IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

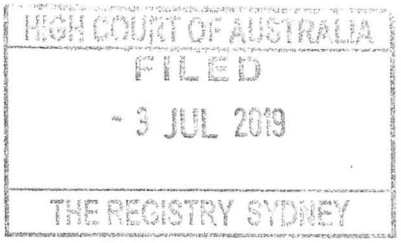
No. S123 of 2019

Redacted for Publication

BETWEEN:

HT

Appellant



and

The Queen

First Respondent

New South Wales Commissioner of Police

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The first respondent certifies that the redacted version of these submissions is in a form suitable for publication on the internet.

Part II: Statement of issues

2. Where the Court of Criminal Appeal of New South Wales (**CCA**) is called upon to hear and determine an appeal under s 5D(1) of the *Criminal Appeal Act 1912* (NSW) in circumstances where the court below considered and took account of closed evidence, does the CCA have power to consider the closed evidence for the purpose of hearing and determining the appeal?

3. Assuming such a power exists, did the exercise of the power in this case involve a denial of procedural fairness to the appellant?

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4. Assuming such a power exists and no impermissible denial of procedural fairness occurred, should the first respondent's appeal to the CCA have been dismissed in the exercise of the residual discretion?

Part III: Section 78B Notice

5. The first respondent does not consider that any notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of facts

10 6. The factual background to the appeal is sufficiently set out in the appellant's submissions (**AS**) at [8]-[12] and the second respondent's submissions (**SRS**) at [7]-[24].[1]

7. Although it is now understood that, prior to the hearing of the appeal in this Court, the legal representatives of the appellant and the first respondent may be given access, if sought (and subject to certain undertakings), to Exhibit C and the confidential affidavits relied upon by the second respondent in the CCA, counsel for the first respondent had not received or seen Exhibit C or the confidential affidavits at the time these submissions were filed.

20 **Part V: Argument**

8. For ease of reference, these submissions will use the phrase "closed evidence" to describe evidence that is before a court for use in proceedings, but has not been seen by and will not be disclosed to a party to the proceedings.

Power to receive and consider closed evidence – Ground 1

9. The exercise of power impugned by Ground 1 is the order of the CCA on 28 June 2017 to keep Exhibit C in the sentencing proceedings before the District Court confidential, including from the appellant's legal representatives (Core Appeal Book (**AB**) 125).

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[1] The first respondent notes that, at the time these submissions were filed, the version of the SRS available to the first respondent contained a number of redactions.

10. The appellant seemingly accepts that, in hearing the first respondent's appeal under s 5D(1) of the *Criminal Appeal Act*, the CCA was required to consider the evidence that was admitted before the sentencing judge (AS [28]). Here, that evidence included Exhibit C, which was treated as closed evidence in the District Court with the appellant's consent.[2] The *existence* of the CCA's power to consider Exhibit C and to treat it as closed evidence – as distinct from the *exercise* of that power, which will be addressed in relation to Ground 2 below – arises for consideration in circumstances where the CCA was called upon to hear and determine an appeal against a decision of the District Court based, in part, on closed evidence. It is important to understand the question of power in this context.

11. In *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, a majority of the Supreme Court of the United Kingdom held that the Court had power to consider closed evidence in circumstances where the use of closed evidence by the courts below had been authorised by statute, but no such authorisation existed for appeals to the Supreme Court.[3] By reference to s 40(2) of the *Constitutional Reform Act 2005* (UK), which provides that appeals may be brought to the Supreme Court "from any order or judgment of the Court of Appeal ... in civil proceedings", the majority reasoned (at [35], [56]):

> "If a closed material procedure was lawfully conducted at the first instance hearing, it would seem a little surprising if an appellate court was precluded from adopting such a procedure on an appeal from the first instance judgment. ... [O]ne would normally expect an appeal court to be entitled to have access to all the material available to the court below and to see all the reasoning of the court below. Otherwise, it is hard to see how an appeal process could be conducted fairly or even sensibly. And, if that involves the appellate court seeing and considering closed material, it would seem to follow that that court would have to adopt a closed material procedure.
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> ...
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> Section 40(2) is plainly intended to render every decision of the Court of Appeal to be capable of being appealed to the Supreme Court (unless specifically precluded by another statute), and, as explained, where it is necessary for this court to consider closed material in order to dispose of the

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[2] See the judgment of the CCA delivered on 17 July 2017 (**Judgment**) at [64]; SRS [9]-[10].

[3] *Bank Mellat* [2014] AC 700 at 738 [43]-[44], 740-741 [56] per Lord Neuberger of Abbotsbury PSC (with whom Baroness Hale of Richmond, Lord Clarke of Stone-cum-Ebony, Lord Sumption and Lord Carnwath JJSC agreed).

> appeal justly, this would only be achievable if a closed material procedure could be adopted."

12. By parity of reasoning, the first respondent submits that, in the present case, the CCA had implied power to consider closed evidence that was before the District Court, and to continue to treat such evidence as closed in appropriate circumstances, by reason of the CCA's power and function to determine an appeal in the proceedings. In *Grassby v The Queen* (1989) 168 CLR 1, Dawson J (with whom Mason CJ, Brennan, Deane and Toohey JJ relevantly agreed) said (at 16):[4]

> "[E]very court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise."

In the absence of a power to consider closed evidence where the court below took that step, it would not be possible for the CCA to exercise its appellate function conferred by Parliament. The power is "required for the effective exercise of a jurisdiction which is expressly conferred".[5] To hold otherwise would be to frustrate the purpose for which the jurisdiction of the CCA is conferred.

13. In her attempt to distinguish cases like *Chu v Minister for Immigration & Ethnic Affairs* (1997) 78 FCR 314, *Nicopoulos v Commissioner for Corrective Services* (2004) 148 A Crim R 74 and *Eastman v Director of Public Prosecutions (No 2)* (2014) 9 ACTLR 178, in which closed evidence was utilised, the appellant seems to accept that it may be necessary in judicial review proceedings for a court to consider closed evidence that was before an administrative decision-maker, in order properly to review the relevant decision (AS [46]-[47]). It is for essentially the same reason that an appellate court must also be able to consider closed evidence admitted in the courts below. The comparison between judicial review proceedings and appellate proceedings for this purpose was considered in *R (Haralambous) v Crown Court at St Albans* [2018] AC 236. In that case, Lord Mance DPSC (with whom Lord Kerr of

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[4] See *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 172 [40] per Kiefel CJ, 175 [52] per Gageler J, 195 [115], 196 [118] per Keane, Nettle and Gordon JJ.

[5] *Grassby* (1989) 168 CLR 1 at 17 per Dawson J. See also *Burrell v The Queen* (2008) 238 CLR 218 at 225 [22] per Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ; *R v JS (No 2)* (2007) 179 A Crim R 10 at 12 [3] per Spigelman CJ (with whom Mason P, McClellan CJ at CL, Hidden and Howie JJ agreed).

Tonaghmore, Lord Hughes, Lady Black and Lord Lloyd-Jones JJSC agreed) said (at 271 [57]-[59]):

> "Although there are differences between judicial review and an appeal in the normal sense of that word, many of the considerations which were of weight in the *Bank Mellat* case [2014] AC 700 on an appeal from lower courts conducting closed material procedures are also of weight in relation to judicial review of lower courts conducting such procedures. In *Bank Mellat*, a determination by the Supreme Court on a basis different from that required and adopted in the courts below would have been self-evidently unsatisfactory, risk injustice and in some cases be absurd. So too in the present context it would be self-evidently unsatisfactory, and productive potentially of injustice and absurdity, if the High Court on judicial review were bound to address the matter on a different basis from the magistrate or Crown Court ...
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> I consider that the only sensible conclusion is that judicial review can and must accommodate a closed material procedure, where that is the procedure which Parliament has authorised in the lower court or tribunal whose decision is under review. ... I add, for completeness, that, even before judicial review was regulated by statutory underpinning, I would also have considered that parallel considerations pointed strongly to a conclusion that the present situation falls outside the scope of the principle in the *Al Rawi* case [[2012] 1 AC 531] and that a closed material procedure would have been permissible on a purely common law judicial review."

14. If the above submissions concerning the implied powers of the CCA in the exercise of its appellate jurisdiction are accepted, it is, strictly speaking, not necessary for the first respondent to demonstrate that the CCA enjoys the full ambit of the inherent jurisdiction of the Supreme Court of New South Wales (cf AS [50]).

15. In any event, however, it is significant that in providing for the constitution of the CCA, the *Criminal Appeal Act* did not create a new court distinct from the Supreme Court,[6] and s 12 of the *Criminal Appeal Act* provides that the CCA "may, if it thinks it necessary or expedient in the interests of justice ... exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters". The powers conferred on the CCA by s 12 include the inherent powers of the Supreme Court and,

[6] See *Stewart v The King* (1921) 29 CLR 234 at 240.

in that way, the inherent powers of the Supreme Court are exercisable by the CCA in support of the jurisdiction conferred on the CCA.[7]

16. Thus, it is submitted that the power of the CCA to consider closed evidence can be located either by implication from the CCA's conferred appellate jurisdiction in circumstances where the court below (permissibly, or at least without challenge) considered the closed evidence, or as an inherent power of the Supreme Court exercisable by the CCA in accordance with s 12 of the *Criminal Appeal Act*. Both approaches invite further analysis of the power to consider closed evidence which inheres in the Supreme Court and/or the District Court (as the Court from which the appeal was brought in this case).

17. At least in circumstances where:

    a. evidence that is proposed to be treated as closed evidence is not used against, or to the detriment of, a party who has not seen the evidence (but, rather, is for the intended benefit of that party); and

    b. that evidence is necessary for the proper and fair determination of the issues in the proceeding; and

    c. the parties to the proceeding consent to the evidence being treated as closed evidence,[8]

the District Court has power to receive and consider the closed evidence. Such circumstances may fairly be described as rare or exceptional. Properly viewed, the power to receive and consider closed evidence is necessary in the service of justice in those circumstances. The District Court has power to make orders necessary for the proper function of the Court in avoiding unacceptable consequences of its processes.[9]

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[7] See *Burrell* (2008) 238 CLR 218 at 243 [103] per Kirby J; *R v AB (No 2)* (2018) 97 NSWLR 1031 at 1040-1041 [38], [40]; *R v Jones; R v Hili (No 2)* (2010) 79 NSWLR 143 at 145-147 [12]-[16], [25] per Rothman J (with whom McClellan CJ at CL agreed). .

[8] A further relevant circumstance, also indicative of the exceptional circumstances of this case, would be the strength of the public interest immunity claim asserted by the second respondent on the basis of the content of Exhibit C (that content being known to the second respondent) (SRS [37](c)). The strength of the public interest immunity claim may also be inferred from Judgment [74].

[9] See *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 at 161 per Mahoney JA (with whom Hope AJA agreed).

18. In the present case, the appellant's counsel consented to Exhibit C being received and considered as closed evidence in the District Court, thereby allowing – for the intended benefit of the appellant – a "lengthy" and "presumably fulsome" account [redacted] to be put before the sentencing judge (AB 29 (line 7); AS [15]). The sentencing judge was obliged to consider the evidence to the extent that it addressed the matters in [redacted] the *Crimes (Sentencing Procedure) Act 1999* (NSW) and counsel for the first respondent in the District Court "generally endorse[d]" the position that the appellant was deserving [redacted]
10 [redacted] (AB 28 (line 30)).

19. If there were no power on the part of the sentencing judge in the District Court to receive and consider Exhibit C as closed evidence, even in circumstances where the appellant consented to that course, it would have been necessary (it seems) for the appellant to be sentenced on the basis of less detailed or more oblique evidence [redacted]. That would be an unattractive outcome and one that would be manifestly inconsistent with the interests of justice. In the first respondent's submission, this further demonstrates why the District Court had power to receive and consider Exhibit C as closed evidence in the particular circumstances of this case. It serves the interests of justice – including here the appellant's interest [redacted]
20 – for the District Court to have such a power in exceptional circumstances.

20. To similar effect, the Supreme Court has "inherent jurisdiction to make appropriate orders whenever it is necessary to do so to secure the proper administration of justice".[10] Section 23 of the *Supreme Court Act 1970* (NSW) also provides that the Court "shall have all jurisdiction which may be necessary for the administration of justice in New South Wales". It is submitted that the Supreme Court would have power to receive and consider closed evidence in the circumstances set out in [17] above. It is further submitted that, for the purposes of s 12 of the *Criminal Appeal Act*, the Supreme Court would, in an appeal in a civil matter, have power to receive
30 and consider closed evidence where receipt and consideration of that evidence was

[10] *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643 at 647-648 [30]-[32] per Mason P (with whom Ipp JA agreed).

necessary to the proper and fair determination of the issues on the appeal, including where the evidence formed part of the record of the court below (as was the case here).

21. There is, of course, an important distinction between a court *possessing* a particular power and the *exercise* of that power. In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson JSC, who delivered the leading judgment, acknowledged that certain classes of case require a departure from the normal rule that courts cannot, without statutory authorisation, receive and consider closed evidence. Two examples were given of the "narrowly defined categories of case" in which special reasons require the use of closed evidence in the interests of justice, namely, wardship proceedings and certain proceedings for the protection of a commercial interest, the disclosure of which would render the proceedings futile (for example, intellectual property proceedings).[11] To those examples might be added proceedings for the determination of public interest immunity claims.[12] What each of these examples, along with proceedings for judicial review[13] and appellate proceedings (discussed above at [11]-[13]), share, as a common feature, is a need for certain evidence, the disclosure of which may be against the public interest or the interest the subject of the proceedings, to be before the court in order for the issues in the proceedings to be ventilated and determined. That was the case here also.

22. Two other members of the Supreme Court emphasised this point in *Al Rawi*. Lord Mance JCS (with whom Baroness Hale of Richmond JSC agreed) said (at 596 [112]):[14]

> "If the court never has jurisdiction (in the strict sense) to order a closed material procedure, that means that, even where a court concluded that a claimant must be denied access to material and the case must otherwise be struck out as untriable [previously referring, by way of example, to *Carnduff v Rock* [2001] 1 WLR 1786], it would be impossible for the court to order, with the consent of the claimant, a closed material procedure. ... I

[11] *Al Rawi* [2012] 1 AC 531 at 584-585 [63]-[65] per Lord Dyson JSC.

[12] See *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 620 per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ; *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 at 900 [33]-[34] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ..

[13] See, for example, *Nicopoulos* (2004) 148 A Crim R 74 at 92-93 [88]-[92]; *Chu* (1997) 78 FCR 314 at 328 per Carr and Sundberg JJ.

[14] See also at 595-596 [108], 599 [120].

> would be surprised if the court's inherent jurisdiction (in the strict sense) were inhibited to this extent."

23. Lord Clarke of Stone-cum-Ebony JSC said (at 616 [177]-[178]):

> "As Lord Dyson JSC himself recognises at paras 63 and 64, various exceptions to the fundamental principles he describes have been recognised by the common law. These show that, although fundamental, the principles are not absolute and must yield where it is necessary in the interests of justice that they do so. As Lord Dyson JSC puts it at para 64 in the context of confidentiality, such claims by their very nature raise special problems which *require* exceptional solutions (his emphasis). If the judge concludes after carrying out the PII balancing exercise that it is necessary to have some form of closed process, that same principle would permit such a process at common law.
>
> Thus, at the conclusion of the PII process it will be necessary for the judge to decide how to proceed. If he is persuaded that it is necessary in the interests of justice that some form of closed process should take place, I can see no reason why such a process should not be followed."

24. The appellant draws to attention that in *Al Rawi* some members of the Supreme Court doubted whether the consent of the parties to a proceeding could justify the adoption of a closed evidence procedure in such cases (AS [52]).[15] It should firstly be noted that the point was not argued in *Al Rawi* and the decision does not squarely address it. It is further submitted that, in circumstances where the relevant evidence is to be adduced for the intended benefit of the consenting party, and the consenting party has an awareness of the factual basis for the evidence in any event, the misgivings expressed by some – but not all – members of the Court in *Al Rawi* in this regard are presently inapposite.

25. The CCA relied expressly on "grounds of public interest immunity" when making its order of 28 June 2017 (AB 125). It may be accepted that public interest immunity is, generally speaking, a doctrine for the exclusion of evidence from a proceeding.[16] If, however, at the conclusion of a traditional public interest immunity enquiry, a court

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[15] See *Al Rawi* [2012] 1 AC 531 at 581 [46] per Lord Dyson JSC, 587 [75] per Lord Hope of Craighead DPSC, 590 [84] per Lord Brown of Eaton-under-Heywood JSC, 593 [98]-[99] per Lord Kerr of Tonaghmore JSC, 596-598 [113]-[116] per Lord Mance JSC, 611-612 [161] per Lord Clarke of Stone-cum-Ebony JSC.

[16] See *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 559 [36] per Gummow, Hayne, Heydon and Kiefel JJ; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 97 [148] per Hayne, Crennan, Kiefel and Bell JJ, 113 [204] per Gageler J. See also *R v Lewes Justices; Ex parte Secretary of State for the Home Department* [1973] AC 388 at 407 per Lord Simon of Glaisdale; *Al Rawi* [2012] 1 AC 531 at 610 [154], 611 [159] per Lord Clarke of Stone-cum-Ebony JSC.

considers that the material the subject of the claimed public interest immunity cannot be disclosed to a party, but also that the material needs to be available for use by the court in determining the matter, it is open to the court to consider the material as closed evidence where that course is pressed upon the court in circumstances similar to those that existed in the present case (see [17] above) . That last step is properly viewed as part of the public interest immunity process or, at least, closely connected or ancillary to it.[17] That is why, in the first respondent's submission, courts have on occasions used the language of public interest immunity when considering whether to receive closed evidence.[18]

10 26. If this Court is of the view that an exercise of a power to receive and consider closed evidence cannot be supported "on the grounds of public interest immunity", in the manner expressed by the CCA, that conclusion would not render the order of 28 June 2017 invalid if an alternative source of power was available to the CCA.[19] For the reasons developed earlier in these submissions, the CCA either enjoyed an implied power or was able to exercise an inherent power of the Supreme Court via s 12 of the *Criminal Appeal Act*, in support of the order made.

27. Finally, it ought be noted that, in addition to a power to receive and consider closed evidence, courts enjoy other relevant powers to control court processes, including to appoint special counsel or amicus curiae to make submissions about evidence to
20 which a party is not privy, if the court considers such assistance useful.[20]

28. Importantly, a court would, at all times, retain its power to dismiss, strike out or stay proceedings, if the court formed the view that closed evidence could not, in the public interest, be disclosed to a party, but also could not be used by the court in the proceedings without occasioning a miscarriage of justice. Courts would also be free, of course, to decline to receive or consider closed evidence.

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[17] *Al Rawi* [2012] 1 AC 531 at 616 [178], 618-619 [188] per Lord Clarke of Stone-cum-Ebony JSC.

[18] See, for example *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84 at 89-91 per Brooking J (with whom Southwell and Teague JJ agreed); *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 275 [139]; *R v Shannon Johnston* [2010] NSWDRGC 3.

[19] See *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at 76 [175] per Crennan and Kiefel JJ, and the authorities cited therein.

[20] See *State of New South Wales v Public Transport Ticketing Corporation (No 3)* (2011) 81 NSWLR 394; *R v Lodhi* (2006) 163 A Crim R 475; *R v Khazaal* [2006] NSWSC 1061 at [51]. See also *R v H* [2004] 2 AC 134.

Procedural fairness – Ground 2

29. Contrary to Ground 2, the appellant was not denied procedural fairness at the hearing of the first respondent's appeal against sentence in the CCA.

30. While procedural fairness is an "immutable characteristic" of the exercise of judicial power, its content is variable.[21] What is required to afford procedural fairness in a particular case may be varied and, in effect, reduced by the circumstances of the case.[22] The point was, with respect, well-made by Brooking J (with whom Southwell and Teague JJ agreed) in *Jarvie* [1995] 1 VR 84 (at 90-91):[23]

> "A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused ... The possible detriment or disadvantage to which an accused may on occasions be required to submit ... may, as in the present case, result from the need to give effect to some principle like that of public interest immunity, which competes with the desideratum that accused persons should not be subjected to any disadvantage in defending themselves against criminal charges."

31. Of present relevance, in *Pompano* (2013) 252 CLR 38, French CJ said (at 72 [68]):[24]

> "Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters."

32. The exceptional circumstances (see [17] above) that may justify a court's exercise of the power to consider closed evidence also justify a variation in the requirements of procedural fairness, such that no impermissible procedural unfairness is occasioned by the party from whom the evidence is withheld not having access to the closed evidence.

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[21] See *Pompano* (2013) 252 CLR 38 at 105 [177], 109 [192], 110 [195] per Gageler J.

[22] See *Kioa v West* (1985) 159 CLR 550 at 615-616 per Brennan J; *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 471-472 per McHugh J.

[23] See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 49 per Brennan J.

[24] See also at 47 [5] per French CJ, 99 [156] per Hayne, Crennan, Kiefel and Bell JJ.

33. The appellant accepts that there may not have been any practical injustice occasioned by the sentencing judge's consideration of Exhibit C as closed evidence (AS [30]). It is submitted that the same must be true of the proceedings before the CCA.

34. The factual matters [redacted], were known to the appellant and, as the appellant's counsel before the CCA accepted in argument, it was open to the appellant to provide her counsel with instructions in relation to those matters (AB 98 (lines 3-6)). To the extent that the appellant was not appraised [redacted], it is relevant that the CCA allowed a portion of Exhibit C to be disclosed to the appellant, [redacted].

35. In written submissions before the CCA, the first respondent accepted that the discount [redacted] for the appellant's plea of guilty [redacted] was open to the sentencing judge and the first respondent did not contend that the sentence imposed [redacted]. Further, the general submission made by the appellant [redacted] may be taken to have been accepted by the CCA. In re-sentencing the appellant, the CCA increased the relevant discount [redacted].

36. It may not be necessary for the appellant to demonstrate that some different outcome would have been achieved had she been given access to Exhibit C.[25] But, in the first respondent's submission, in a case where the CCA was justified in treating Exhibit C as closed evidence, procedural fairness did not require the appellant be given access to Exhibit C in order that her submissions might be made in more specific or tailored terms. It is submitted that the appellant was not denied a fair opportunity to put her case.

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[25] Cf *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 339 [42] per Kiefel, Bell and Keane JJ, 341-342 [55], [57]-[58] per Gageler and Gordon JJ.

37. Finally, to the extent it is said that the CCA gave no consideration to the principles of procedural fairness when determining whether to grant the appellant access to Exhibit C, there is some incongruity in the appellant apparently relying on both the lack of express consideration of those principles and the lack of reasons for the CCA's decision (AS [23], [36]). There is no reason to doubt that the CCA had regard to what procedural fairness required in the unique circumstances of this case. Such consideration, it might be assumed, led the CCA to the view that part of the evaluative component of Exhibit C should be disclosed to the appellant (see [34] above).

Residual discretion – Ground 3

38. The appellant's notice of appeal particularises this ground as a complaint that the CCA failed to consider the denial of procedural fairness to which Ground 2 relates and the conduct of the Executive in bringing an appeal in proceedings which involved closed evidence (AB 136). That complaint should be rejected.

39. [redacted] For the reasons developed above in relation to Ground 2, there was no error in the CCA so reasoning.

40. The first respondent's pursuit of an appeal against sentence to the CCA was a matter separate from the treatment of Exhibit C as closed evidence, the latter being a matter agitated at the hearing before the CCA by the second respondent after the appeal was filed. In circumstances where the second respondent appropriately pursued a course in relation to Exhibit C that was within the power of the CCA and apparently justified on compelling grounds (SRS [2], [11]), and, further, in circumstances where

the first respondent established significant error in relation to the sentence from which the appeal was brought, there was no misconduct on the part of the Executive that would lead this Court to the view that the first respondent's appeal to the CCA ought to have been dismissed. The power exercised by the CCA in relation to Exhibit C was not for the protection of some privilege of the Executive; it was for the protection of the public interest in the administration of justice.[26]

41. Addressing Ground 3 more generally, the significant difficulties which the first respondent identified in the sentencing judge's formulation of the aggregate sentence imposed on the appellant justified the CCA's intervention to re-sentence the appellant in the circumstances of this case [redacted]. This was a case in which the inadequacy of the sentence under appeal was so marked that it amounted to an affront to the administration of justice and risked undermining public confidence in the criminal justice system [redacted]. Consistent with authority, the appellant does not suggest that intervention in connection with an appeal brought pursuant to s 5D(1) is not justified on that basis.[27]

42. The appellant stood to be sentenced for five offences against s 178BA(1) of the *Crimes Act 1900* (NSW), each attracting a maximum penalty of 5 years' imprisonment, and six offences against s 192E(1)(b) of the *Crimes Act*, each attracting a maximum penalty of 10 years' imprisonment. [redacted]

43. [redacted]

[26] See generally *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39 per Gibbs ACJ.

[27] *Green v The Queen* (2011) 244 CLR 462 at 479 [42] per French CJ, Crennan and Kiefel JJ. See also *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 359 [35] per French CJ and Gageler J.

44. Before the sentencing judge, counsel for the appellant did not challenge the proposition that a sentence of imprisonment was required for the offending (AB 28 (line 46)). Before the CCA, counsel for the appellant accepted that the sentence imposed was lenient (AB 112 (line 42)).

45. In the first respondent's submission, the CCA was, with respect, correct to conclude that the sentence imposed on the appellant [redacted] Such a sentence was manifestly inadequate to such an extent, and so overlooked the requirement of the principle of totality, that it tended to undermine public confidence in the proper administration of criminal justice, and, thus, necessitated intervention by the CCA in order that proper sentencing standards be maintained.

Part VII: Time estimate

46. The first respondent estimates that no more than 1.5 hours will be required for the presentation of oral argument.

Dated: 3 July 2019

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