HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B42/2022
File Title:	Minister for Immigration, Citizenship, Migrant Services and M
Registry:	Brisbane
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	02 Dec 2022

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B42 of 2022

BETWEEN: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
Appellant

and

ROSS THORNTON
Respondent

RESPONDENT'S SUBMISSIONS

Part I: FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

Part II: STATEMENT OF ISSUES ON APPEAL

2. The primary issue for determination in this appeal is whether s 184 of the *Youth Justice Act 1992* (Qld) ("the Youth Justice Act") operates in the way contemplated by s 85ZR(2) of the *Crimes Act 1914* (Cth) ("the Crimes Act"), or whether it is merely a "non-recording provision"[1] similar to s 12 of the *Penalties and Sentences Act 1992* (Qld) ("the Penalties and Sentences Act") which operates with respect to adult offenders (*the statutory construction issue*).
3. The second issue raised by the Notice of Appeal is whether the Full Court erred in reaching its state of satisfaction as to there being a realistic possibility that a different decision could have been made by the Minister had he not taken into account Mr Thornton's criminal history as a child (*the materiality issue*).

Part III: SECTION 78B NOTICE

4. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

[1] *Hartwig v Hack* [2007] FCA 1039 at [11] (Kiefel J).

Part IV: FACTS

5. The respondent agrees with the appellant's statement of facts[2] subject to the qualifications in the following paragraphs.
6. The phrase, "assaults occasioning bodily harm-domestic violence" is a shorthand term for the offences for which the respondent was sentenced on 2 February 2018.[3]
7. Although there is no issue as to a failure by the respondent to consider relevant facts, the statement that "the Minister considered all relevant facts" is conclusionary. The facts considered by the respondent may be inferred from the respondent's statement of reasons.[4]
8. It is not in dispute that the respondent considered the offences committed by the respondent as a child for which no conviction was recorded.[5]

Part V: Argument

The statutory construction issue

9. Section 184(2) of the Youth Justice Act provides that "*a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose*".[6]
10. Section 85ZR of the Crimes Act states that where, "*under a State law … a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence*" then the person "*shall be taken … in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority … never to have been convicted of that offence*".

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[2] Appellant's submissions, [5]-[14].
[3] Appellant's submissions, [6]: the phrase is used in the National Police Certificate at Core Appeal Book ("CAB"), page 19 and the Verdict and Judgment Record at CAB, page 99. The primary offence of which the respondent was convicted on 2 February 2018 was one of assault occasioning bodily harm: see s 339(1), Schedule 1, *Criminal Code Act 1899* (Qld) ("*Criminal Code*"). The notation "domestic violence offence" is a recording requirement arising pursuant to s 12A of the *Penalties and Sentences Act 1992* when the offence "is also a domestic violence offence". It is not a circumstance of aggravation listed in s 339 of the *Criminal Code*. The definition of "domestic violence offence" in the *Criminal Code* is applied by virtue of s 4 of the *Penalties and Sentences Act 1992*. That definition, relevantly, means an offence committed by a person where the act done, or omission made, which constitutes the offence is also "domestic violence" or "associated domestic violence". In turn, those terms are defined in ss 8 and 9 of the *Domestic and Family Violence Protection Act 2012* (Qld).
[4] CAB, pages 10-16.
[5] CAB, page 22: assault or obstruct police officer (committed on 1 June 2013); going armed so as to cause fear, serious assault police, and assault or obstruct police officer (committed on 1 December 2012); and failure to appear in accordance with undertaking (committed on 14 December 2012). Also, see *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 at [37] (CAB, page 185).
[6] One exception, contained in s 184(3) is that the finding of guilt acts to prevent a subsequent proceeding for the matter giving rise to the defence of *autrefois convict*.

11. In *Hartwig v Hack*,[7] Kiefel J (as Her Honour then was) dealt with the provision in the adult sentencing regime[8] which provides that "*a conviction without recording the conviction is taken not to be a conviction for any purpose".* That provision was held not to be one which removed or disregarded the conviction, altogether, but, rather, was merely a "*non-recording provision*"[9] the purpose of which was to permit offenders to "*conduct their lives, obtain employment, and other benefits, without having to divulge that aspect of their history*".[10]

12. *Hartwig v Hack* held that s 85ZR envisages State legislation which "*removes or disregards the conviction altogether*".[11] This phraseology is intended to paraphrase the statutory phrase "taken never to have been convicted". It must be kept in mind that the latter phrase in s 85ZR(2) is, itself, qualified by the expression "in particular circumstances or for a particular purpose".

13. In any event, the Full Court was correct, in the present case, in discerning that the Youth Justice Act scheme is materially different from the adult regime dealt with in *Hartwig v Hack*[12] and operates in the way envisaged by s 85ZR(2), at least, in the particular circumstance of an adult who was, in their past, dealt with for an offence under the Youth Justice Act without a conviction recorded.

14. ***First***, there are the textual differences between the schemes for dealing with adult and child offenders. The Bills for both the Youth Justice Act[13] and the Penalties and Sentences Act were introduced in the same Parliamentary term.

15. The relevant text of s 12 of the Penalties and Sentences Act (for adult offenders) reads:

> "(3) Except as otherwise expressly provided by this or another Act— … (a) a conviction without recording the conviction is taken not to be a conviction for any purpose"[14]

16. The text contained in s 184(2) of the Youth Justice Act is:

> "Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose".[15]

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[7] [2007] FCA 1039.
[8] S 12(3) *Penalties and Sentences Act 1992* (Qld).
[9] *Hartwig v Hack* [2007] FCA 1039 at [11].
[10] *Hartwig v Hack* [2007] FCA 1039 at [7].
[11] *Hartwig v Hack* [2007] FCA 1039 at [11].
[12] For example, *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 at [30] (CAB, page 183)
[13] Originally titled *Juvenile Justice Act 1992*: section 125 of the original Act has since been renumbered in the retitled Act as section 184, (similarly s 124 is now s 183) but the text has remained unchanged.
[14] Our underlining.
[15] Our underlining.

17. As well as the adoption of the term "finding of guilt" instead of "conviction" in the Youth Justice Act, note the use of the definite article "the" in the Penalties and Sentences Act (consistent with all sentences being consequent upon the fact of a conviction) and the indefinite article "a" in the Youth Justice Act (which is consistent with an intention not to treat a finding of guilt against a child as a "conviction" unless, exceptionally, a decision is made to record a conviction).

18. ***Second***, s 12(3) of the Penalties and Sentences Act has two limbs. Paragraph (a) is the formulation which is similar to s 184(2) of the Youth Justice Act (with the important textual differences identified above). However, paragraph (b) is concerned with the question of the *recording* of "the conviction" in the records of the court and the offender's criminal history. This tends to confirm, generally, the conclusion reached in *Hartwig v Hack* that the Penalties and Sentences Act scheme for adult offenders is concerned with the question of the recording of the conviction in certain records (particularly the offender's criminal history) rather than deeming the finding of guilt never to have existed.

19. To the contrary, there is no second limb to s 184(2) of the Youth Justice Act. The section contains no provision concerned merely with the question of the *recording* of a "finding of guilt" and none dealing with *criminal history*. It is section 154 of the Youth Justice Act which deals with the question of the *criminal history* of the offender. In the Youth Justice Act, all findings of guilt are part of the criminal history of the child, regardless of whether or not a conviction has been recorded,[16] which suggests that the regime for the recording or non-recording of a conviction against a child offender is not one which is merely concerned with the question of record keeping. Regard may be had by a court to findings of guilt (which are said to be part of the criminal history of the offender) but this is, specifically, only authorised in the case of the subsequent sentencing of the child for any offence *as a child*.[17]

20. ***Third***, a comparison of the text of s 12 of the Penalties and Sentences Act and s 183 of the Youth Justice Act indicates that there are fundamental differences between the two regimes for dealing with offenders. The primary position in the Youth Justice Act is that a conviction is not to be recorded against a child.[18] In some circumstances, a conviction must

[16] With the exception of certain matters diverted to a "restorative justice process": s 154(3) and 163, *Youth Justice Act 1992* (Qld).
[17] S 154, *Youth Justice Act 1992* (Qld).
[18] S. 183(1), *Penalties and Sentences Act 1992* (Qld).

not be recorded in respect of a child offender.[19] The adult regime is different in that the court may generally exercise a discretion to record or not record a conviction but there are circumstances in which a conviction must be recorded.[20] The discretions whether or not to record a conviction in the Youth Justice Act and the Penalties and Sentences Act have been held to involve a different weighing of considerations, with greater weight given to the interests of the offender in the case of the Youth Justice Act.[21]

21. ***Fourth***, pursuant to s 12(4)(b) of the Penalties and Sentences Act, the fact of conviction is always admissible in proceedings against the offender for a subsequent offence. To the contrary, s 148 of the Youth Justice Act operates to prevent the fact that the child was found guilty as a child from being admitted in a proceeding against an adult. The language used in s 148 is instructive:

    (1) In a proceeding against an adult for an offence, there must not be admitted against the adult evidence that the adult was found guilty as a child of an offence if a conviction was not recorded.

22. It is the fact of the finding of guilt which is to be disregarded in the absence of the recording of a conviction. This evinces a legislative intent that a finding of guilt without the recording of a conviction is to be disregarded in the particular circumstance of the child having reached adulthood.

23. This provides context to the command contained in s 184(2) that "*a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose*" except as otherwise specifically provided for in the Youth Justice Act (for example, s 154, discussed above).

24. The true construction of the combined effect of section 148 and 184 of the Youth Justice Act is that the Youth Justice Act is State legislation that operates in the way contemplated by s 85ZR(2) of the *Crimes Act* (Cth) as explained by Kiefel J in *Hartwig* at [7] – [11]. That is, it is legislation that "removes or disregards the conviction altogether".[22]

25. ***Fifth***, subsection 184(3) of the Youth Justice Act (which provides that a finding of guilt against a child without the recording of a conviction stops a subsequent proceeding against the child for the same offence "as if" a conviction had been recorded) is a provision which would be unnecessary if the appellant's argument is correct that s 184(2)

[19] S 183(2), *Penalties and Sentences Act 1992* (Qld).
[20] E.g., ss 12(6), 152, *Penalties and Sentences Act 1992* (Qld).
[21] *R v MDD* [2021] QCA 235 at [21] and [24] (McMurdo JA, with whom Fraser JA agreed).
[22] *Hartwig v Hack* [2007] FCA 1039 at [11].

does not operate to remove the fact of "conviction".[23] That is because, if the appellant is right, then a plea of *autrefois convict* would be available and sufficient to stop a subsequent proceeding against the child for the same offence.[24] The inclusion of s 184(3) is only explicable if s 184(2) is construed as, otherwise, removing the fact of "conviction" as a basis for a plea of *autrefois convict*.

26. ***Sixth,*** the Full Court was correct in discerning that the Youth Justice Act and the Penalties and Sentences Act differ in purpose.[25] While it may be observed, in a general sense, that both deal with justice for offenders, the Youth Justice Act is specifically concerned with the treatment of children and emphasises a child-centric approach to youth justice, as is evident from the Charter of Youth Justice principles contained in the Act.[26]

27. The Second Reading Speech of the Minister for Family Services and Aboriginal and Islander Affairs[27] discloses that a purpose of enacting provisions of the Youth Justice Act was to comply with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").[28]

28. At the time of enactment of the Youth Justice Act, Australia had ratified the *Convention on the Rights of the Child.*[29] That Convention required States Parties to "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention"[30] and that the "best interests of the child" shall be a primary consideration in all actions concerning children, including by courts of law.[31]

29. The text, context of s 184(2) of the Youth Justice Act, together with the purpose of the Youth Justice Act, suggest that the regime for dealing with child offenders is different to that adopted in the Penalties and Sentences Act. The Youth Justice Act operates to treat children as a special group in that they will be treated on the basis that a finding of guilt is

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[23] Compare s 12(4)(b)(iv) of the Penalties and Sentences Act which provides that a conviction without recording a conviction has the same result as if a conviction had been recorded for the purposes of subsequent proceedings against the offender for the same offence.
[24] ss 17 and 602, *Criminal Code* (Qld).
[25] *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 at [30]-[31] (CAB, page 184).
[26] *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 at [31] (CAB, page 183).
[27] Second Reading Speech, (Hon. A. M. Warner), Queensland parliamentary debates, 18 June 1992, page 5926.
[28] Adopted by General Assembly resolution 40/33 of 29 November 1985.
[29] *Convention on the Rights of the Child* [1991] ATS 4; New York, 20 November 1989, Ratified by Australia on 17 December 1990, with effect from 16 January 1991.
[30] Article 4, *Convention on the Rights of the Child.*
[31] Article 3, *Convention on the Rights of the Child.*

deemed not to have occurred for any purpose unless, exceptionally, a court has decided to record a conviction against them. Once they obtain the age of majority, the deeming effect is taken to have accorded the person a clean slate.

30. The words "*a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose*" mean what they say and do not appear in a context which suggests they are directed only to the question of record-keeping.

31. At least in the particular circumstance[32] of a child who suffered a finding of guilt without the recording of a conviction and has subsequently attained adulthood, that person is one who falls within the scope of s 85ZR of the *Crimes Act 1914* (Cth).

10 32. The first ground of the Notice of Appeal assumes that, if s 184(2) of the Youth Justice Act engages s 85ZR(2) of the Crimes Act, then the Minister will have taken into account an irrelevant consideration. This is explained by Justice SC Derrington at paragraphs [13] to [17] of the reasons for judgment.[33] In essence, this is because s 85ZR is not captured by a specific provision (s 85ZZH) which permits certain convictions[34] to be taken into account by "a person who makes a decision under the *Migration Act 1958* … for the purpose of making that decision". This evinces a legislative intention that convictions captured by s 85ZR may not be taken into account by a person who makes a decision under the *Migration Act 1958.*

20 <u>Consideration of Key Aspects of the Minister's Argument</u>

33. The appellant cites the proposition in *Hartwig* that s 85ZR(2) requires that State legislation, to come within its compass, must have the effect of removing or disregarding the conviction, altogether.[35] As was stated above,[36] this phraseology is intended to paraphrase the statutory phrase "taken never to have been convicted". It must be kept in mind that the latter phrase in s 85ZR(2) is, itself, qualified by the expression "in particular circumstances or for a particular purpose".

34. The appellant relies on extrinsic material indicating that the amending legislation which inserted s 85ZR (as part of part VIIC) into the Crimes Act was intended to change the

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[32] S 85ZR(2) refers to "in particular circumstances, or for a particular purpose".
[33] *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 (CAB, page 178-179).
[34] Being those dealt with in Division 3 – 'spent' convictions.
[35] Appellant's submissions, [18].
[36] Supra, [12].

effect of a pardon given on the basis of a wrongful conviction.[37] It may be observed that s 85ZR(1) deals with the purpose referred to in the extrinsic material.

35. As the appellant points out, the same extrinsic material sets out, separately, the purpose of s 85ZR(2).[38] The extrinsic material, in respect of s 85ZR(2), uses the phrase "where a pardon is granted in corresponding circumstances under State or foreign law" it is to receive the same recognition from a Commonwealth authority.[39] The extrinsic material is, at this point, using such imprecise language that it is of little assistance in construing the more precisely articulated language of s 85ZR(2). This use of the word "pardon" as a broad approximation also explains why the headings of s 85ZR, itself, and section 2 and part VIIC use the same word.[40] It seems that no short form version of the statutory language of s 85ZR(2) could be divined.

36. The appellant seeks contextual support for her interpretation from ss s 85ZM and 85ZN of the Crimes Act.[41] The thrust of the argument appears to be that a broad set of circumstances, including circumstances where a finding of guilt has been made but no conviction recorded, are brought within the concept of "conviction" or otherwise within the operative provisions of part VIIC. The provisions do not assist in the construction of the operative effect of s 85ZR. Both subsections of s 85ZR are beneficial provisions. The benefit of a pardon for wrongful conviction[42] should not fail because a conviction was not recorded under the Penalties and Sentences Act. In the case of s 85ZR(2), it is to the provisions of the State (or foreign) statutory provision that one looks to see whether a person is taken never to have been convicted not the broad definition in s 85ZM. A different approach would thwart the purpose of s 85ZR(2).

37. The appellant cites various authorities to the effect that the non-recording of a conviction, per se, is not the opposite of a conviction.[43] So much can be accepted from the decision in *Hartwig v Hack*.[44] However, for the reasons articulated, above,[45] and by the Full Court,[46] the language of the Youth Justice Act,[47] as opposed to the analogous language of the

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[37] Appellant's submissions, [20].
[38] Appellant's submissions, [22].
[39] EM, page 16, [42]c
[40] See appellant's submissions, [23].
[41] Appellant's submissions, [24].
[42] Crimes Act, s 85ZR(1).
[43] Appellant's submissions, [27]-[29].
[44] [2007] FCA 1039.
[45] [14]-[31].
[46] *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 at [23]-[36] (CAB, page 181-185).
[47] Particularly, s 184(2).

Penalties and Sentences Act, construed in context, has the effect that the respondent is, indeed, taken never to have been found guilty of any offence committed as a child.[48]

38. The appellant points out[49] that, under most legislation, the non-recording of a conviction does not prevent the doctrine of *autrefois convict* from applying.[50] As pointed out above[51], this gives singular significance to the circumstance that the legislature considered it necessary to provide, expressly,[52] that the finding of guilt stops a subsequent proceeding against the child for the same offence "as if a conviction had been recorded".

39. The appellant seeks to draw an analogy[53] with the annulment provisions considered by this Court in *Re Culleton (no 2)*.[54] The analogy is weak. In *Culleton*, the annulment required an application made later in time and the exercise of discretion by a judicial officer.[55] Section 184(2) of the Youth Justice Act is a deeming provision which speaks at all times. Section 184(2) has the effect that both a past and a future finding of guilt concerning a child made without recording a conviction is taken not to be a conviction for any but expressly excepted purposes. The contrast with the annulment process in *Culleton* is stark. The attempt to place the finding of guilt as prior to the recording of the conviction, in time, is to no avail since the express words of s 184(2) of the Youth Act deems the finding of guilt, itself, not to be a conviction for any but an excepted purpose. Section 85ZM of the Crimes Act makes no difference. While it defines "conviction" broadly for the purposes of the Crimes Act, it is not intended to restrict the operation of s 85ZR(2) of that Act and it cannot, as the appellant suggests,[56] contradict the express words of s 184(2) of the Youth Justice Act.

The materiality issue

40. If the Minister had not considered the category of convictions for which no conviction was recorded under Queensland law, he may have taken a materially different view of matters before him. The applicant's criminal history was central to the Minister's reasoning as to

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[48] *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23 at [36] (CAB, page 185)
[49] Appellant's submissions, [30]
[50] Citing *Maxwell v The Queen* [1996] HCA 46;(1996) 184 CLR 501, at 508-9
[51] [25].
[52] See Youth Justice Act, s 184(3).
[53] Appellant's submissions, [33]-[39].
[54] [2017] HCA 4; (2017) 263 CLR 176.
[55] [2017] HCA 4; (2017) 263 CLR 176 at [9].
[56] Appellant's submissions, [38].

the "gravity" of the applicant's offending[57] and the risk that he will reoffend.[58] A different view as to the gravity of the offending and the risk of reoffending may have resulted in the Minister reaching a different ultimate conclusion as to whether the risk of harm to the Australian community was unacceptable and outweighed all other considerations.

41. The Full Court did not fail, objectively, to evaluate the significance of the Minister taking into account the irrelevant consideration. The Full Court evaluated this factor in the context of the Minister's reasons.

42. Paragraphs [42] to [45] of the reasons for judgment of SC Derrington J identified the process of reasoning engaged in by the Minister. That reasoning process led, ultimately, to the Minister weighing the "serious nature" of the violent crimes committed by Mr Thornton and the risk of him reoffending "in similar fashion" against other considerations including his lengthy residence and bonds, employment and familial ties to Australia, and hardship upon him, his family and social networks.

43. The Minister's reasons do not disclose precisely how balanced the scales were in his eyes.

44. Derrington J identified that the Minister made specific note of Mr Thornton's juvenile offences before reasoning that Mr Thornton's *repeated* commission of "offences of or related to domestic violence, and other assault offences" added "more gravity to his offending". Derrington J referred to the information contained in the National Police Certificate and found, as a matter of fact,[59] that the reference to "other assault offences" by the Minister was "largely informed by the several quite serious assaults committed by Mr Thornton as a child".

45. The Full Court, therefore, did consider the counter-factual in finding that the Minister's identified reasoning process was tainted by the respondent's criminal history as a child and that this resulted in the realistic possibility of a different decision if it had not been so tainted.

46. An evaluation of the counter-factual is necessarily limited by the factors considered relevant by the decision-maker. In this case, the Minister considered the gravity of the offending as relevant. It is sufficient that the Full Court identified that the Minister's evaluation of the seriousness and gravity of that offending was, in fact, informed by the irrelevant consideration. On the Minister's own reasoning, the offending was graver at least partly because of the juvenile history.

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[57] Reasons page 5, paragraph 32, CAB page 14.
[58] Reasons page 6, paragraph 43, CAB page 15.
[59] Reasons of SC Derrington J, paragraph [44].

47. The ultimate weighing of the risk of reoffending, as against all other factors, was exclusively a matter for the Minister and it was not for the Full Court to decide for itself the likelihood of the scales being tipped.
48. It is sufficient for the court to be satisfied of a realistic *possibility* of a different decision, not a realistic *probability*.[60]
49. The Full Court was correct. If the Minister had not considered the respondent's juvenile criminal history, the Minister *could* realistically have formed the view that his later offending was not so grave as to outweigh all other factors.

Part VI: ESTIMATED TIME

10 50. The respondent estimates that 1.5 hours will be required for the presentation of the respondent's oral argument in this appeal.

Dated: 30 November 2022

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[60] See *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 390 ALR 590 at [39] per Kiefel CJ, Gageler, Keane and Gleeson JJ.

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BRISBANE REGISTRY

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BETWEEN: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
Appellant

and

ROSS THORNTON
Respondent

ANNEXURE

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LIST OF STATUTES ETC.

1. *Criminal Code Act 1899* (Qld), Schedule 1, *Criminal Code,* ss 339 (Reprint current as at 23 September 2016), 17, 602 (Reprint current as at 21 February 2019)
2. *Crimes Act 1914* (Cth), ss 85ZM, 85ZN, 85ZR, 85ZZH (Compilation No. 127)
3. *Domestic and Family Violence Protection Act 2012* (Qld), ss 8, 9. (Reprint current as at 1 December 2017)
4. *Migration Act 1958* (Cth) (Compilation No. 144)
5. *Penalties and Sentences Act 1992* (Qld), ss 4, 12, 12A. (Reprint current as at 11 April 2019)
6. *Youth Justice Act 1992* (Qld), ss 148, 154, 163, 183, 184 (Reprint current as at 11 April 2019)

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