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

RESPONDENT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: ISSUES

2. The respondent agrees with the appellant's concise statement of issues.

3. **Ground 1** largely turns on the construction of s 16AAA of the *Crimes Act 1914* (Cth) (**Crimes Act**) and whether it requires the imposition of a sentence of imprisonment exclusively for a listed offence. A related issue is whether s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**NSW Act**) is consistent with s 16AAA.

4. **Ground 2** turns on the parenthetical words in s 53A(2)(b) of the NSW Act and whether s 53A can be picked up and applied by s 68(1) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) with those words (a) unaltered; (b) translated; or (c) severed.

5. The respondent submits that the unanimous decision of the Court of Criminal Appeal (**CCA**), constituted by a bench of five judges, was correct in relation to the issues it determined raised in each of the grounds.

6. If this court were to uphold Ground 2, that would be a complete answer to Ground 1 which would not need to be decided.

PART III: SECTION 78B NOTICES

7. The appellant has served notices pursuant to s 78B of the Judiciary Act: Core Appeal Book [94]-[95]. No further notice is required.

PART IV: FACTS

8. The respondent agrees with the factual matters stated in the Appellant's Written Submissions (**AWS**) [8]-[12].

9. Further to AWS [12], the respondent was re-sentenced to an aggregate term of imprisonment of 10 years and 9 months commencing on 10 October 2021, with a non-parole period of 7 years and 6 months: CCA [113]. The indicative sentences (after a discount of 30 per cent) are as follows:

   a. Count 1 – 5 years and 7 months;

   b. Count 2 – 2 years and 9 months;

   c. Count 3 – 4 years;

   d. Count 4 – 4 years and 6 months: CCA [112].

PART V: ARGUMENT

GROUND 1

No requirement to impose a sentence exclusively for a listed offence

10. It is not in issue that s 16AAA, when applicable,[1] requires the imposition of a mandatory minimum sentence of imprisonment for the offence.[2] The nub of the appellant's argument is that s 16AAA should be construed as requiring that a sentence of imprisonment of at least the mandatory minimum be imposed not merely *for* the listed offence, but *exclusively for* it. The CCA correctly rejected this argument. The fact that a sentence is also imposed for other offences "does not alter the fact that the aggregate and operative sentence is imposed in punishment of the listed offence(s)": CCA [97]. The CCA was correct not to

[1] Section 16AAA only applies on conviction; ss 19B and 16BA of the Crimes Act remain available.
[2] The CCA rejected a submission to the contrary: CCA [96].

add a gloss to the provision for which there is no warrant in the text, context or legislative purpose.[3]

The text of s 16AAA

11. The natural meaning of the word "sentence" in the context of imprisonment is a "judicial judgment or pronouncement fixing a term of imprisonment".[4] An aggregate sentence of imprisonment fits comfortably within that natural meaning. The appellant is asking this Court to construe the word "sentence" as it appears in s 16AAA in a more limited way.[5] However, as stated in *Pearson*, albeit in a different context, "there is no textual basis for construing the definition of sentence so that it excludes a single form of punishment for more than one offence".[6]

The statutory context

12. The absence of clear words either requiring a separate sentence or excepting ss 16AAA and 16AAB from the operation of aggregate sentencing is significant when one has regard to other relevant provisions of the Crimes Act.

13. Section 4K(4) permits a court to impose a single aggregate sentence for two or more federal offences being prosecuted summarily.[7] Section 4J provides for summary disposal of certain indictable offences. At the time the respondent was re-sentenced in the CCA, none of the offences listed in s 16AAA could have been dealt with summarily because of the length of their maximum penalties.[8] In s 16AAB, a companion section to s 16AAA, eight of the offences could have been, and still can be, dealt with summarily.[9] Section 4J(7) contains

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[3] See *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936; 347 ALR 405; [2017] HCA 34 per Kiefel CJ, Nettle and Gordon JJ at [14]; Gageler J (as his Honour was then) at [37].

[4] *Pearson v The Commonwealth; JZQQ and Ors v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 110; [2024] HCA 46 at [50].

[5] Note: s 16 of the Crimes Act defines "sentence" as "sentence of imprisonment", but only in relation to ss 16B to 19AZD and not s 16AAA or s 16AAB which appear before s 16B. In any event, the phrase in those two sections is "sentence of imprisonment".

[6] *Pearson* at [50]; see also [61].

[7] See *Putland v The Queen* (2004) 218 CLR 174; [2004] HCA 8 at [13]-[15]; [44]-[50].

[8] A number of offences have recently been added to s 16AAA, none of which are Commonwealth child sex offences and many of which can be dealt with summarily. Items 1A, 1B and s 80.2BE(2) in item 1F have maximum penalties of 5 years; item 1D: 3 years; s 80.2BE(1) in item 1F: 7 years.

[9] In the table to s 16AAB items 1, 2, 8, 23 and 35 have maximum penalties of 10 years imprisonment; items 3 and 4: 7 years; and item 9: 5 years. All are amenable to summary disposition: s 4J(1) Crimes Act. None are included in the list of excluded offences in s 4J(7). The jurisdictional limit is 1 year

a list of offences which are precluded from summary disposal. None of the offences in s 16AAA (at the relevant time or now) or s 16AAB are in that list, either individually or as a class. While s 16AAB applies only to offenders with previous convictions, this would not preclude the offences being listed as a class in terms such as "offences where s 16AAB applies".

14. In a statutory context where some of the offences the subject of s 16AAA[10] and s 16AAB are amenable to being included in an aggregate sentence under s 4K, the failure by Parliament to state in clear terms that such offences are precluded from being the subject of an aggregate sentence when dealt with on indictment is inconsistent with an intention to do so. Consistently with Gleeson CJ's observation in *Putland,* s 16AAA "must be able to co-exist with aggregate sentencing, because it exists together with s 4K in the legislation, and [the section] was introduced into legislation that already provided (in relation to summary proceedings) for aggregate sentencing".[11]

15. Another provision of the Crimes Act which is inconsistent with the appellant's construction of s 16AAA is s 19AB, a central provision in federal sentencing law. It requires a court to impose a single non-parole period when sentencing for more than one federal offence where the total effective sentence is more than three years. Given the lengths of the mandatory minima in s 16AAA, it would apply in most cases where an offender is being sentenced for more than one offence where at least one offence is listed in the section.

16. A non-parole period represents the minimum period of imprisonment which justice requires must be served, having regard to all the circumstances of the offence and the offender.[12] A non-parole period, where imposed,[13] is a crucial aspect of any sentence of imprisonment and, in a real sense, is the most

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imprisonment for offences with maximum penalties of up to 5 years and 2 years otherwise: s 4J(3). For items 3 and 4 the mandatory minimum sentence is within the jurisdictional limit without reference to any reduction under s16AAC. For the other offences, a reduction would be required to bring the mandatory minimum within the jurisdictional limit.

[10] Albeit, at the relevant time (unlike now – see footnote 8) all of the offences listed in s 16AAA had maximum penalties exceeding the threshold for summary disposal.

[11] *Putland* at [15].

[12] *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [40]; [44]; *Power v The Queen* (1974) 131 CLR 623; *Deakin v The Queen* (1984) 58 ALJR 367; 54 ALR 765.

[13] Noting that fixed term sentences are available in most jurisdictions, including under federal law: see s 19AB(3).

significant component for the purposes of punishment and deterrence. A single non-parole period is an aggregated figure that is determined by assessing what justice requires for each of the offences for which it is imposed, having regard to the principle of totality. It is the functional equivalent of an aggregate sentence. That Parliament was content to permit this provision to apply to offences listed in s 16AAA, or to which s 16AAB applies, is inconsistent with an intention to narrow the meaning of "sentence of imprisonment" in those sections so that "it excludes a single form of punishment for more than one offence".[14]

17. Regard may also be had to the legislative history of s 16AAA of the Crimes Act. That section, with its companion s 16AAB, was inserted into Part IB by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) (**the Amending Act**) which commenced on 22 June 2020. Sections 16AAA and 16AAB in the Amending Act were in identical terms as in the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017* (Cth) (**the Original Bill**). The Original Bill was introduced to Parliament on 13 September 2017 and contained a similar suite of legislative amendments to the Amending Act.[15] The Minister's Second Reading Speech for the Original Bill noted that it was "consistent with a number of recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in its recently released *Criminal Justice Report*".[16] While none of those recommendations concerned the imposition of mandatory minimum sentences, the *Criminal Justice Report* explicitly referred to aggregate sentencing in States and Territories.[17]

18. By the time the Amending Act was enacted in 2020, the legislative landscape included the longstanding authorities of *Jackson*[18] in 1998 (permitting aggregate

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[14] *Pearson* at [50].
[15] However, this Bill lapsed on 1 July 2019.
[16] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, 2017.
[17] Ibid, Parts VII to X pp 300, 301, 307; Executive Summary and Parts I and II pp 99, 100.
[18] *R v Jackson* (1998) 72 SASR 490.

sentencing of federal offenders in South Australia); *Putland*[19] in 2004 (approving *Jackson* and permitting aggregate sentencing of federal offenders in the Northern Territory), and *Beattie*[20] in December 2017 which applied *Putland* to the NSW aggregate sentencing provisions.

19. Accordingly, contrary to the appellant's submissions (AWS [35]-[38]), it may be accepted that Parliament was cognisant that s 16AAA and s 16AAB were to be enacted in a statutory and historical context where the Commonwealth and some State and Territory sentencing regimes included aggregate sentencing provisions.[21] It was in this context that Parliament failed to make explicit provision for s 16AAA or s 16AAB to require a sentence of imprisonment of at least the minimum length to be imposed *exclusively* for a listed offence and not as an aggregate sentence.

The purpose of s 16AAA

20. Sections 16AAA and 16AAB set "mandatory minimum penalties" which restrict the power of the court to impose any sentence of imprisonment below the minimum term and provide a yardstick representing the least worst possible case warranting imprisonment.[22] Their effect is to increase sentences generally for listed offences.[23] As such, it may be accepted that one purpose of s 16AAA is to achieve general deterrence in relation to offences to which it applies. However, this purpose is not undermined by permitting the imposition of an aggregate sentence. This is because, for a number of reasons, an aggregate sentence does not fail to meet the objective of general deterrence.

21. Firstly, the use of an aggregate sentence does not change (and therefore obscure) the fact that someone who committed a listed offence is sentenced to imprisonment for at least the mandatory minimum period.

22. Secondly, given that the mandatory minimum is a guidepost akin to the maximum penalty, any sentencing court would necessarily make reference to it

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[19] *Putland v The Queen* (2004) 218 CLR 174; [2004] HCA 8.
[20] *Director of Public Prosecutions (Cth) v Beattie* (2017) 270 A Crim R 556; [2017] NSWCCA 301.
[21] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309; [2004] HCA 40 per McHugh J at [81]; see also *Jackmain (a pseudonym)* (2020) 102 NSWLR 847; [2020] NSWCCA 150 at [175].
[22] *Hurt v The King; Delzotto v The King* (2024) 98 ALJR 485 at [27]-[29], [34], [65], [90].
[23] CCA [98]; *Hurt v The King; Delzotto v The King* at [41]-[43], [92]-[93].

in its sentencing judgment. Even where the court is not required to indicate individual sentences under an aggregate sentencing regime, courts are required to give reasons for their decisions, to refer to the mandatory minimum and to give full effect to the purposes of sentencing.

23. Thirdly, "[a]ggregate sentences are commonly imposed for extremely serious offending, such as multiple murders, multiple counts of manslaughter and combinations of those offences and other serious offences involving extreme violence and robbery. Lengthy aggregate sentences are commonly imposed for multiple child sex offences."[24] In all these cases there is no issue that courts are able to give full effect to general deterrence when they impose aggregate sentences: cf AWS [46]ff. The premise underlying the appellant's argument – that aggregate sentences fail to meet the objective of deterrence – should be rejected.

24. Separately, the differences between an aggregate sentence and multiple separate sentences should not be overstated.

25. Firstly, whenever the principle of totality is applied there is a possibility of a separate sentence being subsumed by, or submerged into, the overall effective sentence.

26. Secondly, the principle of totality insofar as it applies to offences listed in s 16AAA is not altered by s 19(5) of the Crimes Act[25] which requires courts to wholly accumulate sentences for Commonwealth child sex offences upon sentences for Commonwealth child sex offences and certain State and Territory child sex offences.[26] In accordance with the ordinary operation of the principle of totality, s 19(5) does not apply "if the court is satisfied that imposing the sentence in a different manner would still result in sentences that are of a severity appropriate in all the circumstances".[27] Thus, as the CCA observed, "[g]iven that sentences of imprisonment operating concurrently may be imposed for offences addressed by ss 16AAA-16AAC (and s 19(5)-(7)), there

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[24] *Pearson* at [52], footnotes omitted.
[25] Introduced by the Amending Act.
[26] Sections 19(5)-(7) of the Crimes Act.
[27] Section 19(6) of the Crimes Act.

is no clash between the purpose and effect of those provisions and the possibility of aggregate sentencing": CCA [100].

27. Thirdly, and in any event, the capacity of the mandatory minimum sentences listed in ss 16AAA and 16AAB to promulgate a clear and concrete message about general deterrence is subject to some inherent limitations:

    a. There is no minimum period to be served in custody and immediate release is available, although exceptional, [28] for the offences listed in s 16AAA at the relevant time.

    b. Offences listed in s 16AAA, or to which s 16AAB applies, are not excepted from the operation of s 19AB so that the minimum period of detention which a court determines justice requires for a particular offence is submerged into a single non-parole period.

    c. The mandatory minima are susceptible to reduction by up to 50 per cent pursuant to s 16AAC.

    d. The offences listed in s 16AAA and s 16AAB are not precluded from being dealt with under s 19B (dismissal or discharge without conviction) or s 16BA (taking other admitted offences into account without conviction or passing sentence for them).

28. Accordingly, would-be offenders in many instances would not learn of the applicable minimum, nor of the actual period required to be spent in custody solely for a particular listed offence, from the sentence pronounced by the court, but only from the court's reasons.

Sections 16AAA and 53A

29. The foregoing are reasons why s 16AAA ought not be construed as requiring a mandatory minimum sentence to be imposed *exclusively* for a listed offence. Such reasons apply to any aggregate sentencing regime. However, in its terms, Ground 1 is directed specifically to s 53A of the NSW Act.

30. The appellant's submissions on this ground emphasise the nature of "indicative sentences" under the NSW Act. It is accepted that an indicative sentence is not a sentence of imprisonment: AWS [24]. But the fact that an "indicative

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[28] See s 20(1)(b)(ii) of the Crimes Act. Note: the requirement for exceptional circumstances does not apply to the offences recently added to s 16AAA, which are not Commonwealth child sex offences.

sentence" is not a sentence is not tantamount to a conclusion that there is no sentence for any of the offences the subject of an aggregate sentence. Neither *PD v The Queen*[29] nor *PN v The King*[30] are authority for the proposition that there is no sentence for offences that are the subject of an aggregate sentence under s 53A (cf AWS [33]). *PD* merely confirms that an "indicative sentence" is not a sentence of imprisonment and that the aggregate sentence is the sentence for all of the offences.[31] Similarly, in *PN* the court did not say that the *aggregate* sentence is not 'the penalty imposed for an offence' (cf AWS [33]) but that '[t]he *indicative* sentence is not of itself the sentence of the court, as it is not "the penalty imposed for an offence"'.[32] It is clear from both *PD* and *PN* that an aggregate sentence is the sentence for all of the offences in respect of which it is imposed – exactly what the CCA correctly decided in this case.

31. Leaving aside the issue raised by Ground 2, the appellant does not appear to be submitting that, if its narrow construction of the meaning of "sentence of imprisonment" in s 16AAA is not accepted, there is some additional reason why s 53A is inconsistent with s 16AAA. However, in the context of determining whether s 53A can be picked up and applied to offences listed in s 16AAA, indicative sentences have a role in providing transparency in the way in which the court has considered the guidepost of the applicable mandatory minimum and aiding in furthering the purpose of deterrence. The appellant's concerns about the possible undermining of the statutory purpose of s 16AAA have little weight in the context of s 53A. This is because:

    a. Section 49(2)(b) of the NSW Act prohibits a sentencing court from imposing an aggregate sentence that is less than the shortest term of imprisonment (if any) that must be imposed for any separate offence, thus preserving the efficacy of any mandatory minimum.

    b. The sentencing court is required to consider, and make a written record of, the sentence it would have imposed for each offence had separate

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[29] [2012] NSWCCA 242.
[30] [2024] NSWCCA 8.
[31] *PD* at [44].
[32] *PN* at [47].

sentences been imposed instead of an aggregate sentence.[33] Thus the sentence that would have been imposed for the listed offence is known and transparency is ensured.[34] This allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence.[35]

c. An aggregate sentence is not to be used to minimise the offending conduct, or obscure or obliterate the range of offending conduct or its totality.[36] As the CCA explained, aggregate sentencing does not permit a court to subvert the operation of s 16AAA: CCA [102]-[103].

32. The resentencing exercise in the respondent's case, and in *R v Delzotto*,[37] are examples of courts giving expression to the purpose of s 16AAA through the use of an aggregate sentence under s 53A. In *Delzotto*, neither the aggregate sentence, nor the indicative sentence for the offence to which s 16AAB applied, was below the applicable mandatory minimum (as reduced pursuant to s 16AAC). Nevertheless, the appeal court had no difficulty in determining both that the indicative sentence revealed error and that the aggregate sentence was manifestly inadequate.

33. In the respondent's case the CCA made clear the basis upon which it arrived at the aggregate sentence and how it applied the mandatory minimum penalty. Significantly, the appellant does not seek that a greater, or even substantively different, sentence be imposed.[38]

34. It may be that other aggregate sentencing provisions, depending upon not only their formal statutory requirements but the extent to which reasons for sentence are required to be provided, might potentially fall short of those purposes and may arguably be so incompatible with s 16AAA as to be inapplicable under s

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[33] Section 53A(2)(b) of the NSW Act; *JM v The Queen* (2014) 246 A Crim R 528; [2014] NSWCCA 297 at [39(4)].
[34] *JM* at [39(4)].
[35] *JM* at [39(6)]. See also *Pearson* at [55]: "…in the ordinary course, the indicative sentences (and the aggregate sentence) will say something about the seriousness of the offending".
[36] *JM* at [39(5)].
[37] (2022) 298 A Crim R 483; [2022] NSWCCA 117.
[38] Appellant's application for special leave to appeal at [14].

68(1). However, that is not the case with the provision the subject of Ground 1 and need not be decided.

35. For all of these reasons, Ground 1 is not made out.

GROUND 2

36. There is no issue between the parties concerning the principles that govern the operation of s 68(1) of the Judiciary Act: CCA [61]; AWS [17]-[21]. Nor does the appellant contend that State or Territory aggregate sentencing provisions can never be picked up by s 68(1) and applied as federal law when sentencing federal offenders.[39]

37. The issue raised by Ground 2 is whether s 53A of the NSW Act is precluded from being picked up and applied as federal law because it is inconsistent with Part IB of the Crimes Act and thus not applicable: AWS [51]-[53]. A proper construction of s 53A reveals no such inconsistency.

Section 53A for State offenders

38. Section 53A provides a mode of sentencing an offender to imprisonment for more than one offence. It has two characteristics. First, s 53A(1) permits a sentencing court to impose an aggregate sentence of imprisonment when sentencing an offender for two or more offences instead of imposing a separate sentence of imprisonment for each. It is in substantially similar terms to s 52(1) of the *Sentencing Act 1995* (NT) (**NT Sentencing Act**), as considered by this Court in *Putland*.

39. The second characteristic is found in s 53A(2), which provides:

> (2) A court that imposes an aggregate sentence of imprisonment under this section on an offender must indicate to the offender, and make a written record of, the following—
>
> (a) the fact that an aggregate sentence is being imposed,
>
> (b) the sentence that would have been imposed for each offence **(after taking into account such matters as are relevant under Part 3 or any other provision of this Act)** had separate sentences been imposed instead of an aggregate sentence (**emphasis added**).

[39] Noting that there is no challenge to the correctness of *Putland*.

40. This requires a sentencing court to make a written record of the fact that an aggregate sentence is being imposed, and to determine the length and make a written record of the sentence it would have imposed for each offence had separate sentences been imposed (referred to as "indicative sentences"[40]). This requirement ensures transparency. Section 53A(2) makes clear that relevant sentencing considerations are taken into account in determining indicative sentences. It does not alter how a sentencing exercise is to be undertaken; it merely relieves the court from the task of fixing separate start and end dates and non-parole periods for offences other than those that attract a standard non-parole period: CCA [39]-[44], [79].[41]

41. The parenthetical words do not prescribe relevant sentencing considerations. Those considerations are listed elsewhere in the NSW Act, eg ss 3A, 21A and 25D. Rather, the parenthetical words merely confirm that those considerations are to be taken into account in arriving at the indicative sentences. This is consistent with the Second Reading Speech[42] which explained that the introduction of s 53A was not intended to alter the sentencing process, other than to the extent described above: CCA [42]-[44][43].

42. That the parenthetical words are so limited is evident from the text of s 53A(2)(b): firstly, the words are in parentheses; secondly, the excision of those words would not change the operation of the provision; and thirdly, the words are in general terms.

43. Further, as the CCA correctly observed, there is nothing in the text to indicate that the parenthetical words in s 53A(2)(b) are intended to be an exhaustive prescription of what must be taken into account in arriving at an "indicative sentence" (CCA [73]). Many sentencing factors, required to be taken into account in sentencing an offender in NSW, are found in the common law. Section 21A(1) of the NSW Act requires certain factors to be taken into account

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[40] See *Pearson* at [45].

[41] See *Pearson* [45]-[46]. Note: the relief from the requirement to set non-parole periods is explicitly provided for in s 44(2C) of the NSW Act. The relief from the need to fix start and end dates is implicit.

[42] Second Reading Speech for the *Crimes (Sentencing Procedure) Amendment Bill 2010* (NSW), the Honourable Michael Veitch on behalf of the then Attorney General, New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 23 November 2010 at 27867.

[43] Citing *JM* at [39(1)].

but provides that such matters are "in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law". Many common law sentencing factors are relevant to sentencing in NSW, but are not "such matters as are relevant under Part 3 or any other provision of [the NSW Act]". Such factors include harsh bail conditions,[44] an offender's deprived background,[45] extra-curial punishment,[46] hardship to third parties,[47] and some aspects of mental illness.[48] Some of these factors are found in s 16A(2) of the Crimes Act. The absence of factors such as those from the parenthetical words in s 53A(2)(b) is further evidence that the parenthetical words merely confirm to a sentencing court that all relevant factors remain to be considered when indicating "the sentence which would have been imposed for each offence … had separate sentences been imposed instead of an aggregate sentence".

44. It follows that the CCA was correct to conclude that the parenthetical words in s 53A(2)(b) "do little to affect the construction of s 53A(2)" (CCA [77]) and s 53A(2)(b) "does not alter how that sentencing exercise is to be undertaken" (CCA [79]). It also follows that the CCA was right to find that the meaning of s 53A(2)(b) is better understood at "the higher level of generality relating to the sentence the court would otherwise have imposed per se" (CCA [80]). This is also consistent with the approach which should be adopted when seeking to determine the legal meaning of a State or Territory text for the purposes of determining whether it can be applied in a federal context.[49]

Section 53A is picked up by s 68(1) of the Judiciary Act

45. Section 53A is part of a broader legislative scheme contained in the NSW Act requiring the application of various sentencing considerations, but the provision itself may be applied on its terms by s 68(1) of the Judiciary Act without regard to those considerations.

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[44] *R v Quinlin* (2021) 293 A Crim R 253.
[45] *Bugmy v The Queen* (2013) 249 CLR 571.
[46] *R v Allpass* (1993) 72 A Crim R 561; *R v Daetz; R v Wilson* (2003) 139 A Crim R 398.
[47] *R v Edwards* (1996) 90 A Crim R 510.
[48] *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177].
[49] See [56] and [57] below.

46. Viewed in this way, s 53A is substantially similar to the provision considered by this Court in *Putland*. It is implicit in s 52(1) of the NT Sentencing Act that a Northern Territory court, when sentencing a Northern Territory offender to an aggregate sentence would apply Northern Territory sentencing laws. It is uncontroversial that a Northern Territory court, when sentencing a federal offender to an aggregate sentence pursuant to the picked up and applied text of s 52(1), would apply *federal* laws including Commonwealth statutes and such other Northern Territory provisions as might be picked up and applied by s 68(1). This is not to give a different meaning to s 52(1) as picked up and applied as federal law.

Picked up and applied on its unaltered terms

47. The CCA found that s 53A could be picked up and applied on its terms, relying on the qualifying phrase "such matters as are relevant" in s 53A(2)(b). This meant that there was no inconsistency between the parenthetical words and the necessity to sentence a federal offender under federal law: none of the matters the subject of the NSW Act would be "relevant" unless the NSW provisions were already otherwise picked up and applied by s 68(1): CCA [74]. The respondent submits that this analysis is correct.

48. The process involved is no different from the requirement on any State court when sentencing a federal offender: to ascertain which, if any, State laws are applicable. Whether any of the various provisions of the NSW Act apply to *federal* offenders is a question that arises whether or not a court imposes an aggregate sentence: CCA [76]; cf AWS [65]-[66], [72]-[73].[50]

49. However, even if this Court takes the view that "relevant" in s 53A(2)(b) does not have this meaning (as seemingly suggested in AWS [64]) and therefore s 53A cannot be applied on its terms, the respondent submits that the parenthetical words can either be translated or severed.

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[50] The appellant's arguments echo the argument made, but implicitly rejected by the majority, in *Putland,* set out in the dissenting judgment of Kirby J at [108].

Translation

50. Section 68(1) involves the application of State law to federal offences by analogy; an act of translation is required.[51] As the CCA held at [81]:

> There is no change to the essential meaning of the provision, nor to its substantive legal operation, to say that a law requiring the indication of a separate sentence for a State offence consistent with State sentencing principles would, when applied analogically at the federal level, be understood to mean the court must indicate a separate sentence for a federal offence consistently with applicable federal sentencing principles.

51. That degree of translation is limited and to a similar degree as permitted by this Court in *Williams*[52] and *Peel*[53]: CCA [62]-[65], [81]. So translated, s 53A would provide a clear path for a sentencing court to apply s 53A to federal offenders, and the appellant concedes as much: AWS [72].

Severance

52. The CCA found that severance of the parenthetical words did not arise because of its primary conclusion (CCA [74]), and the appellant has not addressed this scenario.

53. The respondent accepts that s 53A could not be picked up and applied by s 68(1) by severing the whole of s 53A(2): CCA [71]. However, s 53A(2) may be picked up without the words in parentheses, as the respondent submitted in the CCA.[54] Absent those words, a court sentencing an offender to an aggregate sentence for NSW offences would be required to indicate the sentence that the court would have imposed for each offence and, therefore, to apply relevant sentencing laws and principles when arriving at those indicative sentences. By necessary implication from the fact that a NSW court is sentencing a NSW offender pursuant to a NSW provision, these would be NSW laws and principles.

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[51] *Williams v The King [No 2]* (1934) 50 CLR 551; [1934] HCA 19 at 561; *Huynh* at [59]-[64], [152], [269].
[52] *Williams v The King [No 2]* (1934) 50 CLR 551; [1934] HCA 19.
[53] *Peel v The Queen* (1971) 125 CLR 447; [1971] HCA 59.
[54] See CCA [69].

54. However, whenever the text of a State or Territory sentencing provision is picked up and applied, whether in its terms or with severance, an implicit "translation by analogy" is always required. This is because a court sentencing for federal offences must apply federal sentencing laws and principles, not the State or Territory principles which would necessarily have applied in the original statutory context. This does not give the text a "substantively different legal operation".[55] This is what occurred in *Putland*, where the text of a Northern Territory provision was applied as federal law enabling aggregate sentencing, to which process federal sentencing law necessarily applied.[56] There is therefore no reason why s 53A cannot be picked up and applied without the words in parentheses. The practical operation of the section as federal law would be exactly the same as if the words were translated by analogy as above and would provide an equally clear and workable pathway for sentencing judges.

55. This is consistent with the CCA's analysis of the meaning of the section. The CCA did not construe the section by ignoring the statutory text and looking elsewhere for its purpose or constructing its own idea of a desirable policy, in the manner suggested by the appellant (AWS [62] and footnote 30). Rather, the CCA's analysis was properly grounded in the text of the provision and the extrinsic material: CCA [39]-[44], [79].

Conclusion

56. The text of s 53A may properly be picked up and applied, in terms or with either translation or severance. In the context of s 79 of the Judiciary Act, a section with similar purposes to s 68, Gibbs J (as his Honour then was) said:

> If the laws of a State could not apply if, upon their true construction as State Acts, they related only to the courts of the State, it would seem impossible ever to find a State law relating to procedure, evidence or the competency of witnesses that could be rendered binding on courts exercising federal jurisdiction, because most, if not all, of such laws,

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[55] *Huynh* [65]-[66], [75].
[56] See [46] above.

upon their proper construction, would be intended to apply in courts exercising jurisdiction under State law.[57]

57. As McHugh J observed, also in relation to s 79:

> …courts exercising federal jurisdiction should operate on the hypothesis that s 79 will apply the substance of any relevant State law in so far as it can be applied. The efficacy of federal jurisdiction would be seriously impaired if State statutes were held to be inapplicable in federal jurisdiction by reason of their literal terms or verbal distinctions and without reference to their substance.[58]

58. The unduly narrow view advanced by the appellant is inconsistent with the purposes of s 68(1) and such a literalistic approach would seriously impair the efficacy of federal jurisdiction. For these reasons, Ground 2 should also be dismissed.

Part VI: CROSS-APPEAL OR NOTICE OF CONTENTION

59. There is no cross-appeal or notice of contention.

Part VII: ESTIMATE OF TIME

60. The respondent estimates that 90 minutes is required for presentation of his argument.

Dated: 19 June 2025

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[57] *John Robertson & Co (In Liq) v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88; cited in *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [2001] HCA 1 at [135].
[58] *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [2001] HCA 1 at [141].

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Crimes Act 1914* (Cth)	Compilation No 154	Sections 4J, 4K, 16, 16A, 16BA, 16AAA, 16AAB, 16AAC, 19, 19AB, 19B, 20	Date of judgment in CCA	1 November 2024: Date of CCA judgment
2.	*Crimes Act 1914* (Cth)	Compilation No 159	Sections 16AAA, 16AAB, 16AAC	Current version	
3.	*Crimes (Sentencing Procedure) Act 1999* (NSW)	Historical version for 1 July 2024 to 30 November 2024	Sections 3A, 21A, 25D, 44, 49, 53A	Date of judgment in CCA	1 November 2024: Date of CCA judgment
4.	Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, 2017	14 August 2017	Executive Summary and Parts I and II, pp. 99, 100; Parts VII to X, pp. 300, 301, 307.	Referred to in the Second Reading Speech to the Original Bill (below)	
5.	*Crimes Legislation Amendment (Sexual Crimes Against Children and Community*	As read on 13 September 2017	Section 16AAA	Original Bill introducing s 16AAA into the *Crimes Act 1914* (Cth)	

	Protection Measures) Bill 2017 (Cth)				
6.	*Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth)	As enacted		Act introducing ss 16AAA-16AAC into the *Crimes Act 1914* (Cth)	
7.	*Judiciary Act 1903* (Cth)	Compilation No 50	Section 68	Date of judgment in CCA	1 November 2024: Date of CCA judgment
8.	*Sentencing Act 1995* (NT)	Historical version for 1 June 2000 to 29 September 2001	Table of contents; sections 5, 52	Act that was in force when Mr Putland was sentenced	August 2001: Date of sentence in *Putland*