HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN: **THE KING**
Appellant

and

ANDREW STUART MCGREGOR
Respondent

APPELLANT'S REPLY

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II REPLY

A. GROUND ONE

A.1 The text of ss 16AAA and 16AAB

2. **RS [11]** and **[16]** advance a textual argument focusing on the meaning of the words "sentence" or "sentence of imprisonment", but the respondent ignores a critical aspect of the statutory text. *Explicit* in s 16AAB and *necessarily implicit* in s 16AAA — there could be no suggestion that the provisions operate any differently from each other — is a command that the mandatory minimum sentence be imposed *for* the offence that attracted the minimum. While "[t]he natural meaning of the word 'sentence' in the context of imprisonment is a 'judicial judgment or pronouncement fixing a term of imprisonment'",[1] analysis of that word (or the larger collocation "sentence of imprisonment") is incomplete without grappling with what it means to sentence *for* a particular offence.

3. To the extent any assistance is gained from *Pearson v Commonwealth*,[2] it assists the appellant. A sentence for a term of imprisonment of 12 months or more within the meaning of s 501(7)(c) of the *Migration Act 1958* (Cth) included an aggregate sentence of that duration, in part because s 501(7)(c) "does not, in its terms, provide that the person must be sentenced to a term of imprisonment of 12 months or more for a single offence".[3] Had it done so, an aggregate sentence would *not* have fallen within that provision, because there would be no term of imprisonment imposed for *any* single offence within the aggregate sentence.

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1 *Pearson v Commonwealth* (2024) 99 ALJR 110 at [50].
2 (2024) 99 ALJR 110.
3 (2024) 99 ALJR 110 at [61].

4. **RS [30]** contends that an aggregate sentence is a sentence for every offence in respect of which it is made and thus can be said to be a sentence for the offence subject to a mandatory minimum. That argument should be rejected; a sentence for *all* the offences in aggregate does not equate to a sentence for *each and every* offence aggregated. The aggregate sentence ultimately seeks to reflect (and in this sense could be said to be a sentence for) "the totality of the criminality".[4] Via indicative sentences, that aggregate sentence will say something about the gravity of the individual offences. But it will say less than if an individual sentence was imposed because there is no necessary connection between the duration of the indicative sentences and the ultimate aggregate sentence. Rather, an aggregate sentence owes as much to the individual indicative sentences as to the extent of notional, and potentially expressed, accumulation between them.[5] Individual sentences "accurately reflect the gravity of each offence while at the same time rendering a total effective sentence which, so far as possible, accurately reflects the totality of criminality comprised in the totality of offences",[6] whereas an aggregate sentence focuses on the latter.

A.2 The broader context of the Crimes Act

5. ***Section 4K***. Section 4K(4) allows an aggregate sentence to be imposed in respect of indictable offences prosecuted summarily. **RS [13]-[14]** seeks to draw significance from the facts that: (a) s 4J(7) does not permit certain offences to be tried summarily; (b) s 4J(7) does not preclude every offence to which s 16AAB can apply; (c) and so it would appear on its face that an aggregate sentence could be imposed on an offender subject to s 16AAB if prosecuted summarily.[7] For the respondent, this shows that aggregate sentencing is not incompatible with a regime of mandatory minimum sentences: **RS [14]**.

6. The respondent's reliance (unsupported by any CCA reasoning) on summary disposition under s 4J is misplaced. Section 4K and 16AAA and 16AAB must still be read harmoniously. The harmonious construction is to treat s 16AAA and 16AAB as the leading provisions, such that an aggregate sentence under s 4K is not permissible just as

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4 *Burgess v R* [2019] NSWCCA 13 at [40].

5 See *Stoeski v R* [2014] NSWCCA 161 at [43]; *KS v R* [2024] NSWCCA 147 at [69].

6 *Nguyen v R* (2016) 256 CLR 656 at [64].

7 The respondent also contends that some offences to which s 16AAA applies can *now* be prosecuted summarily albeit that was not the case when these provisions were introduced into the Crimes Act or at the time of the CCA's decision. The detail is ultimately immaterial as there is nothing to suggest that later amendments to s 16AAA were intended to alter the position.

it is not permissible via State or Territory regimes via the Judiciary Act. Further, the appellant submits that summary disposition would *not* be available if that would mean, by reason of s 4J(3), that less than the mandatory minimum sentence is imposed. Such a result would be irreconcilable with the language of s 16AAB, which, as between it and s 4J, would be treated as the leading provision. Finally, the non-inclusion of offences to which s 16AAB can apply in the list of exclusions in s 4J(7) is explicable. Section 16AAB only applies to those offences where the offender is a repeat offender. If it is the offender's first child sexual abuse offence, then s 4J can apply, such that it would be overinclusive to have included the s 16AAB offences in s 4J(7).

10 7. ***Section 19AB***. The respondent at **RS [15]-[16]** draws attention to s 19AB, and contends that if the Parliament was content to permit (indeed, require) a single non-parole period to be imposed then it should not be concluded that the Parliament had any concern about an aggregate head sentence being imposed. This argument should be rejected. *First*, s 19AB is an explicit provision and thus distinguishable. *Second*, the legislative history of the 2020 amendments makes clear that the amendments did not alter the approach to non-parole periods (including, therefore, the imposition of a single non-parole period).[8]

8. ***History.*** Resort to the *Criminal Justice Report* (**RS [17]**) is of no assistance. The respondent accurately acknowledges that it did not make any recommendation about mandatory minimum sentences (despite dealing with the subject briefly),[9] and references
20 to aggregate sentencing are in the context only of concurrency and accumulation. As to the decisional landscape in 2020 (**RS [18]-[19]**), none of the cases to which reference is made at **RS [18]** involved a mandatory minimum sentence. And **RS [19]** does not advance matters as its correctness largely depends on, rather than informs, the correctness of the textual arguments advanced by each party. On the appellant's position, the Parliament did make it clear that there had to be a single sentence for each offence to which a mandatory minimum sentence applied through the text of ss 16AAA and 16AAB, such text being enacted in the relevant landscape where no individual sentence is imposed for an individual offence by an aggregate sentence.

A.3 Purpose

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8 See, eg, Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2019 (Cth) at [195]-[196].

9 See *Criminal Justice Report*, Parts VII – X, at 284-285, 327.

9. The respondent's submissions at **RS [20]-[28]** do not grapple with the requirement in s 15AA of the *Acts Interpretation Act 1901* (Cth) to prefer "the interpretation that would best achieve the purpose or object … to each other interpretation". The appellant does not suggest that an aggregate sentence would *wholly undermine* the legislative intent behind the 2020 amendments. But the appellant does contend that the differences between an aggregate sentence and individual sentences are such that the legislative intent behind them is *best* achieved through an individual sentence.

10. It is in that way that a person who commits that offence can be seen, clearly, to have had a sentence of the minimum duration imposed (subject to all the caveats in **RS [27]**, which are features of the statutory regime that do not bear on the present constructional issue). It is in that way that offenders can be compared so as to ensure an uplift in sentences across the Commonwealth, errors in the sentence for *that* offence can be appealed and corrected[10] and concurrency and accumulation can be more transparently exposed.[11]

B. GROUND TWO

B.1 Meaning of s 53A(2)(b)

11. **RS [40]-[44]** ignore the actual words enacted by the Parliament in s 53A(2)(b): "under Part 3 or any other provision of this Act". On the respondent's account, it is as if those words are not there. That "the words are in parentheses" and that they are said to be "in general terms" does not justify ignoring them. It is otherwise incorrect to submit that the "excision of those words" (being everything in parentheses) "would not change the operation of the provision" (**RS [42]**). For example, it is *because* of the parenthetical words that discounts for guilty pleas are applied at the indicative sentence rather than at the aggregate sentence level, as is the NSW requirement.[12]

12. As for **RS [43]**, that common law principles can be considered under s 21A(1) of the NSW Act does not show that there is any room, consistently with s 53A(2)(b), to take account of factors in the Crimes Act. Because common law principles enter via s 21A(1), taking them into account is consistent with the command in s 53A(2)(b) to consider "any other provision of this Act" in a way that taking account of the Crimes Act is not.

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10 Compare with aggregate sentences: *PN v R* [2024] NSWCCA 86 at [48]-[49].

11 Compare with aggregate sentences: *Stocco v R* [2018] NSWCCA 77 at [164]; *Burgess v R* [2019] NSWCCA 13 at [91]; *Bell v R* [2019] NSWCCA 251 at [62].

12 See *PG v R* (2017) 268 A Crim R 61 at [72], [78]; *R v Cahill* [2015] NSWCCA 53 at [108]-[109].

B.2 Judiciary Act

13. ***Northern Territory.*** There is no valid analogy to *Putland*. Under the different language of s 52(1) of the NT Sentencing Act, a Territory court sentencing a Territory offender is not expressly required to apply Territory sentencing factors. For this reason, s 52(1) could be picked up so as to apply Crimes Act factors without altering its meaning. If anything, a comparison with *Putland* highlights the difficulties with and legislative choice reflected in s 53A(2)(b). Had s 53A(2)(b) been intended to operate as the CCA found and the respondent contends, then the legislative drafting to achieve it is s 53A(4)(b) of the NT Sentencing Act, which simply refers to "the sentence that would have been imposed for each offence if separate sentences were imposed instead of an aggregate sentence".

14. ***Relevance***. **RS [47]-[48]** support the CCA's reasoning that there is no change to the meaning of s 53A(2)(b) by simply picking it up and concluding that no State factors are "relevant" due to the Crimes Act factors operating. The appellant maintains that that gives s 53A(2)(b) a substantively different effect because it cannot be the case that the Parliament ever contemplated that s 53A(2)(b) would result in no State factors applying.

15. ***Translation***. **RS [51]** misunderstands **AS [72]** and there was no concession. The appellant's contentions on translation are at **AS [67]-[71]**. The point of **AS [72]-[74]** is that if the Court rejects the appellant's position, then the least worst result is a decision that, through "translation", the Crimes Act factors (rather than a pastiche of factors) apply.

16. ***Severance***. The appellant did not address severance (cf **RS [52]**) as there is no notice of contention. Severance of the parenthetical words is not possible because it would produce a substantively different provision. Recalling that severance is only reached on the basis that those words *do* direct attention to NSW provisions, to sever them so as to permit resort to federal factors is entirely different. Further, the guilty plea example shows that severance would produce a substantive difference: the discount could then apply to the aggregate sentence rather than the indicative sentences, as is the NSW requirement.

Dated: 10 July 2025

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