HIGH COURT OF AUSTRALIA

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Details of Filing

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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 OUTLINE OF ORAL SUBMISSIONS

Part I: Certification for publication

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

Part II: Outline of propositions

2. The Full Court was correct in concluding, by reference to text and context and, consistent with the reasoning in *Hartwig,* that s 184(2) of the Youth Justice Act ("YJA") engaged s 85ZR(2) of the Crimes Act {Reasons, [23]-[29] RS [29]}.
3. The Full Court was right to highlight the objectives of the YJA's concern with the administration of juvenile justice and its concern for the "child-centric approach to juvenile justice" of the Act's Youth Justice Principles {RS [26]-[28]}; Reasons, [30]-[32], CAB 183-4; YJA, ss 2(a) and 3, JBA, 250-1, sch. 1, JBA, 312, principles 16-20}.
4. The mischief to which s 184(2) YJA is directed concerns how society deals with misbehaviour on the part of children and whether the consequences of youthful misbehaviour should impact outside the confines of the youth justice system. The solution of the Queensland legislature (unless a conviction is recorded) is to allow a child to progress with a clean slate. It recognises that children should be given the opportunity to set aside their childish ways upon entering adulthood.[1]

[1] "When I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things." 1 Corinthians 13:11 (KJV)

5. The text and structure of the YJA legislative scheme lead to the conclusion that the exceptional recording of a conviction under the YJA is a necessary formal act for a finding of guilt to have any existence outside the permitted purposes for which the YJA, principally through s 154 {JBA, 280}, provides. Section 148 {JBA, 275} clarifies that those purposes exclude any use in the criminal justice system after the child attains adulthood. Section 184(2) YJA is not concerned merely with records of the conviction as was held to be the case under the Penalties and Sentences Act ("PSA").
6. A construction that conforms with Australia's international obligations should be preferred: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 {JBA, 713, ll. 15-30}:
    - Convention on the Rights of the Child Articles 3, 4, 40 {JBA 1359, 1371}
    - Beijing Rules Principles 1.2, 2.3, 5.1, 6.1, 8.2, 17.1, 17.4, 21.1 and 21.2 {JBA 1340-1344, 1348-51}
7. Section 184(2) applies across the board "except as otherwise provided". The Full Court {at [35], CAB 185} was correct to observe the absence of any other provision in any other Act which provides for a finding of guilt to be taken into account in the context of a decision under s 501CA(4) of the Migration Act.
8. Contrary to AS [43], the text of ss 12(3)(a) PSA and 184(2) YJA are not identical upon substitution of the defined terms. Upon substitution of the definition of "conviction" {s 4 PSA, JBA, 403}, s 12(3)(a) reads as follows: "Except as otherwise provided by this or another Act, (a) a finding of guilt or the acceptance of a plea of guilty without recording the finding of guilt or the acceptance of a plea of guilty is taken not to be a finding of guilt or the acceptance of a plea of guilty for any purpose; and …"
9. Section 184(2) with the definition of "finding of guilt" {YJA, schedule 4, JBA, 320} reads:
"Except as otherwise provided by this or another Act, a finding of guilt or the acceptance of a plea of guilty by a court without the recording of a conviction is not taken to be a conviction for any purpose".
10. Apart from the contextual indicators and the use of the indefinite article, the adjudicatory step, the finding of guilt or acceptance of a plea, is identified as the subject of the latter part of the sentence which uses the undefined "conviction", with its broader meaning, to declare that the adjudicatory step is not taken to be a conviction, for any purpose.
11. Moreover, these words appear in the context of an Act dealing with children and without the accompaniment of provisions concerned overwhelmingly with record keeping. There

is no proximate reference to criminal history other than that contained in s 154. Section 184(2) and its language should be given full effect.

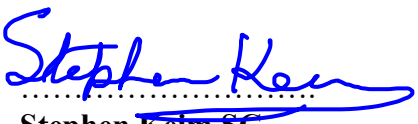
12. The following subsection, s 184(3), would be unnecessary if s 184(2) did not have the effect of deeming that the finding of guilt or acceptance of a plea of guilty had not occurred (in the absence of the recording of a "formal conviction").

13. The Full Court {CAB, 183}, at [28] and [29], cited passages from R v MDD {JBA, 1214} setting out the different considerations in play in exercising the discretion to record a conviction or not as between the PSA and the YJA. The respondent's reliance on statements from various Queensland Court of Appeal decisions comparing s 12(3) PSA and s 184(2) YJA {AS, [42] and [47]} are of no assistance to the Court in that those cases were not addressing the questions of interpretation raised here.

14. The Respondent {RS [48]} refers to the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) (the Rehabilitation Act) as providing context. The Rehabilitation Act provides a spent convictions scheme which only applies to convictions that are recorded (ss 3: definitions of *charge, rehabilitation period, criminal history*; 6, 8 and 9){JBA 360ff}. Section 5 provides a more restricted benefit to a person against whom a conviction is not recorded. A narrow construction of s 184(2) of the YJA may result in a person whose finding of guilt has been recorded being in a more beneficial position than a person whose finding of guilt has not been recorded.

15. The error was material for the reasons given by the Full Court {[39]-[46], CAB 186-7}. The Appellant {ARS [16]} invites the Court to intrude into the merits {R [40]-[49]}.

Dated: 8 March 2023



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