SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAE* [2014] QCA 69
PARTIES:	**R** **v** **FAE** (appellant)
FILE NO/S:	CA No 265 of 2013 DC No 20 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	11 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2014
JUDGES:	Fraser and Morrison JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the verdict on count 3.** **3. Order a retrial on that count.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was charged with maintaining an unlawful sexual relationship with a child under 16 (count 1), rape (count 2), and two counts of indecently dealing with a child under 16 (counts 3 and 4) – where the jury could not agree on a verdict on counts 1 and 2, entered a majority verdict of guilty on count 3, and unanimously acquitted on count 4 – where the Crown's case depended upon the reliability of the complainant's evidence – whether the guilty verdict was unreasonable because it was inconsistent with the jury's inability to agree on counts 1 and 2 – whether the guilty verdict was unreasonable because it was inconsistent with the acquittal on count 4 CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – REVIEW OF EVIDENCE – where the complainant's evidence consisted of pre-recorded evidence and a recorded interview with police – where the appellant gave and called evidence denying the charges – where the jury were granted their request to watch the

complainant's evidence for a second time – whether there had been a miscarriage of justice because the trial judge, after replaying that evidence, did not direct the jury not to give the complainant's evidence undue weight, and did not repeat or summarise the appellant's evidence – whether defence counsel had sought to obtain a forensic advantage by not requesting such a direction

Evidence Act 1977 (Qld), s 93A

Douglass v The Queen (2012) 86 ALJR 1086; [2012] HCA 34, cited
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, considered
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied
R v CX [2006] QCA 409, cited
R v DAL [2005] QCA 281, cited
R v GAO [2012] QCA 54, discussed
R v SBL [2009] QCA 130, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: P J Callaghan SC for the appellant
D L Meredith for the respondent

SOLICITORS: Bernard Bradley & Associates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant pleaded not guilty to four offences: between 15 January 2006 and 27 February 2009, maintaining an unlawful sexual relationship with a child under 16 (count 1); between 15 January 2006 and 8 August 2007, rape (count 2); between 15 January 2006 and 8 August 2007, unlawfully and indecently dealing with a child under 16 (count 3); and between 15 January 2006 and 27 February 2009, unlawfully and indecently dealing with a child under 16 (count 4). The jury were unable to agree upon a verdict on counts 1 and 2, they were unable to agree upon a unanimous verdict on count 3 and returned a verdict of guilty on that count upon which 11 members of the jury agreed, and they returned a unanimous verdict of not guilty on count 4.

[2] The grounds of the appellant's appeal against the verdict of guilty on count 3 are as follows:

"1. The majority verdict of guilty on count 3 was unreasonable. In particular, it was inconsistent with:

1.1. The unanimous verdict of not guilty on count 4; and
1.2. The inability to agree on counts 1 and 2.

2. The learned trial judge erred when, after the jury were played recordings of the complainant's evidence for a second time, he omitted to warn the jury to guard against the risk of giving that evidence undue weight, and to remind them that the Crown case had been contradicted by the appellant's sworn testimony."

The trial

[3] The complainant was between 10 and 12 years old during the period within which count 3 was alleged to have been committed. Her mother was then the appellant's de facto partner. The complainant's mother gave evidence that her relationship with the appellant commenced in 2005. She and the complainant moved into a house with the appellant in 2006 and the three of them were then the only occupants of the house for about seven months. The complainant and her mother moved out to live in an apartment in a different suburb for a month before returning to live with the appellant. In about the middle of 2007 the three of them moved into a shed in a different place and, except for short periods during which the appellant and the complainant's mother were separated, they remained there until the de facto relationship ended in about 2008 or early 2009.

[4] The Crown gave particulars of its case which were mostly taken from the complainant's statement to police on 2 March 2010 which was tendered in evidence under s 93A of the *Evidence Act* 1977 (Qld). The Crown's particulars of count 2 were that the appellant placed his hand inside the complainant's underpants and penetrated her vagina with his finger. The complainant said in her statement to police that when she was about 10 years old her mother was away from the house at work on Saturday mornings. The complainant was sitting on the floor of the appellant's bedroom watching television. The appellant asked her to sit on the bed with him. After a while he put his hand down her pants and started rubbing on her vagina on the outside of her underwear. He then put his hand underneath her underwear, continued to rub against her vagina, and placed his finger once inside the vagina. The complainant screamed because it hurt and the appellant withdrew his finger and apologised. The complainant left the room.

[5] In relation to the count upon which the appellant was convicted, count 3, the particulars were that on the Saturday following count 2, the appellant touched the complainant on the outside of her vagina inside her underpants. The complainant said that this was the second occasion upon which the appellant dealt with her. She thought it happened on the Saturday following the first occasion. The appellant again asked her to sit on the bed whilst she was watching television. She sat and then lay down on the bed. After a while the appellant put his hands down her pants and rubbed her on the vagina underneath her underwear. The complainant said that these two occasions occurred at the house.

[6] The particulars of count 4 were that the complainant felt sick and lay down on an occasion when she was with the appellant whilst he was working; the appellant lay down next to the complainant, and put his hands inside her underpants, in the area of her vagina. The complainant said in her statement to police that about six to 12 months after the first occasion (count 2) her mother asked her to assist the appellant with a painting job at a big shed. The complainant said that there was a tent inside the shed. The complainant started to feel sick and the appellant told her to lie down inside the tent. At the complainant's request the appellant brought her some water. He then lay down next to her and rubbed her on the vagina beneath her underwear.

[7] The Crown case on the maintaining offence in count 1 relied upon counts 2 – 4 and additional allegations that the appellant touched or rubbed the complainant's vagina on a number of occasions, the appellant exposed his penis to the complainant on

a number of occasions, and the appellant kissed the complainant on the lips on at least one occasion. In the complainant's statement to police she said that the appellant exposed his penis to her sometimes whilst she was lying on the bed. She also said that, after they had moved to the shed, on Saturday mornings whilst her mother was at work the appellant would walk in to her area after she had a shower so that she would have to get dressed in front of him. On other occasions she walked in on the appellant whilst he was masturbating. In pre-recorded evidence on 15 March 2012 the complainant referred to an occasion of "fooling around" when the appellant made her sit on top of him and kiss him. She spoke of kissing at the house more than once. In a subsequent answer, the complainant said that the kissing happened, or she could give details of the kissing (the evidence was ambiguous in this respect), "just the once".

[8] Preliminary complaint evidence was given by two of the complainant's school friends, who were interviewed by police in December 2010, and the complainant's mother. One of the complainant's friends, A, said that about a year and a half earlier the complainant told her that the appellant had been touching and kissing the complainant at the complainant's house during the day whilst the complainant's mother was away at work. A said that the complainant gave more details in a conversation at the end of 2009 or the beginning of 2010. The complainant told A of an occasion when the complainant was lying on a bed watching a movie and the appellant came in, touched her on her leg, and put his fingers into her vagina. The complainant referred to this happening a couple of times and she referred to other things which A could not quite remember. A also said that the complainant told her that the appellant had been touching and kissing her, fingering her, and kissing her neck. A suggested that the complainant should tell her mother but the complainant said that she did not want to because she did not want to alarm her mother.

[9] The complainant's friend B said that she could hardly remember much that the complainant said. B said that the complainant told B about things the appellant did. The first conversation seems to have occurred when they were in Grade 7 or Grade 8 and the complainant was living in the shed. The complainant told B about the appellant making her get undressed in front of him and the complainant feeling awkward about that. At the time of the second conversation, when they were in Grade 8, the complainant was living in the shed. B said that the complainant told her that the appellant was feeling the complainant up and had fingered her.

[10] The complainant's mother gave evidence that at the end of February 2010 the complainant said that the appellant had started touching her when the complainant's mother had started working on Saturdays. The appellant used to ask the complainant to watch television with him in the adults' bedroom and he touched her private parts. The complainant referred to one occasion when the appellant put his finger into her. When she screamed, the appellant apologised and let her leave the room. The complainant told her mother that it happened all the time. She said that the appellant kept rubbing her vagina. There was also an incident in the bedroom when the appellant exposed his penis to the complainant. After they moved to the shed there was an occasion when the appellant went into the complainant's room after she had a shower and encouraged her to get dressed in front of him. There was another time when the appellant took the complainant to a place where he was painting. There was a tent there. The complainant got tired and lay down in the tent. She called out when she was hungry. The appellant took food to her. Whilst

she was eating, the appellant started rubbing her on the outside of her pants. The complainant said that she was scared and did not know what to do. She did not give more details which the complainant's mother could remember.

[11] The appellant gave and called evidence. The appellant denied the complainant's allegations in his evidence-in-chief and he maintained his denials in cross-examination. Two former employees of the appellant gave evidence of their observations of the relationship between the complainant and the appellant. C gave evidence that she did not have a lot of interaction with the complainant and her mother. She did recall interactions between the complainant and the appellant at a time when they were doing a job, in about September 2007, just after C had started her apprenticeship. She then saw a very friendly interaction between the appellant and the complainant and she did not see anything out of the ordinary. D gave evidence that he was a friend of the appellant's and he was at the appellant's house or workplace for almost 95 per cent of the time. He never saw any difficulty in the interactions between the complainant and the appellant. They were always nice to each other. Their relationship was like that of father and daughter.

[12] The evidence at the trial occupied two days and a further hour or so on the third day of the trial. The trial judge summed up during the afternoon of the third day of the trial and from about 9.15 am to 11.36 am on the fourth day of the trial. The jury then retired to consider their verdicts. Shortly before lunch on the same day, the trial judge received a note from the jury requesting that the complainant's police interview and her pre-recorded evidence be replayed. Neither counsel made any submission upon that topic. The trial judge acceded to the jury's request. The videos were replayed between 1.35 pm and 3.05 pm. The trial judge subsequently gave directions to the jury to the effect that the jury could take as long as they liked to reach a verdict, that the meaning of a unanimous verdict was a verdict upon which all jurors agreed, that the effect of there being some dissenters in the jury was that they should continue to work towards a unanimous verdict and that the circumstances in which a majority verdict might be returned had not yet arisen. The jury retired again shortly after 5.00 pm.

[13] On the fifth day of the trial the jury sent the trial judge a note which indicated they arrived at a unanimous decision on one charge but were split on the remaining three charges. By that time the jury had deliberated for about seven and a half hours. The trial judge gave the jury a *Black*[1] direction. After the jury had deliberated in total for a little short of nine hours, they informed the trial judge that there had been no change in relation to two of the charges and, although there had been some movement in relation to one of them, it was highly improbable that the jury would significantly move from the present position. The trial judge then gave the jury directions concerning majority verdicts. At about 4.00 pm, after the jury had been deliberating for about nine hours and forty minutes, they indicated they had reached a unanimous decision on one charge and a majority decision on another charge, they could not agree on the other two charges, and it was highly improbable that they could arrive at a majority verdict on those other two charges if given more time. The trial judge then took the verdicts.

Ground 1: inconsistency of verdicts

[14] The appellant argued in his outline of submissions, not only that the guilty verdict on count 3 was unreasonable because it was inconsistent with the verdict of not

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1 See *Black v The Queen* (1993) 179 CLR 44.

guilty on count 4, but also because it was inconsistent with the jury's inability to agree on counts 1 and 2. As to the latter proposition, I accept the respondent's argument that in the circumstances of this case the jury's failure to agree upon verdicts for counts 1 and 2 cannot be equated with verdicts of not guilty such as to give rise to an inconsistency with the guilty verdict on count 3.[2]

[15] In oral argument the appellant's senior counsel focussed instead upon what he submitted was a clear inconsistency between the conviction on count 3 and the acquittal on count 4. He argued that these differing verdicts were such as to "defy reasonable explanation" and "indicate a miscarriage of justice";[3] this case was submitted to be within that "residue of cases" where "the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty."[4] The appellant sought support for those submissions in statements made by the trial judge in summing up to the jury which emphasised the importance of the truthfulness and reliability of the evidence of the complainant, including statements to the effect that the prosecution case stood and fell upon the complainant's evidence. The appellant pointed out that, as the trial judge reminded the jury, defence counsel and the prosecutor accepted that the Crown case stood or fell upon the evidence of the complainant; and the prosecutor did not ask the trial judge to qualify his directions to the jury to the effect that, if the jury were not satisfied that the complainant was a credible and reliable witness in relation to one count, "it would seem to follow that a verdict of not guilty would be required on each of the other counts". The appellant argued that the trial judge and counsel, who had the advantage denied to this Court of being present at the trial, rightly accepted that rational verdicts depended entirely upon the reliability and credibility of the complainant's evidence. The case was demonstrably a "binary proposition", it was expressed in that way by the trial judge, and the diverse verdicts defied reasonable explanation.

[16] The respondent argued that the acquittal on count 4 was explicable by the difference between the complainant's evidence about what the appellant did (he put his hand inside her underpants and touched her skin) and the evidence of the complainant's mother of what the complainant told her that the appellant did (he touched her on the outside of her underpants). The appellant replied that this discrepancy was itself an indication that the complainant's evidence was generally unreliable; her evidence, upon which the prosecution case depended, therefore could not provide an acceptable rationale for the differing verdicts.

[17] In addition to the directions referred to in the appellant's argument, the trial judge gave conventional directions to the jury to consider each count separately. The claimed inconsistency between verdicts is consistent with the jury following that instruction.[5] The jury could take into account in relation to count 4 that on the complainant's own evidence she was unwell at the time when count 4 was alleged to have been committed and, whilst the evidence of both the complainant and her mother was that the appellant had the opportunity to commit count 3 whilst the complainant's mother was absent at work, count 4 was alleged to have occurred at the appellant's workplace. In these circumstances, whether or not the jury preferred

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2 See *R v DAL* [2005] QCA 281 per Keane JA at [21] – [28] (McMurdo P agreeing).

3 *R v Motlop* [2013] QCA 301 at [46].

4 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.

5 See the comparable analysis in *R v CX* [2006] QCA 409 at [33].

the complainant's evidence to her mother's evidence about the precise terms of the complainant's complaint to her mother about count 4, the jury might reasonably have considered that an acquittal on count 4 was appropriate in light of that discrepancy.

[18] In these circumstances, the acquittal on count 4 does not establish that the jury should have harboured a reasonable doubt of the appellant's guilt on count 3; it suggests no more than that the jury were not satisfied to the "designedly exacting"[6] standard of proof of criminal offences that count 4 occurred.[7] There was no discrepancy between the evidence of the complainant and her mother relating to count 3 and the preliminary complaint evidence was consistent with the complainant's evidence. It was not submitted, and it could not be accepted, that the verdict on count 3 was not reasonably supported by the evidence relating to that count. Adopting the required cautious approach to setting aside an otherwise reasonable guilty verdict merely on the ground of a suggested difficulty of reconciling that verdict with an acquittal on a different count,[8] the proper conclusion is that the acquittal on count 4 does not reveal that the jury acted unreasonably in finding the appellant guilty on count 3.

Ground 2: omission to warn the jury

[19] Under the second ground of appeal the appellant argued that a miscarriage of justice arose because the trial judge did not give the jury any direction that they should not give the replayed evidence of the complainant undue weight by virtue of its repetition and the trial judge did not repeat or summarise to the jury any of the evidence given or called by the appellant. The appellant acknowledged that in some cases weight might be given to the circumstance that defence counsel did not seek any such direction but argued that this was not significant in this case because no forensic advantage could conceivably have accrued to the appellant by counsel's omission.

[20] The respondent frankly acknowledged that the failure by the trial judge to warn the jury against giving the evidence of the complainant undue weight was "unfortunate". The respondent accepted that there was an available implication from the reasoning in *Gately v The Queen*[9] that in a case where the defendant gave evidence a jury should be warned against giving undue weight to evidence of the complainant which was replayed to the jury after their deliberations had commenced. The respondent also accepted that there was no apparent forensic advantage to the appellant in not asking the trial judge to give such a warning. In the event that the Court considered that the failure to give the directions contended for by the appellant was an error, the respondent disclaimed any reliance upon the proviso in s 668E(1)(A) of the *Criminal Code* that "the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." The respondent argued, however, that the evidence in the defence case was in such short compass that it would not have been forgotten by the jury and, because the trial judge had repeatedly directed the jury that the case depended entirely upon the evidence of the complainant which

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6 *Douglass v The Queen* (2012) 86 ALJR 1086 at 1096 [48].
7 See *R v SBL* [2009] QCA 130 at [32].
8 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368–369.
9 (2007) 232 CLR 208.

should be carefully assessed by the jury, it was not necessary for the trial judge to warn the jury not to give her evidence undue weight when it was replayed.

[21] Upon an objective analysis, there was no forensic advantage for the appellant to refrain from asking the trial judge to remind the jury of the evidence given and called by the appellant and to warn the jury to guard against the risk of unfairness to the appellant that the replaying of the complainant's evidence at the time when it was replayed might itself cause the jury to give her evidence more weight than the evidence given and called by the appellant. It should therefore be accepted that in the circumstances of this case defence counsel's failure to ask the trial judge to take that course does not militate against a conclusion that there has been a miscarriage of justice.[10]

[22] In *R v GAO*[11] the Court set aside verdicts of guilty and ordered a re-trial in circumstances in which a trial judge had allowed a complainant's police interview to be taken into the jury room. White JA, with whose reasons I and Daubney J agreed, made the following observations (I have added the emphasis):

> "In *R v H* this court discussed the approach to exhibits being taken into the jury room when a jury adjourns to deliberate about their verdict and particularly a statement admitted pursuant to s 93A of the *Evidence Act*. After an analysis of authorities from other jurisdictions the President said:
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> > "[T]he authorities I have reviewed suggest that as a general rule, at least in the absence of the consent of both Crown and defence, videotaped evidence tendered under s. 93A of the Act will not be permitted to go into the jury room during deliberations. If the jury request to hear the evidence of the complainant child a trial judge must deal with each situation on the facts as they arise. … **If the judge decides to allow the jury to view the videotape, this should generally be done after discussing the proposed procedure with counsel in open court. The judge should also warn the jury that because they are hearing the evidence in chief of the complainant repeated a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case.** … The overriding consideration for the trial judge must be fairness and balance, something which can be difficult to achieve in emotive sexual cases which are particularly likely to arouse feelings of prejudice in the jury."
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> That approach was endorsed in *R v DAJ*. Jerrard JA said:
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> > "The learned trial judge specifically exercised the discretion given by s 99 of the *Evidence Act*, to supply the jury with the videos. However, the judge did not comply with the requirement in the judgment of the President and Jones J in *R v H*, namely that the judge warn the jury that because they

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10 See *TKWJ v The Queen* (2002) 212 CLR 124 at [16]–[17] (Gleeson CJ), [25]–[28] (Gaudron J), [81]–[85] (McHugh J), [101] (Gummow J agreeing with Gaudron and Hayne JJ), [106]–[108] (Hayne J).

11 [2012] QCA 54.

> were hearing the evidence in chief of the complainant repeated a second time, and well after all the other evidence, they should guard against the risk of giving that evidence disproportionate weight simply for that reason. Nor did the judge specifically remind the jurors of what emerged in the examination and re-examination of the complainant."
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> It could not be argued, and the respondent did not seek to do so, that the primary judge purported to exercise his discretion under s 99 when he told the jury that they would have the s 93A statements in the jury room during their deliberations. The respondent conceded that, notwithstanding the lack of objection by defence counsel below, that allowing the jury to have the s 93A exhibits when they retired was an irregularity. Mr Cash for the respondent argued that even so a substantial miscarriage of justice had not occurred. This was because when addressing the jury, defence counsel had placed particular emphasis on the complainant's interview with police. He had invited the jury to consider the complainant's body language on the video and reminded them of particular parts of the interview submitting that the complainant had changed her story. He did not emphasise any aspect of her cross-examination in the pre-recording of her evidence. Mr Cash conceded that on a review of the transcript it was unlikely that it was a forensic decision by defence counsel not to seek to have the s 93A statements excluded.
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> There was a material irregularity in permitting the s 93A statements to go into the jury deliberations. Having done so, the failure to give a direction to the jury to guard against the risk of giving the evidence in the s 93A statements disproportionate weight was an error of law. There is no place for a consideration of the proviso."[12]

[23] The circumstances of this case tend to emphasise the need for such directions in order to guard against the risk of a miscarriage of justice. An appreciable period of time had elapsed after the completion of the evidence in the defence case and after the conclusion of the summing up before the jury asked for the evidence of the complainant to be replayed. The replaying of the complainant's evidence occupied a substantial period of time and was of such a character as might arouse strong emotions. In the absence of any reminder to the jury of the appellant's sworn denials of the complainant's evidence or of the other exculpatory evidence in the defence case there was an appreciable risk that the jury might give the complainant's evidence greater weight than the evidence in the defence case merely because the jury saw and heard the complainant's evidence for a second time in those circumstances.

[24] In *Gately v The Queen*[13] the High Court held that, in circumstances in which defence counsel had consented to the trial judge permitting the complainant's video taped evidence to be replayed in the absence of judge and counsel and her statement to be re-read to the jury in the presence of the judge and counsel, no miscarriage of justice had been occasioned by the trial judge's failure to warn the jury about the need to avoid giving undue weight to that evidence. However, the High Court

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12 [2012] QCA 54 at [20]–[24] (citations omitted).

13 (2007) 232 CLR 208.

emphasised that this was the only evidence of significance given in the trial so that there was no possibility of undue weight being given to some evidence at the expense of other evidence.[14] The decision in *Gately* does not govern this case. As Hayne J pointed out, although a jury's request to be reminded of evidence given in the trial should very seldom be refused, the "overriding consideration is fairness of the trial" and it may be necessary to warn the jury that the replayed evidence should be considered in the light of countervailing evidence or considerations upon which the accused relied; that might be necessary to avoid the risk that undue weight would be given to evidence that had been repeated.[15]

[25] It must inevitably be concluded that the trial miscarried because the trial judge did not warn the jury that they should not give the replayed evidence of the complainant undue weight merely by virtue of its repetition and the trial judge did not repeat or summarise to the jury any of the evidence given or called by the appellant.

Orders

[26] I would allow the appeal, set aside the verdict on count 3, and order a retrial on that count. Whether there should be a retrial on counts 1 and 2 is a matter for the prosecution to consider.

[27] **MORRISON JA:** I have had the advantage of reading the reasons of Fraser JA and agree with his Honour's reasons and the orders he proposes.

[28] **APPLEGARTH J:** I agree with the reasons of Fraser JA and with the orders proposed by his Honour.

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14 (2007) 232 CLR 208 at [4]–[5] (Gleeson CJ), [80]–[82] (Hayne J), [112] (Heydon J), [126] (Crennan J).

15 (2007) 232 CLR 208 at [95]–[96].