



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:

PETER LEONARD STEPHENS

Appellant

and

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THE QUEEN

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.

20 Part II: Outline of Oral Submissions

2. *The presumption against retrospectivity applies with varying force.* The strength of the presumption against retrospectivity in its application to s 80AF must be determined in accordance with the basis for the presumption's rationale — being that Parliament does not intend an unjust result — and what is 'necessarily intended' by Parliament should be determined by reference to the ordinary rules of statutory construction: *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 [28], [52] (JBA vol 3, tab 7); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 [30]-[32] (JBA vol 3, tab 9); *Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599 [30], [39]-[41] (JBA vol 4, tab 23); *Lodhi v The Queen* (2006) 199 FLR 303 (*Lodhi*) [35] (JBA vol 4, tab 25).
3. *The decision of the Court of Criminal Appeal (CCA) majority was correct.* The CCA correctly rejected the substantive right proposed by the appellant: CAB 310 CCA [42]-[43], CAB 321 CCA [94]; and also correctly identified the retrospective operation of

s 80AF: CAB 310-311 CCA [44]-[45]. The CCA majority also correctly determined that the reasoning in *Lodhi* did not have a material bearing on the present case: CAB 314 CCA [57]-[58].

4. ***Section 80AF addresses a specific chronological problem of proof.*** Section 80AF was enacted to create a means of resolving an identified and specific chronological problem of proof which arises in the prosecution of historic child sexual abuse (CAB 305 CCA [30], CAB 322 CCA [99]). The extrinsic materials, and the text and structure of s 80AF itself, establishes that this Court's decision in *Gilson v The Queen* (1991) 172 CLR 353 (*Gilson*) was influential in the formation of s 80AF, and the provision adopts the solution to a similar dilemma of proof that was identified in *Gilson*. See NSW Department of Justice, *Discussion Paper, Child Sexual Offences Review* (2017) at RFM 16-17 [6.9]-[6.12]; *Gilson* at 362-363, 367 (JBA vol 3, tab 12).
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5. ***Section 80AF is properly viewed as a procedural provision that concerns the effect to be given to evidence.*** The evidence to which effect is being given is that which forms the state of facts underpinning a determination that there exists a period of uncertainty as to when conduct has occurred (s 80AF(1)(a)) but where, under s 80AF(1)(c) that conduct was always a sexual offence and where, per s 80AF(1)(d), multiple sexual offences could have applied to such conduct during the period of uncertainty. Section 80AF resolves the uncertainty in a manner which ensures that the lesser applicable maximum penalty applies to the punishment of the conduct. See *Rodway v The Queen* (1990) 169 CLR 515 at 521-523 (JBA vol 3, tab 19)
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6. ***For s 80AF to have retrospective effect, it is necessary to identify with precision a vested or accrued substantive right said to be affected by s 80AF.*** Section 80AF does not affect a recognised pre-existing right or entitlement and is distinguished from *Newell v The King* (1936) 55 CLR 707 (*Newell*). The timing of an offence is relevantly of the essence only in circumstances where there is a possibility that the jury's verdict does not indicate that the essential elements of an offence in force were proved beyond reasonable doubt (which possibility is foreclosed by s 80AF(1)(c) and (d)). See *R v Greenaway* (2000) 118 A Crim R 299 (JBA vol 4, tab 27); *MJ v The Queen* [2013] NSWCCA 250 [43], [50], [55] (JBA vol 4, tab 26); *Newell* at 711-713 (JBA vol 3, tab 17)
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7. ***If it applies, the presumption against retrospectivity applies only weakly in the circumstances.*** No pre-existing substantive right is directly or obviously affected by s 80AF and the trend of authority supports the proposition that it is not ordinarily necessary for Parliament to express that it intends a patently retrospective provision to apply to pending proceedings if such a conclusion is otherwise reached through the ordinary processes of statutory construction.
8. ***Lodhi is distinguished from the present case because it involved an ex post facto law.*** *Lodhi* is distinguished on the basis that it involved legislation which had the effect of rendering criminal acts that would not have been criminal at the time they were committed. See *Lodhi* at [35]-[49] (JBA vol 4, tab 25); *Lazarus v ICAC* (2017) 94 NSWLR 36 at [89] (JBA vol 4, tab 24); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 608-610 (JBA vol 3, tab 18).
9. ***Parliament should be taken to have intended that s 80AF apply to pending proceedings.*** Considered in the light of the extrinsic materials, and its text and context, Parliament should be taken to have intended that s 80AF apply to pending proceedings.

Dated 16 June 2022

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David Kell SC

Crown Advocate's Chambers



M W R Adams

Crown Advocate's Chambers