HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: BRIAN XERRI
Appellant

and

THE KING
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Publication

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of Oral Submissions

2. **The NSWCCA was correct to characterise the changes made to s 66EA by the Amending Act as resulting in the enactment of a "new offence": RS [25]-[29].**

   a. Proof of the predecessor offence (JBA V3 T3 p15) required proof of the commission of at least three unlawful sexual acts perpetrated by the accused upon the child. It was necessary for the jury to be unanimously satisfied beyond reasonable doubt of the same three unlawful sexual acts: *MK v R; RB v R* [2023] NSWCCA 180 (***MK***) at [22] (JBA V4 T18 p466), referring to *KBT v The Queen* (1997) 191 CLR 417. The current offence (JBA V3 T3 p17) requires proof of a relationship within which at least two unlawful sexual acts are committed: CCA [96] (CAB 49); [145] (CAB 58) The jury need not agree upon which unlawful sexual acts constitute the unlawful sexual relationship: s 66EA(5).

   b. Other differences include the defined age of a "child" as under 16, and the requirement for an accused to be 18 or over: CCA [91]-[92] (CAB 46-48). The predecessor offence operated prospectively, whereas the current offence applies to an unlawful sexual relationship which existed before the section commenced: s 66EA(7).

c. The current offence is not a re-enactment of the predecessor offence. The predecessor offence was repealed and replaced with a new offence, with different elements.

3. **The intention of the legislature to enact a new offence with retrospective application is clear from the text, history and context: RS [27], [37]-[39].** The current offence was enacted following recommendations of the Royal Commission. Parliament adopted the recommendations for the purpose of being able to prosecute historical ongoing child sexual abuse cases: CCA [105]-[106] (CAB 50-51); Royal Commission Report (JBA V5 T28 pp785-786); *MK* at [95]-[97] (JBA V4 T18 pp491-492). The "mischief" to which the current offence was directed was the fact that the predecessor offence had "not fulfilled [its] objective" to "assist the prosecution" of serious cases of ongoing child sexual abuse, where "many largely indistinguishable incidents of abuse made it difficult for victims to recall specific occasions with sufficient particularity for individual charges": Second Reading Speech (JBA V5 T29 p800). The retrospective application of the current offence was a "key part" of the Royal Commission's recommendations.

4. **Section 19 of the CSP Act does not apply to s 66EA because the repeal and replacement of the provision did not involve an "increase[] [in] the penalty for an offence": RS [17]-[24].** The determination of whether there has been the continuation of "an offence", with an increased maximum penalty, must be considered by reference to the factual ingredients or elements which constitute the crime and not by reference to the conduct engaged in which constitutes the crime in a particular case: *Kingswell v R* (1985) 159 CLR 264 at 292 (per Brennan J) (JBA V3 T10 p186); RS [29]-[31]; cf Reply [2]-[6]. If it is established that s 66EA is a new offence, then s 19 does not apply: RS [17]-[19].

5. **Section 66EA evinces a clear legislative intention that the maximum penalty of life imprisonment has retrospective application: RS [32]-[39].** Section 66EA(7) expressly provides for the retrospective application of "this section" (not "this offence") to an unlawful sexual relationship existing at any time before the current offence commenced: *Siganto v The Queen* (1998) 194 CLR 656 at [13]; [17] (JBA V3 T13 p298). There is no textual justification to divide the express retrospective application of the section. Any "reasonable expectation" that the appellant should only

be subject to a lesser penalty applicable to his unlawful conduct at the time of his offending is accommodated by s 66EA(8): cf *Stephens v R* (2022) 273 CLR 635 at [33]-[34] (JBA V3 T14 p329); RS [43]-[44]. The appellant's proposed construction produces incoherence as the maximum penalty of life imprisonment prescribed would apply to an offence committed before the commencement of the predecessor provision (and after its repeal), but not during its currency.

6. **The enactment of s 25AA of the CSP Act by the Amending Act does not affect the retrospective application of s 66EA: RS [45]-[46]**. Section 25AA of the CSP Act introduced a specific amendment to overturn a common rule applicable in NSW that, when sentencing for an historical child sexual assault offence, courts must apply the sentencing "patterns and practices" from the time of the offence: *Corliss v R* (2020) 282 A Crim R 195 (***Corliss***) at [82] (JBA V4 T17 p432). Section 25AA(4) made clear that this amendment did not affect s 19: *Corliss* at [64]-[70] (JBA V4 T17 pp427-8). But it has no impact upon the question of whether s 19 applies in its terms to s 66EA.

7. **Alternatively, if s 66EA is not considered to be a "new" offence such that s 19 does apply, then s 19 does not operate to deny the express retrospective application of s 66EA including the maximum penalty.** Section 19 is a general provision that confirms or alters the presumption against retrospective application for all offences, depending upon whether the maximum penalty has increased or decreased, to give the offender the benefit of the amendment: *R v MJR* (2002) 54 NSWLR 368 at [18]-[20] (JBA V4 T21, p537). Unlike most offences, s 66EA is not silent as to its temporal application. It expressly provides for its retrospective application, evincing a clear legislative choice that the presumption no longer operate. Section 19 is "insusceptible of application" to s 66EA: RS [40]-[42]. Section 66EA(7) abrogates or negates s 19(1): RS [47]-[48].

Dated 18 October 2023

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