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:

BRIAN XERRI

Appellant

and

THE KING
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSION

Part I: These submissions are in a form suitable for publication on the internet.

Part II:

1. *Issues raised* – The primary issue in this appeal is whether a new maximum penalty of imprisonment for life introduced by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW) "Amendment Act"* has retrospective application for an offence contrary to s 66EA of the *Crimes Act 1900* (NSW) *"Crimes Act"* of persistent sexual abuse of a child" that was committed when a predecessor offence was in force that had a lower maximum penalty of 25 years imprisonment.
2. Relevant to the primary issue are the four questions that have been raised in the Appellant's submissions[1]:
    A. Whether the s 66EA offence, as amended, was an existing offence that had been "reformulated, refined and improved", as opposed to it being a new offence?
    B. Where it may be ambiguous as to whether an offence is a "new offence", in that it broadly covers the same criminal conduct, is the correct approach to apply the normal principles of statutory interpretation to determine the intention of Parliament as to the applicability or otherwise of a new increased maximum penalty?
    C. Does s 19(1) of the *Crimes (Sentence Procedure) Act 1999*. *"CSP Act"* preclude the retrospective application of an increased maximum penalty for an offence without express provision in the offence as to the disapplication of s 19(1)?

[1] Appellant's Submissions (AS) [4 A-D].

D. Was the maximum penalty 25 years imprisonment for the purposes of sentencing the Appellant?

3. The appellant also identified a further issue in relation to the appeal in its written reply[2] to the respondent's submissions, as to whether consistent with the approach taken in *Cooper v Western Australia* (2020) WASCA199, (2020) 286 A Crim R 28, a broad construction should be applied to s 19 of the *CSP Act.* Such an approach would mean that the provision would not just apply to selfsame offences, but would also extend to apply to repealed offences, the elements of which are incorporated into a new offence. By contrast the cases referred to in the respondent's written submissions of *R v Ronen* [2006] NSWCCA 123; 161 A Crim R 30, and *Commissioner of Taxation v Price* [2006] 2 Qd R 316, adopt a narrow approach so that the cognate Commonwealth provision in s 4F *Crimes Act 1914* (Cth) that were held to only apply if the penalty is increased for the existing offences.
4. An examination of the core elements that encompass the actus current s 66EA and predecessor s 66EA offence reveals that there is not much difference between the actus reus of two offences. In addition, whilst the current s 66EA requires proof of a sexual relationship, in which the unlawful sexual acts were committed, if no such relationship was able to proven in relation to offending that occurred prior the current s 66EA offence then no liability would arise under the current offence in any event.
5. *Respondent's Notice of contention:* If the Amendment Act did increase the penalty for the offence in s 66EA for the purposes of s 19(1) of the *CSP Act*, it is disputed by the appellant that the maximum penalty of imprisonment for life applied the appellant by virtue of s 66EA(7), as far clearer language would have been required in the provision as to the disapplication of s 19(1).
6. *Appellant's Argument*: The appellant argues that s 66EA of the *Crimes Act* is partly retroactive, that is, it operates retrospectively, but for the maximum penalty due to s 19(1) of the *CSP Act*, as made clear by s 25AA(4) of the *CSP Act*.[3] The appellant accepts that the effect of s 66EA(7) is that it provides for the offence in the current s 66EA to have retrospective operation.[4]
7. The appellant submits that the majority Bell P (as his Honour the was) and Price J erred in finding that *"... although the current offence covers broadly the same subject matter as*

[2] Appellant's Reply Submissions (ARS) at [2]-[4].
[3] AS at [14].
[4] AS at [11].

the predecessor offence … It is a different offence to which s 19 CSP has no application and the maximum penalty of life imprisonment is intended to apply."[5]

8. The appellant relies on the reasoning in the minority judgment of Hamill J who concluded that the current s 66EA offence was not a new offence, but rather it was a "reformulated, refined and improved" existing offence, and the legislative intention and the language of s 25AA specifically preserved the fundamental provision in s 19 of the *CSP Act*.[6]
9. The appellant argues that Hamill J was correct in his conclusion as that there was no conflict between the retrospective operation of s 66EA and s 19 of the CSP Act. This is because as Hamill J observed if there was any such perceived conflict *"… it is readily reconciled, and the legislative scheme given a cohesive and unified operation, once it is accepted that the retrospectivity relates to the offence, while the increase in the maximum penalty is precluded by the overarching sentencing provision in ss 19 and s 25AA "notwithstanding the literal command of s 66EA."*[7]
10. In terms of considerations of fairness to offenders due the changes to sentencing practices introduced by s 25AA, *"…it was the clear legislative intention of parliament to require attention to be given to contemporary sentencing practices with s 19 confirming that the maximum penalty is that which applied at the time of the commission of the offence"*: *Corliss v The Queen* [2020] NSWCCA 6; 282 A Crim R 195[8].
11. An inference can be drawn that the reason why sub-s 8 of the draft provision for the offence in Appendix H recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, was not enacted in the current s 66EA, is that it would be unnecessary where s 19(1) would be expected to apply where the offending occurred when the predecessor offence was in force as the offender would be sentenced on the basis of the previous maximum penalty of twenty five years imprisonment.

Dated: 18 October 2023

Nathan Steel,
Counsel for the Appellant

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[5] *Xerri v R* [2021] NSWCCA 268 at [103].
[6] *Xerri* at [156].
[7] *Xerri* at [163].
[8] JBA at 433.