# HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

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ROBERT AGIUS APPELLANT

AND

THE QUEEN RESPONDENT

*Agius v The Queen*
[2013] HCA 27
*5 June 2013*
S28/2013

**ORDER**

1. *Grant of special leave to appeal of 15 February 2013 against the whole of the judgment and order of the Court of Criminal Appeal of New South Wales given and made on 24 May 2011 revoked.*

2. *Special leave to appeal against the appellant's conviction on count 2 on 31 July 2012 granted.*

3. *Leave to amend the notice of appeal granted.*

4. *Treat the appeal as instituted and heard instanter.*

5. *Appeal dismissed.*

On appeal from the Supreme Court of New South Wales

**Representation**

I M Barker QC with P R Coady for the appellant (instructed by Eddy Neumann Lawyers)

P W Neil SC with S M McNaughton SC for the respondent (instructed by Commonwealth Director of Public Prosecutions)

## CATCHWORDS

### Agius v The Queen

Criminal law – Conspiracy – Where appellant charged with conspiracy to defraud Commonwealth contrary to ss 86(1) and 29D of *Crimes Act* 1914 (Cth) – Where appellant charged with conspiracy to dishonestly cause loss to Commonwealth contrary to s 135.4(5) of *Criminal Code* (Cth) ("Code") – Where both charges related to single scheme to defraud Commonwealth of taxation revenue – Where two charges necessary because of legislative change – Whether s 135.4(5) of Code required prosecution to prove appellant entered into agreement after commencement of provision – Whether "state of affairs" could be physical element of s 135.4(5) of Code – Whether being party to an existing agreement a "state of affairs" – Whether s 135.4(5) of Code given retrospective effect if offence satisfied by continuation of agreement formed before commencement of provision.

Words and phrases – "agreement", "conspiracy", "state of affairs".

*Crimes Act* 1914 (Cth), ss 29D, 86(1) and 86(2).
*Criminal Code* (Cth), ss 4.1, 4.2, 135.4(5) and 135.4(9).

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. The appellant and three co-accused were charged on indictment with two counts of conspiracy. The first count alleged that the four accused and another person conspired to defraud the Commonwealth between 1 January 1997 and 23 May 2001 contrary to ss 86(1) and 29D of the *Crimes Act* 1914 (Cth) ("the Crimes Act"). The second count, as subsequently amended, alleged that the four accused and another person conspired to dishonestly cause a loss to the Commonwealth between 24 May 2001 and 23 October 2006 contrary to s 135.4(5) of the *Criminal Code* (Cth) ("the Code").

2 The two counts were particularised as arising out of a single scheme to defraud the Commonwealth of taxation revenue which began in 1997 and continued until 2006. The second count was necessary because s 29D of the Crimes Act was repealed with effect from 24 May 2001. Section 86(2) of the Crimes Act, which provided for a greater penalty where a person conspired to defraud the Commonwealth under s 29D, was also repealed from that date. As and from 24 May 2001, the offence of conspiracy to defraud the Commonwealth was contained exclusively in s 135.4 of the Code[1].

3 The appellant's principal contention is that count 2 was charged contrary to the provisions of the Code in that the particulars demonstrated that count 2 did not allege the making of a new conspiracy on or after 24 May 2001. As a result the count was bad. That contention was developed in a number of arguments which we will discuss after first summarising the course of proceedings.

The course of proceedings

4 On 27 April 2011, before the appellant's trial, the appellant sought a permanent stay of the proceedings on the second count in the indictment on the ground that it was an abuse of process, in that there was neither an allegation nor proof of a second agreement being made after 23 May 2001 so as to constitute a second conspiracy. The application for the stay was refused by the learned

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**1** *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth) ("the Amendment Act").

primary judge, Simpson J[2]. An appeal against her Honour's decision to the New South Wales Court of Criminal Appeal ("the CCA") was dismissed[3].

5 Before the primary judge, the appellant argued that given the allegations against each accused involved the making of only one agreement, in 1997, it was not open to the prosecution to charge a further offence under the Code.

6 The primary judge rejected that argument, holding that the appellant's arguments were based on the "fundamental misconception … that the offence of conspiracy depends upon the **formation** of, or **entry into**, an agreement, as distinct from **the existence** of, or participation in, such an agreement."[4] (emphasis in original)

7 The CCA upheld the primary judge's decision. Johnson J, with whom Tobias AJA and Hall J agreed, said that "the offence of conspiracy depends upon the existence of, or participation in an agreement, and not the precise timing of its formation."[5]

8 An application to this Court for special leave to appeal against the decision of the CCA was refused on 15 June 2011.

9 After a trial and upon the verdict of a jury, the appellant was convicted of both counts of conspiracy on 31 July 2012.

10 Thereupon, the appellant made a fresh application to this Court for special leave to appeal against the decision of the CCA of 24 May 2011. That application was granted on 15 February 2013; but because the appellant has been convicted of the offence charged in count 2, an appeal against the CCA's order dismissing the appellant's appeal against the refusal of the primary judge to grant a permanent stay of prosecution, would be incompetent.

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**2** *R v Agius* [2011] NSWSC 367.

**3** *Agius v The Queen* (2011) 80 NSWLR 486.

**4** [2011] NSWSC 367 at [34].

**5** (2011) 80 NSWLR 486 at 502 [62].

11 That having been said, the order of the CCA was an order which affected the final result of the appellant's trial in that, if the stay had been granted, the appellant could not have been convicted of the offence. Accordingly, an appeal would lie by special leave against the final judgment of 31 July 2012 convicting the appellant[6]. When this appeal was called on for hearing, the attention of the appellant's counsel was drawn to this irregularity in the form of the appeal; and counsel were invited to amend the notice of appeal to seek to have the conviction on the second count set aside on the grounds that the CCA erred in:

- holding that proof of the conspiracy alleged in the second count did not require evidence of an agreement entered into on or after 24 May 2001; and

- holding that under the Code an offence of conspiracy could be established by an agreement entered into by the appellant before s 135.4(5) of the Code commenced in operation on 24 May 2001.

12 The Court proceeded to hear argument on those grounds. For the reasons which follow, the arguments advanced by the appellant should be rejected. The decisions of the primary judge and the CCA were correct.

13 First, it is necessary to understand the terms of the legislation under which the appellant and his co-accused were charged.

The charged offences

14 As at 1 January 1997 until immediately prior to 24 May 2001, s 29D of the Crimes Act relevantly provided:

> "A person who defrauds the Commonwealth ... is guilty of an indictable offence.
>
> Penalty: 1,000 penalty units or imprisonment for 10 years, or both."

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**6** See *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 483 [5]-[6]; [2002] HCA 22.

15 During the same period, s 86 of the Crimes Act relevantly provided:

"(1) A person who conspires with another person to commit an offence against a law of the Commonwealth punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

(2) Despite subsection (1), if the person conspires with another person to commit an offence against section 29D of this Act, the conspiracy is punishable by a fine not exceeding 2,000 penalty units, or imprisonment for a period not exceeding 20 years, or both."

16 From 24 May 2001, s 135.4 of the Code relevantly provided:

"(5) A person is guilty of an offence if:

(a) the person conspires with another person to dishonestly cause a loss, or to dishonestly cause a risk of loss, to a third person; and

(b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and

(c) the third person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

...

(9) For a person to be guilty of an offence against this section:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended to do the thing pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

...

(12) A person cannot be found guilty of an offence against this section if, before the commission of an overt act pursuant to the agreement, the person:

(a) withdrew from the agreement; and

(b) took all reasonable steps to prevent the doing of the thing."

The parties' submissions

*Need for a second agreement*

17 The appellant submitted that, absent the making of a second agreement after the commencement of s 135.4(5) of the Code, the second count was bound to fail because an essential element of the offence created by s 135.4(5) was the formation of the conspiracy.

18 The appellant argued that the conduct criminalised by s 135.4(5) is the formation of the offensive agreement. In this regard, the appellant relied upon a general view of what is involved in the concept of conspiracy and on s 135.4(9)(a), which could not be satisfied by an event occurring before s 135.4(5) commenced on 24 May 2001.

19 The respondent countered that, for the purposes of s 135.4(5), the accused must be a party to an agreement on or after the commencement of s 135.4(5). Counsel for the respondent adverted to the observation of French CJ in *R v LK* that "[t]he offence of conspiracy ... is committed where there *is* an agreement" (emphasis added) to commit an offence[7]. That requirement was satisfied here by the circumstance that the appellant was a conspirator, in the sense that the combination between the offenders continued, after 23 May 2001. Contextual support for the proposition that participation in, rather than entry into, an agreement is the physical element of s 135.4(5) was said to be afforded by the terms of the defence of withdrawal from the agreement under s 135.4(12) of the

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**7** (2010) 241 CLR 177 at 183 [1]; [2010] HCA 17.

Code. Further support for this submission was said to be provided by the decision of the House of Lords in *Director of Public Prosecutions v Doot*[8], which was followed and applied in both the primary judgment[9] and in the decision of the CCA[10]. The appellant argued that *Doot* is not a helpful analogy because it was decided according to the common law of England, which "sits awkwardly" with the Code.

20 As to s 135.4(9)(a) of the Code, the respondent argued that this provision is not concerned to add to the elements of the offence, which are fully stated by s 135.4(5).

*State of affairs*

21 The appellant also argued that the primary judge[11] and the CCA[12] erred in holding that the physical element of the offence constituted by s 135.4(5) was a "state of affairs" under s 4.1 of the Code. It was said that the CCA's view of "state of affairs" was not applicable to cases like the present, which involved the making of an agreement.

22 The respondent countered that s 4.1(2) of the Code expressly contemplates that a physical element of an offence may be "conduct" and that "conduct" may include a state of affairs. Accordingly, s 4.1 of the Code enables the physical element of the offence to be satisfied by a state of affairs, namely the existence of a conspiratorial agreement between the appellant and his co-conspirators after the commencement of s 135.4(5). The requirement of s 135.4(5) that there be a conspiratorial agreement was satisfied because the antecedent agreement continued to exist and to be implemented.

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**8** [1973] AC 807.

**9** [2011] NSWSC 367 at [36]-[38].

**10** (2011) 80 NSWLR 486 at 499-501 [51]-[52], [57].

**11** [2011] NSWSC 367 at [45].

**12** (2011) 80 NSWLR 486 at 504 [79].

*Retrospectivity and legislative history*

23 The appellant submitted that the interpretation of s 135.4(5) adopted by the primary judge and the CCA gives the provision a retrospective effect which cannot be reconciled with ordinary principles of statutory interpretation whereby clear words are required to criminalise conduct which was lawful when it occurred, or with the transitional provisions applicable to the Code.

24 It was common ground between the parties that the transitional provisions[13] had the effect of preserving criminal responsibility for conduct prior to 24 May 2001 after ss 29D and 86(2) of the Crimes Act were repealed; but the appellant sought to go further, contending that, by reason of the transitional provisions related to the repeal of ss 29D and 86(2) of the Crimes Act, the Crown did not "need" to charge two counts of conspiracy in respect of an agreement formed before 24 May 2001 and with steps taken in furtherance of the conspiracy from 1997 to 2006.

A second agreement a necessity?

25 It may be noted that each of the arguments advanced on the appellant's behalf involves reliance upon the proposition that the conduct criminalised by s 135.4(5) of the Code was the formation of a conspiracy between the conspirators rather than conspiring.

26 It is important in that context to bear in mind the distinction made by Mason CJ, Wilson, Deane, Dawson and Toohey JJ in *Ahern v The Queen* where their Honours said[14]:

> "In conspiracy cases a clear distinction is to be made between the existence of a conspiracy and the participation of each of the alleged conspirators in it. Conspiracy is the agreement of two or more persons to do an unlawful act ... and it is the fact of the agreement, or combination, to engage in a common enterprise which is the nub of the offence."

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**13** *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth), Sched 2, Item 418.

**14** (1988) 165 CLR 87 at 93; [1988] HCA 39.

27 The appellant sought to support his central proposition by reference to the discussion, in *LK*, of s 11.5(1) of the Code, a provision cast in materially similar terms to s 135.4(5) of the Code. There, Gummow, Hayne, Crennan, Kiefel and Bell JJ, with whom Heydon J agreed, said[15]:

> "Intentional entry into an agreement to commit an offence contrary to s 11.5(1) exposes a person to liability for conspiring to commit that offence should any party to the agreement do an act in furtherance of it."

28 The appellant seized upon the word "entry" in this passage. But their Honours were not concerned to expound the term "conspires" with an eye to the issue of present concern. That this is so can be seen from a later passage where their Honours went on to say[16]:

> "The offence has a single physical element of conduct: conspiring with another person to commit a non-trivial offence."

29 In this respect, there was no point of difference between the observations of the plurality and the observations of the Chief Justice[17], which, as mentioned above, were relied upon by the respondent.

30 The decision of the House of Lords in *Doot* affords persuasive support for the approach of the courts below. That was a case in which the House of Lords held that a conspiracy may exist contrary to the common law of England, even though it was originally formed outside the jurisdiction[18]. Lord Pearson explained that, at common law, parties are taken to "conspire" after the formation of their agreement for so long as they adhere to their agreement. His Lordship said[19]:

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**15** (2010) 241 CLR 177 at 233 [136].

**16** (2010) 241 CLR 177 at 234 [141].

**17** (2010) 241 CLR 177 at 183 [1].

**18** The provisions of ss 15.4 and 135.5 of the Code deal with conspiracies formed outside the jurisdiction.

**19** [1973] AC 807 at 827.

> "When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place[20]. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be."

31 The appellant's argument that *Doot* is not helpful, because it reflects the common law of England, which "sits awkwardly" with the Code, is contrary to the authority of this Court's decision in *LK*.

32 In *LK*, this Court held that, except as expressly modified by the statutory text, common law concepts informed the provisions of the Code concerned with conspiracy[21]. That this should have been so is hardly surprising given that the terms "conspiracy" and "conspire" are not defined in the Code. As Spigelman CJ explained in *R v RK and LK* in terms approved on appeal by this Court[22]:

> "[T]he references to 'conspiracy' in the Code are of a technical legal character for purposes of the application of these principles. The terminology which the drafters of the code used were words and phrases which had well established legal meanings. ...
>
> [T]he references to 'conspiracy' in the Code were also intended by the drafters of the Code to be 'fixed by the common law', subject to any express statutory modification (compare *R v Wyles; Ex parte Attorney-General (Qld)*[23])."

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**20** *R v Aspinall* (1876) 2 QBD 48 at 58-59 per Brett JA.

**21** (2010) 241 CLR 177 at 206 [59], 210 [72], 218 [93].

**22** (2008) 73 NSWLR 80 at 90-91 [47]-[49].

**23** [1977] Qd R 169 at 177-182.

33 A second respect in which *LK* has a direct bearing on the resolution of this case lies in this Court's reasoning, which is inconsistent with the view that s 135.4(9)(a) is an element of the offence in s 135.4(5) of the Code[24].

34 Section 135.4(9)(a) is not the specification of a physical element of the offence. The reference in s 135.4(9)(a) to "an agreement" is to the agreement being the conspiracy that is criminalised in s 135.4(5). To adapt what was said by the plurality in *LK* (in relation to the analogous pars (a) and (b) of s 11.5(2)), pars (a) and (b) of s 135.4(9) are "epexegetical of what it is to 'conspire' with another person to commit an offence within the meaning of" s 135.4(5)[25]. Their Honours went on to explain that the equivalent to s 135.4(9)(a) served to clarify a point made by the Gibbs Committee[26]:

> "The mental element necessary to constitute the crime of conspiracy has been said to be the intention to do the unlawful act which was the subject of the agreement, *but it seems more accurate to say that what is required is an intention to be a party to an agreement to do an unlawful act*". (emphasis of the plurality in *LK*; footnote omitted)

35 In this regard, the primary judge observed that[27]:

> "It would be highly artificial – to an absurd degree – to suggest that an agreement that had its inception prior to the commencement of the relevant provisions of the Code, but that continued, and continued to be implemented, thereafter, could not be prosecuted under the Code because the alleged conspirators failed, on the change of legislation, to renew, or remake, their agreement."

36 The CCA also rejected the contention that s 134.5(9)(a) required in this case that "a person must have entered into an agreement with one or more other

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**24** (2010) 241 CLR 177 at 205-206 [57], 231-232 [131]-[133].

**25** (2010) 241 CLR 177 at 232 [133].

**26** (2010) 241 CLR 177 at 232 [133] citing *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (July 1990) at 393 [40.1] extracted in *LK* at 223 [105].

**27** [2011] NSWSC 367 at [40].

persons on or after 24 May 2001."[28] Consistently with this Court's decision in *LK* as applied by the CCA in this case, s 134.5(9)(a) does not define an element of the offence of conspiracy. It requires, before a person can be found guilty of an offence against the section, that the Crown prove the existence of or participation in an agreement. It does not require that the Crown prove that the agreement was formed on or after 24 May 2001.

State of affairs

37 The appellant argued that s 135.4(5) criminalised active conduct, namely entry into an agreement. The respondent countered that s 4.1 applies to a state of affairs. The relevant state of affairs existed on and after commencement of s 135.4(5), which criminalised adherence to the combination after 23 May 2001.

38 Chapter 2 of the Code applies, by s 2.2(1), its codification of general principles of criminal responsibility to all offences against the Code. By s 3.1 of the Code, it is provided:

> "(1) An offence consists of physical elements and fault elements.
>
> (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
>
> (3) The law that creates the offence may provide different fault elements for different physical elements."

39 At the relevant time, s 4.1 of the Code provided:

> "(1) A physical element of an offence may be:
>
> (a) conduct; or
>
> (b) a circumstance in which conduct occurs; or
>
> (c) a result of conduct.

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**28** (2011) 80 NSWLR 486 at 503-504 [72].

(2) In this Code:

***conduct*** means an act, an omission to perform an act or a state of affairs.

***engage in conduct*** means:

(a) do an act; or

(b) omit to perform an act."

40 Section 4.2 of the Code provides relevantly:

"(1) Conduct can only be a physical element if it is voluntary.

...

(5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control."

41 Sub-sections (1) and (2) of s 4.1 expressly postulate that one may engage in conduct which is a state of affairs. The court must interpret the Code so as to conform to this postulate. The CCA correctly held[29] that the physical element of s 135.4(5) could be satisfied by "conduct" in its extended sense, which, by virtue of s 4.1 of the Code, includes a state of affairs.

42 The term "state of affairs" is not defined. It is not necessary for present purposes to undertake an exhaustive consideration of its content. It is sufficient to indicate our agreement with the reasoning of the CCA, which involved the following steps[30]:

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**29** (2011) 80 NSWLR 486 at 504 [76].

**30** (2011) 80 NSWLR 486 at 504-505 [79]-[82].

- The ordinary meaning of a "state of affairs" is "the way in which events or circumstances stand disposed (at a particular time or within a particular sphere)."[31]

- The term so understood accommodates the concept of a continuing offence.

- An ongoing conspiracy is a continuing offence and thereby conduct within the meaning of the Code.

- Being a party to an ongoing conspiracy is conduct constituted by a state of affairs and thereby conduct within the meaning of the Code.

43 So far as each party to the agreement is concerned, continued participation in an agreement is a state of affairs over which each participant is capable of exercising control. So much is expressly recognised by s 135.4(12) of the Code. Each day that a party adheres to the agreement is another day on which the offence of conspiracy is committed.

44 To be a party to an agreement satisfies the physical element of an offence in that it is voluntary conduct, which is, as a matter of ordinary language, a state of affairs; and indeed a state of affairs over which that party is capable of exercising control so as to enable one to speak of that party as engaging in the conduct. Thus, in *Muslimin v The Queen*, French CJ, Gummow, Hayne, Heydon and Kiefel JJ described a law which made it an offence to have possession or charge of a particular kind of chattel as a proscription "directed not to [an] activity but to the existence of a state of affairs"[32].

45 Similarly, in *Beckwith v The Queen*, a decision from which the appellant sought to derive support, Gibbs J (as his Honour then was) said of the statute there under discussion[33]:

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**31** *The Oxford English Dictionary*, 2nd ed (1989), vol 16 at 551, "state", sense 5a.

**32** (2010) 240 CLR 470 at 479 [16]; [2010] HCA 7.

**33** (1976) 135 CLR 569 at 575; [1976] HCA 55.

> "The words 'has in his possession' are not synonymous with 'gets possession of'; the latter expression connotes activity, the former a state of affairs."

46 Nor does the appellant's reference to the observations of McHugh J in *Krakouer v The Queen*[34] advance his argument under this heading. The observations of McHugh J repeat the warning of Jordan CJ[35] against a court assuming to remedy an apparently inadvertent legislative omission to proscribe conduct of a particular kind by giving a "penal provision a wider scope than its language admits." Continuing adherence to an agreement made at an earlier point in time is, as a matter of ordinary language, readily described as a state of affairs.

Retrospectivity

47 The contentions advanced on the appellant's behalf fail to appreciate that s 135.4(5) has not been given retrospective effect by the decisions of the courts below. The offence with which he was charged in the second count did not involve an allegation that he breached s 135.4(5) by making an agreement before that provision came into force. His offence was in being party to an agreement after the provision came into force.

48 The transitional provision in the Amendment Act, Sched 2, Item 418, which related to the repeal of ss 29D and 86(2), provided relevantly:

> "(1) Despite the ... repeal of a provision by this Schedule, that provision continues to apply, after the commencement of this item, in relation to:
>
> (a) an offence committed before the commencement of this item; or
>
> (b) proceedings for an offence alleged to have been committed before the commencement of this item; or

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**34** (1998) 194 CLR 202 at 223 [62]; [1998] HCA 43.

**35** *Ex parte Fitzgerald; Re Gordon* (1945) 45 SR (NSW) 182 at 186.

(c) any matter connected with, or arising out of, such proceedings;

as if the ... repeal had not been made."

49 This transitional provision preserves the operation of s 29D to criminalise conduct which occurred before 24 May 2001; it does not purport to extend the operation of those provisions beyond that date. From 24 May 2001, it is s 135.4(5) which operates to criminalise adherence to an agreement whenever the agreement might have been made.

50 In the course of oral argument on the appeal it became apparent that the appellant's submission that the Crown did not "need" to charge two counts of conspiracy could not be taken at face value. The appellant's counsel did not accept that a conviction on count 1 justified a sentence which reflected the criminality involved in the appellant's adherence to the conspiracy between 24 May 2001 and 23 October 2006.

Conclusion and orders

51 The grant of special leave to appeal of 15 February 2013 should be revoked and, in its place, special leave granted to appeal against the appellant's conviction on count 2 on 31 July 2012. Leave to amend the notice of appeal should be granted. The appeal against the conviction on count 2 should be dismissed.

52 We would make the following orders:

1. Grant of special leave to appeal of 15 February 2013 against the whole of the judgment and order of the Court of Criminal Appeal of New South Wales given and made on 24 May 2011 revoked.

2. Special leave to appeal against the appellant's conviction on count 2 on 31 July 2012 granted.

3. Leave to amend the notice of appeal granted.

4. Treat the appeal as instituted and heard instanter.

5. Appeal dismissed.

53 GAGELER J. Adopting its abbreviations, I join in the orders proposed in the joint reasons for judgment and agree with the reasons there stated for rejecting the second and third arguments of the appellant. These are my reasons for rejecting the first argument of the appellant.

54 The effect of the holding in *LK*[36] is that: the physical element of the offence of conspiracy created by s 135.4 of the Code is to be found in s 135.4(5); and the word "conspires" is to be understood by reference to the common law, subject to express statutory modification by other provisions in s 135.4 and elsewhere in the Code.

55 The common law meaning of "conspires" being picked up subject to express statutory modification, the reasoning of the House of Lords in *Doot*[37] is not in all respects applicable to the offence of conspiracy created by s 135.4 of the Code. The question answered in *Doot* (whether an agreement made outside territorial jurisdiction can be tried as a conspiracy) is answered in respect of s 135.4 by s 135.5 and s 15.4. The passage in the speech of Lord Pearson quoted in the joint reasons for judgment must be qualified: the first sentence by s 135.4(9)(c); the last sentence by s 135.4(12)(b).

56 Subject to s 135.4(9) and s 135.4(12), the central proposition for which *Doot* is authority at common law is nevertheless applicable to the physical element of the offence of conspiracy created by s 135.4 of the Code that is to be found in s 135.4(5): the physical element of conspiracy may be satisfied by continuing adherence to an existing agreement. Viscount Dilhorne put it this way[38]:

> "When there is agreement between two or more to commit an unlawful act all the ingredients of the offence are there and in that sense the crime is complete. But a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry out the design."

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**36** (2010) 241 CLR 177 at 206 [59], 210 [72], 224 [107]; [2010] HCA 17.

**37** [1973] AC 807.

**38** [1973] AC 807 at 822-823.

He went on to refer to conspiracy as a "continuing offence" at common law[39]. That proposition was endorsed as part of the common law of Australia in *Savvas v The Queen*[40].

57 The question on which the fate of the first argument of the appellant turns is whether the express statutory requirement of s 135.4(9)(a) (that a person "must have entered into an agreement with one or more other persons" to be guilty of the offence created by s 135.4) modifies the content given to the word "conspires" in s 135.4(5) by the application of that common law proposition so as to make the act of entering into an agreement part of the physical element of the offence created by s 135.4. In my view, it does not.

58 The focus of the text of s 135.4(9)(a) is not on the act of entering into an agreement with one or more other persons. It is rather on the existence of an agreement entered into with one or more other persons.

59 That focus is confirmed by reference to the legislative history to which attention was drawn in *LK*[41]. In recommending the retention of the offence of conspiracy, the Interim Report of the Review of Commonwealth Criminal Law Committee chaired by Sir Harry Gibbs observed that the word "conspires" then appearing in s 86 of the Crimes Act appeared to import common law principles of conspiracy[42] and quoted in full the following "frequently cited definition of conspiracy at common law"[43]:

> "A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means".

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**39** [1973] AC 807 at 823.

**40** (1995) 183 CLR 1 at 8; [1995] HCA 29, citing *Doot* [1973] AC 807 at 823 and *R v G, F, S and W* [1974] 1 NSWLR 31 at 43-44.

**41** (2010) 241 CLR 177 at 203-204 [51]-[53], 220-222 [99]-[101].

**42** *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (July 1990) at 361 [34.11].

**43** At 358 [34.8], quoting *Mulcahy v The Queen* (1868) LR 3 HL 306 at 317.

The subsequent report of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General made clear that the prototype for s 135.4(9)(a) was to be read in juxtaposition to the prototype for s 135.4(9)(b) and that they were in combination directed to teasing out the essential distinction made in that common law definition. They were explained as having been drafted so as to "clearly separate the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement"[44].

60 When that focus is appreciated, s 135.4(9)(a) can be seen to be directed not to modifying the content given to "conspires" by the common law but to reinforcing that content by making clear that a person who "conspires" is necessarily a person who "agrees". In so doing, it is consistent with the physical element of conspiracy being satisfied by continuing adherence to an existing agreement.

61 I am unable to dismiss the first argument of the appellant quite as emphatically as did the primary judge in the observation quoted in the joint reasons for judgment. That is because I am unable to read any part of s 135.4 as addressed to transitional considerations.

62 However, for the reasons I have given, I think the better view to be that s 135.4(9)(a) does not modify the common law meaning of "conspires" in s 135.4(5) so as to make the act of entering into an agreement part of the physical element of the offence created by s 135.4. Consistently with s 135.4(9)(a), a person "conspires" within the meaning of s 135.4(5) by continuing to adhere to an existing agreement.

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**44** Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (1992) at 99. See also Australia, Senate, Criminal Code Bill 1994, Explanatory Memorandum at 40.