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

SUBMISSIONS OF THE APPELLANT

PART I FORM OF SUBMISSIONS

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

PART II CONCISE STATEMENT OF ISSUES

2. Where s 16AAA of the *Crimes Act 1914* (Cth) (**Crimes Act**) sets a mandatory minimum sentence for an offence, must a sentencing court impose a separate sentence of imprisonment for that offence, or is it permissible to impose an aggregate sentence in respect of that offence and any other federal offence for which the offender is before the court to be sentenced by applying a State or Territory aggregate sentencing regime picked up by s 68(1) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**)? The Court of Criminal Appeal (**CCA**) held that it *was* permissible to do the latter and the appellant submits that it is not. This is ground one of the appeal.

3. Is s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**NSW Act**) picked up by s 68(1) of the Judiciary Act and applicable, therefore, to the sentencing of federal offenders in New South Wales? The CCA held that it *was* picked up, and the appellant submits that it is not. This is ground two of the appeal.

4. Strictly, ground one is unnecessary to answer if ground two is established. But because of the significance of ground one beyond New South Wales, the appellant respectfully submits that both grounds should be determined even if ground two is established.

PART III SECTION 78B NOTICE

5. The appellant has served a notice under s 78B of the Judiciary Act out of an abundance of caution because jurisprudence on s 109 of the *Constitution* informs the operation of ss 68 and 79 of the Judiciary Act. No Attorney-General has intervened.

PART IV DECISIONS BELOW

6. The remarks on sentence are unreported. The CCA's judgment has the medium neutral citation [2024] NSWCCA 200. The appellant understands that the judgment has been selected for inclusion in the New South Law Reports but as at the date of these submissions it is yet to be published.

PART V RELEVANT FACTS

7. This appeal raises pure questions of law and the facts are relevant only in so far as they explain how those questions have arisen.

8. The respondent pleaded guilty to four Commonwealth child sex offences and admitted his guilt of an additional Commonwealth child sex offence to be taken into account in sentencing him for count four. The District Court of New South Wales (**District Court**) sentenced him to an aggregate term of imprisonment of 11 years and 6 months with a non-parole period of 8 years. The details of the charges and the original sentence are set out at **CAB 46 [1]-[2]**.

9. Count one involved an offence under s 272.11(1)(c) of the *Criminal Code* (Cth), to which a mandatory minimum term of imprisonment of 7 years applied under item 6 of the table in s 16AAA of the Crimes Act.

10. The respondent appealed his sentence to the CCA on the basis that the District Court committed an error of law in its application of s 16AAC(2)-(3), which allows a sentencing court to reduce a sentence of imprisonment below the mandatory minimum term of imprisonment specified in s 16AAA to take account of a plea of guilty or cooperation with law enforcement agencies. The details of that asserted error need not be described here, because the appellant conceded the error that was asserted and it is not the subject of the appeal to this Court.

11. Because there was error in the District Court's sentence and a less severe sentence was warranted, it fell to the CCA to "quash the sentence and pass such other sentence in substitution" for that of the District Court as it considered appropriate under s 6(3) of the *Criminal Appeal Act 1912* (NSW). It was in the context of resentencing that the appellant raised questions as to the permissible structure of the sentence. The appellant raised two difficulties with imposing an aggregate sentence as the District Court had done. Those difficulties reflect the grounds of appeal to this Court, namely that (a) an aggregate

sentence cannot be imposed in respect of offences that include an offence to which a mandatory minimum sentence applies; and (b) in any event, aggregate sentencing under s 53A of the NSW Act is not applicable to sentences for federal offenders due to the unique drafting of that provision.

12. The CCA rejected both arguments and proceeded to impose a single aggregate sentence for all the offences to which the respondent pleaded guilty. It will be convenient to summarise and deal with the CCA's reasons in the course of the argument developed in Part VI below.

PART VI ARGUMENT

10 ### A. BACKGROUND CONTEXT

13. Some background context is relevant to both grounds of appeal and it is convenient to deal with it at the outset.

A.1 The Crimes Act and aggregate sentences

14. Section 4K(3) and (4) of the Crimes Act empowers a court sentencing a person for multiple federal *summary* offences to impose a single sentence in respect of two or more of those offences.[1] The Crimes Act does not, however, contain any express provision that would allow a court sentencing a person for multiple federal offences dealt with on *indictment* to impose a single sentence in respect of two or more of those offences.

15. Whether or not there is power to do so in any particular case is left to the operation of
20 s 68 of the Judiciary Act, as this Court held in ***Putland*** *v The Queen*.[2] This depends, therefore, on the availability of aggregate sentencing in any particular State or Territory in accordance with the terms of the State or Territory legislation in question. Because aggregate sentencing is *not* available in the Australian Capital Territory, Queensland or Western Australia for Territory and State offenders respectively, aggregate sentencing is not available in those jurisdictions for federal offenders.

A.2 Section 68 of the Judiciary Act

16. Section 68(1) of the Judiciary Act has the effect that State and Territory sentencing laws apply "so far as they are applicable" to federal offenders who come before State and

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1 See, eg, *Putland v The Queen* (2004) 218 CLR 174 at [9] (Gleeson CJ), [46], [50] (Gummow and Heydon JJ; Callinan J agreeing), [86] (Kirby J); *R v Bibaoui* [1997] 2 VR 600.

2 See (2004) 218 CLR 174 at [50] (Gummow and Heydon JJ; Callinan J agreeing).

Territory courts to be sentenced in the exercise of jurisdiction vested in those State and Territory courts pursuant to s 68(2). Section 68(1) does not refer expressly to sentencing laws, but this Court's decision in *Putland* authoritatively establishes that sentencing laws can be picked up and applied under s 68(1).[3]

17. While there is occasionally disagreement as to the application of the principles which have developed on s 68(1) of the Judiciary Act, there does not appear now to be much if any disagreement about what those principles are. For present purposes, the relevant principles are as follows.

18. *First*, the purpose of s 68(1) of the Judiciary Act is "to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice".[4]

19. *Second*, State and Territory law is picked up with its meaning unchanged,[5] subject to a permissible degree of "translation" because s 68(1) inevitably operates by way of analogy.[6]

20. *Third*, "s 68(1) does not apply the text of a State or Territory law to the extent that in so applying as a Commonwealth law it would be inconsistent with the Constitution or another Commonwealth law".[7]

21. *Fourth*, "where a particular provision of State law is an integral part of a State legislative scheme, [s 68(1)] could not operate to pick up some but not all of it, if to do so would be to give an altered meaning to the severed part of the State legislation".[8]

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3 See (2004) 218 CLR 174 at [4] (Gleeson CJ), [34] (Gummow and Heydon JJ; Callinan J agreeing). See also at [79] (Kirby J) (relying on s 79, not s 68(1)).

4 *Williams v The King [No 2]* (1934) 50 CLR 551 at 560; *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at [42] (Kiefel CJ, Gageler and Gleeson JJ), [143] (Gordon and Steward JJ).

5 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at [57] (Kiefel CJ, Gageler and Gleeson JJ), [150], [161]-[166], [170]-[174] (Gordon and Steward JJ).

6 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at [57], [62]-[64] (Kiefel CJ, Gageler and Gleeson JJ), [152] (Gordon and Steward JJ).

7 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at [58] (Kiefel CJ, Gageler and Gleeson JJ). See also at [149] (Gordon and Steward JJ); *Putland v The Queen* (2004) 218 CLR 174 at [7] (Gleeson CJ), [41] (Gummow and Heydon JJ; Callinan J agreeing).

8 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [24]; *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at [65]-[66] (Kiefel CJ, Gageler and Gleeson JJ), [153]-[155] (Gordon and Steward JJ), [271] (Jagot J).

A.3 Aggregate sentencing in New South Wales

22. Aggregate sentencing was introduced in New South Wales by the *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) and commenced in March 2011. That amending statute introduced s 53A into the NSW Act. Of particular relevance to this appeal are sub-sections (1) and (2), which are in the following terms:

> **53A Aggregate sentences of imprisonment**
>
> (1) A court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.
>
> (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.

23. There is a substantial body of case law on s 53A and the following principles have crystallised over time.

24. *First*, while s 53A(2)(b) requires a sentencing court to "indicate" the sentence that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence, which are often referred to as indicative sentences, "they are not orders or sentences and cannot be the subject of an appeal in their own right".[9] Rather:[10]

> The only operative sentence imposed by the Court is the aggregate sentence under this statutory scheme. The Court is required to indicate sentences for the purpose of understanding the components of the aggregate sentence in general terms. However, the Court does not pass indicative sentences. The periods indicated by the sentencing Court have no practical operation at all.

So much is an indicative sentence *not* a sentence at all that it has been said that an indicative sentence "should not be expressed as a separate sentencing order".[11]

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9 *Pearson v Commonwealth* (2024) 99 ALJR 110 at [45] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

10 *Vaughan v R* [2020] NSWCCA 3 at [90] (Johnson J; Macfarlan JA and R A Hulme J agreeing). See also, eg, *Maxwell v R* [2020] NSWCCA 94 at [102] (Johnson J; Adamson and Bellew JJ agreeing); *R v Chidiac* [2015] NSWCCA 241 at [49] (Price J; Bathurst CJ and Beech-Jones J agreeing); *Cullen v The Queen* [2014] NSWCCA 162 at [31]-[32] (Adamson J; Macfarlan JA and Bellew J agreeing).

11 *R v Clarke* [2013] NSWCCA 260 at [52] (McCallum J; Hoeben CJ at CL).

25. *Second*, s 53A(2)(b) in terms requires the indicative sentences to be assessed "after taking into account such matters as are relevant under Part 3 or any other provision of this Act", being the NSW Act. New South Wales courts have interpreted s 53A(2)(b) according to its terms. Thus, for example, in the leading case of *JM v The Queen*, R A Hulme J's third proposition was that "[t]he indicative sentences must be assessed by taking into account such matters in Pt 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant".[12] His Honour went on to elaborate, by reference to provisions the NSW Act:

> There is no need to list such matters exhaustively, but commonly encountered ones in Pt 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

26. *Third*, the indicative sentences do not, and do not have to, bear any arithmetical relationship with the aggregate sentence. Thus, an error in an indicative sentence does not necessarily result in appealable error in the aggregate sentence.[13] That said, indicative sentences are not irrelevant to the proper determination of an aggregate sentence. As this Court said in *Park v The Queen*, "the indicative sentences required by s 53A(2)(b) assist in explaining how the aggregate sentence was arrived at".[14] And as New South Wales authority has explained, they "assist[] a sentencing judge in application of the totality principle, an important factor in the assessment of the aggregate sentence to be imposed",[15] and they do so by requiring a sentencing court "to give consideration to the criminality involved in each offence".[16]

27. *Fourth*, s 53A(2) "is clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing

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12 (2014) 246 A Crim R 528 at [39(b)]. See also, eg, *Weiss v R* [2020] NSWCCA 188 at [69] (N Adams J; Macfarlan JA and Lonergan J agreeing); *Acton v R* [2024] NSWCCA 92 at [40] (Chen J; Ward P and Hamill J agreeing).

13 See, eg, *PD v The Queen* [2012] NSWCCA 242 at [44] (Beech-Jones J; Basten JA and Hall J agreeing); *Lee v The Queen* [2020] NSWCCA 244 at [32] (Beech-Jones J; Payne JA and Fagan J agreeing).

14 (2021) 273 CLR 303 at [27] (Kiefel CJ, Gageler, Keane, Edelman and Gleeson JJ).

15 *R v Nykolyn* [2012] NSWCCA 219 at [58] (R A Hulme J; Hall J agreeing). See also, eg, *PD v R* [2012] NSWCCA 242 at [43] (Beech-Jones J; Basten JA and Hall J agreeing).

16 *R v Nykolyn* [2012] NSWCCA 219 at [32] (McClellan CJ at CL; Hall and R A Hulme JJ agreeing). See also, eg, *R v Dashti* [2016] NSWCCA 251 at [110] (Beazley P, Garling and Fagan JJ).

judges".[17] It "allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence".[18] 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".[19] Nor is an aggregate sentence intended to result in a total effective sentence that is different from imposing separate sentences for separate offences.[20]

28. That said, there is some reduction in transparency inherent in the regime of aggregate sentencing. For example, in *PW v The Queen*, Basten JA explained (after referring to statements of principle about the maintenance of transparency in s 53A(2)):[21]

10 > There is truth in each of these statements, but their operation will vary according to particular circumstances. Furthermore, they identify the legislative purposes at a high level of generality which provides limited assistance in determining what is required to comply with s 53A(2). Furthermore, they involve conflicting principles. For example, the greater the detail required of a sentencing judge explaining the reasons for the putative individual sentences, the less the benefit of imposing an aggregate sentence. If a detailed explanation of the process of determining each putative sentence were required, together with an explanation as to how the principle of totality would have operated had those sentences been imposed, the complexity of the sentencing exercise is hardly diminished.

20 29. In *Ibbotson (a pseudonym) v The Queen*, Leeming JA noted that:[22]

> … the imposition of an aggregate sentence is unavoidably less transparent than the imposition of individual sentences for each offence. Even when s 53A(2) is complied with, so that it is clear what the actual individual sentences would have been, an aggregate sentence will not in any case where there are more than two offences expose precisely how the individual sentences have been accumulated. The position would be much more opaque in the absence of s 53A(2).

30. And in *ZA v The Queen*, Johnson and Fullerton JJ (Payne JA agreeing) observed that "absolute precision in specifying the degree of accumulation would be tantamount to

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17 *Khawaja v The Queen* [2014] NSWCCA 80 at [18] (R S Hulme J; Leeming JA and Button J agreeing).

18 *R v Nykolyn* [2012] NSWCCA 219 at [58] (R A Hulme J; Hall J agreeing). See also New South Wales, *Parliamentary Debates*, Legislative Council, 23 November 2010 at 27,867 (Michael Veitch, Parliamentary Secretary).

19 *R v MJB* [2014] NSWCCA 195 at [58] (Adamson J; Hoeben CJ at CL and Fullerton J agreeing).

20 See, eg, *Ibbotson (a pseudonym) v The Queen* [2020] NSWCCA 92 at [9] (Leeming JA); *Portnoy v The King* [2025] NSWCCA 60 at [36] (Sweeney J; Davies and Huggett JJ agreeing).

21 [2019] NSWCCA 298 at [5].

22 [2020] NSWCCA 92 at [9]. See also *Benn v The Queen* (2023) 305 A Crim R 550 at [137] (Gleeson JA; N Adams and Ierace JJ agreeing).

expressing commencement dates for each indicative sentence contrary to one of the rationales for introducing aggregate sentencing".[23]

B. GROUND ONE – MANDATORY MINIMUM SENTENCES

B.1 Aggregate sentencing is not available for a mandatory minimum sentence offence

31. Section 16AAA of the Crimes Act provides (emphasis added):

> Subject to section 16AAC, if a person is convicted of an offence described in column 1 of an item in the following table, **the court must impose a sentence of imprisonment** of at least the period specified in column 2 of that item.

32. When read with item 6 in the table in s 16AAA, the legislative command relevant to the respondent is this: subject to s 16AAC, he is to be sentenced to a term of imprisonment of at least seven years for count one, being his offence under s 272.11(1)(c) of the *Criminal Code* (Cth). That this is the legislative command of s 16AAA follows naturally from the statutory text. Nothing in the extrinsic material suggests to the contrary.[24]

33. Section 53A of the NSW Act is inconsistent in its purported application to an offence to which s 16AAA of the Crimes Act applies, and thus is not picked up under s 68(1) of the Judiciary Act in this operation. That is because, as explained at paragraph [24] above, an aggregate sentence does *not* result in a sentence of imprisonment being imposed for the offence to which s 16AAA applies. "[T]here is no 'sentence' for count 2 [here, count one], only one aggregate sentence for all of the offences".[25] The aggregate sentence is not "the penalty imposed for an offence"[26] under s 272.11(1)(c) of the *Criminal Code* (Cth).

34. Further, a mere indicative sentence in respect of an offence under s 272.11(1)(c) of the *Criminal Code* (Cth) is not compatible with the legislative command in s 16AAA.[27] That

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23 (2017) 267 A Crim R 105 at [88]. See also *Kliendienst v The Queen* [2020] NSWCCA 98 at [84] (N Adams J; Simpson AJA and Rothman J agreeing); *Portnoy v The King* [2025] NSWCCA 60 at [31] (Sweeney J; Davies and Huggett JJ agreeing).

24 See, eg, Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) at [198]:

> The proposed section 16AAA and relevant table establishes that if a person is subject to an offence or offences in column 1, the court must impose a sentence of imprisonment of at least the period specified in column 2. For example, where a person commits an offence against section 272.8(1) of the *Criminal Code* (sexual intercourse with a child outside Australia), the person must be sentenced to a minimum penalty of 6 years' imprisonment, subject to the reduction principles in proposed section 16AAC. …

25 *PD v The Queen* [2012] NSWCCA 242 at [44] (Beech-Jones J; Basten JA and Hall J agreeing).

26 *PN v The King* [2024] NSWCCA 86 at [47] (Wilson J; Chen and Huggett JJ agreeing).

27 Contra *R v Large* [2021] NSWDC 429 at [59] (Montgomery DCJ).

is because, as also explained at paragraph [24] above, "an indicative sentence is not a sentencing order".[28]

35. It cannot be suggested (and the CCA did not suggest) that the Parliament can be taken to have been aware and approved of aggregate sentencing in respect of offences to which s 16AAA applies when it introduced s 16AAA into the Crimes Act. But in case the respondent renews his argument that such approval should be attributed to the Parliament, the appellant notes the following.

36. *First*, *Putland* did not involve an aggregate sentence in respect of an offence to which a mandatory minimum sentence applied.

37. *Second*, when the Commonwealth introduced mandatory minimum sentences into the *Migration Act 1958* (Cth) in 2001,[29] which provided a model for ss 16AAA to 16AAAC, there were only three relevant aggregate sentencing provisions across the Federation.[30] Though New South Wales introduced it and Victoria extended it beyond the Magistrates' Court by the time ss 16AAA to 16AAC were introduced, there is no extrinsic material accompanying the Bill that became the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) in which the presence of aggregate sentencing was even brought to the attention of the Parliament.

38. *Third*, it is improbable that the Parliament could be understood to have approved of aggregate sentencing in respect of an offence to which a mandatory minimum sentence applied when the approach in different States and Territories exhibits so much variation.

39. In New South Wales and the Northern Territory, indicative sentences must be identified.[31] In Tasmania, the sentence that would have been imposed for a child sexual offence has to be indicated (but, by implication, not other offences).[32] South Australia requires the sentence that would have been imposed to be indicated only if different victims were involved or the offences were committed on different occasions.[33] And Victoria provides that the sentencing court is *not* required to indicate the individual sentences that would

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28 *AA v The King* [2024] NSWCCA 132 at [4] (Ward P and Wilson J); *R v Jackson* [2024] NSWCCA 156 at [47] (McNaughton J; Kirk JA and Campbell J agreeing).

29 See *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).

30 *Sentencing Act 1995* (NT) s 52; *Criminal Law (Sentencing) Act 1988* (SA) s 18A, inserted by *Statutes Amendment (Sentencing) Act 1992* (SA); *Sentencing Act 1997* (Tas) s 11.

31 *Sentencing Act 1995* (NT) s 52(4)(b).

32 *Sentencing Act 1997* (Tas) s 11(3).

33 *Sentencing Act 2017* (SA) s 26(2a).

have been imposed.[34] The Victorian Court of Appeal has emphasised that "the components must be sufficiently exposed to enable an understanding of how the aggregate sentence was determined" but that this can be done "without specifically dealing with each count" and in a somewhat "generic way".[35]

B.2 Errors in the CCA's judgment below

40. The CCA concluded that s 53A of the NSW Act was available in respect of an offence to which s 16AAA applied for reasons set out at **CCA [97]** as follows:

> … if an aggregate sentence of at least the minimum term is imposed for offences in the tables in ss 16AAA and 16AAB, then the requirement that at least such a term has been imposed for that offence has been satisfied. In such a case, to quote s 16AAA, the court has met the requirement that it "must impose a sentence of imprisonment of at least the period specified in column 2 of that item". The fact that the sentence is also imposed in punishment of other offences does not alter the fact that the aggregate and operative sentence is imposed in punishment of the listed offence(s).

41. The CCA appears to have concluded that the legislative command is satisfied so long as a person who has committed an offence under one of the provisions to which the section applies is sentenced to a total effective sentence that is at least the minimum specified for that provision regardless of whether the sentence is imposed specifically for that offence. That seems to be the gravamen of the second sentence in **CCA [97]**, which draws attention to "the requirement that it 'must impose a sentence of imprisonment of at least the period specified in column 2 of that item'", as distinct from a sentence of imprisonment *for that offence* of at least the period specified in column 2 of that item.

42. This reasoning gives a distorted construction to the text of s 16AAA. Read fairly and as a whole, the legislative command is to impose a sentence of at least a particular length *for* the particular offence committed.

43. *First*, that construction is consistent with the heading of the section ("Minimum penalties for certain offences"), which is a part of the statute.[36]

44. *Second*, that construction is consistent with s 16AAB(2). That section applies when the offender has previously been convicted of a child sexual abuse offence. Section 16AAB(2) makes it clear that "the court must impose **for the current offence** a sentence

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34 *Sentencing Act 1991* (Vic) s 9(4)(b).

35 See *R v Grossi* (2008) 23 VR 500 at [40].

36 *Acts Interpretation Act 1901* (Cth) s 13.

of imprisonment of at least the period specified in column 2 of that item" (emphasis added). There is nothing in the text or extrinsic materials to suggest that s 16AAA was to operate any differently from s 16AAB.

45. *Third*, imposing an individual sentence for an offence to which s 16AAA applies best achieves the purpose of the mandatory minimum sentence regime.[37]

46. One purpose of the mandatory minimum sentence regime introduced by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) was to ensure that people who committed specific offences were imprisoned (and for a minimum period) *for those offences*. That was done so as to protect the community and achieve specific and general deterrence.[38] People contemplating committing these offences were to know that they would face sentences of a particular severity if they were to do so. Submerging the sentence to be imposed in respect of one of these offences within an aggregate sentence that relates to one or more other offences dilutes the clarity of the deterrent message that was sought to be achieved, as explained in paragraphs [28]-[30] above.

47. An aggregate sentence also threatens to obscure how the instinctive synthesis was resolved to arrive at an indicative sentence for the relevant offence that has regard to the (increased) maximum and the (newly imposed) mandatory minimum. That process jeopardises the legislative objective of the amendments. Indicative sentences are intended to be transparent and to reveal the instinctive synthesis to some degree — but with intentionally less transparency than the process required if individual sentences were to be imposed. That is made clear in the second reading speech for the Crimes (Sentencing Procedure) Amendment Bill 2010 (NSW). The Parliamentary Secretary said:[39]

> the indication with respect to each offence is intended to provide an adequate indication of the criminality attaching to each offence, **but it should not be construed by courts as requiring them to give an indication that is so detailed that they are effectively sentencing the offender for each offence separately in any case**.

48. Court orders have particular force in conveying the court's denunciation of what occurred and thus in deterring others, far more so than remarks on sentence, which may not even

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37 See *Acts Interpretation Act 1901* (Cth) s 15AA.

38 See, eg, Statement of Compatibility, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2020 (Cth) at [27], [33]; Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2019, 4162 (Christian Porter).

39 New South Wales, *Parliamentary Debates*, Legislative Council, 23 November 2010.

be widely published or easily accessible depending on the practice of the individual court. The message conveyed by a sentence for an individual offence is different from the message of an aggregate sentence. The latter speaks to that which is "appropriate to reflect the totality of criminality in all of the offending"[40] rather than the discrete offending the subject of a mandatory minimum sentence. Because it is only the aggregate sentence that can be appealed, any error affecting an indicative sentence is not even capable of correction unless it can be shown to have affected the ultimate aggregate sentence imposed.[41]

49. The matters in paragraphs [46] to [48] can be taken one step further. The problem is not just that the offender, potential offenders and the community at large cannot know that the offender has actually faced the minimum sentence that the Parliament has imposed for this offence, although that is a sufficient reason not to adopt the CCA's approach. Rather, the problem is that because the aggregate sentence is not required to be reached in any jurisdiction with the same discipline and transparency as sentencing for individual offences and then applying totality or cumulation (see paragraph [39] above), there can be no assurance that an offender given an aggregate sentence will actually face the same overall sentence as if the Court had fixed a sentence for the offence that observes the mandatory minimum (following this Court's decision in *Hurt v The King*[42] that the mandatory minimum sets a yardstick for the least worst case).

50. For these reasons, ground one is established. On resentence, the CCA ought not to have imposed an aggregate sentence that encompassed count one.

C. GROUND TWO – FEDERAL OFFENCES AND SECTION 53A(2)(B)

C.1 Aggregate sentencing is not available for federal offences

51. A person who has committed a federal offence must be sentenced in accordance with the Crimes Act, and in particular s 16A. While that section is not an exhaustive code in so far as common law principles can apply, s 16A is exclusive of "peculiarly local or state

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40 *Aryal v The Queen* [2021] NSWCCA 2 at [46] (R A Hulme J; Johnson and Wilson JJ agreeing). See also, eg, *Vaughan v The Queen* [2020] NSWCCA 3 at [117] (R A Hulme J); *XY (a pseudonym) v R* [2023] NSWCCA 50 at [50] (Wright J; Kirk JA and Harrison J agreeing).

41 See *Lee v The Queen* [2020] NSWCCA 244 at [32] (Beech-Jones J; Payne JA and Fagan J agreeing); *KS v The King* [2024] NSWCCA 147 at [72] (Adamson and Stern JJA and Wright J); *Aryal v The Queen* [2021] NSWCCA 2 at [49] (R A Hulme J; Johnson and Wilson JJ agreeing).

42 (2024) 98 ALJR 485.

statutory principles of sentencing".[43] It is inconsistent with this understanding of s 16A and the Crimes Act to indicate sentences for individual federal offences by reference to Part 3 of the NSW Act and other provisions of that Act.

52. The treatment of guilty pleas illustrates the inconsistency between the NSW Act and the Crimes Act For a federal offender, the extent of any reduction of the sentence is not prescribed by statute or authority and is strictly within the discretion of the court.[44] In determining the indicative sentence for a federal offence, a court would indicate the discount that would have been applied based on general principle. By contrast, s 25D(2) of the NSW Act sets out a regime of discounts. Because s 53A(2)(b) directs attention to Part 3 of the NSW Act, the mandatory discounts for guilty pleas stipulated in s 25D must be taken into account in determining indicative sentences because s 25D is in Part 3.[45]

53. Section 53A(2)(b) cannot, therefore, be picked up and applied under s 68(1) of the Judiciary Act due to this inconsistency, consistently with the principle summarised in paragraph [20] above. It follows that the balance of s 53A(2) cannot be picked up either without s 53A(2)(b), because the provision would then operate in a substantively different way contrary to the principle summarised in paragraph [21] above. New South Wales courts have emphasised the importance of indicative sentences: see paragraph [27] above. To excise this provision in respect of federal offenders in New South Wales is not to treat them in the same way that State offenders are treated in New South Wales contrary to the equality of treatment sought after in paragraph [18] above.

C.2 Errors in the CCA's judgment below

54. The CCA accepted that indicative sentences for federal offences must be considered by reference to Part IB of the Crimes Act, but the CCA held that s 53A(2) permitted a court sentencing a federal offender to do that even though s 53A(2) refers to "such matters as are relevant *under Part 3 or any other provision of this Act*" (**CAB 69-71 [70], [74], [76]**).

55. One way to support that conclusion would be to "translate" the reference to the NSW Act to permit those words to mean Part IB of the Crimes Act in the context of federal offenders; that is addressed in Part C.3 below. But the other way to support that

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43 *Johnson v The Queen* (2004) 78 ALJR 616 at [15] (Gummow, Callinan and Heydon JJ; Gleeson CJ agreeing); *R v Hatahet* (2024) 98 ALJR 863 at [13] (Gordon ACJ, Steward and Gleeson JJ).

44 See *Holt v R* [2021] NSWCCA 14 at [58]-[66] (Wilson J; Johnson and R A Hulme JJ agreeing); *Bui v DPP (Cth)* (2012) 244 CLR 638 at [19] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

45 See *Acton v R* [2024] NSWCCA 92 at [40].

conclusion without "translation" is to give s 53A(2) a meaning which is so broad or general as to allow indicative sentences for State offenders to proceed by reference to the NSW Act while also allowing indicative sentences for federal offenders to proceed by reference to Part IB of the Crimes Act without changing the meaning of s 53A(2) when it is picked up by s 68(1) of the Judiciary Act, consistently with the requirement in paragraph [19] above.[46]

56. The CCA took this course by interpreting s 53A(2) as "simply requir[ing] the court to undertake on an indicative basis the same sentencing exercise for each offence as would have otherwise occurred" (**CCA [79]**), "taking account of whatever sentencing factors are applicable with respect to sentencing for the offence in question" (**CCA [76]**), and only taking into account matters in Part 3 of the NSW Act "to the extent they are relevant" (**CCA [74]**). Rather than interpret s 53A(2) to mean that a sentencing court should indicate sentences based on Part 3 and the NSW Act, the CCA interpreted it to mean that a sentencing court should indicate sentences as if they were imposing separate sentences for individual offences howsoever the sentencing court would do that and, evidently in the case of federal offenders, whether or not that involved Part 3 and the NSW Act.

57. This construction of s 53A(2) should be rejected.

58. *First*, it is far from the ordinary and natural meaning of the plain words of the sub-section. In terms, it refers to a Part and to provisions of the NSW Act. Until the CCA's judgment below, NSW courts had always understood s 53A(2)(b) to mean what it says: see paragraph [25] above.

59. While not referred to by the CCA, s 21A(1) of the NSW Act does say that the factors "referred to in this subsection 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". So at first glance, one might wonder if Part IB could be fit within the reference to "any Act or rule of law" so as to be taken into account through the medium of s 21A(1) of the NSW Act. But the reference to "any Act" must be interpreted to mean any New South Wales statute[47] and the reference to "rule of law" is to common law principles.[48]

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46 The possibility that s 53A(2) could somehow be interpreted to allow a sentencing court to apply Part IB of the Crimes Act when indicating sentences for both a State offender and a federal offender too is beyond the pale and can be put to one side.

47 See *Interpretation Act 1987* (NSW) s 12(1)(b).

48 See, eg, *Muldrock v The Queen* (2011) 244 CLR 120 at [18].

60. *Second*, the CCA relied heavily on a proposition their Honours drew from the second reading speech that aggregate sentencing was not intended to change how sentencing courts went about considering the appropriate sentence for individual offences: **CCA [42], [44], [75]**. Their Honours quoted the Parliamentary Secretary: "[i]t must be emphasised that these amendments are not intended to alter the way offenders are sentenced in any substantial way, or to have any impact on the overall length of sentences" (**CCA [75]**). So much may be accepted but the analysis is incomplete. *State offenders* are sentenced for individual offences by applying *State sentencing factors* without any contemplation that federal factors in Part IB could ever be applied.

10 61. Indeed, other aspects of the second reading speech suggest that the Parliament had in mind that the same *State considerations* should continue to be applied in working through indicative sentences. Specifically, the Parliamentary Secretary referred to "the benefits in publicly recognising the particular aggravating and mitigating factors of an offence *as required under the Act*"[49] as a reason to have indicative sentences. The language of aggravating and mitigating factors is the language of s 21A of the NSW Act, not s 16A of the Crimes Act. Whether that language can then be translated to mean s 16A is a separate question; at the stage of interpreting s 53A(2) in its application to State offenders the implication that NSW factors are to apply is clear.

62. *Third and relatedly*, the CCA considered that their Honours' interpretation was consistent
20 with the purpose of s 53A(2)(b) understood at "the higher level of generality relating to the sentence the court would otherwise have imposed per se" (**CCA [80]**). The problem with this reasoning is that it ignores the statutory text actually enacted. It is an example of reasoning deprecated by this Court on several occasions.[50] The reasoning is not, in any event, soundly based in the extrinsic materials (see paragraph [59] above).

63. The passing reference in **CCA [80]** to s 25A(1) of the NSW Act, which expressly contemplates the provision being applicable to *federal offenders*, is inapposite because, whatever s 25A(1) might say and the New South Wales Parliament might have

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49 New South Wales, *Parliamentary Debates,* Legislative Council, 23 November 2010 at 27,870 (Michael Veitch, Parliamentary Secretary).

50 See, eg, *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26] (French CJ and Hayne J).

contemplated in enacting it, New South Wales lacks legislative competence to enact a law directly applicable in federal jurisdiction.[51]

64. *Fourth*, the CCA's reasoning comes at the question of the proper meaning of s 53A in sentencing *State offenders* in only an indirect manner. Their Honours address that issue through the lens of examining whether a sentencing court considering Part IB of the Crimes Act could do so consistently with s 53A of the NSW Act. The CCA concluded that this is possible because, in so far as there was any inconsistency between the two, the sentencing court could simply put the State consideration to one side consistent with s 53A(2) itself. Section 53A(2) only requires State factors to be considered "as are relevant", and on this hypothesis a State factor that is inconsistent with Part IB "could and would not be relevant" (**CCA [74]**).

65. One difficulty with this analysis is that it *does* involve a change in the meaning of s 53A(2). Part IB excludes any consideration of State factors, so the NSW Act would be excluded in its entirety in so far as working through the indicative sentences for a federal offence is concerned. That is most different to how s 53A(2) would operate and was intended to operate in respect of a *State offender*.

66. Another difficulty is that it would appear to contemplate a court sentencing a federal offender applying the NSW Act (perhaps even *starting* with the NSW Act) and only putting the State factors to one side if and to the extent that they are inconsistent with s 16A of the Crimes Act. Leaving aside that this would mean excluding all of them (the first difficulty), the process contemplated is a fundamentally different one to that required by s 16A. At the federal level, s 16A leaves no room for peculiarly local or state sentencing principles.

C.3 "Translation" is not possible

67. The CCA held in the alternative that if s 53A(2)(b) directed attention only to State factors, then this could be "translated" to permit a New South Wales court exercising federal jurisdiction to sentence a federal offender by reference to Part IB of the Crimes Act: **CCA [81]**. That was said to be because "[t]here is no change to the essential meaning of the provision, nor to its substantive legal operation": **CCA [81]**.

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[51] See *Rizeq v Western Australia* (2017) 262 CLR 1.

68. Once it is accepted that s 53A(2)(b) directs attention to Part 3 of the NSW Act and other provisions of the NSW Act, it cannot be accepted that there is no substantive difference between applying New South Wales sentencing factors as distinct from federal sentencing factors. The example of guilty pleas referred to at paragraph [51] above demonstrates the point. There are other differences between the regimes as identified by N Adams J (Rothman J agreeing) in *Chan v The King*.[52]

69. The CCA proposed that this "is a similar degree of translation to that involved in *Williams* and *Peel*, and involves a lesser degree than that involved in *Rohde*": **CCA [81]**. Those cases were about whether a federal office holder could exercise the appeal right conferred by State law on a State office holder. This Court held that the federal office holder could do so because that ensured that the conferral of federal jurisdiction on the State court was efficacious.

70. Those cases are distinguishable. It is one thing to treat exercising an appeal right as implicit or inherent in the Commonwealth Crown being permitted to commence and maintain a prosecution for a federal offence in a State Court; it would be distinctly odd to allow the Commonwealth Crown to prosecute the offence but then require the State Crown to run any appeal arising from that prosecution. But it is very different to treat it as implicit in the vesting of federal jurisdiction that federal sentencing principles must be applied so as to ensure the efficacy of that investment of jurisdiction. Such an implication is not necessary for that purpose. The translation proposed by the CCA here is much more radical than this Court's precedents permit.

71. For these reasons, the CCA's approach goes beyond any legitimate process of translation. Ground two is established. On resentence, the CCA ought not to have imposed an aggregate sentence at all.

C.4 Would translation produce the same result as the CCA's primary position?

72. The CCA clearly considered that translation would produce the same result as its primary position. But is that so? It seems that via translation the CCA had in mind that for federal offenders the sentencing court wholly ignores State factors and applies solely federal factors: see paragraph [63] above. Yet under its primary construction, the CCA opened up considerable uncertainty whether the sentencing court solely applies federal factors,

[52] [2023] NSWCCA 206 at [108]-[111]. *Chan* was overruled in *Vamadevan v The King* [2024] NSWCCA 223 for reasons that did not call these paragraphs into question.

or engages in some "hybrid" under which state factors play a role, if not a complete role: see paragraph [65] above. These represent two different approaches to sentencing. Translation (if it were available which it is not) would at least provide a clear path to what the sentencing court is to do.

73. The CCA's primary position invites significant uncertainty. It means the sentencing judge cannot open one statute book and easily discern the relevant factors to be applied. The judge must open the Crimes Act, and then the relevant State Act, and then form some amalgam list. If a given factor is expressed identically at federal and State level, it is added to the list. If it is expressed differently, presumably, its federal expression is added to the list. If a factor is in the federal list but not the State list, presumably, it is added to the amalgam. If it is in the State list but not the federal list, is it added to the amalgam?

74. The result is that this Court should not approve either formulation from the CCA for all of the reasons above. But if it had to, at least translation, as explained above, would not suffer the vice of being totally unworkable.

PART VII ORDERS SOUGHT

75. The appeal should be allowed, the orders of the CCA set aside and the matter be remitted to that Court for resentencing. The appellant sought and was granted special leave on the basis that it should be conditioned on the appellant paying the respondent's costs of the special leave application and of the appeal to this Court, and costs should be ordered accordingly.

PART VIII ESTIMATE OF TIME FOR ORAL ARGUMENT

76. The appellant will require two hours, which includes time for reply.

Dated: 22 May 2025

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

ANDREW STUART MCGREGOR

Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	*Acts Interpretation Act 1901* (Cth)	Compilation No 37	Sections 13, 15AA	Date of judgment in CCA	1 November 2024: Date of CCA judgment
2.	*Border Protection (Validation and Enforcement Powers) Act 2001* (Cth)	As enacted		Act introducing mandatory minimum sentences into *Migration Act 1958* (Cth)	27 September 2001: Commencement of statute
3.	*Crimes Act 1914* (Cth)	Compilation No 154	Part IB, ss 4K, 16A, 16AAA, 16AAB, 16AAC	Date of judgment in CCA	1 November 2024: Date of CCA judgment
4.	*Crimes (Sentencing Procedure) Act 1999* (NSW)	Historical version for 1 July 2024 to 30 November 2024	Part 3, ss 21A, 25A, 25D, 53A	Date of judgment in CCA	1 November 2024: Date of CCA judgment
5.	*Crimes (Sentencing Procedure) Amendment Act 2010* (NSW)	As enacted		Act introducing aggregate sentencing in NSW	None specifically
6.	*Crimes Legislation Amendment (Sexual Crimes Against Children and Community*	As enacted		Act introducing ss 16AAA-16AAC into *Crimes Act*	None specifically

	Protection Measures) Act 2020 (Cth)			*1958* (Cth)	
7.	*Criminal Appeal Act 1912* (NSW)	Current version	Section 6	Date of judgment in CCA	1 November 2024: Date of CCA judgment
8.	*Criminal Code* (Cth)	Compilation No 138	Sections 272.11	Date of offending in count one	11 August 2021 to 14 September 2021: date range for count one
9.	*Criminal Law (Sentencing) Act 1988* (SA)	Reprint No 22	Section 18A	Act in force when *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) commenced	21 September 2001: commencement of *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth)
10.	*Interpretation Act 1987* (NSW)	Historical version for 9 August 2024 to 20 November 2024	Section 12	Date of judgment in CCA	1 November 2024: Date of CCA judgment
11.	*Judiciary Act 1903* (Cth)	Compilation No 50	Sections 68	Date of judgment in CCA	1 November 2024: Date of CCA judgment
12.	*Migration Act 1958* (Cth)	Compilation prepared on 27 September 2001		Act in force following *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth)	21 September 2001: commencement of *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth)
13.	*Sentencing Act 1991* (Vic)	Current version	Section 9	Submission made about operation of existing provisions	None specifically
14.	*Sentencing Act 1995* (NT)	Version as in force at 1 June 2000 and current version	Section 52	Historical version: Act in force when *Border*	Historical version: 21 September 2001: commencement

				Protection (Validation and Enforcement Powers) Act 2001 (Cth) commenced Submission otherwise made about operation of existing provisions	of *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth)
15.	*Sentencing Act 1997* (Tas)	Historical version for 14 August 2000 to 18 September 2001 and current version	Section 11	Historical version: Act in force when *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) commenced Submission otherwise made about operation of existing provisions	Historical version: 21 September 2001: commencement of *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth)
16.	*Sentencing Act 2017* (SA)	Current version	Section 26	Submission made about operation of existing provisions	None specifically
17.	*Statutes Amendment (Sentencing) Act 1992* (SA)	As enacted		Act introducing s 18A into *Criminal Law (Sentencing) Act 1988* (SA)	None specifically