IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S28 of 2013

BETWEEN

ROBERT AGIUS
Appellant

and

10

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II: Concise statement of issues

20 2. The respondent accepts that this appeal raises the issues set out in Part II of the Appellant's Further Amended Submissions ("AFAS") filed 5 April 2013 save as follows:

In paragraph 2(a) the respondent submits the issue should be read absent the words *"to have been entered into"*, viz:

> "Does proof of a conspiracy alleged contrary to *Criminal Code Act* 1995 (The Code) s.135.5(4) require evidence of an agreement entered into on or after 24 May 2001?"; and

In paragraph 2(c) the respondent submits the issue should be read absent the word *"retrospectively"*, viz:

30 > "Can the Code s.135.4(5) apply to an agreement entered into before 24 May 2001 as proof of a conspiracy charged under s.135.4(5)?

Filed on behalf of the respondent

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Part III: Certification in respect of s.78B *Judiciary Act 1903 (Cth)*

3. The respondent has considered whether any notice should be given in compliance with s.78B and agrees with the appellant that no such notice is required.

Part IV: Statement of material facts

4. The respondent takes no issue with statement of narrative facts set out in Part V of the AFAS.

Part V: Statement with respect to applicable constitutional provisions, statutes and regulations

10 5. The appellant does not identify any applicable constitutional provisions or regulations. The respondent does not contend that there are any applicable constitutional provisions or regulations. The appellant identifies and submits upon applicable statutes and sets out relevant legislative history. The respondent accepts their relevance but for the reasons that follow submits the interpretation placed on them by the appellant is incorrect.

Part VI: Statement of argument in response to the appellant's argument

Need for agreement (Notice of Appeal Ground 1)

6. The Crown case at trial was that there was one conspiratorial agreement to which, inter alia, the appellant and the co-offender, Kevin Zerafa, were
20 parties which existed between about 1 January 1997 and about 23 October 2006 and therefore encompassed both counts in the indictment. The Crown case was that the appellant and his co-accused were parties to the agreement and were carrying it out before and up to the commencement of 24 May 2001. The Crown case was that as and from that date they continued as parties to the agreement and participants in its implementation.

7. The agreement alleged by the Crown had both the characteristics of an agreement to defraud the Commonwealth within the meaning of s.86(1) and s.29D of the Crimes Act 1914 (Cth) and an agreement to dishonestly
30 cause a loss or a risk of loss to the Commonwealth within the meaning of s.135.4(5) of the Criminal Code Act 1995 (Cth). The Crown case was that where, prior to the commencement of the Code offence, persons were

parties to and implementing a conspiratorial agreement that satisfies the requirements of the Code offence, they commit that offence if the agreement continues and they remain parties to it, provided only that at least one party to the agreement commits an overt act pursuant to the agreement.[1]

8. It is not necessary for the parties to the antecedent agreement to enter into a new agreement in order to be guilty of the Code offence on the basis propounded. The reasons of French CJ in *R v LK and RK* (2010) 241 CLR 177; [2010] HCA 17 commence with the following statement:

> *1. The offence of conspiracy created by the Criminal Code (Cth) ("the Code") is committed where there* ***is*** *an agreement between the offender and one or more other persons, coupled with an intention, on the part of the offender and at least one of the other persons, that an offence will be committed pursuant to the agreement. Proof of commission of an overt act by the offender or another party to the agreement pursuant to the agreement is necessary.* (emphasis added).

On the Crown case the requirement that as at 24 May 2001 there *is* an agreement was satisfied. Nothing in the reasons of the plurality[2] in *R v LK and RK* is inconsistent with the statement of principle enunciated by French CJ.

9. Further, French CJ at [42], drew attention to s.3.1 of the Code and noted that, as defined in s.4.1(1), a physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

His Honour pointed out that conduct is broadly defined by s.4.1(2) to mean *"an act, an omission to perform an act or a state of affairs."* To *"engage in conduct"* means to *"do an act"* or to *"omit to perform an act"*.

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1 There was no issue at the trial that this requirement was satisfied.

2 Gummow, Hayne, Crennan, Kiefel and Bell JJ.

However the concept of engaging in conduct which is a state of affairs is not explained.

10. Relevant to count 2 in the indictment, s.4.1 enabled the physical element of the offence to be satisfied by the circumstance of a state of affairs existing, namely a conspiratorial agreement existing at the commencement of 24 May 2001 which, immediately before and after that time, was being implemented without interruption by the appellant and others.

11. In *R v LK and RK* at [107] the plurality said that Spigelman CJ's conclusion[3] that the words *"conspires"* and *"conspiracy"* in s.11.5(1) of the Code are to be understood as fixed by the common law subject to express statutory modification is to be accepted. The respondent accepts that this statement of principle applies equally to the conspiracy offence under s.135.4(5) of the Code. However the requirement in subsection 135.4(9)(a) that for a person to be guilty of an offence against the section the person must have entered into an agreement with one or more other persons is not an express statutory modification of the common law but merely a re-statement of it[4].

12. In *R v Ansari* (2007) 70 NSWLR 89; [2007] NSWCCA 204 Howie J, with whom Simpson and Hislop JJ relevantly agreed, held, at [66], that the offence of conspiracy under the Code is similar to that at common law but with three differences. Under the Code:

(a) it is not an offence to enter into an agreement to commit a lawful act by unlawful means;

(b) it is not an offence to agree to commit a crime for which the maximum penalty is less than that stated in the section (relevantly, s.11.5(1));

(c) there must be an overt act committed by at least one person toward the achievement of the object of the agreement[5].

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3 In *R v RK and LK* [2008] NSWCCA 338 at [47]-[49].

4 Noting also that s86(3) of the Crimes Act 1914 was in the same terms.

5 The need for an overt act also appeared in s86(3)(c) of the Crimes Act 1914.

13. Subsequent decisions of this Court have cast no doubt upon Howie J's characterisation of the differences between the offence of conspiracy under the common law and under the Code.[6] It was expressly accepted by the Court of Criminal Appeal at [69]-[71] where Johnson J, at [71], held that the only presently relevant alteration to the common law is that effected by s.135.4(9)(c), which requires proof of the commission of an overt act pursuant to the agreement. [AB 79]

14. In the decision of the Court of Criminal Appeal in *R v RK and LK* (2008) 73 NSWLR 80; [2008] NSWCCA 338 Spigelman CJ, with whom Grove and Fullerton JJ agreed, identified, at [55]-[56], the critical aspect of the common law offence of conspiracy to commit an offence that is picked up by the Code is that an accused must know the facts that make the act or acts unlawful. This is because the mere intention to enter into an agreement is an intention without a moral component of any character. It is the subject matter of the agreement where the moral culpability required for a criminal offence must be identified. In the crime of conspiracy, the requisite moral culpability cannot exist unless the accused knows the facts that make the conduct unlawful. It follows, in the Crown's submission, that an antecedent agreement in place and being implemented at the time the Code offence commenced, which has the characteristics of moral culpability required by the Code offence i.e. those set out in s.135.4(5)[7] is necessarily a conspiracy within the meaning of s.135.4(5)(a) of the Code.

15. Although, as the appellant submits, the plurality in *R v LK and RK*, at [133], said that s.11.5(2)(b) looks to the time at which the agreement was entered, their Honours were not discussing time in the context relevant to this appeal. The Crown submits that nothing that fell from their Honours precludes the time being antecedent to the commencement of the Code offence.

16. The Court of Criminal Appeal in this matter[8] noted at [29] that at [25]-[30] of the first instance decision Simpson J set out a number of principles [AB 65-66] [AB 27-28]

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6 *Ansari v The Queen* (2010) 241 CLR 299; [2010] HCA 18 and *R v RK and LK* (supra).

7 Subject to s.135.4(9).

8 *Agius v R; Abidabra v R; Jandagi v R; Zerafa v R* (2011) 80 NSWLR 486; [2011] NSWCCA 119. Johnson J, with whom Tobias AJA and Hall J agreed, at [46]-[62], adopted and expanded upon Simpson J's categorisation at first instance (*Agius v R;*

concerning the common law crime of conspiracy which, apart from the last sentence in [30], were not challenged by the appellant. The Crown submits that Johnson J's exposition at [46]-[62] is correct. By reference to his Honour's citation of the well known passages in the judgment of Fenton-Atkinson J in *R v Simmonds* (1969) 1 QB 685 at 696[9], it would be unrealistic to construe the Code as only allowing the prosecution of conspiracies entered by persons simultaneously on one occasion and not criminalise the actions of late joiners, or to contemplate conspirators leaving. The fact that the Code in s.135.4(12) provides a defence of withdrawal from the agreement on the conditions stated therein points in the opposite direction, namely that participation, rather than entry, is the actus reus or physical element. Otherwise it would not be possible for the entrenched principle of conspiracy re-stated by Fenton-Atkinson J in *Simmonds* to apply, that is, for A and B to initially conspire and then for C to join in, A to drop out and be replaced by D. If the actus reus is spent at the moment of the entry into the agreement between A and B, which essentially appears to be what the appellant contends, there is nothing for C to join at a later time. In other words, there is no counter-party for C, unless a fresh agreement is entered into between A, B and C. Such a proposition is contrary to the long history of the law of conspiracy and would represent a radical departure from authority.[10] [AB 72-77]

17. On the proposition contended for by the appellant, if three conspirators entered into the agreement shortly before the Code offence commenced and a fourth entered into it with them shortly thereafter, three would be guilty of the crime of conspiracy (albeit under sections 86 and 29B of the Crimes Act 1914[11]) but the fourth could not be guilty of any offence of conspiracy. The Crown submits that this is not how the legislative scheme operates. Rather, the position is as stated by Simpson J in the first instance

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Abidabra v R; Jandagi v R; Zerafa v R [2011] NSWSC 367) of the actus reus of conspiracy at common law.

9 Set out in the CCA judgment at [54].

10 In *B v R* [2008] NSWCCA 85 at [66] Spigelman CJ, with whom James and Howie JJ agreed, stated in relation to the Code conspiracy offence – *"Mr Walker accepted that it was the nature of the conspiracy charged that there would be various permutations. To give only one example, it has long been accepted that it is not necessary that all conspirators join the conspiracy at the same time, nor that they participated in the same way or to the same extent."*

11 Provided there was proof of an overt act: s86(3)(c).

decision at [48], namely that the relevant conduct is criminalised by two different legislative regimes. [AB 34]

18. One can extend the appellant's argument to its logical conclusion by observing that if the initial agreement was entered into by three conspirators simultaneously after the Code offence commenced, say in June 2001, and then a fourth joined the agreement in September 2001, the fourth person would not be guilty of the crime of conspiracy because there would be no counter-party to the agreement. As stated by Viscount Dilhorne in *R v Doot* [1973] AC 807 at 823:

> *In Reg v Murphy (1837) 8 C & P 297 Coleridge J said in the course of his direction to the jury, at p.311:*
>
> > *'It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. You are to say whether, from the acts that have been proved, you are satisfied that these defendants were acting in concert in this manner.'*
>
> *This statement of Coleridge J has not been questioned and I take it to be well established that it is a correct statement of the law. If it is, it is not easy to reconcile it with the view expressed by the Court of Appeal, for the man who joins a conspiracy after it has been formed was not a party to the conspiracy when it was "completed". The fact that a man who later joins a conspiracy may be convicted of it shows that although the offence is complete in one sense when the conspiracy is made, it is nevertheless a continuing offence.*

19. This accords with Hope JA's oft-cited judgment in *R v Saffron* (1988) 17 NSWLR 395 at 419G (Clarke JA and Hunt A-JA agreeing):

> *"Although a conspiracy may be established by proving an agreement which has never been implemented, it is not necessary in the usual case where a succession of overt acts are relied upon to prove the conspiracy to establish a date when, or the date before which, the conspiratorial agreement was made: R v Ongley* (1940) 57 WN (NSW) 116 at 117. *What the Crown generally seeks to prove in such a case are facts that go to establish that two or more persons acted in concert to achieve an unlawful object ... The agreement is to be inferred from those facts, which may*

> *be the "separate acts of the individuals charged which, although separate acts, yet point to a common design and when considered in combination justify the conclusion that there must have been a combination such as that alleged in the indictment": Tripodi v The Queen (1961) 104 CLR 1 at 6, quoted in Ahern v The Queen (1988) 165 CLR 87 at 93; 34 A Crim R 175 at 177.*

20. The relevant passage from *R v Ongley* (1940) 57 WN (NSW) 116 at 117, per Jordan CJ (referred to in *Saffron)* is as follows:

> *Although facts necessary to establish an agreement between the accused must be proved, it is not necessary to adduce such evidence of agreement as would be required in an action of assumpsit. The prosecution is not called upon to define the exact moment at which the conspiracy began or the exact act which marked its inception: R v Pepper.(15). If it is established that the accused did things which indicate that they were acting in concert to achieve a common purpose, this supplies all the evidence that is required to establish that they had agreed to achieve that purpose. Indeed, in a prosecution for conspiracy it is unusual for any other evidence of agreement to be tendered than is supplied by evidence of the respective overt acts.*

21. The appellant places heavy reliance on this Court's decision in *R v LK and RK* but in the Crown's submission his approach elevates the case to authority determining the actus reus of conspiracy at common law and under the Code when, relevantly, it was concerned with the elements of the offence of conspiracy under s.11.5(1) of the Code. The Code offences under both s.11.5(1) and 135.4(5) are committed when there is an agreement between the offender and one or more other persons, coupled with an intention, on the part of the offender that at least one of the other persons, that the respective proscribed acts will be done pursuant to the agreement.[12] At the time the s.135.4(5) offence commenced,[13] the requirement that there is an agreement was satisfied because an antecedent agreement existed which was being and continued to be implemented.[14]

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12 Together with proof of an overt act.

13 24 May 2001.

14 With the appellant being a participant throughout.

Express statutory modification and retrospectivity (Notice of Appeal grounds 2(a) and (c))

22. The Crown takes issue with the last sentence of AFAS [18]. Issue is also taken with the whole of AFAS [19]-[20]. So far as concerns AFAS [21], no issue is taken with the first two sentences or the fourth sentence. So far as concerns the third sentence, it was the Crown case at trial that the four accused were parties to the agreement until 23 October 2006. The Crown case was that the agreement was brought to an end by the intervention of the Australian Federal Police on 23 October 2006 by the execution of a search warrant on the Burwood premises of OTD and the seizure under the warrant of a large quantity of documents and other items.[15] However, on the Crown's argument, it was not necessary for all of the accused to have continued to be parties to the agreement until it was so ended. One or more of them could have withdrawn from the agreement at an earlier time, although on the Crown case that did not happen. As to the last sentence the Crown does not say, and has never said, that any of the four accused joined the agreement a second time.

R v Doot [1973] AC 807

23. In response to AFAS [22], the Crown submits that *Doot* is directly analogous to the present case, for the reasons given by Johnson J in the CCA decision at [51]-[57].[16] The fact that in *Doot* there was no question of the conduct in England being the product of a second conspiracy does not detract from its force or applicability to this case. Johnson J's reasoning is sound, including his Honour's analysis of the nature of a continuing offence in the judgment below at [58]-[61]. [AB 73-76] [AB 76-77]

24. The submission at AFAS [23] should be rejected.

Retrospectivity and legislative history

25. No issue is taken with AFAS [24]-[28] or with the legislative history at [48] subject to the submissions below as to Item 418 of the transitional

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15 Many of which became Crown exhibits in the trial.

16 And also for the reasons given by Simpson J at first instance at [36]-[38].

provisions.[17] Item 418 has the effect of preserving the criminality of relevant conduct committed prior to 24 May 2001 when sections 29D and 86(2) of the Crimes Act were repealed and s.135.4(5) of the Code commenced. Even without such a provision s.7(2) of the *Acts Interpretation Act 1901 (Cth)* would probably have the same effect. Such provisions are unremarkable. Prosecutions charged under repealed acts are regularly dealt with in the criminal courts of Australia. Count 1 in the indictment was able to proceed as a result of Item 418.

26. The transitional provision, however, does not have the effect contended for in AFAS [30]-[31], namely *"that there was no need for the Crown to charge two counts of conspiracy in this matter"* as *"such conduct could adequately be prosecuted"* under count 1. Item 418 has nothing to say about this situation. The appellant's submission at AFAS [30] that once the agreement was made *"steps were taken in furtherance of the conspiracy from 1997 to 2006"* and therefore those *"steps"* could adequately be prosecuted by an offence ending on 23 May 2001 is not correct. Rather, those *"steps"* evidence a continuing conspiracy and continuing criminal conduct. However the continuing conduct is criminalised under a new legislative regime.

27. The effect of the transitional provisions was correctly set out by Simpson J in the first instance decision at [18]-[20] and [46]-[48][18]. Her Honour's encapsulation of them was accepted as accurate by the Court of Criminal Appeal: see the reasons of Johnson J at [26]-[27] and [85]-[89].[19] The appellant did not submit to either Simpson J or the Court of Criminal Appeal the matters put to this Court at AFAS [31] and the first sentence of [32]. [AB 25-26 and 34] [AB 63-64 and 82-83]

28. So far as concerns the submission in the second sentence at AFAS [32], the question whether it was open to the CDPP to bring charges in respect of substantive offences is not relevant to the issues falling for

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17 *Criminal Code Amendment (Theft Bribery and Related Offences) Act 2000,* Schedule 2, Item 418. [AB 30-31]

18 It is clear from the appellant's submissions before this Court that he acknowledges the transitional provisions under the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (the Act which effected the repeal of the remainder of s86 on 15 December 2001) are irrelevant.

19 The Court of Criminal Appeal expressly found that Simpson J's analysis and application of the transitional provisions was correct: see Johnson J at [89].

determination by this Court. Plainly the charges on the indictment were not brought lightly, given that under s.135.4(14) of the Code they were brought with the express consent of the Director of Public Prosecutions. In any event the mere assertion that substantive charges were available should not be taken as establishing the matter asserted. It was expressly agreed at the trial, in respect of all of the eight client companies of OTD and their directors involved in the scheme, that the appellant had no involvement whatever (either with members of OTD or the directors of the companies) in the preparation and lodgment of the company and personal tax returns by which, under the Australian taxation self-assessment regime, the frauds on the Commonwealth were perpetrated. The appellant was predominantly based outside of Australia during the period of the charges, although he made visits to the OTD premises from time to time and had discussions with some of the directors whose companies participated in the scheme. However none of the directors or their companies were his clients at any time and he had no input into the preparation and lodgment of the relevant tax returns. In these circumstances the bare assertion that substantive offences were available against the appellant is, if relevant at all,[20] of no weight.

29. Further,[21] the first eight pages of the Particulars of Conspiracy and Overt Acts reproduced at AB 5-12 are a precursor to the overviews and summaries of evidence concerning the Australian companies and their officers that followed in the full set of Particulars served by the Crown (not reproduced) which total 836 pages including summaries of many bodies of evidence. The Particulars as a whole identified innumerable acts of the appellant over ten years (as did the evidence in the trial) relied on as overt acts in proof of the charges on the indictment. The practical impossibility of prosecuting the appellant on substantive charges for his criminal acts in the count 2 period is relevant to the issue at AFAS [32], last sentence, if the issue is relevant.[22]

30. As to AFAS [33] to apply s.4.1 in its terms with respect to *"a state of affairs"* does not give s.135.4 a retrospective effect. Because under s.4.1(2) conduct means, inter alia, a state of affairs and because, self

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20 The Crown submits it has no relevance.

21 But hopefully without labouring the point.

22 The Crown submits that it is not.

evidently, a state of affairs can exist at the time of commencement of s.135.4(5) of the Code, the requirement of s.135.4(9)(a) is satisfied, namely that the person (here the appellant) has entered into an agreement with one or more other persons (as at the time of commencement of the Code offence) because that state of affairs existed at that time. This is to give s.135.4(5) a current, not a retrospective, operation.

31. Similarly, reference AFAS [34], there is a fundamental difference between an immediate effect and a retrospective effect. It is the former that applies to count 2.

32. So far as concerns the submissions at AFAS [35]-[37], the passage cited from the Explanatory Memorandum says nothing relevant to the issue in question. The *"agreement component of a conspiracy"* must necessarily incorporate (knowing) participation in the conspiracy so long as the agreement component subsists, unless the common law of conspiracy is to be turned on its head. Nothing in the cited paragraphs from the Explanatory Memorandum at AFAS [36] supports the appellant's submission at AFAS [37] if the submission is intended to be understood as meaning that the crime of conspiracy has ended at the time the parties intentionally entered the conspiratorial agreement. The appellant's submissions as a whole avoid coming to grips with the fact that conspiracy at common law, under the Crimes Act and under the Code is a continuing offence.

33. The submission at AFAS [38] misconceives the Crown's position. It is not *"to separate the acts of forming the intention from the agreement"*. It is merely to recognise that, both under the common law and the Code, the commission of the crime of conspiracy is not, and rarely will be, concluded at the moment the agreement is entered by the *original* conspirators. The common law, which has never been doubted, was succinctly stated by Lord Pearson in *Doot* (supra) at 827 at follows:

> *When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place ... But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried*

> *out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be.*[23]

Nothing in the judgment of the Court of Criminal Appeal in this matter gives s.135.4(5) a retrospective construction.

34. It is uncontroversial that by s.4.1(2) conduct includes *"a state of affairs"*. A state of affairs connotes a situation with particular attributes, as explained in the Oxford English Dictionary – *"the (or a) state of things or affairs"* means *"the way in which events or circumstances stand disposed (at a particular time or within a particular sphere)."* Johnson J's consideration of a state of affairs in the decision below at [76]-[84] is correct, particularly his Honour's acceptance at [79] that an ongoing conspiracy is a state of affairs, and hence conduct, within the meaning of the Code, and that being a party to an ongoing conspiracy is a state of affairs with the same consequence. Clearly the way in which events or circumstances stand disposed at a particular time, that is, the attributes of a state of affairs, must have come about as a result of things that happened in the past but this does not give a state of affairs a retrospective effect or result in it having retrospective operation. A state of affairs, relevant to this case, simply recognises how circumstances stand at the time the Code offence commenced. Therefore, in response to AFAS [38]-[43] the appellant's submission that, effectively, the Court of Criminal Appeal has given a state of affairs within the meaning of s.4.1(2) of the Code a retrospective construction is flawed. [AB 80-82]

State of affairs (Notice of Appeal Ground 2(b))

35. Further to the above, the submission at AFAS [44] cannot sit with the language of s.4.1(2) which expressly provides that a physical element of an offence may be conduct and conduct includes a state of affairs. The Crown submits that the interpretation placed on the meaning of *"a state of affairs"* by the Court of Criminal Appeal in the reasons of Johnson J at [76]-[84] is not *"a doubtful interpretation of the extent of the meaning of 'state of affairs' in the relevant context."* There is no disharmony between [AB 80-82]

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[23] The above passage was cited in the decision of the Court of Criminal Appeal in this matter by Johnson J at [56].

Johnson J's exposition of the meaning of *"a state of affairs"* as amounting to conduct by operation of s.4.1 of the Code and any of the authorities relied on by the appellant. It is not to the point that some authorities dealing with *"state of affairs"* are directed to passive circumstances rather than actions.[24] The meaning of a state of affairs both outside the Code and within it cannot be artificially reduced to only passive circumstances because other cases have dealt with passive circumstances.

36. Reference AFAS [45], neither the Explanatory Memorandum nor s.4.2(5) of the Code[25] bear upon the reasoning of the Court of Criminal Appeal or Simpson J at first instance. The appellant obviously was capable of exercising control over the state of affairs in question, namely his conduct in participating in the conspiratorial agreement as and from the commencement of the Code offence.

Generally

37. At first instance, Simpson J introduced her reasoning as to the proper construction of s.4(2) at [39] by noting that the physical element upon which the Crown relied was *"conduct"*, that term being given an extended definition so as to include *"a state of affairs"* by s.4.1(2). Her Honour was correct to say there is no escaping the conclusion that *"a state of affairs"* includes the existence (continuing) of an agreement to defraud the Commonwealth. [AB 82] [AB 32]

38. At [45] of the first instance judgment Simpson J also correctly said that the physical element of an offence may be constituted by *"a state of affairs"* which, by operation of s.4.1(2), is distinct from an act or omission to perform an act. Johnson J, at [80], correctly held that what is necessary to establish the count 2 offence is a physical element which may be conduct, or a result of conduct, or a circumstance in which conduct, or a result of conduct occurs – s.4.1(1) – all of which may be encompassed in a state of affairs. His Honour also appropriately had regard, at [72], to s.15AA of the *Acts Interpretation Act 1901 (Cth)* which requires that the interpretation that would best achieve the purpose or object of an Act is to be preferred [AB 33] [AB 81]

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24 The Crown submits that this characterisation by the appellant is an over simplification.

25 Section 4.2(5) provides - *"If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control."*

to each other interpretation. The artificiality and absurdity pointed to by Simpson J at [40] and accepted by the Court of Criminal Appeal at [74] cannot sit with s.15AA and can only be avoided if the interpretation of s.135.4(5), taking account of paragraph (9), made by the Court of Criminal Appeal is upheld by this Court.[26] [AB 79] [AB 32] [AB 80]

Part VII: Statement of the argument on the respondent's Notice of Contention or Notice of Cross Appeal

39. Not applicable.

Part VIII: Time estimate

40. It is estimated that the respondent's oral argument will take about one half day to present.

Dated: 12 April 2013

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26 See *Singh v The Commonwealth* (2004) 222 CLR 322; [2004] HCA 43 per Gleeson CJ at 336 [20].