HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

C7 and C8 of 2023

BETWEEN:

RAYMOND JAMES CHOI HURT
Appellant

and

THE KING
Respondent

APPELLANT'S SUBMISSIONS

Part I: Suitable for publication

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

Part II: Issues

2. The issues raised by this appeal are whether:
   (i) In sentencing for an offence to which s16AAB of the *Crimes Act 1914* (Cth)[1] applies, should a court adopt the approach in *Bahar v The Queen,*[2] or the approach in *R v Pot*[3]? ("the *Bahar* issue.").
   (ii) What is meant by the phrase "where the relevant conduct was engaged in" in the application provisions for s16AAB of the *Crimes Act?*[4] ("the transitional issue").

Part III: Section 78B Notices

3. The appellant has considered whether notices should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and is satisfied that such a notice is not necessary.

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[1] "*Crimes Act*".
[2] (2011) 45 WAR 100; [2011] WASCA 249 ("*Bahar*").
[3] Supreme Court of Northern Territory Riley CJ 18 January 2011 ("*Pot*").
[4] Being Item 3(2) contained within Part 1 of Schedule 6 to the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020 ("the Amending Act").*

Part IV: Reasons for the judgment below

4. The medium neutral citation of the judgment below is *Hurt v The Queen* [2022] ACTCA 49.[5] The medium neutral citation of the primary judgement is *R v Hurt (No 2)* 2021 ACTSC 241.[6]

Part V: Statement of relevant facts

The offences

5. In considering the relevant facts, it is pertinent to note that:
   (i) the *Amending Act* introduced mandatory minimum penalties for certain offences against the *Criminal Code*. In particular, s16AAB of the *Crimes Act* introduced mandatory minimum terms for, inter alia, a second or subsequent offence against s474.22A(1) of the *Criminal Code*. Section 16AAB commenced on 23 June 2020;[7] and
   (ii) Section 474.22A of the *Criminal Code* is somewhat unusual in that the offence created by the provision of possession of material is **only** committed if the person who possesses the material had **themselves** obtained or accessed the material.
6. In 2019, the appellant was convicted of two "child sexual abuse offences" as that term is used in s16AAB(1) of the Crimes Act and sentenced to good behaviour orders. In 2020 the appellant committed three further offences involving transmitting, accessing, and possessing child abuse material.[8] The appellant pleaded guilty to these offences in the ACT Magistrates Court and was committed for sentence to the Supreme Court of the Australian Capital Territory. He was sentenced for these offences (and the consequent breach of good behaviour orders) by Mossop J (CAB pages 13 – 74).[9]
7. The transmission offence related to the period 26 May to 31 May 2020 and related to the transmission by the appellant to himself of child abuse material, being 357 photos and 7 videos. The access offence related to the period of 4-5 June 2020, and related to the access by the appellant of 104 photos.
8. The possession offence concerned the appellant's possession on 29 July 2020 (the date of the execution of a search warrant at the appellant's house) of:

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[5] "*Hurt*".
[6] *"Hurt (No 2)"*
[7] "The commencement date".
[8] The offences were: causing child abuse material to be transmitted to himself contrary to s474.22(1)(a)(ii) of the *Criminal Code* ("the transmission offence"); accessing child abuse material contrary to s474.22(1)(a)(i) ("the access offence"); and possessing child abuse material obtained or accessed using a carriage service contrary to s474.22A(1) ("the possession offence").
[9] *R v Hurt (No 2)* [2021] ACTSC 241 (*"Hurt (No 2)"*). CAB pages 13 – 74.

- The 104 photos he had previously accessed the subject of the access offence;
- The 357 photos he had previously transmitted to himself the subject of the transmission offence; and
- a further 25 photos and 48 videos.

9. There was thus considerable overlap of material covered by the transmission and access offences on the one hand, and the possession offence on the other (CAB pages 16 – 17).[10] It was agreed by the parties at the sentencing proceedings that of the material covered by the possession offence, only the further 25 photos were obtained or accessed after 23 June 2020. The further 48 videos had been obtained or accessed **before** 23 June 2020.

10 10. As the transmission and access offences were committed before the commencement date, the appellant was sentenced on those matters on the basis (accepted by both parties) that s16AAB did not apply.

11. For present purposes, the important offence is the possession offence. The appellant was sentenced for that offence on the basis that s16AAB applied to it. The possession offence was said to have been committed on a date after the commencement date, but the obtaining or accessing of the material said to be possessed mainly took place before the commencement date. This gives rise to the transitional issue.

Sentence by Mossop J

20 12. Mossop J engaged in a lengthy critique of *Bahar* and concluded "but for the decision in *Bahar* and subsequent cases, it would be appropriate to interpret the provisions in the manner contended for by the offender" (CAB page 33).[11] However, Mossop J could find no principled basis to depart from *Bahar* given the acceptance of that approach by intermediate courts of appeal. Despite the fact that the legislation was different, "the relevant statutory command, that is, a command to impose a sentence of "at least" a specified number of years is the same in the *Crimes Act* as it was in the *Migration Act"* (CAB pages 33 – 34).[12]

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[10] The facts were dealt with by Mossop J in detail at *Hurt (No 2)* [11] to [18]. CAB pages 16 – 17.
[11] *Hurt (No 2)* at [93]. CAB page 33.
[12] *Hurt (No 2)* at [94]. CAB pages 33 – 34.

13. In relation to the transitional issue, Mossop J accepted the submission of the appellant[13] that the increased penalty only applied to the offence of possession "insofar as it involved the 25 additional photographs" (CAB page 35).[14]

14. Mossop J sentenced the appellant to 4 years imprisonment for the possession offence, 15 months imprisonment for the access offence, and 15 months imprisonment for the transmission offence, with some accumulation between the counts.[15]

15. The starting point for the possession offence was 5 years, with a one year reduction for the plea of guilty which Mossop J noted was "the maximum that is permitted under s 16AAC(3)(a)" (CAB page 37).[16]

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The appeal to the Court of Appeal

16. The appellant appealed to the Court of Appeal on the basis that Mossop J had erred in following *Bahar,* and in the degree of accumulation. The Crown also appealed – on the transitional issue and on the basis of manifest inadequacy of sentence.

17. In the Court of Appeal the majority judgement[17] rather tepidly endorsed *Bahar*, noting that there were "cogent reasons" for concluding that ss16AAA and 16AAB "were intending to interact with the courts' sentencing discretion in the manner identified in *Bahar*, even if the reasoning in that case proved on further consideration to have been incorrect. In any event, … we think that reasoning is correct: or, at least, it is not flawed
20 to an extent that would justify this Court in departing from it." (CAB page 117).[18]

18. The majority[19] also ruled in favour of the Crown on the transitional issue, holding that "the minimum sentence set out in s 16AAB is applicable to the conviction on the possession charge as a whole. Its effect is not mitigated or adjusted as a result of the fact that most of the relevant child abuse material had been downloaded before s 16AAB came into effect." (CAB page 124).[20]

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[13] Although not on the basis put forward by the appellant. See *Hurt (No 2)* at [103] (CAB page 35): Mossop J did not find it necessary to engage in the characterization of physical and fault elements urged by the appellant: rather his Honour's concluded at [104] (CAB page 35): *"the most straightforward reading of the expression 'conduct engaged in' is to require that all of the conduct required to constitute the offence was engaged in after the relevant date. That is because element (a) and element (c) each refer to conduct."*.

[14] *Hurt (No 2)* at [106]. CAB page 35.

[15] The total sentence on the three offences was just under 4 years 10 months, with a non-parole period of 2 years 1 month.

[16] *Hurt (No 2)* at [120]. CAB page 37.

[17] Of Kennett and Rangiah JJ.

[18] *Hurt* at [156]. CAB page 117.

[19] With whom on this point Loukas-Karlsson J agreed - see *Hurt* at [6] (CAB page 89).

[20] *Hurt* at [193]. CAB page 124.

19. However, in effect, the majority accepted the appellant's argument concerning accumulation (CAB page 125)[21]

20. In re-sentencing the appellant, the majority adopted a starting point for the possession offence of 6 years, and were "inclined to apply a 25 per cent discount for the plea of guilty," (CAB page 125)[22] thus giving a sentence of 4 years 6 months.[23]

21. Dissenting, Loukas-Karlsson J found that the reasoning in *Bahar* and cases that had followed it was plainly wrong and ought not be followed (CAB page 99).[24] Loukas-Karlsson J endorsed the views expressed by Mossop J in holding that s16AAB "does no more than require a sentencing judge to impose a sentence of *at least* the minimum period specified for the offence" (CAB page 100).[25] In accordance with her Honour's rejection of *Bahar*, Loukas-Karlsson J would have adopted a starting point on the possession offence of 4 years and 9 months imprisonment, to which she would have applied a discount for the plea of guilty of 25 per cent, yielding a sentence of 3 years 6 months and 22 days (CAB page 104).[26]

Part VI: Outline of argument

A. The *Bahar* issue

Mandatory minimum penalties - the competing approaches

22. The operation of mandatory minimum sentencing regimes has been a matter of judicial controversy. Initially this arose in relation to a mandatory minimum regime introduced for offences against the *Migration Act 1958* (Cth).[27] It has continued in relation to the mandatory minimum provisions introduced by the *Amending Act*. Two competing approaches have emerged. In *Pot*, Riley CJ found that the correct approach was to determine the sentence that would have been imposed but for the existence of the statutory minimum, and if that sentence was less than the statutory minimum, increase it to the statutory minimum. That approach was rejected in *Bahar*, where the Court held that the statutory minimum was reserved for the lowest category of offending. In other words, the mandatory minimum was not just a floor, but a starting point.

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[21] See *Hurt* at [200]. CAB page 125.
[22] *Hurt* at [198]. CAB page 125.
[23] The total sentence was 4 years and 10 months (3 days longer than Mossop J) with a non-parole period of 2 years 2 months (1 month longer than Mossop J).
[24] *Hurt* at [68]. CAB page 99.
[25] *Hurt* at [75], emphasis in original. CAB page 100.
[26] *Hurt* at [103], [104]. CAB page 104.
[27] "*Migration Act*".

23. The effect of the *Bahar* approach is to increase penalties for the nominated offences generally. The *Pot* approach has the effect of increasing penalties only for those who would otherwise receive less than the mandatory minimum: such offenders must receive "at least" the nominated minimum.

24. The *Bahar* approach has been adopted by a number of intermediate appellate courts,[28] but has been doubted in a number of decisions, not least by Adams J and McCallum J[29] in obiter comments in *Dui Kol v R*,[30] and in the present matter by the primary judge Mossop J[31] and Loukas-Karlsson J dissenting in the Court of Appeal.

10 ***The statutory scheme introduced by the Amending Act***

25. These submissions will first consider the statutory scheme introduced by the *Amending Act*. No such consideration of the legislative context was engaged in (in any depth) by either *Bahar* or the cases which have followed it.

26. The *Amending Act* did increase the (maximum) penalties for some offences (mostly for those offences covered by s16AAA) but did not increase penalties for most of the offences subject to s16AAB, and in particular, did not increase the maximum penalty for an offence against s474.22A(1) of the *Criminal Code*. An increase in the maximum penalty for an offence is the usual way that the legislature would provide for a *general* increase in penalties for that offence.[32]

20 27. In other words, if the purpose had been to increase penalties **generally**, this would be expected to be effected through the increase in maximum penalties, not in the provision of a minimum sentence.[33] The scheme of the *Amending Act* and the extrinsic material, rather suggests that the purpose is to ensure that offenders should serve *some* time in custody, and sufficient time to permit the offender to undertake rehabilitation programs in custody.

The Amending Act

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[28] Including in relation to mandatory minimum penalties in the *Criminal Code Act Compilation Act 1913* (WA): *Eldridge v The State of Western Australia* [2020] WASCA 66.
[29] As her Honour then was.
[30] [2015] NSWCCA 150 ("*Dui Kol*").
[31] *R v Hurt* (No 2) [2021] ACTSC 241 ("*Hurt (No 2)*") (CAB pages 13 – 39).
[32] "An increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased": *Muldrock v The Queen* (2011) 244 CLR 120 at [31] per curiam.
[33] Schedule 5 of the Amending Act, which substitutes the increased maximum penalties is headed "increased penalties". Schedule 6 which inserts ss16AAA, 16AAB and 16AAC is headed "minimum penalties".

28. The *Amending Act* introduced mandatory minimum penalties for certain offences against the *Criminal Code*. In particular, s16AAB of the *Crimes Act* introduced mandatory minimum terms for, inter alia, a second or subsequent offence against s474.22A(1) of the *Criminal Code*.[34]

29. Unlike the *Migration Act* provisions considered in *Bahar*, the *Amending Act* inserted the provisions which are the subject of the present appeal into the **general sentencing provisions** of the Crimes Act, Part IB which is entitled "Sentencing, imprisonment and release of federal offenders". The key provisions for present purposes, ss 16A, 16AAA, 16AAB and 16AAC are in Division 2 of that Part, entitled "General sentencing
10 principles".

30. Section 16A of the *Crimes Act* sets out the matters to which a court is to have regard when passing sentence. Section 16A(1) provides that "a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence." The only amendment made by the *Amending Act* to s16A(1) was the addition of a note which reads: "Minimum penalties apply for certain offences—see sections 16AAA, 16AAB and 16AAC". Section 16A(2) sets out a number of matters both subjective to the offender and objective to the circumstances of the offending which the court must take into account, along with sentencing purposes such as specific and general deterrence.

20 31. Section 16AAB provides that if a person who has previously been convicted of a child sexual abuse offence is convicted of a current offence described in column 1 of an item in the table set out in the section, "the court must impose for the current offence a sentence of imprisonment of **at least** the period specified in column 2 of that item" (emphasis added).[35] Section 16AAB is subject to s16AAC, which provides for the reduction of the minimum penalty in certain circumstances.[36]

32. Section 17A(1) in Div 3 of Part IB headed "Sentences of imprisonment", provides that a court shall not pass a sentence of imprisonment "unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case". The *Amending Act* did not expressly amend s17A.

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[34] Section 16AAB commenced on 23 June 2000.

[35] The table inter alia includes an Item 24A relating to an offence against subsection 474.22A(1) of the *Criminal Code* with 4 years specified as the sentence of imprisonment.

[36] Section 16AAA which is not directly engaged here provides that if a person is convicted of an offence described in column 1 of an item in the table set out in the section, "the court must impose for the current offence a sentence of imprisonment of **at least** the period specified in column 2 of that item" (emphasis added). Section 16AAA is also subject to s16AAC.

33. Lastly, s19B of the Crimes Act, also in Part IB, deals with the discharge of offenders without proceeding to conviction. The operation of s19B is not affected by the *Amending Act*, meaning a non-conviction outcome, with no penalty, is still available for the offences covered by s16AAB.[37]

No discernable purpose of increasing sentences generally

34. The overall impression from the provisions in the *Amending Act* is that, except in providing minimum sentences for some offences or instances of offences, the general sentencing discretion of judges remains intact.

10 35. There is nothing in the extrinsic material which indicates a purpose of the provisions of the *Amending Act* to increase sentences **generally**. Rather, the concern appears to be that offenders should serve *some* time in custody (with a concomitant general deterrence effect), and that offenders should serve sufficient time to permit the offender to undertake rehabilitation programs in custody.

36. The explanatory memorandum for the *Amending Act*[38] outlines: [39]

> This Bill better protects the community from the dangers of child sexual abuse by addressing inadequacies in the criminal justice system that result in outcomes that insufficiently punish, deter or rehabilitate offenders.[40]

37. In the Second Reading Speech, the Attorney-General emphasised that child sex offenders

20 were "too often handed short jail terms and are released into the community without any supervision, or worse still, without serving a single day in prison".[41] He added "Too often, child sex offenders spend insufficient time in custody to undergo even treatment programs or receive any significant rehabilitation before being eligible for release back

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[37] Query whether s20(1)(a) of the *Crimes Act* which provides for conditional release of offenders after conviction, and is not expressly subject to the provisions inserted by the *Amending Act*, might also have operation unaffected by those provisions: it provides that where a person is convicted the court may conditionally release the person "without passing sentence on him or her". It is unnecessary to develop this argument here.

[38] Explanatory Memorandum for *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019* ("EM").

[39] At [1].

[40] Further, EM notes at [3] that the purpose of the amendments included to:

- *ensure that when sentencing a Commonwealth child sex offender, the court must have regard to the objective of rehabilitating the person, including by considering whether to impose any conditions about rehabilitation and treatment and considering if the length of sentence is sufficient for the person to undertake a rehabilitation program while in custody;* [This is specifically achieved by s16A(2AAA) which was inserted by the Amending Act.]
- *insert a presumption in favour of Commonwealth child sex offenders serving an actual term of imprisonment.*

[41] Second reading speech in the House of Representatives, 11 September 2019, Attorney-General Porter, p2444.

into the community" and referred to offenders being released without any form of supervision.[42] He said the "bill addresses this unacceptable situation by introducing a sentencing presumption in favour of actual imprisonment, rebuttable only in exceptional circumstances" and then referred to the introduction of minimum terms for serious child sex offences and recidivist child sex offences.[43]

38. None of these objects requires an increase in penalties generally: each is achieved by following the *Pot* approach.

The significance of the note to s16A(1)

39. Section 16A(1) requires a sentence that is of a severity appropriate in all the circumstances of the offence. Of the note inserted by the *Amending Act* to this subsection, the EM states: "This item clarifies that, despite section 16A(1), there will be applicable minimum penalties for certain Commonwealth child sex offences under proposed sections 16AAA, 16AAB and 16AAC."[44] This suggests that for the nominated offences, the court would go through the usual process of determining an appropriate sentence, and if that sentence were less than the minimum penalty, then **despite** it being a sentence of appropriate severity, a minimum penalty would apply. If the *Bahar* approach were correct, the note would be superfluous as the point of the minimum penalty on the *Bahar* approach is to provide a floor, which shrinks the range within which a sentence of an appropriate severity can be found.

Significance of s16AAC: court "is" taking into account plea of guilty and assistance

40. Section 16AAC provides a mechanism for the reduction of the minimum penalty if a court in considering the matters in s16A(2) "is" taking into account a plea of guilty[45] or assistance to authorities.[46] The use of "is" is significant: it means that the court will have to have considered the s16A(2) matters, and positively have determined to take either or both of those factors into account, **before** it can consider whether to reduce the minimum penalty.

The argument based on the statutory context

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[42] Ibid p2445.
[43] Ibid p2445.
[44] EM [197].
[45] Section 16A(2)(g) *Crimes Act*.
[46] Section 16A(2)(h) *Crimes Act*.

41. It is clear from the statutory scheme that the sentencing court must first assess the appropriate sentence without having regard to the minimum penalty.

42. First, the minimum penalty will only apply if the court determines not to discharge the offender under s19B of the *Crimes Act.*[47] In other words, the minimum penalty will only apply if the court determines to convict the offender.

43. Secondly, if the court does determine to convict, it must impose a sentence of imprisonment of "at least"[48] a particular duration, which suggests that the sentence may have to be increased if it is first determined to be of a lesser duration.

44. Third, in making its initial determination, the court will have regard to the matters set out in s16A(2) of the *Crimes Act*, including as provided by ss16AAC(2) and (3), paragraphs 16A(2)(g) and 16A(2)(h).

45. Nothing in the changes effected by the Amending Act requires that the consideration of the matters in s16A(2) (which are essentially left undisturbed by the *Amending Act*)[49] must produce a particular result: rather, if the court determines to impose a sentence of imprisonment, the sentence must if necessary be increased to "at least" the minimum term. In other words, the sentencing regime does not require that the result of the consideration of the s16A(2) matters must be equal or greater to the minimum term, rather, if it is less than the minimum term, the sentence actually imposed must be increased to "at least" the minimum term.

The reasoning in Bahar

46. Turning to *Bahar* and the cases that followed it, it must be pointed out that this case, and *Delzotto*, were the first appellate court considerations of the new statutory scheme embodied in the sentencing provisions of the *Crimes Act*. The provision in the *Migration Act* considered by *Bahar* was simple and specific; the new *Crimes Act* provisions are comprehensive, tailored into the general principle of sentencing for Federal offences, and drafted so as easily to permit the addition of further offences. The statutory schemes are somewhat different.[50]

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[47] Or semble, make a recognizance release order under s20(1)(a) of the *Crimes Act*. Section 19B deals with discharge of offenders without proceeding to conviction, s20(1)(a) deals with release on recognizance without passing sentence. Neither s19B nor s20(1)(a) was amended by the *Amending Act*. It is notable that s19 which deals with cumulative, partly cumulative or concurrent sentences of imprisonment, and s20(1)(b) which deals with suspended sentences of imprisonment, were amended by the *Amending Act*.

[48] Section 16AAA and s16AAB(2).

[49] Schedule 8 of the *Amending Act* amended s16A(2)(g) and inserted s16A(2)(ma).

[50] It is noted that in the *Migration Act* as it stood at the time:

47. *Bahar*, and the cases which both followed it and doubted it, are extensively rehearsed in the judgements below. (CAB pages 25 – 28; 91 – 94; 110 – 112)[51] A general criticism of the *Bahar* line of cases is that there was little consideration of the statutory context, and scant regard to the principle of legality. Conversely, that principle is heavily relied upon by judicial critics of *Bahar*, including Mossop J and Loukas-Karlsson J in the present matter.

48. *Bahar,* which was decided soon after *Pot,* considered s233C of the *Migration Act* which provided that for particular offences "the court must impose a sentence of at least [a certain length]", and "must also set a non-parole period of at least [a certain length]".[52] The essence of the decision is:[53]

- Section 233C was positively inconsistent with s17A of the *Crimes Act* and s233C prevailed;[54]
- Otherwise, there was no positive inconsistency in terms between s233C and the general sentencing provisions in the *Crimes Act 1914*. *"In particular, the sentencing principles are intentionally framed at a level of generality for application within the boundaries of power established not only by the maximum statutory penalty but also the minimum statutory penalty."*[55]
- The statutory maximum and minimum also dictate the seriousness of the offence for the purpose of s 16A(1): "… *The statutory minimum and statutory maximum penalties are the floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the general sentencing principles are to be applied.*"[56]

49. There were a number of questionable assumptions underpinning this judgment. **First**, there was what is, with respect, a facile equation made between maximum statutory penalties on the one hand, and minimum statutory penalties on the other. The cited

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- A note appeared to the offence creating provisions s232A and 233A which read: "Sections 233B and 233C limit conviction and sentencing options for offences under this section."
- Resort to s19B of the *Crimes Act* was specifically excluded by s233B;
- Section 233C included mandatory non-parole periods as well as mandatory minimum sentences of imprisonment.

[51] See *Hurt* per Kennett and Rangiah JJ [127] to [138]; *Hurt* per Loukas-Karlsson J [17] to [25]; *Hurt (No 2)* [50] to [66] per Mossop J. (CAB pages 110 – 112; 91 – 94; 25 – 28 respectively).
[52] Note the length of the mandatory non-parole was less than the length of the mandatory minimum penalty; cf s 25B(1) of the *Crimes Act 1900* (NSW).
[53] McLure P, with whom Martin CJ and Mazza J agreed. It was implicit in the reasoning of McLure P that her Honour rejected the reasoning of Riley CJ in *Pot*.
[54] *Bahar* [53].
[55] *Bahar* [54].
[56] *Bahar* [54].

authority of *Muldrock v The Queen*[57] does not support the proposition that the well known statement in *Markarian v The Queen*[58] concerning maximum penalties is "equally applicable" to minimum statutory penalties.[59] As Mossop J noted in the present matter, in assuming that the statutory minimum is a goalpost equivalent to the statutory maximum, "this reasoning assumes the correctness of the characterization … that it seeks to prove. … [W]hether there is such an equivalence must be a question requiring detailed examination of the text of the statute and its context." (CAB pages 30 – 31)[60] A consideration of the operation of the statutory minimum penalties provided by s16AAA and 16AAB and statutory maximums reveals the difference. A maximum penalty is just that – it is the maximum sentence that can be imposed: a Court cannot impose a sentence more severe than the statutory maximum. It is a true ceiling. On the other hand, the mandatory minimum penalties in ss 16AAA and 16AAB do not operate as a true floor because a sentencing court may:

- proceed without conviction and without penalty: s19B;
- sentence the person to imprisonment but release the person immediately, subject to conditions, if there are exceptional circumstances: s20(1)(b)(iii);
- reduce the minimum sentence to take into account a plea of guilty and/or assistance to authorities: s 16AAC.

50. **Secondly**, the principle of legality is given short shrift in *Bahar*. McLure P mentions the principle, then notes enigmatically that "the strength of the presumptions can vary according to whether the rights and principles are "fundamental" or of some lesser status",[61] without indicating the status of the rights in question in *Bahar*. Contrast the remarks of Adams J in *Dui Kol*:[62]

> *The advantage of the* Pot *interpretation is that it does least violence to fundamental principles of criminal justice, which measures punishment, with regard to the statutory benchmarks, certainly, but necessarily also by reference to the particular circumstances of the offence and of the offender, both of which may vary very significantly from case to case. It also maintains as much as possible the important principle that offenders are not sentenced by the legislature but by independent courts.*

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[57] (2011) 244 CLR 120 at [26] – [31].
[58] (2005) 228 CLR 357 at [31].
[59] *Bahar* [48] – [49].
[60] *Hurt (No 2)* at [82]. CAB pages 30 – 31.
[61] Bahar at [51].
[62] At [14]. See also *Hurt (No 2)* at [91], [92] per Mossop J (CAB page 33) and *Hurt* at [51] per Loukas-Karlsson J (CAB page 97).

51. **Thirdly**, and perhaps most tellingly, *Bahar* does not grapple with the statutory language and context: as Mossop J points out, the reasons do not disclose that attention was paid to the expression "at least" – "[r]ather, the exercise of statutory interpretation appears to have been achieved more by reference to assumed context and purpose than by reference to the actual words used or any textual expression of the purpose of the legislation." CAB page 101)[63] This led to a "conclusory statement" equating the statutory maximum with the statutory minimum (CAB page 101).[64]

The cases that followed Bahar

52. Turning to the cases which have followed *Bahar*, they are generally marked by an uncritical acceptance of the reasoning in *Bahar*,[65] with a similar failure to engage in contextual analysis of the legislation, or properly to consider the effect of the principle of legality. For example, in *R v Karabi*,[66] which was the first occasion the matter was considered at the appellate level in Queensland, Muir JA simply cited the reasons in *Bahar* and concluded that "this Court is obliged to follow the decision of another intermediate appellant court unless persuaded that it is plainly wrong".[67] The reasoning in *Bahar* having been so, with respect, uncritically adopted in *Karabi*, *Bahar* became holy writ in Queensland.[68] Similarly, when the matter was considered by the Court of Appeal in Victoria,[69] the "conclusory" statement from *Bahar* equating maximum penalties and minimum sentences was adopted without any analysis.[70]

53. In *Karim*, Allsop P did attempt a further justification of *Bahar*, advancing[71] an "independent reason" which favoured the construction in *Bahar*: the *Pot* reasoning would result in "unequal justice", because of compression at the bottom end of the mandatory minimum. Allsop P continued: *"...Bahar permits all usual sentencing*

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[63] *Hurt (No 2)* at [80]. (CAB page 101).
[64] Ibid.
[65] For example, in *Karim v The Queen* [2013] NSWCCA 23 ("*Karim*") Allsop P conceded at [44] that the *Pot* approach was "open and arguable, but "its arguability does not convince me of any error in the approach taken in four intermediate Court of Appeal decisions in two States". In *Hurt*, at [156] (CAB page 117) the majority concluded that the reasoning was correct, "or, at least, it is not flawed to an extent that would justify this Court in departing from it". This begs the question: how flawed would it have to be to justify the court from declining to follow it?
[66] [2012] QCA 47.
[67] At [35]. Fraser and Chesterman JJA agreed. The contrary had not been argued.
[68] See *R v Nitu* [2012] QCA 224; *R v Latif* [2012] QCA 278; *R v Selu* [2012] QCA 345.
[69] *DPP v Haidari* [2013] 149.
[70] At [40] per Harper JA with whom Weinberg JA and Priest JA agreed.
[71] *Karim* at [45].

considerations, including parity, to be accommodated, though in a more compressed range, and with the consequence of a general increase in the levels of sentences".[72]

54. Criticism of Allsop P's compression argument has been a key factor in judicial doubt of the *Bahar* approach. In *Dui Kol*, Adams J, while accepting the Court was bound to apply *Bahar*,[73] engaged in a vigorous critique of the reasoning.[74] In particular, Adams J found Allsop P's "independent reason" was unpersuasive: The principle of parity has never justified an increase of a comparative sentence, only a decrease.[75] To increase further a sentence which on usual principles was greater than the minimum simply multiplied injustice. *"I accept, of course, that the Court must apply the law as it is prescribed by the legislature but I do not see that there is a duty to disguise its inherently arbitrary character by emollient jurisprudence."*[76] Mossop J, too, found Allsop P's additional reason of marginal significance: the "conceptual elegance" of the approach being "achieved at a very high cost" (CAB page 31).[77]

The principle of legality

55. Perhaps the most telling argument against the *Bahar* reasoning involves the principle of legality. In approaching the task of construing the statutory words, in a case involving the imposition of criminal penalties the principle must be of significance. As Mossop J noted (CAB page 33):[78]

> *The imposition of criminal penalties is the most basic infringement of personal liberty. Whether described as the principle of legality or simply as a principle of interpretation which tends against an interpretation which expands the scope of penal laws, it is a principle which the legislature must be taken to be conscious of.*

56. Mossop J then cited authority for this proposition and continued:

> *These comments appear particularly apt in the present case where neither the text nor the extrinsic material indicate that the Commonwealth Parliament has clearly grasped the full implications of the interpretation contended for by the Crown and hence accepted political accountability for such legislation.*

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[72] Ibid.
[73] *Dui Kol* at [11].
[74] McCallum J (as her Honour then was) at [27] shared Adam J's reservations as to the correctness of *Bahar*. Hoeben CJ at CL at [1] did not join in Adam J's observations.
[75] *Dui Kol* at [16].
[76] *Dui Kol* at [16].
[77] *Hurt (No 2)* at [85]. CAB page 31.
[78] *Hurt (No 2)* at [91]. CAB page 33.

57. This approach was approved and amplified by Loukas-Karlsson J in the Court of Appeal (CAB page 101).[79] Her Honour referred to a classic statement of the principle by Edelman J[80] and continued that given that the *Bahar* approach has the effect of an overall increase in sentences for *all* offenders clear words would be required to effect this: "judges must take care to ensure that they do no more than Parliament has intended." (CAB page 102).[81]

58. The critique of *Karim* engaged in by Adams J and McCallum J in *Dui Kol* was also fundamentally informed by the principle of legality.[82]

Conclusion on Bahar issue

59. *Bahar* rests on unfirm foundations and should not be followed. The conclusion of Loukas-Karlsson J below that *Bahar* was plainly wrong and ought not be followed was sound. The statutory language and the extrinsic material support the conclusion that all that was done by the *Amending Act* was to ensure a minimum term of imprisonment, while keeping the sentencing framework otherwise intact. The principle of legality supports this interpretation. The compression effect, relied upon to support *Bahar*, is simply a consequence of the amendments, and is not a proper basis to ignore the statutory language and the principle of legality. The majority in the Court of Appeal wrongly interpreted s16AAB. The sentencing judge should have applied all relevant sentencing factors to determine the appropriate sentence, and if that were less than the statutory minimum, then raise the sentence to the threshold.[83] It was wrong to treat the mandatory minimum as a starting point reserved for the least serious category of offending.

B. The transitional issue

The appellant's element analysis

60. The transitional issue arises out of conflicting analyses of the elements of the offence created by s474.22A(1) of the *Criminal Code*, and the interaction of those elements with

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[79] *Hurt* [80] et seq. CAB page 101.
[80] In *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at [55]:
"... [The principle of legality] usually represents the natural process of reasoning that the more important or fundamental a person's right, and the greater the alleged adverse effect on the right, the less likely it is that Parliament would have intended that effect, and the clearer the words that are required to achieve it. ..."
[81] *Hurt* at [85]. CAB page 102.
[82] See Dui Kol at [14] per Adams J and [29] per McCallum J.
[83] The Court would then apply s16AAC if applicable.

the transitional provisions. The transitional provisions provided that the amendments made by this Part apply "in relation to conduct engaged in on or after the commencement of this Part", and specifically provided in relation to s16AAB that it applied: "where the **relevant conduct was engaged in** on or after the commencement of this Part".

61. The reference to "conduct engaged in" is significant. "Conduct" is one of the physical elements the existence of which must be proved to establish guilt under the *Criminal Code*.[84] Since it is only the conduct engaged in after the commencement date that is subject to the increased penalty, it is necessary to examine the offence creating provision to identify what the conduct elements of the offence are, as distinct from elements that are a result of conduct; or a circumstance in which conduct, or a result of conduct, occurs.

62. It is submitted that analysis of the **physical** elements of s474.22A(1) reveals it contains **two** physical elements of conduct,[85] namely:

    (1) (per paragraph 474.22A(1)(c)) A person (A) **obtained or accessed** material; and

    (2) (per paragraph 474.22A(1)(a)) A has **possession or control** of the material[86].

63. Section 474.22A(3) confirms that s474.22A(1)(c) contains two physical elements, a conduct element (obtaining or accessing material) and an element of circumstance in which the conduct occurred (the material was obtained or accessed using a carriage service).

64. The offence created by s474.22A(1) is unusual in that it can only be committed by a person possessing/controlling material that **they themselves** have accessed or obtained. It is not an offence **under this section** for a person to possess / control material that another has accessed / obtained. Both physical elements in s474.22A(3) must be proved by the Crown to make out the offence, but if the prosecution prove the matters in paragraphs 474.22A(1)(a), (b) and (d) beyond reasonable doubt, the physical elements are presumed unless proved to the contrary by the accused.[87]

How the matter was dealt with below

65. The Crown's position was that the element that the accused used a carriage service to

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[84] *Criminal Code* s 3.2, 4.1. Conduct" is defined as "an act, an omission to perform an act or a state of affairs" Engage in conduct" means do an act; or omit to perform an act: *Criminal Code* s 4.1(2). The other physical elements are: a result of conduct; or a circumstance in which conduct, or a result of conduct, occurs.

[85] The other elements, being the use by A of a carriage service to obtain or access the material; the material being child abuse material; and the material being in the form of data held in a computer, were on this analysis, physical elements of circumstance in which conduct occurred.

[86] Section 473.2 of the *Criminal Code* defines what is meant by possession or control in this context.

[87] The accused bears a legal burden in relation to this issue: s13.4 of the *Criminal Code*.

obtain or access the material was a physical element of circumstance rather than conduct and thus not caught by the transitional provisions. On the Crown analysis the only physical element of conduct was the possession of the material which continued after the commencement date. The Crown relied on *Allison v The Queen.*[88] The issue in that case was whether offences of access and possession were duplicitous. The Court engaged in an element analysis of the offences and concluded they were not. The Court did "not accept"[89] an argument that the physical element in s474.22A(1)(c) was a conduct element, but noted that even if it were, it would make no difference to the application.

66. Mossop J accepted that, as a consequence of the operation of the transitional provisions, the increased penalties only applied to the 25 additional items. His Honour however, did not find it necessary to engage in the element analysis urged by each side, but rather held that using a carriage service to obtain or access material involved conduct, albeit conduct in the past, and it was irrelevant how that conduct was characterised (CAB page 35).[90]

67. The Court of Appeal rejected Mossop J's approach and accepted the analysis in *Allison*, although noting that view did not form part of the ratio of that case (CAB page 123).[91] Their Honours also relied on observations in *R v Delzotto*,[92] endorsing *Allison*, noting the view "does appear to have been a necessary step in the reasoning in that case" (CAB page 123).[93]

68. Central to the Court of Appeal's reasoning was the significance placed on the fact that whereas paragraph 474.22A(1)(a) is expressed in the present tense, paragraph 474.22A(1)(c) is expressed in the past tense. This, in the Court's view, indicated that the conduct referred to in paragraph 474.22A(1)(c) "lies in the background" to the conduct described in paragraph 474.22A(1)(a), which in turn favoured "the view that para (c) describes an element of circumstance rather than of conduct." (CAB pages 122 – 123).[94]

69. It is unusual to have a mixture of tenses such as is found in s474.22A(1). However, in itself, this cannot conclude the issue of whether words which describe a person using a carriage service to "obtain or access" material describe conduct. It is pertinent to note that it is only those persons who have engaged in the conduct of obtaining or accessing

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[88] [2021] VSCA 308.
[89] At [41].
[90] *Hurt (No 2)* at [103] – [104]. CAB page 35.
[91] *Hurt* at [190]. CAB page 123.
[92] [2022] NSWCCA 117 at [60] – [66].
[93] *Hurt* at [190] per Kennett and Rangiah JJ, with whom on this point Loukas-Karlsson agreed. CAB page 123.
[94] *Hurt* at [187]. CAB pages 122 – 123.

the material who may be charged under the section. As it is necessary that the person be shown to have both accessed / obtained the material, and possessed it, then both of those elements, which describe conduct, should be construed as conduct elements.

70. The Court of Appeal also relied on the reversal of onus in relation to paragraph 474.22A(1)(c) as supporting their analysis, although conceding that the reverse onus provisions "are not logically inconsistent with the element described in para (c) being one of conduct." (CAB page 123).[95] It is submitted that the reversal of onus is simply irrelevant – the Crown must prove the obtaining or accessing, albeit can rely on the reversal of onus on the issue.

10 71. The Crown argued that paragraph 474.22A(1)(c) embodied a "jurisdictional element" (the use of a carriage service). The Court of Appeal rightly rejected this argument (CAB page 123).[96] Paragraph 474.22A(1)(c) plainly embodies two elements, only one of which is a jurisdictional element of circumstance.

Conclusion on the transitional issue

72. It is submitted that *Allison* did not consider the effect of the transitional provisions and that the conclusion about the elements was obiter. The element analysis accepted by the Court of Appeal here was wrong, and the transitional provisions have thereby been misapplied. The transitional provisions only applied to conduct engaged in after the
20 commencement date, and here, the relevant conduct was **both** the obtaining or accessing of the material, as well as the possessing or controlling of the material. Accordingly, as, most of the material subject of the charge was obtained or accessed before the increase in penalty[97] the new provisions either did not apply at all, or applied only in relation to the material obtained or accessed after the commencement date. If they did not apply at all, s16AAB was not engaged. If they applied only to the material obtained after commencement, the offence was comparatively low in objective seriousness, even if the mandatory minimum applied.

Part VII: Orders sought by the appellant

30 73. The orders sought are:

(a) That the appeal be allowed.

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[95] *Hurt* at [188]. CAB page 123.
[96] *Hurt* at [189]. CAB page 123.
[97] As explained above, just 25 images were obtained or accessed after the new penalty came into effect.

(b) That the matter be remitted back to the ACT Court of Appeal for determination according to law.

Part VIII: Estimate of time for oral argument

74. Two hours.

Dated June 2023

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Annexure A – List of statutes and statutory instruments

Pursuant to Practice Direction No. 1 of 2019, the Appellant sets out below a list of the constitutional provisions statutes and statutory instruments referred to in these submissions.

Constitution, Statutes and Statutory Instruments	Provisions	Version
Commonwealth		
Crimes Act 1914 (Cth)	ss 16A, 16AAA, 16AAB, 16AAC, 17A, 19B, 20	Current
Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020	Item 3, Schedules 5, 6 and 8	Current
Criminal Code (Cth)	ss 3.2, 4.1, 13.4, 473.2, 474.22, 474.22A	Current
Judiciary Act 1903 (Cth)	s 78B	Current
Migration Act 1958 (Cth)	ss 233A, 233B, 233C	As in force at 23 June 2009
New South Wales		
Crimes Act 1900 (NSW)	s 225B	Current
Western Australia		
Criminal Code Act Compilation Act 1913 (WA)		Current

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