HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **SEYYED ABDOLZADEH FARSHCHI**
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2 If, as contemplated by s 64(1)(e) of the *Jury Directions Act 2015* (Vic) (**JD Act**), a trial judge explains to a jury that "a reasonable doubt is not … an unrealistic possibility" (**the impugned explanation**), will the judge *necessarily* have directed the jury to apply a standard that is not "beyond reasonable doubt"? The answer to that question is "no". Accordingly, s 68(1) of the *Judiciary Act 1903* (Cth) applied s 64(1)(e) of the JD Act to the appellant's trial and, therefore, both grounds of appeal must be dismissed.

PART III: SECTION 78B NOTICE

3 Notice pursuant to s 78B of the Judiciary Act has been given: **CAB 240**.

PART IV: MATERIAL FACTS

A BACKGROUND

4 The appellant (and his wife) were charged on indictment with causing a person to remain in forced labour and conducting a business involving forced labour, contrary to ss 270.6A(1) and (2) of the *Criminal Code* (Cth): **CAB 5**. The complainant was a refugee who had fled Iran and travelled by boat to Australia. The complainant responded to a job advertisement for the appellant's confectionary business and, after an initial unpaid training period, commenced working for the appellant.

5 The prosecution case was that after the complainant raised concerns about his pay, the appellant made threats to the complainant. Those threats included that the appellant had connections in the Department of Immigration that could be used to have the complainant placed in immigration detention or deported. On the basis of those threats, the complainant continued to work for the appellant, believing he had no other choice: **CAB 210-212 [9]-[20]**. The defence case centred on the credibility and reliability of the complainant.

B THE TRIAL

6 On 7 September 2023, the first trial of the appellant commenced before Chief Judge Kidd in the County Court of Victoria. However, the jury was discharged without a verdict: **CAB 214 [26]**. The second trial (which concluded with a verdict) commenced on 20 September 2023, again before Chief Judge Kidd. Because the appellant was charged with Commonwealth offences, the "matter" was necessarily one arising under

the law of the Commonwealth creating those offences.[1] The County Court was vested with federal jurisdiction to determine that matter by s 68(2) of the Judiciary Act: **CAB 212 [22]**.[2]

7 Sections 63 and 64 of the JD Act are laws "respecting … the procedure for" the "trial and conviction" of persons charged with State offences. That being so, s 68(1)(c) of the Judiciary Act applied those provisions to the appellant's trial for Commonwealth offences — subject to the issues raised in Grounds 1 and 2 of this appeal.

7.1 Section 63(1) of the JD Act requires a trial judge to give the jury an explanation of the phrase "proof beyond reasonable doubt" unless there are "good reasons for not doing so".

7.2 Section 64(1) provides that, in explaining the phrase "proof beyond reasonable doubt" under s 63, the trial judge "may":

> (a) refer to—
>
> (i) the presumption of innocence; and
>
> (ii) the prosecution's obligation to prove that the accused is guilty; or
>
> (b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or
>
> (c) indicate that—
>
> (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
>
> (ii) the prosecution does not have to do so; or
>
> (d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
>
> (e) indicate that **a reasonable doubt is not** an imaginary or fanciful doubt or **an unrealistic possibility**.
>
> (emphasis added)

8 During the first trial, the trial judge received submissions on the operation and effect of s 64 of the JD Act, including how the explanation of the phrase "beyond reasonable doubt" may be given. The appellant opposed the trial judge giving the impugned explanation. Counsel for the appellant reserved the position as to whether such a direction is lawful given s 80 of the Constitution. Ultimately, the judge did not give the

1 *Attorney-General (Cth) v* ***Huynh*** (2023) 97 ALJR 298 at [43] (Kiefel CJ, Gageler and Gleeson JJ).
2 See *Huynh* (2023) 97 ALJR 298 at [44]-[46] (Kiefel CJ, Gageler and Gleeson JJ).

impugned explanation, reserving the issue for revisitation at the end of the trial: **CAB 214 [26]**.

9 At the second trial, the trial judge did not give the impugned explanation during his introductory remarks to the jury. However, at the conclusion of the evidence and prior to closing addresses, as part of the discussion contemplated by s 12 of the JD Act, the trial judge entertained further submissions on the issue. Once more, the appellant opposed the giving of the impugned explanation, but was unsuccessful: **CAB 214 [27]**.

C DIRECTIONS ON STANDARD OF PROOF

10 In charging the jury, the trial judge said (T1377.12-30, **CAB 22**):[3]

> I want to emphasise again, and I think all counsel have done this, but you can probably never say enough on this topic. I want to emphasise again that under our justice system, people are presumed to be innocent unless and until they are proved guilty. Before you may return a verdict of guilty, the prosecution must satisfy you that each of the accused is guilty of the changes in question. I will say something further about the separate two accused and the separate charges later. But when you are considering a charge against an accused you must be satisfied that the prosecution has established the charge in question.
>
> The accused do not have to prove anything. The prosecution must do this as in satisfy, prove the charge against the accused for each of the charges beyond reasonable doubt. Beyond reasonable doubt is the highest standard of proof that our law demands. It is not enough for the prosecution to prove that the accused is probably guilty or even very likely to be guilty.

11 The trial judge then stated (T1378.2-11, **CAB 23**):

> It is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. **A reasonable doubt is not** an imaginary or fanciful doubt or **an unrealistic possibility**. You cannot be satisfied the accused is guilty if you have a reasonable doubt about whether the accused is guilty. I mentioned to you at the beginning of the trial that these words 'proof beyond reasonable doubt' mean exactly what they say, proof beyond reasonable doubt.
>
> (emphasis added)

12 Later in the charge, the trial judge said (T1406.20-31, **CAB 43**):

> You may only convict the accused if you are satisfied that his or her guilt is the only reasonable conclusion to be drawn from the whole of the evidence, both direct and indirect. If there is another reasonable view of the facts which is consistent with the accused's

[3] The trial judge's directions reinforced statements about "beyond reasonable doubt" made in the closing addresses of defence counsel for each accused: T1254.23-24 (**RFM 53**), T1301.21-1302.5 (**RFM 84-85**), T1363.5-29 (**RFM 135**).

innocence, then the prosecution will not have proved his or her guilt beyond reasonable doubt and you must acquit him or her. If there is a reasonable hypothesis, a reasonable view of the facts you have examined and it is consistent with innocence, you have examined it and you cannot exclude it beyond reasonable doubt, then that results in an acquittal.

13 Then, when turning to address the elements of the charge, the trial judge said (T1410.29-1411.7, **CAB 47-48**):

> Now can I just remind you of two things. That for all of these charges, the prosecution must prove all of the elements, and the prosecution must prove all of the elements beyond reasonable doubt.
>
> If you are satisfied that the prosecution has proved all of the elements and has done so beyond reasonable doubt, you can return a verdict of guilty. If you are not satisfied of any one of the elements, you must acquit. If you entertain a reasonable doubt about any one of the elements, you must acquit.

14 In discussing the physical element of whether the appellant engaged in the conduct relied upon by the prosecution, the trial judge said (T1414.25-1416.12, **CAB 51-53**):

> The defence case is the threats were not made and you should entertain a reasonable doubt about whether they were made. You will also have to exclude a motive to lie which has been raised and I will say something specifically about that in due course. But a motive lie must be excluded.
>
> [The complainant] has lied to improve his visa prospects. That is the motive to lie which has been raised. It is a hypothesis or a view of the facts which is consistent with innocence and that is why you need to exclude it.
>
> The defence says there were discussions between Dr Farshchi and [the complainant] about his visa situation. But the evidence raises the hypothesis of a reasonable possibility that [the complainant] misinterpreted or misconstrued what was said to him. The defence case or view of the facts if you like, is that [the complainant's] account and recollections are coloured by his stressful and desperate circumstances, drug consumption or taking and his later disputes with Dr Farshchi over — with his disputes with Dr Farshchi over work conditions, including his later disputes.
>
> The defence case is that these may have affected [the complainant's] reconstruction of the events and conversations. [The complainant] may have concluded threats were made when, in fact, they were not made at all. There is, therefore, an issue about honest but mistaken recollection of events. You have got two hypotheses there that you need to consider. Motive to lie, [the complainant] has just not told you the truth. But also this view of the facts or hypothesis that he is mistaken. He is honest but he was mistaken about what he understood and heard, bearing mind the defence case that he saw everything through a particular lens. That is what they argue.
>
> Amongst that, it has also been raised that there is a motive to not just lie but exaggerate. You need to consider all of those particular hypotheses. In order to find Element 1 proved,

you must be satisfied that the threats were made beyond reasonable doubt. Effectively, that involves you accepting [the complainant] as an honest credible witness and a reliable accurate witness.

You will need to exclude those hypotheses that I have just outlined to you, namely motive to lie or this is a product of exaggeration or misinterpretation. You will need to exclude those hypotheses as reasonable possibilities. If they were reasonable possibilities and you can't exclude them, then you are entertaining a reasonable doubt about Element 1 and you would have to acquit.

15 The trial judge later returned to the issue of a motive to lie or to distort, and said to the jury (T1462.21-1463.17, **CAB 87-88**):

Now, I have told you that it is for the prosecution to prove beyond reasonable doubt that the accused is guilty and they need to exclude all defence hypotheses consistent with innocence beyond reasonable doubt. This is such a defence hypothesis; this motive to lie or distort. You can only convict Dr Farshchi and Ms Mostafaei on the basis of all the evidence once you have actually excluded this motive to lie. Ms Mostafaei has raised it, but it cuts across both defences, you will appreciate.

The accused — neither accused and Ms Mostafaei whose counsel raised this, they do not need to have to prove that [the complainant] had a reason for giving false evidence or distorted evidence. They do not need to prove or satisfy you of the existence of this motive to lie or distort. Rather, it is the Crown that has to exclude it and that is consistent with the standard and burden of proof. It would, therefore, be wrong of you to think that unless you find a reason for [the complainant] to lie or give false or distorted evidence then [the complainant] must be telling the truth.

If you did that, you would be expecting the accused to prove their innocence and that would be contrary to the rule that the prosecution must prove the accused's guilt beyond reasonable doubt. So what that means in practical and also legal terms is that you do need to consider this motive to lie or distort. And in order to convict you have to exclude it beyond reasonable doubt.

PART V: ARGUMENT

A INTRODUCTION

16 Section 68(1) of the Judiciary Act does not apply the text of a State law to the extent that, in so applying as a Commonwealth law, it would be: (1) inconsistent with another Commonwealth law; or (2) inconsistent with the Constitution.[4]

[4] *Huynh* (2023) 97 ALJR 298 at [58] (Kiefel CJ, Gageler and Gleeson JJ), [149] (Gordon and Steward JJ), [194] (Edelman J).

17 **Ground 1** invokes the first of those limitations, by reference to s 13.2 of the Criminal Code. That section provides:

> (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
>
> (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

18 Section 13.2 applies to all offences against the Criminal Code, including those created by ss 270.6A(1) and (2).[5] Section 270.6A does not specify a different standard of proof for the purpose of s 13.2(2). Therefore, in accordance with s 13.2(1), any legal burden of proof on the prosecution in relation to those offences must be discharged "beyond reasonable doubt".

19 **Ground 2** invokes the second of the limitations on s 68(1) of the Judiciary Act, by reference to s 80 of the Constitution. That section relevantly provides that the "trial on indictment of any offence against any law of the Commonwealth shall be by jury". The appellant contends that "the criminal standard of proof" is an "essential characteristic" of a jury trial under s 80 of the Constitution: see **AS [5.2], [12], [55]**.

20 The premise of both Grounds is that the "unrealistic possibility" portion of s 64(1)(e) of the JD Act is *incapable* of being applied by s 68(1) of the Judiciary Act. That depends on the proposition that the giving of the impugned explanation — *in and of itself* — amounts to a direction to the jury to apply a standard different from "beyond reasonable doubt". For the reasons explained below, that proposition is not correct.

B REFERRING TO AN "UNREALISTIC POSSIBILITY" DOES NOT ALTER THE STANDARD OF PROOF

B.1 The explanation in s 64(1)(e) is consistent with "beyond reasonable doubt"

21 The appellant's complaint is limited only to that portion of s 64(1)(e) that refers to an "unrealistic possibility". The appellant does not suggest it is inconsistent with either s 13.2(1) of the Criminal Code (or s 80 of the Constitution) for a trial judge to give to the jury an explanation about the meaning of "beyond reasonable doubt". Nor does the appellant suggest that there is any inconsistency between s 13.2(1) of the Criminal Code (or s 80 of the Constitution) and any of the other various explanations set out in s 64(1)

5 Criminal Code, s 2.2(1).

of the JD Act. Thus, the appellant accepts that s 63 and the vast majority of s 64 of the JD Act applied to the appellant's trial by force of s 68(1) of the Judiciary Act.

22 Indeed, the appellant endorses the part of s 64(1)(e) of the JD Act permitting a direction that a reasonable doubt is not an imaginary or fanciful doubt: **AS [39]**. The appellant also accepts that stating in a charge to a jury that a reasonable doubt is not "an unreal possibility" does not, alone (that is, in and of itself), diminish the criminal standard of proof: **AS [31]**. It therefore appears that the appellant would have no objection if s 64(1)(e) said that a trial judge may "indicate that a reasonable doubt is not an imaginary or fanciful doubt or an **unreal** possibility". Thus, the crux of the appellant's submissions lies in the difference between the words "unreal" and "unrealistic".

23 In distinguishing between the words "unreal" and "unrealistic", the appellant engages in an acontextual semantic analysis by reference to dictionary definitions: **AS [43]-[48]**. In essence, the appellant takes the least stringent dictionary definition of "unrealistic" and uses it to conclude that, if the jury is directed by reference to an "unrealistic possibility", the standard of proof will necessarily be altered: see **AS [46], [48], [51]**. This narrow semantic approach ignores the overlap between the words "unreal" and "unrealistic":[6] see **CAB 218 [40]**; cf **AS [47]**. Consistent with Barwick CJ's observations in ***La Fontaine*** *v The Queen*, it is questionable whether a member of the jury listening to the charge would appreciate any difference between "unreal" and "unrealistic".[7]

24 The appellant's central point is that "unreal" things are "so unlikely as to be removed from reality", whereas "unrealistic things happen": **AS [47]**. The assumption underpinning this submission appears to be that any doubt must lead to acquittal unless it relates to something that cannot happen or is "removed from reality" — that is, unless it is (or is nearing) an impossibility. That proposition cannot be sustained.

25 As explained in *R v* ***Dookheea***,[8] the "beyond reasonable doubt" standard was introduced in the mid-18th century as a means of expressing more clearly the then well-settled test of satisfaction as a matter of conscience or moral certainty. The formula of "beyond reasonable doubt" was intended to reflect the previous understanding that moral

6 Thus, for example, one of the definitions of "unreal" in the *Oxford English Dictionary* is "[n]ot realistic, genuine or true to life; artificial. Also: extremely unusual; so strange as not to seem real."

7 (1976) 136 CLR 62 at 73.

8 (2017) 262 CLR 402 at [30], [33] (the Court).

certainty meant somewhere between probable suspicion and complete certainty[9] — in other words, "a very high but not complete degree of persuasion".[10] It reflected English law's rejection of the idea that facts could be established with absolute certainty beyond any doubt.[11] In that sense, as United States Supreme Court recognised in ***Victor*** *v Nebraska*, the "beyond reasonable doubt" standard "is itself probabilistic",[12] because:[13]

> in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief — the degree to which a factfinder is convinced that a given act actually occurred — can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he [or she] should have in the correctness of factual conclusions for a particular type of adjudication.

26 Because of the limits of human knowledge, "proof beyond reasonable doubt" does not require absolute certainty (consistent with s 64(1)(c) of the JD Act): see **AS [39]**. Requiring an acquittal unless any doubt involves an impossibility or something approaching an impossibility is in tension with that position. The dichotomy the appellant seeks to draw between "unreal" and "unrealistic" possibilities is a false one. An "unreal possibility" can also happen — hence the word "possibility" — but the adjectival "unreal" speaks to the degree of (un)likelihood, and thus the degree of confidence that the jury has in putting aside that possibility. The question is whether the reference to an "unrealistic possibility" in s 64(1)(e) of the JD Act speaks to a degree of (un)likelihood that is consistent with the degree of confidence required by the standard of "beyond reasonable doubt".

27 Even if an "unrealistic possibility" were considered to differ from an "unreal possibility", it does not follow that the explanation in s 64(1)(e) is inconsistent with the standard of proof: words other than beyond reasonable doubt "will suffice, so long as

9 *Dookheea* (2017) 262 CLR 402 at [33] (the Court).
10 Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development" (2012) 10 *University of New Hampshire Law Review* 97 at 146-147, quoting Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (2001) at 69.
11 *Dookheea* (2017) 262 CLR 402 at [34] (the Court).
12 511 US 1 at 14 (1994) (the Court).
13 *In re Winship*, 397 US 358 at 397 (1970) (Harlan J) (emphasis in original), quoted in *Victor* 511 US 1 at 14 (1994) (the Court).

the message is clear".[14] As the Court of Appeal correctly observed, the question would then be whether the direction would provide the jury with a false basis for deciding whether the Crown had proved its case: **CAB 218 [40]**.[15] Having regard to the meaning of "unrealistic possibility" when considered in the context of the direction in s 64(1)(e), the answer must be "no".

28 The reference to "imaginary or fanciful doubt" in s 64(1)(e) conveys the sense in which the word "unrealistic" is used. In a similar vein, the United States Supreme Court held in *Victor* that a direction that a reasonable doubt is "not a mere possible doubt" was not erroneous in circumstances where the meaning of the word "possible" was made clear from the further statement that everything "is open to some possible or imaginary doubt".[16] An "unrealistic possibility" itself conveys a very low degree of likelihood, and that is amplified by its placement next to an "imaginary and fanciful doubt". In those circumstances, as the Court of Appeal recognised, there is no practical difference between "unreal" and "unrealistic" possibilities in this context: see **CAB 217 [40]**.

29 The appellant relies on ***Green*** *v The Queen* (**AS [27]-[28]**), but does not refer to the actual directions in *Green* that were the subject of the case. It involved a lengthy series of statements that expressly invited the jury to "try and take it out and identify this thing which is … causing the doubt" and assess it in various ways, culminating with a direction that "before you find anybody guilty of a crime like this, you do need to feel comfortable about it".[17] The circumstances in *Green* were markedly different to the case posited by the appellant, namely that any reference to "unrealistic possibility", in and of itself, alters the standard of proof.

30 In support of his position, the appellant asserts that the explanation permitted by s 64(1)(e) "is unique in the common law world": **AS [41]**. Insofar as that is a submission that the word "unrealistic" is not used as part of standard directions on reasonable doubt in other common law jurisdictions, it may be accepted. However, other jurisdictions use analogous directions. As noted above, the United States Supreme Court has endorsed

[14] *Ferguson v The Queen* [1979] 1 WLR 94 at 99 (Lord Scarman for the Privy Council); see also *Victor*, 511 US 1 at 5 (1994) (O'Connor J, joined by Rehnquist CJ, Stevens, Scalia, Kennedy and Thomas JJ).

[15] *La Fontaine* (1976) 136 CLR 62 at 72 (Barwick CJ); *Dookheea* (2017) 262 CLR 402 at [37] (the Court).

[16] 511 US 1 at 17 (1994) (the Court). This particular formulation of the meaning of beyond reasonable doubt derives from the statement of Chief Justice Shaw in *Commonwealth v Webster*, 59 Mass 295 at 320 (Sup Ct Mass 1850): "It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt."

[17] (1971) 126 CLR 28 at 30-31 (the Court).

the formula that a reasonable doubt is "not a mere possible doubt" because everything "is open to some possible or imaginary doubt". The Supreme Court of Canada in *R v* ***Lifchus*** not only endorsed, but mandated, an explanation that a reasonable doubt "is not an imaginary or frivolous doubt".[18] Section 64(1)(e) of the JD Act was modelled on this *Lifchus* direction, with the reference to "frivolous" changed to "unrealistic" "to better reflect modern Australian language".[19]

B.2 The explanation in s 64(1)(e) does not alter the jury's task

31 The appellant submits that the impugned explanation erroneously invites jurors to subject their mental processes to objective analysis: **AS [50]-[51]**. That submission replicates the reasoning of King CJ in *R v Wilson*:[20]

> The Judge said: "If you think there is a doubt but that it is merely a fanciful doubt, you will still convict because that is not a reasonable doubt". This direction postulates a doubt about guilt which the jury thinks exists. It then invites them to subject their mental state to examination in order to determine whether the doubt about guilt which they think to exist, is to be characterized as fanciful or reasonable. That direction is a negation of the proposition for which *Green's* case is authority that the test of whether a doubt is reasonable is whether the jury entertains it in the circumstances.

32 King CJ's reasoning was emphatically rejected by this Court in *Dookheea* as having "misconceived the effect of this Court's decisions in *Thomas*[21] and *Green*" and as "a process of reasoning that should not be followed":[22] cf **AS n 53**. The appellant's submission is therefore contrary to authority of this Court.

33 The appellant also submits that the impugned explanation creates a risk of jurors shifting their focus onto whether the defence has raised a "realistic" doubt, and is confusing because it requires jurors to define reasonable doubt by what it is not: **AS [52]-[53]**. However, the same could be said of a direction that a reasonable doubt is not an "unreal possibility", or a direction that a reasonable doubt is not "an imaginary or fanciful doubt". The appellant does not take issue with either of these directions: **AS [31], [39]**. The appellant's submissions in this regard are internally incoherent.

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18 [1997] 3 SCR 320 at [31], [36] (Lamer CJ, Sopinka, Cory, McLachlin, Iacobucci and Major JJ).

19 Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (January 2013) at 94. This paper underpinned s 21(1)(e) of the *Jury Directions Act 2013* (Vic), the predecessor to s 64(1)(e) of the JD Act: see the Attorney-General's second reading speech for the Jury Directions Bill 2012 (Vic) (Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012 at 5556).

20 (1986) 42 SASR 203 at 207 (citations omitted).

21 *Thomas v The Queen* (1960) 102 CLR 584.

22 (2017) 262 CLR 402 at [29]-[30] (the Court).

B.3 The direction given did not alter the standard of proof

34 As noted, both Grounds ultimately depend on the proposition that there will *necessarily* be a misdirection on the standard of proof if the trial judge directs the jury that an "unrealistic possibility" is not a reasonable doubt. For the reasons already advanced, that is not the case. A further error in the appellant's approach is that it assumes that a single phrase in one of the directions given by a trial judge is to be considered in isolation. The authorities are clear: the correctness (or otherwise) of directions must be assessed having regard to the context in which they are given, "including the issues at the trial, the evidence, closing addresses by counsel and the whole of the trial judge's summing-up".[23]

35 In *La Fontaine*, having found that the trial judge erroneously equated a reasonable doubt with a "rational explanation" consistent with the innocence of the accused, Barwick CJ observed that the real question was whether the spoken words "would be so appreciated by the jury as to provide them with a false basis for deciding whether the Crown had proved its case".[24] The Chief Justice referred to the "time-honoured view … that the adequacy of a summing up ought not to be judged upon a subtle examination of its transcript record or by undue prominence being given to any of its parts. It should be taken as a whole and as a jury listening to it might understand it."[25] Applying those principles, His Honour concluded that the jury in that case were not likely to be misled.[26] His Honour referred to later, unimpeached parts of the charge on the standard of proof, and also took into account that the jury were unlikely to have appreciated a distinction between "rational" and "reasonable" as used in the charge.[27]

36 Those statements of principle from *La Fontaine* were unanimously endorsed in *Dookheea*,[28] and are consistent with the flow of this Court's authority about how one is to assess the correctness of directions generally.[29] In short, even if a direction appears

23 ***Huxley*** *v The Queen* (2023) 98 ALJR 62 at [43] (Gordon, Edelman and Steward JJ).
24 (1976) 136 CLR 62 at 72.
25 (1976) 136 CLR 62 at 73.
26 (1976) 136 CLR 62 at 73.
27 (1976) 136 CLR 62 at 73, see also at 81 (Gibbs J), 87 (Mason J).
28 (2017) 262 CLR 402 at [37] (the Court). See also *Graham v The Queen* (2016) 90 ALJR 820 at [59] (Gordon J); and, in the United States, *Victor* 511 US 1 at 5 (1994) (O'Connor J, joined by Rehnquist CJ, Stevens, Scalia, Kennedy and Thomas JJ).
29 *Huxley* (2023) 98 ALJR 62 at [43] (Gordon, Edelman and Steward JJ). See also *Hargraves v The Queen* (2011) 245 CLR 257 at [46] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

to be wrong when viewed in isolation, the surrounding context may reveal that there was no error or irregularity at all.[30]

37 The appellant alludes to these principles (see **AS [13]**) but then disregards them.

38 The appellant's submission that a single utterance of the word "unrealistic" necessarily controls the meaning of "reasonable doubt" throughout the charge (**AS [15]**) is contrary to *La Fontaine*, where the equation of a reasonable doubt to a "rational explanation" was held to have been sufficiently ameliorated by subsequent directions. Barwick CJ expressly rejected the kind of argument now sought to be made by the appellant, saying:[31]

> Now, whilst in the calm and inquisitive atmosphere of a court of appeal it may be said that there was present, by inference, every time a reference was made to reasonable doubt, the meaning which was given to the expression at the second page of the typescript record of summing up, the trial judge did not at any stage so qualify his references to the onus of proof: nor did he at any stage remind the jury of his early, and, by the time he used the expressions I have quoted … remote, exposition of a possible approach to their task of seeking satisfaction beyond reasonable doubt.

39 The appellant's submissions do not permit consideration of how the meaning of "unrealistic possibility" may be influenced by other parts of the trial judge's charge. In this case, the impugned explanation was immediately preceded by statements that beyond reasonable doubt is "the highest standard of proof that our law demands" (T1377.24–28, **CAB 22**) and that it was "not enough for the prosecution to prove that the accused is probably guilty or even very likely to be guilty" (T1377.28–30, **CAB 22**). The trial judge emphasised that it was for the prosecution to prove all of the elements beyond reasonable doubt, and that the accused did not bear any burden in respect of hypotheses consistent with innocence that had been raised by the accused (T1410.29-1411.1, **CAB 47-48**; T1462.21-1463.17, **CAB 87-88**). On the appellant's approach, these contextual statements are irrelevant in ascertaining the meaning of "unrealistic" as it would be understood by the jury. Having regard to *La Fontaine* and *Dookheea*, that cannot be correct.

40 In this case, consideration of the trial judge's charge taken as a whole — as required by the authorities — demonstrates that the jury would not have been misled about the

[30] See *Brawn v The King* [2025] HCA 20 at [7] (the Court), citing *Huxley* (2023) 98 ALJR 62 at [24], [30] (Gageler CJ and Jagot J), [40]-[41], [61]-[62], [67]-[68] (Gordon, Edelman and Steward JJ).

[31] (1976) 136 CLR 62 at 73.

standard of proof. This is a further reason why the absolutist position underpinning the appellant's Grounds should not be accepted.

B.4 Disposition of the appeal

41 The giving of the impugned explanation does not, in and of itself, result in an alteration of the standard of proof. Because the appellant does not rely on any other circumstance to allege that the directions given by the trial judge diminished the standard of proof, it follows that the jury in the appellant's trial were not misdirected on the standard of proof: cf **AS [12]**. The appeal should be dismissed.

42 However, if the giving of the impugned explanation by a trial judge, in and of itself, results in an alteration of the standard of proof (contrary to the respondent's submissions), it would follow that the "unrealistic possibility" portion of s 64(1)(e) of the JD Act is inconsistent with s 13.2(1) of the Criminal Code. That would have two consequences:

42.1 *first*, s 68(1) of the Judiciary Act would not have applied the "unrealistic possibility" portion of s 64(1)(e) of the JD Act to the appellant's trial; and

42.2 *second*, in any event, the giving of the impugned explanation by the trial judge would have been contrary to s 13.2(1) of the Criminal Code.

43 The respondent accepts that, if the jury were directed contrary to s 13.2(1) of the Criminal Code, that would be an error or irregularity in the appellant's trial that resulted in a "substantial miscarriage of justice".[32] The appeal would therefore be allowed on Ground 1.

C SECTION 80 OF THE CONSTITUTION

44 "It is not the practice of the Court to investigate and decide constitutional questions unless there exist a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties".[33] One implication of this prudential approach is that the necessity of answering a question of law "may not sufficiently appear where there remains a prospect that the controversy can be judicially determined on another basis".[34] The considerations supporting this

[32] *Criminal Procedure Act 2009* (Vic), s 276. See *Karam v The King* [2023] VSCA 318 at [216] (the Court).
[33] *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (the Court). See also ***Mineralogy*** *Pty Ltd v Western Australia* (2021) 274 CLR 219 at [56]-[58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
[34] *Mineralogy* (2021) 274 CLR 219 at [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also *Babet v Commonwealth* [2025] HCA 21 at [56] (Gageler CJ and Jagot J), [259] (Beech-Jones J).

approach include "avoiding the formulation of a rule of constitutional law broader than required by the precise facts to which it is to be applied".[35]

45 Consistent with that prudential approach, the Court should refrain from deciding Ground 2 in circumstances where the appeal can be decided on a different basis. That is the position here:

45.1 If Ground 1 succeeds, the appeal will be allowed on that ground, making it unnecessary to resolve Ground 2.

45.2 If Ground 1 fails, Ground 2 must also fail because it depends on the same premise as Ground 1.

46 Prudential considerations loom particularly large in this case. As the appellant acknowledges (**AS [55]**), the question it poses has not been the subject of any previous direct consideration by this Court. The appellant's submissions fail to define with any precision what it means for "proof beyond reasonable doubt" to be an "essential characteristic" protected by s 80 of the Constitution. The appellant's position is in tension with existing constitutional jurisprudence of this Court concerning the competence of the Commonwealth Parliament to regulate certain aspects of federal criminal trials. Further, the broad question the appellant poses raises unsettled issues about the purpose of, and approach to, s 80 of the Constitution.

C.1 The imprecision of the appellant's question

47 The appellant's submissions refer to the "criminal standard of proof" being an essential characteristic of trial by jury under s 80 in a general way: see **AS [5.2], [12], [55]**. There is no consideration of the various ways in which a standard of proof may be engaged in a criminal trial.

48 For Commonwealth offences, the general principles of criminal responsibility are codified in Ch 2 of the Criminal Code. Under those general principles, each offence consists of physical elements and fault elements.[36] For a person to be found guilty of an offence, each physical element of the offence and (for those physical elements with a fault element) the applicable fault element for each physical element must be proved.[37]

[35] *Mineralogy* (2021) 274 CLR 219 at [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [47] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

[36] Criminal Code, s 3.1.

[37] Criminal Code, s 3.2.

Part 2.3 sets out defences to an offence that are generally available. They include, for example, mental impairment, mistake or ignorance of fact, duress, sudden or extraordinary emergency, self-defence and lawful authority. Defences specific to offences or classes of offences are provided for elsewhere in the Criminal Code and in other Commonwealth laws.

49 The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.[38] A defendant who wishes to rely on a defence bears an evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.[39] Further, a law may expressly impose a legal burden on the defendant.[40] Otherwise, the prosecution bears the legal burden of disproving any matter in relation to which a defendant has discharged an evidential burden imposed on the defence.[41] As already noted, under s 13.2 of the Criminal Code, unless the law creating the offence specifies otherwise, a legal burden of proof on the prosecution must be discharged beyond reasonable doubt. A legal burden of proof on a defendant must be discharged on the balance of probabilities.[42]

50 Presumably, the appellant's position is that s 80 of the Constitution requires the prosecution to prove each and every (physical and fault) element of an offence beyond reasonable doubt. That position has implications for the validity of s 13.2(2) of the Criminal Code and Commonwealth laws that, as contemplated by s 13.2(2), specify a different standard of proof for elements of an offence.[43]

51 It is less clear whether the appellant contends that s 80 of the Constitution requires the prosecution to disprove any defence for which an accused has discharged an evidentiary burden to the standard of "beyond reasonable doubt". If "yes", does the appellant also contend that s 80 does not permit the Commonwealth to legislate so as to place the legal

38 Criminal Code, s 13.1(1).
39 Criminal Code, s 13.3.
40 Criminal Code, s 13.4. See, eg, ss 102.3(2), 102.6(3).
41 Criminal Code, s 13.1(2).
42 Criminal Code, s 13.5.
43 See, eg, *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AMLCTF Act**) ss 142-143; *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 234(5), 235(5). In *Lee v The Queen* (2007) 71 NSWLR 120, the NSW Court of Criminal Appeal held that s 31(1) of the *Financial Transaction Reports Act 1988* (Cth), the predecessor to s 142 of the AMLCTF Act, prescribed another standard of proof of "reasonable to conclude" for the purposes of s 13.2(2) of the Criminal Code. A constitutional challenge to the validity of s 31(1) of the *Financial Transaction Reports Act* on grounds unrelated to s 80 of the *Constitution* was dismissed in *Leask v Commonwealth* (1996) 187 CLR 579.

burden of proving a defence upon the accused, as contemplated by s 13.4 of the Criminal Code and at common law?[44] If "no", does the appellant contend that s 80 of the Constitution regulates the manner in which Commonwealth legislation identifies "defences", as opposed to "elements", of offences? These questions disclose the complexities inherent in the broad question raised by the appellant, on which the appellant is entirely silent.

C.2 Tension with existing constitutional jurisprudence

52 The appellant's submissions do not refer, at all, to the line of constitutional jurisprudence of this Court which holds that the legislature can reverse the onus of proof. As Viscount Sankey LC said in ***Woolmington*** *v Director of Public Prosecutions*:[45]

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity **and subject also to any statutory exception**.

53 In ***Williamson*** *v Ah On*,[46] a majority of this Court held that provisions of the *Immigration Act 1901* (Cth) placing the legal burden upon a defendant to disprove an element of an offence were constitutionally valid. Isaacs J observed that this was consistent with the position at common law where the burden of proving facts especially within the knowledge of an accused may be placed upon the accused.[47] Rich and Starke JJ held that the provisions did not constitute any exercise by the Parliament of the judicial power of the Commonwealth, but "merely establish a rule of evidence for observance by the Courts of law".[48] The majority view in *Williamson* was followed in ***Orient Steam Navigation*** *Company Ltd v Gleeson*,[49] in which Dixon J said:[50]

> Upon such matters, falling as they do within the subject over which the Commonwealth has power, the Parliament may place the burden of proof upon either party to proceedings in a Court of law. The onus of proof is a mere matter of procedure. If the Parliament may place the burden of proof upon the defendant, it may do so upon any contingency which it chooses to select.

44 See, eg, *Director of Public Prosecutions v Untied Telecasters Sydney Ltd* (1990) 168 CLR 594 at 600-601 (Brennan, Dawson and Gaudron JJ).
45 [1935] AC 462 at 481 (emphasis added).
46 (1926) 39 CLR 95.
47 (1926) 39 CLR 95 at 112-115.
48 (1926) 39 CLR 95 at 128, see also at 122 (Higgins J).
49 (1931) 44 CLR 254 at 259-260 (Starke J), 262-263 (Dixon J), 264 (Evatt J).
50 (1931) 44 CLR 254 at 262-263 (Dixon J).

54 These views in *Williamson* and *Orient Steam Navigation* were adopted by three members of this Court in ***Milicevic*** *v Campbell*.[51] Gibbs J stated:[52]

> The parliament may, when legislating with respect to a subject within the ambit of its powers, validly enact laws prescribing the rules of evidence and procedure to be observed in any legal proceedings, whether criminal or civil, arising in relation to that subject matter and may in particular cast the onus of proof upon either party to those proceedings …

55 In *Sorby v Commonwealth*, after dismissing an argument that the privilege against self-incrimination is protected by s 80 of the Constitution, Gibbs CJ reiterated the view he had expressed in *Milicevic*.[53] In *Nicholas v The Queen*, Brennan CJ accepted this line of authority subject to a qualification: His Honour stated that the reversal of an onus of proof "is not open to constitutional objection provided it prescribes a reasonable approach to the assessment of the kind of evidence of which it relates".[54]

56 Reflecting that line of authority, the joint judgment of Crennan, Kiefel, Gageler and Keane JJ in *Kuczborski v Queensland* stated:[55]

> It has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof of matters on which questions of substantive rights and liabilities depend. Laws which do no more than effect such changes do not "deal directly with ultimate issues of guilt or innocence".

57 The appellant asserts that the standard of proof of "beyond reasonable doubt" is "not merely a rule of evidence or procedure", as a means of distinguishing decisions of this Court that confirm the abrogation of the privilege against self-incrimination is not protected by s 80 of the Constitution because it is an evidentiary rule: **AS [76]** and **n 93**. However, the appellant does not address the observations of this Court, set out above, that the burden of proof is a matter of evidence or procedure.[56]

58 This line of authority, while not directly concerning s 80 of the Constitution, is significant to the constitutional question the appellant asks the Court to answer. If it is

51 (1975) 132 CLR 307 at 316-317 (Gibbs J), 318-319 (Mason J), 320-321 (Jacobs J). The fourth member of the bench, McTiernan ACJ, did not consider it necessary to rely upon *Williamson* in order to decide the case: at 311.

52 (1975) 132 CLR 307 at 316-317. See also *Sorby v Commonwealth* (1983) 152 CLR 281 at 298 (Gibbs CJ).

53 (1983) 152 CLR 281 at 298.

54 (1998) 193 CLR 173 at [24].

55 (2014) 254 CLR 51 at [240] (citations omitted).

56 Cf *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [32]-[33] (Gummow J), [73]-[76] (Kirby J), [133]-[134] (Hayne J).

not constitutionally objectionable for the Commonwealth Parliament to place a legal burden of proof on an accused in respect of some element of an offence, it is difficult to see, as a matter of logic, how it could be constitutionally objectionable for the Commonwealth Parliament to prescribe a standard of proof different from beyond reasonable doubt in respect of elements for which the prosecution bears the burden.

59 Accepting the appellant's proposition regarding s 80 of the Constitution therefore requires this Court to potentially depart from, or at least reconcile, a number of previous judgments of the Court. This underscores the prudential concerns weighing heavily against deciding the s 80 question in this case.

C.3 The purpose of, and approach to, s 80 of the Constitution

60 The appellant submits that s 80 has two purposes: democratic representation and the protection of individual liberty: **AS [62]**. That assertion obscures the divergences in the decisions of this Court as to the purpose of, and correct approach to, s 80. Stellios observed in 2005 that "a broad cohesive vision of s 80 continues to elude the High Court" and that no clear majority view has prevailed as to the intended larger purpose of s 80.[57] That remains the case after this Court's decision in ***Alqudsi*** *v The Queen*.[58]

61 In *Alqudsi*, French CJ (dissenting) expressed the view that s 80 has both an institutional dimension as well as a rights protective dimension.[59] It was the latter that led his Honour, alone, to conclude that the right to a trial by jury should be capable of waiver and that the decision in ***Brown*** *v The Queen* should be overruled. In contrast, the joint judgment of Kiefel, Bell and Keane JJ, in applying *Brown*, held that the object of s 80 is "to prescribe how the judicial power of the Commonwealth is engaged in the trial on indictment of Commonwealth offences",[60] rather than to provide a right or privilege personal to the accused.[61] Gageler J identified s 80 as having a democratic purpose, noting that the long political struggle in New South Wales resulting in the introduction of trial by jury towards the middle of the nineteenth century was "much less about the civil right of a member of the populace to be tried by jury than it was about the political

57 Stellios, "The Constitutional Jury — 'A Bulwark of Liberty'?" (2005) 27 *Sydney Law Review* 113 at 113, 127. See also Bell, "Section 80 — The Great Constitutional Tautology" (2014) 40 *Monash University Law Review* 1 at 25.
58 (2016) 258 CLR 203.
59 (2016) 258 CLR 203 at [70].
60 (2016) 258 CLR 203 at [115].
61 (2016) 258 CLR 203 at [94], [116].

right of a section or enlarged section of the populace to sit on a jury".[62] Nettle and Gordon JJ did not express a view on the purpose or purposes of s 80.

62 Thus, contrary to the appellant's submissions, the identification of the purpose of s 80 is an unsettled and difficult issue. The resolution of that issue "proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy".[63] That is not the case here.

63 It should also be noted that aside from general statements that the criminal standard of proof is "an essential and inseparable part" of the jury's institutional functions (**AS [74]**), the appellant does not explain how the democratic representation purpose necessitates the entrenchment of the standard of "beyond reasonable doubt": see **AS [66]**. In *Cheatle v The Queen*, the Court endorsed as "correctly draw[ing] attention to the representative character of a jury"[64] the description of trial by jury as "the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process".[65] As the reference to civil litigation in that description implies, a jury can be representative and serve a fact-finding function in respect of the "balance of probabilities" standard used in civil proceedings.

64 The appellant's assertion that s 80 "should be construed liberally, and according to substance over form" (**AS [73]**) does not address the line of authorities of this Court which establishes that the Commonwealth Parliament can determine whether any class of offence, however grave, is to be tried summarily by judge alone, so as not to engage s 80.[66]

65 Finally, the requirement in s 80 of a trial "by jury" is referable to that institution as understood at common law at the time of Federation,[67] with the "essential features" of the institution to be discerned with regard to the purpose which s 80 was intended to

62 (2016) 258 CLR 203 at [129].

63 *Mineralogy* (2021) 274 CLR 219 at [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Clubb v Edwards* (2019) 267 CLR 171 at [137] (Gageler J).

64 (1993) 177 CLR 541 at 549 (the Court).

65 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 (O'Connor J).

66 *R v Archdall and Roskruge; Ex parte Corrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Sachter v A-G (Cth)* (1954) 94 CLR 86; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Kingswell v The Queen* (1985) 159 CLR 264 at 276-277 (Gibbs CJ, Wilson and Dawson JJ). See also *Alqudsi v The Queen* (2016) 258 CLR 203 at [25]-[32] (French CJ).

67 *Cheatle v The Queen* (1993) 177 CLR 541 at 549 (the Court).

serve and to the evolution of the characteristics and incidents of jury trial.[68] In this regard, it is important to note that at the time of Federation, the principle that the onus of proof in a criminal trial generally rests on the prosecution was subject to significant exceptions: cf **AS [75]**, referring to "limited" exceptions. One such exception was that if homicide were proved, malice was presumed — a position not finally overturned until the decision in *Woolmington*.[69] The question arises whether, in the face of such exceptions, the prosecution's burden of proof can be described as an "essential feature" of the institution referred to in s 80; and, for the reasons stated above,[70] that in turn poses difficulties for regarding a particular standard of proof as being an "essential feature".

10 66 These matters further demonstrate that the present case is particularly unsuited to the resolution of questions about the scope and operation of s 80 of the Constitution.

PART VII: ESTIMATE

67 The respondent will require 1.5 to 2 hours to present oral submissions.

Dated: 22 May 2025

Raelene Sharp KC
Director of Public Prosecutions (Cth)
03 9605 4377
raelene.sharp@cdpp.gov.au

Thomas Wood
03 9225 6078
twood@vicbar.com.au

Julia Wang
03 9225 7999
julia.wang@vicbar.com.au

68 *Ng v The Queen* (2003) 217 CLR 521 at [9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

69 [1935] AC 462. See also Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (2002) at 4 n 4, which is cited at **AS n 90**; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [100] (Hayne and Bell JJ).

70 See at paragraph 58 above.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **SEYYED ABDOLZADEH FARSHCHI**
Appellant

and

THE KING
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Commonwealth		**Provisions**	**Version**	**Reason for providing this version**	**Applicable date or dates**
1.	*Constitution*	s 80	Current	In force during trial	20 September 2023 to 30 October 2023: appellant's second trial
2.	*Criminal Code* (Cth)	ss 2.2, 3.1, 3.2, 13.1-13.5	Current	s 13.2 in same form as during trial; other provisions for illustrative purposes	20 September 2023 to 30 October 2023: appellant's second trial
3.	*Criminal Code* (Cth)	s 270.6A	Compilation No 99	In force at start of period of offending; provision unchanged in subsequent versions	July 2015 to March 2017: period of offending
4.	*Judiciary Act 1903*	s 68	Compilation No 49	In force during trial	20 September 2023 to 30 October 2023: appellant's second trial
State					
5.	*Jury Directions Act 2015* (Vic)	ss 63, 64	Authorised Version No 13	In force at start of trial; relevant provisions unchanged in subsequent version	20 September 2023 to 30 October 2023: appellant's second trial

6.	*Jury Directions Act 2013* (Vic)	ss 20, 21	Authorised Version No 2	For illustrative purposes only	N/A
7.	*Criminal Procedure Act 2009* (Vic)	s 276	Current	In force at date of Court of Appeal judgment	14 October 2024: date of judgment