[2023] HCATrans 161

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S12 of 2023

B e t w e e n -

ISAAC LESIANAWAI

Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Defendant

GAGELER CJ
GORDON J
EDELMAN J
GLEESON J
BEECH-JONES J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON THURSDAY, 16 NOVEMBER 2023, AT 9.59 AM

MR D.J. HOOKE, SC: May it please the Court, I appear with my learned friend **MR J.D. DONNELLY** for the plaintiff. (instructed by Zarifi Lawyers)

MR P.M. KNOWLES, SC: If the Court pleases, I appear with my learned friend **MR B.D. KAPLAN** for the defendant. (instructed by Sparke Helmore)

GAGELER CJ: Thank you, Mr Knowles. Mr Hooke.

MR HOOKE: Thank you, your Honour. Your Honours, as you know, we move on a further amended application for constitutional or other writ filed on 12 April 2023, and there is in the court book an agreed bundle of documents providing the factual foundation for the determination of the matter.

GORDON J: Mr Hooke, would you mind speaking up, please?

MR HOOKE: I am sorry, your Honour, I will try and do better. Much of the subject matter of this proceeding is, of course, well known to your Honours from the recent excursus in *Thornton*. I apologise if I delay too much on matters with which your Honours are only too well familiar. Could I take your Honours first of all to the *Crimes Act* (Cth), which is in volume 1 of the joint bundle. At page 59, your Honours will find section 85ZR. Relevantly in this case as in *Thornton*, your Honours see that subsection (2) provides that:

> Despite any other Commonwealth law or any Territory law, where, under a State law –

relevantly:

> a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted an of offence under a law of that State –

Relevantly, at paragraph (b):

> the person shall be taken . . . by any Commonwealth authority in that State or country, never to have been convicted of that offence.

GAGELER CJ: That is the provision that was interpreted and applied in *Thornton*.

MR HOOKE: In *Thornton*, indeed.

GAGELER CJ: We are familiar with it.

MR HOOKE: It is difficult to present the argument in this case without some duplication of what your Honours heard in *Thornton*. Hence my apology at the outset. As your Honours know, then having engaged section 85ZR, section 85ZS comes into play, and relevantly in subparagraph (1)(d):

> anyone else who knows, or could reasonably be expected to know, that section 85ZR applies . . . shall not:
>
> . . .
>
> (ii) in those circumstances, or for that purpose, take account of the fact that the person was charged with, or convicted of, the offence.

The first limb of subparagraph (ii) is important in this case because, relevantly to the juvenile offending, there was no material before the delegate in relation to the conduct involved other than the fact of the charge and what was wrongly recorded in the police certificate as a conviction in relation to those offences.

Once one has not only the false convictions but also the fact of the charge removed from consideration, there was no material before the delegate in relation to that conduct at all, hence we say that the fall-back position of the Minister that the delegate was entitled to have regard to the conduct does not aid them the Minister in this case, because there was just no material available permissibly for that to occur. For that reason, we say that materiality really is a non-issue in this case.

BEECH-JONES J: That is on ground 2, Mr Hooke.

MR HOOKE: On ground 2 and also on ground 1, your Honour, because if, as we say, the delegate misunderstood what was being dealt with, then one comes back to, simply, the charge, and the charge in the circumstances of this case does not come accompanied by a fact sheet or anything like that which might inform as to the relevant conduct, it is simply an allegation.

BEECH-JONES J: You will come to this, but at some point can you consider whether – just looking at ground 1 alone, if the issues paper and the delegate had said, criminal convictions and findings of guilt, would that be a problem?

MR HOOKE: On ground 1 alone, perhaps not, but that is not, of course, what occurred in this case. But I am bound to say to your Honours that ground 2 is the stronger of the grounds.

GORDON J: Put in different terms, if you succeed on ground 2, you do not need anything else.

MR HOOKE: Yes. We do not need ground 1 to succeed if we have ground 2.

GAGELER CJ: Your say ground 2 is just a straight application of *Thornton* to a slightly differently worded provision.

MR HOOKE: Yes, yes. Indeed, we say – and I will turn now to the *Children (Criminal Proceedings) Act 1987* (NSW), which starts at page 12 of volume 1 of the authorities. We say that the way that section 14 operates under this Act, is stronger than the position obtained under the Queensland legislation considered in *Thornton* because it engages a blanket prohibition not only against recording a conviction but against proceeding to that stage, rather than any question of discretion.

If your Honours then have the Children Act, could I ask your Honours to note in passing, in section 3, the definition of "serious indictable offence". I ask your Honours to note it only because it demonstrates the severity of offending that is required to take a matter outside the general operation of this Act. Over the page, at section 6, your Honours see the principles relating to the exercise of criminal jurisdiction under this Act, and your Honours see that (a) is an unexceptional equality before the law; (b) provides:

> that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance –

in (c):

> it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption –

And (d) and (e) we note in passing as well. In terms of process, your Honours see in section 8 that there is a presumption that proceedings will be commenced by way of summons rather than by way of arrest and charge. And in section 10, an exclusion of the general public from criminal proceedings in respect of minors. Section 11, prohibitions on publication and broadcasting of names and matters that might tend to identify a child involved in proceedings under the Act.

There are other procedural provisions which aid those objectives to which I have made reference and the procedural provisions to which I have taken your Honours. Then we come to section 14. Section 14 is, of course, the nub - - -

GLEESON J: Can I just ask you about what version of the Act you are looking at?

MR HOOKE: Your Honour, it is a reprint as at 25 March 1997, which is around the time at which these events were taking place.

GLEESON J: Thank you.

MR HOOKE: That identification is found at the top of page 12 of the book of authorities. Section 14, of course, is central to the argument. Your Honours see that:

> Without limiting any other power of a court to deal with a child who has pleaded guilty to, or been found guilty of, an offence, a court:
>
> (a) shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years, and
>
> (b) may, in respect of an offence which is disposed of summarily, refuse to proceed to, or record such a finding as, a conviction in relation to a child who is of or above the age of 16 years.

Those benchmark ages assume some significance when your Honours come to the National Police Certificate, to which I will take your Honours later. Subsection (2) provides a carve-out in respect of:

> an indictable offence that is not disposed of summarily.

Section 15 provides another carve-out in relation to the use of findings and the admissibility of findings in particular circumstances that are identified in that section.

BEECH-JONES J: Sorry, what was – you said "other", what is the carve-out in section 15 for the use of a finding of guilt?

MR HOOKE: That if, despite the fact that a conviction was not recorded against a person, that is paragraph (a) - - -

BEECH-JONES J: This is 15?

MR HOOKE: In 15.

BEECH-JONES J: You said "another carve-out" for a finding of guilt. Section 14 does not have a carve-out for a finding of guilt.

MR HOOKE: Sorry, 14(2) was the carve-out.

BEECH-JONES J: That is a carve-out - - -

MR HOOKE: In respect of - - -

BEECH-JONES J: - - - the prohibition on conviction?

MR HOOKE: Yes.

BEECH-JONES J: Yes, but not on a use of the finding of guilt.

MR HOOKE: No. No. So, 15(1)(a), to be clear, provides that the fact of a plea of guilty or a finding of guilt becomes able to be used despite a conviction not being recorded if there has been reoffending within the two years prior to the commencement of proceedings for the later offence. So, that is a carve-out. If your Honours then turn to section 28, your Honours see:

> The Children's Court has jurisdiction to hear and determine:
>
> (a) proceedings in respect of any offence (whether indictable or otherwise) other than a serious indictable offence –

So, homicide, rape and offences carrying a term of imprisonment of 25 years or more – and:

> (b) committal proceedings in respect of indictable offence (including serious indictable offence) –

And at section 31(1):

> If a person is charged before the Children's Court with an offence (whether indictable or otherwise) other than a serious indictable offence, the proceedings for the offence shall be dealt with summarily.

That puts to rest any doubt about whether we are in section 14 territory. Section 33, in terms of the objectives of the statutory scheme, is of some significance. It provides for the penalties that can be imposed by the

Children's Court in dealing with a matter, and the most harsh of those penalties is found in subsection (1)(g), which is committing the young person:

> for such period of time (not exceeding 2 years) as it thinks fit to the control of the Minister administering the *Children (Detention Centres) Act* –

That, according to subsection (2), is a matter of last resort. Subsection (4) provides that:

> Notwithstanding any other Act or law to the contrary, the Children's Court shall not sentence a person to imprisonment.

Subsection (5), which in 2008 was supplemented by subsection (6), provides for another carve-out, which is that a finding of guilt or a plea of guilty can, notwithstanding section 14, be used for the purposes identified in subsection (5) and subsection (6) expands the matter in relation to motor traffic matters.

So, your Honours see that there is a comprehensive code, as the *Youth Justice Act* (Qld) was described in *Thornton*, for dealing with juveniles who come into contact with the criminal justice system. Like the Queensland legislation, it is child-centric and it is designed to protect the ongoing interests of the child and not to have the stigma and consequences of criminal conviction on the record of the child except in those very limited circumstances.

The scheme under that Act stands in stark contrast to proceedings in relation to adult offenders, and in volume 2 of the authorities we have given your Honours some provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) including, relevantly, section 3A which describes the purposes of sentencing, again, matters with which your Honours are well familiar but which enumerate: punishment; deterrence, specific and general; making the offender accountable; denouncing the conduct and recognising the harm done to the victim and the community. So, a very different set of objectives to the Children Act. Again, in stark contrast in the same way as the adult offending provisions in Queensland apropos of the *Youth Justice Act*.

GAGELER CJ: You say what was spelt out in section 184(2) of the Queensland Act is implicit in the scheme of this Act.

MR HOOKE: Yes, absolutely, your Honour.

GAGELER CJ: And is confirmed by section 33(6).

MR HOOKE: Yes, and we go further and say where you have blanket prohibition on something ever coming into existence, it is a nonsense, with respect to my learned friends, to suggest that it is necessary to deem it not to exist, because it - - -

GORDON J: Your point is that a provision enters at an earlier point in the process.

MR HOOKE: Indeed. Indeed, so there is nothing for a deeming provision like section 184 of the Queensland Act to operate on.

BEECH-JONES J: Just run that by me again. So, if you look at 15(1), it operates to restrict the use of the finding of guilt in subsequent criminal proceedings in circumstances where there was no offending within two years, and in your client's case there was such offending, as I understand it. What is the prohibition to be found on the use of the finding of guilt that we otherwise get from the Act, as opposed to the stigma of conviction?

MR HOOKE: When one looks at what section 15 – at the scope of operation of section 15, it is dealing with the admissibility of a plea or a finding of guilt in a subsequent criminal proceeding, and that is why I described it as a carve-out from the general operation of section 14.

BEECH-JONES J: That is not carve-out. No, (1) is the prohibition. It is not a permission, it is a prohibition. It is a prohibition with a carve-out.

MR HOOKE: I accept that distinction, your Honour.

BEECH-JONES J: Where is the rest of the prohibition?

MR HOOKE: The rest of the prohibition is in section 14, in subsection (1), in prohibiting a court from proceeding to or recording a conviction. We say that, in those circumstances, the prohibition operates to prevent there ever coming into existence anything that could be described as a conviction. In those circumstances, we say that there would be nothing for a deeming provision of the kind found in section 184 of the Queensland Act to operate upon.

BEECH-JONES J: The Queensland Act referred to a finding of guilt without – is not to be taken to be a conviction for any purpose.

MR HOOKE: Yes. But the Queensland Act also only steps in at the stage of recording a conviction, not at the stage of proceeding to a conviction or recording.

EDELMAN J: There are evidential provisions in the Queensland Act, as well.

MR HOOKE: Quite.

EDELMAN J: And admissibility of findings, and so on.

MR HOOKE: As the Court was at pains to point out in *Thornton*, it was necessary for those provisions to exist or to co-exist with 184 and the other provisions in order for the Children's Court to be able to perform its functions under the Act – and so, too, here.

BEECH-JONES J: Mr Hooke, the usual procedure is finding of guilt and then proceed to conviction, and then record conviction.

MR HOOKE: Yes.

BEECH-JONES J: The Queensland Act had a specific provision saying, you cannot use the finding of guilt for any other purpose. Section 14, simply, does it not, prevent the proceeding to and the recording of a conviction. It does not say anything about the use of the finding of guilt, except in the limited way in section 15, does it?

MR HOOKE: In our submission, what it does is it steps in at the stage of the finding of guilt or the plea of guilty to prevent progression to anything that is properly regarded as a conviction, including the intermediate step that your Honour draws attention to – that is, proceeding to conviction and then recording the conviction. Those are the two stages that are prohibited under section 14(1). So, that evinces a clear legislative intention consistent with the context in which it exists, consistent with the objectives of the Act that findings of guilt, not be treated as convictions or regarded as convictions for any purpose except for those which are enumerated in the other provisions to which I have taken your Honours.

We say, as I have said, in those circumstances, it renders unnecessary an equivalent of section 184 of the Queensland Act. Against that background – as we say in our outline – the New South Wales legislation is, at least in any sense favourable to the defendant, indistinguishable from the Queensland legislation in *Thornton*.

When one then goes back to 85ZR, we submit that the circumstance required to engage 85ZR is a necessary consequence of section 14(1), and we say that, properly construed, section 85ZR does not, as our learned friends would appear to suggest, require that there would be some form of expressed deeming provision of the kind found in 184 of the Queensland Act where the circumstance exists under the Children Act of

New South Wales. It does not matter, in our submission, how it exists under that law, the important factor for the purpose of 85ZR is that it does exist under that Act.

GLEESON J: Mr Hooke, would you able to speak up a little?

MR HOOKE: I do apologise, your Honour. The important thing is that the circumstance exists under the Children Act for the engagement of 85ZR. We say that the mandatory and absolute terms in 14(1)(a) of the Children Act caused that circumstance to exist in every case to which that provision applies. Your Honours, turning to the delegate's decision – which is mercifully brief - - -

GAGELER CJ: So, that deals with ground 2?

MR HOOKE: Yes, your Honour.

GAGELER CJ: Yes.

MR HOOKE: The delegate had before him an issues paper which commences at page 54 of the court book. It sets out some salient matters. At page 54, at about point 7, it records his date of birth – it is 28 July 1983. His arrival in Australia. Then at court book page 57 in paragraph 15 dealing with the first of the primary considerations under Ministerial Direction 55, the departmental issues paper records that the plaintiff:

> has an extensive criminal history, with 16 court appearances since 1996 as a juvenile and adult, and convictions (or admissions by way of Form 1) for some 60 offences.

Now, when your Honours look at the National Police Certificate, "some 60 offences" is the total of all offending recorded on the police certificate, whether as a juvenile or as an adult, and I can tell your Honours, having done the sums, that about half the of the 60 were as a juvenile in circumstances to which section 14(1) would apply. At page 61 of the court book, in paragraph 28, the matter is revisited in the issues paper, recording that the plaintiff:

> has other serious convictions of a similar nature dating back to 1996, when he was juvenile aged 13, including a large number of previous convictions for crimes of violence, including many of robbery in company or robbery armed with a dangerous weapon, as well as assaults, and car stealing offences.

Over the page at paragraph 36, the issues paper states that the plaintiff's:

convictions in the juvenile system resulted in almost 20 Control Orders, requiring his detention, for periods up to two years –

And at 38, his:

offending commenced as a juvenile in 1995 and resulted in convictions in the Cobham Childrens Court on 13 March 1996 on four robbery and six armed robbery charges. A few months later he was convicted of two counts of Demand Money with Menaces, then over 1997-2001 he was convicted of many more similar offences.

At page 66, in paragraph 57:

As stated above Mr LESIANAWAI's offending commenced as a juvenile in 1995, some seven years after arriving in the country - - -

BEECH-JONES J: Just stopping you there at paragraph 57, that statement is undeniably correct unless one is specifically prohibited by 85ZR from considering the findings of guilt, is it not?

MR HOOKE: Yes:

which subsequently saw him appearing as a 12 year old in the Children's Court in Parramatta on 13 March 1996 on a total of ten charges of robbery. As described above, he has since committed serious and violent offences, including armed robberies –

GORDON J: What paragraph was that, Mr Hooke?

MR HOOKE: Paragraph 57, your Honour.

GORDON J: Thank you.

MR HOOKE: So, there is no attempt in the issues paper and nor, as your Honours will see, is there in the delegate's reasoning to distinguish between adult offending, juvenile offending or offending in that cusp between 16 and 18 where there is a discretion reposed by section 14(1)(b) of the Children Act.

The delegate's decision commences at page 71, with a table identifying the material before the delegate, and your Honours will see that there is nothing, as I said earlier, that addresses the juvenile offending beyond the matters contained in the National Police Certificate. At page 72, in the decision itself, the delegate says, at the top of the page:

> I have considered all relevant matters . . . and all material before me provided by, on behalf of, or in relation to Isaac LESIANAWAI in connection with the proposed cancellation of –

the visa. On page 73, at the start of paragraph 4, the delegate again confirms that he has:

> considered the information set out in the Issues Paper and attachments –

And then at page 74, in paragraph 9, the delegate records that the plaintiff:

> Has other serious convictions of a similar nature dating back to 1996 when he was aged 13. He has a large number of previous convictions for crimes of violence, including many of robbery in company or robbery armed with a dangerous weapon, as well as assaults, and for car stealing offences.

At paragraph 14, the delegate picks up from the issues paper. The plaintiff:

> first appeared in court as a 12 year old, and was convicted on a number of robbery offences. His offending since then has involved –

various matters. And then, at the end of the paragraph:

> as a juvenile and later as an adult.

So, that is the consideration of the factual material. And then in the conclusion section on page 75 of the court book, at paragraph 22:

> I concluded that Mr LESIANAWAI represents a risk of harm to the Australian community which is unacceptable –

And then, in the last sentence of that paragraph:

> I noted in particular, the length of time Mr LESIANAWAI has lived in Australia, and his prospects on return to Fiji, but consider the history and nature of his offending and his risk of reoffending do not outweigh these considerations.

That appears to be a typographical error because, if it were correct, the decision would have been the opposite. The next document to which I wish to take your Honours is the National Police Certificate, which starts at page 78 of the court book. Your Honours see halfway down page 78 the identification of the plaintiff and the recording of his date of birth. The

entries in the certificate then commence halfway down page 81 and work backwards.

If your Honours go to page 81, your Honours see on that page three entries for Cobham Children's Court, the first two – working up the page – were when the plaintiff was 12, the top one was 13. On page 80, at the bottom of the page – again, Cobham Children's Court – he was 14 at the time that the matter was dealt with by the court, but one might wonder whether he was 13 or 14 at the time of the events in question.

The next entry, Cobham Children's Court on the 24 August 1998, he was 15. Then, Lidcombe Children's Court, 8 September 1999. Depending on the proximity of the court date to the offending events, he was either 15 or possibly 16. He was 16 when it went to court, but one would think probably 15 at the time of the offending.

GAGELER CJ: What are we to infer here? That the certificate is wrong when it refers to a conviction, or that a conviction was wrongly recorded?

MR HOOKE: In our submission, your Honours would infer that the certificate is wrong. It would be improbable in the extreme, in our submission, that the Children's Court would misconceive its jurisdiction on all of those occasions, and the more probable inference is that the certificate is wrong.

GORDON J: For your purposes for section 14, is it the position that you would have us draw a line above Bidura Children's Court?

MR HOOKE: We would say that the Bidura Children's Court entry probably falls within the discretionary period under 14(1)(b), so your Honours would draw a line under it, in our submission, and that means that there are 32 false convictions to which the delegate had regard, in our submission.

BEECH-JONES J: Mr Hooke, do you take section 14 as cutting in as referable to the time of the offending as opposed to the time of the conviction? Sorry, the time of the finding of guilt.

MR HOOKE: Yes.

BEECH-JONES J: Do you know if that has ever been considered?

MR HOOKE: I cannot answer that, but I would be happy to send in a note if that would assist your Honours. I do not know, but one would think that it would operate on the time of offending rather than the time of disposition.

GORDON J: If you limit it to the Cobham Children's Court and below, about which there can be no dispute, is that right, that he was under the age of 16 at the time it was dealt with by the court? Is the position you get to 23?

MR HOOKE: Yes, 23, and 32 if you include Lidcombe Children's Court.

GORDON J: Thank you.

MR HOOKE: So, your Honours will see from that analysis why we say that the question of materiality just cannot be engaged at all, in our submission.

EDELMAN J: What is more extreme than *Thornton*?

MR HOOKE: Than *Thornton*? Indeed. Thornton's offending only involved as a juvenile. It started at 16 and involved four offences, I think. This is a much more extreme case than *Thornton*. I have already made the point, I think, that the police certificate and its extraction in the issues paper was the only material before the delegate in relation to the facts or circumstances of any of the juvenile offending. Once it falls away, there is just nothing else for the delegate to have regard to, prior to at least the juror, but probably Lidcombe Children's Court. Of course, once one excludes under 85ZS to even reference or having regard to the fact of charge, that strips away anything including the fact of an allegation. So, it literally does reduce to nothing.

For those reasons, we say that ground 2 is made out because, if 85ZR and 85ZS are engaged, there was a prohibition under a Commonwealth statute from any of those matters being taken into account in any way, and it does not avail our friends to rely on what, in our submission, is something of a red herring, and that is a delineation between – I am sorry, your Honour – what law a decision-maker is required to properly understand in order to validly discharge their jurisdiction and what law they are allowed to get wrong within jurisdiction because it is simply unnecessary to go there.

The *Crimes Act* (Cth) expressly prohibits matters to which 85ZR and 85ZS apply from being considered by any Commonwealth agency, including the Minister. So, nice questions about what is within and what is without jurisdiction do not arise, in our submission, in this case because of the effect of the *Crimes Act* (Cth). I did not propose, having regard to the recent familiarity of your Honours with your own decision in *Thornton*, to go through it with your Honours.

GAGELER CJ: I think that is a wise choice.

MR HOOKE: So, unless there is anything further I can assist your Honours with, those are our submissions.

BEECH-JONES J: Do you want to say anything further about ground 1 or you are just content to rely on your written submissions?

MR HOOKE: We rely on our written submissions, your Honour.

GAGELER CJ: Thank you. Mr Knowles.

MR KNOWLES: If the Court pleases. Prior to my friend answering the last question by relying on his written submissions in respect of ground 1, I had thought that the issues had narrowed substantially because, as put in writing, ground 1 was a freestanding error arising from a misunderstanding of section 14 of the State Act which did not rely on the operation of the *Crimes Act* (Cth), whereas ground 2 was a ground identical to that upheld in *Thornton* which did rely on the *Crimes Act* (Cth).

That has some importance in what I am about to say and make a concession in relation to materiality. In writing, we had in respect of ground 1 said that the error was immaterial because although the delegate referred to convictions, in effect, it is the fact of the finding of guilt and the underlying offences which was determinative. We maintain that submission, but in respect of ground 1 only. In respect of ground 2, and any other argument that relies on the effect of section 85ZR, I accept that that type of materiality argument runs into an insurmountable problem in the form of section 85S where the charge cannot be considered, therefore the fact of the offending and the finding of guilt also cannot be considered.

So, I apologise that this was not clear from our written submissions. Your Honours should simply rule a line through paragraph 34 of our written submissions to the extent – in respect of ground 2. We adopt the materiality submissions made in respect of ground 1. I do maintain the materiality submission in respect of ground 1.

Can I move to what is the heart of the matter. I can be relatively brief because of the way in which Mr Hooke has taken your Honours through the Act and because your Honours are familiar with the issues from *Thornton*. The critical issue, of course, your Honours, is whether or not section 14 engages the operation of section 85ZR in the manner that your Honours found in *Thornton*; the Queensland State Act was engaged. We make two submissions as to why the Commonwealth Act does not apply. The first is that section 85ZR(2), operates in respect of a law where a person is to be taken never to have been convicted.

I will not take your Honours to the decision in *Thornton*, but just giving your Honours a reference to paragraph [24] in the decision of your Honour the Chief Justice and Justice Jagot. The short point is that, having referred to the decision of her Honour Justice Kiefel, sitting at first instance in the Federal Court, determined or described section 85ZR(2) as being a law which applies where a person is deemed never to have been convicted or takes away the fact of that conviction.

Mr Hooke says this case is even stronger because there is no deeming required; there is, in fact, no conviction. My submission is that the language of section 85ZR and the discussion in both *Hartwig v Hack*, as picked up in *Thornton*, makes clear the limited field of operation of section 85ZR. That is, it operates where a deeming provision does apply. Section 14 does not have those characteristics. There is no deeming a conviction not to have occurred, or taking away of the fact, it is simply a command to the court not to record or proceed to a conviction. As your Honour - - -

EDELMAN J: That would mean, then, that the purposes of the 1987 Act would have misfired substantially because of the language and the process which was adopted.

MR KNOWLES: Not quite, your Honour, with respect, because when your Honour refers to the purposes, if I might use the old-fashioned term of "mischief", what is different between the Queensland Act and the New South Wales Act is the New South Wales Act is more clearly focused at a more narrow range of aspects of criminal procedure, whereas, as your Honour and Justice Gordon identified by reference to the long to title of the Queensland Act in *Thornton*, that was a code for how issues of youth justice were to be considered, not limited, in my submission, to the curial context or the curial focus, which is the focus of the New South Wales Act.

So, I accept that there is a similarity of purpose. There is no doubt that the 1997 New South Wales State Act is directed for the benefit of children, to recognise the special position of children, and to recognise that children found to have offended ought not have that as a permanent mark on their criminal record in the form of a conviction.

BEECH-JONES J: Mr Knowles, in *Thornton*, the State legislation precluded the recording of a conviction.

MR KNOWLES: Yes.

BEECH-JONES J: As I understand it, you are saying that the words "taken never to have been convicted" only operate upon a State provision that has some deeming operation. Is that right?

MR KNOWLES: Yes.

BEECH-JONES J: But does not both the legislation in *Thornton* and here simply prevent – it is not a deeming, it just prevents the court from recording a conviction.

MR KNOWLES: The deeming operation in the Queensland Act comes from section 184(2), where the finding of guilt is - - -

GAGELER CJ: That section simply said that a finding of guilt was not to be taken as – to be a conviction for any purpose. I mean, you could have had a provision along those lines as subsection (3) of section 14. It is kind of unnecessary because it is clear from the distinction drawn in subsection (1) between the finding of guilt and the conviction that a finding of guilt is not a conviction for any purpose. That is sort of confirmed, is it not, by section 33(6), which, in effect, creates an exception to that rule.

MR KNOWLES: Your Honour's question has a couple of elements - - -

GAGELER CJ: Yes, I am sorry, there was a lot wrapped up in that.

MR KNOWLES: Section 14, it may be accepted, it seems, from your Honour's question, does not in terms contain a deeming. The question put is whether or not that is unnecessary in circumstances where there is, in fact, no conviction. That part of the argument has force, with respect, but what has less force, with respect to your Honour's question, is what was added, and – to use my words, not your Honour's – it is implicit that there not be a conviction for all purposes, because the argument we make – and it is separate to the fact that there is no deeming operation – is that section 14 read with section 15 and section 33 operate quite differently in the sense of, they are focussed upon how the Children's Court, in particular, will manage matters of criminal procedure.

So, there is not taken to be no conviction for all purposes. If there is an implied aspect of deeming in section 14, it is simply that, for the purpose of this Act, it is not taken to be a conviction. So, I do not – I hope I have answered your Honour the Chief Justice's question, but it is, to repeat myself, simply that there is nothing implicit about the combination of section 14 and section 15 - - -

EDELMAN J: I do not understand that answer. How, under section 14(1), could a court take an offence – say under section 14(1)(a) – to be a "conviction" for the purposes of any other Act?

MR KNOWLES: The answer to that lies in your Honour's question: how could a court do that? The argument I am seeking to make is that section 85ZR operates in relation to, where there is a correspondence between the circumstances and the purpose, as between the State Act and the Commonwealth official.

EDELMAN J: But how can a Commonwealth official take it if the court cannot proceed to a conviction? You are saying that despite the fact the court cannot proceed to a conviction, a Commonwealth official can take it as a conviction.

MR KNOWLES: Yes, your Honour, because it operates in respect of different – and one has to consider the circumstances and the purposes for which the Commonwealth official is acting. The Commonwealth official, in this case, is acting for quite a different circumstance than the legislative direction to the Children's Court in sections 14 and 15.

GLEESON J: I had thought you might have been saying that you accept, as a matter of fact, that a juvenile cannot be taken to have been convicted of a juvenile offence, but what you are saying is actually the reverse: that the juvenile can be taken to have been convicted of an offence in circumstances where they were not convicted.

MR KNOWLES: I will put the argument, your Honour, as section 85 not applying for two reasons. One is that there is no deeming aspect of it, but there is no conviction which is deemed not to have occurred because, on its face, section 14 prohibits the conviction. But I also make the argument that the Commonwealth official is not prohibited from treating that as a conviction because the Commonwealth official is not acting in the corresponding circumstances or for a corresponding purpose.

GLEESON J: On what basis would a Commonwealth official take someone to have been convicted when they were not?

MR KNOWLES: When there is a finding of guilt, your Honour, because the word "conviction" of itself – as we have said in writing by reference to the decision in *Maxwell* – can have multiple meanings when one has regard to the context of section 501, and particularly section 501(7), referring to a "sentence" and the definition of "sentence" within section 501. The delegate was operating on a basis that what was relevantly important was the finding of guilt, not the technical description of that as a conviction.

GORDON J: "Conviction" is not defined but there is distinction drawn in section 14 between a finding of guilt and then the recording of that finding as a conviction. There is a distinction drawn in its terms.

MR KNOWLES: Yes, and the Queensland legislation considered in *Hartwig v Hack* prohibited only the recording of the conviction. That was considered by her Honour Justice Kiefel not sufficient to engage section 85ZR. *Thornton* was obviously different for the reasons that both of the joint judgments in that case described, but it was particularly different because there was the expressed provision in section 184(2) that it was to operate for all purposes. That is really what is missing in this case, that the direction or the command in section 14 to the Children's Court does not extend – certainly, does not extend expressly – and, in my submission, the fact that it prevents not only the recording of a conviction but proceeding to a conviction. It does not change that when one has regard to what the Act is doing, which is governing matters of criminal procedure.

I did briefly want to return to one aspect of a question raised by your Honour the Chief Justice, which was what one is to make of section 33(6). Before I answer that directly, I should acknowledge that my friends have referred to that provision in their written outline. The version of the Act which we provided, which is roughly contemporaneous with the offending, was prior to the introduction of section 33(6), but section 33(6) was in force at the time of the delegate's decision, it being introduced in 2008. With that issue explained - - -

EDELMAN J: All that is to say is that Parliament, in enacting section 33(6), did so on a particular assumption as to the operation of the Act.

MR KNOWLES: Parliament did so for a particular assumption as to how courts in New South Wales would treat a finding of guilt in respect of motor offences. So the provision in section 33(6), which can be found in my learned friend's written submissions at paragraph 59, there – again in the frame of a command to the Children's Court:

> the Children's Court may exercise any power it could exercise under that legislation if the person had been convicted –

GAGELER CJ: Is the first sentence a command?

MR KNOWLES: Could your Honour give me a moment?

EDELMAN J: The whole premise of the first sentence is that it is not taken to be a conviction otherwise.

MR KNOWLES: It is not taken to be a conviction within the scope of the operation of this Act. It does not expressly use the terms "otherwise". Your Honour's question was whether that is an implicit premise. It is no, with respect, because section 33(6) is essentially a facultative one which is entirely directed to the same field of operation, being criminal procedure. That is why we submit that section 85ZR is not engaged, because the purposes – and the circumstances, for that matter – in which the delegate comes to consider this does not correspond. That, your Honours, is essentially the argument in respect of how the – or the reasons why, I should say, the Commonwealth provisions in section 85ZR in particular do not assist my learned friends.

BEECH-JONES J: So, Mr Knowles, just so I get it, you are saying 87ZR(2) is not engaged because there is a difference between being taken never to have been convicted and not in fact having been convicted. Is that what we are - - -

MR KNOWLES: That is one difference.

BEECH-JONES J: And the other difference is?

MR KNOWLES: The other difference is that there is no equivalent, express or implied, in this legislation that it is taken to operate for all purposes or for any purpose or circumstance which corresponds to that being exercised by the Commonwealth official.

EDELMAN J: That is the submission that it effectively – although the Children's Court cannot proceed to a conviction, other agencies are able to treat the Children's Court as if it had proceeded to a conviction.

MR KNOWLES: Other Commonwealth agencies? Certainly, yes, they can, your Honour. Because there is no magic in the term "conviction" – section 85ZM itself describes the term "conviction" broadly, the issue really is whether that – and I am repeating myself here, I acknowledge – the issue really is whether the limited focus of section 14 read with section 15, directed at matters of criminal procedure and directed at the Children's Court are sufficient to give rise to an inference that that prohibition on conviction is to apply for all purposes and in all circumstances.

BEECH-JONES J: Just dealing with the State agencies, is your proposition that the *Children (Criminal Proceedings) Act* does not prescribe or deal with the circumstances in which the finding of guilt can be treated by others as a conviction or not as a conviction. Is that - - -

MR KNOWLES: Yes, but it would be subject to whatever legislative authority was being exercised by a State agency.

BEECH-JONES J: All right. So, for instance, you could have another Act that said, for the purposes of an appeal it will be treated as a conviction?

MR KNOWLES: There may be some force to having such a provision, because that would permit an appeal on a finding of guilt.

BEECH-JONES J: But there is no prescription in the statute beyond section 15 about what you can do with a finding of guilt, and therefore no corresponding restriction on the Commonwealth agency?

MR KNOWLES: Yes. Even if there was – I do not back away from my answer of yes, but even if there was some restriction on a state authority for a particular purpose, one would have to determine whether the Commonwealth official was acting for a corresponding purpose.

BEECH-JONES J: So, a Commonwealth court could not act in a manner – would have to be obliged to act in a similar manner to section 15, for example, which I think is a – a Federal Court is a Commonwealth authority.

MR KNOWLES: On its face, section 15 is only directed to the Children's Court, but if the construction – and I am sorry, I am not aware of any authority on this proposition – but if the proposition is that all State courts are not permitted to act as if that were a conviction, then in a corresponding curial context, 85ZR would apply.

GORDON J: Can I ask one question, which I do not think you have addressed, and that is Mr Hooke's argument about 85ZS(1)(d)(ii), which is even if 85 – and it is relevant to the way in which 85ZR works – and that is that it extends to not taking into account the charge as well as the conviction. Does that impact upon the construction you have just put to us, both about the way 85ZR works, but also the way you might look at section 14?

MR KNOWLES: I think the answer to your Honour's question is no. It certainly impacts upon and drives the reason why I abandoned the materiality submission in respect of any ground that depends on 85ZR. But section 85ZS(1)(d)(ii) does not – and this is clear from the words in the chapeau in subparagraph (d) – does not extend the operation of section 85ZR. If 85ZR applies, and that is, it applies to this decision-maker exercising power in this context, then *Thornton* is indistinguishable and ground 2 is made out. My arguments for distinguishing *Thornton* all depend on 85ZR not applying, in which case we do not get to the extended operation of section 85ZS.

Your Honours, I do not want to – given the way my learned friend addressed the case, I do not want to dwell unnecessarily on ground 1, but there are simply two matters which I would raise. First, if my learned friend is correct that the inference to be drawn from the National Police Certificate is that the certificate was wrong in recording a conviction, as opposed to the certificate being correct but the Children's Court improperly and contrary to section 14 proceeding to a conviction – and that is an inference which one might well accept – then ground 1 reduces to a mere error of fact as to whether or not a particular piece of evidence accurately described an event, and that does not of itself constitute jurisdictional error, and nor can, absent the intervention of section 85ZR to which ground 2 is focused, nor can section 14 apply directly to constrain the operation of a Commonwealth decision-maker.

GLEESON J: How does that submission submit with your argument that a finding of guilt can be characterised as a conviction? Does not that mean that at the least, it is a mixed question of fact and law?

MR KNOWLES: No, with respect, because if the error is simply the way the police certificate describes something, and I accept that at a level of abstraction, there are difficulties in determining it or distinguishing between questions of fact and mixed questions of fact and law. But, if the only error is that the police certificate used a term that was inapt, the proper characterisation of that is, in my respectful submission, that that is an error of fact.

Even if I am wrong, and adopting the alternative position that that is an error of law or a mixed question of error in law, we rely on our written submissions for the proposition that, especially by reference to what your Honour the Chief Justice said in *Probuild*, that jurisdictional error focuses upon an error, misunderstanding or misapplication of the law applicable to the power being exercised. And the power being exercised and the law applicable to it is obviously enough here, section 501.

Any inapt description, whether it be considered an error of fact or a mixed question of fact or law as to the operation of the New South Wales State provision, does not elevate to the status of a jurisdictional error. But my learned friend was correct to say that that analysis is not necessary for ground 2 because we accept that if the State law is picked up and given force by section 87ZR, then that becomes part of the law that is applicable to the decision-making itself.

If your Honours would just give me one moment. They are the submissions, if the Court pleases.

GAGELER CJ: Thank you, Mr Knowles. Mr Hooke, is there anything in reply?

MR HOOKE: Only one matter, and that concerns ground 1 and the way in which our learned friend has just addressed it. We thought we had made clear that the misunderstanding of the law upon which we rely in relation to ground 1 based – though it is in section 14 of the Children Act, necessarily picks up and operates through sections 85ZR and 85ZS of the *Crimes Act* (Cth) because that misunderstanding feeds through into the engagement, which the delegate did not recognise, of the provisions in the *Crimes Act* (Cth) that foreclosed.

GAGELER CJ: Are you collapsing ground 1 into ground 2?

MR HOOKE: No.

EDELMAN J: But if that submission is right, does that not mean that you either win on ground 2 or, if you do not win on ground 2, you do not win on ground 1?

MR HOOKE: It is probably right, but what it means is that it is not apt to say, as the defendant does, that ground 1 involves only a question of whether the delegate misunderstood the State law. The delegate also misunderstood the Commonwealth law that was engaged by the State law. I take it, in light of the way that the arguments unfolded, that your Honours will not need a note on the operative date of section 14 relative to the offending or the court date. I think in light of my friend's - - -

GAGELER CJ: Yes, we would like a note on that, very quickly, please.

MR HOOKE: We will attend to that, your Honour. We will try and doing it jointly.

GAGELER CJ: You will do a joint note, yes.

MR KNOWLES: I think that is preferable than a reply, your Honour.

MR HOOKE: May it please the Court.

GAGELER CJ: Thank you, Mr Hooke. The Court will reserve its decision in this matter and will adjourn until 9.30 am tomorrow.

AT 11.15 AM THE MATTER WAS ADJOURNED