that:

> "…the dates of the alleged offences will be refined or significantly changed. A complainant may recall more details about the time of the offence or it may become apparent that they were mistaken about the time … [In such circumstances] [t]he prosecution can make an application to amend the indictment [under s 20 of the *CPA*], however, this requires either leave of the court or consent of the defence. Where there is no consent and the application is refused, the accused must be acquitted."[7]

14. The Review Paper noted that "[c]ase law provides some guidance on this issue, however, it has not been satisfactorily resolved",[8] and went on to consider the limits of the case law with reference to *NW v R* [2014] NSWCCA 217 (***NW***). After a discussion of the approach taken in *Gilson*, the Review Paper identified the following Option for Reform:

> "A legislative provision could be introduced to allow the prosecution to rely on the offence with the lowest maximum penalty where there is uncertainty about the age of the victim at the time of the offence and the date range falls into more

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[4] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 6, 7: **RFM 8-9**.
[5] NSW Department of Justice, Discussion Paper, *Child Sexual Offences Review* (2017) (**Review Paper**) at [1.11]-[1.12]: **RFM 14**.
[6] Ibid, at [6.9]: **RFM 16**.
[7] Ibid, at [6.11] (footnote omitted): **RFM 17**.
[8] Ibid, at [6.10]: **RFM 16-17**.

than one offence. This would be consistent with the decision of *Gilson v The Queen* as discussed above."[9]

**The decision of the Court of Criminal Appeal**

15. In the NSW Court of Criminal Appeal (**CCA**), as in this Court, the appellant argued that s 80AF affected a substantive right, being the right not to be convicted of an offence unless the prosecution is able to prove that the particular offence-creating provision was in force at the time of the alleged conduct which the prosecution asserts constitutes that offence: AS [23]. The appellant, with reference to *Rodway v The Queen* (1990) 169 CLR 515 (***Rodway***), *Lodhi v The Queen* (2006) 199 FLR 303 (***Lodhi***) and *Newell v The King* (1936) 55 CLR 707 (***Newell***), argued that s 80AF did not apply to his trial because it was not expressed to do so in explicit terms either in the text or the extrinsic materials: see AS [17], **CAB 308, 310** CCA [36], [42].

16. The respondent argued that s 80AF concerned the effect to be given to evidence and thus was not substantive, and, further, that *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36 (***Lazarus***) established that *Lodhi* is properly viewed as concerning a provision that retrospectively creates legal liability – an *ex post facto* law. The respondent contended that *Lazarus* was reflective of a modern approach to the statutory construction of retrospective provisions that was accommodating of textual, contextual and purposive considerations, which favoured a construction of s 80AF being taken to have been intended by Parliament to apply to any proceeding in which the problem of proof arose.

17. The CCA, by majority (Simpson AJA, Davies J agreeing), dismissed the appeal. All members of the CCA appear to have accepted that s 80AF did not affect a 'substantive right': **CAB 310** CCA [43] (Simpson AJA, with Davies J agreeing), **321** [94] (Button J). The majority further accepted that the context in which s 80AF was enacted warranted the conclusion that it was to be read as applying retrospectively, and accepted the respondent's submission that the considerations raised in *Lodhi* did not compel a reading down of s 80AF so as not to apply to pending proceedings: **CAB 311, 314** CCA [45], [46], [58].

[9] Ibid, at [6.12] (footnote omitted): **RFM 17**.

**A question of construction**

18. The respondent submits that the decision of the CCA majority reflects the correct approach to construction, consistently with that undertaken in *Lazarus*. Further, as [85]-[101] of *Lazarus* make clear, that approach (referred to at [16] above) does not turn on the status of a Validation Act per se (cf AS [36]), but rather on the application of the settled techniques of statutory construction.

19. A determination of the retrospective effect of a statutory provision involves a "single question", sometimes described as being one "of fairness."[10] In Australia, the question is one of statutory construction, directed to "the concept, central to statutory construction, of intention", as Gleeson CJ stated in *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 (***AIRC***) at [7]. Relevantly, Gleeson CJ made these observations in the course of considering the way in which the *Acts Interpretation Act 1901* (Cth) operated to resolve the question of whether a statutory provision applied retrospectively to pending proceedings: see AIRC at [1] to [4].

20. *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 (***Goudappel***) and *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 ***(AEU)*** reflect the position adopted by this Court that questions of retrospectivity are to be answered through "the determination of the construction that, according to established rules of interpretation, best serves the statutory purpose",[11] tempered by the principle of legality, of which the presumption against retrospectivity is an aspect.[12] The principle of legality and the modern approach to statutory construction are said to "pull in different directions."[13] Principles of construction that narrow the meaning and operation of a statutory provision, such as the principle of legality and the presumption against retrospectivity, have "variable impact",[14] depending on the context in which they are invoked.

21. In NSW, resolution of the tension between the principle of legality and the modern approach to statutory interpretation is undertaken consistently with the requirements

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[10] *L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 527G–528C per Lord Mustill; *Attorney General (NSW) v World Best Holdings Ltd (**World Best**)* (2005) 63 NSWLR 557 at [58] per Spigelman CJ; *Wilson v First County Trust Ltd (No 2)* (***Wilson***) [2004] 1 AC 816 at [200].

[11] *Goudappel* at [28] per French CJ, Crennan, Kiefel and Keane JJ; [61]-[62] per Gageler J.

[12] *AEU* at [30] per French CJ, Crennan and Kiefel JJ; *Lodhi* at [30].

[13] *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599 (***Hayward***) at [39]; and see generally Dan Meagher, "The 'Modern Approach' to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?" (2018) 46 *Federal Law Review* 397.

[14] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at [102] per Edelman J.

of the *Interpretation Act 1987* (NSW). The approach taken requires the identification "with a degree of precision" of the right said to be affected.[15] Precision is needed because "[a]ny presumption of non-interference by general words will carry greater or lesser weight according to the precise issues identified", such issues falling to be considered in light of the statute's overall "conflicting purposes."[16]

22. The respondent submits that because the presumption against retrospectivity is an aspect of the principle of legality (see *AEU* at [30]), the same approach as that identified in *Hayward* applies to the construction of a purportedly retrospective statute, namely one in which the "function and operation of the principle must be understood within the confines of general principles of statutory construction."[17]

23. That approach to the presumption of retrospectivity (which assigns it particular weight and then incorporates it within a broader exercise of statutory interpretation: see further at [20] to [21] above) explains the decision of the CCA in the present case, *Lazarus*, as well as *Lodhi*, and the basis upon which *Lodhi* distinguished the settled authority referred to in *Lodhi* at [23], including *Hutchinson v Jauncey* [1950] 1 KB 574 (***Hutchinson v Jauncey***), *Zainal bin Hashim v Government of Malaysia* [1980] AC 734 (***Zainal***) and *Bawn Pty Ltd v Metropolitan Meat Industry Board* (1970) 72 SR (NSW) 466 (***Bawn***).[18] In *Bawn* at 487D, Mason JA (as his Honour then was) explained that it should not generally be required that Parliament expressly refer to whether a retrospective provision is to apply to pending proceedings and that such:

> "a rule which, according to its formulation, insists on a specific or explicit reference to rights in pending actions as an essential preliminary to the application of the new statute to those rights … would import into the interpretation of statutes an arbitrary rigidity which is foreign to the traditional principles by which the intention of the legislature is ordinarily to be ascertained."[19]

24. The basis on which *Lodhi* distinguished *Bawn* was on the "strength" of the presumption against retrospectivity in *Bawn*.[20] By contrast, what was of"significance", in *Lodhi*, was that "retrospective effect [was] sought to be given to a provision creating

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[15] *Hayward* at [39].
[16] *Hayward* at [39]; see also *Hayward (a pseudonym) v R* (2018) 97 NSWLR 852 at [66]-[67] per Bathurst CJ (Hoeben CJ at CL, Price, Fullerton and Garling JJ agreeing); Lisa Burton Crawford, "An Institutional Justification for the Principle of Legality" (2022) 45(2) *Melbourne University Law Review (Advance)* at 31-38.
[17] *Hayward* at [30].
[18] See *Lodhi* at [23], [40]-[42].
[19] See further *Minogue v Victoria* (2018) 264 CLR 252 (***Minogue***) at [93] per Gageler J.
[20] See *Lodhi* at [42].

a criminal offence"[21] (ie, a provision properly regarded as an *ex post facto* law). This was the context in which Spigelman CJ, in *Lodhi*, formulated the statement of principle requiring a clear statement by Parliament of retrospective effect, as was explained in *Lazarus* at [89].

25. If it applies at all, the strength of the presumption against retrospectivity in the present context is, by comparison to *Lodhi*, relatively weak. The only way in which the substantive right for which the appellant contends can reasonably be understood is a right to a specific mode of proof equivalent to that which found disapproval in *Gilson,* upon which s 80AF was based and upon which Parliament should be taken to have acted. Properly viewed, the specific mode of proof that prevailed prior to the enactment of s 80AF is not a right at all, but is a gap in the framework of proof. Moreover, it may fairly be viewed equivalent, in effect, to what Brennan J in *Gilson* at 367 described as:

> "a device for permitting the guilty to escape by raising a dilemma of proof between offences when the accused has been proved beyond reasonable doubt to have committed one or other of them and a conviction for one exposes him to no greater punishment than conviction for the other."

26. In the respondent's submission, Parliament should not be taken to have intended to preserve, in pending proceedings, the form of proof that prevailed prior to s 80AF. To do so is, in effect, to take Parliament to intend – adopting the language in *Gilson* at 363 per Mason CJ, Deane, Dawson and Toohey JJ – to permit "an accused who is clearly guilty of one offence or the other … to escape conviction altogether", an outcome in which the law will "surely be brought into disrepute". The presumption against retrospectivity can operate only weakly in such a context, if at all, and *Lodhi* should not be understood to require an explicit statement of application in such a context.

**Procedure and substance**

27. As Gleeson CJ observed in *AIRC* at [6], "[t]he terms retrospective and prospective may often be a convenient shorthand, but in a given case it may be necessary to identify more precisely the particular application of the alteration to the law in question."

28. In *Rodway* at 518, this Court explained that a merely procedural statute operates "prospectively because it will prescribe the manner in which something may or must

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[21] See *Lodhi* at [43].

be done in the future, even if what is to be done relates to, or is based upon, past events. A statute which prescribes the manner in which the trial of a past offence is to be conducted is one instance." At 521, the Court in *Rodway* observed, with reference to *Maxwell v Murphy* (1957) 96 CLR 261 (***Maxwell v Murphy***):

> "… ordinarily an amendment to the practice or procedure of a court, *including the admissibility of evidence and the effect to be given to evidence, will not operate retrospectively so as to impair any existing right*. It may govern the way in which the right is to be enforced or vindicated, but that does not bring it within the presumption against retrospectivity. *A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial*. The principle is sometimes succinctly, if somewhat sweepingly, expressed by saying, as did Mellish LJ in the passage cited by Dixon CJ in *Maxwell v Murphy*, that no one has a vested right in any form of procedure. It is a principle which has been well established for many years". (emphasis added)

29. In the quote above from *Rodway*, the reference to *Maxwell v Murphy* is specifically to Dixon CJ's endorsement (at 267) of Mellish LJ's observation in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 (***Erlanger***) at 69 that: "[n]o suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done." The Court in *Rodway* (at 520) also endorsed *Erlanger*, but did so conditionally, noting the stated proviso that "no injustice is done." That was necessary because, as the Court noted in *Rodway* at 520, *Newell* was a "case in which a vested right in a particular procedure, or something very like it, appears to have been recognized."

30. What is important to understand about *Newell* is that the question before the Court was whether the removal of the requirement of jury unanimity was to be properly regarded as procedural or substantive in nature.[22] It was determined to be "an essential and inseparable part" of the right to trial by jury – one of the "fundamental rights of citizenship"[23] – and "not a subordinate or merely procedural aspect of it": *Newell* at 713 per Evatt J. *Rodway*, properly viewed in light of its endorsement of *Erlanger*, was seeking to distinguish *Newell* by identifying the point in time at which the substantive right to trial by jury – separately and precisely identified – was vested in the accused for the purposes of his trial.

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[22] *Newell* at 711 per Latham CJ; see also *Lazarus* at [91]-[95] per Leeming JA (McColl and Simpson JJA agreeing).

[23] *Newell* at 711 per Latham CJ, referring to *Looker v Halcomb* (1827) 130 ER 738; see also Evatt J at 713.

**Identifying a substantive right affected by s 80AF**

31. Consistently with *Rodway*, and in contrast to the right recognised in *Newell*, a mode of proof of certain facts is not generally regarded as a substantive right; and ‘‘the evidence by which an offence may be proved is a matter of mere procedure.”[24] Even if a trial has commenced, consistently with *Erlanger* that fact alone would not itself ordinarily result in there being a vested interest in the course of procedure nor form the basis of a valid complaint if, during the litigation, the procedure is changed. As in *Newell*, the substantive right affected must still first be identified.[25] It is the effect of a law on a substantive right that renders a procedural law retrospective, and, furthermore, when done precisely, identification of the right is submitted to calibrate the strength of the presumption as against other considerations of statutory construction such as text, context and purpose.

32. A substantive right is an “existing”, “vested” or “accrued” right which the application of the retrospective law affects.[26] As has been said, “[t]he distinction between what is and what is not ‘a right’ must often be one of great fineness.”[27] Although a “right might fairly be called inchoate or contingent,” it is must be more than a “mere hope or expectation”,[28] and it is not merely a “power to take advantage of an enactment.”[29] The common law presumption against retrospectivity is reflected in s 30 of the *Interpretation Act* insofar as an amendment or repeal of an Act affects a right, privilege, obligation or liability “acquired, accrued or incurred under the Act”[30]: s 30(1)(c), (e). Section 30 operates subject to any contrary intention: *Interpretation Act*, s 5(2), which “may appear from context or legislative purpose.”[31]

33. The appellant submits (AS [3]) that, in the present case, the substantive right is the “right not to be convicted of an offence unless the prosecution is able to prove that the offence-creating provision was in force at the time of the alleged conduct which the prosecution asserts constitutes that offence.” Yet s 80AF still requires this fact (ie, of the offence in force at the time of the alleged conduct) to be proved, albeit by more

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[24] *Williamson v Ah On* (1926) 39 CLR 95 at 121-122 per Higgins J, see also 129 per Rich and Starke JJ.
[25] See also *Esber v Commonwealth* (1992) 174 CLR 430 at 439-440 per Mason CJ, Deane, Toohey and Gaudron JJ.
[26] Ibid, at 445 per Brennan J (dissenting); *Maxwell v Murphy* at 270.
[27] *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541 at 552 per Lord Evershed (delivering the judgment of the Privy Council).
[28] Ibid.
[29] *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 75 ALJR 542 at [27] per McHugh J, referring to *Mathieson v Burton* (1971) 124 CLR 1 at 23 per Gibbs J.
[30] Compare *Parr v Rural Agents Pty Ltd* [1975] 2 NSWLR 347 at 353F-354A per Yeldham J.
[31] *Alcan (NT) v Commissioner of Territory Revenue* (2009) 239 CLR 27 (***Alcan***) at [6] per French CJ.

liberal means. Therefore, the appellant is claiming not just a right to proof of this fact but to the specific mode of proof of this fact that persisted prior to the enactment of s 80AF. There are strong reasons to conclude that such a right does not exist, or, alternatively, is erased entirely by the form of proof provided by s 80AF.

34. The appellant submits that the substantive right claimed is demonstrated by *R v Greenaway* (2000) 118 A Crim R 299 (***Greenaway***): AS [26]. In the present case, however, (correctly) no member of the CCA appears to have accepted this submission: **CAB 310** CCA [43], **321** [94]. Properly viewed, *Greenaway* simply reflects an outcome obtained (rather than recognition of a right) in particular circumstances.

35. Moreover, *Greenaway* is not engaged in circumstances where the "words of each relevant count [in the indictment] are sufficient to allege an offence under either the former provision or the later provision",[32] as long as the accused is convicted of the offence with the lowest maximum penalty.[33] Relevant to the present case, it may be acknowledged that ss 81 and 78K had different elements. However, as Macfarlan JA made clear in *MJ* at [55], the problem that arose in *Greenaway* was that (because of the wording of the counts in that case) "a verdict of guilty in relation to the count [of which the accused was convicted] would not have indicated that the essential ingredients of the later offence [which were different] were established."

36. That is not the case here, because of s 80AF(1)(c) and (d). The effect of those sub-sections is that, to engage s 80AF, the alleged offending conduct must satisfy the essential elements of each sexual offence in force during the period in which that conduct is alleged to have occurred. Per sub-s (2)), the accused is then subject only to the lowest penalty. When s 80AF applies, it necessarily indicates that the essential ingredients of each offence potentially in force will be established by a conviction, and Greenaway is, accordingly, not engaged. Unlike the circumstances in which s 80AF is engaged, *Greenaway* is concerned with a situation in which it is possible that an accused has been convicted of an offence that the jury may not have been satisfied was established on the facts.

37. Further, as noted at [34] above, nor does *Greenaway* imply a right. Although the distinction between procedure and substance may, at times, be difficult to ascertain, there is a distinction which is to be maintained. Therefore, it is necessary to distinguish

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[32] *MJ v The Queen* [2013] NSWCCA 250 (***MJ***) at [55] per Macfarlan JA (Adams and Latham JJ agreeing).
[33] Ibid, at [33]-[34], [50]; see also *R v MAJW* (2007) 171 A Crim R 407 at [27] per James J, and at [55], [61] per Rothman J.

between a requirement of procedure the non-compliance with which can result in a miscarriage of justice, and a substantive right vested in an accused. As the Court in *Rodway* recognised (at 522), a procedure may be "important", or even a "fundamental protection against wrongful conviction", but in "conformity" with *Maxwell v Murphy* that provides "no basis for regarding them as having a retrospective operation simply because the trial concerns events and transactions past and closed." Therefore, under *Rodway* it is not enough to establish the retrospective effect of a procedural provision by demonstrating that it expands inculpation in a real and practical sense.[34]

38. Section 80AF does not impact upon any underlying substantive right to proof of the essential elements of an offence beyond reasonable doubt. In *Gilson* at 364 and 367, the Court did not regard *Woolmington v Director of Public Prosecutions* [1935] AC 462 as supporting the enabling of an accused to avoid conviction by raising a dilemma of proof between offences each of which he or she is proved guilty beyond reasonable doubt (see further at [25] above).

39. Nor does the application of s 80AF deprives the accused of the benefit of an early plea of guilty. Consistently with this Court's decision in *Cameron v The Queen* (2002) 209 CLR 339 at [23]-[25], an accused who changed his or her plea to guilty after s 80AF was applied would properly be regarded as pleading guilty at the first reasonable opportunity and would have the benefit of that plea.

40. Properly viewed, the only way in which a possible substantive right affected by s 80AF might conceivably be framed for consideration is as a (narrow) protection of the accused's right to a specific mode of proof of the offence in force at the time of proceedings. However, the existence of such a 'right' would be incompatible with the reasoning in *Gilson*, because it would recognise, in effect, that an accused has a right to the benefit of a gap in the fabric of proof akin to that recognised in *Gilson* as tending to bring the law into disrepute. To similar effect, such a right as contended for by the present appellant is apt to be harmful to public confidence in the administration of justice. Accordingly, the respondent submits on the authority of *Gilson* that there is no such substantive right, and that, if that be wrong, then the strength of the presumption of retrospective non-interference with such a 'right' is, for the reasons given above, to be properly regarded as weak. As expanded upon in the next section, dealing with retrospectivity, it is also the very 'right' that is the target of s 80AF.

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[34] Cf AS [17], [32], referring to **CAB 321-322** CCA [95], [98] per Button J.

**Retrospectivity and pending proceedings**

41. A law is presumed not to have retrospective effect on vested rights absent "express words or necessary intendment."[35] *Necessary intendment* "only means that the force of the language in its surroundings carries such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable".[36] Further, the presumption "may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it."[37]

42. It is clear that s 80AF is intended to, and does expressly, operate to deprive an accused of the suggested 'right' identified by the appellant. It is in that sense patently retrospective. However, in *Lodhi* at [23], Spigelman CJ, with reference to authority, identified the application of the presumption to pending proceedings as being treated as a "distinct category." The distinctiveness of this category arises from the fact that the presumption against retrospectivity is a presumption that "the legislature did not intend to act unjustly or unfairly."[38] It is also said that because the "potential injustice of interfering with the rights of parties to actual proceedings is particularly obvious, this … presumption will be that much harder to displace."[39]

43. Contrary to what is suggested by the appellant (AS [35]-[37]), the perceived particular unfairness associated with this category does *not* require Parliament to separately address the application of a retrospective statute to pending proceedings. That is not what the authorities referred to in *Lodhi* at [23] say.

44. In *Bawn*, all three members of the court (Sugerman P, Asprey and Mason JJA) considered that, in its application to pending proceedings, the presumption could be displaced in application of, what would now be understood to be, the modern approach to statutory construction. No member of the Court considered it necessary for Parliament to identify the specific application of a retrospective statute to pending proceedings. As Sugerman P explained at 475B, *Hutchinson v Jauncey* (one of the authorities cited by Spigelman CJ in *Lodhi* at [23]) supports the proposition that "if the legislature has shown as a matter of necessary intendment that it intends to take away or destroy an existing cause of action, that should be taken … to embrace an

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[35] *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 (***Worrall***) at 32; *World Best* at [49].
[36] *Worrall* at 32.
[37] *Sunshine Porcelain Potteries Ltd v Nash* (1961) 104 CLR 639 at 642-643 per Lord Reid.
[38] *World Best* at [57] per Spigelman CJ, citing *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at 724 per Staughton LJ.
[39] *Wilson* at [198] per Lord Rodger of Earlsferry.

intention that any action, even though pending … should fail." As the learned President put it, "the one thing is embraced in the other."

45. In preferring *Hutchinson v Jauncey*, the Court in *Bawn* rejected the narrow approach taken by Sir George Jessel in his dicta in *In re Joseph Suche & Co Ltd* (1875) 1 Ch D 48 at 50 and by Griffith CJ in his dissent in *Moss v Donohue* (1915) 20 CLR 615 at 621 in which it was held that the application of a retrospective statute to pending proceedings needed to be express. As Asprey JA explained in *Bawn* at 482E-483B, both Sir George Jessel and Griffith CJ should be understood as having resiled from that approach in subsequent decisions.

10 46. Further, it is misconceived to generally require the identification of a literal Parliamentary intention to apply a retrospective provision to pending proceedings. This Court has cautioned against such an approach. The meaning given to a provision is that which Parliament is *taken* to have intended it to have, a conclusion that is reached through judicial findings made in the application of the settled techniques of statutory construction.[40] The approach advocated by the present appellant would be apt to produce the kind of "arbitrary rigidity … foreign to the traditional principles by which the intention of the legislature is ordinarily to be ascertained" which Mason JA cautioned against in *Bawn* at 487D.

***The strength of the presumption in Lodhi***

20 47. As Leeming JA (McColl and Simpson JJA, agreeing) observed in *Lazarus at* [89], the specific "context in which Spigelman CJ formulated the statement of principle" adopted in *Lodhi* was one which concerned "legislation which retrospectively alters a criminal offence":

> "In *Lodhi*, the retrospective amendments were directed to the elements of the relevant criminal offences, widening their scope, so that the Crown was no longer required to prove that preparations had been made for a particular terrorist act; it followed that past acts that would not have been criminal at the time they were committed were rendered criminal".

48. In other words, *Lodhi* was concerned with an *ex post facto* law. The essential
30 characteristic of an *ex post facto* law is that it punishes behaviour that was not criminal

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[40] See eg *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 per McHugh, Gummow, Kirby and Hayne JJ; *Zheng v Cai* (2009) 239 CLR 446 at [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *R v A2* (2019) 269 CLR 507 (***A2***) at [32].

at the time it was committed.[41] An *ex post facto* law suffers from the defect identified by Blackstone, namely that "it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust."[42] For that reason, "*ex post facto* criminal legislation has been generally seen in common law countries as inconsistent with fundamental principle under our system of government."[43]

49. However, as Dawson J observed in *Polyukhovich* at 643, that rationale applies with lesser force where "[t]he wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law." By logical extension, the rationale applies with far lesser force again where the wrongful nature of the conduct would have been apparent because it was at all times criminal. Indeed, a retrospective law of this kind is not properly viewed as an *ex post facto* law.

50. Properly viewed, Spigelman CJ's analysis in *Lodhi* was anchored to the strength of the presumption arising out of the *ex post facto* nature of the law there under consideration. Spigelman CJ generally accepted the approach that the respondent submits is correct, namely, that the retrospective effect of a statute "is to be determined by the words of the statute, construed in their full context, and in accordance with the scope and purpose of the legislation": *Lodhi* at [25], and noting, at [40] (referring to *Hutchinson v Jauncey* and *Bawn*), that it was not necessary for Parliament to "expressly address the question of pending actions."

51. But Spigelman CJ proceeded to assess the "strength" of the presumption in decisions such as *Bawn* as not "great", on the basis that in civil proceedings "an order for indemnity costs may overcome any injustice": *Lodhi* at [42]. Distinguishing the retrospective amendments at issue in *Lodhi*, Spigelman CJ observed that the proceedings were criminal and that "of particular significance in the present case is the fact that retrospective effect is sought to be given to a provision creating a criminal offence", and that such a case warranted the application of a clear statement principle: *Lodhi* at [43].

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[41] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (***Polyukhovich***) at 608, 618 per Deane J.
[42] *Commentaries*, Vol I (1830) at 45-46, quoted by Deane J in *Polyukhovich* at 609.
[43] *Polyukhovich* at 610 per Deane J.

52. Spigelman CJ explained that a law of that nature conflicted with recognised principles that Parliament would be *prima facie* expected to respect: "Parliament is 'prima facie expected to respect' the principle that a statute will not retrospectively alter a criminal offence where a trial has commenced" (*Lodhi* at [49]). Accordingly, in such circumstances, Spigelman CJ did not place emphasis upon the construction that would best serve the statutory purpose: *Lodhi* at [36]-[39].

53. The respondent accepts the relevance of the fact that the present pending proceedings were criminal proceedings: *Lodhi* at [41]. However, as this Court indicated in *Minogue* at [23]-[24] and at [93], that fact does not exclude the need to consider the full context of a statutory provision in the course of determining whether Parliament is to be taken to have intended a statutory provision to apply retrospectively to pending proceedings "affecting the criminal justice system or otherwise impinging on the liberty of the subject" (*Minogue* at [23]).

**Overcoming the presumption in the present case**

54. The retrospective effect of s 80AF is unlike the provision at issue in *Lodhi*: cf AS [33]. As Simpson AJA explained at **CAB 314** CCA [58],

> "s 80AF does not 'have the effect of making past acts criminal'; nor does it create a criminal offence; nor, indeed, does it even alter (as was the case in *Lodhi*) a pre-existing criminal offence. It does no more than facilitate the proof of criminal conduct as an offence, whatever nomenclature was used in the offence-creating provision."

55. Consistently with the analysis of Simpson AJA, s 80AF is not an *ex post facto* law. It does not purport to punish previously innocent behaviour, but rather provides a procedural means by which previously criminal behaviour may be prosecuted. Therefore, s 80AF either (a) does not affect a substantive right, or (b) affects a substantive right to a specific mode of proof only peripherally, and such that the presumption against retrospectivity is properly regarded as weak. Further, if (b) is accurate (namely, that s 80AF affects only a substantive right to a specific mode of proof), then (c) s 80AF is written explicitly to remove that right.

56. The question remains as to whether s 80AF does so (ie, removes such right) in its application to pending proceedings. In circumstances where the presumption is weak and the statute is explicitly directed at removing the right claimed by the appellant, the approach taken in *Hutchinson v Jauncey* and *Bawn* (and *Lazarus*, *Goudappel* and *Minogue*) should be followed rather than treating *Lodhi* (in the way sought to be relied on by the appellant) as decisive. Even if the presumption had some strength in its

application to s 80AF, however, the respondent's submission is that the presumption can be rebutted by reference to considerations of text and purpose supporting a judicial finding that Parliament cannot reasonably be taken to have considered that the application of s 80AF to pending proceedings would be unjust. As Isaacs J once observed:[44]

> "'Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation.' That is the universal touchstone for the Court to apply to any given case. *But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it*. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side."[45] (emphasis added)

57. That is not to say, as Spigelman CJ did in *World Best* at [59], that the construction of a retrospective statute "requires the Court to determine the scope and degree of the unfairness or injustice that is applicable in the particular case." *World Best* has been disapproved of by this Court in *AEU* at [32] as involving a "broad evaluative judgment" of the fairness or justice of applying a retrospective provision in particular cases, and to the extent that *Lodhi* relied upon such an approach to distinguish decisions such as *Hutchinson v Jauncey* and *Bawn*, *Lodhi* should not be followed.

58. However, the modern approach to statutory construction requires that the context of a provision be considered in the first stage of statutory construction, and that context "is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole."[46] Section 33 of the *Interpretation Act* also requires the Court to prefer a construction that promotes the statutory purpose, ascertained by reference to the extrinsic material and legislative history,[47] and by facts taken to be within the knowledge of Parliament.[48]

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[44] *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 (***George Hudson***) at 434.
[45] The first sentence being a quote from *Maxwell on Statutes*, 6th ed, p 381.
[46] *A2* at [33] per Kiefel CJ and Keane J; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 (***SZTAL***) at [14] per Kiefel CJ, Nettle and Gordon JJ; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson J, Toohey J and Gummow J.
[47] See *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at [12], [20]-[21] per McHugh, Gummow, Hayne and Heydon JJ; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at [2]-[13] per French CJ, Hayne, Kiefel and Nettle JJ, [84], [98]-[113] per Gageler J; *SZTAL* at [39]-[44] per Gageler J.
[48] *Singh v Commonwealth* (2004) 222 CLR 322 at [12] per Gleeson CJ.

59. When it is asserted that Parliament should be taken not to have intended that a statutory provision applies to pending proceedings, the potential force of that assertion lies in the proposition that Parliament is taken not to intend an unjust outcome. However, the modern approach to statutory construction requires that such an assertion be contemplated with regard to "the whole of the circumstances which the Legislature may be assumed to have had before it": *George Hudson* at 434.

60. As an aspect of that analysis, where the extrinsic materials, legislative history and statutory context supports a judicial finding that Parliament could not be taken to have considered the application of a retrospective provision to pending proceedings unjust, it deprives the assertion that Parliament did not intend an unjust outcome in the application of the provision to pending proceedings of its force.

61. In this way, the substantive right said to be affected by a retrospective law, once precisely identified, equally provides both the basis for the presumption and the basis upon which that presumption may be rebutted by contradictory material.

62. Consistently with the analysis at [33] to [40] above, the basis for the presumption in the present case is that Parliament cannot be taken to have intended that an accused whose trial had commenced would be deprived of the 'right' to be acquitted in circumstances where he or she was proved, beyond reasonable doubt, to have engaged in conduct that was always criminal at the time it was committed but where it could not be said which offence-creating provision criminalised that conduct because of the recognised difficulties associated with prosecutions for historic child sex offending. If the presumption were to be given force in limiting the application of s 80AF to pending proceedings, it would have the effect of taking Parliament to intend that the identified problem nonetheless continue to operate in a trial that had already commenced. For the following reasons, Parliament cannot be taken to have intended such a thing.

63. *First*, as submitted at [40] above, the substantive right asserted by the appellant is better understood as a species of the 'dilemma of proof' that was the subject of negative comment by this Court in *Gilson*. In *Gilson*, a problem arose in which an accused was charged in the alternative with a count of shopbreaking and larceny and a count of receiving stolen goods. The evidence was such that the jury was "unable to say beyond reasonable doubt which of the two offences was committed by the accused, being at the same time convinced beyond reasonable doubt that he committed one or other of them": *Gilson* at 362 per Mason CJ, Deane, Dawson and Toohey JJ. The majority responded to this problem by deciding that when conduct capable of being an offence

under multiple provisions is proven beyond reasonable doubt, the solution is to enter a conviction for the offence for which the lesser punishment is provided. Their Honours observed at 363:

> "It is clearly unsatisfactory to require a jury to acquit an accused entirely when they are convinced beyond reasonable doubt that he was guilty of either theft or receiving, merely because, as a result of being required to apply the same standard of proof, they cannot determine which offence he committed. The law must surely be brought into disrepute if it is so bereft of answers that an accused who is clearly guilty of one offence or the other is allowed to escape conviction altogether."

64. *Secondly,* the text and structure of s 80AF – which resolves ambiguity as to which potentially applicable provision criminalises conduct by reference to the provision with the lowest maximum penalty – indicates, when considered against the extrinsic material, that Parliament should be taken to have accepted that the mischief to be solved by s 80AF as being similar or identical to that arising in *Gilson.* The Review Paper relevantly referred to *Gilson* and the proposed reform (which became s 80AF) was designed to be "consistent with the decision of *Gilson v The Queen*".[49] The work of the Review was acted on by Parliament (see further at [12]-[14] above).

65. *Thirdly,* the effect of the appellant's construction would be to take Parliament to have intended the purpose of s 80AF to be significantly frustrated by permitting situations of the precise kind it was intended to remedy to persist. On the appellant's construction, therefore, Parliament is to be taken to have acted on the Review but to have allowed a problem, which the Review characterised by reference to *Gilson*, to remain in pending proceedings in circumstances where such a characterisation implies the problem brings the law into disrepute. The respondent submits that such a judicial finding would not lightly be made.

66. *Fourthly,* it is clear that the plain language of s 80AF is "clearly inconsistent with the survival" of the pre-existing right that is said to be vested in the accused.[50] The section, in terms, "applies" once the criteria in sub-s (1) are met, most particularly at the stage when it "is uncertain as to when during a period conduct is alleged to have occurred": s 80AF(1)(a), such uncertainty often arising during a criminal trial as the evidence develops (see further at [13] above).

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[49] Review Paper at [6.10] and [6.12]: **RFM 16-17**.
[50] *AIRC* at [52] per Gaudron, McHugh, Gummow and Hayne JJ; see also *Goudappel* at [52] per Gageler J.

67. *Fifthly*, any perceived unfairness to the accused resulting from the invocation of s 80AF during the trial is offset by s 20 of the *CPA*, which requires that the amendment[51] of an indictment (which would be necessary in order to rely upon s 80AF) occur with the consent of the accused or by leave of the judge.[52]

68. The above reasons support the conclusion that s 80AF should not be read down so as not to apply to pending proceedings. The basis for the application of the presumption in this context is not compelling and is rebutted (per reasons one and two). A reading down would frustrate the purpose of s 80AF in a fundamental way (per reasons two and three). The text and structure of s 80AF does not favour such a construction (per reasons two and four). And any unfairness resulting from the application of s 80AF during a trial, including for trials commencing after s 80AF came into effect, is apt to be dealt with by s 20 of the *CPA* (per reason five).

69. The respondent submits that, on its proper construction, s 80AF applied to the appellant's trial. The appeal should be dismissed.

**Retrial**

70. In the event that the appeal is successful, the respondent does not press for an order for a retrial on any of counts 6, 7 or 13.

**Part VI: Estimate of Time**

71. The respondent estimates that 1.5 hours will be required for oral argument.

20 May 2022

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[51] Which includes substitution: *CPA*, s 20(3).
[52] As occurred here, without objection: **CAB 16** T14-15 (5.2.2019), **CAB 31** T447.37-41 (19 .2.2019).

## ANNEXURE

### Constitutional provisions, statutes and statutory instruments referred to in the respondent's submissions

| | Provision | Version |
|---|---|---|
| 1. | *Crimes Act 1900* (NSW), s 80AF | In force from 1 December 2018 to 26 September 2019 |
| 2. | *Crimes Act 1900* (NSW), s 81 | As in force prior to repeal on 8 June 1984 |
| 3. | *Crimes Act 1900* (NSW), s 78K | As in force from 8 June 1984 to 12 June 2003 |
| 4. | *Criminal Procedure Act 1986* (NSW), s 20 | As in force from 1 December 2018 to 31 December 2018 and 1 January 2019 to 25 September 2019 |
| 5. | *Interpretation Act 1987* (NSW), ss 5, 30, 33 | As in force from 28 November 2018 to 13 May 2020 |
| 6. | *Judiciary Act 1903* (Cth), s 78B | Version currently in force |