HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA S44 of 2023
SYDNEY REGISTRY

BETWEEN: ENRICO ROBERT CHARLES DELZOTTO
Appellant

and

THE KING
Respondent

NAAJA'S SUBMISSIONS SEEKING LEAVE TO BE HEARD AS AMICUS CURIAE

Part I: Certification

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

Part II: Basis of application for leave to be heard as amicus curiae

2. The North Australian Aboriginal Justice Agency (**NAAJA**) seeks leave to be heard in Mr Hurt and Mr Delzotto's appeals as amicus curiae on the issue of the correctness of the decision of the Supreme Court of the Northern Territory in *R v **Pot**, Wetangky and Lande*[1] as compared to the decision in ***Bahar** v The Queen*.[2] In particular, NAAJA would make submissions with reference to Territory jurisprudence as to why the *Pot* approach:
   a. is more consistent with fundamental principle than the *Bahar* approach;
   b. better acknowledges the distinction between minimum and standards sentences than the *Bahar* approach; and
   c. is workable.
3. NAAJA's written submissions are identical in both Mr Hurt and Mr Delzotto's appeals.

Part III: Reasons why leave should be granted

4. NAAJA should be granted leave to be heard as amicus curiae because the appeals raise a question as to the correctness of the Northern Territory approach to mandatory

[1] (Supreme Court (NT), 18 January 2011, Riley CJ).
[2] *Bahar v The Queen* (2011) 45 WAR 100.

sentencing provisions – an approach which was stated in the federal context in *Pot* but which is also applied to Territory legislation – and that is a question that:

a. is unlikely to be fully addressed in the submissions of the other parties; and

b. NAAJA is institutionally well-suited to addressing.

Northern Territory approach unlikely to be fully addressed by other parties

5. French CJ explained in *Wurridjal v Commonwealth* that 'the Court may be assisted where a prospective amicus curiae can present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties'.[3] French CJ went on to say that 'it may be in the interests of the administration of justice' for the Court to hear submissions from an amicus curiae if those submissions would give the Court 'the benefit of a larger view of the matter before it'. [4]

6. In the present case, the submissions of the parties will no doubt deal with *Pot*, but their treatment of that decision will likely (and understandably) be limited to considering the Commonwealth legislation with which that decision was immediately concerned,[5] and the different Commonwealth legislation at issue in the present appeals.[6] However, the *Pot* approach did not emerge from a *tabula rasa*, it was articulated in the context of the Northern Territory judiciary being well familiar with the operation of (Territory) mandatory sentencing provisions, which had been in operation since the mid 1990s.[7] Further, this Court's consideration of the relative merits of the *Pot* and *Bahar* approaches has potential implications beyond the Commonwealth legislation with which those cases (and the present appeals) are concerned. The *Bahar* approach has been accepted to apply to Western Australian mandatory sentencing legislation,[8] but the *Pot* approach has been preferred by Northern Territory courts interpreting Territory legislation.[9]

7. Thus NAAJA can offer a 'larger view' of the question presently before the Court by contextualising the *Pot* approach by reference to the broader landscape of mandatory sentencing jurisprudence in the Northern Territory.

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[3] *Wurridjal v Commonwealth* (2009) 237 CLR 309, 312 (French CJ, emphasis added).
[4] *Wurridjal v Commonwealth* (2009) 237 CLR 309, 312 (French CJ, emphasis added).
[5] *Migration Act 1958* (Cth) s 233C.
[6] *Crimes Act 1914* (Cth) ss 16A, 16AAA, 16AAB, 16AAC; *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) Sch 6, Item 3.
[7] David Gibson, 'Mandatory Madness: The True Story of the Northern Territory's Mandatory Sentencing Laws' (2000) 25(3) *Alternative Law Journal* 103.
[8] *Eldridge v The State of Western Australia* [2020] WASCA 66, [30]–[39] (the Court); *The State of Western Australia v Clark* (2020) 283 A Crim R 512, [64] (the Court); *Fernie v The State of Western Australia* [2022] WASCA 20, [30] (the Court).
[9] See, eg, *R v Deacon* (2019) 282 A Crim R 329.

NAAJA's historical involvement in legal and policy debates about mandatory sentencing

8. NAAJA – the largest legal organisation in the Northern Territory – is institutionally well-suited to offering this assistance to the Court. Together with its predecessor organisations,[10] NAAJA has been representing Indigenous persons in sentencing proceedings in the Northern Territory for over 50 years. NAAJA also advocates for systemic improvements in the legal system through policy and law reform work.

9. Consistently with those functions, NAAJA has litigated and lobbied for the abolition and amelioration of mandatory sentencing provisions for as long as they have been in operation in the Northern Territory.[11] This has been, and remains, an issue of particular concern to NAAJA not just because mandatory sentences are recognised to be 'the very antithesis of just sentences'[12] but also because that injustice is felt disproportionately by Aboriginal people.[13] For example, under the Northern Territory's early mandatory sentencing scheme – described by Sir Anthony Mason as 'Draconian'[14] – Aboriginal people were 8.6 times more likely to be imprisoned than non-Aboriginal people.[15] More recent statistics on mandatory sentencing provisions for certain drug offences confirm their disproportionate impact on Aboriginal people.[16] International bodies monitoring Australia (and specifically the Northern Territory) have noted the disproportionate impact of mandatory sentencing laws on Indigenous people.[17]

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[10] Central Australian Aboriginal Legal Aid Service; Katherine Regional Aboriginal Legal Aid Service; Miwatj Aboriginal Legal Service and North Australian Aboriginal Legal Aid Service. Subsequent references to NAAJA's history of litigation and policy advocacy include references to these predecessor organisations.

[11] NAAJA, *Submission on the 'Mandatory Sentencing and Community – Based Sentencing Options'* (November 2020) p iii.

[12] *Trenerry v Bradley* (1997) 6 NTLR 175, 187 (Mildren J).

[13] Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, March 2018) p 273 [81], see also recommendation 8-1; Northern Territory Law Reform Commission, *Mandatory Sentencing and Community-Based Sentencing Options: Final Report* (Report No 47, March 2021) [1.2].

[14] Anthony Mason, 'Mandatory Sentencing: Implications for Judicial Independence' (2001) 7 *Australian Journal of Human Rights* 21, 30.

[15] Northern Territory Office of Crime Prevention, *Northern Territory Government, Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience* (August 2003) p 3.

[16] *Bara v Blackwell* [2022] NTCCA 17, [7(a)] but see [88] (the Court).

[17] See, eg, Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 19 November 1997) [19.50]–[19.64]; Joint Standing Committee on Treaties, Parliament of Australia, United Nations Convention on the Rights of the Child (Report No 17, August 1998) 346 [8.53]; United Nations Human Rights Committee, *Concluding Observation of the Human Rights Committee: Australia*, 69th sess, CCPR/CO/69/Australia (28 July 2000) [17]; United Nations Committee Against Torture, *Concluding Observations of the Committee Against Torture: Australia*, 40th session, CAT/C/AUS/CO/1 (15 May 2008) 7–8 [Rec 23(c)]; Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (Discussion Paper, May 2014) 30–1 [115]–[123].

10. In 1997, NAAJA challenged the validity of Northern Territory mandatory sentencing legislation[18] and in 2000, NAAJA lodged a communication relating to mandatory sentencing with the United Nations High Commissioner for Human Rights.[19] More recently, NAAJA has been involved in cases directed towards maximising the capacity for leniency and judicial discretion within mandatory sentencing provisions.[20] In its policy advocacy, NAAJA has for a quarter of a century made many submissions on the effect of mandatory sentencing provisions.[21]

11. NAAJA has identified 'with particularity what it is that the applicant seeks to add to the arguments that the parties will advance' (see [2] above).[22] This Court will be 'significantly assisted by the submissions of the amicus and … any costs to the parties or any delay … is not disproportionate to the expected assistance.'[23]

12. NAAJA has recently shown itself to be capable of assisting this Court as amicus curiae on other issues of concern to Aboriginal people in the Northern Territory criminal justice system.[24] It is hoped that NAAJA can offer similar assistance on this occasion.

Part IV: Argument

13. Absent particular matters of statutory context, a statutory provision requiring the imposition of 'at least' a sentence of X years is better understood to require only that sentences not be less than X years (the *Pot* approach). Such a provision should not normally be understood to have the effect of shifting upwards sentences that would in any event have fallen above the mandatory minimum offence. Experience in the

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[18] *Wynbyne v Marshall* (1997) 7 NTLR 97, special leave refused: Transcript of Proceedings, *Wynbyne v Marshall* (High Court of Australia, D174/1997, Gaudron and Hayne JJ, 21 May 1998).

[19] See *Submission on the 'Mandatory Sentencing and Community – Based Sentencing Options'* (November 2020) p 3.

[20] *Dhamarrandji v Curtis* [2014] NTSC 39, [23] (Blokland J); *R v Duncan* [2015] NTCCA 2, [21] (the Court); *Wright v Valladares* [2015] NTSC 59, [14]–[18] (Kelly J); *Wilson v Berlin* [2015] NTSC 52, [29]–[30] (Kelly J); *Orsto v Grotherr* [2015] NTSC 18, [20] (Blokland J); *Arnott v Blitner* [2020] NTSC 63, [17]–[73] (Kelly J); *Courtney v Narjic* [2021] NTSC 61, [6]–[17] (Grant CJ); *Firth v Namarnyilk* [2021] NTSC 75, [10] (Barr J). NAAJA also represented the accused in the first case engaging the exception to the Northern Territory's murder mandatory sentencing provisions: *R v Evelyn Namatjira* (Supreme Court (NT), 3 July 2012, Southwood J).

[21] For early examples see NAAJA's submission to the Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (Cth)*. See also John Sheldon and Kirsty Gowans, 'Dollars Without Sense: A Review of NT's Mandatory Sentencing Laws', *North Australian Aboriginal Legal Aid Service* (1998). More recently, see *Submission: Review of the legislation and justice response to domestic and family violence* (November 2022) p 34; *Submission on the 'Mandatory Sentencing and Community – Based Sentencing Options'* (November 2020) p 3–20; *Submissions to the Australian Law Reform Commission Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples* (October 2017) p 25–32.

[22] *Roadshow Films Pty Ltd v iiNet Limits (No 1)* (2011) 248 CLR 37, [6] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[23] *Roadshow Films Pty Ltd v iiNet Limits (No 1)* (2011) 248 CLR 37, [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), affirming *Levy v Victoria* (1997) 189 CLR 579, 604–5 (Brennan CJ).

[24] *Nguyen v The Queen* (2020) 269 CLR 299, [76] (Edelman J); *Singh v The Queen* (2020) 94 ALJR 714.

Northern Territory confirms that the *Pot* approach: is more consistent with fundamental principle than the *Bahar* approach; better acknowledges the distinction between minimum and standards sentences; and is workable, despite suggestions to the contrary.

Pot approach more consistent with fundamental principle

14. In 1997, in the Supreme Court of the Northern Territory, Mildren J said that '[p]rescribed minimum mandatory sentencing provisions are the very antithesis of just sentences.'[25] Courts outside of the Northern Territory have endorsed[26] or echoed those remarks, explaining that the vice of mandatory minimum sentences is that they remove judicial discretion to impose the particular sentence that 'would be proper according to the justice of the case'.[27] While Mildren J's observations were referred to in *Bahar*,[28] the Court did not grapple with the deeply rooted legal values underlying them – a commitment to individualised justice and the closely linked concepts of mercy and parsimony.

15. Individualised justice: In furtherance of individualised justice, courts sentencing persons for criminal offending typically endeavour to take account of the particular facts of the offence and the offender.[29] As Sir Anthony Mason observed in extra-curial discussion of Northern Territory mandatory sentencing legislation: 'it has been the traditional function of the courts to make the punishment appropriate to the circumstances as well as the nature of the crime'.[30] Also writing extra-curially, this time in a Queensland context, Walter Sofronoff QC linked the law's commitment to individualised justice, and its hostility to mandatory sentences, to 'the great conservative politician Edmund Burke' who in turn wrote of the importance of context and circumstances to the application of general principle.[31] However far one traces it back, individualised justice is a bedrock principle of the Australian legal system and statutory interventions in sentencing are typically interpreted so as to minimise interference with this principle.[32] It ought not be

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[25] *Trenerry v Bradley* (1997) 6 NTLR 175, 187 (Mildren J). Special leave refused: *Bradley v Trenerry* [1998] HCATrans 179.
[26] See recently *Buckley v The Queen* [2022] VSCA 138, [5] (the Court).
[27] *Trenerry v Bradley* (1997) 6 NTLR 175, 187 (Mildren J). See also *Curnow v Pryce* (1999) 131 NTR 1, [12] (Mildren J); *Hales v Williams* [2004] NTSC 41, [9] (Riley J); *R v Tahir* (Supreme Court (NT), 28 October 2009, Mildren J); *R v Edward Nafi* (Supreme Court (NT), 19 May 2011, Kelly J); *R v Zak Greive* (Supreme Court (NT), 9 January 2013, Mildren J).
[28] *Bahar v The Queen* (2011) 45 WAR 100, [46] (McLure P, Martin CJ and Mazza J agreeing).
[29] See generally *Bugmy v The Queen* (2013) 249 CLR 571, [36], [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [56] (Gageler J).
[30] Anthony Mason, 'Mandatory Sentencing: Implications for Judicial Independence' (2001) 7 *Australian Journal of Human Rights* 21, 23–4. See also *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ).
[31] Walter Sofronoff QC, *Queensland Parole System Review: Final Report* (November 2016) [521] quoting Edmund Burke, *Reflections on the Revolution in France* (Penguin Classics, 1968) 90.
[32] See, eg, *R v Way* (2004) 60 NSWLR 168, [55] (the Court).

readily concluded that Parliament, by introducing a mandatory minimum, intended to deprive courts of the ability to impose a sentence as low as the law permits (i.e. the minimum) in order to account for mitigating factors particular to the offence or offender.

16. Mercy: Related to the principle of individualised justice is the idea that the law should retain a capacity for mercy where the circumstance of a case call for it.[33] As Windeyer J remarked in *Cobiac v Liddy*, '[t]he whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy. … [I]n special circumstances to avoid the rigidity of inexorable law is of the very essence of justice'.[34] The *Pot* approach better preserves the judicial capacity for mercy than the *Bahar* approach, by permitting the imposition of a mandatory minimum sentence even where the case does not fall within the 'least serious' category.

17. Parsimony: The principle of parsimony requires that a person ought not be sentenced to a more severe sentence than that which is necessary to give effect to the purposes of sentencing.[35] As was explained long ago: 'The courts should endeavour to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest.'[36] By legislating for a mandatory minimum sentence Parliament prescribes the minimum that the public interest requires for a particular category of offence, parsimony leans towards permitting courts to go no further than that minimum for offences that would otherwise have fallen below it.

18. To say that individualised justice, mercy and parsimony are valued by the legal system is not to say that they can override statutory text. But they can, like other 'fundamental principles and systemic values',[37] inform the task of discerning Parliament's intent. It ought not be readily inferred that Parliament intended to discard these fundamental principles. Neither should it be thought that Parliament treated them in an 'all-or-nothing' way. Rather, Parliament ought only be understood to have eroded these

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[33] See generally Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25(1) *Monash University Law Review* 1.
[34] *Cobiac v Liddy* (1969) 119 CLR 257, 269 (Windeyer J).
[35] *Boulton v The Queen* (2014) 46 VR 308, [140] (the Court).
[36] *Webb v O'Sullivan* (1952) SASR 65, 66 (Napier CJ, emphasis added).
[37] See, in a different context, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [313] (Gageler and Keane JJ). For other references to the relevance of deeply rooted legal values to the practice of statutory interpretation see *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, [58] (Gageler J); *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, [81] (Gordon J), [93] (Edelman J).

principles – and liberty[38] – to the extent it has clearly expressed an intention to do so. The result is that where the *Pot* approach is 'reasonably open' this Court ought prefer it because it 'involves the least interference with [fundamental principles]'.[39]

19. Equal justice: There are four reasons to reject the contrary argument[40] that another fundamental principle – equal justice – warrants a preference for the *Bahar* approach.

20. *First*, the common law has never been particularly concerned to ensure that persons receive equally harsh sentences. As Adams J explained in *Kol v The Queen*: 'the principle of parity has never justified the increase of a comparative sentence but only a decrease'.[41] Northern Territory courts have regularly remarked on the injustice of mandatory sentencing, with comments like those of Kelly J in *R v Nafi*: 'I am compelled by the legislation to hand down a sentence which is harsher than a just sentence arrived at on the application of longstanding sentencing principles applied by the Courts and which have been applied by those Courts for the protection of society and of the individual. I have no choice.'[42] It would be a strange thing if the common law – historically so concerned with avoiding injustice and harshness in criminal punishment – by the principle of equal justice required courts to compound the injustice already observed in mandatory sentencing. That would be to 'multiply the injustice', which is not something the common law is oriented to achieving.[43]

21. *Second*, the demands of equal justice depend upon the statutory context. As this Court has explained: 'Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law.'[44] When Parliament passes a mandatory sentencing prescription it necessarily renders *irrelevant* those matters that would otherwise have taken a sentence below the mandatory minimum, at least to that extent.

22. *Third*, statutory *minima*, like statutory *maxima*, inherently present obstacles to perfectly equal justice. If the maximum sentence is reserved for the worst category of cases there will inevitably be cases even within the 'worst category' that are worse than others in that category,[45] yet both must receive the same sentence (the maximum). Similarly, in

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[38] As to the liberty-sensitive approach to interpreting mandatory sentencing provisions see *McMillan v Pryce* [1997] NTSCFC 83, p 8–9 (Mildren J, Martin CJ agreeing).
[39] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [11] (French CJ, Kiefel and Bell JJ).
[40] See, eg, *Karim v The Queen* (2013) 83 NSWLR 268, [45] (Allsop P).
[41] *Kol v The Queen* [2015] NSWCCA 150, [16] (Adams J).
[42] *R v Edward Nafi* (Supreme Court (NT), 19 May 2011, Kelly J). See also the cases cited above at note 27.
[43] *Kol v The Queen* [2015] NSWCCA 150, [16] (Adams J).
[44] *Green v The Queen* (2011) 244 CLR 462, [28] (French CJ, Crennan and Kiefel JJ, emphasis added).
[45] *R v Kilic* (2016) 259 CLR 256, [18] (the Court).

enacting a mandatory minimum the legislature can be taken to have understood that it might be imposed in cases of differing seriousness and to offenders of differing culpability.

23. *Fourth*, as Mason CJ wrote extra-curially of the Norther Territory mandatory sentencing laws: if Parliament wishes to infringe equal justice it can.[46] As has been recognised in the Territory courts, the prospects of some 'unequal justice' is 'the consequence of the statutory scheme' for mandatory sentencing.[47] Parliament ought be taken to have been willing to pay the price of some unequal justice when imposing mandatory minimums.
24. For the above reasons, the *Pot* approach is more consistent with fundamental principles – or, put differently, 'does least violence'[48] to those principles – than the *Bahar* approach.

Pot approach better accounts for distinction between minimum and standard sentences

25. The next reason that the *Pot* approach ought be preferred to that in *Bahar* is that the former better accounts for the distinction between minimum and standard sentences. This is another matter borne out by the Northern Territory experience.
26. Experience in the Northern Territory and elsewhere in Australia confirms that there are generally three[49] mechanisms available to Parliament to increase sentences for a particular offence: raising the maximum penalty, introducing a standard sentence, or fixing a mandatory minimum. Parliament's choice between these three options will depend upon exactly what it is about current sentencing practices that is of concern.
27. Raising the maximum penalty is the most apt legislative choice when Parliament is concerned that an entire category of offence (whether serious or less serious examples of the offence) is not being taken seriously enough by the courts. The effect of raising the maximum penalty is to stretch the sentencing range upwards such that *all* sentences should increase,[50] although not necessarily in proportion to the increase in maximum.[51] The increase will be most pronounced for offences in the worst category – i.e. those

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[46] Anthony Mason, 'Mandatory Sentencing: Implications for Judicial Independence' (2001) 7 *Australian Journal of Human Rights* 21, 27 citing *Leeth v The Commonwealth* (1992) 174 CLR 455.
[47] *R v Deacon* (2019) 282 A Crim R 329, [39] (the Court).
[48] *Kol v The Queen* [2015] NSWCCA 150, [14] (Adams J).
[49] Leaving aside 'baseline' sentences, as to which see generally *DPP v Walters* (2015) 49 VR 356.
[50] See, eg, *Bara v Blackwell* [2022] NTCCA 17, [73(e)] (the Court) considering the remarks of Southwood J in *Blackwell v Bara* [2022] NTSC 17; *Clark v Trenerry* (1996) 125 FLR 260, 268 (Martin CJ); *Bellis v Burgone* [2003] NTSC 103 [16] (Mildren J); *Ahfat v Cassidy* [2022] NTSC 27, [15] (Riley AJ); *R v AB (No 2)* (2008) 18 VR 391, [41] (the Court); *DPP (Vic) v Janson* (2011) 31 VR 222, [21]–[23] (Nettle JA, Neave JA and Kyrou AJA agreeing); *Muldrock v The Queen* (2011) 244 CLR 120, [31] (the Court); *Wassef v The Queen* [2011] VSCA 30, [26], [30] (Redlich JA, Maxwell P agreeing).
[51] *Blackwell v Bara* [2022] NTSC 17, [32(e)] (Southwood J).

attracting the new maximum – and will be more attenuated at middle and especially lower end of the range.

28. Standard sentences address a different perceived problem in sentencing practices, namely a concern that sentences are bunched towards the bottom of the existing range when they should be somewhere else. By introducing the 'legislative guidepost'[52] of a standard sentence – usually with a command that it reflects an offence in the middle range of objective seriousness – Parliament commands the courts to shift upwards their sentencing practices for mid and lower-mid range offending while leaving unchanged the practice for the 'worst category' of offence (which should have previously been attracting the maximum) and for less serious examples of the offence (which should have been well below the standard sentence).

29. Finally, a mandatory minimum sentence is typically fixed when Parliament perceives that courts are imposing relatively short sentences of imprisonment (or non-custodial sentences) for offences that warrant significant terms of imprisonment. By introducing a mandatory minimum, Parliament leaves unaffected the middle of the range (which it could have changed by introducing a standard sentence) and the top of the range (which it could have changed by raising the maximum). It is true that the fixing of a minimum can result in a 'compression'[53] of sentences towards the bottom of the range (i.e. sentences that would have otherwise fallen below the minimum). That is a collateral consequence of this particular legislative innovation. If Parliament wishes to avoid compression it can fix a mandatory minimum at the same time as introducing a standard sentence (for example, for an offence with a maximum penalty of ten years' imprisonment, Parliament could enact a mandatory minimum of 2 years and a standard sentence of 6 years so as to bring symmetry to the 8 year available sentencing range).

30. The *Pot* approach's ability to distinguish between the above statutory interventions is apparent in the Northern Territory decision of *R v Deacon*.[54] In that case, the Northern Territory Court of Criminal Appeal rejected a *Bahar*-style submission that a mandatory minimum sentence of life imprisonment with a non-parole period of 20 years for murder ought be reserved for the least serious category of offences. With reference to New South Wales jurisprudence on standard sentences, the Court explained that the Northern Territory Parliament had expressly acknowledged the appropriateness of the mandatory minimum for offences in the middle level of the range of objective seriousness and thus

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[52] *Muldrock v The Queen* (2011) 244 CLR 120, [27] (the Court).
[53] *Atherden v Western Australia* [2010] WASCA 33, [42]–[43] (Wheeler JA).
[54] *R v Deacon* (2019) 282 A Crim R 329.

the Court rejected the idea that Parliament had intended the minimum to be reserved for the least serious category of cases.[55]

Pot approach is workable

31. It has been said that the *Pot* approach is 'awkward'[56] and that it can create 'complications'[57] in allowing discounts for mitigating factors. However, Northern Territory courts have long applied the *Pot* approach without apparent difficulty. If anything, there is a crude simplicity in applying Parliament's command that, whenever a person's sentence may otherwise have fallen below the mandatory minimum, the Court must impose the minimum. That command has been readily understood by Northern Territory courts. To give just one example,[58] Riley CJ said in *R v Suwandi*:

> Where the appropriate sentence so determined is less than the mandatory minimum the Court must then impose the mandatory minimum in accordance with the requirements of the *Migration Act*.
>
> I have considered the whole of the circumstances surrounding the offending including the personal circumstances of Mr Suwandi. I have reached the conclusion that a sentence less than the mandatory minimum would be appropriate for him... That being the case I impose the mandatory minimum.[59]

32. Even if there were some impracticalities to the *Pot* approach (which is not accepted), these would not count strongly against it in light of its penal consequences. As has been explained by this Court, and endorsed in a mandatory sentencing context by the Northern Territory Supreme Court: '[a]n appreciation of the heavy hand that may be brought down by the criminal law suggests the need for caution in accepting any loose, albeit "practical", construction'.[60]

Conclusion

33. For the above reasons, the *Pot* approach is preferable to that in *Bahar*.

34. If the Court were not to accept that submission, and instead preferred the *Bahar* approach, NAAJA would ask that the Court leave for another day the question of whether that approach is warranted in other statutory contexts. While it is true that there is now a line of Western Australian authority applying *Bahar* to mandatory minimum provisions

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[55] *R v Deacon* (2019) 282 A Crim R 329, [19] (the Court).
[56] *Hurt v The Queen* (2022) 18 ACTLR 272, [93] (Loukas-Karlsson J).
[57] *Bahar v The Queen* (2011) 45 WAR 100, [56] (McLure P, Martin CJ and Mazza J agreeing).
[58] See also *R v Tahir* (Supreme Court (NT), 28 October 2009, Mildren J); *R v Syukur* (Supreme Court (NT), 15 March 2011, Riley CJ); *R v Edward Nafi* (Supreme Court (NT), 19 May 2011, Kelly J).
[59] *R v Suwandi* (Supreme Court (NT), 18 February 2011, Riley CJ).
[60] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, [45] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *R v Mahendra* (2011) 211 A Crim R 462, [9] (Blokland J).

in that State,[61] and such authority was cited approvingly in one of the judgments below,[62] the correctness of that line of authority would raise different questions about state and territory statutory context and require consideration of decisions of courts in those jurisdictions that might engage the re-enactment presumption. In places like the Northern Territory, for example, where the *Pot* approach has long been orthodox, there would be stronger arguments in favour of it than, perhaps, in Western Australia.

Part V: Estimate

35. NAAJA would be pleased to offer assistance by way of oral submissions if the Court desires it. NAAJA would require no more than a total of 20 minutes for oral submissions across both the *Hurt* and *Delzotto* appeals.

Dated: 21 June 2023

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[61] See the authorities cited above at note 8.
[62] *R v Delzotto* [2022] NSWCCA 117, [75] (Adamson J, Beech-Jones CJ at CL and R A Hulme J agreeing).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S44 of 2023

BETWEEN: ENRICO ROBERT CHARLES DELZOTTO
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NAAJA'S LEGISLATIVE PROVISIONS

No.	Description	Date
1.	*Crimes Act 1914* (Cth) ss 16A, 16AAA, 16AAB, 16AAC	Current
2.	*Migration Act 1958* (Cth) s 233C	23.6.2009