HIGH COURT OF AUSTRALIA

## NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 19 Jul 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

### Details of Filing

| | |
|---|---|
| File Number: | C7/2023 |
| File Title: | Hurt v. The King |
| Registry: | Canberra |
| Document filed: | Form 27E - Reply-appellant reply in respect of both C7 and C |
| Filing party: | Appellant |
| Date filed: | 19 Jul 2023 |

### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY
BETWEEN:

C7 and C8 of 2023

RAYMOND JAMES CHOI HURT
Appellant

and

THE KING
Respondent

# APPELLANT'S REPLY

## Part I: Suitable for publication

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

## Part II: Reply

### The transitional issue

2. The respondent properly concedes that if the transitional issue is resolved in favour of the appellant, then s16AAB did not apply to the appellant.[1] Specifically, the respondent properly concedes that if *some* of the material possessed was accessed or obtained prior to 23 June 2020 (and *most* of it was) then if the appellant's arguments as to the transitional issue are correct, s16AAB had no application *at all* to the charge.[2]
3. The respondent in effect accepts (**RDS** [17]) the appellant's argument[3] that the issue is to be resolved by ascertaining whether the element of the offence against s474.22A(1) that a person "obtained or accessed [child abuse] material" is a physical element of conduct in accordance with the *Criminal Code*.[4] Under s474.22A(1) the prosecution must prove that the accused (as distinct from another person) both obtained or accessed the material, **and** possessed it. Subsection 474.22A(3) makes it clear that paragraph 474.22A(1)(c) contains two elements: the accused "obtained or accessed the material"; and the accused used a carriage service to do so. The provision "obtain or access" material can only be the description of a physical element of conduct.[5] The provision of "used a carriage service" to obtain or access material describes a circumstance in which

---

[1] Respondent's written submissions in *Delzotto v The King* (**RDS**) [8].
[2] Respondent's written submissions in *Hurt v The King* (**RHS**) [9].
[3] Appellant's submissions (**AS**) [61].
[4] The plurality of the Court of Appeal was also of this view: see *Hurt v The Queen* [2022] ACTCA 49 "*Hurt*" at [185] (CAB 122).
[5] Cf *Criminal Code* s4.1(1)(a).

conduct (the obtaining or accessing) occurs.[6]

4. Contrary to this, the respondent argues **RDS** [18] that s474.22A(1)(c) describes one element, being an element of circumstance in which conduct occurred. In doing so, the respondent ignores the effect of s474.22A(3) and fails to address the obvious point that an offence may have more than one physical element of conduct.

5. The respondent also relies **RDS** [18] on the fact that no fault element attaches to the element or elements in s474.22A(1)(c). As the plurality of the Court of Appeal conceded, the lack of a fault element attaching to s474.22A(1)(c) and the reversal of onus of proof "are not logically inconsistent with the element described in para (c) being one of conduct".[7] Actually those matters are *irrelevant* – the prosecution still has to prove that the accused obtained or accessed the material, albeit the prosecution's task is made easier.

6. The respondent's argument **RDS** [20] that the only conduct which is "criminalised" by s474.22A(1) is having possession or control of child abuse material is wrong: the conduct which is criminalised is the conduct of obtaining or accessing the material **and** the conduct of possessing the material so accessed or obtained. Only a person who has assessed or obtained the material they then possess can be convicted.[8] It follows that the "conduct engaged in" in the present matter was not engaged in on or after the commencement of the Part.

**The *Bahar* issue**

7. The respondent rightly acknowledges **RDS** [23] that the issue here is one of statutory construction. It is telling therefore that the respondent eschews close attention to the statutory words in favour of an argument by analogy with maximum penalties. The suggested equivalence is false,[9] and the respondent dismisses with little or no analysis or argument the significance to the task of statutory construction of: the words "at least" in both s16AAA and s16AAB(2); the note to s16A(1); and the word "is" in s16AAC(2)(a) and (b). Strikingly also, there is virtually no analysis of the reasoning in *Bahar* itself, nor the cases which have followed it.

---

[6] Cf *Criminal Code* s4.1(1)(c).
[7] Hurt [188(b)] (CAB 123).
[8] It is pertinent that other offences are provided for both accessing etc child abuse material using a carriage service s474.22 *Criminal Code*; and possessing etc child abuse material for use through a carriage service s474.23 *Criminal Code*.
[9] Cf *Hurt* per Loukas-Karlsson J at [47] (CAB 96).

*No analogy with maximum penalties*

8. The respondent argues that a minimum penalty is a yardstick "in the same manner" as a maximum sentence **RDS** [39]. But placing the same label on the minimum penalty regime assumes the argument and obscures the differences in the way sentencing works between maximum and minimum penalties. The minimum penalties here are not a "floor" in the way that maximum penalties are a ceiling. A sentence below the minimum penalty may be imposed in various ways: by a non-conviction order;[10] a suspended sentence;[11] through the mechanism in s16AAC; and by a non-parole period. Accordingly, contrary to the respondent's argument **RDS** [46] the "theoretical underpinnings" of maximum and minimum are not the same and there is a principled basis to treat them differently (cf **RDS** [36]). A penalty of "at least" a specified period, which period is liable to be reduced in particular circumstances, is not a "yardstick" of "appropriate punishment" in the same way that a maximum is a yardstick.

*Parity proportionality and legality*

9. For the respondent "the concern to achieve proportionality and equality of treatment" trumps the principle of legality **RDS** [63]. The respondent asserts **RDS** [48] that the appellant does not identify an error in Allsop P's "independent reason", but ignores the critique of that "independent reason" summarised at **AS** [54]. The error is in failing to recognize that it is the statute *itself* which affects parity and proportionality: it is not for judges to "multiply the injustice" by further increasing sentences for others in an arbitrary fashion contrary to the principle of legality.[12] The respondent asserts that those others[13] should have no cause for complaint when their sentences are well above where they would previously have been (**RDS** [68]), but for those offenders, Parliament has not increased the maximum penalty.[14]

*"At least"*

10. The respondent asserts dogmatically that the words "at least" in both s16AAA and s16AAB(2) are of no relevance to the construction issue **RDS** [31]. Ignoring those words, the respondent's argument is that "s16AAB has an operation to indicate

---

[10] Under s19B(1) *Crimes Act*.
[11] Under s20(1)(b) *Crimes Act*, noting the requirements for special circumstances in some instances.
[12] Cf *Dui Kol* at [16] per Adams J (McCallum J agreeing at [27]); *Hurt (No 2)* at [85], [91] per Mossop J CAB 31, 33); *Hurt* at [85] - [86] per Loukas-Karlsson J CAB 102).
[13] Who the respondent describes as "offenders of a less serious kind, but still well more serious than the least worse case" **RDS** [68].
[14] Cf Loukas-Karlsson J in *Hurt* at [85]: *"judges must take care to ensure that they do no more than Parliament has intended"*.

something about how the sentencing judge is to approach the *task of severity* under s16A" (**RDS** [27] emphasis added). It is worth reiterating what s16A actually provides. In determining the severity of the offence, the sentencing judge is directed by s16A(1) solely to the *circumstances of the offence*.[15] As Riley CJ noted in ***Pot***:[16]

> There is nothing to suggest that it was intended that the requirements of s 16A(1) of the *Crimes Act* should be read to require a Court to determine the appropriate severity of a sentence by reference to a predetermined base not necessarily reflecting the circumstances of the offending and which may be removed from what the Court would otherwise consider an appropriate sentence in all the circumstances.

11. Contrary to the respondent's argument, s16AAB has no effect on the "task of severity" under s16A: Having determined a sentence in accordance with the edict in s16A(1), if such a sentence is less than the statutory minimum, the court must then impose "at least" the minimum in accordance with s16AAA or s 16AAB. s16AAB operates once that task is complete, to ensure that "at least" a minimum is imposed. The effect of the sections is not that a judge is to ignore, or in some unspecified way attenuate consideration of, the circumstances of the offence in determining appropriate severity. Instead the judge performs the task required by s16A(1), having been warned by the note to the subsection that the task is not over - for certain offences, notwithstanding what will be the determination of severity, minimum penalties apply.

12. A variation on the respondent's argument at **RDS** [51] is that while "for offences in general, s16A operates in accordance with its terms", for specific offences s16AAA and s16AAB *amend* s16A(1) The sentencing judge must (so the argument goes) take account what Parliament has said about the severity of the specified offences. The simple answer is that the Amending Act says nothing about the *severity* of specific offences, leaving that to be determined by the circumstances of the offence, and not by the penalty applying to the offence. If it had been desired in specific instances to have the severity of the particular offence be determined by reference to the penalty applying to the offence, then an amendment to s16A would be required. Specifically, if it were desired to make special provision for consideration of particular offences in reaching a conclusion under s16A, this could be expected to take the form of an addition to the matters to be taken into

---

[15] Section 16A 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*" (emphasis added). The Amending Act does not amend s16A, but merely inserts a note "Minimum penalties apply for certain offences—see sections 16AAA, 16AAB and 16AAC"

[16] Supreme Court of Northern Territory Riley CJ 18 January 2011 ("*Pot*"), reproduced in *Bahar* at [33].

account under s16A(2).[17]

*The note*

13. The respondent deems the note to s16A(1) "an irrelevance" **RDS** [49] - [50], but then tellingly seeks to remould it nearer to the respondent's heart's desire as being a note directed to advising the sentencing court as to what it must take into account (the minimum penalty rules) when *assessing severity* under s16A(1). If that is what the note was intended to achieve, then one wonders why it did not say that. Instead, in the words of the EM, the note simply "clarifies that, despite section 16A(1), there will be applicable minimum penalties" for particular offences. Contrary to the argument of the respondent, it leaves the operation of s16A(1) unaffected.

*The court "is" taking into account plea of guilty and cooperation*

14. In disputing the relevance of the appellant's argument **RDS** [57], the respondent again seeks to recast the provision to fit the argument. The respondent's argument is tantamount to this: the consideration of the s16A factors must result in a specific sentence which is equal to or greater than the specified minimum. Again, if that had been the objective why not simply so provide. Instead the s16A factors relating to the circumstances of the offence are left untrammeled, with a subsequent possible adjustment to ensure that the sentence be "at least" a particular minimum. This explains the use of the word "is" in s16AAC(2)(a) and (b) – the court will have to consider those matters with all the other relevant matters in considering its task under s16A. If it "is" taking into account those matters *in its consideration of the s16A matters*, then, when it comes to adjust the sentence if necessary to "at least" the minimum, the reduction of minimum penalty provisions in s16AAC(2) and (3) come into play.[18]

Dated 17 July 2023

Name: Jonathan White SC
Telephone: 0402 386700
Email: jon.whitesc@icloud.com

[17] For example, certain offences have been specifically exempted from the exclusion of consideration of customary law under s16A *Crimes Act*: see s16A(2A), s16A(2AA).

[18] The respondent also misunderstands the operation of s19B at **RDS** [55]. The court will have to consider the s16A factors *en route* to a s19B outcome: s16A applies to "an order to be made" which includes s19B. This emphasizes that the s16A factors must be considered *before* moving to passing sentence.