IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S114 of 2013

BETWEEN:

BONANG DARIUS MAGAMING
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Filed on behalf of the appellant on 16 August 2013:

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PART I CERTIFICATION

1 The appellant certifies that these submissions are suitable for publication on the internet.

PART II ARGUMENT

The rule of law

2 The interveners do not appear to cavil with the appellant's submissions on the rule of law, but nor do they seek to answer the concerns raised by the appellant respecting the reconciliation of rule of law requirements with the statutory scheme challenged in this appeal.

3 Lord Diplock said: "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."[1] No intervener has indicated how the appellant before committing the offence could have known, in light of the effect of ss 233A and 233C, whether he would be sentenced to imprisonment for at least five years upon conviction. This and other aspects of the rule of law relied on by the appellant provide the backdrop against which the appellant's submissions respecting validity fall to be considered, and buttress the significance of the criticisms of the legislation made by the appellant.

No comparison with maximum penalties

4 The interveners seek in various ways to draw analogies between maximum and minimum penalties; see Commonwealth: [16], [49.1], New South Wales: [16], South Australia: [19]-[20], Western Australia: [37], [60]. But as acknowledged by the AHRC: [47], there are important differences between maximum and minimum penalties.

5 In the absence of a prescribed penalty, a statutory offence is accompanied by an open-ended sentencing discretion. Where a maximum penalty is prescribed for an offence, it determines "the extent of the judicial power to send an offender to prison and the corresponding liability of an offender to be sent to prison".[2] It *limits* the court's authority to deprive an offender of his or her liberty; does not *require* any deprivation of liberty; and *indicates* the legislature's view of the seriousness of the worst category of offending while permitting the judge to determine the weight to be given to that view in other cases. A minimum penalty is different in two ways: it *requires* that a court deprive *every* offender of his or her liberty to the specified extent; and it *requires* the court to treat *every* offence as being no less serious than the view expressed by the legislature, irrespective of the strength of the competing sentencing considerations to which it must also have regard. Minimum penalties thus differ significantly in degree and quality from maximum penalties; more so from the perspective of offenders. The expressions "ceiling" and "floor" obscure these differences.

6 Western Australia refers to examples of statutory schemes prescribing "a multiplicity of different offences with different graded maxima": [13], [38]. However, notably, there are few examples of schemes with different graded minimum penalties, and no other examples of such schemes proscribing the same conduct. Acceptance of the interveners' submissions in this case would permit the Parliament to enact a series of offences proscribing the same conduct with graded

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1 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 638 (Diplock LJ). See Friedrich Hayek, *The Road to Serfdom* (1944) 54 (identifying the principle that "government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's affairs on the basis of this knowledge"); Joseph Raz, 'The Rule of Law and Its Virtue' in Keith Culver (ed), *Readings in the Philosophy of Law* (1999) 13, 16 (associating the rule of law with the principle that "the law must be capable of guiding the behaviour of its subjects"). See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [102].

2 *Leeth v Commonwealth* (1992) 174 CLR 455 at 475 (Brennan J).

minimum penalties, leaving the choice of sentence upon conviction to a non-judicial body. The exclusively judicial function of determining sentences for individual offenders should not be permitted to be removed from the courts in that way.

7 Western Australia also raises "each way offences", or offences that may be tried either summarily or on indictment: [39]. Although the choice between those processes may expose an offender to a lower or higher maximum penalty respectively, limiting the court's authority to deprive an offender of liberty to a greater or lesser extent, the choice never *requires* a deprivation of liberty. That question is left to the judiciary. The result is that there is no necessary connection between the choice of procedure and any subsequent deprivation of liberty. The selection of a charge in that way "is capable of having a bearing on the sentence",[3] but in a manner unlike a minimum penalty.

8 For the same reasons, the Commonwealth is also incorrect to submit that the logic of the appellant's argument forbids a prosecutor to choose between offences attracting different maximum penalties: [16]. That choice does not entail any deprivation of liberty for the offender.

Construction of ss 233A and 233C

9 Section 23(b) of the *Acts Interpretation Act 1901* (Cth) provides that "words in the singular number include the plural", subject to a contrary intention: s 2(2). On their face, the expressions "second person" and "another person" in s 233A include third, fourth and fifth persons and other people respectively. The use of a word in the singular number is the very kind of language to which s 23(b) is directed and cannot itself demonstrate the contrary intention required by s 2(2). None of the interveners have pointed to any other textual basis showing a contrary intention.

10 Such textual indications as exist point instead to the appellant's construction. Section 233C(3) makes plain that prosecution of a charge of smuggling five people contrary to s 233C presents no bar to conviction for the offence of smuggling between one and four people contrary to s 233A. The suggestion of the Commonwealth: [34.1] and New South Wales: [8] that no offence exists of smuggling between two and four people is irrational. There is no basis upon which it can be said that the legislature intended the statute to operate in that way. Indeed, the Attorney-General's direction reveals that the statute does not in practice operate in that way.

11 Moreover, the construction that the Commonwealth seeks to place on s 233A would not have the result for which it contends: [34.3]. Had the appellant been convicted of five counts of smuggling under s 233A instead of one count under s 233C, the facts before the sentencing judge would have been no different. Although a plea of guilty does not admit any matter of aggravation or deny any matter of mitigation not covered by the offence charged, the plea necessarily admits the elements of the offence.[4] In the appellant's case, admission of the elements of five counts of smuggling under s 233A necessarily involved admission of the elements of one count under s 233C.

12 Having convicted the offender of five counts contrary to s 233A, it is not possible for the sentencing judge to apply *De Simoni*[5] to exclude consideration of the fifth person smuggled, because to do so would be to ignore entirely one of the five offences of which the offender has been convicted. Contrary to the Commonwealth's submissions: [34.3], *De Simoni* cannot be applied where the elements of the so-called 'aggravated' offence represent a multiple of the elements of another offence.[6] Section 233C does not include an aggravating element such as a danger of death or serious harm as may be found in the aggravated offence in s 233B. Sections 233A and 233C proscribe the same conduct and cannot be compared to other statutory schemes involving tiers of aggravation comprised of different elements.

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3 *Elias v The Queen* [2013] HCA 31 at [34] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

4 *R v Jobson* [1989] 2 Qd R 464 at 475 (Ryan J with whom Connolly J agreed).

5 *R v De Simoni* (1981) 147 CLR 383 at 389 (Gibbs CJ).

6 South Australia appears to recognise this implicitly by referring to *De Simoni* only in relation to a single count of an offence contrary to s 233A and omitting any reference to *De Simoni* in relation to multiple counts: [21].

13 New South Wales submits that facilitating the entry of multiple non-citizens is "not properly characterised as a single act": [8], but that cannot be correct in a case such as the present where the appellant's offending conduct was helping to "steer the boat", being a boat that carried multiple non-citizens. In any event, New South Wales accepts that, for the class of offenders who have smuggled five or more persons, there is a choice of "either five or more counts under s 233A or one count under s 233C": [8(a)]. The appellant also does not submit that "the prosecutorial choice of charge determines a person's sentence *in any case* where an offence with a mandatory minimum sentence is selected": cf NSW [11].

14 Ultimately, on either construction of s 233A, the proposition that the same conduct "is viewed divergently by Parliament" remains: [57] **AB55**. It is that proposition that denies the conclusion that there is a legislative judgment as to the irreducible seriousness of an offence against ss 233A and 233C. In the absence of such a judgment, this sui generis law cannot stand.

Arbitrariness

15 The concept of arbitrariness is not limited to the taxation power, as suggested by the Commonwealth: [42], South Australia: [58] fn 101, and Western Australia: [44]. It invokes more general principles of "elementary constitutional law".[7] For example, the observations of Kitto J in *Giris*[8] are closely related to this court's recognition that the absence of a power in the executive to dispense with statute law is "an aspect of the rule of law".[9] That statement applies equally to a sentencing law such as s 236B(3)(c). Although New South Wales submits that a choice between s 233A and 233C would "presumably" be made "following an assessment of the available evidence" and in accordance with applicable policies and directions: [9], that does not deny in this case that the choice determined the appellant's sentence without reference to ascertainable (statutory) criteria and other than by the exercise of judicial power.

The rule of law and proportionality

16 The interveners object to the foundation and application of any principle of proportionality. But proportionality is founded on the rule of law.[10] To the extent there is tension between a federal law and the separation or content of federal judicial power,[11] the use of a proportionality formulation is a rational way to resolve that tension.[12] It is a formula that is intended to reflect the appropriate constitutional relationship between the judiciary and the other branches of government.[13]

17 The suggestion by the Commonwealth that there are no "workable criteria" for a proportionality approach: [40] cannot be reconciled with the decisions of this court in which such approaches have not infrequently been taken. That one "overarching ideology" is yet to emerge is simply a reflection of the "careful, incremental common law method, by which the accretion of cases and academic commentary, sometimes conflicting, crystallise into general principles over time".[14]

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7 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639 (Gibbs CJ, Wilson, Deane and Dawson JJ), 658-659 (Brennan J).

8 *Giris Pty Ltd v Commissioner of Taxation* (1969) 119 CLR 365 at 379 (Kitto J) (referring to a law that "purports to authorize an administrative officer to exclude from the application of a law any case in which he disapproves of its application").

9 *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348 at [13] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also *Plaintiff M79-2012 v Minister for Immigration and Citizenship* [2013] HCA 24 at [87]-[88] (Hayne J).

10 *Momcilovic v The Queen* (2011) 245 CLR 1 at [562] (Crennan and Kiefel JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [457] (Kiefel J); David Beatty, *The Ultimate Rule of Law* (2004) 159-188, 163.

11 *South Australia v Totani* (2010) 242 CLR 1 at [423]-[424] (Crennan and Bell JJ).

12 *Monis v The Queen* (2013) 87 ALJR 340 at [346] (Crennan, Kiefel and Bell JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [424]-[466] (Kiefel J).

13 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [33] (Gleeson CJ).

14 George Williams and David Hume, *Human Rights under the Australian Constitution* (2013) 137.

Judicial assessment of the seriousness of an offence

18 The place in the sentencing synthesis of the legislature's assessment of the seriousness of an offence is not as hallowed as the interveners submit. South Australia submits that a sentence "is not any more or less proportionate" where an offender's sentence is increased "as a result of an increased maximum penalty or the introduction of a minimum penalty": [37]. Although it is correct to say that the court "is sentencing *the* offender for *the* offence",[15] it does not follow that the sentencing judge cannot or should not make an independent assessment of the objective seriousness of the offence for which the offender is being sentenced. For the reasons which follow, the submissions of the interveners should not be accepted.

19 Although a maximum penalty operates as a jurisdictional limit and careful attention to it is almost always required, the weight to be given to it in the final synthesis is a matter for the sentencing judge. In some cases, the maximum penalty will properly be seen to be "of little relevance".[16] Thus the sentencing judge's own assessment of the gravity of the proscribed conduct, independently of Parliament's assessment, remains important. In *Veen*, Deane J said: "It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors – such as good character, previous offences, repentance, restitution, possible rehabilitation and intransigence – will point to what is the appropriate sentence in all the circumstances of the present case."[17]

20 The sentencing judge's duty is to "arrive at a sentence that is just in all of the circumstances" even where the maximum penalty, representing the legislature's view of the seriousness of the offence, may pull towards a higher sentence.[18] That is the force of Mildren J's conclusion that "the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case".[19] The "justice of the case" refers to standards implicitly applied in the exercise of judicial power to reach sentences that "accord with the general moral sense of the community".[20]

21 The determination of what is a "just" sentence lies at the heart of the judicial power to sentence offenders, and occurs by reference to those implicit judicial standards.[21] There are limits on Parliament's ability to rewrite those standards, and limits on Parliament's ability to redefine the judiciary's assessment of what is "just", transgressed in this case by the prescription of a minimum penalty irreconcilable with the least serious category of offending. In other words, "the assessment of a just and appropriate sentence is ultimately a judicial task, by the deployment of judicial method": [120] **AB77**, and this law distorts that task to an impermissible extent.

22 That Parliament may eliminate sentencing discretion altogether does not detract from the proposition that Parliament cannot require a sentencing judge, in the apparent exercise of a discretion reposed in him or her, to impose a sentence that is contrary to accepted notions of judicial power. Where there exists judicial discretion, there must exist judicial standards. The Commonwealth is incorrect to submit otherwise: [45.1].

23 As the AHRC points out, the judicial assessment described above can be made a priori by inspection of the legislation: [48], although a person may not have standing unless convicted.

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15 Commonwealth: [15.1] and New South Wales: [15], citing *Elias v The Queen* [2013] HCA 31 at [26] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

16 *Elias v The Queen* [2013] HCA 31 at [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ), citing *Markarian v The Queen* (2005) 228 CLR 357 at [30] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

17 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 490 (Deane J).

18 *Elias v The Queen* [2013] HCA 31 at [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

19 *Trenerry v Bradley* (1997) 115 NTR 1 at 11 (Mildren J).

20 *R v Rushby* [1977] 1 NSWLR 594 at 598 (Street CJ, Lee and Slattery JJ), citing *R v Geddes* (1936) 36 SR(NSW) 554 at 555 (Jordan CJ).

21 Allsop P described these standards by reference to "inhering norms of fairness, justice and equality": [120] **AB78**.

Procedural fairness

24 The Commonwealth correctly submits that a prosecutor, prior to laying charges, owes no duty to inform a person of the charges that may be laid against that person: [62]. However, it does not follow in relation to this statutory scheme that "there is no practical unfairness" to the appellant and "no possible grounds for a stay". The absence of a prosecutorial duty of that kind does not deny that the critical component of the appellant's sentence was determined by a process in which he was not heard. Neither the Commonwealth nor any other intervener has submitted that the appellant was so heard, nor could that submission be made. The result is that the sentencing court was conscripted to a process that is unfair to offenders. It is the impermissibility of that result on which the appellant relies, and not whether the prosecutor should have done anything else. This law required the court to sentence the appellant notwithstanding the practical unfairness he faced.

25 It could only be said that there was no "practical unfairness" to the appellant if it were a necessary consequence of his offending conduct that he be sentenced to at least five years upon conviction. The Attorney-General's direction confirms that was not the case: **AB24-25**.

Equal justice

26 New South Wales submits that equal justice is not violated because "co-offenders who are convicted under the two different sections are not identically situated before the law": [21]. However, once it is accepted that the hypothesised distinction between co-offenders is limited to the form of the charge, as New South Wales appears to accept: [8](a), the submission cannot be maintained. The offences do not involve "distinct conduct": cf NSW [23]. South Australia also submits that "the penalty applicable to different offences is ... a relevant difference between co-offenders": [62]. To accept that submission in circumstances where "[t]wo provisions of the same polity's legislation have criminalised the same conduct with significantly different penalties" would be to allow form to triumph over substance: [56] **AB54**.

Other decisions

27 Barwick CJ's dicta in *Palling* were unnecessary to decide the case and should not be given the breadth for which the Commonwealth contends: [36]. *Palling* should be distinguished for the reasons explained by the appellant in his submissions at [101]-[108]. If *Fraser Henleins* cannot be distinguished, it should not be followed. The elucidation since 1945 of the nature of judicial power, the requirements of Ch III and the relationship between the judiciary and the other arms of government requires a more nuanced approach than was apparently taken in that decision.

28 Such developments are readily demonstrated. For example, South Australia submits that the courts "do not adjudge and punish criminal guilt of their own motion": [28]. But in *Lowenstein* a federal law that confers jurisdiction on a federal court to charge, try, convict and sentence a person for a bankruptcy offence was held valid.[22] Leave to reopen that decision was refused in *Sachter*.[23] Those cases straddle *Fraser Henleins* and were decided at a time when there was a different understanding of the constitutional separation of prosecutorial and judicial functions. This court should revisit the issues now raised with the benefit of its later jurisprudence.

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22 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556.

23 *Sachter v Attorney-General (Cth)* (1954) 94 CLR 86 at 88 (Dixon CJ).