*Leo v The Queen* [2014] NTCCA 8

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| PARTIES: | LEO, PRISCILLA<br><br>v<br><br>THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CA 28 of 2013 (21321030) |
| DELIVERED: | 27 March 2014 |
| HEARING DATES: | 10 February 2014 |
| JUDGMENT OF: | RILEY CJ, KELLY and HILEY JJ |
| APPEALED FROM: | BLOKLAND J |

**CATCHWORDS:**

SENTENCING – Appeal against sentence – mandatory sentencing – mandatory minimum imprisonment for violent offences – presumption against retrospective application – inclusion of the words 'whenever committed' in the provision did not retrospectively impose criminal liability or increase the penalty for offences committed prior to the commencement of the provision – *Sentencing Amendment Act 2013* (NT).

SENTENCING – Appeal against sentence – mandatory sentencing – mandatory minimum imprisonment for violent offences – presumption against retrospective application – new legislative provisions only apply to offences, including prior offences, committed on or after the commencement of the Act – appeal allowed – matter remitted for resentence – ss 78D, 78DA, 78EA of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT).

SENTENCING – Appeal against sentence – mandatory sentencing – mandatory minimum imprisonment for violent offences – provisions imposing a mandatory minimum sentence must do so clearly and explicitly – ambiguity or doubt in the meaning of language in penal statute resolved in favour of the subject.

*Fisher v Hebburn* (1960) 105 CLR 188; *Hoppo v Samuels* (1978) 18 SASR 277; *Maxwell v Murphy* (1957) 96 CLR 261, applied.

*Ajinomoto Co Inc v Nutrasweet Australia Pty Ltd* (2008) 166 FCR 530; *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384; *Minister of State Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565; *R v Roussety* (2008) 192 A Crim R 32, referred to.

*McMillan v Pryce* (1997) 115 NTR 19; *Page v Winkler* (1975) 12 SASR 126, followed.

*R v Leo* [2013] NTSC 70, overruled.

*Criminal Code 1983* (NT) s 14
*Interpretation Act 1978* (NT) s 6
*Sentencing Act 1995* (NT) ss 78BA, 78C, 78CA, 78D, 78DA, 78DC 78DD, 78DF, 78DI, 78EA, 121
*Sentencing Amendment Act 2013* (NT)
*Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT)

**REPRESENTATION:**

*Counsel:*

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| Appellant: | A Wyvill SC<br>J Hunyor |
| Respondent: | M Grant QC<br>R Bruxner |

*Solicitors:*

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| Appellant: | North Australia Aboriginal Justice Agency |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
| Judgment ID Number: | Ril1404 |
| Number of pages: | 21 |

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Leo v The Queen* [2014] NTCCA 8
No. CA 28 of 2013

BETWEEN:

**PRISCILLA LEO**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: RILEY CJ, KELLY and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 27 March 2014)

THE COURT:

[1] The focus of this appeal is the application of Division 6A of the *Sentencing Act 2013* (NT) which introduced a regime of mandatory minimum imprisonment for violent offences.

[2] On 1 May 2013 the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT) (the May 2013 amendments) commenced. On 14 May 2013 the appellant committed the offence of causing serious harm. On 12 July 2013 the *Sentencing Amendment Act* (the July 2013 amendments)

commenced.[1] On 4 September 2013, the appellant pleaded guilty to committing the offence of having caused serious harm (a level 5 offence for the purposes of the legislation) on 14 May 2013. At that time, the appellant had one previous conviction for aggravated assault (recorded on 20 April 2001 and committed on 14 June 1998) and one previous conviction for assault (recorded on 16 March 1995). There is no dispute that each of the previous convictions fell within the definition of "violent offence" in section 78C of the *Sentencing Act 2013* (NT). On 31 October 2013, the sentencing judge held that the appellant was liable to the mandatory minimum penalty of imprisonment for 12 months provided for by the May 2013 amendments.

**The legislation**

[3] Prior to 1 May 2013 the *Sentencing Act 2013* (NT) provided that upon a court finding an offender guilty of a violent offence as contemplated under s 78 BA of the Act, and where the offender had "before or after commencement of this section" been found guilty of a violent offence, then the court must record a conviction and must order the offender to serve a term of actual imprisonment or a term of imprisonment that is partly but not wholly suspended.

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1 The *Sentencing Amendment Act 2013* (NT) was silent as to when its provisions came into force. Pursuant to s 6(1) of the *Interpretation Act 1978* (NT), the provisions came into effect on 12 July 2013, the day on which assent was declared.

[4] The May 2013 amendments replaced the previous Part 3, Division 6A of the *Sentencing Act 2013* (NT) with a new Division 6A entitled "Mandatory imprisonment for violent offences". The May 2013 amendments also inserted a number of definitions including a new definition of "violent offence"[2]. The May 2013 amendments also categorised each offence into one of five "offence levels" (s 78CA). Depending upon the offence level, and whether or not the offence is a second or subsequent offence, the court must impose "a term of actual imprisonment"[3] or "a minimum sentence" of actual imprisonment[4] (ss 78D – 78F). Section 78DI permits a court to impose a term of actual imprisonment instead of a minimum sentence where the circumstances of the case are exceptional.[5] Section 78EA provided that the Division "does not apply in relation to an offence committed before the commencement of" the new Division 6A.

[5] Relevant for present purposes are the following provisions:

> **Section 78C**
>
> ***violent offence*** means:
>
> (a) an offence against a provision of the *Criminal Code* listed in Schedule 2; or
>
> (b) an offence substantially corresponding to an offence mentioned in paragraph (a) against:

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2 For the purposes of Division 6A the definition is that contained in s 78C. Section 78C refers to a new Schedule 2 which lists a number of offences which are violent offences for the purposes of that section.

3 Section 78DG states what is required when imposing a term of actual imprisonment.

4 Section 78DH states what is required when imposing a minimum sentence of actual imprisonment.

5 Section 78DI(4) provides that certain circumstances, including that the offender was voluntarily intoxicated by alcohol or drugs at the time of committing the offence, do not constitute exceptional circumstances.

(i) a law that has been repealed; or

(ii) a law of another jurisdiction (including a jurisdiction outside Australia).

**Section 78D**

**Level 5 offence – first offence**

(1) This section applies if:

(a) a court finds an offender guilty of a level 5 offence; and

(b) the offender has not previously been convicted of a violent offence.

(2) The court must impose a minimum sentence of 3 months actual imprisonment.

**Section 78DA**

**Level 5 offence – second or subsequent offence**

(1) This section applies if:

(a) a court finds an offender guilty of a level 5 offence; and

(b) the offender has previously been convicted of a violent offence.

(2) The court must impose a minimum sentence of 12 months actual imprisonment.

**Section 78EA**

**Division does not apply to offence committed before commencement**

This Division does not apply in relation to an offence committed before the commencement of section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

[6] Following issues being raised in the Court of Summary Jurisdiction the Parliament passed the July 2013 amendments. The July 2013 amendments amended ss 78D(1)(b), 78DA(1)(b), 78DC(1)(b), 78DD(1)(b) and 78DF(1)(b) by inserting after the words "previously convicted of a violent offence" the words "(whenever committed)". Section 78EA was also amended by inserting after the words "in relation to" the words "the sentencing of an offender for".

[7] The relevant parts of the legislation, as amended, are as follows (emphasis added):

> **Section 78D**
>
> **Level 5 offence – first offence**
>
> (1) This section applies if:
>
> (a) a court finds an offender guilty of a level 5 offence; and
>
> (b) the offender has not previously been convicted of a violent offence (**whenever committed**).
>
> (2) The court must impose a minimum sentence of 3 months actual imprisonment.

> **Section 78DA**
>
> **Level 5 offence – second or subsequent offence**
>
> (1) This section applies if:
>
> (a) a court finds an offender guilty of a level 5 offence; and
>
> (b) the offender has previously been convicted of a violent offence **(whenever committed)**.
>
> (2) The court must impose a minimum sentence of 12 months actual imprisonment.

**Section 78EA**

**Division does not apply to offence committed before commencement**

This Division does not apply in relation to **the sentencing of an offender for** an offence committed before the commencement of section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

**The Sentence**

[8] Following a careful review of the legislation the sentencing judge concluded that the appellant was liable to serve the 12 month mandatory minimum period provided in s 78DA rather than the three month mandatory minimum period specified in s 78D, and imposed that sentence. Her Honour based this conclusion on the July 2013 amendments, having rejected arguments that the May 2013 amendments brought about this result.

[9] The sentencing judge concluded that by adding the words "whenever committed" into s 78DA(1)(b) and the words "to the sentencing of an offender" into s 78EA, the legislature made its intention clear. Her Honour observed that:

> Previous convictions for 'violent offences' are to be taken into account whether they were committed before or after the commencement of the Division for the purposes of the aggravated minimum penalty.[6]

6 *R v Leo* [2013] NTSC 70 at [27].

[10] Her Honour considered whether and how the July 2013 amendments applied to the appellant's offence given that it occurred prior to the commencement of the July 2013 amendments. Her Honour concluded that the additional phrase "whenever committed" "clearly permits retrospective operation in relation to previous convictions; notwithstanding that for some offenders, such as (the appellant), the rules have changed during the course of her being dealt with for the subject offence".[7] Her Honour held that s 121(1) of the *Sentencing Act 1995* (NT) did not apply because the July 2013 amendments did not increase the penalty; rather, the amendments "sought to define the meaning of 'previous violent offence' by the introduction of the phrase 'whenever committed'".[8] Her Honour also concluded that s 14(2) of the *Criminal Code 1983* (NT) "must give way to the later amendment".[9] Accordingly, the sentencing judge found that s 78DA applied and that the mandatory minimum sentence of 12 months imprisonment had to be imposed.[10]

**The Appeal**

[11] This is the conclusion that the appellant challenged in her Notice of Appeal. She contended that "the learned sentencing judge erred in finding that the

7 Ibid [30].
8 Ibid [31].
9 Ibid [33].
10 Ibid [36].

*Sentencing Amendment Act 2013* (NT) had retrospective operation so as to apply to sentencing for offences committed prior to 12 July 2013".[11]

[12] The respondent agreed that, if the effect of the May 2013 amendments was that the appellant was only liable to the three month minimum detention period, the effect of the July 2013 amendments must necessarily have been to increase the penalty for the relevant offence. This would have attracted the operation of s 121(1) of the *Sentencing Act 1995* (NT) and/or s 14 of the *Criminal Code 1983* (NT) and/or the presumption against retrospectivity.[12] We agree.

[13] Section 121(1) of the *Sentencing Act 1995* (NT) provides that where an Act "increases the penalty or the maximum or minimum penalty for an offence, the increase applies only to an offence committed after the commencement of the provisions effecting the increase". The sentencing judge concluded that this provision did not apply as the July 2013 amendments did not increase the penalty but, rather, operated to correct a previous interpretation. Even if the purpose of the July 2013 amendments was to "correct" a previous interpretation of the legislation the reality was that the effect would have been to increase the minimum penalty applicable in the circumstances of the appellant from three months imprisonment to 12 months. In our opinion, if the effect of the May 2013 amendments was that the minimum penalty was three months imprisonment, s 121(1) would have

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11 The Notice of Appeal raised a second ground, but that was not pursued.
12 Respondent's Submissions [30(c)].

had application, and as the relevant offending occurred prior to the commencement of the July 2013 amendments those amendments would not apply in the appellant's case.

[14] Secondly, s 14(2) of the *Criminal Code1983* (NT) would also apply if the effect of the May 2013 amendments was that the minimum penalty was three months imprisonment. The section provides:

> If the law in force when the conduct impugned occurred differs from that in force at the time of the finding of guilt, the offender cannot be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law.

[15] The sentencing judge concluded that s 14(2) did not have application because the inclusion of the words "whenever committed" expressly provided for a degree of retrospectivity and, "being a later amendment on a particular subject, s 14(2) must give way to the later amendment".

[16] In our opinion, the inclusion of those words did not provide for retrospectivity in the relevant sense. The effect was to alter the significance of historic events, being the earlier convictions for identified offences, in relation to the exercise of the sentencing power regarding a different offence occurring at a later time. A new provision requiring a sentencing court to take into account convictions that occurred before the date of enactment does not have retrospective effect in the sense of imposing criminal liability

or increasing the penalty for offences committed prior to the commencement of the provision. As was observed by Hogarth J in *Page v Winkler*[13]:

> Furthermore, the section in its amended form does not seek to impose criminal liability retroactively. It is not retroactive in that it penalises events which occurred before its enactment. It provides that such events may be taken into account in determining what is the appropriate penalty for offences committed after the re-enactment of the subsection.

[17] Section 14(2) would not be inconsistent with the July 2013 amendments and would not be overridden by the terms of those amendments.

[18] Thirdly, to construe the July 2013 amendments as having the effect of increasing the minimum penalty for the offence committed prior to commencement would offend the well-established presumption that an Act will not have retrospective effect. In *Maxwell v Murphy*[14], Dixon CJ said:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.

[19] See also *Fisher v Hebburn Ltd*[15] where Fullagar J said:

> There can be no doubt that the general rule is that an amending enactment – or, for that matter, any enactment – is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts, or events which occurred before its commencement.

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13 *Page v Winkler* (1975) 12 SASR 126 at 129 which was applied by the Full Court in *Hoppo v Samuels* (1978) 18 SASR 277 at 282.

14 *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

15 *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194.

[20] In our opinion there is nothing in the July 2013 amendments that indicates an intention to attach "new legal consequences", namely a minimum penalty of 12 months imprisonment instead of three months imprisonment, to events which occurred on 14 May 2013. The July 2013 amendments did not apply to the subject offending.

**The Notice of Contention**

[21] The respondent contended that the sentencing judge erred in finding that the May 2013 amendments did not require the Court, when sentencing the appellant for the offence of causing serious harm, to take into account the appellant's earlier identified assault convictions and, on that basis, to impose a minimum term of actual imprisonment of 12 months pursuant to s 78DA of the *Sentencing Act 1995* (NT). It was submitted that her Honour erroneously considered that the May 2013 amendments had retrospective operation and, further, that there was ambiguity as to whether the May 2013 amendments required convictions occurring prior to commencement to be taken into account.

[22] The respondent contended that the effect of the May 2013 amendments is clear. The respondent acknowledged, and the appellant accepted, that the construction process was informed by two principles. First, a provision purporting to impose a mandatory minimum sentence must do so clearly and explicitly, and, second, where the language and meaning of a penal statute is

ambiguous or doubtful any ambiguity or doubt must be resolved in favour of the subject.

[23] The respondent submitted that the May 2013 amendments operated to expose offenders to longer mandatory prison terms for violent offences when there is a history of violent offending and they do so in terms that are both "unmistakable and unambiguous". There was nothing in the text which suggested that the term "violent offence", where it appears in the relevant sections (including the definition section, s 78C and s 78D and s 78DA), was limited to offences committed after 1 May 2013. The terminology found in s 78D and s 78DA and the remaining penalty provisions, which refer to the offender having "previously been convicted of a violent offence", does not provide a basis to limit the scope of the words to violent offences committed since the commencement of the May 2013 amendments. The respondent also submitted that the text draws a clear distinction between the subject offence for which an offender is being sentenced under the new regime, and the "violent offences" which operate to increase the minimum penalty in respect of the offence for which the offender is being sentenced.

**The further ground of appeal**

[24] The appellant accepted that the application of the May 2013 amendments did not turn on questions of retrospectivity. However, the appellant argued that the sentencing judge was right to conclude that the May 2013 amendments applied to the appellant, making her liable to a mandatory period of

imprisonment of three months under s 78D of the Act, rather than 12 months under s 78DA of the Act. The appellant submitted that the position adopted by her Honour could be supported on a different ground to that relied upon in the reasons for decision.

[25] To enable this argument to be presented, the appellant was granted leave to add an additional ground of appeal as follows:

> That the learned sentencing judge erred in finding that s 78EA of the *Sentencing Amendment (Mandatory Minimum Sentences) Act* did not operate to preclude reliance on violent offences committed before the commencement of that Act for the purposes of satisfying s 78 DA(1)(b).

[26] The appellant submitted that the principles of construction set out in *McMillan v Pryce*[16] apply. In that case it was said:

> The Act does not, by unmistakable and unambiguous language, make it plain that offences against the sections referred to in the Schedule which were committed prior to late March 1997 were intended to be regarded as coming within the ambit of the general words and the expression "been found guilty of a property offence". Consequently that expression should be interpreted in favour of the liberty of the subject, unless the effect would be to deprive the expression of all meaning. Clearly the interpretation contended for by the applicant does not have that result.

[27] The appellant submitted that the position in relation to the May 2013 amendments is directly analogous to the position in that case.

[28] At the time when the subject offence was committed s 78EA provided as follows:

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16 (1997) 115 NTR 19 at 23 per Mildren J with whom Martin CJ agreed.

> **Division does not apply to the offence committed before commencement**
>
> This Division does not apply in relation to an offence committed before the commencement of section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act* 2013.

[29] The appellant submitted that the word "offence" employed in that section should not be confined to the subject offence only. It was submitted that the word "offence" was used without qualification and without differentiating between the current offence (under s 78 DA(1)(a)) and the past offence under s 78 DA(1)(b). It was contended that the trial judge erred in saying:

> On a plain reading, in the context of Division 6A, "an offence" in section 78 EA should be read as being a reference to the subject offence; in (the appellant's) case, the offence of cause serious harm, committed on 14 May 2013. Section 78 EA does not refer to a "previous conviction" or a "conviction" for a "violent offence". Even applying the strict rules of construction of statutes of this kind, on a plain reading of Division 6A, the initial interpretation advanced on behalf of (the appellant) in my opinion cannot stand.

[30] As we have noted in paragraph [22] above, the respondent contended that the effect of the May 2013 amendments is clear. During oral submissions counsel for the respondent took the Court to the definition of "violent offence" in s 78C, pointing out that the definition made no distinction between offences committed before or after the commencement of the May 2013 amendments. Counsel then directed the Court to s 78CA which defined various "offence levels", and then to Subdivision 2 which contains the substantive provisions indicating which mandatory sentence applies to each kind of offence.

[31] The primary focus of the respondent's submission was the words "previously been convicted of a violent offence" as they appear in ss 78D(1)(b) and 78DA(1)(b) (and in the following sections which relate to offences that are categorised as being of other levels). The submission was to the effect that there is no reason to limit the scope of those words so that they are confined to violent offences committed previously but since the commencement of the May 2013 amendments.[17]

[32] However, it is also necessary to consider the existence and effect of s 78EA.

[33] As counsel for the appellant pointed out, s 78EA uses the word "offence" without any relevant qualification and, in particular, without differentiating between the kind of offences referred to in the other parts of the new Division 6A. For example, the new Division 6A does not differentiate between the current offence (in the present matter a level 5 offence) referred to in ss 78D(1)(a) and 78DA(1)(a) and a previous offence of the kind referred to in ss 78D(1)(b) and 78DA(1)(b). Similar provisions in subsequent sections also fail to differentiate between the different kinds of offences.

[34] We agree. We see no reason why reference to an offence should be confined to the current offence. Not only would that require one to read into the section additional words that qualify the ordinary meaning of "offence", particularly as that word is used elsewhere in the May 2013 amendments and

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17 Cf *R v Roussety* (2008) 192 A Crim R 32 at [15], [18] and [22].

indeed in the *Sentencing Act 1995* (NT), but it would also render the whole section superfluous.

[35] The respondent submitted that s 78EA is there to confirm that the May 2013 amendments only apply where a court is dealing with a new offence committed subsequent to the commencement of the May 2013 amendments. But such a construction would leave s 78EA without any work to do, apart from expressly stating what would be understood to be the situation in any event, not only at common law but also in light of s 121(1) of the *Sentencing Act 1995* (NT) and s 14(2) of the *Criminal Code 1983* (NT).

[36] Such a construction would be contrary to the general principle that any word or sentence in legislation should not be considered as superfluous.

[37] In *Ajinomoto Co Inc v Nutrasweet Australia Pty Ltd*[18] the Full Court of the Federal Court said:

> In Pearce and Geddes, 2006, the learned authors state (at para 2.22)[19] that as a general principle no word or sentence in an Act should be regarded as superfluous or insignificant. All words must, prima facie, be given some meaning and effect. This is, however, subject to the overriding consideration that it may be impossible to give a full and accurate meaning to every word. In such cases it is the duty of the court to give the words the construction that produces the greatest harmony and the least inconsistency.
>
> In *Minister of State Resources v Dover Fisheries Pty Ltd* … Gummow J observed that it was "improbable that the framers of legislation could have intended to insert a provision which has

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18 *Ajinomoto Co Inc v Nutrasweet Australia Pty Ltd* (2008) 166 FCR 530 at 552; 247 ALR 552 at 572 [114] – [115].

19 Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia,* (LexisNexis, 7th ed, 2011) at [2.26].

> virtually no practical effect". His Honour added that in such a case the court should look to see whether any other meaning produces a more reasonable result.

[38] We appreciate that legislation does sometimes contain a provision that is intended to do no more than confirm what is intended by the provisions. This is often done by including words such as "for the avoidance of doubt" and sometimes by inserting relevant provisions in transitional provisions which are contained at the end of an amending Act.

[39] In the present case, s 78EA is very much a part of the new division and must be read with the earlier subdivisions, importantly ss 78D to 78DF. The latter provisions, relevantly ss 78D and 78DA, must be read in the context of s 78EA.[20]

[40] In our view s 78EA qualifies the scope of those earlier provisions, with the result that they only apply to offences, including previous offences, committed after the commencement of the May 2013 amendments.

[41] Even if, contrary to our conclusion that the wording in s 78EA has that meaning and effect, the wording was ambiguous, we consider that the same construction follows if one goes to other materials outside the language of the May 2013 amendments themselves.

[42] The previous version of Division 6A made it abundantly clear that the mandatory imprisonment provisions applied to prior violent offences whenever they were committed. Section 78BA(1)(b) included the words

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[20] Cf *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384 at 408.

(emphasis added) "any other violent offence committed after the offender has (**before or after the commencement of this section**) been found guilty of …".

[43] The May 2013 amendments could easily have contained similar wording in ss 78D(1)(b) and 78DA(1)(b) and so on, or otherwise expressed such an intention in s 78EA. The failure to do so implies that the legislature intended to depart from the breadth of that part of the previous legislation.

[44] The Second Reading Speech included statements to the effect that the Bill did "not intend to remove the effect of the current mandatory imprisonment provisions for violent offences in section 78BA of the Sentencing Act. It retains the effect of those provisions and supplements them with new mandatory minimum sentences for specified offences". The speech goes on to refer to the need to send a clear message to serious and repeat violent offenders, but does not indicate whether or not the Bill is intended to apply to prior offences committed before the commencement of the new legislation.[21]

[45] Also, the fact that the July 2013 amendments were enacted and the clear wording in those amendments support the conclusion that until they were enacted, the previous legislation (the May 2013 amendments) had a different

[21] With one exception, namely in relation to a first "level 1 offence" which is not dealt with at all in the May 2013 amendments, those amendments did what the speech indicated they would and retained the effect of the earlier provisions.

meaning namely that which we have concluded to be the true meaning of s 78EA in the May 2013 amendments.

[46] In resorting to the later amendments as an aid to construction, we acknowledge the need to do so with caution, particularly to ensure that the amending legislation was not merely intended to remove possible doubts. The relevant principles in relation to the use of amending legislation in order to construe the previous legislation are set out in *Ajinomoto*[22] at [92] – [99].

[47] The Second Reading Speech, in relation to the July 2013 amendments, asserts that the purpose of that Bill was to clarify the operation of the May 2013 amendments. The Second Reading Speech noted that the provisions, for example in s 78DA, "may not be interpreted to include prior convictions predating the commencement of the new mandatory sentencing provisions on 1 May 2013" and recognised that "the currently worded sections may be read down in favour of limiting the scope of the [prior] convictions".

[48] Whilst this suggests that the Minister had a particular view about the meaning and effect of the May 2013 amendments and, thus, felt the need to clarify the position by way of further amendment, it does not really answer the primary question as to what is in fact the proper construction of those provisions. However, the particular amendments made, namely adding the words "(whenever committed)" into s 78D and so on and the words "the

[22] (2008) 166 FCR 530.

sentencing of an offender for" into s 78EA, demonstrate that if Parliament in fact intended the May 2013 amendments to have the meaning and effect for which the respondent contends, it could have easily done so by using such clear language in the first place, or, as we have already said, using similar language as that used in s 78BA of the previous Division 6A.

[49] Also, the respondent's contentions would necessarily lead to the conclusion that, like its contentions in relation to s 78EA, the July 2013 amendments made no substantive change to the previous position. This again would offend against the general presumption to which we have already referred in relation to the May 2013 amendments that any word or sentence in legislation should not be considered as superfluous.

[50] The respondent also contended that the appellant's construction of the May 2013 amendments would carry perverse consequences because a person who had committed a violent offence prior to 1 May 2013 who came before the court for another violent offence committed after 1 May 2013 would be treated more leniently than would have been the case under the previous mandatory imprisonment provisions. This is because the previous provisions required the court to order the offender to serve a term of actual imprisonment. However, as counsel for the appellant pointed out, with one exception, the May 2013 amendments do require actual imprisonment in all cases, including those which do not involve a second or subsequent offence. The exception is a level 1 offence which is not a second offence. But this is only an exception because the new Division 6A does not apply to such an

offence at all. Perhaps, consistently with s 78BA(1A) of the previous Division 6A, this kind of (less serious) offence is not to be the subject of mandatory imprisonment, and never was.

[51] We conclude that s 78EA as it was enacted in the May 2013 amendments had the effect that those amendments, in particular ss 78D and 78DA, only applied to offences, including prior offences, committed on or after 1 May 2013.

[52] Accordingly, the minimum mandatory period of imprisonment was three months, not 12 months. The further ground of appeal is made out and the appeal is allowed.

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