HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **ENRICO ROBERT CHARLES DELZOTTO**

Appellant

and

THE KING

Respondent

SUBMISSIONS OF THE RESPONDENT

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. The following submissions are in response to the written submissions of the appellant in *Delzotto v The King* (**ADS**) and the written submissions of the appellant in *Hurt v The King* (**AHS**). The respondent will rely upon these written submissions in both appeals.

3. The first issue in these appeals is whether s 16AAB of the *Crimes Act 1914* (Cth) applied to each of the appellants by reason of the application provision in s 3(1) of the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) (**Amending Act**). The respondent submits that the answer is "yes", which is consistent with the unanimous decisions of the courts below.

4. The second issue in these appeals, which arises only if the respondent succeeds on the first issue, is whether the minimum sentence in s 16AAB of the *Crimes Act* is a yardstick for the least serious instances of the specified offences to which it applies (the approach in ***Bahar*** *v The Queen*[1]) or whether it operates only to require a sentencing judge to increase the sentence which they would have imposed (otherwise ignoring the minimum sentence) if that sentence is less than the stipulated minimum (the approach in *R v* ***Pot***[2]). The respondent submits that the former is the correct approach.

5. The second issue is best approached and answered in respect to s 16AAB in the context of Part IB of the *Crimes Act* in which it operates (with attention to the direct analogy in

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1 (2011) 45 WAR 100.

2 (Unreported, NTSC, 18 January 2011, Riley CJ).

the provisions of the *Migration Act 1958* (Cth) that were in issue in *Bahar*), rather than as some more general enquiry into all mandatory minimum regimes that currently exist, or could possibly be devised, across the entire Federation.

PART III SECTION 78B NOTICE

6. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV MATERIAL FACTS IN DISPUTE

7. There are no facts in dispute, and the respondent does not take issue with **ADS [7]-[13]**.

PART V ARGUMENT

A. GROUND 2 – THE APPLICATION PROVISION OF THE AMENDING ACT

8. The starting point in this appeal should be ground 2, because ground 1 is not reached if the appellants succeed in demonstrating that s 16AAB did not apply to them at all.

9. The issue in ground 2 arises in this appeal in the following way; the ground arises in slightly different factual circumstances in *Hurt*.

10. Mr Delzotto had been convicted of a Commonwealth child sexual abuse offence, namely an offence against s 474.22A(1) of the *Criminal Code* (Cth). It provides:

> **474.22A Possessing or controlling child abuse material obtained or accessed using a carriage service**
>
> (1) A person commits an offence if:
>
> (a) the person has possession or control of material; and
>
> (b) the material is in the form of data held in a computer or contained in a data storage device; and
>
> (c) the person used a carriage service to obtain or access the material; and
>
> (d) the material is child abuse material.
>
> Penalty: Imprisonment for 15 years.
>
> (2) Absolute liability applies to paragraph (1)(c).
>
> Note: For absolute liability, see section 6.2.
>
> (3) If the prosecution proves beyond reasonable doubt the matters mentioned in paragraphs (1)(a), (b) and (d), then it is presumed, unless the person proves to the contrary, that the person: (a) obtained or accessed the material; and (b) used a carriage service to obtain or access the material.
>
> Note: A defendant bears a legal burden in relation to the matters in this subsection: see section 13.4.

11. Section 16AAB provided:

16AAB Second or subsequent offence

(1) This section applies in respect of a person if:

(a) the person is convicted of a Commonwealth child sexual abuse offence (a ***current offence***); and

(b) the person has, at an earlier sitting, been convicted previously of a child sexual abuse offence.

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

12. Item 24A of the Table specified s 474.22A(1) and a minimum sentence of 4 years' imprisonment.

13. Whether s 16AAB applied to Mr Delzotto depended upon the operation of a transitional provision. The Amending Act which inserted s 16AAB into the *Crimes Act* commenced on 23 June 2020: see Amending Act, s 2(1) (table, item 7). Item 3 of Schedule 6 was a familiar kind of transitional provision that dictated the circumstances when this new provision was to apply. It said:

3 Application provisions

(1) Subject to subitem (2), the amendments made by this Part apply in relation to conduct engaged in on or after the commencement of this Part.

(2) Section 16AAB of the Crimes Act 1914, as inserted by this Part, applies in relation to a conviction for a Commonwealth child sexual abuse offence where the relevant conduct was engaged in on or after the commencement of this Part (regardless of whether the relevant previous conviction of the person for a child sexual abuse offence occurred before, on or after that commencement).

14. Accordingly, whether item 3 applies (and thus whether s 16AAB applies) depends upon the proper identification of "the relevant conduct [which] was engaged in" to use the language in item 3(2). The respondent notes in passing that this language differs slightly from the language of "conduct engaged in" in item 3(1), but this difference does not appear to have any material consequence. The evident purpose of item 3(2) was not to produce any difference between item 3(1) and (2) but to make it clear that a previous conviction necessary to engage s 16AAB could have occurred prior to 23 June 2020.[3]

15. The "relevant conduct [which] was engaged in" is a reference to the doing of an act or the omission to do an act which resulted in the accused person committing a

[3] See Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2019 (Cth) at [214]-[215] (**2019 EM**).

Commonwealth child sexual abuse offence. That is the ordinary and natural meaning of the words in item 3.

16. What is the relevant conduct which resulted in Mr Delzotto committing an offence against s 474.22A(1) of the *Criminal Code*? The respondent submits that the answer is having possession or control of material that fits a particular description, namely material which (i) "is in the form of data held in a computer or contained in a data storage device", (ii) had been obtained or accessed by the appellant using a carriage service and (iii) was child abuse material. It is the act of having possession or control of material fitting this cumulative description which constitutes the criminal conduct. That follows from the ordinary and natural meaning of s 474.22A(1) without needing to resort to the definition of "conduct" in s 4.1 of the *Criminal Code*. That reading of item 3 of the Amending Act in the context of s 474.22A(1) of the *Criminal Code* is consistent with the analysis of Brennan J in *He Kaw Teh v The Queen*,[4] as approved by Bell J (Wood CJ at CL and Simpson J agreeing) in *R v Saengsai-Or*.[5]

17. That said, the *Crimes Act* should be read together with the *Criminal Code* because they are plainly *in pari materia*: cf **ADS [67]**.[6] Having regard to Chapter 2 of the *Criminal Code*, the only physical element amounting to "conduct" in s 474.22A(1) is in s 474.22A(1)(a): cf **AHS [69]**.[7] The relevant "conduct" constituting an offence is having possession or control of certain material.

18. That the element requiring that the material being possessed was obtained or accessed by the appellant using a carriage service is a *circumstance* in which possession occurred is also clear from the fact that while s 474.22A contains the physical elements of both possessing and using a carriage service to access the material, no *fault* element attaches to s474.22A(1)(c), being the element that material in the possession of an accused was obtained or accessed using a carriage service.[8] Proof of this element is by way of a rebuttable presumption: s 474.22A(3). If the other elements are proved beyond reasonable doubt, the prosecution is not required separately to prove that the offender either intentionally or recklessly used a carriage service to obtain or access the material. In

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4 (1985) 157 CLR 523 at 584.

5 (2004) 61 NSWLR 135 at [59]

6 See also *Hurt* (2022) 18 ACTLR 272 at [185].

7 See *Allison (a pseudonym) v The Queen* (2021) 362 FLR 445 at [40]-[47] (T Forrest and Walker JJA and Macaulay AJA).

8 *Criminal Code*, ss 6.2(2), 474.22A(2).

contrast, the conduct which does have a fault element in the s 474.22A provision is the *possession* of the material, which must be intentional.[9]

19. Accordingly, it is irrelevant that Mr Delzotto obtained or accessed the material prior to 23 June 2020 because the relevant conduct constituting the offence is not the act of using a carriage service to obtain or access material but the act of possessing or controlling the material which has been obtained or accessed. The use of the carriage service was the *circumstance* in which he came to be in possession. Because Mr Delzotto had this material in his possession or control on or after 23 June 2020, item 3 applied and s 16AAB had application.

10 20. Mr Delzotto argues that using a carriage service to obtain or access material in s 474.22A(1)(c) is conduct as a matter of ordinary English: **ADS [65], [67]**. A similar argument is made by Mr Hurt: **AHS [64, [69]**. So much may be accepted. However, the appellants ignore the fact that the conduct which is criminalised by s 474.22A(1) is only the act of having possession or control of child abuse material. Merely having used a carriage service to obtain or access material is not an offence under s 474.22A. It can therefore only be the conduct of possessing or controlling, to which item 3 directs attention. As Kennett and Rangiah JJ noted in *Hurt*, accessing child abuse material is a conduct element in the entirely separate offence created by s 474.22.[10]

21. The parenthetical text in item 3(2) does not assist the appellants: **cf ADS [66]**. The point
20 of item 3(2) and the insertion of language in parentheses was to make it clear that, when s 16AAB(1)(b) provides that "the person has, at an earlier sitting, been convicted previously of a child sexual abuse offence", that previous conviction can pre-date 23 June 2020. That says nothing about how the relevant conduct should be identified in item 3(2).

22. Ground 2 must fail for these reasons, which generally reflect the analysis in *Hurt* and in the Court below. The respondent also endorses their Honours' reasoning to the extent it is not expressly picked up above.

B. GROUND 1 – MINIMUM SENTENCES

23. If ground 2 is resolved adversely to the appellants, this Court will then reach the principal issue in these appeals, which is whether or not a minimum sentence provides a yardstick

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9 *Criminal Code*, s 5.6(1).

10 *Hurt* (2022) 18 ACTLR 272 at [188(a)].

for usually the least serious instances of the specified offences. That issue is to be resolved as a matter of statutory construction.

B.1 Statutory text

24. Section 16AAB sits within "Division 2—General sentencing principles" of "Part IB—Sentencing, imprisonment and release of federal offenders". It follows the general command in s 16A(1) that the sentencing judge must impose a sentence or make an order that is of a severity appropriate in all of the circumstances of the offence, including so far as relevant and known the matters in s 16A(2). Subject to s 16AAC, it directs the sentencing judge to impose a sentence of imprisonment "of at least the period specified" in a table which in turn is headed "Minimum penalty".[11] The statutory language thus indicates that s 16AAB is identifying a minimum penalty for the 35 offences currently listed in the table, which minimum operates together with the maximum penalties specified in each of the offence creating provisions.[12]

25. There are competing constructions of this statutory language. It could, as Mr Delzotto argues, be a mere restriction on the power of the sentencing judge to impose a lesser sentence, which accords with the approach in *Pot*. Or it could serve that function but also indicate something relevant to the primary task of sentencing under s 16A, namely the Parliament's view of the appropriate sentence for, generally, the least serious category of offending for each of the specified offences, which accords with the approach in *Bahar*.

26. The latter "double function" view is clearly open on the text of s 16AAB, read in the context of s 16A, and would be the preferable view even before coming to the obvious analogy with maximum penalties. Those have long been regarded as a yardstick for those instances of the offence which are so grave as to warrant the maximum prescribed penalty,[13] without need for the statutory text to deploy additional language to make this explicit. It is not to the point, therefore, that s 16AAB does not expressly state that the minimum penalties provided for should be treated as a yardstick: cf **ADS [55]**.

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11 All material from and including the first section of an Act to the last Schedule is part of the Act, thus including this heading: *Acts Interpretation Act 1901* (Cth) s 13(1)(b).

12 Relevantly, 15 years' imprisonment for s 474.22A(1) as at 1 July 2020.

13 *R v Kilic* (2016) 259 CLR 256 at [16]-[20] (Bell, Gageler, Keane, Nettle and Gordon JJ). See, eg, *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452 (Mason CJ, Wilson, Brennan, Toohey and Gaudron JJ); *Bensegger v The Queen* (1979) WAR 65 at 68 (Burt CJ); *Harrison* (1909) 2 Cr App R 94 at 96 (Channell J). See also fn 19 below.

27. The issue of construction is not resolved by observing that s 16AAB has been structurally separated from the offence creating provisions: cf **ADS [48]**. That argument elevates form over substance. The different items in the table in s 16AAB are directed at individual or separate offences; rather than imposing a minimum penalty in each individual section, the Parliament has opted to do so by way of s 16AAB together with a table. This is a formally different, but substantively identical, means of achieving the same result. It is also both a convenient and informative form of drafting. The command in s 16AAB, applied currently to 35 offences, is subject to the qualification in each case in s 16AAC. Many words are saved by doing this in one place. In addition, given (on the respondent's view) that s 16AAB has an operation to indicate something about how the sentencing judge is to approach the task of severity under s 16A, the specification of the minimums sits appropriately next to s 16A.

28. It has never been suggested that maximum penalties which are *not* contained in the offence-creating provision should not be treated as a yardstick.[14] Given that maximum penalties may or may not appear in the same statute as the offence-creating provision, they serve by analogy to illustrate the undue formality of Mr Delzotto's argument.

29. Nor is it of assistance to observe that s 16AAB applies based on the nature of the offender as a repeat offender: cf **ADS [54]**. This does not mean that s 16AAB cannot be understood to speak to the seriousness of an offence committed by such an offender. It is not dissimilar from a provision which imposes a higher maximum penalty where there are circumstances of aggravation.

30. In so far as Mr Delzotto relies upon this feature to distinguish the *Migration Act* provisions dealt with in *Bahar* (rather than to contend that *Bahar* was wrong), it should be noted that both the *Migration Act* provisions in *Bahar* and s 16AAB provide that the minimum sentences do not apply to persons aged under 18,[15] and s 233C of the *Migration Act* and s 16AAB of the *Crimes Act* both provide for mandatory penalties to be imposed in respect of a specific *type of offender* – that is, a repeat offender.[16] There is thus no basis to distinguish the provisions textually. And were it thought significant (it is not) that it is the repetition of the offence that has attracted the mandatory minimum as opposed to

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14 See, eg, *Corporations Act 2001* (Cth) ss 1311, 1311A, Schedule 3.

15 *Migration Act*, s 233C(1); *Crimes Act*, s 16AAC(1).

16 Section 233C of the *Migration Act* applied unless it was established on the balance of probabilities that the offender was aged under 18 years when the offence was committed. It imposed a mandatory minimum penalty for the offence and a higher mandatory minimum penalty for repeat offences.

every instance of the offending, then s 16AAB would operate differently to s 16AAA which *does* impose a minimum penalty for *every* instance of the relevant offending. Given that ss 16AAA and 16AAB were inserted by the same Amending Act, it is improbable that s 16AAA would operate as a yardstick but s 16AAB not. There is nothing in the extrinsic materials to suggest any such bifurcation of approach.

31. Nor do the words "at least" point strongly or indelibly towards the approach in *Pot*: cf **AHS [43], [45]**.

B.2 False comparison with jurisdictional limits

32. Mr Delzotto contends that a provision such as s 16AAB is "directed to the sentencing court, imposing a requirement about the sentence which the court must impose": **ADS [21]**. Mr Delzotto thus seeks to analogise s 16AAB to a jurisdictional limit upon the sentence that can be imposed by a particular court, a common kind of provision as considered by this Court in *Park v The Queen*.[17] In that case, this Court considered how a sentencing judge should approach the sentencing task where the maximum penalty stipulated by the Parliament for an offence exceeded the jurisdictional limit upon the Court's power to impose a penalty. This Court held that the sentencing judge should consider the maximum attached to the offence rather than its own jurisdictional limit in assessing the seriousness of the offending, because the latter (the jurisdictional limit) was entirely unrelated to the offence.

33. Jurisdictional limits on the sentence which a particular court can impose are distinguishable from s 16AAB. Section 16AAB sets out specific minimum penalties for specific offences in circumstances where the section applies (loosely, when the offender has offended previously). It imposes minimum penalties "by reference to the nature of the offence and its gravity in relation to other offences" rather than by reference to the status of the sentencing judge or court or some other factor entirely unrelated to the offending.[18] Section 16AAB, contained in Division 2 of Part IB of the *Crimes Act* titled "General sentencing principles", should be understood as directed to the task of sentencing, rather than to the limits of the court's jurisdiction divorced from the offence for which the offender is to be sentenced.

34. The attempted analogy should thus be rejected.

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17 (2021) 273 CLR 303.

18 See *R v Duncan* (2007) 172 A Crim R 111 at [20] (Nettle JA; Chernov and Vincent JJA agreeing).

B.3 A close and compelling analogy to maximum sentences

35. The analogy with maximum sentences is both close and compelling. It is well established that a maximum penalty "represents the legislature's assessment of the seriousness of the offence and for this reason provides a sentencing yardstick" which "invites comparison between the case with which the court is dealing and cases falling within the category of the 'worst case'".[19] The maximum penalty thus informs an assessment of the severity of the sentence appropriate in all the circumstances within the meaning of s 16A(1) of the *Crimes Act*.

36. There is no reason in principle why a minimum sentence should not be approached on the basis that it too offers a sentencing yardstick inviting comparison between the instant case and the least serious category of offending (in the sense of those instances of the offence which are so lacking in seriousness as to warrant the minimum prescribed penalty). In ***Magaming*** *v The Queen*, in rejecting a constitutional challenge, the plurality said:[20]

> In *Markarian v The Queen*, the plurality observed that "[l]egislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks". The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.

37. To similar effect, Keane J said:[21]

> The discussion of proportionality in sentencing in those cases proceeds by reference to legislated yardsticks. Each yardstick fixed by the legislature provides a necessary datum point from which the discussion of proportionality in sentencing may proceed. As was said in *Markarian v The Queen* by Gleeson CJ, Gummow, Hayne and Callinan JJ: "Judges need sentencing yardsticks." The provision of those yardsticks is the province of the Parliament.

38. This was not new. As long ago as *Reynolds v Wilkinson* in 1948, Dwyer CJ did not draw any conceptual distinction between a maximum and a minimum when his Honour said:[22]

> In considering such a question, it is to be remembered that the penalties prescribed by law are invariably maxima, and sometimes a minimum, as in the case under review, is also fixed. The quantum within such limits is a matter for the tribunal trying the case. It may be said that it is the policy of the law that the maxima are intended for the worst

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19 *Elias v The Queen* (2013) 248 CLR 483 at [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Muldrock v The Queen* (2011) 244 CLR 120 at [31] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Markarian v The Queen* (2005) 228 CLR 357 at [30]-[31] (Gleeson CJ, Gummow, Hayne and Callinan JJ). See also fn 13 above.

20 (2013) 252 CLR 381 at [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

21 (2013) 252 CLR 381 at [103].

22 (1948) 51 WALR 17 at 18.

> cases of the sort, and that first offenders should, in the absence of special malignity, be treated with greater leniency than others. But how far the punishment should recede from the maximum in any particular case is a matter for the discretion of the tribunal of trial, and a wide discretion is left to that tribunal.

39. It is true that the question in this appeal was not argued in *Magaming*: see **ADS [33]-[34]**. The respondent does not submit, therefore, that leave to reopen and then overturn *Magaming* is required. That said, it is pertinent that a majority of this Court expressed no misgivings about treating a minimum sentence in the same manner as a maximum sentence. It is also pertinent (albeit not authority) that special leave to appeal this issue was refused when a co-offender of Mr Magaming sought special leave.[23]

40. It might have been possible for Australian sentencing law to have developed in a way that treated maximum penalties as a mere constraint on the power of a sentencing judge to impose a penalty higher than the maximum. Yet that is not what has occurred. Maximum penalties have long had "a twofold significance".[24] As Brooking J (Hampel and Smith JJ agreeing) went on to explain in *Hansford v Neesham*:[25]

> In the first place, a sentence which goes beyond that maximum is unlawful as beyond the power of the sentencing court. In the second place, the maximum shows Parliament's view of the gravity of the offence and is a consideration to which regard must be had in determining what is an appropriate sentence, both by the operation of s 5(2) and (in the absence of a statutory provision like s 5(2)) as a matter of the general law relating to sentencing …

41. To similar effect, Brennan, Deane and Gallop JJ in *R v Tait* said:[26]

> The prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the worst type of case which falls within the relevant class of offence.

42. And in *R v Oliver* Street CJ said:[27]

> The first initial consideration is the statutory maximum prescribed by the legislature for the offence in question. The legislature manifests its policy in the enactment of the maximum penalty which may be imposed. The courts are, of course, absolutely bound by the statutory limit itself as well as by the legislative policy disclosed by the statutory maximum.

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23 *Bayu v The Queen* [2013] HCATrans 144.

24 *Hansford v Neesham* [1995] 2 VR 233 at 236.

25 [1995] 2 VR 233 at 236.

26 (1979) 46 FLR 386 at 398.

27 (1980) 7 A Crim R 174 at 177.

43. Australian law having taken this deliberate course over half a century or more in relation to maximum penalties, there is no evident reason why some different course should be charted with minimum penalties. If a maximum penalty is a yardstick, so too is a minimum penalty. That a minimum penalty operates to confine the sentencing judge's power to impose a lesser sentence does not exhaust the provision's operation, just as a maximum penalty does more than confine the sentencing judge's power at the upper end.

44. The criticism that treating a minimum penalty as a yardstick "assumes the correctness of the characterisation of a statutory minimum that it seeks to prove"[28] is misconceived: cf **ADS [32]**. Treating a statutory maximum as a yardstick assumes that it does more than confine the court's power just as much as treating a statutory minimum as a yardstick. The point is this: sentencing law, having already taken that course with maximums, there is no reason to take some other course with minimums. To the contrary, there is every reason to take the same course. Maximum penalties have come to inform the seriousness of the offence as an outworking of the law's concern for proportionality and equal justice.[29] In *R v Tait*, Brennan, Deane and Gallop JJ explained it in these terms:[30]

> A maximum penalty is reserved for the worst type of case falling within the relevant prohibition. The observance of this principle provides the flexibility in sentencing which secures proportionality and comparability among sentences imposed …

45. That is to say, the maximum penalty identifies what the Parliament considers the appropriate punishment for those instances of the offence which are so grave as to warrant the maximum prescribed penalty. This provides a yardstick against which to compare other sentences to ensure proportionality between the sentence and the seriousness of the offending and parity, such that like offenders are treated alike.

46. These same theoretical underpinnings justify treating a minimum sentence as a yardstick. It identifies what the Parliament considers the appropriate punishment for the lowest category of offending, which again provides a yardstick against which to compare other sentences to ensure proportionality and parity. To treat it as only confining the sentencing

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28 *Hurt v The Queen [No 2]* (2021) 294 A Crim R 473 at [82] (Mossop J); *Hurt* (2022) 18 ACTLR 272 at [55] (Loukas-Karlsson J).

29 See generally Richard G Fox and Arie Freiberg, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (September 1989) at [48]-[49].

30 (1979) 46 FLR 386 at 398, cited with approval in *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452 (Mason CJ, Wilson, Brennan, Toohey and Gaudron JJ).

judge's power to impose a lesser sentence does not ensure parity and disjoints the consideration of proportionality.

47. Allsop P (Bathurst CJ, Hall and Bellew JJ agreeing) explained this in the following way in *Karim v The Queen*, which the respondent supports in this Court:[31]

> There is an independent reason that leads me to favour the construction in *Bahar*. Equal justice inheres in judicial power, the fabric of the law and the basal notion of justice that underpins, informs and binds the legal system. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at 608 [65], "[e]qual justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect" (emphasis in original). To approach the matter as in *Pot* would see cases of perceived different seriousness by force of statute given the same penalty. Thus, if a judge thought the relevant offending in one case to be of low seriousness and worthy of a sentence of 6 months, but in another case to be of significant seriousness worthy of imprisonment for 5 years, she or he would be obliged to revise the first sentence to 5, leaving the second sentence at that point also. The statute, and through it the order of the Court, would be the instrument of unequal justice and, so, injustice: *R v Green* [2010] NSWCCA 313; (2010) 207 A Crim R 148 at 156 [23]; and *Green v The Queen* [2011] HCA 49; (2011) 244 CLR 462 at 466 [4] and 489 [80]. On the other hand, approaching the matter as in *Bahar* permits all usual sentencing 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.

48. The appellants do not identify any error in Allsop P's analysis as such. The appellants' preferred approach would see cases of varying seriousness be given the same penalty by force of statute, where equal justice requires different outcomes in cases that are different in some relevant respect. Adamson J in *Delzotto* was correct to conclude that Allsop P's point is a "strong contextual matter which indicates that the Court ought not construe a minimum penalty provision such as s 16AAB in such a way as to compromise this principle unless the words actually require such a conclusion" (**CAB 74 [82]**). Kennett and Rangiah JJ also referred to Allsop P's reasoning with approval in *Hurt*.[32]

B.4 An irrelevance: the statutory notes

49. The appellants rely on the note to s 16A(1), supported by certain extrinsic material, and an argument that notes in the *Migration Act* were disregarded wrongly in *Bahar*.

50. As to s 16A(1) of the *Crimes Act*, a rather unremarkable note says: "Note: Minimum penalties apply for certain offences – see sections 16AAA, 16AAB and 16AAC". According to Mr Delzotto, the note to s 16A(1) would be otiose if s 16AAB was relevant

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31 (2013) 83 NSWLR 268 at [45].

32 (2022) 18 ACTLR 272 at [144(d)].

to the assessment of the seriousness of the offence: **ADS [56]-[57]**. A note is commonly inserted out of an abundance of caution. The text of this note does not particularly favour either side of the debate. It helpfully says: "remember, when the court is assessing severity and determining the ultimate sentence, it must take into account and comply with the minimum penalty rules found in three sections that follow shortly".

51. As to the related Explanatory Memorandum, it says simply that "[t]his 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":[33] see **ADS [56]-[57]; AHS [39]**. The appellants' argument assumes that the single word "despite" points inexorably in the direction of a statutory intent that denies the *Bahar* approach. The dangers of reliance upon a single word, found in extrinsic material, are too obvious to require elaboration. But even if weight is sought to be given to the "despite", it can equally be understood as consistent with *Bahar*. Whether ss 16AAA, 16AAB and 16AAC have a single function (as per *Pot*) or a double function (as per *Bahar*), they operate, in the context of the *specific offences* to which they apply, to specify the minimum for each such offence. The relevant minimum, so specified, then informs or qualifies the basic task under s 16A for those *specific offences* only. For offences in general, section 16A operates in accordance with its terms. For the *specific offences*, what would otherwise be the general operation of s 16A must give precedence to the commands of ss 16AAA, 16AAB and 16AAC. If *Bahar* is correct, which is the ultimate question, the overall task under s 16A remains the same one of imposing the sentence of appropriate severity; it is just that in assessing that appropriate severity, the sentencing judge must take into account what the Parliament has said about the severity of each of the *specific offences* by reference to its specified minimum.

52. As to the *Migration Act* notes, Mr Delzotto challenges the correctness of *Bahar*[34] on the basis that McLure P overlooked the notes to s 232A and s 233A of the Migration Act, which said that "Sections 233B and 233C limit conviction and sentencing options for offences under this section": **ADS [22]-[23]**. The respondent's response is similar to the above. The argument reads too much into these words. No doubt s 232A and s 233A do "limit conviction and sentencing options" for the specific offences to which they apply. The question is how – by one operation or two? There is nothing in the statutory text or

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33 2019 EM at [197].

34 (2011) 255 FLR 80.

extrinsic materials to the relevant amendments to the *Migration Act* to indicate that the *only* purpose of the amendment was to limit options in the *Pot* way.

B.5 The legislative architecture

53. Moving beyond the notes, several of the appellants' arguments can be considered as attempts to derive support from the broader legislative architecture.

54. *First*, Mr Delzotto contends that the application provision in item 3 of Schedule 6 to the Amending Act would be *otiose* if s 16AAB were relevant as a yardstick because s 4F of the Crimes Act would already do the same work: **ADS [58]**. Section 4F(1) provides that "[w]here a provision of a law of the Commonwealth increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of that provision". However, there is nothing surprising about the Parliament, when it introduces a provision significantly altering existing law, being very specific about the transition it contemplates rather than leaving the matter to arguments about the applicability of pre-existing general transitional provisions. Further, if *Bahar* is correct, s 4F, at least arguably, does not address its full operation and there is good reason to legislate a specific transitional provision.

55. *Second*, the appellants correctly observe that a non-conviction order under s 19B remains available for offences listed in s 16AAB: **ADS [49]; AHS [33], [42], [49]** but this point goes nowhere in the present debate. Section 19B operates only where a court is satisfied that the charge is proved but is of the opinion (having regard to a confined list of matters) that it is inexpedient to inflict any punishment or a punishment other than a nominal punishment, or it is expedient to release the offender on probation. Section 19B, where it operates, leads to the court *dismissing* the charges or *discharging* the person without proceeding to conviction but upon security that the person will comply with stated conditions. Textually, as the person is not convicted of the charge, the court does not come to pass sentence under s 16A, and the mandatory minimum provisions for a sentence under ss 16AAA, 16AAB and 16AAC are never reached, just as the stated maximums for the offences are never reached. Nothing in s 19B leads to any implication for which of the *Pot* or *Bahar* approaches is to be preferred, or indeed the role for the statutory maximum in the situations where, by definition, s 19B has no application.

56. *Third*, the appellants note that s 16AAB is subject to s 16AAC, which provides for reductions for a plea of guilty and/or cooperation with law enforcement agencies and

which can take a penalty below the stipulated minimum penalty to recognise the value of those factors: **ADS [50]; AHS [49]**.[35] But these possible reductions do not alter the conclusion that the statutory minimum and maximum penalties are the yardsticks within which to determine the seriousness of the offending and the appropriate sentence. Section 16AAC can be seen to reinforce that the Parliament intended that the minimum and maximum penalties be the relevant yardsticks, but subject to ss 16AAC(2) and (3) where appropriate and necessary.

57. Mr Hurt's argument that the word "is" in s 16AAC(2)(a) and (b) is significant to the constructional issue in these appeals should be rejected: **AHS [40]**. The provision says nothing more than that a sentencing judge has an even lower minimum penalty available in the event of a guilty plea and/or cooperation. In short, the Parliament has reviewed the 17 mandatory factors specified in s 16A(2) as bearing on the assessment of the appropriate severity under s 16A(1) and determined that 15 of them can never, individually or collectively, deprive the mandatory minimum for the specific offence of its work under s 16AAA or s 16AAB, whereas two of them are regarded as of such public importance and warranting of encouragement that they, individually or collectively, may, within the discretion of the court, lead to a lower mandatory minimum, but always within the outer limits specified in s 16AAC(3).

58. It should be recognised that s 16AAC might give rise to a different question, not expressly addressed by the appellants, as to how the potential reduction of the mandatory minimum by reference to the two particular factors identified in the section interrelates with the primary task of instinctive synthesis under s 16A. In New South Wales, the undiscounted minimum has been brought to account as the lower yardstick and the instinctive synthesis carried out without reference to the two discounting factors.[36] The end result would then be increased if necessary by reference to the mandatory minimum adjusted under s 16AAC. In relation to the present appeal, this different question is neutral.

59. *Third*, the appellants correctly observe that s 16AAB does not mandate a minimum non-parole or pre-release period:[37] **ADS [51]; AHS [49]**. This does not mean that the minimum penalty in s 16AAB cannot serve as a yardstick, just as a maximum penalty can do so

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35 2019 EM at [210].

36 See *Glasheen v R* [2022] NSWCCA 191; *Delzotto* [2022] NSWCCA 117 at [3]-[4]. A possibly more flexible approach has been applied in Queensland: see *R v Stiller* [2023] QCA 51 at [29]-[32].

37 See *Crimes Act*, ss 19AC, 19AB, 20(1). See also 2019 EM at [195]-[196].

despite the possibility of non-parole or pre-release periods. If anything, the ongoing discretion to tailor the non-parole period alleviates some of the concern for liberty upon which the appellants rely: see Section B.6 below. There is no undermining of the interest in equal justice; to the contrary, the enduring ability to tailor non-parole periods is consistent with a concern to ensure that different cases are treated differently.

B.6 Liberty

60. The appellants rely heavily upon the principle of legality and the courts' concern to protect against unintended limitations upon liberty. From this perspective, so it is said, liberty is better protected by construing s 16AAB as affecting only the liberty of those who would otherwise have received a lesser sentence, thus sparing all offenders to whom s 16AAB would apply from the minimum penalty being used as a yardstick: see **ADS [38]-[43]**; **AHS [50], [55]-[59]**. There are several answers to this argument.

61. *First*, the Parliament should be understood to have intended to increase sentences, and thus further intrude upon the liberty of offenders, for those to whom the sections of the Amending Act applied. That is evident from a proper reading of the extrinsic materials (see Section B.7 below). The principle of legality's concern to protect against unintended consequences is thus satisfied.

62. *Second*, there remains scope for the sentencing judge to tailor the length of the non-parole period to the circumstances because there is no limit upon the minimum period to be served in full time custody.[38] This forms part of the overall scheme by which the interest in liberty is respected, but curtailed. There is, then, much less reason to prefer liberty over equality of treatment and proportionality.

63. *Third*, the concern to protect liberty offers limited assistance in understanding the reach of s 16AAB when, self-evidently, its very purpose is to restrict liberty.[39] Any assistance must be balanced with the concern to achieve proportionality and equality of treatment, and any weight to be attached to the principle is far less than what the appellants advance.

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38 See *Crimes Act*, ss 19AC, 19AB, 20(1). See also 2019 EM at [195]-[196].

39 See generally *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 at [43] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [314] (Gageler and Keane JJ).

B.7 Legislative purpose

64. As Adamson J said in *Delzotto* (**CAB 72-74 [76]-[82]**), the legislative history of ss 16AAA and 16AAB makes clear that the Parliament considered sentences for the Commonwealth child sex offences listed in those sections "ought generally be increased (which is the effect of the *Bahar* approach), rather than that the increase be confined to less serious offences (which is the effect of the *Pot* approach)": cf **AHS [34]-[38]**. The Explanatory Memorandum accompanying the Bill which became the Amending Act stated that it addressed "community concern that the sentencing for child sex offences is not commensurate to the seriousness of these crimes", and the introduction of minimum penalties addressed the "disparity between the seriousness of child sex offending and the sentences currently handed down by the courts".[40]

65. The Amending Act was infused by this intention to increase the sentences for the full range of the relevant offending rather than increasing the sentences only for the less serious instances of the relevant offending. The Amending Act did this in a variety of other ways too. It:

65.1. increased the maximum penalties for many Commonwealth child sex offences, including the offences listed in the table in s 16AAA (except s 474.23A, which was inserted into the *Crimes Act* by the Amending Act);[41]

65.2. prohibited a court from making an order that a sentence imposed on a person for a Commonwealth child sex offence be served partly cumulatively, or concurrently, with an uncompleted term of imprisonment for another Commonwealth child sex offence or a State or Territory registrable offence, unless the court is satisfied this would still result in a sentence of appropriate severity, in which case the court must state its reasons for imposing the sentence in that manner;[42] and

65.3. prohibited a court from ordering the immediate conditional release of a person sentenced to imprisonment for a Commonwealth child sex offence unless the court is satisfied that there are "exceptional circumstances".[43] This deals with, and points against, **ADS [33]**.

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40 2019 EM at [2], [24]. See also at [1], [30], [27], [40]-[41].

41 Amending Act, Schedule 4, item 24; Schedule 5.

42 Amending Act, Schedule 10, item 27, which inserted ss 19(5) to 19(7) into the *Crimes Act*.

43 Amending Act, Schedule 11, item 1, which inserted s 20(1)(b)(iii) into the *Crimes Act*.

66. In enacting these amendments, it was the Parliament's intention to "reflect the seriousness of child sexual abuse", including by introducing a mandatory minimum sentencing scheme applicable to Commonwealth child sex offences with the highest maximum penalties, and all Commonwealth child sex offences for repeat offenders.[44]

67. The Court in *Delzotto* did not "selectively rely" upon parts of the Explanatory Memorandum in construing s 16AAB: cf **ADS [45]**. To the contrary, the Explanatory Memorandum is replete with indications of the Parliament's intention that the Bill would increase sentences for Commonwealth child sex offences. In particular, it expressly states the "legitimate objective" of the minimum sentencing scheme and the increase in maximum penalties was to "ensur[e] that the courts are handing down sentences for Commonwealth child sex offenders that reflect the gravity of these offences and ensure that the community is protected from child sex offenders".[45]

68. In summary, the legislative concern revealed by both the text and these extrinsic materials was never to achieve a mere *Pot* like result whereby *some persons* committing the most serious categories of Commonwealth child sex offences (seriousness measured by the offences having the highest maximums or being repeat offences) would face higher sentences – those at the less serious end of this category who, but for the amendments, would have escaped with a sentence below the new minimums. The concern was to achieve a *Bahar* result whereby the community would have the assurance that *all persons* contemplating or having been found to commit crimes within the most serious categories of Commonwealth child sex offences would face higher sentences. They would face higher sentences because of the *double operation* of the newly inserted minimums. All offenders in this category would know that, if convicted, they would never face *less than* the new minimum (save only within the narrowly confined limits of s 16AAC). They Would also know that the general task of sentencing under s 16A would now be carried out, *for each and all of them*, within the two yardsticks set by the statutory maximum stated next to each offence and the statutory minimum stated in ss 16AAA and 16AAB. The necessary and intended result was that offenders of the worst kind always faced, and would continue to face, the statutory maximum. Offenders of a less serious kind, but still well more serious than the least worst case within the category, should have no cause for

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44 2019 EM at [3], [27].

45 2019 EM at [40].

complaint when their sentences were passed within the range set by the yardsticks and well above where they would previously have been.

B.8 Miscellaneous matters

69. Some final matters remain to be addressed. *First*, Mr Delzotto's reliance upon *Garth v The Queen* is misconceived: **ADS [19]-[20]**.[46] In that case, the applicant sought to quash an indictment charging him with an offence under s 25A(2) of the *Crimes Act 1900* (NSW) (assault causing death) on the basis that it did not charge an offence known to law. It was said not to do so because s 25B provided for a mandatory minimum sentence, and the applicant contended that s 25B was invalid and so too was s 25A. The primary judge declined to quash the indictment, holding that even if s 25B was invalid (which was not decided), it could be severed from s 25A and so the indictment did charge an offence known to the law. This was upheld on appeal to the Court of Criminal Appeal. While it was emphasised that s 25B was not a "penalty-creating provision"[47] and was not inextricably intertwined with the offence creating provision in s 25A, that says nothing about whether the minimum sentence provision can be relied upon as a yardstick that informs the seriousness of the offending at the lowest end of the spectrum. The case is far removed from the present.

70. *Second*, the Amending Act inserted s 16AAB into the *Crimes Act* at a time when there was substantial intermediate appellate court authority (and a refused special leave application and dicta of this Court) which favoured treating language like that found in s 16AAB as a minimum sentence that acted as a relevant yardstick in sentencing.[48] Section 16AAC evidently alleviates some of the "complications for reductions in sentence for mitigatory factors" when applying *Bahar*.[49] These are indicators that Parliament intended s 16AAB to operate consistently with that body of authority.[50]

71. Relatedly, s 16AAB is not relevantly distinguishable from the provisions of the *Migration Act* at issue in *Bahar*. In addition to what is submitted at [30] above, both regimes provide

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46 (2016) 261 A Crim R 583.

47 (2016) 261 A Crim R 583 at [28]-[29] (Bathurst CJ; Beazley P and Simpson JA agreeing).

48 See *Bayu v The Queen* [2013] HCATrans 144; *Magaming* (2013) 252 CLR 381 at [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [103] (Keane J); *Bahar* (2011) 45 WAR 100; *R v Karabi* (2012) 220 A Crim R 338; *R v Nitu* [2013] 1 Qd R 459; *R v Latif* [2012] QCA 278; *R v Selu* [2012] QCA 345; *Karim v The Queen* (2013) 83 NSWLR 268; *DPP v Haidari* (2013) 230 A Crim R 134.

49 (2011) 45 WAR 100 at [56].

50 See, eg, *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at [15] (French CJ, Hayne Kiefel, Gageler and Keane JJ); *Hurt* (2022) 18 ACTLR 272 at [154]-[155].

that mandatory minimum penalties apply for specific types of offences[51] and both set out the actual mandatory penalty or penalties that apply and direct that a period of imprisonment of "at least" the specified mandatory period of imprisonment be imposed.[52] The differences addressed above in [55]-[59] do not suggest that it is inappropriate to follow the approach in *Bahar*.

72. *Third*, Mr Delzotto complains that treating a minimum sentence as a yardstick relevant to determining the seriousness of the offence would erode judicial independence: **ADS [43]**. This is a (non-constitutionalised) version of the (constitutional) argument rejected in *Magaming* and should be rejected for similar reasons. It is wholly inconsistent with the long history of the Parliament confining judicial discretion in sentencing. It is well established that a court's sentencing discretion "is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge-made principles".[53] Just as the nomination of a maximum penalty has never been "regarded as an inappropriate incursion or limitation on the scope of the judicial sentencing discretion",[54] the nomination of a minimum penalty should not be regarded as so.

C. NAAJA'S APPLICATION TO APPEAR AS AMICUS CURIAE

73. NAAJA's application should be refused. The basis for its application is its proposed contribution on Northern Territory practice, which has peripheral relevance to the appeal and features only peripherally in NAAJA's own submissions.

PART VI NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

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

PART VII ESTIMATE OF TIME FOR ORAL ARGUMENT

75. A total of 2 hours for this matter and *Hurt v The King* (C7/2023) combined.

Dated: 7 July 2023

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51 *Migration Act*, s 233C(1); *Crimes Act*, s 16AAB.

52 *Migration Act*, s 233C(2)-(3); *Crimes Act*, s 16AAB(2).

53 (2013) 252 CLR 381 at [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

54 *Bahar* (2011) 45 WAR 100 at [46].

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **ENRICO ROBERT CHARLES DELZOTTO**

Appellant

and

THE KING

Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

10 Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Crown sets out below a list of the particular statutes and Conventions referred to in these submissions.

No	Description	Version	Provision(s)
1.	*Acts Interpretation Act 1901* (Cth)	Current	s 13
2.	*Crimes Act 1914* (Cth)	As at 25 June 2021	ss 4F, 16A, 16AAA, 16AAB, 16AAC, 19AC, 19AB, 20(1)
3.	*Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth)	As enacted	
4.	*Criminal Code Act 1995* (Cth)	As at 1 July 2020	ss 4.1, 474.22A(1)
5.	*Migration Act 1958* (Cth)	As at 23 June 2009	ss 232A, 233A, 233B, 233C