IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P34 of 2013

ON APPEAL FROM THE COURT OF APPEAL
SUPREME COURT OF WESTERN AUSTRALIA

BETWEEN:

ERNEST MUNDA
Appellant

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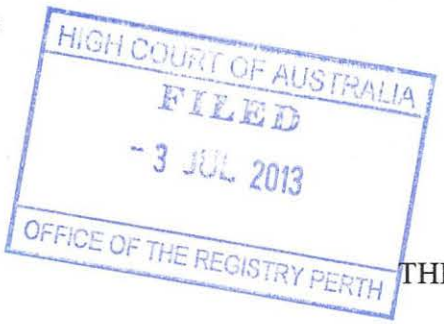

-and-

THE STATE OF WESTERN AUSTRALIA
Respondent

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APPELLANT'S SUBMISSIONS

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Part 1: Certification

1 We certify that this submission is in a form suitable for publication on the Internet.

Part II: Issues

2 This appeal raises issues concerning the principles that apply to an appellate court ('**COA**') in a prosecution appeal brought on the ground of manifest inadequacy.

2.1 Can a conclusion of 'manifest inadequacy' be reached without showing that a sentence is outside the range set by comparable past sentences? Can perceived prevalence inform such a conclusion by an appellate court?

2.2 Was the basis for intervention by the COA permissible where the only ground of appeal before it was manifest inadequacy?

2.3 Was sufficient regard given to the circumstances of social deprivation and endemic alcohol abuse evident in the appellant's antecedents, including his Aboriginality, by the COA or should such circumstances have been regarded as matters of mitigation under s 8 of the *Sentencing Act* 1995 (WA) (***'the Sentencing Act'***)? Was evidence of 'traditional punishment' faced by the appellant given proper regard in this respect?

2.4 The COA accepted that s 41(4) of the *Criminal Appeals Act* 2004 (WA) (***'the Criminal Appeals Act'***) still left it discretion not to set aside a sentence in a State appeal notwithstanding appellable error ('**the residual discretion**'). Is the likelihood of its exercise affected by the particular appellable error identified to warrant intervention?

Part III: Section 78B of the *Judiciary Act 1903*

3 We have considered s 78B of the *Judiciary Act 1903* (Cth) and no notice is required.

Part IV: Citations

4 Primary judgement: *SOWA v Munda* [2011] WASCR 87 and COA judgement: *SOWA v Munda* [2012] WASCA 164; (2012) 43 WAR 137.

Part V: Facts

5 McLure P ('**the President**') with whom Mazza JA agreed ('**the majority**') summarised the facts as to the commission of the offence[1]. Commissioner Sleight ('**the primary judge**') also made findings.[2] On 13 July 2010 at an Aboriginal community near Fitzroy Crossing, prompted by jealousy, the appellant killed his wife in a 'sustained, violent attack'. She was 'punched', 'thrown about the room' and 'her head [was] rammed into fibro walls of [their] house'. She suffered 'bruising', 'swelling of her brain', 'a fracture to her left jaw' and 'a number of broken ribs'. The 'cause of death was the head injury'. Both 'were intoxicated'.

6 Information relating to the appellant was also placed before the primary judge[3] ('**the appellant's antecedents and personal circumstances**'):[4]

6.1 The appellant was 32 years old at the time of this offence. He is a 'traditional Walmajarri man taking on the tribal affiliations from his father's side'. His father is 'a

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[1] *SOWA v Munda* [2012] WASCA 164 at [43] to [48] and Buss JA at [73] to [77].
[2] *SOWA v Munda* [2011] WASCR 87 at [3] to [7].
[3] *SOWA v Munda* [2011] WASCR 87 at [13] to [17]; *SOWA v Munda* [2012] WASCA 164 at [49] to [55], [67] and [84] to [89].
[4] Sentence Transcript (4 July 2011), pp 7-16.

senior Walmajarri man who lives at the Kadjina Community', near Fitzroy Crossing 'on the edge of the Great Sandy Desert'. His mother is 'an *Indjiparti Nullaga* woman whose traditional country surrounds Roebourne and Karratha'.

6.2 He lived a 'nomadic early life with his family' moving 'between Aboriginal communities on country, pursuing traditional practices including hunting, law and cultural activities, participating in formative men's business'. He underwent 'two separate traditional initiation ceremonies as a teenager'. He spoke *Walmajarri* ahead of English when a child and also speaks the *Nikinya*, *Bunaba* and *Indjipart Numela* traditional languages, as well as *Kriol*. He left school at age 17 with the 'last couple of years' devoted to training in 'basic mechanics and other practical skills for working in the bush'. Although he had acquired communication skills in English, he is 'probably functionally illiterate and innumerate'. He cannot spell his children's names in English. His work was 'confined exclusively' to [Community Development and Employment] CDEP programmes in remote Aboriginal communities and cattle stations and he has 'never had a paid job in the conventional sense'.

6.3 He met his wife when he was 16. She was a 'traditional Walmajarri woman'. They were 'considered to be married' and have four children. They had been together for 16 years in a 'for the most part harmonious' relationship and, 'especially during the early years', there were 'no significant issues with violence either physical or emotional'.

6.4 'Alcohol abuse [had] been a serious issue in his life', since he 'began drinking at the age of 16'. His criminal history includes one previous violent assault of his wife, but the relationship was not marked by 'ongoing episodes of domestic violence'. He was involved in 'bouts of binge drinking' when living at dry communities but remained largely sober and pursued a 'traditional lifestyle with [his wife] and their children', working under the CDEP program to support them. Nearly all of his offending as a young man 'had its genesis in alcohol'.

6.5 In 2008 they moved to be closer to their family support in the *Kurnangi* and *Mindi Rardi* Aboriginal communities where the offence was committed. The appellant had not worked since moving there. These communities are 'within walking distance' of licenced taverns and he was involved in 'at times daily drinking where prodigious amounts of alcohol would be consumed'. This led to his wife also 'being sucked into this vortex of acute alcohol abuse'. From this abuse of alcohol, 'the relationship became entangled in what is often described as 'jealousy behaviour where mutual feelings when drunk about each other's fidelity in the relationship borders on paranoia'. This 'became a trigger for violence'. He was the subject of a 'banning order' from the local tavern, requiring him to leave at 3.00 pm each day, thus allowing him (only) three hours to drink each day. This prompted him to 'drink fast'.

6.6 The appellant was 'very intoxicated' at the time of the offence.

6.7 The wife's death and the appellant's incarceration have left their four young children with no contact with their surviving parent for a significant period of time.

7 The primary judge found three aggravating features viz.,[5] **(1)** the appellant was 'subject to a life violence restraining order' which prohibited contact with his wife; **(2)** the parties were in a 'domestic relationship' which 'ought to have provided her with protection' and not exposed her to his 'unacceptable cowardly violence'; and **(3)** that the

[5] *SOWA v Munda* [2011] WASCR 87 at [9] to [11].

assault was sustained and violent. His Honour also later indicated as important 'that drunken violence against Aboriginal women is viewed as very, very serious.'[6]

8 His Honour also accepted that the appellant's conduct was 'largely spontaneous, arising out of [his] suppressed anger, which was released under the influence of alcohol,'[7] before identifying three specific matters of mitigation viz.,[8] (1) the appellant's co-operation with police and entry of a 'fast-track' guilty plea 'entered at first opportunity'; (2) his clear and immediate 'remorse'; and (3) his antecedents, including him being from a remote Aboriginal community, such that a term of imprisonment would be particularly isolating.

9 His Honour also made other observations including:

> '... it is proper for a court to recognise the problems of alcohol abuse and violence which exist in many Aboriginal communities and the social disadvantages they create. These social disadvantages often create a conditioning in the community to accept as normal alcohol abuse, as if it were a way of life. In such circumstances, there needs to be recognition that, although punishment plays a role in personal and general deterrence, to change such behaviour requires a change in the social circumstances. *However, notwithstanding these considerations, the seriousness of an offence must always be given proper weight. Like in all communities, the sentences imposed play a role in trying to protect the vulnerable. This includes, in Aboriginal communities, Aboriginal women, who are frequently subject to violence.*'[9] (our emphasis)

10 Finally, before the primary judge, it was submitted it was 'a reality' that the appellant would face 'traditional punishment' on his release.[10] Evidence was tendered including from 'senior law men' that this entailed the appellant getting 'flogged by families of his wife' 'with sticks and *nulla nullas* on the arms, legs, back and head'[11] and that the appellant reported: 'one of the hardest aspects of being imprisoned is not being able to go home and resolve the family business'.[12] The primary judge gave 'limited weight' to the likelihood of the appellant 'suffering a payback in the future'.[13] The majority ignored this feature in its reasoning.[14]

11 On 4 May 2011, the appellant pleaded guilty to manslaughter and then on 4 July 2011 was arraigned in the WA Supreme Court and again pleaded guilty[15] and on 6 July

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[6] *SOWA v Munda* [2011] WASCR 87 at [28].
[7] *SOWA v Munda* [2011] WASCR 87 at [19].
[8] As permitted under s 6(2)(d), 3(a) & 8(1) of the *Sentencing Act* 1995 (WA), *SOWA v Munda* [2011] WASCR 87 at [20] to [23].
[9] *SOWA v Munda* [2011] WASCR 87 at [23]. Note however that COA's citation of this passage in *SOWA v Munda* [2012] WASCA 164 at [63] omitted the part here italicised.
[10] Sentence Transcript (4 July 2011), p 23.
[11] Letter from Walmajarri elders dated 28 June 2011.
[12] Report from Dr Watts, dated15 June 2011.
[13] *SOWA v Munda* [2011] WASCR 87 at [25]-[27].
[14] Buss JA acknowledged it at *SOWA v Munda* [2012] WASCA 164 at [95].
[15] The maximum penalty was then 20 years imprisonment.

2011 was sentenced to 5 years and 3 months imprisonment, backdated to 13 July 2010.[16] The State lodged its appeal on 21 July 2011. On 22 August 2012 the State appeal was upheld, the original sentence set aside and the appellant resentenced to 7 years and 9 months imprisonment. On 6 June 2013 special leave was granted to raise three broadly identified grounds of appeal, now reflected in the appellant's Notice of Appeal.

Part VI: Argument

Ground 2.1 – The COA failed to apply the principles that attend the disposition of a State appeal and erroneously found the original sentence manifestly inadequate.

The State's appeal

12 The principles applicable to a State appeal include that it 'should only be brought in the rare and exceptional case' and must 'reveal such manifest inadequacy or inconsistency in sentencing standards as to constitute error in principle'[17] and that an appellate court should only intervene 'when it is necessary to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience'.[18]

13 The State's sole ground of appeal contended that the primary judge 'erred in law in imposing a sentence that was so inadequate as to manifest error'. Leave was granted only in respect of that ground.[19]

Prevalence

14 Before turning to the State's appeal, there is a preliminary issue, given the majority's premise for intervention includes the notion of prevalence.[20] Although no relevant material was placed before the primary judge, members of the Court asked whether the original sentence was 'within the range of sentences customarily imposed' and, if it was, 'whether this is the opportunity that the court should take to consider what (sic) that's not an appropriate range'.[21] After the State affirmed both propositions, the President added:[22]

> 'Well, we're talking about the range that is customarily imposed, which of course does not identify the boundaries of the proper sentencing range. [...] but if we are going to say that this is the time to look at the level of sentences customarily imposed because, say, the incidence of this sort of violent behaviour in the community seems to be increasing and it's time to increase the general level of sentencing for this time [sic] of offence...' (our emphasis)

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[16] Under the original sentence he would have become eligible for parole on 13 October 2013.
[17] *Everett v R* (1994) 181 CLR 295 at 299-300.
[18] *R v Osenkowski* (1982) 30 SASR 212 at 213; *Dinsdale v R* (2000) 202 CLR 321 at 340-341 [61]-[62]; *Lowndes v R* (1995) 195 CLR 665 at 671-672.
[19] In the Supreme Court of Western Australia, all appellants must obtain leave for any ground of appeal. Leave is granted under s 27, *Criminal Appeals Act* 2004 (WA). The 'Appellant's case' filed pursuant to s 32, *Supreme Court (Court of Appeal) Rules* 2005 (WA) did not seek leave to add any further grounds.
[20] *SOWA v Munda* [2012] WASCA 164 at [64]. Buss JA expressly disavowed this premise at [256].
[21] COA appeal transcript, pp 2-3.
[22] COA appeal transcript, p 4.

15 The State responded, elusively, that:[23]

'... on current sentencing outcomes, this is an inadequately lenient sentence for the facts of the case, but certainly rather than being a submission about prevalence, in the sense that there's an increasing prevalence in terms of this type of domestic violence in the communities, particularly Aboriginal communities, our submission focuses upon the fact that 12 years ago, something that could be seen to be a similar situation arose and was a treated in a crown appeal, the matter of *R v Gordon*[24] which obviously had some focus...'

16 The State submitted in this Court that:[25]

'The learned counsel who appeared on behalf of the State at the hearing before the Court of Appeal expressly stated that the State was not relying upon the growing prevalence. That issue arose solely because the court raised it for the first time at the hearing.' (our emphasis)

17 The first part of the above proposition is not supported by what was further said: [26]

'We have identified this case [*Gordon*] because it canvasses particular principles which we are [sic] say are matters that the Court of Appeal may be inclined to consider in making some sort of consideration of a statement in principle as to how these sorts of offences should be treated in these factual circumstances for manslaughter. I suppose what I was addressing is simply we are not saying it is an increased prevalence necessarily. It's an ongoing problem that has been going longer than 12 years. There are certainly cases before that, but this is a continuing problem.' (our emphasis)

18 Whether it was the State or the Court that first raised notions of prevalence in these proceedings is perhaps of little consequence. It was not agitated before the primary judge, and importantly, no evidence was placed before his Honour. The COA then asked the parties to explain why: [27]

'... even if it's broadly consistent with sentencing patterns, why should we not conclude in this case that the sentence is manifestly inadequate, having regard to [...] the prevalence of this sort of offending, especially amongst regional or Aboriginal...' (our emphasis)

19 The appellant noted that such a contention had not been raised before the primary judge[28] and, in supplementary submissions, sought to explain why such an approach was not otherwise permissible,[29] including the absence of any factual basis to support the consideration. The State did not seek to answer the posed question, disavow prevalence

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[23] COA appeal transcript, p 4.

[24] The case referred, *R v Gordon* [2000] WASCA 401, was an unsuccessful State appeal against a 7 year sentence for manslaughter. Gordon had a prior conviction for a spousal manslaughter, on both occasions used a weapon (on the latter, an iron bar) and had a 'worse' record than the current appellant.

[25] Special leave transcript at p10, L391

[26] COA appeal transcript, p 4-5.

[27] COA appeal transcript, p 16, McLure P.

[28] COA appeal transcript, pp 6,12.

[29] Including that s 143 *Sentencing Act* 1995 (WA) (guideline judgements) had not been invoked.

as a proper consideration in the present case or otherwise respond to the appellant's submissions on this point.

20 In the majority's reasons for allowing the appeal, the President found, citing only 'the experience of judicial officers in the jurisdiction':[30]

> '...the gross over-representation of Aboriginal people in this State's criminal justice system referred to in *Richards* is directly related to alcohol abuse and, more recently, often in combination with illicit drug use. [...] a grossly disproportionate number of offenders convicted and sentenced for manslaughter in the Supreme Court in recent years are Aboriginal...'. (our emphasis)

21 The State's submissions in this Court that 'the court below did not rely (...) on any suggestion of a growing prevalence of this type of offending in deciding to allow the appeal or deciding upon the appropriate disposition in resentencing' and that 'her Honour [the President] never referred to growing prevalence'[31] should be rejected.

22 The State's purported disavowal of such reliance (and that of Buss JA in dissent[32]) is understandable. Such a premise could never permit appellate intervention, when no 'material [...], which establishes and explains the foundation in fact for the submission'[33] is placed before the sentencing judge. It is fundamentally not the province of an appellate court, conducting an appeal by way of re-hearing,[34] to interfere with a sentence on such a basis in those circumstances.[35]

The proper test for appellate intervention

23 *House v The King*[36] is still the test for intervention on the ground brought by the State and upon which the COA purported to intervene – manifest inadequacy. This Court recently has added some elaboration in respect of such an appeal. An appellate court is not required to point to a specific error. Although 'the nature of the error may not be discoverable' it still must be shown that a 'substantial wrong has in fact occurred'.[37] This must be done 'in accordance with recognized principles'.[38] The process is not 'fundamentally intuitive'.[39] Intervention 'is not justified simply because the result arrived at is markedly different from other sentences that have been imposed in other cases'. It 'is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.'[40] A court may only intervene if the sentence under review is 'out of all proportion to any

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[30] *SOWA v Munda* [2012] WASCA 164 at [64].
[31] Special leave transcript.
[32] *SOWA v Munda* [2012] WASCA 164 at [256].
[33] *Power v Tickner* (2010) 203 A Crim R 421 at [84]; *DPP v Karazisis* (2010) 206 A Crim R 14 [116].
[34] *Lacey v Attorney-General (QLD)* (2011) 242 CLR 573 at 597 [58].
[35] *Green v The Queen* (2011) 244 CLR 462 at 478 [38].
[36] *House v The King* (1936) 55 CLR 499 at 505.
[37] *House v The King* (1936) 55 CLR 499 at 505.
[38] *Cranssen v The King* (1936) 55 CLR 509 at 519.
[39] *Hili v The Queen* (2010) 242 CLR 520 at 539.
[40] *Wong v The Queen* (2001) 207 CLR 584 at 605 [58]-[59].

view of the seriousness of the offence which could reasonably be taken', it 'bearing no proportion either to the impropriety of the [offender's] conduct or the kind of penalty which would suffice as a deterrent.'[41]

24 'In exercising the sentencing discretion, the judge must act in accordance with statutory and any applicable common law principles and in a manner that is consonant with reasonable consistency'.[42] Such 'consistency is not demonstrated by, and does not require, numerical equivalence'. 'The consistency that is sought is consistency in the application of the relevant legal principles' and 'in seeking consistency, sentencing judges must have regard to what has been done in other cases.'[43]

25 As to *how* to determine 'manifest error' in this context, the President identified a formulation at [57] which resembles that stated by King CJ in *R v Morse* ***('Morse')***,[44] which was adopted in WA in *Chan v R* ***('Chan')***:[45]

> 'To determine whether a sentence is excessive [or inadequate], it is necessary to view it in the perspective of the maximum sentence prescribed by law for the crime, the standards of sentencing customarily observed with respect to the crime, the place which the criminal conduct occupies in the scale of seriousness of crimes of that type, and the personal circumstances of the offender.'

26 This formulation is unexceptionable, provided there is clarity and discipline as to what is regarded as 'sentences customarily observed…' The identification of the 'range of appropriate sentences with respect to a particular offence is a difficult task' and a matter 'about which reasonable minds may differ'.[46] 'What constitutes the range remains a somewhat mysterious and often elusive process.'[47]

'Sentences customarily observed'

27 A mere catalogue of 'past sentences' for an offence 'does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits', but, 'sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and appellate courts' and 'can, and should, provide guidance to sentencing judges, and to appellate courts, *and stand as a yardstick against which to examine a proposed sentence*' (our underlining, the Court's italicisation).[48] Such a catalogue is only likely to be useful 'if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal'.[49]

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[41] *Cranssen v The King* (1936) 55 CLR 509 at 521 [20].
[42] *Elias v The Queen; Issa v The Queen* (2013) HCA 31 at [28].
[43] *Hili v The Queen* (2010) 242 CLR 520 at 536 [49], [53].
[44] *R v Morse* (1979) 23 SASR 98 at 99.
[45] *Chan v R* (1989) 38 A Crim R 337 at 342.
[46] *Everett v The Queen* (1994) 181 CLR 295 at 306.
[47] *R v Bangard* (2005) 159 A Crim R 145 at 149.
[48] *Hili v The Queen* (2010) 242 CLR 520 at 537 [54].
[49] *Hili v The Queen* (2010) 242 CLR 520 at [55] citing *Wong v The Queen* (2001) 207 CLR 584 at [59].

28 A past sentence for the offence should *not* be excluded from consideration merely because it was not, or not successfully, challenged by any party on appeal.[50] Its utility in appellate review is not determined by its precedent or binding value (there is none); it only matters whether it is a legitimate inclusion within the constellation of examples from which to compare the original sentence. The primary guide for inclusion must be the degree of similarity of factual matters concerning both the offence and the personal circumstances of the offender and the existence, if any, of similar principles at play in the imposition of the sentence.

Determination of manifest inadequacy

29 Despite identifying an appropriate formulation, the majority did not apply it.[51] First, the President did not properly identify 'the standards of sentencing customarily observed' or 'the place which the criminal conduct [of the appellant] occupies in the scale…'. Schedules of past sentences imposed for the offence were provided which revealed a band of cases with reasonable similarity and provided a 'yardstick' against which to view the original sentence. There is no mention of any consideration of these cases. The three particular sentences pointed to by the State[52] were found to be of 'little guidance', however the reasons given are unconvincing.[53] There is considerable comparability between the facts of those cases and the present (save for the absence of any weapon being used by the appellant), hence this might explain the State's failure to insist that it was outside the range. This meant that they were in fact useful, if not decisive of this ground. In the absence of any other cases with which to compare, there was no basis for the COA to have been 'convinced that the sentence is definitely outside the appropriate range' to justify setting the original sentence aside on the ground of appeal before the court.[54]

30 The majority then embarked upon an unconventional, and ultimately impermissible path, starting with an imprecise characterisation of the State's only ground of appeal: 'the gravamen' of which was said to 'concern weighting errors' including that the primary judge 'gave too little weight to deterrence'.[55] This transmogrified the 'explanations'[56] for the conclusion of manifest inadequacy as listed in the 'Appellant's Case'[57], into specific errors.[58] That this occurred is exemplified by how the primary judge's observations concerning the appellant's circumstances (especially his Aboriginal antecedents) were critiqued, and included statements of the majority such as:[59] '… it is wrong in principle to…', 'the evidence did not establish…' and 'it cannot

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[50] Cf. *SOWA v Munda* [2012] WASCA 164 at [61] and Appeal transcript, p 3.
[51] *SOWA v Munda* [2012] WASCA 164. They comprise [57] to [68] of the reasons of the President.
[52] *R v Churchill* [2000] WASCA 230 – 3½ years imprisonment; *State of Western Australia v Walley* [2008] WASCA 12 – 3 years imprisonment; and *R v Gordon* [2000] WASCA 401 – 7 years imprisonment (4 years 8 months).
[53] *SOWA v Munda* [2012] WASCA 164 at [61]. Note the submissions at [19] above.
[54] *Everett v The Queen* (1994) 181 CLR 295 at 306. See also the principles distilled in [28]-[29] above.
[55] *SOWA v Munda* [2012] WASCA 164 at [63].
[56] *Carroll v The Queen* (2009) HCA 13; (2009) 83 ALJR 579 at [8]-[9].
[57] As that term is used in r 32, *Supreme Court (Court of Appeal) Rules* 2005 (WA).
[58] In the sense used in *House* at 505.
[59] *SOWA v Munda* [2012] WASCA 164 at [53]-[55], the last sentence in [58], and [63]-[67].

be said' etc. These matters are related to Ground 2 and examined in more detail below. This pejorative view of these circumstances included the finding that a prior sentence for grievous bodily harm 'was manifestly inadequate'. This led to specious findings of specific error suggestive that the primary judge's disposition had 'allowed extraneous or irrelevant matters to guide or affect' him, or 'had mistaken the facts'.

31 If the State had sought to argue such a ground 'it would have been necessary (for it) to identify the asserted error in the grounds of appeal',[60] *and* obtain leave to argue it.[61] Absent such leave the COA, of its own volition, and without any notice of an intention to undertake such a process during argument, could not have allowed the appeal on that basis. This goes to the competency of the appeal itself. Unlike some other Australian jurisdictions,[62] in Western Australia, every appellant, including the State, must obtain leave on each ground that it wishes to argue on appeal. No such leave was sought.

32 In the result, the COA did not determine the appeal in accordance with applicable statutory provisions and principles. It intervened without any proper basis to find manifest inadequacy, was distracted by unsubstantiated notions of prevalence, a matter not argued before the primary judge, and further erred in the several respects identified above. It also 'erred in its reasoning to the conclusion of manifest inadequacy'[63] (relying on a ground not before it)[64] and sought 'to substitute its own opinion' for that of the primary judge.[65]

Ground 2 – The COA erred in principle in determining the scope and regard that should be given to the appellant's antecedents and personal circumstances.
Applicable sentencing principles

33 The appellant's antecedents and personal circumstances were relevant, both in the imposition of sentence[66] and in any appellate review.[67] Sections 6, 7 and 8 of the *Sentencing Act* (WA) set out the relevant principles. The 'purposes there stated are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law. There is no attempt to rank them in order of priority and [there is] nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No 2)*[68] in applying them'.[69]

34 The State's sole ground of appeal did not allege any misapplication of principle, statutory or otherwise on the part of the primary judge.

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[60] *Carroll v The Queen* (2009) HCA 13; (2009) 83 ALJR 579 at [8].
[61] Section 27(1), *Criminal Appeals Act* 2004 (WA).
[62] Cf. *R v JW* (2010) 199 A Crim R 486 at 494-496 [16]-[38].
[63] *Carroll v The Queen* (2009) HCA 13; (2009) 83 ALJR 579 at [24].
[64] Sections 27, 31 *Criminal Appeals Act* 2004 (WA); rr 29, 35 *Supreme Court (Court of Appeal) Rules* 2005 (WA).
[65] *Lowndes v The Queen* (1999) 195 CLR 665 at 671-672.
[66] Sections 6-8 *Sentencing Act* 1995 (WA).
[67] *Chan v R* (1989) 38 A Crim R 337 at 342.
[68] *Veen v The Queen (No 2)* (1988) 164 CLR 465.
[69] *Muldrock v The Queen* (2011) 244 CLR 120, 129 [20].

The COA's approach to sentencing principles

35 The majority's intervention is partly, if not significantly, justified by disagreement with the regard given to one particular aspect of the appellant's personal circumstances by the primary judge, viz. his Honour's 'recognition that, although punishment plays a role in personal and general deterrence, to change such behaviour requires a change in the social circumstances'.[70] Significantly, the President left out the important rider that followed this proposition when her Honour purported to quote the passage at [63], viz.:

> 'However, notwithstanding these considerations, the seriousness of an offence must always be given proper weight. Like in all communities, the sentences imposed play a role in trying to protect the vulnerable. This includes, in Aboriginal communities, Aboriginal women, who are frequently subject to violence.' (our emphasis)

The primary judge was merely recognising matters frequently discussed in previous cases as to this difficult balancing exercise.[71] The President then asserted:[72]

> '... it is wrong in principle to reduce the weight to be given to general deterrence in circumstances where alcohol-fuelled violence is endemic in the community generally, even if not sufficiently deterred in fact by the prospect of imprisonment.'

36 Fundamentally, this is argument is a 'straw man'. The primary judge made no suggestion (at [23] or elsewhere) that 'reduced weight should be given to general deterrence' at all; rather his Honour merely sought to *recognise* the limits of deterrence in these communities and that 'their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.'[73] The recording of the primary judge's balancing of countervailing considerations was selective. The President further wrote:[74]

> 'The evidence in this case did not establish that the [appellant] was raised in circumstances of such deprivation and difficulty as to render his addictions mitigatory'; and
>
> 'It is the case that the [appellant] will be separated from his family and country for the term of his imprisonment. However, [given...], it cannot be said that imprisonment would bear particularly harshly upon him.'

37 These passages suggest that the appellant's antecedents and personal circumstances should have, at least according to the President, little, if any mitigatory effect. The cases cited[75] are all examples of her Honour's past consideration of these issues. This

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[70] *SOWA v Munda* [2011] WASCR 87 at [23].

[71] For example those canvassed in *R v KU, ex parte Attorney-General (No 2)* [2011] 1 Qd R 439 at [129] to [133].

[72] *SOWA v Munda* [2012] WASCA 164 at [66].

[73] *R v Fernando* (1992) 76 A Crim R 58 at 62, proposition (A).

[74] *SOWA v Munda* [2012] WASCA 164, McLure P at [67] (cases and citations omitted).

[75] At [65]-[66]: *Samson v The State of Western Australia* [2011] WASCA 173 at [12], [14] (McLure P); *Wongawol v The State of Western Australia* (2011) 212 A Crim R 284; [2011] WASCA 222 at [38]-[39] (McLure P); *THG v The State of Western Australia* [2012] WASCA 139 at [22] (McLure P).

unconvincing line of reasoning, culminating in the present case, has since resulted in a gradual increase in the sentences imposed for this type of manslaughter.[76]

Evidence

38 A sentencing court 'may inform itself in any way it thinks fit' of any matter 'to decide on the proper sentence to be imposed.'[77] None of matters placed before the primary judge concerning the appellant's circumstances, including the 'tribal punishment' he faced, was contested. The State did not oppose the reception of any of this evidence and there was no ground of appeal respecting the issue. There was simply no proper basis for the COA to inquire into, still less conclude, that there was insufficient evidence to render such circumstances mitigatory.

Scope of regard for the appellant's personal circumstances

39 The primary judge, perhaps due to a misunderstanding of the constraints of authority in WA following *Western Australia v Richards*[78] (**'Richards'**) limited the allowance for the social disadvantage and effects of alcohol abuse upon the appellant surrounding this offence to the effects of hardship in prison.[79] Even this faint regard was considered by the COA to have been too much.[80]

40 The regard to be given to such circumstances has long troubled courts throughout Australia when they arise in the sentencing of Aboriginal people. Some of these circumstances are starkly different from that experienced by most non-Aboriginal Australians, and in some respects are unique to communities such as those where the appellant's offence was committed. The responsibility for and the regard to be given to such circumstances are matters about which political minds will often disagree. Within the administration of justice, they must be reflected by disciplined legal analysis and principle.

41 In *Neal v The Queen*[81] Brennan J wrote that 'in imposing sentences, courts are bound to take into account, [...] all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.' Indeed not doing so 'offends principles of equality of fact'.[82] Malcolm CJ observed in *Rogers v The Queen* (**'Rogers'**),[83] that 'for years, [...], the judges of this Court in dealing with Aborigines, have endeavoured to make allowance for ethnic, environmental and cultural matters...' and that in applying ordinary 'sentencing principles for an offence committed by an Aboriginal', the court

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[76] *Hishmeh v The State of Western Australia* [2012] WASCA 183 at [70]; *McNamara v The State of Western Australia* [2013] WASCA 63 at [60]; *Dodd v The State of Western Australia* [2013] WASCA 80 at [41].
[77] Section 15, *Sentencing Act* 1995 (WA).
[78] *Western Australia v Richards* (2008) 185 A Crim R 413.
[79] *SOWA v Munda* [2011] WASCR 87 at [22].
[80] *SOWA v Munda* [2012] WASCA 164 at [67].
[81] *Neal v The Queen* (1982) 149 CLR 305 at 326.
[82] *Gerhardy v Brown* (1985) 159 CLR 70 at 128.
[83] *Rogers v The Queen* (1989) 44 A Crim R 301 at 305 citing with approval what Muirhead J wrote in *Iginiwuni* (unreported, 12 March 1975) NTSCC (No 6 of 1975).

'must take into account [matters] which are mitigating factors' which 'include social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race'.[84]

The 'Fernando principles'

42 Wood J (as his Honour then was) in *R v Fernando* ***('Fernando')***[85] distilled and consolidated into eight propositions,[86] existing common law principles concerning 'the sentencing of Aborigines'. His Honour later explained in *R v Ceissman*[87] and *R v Pitt*,[88] that:

'[the identified principles] were not intended to mitigate the punishment of persons of Aboriginal descent, but rather to highlight those circumstances that may explain or throw light upon the particular offence, or upon the circumstances of the particular offender which are, referable to their aboriginality, particularly in the context of offences arising from the abuse of alcohol.'

43 The authorities cited in *Fernando*, included *R v Rogers and Murray*, and *Juli v The Queen*[89] where Malcolm CJ referring to *Rogers*, wrote:[90]

'In the particular circumstances of this case the applicant's abuse of alcohol reflects the socio-economic circumstances and environment in which he has grown up and should be taken into account as a mitigating factor [...], the substantive point which I sought to make [...] was:

> It is a notorious fact that the increased use of alcohol by Aboriginal persons in relatively recent times has caused grave social problems, including problems of violence, in the communities in which they live. The general circumstances which have led to problems associated with the consumption of alcohol may themselves provide circumstances of mitigation...' (our emphasis)

44 These authorities illustrate that the common law preceding *Fernando* acknowledged the mitigating effect of systemic Aboriginal societal disadvantage on a number of bases, including the 'tremendous social problems' facing Aboriginal children who are 'growing up in an environment of confusion...problems of alcohol...conflict and dilemma'.[91] The 'continuing disruption of their [Aboriginal] social structure caused by consumption of alcohol' was 'one of the greatest threats to their dignity and existence'.[92] In *Friday*[93] and *Charlie, Uhl and Nagamarra*[94] the respective courts

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[84] *Rogers v The Queen* (1989) 44 A Crim R 301 at 307.
[85] *R v Fernando* (1992) 76 A Crim R 58 at 62.
[86] The 'papers and decisions' to which Wood J referred in *Fernando* at 62 were: Extracts from a paper "The Sentencing of Aboriginal Offenders" by Justice Toohey; the report of J H Wooten QC concerning the Royal Commission into Aboriginal deaths in custody; *Neal v The Queen* (1982) 149 CLR 305; *R v Davey* (1980) 2 A Crim R 254; *R v Friday* (1984) 14 A Crim R 471; *R v Yougie* (1987) 33 A Crim R 301; *R v Rogers and Murray* (1989) 44 A Crim R 301; and *Juli v The Queen* (1990) 50 A Crim R 31.
[87] *R v Ceissman* (2001) 119 A Crim R 535 at 540.
[88] *R v Pitt* [2001] NSWCCA 156 at [19]-[21].
[89] *Juli v The Queen* (1990) 50 A Crim R 31.
[90] *Juli v The Queen* (1990) 50 A Crim R 31 at 36.
[91] *Jabaltjari v Hamersley* (1977) 15 ALR 94 at 98.
[92] *Jabanunga v Williams* [1980] 6 NTR 19 at 20.
[93] *Friday* (1984) 14 A Crim R 471 at 472.

authorised the achievement of each of the punitive, rehabilitative and deterrent objects of sentencing by imposition of 'unusually short minimum term(s)', producing 'a long period of parole'.[95] In the latter case, Burt CJ referred to the Aboriginal offenders being 'not altogether responsible' for the destructive effect of their alcohol addictions, and adverted to the need for 'a more constructive approach' than the 'essentially negative' character of 'a conventional prison'. Separately, the Full Court of the Federal Court in *Sampson*[96] recognised as a mitigating factor the 'severe emotional distress' experienced by disadvantaged Aboriginal offenders as a part of the 'trans-cultural dimension' of their condition. In *Yougie v R*[97] it was said that the 'cure' to the 'very real' problems of violence, alcohol abuse and 'other demoralising factors' in Aboriginal communities required 'more subtle remedies than the criminal law can administer'. In *Peter,*[98] the court took into account the undue hardship suffered by a remote-area Aboriginal in serving a jail sentence in a distant and unfamiliar environment. A further recent consideration was undertaken in *R v KU, ex parte Attorney-General.*[99]

45 From this jurisprudence emerged a recognition that the adverse social circumstances of many Aboriginal offenders represented 'proof...to some extent of the limited nature of deterrence in this social context'[100] and that 'sentencing polices are unlikely to prove an effective deterrent'.[101] Acknowledging the limits of punishment and deterrence in respect of Aboriginal offenders viz. the 'two conflicting responsibilities vested in the sentencing judge', Muirhead J adopted the 'true position in law' expressed in *Webb v O'Sullivan*[102], that is, to 'award the least that is consistent with the public interest'. Burt CJ in *R v Peterson*[103] added:

> 'The need for punishment must be accepted, but it must be accepted with a full appreciation of its limitations.'

Summation of principles

46 Discrimination in the sentencing process on the basis of race is of course not permissible.[104] However, it is not the fact of Aboriginality *per* se that warrants a degree

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[94] *Charlie, Uhl & Nagamarra* (unreported, Supreme Court, WA, No 96 of 1987, 14 August 1987).

[95] The legislative regime in Western Australia has prevented the criminal court from fixing a minimum term since 15 June 1988. In *Rogers* (supra) at 309, Malcolm CJ remarked that the then 'statutory formula for parole' made it, 'necessary for the courts to temper the disposition'. Since 2003, s 93 of the *Sentencing Act* 1995 (WA) has prescribed that a prisoner is eligible for parole release after serving two years less than any term of imprisonment of more than four years.

[96] *R v Sampson* (1984) 68 FLR 331 at 338.

[97] *Yougie v R* (1987) 33 A Crim R 301 at 303, 304.

[98] *Peter* (unreported, Supreme Court, WA, Kennedy J, No 108 of 1989, 19 June 1989).

[99] *R v KU, ex parte Attorney-General (No 2)* [2011] 1 Qd R 439 at [129] to [133]

[100] *Yougie v R* (1987) 33 A Crim R 301 at 303, 304.

[101] *R v Davey* (1980) 2 A Crim R 254 at 258.

[102] *Webb v O'Sullivan* [1952] SASR 65 at 66; *Kear* (1977) 75 LSJS 311.

[103] *R v Peterson* (1983) 11 A Crim R 164 at 168.

[104] *Rogers v the Queen* (1989) 44 A Crim R 301 at 307; *Racial Discrimination Act* 1975 (Cth) s 9; *Hickey* (unreported, Court of Criminal Appeal, NSW, No 60410 of 1994, 27 September 1994) at 3-4 (Simpson J preferred the term 'litany of disadvantage'); *R v Powell* [2000] NSWCCA 108 at [23]-[24]; *R v Pitt* [2001] NSWCCA 156 at [19]-[21] referring to *R v Ceissman* (2001) 119 A Crim R 535 at 539-540; *R v (Stanley) Fernando* [2002] NSWCCA 28, Spigelman CJ at [67].

of leniency, but, rather, the 'disadvantage associated too often with Aboriginality' and 'the well known social and economic problems that frequently attend Aboriginal communities'. [105] Such an approach does not infringe the pursuit of 'reasonable consistency' in sentencing; that is, 'consistency in the application of the relevant legal principles' ensuring 'the treatment of like cases alike, and different cases differently'.[106] It merely requires 'full account'[107] being taken of 'all material facts'[108] associated with their adverse antecedents and personal circumstances. It also requires 'full weight' to be attributed to 'the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part'.[109]

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47 Adoption of these principles by this Court would guide sentencing judges and intermediate appellate courts to undertake the 'extremely difficult balancing exercise' associated with 'the tightrope'[110] that frequently presents in sentencing disadvantaged Aboriginal offenders, 'particularly in the context of offences arising from the abuse of alcohol'.[111] 'The product of the application to the particular circumstances of ordinary sentencing principles'[112] may often involve Aboriginal offenders, in particular those who commit crimes of violence after the consumption of alcohol, being dealt with 'more leniently or sympathetically than has been the case with offences of a similar nature committed by Europeans and people of non-Aboriginal extraction'.[113] So much was
20 accepted in *R v Woodley*.[114] 'It is obvious that equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations.'[115]

The COA's approach in Munda

48 Notwithstanding repeated reference to the *Fernando* considerations by the WA Court of Appeal,[116] the application of these considerations has been uneven.[117] The approach of the majority below, despite referring to *Richards*, [118] adopted an unjustified circumscription of, and departure from, decisions elucidating the principles that apply in
30 sentencing offenders with the antecedents and personal circumstances such as that pertaining the appellant. It diminished the status of (Aboriginal) socio-economic

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[105] *R v Newman* (2004) 145 A Crim R 361 at 388, citing *R v Powell* [2000] NSWCCA 108 at [17], [23].
[106] *Hili* (2010) 242 CLR 520 at 535; *Wong v R* (2001) 207 CLR 584 at 591 [6].
[107] *Rogers v the Queen* (1989) 44 A Crim R 301 at 307, 311.
[108] *Neal v The Queen* (1982) 149 CLR 305 at 326.
[109] *R v Fernando* (1992) 76 A Crim R 58 at 63.
[110] *R v Powell* [2000] NSWCCA 108 at [23]-[24].
[111] *R v Ceissman* (2001) 119 A Crim R 535 at 540.
[112] *Rogers v R* (1989) 44 A Crim R 301, at 309.
[113] *Friday* (1984) 14 A Crim R 471 at 472.
[114] *R v Woodley* (1994) 76 A Crim R 302 at 306.
[115] *Gerhardy v Brown* (1985) 159 CLR 70 at 128, citing *Kerala v Thomas* [1976] 1 SCR 906 at 951.
[116] e.g. *R v Woodley* (1994) 76 A Crim R 302 at 306; *R v Churchill* [2000] WASCA 230 at [25]-[27]; *R v Gordon* [2000] WASCA 401; *Western Australia v Richards* (2008) 185 A Crim R 413; *Wongawol v The State of Western Australia* (2011) 212 A Crim R 284.
[117] See: J Manuell SC (December 2009) 'The *Fernando* Principles: the sentencing of Indigenous offenders in NSW' *(Discussion paper prepared for the NSW Sentencing Council),* pp.4-12 & Appendix 1.
[118] *Western Australia v Richards* (2008) 185 A Crim R 413

deprivation as a mitigating factor.[119] Moreover, the majority's finding that such hardship would be rendered nugatory by his earlier convictions and some other aspects in his history[120] is unfounded. Mere 'association with white people does not necessarily erase deep-rooted customary fears or beliefs, nor does it eradicate the sense of what is, or what is not, acceptable or appropriate'.[121]

49 This Court should reject this limiting approach. Contrary to the President's contentions,[122] affording 'realistic recognition' and treating such circumstances as mitigatory does not necessarily mean 'reducing the weight to be given to deterrence.' To also focus on the 'addictions' of the appellant is to not fully appreciate the breadth of the *Fernando* principles that can be drawn from the jurisprudence.[123] It also ignores the appreciation that 'where there is something which, whether wholly or in part, excuses the taking of drink or drugs, it will treat that circumstance as going in mitigation'.[124] And the understandable desire to have regard to 'personal deterrence and/or community protection, because of the associated ... risk of reoffending' cannot justify a sentence that offends the basic principle of proportionality.[125] The appellant's circumstances did not warrant his being used as a 'scapegoat'.[126] The sentencing exercise necessarily involves balancing such countervailing matters.[127]

50 The appellant's circumstances called for application of the *Fernando* principles. Additionally, the evidence before the primary judge revealed a further mitigating factor. The 'reality' is that 'on release' he will undergo 'traditional punishment...of a serious order' involving being 'struck with *nulla nullas* and sticks on a number of occasions by the family of the deceased and admonished by his community', as 'a means of healing the rift within his community...created by virtue of his wrongdoing'.[128] That such traditional punishment enables 'the two people involved with the dead person and the prisoner...to be reconciled'[129] and is 'a form of freeing the family concerned of their guilt'[130] and 'would occur...even...if he served a lengthy sentence...afterwards'[131] constitutes a material fact 'which exist only by reason of the [appellant's] membership of an ethnic or other group'.[132] It 'transcends vengeance', and was 'in Walmajarri culture...the way to make peace between families'[133] and therefore 'of positive benefit to

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[119] *R v Gordon* [2000] WASCA 401 at [32]-[35]; *Walley* [2008] WASCA 12 at [18]-[19], [23], [38]-[39]; *Samson* [2011] WASCA 173 at [12], [14]; *Wongawol v Western Australia* (2011) 212 A Crim R 284.
[120] Including his past employment in Aboriginal CDEP programs, previous terms of imprisonment and capacity to communicate sufficiently in spoken English.
[121] *R v Davey* (1980) 2 A Crim R 254 at 258.
[122] *SOWA v Munda* [2012] WASCA 164 at [66] & [67].
[123] In particular (C) and (E) in Wood J's list.
[124] *Redenbach* (1991) 52 A Crim R 95 at 99.
[125] *Veen v The Queen (No.2)* (1988) 164 CLR 465 at 472, 485-486, 490-491, 496.
[126] *R v Peterson* (1983) 11 A Crim R 164 at 169.
[127] *Veen v The Queen (No.2)* (1988) 164 CLR 465 at 476-7.
[128] Sentence transcript (4 July 2011), p 23.
[129] *R v Wilson* (1995) 81 A Crim R 270 at 276.
[130] *R v Minor* (1992) 59 A Crim R 227 at 237.
[131] *R v Wilson* (1995) 81 A Crim R 270 at 276.
[132] *Jadurin* (1982) 7 A Crim R 182 at 187; *R v Minor* (1992) 59 A Crim R 227 at 237; *Neal v The Queen* (1982) 149 CLR 305 at 26.
[133] Letter from Walmajarri elders dated 28 June 2011.

the peace and welfare of a particular community'.[134] The court 'must take into account' these 'particular matters' as 'mitigating factors applicable to the particular offender'.[135]

51 Also, there is evidence that the appellant will find as 'one of the hardest aspects of being imprisoned'[136] that he will not be able to receive this punishment. Under s 8 of the *Sentencing Act*, this operates to 'decrease the extent to which the offender should be punished'.[137] In doing so, the court does not 'sanction unlawful violence'[138] or 'retribution'[139], particularly where 'there was no evidence...that the form of punishment imposed was unlawful'.[140] Contrary to the determination of the primary judge, the 'amount of weight' to be given 'to the likelihood' of traditional punishment' was not, 'necessarily limited'.[141] The primary judge's regard was too confined. The majority's failure to have any regard to this aspect of the antecedents and personal circumstances of the appellant was similarly in error.

52 That there might develop a discernable degree of relative leniency in dispositions upon offenders with such circumstances of disadvantage does not impermissibly set a separate range on the basis of race or Aboriginality.[142] A discrepancy in the 'numerical equivalence' of such sentences is not indicative of impermissible inconsistency. It does not follow that the (mandatory) considerations of punishment or deterrence are undermined.[143] Whilst the appellant's circumstances can be seen to be 'associated with or related to [his] Aboriginality',[144] that association does not deprive them being regarded as matters of mitigation, merely because his 'victim' also comes from such a community.

53 The 'even administration of criminal justice' and the search for the consistent application of principles require the sentencing court to take into account and accord full weight to 'all material facts' attending the appellant's antecedents and personal circumstances. The *Fernando* considerations were engaged in the case. And the evidence concerning 'tribal punishment' made it especially necessary to have proper regard to all of the principles. The manner in which the primary judge took them into account was too limited in the two respects identified above. The approach of the COA below should be rejected.

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[134] *R v Minor* (1992) 59 A Crim R 227 at 228.
[135] *Rogers and Murray* (1989) A Crim R 301 at 307.
[136] Report of Dr Watts, dated 15 June 2011.
[137] *Sentencing Act* 1995 (WA), s 8(1).
[138] *R v Minor* (1992) 59 A Crim R 227 at 239.
[139] *Jadurin* (1982) 7 A Crim R 182 at 187.
[140] *R v Minor* (1992) 59 A Crim R 227 at 239.
[141] *SOWA v Munda* [2011] WASCSR 87 at [27].
[142] Cf. *R v Rogers & Murray* (1989) 44 A Crim R 301 at 308, *R v KU, ex parte Attorney-General (No 2)* [2011] 1 Qd R 439 at [130].
[143] *R v Williscroft* [1975] VR 292 at 298; *R v Leucus* (1995) 78 A Crim R 40 at 46-47; *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476; *Western Australia v Walley* [2008] WASCA 12 at [16]-[19],[38]-[39].
[144] *R v Rogers & Murray* (1989) 44 A Crim R 301 at 307.

Ground 2.3 – The COA erred in its identification and application of the principles concerning its residual discretion in a State appeal

54 In *Green v The Queen ('Green')*,[145] French CJ, Crennan and Kiefel JJ reiterated the purpose of prosecution appeals against sentence, 'to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons. That is a limiting purpose. It does not extend to the general correction of errors by sentencing judges'.[146]

Identification

55 The COA accepted that the court had a residual discretion to dismiss a State appeal against a sentence that is manifestly inadequate, and that (at [31]): '... s 41(4)(b) has not altered the purpose of a State appeal which is to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons.'

56 The President articulated some propositions relating to appeals under ss 31 and 41 of the *Criminal Appeals Act* 2004 (WA), construed (at [41]) 'against the background of *Green* and *Lacey*'. Those included at [41(3)]: '... relevant actions, events and consequences associated with the serving of the sentence under appeal or the manner of the conduct of the appeal or otherwise, such as the residual discretionary considerations, are not excluded' (our emphasis). However in specifically listing the circumstances which 'may combine to produce injustice',[147] the President excluded 'delay in the hearing and determination of the appeal', in circumstances where the present appeal took three months to get to the point of argument and was reserved for a further nine months.

57 Then at [41(4)], her Honour misstated an important matter of principle, by suggesting that the discretion is affected by the basis for determining appellable error. In *Green*[148] the majority gave an example of when, despite finding a sentence to be manifestly inadequate, an appellate court 'may decide not to intervene so as not to disturb parity...' (our emphasis). This was re-cast to erroneously state that 'save where parity considerations arise the residual discretion is only likely to be exercised if the error has not resulted in a manifestly inadequate sentence' (our emphasis). Buss JA joined in this view.[149] This is contrary to what this Court identified in *Green* at [43].

58 The President nevertheless then undertook to (at [40]): '... follow the approach of the High Court which requires the identification of particular considerations that enliven the residual discretion to dismiss an appeal from an erroneously lenient sentence.' Her Honour then asserted having 'given reasons below' which justified the conclusion, that there was 'nothing in the facts and circumstances that would require or justify this court exercising the residual discretion' (at [42]). However, no explanation was in fact given.

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[145] *Green v The Queen* (2011) 244 CLR 462.
[146] *Green v The Queen* (2011) 244 CLR 462 at 465-466 [1], citations omitted.
[147] *Green v The Queen* (2011) 244 CLR 462 at 479-480 [43].
[148] *Green v The Queen* (2011) 244 CLR 462 at 478 [40].
[149] *SOWA v Munda* [2012] WASCA 164 at [256].

Application

59 In *Green*, French CJ, Crennan and Kiefel JJ concluded:

> 'The Court of Criminal Appeal erred in failing to give adequate weight to the purpose of Crown appeals and the importance of the parity principle. It also erred in allowing the appeals partly on a basis that was never raised in argument.'[150] (our emphasis)

60 There was no mention in the President's reasoning of the specific matters raised by the appellant before the COA as to why the residual discretion should not be exercised.[151] They do not reveal what was or was not considered.[152]

61 There are five matters, individually or 'combined' which compelled its exercise in favour of declining to intervene in the event that manifest inadequacy was demonstrated.
61.1 Most significantly, the COA's bases for concluding manifest inadequacy are premised on considerations not raised by the State before the primary judge or identified in the State's appeal;[153] indeed they have been disavowed by the State in this Court.
61.2 Secondly, a 'sentencing judge, who has seen the accused ... is uniquely well placed... to exercise a discretion'.[154]
61.3 Thirdly, no error of principle was corrected by the COA in its reasoning for intervention.
61.4 Fourthly, there was nearly a year's delay in the 'hearing and determination of the appeal' and, under the original sentence the appellant becomes eligible for parole on 13 October 2013.[155]
61.5 Fifthly, the appellant's children will be affected by the delayed release of their father in circumstances where they have already lost their mother.[156]

62 In the result the COA failed to properly apply its residual discretion.

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[150] *Green v The Queen* (2011) 244 CLR 462 at 466 [4], 488 [76].
[151] Cf. *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-214 [54]-[55]; *Soulemezis v Dudley Holdings* (1987) 10 NSWLR 247 at 279-280.
[152] Buss JA provided reasons at [256].
[153] *Carroll v The Queen* (2009) HCA 13; (2009) 83 ALJR 579 at [8]; *R v JW* (2010) 199 A Crim R 486 at 495 [24]-[25], 505-506 [92]-[95]; *Director of Public Prosecutions (Vic) v Karazisis* (2010) 206 A Crim R 14 at 39-40 [104].
[154] *R v Melano; ex parte A-G* (1995) 2 Qd R 186 at 190; *Lacey v A-G (Qld)* (2011) 242 CLR 573 at [34].
[155] Cf. *Green v The Queen* (2011) 244 CLR 462 at 479 [43]: 'the delay etc...' and 'the imminent... release on parole'.
[156] *R v JW* (2010) 199 A Crim R 486 at 499 [53], the Attorney-General's concession included: 'negative effects on third parties such as family members, ... or his or her imminent release...'

Part VII: Applicable statutes
See *Appendix B.*

Part VIII: Orders sought
(1) Appeal allowed.
(2) Appeal to the Court of Appeal dismissed

Part IX:

10 **63** We estimate that presentation of the appellant's oral argument will take 1½ hours.

Dated: 1 July 2013

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P38 of 2013

ON APPEAL FROM THE COURT OF APPEAL
SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N:

ERNEST MUNDA
Appellant

-and-

THE STATE OF WESTERN AUSTRALIA
Respondent

APPENDIX 'B'

No.	Description	Date	Sections
1.	*Criminal Appeals Act* 2004 (WA) Version: 23 January 2009 – 20 May 2012	As at 21/07/2011 Still in force as at 03/07/2013	ss 27, 31 & 41
2.	*Criminal Code Act Compilation Act* 1913 (WA) Version: 7 July 2010 – 27 August 2010	As at 13/07/2010 Amended on 17/03/2012	s 280, Appendix A
3.	*Manslaughter Legislation Amendment Act* 2011 (WA) Version: 30 November 2011	As at 30/11/2011 Still in force as at 03/07/2013	s 4
4.	*Racial Discrimination Act* 1975 (Cth) Version: 5 August 2009 – 26 December 2011	As at 04/07/2011 Still in force as at 03/07/2013	s 9
5.	*Sentencing Act* 1995 (WA) Version: 22 June 2011 – 28 August 2011	As at 04/07/2011 Still in force as at 03/07/2013	ss 6, 7, 8, 15, 143
6.	*Supreme Court (Court of Appeal) Rules* 2005 (WA) Version: 2 May 2005 - present	As at 21/07/2011 Still in force as at 03/07/2013	s 32

(5) An appeal under this section against a decision must be commenced within 7 days after the date of the decision and before the day on which the accused's trial is listed to start.

(6) If an appeal under this section is commenced on or after the day on which the accused's trial is listed to start, the appeal must be dismissed.

(7) On an appeal under this section against an order or a refusal to make an order, the Court of Appeal may confirm the order or refusal, or set it aside and make any order that could have been made on the application for a separate trial.

[Section 26 amended by No. 2 of 2008 s. 34.]

Division 3 — Commencing and deciding appeals

27. Leave to appeal required in all cases

(1) The leave of the Court of Appeal is required for each ground of appeal in an appeal under this Part.

(2) After an appeal is commenced, the Court of Appeal must not give leave to appeal on a ground of appeal unless it is satisfied the ground has a reasonable prospect of succeeding.

(3) Unless the Court of Appeal gives leave to appeal on at least one ground of appeal in an appeal, the appeal is to be taken to have been dismissed.

(4) The Court of Appeal may decide whether or not to give leave to appeal —

(a) with or without written or oral submissions from the parties to the appeal;

(b) before or at the hearing of, or when giving judgment on, the appeal.

28. Commencing an appeal

(1) An appeal under this Part must be commenced and conducted in accordance with this Part and rules of court.

(e) if the offender could have been found guilty of some other offence (***offence B***) instead of offence A and the court is satisfied —

(i) that the jury must have been satisfied or, in a trial by a judge alone, that the judge must have been satisfied of facts that prove the offender did the acts or made the omissions that constitute offence B; and

(ii) that the offender should have been found not guilty of offence B on account of unsoundness of mind,

enter a judgment of acquittal of offence B on account of unsoundness of mind and deal with the offender under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

(6) If the Court of Appeal enters a judgment of acquittal of offence A or enters a judgment of conviction of offence B, it may vary any sentence —

(a) that was imposed for an offence other than offence A at or after the time when the offender was sentenced for offence A; and

(b) that took into account the sentence for offence A.

31. Appeal against sentence etc., decision on

(1) This section applies in the case of an appeal commenced by an offender under section 23, or by a prosecutor under section 24(1), against —

(a) the sentence imposed or any order made as a result of —

(i) a conviction on indictment; or

(ii) a conviction by a court of summary jurisdiction in respect of which the offender was committed for sentence;

(b) a refusal by a superior court to make an order that might be made as a result of such a conviction.

[(2) deleted]

(3) Unless under subsection (4) the Court of Appeal allows the appeal, it must dismiss the appeal.

(4) The Court of Appeal may allow the appeal if, in its opinion —

(a) in the case of an appeal referred to in subsection (1)(a), a different sentence should have been imposed; or

(b) in the case of an appeal referred to in subsection (1)(b), an order should have been made.

(5) If the Court of Appeal allows an appeal referred to in subsection (1)(a), it must set aside the sentence and —

(a) may instead impose a new sentence that is either more or less severe; or

(b) may send the charge back to the court that imposed the sentence to be dealt with further.

(6) If the Court of Appeal allows an appeal referred to in subsection (1)(b), it —

(a) may make any order that should have been made; or

(b) may send the charge back to the court that refused to make the order to be dealt with further.

[Section 31 amended by No. 2 of 2008 s. 35.]

32. Appeal under s. 25, decision on

(1) This section applies in the case of an appeal commenced under section 25 in relation to a charge of which an accused has been acquitted on account of unsoundness of mind under *The Criminal Code* section 27.

(2) An appeal against an acquittal of an offence (***offence A***) on account of unsoundness of mind is to be dealt with as if the appeal were against —

(a) a finding that the accused did the acts or made the omissions that constitute the offence (the ***factual finding***); or

41. Sentencing or re-sentencing on appeal

(1) If under this Act an appeal court decides to impose a sentence, it may do one or more of the following —

(a) order that the sentence is to be taken to have taken effect on a date before the date of the order;

(b) order that the sentence is to take effect on a date on or after the date of the order.

(2) If under this Act an appeal court varies or sets aside a sentence (***sentence A***), it may vary any other sentence —

(a) that was imposed at or after the time when sentence A was imposed; and

(b) that took into account sentence A.

(3) If under this Act an appeal court decides to vary a sentence, it may do one or more of the following —

(a) vary the sentence as imposed;

(b) impose a different sentence involving a different sentencing option;

(c) order that the sentence is to be taken to have taken effect on a date before the date of the order;

(d) order that the sentence is to take effect on a date on or after the date of the order.

(4) The appeal court deciding an appeal that does or may require it to impose a sentence, or to vary a sentence imposed, on a person for an offence (whether the appeal was commenced by the person or by the prosecutor) —

(a) may take into account any matter, including any material change to the person's circumstances, relevant to the sentence that has occurred between when the lower court dealt with the person and when the appeal is heard; but

(b) despite paragraph (a), must not take into account the fact that the court's decision may mean that the person is again sentenced for the offence.

(5) If an appeal court decides to impose a sentence, or vary a sentence already imposed, on a party, it may do so in the absence of the party, despite the *Sentencing Act 1995* section 14.

(6) If an appeal court, in deciding an appeal in relation to a person sentenced to imprisonment —

(a) sets aside the sentence; or

(b) varies the sentence, or amends the conviction in respect of which the sentence was imposed; or

(c) confirms the sentence,

the court must send a memorandum setting out the result of the appeal to the chief executive officer (as defined in the *Prisons Act 1981*).

(7) If subsection (6)(a) applies and the court does not impose another sentence of imprisonment on the person, the person must be released as soon as practicable after the memorandum is received by the chief executive officer, unless the person is required to be in custody for some other matter.

(8) If subsection (6)(b) applies, the warrant for the imprisonment of the person previously issued and in force has effect as if it were amended in accordance with the memorandum.

(9) The memorandum is to be put in the records of the department (as defined in the *Prisons Act 1981*) and is evidence of the matters stated in it.

(10) This section is in addition to and does not affect the operation of the *Sentencing Act 1995* except as expressly stated.

[Section 41 amended by No. 2 of 2008 s. 39.]

42. Result of appeal to be given to other court

(1) When an appeal is concluded, the appeal court must send a memorandum setting out the result of the appeal to the lower court.

(b) the person is unlikely to be a threat to the safety of the community when released from imprisonment,

in which case the person is liable to imprisonment for 20 years.

(5) A child who is guilty of murder is liable to either —

(a) life imprisonment; or

(b) detention in a place determined from time to time by the Governor or under another written law until released by order of the Governor.

(6) A court that does not sentence a person guilty of murder to life imprisonment must give written reasons why life imprisonment was not imposed.

[Section 279 inserted by No. 29 of 2008 s. 10.]

280. Manslaughter

If a person unlawfully kills another person under such circumstances as not to constitute murder, the person is guilty of manslaughter and is liable to imprisonment for 20 years.

Alternative offence: s. 281, 284, 290, 291 or 294 or *Road Traffic Act 1974* s. 59.

[Section 280 inserted by No. 29 of 2008 s. 11.]

281. Unlawful assault causing death

(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.

(2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

[Section 281 inserted by No. 29 of 2008 s. 12.]

*[**281A.** Deleted by No. 29 of 2008 s. 13.]*

*[**282.** Deleted by No. 29 of 2008 s. 10.]*

Part 2 — *The Criminal Code* amended

3. Act amended

This Part amends *The Criminal Code*.

4. Section 280 amended

In section 280 delete "20 years." and insert:

life.

Part II—Prohibition of racial discrimination

8 Exceptions

(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

(2) This Part does not apply to:

(a) any provision of the governing rules (within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012*) of a registered charity, if the provision:

(i) confers charitable benefits; or

(ii) enables charitable benefits to be conferred;

on persons of a particular race, colour or national or ethnic origin; or

(b) any act done in order to comply with such a provision.

(3) In this section, ***charitable benefits*** means benefits for purposes that are exclusively charitable according to the law in force in any State or Territory.

9 Racial discrimination to be unlawful

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(1A) Where:

(a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and

(b) the other person does not or cannot comply with the term, condition or requirement; and

(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

(3) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of this section.

10 Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

Part 2 — General matters

Division 1 — Sentencing principles

6. Principles of sentencing

(1) A sentence imposed on an offender must be commensurate with the seriousness of the offence.

(2) The seriousness of an offence must be determined by taking into account —

(a) the statutory penalty for the offence; and

(b) the circumstances of the commission of the offence, including the vulnerability of any victim of the offence; and

(c) any aggravating factors; and

(d) any mitigating factors.

(3) Subsection (1) does not prevent the reduction of a sentence because of —

(a) any mitigating factors; or

(b) any rule of law as to the totality of sentences.

(4) A court must not impose a sentence of imprisonment on an offender unless it decides that —

(a) the seriousness of the offence is such that only imprisonment can be justified; or

(b) the protection of the community requires it.

(5) A court sentencing an offender must take into account any relevant guidelines in a guideline judgment given under section 143.

(6) For the purpose of subsection (4), an order under section 58 that a person be imprisoned is not a sentence of imprisonment.

[Section 6 amended by No. 23 of 2001 s. 12.]

7. Aggravating factors

(1) Aggravating factors are factors which, in the court's opinion, increase the culpability of the offender.

(2) An offence is not aggravated by the fact that —

(a) the offender pleaded not guilty to it; or

(b) the offender has a criminal record; or

(c) a previous sentence has not achieved the purpose for which it was imposed.

(3) If the statutory penalty for an offence is greater if the offence is committed in certain circumstances than if it is committed without the existence of those circumstances, then —

(a) an offender is not liable to the greater statutory penalty unless he or she has been charged and convicted of committing the offence in those circumstances; and

(b) whether or not the offender was so charged, the existence of those circumstances may be taken into account as aggravating factors.

8. Mitigating factors

(1) Mitigating factors are factors which, in the court's opinion, decrease the culpability of the offender or decrease the extent to which the offender should be punished.

[(2) deleted]

(3) The fact that criminal property confiscation has occurred or may occur is not a mitigating factor.

(3a) However, except in the case of derived property, facilitation by the offender of criminal property confiscation is a mitigating factor.

(4) If because of a mitigating factor a court reduces the sentence it would otherwise have imposed on an offender, the court must state that fact in open court.

(5) If because an offender undertakes to assist law enforcement authorities a court reduces the sentence it would otherwise have imposed on the offender, the court must state that fact and the extent of the reduction in open court.

(6) In this section —

criminal property confiscation means —

(a) confiscation of derived property or any other property under section 6, 7 or 8 of the *Criminal Property Confiscation Act 2000*; or

(b) confiscation or forfeiture to the State of derived property under any other written law;

derived property means property derived or realised, directly or indirectly, by the offender, or that is subject to the effective control of the offender, as a result of the commission of the offence.

[Section 8 amended by No. 29 of 1998 s. 15; No. 26 of 2004 s. 7; No. 41 of 2006 s. 71(1) and 79; No. 42 of 2012 s. 3.]

9AA. Plea of guilty, sentence may be reduced in case of

(1) In this section —

fixed term has the meaning given in section 85(1);

head sentence, for an offence, means the sentence that a court would have imposed for the offence if —

(a) the offender had been found guilty after a plea of not guilty; and

(b) there were no mitigating factors;

victim has the meaning given in section 13.

(2) If a person pleads guilty to a charge for an offence, the court may reduce the head sentence for the offence in order to recognise the benefits to the State, and to any victim of or witness to the offence, resulting from the plea.

(3) The earlier in the proceedings the plea is made, the greater the reduction in the sentence may be.

15. Court may inform itself as it thinks fit

To decide on the proper sentence to be imposed, or on imposing an order in addition to sentence, a court sentencing an offender may inform itself in any way it thinks fit.

16. Adjourning sentencing

(1) A court may adjourn the sentencing of an offender —

(a) to obtain information about the offence, the offender or a victim; or

(b) to allow a pre-sentence report to be prepared for the court under Division 3; or

(c) to enable a victim impact statement to be given to the court under Division 4; or

(d) to allow a mediation report to be prepared for the court under Division 5; or

(e) to allow a list of pending charges to be prepared under Division 6; or

(f) for the making or determination of an application under a written law for the confiscation or forfeiture to the State (otherwise than under the *Criminal Property Confiscation Act 2000*) of property legitimately owned by the offender and used in, or in connection with, the commission of the offence; or

(g) for any other reason the court thinks is proper.

(2) The sentencing of an offender must not be adjourned for more than 6 months after the offender is convicted.

(3) Subsection (2) does not prevent a court sentencing an offender more than 6 months after the offender is convicted.

[Section 16 amended by No. 26 of 2004 s. 8; No. 41 of 2006 s. 71(2).]

Part 20 — Miscellaneous

143. Guideline judgments by Court of Appeal

(1) The Court of Appeal may give a guideline judgment containing guidelines to be taken into account by courts sentencing offenders.

(2) A guideline judgment may be given in any proceeding considered appropriate by the court giving it, and whether or not it is necessary for the purpose of determining the proceeding.

(3) A guideline judgment may be reviewed, varied or revoked in a subsequent guideline judgment.

[Section 143 amended by No. 45 of 2004 s. 37.]

143A. Sentencing guidelines for courts of summary jurisdiction

(1) For the purpose of reducing any disparity in sentences imposed by courts of summary jurisdiction, the Chief Magistrate of the Magistrates Court may from time to time publish guidelines for the sentencing of offenders in such courts.

(2) The guidelines are not binding on courts of summary jurisdiction.

(3) Without limiting the matters that may be included in the guidelines, they may include —

(a) guidance about —

(i) assessing the seriousness of offences;

(ii) the sentencing process;

(iii) when it is appropriate to impose particular sentencing options;

(b) suggestions as to the appropriate sentence to be imposed for a particular offence or class of offence.

[Section 143A inserted by No. 57 of 1999 s. 39; amended by No. 59 of 2004 s. 141.]

31. Respondent's options

(1) On being served with an appeal notice, a respondent may file a Form 4.

(2) If the respondent files a Form 4, it must be filed within 7 days after the date on which the respondent is served with the appeal notice.

(3) A Form 4 may be filed together with an application, made in accordance with rule 44, for an interim order.

(4) If a respondent does not file a Form 4, the respondent is not entitled to take part or be heard in the appeal and is not a party to the appeal for the purposes of these rules.

(5) If a respondent files a Form 4 in which the respondent also appeals against the decision specified in the appellant's appeal notice, the registrar may order —

(a) the respondent to file documents in respect of the respondent's appeal that correspond to the "Appellant's case" referred to in rule 32; and

(b) the appellant to file documents in respect of the respondent's appeal that correspond to the "Respondent's answer" referred to in rule 33,

within such periods as the registrar may order.

32. "Appellant's case" to be filed

(1) After an appeal notice is filed, the appellant must file the "Appellant's case".

(2) The appellant's case must be filed —

(a) in an interlocutory civil appeal, within 7 days after the date on which the appeal notice is filed;

(b) in any other appeal, within 35 days after the date on which the appeal notice is filed.

(3) The appellant's case consists of a Form 7 to which is attached —

(a) in an interlocutory civil appeal or a sentence appeal, these documents —

(i) a document titled "Appellant's grounds of appeal";

(ii) a document titled "Appellant's submissions";

(iii) a document titled "Appellant's legal authorities";

(iv) a document titled "Orders wanted";

(b) in any other appeal, these documents —

(i) a document titled "Appellant's grounds of appeal";

(ii) a document titled "Appellant's submissions";

(iii) a document titled "Appellant's legal authorities";

(iv) a document titled "Orders wanted";

(v) a document titled "Draft chronology";

(vi) a document titled "Draft appeal book indexes".

(4) The document titled "Appellant's grounds of appeal" —

(a) must contain all of the grounds of appeal on which the appellant intends to rely at the hearing of the appeal;

(b) must state the grounds, and concise particulars of them, succinctly in numbered paragraphs and must not merely allege —

(i) that the primary court erred in fact or in law;

(ii) that the primary court's decision is against the evidence or the weight of evidence or is unreasonable and cannot be supported having regard to the evidence;

(iii) that the primary court's decision is unsafe or unsatisfactory; or

(iv) in the case of an appeal against a sentence, that the sentence is excessive or inadequate;

and

(c) must state, for each ground, whether it is —

(i) an error of fact;

(ii) an error of law; or

(iii) an error of mixed fact and law.

(5) The document titled "Appellant's submissions" —

(a) must, for each ground of appeal, contain the appellant's written submissions (or argument) expressed so as to convey the substance of them clearly and as succinctly as possible;

(b) must set out the submissions about the ground in numbered paragraphs;

(c) must include references to —

(i) each page number of the primary court's transcript on which relevant material appears;

(ii) the number of each exhibit in the primary court that is relevant; and

(iii) each principal legal authority on which the appellant relies in support of the ground;

(d) must not be more than 20 pages long; and

(e) must be signed by the person who prepared it.

(6) The document titled "Appellant's legal authorities" —

(a) must list, and number consecutively, each principal legal authority to which the court is referred, under these headings in this order —

(i) "Written laws";

(ii) "Judgments";

(iii) "Legal texts";

(b) must mark with an asterisk any legal authority from which it is intended to read any text to the court at the hearing;

(c) for each written law listed, include its short title, its jurisdiction and each relevant section or provision of it;

[Example:
Written laws:
*1. Interpretation Act 1984 (WA) s. 5 "under"; s. 61.
2. Acts Interpretation Act 1901 (Cth) s. 22(1).]

(d) for each judgment listed, include —

(i) first, its citation in an authorised law report (if any) and any page of it on which is a relevant passage; and

(ii) second, its media neutral citation (if any).

[Example:
Judgments:
*3. Ward v The Queen (2000) 23 WAR 254 at 274; [2000] WASCA 413 at [106].
4. Talbot v Lane (1994) 14 WAR 120.]

and

(e) for each authoritative legal text listed, refer to the edition concerned and to each relevant passage.

(7) The document titled "Orders wanted" must set out —

(a) the orders that the appellant wants the Court of Appeal to make; and

(b) if in a criminal appeal the appellant wants the Court of Appeal to give a guideline judgment — the guidelines that it is proposed the court should give.

(8) The document titled "Draft chronology" must state succinctly in numbered paragraphs arranged in date order the date and facts of each event that is material to the appeal.

(9) The document titled "Draft appeal book indexes" must set out for each of the 3 parts of the appeal book a draft index of the

proposed contents of the part, being the documents required by rule 38 to be in the part.

33. "Respondent's answer" to be filed

(1) In this rule —

appellant's grounds of appeal means the appellant's grounds of appeal as modified by any order made under rule 43.

(2) After being served with the appellant's case, the respondent must file the "Respondent's answer".

(3) The respondent's answer must be filed —

(a) in an interlocutory civil appeal, within 7 days after;

(b) in any other appeal within 21 days after,

the date the respondent is served with a notice issued by the registrar requiring the answer to be filed.

(4) The respondent's answer consists of a Form 8 to which is attached —

(a) in an interlocutory civil appeal, these documents —

(i) a document titled "Respondent's submissions";

(ii) if the respondent seeks to uphold the primary court's decision on a ground not relied on by the primary court — a document titled "Respondent's notice of contention";

(iii) a document titled "Respondent's legal authorities";

(b) in a sentence appeal, these documents —

(i) a document titled "Respondent's submissions";

(ii) a document titled "Respondent's legal authorities";

(c) in any other appeal, these documents —

(i) a document titled "Respondent's submissions";