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**
**MELBOURNE REGISTRY**

BEWEEN

**The Director of Public Prosecutions**
**Applicant**

**Benjamin Roder (a pseudonym)**
**Respondent**

## RESPONDENT'S SUBMISSIONS

### PART I: CERTIFICATION

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

### PART II: ISSUES

2. This Court has traditionally reserved the grant of special leave from interlocutory decisions in criminal proceedings for cases which are exceptional.[1]

3. The respondent agrees, save for one qualification, with the summary of issues identified by the applicant. The qualification is that it is only the charged *act* which a jury must find proved beyond reasonable doubt – and be instructed to find proved beyond reasonable doubt – before using it as tendency evidence, not all or 'any evidence' relating to a charge.[2]

### PART III: SECTION 78B

4. The respondent does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is necessary.

### PART IV – MATERIAL FACTS

5. The applicant has accurately summarised the material facts.[3]

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1 See, eg, *Carter v Managing Partner Northmore, Hale, Daly & Leak* [1994] 8 Leg Rep SL2; *Ebataringa v Deland* [1998] HCATrans 188; *Taylor v The Queen* [1989] 7 Leg Rep C1.
2 *Applicant's submissions*, [55].
3 *Applicant's submissions*, [8] – [12].

## PART V: ARGUMENT

### A. SUMMARY

6. The Court of Appeal was right to endorse the trial judge's proposed direction. It was right to have done so for the following reasons.

7. *First*, the direction is necessary. It is necessary to guard against the jury's reasoning toward guilt in an impermissible way; and it is necessary to guard against the erosion of the jury's adherence to the criminal standard of proof and its application. The Court of Appeal's decision does not lead to an unprincipled inconsistency in the treatment of charged and uncharged acts when used as tendency evidence. The decision is not at odds with established approaches to tendency reasoning or with the treatment of evidence in criminal trials. [**See section B below**]

8. *Second*, the proposed direction does not offend s 61 of the *Jury Directions Act 2015* ('the **JDA**'). The section permits a trial judge to direct the jury, when necessary, that a charged act – an act representing a finding which corresponds to an element of the offence charged – must be proved beyond reasonable doubt before it can be used as tendency evidence. [**See section C below**]

### B. TENDENCY EVIDENCE AND TENDENCY REASONING

9. Tendency reasoning is inductive or inferential in nature.[4] The law does not regard it a more or less compelling form of reasoning than deduction or syllogistic reasoning, but it has traditionally demanded that courts exercise caution in their reception of tendency evidence and in their management of the risks associated with its use.[5]

10. This Court has over time formulated safeguards against the risk that a jury might use tendency improperly or to reason impermissibly from its acceptance toward a finding of guilt.[6] But there are other problems associated with the use of tendency evidence or tendency reasoning. One is the problem of 'cognitive bias', or a preparedness on the part of jurors to attach too much weight to dispositional explanations of an accused person's conduct, and to undervalue situational explanations for that conduct.[7]

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4 *Hughes v The Queen* (2017) 263 CLR 338, 365 [71]-[72] (Gageler J) ('*Hughes*').
5 *Hughes*, 365 [71] (Gageler J).
6 See, eg *Hughes*, 349 [17] (Kiefel, Bell, Keane and Edelman JJ, and 364-366 [69]-[73] (Gageler J). See also *HML v The Queen* (2008) 235 CLR 334, 359 [28] (Gleeson CJ).
7 *Hughes*, 365-66 [70] and [72]-[73] (Gageler J).

11. The central question of this application arises as a result of the prosecution's intention in the respondent's trial to use not just the evidence of uncharged offending in proof *inter alia* of his tendency to commit the charged acts, but the charged acts themselves (**AFM 4-19**). The Court of Appeal held that, as a result, it is necessary that the jury be directed that 'every charged act relied upon by the prosecution as tendency evidence must be proved beyond reasonable doubt before it can be so used' (**CAB 39 [34]**). It reasoned that, without the proposed direction, the respondent would be exposed to a process that employed impermissible or circular reasoning; and that the direction was necessary to guard against the erosion of the criminal standard of proof and its application by the jury.

12. The applicant – relying on and largely adopting the holdings and reasoning of the New South Wales Court of Criminal Appeal in a series of three (3) recent cases[8] – charges that the Court below erred. It is submitted[9] that the Court of Appeal's holding 'leads to an unprincipled inconsistency in the treatment of charged and uncharged acts that are used as tendency evidence'; that the Court's concern about the erosion of the standard of proof 'was capable of being addressed by other directions'; and that the Court of Appeal's approach is 'at odds with established approaches to tendency reasoning and to the treatment of evidence in a criminal trial.' Those criticisms are ill-founded and should be rejected. To the extent that they gain support from the cases decided in NSW, those decisions are wrong.

The charge of circular reasoning

13. Whether tendency reasoning in a criminal trial which is founded upon charged acts invites from a jury a mode of circular reasoning does not conclusively resolve the question whether the proposed direction is necessary. But the question's resolution is foundational and was a focus (both) of the Court of Appeal's decision and of the cases decided in NSW.

14. Tendency reasoning has built into it a measure of circularity which the law tolerates.[10] In a trial in which a complainant alleges the commission of a charged act and in which she also is permitted to give evidence of several uncharged acts, the prosecution may rely upon the evidence of those uncharged acts to invite from the judge the finding (for example) that the accused man had a tendency to act in a particular way. If the jury finds or infers that the tendency is made out, that

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8 *JS v The Queen* [2022] NSWCCA 145 ('*JS*'); *Gardiner v The King* [2023] NSWCCA 89 ('*Gardiner*'); *Decision restricted* [2023] NSWCCA 119 ('*Decision restricted*').

9 *Applicant's submissions*, [15].

10 See *Decision restricted*, [104] (Hammil J); cf *Hughes*, [40] (Kiefel CJ, Bell, Keane and Edelman JJ).

finding and the evidence it is founded upon may be used as circumstantial evidence rendering the accused man's commission of the charged act more likely. That occurs despite the fact that the source of the tendency and the inferential process it founds is the same as the source of the allegation it is utilised to support and prove.

15. The prosecution's reliance in the respondent's trial upon tendency evidence comprising *inter alia* the charged acts, corresponding to the ultimate fact in issue or the *actus reus* of the offences charged, superimposes onto the jury's task another layer of circularity.[11] The jury is invited to reason in the following way. *First*, and for each charge it considers separately, the jury may consider all the evidence – including the complainant's evidence of uncharged offending or 'misconduct'[12] and the evidence corresponding to the acts (or ultimate facts in issue) of the charged offending – to decide (at a standard lower than the criminal standard) whether those charged acts occurred. *Second*, the jury may (then) use *inter alia* their findings regarding that conduct or those acts to infer that the respondent possesses the tendency or tendencies alleged by the prosecution. *Finally*, and if the jury is satisfied of the respondent's tendency, it may use it in proof of – or as rendering more likely – the offence charged. Thus, in the context of the respondent's trial and the jury's consideration of (say) charge 2, the applicant contends that the jury may, having regard to all the evidence (including that corresponding to the other charged acts), find that penetration occurred on (for example) the balance of probabilities, use that finding in proof of tendency and, utilising tendency reasoning, find that penetration occurred and charge 2 proved beyond reasonable doubt. The Court or Appeal was right to have characterised that process as impermissibly circular (**CAB 39 [34]**).

16. Tendency evidence – like all forms of evidence – must satisfy a rational threshold for its admission at trial.[13] It must be capable of rationally affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue.[14] The way it does so is by a process of induction; *first*, by providing a foundation from which a jury may infer that an accused person has a tendency to have a particular state of mind or to act in a particular way can be inferred (s 97); and *second*, if

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11 *Decision restricted*, [104] (Hammil J).

12 See JDA, Part 4, Division 2 and, in particular, s 26.

13 *Evidence Act 2008* (Vic) ('Evidence Act'), s 55; cf *HML*, 351-52 [5]-[6] (Gleeson CJ) (footnotes omitted); *R v Kilbourne* [1973] AC 729, 756. See, generally, on the statutory scheme by which tendency evidence, specifically, is admitted under the Uniform Evidence Legislation, *Hughes*, 364-65 [69] (Gageler J).

14 In the case of tendency evidence this stricture on rationality is even more acute given the prescriptive operation of s 101.

the tendency is established from the evidence, by utilising the tendency to render more likely his or her commission of the offence in question.[15]

17. The inductive method which the jury is asked to apply must conform to the same dictates of logic which underpin the reception of all evidence, including tendency evidence. In *Sutton v The Queen*[16] Brennan J said that it is 'a canon of logic, rather than of law, that one cannot prove a fact by a chain of reasoning which assumes the truth of that fact.'[17] Applied to the present application, a jury asked to consider one of many charges on an indictment should not be permitted to find the existence of a tendency which is inferred from a body of evidence and from findings made by the jury which include the very act which tendency is relied upon to prove.[18]

18. By way of illustration, a jury would not be permitted, on its consideration of an indictment comprising only one charge, to rely upon its finding that the charged act occurred to prove that the charged act occurred. The objectional nature of that process persists when a jury is asked to consider an indictment containing 10 charges: the prosecution invites the jury to find that the charged acts occurred; those acts demonstrate that the accused person had a tendency to act in a particular way; the tendency renders more likely that the charged acts occurred; the charged acts occurred beyond reasonable doubt. The introduction to the chain of proof of the prosecution's reliance on tendency reasoning does not solve the offence to logic which the process manifests.

19. The applicant has submitted – and the NSW Court of Criminal Appeal has concluded – that it would be open to a jury so to reason; that the process is sound as a matter of logic and principle; and that the proposed direction is unnecessary and unprincipled. For the reasons which are developed later in these submissions do not withstand scrutiny.

<u>Eroding the criminal standard of proof</u>

20. The Court of Appeal was correct to have found that, unless the jury are given the proposed direction, the process by which the prosecution intends to prove its case on the offences charged will distort and undermine the jury's application of the criminal standard (**CAB 38 [29] and 39**

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15 *Hughes*, 348-49 [16] and 356 [40] (Kiefel CJ, Bell, Keane and Edelman JJ),
16 *Sutton v The Queen* (1984) 152 CLR 528 ('*Sutton*').
17 *Sutton*, 552; see also 533 (Gibbs CJ); and *Perry v The Queen* (1982) 150 CLR 580, 589-90 (Gibbs CJ) and 612 (Brennan J).
18 See, eg, *Ilievski v The Queen; Noland v The Queen* [2018] NSWCCA 164, [93] (Bathurst CJ).

**[34]**).[19] It was right to hold that, in so far as the Court in *Dempsey* had recognised that the that proposed direction was necessary to guard against the same risk in that case, *Dempsey* and the respondent's case were indistinguishable (**CAB 38 [29]**).

21. The path of reasoning advanced by the applicant would permit – indeed, in most cases, it would demand – that the jury apply different standards of proof to the same, principal (or ultimate) finding of fact at different stages along its chain of proof toward a verdict of guilty. Put another way, the jury would engage in a process that would permit or require them (for example) to be satisfied on the balance of probabilities that the conduct the subject of a charged act occurred, and then to use that conclusion in proof of tendency, and (then) circumstantially, to satisfy them that the charged act occurred beyond reasonable doubt.[20] Provided the jury are correctly instructed, it said, on the standard of proof attaching to the elements of the offence, and on the nature of tendency reasoning, there is no vice. But it is difficult – or perhaps impossible – to know the cognitive and analytical impact upon a jury, and upon its verdict, of a process that permits or requires the jury to reason from a finding that 'an event occurred' to the finding that 'an event occurred beyond reasonable doubt'. The risk that the jury's first finding will compromise the process by which the jury arrives at its latter finding (and verdict) is real.

22. The NSW Court of Criminal Appeal has held[21] that the proposed direction is not necessary and that the process of reasoning on which the applicant intends to rely at the respondent's trial gives rise neither to the vice of circularity or to the erosion of the criminal standard of proof. Those holdings – and the applicant's reliance on them – betray error.

Charged acts and tendency – New South Wales

23. The focus of this Court's decisions in *Hughes* and *Bauer*[22] was the admissibility of uncharged acts led in proof of tendency in criminal trials. *Hughes* was a case in which only uncharged acts were relied upon by the prosecution to prove tendency. In *Bauer*, the tendency evidence on which the prosecution had relied extended to charged acts, but the Court's focus was (again) on uncharged acts and the directions which should attach to a jury's consideration of them when they are relied

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19 Cf *Dempsey (a pseudonym) v The Queen* [2019] VSCA 224, [76] ('*Dempsey*') (footnotes omitted).
20 Cf Evidence Act, s 41.
21 *Supra* footnote 7.
22 *R v Bauer (a pseudonym)* (2018) 266 CLR 56 ('*Bauer*').

upon in proof of tendency. The Court did not address whether those directions sufficed to ensure fairness to an accused person, or to guard that person against a process that disclosed error, in a trial where *inter alia* charged acts are sought to be utilised as tendency evidence.

24. *Bauer* affirmed that a jury's use of uncharged acts to infer a tendency in proof of an offence charged should conform to the manner in which juries are invited to utilise circumstantial evidence more widely. The Court confirmed that trial judges should 'not ordinarily' direct a jury that, 'before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt.'[23] The direction will not be necessary or desirable 'unless it is apprehended that… there is a significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt.'[24]

25. In *JS*, Basten AJA (with whom Hamill and Dhanji JJ agreed) acknowledged that *Bauer* was relevantly confined to tendency evidence consisting of uncharged acts.[25] But his Honour rejected the applicant's claim that when charged acts, rather than uncharged acts, are relied upon in proof of tendency, the proposed direction was necessary. Citing *Shepherd*[26] and Gleeson CJ's judgment in *HML*,[27] his Honour held:[28]

> In principle, the same reasoning applies to cross-admissible evidence of charged acts. It is not easy to envisage a circumstance in which the commission of one offence against a victim will be an indispensable step in the reasoning that the other offence was committed. Accordingly, in principle it will usually be correct (and was correct in the present case) to say that, in assessing one charge, the jury could take into account the evidence of the activity said to constitute the other charge, without being satisfied at that point that it was proved beyond reasonable doubt. If *Bauer* were to be distinguished in the manner submitted by the applicant it would produce the odd result that the Crown could choose between making its case stronger on one count by not charging another act, or pursuing convictions on both acts.

26. The applicant commends Basten AJA's analysis to this Court and, in particular, his Honour's observation regarding the 'odd result' that would ensue were it necessary that juries be given the

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23 *Bauer*, 96 [80].
24 *Bauer*, 98 [86].
25 *JS*, [37].
26 *Shepherd v The Queen* (1990) 170 CLR 573 ('*Shepherd*'), 584-85 (Dawson J, with whom Mason CJ, Toohey and Gaudron JJ agreed).
27 *HML*, 551-552 [5].
28 *JS*, [39] (footnotes omitted).

proposed direction. The applicant's adoption of the observation betrays a measure (both) of cynicism and naivete. Prosecutors are bound by the duties, including the constraints, that attach to the execution of their office as ministers of justice. The outcome of this application should not affect how those duties are exercised when drawing indictments. In any event, it is wrong to assume that forensic decisions do not inform how indictments are framed, or to ignore that choices about how trials are prosecuted – and what charges are prosecuted – have tactical implications. One example is when a prosecutor chooses not to plead a (lesser) statutory alternative to a principal charge even though the evidence could give rise to a lesser verdict. Another is when a prosecutor chooses to plead a charge of 'persistent sexual abuse of a child'[29] or lays a 'course of conduct' charge.[30]

27. On the questions of circularity and the erosion of the standard of proof the applicant looks also to *Decision restricted* for support and, in particular, to the following remarks by Beech-Jones CJ at CL (with whom Button J agreed):[31]

> the applicant's argument that using evidence that directly supports a charged count as tendency evidence necessarily invites circular reasoning falls away when regard is had to the nature of tendency evidence and that a tendency need not be established beyond reasonable doubt[.] …
>
> So far as the onus of proof is concerned, it is not circular reasoning for the jury to first consider whether, based on all the evidence adduced in support of the tendency, including the evidence adduced in support of the counts on the indictment, the asserted tendency is established and then consider whether each of the counts on the indictment is proven beyond reasonable doubt including by reference to the asserted tendency if the jury considers it to be established. This may involve the jury reconsidering the evidence on each count but if it does it will be undertaking each consideration at different stages of its deliberations with a different onus of proof and for a different purpose.

28. The applicant submits that '[a]s a matter of principle and logic the use of a charged act as an item of tendency evidence in proof of a tendency does not invite "circular reasoning"[32] because it does not relieve the jury of the need to decide whether the elements of the offence are proved beyond reasonable doubt. Nor does the process undermine, it is said, the standard of proof. The risk that a jury will fail properly to apply the criminal standard can be addressed by directions emphasising

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29 See, eg, *Crimes Act 1958 (Vic)*, 44J.
30 See, eg, *Criminal Procedure Act (2008)* (Vic), Sch. 1 cl. 4A.
31 *Decision restricted*, [6], [9],
32 *Applicant's submissions*, [45].

the standard of proof.[33] Jurors are bound by the directions they are given and are assumed to apply them. The Court of Criminal Appeal in *JS* and *Decision restricted* considered examples of jury directions which did not include the proposed direction and concluded that they were adequate. And the same may be said of the directions considered in *Bauer*.

29. Finally, the applicant has submitted that the proposed direction would require the jury to engage in a process that departs from established principle and would itself impose upon them a process which is convoluted and confusing. The proposed direction would prevent the jury, in considering a particular charge, from having regard to all the evidence adduced at trial in support of tendency and would require the jury to 'disregard any evidence of conduct that is also the subject of [that] charge.' Doing so would 'deprive tendency evidence of the forensic force which long-standing authority has established that it has.'

30. Those submissions betray are number of errors.

31. Putting to one side the operation of s 61 of the JDA, the central question of this application is whether the proposed direction is necessary. The direction will be necessary if the process of reasoning in which the jury is asked to engage is itself impermissible. The process will be impermissible if it is circular or if it betrays a measure of circularity which might compromise the inductive method.[34] That is a question of logic. But the direction may also be necessary even if the process is found not to offend to the dictates of logic – which is not conceded – if the process creates the real risk that, without it, the jury will engage in an analytical process which departs from what is permissible.

32. In its present context, the problem of circularity persists despite the applicant's emphasis on different standards of proof attaching to different stages of the process. Far from solving the problem of circularity, the 'reconsideration' process to which Beech-Jones CJ at CL referred,[35] – and on which the applicant relies – underscores it.

33. But even if the resort to different standards of proof attaching to different stages of the jury's analytical process does solve the problem of circularity – which is not conceded – it does so only at as a matter of strict logic. Jurors are not logicians. The law assumes that they apply the directions

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33 *Applicant's Submissions*, [47]-[51].

34 Or to use the language employed by Beech-Jones CJ at CL 'necessarily invites circular reasoning': See, *Decision restricted*, [6].

35 *Decision restricted*, [9]

they are given. But directions are sometimes given, not just as a matter of law, but so as to guard the jury's verdict against error or the real risk of error.

34. By way of example only, *Shepherd* decided conclusively that in trials where the prosecution relies upon circumstantial reasoning, as a matter of law, no individual fact founding an inference in proof of guilt need be proved to any particular standard. However, the Court recognised that, if evidence of a fact relevant to a fact in issue is the only evidence of the fact in issue, or is an indispensable link in a chain of evidence necessary to prove guilt, then it will be necessary for a trial judge to direct a jury that the prosecution must establish the fact beyond reasonable doubt.[36]

35. Discussing that general principle and its application to a trial at which a complainant's evidence of uncharged acts is adduced in proof of the accused man's sexual interest, Gleeson CJ observed in *HML*:[37]

> Where a complainant's evidence of uncharged acts is relied upon by the prosecution as evidence of motive in order to support the complainant's evidence of the charged acts, two considerations may arise. First, if that evidence is an indispensable step in reasoning towards guilt, then it may be necessary and appropriate to give a direction about the standard of proof in respect of such evidence. Secondly, *it may be unrealistic, in cases such as the present, to contemplate that any reasonable jury would differentiate between the reliability of the complainant's evidence as to the uncharged acts and the complainant's evidence as to the charged acts*. That will not always be so. There may be cases where some parts of a complainant's evidence are corroborated and others are not, or where an accused's response to part of the evidence is different from the response to other parts. Generally speaking, however, the indispensable link case apart, it is ordinarily neither necessary nor appropriate for a trial judge to give separate directions about the standard of proof of uncharged acts.

36. In *Pfennig*[38] – a case about similar fact evidence and admissibility – the plurality acknowledged that the common law test for admissibility was to weigh probative value and prejudicial effect. But it concluded that, [b]ecause propensity evidence [was] *a special class of circumstantial evidence*, and 'because it ha[s] a prejudicial capacity of a high order', a trial judge had to determine its admissibility by reference to the same standard by which a jury determines the question of guilt.

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36 *HML*, 360 [31] (Gleeson CJ), applying *Shepherd*, 579-80 and 585 (Dawson J).
37 *HML*, 361-62 [32] (emphasis added).
38 *Pfennig v the Queen* (1995) 182 CLR 461 ('*Pfennig*'), 482-483.

37. The law relating to the admissibility and use of uncharged acts, and to the directions that they attract when they are relied in proof of tendency under Uniform Evidence Acts has been decided. That is not the point. Those passages highlight the law's readiness, when necessary, to formulates responses to problems which may represent an exception to general principle.

38. Furthermore, the extent to which the proposed direction would adversely affect the prosecution's reliance on charged acts in proof of tendency should not overstated. Contrary to the applicant's submission, the direction would *not* compel a jury in its consideration of a particular charge to 'disregard any evidence of conduct that is also the subject of a charge on the indictment;'[39] nor would it rob the tendency of its cumulative effect or its 'forensic force.'[40] Those submissions are predicated upon a misconception. Rather, the direction would require the jury only to defer its ultimate finding of fact on the charge the subject of its separate consideration – unless it were proved beyond reasonable doubt by the evidence directly relevant to it – and to decide the charge having regard to all the evidence relevant to its circumstantial proof, including any tendency the jury found proved, without reference to that charge. Thus understood, the jury's method would avoid the problem of circularity and ensure that, in deciding (finally) the ultimate fact in issue and its corresponding element, the jury adheres to the criminal standard of proof.

39. The proposed direction is not unprincipled. It preserves the essential inductive nature of tendency reasoning whilst providing a necessary and explicit safeguard against a particular kind of error. Its necessity is emboldened by the fact that the directions otherwise relied upon to safeguard against that error are general in nature and do not address the particular vice in question. If the direction is necessary as a matter of law it must be given. If it is necessary in the sense that it is required to avoid a perceptible risk of a miscarriage of justice[41] it will usually be appropriate. That the courts in *JS* and *Restricted decision* determined that the directions given in those cases at trial were adequate does not render the proposed direction any less necessarily. Those holdings were made consequential upon the Courts having found that the invitation to use charged acts as tendency evidence did not expose an accused person to the problem of circularity, and did not materially endanger the jury's application of the criminal standard. Those findings cannot but have informed

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39 *Applicant's submissions*, [54].

40 *Applicant's submissions*, [55].

41 *Longman v R* (1989) 168 CLR 79, 86. In Victoria Parliament has abolished the common law rules which dictate the directions which a trial judge must give. Part 3 of the JDA creates a statutory scheme whereby trial judges need not give directions other than 'general directions' or directions mandated by statute (s 10(1)), unless counsel request them (s 12). The trial judge must give a 'requested direction unless there are good reasons' for not giving it (s 14). The trial judge must not give a direction that has not been requested (s 15), unless he or she considers that there are 'substantial and compelling reasons' for doing so (s 16).

their Honours' assessment of the adequacy of the directions given. Similarly, in so far as the applicant calls in aid of this Court's finding in *Bauer* that the direction there was adequate, it is necessary to recognise and acknowledge the context in which that direction was deemed adequate is: *Bauer* was *inter alia* a case about uncharged acts and about the adequacy of directions formulated to address the dangers associated with a jury's use of uncharged acts as tendency evidence. The Court was not asked to consider the questions the subject of this application. Just as the Court in *Hughes* had no cause to address the errors in the trial judge's directions in that case, which attached the criminal standard of proof to the uncharged acts relied upon as tendency evidence and to the tendency itself, so too in *Bauer*.

Conclusion on section A

40. The proposed direction is necessary. The Court of Appeal was correct to have found that the jury in the respondent's trial be given it.

## A. SECTION 61 OF THE JDA

41. Section 61 of the JDA does not prohibit the proposed direction. The Court of Appeal was right to have so held.

The applicant's submissions

42. In contending that the proposed direction offends ss 61 and 62 of the JDA the applicant relies, in summary, on a construction that commences with the JDA's 'express purposes'[42] and, in particular, to those which directed to reducing the complexity of jury directions and to promoting directions that are simple, brief and clear.[43] The applicant relies on Parliament's stated intention that trial judges should:[44] (a) give directions on only so much of the law as the jury needs to know to determine the issues in the trial; (b) avoid using technical legal language wherever possible; and (c) be as clear, brief, simple and comprehensible as possible. Those are 'guarding principles' to which courts must have regard when applying and interpreting the JDA.[45]

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42 *Applicant's submissions*, [16].
43 JDA, s 1(a), (b) and (c).
44 JDA, 5(4).
45 JDA, s 5(5).

43. After setting out the terms of ss 61 and 62 (and the notes that follow s 62) the applicant directs attention to the statute's distinction between 'elements' and 'other "matters"' and to the terms of s 4 which provides that 't]he Act applies despite any rule of law or practice to the contrary.'

44. Against that background, it is contended that the principal error in the Court of Appeal's holding and is exposed by the following passage in its reasons (**CAB 39 [33]**):

> By its clear terms, s 61 requires a trial judge to direct the jury that 'the elements of the offence charged' must be proved beyond reasonable doubt. In the present case, *every sexual act alleged in every charge on the indictment is an element of that charge*. A direction that any such element must be proved beyond reasonable doubt — *no matter the use sought to be made of the evidence* — would not offend s 61 of the JDA (emphasis added).

45. It is said that the 'drift' in the Court's language – from 'element' to 'evidence' – manifests a conflation that betrays error.[46] It is submitted that the operation of s 61 requires an understanding of the 'textual' distinction' between 'the elements of an offence' and the (other) 'matters' to which the statute refers.[47] Elements are the legal constituents or essential ingredients which must be proved beyond reasonable.[48] Behind 'the facts that themselves establish the elements' may be other facts from which those facts may be inferred.[49] The facts that are 'used to establish the element' are the 'facts in issue'.[50] The information a court receives to decide the facts in issue is the 'evidence'.[51] The legal requirement regarding the onus and standard of proof is related to the elements.[52]

46. These are distinctions, it is said, which the common law has long recognised and against the backdrop of which s 61 was enacted.[53] An 'overarching purpose' of the JDA is to simplify directions. A specific purpose of ss 61 and 62, it is said, is to reform directions about the criminal standard of proof by replacing the common law rules and to return the law to when juries were

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46 *Applicant's submissions*, [23].
47 *Applicant's submissions*, [25]; see, generally, *HML* (2008) 235 CLR 334, 360 [29] (Gleeson CJ).
48 *Applicant's submissions*, [26]; citing *Shepherd*, 580 (Dawson J, with whom Mason CJ, Toohey and Gaudron JJ agreed).
49 *Smith v The Queen* (2001) 206 CLR 650 ('*Smith*'), 654 [7] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
50 Cf *McNamara v The King* (2023) 98 ALJR 1, 18 [69] (Gageler CJ, Gleeson and Jagot JJ).
51 *Applicant's submissions*, [25](3); citing *HML*, 350 [4] (Gleeson CJ); and, generally, *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 ('*Chief Executive Officer of Customs v El Hajje*') at 174 [38] (McHugh, Gummow, Hayne and Heydon JJ).
52 *HML*, 351 [4] (Gleeson CJ); see also, 490 [477] (Crennan J), and cited in *Bauer*, 98 [86] (the Court).
53 *Applicant's submissions*, [27].

directed that only the elements of the offence and the absence of a defence needed to be proved beyond reasonable doubt.[54]

47. It is submitted that the text of ss 61 and 62 gives effect to that objective.[55] No 'matter' other than the elements of the offence charged (or an alternative offence) and the absence of a defence may attract the direction that it must be proved beyond reasonable doubt. Those 'matters' include 'intermediate facts' in the chain of proof and the 'evidence' relied upon to make findings of fact. Once s 61 is properly construed, it is submitted, it becomes apparent that the Court of Appeal erred by 'eliding the distinction between "elements" and "evidence".'[56] The proposed direction is not a direction attaching to 'the elements of the offence charged', but to 'evidence' led in proof of a tendency which the jury are invited to use to find proved the ultimate fact in issue and element of the offence charged.

48. Finally, the applicant contends that the Victorian Court of Appeal's earlier decision in *Dempsey* provides little or no support for the Court's analysis below and, to the extent that it might, it is itself wrong.

49. For the following reasons, the applicant's submissions should be rejected.

The Court of Appeal's reasons

50. The Court of Appeal's reasons betray neither a conflation of the distinction between 'elements' and 'evidence', nor does it manifest a failure properly to understand the reasoning process which the prosecution intends to invite the jury to apply in its proof of the offence charged (**CAB 39 [33]**). To the contrary, the Court's holding and reasons follow logically from its analysis of the process itself. It is why it is preferable that the process (first) be scrutinised and understood before the question of its possible violation of s 61 is resolved. In that respect, the Court correctly found support for its decision in *Dempsey*.

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54 *Applicant's submissions*, ]27]; Explanatory Memorandum, Jury Directions Bill 2015 (Vic) at 38; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2015 at 680-81 (Mr Pakula, Attorney-General); cf Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 141-145 [3.134] - [3.151].

55 *Applicant's submissions*, [28].

56 *Applicant's submissions*, [29].

51. The Court's analysis commenced by an observation that it was 'noteworthy' that the prosecution's tendency notice identified 'the [charged] act' as the fact relied upon to prove the asserted tendencies (**CAB [4]**). By that observation the Court was emphasising that it was the jury's finding (to a standard less than the criminal standard) – rather than the evidence led in its proof – that the prosecution intends the jury to use as tendency 'evidence'. Taking charge 2 as an example, the prosecution alleges that the respondent committed the crime of incest. To make out the offence charged, the prosecution must prove to the jury's satisfaction, and to the criminal standard, that the respondent penetrated the complainant. The prosecution intends to rely upon tendency reasoning to prove penetration beyond reasonable doubt. But it wants to prove tendency by *inter alia* inviting the jury to find to a lesser standard that the respondent penetrated complainant.

52. Rather than representing a conflation of the conceptual difference between the elements of an offence and the evidence led in its proof, the Court was recognising that, in its application to the process on which the prosecution intends to rely, the distinction is without a difference. That is what the Court meant when it said that, in the respondent's case, 'every sexual act alleged in every charge on the indictment is an element of that charge… no matter the use sought to be made of the evidence' (**CAB 39 [33]**).

53. The proposed direction is intended to prevent the prosecution from inviting the jury to make a finding which corresponds to an element of the offence charged to a standard other than the criminal standard. The direction is an attack on the process on which the prosecution intends to rely.[57] Thus understood, rather than its representing a violation of s 61, it is an application of its mandate: no finding of fact which corresponds to an element of an offence charged may be made by a jury – whatever its intended use – unless the jury finds it proved beyond reasonable doubt.

54. In *Smith*,[58] this Court said that:

> [i]n determining relevance, it is fundamentally important to identify what are the issues at the trial. On a criminal trial *the ultimate issues will be expressed in terms of the elements of the offence with which the accused stands charged. They will, therefore, be issues about the facts which constitute those elements*. Behind those ultimate issues there will often be many issues about facts relevant to facts in issue.

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57 Cf *Applicant's submissions*, [32]; *Decision restricted*, [9] (Beech-Jones CJ at CL, with whom Button J agreed).
58 *Smith*, 654 [7] (the Court).

And in *Chief Executive Officer of Customs v El Hajje*,[59] McHugh, Gummow, Hayne and Heydon JJ (with whom Kirby J agreed in the result) said:

> Reference to cases like *Hayes* does not support or require the conclusion that material facts or the ultimate fact or facts in issue cannot be averred. The distinction which Fullagar J made in *Hayes* was between *the proposition to be established and the material evidencing the proposition*. That is a distinction found in the writings of Bentham and Wigmore. *It is a distinction drawn by those authors in the context of describing the law of evidence as being concerned with the relationship between what is to be proved (the proposition to be established, whether as an ultimate fact in issue or subsidiary fact relevant to an issue) and the manner of its proof*. As Bentham said, "[e]vidence is a word of relation".

55. Crucial to understanding the Court of Appeal's construction of s 61 and, more importantly, to its decision whether the proposed direction offends ss 61 and 62, is its analysis of the process of reasoning on which the prosecution intends to rely in the applicant's trial. The Court's reasons reflect its conclusion that that process will invite the jury to determine on any given charge, to use the language employed in the passages above an 'ultimate issue' corresponding to an element of the offence; or an 'issue about the facts which constitute[s] [an] element', in proof of that same issue and element. So understood, the applicant's criticism that the Court did not give effect to the statute's distinction between the 'elements' of an offence and the other 'matters' to which the statute refers, falls away.

56. That the purposes and the guiding principles of the JDA reflect Parliament's intention to promote jury directions which are, to the extent that they can be, clear, simple and brief is uncontroversial; although one may query whether the JDA, since its enactment, has achieved those objectives, and whether the amendments made since its introduction have adhered to those objectives.[60] Those objectives form part of the essential context against which the JDA's provisions must be construed and applied. Judges who are called upon to formulate and give jury directions must give effect to those objectives. Less clear is how Parliament intends that courts – and, in particular, Victoria's Court of Appeal – should resolve the tension between the competing objectives of simplicity, clarity and brevity, and the need to formulate directions that are necessary to do justice in a particular case or type of case.

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59 *Chief Executive Officer of Customs v El Hajje*, 174 [38] (footnotes omitted).

60 Justice P G Priest, 'Codifying Jury Directions: *The Jury Directions Act 2015* (Vic)' (2023) 97 ALJ 378.

57. To that end, it is unclear what the applicant means when it is said that it is an 'overarching purpose' of the JDA that juries be directed in clear, brief and concise terms on only so much of the law as is necessary to decide the issues at trial.[61] If all that is meant is that that purpose manifests a general objective to which the courts must give effect to the extent that they can, that submission may readily be accepted. If what is meant is that courts must steer by that objective, in the sense that those courts, in deciding whether and how to direct a jury, allow considerations which may weigh in favour of a given a direction that is prudential in nature and protects an accused person from potential injustice, to yield to the perceived demands of the 'overarching purpose', that submission should be rejected.

58. The proposed direction is necessary. It is necessary to prevent the prosecution, in its case against the respondent, utilising findings of fact that correspond to elements of the offences charged without attaching to them the criminal standard of proof. Section 61 not only accommodates the proposed direction, it demands it. The Court of Appeal was right to have so held.

Conclusion on section B

59. Section 61 does not prohibit the proposed direction. Special leave should be refused.

## PART VI – ESTIMATE OF THE RESPONDENT'S ARGUMENT

60. It is estimated that the Respondent will require 2.5 hours for oral argument.

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61 *Applicant's submissions*, [27].