HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M41 of 2026

BETWEEN:

DEMETRIOS CHARISIOU
Appellant

and

THE KING
Respondent

APPELLANT'S SUBMISSIONS

PART I — FORM OF SUBMISSIONS

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

PART II — ISSUES

2. The appeal raises two issues concerning the principles governing the role of "family hardship" in sentencing for State offences in Victoria:

   (a) **Common law**: whether the rule stated in ***Markovic*** *v The Queen* (2010) 30 VR 589; [2010] VSCA 105 — that, absent exceptional circumstances, family hardship may not be considered as a sentencing factor in its own right — should be overruled.

   (b) **Statutory construction**: in any event, whether s 5(2)(g) of the *Sentencing Act 1991* (Vic) (***Sentencing Act***), read in conformity with s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Charter***) and the right in s 17 of the *Charter*, required the sentencing judge to take family hardship into account without any threshold of exceptionality.

PART III — SECTION 78B NOTICES

3. Notices are not required under s 78B of the *Judiciary Act 1903* (Cth). The constitutional validity of s 32(1) was determined in ***Momcilovic*** *v The Queen* (2011) 245 CLR 1; [2011] HCA 34 and is not in issue.

PART IV — CITATION OF REASONS BELOW

4. The reasons of the Court of Appeal of the Supreme Court of Victoria (Priest, Beach and Walker JJA) are reported as ***Charisiou*** *v The King* [2025] VSCA 277 (CAB 123–166). The reasons of the primary judge (Champion J) are at *DPP v Charisiou* [2024] VSC 303 (CAB 26–117).

PART V — STATEMENT OF FACTS

5. The appellant pleaded guilty in the Supreme Court of Victoria to two counts of obtaining a financial advantage by deception, contrary to s 82(1) of the *Crimes Act 1958* (Vic), and two counts of using a false document, contrary to s 83A(2) of the *Crimes Act 1958* (Vic). The financial advantage obtained in respect of charges 1 and 2 totalled approximately $38.6 million. On 24 May 2024, Champion J imposed a total effective sentence of 12 years' imprisonment with a non-parole period of 8 years.[1]

6. The Court of Appeal dismissed the appeal. Priest and Beach JJA (with whom Walker JA agreed on grounds 1 and 2) held that the sentences were not manifestly excessive and that totality had been properly applied. On ground 4 — family hardship — Priest and Beach JJA held that *Markovic* continued to govern, that the *Charter* did not require revisitation of *Markovic*, and that nothing in ss 17 or 32 of the *Charter* altered the position.[2] Walker JA dissented on ground 4. Her Honour held that s 5(2)(g) of the *Sentencing Act*, read with ss 17(1) and 32(1) of the *Charter*, required the engagement of a *Charter* right to be treated as a "relevant circumstance" without any threshold of exceptionality.[3]

7. The family circumstances were placed before the sentencing judge. They concerned the appellant's elderly mother (then in her 90s, for whom the appellant had been a part-time overnight carer, sleeping over several nights a week and coordinating her medical and other support services); his wife (a 30-year marriage); and his two adult daughters. Each of his wife and two daughters suffered from anxiety and depression; his wife and eldest daughter had both battled cancer (in remission at the time of plea). Both the appellant's daughters were supported by the appellant throughout their (ongoing)

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1 *DPP v Charisiou* [2024] VSC 303 (CAB 26–117); the orders are recorded in the return of prisoner convicted (CAB 22–23).
2 *Charisiou* at [57]–[65] (CAB 141–142).
3 *Charisiou* at [125]–[160] (Walker JA) (CAB 157–166).

mental health challenges. The appellant's youngest daughter suffered from debilitating mental health and was said to be severely impacted by her father's circumstances. The appellant accepted that those circumstances were not "exceptional" in the *Markovic* sense. Walker JA inferred that the appellant's family members would experience hardship "greater than the ordinary hardship experienced by many family members of offenders who are imprisoned", and would have reduced the total effective sentence to 10 years and 6 months, with a non-parole period of 7 years.[4]

PART VI — ARGUMENT

A. Overview

8. The appeal should be allowed on two bases.

9. First, the rule as expressed in *Markovic* — that "objective" family hardship cannot be considered absent exceptional circumstances — does not (or at least should not from this point forward) represent the common law of Australia. Each of the four reasons given in *Markovic* for the rule has been the subject of sustained criticism in the New South Wales and South Australian Courts of Criminal Appeal: *R v* ***Zerafa*** (2013) 235 A Crim R 265; [2013] NSWCCA 222 (Beech-Jones J, in a substantive minority on the point); *Director of Public Prosecutions (Cth) v* ***Pratten (No 2)*** (2017) 94 NSWLR 194; [2017] NSWCCA 42 (Basten JA); ***Totaan*** *v The Queen* (2022) 108 NSWLR 17; [2022] NSWCCA 75 (Bell CJ, for a bench of five); ***Carter*** *v The Queen* [2018] NSWCCA 138 (McCallum J); and ***Adams*** *(a pseudonym) v The Queen* (2022) 141 SASR 204; [2022] SASCA 47 (Livesey P, Doyle and Bleby JJA).

10. Three of those cases — *Zerafa*, *Pratten (No 2)* and *Totaan* — concerned the construction of s 16A(2)(p) of the *Crimes Act 1914* (Cth) (***Commonwealth Crimes Act***). *Carter* concerned the common law as it applies to sentencing under the *Crimes (Sentencing Procedure) Act 1999* (NSW), the common-law family-hardship principle being preserved by the concluding words of s 21A(1). *Adams* concerned the common law of South Australia and s 11(2) of the *Sentencing Act 2017* (SA). The reasoning in each of those cases, developed below, engages with underlying principle and is squarely applicable to the common law. Walker JA, on her Honour's assessment that *Markovic* was not "plainly wrong", was constrained by *Hill v Zuda Pty Ltd* (2022) 275

[4] *Charisiou* at [157]–[161] (Walker JA) (CAB 165–166).

CLR 24; [2022] HCA 21 from departing from *Markovic* at the intermediate level. This Court, of course, is not so constrained.

11. Second, and in any event, s 5(2)(g) of the *Sentencing Act*, properly construed in accordance with the *Charter*, required the sentencing judge to take family hardship into account without any exceptionality threshold. The argument begins, as Walker JA did, with the open-textured text of s 5(2)(g) and the constructional choices it presents. Once those choices are identified, the operation of s 32(1) of the *Charter* directs the rights-compatible construction. The rights-compatible construction is a construction that permits a sentencing judge to consider the impact of a sentence on an offender without first determining that the impact is "exceptional".

B. Ground 1: *Markovic* should be overruled

B.1 The rule and its asserted rationales

12. In *Markovic*, a bench of five held that family hardship is "not a mitigating factor properly so-called" and that reliance on it as a sentencing consideration in its own right requires exceptional circumstances.[5] Four rationales were identified: (i) imprisonment will almost inevitably have an adverse effect on dependants; (ii) the primary function of a sentencing court is to impose a sentence commensurate with the gravity of the crime; (iii) the consideration produces the "paradoxical result that a guilty person benefits in order that innocent persons suffer less"; and (iv) to treat an offender with needy dependants more leniently than an equally culpable co-offender without dependants would defeat the appearance of justice and be patently unjust.[6]

B.2 The reasoning of Beech-Jones J in *Zerafa*

13. In *Zerafa*, Beech-Jones J reviewed the long line of NSW and other authority on s 16A(2)(p) and concluded that the cases requiring exceptional circumstances were "plainly wrong" — a principle, in his Honour's words, "with little to commend it". His Honour identified the structural defect at [140]:[7]

> If in other contexts Courts are bound to consider the impact of their orders on innocent third parties (*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* [1998] HCA 30; 195 CLR 1 at [65] to [66]; *Silktone Pty Ltd v Devreal Capital*

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5 *Markovic* at 591 [5]–[7], 594 [14].
6 *Markovic* at 591–592 [6]–[7].
7 *Zerafa* at 290–298 [109]–[142], 298 [140] (Beech-Jones J).

> *Pty Ltd* (1990) 21 NSWLR 317 at 324 and 332), why is the impact on children of any sentence under consideration to be excluded unless their hardship is only exceptional? The primary objects in sentencing of 'retribution, deterrence [and the] protection of society' ... can still be given effect to without requiring sentencing courts to divide the forms of hardship occasioned to an offender's family into those which meet the description 'exceptional' and those which do not. The assessment of probable hardship to family members is a task that sentencing courts are perfectly able to undertake, and no doubt they do.

14. Beech-Jones J's view that the line of authority was "plainly wrong" was, at that stage, a minority view. Hoeben CJ at CL (with whom Latham J agreed) held that, while there was room for disquiet about the reasoning of the earlier cases, it was not appropriate for the Court of Criminal Appeal to depart from them.

15. Further, Beech-Jones J was construing s 16A(2)(p) of the *Commonwealth Crimes Act*. The Court in *Markovic* was not. But the distinction is not material to the soundness of the reasoning deployed. The argument advanced here is directed to the principled basis for an exceptional-circumstances threshold, wherever it arises. The animating proposition — that the exclusion of a relevant matter on the ground of "exceptionality" has no principled foundation — applies with equal force to the common law. McCallum J said as much in *Carter* (a case concerning NSW state offences and the common-law hardship principle preserved by s 21A(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)): "those remarks apply with equal logic to the common law hardship principle". Her Honour's broader views on the common-law approach were not joined by the other members of the Court (Leeming JA and Fullerton J expressly declining to express a view on the matters discussed under her Honour's heading "Proper approach to family hardship on re-sentence").[8]

B.3 *Pratten (No 2)*: the frame-of-reference problem

16. In *Pratten (No 2)*, Basten JA adopted the reasoning of Beech-Jones J and added an important observation. The characterisation of circumstances as exceptional or unexceptional depends upon the chosen frame of reference. His Honour observed that, if the frame is the prison population as a whole, then primary caregivers are a small minority and their case may be exceptional; if the frame is women prisoners, where some 85% are primary caregivers of their children, the case is utterly unexceptional.[9]

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8 *Carter* at [61] (McCallum J).
9 *Pratten (No 2)* at 205 [53] (Basten JA).

The threshold does not reliably select cases for which mitigation is appropriate; it merely produces an arbitrary result determined by the reference class chosen. As his Honour added: "Why ... it should deny a sentencing judge the flexibility to adopt a proportionate response is obscure".[10] That reasoning, like Beech-Jones J's, addresses the principled basis for the threshold. It is no less applicable to the common law. Basten JA's analysis of s 16A(2)(p) was, however, obiter; Campbell J and N Adams J each agreed in the result and observed that there was "much to be said for" (Campbell J) or "much force in" (N Adams J) Beech-Jones J's view, but considered that it was not an appropriate case in which a court of three should depart from the established line of authority.

B.4 The nature of exceptionality

17. The frame-of-reference problem invites attention as to the concept of 'exceptionality' itself. The concept is apt to confuse. Being a relative concept, it tends to conjure statistical comparison, but that is misguided: ***GLJ*** *v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at 449 [3], 469–470 [52] (Kiefel CJ, Gageler and Jagot JJ); [2023] HCA 32[11]. Exceptionality is a description, not a test. Stays of proceedings illustrate the point. While a stay may be described as an "exceptional" remedy, it is not the case that the test for whether a stay should be granted is whether a proceeding is 'exceptional' or not. The requisite analysis calls for an open-ended and evaluative enquiry about whether a proceeding should be allowed to proceed. It does not involve an all-or-nothing judgment about exceptionality.

18. Still, the stay analogy can be pushed too far. A stay is "exceptional" because the "power to refuse to exercise jurisdiction" is an exception to the general duty to exercise it: *GLJ* at 458 [21]. Exceptionality has a different connotation in the present context. While it may be true that a *significant* reduction will be unusual or 'exceptional' (as Doyle JA put it in Adams at 227 [97]–[98], 228 [101]), there is no good reason think that it would or should be only in exceptional cases that family hardship will influence a sentencing outcome. In a sentence arrived at by instinctive synthesis, it is often impossible to identify the precise role that any factor has had in the process of arriving at that sentence. The language of exceptionality is inapt to describe even the likely

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10 *Pratten (No 2)* at 206 [55] (Basten JA).

11 See also *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCATrans 076 lines 2532–2549 (Walker SC).

outcome of taking into account family hardship. In every case, family hardship should be given the weight that it deserves, without any second-order 'exceptionality' assessment.

19. There is a further point to be made. Treating exceptionality as a test rather than as a description (as the *Markovic* approach does) is to treat it in the same way as 'proximity' was treated before the ***Sullivan*** *v Moody*[12] watershed. There, this Court recognised that it is a mistake to analyse whether a duty of care exists by reference to whether a given relationship could be described as "proximate" or not: *Sullivan* at 578 [48] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ). Describing a relationship as proximate enough to give rise to a duty of care is a "statement of conclusion" reached after all relevant features have been taken into account; it is not a criterion for determining whether a duty of care exists at all.

20. Likewise here. Describing family hardship as sufficiently "exceptional" to warrant a significant reduction in sentence is a "statement of conclusion" reached after the hardship (which *ipso facto* must be relevant to the sentencing exercise) is taken into account and assessed. It is not a criterion for determining whether family hardship can be taken into account at all. In other words, 'exceptionality' "is a conclusion of a process of reasoning, not a premise that is capable of direct application": *Redland City Council v Kozik* (2024) 281 CLR 202 at [217] (Gordon, Edelman and Steward JJ); [2024] HCA 7. The vice of conclusory labels which mask underlying reasoning is, of course, well-known.

B.5 *Totaan*: the equal-justice objection turned on its head

21. In *Totaan*, a bench of five of the New South Wales Court of Criminal Appeal overruled the line of cases that had applied a *Markovic*-style threshold to s 16A(2)(p). Bell CJ's reasoning on the equal-justice point goes directly to the third and fourth of the *Markovic* rationales. His Honour observed that the precept of equal justice "is violated by the test at common law itself, which discriminates between like offenders by reference to the degree (as opposed to the existence) of hardship".[13] The threshold creates the unfairness it is said to remedy. That observation does not depend on the

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12 (2001) 207 CLR 562; [2001] HCA 59.
13 *Totaan* at 27 [47] (Bell CJ).

construction of any particular provision: it concerns the underlying common law premise.

22. Bell CJ also recognised that the "paradox" rationale rests on a contested value-judgment. Mitigating sentence to protect innocent dependents is, on one view, a legitimate refinement of sentencing as a moral institution. Whether it is paradoxical is a question of values, not of logic. It is no more paradoxical than Blackstone's injunction that it is "better that ten guilty persons escape than that one innocent suffer": *R v Carroll* (2002) 213 CLR 635 at 643 [21]; [2002] HCA 55 (Gleeson CJ and Hayne J). Whichever side of that debate a court chooses, the answer lies in values: it is not foreclosed by logic. The *Markovic* Court was wrong to treat the matter as if the answer was a given.

B.6 Why criticism of statutory construction supports common-law revision

23. It might be said in reply that *Totaan* and *Pratten (No 2)* were decisions on the construction of s 16A(2)(p); that *Markovic* remains the common law; and that the Court of Appeal majority's observation that any change is for this Court or the legislature[14] does not determine that the change should be made. Three responses:

(a) First, the reasoning in those cases is not confined to questions of textual interpretation of statute. It is reasoning about the principled basis for an exceptionality threshold in the sentencing exercise. That reasoning is concerned with whether the threshold has any sound footing in sentencing theory and equal-justice principle. Beech-Jones J and Bell CJ each engaged directly with the four *Markovic* premises and found them wanting. That is reasoning about the common law no less than the statute. McCallum J's observation in *Carter* that the criticism applies "with equal logic" to the common law puts the point exactly.

(b) Secondly, the South Australian common law has, in substance if not form, moved away from the strict *Markovic* position. The South Australian Court of Appeal in *Adams* confirmed that the SA authorities since *R v Wirth* (1976) 14 SASR 291 — including *Bates v Police* (1997) 70 SASR 66, *R v Buckskin* [2010] SASC 138 (Kourakis J), *R v Constant* (2016) 126 SASR 1 and *Zefi v The Queen* [2021] SASCA 15 — have refined the "exceptional circumstances" formulation

[14] *Charisiou* at [65] (Priest and Beach JJA) (CAB 142).

so that it no longer operates as a threshold of relevance. Hardship is always relevant; the language of "exceptional circumstances" describes only the degree of hardship needed before it has significant effect on sentence. As Doyle JA put it directly in *Adams* at 227 [97]–[98], 228 [101], the SA approach "represent[s] something of a retreat from the articulation of the common law principles in *R v Wirth*", involves "treat[ing] the exceptionality of the hardship as merely descriptive of the circumstances in which it may have a significant influence upon the sentence to be imposed", and "there is little, if any, practical difference between an approach that applies a threshold requirement of exceptionality, and one which accepts the relevance of hardship in all cases but which also acknowledges that it will not have any significant impact upon the sentence unless it is exceptional".

The result is that Victoria and South Australia — purporting to apply the same common law — apply it differently in substance. The formal uniformity is illusory. There is one common law of Australia (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563; [1997] HCA 25; *Lipohar v The Queen* (1999) 200 CLR 485 at 507–509 [51]–[53]; [1999] HCA 65); the unresolved divergence within it on this point is unsustainable as a long-term statement of principle. It should be resolved by the abandonment of the literal threshold, which more closely conforms with the substance of the SA position.

(c) Thirdly, the convergence of considered intermediate-appellate criticism of the *Markovic* premises — Beech-Jones J in *Zerafa* (in substantive dissent on the construction of s 16A(2)(p)), Basten JA in *Pratten (No 2)* (in obiter, with Campbell J and N Adams J expressing sympathy but declining to depart from the established line), Bell CJ for a bench of five in *Totaan* (which carried that view to its proper conclusion), McCallum J in *Carter* (writing for herself in extending the same critique expressly to the common law as applied in New South Wales, the other members of the Court expressly declining to address that broader question), and Livesey P and Doyle JA in *Adams* (recognising the SA retreat from the strict *Wirth* position) — is itself a reason for this Court to act. The decision below is an outlier.

(d) Fourthly, the fact that statute law has developed in such a way as to accommodate consideration of family hardship in all cases, absent any "exceptional circumstances" threshold, is relevant to the content of the common law. The notion that statutory and common law develop on parallel tracks, uninfluenced by changes in each other, is an illusion; they interact.[15] Statutes exert a "gravitational pull" upon the common law.[16] Here, sight must not be lost of the fact that at the Commonwealth level and at the State level in New South Wales, South Australia, and the Australian Capital Territory, the statutory law has developed in such a way that no exceptional circumstances filter concerning the relevance of family hardship to sentencing exists (other than by label). That alteration to the legislative landscape bears on the content of the common law.

B.7 Disposition of Ground 1

24. The Court should hold that the common law of Australia does not require exceptional circumstances before family hardship may be considered as a factor in the sentencing exercise. The weight to be given to the factor in any particular case is, of course, a matter of judgment for the sentencing court, having regard to the seriousness of the offending, the importance of general and specific deterrence, the legitimate interests of victims, and the particular characteristics of the family circumstances relied upon. That orthodox application of the instinctive synthesis is a task sentencing courts are well placed to undertake: *DPP v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 at 433 [4], 434 [7]; [2017] HCA 41.

C. Ground 2: Section 5(2)(g), properly construed, requires consideration of family hardship without any threshold of exceptionality

C.1 The constructional choice presented by s 5(2)(g)

25. It is convenient to begin where Walker JA began: with the text of s 5(2)(g) of the *Sentencing Act*. The provision requires a court to have regard to "the presence of any aggravating or mitigating factor concerning the offender or of any other relevant

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15 See generally, MJ Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (2023, Federation Press), Introduction and Ch 4 (***CLES***). The interrelationship is such that there once was a time when it could be said that "the common law is nothing else but statutes worn out by time": *Collins v Blantern* (1767) 2 Wils KB 347 at 348 [95 ER 847] (Wilmot LCJ).

16 *CLES* at pp 124–126, citing *Warnick v J Townent & Sons (Hull) Ltd* [1979] AC 731 at 743; *Esso Australia Resources Ltd v Federal Commission of Taxation* (1999) 201 CLR 49 at 61–63 [23]–[28]; [1999] HCA 67; *Lamb v Cotogno* (1987) 164 CLR 1 at 11–12; [1987] HCA 47; *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at 215–216 [5]; [2012] HCA 30.

circumstances". The general words "any other relevant circumstances" are open-textured. The question is what they pick up.

26. Walker JA identified five possible constructions of the general words.[17] It is sufficient to focus on the two that command serious attention:

(a) **Construction A**: the general words pick up those circumstances which are "relevant" according to the common law — including the *Markovic* exceptionality threshold. On this view, "relevant circumstances" is a shorthand for the circumstances that the common law regards as relevant to the sentencing exercise.

(b) **Construction B**: the general words bear their ordinary meaning. "Relevant circumstances" means circumstances that are, by reference to the entire corpus of law applicable to the case (both enacted and common law), relevant to the sentencing task. On this view, where a *Charter* right is engaged by the imposition of a sentence, the engagement of that right is, of itself, a "relevant circumstance"— one that bears upon the sentence that should be imposed.

27. Three preliminary points. First, the words "any other relevant circumstances" are not on their face confined to common-law mitigation: there is no textual marker that so confines them. Secondly, the words admit of either construction. Thirdly, the choice is a constructional choice within the meaning of s 32(1) of the *Charter*: it is a choice that the text reasonably admits of, consistently with the purpose of the provision. As the Court of Appeal recognised in ***FT*** *v The King* [2024] VSCA 90, the operation of s 32 "depends on the existence of a constructional choice".[18] Here it exists.

28. The constructional question is which of A or B is to be preferred. That is where s 32(1) of the *Charter* does its work.

C.2 How s 32(1) operates

29. The most recent statement of this Court on the operation of s 32(1) is *Director of Public Prosecutions (Vic) v* ***Smith*** (2024) 98 ALJR 1163; [2024] HCA 32. The plurality (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) said two things of present

17 *Charisiou* at [134] (Walker JA) (CAB 159).
18 *FT* at [62].

significance. First, s 32(1) requires Victorian legislation to be interpreted in a way that is compatible with the rights set out in Pt 2 of the *Charter*, so far as it is possible to do so consistently with the provision's purpose: "[w]here more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the *Charter* is to be preferred": *R v DA* (2016) 263 A Crim R 429 at 443 [44]; [2016] VSCA 325, as endorsed in *Smith* at 1176 [57]. Secondly, s 32(1) requires "close attention to the particular rights said to be engaged by the statutory provision that falls for interpretation": *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at 64 [195]; [2013] VSCA 37, as endorsed in *Smith* at 1176 [58].

30. The plurality did not resolve the general operation of s 32(1).[19] But Edelman J, in a concurring judgment, engaged with that question in detail. His Honour identified three interpretive techniques available under s 32(1): reading down, severance, and partial disapplication.[20] Drawing on Professor Rishworth KC's writing, his Honour explained that there are not multiple meanings; rather, the interpretive exercise gives "particular weight to important considerations in identifying that meaning".[21] That technique — weighting *Charter* rights in the constructional task — is described at common law as the principle of legality and is reflected in s 32, which "demands that weight be given to the civil and political rights set out in Pt 2 of the *Charter*".[22]

31. Edelman J emphasised the textual limit (interpretation must be consistent with the provision's purpose), the institutional limit ("great care must be exercised, and institutional respect afforded"), and the parliamentary limit (severance and partial disapplication are not available where Parliament has issued a statement of incompatibility under s 28(3)(b) of the *Charter*, or where the residual operation of the provision would differ from that intended).[23]

C.3 Section 32(1) is more than the principle of legality

32. The appellant accepts that *Smith* places the "weight" element of s 32(1) within the same conceptual family as the principle of legality.[24] But the conceptual family has

19 *Smith* at 1176 [58].
20 *Smith* at [131]–[140] (Edelman J).
21 *Smith* at [133]–[134] (Edelman J).
22 *Smith* at [134] (Edelman J).
23 *Smith* at [134], [138] and [140]–[141] (Edelman J).
24 *Smith* at [134] (Edelman J).

more than one member, and extends beyond the principle of legality alone. Section 32(1) is a statutory command, not a presumption. It differs from the principle of legality in essential respects:

(a) **Source**. The principle of legality is a judicially developed presumption attributed to Parliament: *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] (Gleeson CJ); [2004] HCA 40. Section 32(1) is an enactment of the Parliament: a direction as to how the interpretive task is to be performed.

(b) **Form**. The principle of legality operates by attribution of legislative intention: *Coco v The Queen* (1994) 179 CLR 427 at 437; [1994] HCA 15. Section 32(1) imposes a direct command: courts "must" interpret compatibly with human rights, so far as possible.

(c) **Scope**. The principle of legality covers a contested catalogue of "fundamental" common law rights. Section 32(1) operates on the enumerated, defined human rights in Pt 2 of the *Charter* — including rights without common law analogue: protection of families (s 17(1)), the right to privacy (s 13), freedom of assembly (s 16), the right to equality (s 8).

(d) **Content**. Common law principle of legality rights are typically negative in formulation: protection from interference. *Charter* rights, by their text, include positive obligations. The right in s 17(1) — families "are entitled to be protected by society and the State" — is on its face a right to positive protection. The principle of legality does not have that character.

(e) **Available techniques**. The principle of legality presses meaning toward rights-compatible readings. Section 32(1) does that, and on the reasoning of Edelman J in *Smith* it does more: it may, within the textual purpose constraint, mandate severance or partial disapplication. The appellant does not need that further step for the present case. But it indicates the qualitative distance between the principle of legality and the *Charter* command.

33. Equating s 32(1) with the principle of legality also results in incoherence. The principle of legality is attended by uncertainty as to which rights are "fundamental", which has

been the focus of considered academic criticism.[25] Section 32(1) eliminates that uncertainty by directing the court to a defined statutory catalogue. To collapse s 32(1) into the principle of legality reintroduces the very uncertainty Parliament resolved.

34. The result is not that s 32(1) authorises the court to depart from interpretive method. The result is that s 32(1) is a statutory direction as to how the interpretive process is to be carried out. Where the text reasonably admits a constructional choice consistent with statutory purpose, the rights-compatible construction must be preferred. As *Smith* confirms, where more than one interpretation is available on a plain reading, the
10 *Charter*-compatible interpretation is to be preferred.[26] The mandate engages wherever the language permits a constructional choice; it is not a tie-breaker reserved for cases where all other interpretive tools have failed.

35. For completeness, it may be noted that the Court in *Smith* did not consider the effect of s 7(2) of the *Charter* on the interpretive exercise mandated by s 32(1). There is no need to consider that question in this case because the answer is the same either way. If it is considered, the appellant submits that s 7(2) is not relevant to the interpretive exercise mandated by s 32(1). That is the conclusion that was reached by the Victorian Court of Appeal in *R v Momcilovic* (2010) 25 VR 436; [2010] VSCA 50 and favoured by French CJ and Crennan and Kiefel JJ in *Momcilovic*.

20 **C.5 The s 17 right: meaning and scope**

36. Section 17 of the *Charter* provides:

> (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
>
> (2) Every child has the right, without discrimination, to such protection as is in the child's best interests and is needed by the child by reason of being a child.

37. Section 17(1) was modelled on art 23(1) of the *International Covenant on Civil and Political Rights* (***ICCPR***).[27] Section 17(2) was modelled on art 24(1) of the *ICCPR*; the Convention on the Rights of the Child (***CROC***) is also relevant to its scope: *Certain Children v Minister for Families and Children* (2017) 52 VR 441 at [260]–[262];

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25 See, eg, Bruce Chen, "Revisiting Section 32(1) of the Victorian Charter: Strained Constructions and Legislative Intention" (2020) 46 *Monash University Law Review* 174 at 187–188.

26 *Smith* at 1176 [57] (plurality).

27 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) at 14.

[2017] VSC 251. As Walker JA recognised below, a narrow construction of s 17(1) is not appropriate.[28]

38. The international materials, available under s 32(2) of the *Charter*, provide guidance.

(a) General Comment No 19 of the Human Rights Committee on art 23(1) of the *ICCPR* creates a positive State obligation: states parties must "adopt legislative, administrative or other measures" for the protection of the family.[29]

(b) In a series of communications concerning State decisions to remove a family member from the country, the Human Rights Committee has held that State action which produces "substantial changes to long-settled family life" constitutes "interference with the family" engaging arts 17 and 23 of the ICCPR: *Winata v Australia*, Communication No 930/2000, UN Doc CCPR/C/72/D/930/2000 (16 August 2001) at [7.2]; *Madafferi v Australia*, Communication No 1011/2001, UN Doc CCPR/C/81/D/1011/2001 (26 August 2004) at [9.8]; *Leghaei v Australia*, Communication No 1937/2010, UN Doc CCPR/C/113/D/1937/2010 (15 May 2015) at [10.3]–[10.5]. Those communications concern deportation; but the test is general, and is satisfied *a fortiori* by a term of imprisonment.

(c) General Comment No 14 of the Committee on the Rights of the Child establishes that the best-interests principle in art 3 of the *CROC* — reflected in s 17(2) — applies in relation to children affected by the sentencing of their parents. In sentencing decisions where children are affected, "alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child or children".[30]

(d) Comparable instruments and jurisdictions confirm that family-protection rights are engaged at the sentencing stage and that the proper response is a structured proportionality balance, not a threshold of exceptionality. In the United

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28 *Charisiou* at [146] (Walker JA) (CAB 162).

29 Human Rights Committee, *General Comment No 19: Article 23 (The Family)*, 39th sess, UN Doc HRI/GEN/1/Rev.9 (27 July 1990) at [3]–[4].

30 Committee on the Rights of the Child, *General Comment No 14*, UN Doc CRC/C/GC/14 (29 May 2013) at [3], [69]–[72].

Kingdom, *R v Petherick* [2012] EWCA Crim 2214 at [17]–[20] (Hughes LJ) held that the sentencing of a defendant "inevitably engages" the art 8 family life of the defendant and her family; the appropriate response is a structured proportionality inquiry, with the third (proportionality) step doing the work. Where the case is "on the cusp of custody" the interference "can sometimes tip the scales"; as the offending becomes graver, the likelihood of disproportionate interference "is inevitably progressively reduced". The Court of Appeal reaffirmed and restated those principles in *Foster v R* [2023] EWCA Crim 1196 at [41] (Dame Sharp P). In South Africa, *S v M* [2007] ZACC 18 at [33] (Sachs J) held that s 28(2) of the Constitution requires "focused and informed attention" to the interests of children at the sentencing stage, with the form of punishment imposed being the one least damaging to those interests "given the legitimate range of choices ... available to the sentencing court"; a balancing exercise between children's interests and the legitimate sentencing aims is required. *S v S* [2011] ZACC 7 at [20]–[34] confirmed that the same approach applies even where another parent is available.

39. Further, in the Australian Capital Territory, *Hugg v Driessen* (2012) 261 FLR 324; [2012] ACTSC 46 at [62] (Refshauge J) held that s 11 of the *Human Rights Act 2004* (ACT) and s 33 of the *Crimes (Sentencing) Act 2005* (ACT) together require the interests of the offender's children to be taken into account "even in cases of serious offending", with *S v M* applied. See also *Aldridge v R* [2011] ACTCA 20 at [34].

40. Walker JA correctly concluded that s 17(1) requires "positive measures — including the positive legal recognition of the hardship that may be experienced by family members (including adult family members) as a consequence of the treatment of a particular person".[31]

C.6 The interpretation of s 5(2)(g) must apply across the board

41. There is, however, a matter on which the appellant respectfully departs from the analysis of Walker JA, and which is also reflected in the reasoning of the Court of Appeal majority. Walker JA noted that the appellant has no children under 18 and accordingly left open the question of what s 17(2) requires in relation to minor

[31] *Charisiou* at [146] (Walker JA) (CAB 162).

children.[32] The majority did likewise. The point underlying that reservation is reasonable enough as to disposition (the s 17(2) question may not need to be answered to dispose of this case), but it should not affect the construction of s 5(2)(g).

42. The construction of s 5(2)(g) is not, and cannot be, contingent on the family composition of the offender before the Court. The provision does not change its meaning when the facts change. The construction adopted in this case will be the construction applied in the next case, where minor children are involved, and the next case, where Aboriginal cultural rights under s 19 are engaged, and the next case, where freedom of religion under s 14 is engaged. Section 32(1) requires the choice to be made by reference to the suite of *Charter* rights that might be engaged by the operation of s 5(2)(g). The fact that one such right is not engaged in one case is not a reason to read s 5(2)(g) as if it were not engaged in any case.

43. This is not a small matter. Construction A treats "relevant circumstances" as a common-law shorthand that excludes *Charter* rights from its content. Once the words bear that meaning, they cannot, in the next case, be expanded to include s 17(2) where children are affected, or s 19 where Aboriginal cultural connection is affected. Either the words pick up *Charter* rights or they do not. The need for a single construction across the field of operation requires that the choice be made by reference to the full range of cases to which the section applies. That necessarily includes cases involving the engagement of s 17(2) and other *Charter* rights.

44. Once that point is appreciated, the constructional choice is plain. Section 5(2)(g), construed in light of *Charter* rights in the round, picks up the engagement of any *Charter* right as a "relevant circumstance". On the facts of this case, the right engaged is s 17(1). In a future case, it might be s 17(2), or s 19, or some other right. The construction operates uniformly. That is Construction B.

C.7 Application: the construction of s 5(2)(g) on the present facts

45. Applying Construction B to the present case:

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[32] *Charisiou* at [104], [148] (Walker JA) (CAB 152, 163); see also at [67]–[69] (Priest and Beach JJA) (CAB 143).

(a) Section 17(1) of the *Charter* is engaged. The appellant's wife, mother and daughters are his "family" (as the respondent accepted before the Court of Appeal).[33] The imposition of imprisonment substantially affects their family life. The right calls for "positive measures" by the State to protect families.

(b) Section 5(2)(g) requires the sentencing court to have regard to "any other relevant circumstance". The engagement of s 17(1) is such a circumstance. The sentencing judge was accordingly required to take it into account.

(c) The construction is "possible consistently with [the provision's] purpose": *Charter*, s 32(1). Section 1(d)(iv)(C) of the *Sentencing Act* refers to punishment to the extent justified by "any other relevant circumstances"; s 5(1)(a) requires that punishment be "just in all the circumstances". Those open-textured purposes harmonise with, and are advanced by, Construction B. They are not advanced by Construction A.

(d) The construction involves no reading-in of words, no "large alteration to the text", and no "reading down that changes the meaning of the provision": *Slaveski v Smith* (2012) 34 VR 206 at 219 [45]; [2012] VSCA 25. It gives the language its ordinary meaning, informed by a separate statutory command (s 32(1)) and a separate statutory right (s 17). It is interpretation, not legislation.

C.8 The Court of Appeal majority's reasoning addressed

46. The Court of Appeal majority rejected this construction for three reasons. Each falls away on a proper view of s 32(1):

(a) **Tacit approval**. The majority's reasoning that Parliament's failure to amend s 5 since *Markovic* indicates approval of *Markovic*[34] is contrary to settled principle: "[m]ere amendment of a statute not involving any re-enactment of the words in question could seldom if ever constitute approval of an interpretation of those words": *Flaherty v Girgis* (1987) 162 CLR 574 at 594; [1987] HCA 17; see also *DPP Reference No 1 of 2019* (2021) 274 CLR 177 at 198–199 [51]; [2021] HCA 26. *Markovic* did not construe s 5(2)(g).[35] And, as Walker JA observed, "[a]ny

33 *Charisiou* at [131] (Walker JA) (CAB 158).
34 *Charisiou* at [60]–[61] (Priest and Beach JJA) (CAB 141–142).
35 *Charisiou* at [105], [140] (Walker JA) (CAB 152, 161).

argument based on tacit approval has even less work to do where the operation of the *Charter* is concerned" — because s 32 is itself an express command to construe statutes compatibly with rights.[36]

(b) ***Charter* rights pre-existed *Markovic***. The observation that the relevant *Charter* rights existed in 2010[37] does not advance the analysis. *Markovic* did not expressly or implicitly consider the operation of s 32(1) or s 17 of the *Charter*.[38] *Markovic* is not authority on the operation of the *Charter*.

(c) **Circularity**. The "circularity" objection[39] inverts the inquiry. The *Charter* resolves the alleged circularity by directing what counts as "relevant" where a *Charter* right is engaged. Section 32(1) does not require a fact to be already relevant at common law before the *Charter* can speak to it; that would invert the statutory command.

C.9 The weight of family hardship in the sentencing exercise

47. Construction B does not mean that family hardship will outweigh other sentencing considerations. As Walker JA observed, where the hardship is minor or the offending serious, the weight given to the factor will be correspondingly modest.[40] The full range of legitimate sentencing aims — the seriousness of the offending, the importance of general and specific deterrence, the legitimate interests of victims — will properly bear upon the weighting. What is required by s 5(2)(g), as construed under s 32(1), is that the engagement of the *Charter* right be considered as a relevant circumstance. Beyond that, the instinctive synthesis takes its ordinary course.

48. In the present case, the sentencing judge did not consider the objective aspect of family hardship — understandably, given the state of the law. That was an error.

D. Disposition

49. The appeal should be allowed. The orders of the Court of Appeal should be set aside. The appropriate course is for the matter to be remitted to the Court of Appeal for

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36 *Charisiou* at [142] (Walker JA) (CAB 161).
37 *Charisiou* at [60] (Priest and Beach JJA) (CAB 141).
38 *Charisiou* at [105] (Walker JA) (CAB 152).
39 *Charisiou* at [62]–[63] (Priest and Beach JJA) (CAB 142).
40 *Charisiou* at [153]–[154] (Walker JA) (CAB 164–165).

resentencing according to the facts appertaining at that time. That course has been adopted by this Court previously.[41]

PART VII — ORDERS SOUGHT

50. The appellant seeks the following orders:

(a) Appeal allowed.

(b) Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 20 November 2025.

(c) Remit the matter to the Court of Appeal of the Supreme Court of Victoria for resentencing of the appellant.

PART VIII — ESTIMATE OF TIME FOR ORAL ARGUMENT

51. The appellant estimates that the presentation of his oral argument will require 2 hours.

Dated: 26 May 2026

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[41] See *Inge v The Queen* (1999) 199 CLR 295; [1999] HCA 55 and *R v Guode* (2020) 267 CLR 141; [2020] HCA 8.

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision (s)	Reason for providing this version	Applicable date or dates
1	*Sentencing Act 1991 (Vic)*	Compilation No. 226	s 5(2)(g)	Version in force on sentence date (provision unchanged since)	24 May 2024
2	*Charter of Human Rights and Responsibilities Act 2006* (Vic)	Compilation No. 15	ss 17, 32	Version in force on sentence date (provision unchanged since)	24 May 2024
3	*Crimes Act 1914* (Cth)	Compilation No. 165	s 16A(2)(p)	Current version; version relevantly identical to that which was considered in *Zerafa*, *Pratten (No 2)* and *Totaan*	All relevant times
4	*Sentencing Act 2017* (SA)	Reprint as at 16 February 2026	s 11(2)	Current version; version relevantly identical to that which was considered in *Adams*	All relevant times
5	*Human Rights Act 2004* (ACT)	Compilation No. 17	s 11	Current version; version relevantly identical to that which was considered in *Hugg v Driessen* (2012) 261 FLR 324	All relevant times
6	*Crimes (Sentencing) Act 2005* (ACT)	Compilation No. 71	s 33(1)(o)	Current version; version relevantly identical to that which was considered in *Hugg v Driessen* (2012) 261 FLR 324	All relevant times