HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A6/2022
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF SOUTH AUSTRALIA

No. A6 of 2022

BETWEEN: **JACOB ARTHUR WICHEN**

Appellant

and

THE QUEEN

Respondent

No. A5 of 2022

BETWEEN: **DARRYL MARTIN HORE**

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

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

Part II: OUTLINE OF ORAL SUBMISSIONS

Ground 1: The meaning of "willing"

2. Section 59(1a) of the *Sentencing Act 2017* ("**the Act**") must be construed within the legislative scheme provided for by Division 5 of Part 3 of the Act.

3. The starting point for the textual consideration of the meaning of the word "willing" found in s 59(1a) is that Parliament has selected the antonym of the word "unwilling". The word "unwilling" is defined for the purposes of s 57 of the Act, but also carries that defined meaning throughout Division 5, in ss 58, 59 and 62 of the Act.

4. Contrary to the submission of the Appellant, the construction of "willing" as bearing the converse meaning of the defined term "unwilling" does not involve a strained construction. It narrows the focus of the plain meaning in a manner that provides guidance and promotes the purpose of the scheme. Willingness is not to be assessed by reference to a person's state of mind whilst in custody, but rather at the time and in the context of an opportunity to reoffend. (R [28]-[30])

5. Before determining an application under s 59, it is necessary for the Supreme Court to direct that at least 2 legally qualified medical practitioners inquire into the mental condition of the person and report on whether the person is incapable of controlling, or unwilling to control, the person's sexual instincts. Those reports are directed to whether the person is unwilling to control their sexual instincts when given an opportunity to commit a relevant offence. The construction of the word "willing" advanced by the Appellant would have the result that reports prepared by the medical practitioners under s 59(2) would be directed to a different question to the threshold test that the Court must decide under s 59(1a). (R [35]-[38])

6. The Appellant's submission that the coherence of the legislative scheme relied on by the Court of Appeal is undermined by virtue of the absence of an express threshold requirement for the making of a detention order under s 57 of the Act is incorrect. It has long been held that the power of the Court to make an order for detention pursuant to s 57 of the Act is subject to an implied prerequisite that the Court must be satisfied

that a person is incapable of controlling, or unwilling to control, the person's sexual instincts. (R [44]-[45])

7. The construction of the word "willing" by reference to the converse meaning of the defined term "unwilling" is strongly supported by the purpose of the legislative scheme to protect the safety of the community. The test for willingness contended for by the Respondent focuses on the person's state of mind at the very moment that harm to the community is imminent, namely in the face of an opportunity to reoffend in the community. (R [48]-[49], [53])

8. The principle of legality is fulfilled in this case because the text, context and purpose of s 59(1a) make plain that the Parliament did direct its attention to the curtailment on liberty that the amendment to the Act effected. This is also apparent from the context within which the amendments to the scheme were made, the Second Reading Speech and the terms of the amendments themselves. (R [54]-[56])

Ground 2: The assessment of risk

9. Ground 2 arises in the alternative, if the Court holds that the word "willing" in s 59(1a) of the Act should be construed to mean that there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control.

10. The Respondent adopts the reasoning of the Trial Judge in the matter of *Hore v The Queen*, and accepted by the Court of Appeal, that the language and structure of s 59 support the conclusion that the assessment of the threshold test presented by s 59(1a) of the Act is to be answered without regard to the likely conditions that may be imposed.

11. That construction also finds support in the legislative history and purpose of the amendments to the Act discernable from the Second Reading Speech. It is apparent that Parliament did not have confidence that conditions imposed under s 59(8) would be adhered to or adequately enforced, such that the threshold question about risk should be answered without regard to them. (R [63]-[66])

Dated: 11 May 2022

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M J Wait SC