SUPREME COURT OF QUEENSLAND

CITATION:	*R v HXY & Ors* [2017] QSCPR 2; [2017] QSC 108
PARTIES:	**R** **v** **HXY, CEV and AQL** (applicants)
FILE NO/S:	BS No 77 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2017
JUDGE:	Douglas J
ORDER:	**The applications are refused.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – PRESERVATION OF RIGHTS, LIABILITIES AND LEGAL PROCEEDINGS ON AMENDMENT, REPEAL, LAPSING ETC OF ACT OR PROVISION – APPLICATION TO OFFENCES – where defendants charged with offences with circumstances of aggravation supplied by *Vicious Lawless Association Disestablishment Act* 2013 ('VLAD Act') – where VLAD Act repealed prior to proceedings – whether s 20 of *Acts Interpretation Act* applies to permit proceeding to continue and for penalty to be imposed as though repeal had not occurred STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – REPEAL – EFFECT – GENERALLY – whether offence under *Criminal Code* includes within its definition circumstances of aggravation charged in respect of the offence – whether s 11(1) *Criminal Code* applies to offences where Act providing circumstances

of aggravation is repealed – when person 'charged' with offence – whether s 11(2) *Criminal Code* applies to limit punishment available upon conviction – whether s 180 *Penalties and Sentences Act* applies to reduce the maximum sentences for alleged offences – whether 161Q *Penalties and Sentences Act* applicable to punishments for alleged offences

Criminal Code (Qld), s 11, s 36, s 56, s 229J, s 328A, s 554, s 557, s 558, s 560, s 562, s 564, s 567, s 568, s 569, s 570, s 572, s 575, s 576, s 614, s 651
Acts Interpretation Act 1954, s 20
Drugs Misuse Act 1986, s 5
Justices Act 1886, s 42
Penalties and Sentences Act 1992, s 161O, s 161P, s 161Q, s 161R, s 180
Serious and Organised Crime Legislation Amendment Act 2016, s 244, s 245, s 279, s 282, s 492
Vicious Lawless Association Disestablishment Act 2013, s 3, s 5, s 7

Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15, cited
Commissioner of Taxation v Price [2006] 2 Qd R 316; [2006] QCA 108, applied
Kingswell v The Queen (1985) 159 CLR 264; [1985] HCA 72, cited
Mansray v Rigby (2014) 292 FLR 404; [2014] NTSC 62, cited
Perlman v Perlman (1984) 155 CLR 474; [1984] HCA 4, cited
Project Blue Sky v ABA (1998) 194 CLR 355; [1998] HCA 28, cited
R v Aniezue [2016] ACTSC 82, cited
R v Barlow (1997) 188 CLR 1; [1997] HCA 19, cited
R v Brancourt (2013) 280 FLR 356; [2013] NTSC 56, cited
R v Graham [2016] QCA 73 considered
R v Phillips and Lawrence [1967] Qd R 237, considered
R v Ronen [2005] NSWSC 991, cited
R v Ronen (2006) 161 A Crim R 300; [2006] NSWCCA 123, cited
R v Wyles; Ex parte Attorney-General [1977] Qd R 169, cited
Rosser v Donges [1990] 1 Qd R 490, cited
Woodward v The Queen [2017] NSWCCA 44, cited

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D J Walsh for the applicant CEV
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M R Byrne QC with S L Dennis for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the applicant HXY
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Fisher Dore for the applicant AQL
Office of the Director of Public Prosecutions for the respondent

Introduction

[1] This is an application under s 590AA of the *Criminal Code* for pre-trial rulings that, in effect, the repealed *Vicious Lawless Association Disestablishment Act* 2013 ("the VLAD Act") does not apply to set the punishment in respect of the charges the applicants face. It is also submitted that the legislation that replaced the VLAD Act, the *Serious and Organised Crime Legislation Amendment Act* 2016 ("the SOCLA Act"), by which Part 9D was inserted into the *Penalties and Sentences Act* 1992 is also inapplicable to set the punishment that may apply to those charges.

[2] The submissions require me to consider:

(1) whether s 20 of the *Acts Interpretation Act* 1954 applies to permit the proceeding to continue and be completed and that any penalty be imposed as if the repeal of the VLAD Act had not happened; and

(2) whether an offence under the *Criminal Code* includes within its definition circumstances of aggravation charged in respect of the offence; and

(3) whether s 11(1) of the *Criminal Code* applies to the case and, in the context of s 11(1) in particular, when is a person charged with an offence; and

(4) whether s 11(2) of the *Criminal Code* applies to limit the punishment applicable on any conviction;

(5) whether s 180 of the Penalties and Sentences Act applies to reduce the maximum sentences for these alleged offences;

(6) whether s 161Q of the *Penalties and Sentences Act* inserted as part of Part 9D is applicable to the punishment for any offence charged on the indictment.

Background

[3] The applicants were indicted on 10 April 2017, after the repeal of the VLAD Act on 9 December 2016, with several offences related to trafficking in dangerous drugs both before the VLAD Act came into force on 17 October 2013 and since its introduction. Count 1 on the indictment charges all three applicants in respect of the period before the VLAD Act came into force with the offence of trafficking in heroin. Count 2 charges HXY and CEV with trafficking in heroin and methylamphetamine between 16 October

2013 and 31 January 2014 when the VLAD Act was in force. They are also charged with the circumstances of aggravation created by the VLAD Act that they were vicious, lawless associates and office bearers of an association. Count 3 similarly charges AQL that, between 16 October 2013 and 4 April 2014, he trafficked in heroin with the same circumstances of aggravation.

[4] Counts 4 and 5 against HXY and CEV, are charges of production and possession of heroin with the same circumstances of aggravation. Count 7, against AQL, is also a charge of production and possession of heroin with the same circumstances of aggravation.

[5] Because of the argument about the possible relevance of the dates when charges were laid before the indictment was presented, I was also informed that on 30 January 2014, HXY and CEV were charged by police with production and possession of a dangerous drug. On 3 April 2014, AQL was arrested and charged with possession of a dangerous drug. All of those charges alleged that the applicants were in possession of an amount of the dangerous drug in excess of two grams. None of them had a circumstance of aggravation alleged against them pursuant to the VLAD Act.

[6] On 14 July 2014, CEV was charged with trafficking as a vicious, lawless associate and as an office bearer. On 17 July 2014, HXY was charged with an identical offence. Again on 17 July 2014, AQL was charged with trafficking as a vicious, lawless associate but it was not alleged against him that he was an office bearer.

[7] Then, after committal hearings had occurred, HXY was the subject of an indictment presented on 22 April 2016 charging him with trafficking as a vicious, lawless associate and as an office bearer, producing a dangerous drug as a vicious, lawless associate and as an office bearer and possessing in excess of two grams of a dangerous drug as a vicious, lawless associate and as an office bearer. That was still within the currency of the VLAD Act.

[8] Similarly, on 22 July 2016, an indictment was presented against AQL charging him with trafficking and secondly with trafficking as a vicious, lawless associate and as an office bearer and thirdly with possessing in excess of two grams of a dangerous drug as a vicious, lawless associate and as an office bearer. That too was during the currency of the VLAD legislation.

[9] Then the indictment currently before the court was presented on 12 April 2017 setting out the charges to which I have already referred. That indictment was presented after the repeal of the VLAD Act. The repeal was effected by the SOCLA Act which was assented to on 9 December 2016. Section 492 repealed the VLAD Act while s 279 inserted Part 9D into the *Penalties and Sentences Act* as I have already said.

[10] Part 9D creates a circumstance of aggravation under s 161Q argued by the respondent to be comparable with that previously existing under the VLAD Act. It is, however, different in effect. The relevant VLAD Act circumstance of aggravation was set out in s 5 and s 6, describing a vicious, lawless associate, amongst other things, as a

participant in the affairs of a relevant association which is defined to mean, after listing identified groups, "any other group of three or more persons by whatever name called …".[1] Section 6 sets out the means of proof that a person is an office bearer of an association while s 3 defines office bearer.

[11] Under the VLAD Act, s 7, a court sentencing a vicious, lawless associate for a declared offence must impose 15 years' imprisonment served wholly in a corrective services facility and, if the vicious, lawless associate was an office bearer, a further sentence of 10 years' imprisonment served wholly in a corrective services facility served cumulatively on the 15 years' imprisonment.

[12] Under the amendments to the *Penalties and Sentences Act* created by the SOCLA Act, a new circumstance of aggravation is created in respect of a participant in a criminal organisation, which can include an office holder, pursuant to s 161P(1)(d). Section 161Q then provides:

> "**161Q Meaning of serious organised crime circumstance of aggravation**
>
> (1) It is a circumstance of aggravation (a ***serious organised crime circumstance of aggravation***) for a prescribed offence of which an offender is convicted that, at the time the offence was committed, or at any time during the course of the commission of the offence, the offender—
>
> (a) was a participant in a criminal organisation; and
>
> (b) knew, or ought reasonably to have known, the offence was being committed—
>
> (i) at the direction of a criminal organisation or a participant in a criminal organisation; or
>
> (ii) in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or
>
> (iii) for the benefit of a criminal organisation.
>
> (2) For subsection (1)(b), an offence is committed for the benefit of a criminal organisation if the organisation obtains a benefit, directly or indirectly, from the commission of the offence.
>
> (3) To remove any doubt, it is declared that a criminal organisation mentioned in subsection (1)(b) need not be the

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[1] See s 3 of the VLAD Act.

> criminal organisation in which the offender was a participant."

[13] If that circumstance of aggravation is established, then s 161R provides for a mandatory component of a sentence of imprisonment to be imposed of up to seven years. That must be served cumulatively with the base component of the sentence.

[14] It seems significant to me that s 161Q, in defining the meaning of a serious organised crime circumstance of aggravation, is more detailed in its description of the circumstance of aggravation than was the case under the VLAD Act. While there are similarities between the two provisions, there are also significant differences. One of them was said to be that under s 161Q(1)(b)(ii), only two people need to commit an offence, rather than three under the VLAD Act. The critical difference, however, was said to be the concept of "criminal organisation" under s 161O of the *Penalties and Sentences Act*, where it would be necessary to establish that the criminal organisation represented an unacceptable risk to the safety, welfare or order of the community.

[15] By contrast s 5 of the VLAD Act provided:

> "**5 Meaning of vicious lawless associate**
>
> (1) For this Act, a person is a ***vicious lawless associate*** if the person—
>
> (a) commits a declared offence; and
>
> (b) at the time the offence is committed, or during the course of the commission of the offence, is a participant in the affairs of an association (***relevant association***); and
>
> (c) did or omitted to do the act that constitutes the declared offence for the purposes of, or in the course of participating in the affairs of, the relevant association.
>
> (2) However, a person is not a vicious lawless associate if the person proves that the relevant association is not an association that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences."

[16] It is necessary also, when considering the roles played by s 20 of the *Acts Interpretation Act* and s 11 of the *Criminal Code*, to set out those sections.

[17] Section 20 of the *Acts Interpretation Act* provides:

> "**20 Saving of operation of repealed Act etc**
>
> (1) In this section—
>
> *Act* includes a provision of an Act.
>
> *repeal* includes expiry.

(2) The repeal or amendment of an Act does not—

(a) revive anything not in force or existing at the time the repeal or amendment takes effect; or

(b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or

(c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or

(d) affect a penalty incurred in relation to an offence arising under the Act; or

(e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d).

(3) The investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened.

(4) Without limiting subsections (2) and (3), the repeal or amendment of an Act does not affect—

(a) the proof of anything that has happened; or

(b) any right, privilege or liability saved by the operation of the Act; or

(c) any repeal or amendment made by the Act; or

(d) any savings, transitional or validating effect of the Act.

(5) This section is in addition to, and does not limit, sections 19 and 20A, or any provision of the law by which the repeal or amendment is made."

[18] Section 11 of the *Criminal Code* says:

"**11 Effect of changes in law**

(1) A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.

(2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not 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."

[19] The *Acts Interpretation Act* over many years until 1995 had made it explicit that s 20 did not affect the provisions of s 11 of the *Criminal Code*.[2]

[20] It had also until 1995 been explicit that s 20 of the *Acts Interpretation Act* did not affect the operation of s 180 of the *Penalties and Sentences Act*. Section 180(2) was also said to be significant in this context as it provides that if a provision of the *Penalties and Sentences Act* or another Act reduces the sentence for an offence, the reduction extends to offences committed before the commencement of the provision but does not affect any sentence imposed before the commencement.

[21] Those express references to s 11 of the *Criminal Code* and s 180 of the *Penalties and Sentences Act* were removed from s 20 of the *Acts Interpretation Act* in 1995 without an explanation that counsels' researches have uncovered.[3]

The effect of s 20 of the *Acts Interpretation Act* and whether a penalty incurred in relation to an offence includes a penalty referable to a circumstance of aggravation

[22] When one construes s 20 of the *Acts Interpretation Act* and s 11 of the *Criminal Code* as one should, on the basis that they are intended to give effect to harmonious goals,[4] it is reasonably obvious that s 20(2)(c), s 20(2)(d) and s 20(2)(e) of the *Acts Interpretation Act* allow the liabilities and penalties allegedly incurred under the *Drugs Misuse Act* 1986 and the VLAD Act to continue to be the subject of a proceeding in relation to a liability or a penalty as if the repeal of the VLAD Act had not happened. That is on the basis that the liability or penalty is incurred at the time at which the offence takes place. That conclusion, namely that a penalty is incurred at the time at which the offence takes place, was put in issue for the applicants but my view is that the decision in *Commissioner of Taxation v Price*[5] applies and binds me and that the liability incurred includes one to the increased penalties under the VLAD Act.[6]

[23] It was argued, however, that where s 20(2)(d) provides that the repeal of an Act does not affect a penalty incurred in relation to an offence arising under the Act it becomes necessary to consider whether the reference to an "offence" extends to a circumstance of aggravation also charged.

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[2] See the 1962 Reprint and Reprint Nos 1, 3 and 5 and note the reference in Reprint 3 where s 20(3)(a) provides that that section does not affect the operation of s 11 of the *Criminal Code* in its application to punishments on charges and the provisions of the Code.

[3] See Reprint No 8.

[4] See *Project Blue Sky v ABA* (1998) 194 CLR 355, 381-382 at [69]-[71].

[5] See *Commissioner of Taxation v Price* [2006] 2 Qd R 316, 337-338 at [58].

[6] See *R v Brancourt* (2013) 280 FLR 356, 359 at [16]-[17]; *Mansray v Rigby* (2014) 292 FLR 404, 407-408 at [13]-[19].

[24] The view was expressed recently by McMurdo JA in *R v Graham*[7] that, although a circumstance of aggravation appears as an allegation in an indictment, the circumstance is distinct from the offence with which the accused provision in charged. His Honour was drawn to that conclusion by the definition of "offence" in s 2 of the *Criminal Code* as "an act or omission which renders the person doing the act or making the omission liable to punishment" which, when coupled with the definition of "circumstance of aggravation" in s 1 as "any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the assistance of that circumstance" led to the view that it was "apparently clear that a circumstance of aggravation is not a constituent part of the offence itself".[8]

[25] Because of statements in *R v Phillips and Lawrence*,[9] however, to the effect that a circumstance of aggravation was an element of an offence or that robbery in company and robbery in company with personal violence were each offences, his Honour did not express a concluded view as to "whether s 7(1)(c) could ever be used to prove an aggravating circumstance of burglary".[10]

[26] Mr Byrne QC for the respondent submitted, therefore, that his Honour's statements did not constitute a binding authority on the issue. He also argued that his Honour's reasons were inconsistent with the decision in *R v Wyles; Ex parte Attorney-General*[11] and the following passage in *R v Barlow*[12] in the joint reasons of Brennan CJ, Dawson and Toohey JJ:

> "Section 2 of the Code makes it clear that 'offence' is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment."

[27] I do not need to reach a view on whether an "offence" includes a circumstance of aggravation in this case. The real issue here is whether any penalty relevant to the circumstance of aggravation will have been incurred "in relation to" an offence for the purposes of s 20(2)(d) of the *Acts Interpretation Act.* In my view that will have occurred if any of the applicants is found guilty of the substantive offence with a relevant circumstance of aggravation. The words "in relation to" often have wide

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7 [2016] QCA 73 at [43]-[45].

8 See at [53] and see also the discussion by his Honour of *R v Barlow* (1997) 188 CLR 1 at [48]-[53] of *R v Graham*.

9 [1967] Qd R 237, 260-261 and 284-285.

10 See *R v Graham* at [58] and see Jackson J at [81] also.

11 [1977] Qd R 169, 178 per Lucas J.

12 (1997) 188 CLR 1, 9. See also *Kingswell v The Queen* (1985)159 CLR 264, 280.

connotations, the meaning to be attributed to the words depending on their context.[13] In this context it is my view that a penalty incurred for any of the circumstances of aggravation alleged would be one incurred in relation to the offence of trafficking as there is an association between the offence and the circumstance of aggravation.[14]

The role of s 11(1) of the *Criminal Code*

[28] Section 11(1) of the *Criminal Code* prevents punishment for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred, nor, unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence. The applicants argued that, when the current indictment was presented on 12 April 2017, after the repeal of the VLAD Act, was the relevant occasion on which they were charged so that doing the acts charged against them would not then constitute an offence, particularly if "offence" included the circumstances of aggravation alleged under the VLAD Act. That again gives rise to the issue to which I have just referred as one I do not need to decide, namely whether "offence" includes a circumstance of aggravation.

[29] If the "offence" for the purposes of s 11(1) was simply that of drug trafficking under s 5 of the *Drugs Misuse Act* then that was the law in force both when the alleged acts occurred and when the applicants were charged on indictment. If the offence included the circumstances of aggravation, however, then, by the time of the presentation of the indictment before me, the relevant acts would not have included the alleged circumstance of aggravation as part of the offence and the submission was that the applicants could not, therefore, be punished for doing the acts constituting the alleged circumstances of aggravation.

[30] I do not need to decide the issue in this context either, however, because the real issue seems to me to be whether the relevant charges are the ones contained in the indictment or the charges earlier laid by police. The language of s 11(1) focuses on punishment for an act constituting an offence when it occurred *and* when the person is charged with the offence. Here the applicants were charged when arrested. They may well also have been charged when the earlier indictments were presented. Nonetheless, it seems clear to me that the word "charged" used in s 11(1) means the initial charge, commonly laid by police either at the time of arrest or by a complaint. It can also include the earlier indictments presented during the period before the VLAD Act was repealed.

[31] I say that because the *Criminal Code*, when it uses the word "charged" appears to distinguish between its use in general to include summary charges[15] and its use in the

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[13] See *Rosser v Donges* [1990] 1 Qd R 490, 492 and the cases cited there.

[14] See *Perlman v Perlman* (1984) 155 CLR 474, 483-484 and *R v Aniezue* [2016] ACTSC 82 at [73]-[75].

[15] See, for example, s 36, s 56(2)(a), s 554, s 557, s 558 and s 560.

context of a charge on indictment.[16] The structure of the *Criminal Code* suggests that, were it intended that the relevant charge in this context should be the charge made in the current indictment, then that would have been made clear in the section by using language such as "charged on indictment" as occurs elsewhere in the C*riminal Code*. It is also relevant that "charge" is defined in Schedule 1 of the *Acts Interpretation Act* to mean a charge in any form, including, for example, a charge on an arrest, a complaint under the *Justices Act* 1886, a charge by a court under the *Justices Act* 1886 s 42(1A) or another provision of an Act and an indictment.

[32] When the applicants were charged initially the VLAD Act was still in force so that s 11(1) is not available to prevent any of them from being punished in respect of the circumstances of aggravation alleged pursuant to that legislation.

The role of s 11(2) of the *Criminal Code*

[33] Where s 11(2) of the *Criminal Code* applies, in my view, is when it comes to determine the punishment that should be applied once it has been determined in a proceeding that liability for a penalty has been incurred. The *Acts Interpretation Act*, in s 36 and Schedule 1, defines "penalty" to include "punishment" but the distinction between a penalty, often specified at the end of a section, such as s 5 of the *Drugs Misuse Act* 1986, and the punishment imposed on a conviction is made, for example, in s 41 and s 41A of the *Acts Interpretation Act* when those sections provide that an offence is punishable on conviction by a penalty not more than the specified penalty.

[34] Section 11(2) then sets out the principle that, the offender cannot be punished to any greater extent than is authorised by the law in force at the time of conviction. Where, as here, the law in force at the notional time of conviction when this application was heard includes the potential liability to the mandatory penalty incurred in relation to the offences charged because of the effect of s 20(2)(d) of the *Acts Interpretation Act*, it cannot be said that the law differs from that applicable at the time the act or omission occurred.

[35] Even though the maximum sentence for the offence of trafficking with the circumstances of aggravation alleged under the VLAD Act has been reduced because of the repeal of the legislation creating those circumstances of aggravation, the applicants, if convicted, can still be punished to the extent authorised by the former law, including the relevant circumstances of aggravation. So s 11(2) does not limit the extent of the punishment that may apply to the applicants.

The role of s 180 of the Penalties and Sentences Act

[36] The authorities are clear that s 180(2) of the *Penalties and Sentences Act* applies when there is a reduction of the maximum penalty for an offence contained within the

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[16] See, for example, s 229J(4), s 328A(6), the definition of "prescribed offence", s 562, s 564, s 567, s 568, s 569, s 570, s 572, s 575, s 576, s 614(1) and s 651.

legislation rather than in the situation arising following the repeal of legislation.[17] So, if the maximum penalty of 25 years applicable under s 5 of the *Drugs Misuse Act* had been lowered then the section would have applied. Here, where the VLAD Act has been repealed and replaced by a different circumstance of aggravation with different elements, it does not. To adapt what Keane JA said in *Commissioner of Taxation v Price*[18] in respect of the equivalent Commonwealth legislation, s 180 of the *Penalties and Sentences Act* has no relevant operation. Rather the case is governed by s 20(2)(d) of the *Acts Interpretation Act*.

The role of s 161Q of the Penalties and Sentences Act

[37] The respondent argued that, in the alternative to its submission that the VLAD Act penalties persisted because of s 20(2)(d) of the *Acts Interpretation Act*, then the law in force at the notional conviction date, when this application was heard on 22 May 2017, included s 161Q of the *Penalties and Sentences Act.* In my view, that submission is misconceived. The circumstance of aggravation is defined differently to that applicable under the VLAD Act and the new maximum penalty applies only to an offence committed after the SOCLA Act commences; see s 20C(3) of the *Acts Interpretation Act*. Basic principles of statutory interpretation including the presumption as to legality, prevent the circumstance of aggravation created by s 161Q from applying to conduct before the passage of that provision.[19]

[38] It is also significant that the SOCLA Act, in its transitional provisions in s 282, provided for the reopening of sentencing proceedings if a court had already sentenced a person as a vicious, lawless associate under the VLAD Act; see s 244. Section 245(2) required such an application to be made within 3 months of the commencement of the legislation, with a power to extend that period given by s 245(3). Section 246(3) then permits this Court to reopen the sentencing proceedings and resentence the person to a further sentence as if the law applicable were that in s 161R(2)(b) of Part 9D of the *Penalties and Sentences Act*. No such provision is made in respect of proceedings on foot where sentencing has not yet occurred under the VLAD Act.

[39] That may well be a gap in the legislation which could be addressed to rectify the anomaly that will occur in respect of these applicants compared to those who may have been sentenced already before the SOCLA Act commenced.

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[17] See *R v Ronen* [2005] NSWSC 991 at [54]; (2005) 71 ATR 65, 76 followed in *Commissioner of Taxation v Price* [2006] 2 Qd R 316, 341 at [80]-[83]. See also the subsequent decisions of the NSW Court of Criminal Appeal in *R v Ronen* [2006] NSWCCA 123; (2006) 161 A Crim R 300, 308-310 at [32]-[39] and *Woodward v The Queen* [2017] NSWCCA 44 at [61]-[64].

[18] See *Commissioner of Taxation v Price* [2006] 2 Qd R 316, 341-342 at [80]-[83].

[19] See *Coco v The Queen* (1994) 179 CLR 427, 437-438.

Conclusion

[40] Consequently, s 20(2)(d) of the *Acts Interpretation Act* preserves the potential liability of the applicants to a penalty incurred in relation to an offence arising under the *Drugs Misuse Act* as well as to a penalty incurred in relation to such an offence under the VLAD Act.

[41] The applications will be refused.