

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

EMMA-JANE STANLEY

APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
(NSW) & ANOR

RESPONDENTS

Stanley v Director of Public Prosecutions (NSW)

[2023] HCA 3

Date of Hearing: 15 November 2022

Date of Order: 15 November 2022

Date of Publication of Reasons: 15 February 2023

S126/2022

ORDER

1. *Appeal allowed.*
2. *Set aside Order 1 of the Orders made by the Court of Appeal of the Supreme Court of New South Wales on 21 December 2021 and, in its place, order that:*
 - (1) *the orders of the District Court of New South Wales of 17 June 2021 dismissing the appellant's appeal under s 20(2)(c) of the Crimes (Appeal and Review) Act 2001 (NSW) are set aside; and*
 - (2) *the appellant's appeal to the District Court of New South Wales be heard and determined by the District Court of New South Wales according to law.*

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with T Quilter and C E O'Neill for the appellant (instructed by Legal Aid NSW)

C O Gleeson with A Poukchanski for the first respondent (instructed by Solicitor for Public Prosecutions (NSW))

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Stanley v Director of Public Prosecutions (NSW)

Administrative law – Judicial review – Jurisdictional error – Sentencing powers of inferior court – Where s 7 of *Crimes (Sentencing Procedure) Act 1999* (NSW) ("Sentencing Procedure Act") empowered sentencing court to make intensive correction order ("ICO") directing that a sentence of imprisonment be served by way of intensive correction in community – Where power to make ICO was a discrete function arising after sentence of imprisonment imposed – Where s 66(1) of Sentencing Procedure Act provided community safety was paramount consideration in exercising discretion to make ICO – Where s 66(2) of Sentencing Procedure Act required sentencing court, when considering community safety, to assess whether making ICO or serving sentence by way of full-time detention more likely to address offender's risk of reoffending – Whether failure to comply with s 66(2) amounted to jurisdictional error – Consideration of categories of jurisdictional error in *Craig v South Australia* (1995) 184 CLR 163 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

Sentence – Sentence imposed by State court – Discretion to make ICO – Where community safety was paramount consideration in exercising discretion to order ICO – Where sentencing judge declined to make ICO and ordered sentence of imprisonment be served by way of full-time detention – Whether sentencing judge undertook assessment of community safety in accordance with s 66 of Sentencing Procedure Act.

Words and phrases – "community safety", "error of law", "error of law by an inferior court", "full-time detention", "intensive correction order", "jurisdictional error", "misconception of function", "paramount consideration", "risk of reoffending", "sentencing process".

Crimes (Appeal and Review) Act 2001 (NSW), ss 11, 17.

Crimes (Sentencing Procedure) Act 1999 (NSW), ss 3A, 5, 7, 66, Pt 2 Div 2, Pt 5.

Supreme Court Act 1970 (NSW), s 69B.

1 KIEFEL CJ. The appellant pleaded guilty in the Local Court of New South Wales to multiple offences against the *Firearms Act 1996* (NSW). In a statement of agreed facts, it was said that her cousin stored numerous firearms, firearm parts and ammunition at the appellant's house in Dubbo. When the appellant became aware of their presence, she allowed them to remain there until sold to a known person. She received a small sum for her participation.

2 The appellant was sentenced in the Local Court to an aggregate term of imprisonment of three years with a non-parole period of two years. On her appeal to the District Court the appellant conceded that no penalty other than imprisonment was appropriate. However, she argued that the term of imprisonment should be served in the community by way of an intensive correction order ("ICO") rather than by way of full-time detention. The District Court Judge said that she had given "very close consideration" to the argument for an ICO but dismissed the appeal.

3 The District Court Judge had a discretion to make an ICO under s 7(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the *Sentencing Procedure Act*"), which relevantly provides that:

"A court that has sentenced an offender to imprisonment in respect of 1 or more offences may make an intensive correction order directing that the sentence or sentences be served by way of intensive correction in the community."

4 Section 66 of the *Sentencing Procedure Act* provides:

"Community safety and other considerations"

- (1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.
- (2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.
- (3) When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant."

5 Section 3A, which is referred to in s 66(3), provides that there are a number of purposes for which a court may impose a sentence on an offender. They include to ensure that an offender is adequately punished, to prevent crime by deterring the

offender and others from committing similar offences, to promote the rehabilitation of the offender, and to protect the community from the offender.

6 The appellant sought relief from the Supreme Court in the nature of certiorari to quash the sentence, and to remit the matter to the District Court to be dealt with according to law. A privative clause¹ had the effect of limiting the supervisory jurisdiction of the Supreme Court to review for jurisdictional error.

7 It was either found or assumed by members of the Court of Appeal that the District Court Judge had not undertaken the assessment required by s 66(2) of the *Sentencing Procedure Act*. The question for the Court was whether that failure amounted to jurisdictional error. The majority (Bell P, Basten, Leeming and Beech-Jones JJA, McCallum JA dissenting) held that it did not and dismissed the application for review².

8 At the conclusion of oral argument, this Court by a majority ordered that the appeal from the decision of the Court of Appeal be allowed and made consequential orders. I did not agree in the making of those orders. I considered that the majority of the Court of Appeal were correct to hold that there was no jurisdictional error. That was essentially because s 66(2), read with s 66(1), of the *Sentencing Procedure Act* does not condition the authority of the sentencing court to make or refuse to make an ICO under s 7(1)³.

9 As the Court of Appeal recognised, whether a failure to conduct the assessment referred to in s 66(2) amounts to an error going to jurisdiction is to be determined by reference to the *Sentencing Procedure Act*. I gratefully adopt the analysis of Jagot J of that statute's provisions.

10 Section 66 is not expressed in terms to condition the discretion under s 7(1). It does not by its terms effect a constraint upon the powers of a sentencing court. As Basten JA observed⁴, it is better described as a direction to the sentencing court that considerations which may promote the safety of the community are to be given special weight and that one factor to be included in the process of assessment is whether the risk of re-offending would be more likely under an ICO or by requiring full-time detention. It serves as a reminder to the court that giving paramount effect to community safety does not require incarceration.

1 *District Court Act 1973* (NSW), s 176.

2 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1.

3 See also *Quinn v Commonwealth Director of Public Prosecutions* (2021) 106 NSWLR 154.

4 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 34 [138].

3.

11 On any view, the *Sentencing Procedure Act* does not make the outcome of the s 66(2) assessment or the consideration of community safety mandated by s 66(1) determinative of a sentencing judge's decision as to whether or not to make an ICO⁵. The decision to make or refuse to make an ICO is required to be informed by other considerations. Section 66(3) is equally emphatic⁶ in mandating that a sentencing court must also consider the sentencing purposes contained in s 3A and any relevant common law sentencing principles. It may also consider any other matters it considers relevant. One of the sentencing purposes to which s 3A refers is community safety, of which the assessment in s 66(2), undertaken by reference to the consideration in s 66(1), is but a factor.

12 The clear legislative intention is that a sentencing court is to undertake an evaluative process in which the various considerations to which attention is directed are weighed. Some will be accorded greater weight. It is not possible to infer that Parliament intended the obligation under s 66(2) to condition the validity of the sentencing process. Section 66(2) cannot be read in isolation and thereby elevated to a condition upon the exercise of the power under s 7(1).

13 The appeal should not have been allowed. It should have been dismissed.

5 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 47-48 [193] per Beech-Jones JA.

6 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 34 [138] per Basten JA; see also at 36-37 [145]-[147] per Leeming JA.

14 GAGELER J. Within a system of government in which power to affect a legal right or interest is limited to that authorised by law, there is utility in having a standardised means of expressing a conclusion that a purported exercise of power pursuant to an authority conferred by law exceeds the limits of that authority. Within our system, a conclusion to that effect has come to be expressed in the terminology of "jurisdictional error".

15 When used to express a conclusion that a decision made in a purported exercise of judicial power exceeds the limits of decision-making authority legislatively conferred on a court, "jurisdictional error" has the same meaning as it has when used to express a conclusion that a decision made in a purported exercise of non-judicial power exceeds the limits of decision-making authority legislatively conferred on a person or body other than a court. Except in the case of an order of a superior court⁷, the import of the conclusion is the same⁸. The import of the conclusion is that the purported exercise of power lacks the authority of law: the decision made in fact "is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as 'no decision at all'"⁹.

16 Applied to a purported order of an inferior court of a State, such as the District Court of New South Wales¹⁰ or the Local Court of New South Wales¹¹, "jurisdictional error" expresses the conclusion that the order is and was from the moment of its making lacking in legal authority: that it "is not an order at all"¹². The purported order can be set aside in the constitutionally entrenched supervisory jurisdiction of a State Supreme Court such as that exercisable by the Supreme Court of New South Wales under s 69 of the *Supreme Court Act 1970* (NSW)¹³. The purported order can also be impeached collaterally in any proceeding in any

7 *New South Wales v Kable* (2013) 252 CLR 118 at 133 [32], 140-141 [56].

8 *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at 485 [27]; 400 ALR 1 at 8.

9 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 [24], quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 615 [51]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 374-375 [41].

10 Section 8 of the *District Court Act 1973* (NSW).

11 Section 7 of the *Local Court Act 2007* (NSW).

12 *Parisiene Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 375. See also at 391-392.

13 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 578-581 [91]-[100].

court in which it might be sought to be relied upon to support or deny a claim for relief¹⁴.

17 The manifest inconvenience which would arise from the uncertainty of never knowing whether an order made in fact by an inferior court was valid unless and until its validity had been raised in and determined by the same or another court in a subsequent proceeding, in combination with the potentially extreme consequences for those who might have acted in the interim on the faith of the order, has long been thought to provide reason to pause before reaching a conclusion that a perceived error on the part of the court in deciding to make the order is jurisdictional¹⁵. There is accordingly no novelty in the proposition that a mistake on the part of an inferior court, even as to the proper construction of a statute which invests that court with jurisdiction, will not necessarily or even ordinarily deprive a resultant order of the authority conferred on the court to make an order of that kind: there are mistakes, and then there are mistakes¹⁶.

18 The decisions of this Court in *Craig v South Australia*¹⁷ and *Kirk v Industrial Court (NSW)*¹⁸ bear that out. Emphasised in *Craig*¹⁹ and reiterated in *Kirk*²⁰ was that a defining characteristic of any court is that it is an institution the decision-making authority of which is to quell controversies about legal rights through the conclusive determination of questions of law as well as questions of fact. To that end, the decision-making authority of a court, whether superior or inferior, routinely encompasses "[t]he identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not

14 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 445-446 [27]-[28]; *New South Wales v Kable* (2013) 252 CLR 118 at 140-141 [56].

15 *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391. See also *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125-126; *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 375 [31].

16 *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420. See also *Wang v Farkas* (2014) 85 NSWLR 390 at 400 [42].

17 (1995) 184 CLR 163 at 176-180.

18 (2010) 239 CLR 531 at 571-573 [66]-[68].

19 (1995) 184 CLR 163 at 179-180.

20 (2010) 239 CLR 531 at 571-573 [66]-[68]. See also *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at 29 [73].

relevant evidence"²¹. So it was noted in *Craig*²² and repeated in *Kirk*²³ that, whilst an inferior court would fall into jurisdictional error were it to misconceive the nature of the function it was required by statute to perform or to disregard some matter which statute required it to take into account as a condition of its jurisdiction, "a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction ... will not ordinarily involve jurisdictional error".

19 Whether non-compliance with a statutory provision expressed in terms that a court take a specified consideration into account in a decision-making process to be undertaken before making an order of a specified kind gives rise to jurisdictional error turns on the construction of the statute in question. The question of construction is not whether the statute requires the court to take the consideration into account. A mandatory consideration is not, without more, a jurisdictional consideration. The ultimate question of construction is whether the statute makes taking the consideration into account a condition of the authority which the statute confers on the court to make an order of that kind. Determining that question, like determining any question of whether non-compliance with a mandated step in a decision-making process transgresses the limits of decision-making authority conferred by statute, requires attention to "the language of the relevant provision and the scope and object of the whole statute"²⁴.

20 The opinion I formed during the hearing of this appeal and still hold is that the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Sentencing Procedure Act") does not condition the authority of a sentencing court to sentence an offender to a term of imprisonment on the sentencing court taking the consideration to which s 66(2) refers into account when deciding under s 7(1) to make or refuse to make an intensive correction order ("ICO") in respect of a term of imprisonment. That is for each of two sufficient and distinct reasons. One is that the authority of the sentencing court to sentence an offender to a term of imprisonment is not conditioned on the proper exercise of the power under s 7(1) to make an ICO. If an order sentencing an offender to a term of imprisonment is otherwise within jurisdiction, that order remains within jurisdiction even if the sentencing court exceeds its jurisdiction when making or refusing to make an ICO in the purported exercise of the authority conferred by s 7(1). The other is that s 66(2) does not in

21 *Craig v South Australia* (1995) 184 CLR 163 at 179-180. See also *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 572 [67].

22 (1995) 184 CLR 163 at 177-178, 179-180.

23 (2010) 239 CLR 531 at 572 [67], 573-574 [72].

24 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [91], quoting *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24.

any event condition the authority of the sentencing court to make or refuse to make an ICO under s 7(1). Non-compliance with s 66(2) does not result in the sentencing court exceeding the limits of the decision-making authority conferred on it by s 7(1).

21 Having formed that opinion, I did not join in the orders made by majority at the conclusion of the hearing of this appeal. The orders then made allowed the appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales²⁵ and set aside an order of the Court of Appeal dismissing an application to it under ss 69 and 69B of the *Supreme Court Act*. In place of that order, they set aside orders made by the District Court on an appeal²⁶ by way of hearing de novo²⁷ from an order of the Local Court which had sentenced the appellant to an aggregate term of imprisonment of three years for offences against the *Firearms Act 1996* (NSW). By those orders, the District Court had dismissed the appellant's appeal²⁸ and had confirmed the appellant's sentence to the three-year term of imprisonment subject to variation of the commencement date of the sentence²⁹. If within the authority of the District Court, the sentence of imprisonment so varied had the same effect and was enforceable in the same way as if it had been imposed by the Local Court³⁰.

22 My opinion as to the proper construction of the Sentencing Procedure Act aligns in material respects with the views expressed in separate reasons for judgment by each member of the majority of the Court of Appeal in the decision under appeal (Bell P, Basten, Leeming and Beech-Jones JJA) and with the reasoning of Leeming JA (with the concurrence of Johnson J) and Simpson JA in *Quinn v Commonwealth Director of Public Prosecutions*³¹.

23 My opinion accords also with the analysis now undertaken by Jagot J, whose reasoning I gratefully adopt insofar as her Honour explains the scheme of the Sentencing Procedure Act and addresses issues of statutory construction. Unlike her Honour, but like most members of the majority of the Court of Appeal

25 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1.

26 See s 11 of the *Crimes (Appeal and Review) Act 2001* (NSW).

27 See s 17 of the *Crimes (Appeal and Review) Act 2001* (NSW). See also *Engelbrecht v Director of Public Prosecutions (NSW)* [2016] NSWCA 290 at [92].

28 See s 20(2)(c) of the *Crimes (Appeal and Review) Act 2001* (NSW).

29 See s 20(2)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW).

30 See s 71(3) of the *Crimes (Appeal and Review) Act 2001* (NSW).

31 (2021) 106 NSWLR 154.

in the decision under appeal (Bell P, Basten and Leeming JJA), I do not find it necessary to resolve the question of whether the District Court in fact took the consideration to which s 66(2) refers into account when deciding under s 7(1) to refuse to make an ICO.

24 Being in dissent on a question of the construction of a statute peculiar to New South Wales and having the benefit of the reasons of Jagot J, I propose to confine these reasons to highlighting key points.

Section 7(1) of the Sentencing Procedure Act does not condition the authority of a sentencing court to impose a sentence of imprisonment

25 In the language of s 5(5) of the Sentencing Procedure Act, a sentence of imprisonment can become the "subject of" an ICO made under s 7(1). The sentence of imprisonment is not "subject to" an ICO.

26 Section 7(1) of the Sentencing Procedure Act makes clear that the authority of a sentencing court to make an ICO arises only where that court has first sentenced an offender to a term of imprisonment. Section 7(1) also spells out that an ICO takes effect as a direction as to how that sentence to a term of imprisonment is to be served. An ICO is a direction that the term of imprisonment is to be served by way of intensive correction in the community.

27 To that end, unless it is sooner revoked, an ICO automatically has the same term as the term of imprisonment in respect of which it is made³² and an ICO can only be made by the sentencing court subject to conditions imposed under Div 4 of Pt 5 of the Sentencing Procedure Act.

28 Under the *Crimes (Administration of Sentences) Act 1999* (NSW) ("the Administration of Sentences Act")³³, compliance with the conditions of an ICO is monitored by a community corrections officer subject to the oversight of the Parole Authority. The Parole Authority is empowered to alter or supplement the conditions of an ICO and to revoke an ICO in the event of non-compliance or other specified circumstances³⁴. The Parole Authority is also empowered to reinstate a revoked ICO on application by the offender or of its own initiative³⁵.

32 Section 70 of the Sentencing Procedure Act; s 83 of the *Crimes (Administration of Sentences) Act 1999* (NSW).

33 Part 3 and Div 1 of Pt 7 of the Administration of Sentences Act.

34 Sections 81A, 164 and 164AA of the Administration of Sentences Act.

35 Section 165 of the Administration of Sentences Act.

29 That the sentence of imprisonment in respect of which an ICO is or might be made has a distinct and concurrent ongoing operation which is independent of the ICO is confirmed by the interlocking and complementary operation of s 62(4) of the Sentencing Procedure Act and s 181 of the Administration of Sentences Act. Section 62(4) of the Sentencing Procedure Act makes the standard requirement of s 62(1) – that a sentencing court issue a warrant for the committal of an offender to a correctional centre as soon as practicable after sentencing the offender to a term of imprisonment – inapplicable while action is being taken under Pt 5 in relation to the making of an ICO or where the sentence of imprisonment is the subject of an ICO. Section 181 of the Administration of Sentences Act provides for the Parole Authority to issue a warrant committing the offender to a correctional centre to serve the remainder of the sentence by way of full-time detention in the event of the ICO being revoked.

30 The Court of Criminal Appeal of the Supreme Court of New South Wales has held, repeatedly and correctly, that whether an offender is to be sentenced to a term of imprisonment, and (if so) for what term, are questions to be asked and answered within the scheme of the Sentencing Procedure Act before any question can arise as to whether or not to make an ICO and (if so) on what conditions³⁶.

31 Consideration of the making of an ICO (where raised³⁷) forms part of the sentencing procedure to be engaged in by a sentencing court, and an ICO (if made) forms part of the sentence (being the penalty³⁸) that is imposed for an offence. The sentence of imprisonment and an ICO (if made) are commonly expressed in the form of a compendious order.

32 Nevertheless, the decision of the sentencing court as to whether to sentence an offender to a term of imprisonment and the decision of that court as to whether to make an ICO directing the term of imprisonment to be served by way of intensive correction in the community involve distinct and consecutive exercises of decision-making authority separately conferred on the sentencing court. Imposition of a sentence of imprisonment is a precondition to the subsequent making of an ICO. Want or excess of authority in making or refusing to make an ICO cannot affect the validity of the prior sentence of imprisonment in respect of which the ICO is made or sought.

36 See *Mandranis v The Queen* (2021) 289 A Crim R 260 at 264-265 [22]-[26], referring to *R v Zamagias* [2002] NSWCCA 17. See also *R v Fangaloka* [2019] NSWCCA 173 at [44]-[45].

37 See *Blanch v The Queen* [2019] NSWCCA 304 at [68]-[69].

38 See s 3(1) of the Sentencing Procedure Act (definition of "sentence").

33 Assuming a sentence of imprisonment to be otherwise within jurisdiction, the sentence of imprisonment stands whether or not consideration is given by the sentencing court to the making of an ICO under s 7(1) of the Sentencing Procedure Act and whether or not any consideration that is given is brought to valid completion.

Section 66(2) of the Sentencing Procedure Act does not condition the authority of the sentencing court to make or refuse to make an ICO under s 7(1)

34 Section 7(3) of the Sentencing Procedure Act limits the authority conferred on a sentencing court to make an ICO under s 7(1) to an offender who is 18 years of age or over. Section 7(4) points to the authority conferred on the sentencing court to make an ICO being further limited by provisions within Pt 5.

35 Division 2 of Pt 5 is headed "Restrictions on power to make intensive correction orders". A restriction on power does not necessarily condition, and thereby limit, the authority to exercise that power³⁹.

36 The protection that is given by a privative clause to sentencing decisions of the District Court on appeal from the Local Court⁴⁰ provides reason to consider that not every restriction set out in Div 2 of Pt 5 conditions, and thereby limits, the decision-making authority of a sentencing court to make an ICO under s 7(1). The availability of appeals to correct errors within jurisdiction in any decision to make or refuse to make an ICO at first instance by both the Local Court⁴¹ and the District Court⁴² is another. Section 101A of the Sentencing Procedure Act specifically provides that a failure to comply with a provision of that Act may be considered by an appeal court in any appeal against sentence. Non-compliance with a restriction on power can therefore be corrected on an appeal against sentence whether or not the restriction is jurisdictional.

37 Within Div 2 of Pt 5 are three provisions which undoubtedly limit the authority of a sentencing court to make an ICO. The first is s 67, the effect of which is that an ICO is not available for certain offences. The second is s 68, the effect of which is that an ICO is not available in respect of a term of imprisonment which

39 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 373-374 [37]-[39].

40 Section 176 of the *District Court Act 1973* (NSW).

41 Sections 3(1) (definition of "sentence"), 11, 17 and 20(2) of the *Crimes (Appeal and Review) Act 2001* (NSW).

42 Sections 2(1) (definition of "sentence"), 5(1)(c) and 6(3) of the *Criminal Appeal Act 1912* (NSW).

exceeds a two-year or three-year limit. The third is s 69(3), the effect of which is that an ICO is not available in respect of an offender who resides, or intends to reside, in another State or Territory.

38 Like an ICO purportedly made in contravention of s 7(3), an ICO purportedly made in contravention of any of s 67, s 68 or s 69(3) would exceed the authority of a sentencing court to make an ICO under s 7(1). A purported order made in contravention of any one or more of them would be no order at all, although for reasons already stated its invalidity would not detract from the validity of the sentence of imprisonment.

39 Within Div 2 of Pt 5 also are ss 66 and 69(1). The restrictions those provisions impose on the authority of a sentencing court to make an ICO are quite different in their substantive content and in their manner of expression. Unlike s 7(3), and ss 67, 68 and 69(3), the restrictions in ss 66 and 69(1) do not speak to whether the sentencing court has authority to make an ICO in respect of a class of offender or a class of offence or a particular term of imprisonment. They speak rather to how the authority of a sentencing court to make or refuse to make an ICO under s 7(1) is to be exercised. Section 66 speaks to the considerations to be taken into account and how those considerations are to be weighted. Section 69(1) speaks to the sources of information to which regard is to be had. Those are subject matters of a kind typically, indeed quintessentially, within the decision-making authority of a court.

40 That the restrictions imposed by s 66 are legislatively intended to operate within the decision-making authority of the sentencing court is apparent from the language of the section. Importantly, s 66(1) and (3) are both expressly addressed to what the sentencing court must consider "when" the sentencing court is "deciding" whether to make an ICO. The language is suggestive of the drafters' advertence and adherence to "the clear distinction ... between want of jurisdiction and the manner of its exercise"⁴³. The language signifies what the sentencing court is required to do in the course of exercising the decision-making authority conferred by s 7(1).

41 Further support for the restrictions imposed by s 66 being construed to operate within the decision-making authority of the sentencing court is to be found in the structure of the section and in the nature of the considerations which the provision mandates be taken into account. The considerations which s 66(1) and (3) of the Sentencing Procedure Act combine to mandate that the sentencing court take into account in deciding whether to make or refuse to make an ICO comprise:

43 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389.

- "community safety", which s 66(1) says must be "the paramount consideration", meaning that the consideration must be treated as of the highest level of importance⁴⁴;
- the purposes of sentencing set out in s 3A of the Act, being to ensure that the offender is adequately punished for the offence, prevent crime by deterring the offender and other persons from committing similar offences, protect the community from the offender, promote the rehabilitation of the offender, make the offender accountable for his or her actions, denounce the conduct of the offender and recognise the harm done to the victim of the crime and the community; and
- any relevant common law sentencing principles.

In addition, s 66(3) permits the sentencing court to take into account any other matters that the court thinks relevant.

42 Not unimportant within the structure of s 66 is that s 66(2) does not operate to impose a freestanding restriction. It does not even mandate the taking into account of an additional consideration. Rather, s 66(2) mandates an assessment which the sentencing court is required to undertake when considering community safety for the purposes of s 66(1). The outcome of the mandated assessment, of whether intensive correction in the community pursuant to an ICO or full-time detention is more likely to address the offender's risk of re-offending, then feeds into the paramount consideration of community safety and through it into the mix of considerations which s 66(1) and (3) together require and permit to be taken into account in deciding whether to make or refuse to make an ICO.

43 Implicit in the legislative prescription that the sentencing court must take account of all of the numerous, evaluative, amorphous, overlapping and potentially competing considerations referred to in s 66(1), as informed by s 66(2), and in s 66(3) is a legislative contemplation that the sentencing court is to synthesise them in making an overall evaluative decision whether to make or refuse to make an ICO. The weightings of the consideration referred to in s 66(1), as informed by s 66(2), and of the considerations referred to in s 66(3) are different. But all bear upon the making of the decision under s 7(1) in the same way. No one consideration can be construed to be a condition of the authority of the court to make or refuse to make an ICO unless all are construed as conditions of its authority to do so. To construe all as conditions of the authority of the sentencing court to make or refuse to make an ICO would be to treat every failure of the court to take account of a relevant consideration as amounting to jurisdictional error.

44 cf *Storie v Storie* (1945) 80 CLR 597 at 611-612.

44 Moreover, for s 66 to condition the authority of a sentencing court to make or refuse to make an ICO under s 7(1) would be incongruous in light of the clear indication of legislative intention in s 5(4). The indication is that a failure on the part of the sentencing court to comply with s 5(1) – which requires that the court consider all possible alternatives so as to be satisfied that no penalty other than imprisonment is appropriate – is not to take a sentence of imprisonment beyond the authority of the sentencing court. Given the express statement of legislative intention that a sentence of an offender to a term of imprisonment is not to be invalidated by a failure on the part of a sentencing court to comply with the requirement of s 5(1), it is difficult to discern a rational basis in terms of legislative policy for inferring that the legislature impliedly intended that a failure on the part of the court to take account of one or more of the considerations specified in s 66 would invalidate the making of or refusal to make an ICO under s 7(1), which governs how the sentence is to be served.

45 The absence from s 66 of a provision along the lines of s 5(4), explicitly preserving validity in the event of non-compliance, cannot be taken to indicate that such an odd result was contemplated in the legislative design. The presence of s 5(4) is explained by an evident legislative concern to avoid the potential for a court to infer that the satisfaction required of a sentencing court by s 5(1)⁴⁵ was legislatively intended to be a "jurisdictional fact" absence of which would deprive the court of authority to impose the sentence⁴⁶. Applying orthodox principles of construction, the language and structure of s 66, and the essentially evaluative nature of the decision for which it calls⁴⁷, do not carry the same potential for an inference to be drawn that any element of the section was intended to be treated as a jurisdictional fact.

Conclusion

46 The appeal should not have been allowed. It should have been dismissed.

45 cf *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137]; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 188-189 [34].

46 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574 [72], citing *Craig v South Australia* (1995) 184 CLR 163 at 177-178.

47 See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 179 [57], citing *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303-304.

Gordon J
Edelman J
Steward J
Gleeson J

14.

47 GORDON, EDELMAN, STEWARD AND GLEESON JJ. The appellant is a woman from a background of disadvantage with five children and a significant employment history. In 2019, in contravention of the *Firearms Act 1996* (NSW), she committed offences of knowingly taking part in the supply of a firearm and having in possession for supply a shortened firearm. The offences were committed after she became aware that her cousin had stored firearms under her house in regional New South Wales and in the back of a vehicle parked in her back yard. She said that she wanted the guns out of her house but did not want to get her cousin "into trouble". The appellant allowed the firearms to remain in her house for eight days and she accepted \$50 of the sale price of the firearms.

48 In October 2020, the appellant pleaded guilty in the Local Court of New South Wales at Dubbo to the contraventions of the *Firearms Act*, and was granted bail pending sentence. In December 2020, she was sentenced to an aggregate term of imprisonment of three years with a non-parole period of two years. She was again granted bail, pending an appeal to the District Court of New South Wales. The appellant appealed to the District Court against the severity of the sentence and asked the District Court, under s 7(1) in Div 2 of Pt 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the *Sentencing Procedure Act*") (read with Pt 5 of that Act), to make an intensive correction order ("ICO") that would have directed that the appellant's sentence of imprisonment be served "by way of intensive correction in the community"⁴⁸.

49 Section 66(1), within Pt 5, of the *Sentencing Procedure Act* provides that community safety must be the paramount consideration when the court is deciding whether to make an ICO in relation to an offender. Section 66(2) provides that, when considering community safety, the court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.

50 The appellant's appeal to the District Court was pursuant to s 11 of the *Crimes (Appeal and Review) Act 2001* (NSW) ("the *CAR Act*"). By s 17 of that Act, the appeal was "to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings". Accordingly, the District Court Judge was required to engage in a fresh sentencing task and form her own view as to the appropriate sentence⁴⁹.

48 *Sentencing Procedure Act*, s 7.

49 *Engelbrecht v Director of Public Prosecutions (NSW)* [2016] NSWCA 290 at [91]-[92]; *Wany v Director of Public Prosecutions (NSW)* (2020) 103 NSWLR 620 at 626-627 [22]-[28].

The District Court Judge confirmed the sentence imposed in the Local Court and dismissed the appeal⁵⁰. The District Court's reasons for dismissing the appeal failed to make any express reference to, or findings in relation to, the assessment in s 66(2) of the *Sentencing Procedure Act*.

51 Having no appeal rights⁵¹, the appellant filed a summons in the New South Wales Court of Appeal seeking, pursuant to s 69B(1) of the *Supreme Court Act 1970* (NSW), relief in the nature of certiorari quashing the decision of the District Court. The Court of Appeal⁵² concluded, by majority (Bell P, Basten, Leeming and Beech-Jones JJA, McCallum JA dissenting), that non-compliance with s 66(2) was not a jurisdictional error of law, but merely an error of law within the jurisdiction of the District Court. Consequently, the Court of Appeal concluded that its jurisdiction did not extend to the correction of such an error and dismissed the summons.

52 The appellant was granted special leave to appeal to this Court. This appeal raises two issues: (1) whether failure by a judge of the District Court to make the assessment required by s 66(2) in declining to make an ICO is a jurisdictional error of law reviewable by the Supreme Court of New South Wales; and, if so, (2) whether the District Court Judge failed to make that assessment. At the completion of the hearing before this Court, at least a majority of Justices had concluded that the answer to both those questions was "Yes". As a result, orders were made allowing the appeal, setting aside the orders made by the Court of Appeal, and, in their place, ordering that the orders of the District Court dismissing the appellant's appeal be set aside and the appellant's appeal to the District Court be heard and determined by the District Court according to law.

53 These are the reasons for those orders.

54 In summary, the District Court Judge dismissed the appeal and imposed upon the appellant a sentence of imprisonment to be served by full-time detention without undertaking the assessment mandated by s 66(2) of the relative merits of full-time detention as against intensive correction in the community, for the purposes of considering the "paramount consideration" of community safety identified in s 66(1). In failing to undertake that assessment, the District Court

50 Under s 20(2)(c) of the *CAR Act*.

51 *Gibson v Commissioner of Police (NSW Police Force)* (2020) 102 NSWLR 900 at 906 [20].

52 To which the proceeding was assigned by *Supreme Court Act 1970* (NSW), s 48.

Gordon J
Edelman J
Steward J
Gleeson J

16.

Judge misconstrued s 66 and thereby both misconceived the nature of her function under s 7 of that Act and disregarded a matter that the *Sentencing Procedure Act* required to be taken into account as a condition or limit of jurisdiction. Where the power to make an ICO is enlivened, a sentencing court does not have jurisdiction to decide that a sentence of imprisonment is to be served by full-time detention without assessing the comparative merits of full-time detention and intensive correction for reducing the offender's particular risk of reoffending. The District Court Judge's error of law can be understood as an instance of both the second and third examples of jurisdictional error on the part of an inferior court identified in *Kirk v Industrial Court (NSW)*⁵³. It was properly conceded by counsel for the first respondent, in her clear and comprehensive written and oral submissions, that, s 66 aside, every other provision in Div 2 of Pt 5 of the *Sentencing Procedure Act*, headed "Restrictions on power to make intensive correction orders", contains one or more jurisdictional conditions. On a proper construction of s 66, that provision is no exception.

Jurisdictional error by an inferior court

55 The Supreme Court's jurisdiction to determine proceedings for judicial review of a sentence has been held to be limited to review for jurisdictional error of law, due to the constraint of the privative clause in s 176 of the *District Court Act 1973* (NSW), which provides that "[n]o adjudication on appeal of the District Court is to be removed by any order into the Supreme Court"⁵⁴. The District Court is a court of limited jurisdiction⁵⁵, and an inferior court⁵⁶. Whether an error of law

53 (2010) 239 CLR 531 at 573-574 [72].

54 *Ex parte Blackwell; Re Hateley* [1965] NSWLR 1061 at 1062-1065; *Attorney-General (NSW) v Dawes* [1976] 1 NSWLR 242 at 247-248; *Reischauer v Knoblanche* (1987) 10 NSWLR 40 at 46-47; *Anderson v Judges of the District Court of New South Wales* (1992) 27 NSWLR 701 at 717; *Spanos v Lazaris* [2008] NSWCA 74 at [14]-[15]; *Director of Public Prosecutions (NSW) v Emanuel* (2009) 193 A Crim R 552 at 561 [45].

55 *District Court Act 1973* (NSW), s 9.

56 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 456-457 [71], 474 [121]; *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 370 [11].

by an inferior court, such as the District Court, is jurisdictional will depend on the proper construction of the relevant statute⁵⁷.

56 In *Craig v South Australia*⁵⁸, the Court described the scope of an inferior court's ordinary jurisdiction in the following passage:

"[T]he ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."

57 The circumstances in which an inferior court may fall into jurisdictional error are not closed. In *Craig*, the Court gave examples of the circumstances in which an inferior court will fall into jurisdictional error, including, as is presently relevant, "if it misconstrues [the statute conferring its jurisdiction] ... and thereby misconceives the nature of the function which it is performing or the extent of its

57 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 [91]; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at 14-15 [34]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133-134 [27], 147-148 [72]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 452 [30]; 390 ALR 590 at 597; *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 96 ALJR 819 at 827 [31]; 403 ALR 604 at 612-613.

58 (1995) 184 CLR 163 at 179-180.

Gordon J
Edelman J
Steward J
Gleeson J

18.

powers in the circumstances of the particular case"⁵⁹, or "if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist"⁶⁰, or if it "disregards ... some matter in circumstances where the statute ... conferring its jurisdiction requires that that particular matter be taken into account ... as a pre-condition of the existence of any authority to make an order"⁶¹. For instance, in *Samad v District Court of New South Wales*⁶², certiorari was granted to quash a decision based on the District Court Judge's misapprehension of the scope of his discretion to cancel a licence. In this case, it is not necessary to go beyond the instances of jurisdictional error by an inferior court that were identified in *Craig* and reinforced in *Kirk*⁶³.

Legislative framework

58 The regime for sentencing criminal offenders in the *Sentencing Procedure Act* is complex and highly prescriptive. The core sentencing task of identifying the appropriate sentence to be imposed on the offender requires the sentencing court to identify the relevant limits of the court's jurisdiction and the available sentencing options. The Act prescribes the process required to be undertaken, and a multiplicity of relevant considerations, which may be competing and contradictory⁶⁴. There is no dispute that many prescriptions in the *Sentencing Procedure Act* constitute limits upon the jurisdiction of the sentencing court. Examples include provisions that are stated not to apply to offenders under 18 years of age, such as the power to decline to set a non-parole period⁶⁵. In many other cases, as noted later in these reasons, the legislature has also stated explicitly that non-compliance with a prescription in the Act does not operate to invalidate a sentence or other order made under the Act.

⁵⁹ *Craig* (1995) 184 CLR 163 at 177-178.

⁶⁰ *Craig* (1995) 184 CLR 163 at 177.

⁶¹ *Craig* (1995) 184 CLR 163 at 177.

⁶² (2002) 209 CLR 140 at 151 [27].

⁶³ (2010) 239 CLR 531 at 573-574 [72].

⁶⁴ *Wong v The Queen* (2001) 207 CLR 584 at 612 [77].

⁶⁵ *Sentencing Procedure Act*, s 54D. See also ss 7(3), 25A(1)(b) and 61(6).

Three steps to the sentencing process

59 There are three steps to be undertaken by a sentencing court prior to the final order by which a sentence of imprisonment is imposed under the *Sentencing Procedure Act*, or confirmed or varied on a sentencing appeal: first, a determination that the threshold in s 5(1), described below, is met; second, determination of the appropriate term of the sentence of imprisonment; and third, where the issue arises, consideration of whether or not to make an ICO⁶⁶. The identification of these steps does not conflict with the principle, stated in *Markarian v The Queen*⁶⁷, that sentencing does not involve a mathematical approach of increments to and decrements from a predetermined range of sentences. The sentencing court must engage in a process of instinctive synthesis of multiple factors at each stage of the sentencing process⁶⁸.

60 The first step requires the court to be satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate⁶⁹. The possible alternative penalties include a community correction order⁷⁰, a conditional release order⁷¹, conviction with no other penalty⁷² and a fine⁷³. An ICO is not an alternative penalty.

61 ICOs are of a different kind – an ICO is a sentence of imprisonment (for the purposes of s 5) that is directed, under s 7, to be served by way of intensive

66 *R v Zamagias* [2002] NSWCCA 17 at [24]-[30]; *R v Fangaloka* [2019] NSWCCA 173 at [44]; *Wany* (2020) 103 NSWLR 620 at 625 [17].

67 (2005) 228 CLR 357 at 373 [37], quoting *Wong* (2001) 207 CLR 584 at 611 [74].

68 *Blanch v The Queen* [2019] NSWCCA 304 at [51].

69 *Sentencing Procedure Act*, s 5(1).

70 *Sentencing Procedure Act*, s 8.

71 *Sentencing Procedure Act*, s 9.

72 *Sentencing Procedure Act*, s 10A.

73 *Sentencing Procedure Act*, s 15.

Gordon J
Edelman J
Steward J
Gleeson J

20.

correction in the community rather than full-time detention⁷⁴. Section 7, headed "Intensive correction orders", provides:

- "(1) A court that has sentenced an offender to imprisonment in respect of 1 or more offences may make an intensive correction order directing that the sentence or sentences be served by way of intensive correction in the community.
- (2) If the court makes an intensive correction order directing that a sentence of imprisonment be served by way of intensive correction in the community, the court is not to set a non-parole period for the sentence.
- (3) This section does not apply to an offender who is under the age of 18 years.
- (4) This section is subject to the provisions of Part 5."

Power arises after sentence of imprisonment imposed

62 There was no dispute that the power to order or decline to order an ICO under s 7(1) is a discrete function that arises *after* the sentencing court has imposed a sentence of imprisonment. That is clear from the words of s 7(1). The possibility of an ICO does not arise unless and until the sentencing court has first determined that no penalty other than imprisonment is appropriate and has sentenced an offender to imprisonment⁷⁵.

63 The discrete character of an ICO is reinforced by the consequences of failure to comply with an ICO. Where an offender fails to comply with obligations under an ICO, the consequences are prescribed by the *Crimes (Administration of Sentences) Act 1999* (NSW) ("the CAS Act"). If a community corrections officer is satisfied that an offender has failed to comply with the offender's obligations under an ICO, the community corrections officer may take any of several actions ranging in seriousness from recording the breach and taking no further action (s 163(2)(a) of the CAS Act) to referring the breach to the State Parole Authority because of the serious nature of the breach (s 163(3) of the CAS Act). A failure to satisfy an obligation under an ICO may also come to be considered by the Parole Authority

74 *Sentencing Procedure Act*, ss 5(1), 5(5) and 7(1)-(2).

75 *Wany* (2020) 103 NSWLR 620 at 625 [18].

on that authority's own initiative, by exercise of its power of inquiry under s 162(1) of the *CAS Act*.

64 If the Parole Authority is satisfied that an offender has failed to comply with their obligations under an ICO, s 164 will apply and will authorise the Parole Authority in taking any of a suite of actions including (at the most serious end of the range) the action of revoking the ICO (s 164(2)). If the Parole Authority does revoke the ICO, the Parole Authority is empowered by s 181(1) to issue a warrant committing the offender to a correctional centre to serve the remainder of their sentence by way of full-time detention. The Parole Authority may on its own initiative or on an application order the reinstatement of a previously revoked ICO (s 165(1)).

Power to make or refuse to make an ICO

Discretionary power, corresponding duty

65 The power to make, or refuse to make, an ICO is discretionary. However, as the parties accepted, that conferral of power comes with a corresponding duty. The court will come under a duty to consider whether to make an ICO where that matter is properly raised in the circumstances of the case, and where the disentitling provisions identified below are not engaged⁷⁶. This is consistent with the general principle that, where a jurisdiction is conferred and "created for the public benefit or for the purpose of conferring rights or benefits upon persons the court upon an application properly made is under a duty to exercise its jurisdiction and is not at liberty to refuse to deal with the matter"⁷⁷.

Provisions defining the jurisdiction to make an ICO

66 Once the power to make an ICO is enlivened, the sentencing court must address the requirements in the *Sentencing Procedure Act* relevant to the imposition of such an order.

67 Section 4B of the *Sentencing Procedure Act* restricts the making of an ICO in respect of a domestic violence offender, and s 7(3) provides that an ICO may

76 *Blanch* [2019] NSWCCA 304 at [68]-[69].

77 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 398-399. See also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189; *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 18.

Gordon J
Edelman J
Steward J
Gleeson J

22.

not be made in respect of an offender under 18 years old. Further, a sentencing court must not make an ICO in respect of an offender unless it has obtained a relevant assessment report in relation to the offender or it is satisfied that there is sufficient information before it to justify the making of such an order without an assessment report⁷⁸. When considering the imposition of a home detention condition on an ICO, the court must not request an assessment report relating to the proposed condition unless it has imposed a sentence of imprisonment on the offender for a specified term⁷⁹.

68 Part 5 of the *Sentencing Procedure Act* applies when a sentencing court is considering, or has made, an ICO⁸⁰. It includes provisions that define the jurisdiction to make an ICO. So, for example, an ICO commences on the date on which it is made⁸¹ and, unless revoked sooner, the term of an ICO is the same as the term or terms of imprisonment in respect of which the order is made⁸². Division 4 of Pt 5 makes provision for the conditions of an ICO, including that the sentencing court must impose certain standard conditions and at least one of the "additional conditions" of an ICO⁸³. The court may also impose further conditions provided they are not inconsistent with the standard or additional conditions⁸⁴.

69 Division 2 of Pt 5, comprising ss 66 to 69, is entitled "Restrictions on power to make intensive correction orders". Division 2 contains prohibitions on the making of an ICO: in respect of certain offences (for example, an offence involving the discharge of a firearm)⁸⁵; where the term of imprisonment exceeds certain limits including, relevantly, an aggregate sentence of imprisonment exceeding

78 *Sentencing Procedure Act*, s 17D(1)-(2); *Crimes (Sentencing Procedure) Regulation 2017* (NSW), cl 12A.

79 *Sentencing Procedure Act*, s 17D(3).

80 *Sentencing Procedure Act*, ss 7(4) and 64.

81 *Sentencing Procedure Act*, s 71.

82 *Sentencing Procedure Act*, s 70.

83 *Sentencing Procedure Act*, s 73A(1)-(2).

84 *Sentencing Procedure Act*, s 73B.

85 *Sentencing Procedure Act*, s 67.

three years⁸⁶; and where an offender resides or intends to reside interstate⁸⁷. The first respondent accepted that these prohibitions, as well as the prohibitions in ss 4B and 7(3) mentioned earlier, are conditions upon the sentencing court's jurisdiction to make an ICO so that non-compliance with those provisions is a jurisdictional error of law.

70 Read with s 73A(3), s 69 contains yet another condition upon the court's jurisdiction. It provides that, while the sentencing court is not bound by an assessment report obtained in relation to the offender, the court must not impose a home detention condition or community service work condition on an ICO unless the assessment report states that the offender is suitable to be subject to such a condition⁸⁸. There is no reason to doubt that this restriction is a condition upon the sentencing court's jurisdiction to make an ICO.

Section 66 – Community safety and other considerations

71 Section 66, headed "Community safety and other considerations", provides (emphasis added):

- "(1) Community safety *must* be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.
- (2) When considering community safety, the sentencing court *is to assess* whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.
- (3) When deciding whether to make an intensive correction order, the sentencing court *must also* consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant."

72 There was no dispute before this Court that s 66 imposes specific mandatory considerations upon the decision maker to make, or refuse to make, an ICO. Section 66(1) requires the court to treat community safety as the "paramount

86 *Sentencing Procedure Act*, s 68.

87 *Sentencing Procedure Act*, s 69(3).

88 *Sentencing Procedure Act*, ss 69(2) and 73A(3). Compare s 69(1).

Gordon J
Edelman J
Steward J
Gleeson J

24.

consideration". In the context of s 66(2), community safety principally concerns the possible harms to the community that might occur in the future from the risk of reoffending by the offender. The issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may adversely affect community safety.

73 The identification of community safety in s 66(1) as the "paramount" consideration also indicates that s 66 is concerned with an aspect of the sentencing task that requires the sentencing court to have a particular and different focus at the third stage of the three-step process described earlier. When the court is deciding the discrete question whether or not to make an ICO, community safety is the consideration to which other considerations are to be subordinated, although other considerations must or may be taken into account as prescribed by s 66(3)⁸⁹.

74 Section 66(2) explains how the sentencing court must engage with the paramount consideration of community safety. For the purpose of addressing community safety, s 66(2) requires the sentencing court to undertake a task of assessing the possible impacts of an ICO or full-time detention on the offender's risk of reoffending. Section 66(2) gives effect to Parliament's recognition that, in some cases, community safety will be better promoted by a term of imprisonment served in the community than by full-time detention. Section 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety. Thus, s 66(2) requires the sentencing court to look forward to the future possible impacts of the sentence of imprisonment, depending upon whether the sentence is served by way of full-time detention or by way of intensive correction in the community.

75 The assessment required by s 66(2) is not determinative of whether an ICO may or should be made. To the contrary, as is plain from s 66(3), the assessment is required for the purpose of addressing community safety as the paramount, but not the sole, consideration in deciding whether or not to make an ICO. Thus, the power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). In that respect, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending.

89 *R v Pullen* (2018) 275 A Crim R 509 at 531 [86]; *Mandranis v The Queen* (2021) 289 A Crim R 260 at 270-271 [50]-[51]; cf *Fangaloka* [2019] NSWCCA 173 at [61].

76 That said, community safety will usually have a decisive effect on the decision to make, or refuse to make, an ICO, unless the relevant evidence is inconclusive. There may be cases where a court cannot be satisfied whether serving a sentence by way of intensive correction in the community or serving a sentence in full-time custody would be more likely to address reoffending. In those cases, other factors will assume significance and will be determinative. On the other hand, there will be cases where a court concludes that serving the sentence by way of intensive correction in the community is more likely to address reoffending.

77 While aspects of community safety underpin some of the general purposes of sentencing⁹⁰, such as specific and general deterrence and protection of the community from the offender, those aspects will have been considered in deciding whether to impose a sentence of imprisonment (ie, before considering an ICO). Community safety is required to be considered *again* and in a different manner under s 66 when considering whether to make an ICO. At this third step, community safety in s 66(1) is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving that term of imprisonment.

Failure to undertake assessment in s 66(2) is jurisdictional error

78 Whether s 66(2) imposed a condition or limit upon the power of the District Court Judge or affected the nature of the function to be performed by her Honour in deciding whether or not to make an ICO is a matter of statutory construction. The appellant did not seek to contend that the s 66(2) assessment was required to establish any jurisdictional fact⁹¹. Nor did the appellant treat the s 66(1) "paramount consideration" as merely a relevant consideration. As appears from *Craig*, a failure by a sentencing court to take into account a relevant consideration in the course of arriving at a sentencing decision will not ordinarily be jurisdictional error without more. Rather, the following matters combine to illustrate the jurisdictional nature of the paramount consideration in s 66(1) as directed by the assessment in s 66(2).

90 *Sentencing Procedure Act*, s 3A.

91 *cf Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303-304; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 174 [44].

Gordon J
Edelman J
Steward J
Gleeson J

26.

Assessment required by s 66

79 The inclusion of s 66 in Div 2 of Pt 5, which, as has been observed, is headed "Restrictions on power to make intensive correction orders", is an indication that the legislature intended s 66 to operate as an enforceable limit upon power. The Division heading is taken as part of the Act⁹². As identified above, Div 2 contains several restrictions on the power to make ICOs. As a general proposition, Div 2 reveals a clear legislative intention that sentencing courts are not "islands of power immune from supervision and restraint"⁹³ in respect of compliance with Div 2. The requirement for the assessment under s 66 is a limit that operates at the third step in the sentencing process, that is, the limit affects the power to decide whether or not to make an ICO under s 7; it does not operate at the first and second steps of deciding whether to impose a sentence of imprisonment and, if so, the term of the sentence.

80 A failure to undertake the assessment required by s 66(2) does not merely involve a mistake in the identification of relevant issues, the formulation of relevant questions or the determination of what was or was not relevant evidence⁹⁴. Rather, it is a failure to undertake a task that is mandated for the purpose of deciding whether to make an ICO by reference to community safety as the paramount consideration. Such an error tends to defeat the evident statutory aim of improving community safety through provision of an alternative way to serve sentences of imprisonment by way of intensive correction in the community. The legislative importance of that aim is reinforced both by the characterisation of community safety as a "paramount" consideration and by the stipulation of the assessment task in s 66(2) to inform the consideration of community safety.

81 The jurisdiction conferred by s 7 is thus to decide whether community safety as a paramount consideration together with the subordinate considerations in s 66(3) warrant full-time detention or intensive correction in the community. The s 66(2) assessment is integral to the function of choosing between full-time detention and intensive correction in the community in compliance with the requirement in s 66(1) to treat community safety as the paramount consideration.

82 The question raised by this appeal is whether an error in undertaking this discrete task at the third step of the sentencing process can be characterised as one

92 *Interpretation Act 1987* (NSW), s 35(1).

93 *Kirk* (2010) 239 CLR 531 at 581 [99].

94 cf *Craig* (1995) 184 CLR 163 at 179-180.

going to the jurisdiction of the sentencing court. There is no basis to assume that an error at that step is "necessarily" an error within the sentencing court's jurisdiction simply because it follows the imposition of a sentence of imprisonment. As explained, the jurisdiction to grant an ICO calls for a subsequent and separate decision to be made *after* a sentence of imprisonment is imposed. The fact that the sentencing court may have acted within jurisdiction at the first and second steps in imposing the sentence of imprisonment does not mean that the sentencing court will necessarily remain within jurisdiction when making the separate decision whether to order an ICO. Section 7 is not an inconsequential subsequent power after the sentencing process is complete. Section 66 is "more than one evaluative step amongst many" that the Act requires to be carried out after a sentence of imprisonment is imposed. Section 7 is itself a sentencing function that is to be exercised by reference to the paramount consideration in s 66(1). It is a discretionary power – which, when enlivened, comes with a corresponding duty – that fundamentally changes the nature of the sentence of imprisonment imposed from full-time detention to one of intensive correction in the community. The sentencing court may bring itself outside of jurisdiction if it misconceives the nature of that function or fails to comply with a condition on the jurisdiction when exercising the power. And, as will be seen, that is what the District Court did in this case.

Purpose of ICOs

83 The power to make an ICO was introduced into the *Sentencing Procedure Act* by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW) ("the 2010 Act"). The second reading speech records that the ICO was designed "to reduce an offender's risk of re-offending through the provision of intensive rehabilitation and supervision in the community" and to address some of the documented shortcomings of periodic detention, which was abolished by the 2010 Act⁹⁵.

84 In 2017, the statutory scheme for ICOs was substantially amended by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) ("the 2017 Act"). In his second reading speech, the New South Wales Attorney-General, Mark Speakman SC, stated that the legislation "introduce[d] new, tough and smart community sentencing options that will promote community

95 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2010 at 24426.

Gordon J
Edelman J
Steward J
Gleeson J

28.

safety by holding offenders accountable and tackling the causes of offending"⁹⁶. The Attorney-General stated that "[w]e know from Australian and international research that community supervision, combined with programs that target the causes of crime reduce offending ... We also know that community supervision is better at reducing reoffending than a short prison sentence ... With the new [ICO], offenders who would otherwise be unsuitable or unable to work will be able to access intensive supervision as an alternative to a short prison sentence"⁹⁷.

85 In his second reading speech for the *2017 Act*, the Attorney-General also stated⁹⁸:

"New section 66 of the Crimes (Sentencing Procedure) Act will make community safety the paramount consideration when imposing an intensive correction order on offenders whose conduct would otherwise require them to serve a term of imprisonment. Community safety is not just about incarceration. Imprisonment under two years is commonly not effective at bringing about medium- to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective at this. That is why new section 66 requires the sentencing court to assess whether imposing an intensive correction order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending."

86 These extrinsic materials reinforce what is evident from the terms of s 66: that the conduct of the assessment in s 66(2) is a prescribed and essential aspect of giving "paramount consideration" to community safety, as s 66(1) requires.

Mandatory language of s 66(1) and (2)

87 By itself, and particularly in the context of the privative clause, the mandatory language of s 66(1) ("Community safety must be the paramount consideration") and s 66(2) ("the sentencing court *is* to assess") is a relevant, but not conclusive, indication that the consideration of community safety is a condition

96 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 October 2017 at 273.

97 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 October 2017 at 273-274.

98 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 October 2017 at 274.

or limit on jurisdiction. In the *Sentencing Procedure Act*, mandatory language is used in several instances in which it is unlikely that the legislative intention was that non-compliance would result in invalidity – for example, in ss 9(2), 10(3) and 21A, all of which require the court to take into account certain matters. Nevertheless, the mandatory language of s 66(1) and (2) is consistent with the mandatory language used for the jurisdictional condition or limit in every other provision in Div 2.

Discretion and corresponding duty of the s 66 decision

88 As noted earlier, the power to make or refuse to make an ICO at the third step is a discretionary decision separate from the decision to impose a sentence of imprisonment at the first step. That conferral of power comes with a corresponding duty⁹⁹. But the discretionary nature of the decision under s 7 does not mean that an error cannot be jurisdictional. Every statutory discretion, whether conferred on a judicial or an administrative officer, is constrained by the statute under which it is conferred¹⁰⁰. Similarly, the evaluative nature of the task under s 66 does not tell against a conclusion that its performance was intended by the legislature to be a condition of the jurisdiction to decide whether or not to make an ICO¹⁰¹. A person entrusted with a discretion or an evaluative judgment "must call [their] own attention to the matters which [they are] bound to consider"¹⁰². While a failure by an inferior court to consider a matter which it is required by law to take into account in determining a question within jurisdiction will not ordinarily involve jurisdictional error¹⁰³, a failure to consider the paramount consideration in s 66(1) by reference to the assessment in s 66(2) goes beyond that ordinary case. It demonstrates a misconception of the function being performed under s 7 by failing to ask the right question within jurisdiction.

99 See [65] above.

100 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348-349 [23]-[24]; see also 363 [65], 365 [71], 370-371 [90].

101 cf *Kioa v West* (1985) 159 CLR 550 at 586; *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at 37 [10].

102 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39, quoting *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

103 *Craig* (1995) 184 CLR 163 at 180.

Gordon J
Edelman J
Steward J
Gleeson J

30.

Absence of a "saving" provision

89 Throughout the *Sentencing Procedure Act*, there are many provisions which state expressly that non-compliance with a provision does not lead to invalidity. There is no such provision in s 7 or s 66.

90 As originally enacted, the *Sentencing Procedure Act* included such saving provisions in s 45(4) (concerning a requirement to make a record of reasons for declining to set a non-parole period for a sentence of imprisonment); s 48(3) (concerning a requirement to give information about the likely effect of a sentence of imprisonment); ss 71(2), 83(2), 92(2) and 96(2) (concerning requirements to take all reasonable steps to explain the offender's obligations under, and the consequences of failure to comply with, a periodic detention order; a home detention order; a community service order; and a good behaviour bond); and ss 72(3) and 93(3) (concerning requirements to give written notice to the offender and the Commissioner of Corrective Services of a periodic detention order and a community service order).

91 The *2010 Act*, which introduced the ICO, contained five saving provisions, all of which were directed to aspects of the scheme for making ICOs. Section 67, which was replaced by ss 7(3) and 66 in the *2017 Act*, contained a saving provision in s 67(6), limited to a requirement on the court in s 67(5) to indicate to the offender and record reasons for declining to make an ICO in certain circumstances. The former s 67 reveals a deliberate choice by the legislature to include a saving provision only for a procedural aspect of the section that applied to an error made after the decision to decline to make an ICO.

92 Also in the *2010 Act*, new ss 71, 72 and 73 corresponded with the former ss 70, 71 and 72, concerning periodic detention orders. By s 71(3), an ICO was not invalidated merely because it specified a date of commencement of the sentence of imprisonment that did not comply with the requirements of s 71. Section 72(2) provided that non-compliance with requirements to take all reasonable steps to explain the offender's obligations under an ICO and the possible consequences of failure to comply with the relevant order did not invalidate the ICO. Section 73(3) provided that an ICO was not invalidated by a failure to comply with the notice requirements in s 73. The fifth saving provision was contained in an amendment to the *Fines Act 1996* (NSW), and concerned the notice requirements following the making of an ICO in relation to a fine defaulter¹⁰⁴.

104 *Fines Act 1996* (NSW), s 89A(5).

93 By the *2017 Act*, similar provisions to the former s 67(5) and (6) were added to Div 4C of Pt 2 in the form of ss 17I and 17J. Section 71 was amended to remove the saving provision for an error in specifying the commencement date of an ICO. Additionally, in Div 4 of Pt 5, s 73A(1B) was inserted, providing that, where the sentencing court exercises the discretion in s 73A(1A) not to impose an additional condition on an ICO, the court must have a record of its reasons for not imposing an additional condition but the failure of the sentencing court to do so does not invalidate the sentence.

94 Contemporaneously with the *2017 Act*, the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) amended the *Sentencing Procedure Act*, including by introducing a saving provision in s 25F(8). Section 25F(8) provides that the failure by a court to comply with Div 1A of Pt 3 of the *Sentencing Procedure Act* does not invalidate any sentence imposed by the court. Division 1A comprises ss 25A to 25F and broadly concerns sentencing discounts for guilty pleas to indictable offences.

95 This survey of the history of the *Sentencing Procedure Act* reveals a pattern of deliberate inclusion by the New South Wales legislature of saving provisions in the *Sentencing Procedure Act* purporting to identify when non-compliance with the Act does not invalidate a sentence imposed by a sentencing court, including an ICO¹⁰⁵. Section 5(4) stands in contradistinction to the absence of an analogous provision in s 66 in the exercise of the discretion in s 5(1). Section 5(4) illustrates a choice by the legislature to save from invalidity a sentence affected by an error that otherwise might be regarded as a jurisdictional error. Section 5 supports a conclusion that s 66(2) operates as a limit upon the power of the sentencing court to make or refuse to make an ICO.

Consequences of invalidity

96 In the Court of Appeal, Basten JA (Bell P and Leeming JA agreeing¹⁰⁶) considered that the adverse consequences of invalidity told against a conclusion

105 cf *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 164-165 [55]-[56].

106 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 14-15 [56] and 38 [157].

Gordon J
Edelman J
Steward J
Gleeson J

32.

that non-compliance with s 66(2) was a jurisdictional error of law¹⁰⁷. Basten JA noted that the issue was not fully explored¹⁰⁸. In this Court, the issue was again, wisely, not put at the forefront of the first respondent's argument. Ultimately, it tells against the first respondent's argument.

97 The central adverse consequence was said to be that if the failure by a Local Court to comply with the condition in s 66(2) was a jurisdictional error, then a person who was refused an ICO would be unlawfully imprisoned. This consequence could not arise in a case such as the present appeal. Even if the jurisdictional error by the District Court Judge invalidated the entire sentence, the imprisonment orders of the Local Court would prevent any conclusion of unlawful imprisonment. Further, even in a case where the jurisdictional error is made by the Local Court judge, there is serious reason to doubt the correctness of the assumption underlying Basten JA's reasoning.

98 It is strongly arguable that the failure to undertake the assessment did not invalidate the sentence of imprisonment, because at the point at which s 66 was engaged, the court had already made a separate decision to impose a sentence of imprisonment on the appellant¹⁰⁹. Section 66 does not, therefore, restrain the power to impose a sentence of imprisonment; rather, it is engaged "when the sentencing court is deciding whether to make an [ICO] in relation to an offender"¹¹⁰. On this view, concerns that a finding of jurisdictional error would mean the sentence of imprisonment is a "nullity" that any person can disregard are unfounded. The jurisdictional error means that the discretion to consider whether or not to grant an ICO under s 7(1) was invalid, and therefore has not been exercised.

99 This understanding – premised on the discrete function of determining whether to direct that a sentence of imprisonment be served by way of an ICO rather than full-time detention – also addresses concerns about apparent incongruity with provisions of the *Sentencing Procedure Act* providing that non-compliance with certain sections does not invalidate a sentence of imprisonment¹¹¹.

107 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 32-34 [127]-[137]; cf *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 375-376, 391; *Project Blue Sky* (1998) 194 CLR 355 at 388-389 [91].

108 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 34 [134].

109 *Sentencing Procedure Act*, s 7(1), see also, eg, s 68(1)-(2).

110 *Sentencing Procedure Act*, s 66(1).

111 See, eg, s 5(4).

There are constructional and constitutional questions about the scope of those provisions (in particular, s 5(4))¹¹²; however, those questions do not need to be addressed in this case. If non-compliance with s 66 does not invalidate a sentence of imprisonment it cannot cut across and is otherwise consistent with s 5(4).

100 The lack, or unlikelihood, of any serious consequences of invalidity from failure to comply with the condition in s 66(2), as Beech-Jones JA recognised¹¹³, must also be balanced against the potentially serious consequences of not treating non-compliance with s 66(2) as a jurisdictional error. It would mean that unlike the position in relation to every other provision in Div 2, a District Court judge undertaking a rehearing of a sentencing process would be wholly immune from review where a fundamental step in the mandated process for deciding whether to make an ICO is omitted and, consequently, the judge makes a fundamental error of ignoring entirely the paramount consideration for imposing an ICO, which motivated Parliament to introduce these orders and which was made explicit in the text of s 66.

District Court appeal

101 As explained, the appellant was sentenced by the Local Court to an aggregate term of three years' imprisonment, and appealed as of right to the District Court. Before the District Court, the appellant conceded that no penalty other than imprisonment was appropriate. The only issue was whether her term of imprisonment should be served by an ICO¹¹⁴.

Facts and evidence

102 The agreed facts presented to the District Court Judge included that the appellant's cousin had stored numerous firearms, firearm parts and ammunition at the appellant's home in suburban Dubbo without her knowledge. The appellant became aware of the items and allowed the items to remain at her home for eight days until they were sold to a known person. There were discussions between the appellant and another co-offender concerning the price for the items, during which the appellant was told that she would be given \$500 if the items could be sold for

112 See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; *Futuris Corporation* (2008) 237 CLR 146; *Kirk* (2010) 239 CLR 531.

113 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 50 [202].

114 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 44-45 [179]-[182].

Gordon J
Edelman J
Steward J
Gleeson J

34.

\$3,000. About a week after the appellant's discovery of the items, the co-offender and the known person met the appellant at her home and the known person gave the co-offender \$6,000 in cash in exchange for the items. The police later seized the items. The appellant was arrested and made full admissions to the offences. She said she had been told that only \$3,000 had been paid, of which she took \$50.

103 The appellant gave evidence and said that, as a parent, when she became aware of the guns, she just wanted them out of the house. She said that she did not call the police because "I didn't want to get my, my cousin into trouble and get him put in gaol".

104 As Beech-Jones JA observed in the Court of Appeal¹¹⁵, the case required the District Court Judge to engage in the difficult task of reconciling the relative seriousness of the offences against the appellant's subjective circumstances. And as Bell P rightly said, the appellant presented "a strong subjective case"¹¹⁶.

105 The appellant was a 38-year-old woman, who had five children. Two children lived with their father and saw the appellant every weekend; three children (a 15-year-old and four-year-old twins) lived with the appellant. The appellant was single. During her upbringing, her stepfather was in a motorcycle club and her mother had been a heroin addict and physically abusive. The appellant used "ice" from around 2013-2015, following her mother's death, but not subsequently. The appellant otherwise has a limited history of drug use. She had attended secondary school and had a significant employment history with long periods of continuous employment. She had some previous criminal convictions for offences that were of relatively minor seriousness. One of those convictions had resulted in an ICO. The appellant had complied with the terms of that order. The appellant had never previously served a term of full-time imprisonment.

106 The evidence before the District Court included a sentencing assessment report prepared by Corrective Services NSW that had earlier been provided to the Local Court. The report included assessments that the appellant was a "T1/Medium risk of reoffending according to the Level of Service Inventory – Revised" and that the appellant was suitable to undertake community service work. The report stated that the information in the report may be used to make, relevantly, an ICO.

115 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 46 [189].

116 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 5 [6].

Submissions before the District Court Judge

107 The submissions made before the District Court Judge and the oral exchanges between the judge and counsel have very limited relevance to the construction of the reasons of the District Court Judge given that those reasons were delivered after being reserved for several weeks. But to the extent that they might be considered they further demonstrate a misunderstanding of the function of the District Court Judge. During the oral hearing, counsel for the appellant made submissions about the "detailed comprehensive plan" prepared by Community Corrections for the appellant, saying that the plan would have the effect that prospects of reoffending would be low. That was a submission about the paramount consideration of whether an ICO was more likely to address the risk of reoffending than full-time detention. But the District Court Judge responded by saying "[y]ou haven't addressed me on general deterrence" and, after emphasising the importance of general deterrence in relation to firearms, added that general deterrence "must be a very important and central platform of the sentencing exercise". Rather than treating community safety, in the sense of s 66(2), as the paramount consideration the District Court Judge infused that concept with notions of general deterrence.

The District Court Judge's reasons

108 After recording relevant facts, the District Court Judge referred to the general sentencing principles in s 3A of the *Sentencing Procedure Act*, including general and specific deterrence, denunciation, retribution, remorse and rehabilitation. The judge referred to the s 5(1) threshold and stated "[i]n all the circumstances there is no question that the s 5 threshold has been crossed". This finding was a reference to the appellant's concession that no penalty other than imprisonment was appropriate. Her Honour referred to comparable cases, set out the appellant's subjective case and her evidence, and summarised the submissions on behalf of the appellant, including noting the submission that an ICO was the most appropriate way of serving her sentence. Her Honour summarised the appellant's sentencing assessment report and the Crown's submissions including that the objective seriousness of the offending warranted a full-time custodial sentence.

109 After making findings about the objective seriousness of the offences, and aggravating and mitigating circumstances, the District Court Judge said she had given "very close consideration" to the matters put to the court concerning the "appropriateness" of an ICO. There is no basis for drawing an inference about what was involved in her Honour's consideration. Her Honour then said:

Gordon J
Edelman J
Steward J
Gleeson J

36.

"I am very aware of the law which prescribes the availability of an ICO including such cases as *Pullen*, *Fangaloka*, *Karout* and *Casella*. I am aware of the three step process that must be followed by the Court in assessing whether or not an ICO is appropriate."

The cases referred to by the District Court Judge were four decisions of the New South Wales Court of Criminal Appeal concerning the power to make an ICO. The decisions address a range of issues and do not state a uniform interpretation of s 66. There is nothing in the District Court Judge's reasons from which it might be inferred that the District Court Judge applied any aspect of any of the decisions in making her decision. In the absence of anything to indicate what the judge made of the four decisions, the assertion that she was "very aware" of them sheds no light on her decision-making process. The judge also made no reference to *Wany v Director of Public Prosecutions (NSW)*¹¹⁷, a then recent relevant intermediate appellate court authority that considered whether non-compliance with s 66(2) was a jurisdictional error of law.

110 The District Court Judge's reference to the "three step process" concerns the established sequence of determinations to be made by a sentencing court in New South Wales before sentencing an offender to a term of imprisonment to be served by way of full-time detention as described earlier in these reasons¹¹⁸.

111 The District Court Judge took the first two of the required three steps. First, the judge determined whether a sentence of imprisonment was appropriate. Second, the judge considered the length of the sentence of imprisonment. The judge referred to the need to take into account "all the matters that the Court must consider in the sentencing exercise particularly general deterrence which must loom large particularly specific deterrence and of course community safety and denunciation". The judge concluded that "a sentence ... of three years is an appropriate sentence".

112 Her Honour purported to address the third step of the sentencing process, which required consideration of whether or not an ICO should be made, saying:

"The third and final task that the Court must do in assessing whether or not an ICO is an appropriate term of imprisonment is to determine whether or not an ICO is an appropriate sentence taking into account all of the factors

117 (2020) 103 NSWLR 620.

118 *Zamagias* [2002] NSWCCA 17 at [24]-[30]; *Fangaloka* [2019] NSWCCA 173 at [44]; *Wany* (2020) 103 NSWLR 620 at 625 [17].

including community safety and rehabilitation. I have as I said given very close consideration to this. In my view community safety is of paramount consideration. There are a substantial number of firearms. The firearms in my view pose a significant risk to the people of Dubbo.

Taking into account all of those matters I am not of the view that it is appropriate for the matter, for this sentence to be served by way of an Intensive Corrections Order."

Jurisdictional error

113 In addressing the appellant's application for an ICO, the District Court Judge did not refer to s 66 of the *Sentencing Procedure Act* specifically or in substance, although her reference to community safety as the paramount consideration indicated an awareness of the provision. Her Honour did not record any findings about whether an ICO or full-time detention was more likely to address the appellant's risk of reoffending. Nor did her Honour refer in any way to the conditions that might be suitably imposed in an ICO on the facts in this case. Without contemplating conditions of this kind, the risk of reoffending cannot have been measured.

114 The District Court Judge's reasons reveal no assessment of community safety based on whether the risk of reoffending by the specific offender – the appellant – would be better reduced by full-time imprisonment or by an ICO, giving consideration to the appellant's personal circumstances. It cannot be inferred from the reasons that she undertook any such assessment¹¹⁹. Her Honour's statement that "[t]here are a substantial number of firearms. The firearms in my view pose a significant risk to the people of Dubbo" does not reveal a consideration of community safety in a forward-looking manner having regard to the appellant's risk of reoffending. In fact, the firearms posed no ongoing risk to community safety whether by future offending conduct on the part of the appellant or anyone else, as they had been seized. As is apparent, the District Court Judge purported to address community safety at the third step in the same manner that it might have been considered in step one or two by observing the safety risk posed by the offending conduct.

115 The inescapable conclusion is that the District Court Judge failed to undertake the assessment in s 66(2). A further conclusion is that the District Court Judge failed to apprehend that her function at the third stage of the sentencing

119 cf *Mourtada v The Queen* (2021) 290 A Crim R 514 at 524 [37]; *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 47 [192].

Gordon J
Edelman J
Steward J
Gleeson J

38.

process required her to assess the risks that the appellant would reoffend, in a manner that might affect community safety, depending upon whether she served her sentence of imprisonment by full-time detention or intensive correction in the community.

116 A further matter that supports the conclusion that the District Court Judge failed to undertake the assessment in s 66(2), identified by Beech-Jones JA, is the lack of any reference to the circumstances of the offending as a matter bearing upon the appellant's risk of future reoffending. As his Honour put it¹²⁰, the District Court Judge failed to address "whether the [appellant] was a dedicated gun runner or someone caring for five children who just wanted the guns out of her house". As earlier noted, the s 66(2) assessment required consideration, not merely of the appellant's risk of reoffending, but of her risk of reoffending in a manner that might affect community safety. That was a matter that almost certainly required consideration of the likelihood that the appellant would repeat offences of the kind for which she had been convicted. That assessment was not done.

117 Given the invalidity, there has been no decision on the issue of an ICO at all. As there is a duty to consider whether to grant an ICO in cases where the power is engaged (as it clearly was in this case)¹²¹, this duty remains unperformed. Therefore, the District Court failed to perform its duty and did not determine the appellant's appeal according to law. It was therefore appropriate to set aside the order of the District Court dismissing the appellant's appeal, and order the Court to determine her appeal according to law.

Relief

118 Accordingly, the following orders were made:

1. Appeal allowed.
2. Set aside Order 1 of the Orders made by the Court of Appeal of the Supreme Court of New South Wales on 21 December 2021 and, in its place, order that:
 - (1) the orders of the District Court of New South Wales of 17 June 2021 dismissing the appellant's appeal under

¹²⁰ *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 47 [191].

¹²¹ *Blanch* [2019] NSWCCA 304 at [68]-[69].

Gordon *J*
Edelman *J*
Steward *J*
Gleeson *J*

39.

s 20(2)(c) of the *Crimes (Appeal and Review) Act 2001* (NSW) are set aside; and

- (2) the appellant's appeal to the District Court of New South Wales be heard and determined by the District Court of New South Wales according to law.

119 JAGOT J. I consider that the Court of Appeal of the Supreme Court of New South Wales was correct to decide that an alleged failure of a judge of the District Court of New South Wales to comply with s 66(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which requires a sentencing court to assess an offender's risk of reoffending in considering whether to make an intensive correction order, did not involve jurisdictional error amenable to correction by the Supreme Court in its supervisory jurisdiction. I am also unable to conclude that, in this case, the District Court judge did not comply with s 66(2). Accordingly, I consider that this appeal should have been dismissed.

The statutory schemes

Offence triable summarily or on indictment

120 The appellant pleaded guilty to offences against the *Firearms Act 1996* (NSW). By s 5(1) of the *Criminal Procedure Act 1986* (NSW), an "offence must be dealt with on indictment unless it is an offence that under this or any other Act is permitted or required to be dealt with summarily". Under s 84(1) of the *Firearms Act*, proceedings for an offence under that Act could be disposed of summarily before the Local Court of New South Wales.

121 By s 7(1) of the *Criminal Procedure Act*, an "offence that is permitted or required to be dealt with summarily is to be dealt with by the Local Court". Chapter 5 of the *Criminal Procedure Act* regulates the summary disposal of indictable offences by the Local Court. By s 260(2) and Table 2 of Sch 1 to that Act, the offences to which the appellant pleaded guilty were required to be dealt with summarily unless "the prosecutor elects ... to have the offence dealt with on indictment".

122 Section 261 of the *Criminal Procedure Act* requires an indictable offence to which s 260 applies to be dealt with summarily "as if it were a summary offence" (meaning, by s 3(1), an offence that is not an indictable offence). Section 268 then prescribes the maximum penalty that may be imposed for an indictable offence listed in Table 2 of Sch 1 dealt with summarily (in effect, by s 268(1A), the maximum term of imprisonment is "2 years or the maximum term of imprisonment provided by law for the offence, whichever is the shorter term").

123 If the offences committed by the appellant had not been dealt with summarily in accordance with these provisions, then s 8 of the *Criminal Procedure Act* would have operated to require prosecution on indictment in the Supreme Court or the District Court. In that event, the maximum sentences to which the

appellant would have been exposed would have been much greater than two years for each offence¹²².

Sentencing

124 Sentencing in New South Wales is regulated by the *Crimes (Sentencing Procedure) Act*.

125 Section 3(1) in Pt 1 (headed "Preliminary") of the *Crimes (Sentencing Procedure) Act* includes the following definitions:

"aggregate sentence of imprisonment – see section 53A.

...

community correction order means an order referred to in section 8.

...

full-time detention means detention in a correctional centre.

...

intensive correction has the same meaning as in the *Crimes (Administration of Sentences) Act 1999*^[123].

intensive correction order means an order referred to in section 7.

...

non-parole period means a non-parole period referred to in section 44(1).

offender means a person whom a court has found guilty of an offence.

...

122 That is, a maximum of five years' imprisonment for each offence against ss 51(1)(a) and 51BA(1) of the *Firearms Act* and a maximum of 14 years' imprisonment for each offence against s 62(1)(c) of that Act.

123 "Intensive correction" is defined in s 3(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW) as "intensive correction in the community pursuant to an intensive correction order".

sentence means –

- (a) when used as a noun, the penalty imposed for an offence, and
- (b) when used as a verb, to impose a penalty for an offence.

...

sentencing court, in relation to an offender undergoing a penalty imposed by a court, means the court by which the penalty was imposed."

126 Part 1 of the *Crimes (Sentencing Procedure) Act* also contains s 3A as follows:

"The purposes for which a court may impose a sentence on an offender are as follows –

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community."

127 Part 2 of the *Crimes (Sentencing Procedure) Act* concerns "Penalties that may be imposed". The basic provision is s 4(1), that the "penalty to be imposed for an offence is to be the penalty provided by or under this or any other Act or law". Division 2 of Pt 2 concerns "Custodial sentences". It contains both ss 5 and 7 as follows:

"5 Penalties of imprisonment

- (1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

43.

- (2) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including –

...

- (3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.
- (4) A sentence of imprisonment is not invalidated by a failure to comply with this section.
- (5) Part 4 applies to all sentences of imprisonment, including any sentence the subject of an intensive correction order.

...

7 Intensive correction orders

- (1) A court that has sentenced an offender to imprisonment in respect of 1 or more offences may make an intensive correction order directing that the sentence or sentences be served by way of intensive correction in the community.
- (2) If the court makes an intensive correction order directing that a sentence of imprisonment be served by way of intensive correction in the community, the court is not to set a non-parole period for the sentence.
- (3) This section does not apply to an offender who is under the age of 18 years.
- (4) This section is subject to the provisions of Part 5."

128 Division 3 of Pt 2 of the *Crimes (Sentencing Procedure) Act* concerns "Non-custodial alternatives". It deals with community correction orders (s 8), conditional release orders (s 9), and (amongst other things) other alternatives to a sentence of imprisonment (ss 10 and 11).

129 Division 4B of Pt 2 of the *Crimes (Sentencing Procedure) Act* concerns "Assessment reports". By s 17B(1), an "**assessment report**" means a report made by a community corrections officer or a juvenile justice officer under this Part". By s 17B(2), the "purpose of an assessment report is to assist a sentencing court to determine the appropriate sentence options and conditions to impose on the offender during sentencing proceedings". Section 17C(1) says that, "[e]xcept as provided by section 17D", the sentencing court may (but is not obliged to) request

an assessment report only at certain times (eg, after a finding of guilt but before a sentence is imposed). Section 17D provides (in part) that:

- "(1) The sentencing court must not make an intensive correction order in respect of an offender unless it has obtained a relevant assessment report in relation to the offender.
- (1A) However, the sentencing court is not required to obtain an assessment report (except if required under subsection (2) or (4)) if it is satisfied that there is sufficient information before it to justify the making of an intensive correction order without obtaining an assessment report."

130 Part 3 of the *Crimes (Sentencing Procedure) Act* concerns "Sentencing procedures generally". Division 1 ("General") contains a series of provisions including, for example: (a) s 21A, which specifies matters that the court is to take into account in determining the appropriate sentence for an offence, including certain general matters and aggravating and mitigating factors; (b) s 22, which provides that, in passing sentence for an offence on an offender who has pleaded guilty, a court must take into account the fact that the offender has pleaded guilty, when the offender pleaded guilty or indicated an intention to plead guilty, and the circumstances in which the offender indicated an intention to plead guilty; and (c) s 24, which identifies other matters that the court must take into account in sentencing an offender.

131 Part 3 of the *Crimes (Sentencing Procedure) Act* also contains s 43, which provides (in part) that:

- "(1) This section applies to criminal proceedings (including proceedings on appeal) in which a court has –
 - (a) imposed a penalty that is contrary to law, or
 - (b) failed to impose a penalty that is required to be imposed by law,
 and so applies whether or not a person has been convicted of an offence in those proceedings.
- (2) The court may reopen the proceedings (either on its own initiative or on the application of a party to the proceedings) and, after giving the parties an opportunity to be heard –
 - (a) may impose a penalty that is in accordance with the law, and
 - (b) if necessary, may amend any relevant conviction or order."

132 Part 4 of the *Crimes (Sentencing Procedure) Act* concerns "Sentencing procedures for imprisonment". Section 44(1) provides that "[u]nless imposing an aggregate sentence of imprisonment, when sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence)". But s 45(1) provides that a court may decline to set a non-parole period for an offence (or for offences, in the case of an aggregate sentence of imprisonment) for several reasons, including, in s 45(1)(c), "for any other reason that the court considers sufficient".

133 Part 4 of the *Crimes (Sentencing Procedure) Act* also contains provisions concerning, amongst other matters, the commencement of sentence (s 47), the term of sentence (s 49), multiple sentences of imprisonment (s 53), aggregate sentences of imprisonment for more than one offence (s 53A), standard non-parole periods (s 54A), and concurrent and consecutive sentences (ss 55-60). Section 62 of the *Crimes (Sentencing Procedure) Act* provides that:

"(1) As soon as practicable after sentencing an offender to imprisonment, a court must issue a warrant for the committal of the offender to a correctional centre.

...

(3) A warrant under this section is sufficient authority –

(a) for any police officer to convey the offender to the correctional centre or police station identified in the warrant, and

(b) for the governor of the correctional centre, or the person in charge of the police station, to keep the offender in his or her custody for the term of the sentence.

(4) This section does not apply –

(a) while action is being taken under Part 5 in relation to the making of an intensive correction order, or

(b) to a sentence of imprisonment that is the subject of an intensive correction order."

134 Part 5 of the *Crimes (Sentencing Procedure) Act* concerns "Sentencing procedures for intensive correction orders".

135 Section 64 of the *Crimes (Sentencing Procedure) Act*, in Div 1 of Pt 5, provides that Pt 5 "applies in circumstances in which a court is considering, or has made, an intensive correction order". This temporal operation reflects that Pt 5

contains provisions which operate before and after an intensive correction order is made.

136 Division 2 of Pt 5 of the *Crimes (Sentencing Procedure) Act* concerns "Restrictions on power to make intensive correction orders". Section 66, containing the key provision, s 66(2), is in these terms:

- "(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.
- (2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.
- (3) When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant."

137 Section 67 provides that an intensive correction order is not available for certain offences. Section 68(1) provides that an intensive correction order is not to be made "in respect of a single offence if the duration of the term of imprisonment imposed for the offence exceeds 2 years". Section 68(2) provides that an "intensive correction order may be made in respect of an aggregate sentence of imprisonment. However, the order must not be made if the duration of the term of the aggregate sentence exceeds 3 years."

138 By s 69(1) of the *Crimes (Sentencing Procedure) Act*, in deciding whether to make an intensive correction order, the sentencing court is to have regard to "(a) the contents of any assessment report obtained in relation to the offender, and (b) evidence from a community corrections officer and any other information before the court that the court considers necessary for the purpose of deciding whether to make such an order". Section 69(3) provides that the sentencing court "may not make an intensive correction order in respect of an offender who resides, or intends to reside, in another State or Territory, unless the State or Territory is declared by the regulations to be an approved jurisdiction".

139 Section 70, in Div 3 of Pt 5, provides that, "[u]nless sooner revoked, the term of an intensive correction order is the same as the term or terms of imprisonment in respect of which the order is made".

140 By s 71(1), "[a]n intensive correction order commences on the date on which it is made".

141 Section 72, in Div 4 of Pt 5, specifies that an intensive correction order is subject to standard conditions under s 73, any additional conditions under s 73A, and any further conditions under s 73B. The standard conditions under s 73 are that the offender must not commit any offence and must submit to supervision by a community corrections officer. Subject to s 73A(1A), at least one additional condition must be imposed on an intensive correction order from several available under s 73A(2).

142 Section 101A of the *Crimes (Sentencing Procedure) Act* provides that:

"A failure to comply with a provision of this Act may be considered by an appeal court in any appeal against sentence even if this Act declares that the failure to comply does not invalidate the sentence."

143 The *Crimes (Sentencing Procedure) Act* has numerous provisions to the effect that a failure to comply with a requirement of the Act does not invalidate the sentence. Leaving aside s 5(4), some of these provisions relate to substantive requirements relevant to the term of a sentence or a non-parole period (eg, ss 22(4), 25F(8), 53A(5), and 54B(7)). Others relate to requirements of a more procedural kind, such as providing reasons or explanations for certain matters or notices or information to an offender (eg, ss 17I(2), 17J(4), 23(6), 32(6), 44(3), 45(4), 48(3), 54C(2), 73A(1B), 100A(2C), 100B(2), and 100P(2)).

Appeal rights

144 Appeals from the Local Court are regulated by the *Crimes (Appeal and Review) Act 2001* (NSW). Section 11(1) of that Act provides that "[a]ny person who has been convicted or sentenced by the Local Court may appeal to the District Court against the conviction or sentence (or both)". By s 17 of that Act, appeals against sentence by the person convicted are to "be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings". While described as a "rehearing", this kind of appeal involves a hearing *de novo*, and is not dependent on establishing error by the Local Court¹²⁴. By s 20(2) of that Act, the District Court can set aside the sentence, vary the sentence, or dismiss the appeal.

145 Section 166(1) of the *District Court Act 1973* (NSW) provides that the District Court has the criminal jurisdiction "conferred or imposed on it by or under this Act, the *Criminal Procedure Act 1986* and any other Act".

¹²⁴ *Engelbrecht v Director of Public Prosecutions (NSW)* [2016] NSWCA 290 at [92]-[95] ("*Engelbrecht*"); *DK v Director of Public Prosecutions (NSW)* (2021) 105 NSWLR 66.

146 Section 176 of the *District Court Act* provides that:

"No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court."

147 The appellant takes no issue with the orthodox position that s 176 excludes judicial review by the Supreme Court under s 69 of the *Supreme Court Act 1970* (NSW) other than in respect of jurisdictional error¹²⁵.

148 In contrast to the position of an offender who has appealed from the Local Court to the District Court, by s 5(1) of the *Criminal Appeal Act 1912* (NSW) a person convicted on indictment (which will necessarily be in the Supreme Court or the District Court) may appeal to the New South Wales Court of Criminal Appeal including, with leave, on any ground which appears to the court to be a sufficient ground of appeal. By s 5AA of that Act, a person convicted by the Supreme Court or the District Court in their summary jurisdictions may appeal to the Court of Criminal Appeal against conviction or sentence.

The appellant's sentence and appeal to the District Court

149 The Local Court convicted the appellant of the offences and sentenced her to an aggregate term of three years' imprisonment with a non-parole period of two years. The appellant was granted bail pending her appeal.

150 The appellant appealed to the District Court against the severity of her sentence in accordance with s 11 of the *Crimes (Appeal and Review) Act*. The District Court heard the appeal on 28 May 2021. The District Court delivered oral reasons on 17 June 2021 in which the appeal was dismissed. The order made by the District Court was that the appellant "is sentenced to an aggregate term of imprisonment of 3 years to commence on 17 June 2021 and expiring on 16 June 2024 with a non-parole period of 2 years. The offender is to be released to parole on 16 June 2023." It is that order which the appellant seeks to quash. The commencement date of the sentence, 17 June 2021, is the date the District Court judge sentenced the appellant to imprisonment, reflecting that the District Court judge had to determine the appeal (and thus the sentence itself) *de novo* and that the appellant had been on bail pending the determination of her appeal.

151 As it will become relevant later, it should also be noted that the sentences imposed by both the Local Court and the District Court said that the appellant was sentenced to a term of imprisonment. The orders did not say that the appellant was sentenced to a term of imprisonment "to be served by way of full-time detention". The form of the orders reflects an important feature of the structure of the *Crimes*

¹²⁵ eg, *Wang v Farkas* (2014) 85 NSWLR 390 at 393 [8]; *Engelbrecht* [2016] NSWCA 290 at [44].

(*Sentencing Procedure*) Act, in place since its enactment, that an inherent aspect of a "sentence of imprisonment", as that term is used throughout the Act, is that such a sentence is served by way of "full-time detention" (as defined in s 3(1)) unless an order is made directing that the sentence of imprisonment is to be served in some other way.

The summons in the Supreme Court

152 The appellant filed a summons in the Supreme Court seeking relief in the nature of certiorari quashing the decision of the District Court under s 69B(1) of the *Supreme Court Act* and the return of the proceedings to the District Court to be dealt with according to law.

153 Section 69 of the *Supreme Court Act* confirms the jurisdiction of the Supreme Court to "grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description". No argument was put that this matter involved an error of law that appears on the face of the record as referred to in s 69(3) and (4) of the *Supreme Court Act*.

154 Section 69B of the *Supreme Court Act* provides that:

- "(1) In determining proceedings for judicial review in relation to a conviction or sentence for an offence, the Court may make an order quashing either the conviction of, or the sentence imposed on, the claimant, or quash both the conviction and the sentence.
- (2) This section applies to judicial review of orders made by the Local Court or the District Court despite anything contained in the *Crimes (Appeal and Review) Act 2001*."

155 The Court of Appeal dismissed the summons. The majority held that the assumed or found error of the District Court judge, a failure to carry out the assessment required by s 66(2) of the *Crimes (Sentencing Procedure) Act*, did not amount to jurisdictional error so that s 176 of the *District Court Act* operated to preclude judicial review by the Supreme Court¹²⁶.

126 *Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1 at 13 [50], 15-16 [59]-[61] per Bell P, 34-35 [138]-[139] per Basten JA, 37-38 [150]-[155], 38 [157] per Leeming JA, 47-48 [193]-[195] per Beech-Jones JA, McCallum JA dissenting at 45 [185] ("*Stanley*").

Jurisdictional error

Some basic principles

156 "It cannot be said that, whenever a court makes an erroneous decision, it acts without jurisdiction. An order made without jurisdiction – as if a court of petty sessions purported to make a decree of divorce – is not an order at all. It is completely void and has no force or effect. The persons who make the order will, for example, if any action by way of interference with person or property is taken under the authority of the order, be liable in an action of trespass. But an order is not rendered void *ab initio* when it is set aside on appeal as erroneous. The fact that it was erroneous does not show or even suggest that it was made without jurisdiction. Jurisdiction is not merely jurisdiction to decide a question rightly."¹²⁷

157 This statement by Latham CJ in *Parisiennne Basket Shoes Pty Ltd v Whyte*¹²⁸ reflects three propositions. First, a court has jurisdiction to decide its jurisdiction. Second, an error by a court which would lead to its order being set aside on appeal (if there is a right of appeal) does not mean that the court had no jurisdiction to make the order. Third, an order made without jurisdiction, in contrast to an erroneous order within jurisdiction, is void from the outset, so that acts under the order, before the order is declared void, are not authorised by the order.

158 In the context of orders of a court, this distinction – between erroneous orders within jurisdiction, liable to be set aside if there is a right of appeal, and orders made without jurisdiction, which are void from the outset – is fundamental. If it did not exist, then rights of appeal (which are "creature[s] of statute"¹²⁹) would be meaningless, as would be statutory limits on such rights. Further, acts done in pursuit of an order made without jurisdiction (eg, imprisonment on an order of conviction and custodial sentence) would be done without authority, exposing those acting under the order to liability for their acts (eg, in the torts of false imprisonment or trespass to the person)¹³⁰.

127 *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 375; see to the same effect at 384, 389 ("*Parisiennne Basket*").

128 (1938) 59 CLR 369.

129 *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 128 [2]; see also *CDJ v VAJ* (1998) 197 CLR 172 at 196-197 [95].

130 eg, *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 445-446 [27]-[28]; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 645-646 [151]; *New South Wales v Kable* (2013) 252 CLR 118 at 140-141 [56].

159 Latham CJ also made the point that if a court "has no jurisdiction to decide [a] question wrongly, then it has no jurisdiction to decide it at all – even rightly"¹³¹. As Latham CJ put it, the jurisdiction of inferior courts is not "jurisdiction only to decide rightly, with the consequence that, in deciding otherwise than rightly, they do not decide at all and any order made is *coram non judice*"¹³².

160 Dixon J made the same point in *Parisienne Basket* in these terms¹³³:

"In courts possessing the power, by judicial writ, to restrain inferior tribunals from an excess of jurisdiction, there has ever been a tendency to draw within the scope of the remedy provided by the writ complaints that the inferior court has proceeded with some gross disregard of the forms of law or the principles of justice. But this tendency has been checked again and again, and the clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or appeal. But, if there be want of jurisdiction, then the matter is *coram non judice*. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable."

161 In *Craig v South Australia*, the distinctions between the jurisdiction of an inferior court and a statutory tribunal and between an error within and outside jurisdiction were confirmed¹³⁴. Accordingly, an "inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist"¹³⁵. The second kind of jurisdictional error (misapprehending or disregarding the nature or limits of functions or powers) was described as including: (a) disregarding or considering some matter if the statute conferring jurisdiction requires that particular matter to "be taken into account or ignored as a pre-condition of the existence of any

131 *Parisienne Basket* (1938) 59 CLR 369 at 375.

132 *Parisienne Basket* (1938) 59 CLR 369 at 377. *Coram non judice* means "not before a judge".

133 (1938) 59 CLR 369 at 389 (citation omitted).

134 (1995) 184 CLR 163 at 175-177, 179-180 ("*Craig*").

135 *Craig* (1995) 184 CLR 163 at 177.

authority to make an order"; and/or (b) misconstruing the statute conferring jurisdiction so as to misconceive the nature of the function being performed¹³⁶.

162 Further, "[t]he identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence" in respect of issues which the court has jurisdiction to determine may involve error of law, but "will not ... ordinarily constitute jurisdictional error"¹³⁷.

163 In *Kirk v Industrial Court (NSW)*¹³⁸, the misconceptions involved the core of the offence-creating provision, s 15 of the *Occupational Health and Safety Act 1983* (NSW), and a departure from the applicable rules of evidence which was impermissible even with the defendant's consent (that is, calling the defendant to give evidence for the prosecution when s 17(2) of the *Evidence Act 1995* (NSW) provided that the defendant was not competent to give evidence as a witness for the prosecution).

164 It is readily understandable that, in *Kirk*, both classes of error were held to be jurisdictional.

165 The first error in *Kirk* went to the heart of the commission of the offence. Construed in context, the offence-creating provision depended on the identification of a measure the employer should have taken to obviate an identifiable risk¹³⁹ and thereby required the statement of offence to identify the act or omission said to constitute the contravention (that is, the measure not taken)¹⁴⁰. Accordingly, convicting a defendant based on an alleged offence lacking any identification of the measure not taken to ensure the health, safety, and welfare at work of employees involved a fundamental misconception of the function of the court¹⁴¹.

166 The second error in *Kirk* went to the heart of the modern common law criminal justice system. No matter how benign the reason (such as a request by a defendant to give evidence in the prosecution's case), a defendant is not competent

136 *Craig* (1995) 184 CLR 163 at 177-178.

137 *Craig* (1995) 184 CLR 163 at 179-180.

138 (2010) 239 CLR 531 ("*Kirk*").

139 *Kirk* (2010) 239 CLR 531 at 553 [12].

140 *Kirk* (2010) 239 CLR 531 at 553-554 [14]-[17].

141 *Kirk* (2010) 239 CLR 531 at 556-558 [22]-[28], 560 [32]-[33], 561-562 [37]-[38].

to give evidence as a witness for the prosecution in New South Wales¹⁴². On the basis that a competent witness is generally a compellable witness, this principle accords with both the presumption of innocence and the accused's right to silence; "[u]nder our system society carries the burden of proving its charge against the accused not out of his own mouth"¹⁴³.

The appellant's case

167 The appellant alleged jurisdictional error on the part of the District Court judge by proposing that s 66, specifically s 66(2), creates a condition precedent to the imposition of any sentence of imprisonment. The centrality of this proposition to the appellant's argument must be recognised. It was not the appellant's case that s 66(2) was a jurisdictional pre-condition to the making of an intensive correction order. This was not the appellant's case because this proposition itself tends to expose the non-jurisdictional character of s 66(2). This will be explained below.

168 The appellant put her argument in several ways, but the essence of the argument is that it would be an error to construe s 66 as if it were concerned only with the question whether an intensive correction order should be made. Rather, according to the appellant, s 66 is concerned with whether an offender is subject to an order to serve their sentence of imprisonment by way of full-time detention (defined in s 3(1) as meaning "detention in a correctional centre") or in the community under an intensive correction order.

169 That is, according to the appellant, serving a sentence of imprisonment by way of full-time detention is not the default position if the assessment under s 66(2) is not carried out. The assessment under s 66(2) is a condition precedent to the court imposing both a sentence of imprisonment to be served by way of full-time detention and a sentence to be served in the community under an intensive correction order. Unless and until the assessment under s 66(2) is made, there can be no order for a sentence of imprisonment. As such, the appellant argued, the assessment required by s 66(2) in Pt 5 of the *Crimes (Sentencing Procedure) Act* is an essential pre-condition to the operation of both Pt 4 ("Sentencing procedures for imprisonment") and Pt 5 of that Act ("Sentencing procedures for intensive correction orders").

142 *Evidence Act 1995* (NSW), s 17(2). See also *Evidence Act 1995* (Cth), s 17(2); *Evidence Act 1977* (Qld), s 8(1); *Evidence Act 1929* (SA), s 18(1); *Evidence Act 2001* (Tas), s 17(2); *Evidence Act 2008* (Vic), s 17(2); *Evidence Act 1906* (WA), s 8(1)(a); *Evidence Act 2011* (ACT), s 17(2); *Evidence (National Uniform Legislation) Act 2011* (NT), s 17(2).

143 *Watts v Indiana* (1949) 338 US 49 at 54.

170 If not so characterised, it is apparent that a failure to undertake the assessment required by s 66(2) would be an error, but an error within jurisdiction. If the assessment required by s 66(2) is not a condition precedent to the imposition of a sentence of imprisonment, the assessment is nothing more than one evaluative step amongst many which the *Crimes (Sentencing Procedure) Act* requires to be carried out, not in making an order sentencing an offender to imprisonment, but in directing that the sentence of imprisonment be served other than by way of full-time detention. Putting it another way, in that event, there would be no failure to observe an essential condition to the exercise of the sentencing power and no want of jurisdiction; there would be a wrong manner of exercise of a subsequent power within jurisdiction (to make an order directing the sentence of imprisonment to be served other than by way of full-time detention), amenable to correction on appeal if a right of appeal exists.

171 While it may be difficult to draw "a bright line between jurisdictional error and error in the exercise of jurisdiction"¹⁴⁴, the distinction between deciding something which the decision-maker has no authority to decide (jurisdictional error) and wrongly deciding something the decision-maker has authority to decide (non-jurisdictional error) is necessary. This is particularly so in the context of a privative provision such as s 176 of the *District Court Act*, which reflects the intention of the New South Wales Parliament that there is to be a right to a hearing *de novo* in the District Court from a sentence imposed by the Local Court for an indictable offence dealt with summarily (for which the maximum sentence is generally constrained to two years for each offence) and no further right of appeal¹⁴⁵.

Section 66 of the *Crimes (Sentencing Procedure) Act*

172 The history, structure, context, and text of the *Crimes (Sentencing Procedure) Act* speak against the conclusion that s 66(2) functions as a jurisdictional pre-condition to a sentence of imprisonment or, indeed, to any sentencing function of a sentencing court.

173 Division 2 of Pt 2 of the *Crimes (Sentencing Procedure) Act* deals with custodial sentences. The key provision, s 5(1), is that "[a] court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate". Section 5(4) makes plain that the New South Wales Parliament did not intend a breach of s 5 to invalidate a sentence.

144 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163], citing *Craig* (1995) 184 CLR 163 at 177-178.

145 See *Wang v Farkas* (2014) 85 NSWLR 390 at 400 [42].

174 What is the effect of a sentencing court sentencing "an offender to imprisonment" as referred to in s 5(1)? As will be explained, the effect is that unless the court makes an order directing that the sentence is to be served by some other available option, such as an intensive correction order under s 7(1), the sentence of imprisonment is to be served by way of "full-time detention". The very concept of an intensive correction order being an order directing the way in which a sentence of imprisonment is to be served (if not by full-time detention) speaks against functions relating to such an order having the character of a jurisdictional pre-condition to a sentence of imprisonment or any sentencing function. Further, s 7(1), in terms, provides that the making of an intensive correction order involves a discretionary exercise. This too speaks against functions relating to an intensive correction order operating as a jurisdictional pre-condition to a sentence of imprisonment.

175 That is, contrary to the appellant's argument, when a court sentences an offender to imprisonment under s 5(1), the *Crimes (Sentencing Procedure) Act* assumes that the sentence of imprisonment is to be served by way of full-time detention unless (relevantly) the discretionary power in s 7(1) is exercised. If that discretionary power is not exercised due to legal error, the sentence of imprisonment to be served by way of full-time detention remains within jurisdiction.

176 This explains why it was unnecessary for the orders of the Local Court and District Court to say that the appellant's sentence of imprisonment was "to be served by way of full-time detention". As neither court made an order directing the sentence of imprisonment to be served by way of intensive correction in the community, the position pre-supposed by the *Crimes (Sentencing Procedure) Act* operated – the sentence of imprisonment was to be served by way of full-time detention.

177 Now it is necessary to explain why a sentence of imprisonment is to be served by way of full-time detention unless the court, relevantly, makes an intensive correction order.

178 As enacted, the *Crimes (Sentencing Procedure) Act* assumed that, if a court was satisfied that no penalty other than imprisonment was appropriate, the sentence would be served by way of full-time detention unless an order for either periodic or home detention (the then available alternatives) was made¹⁴⁶. Under s 3(1), "full-time detention" was defined to mean "imprisonment that is required to be served otherwise than by way of periodic detention or home detention". That

146 See ss 5 to 7 of the *Crimes (Sentencing Procedure) Act* as enacted, commencing on 3 April 2000.

is, but for the making of a home detention order or a periodic detention order, the sentence of imprisonment was to be served by way of full-time detention.

179 The *Crimes (Sentencing Procedure) Act* was amended by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW) ("the 2010 Amending Act"). The 2010 Amending Act introduced intensive correction orders and abolished periodic detention, and therefore the definition of "full-time detention" in s 3(1) was also amended (to mean "imprisonment that is required to be served otherwise than under an intensive correction order or by way of home detention"). Accordingly, it is apparent that nothing about the introduction of intensive correction orders as an option for the way in which a sentence of imprisonment could be served changed the fact that a sentence of imprisonment was to be served by way of full-time detention unless an alternative order was made.

180 The Second Reading Speech for the 2010 Amending Act confirmed that the underlying logic of the legislation remained as it was, it being said that the "bill requires a court to first determine that it will sentence a person to imprisonment and then to seek a suitability assessment to assist the sentencing court in determining whether or not the sentence of imprisonment is to be served by way of an ICO [intensive correction order]"¹⁴⁷.

181 The definition of "full-time detention" was amended again by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) ("the 2017 Amending Act")¹⁴⁸. The amended definition was (and is) "**full-time detention** means detention in a correctional centre". This is to be understood in the context that this Act also abolished home detention orders, which were the last remaining kind of detention other than "full-time detention". What cannot be inferred is that, in so amending the definition of "full-time detention", the legislature intended that a sentence of imprisonment might be served other than by way of full-time detention if no order for an alternative way of serving the sentence of imprisonment was made. That is, the underlying logic of the statute remained that a sentence of imprisonment was to be served by way of full-time detention unless an order directing service of the sentence of imprisonment in some other way was made.

147 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2010 at 24430.

148 The amendments to the *Crimes (Sentencing Procedure) Act* as a result of the 2017 Amending Act came into force on 24 September 2018.

182 The Second Reading Speech for the 2017 Amending Act confirmed that the underlying logic of the *Crimes (Sentencing Procedure) Act* remained unaltered. Accordingly, the Attorney-General said¹⁴⁹:

"[W]e are strengthening the intensive correction order. It will be available for offenders sentenced to up to two years imprisonment ... With the new intensive correction order, offenders who would otherwise be unsuitable or unable to work will be able to access intensive supervision as an alternative to a short prison sentence."

183 Further, another important provision, s 5(5), has been part of the *Crimes (Sentencing Procedure) Act* since enactment (albeit in terms reflecting the alternative ways in which a sentence of imprisonment could be served other than by way of full-time detention from time to time). Section 5(5) currently provides that Pt 4 of the *Crimes (Sentencing Procedure) Act* applies to all sentences of imprisonment, including any sentence the subject of an intensive correction order. In the face of that provision, ss 7 and 66 of the *Crimes (Sentencing Procedure) Act* cannot be jurisdictional pre-conditions to Pt 4 and the imposition of a sentence of imprisonment.

184 Another provision which has been part of the *Crimes (Sentencing Procedure) Act* since its enactment (albeit subject to amendments) is s 62. Section 62, like s 5(5), is a powerful indicator that ss 7 and 66 are not jurisdictional pre-conditions to a sentence of imprisonment or any sentencing function. Section 62 operates so that unless a sentencing court makes an order for an alternative method to serve a sentence of imprisonment (currently, an intensive correction order but, previously, a home detention or periodic detention order), it "must" issue a warrant for the committal of the offender to a correctional centre. That is, it is the fact that no intensive correction order is made which requires the warrant to be issued in respect of the sentence of imprisonment. This duty is inconsistent with the operation of ss 7 and 66 as jurisdictional pre-conditions to a sentence of imprisonment or any sentencing function.

185 It should also be recognised that the *Crimes (Sentencing Procedure) Act* and the *Crimes (Administration of Sentences) Act 1999* (NSW) were enacted as part of a legislative package¹⁵⁰. The *Crimes (Administration of Sentences) Act* deals with imprisonment by way of full-time detention in Pt 2 and imprisonment by way

149 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 October 2017 at 274.

150 The legislative package was introduced in response to a report of the New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996); see New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 October 1999 at 2325.

of intensive correction in the community in Pt 3. Importantly, if an offender breaches an intensive correction order, the Parole Authority may revoke the order under s 164(2)(e) of the *Crimes (Administration of Sentences) Act*. Section 181 of that Act then provides (in part) that:

"(1) If the Parole Authority revokes an intensive correction order, a re-integration home detention order or parole order, it may issue a warrant committing the offender to a correctional centre to serve the remainder of the sentence to which the order relates by way of full-time detention.

...

(3) Subject to any order under subsection (1B), a warrant under this section is sufficient authority –

(a) for any police officer to arrest, or to have custody of, the offender named in the warrant, to convey the offender to the correctional centre specified in the warrant and to deliver the offender into the custody of the governor of that correctional centre, and

(b) for the governor of the correctional centre specified in the warrant to have custody of the offender named in the warrant for the remainder of the sentence to which the warrant relates."

186 The words in s 181(1), "to serve the remainder of the sentence to which the order relates by way of full-time detention", and in s 181(3)(b), "for the remainder of the sentence to which the warrant relates", confirm that the statutory scheme as a whole operates on two assumptions: (a) once a sentencing court has sentenced an offender to imprisonment, the sentence is not conditioned on any provisions relating to the making of an intensive correction order, and (b) the default position for a sentence of imprisonment is that it is to be served by way of full-time detention. If this were not the case, on revocation of an intensive correction order the offender would have to be sentenced again to a sentence of imprisonment to be served by way of full-time detention.

187 Section 165 of the *Crimes (Administration of Sentences) Act* enables the Parole Authority to reinstate a revoked intensive correction order in respect of the "remaining balance of the offender's sentence". That balance is necessarily the sentence of imprisonment otherwise to be served by way of full-time detention.

188 Like ss 5(5) and 62 of the *Crimes (Sentencing Procedure) Act*, ss 165 and 181 of the *Crimes (Administration of Sentences) Act* are strong indicators that ss 7 and 66 of the *Crimes (Sentencing Procedure) Act* are not jurisdictional pre-conditions to a sentence of imprisonment or any sentencing function.

189 It also follows from this analysis that the absence of a provision equivalent to s 5(4) (that a sentence of imprisonment is not invalidated by a failure to comply with s 5) in s 7 of the *Crimes (Sentencing Procedure) Act* is irrelevant. Section 7 involves a way in which a sentence of imprisonment might be served other than by full-time detention. Accordingly, any exercise of power under s 7 is predicated on an exercise of power having already occurred under s 5(1). The exercise of power under s 5(1) (the sentencing of an offender to imprisonment) is protected by s 5(4). That protection, whatever its scope, operates on the exercise of power under s 5(1) whether or not an exercise of power is available under s 7.

190 That is, if an intensive correction order can be and is made under s 7(1), to the extent that the order depends on an exercise of power under s 5(1) (the sentencing of an offender to imprisonment), s 5(4) will operate. This accords with the fact that s 7 (and the related provisions of Pt 5) is about the manner of service of a sentence of imprisonment and not the imposition of a sentence of imprisonment. While the way in which a sentence of imprisonment is to be served is of profound importance to an individual offender, the scheme of the *Crimes (Sentencing Procedure) Act* does not treat s 66, still less s 66(2), as an essential pre-condition to a sentence of imprisonment.

191 The fact that s 66 is part of Div 2 of Pt 5 of the *Crimes (Sentencing Procedure) Act*, entitled "Restrictions on power to make intensive correction orders", does not indicate that every provision of Div 2 is a jurisdictional pre-condition to a sentence of imprisonment to be served by way of full-time detention. Division 2 of Pt 5 does contain some jurisdictional pre-conditions, but they are pre-conditions to the making of an intensive correction order, not a sentence of imprisonment. Sections 67, 68 and 69(3) are jurisdictional pre-conditions to the making of an intensive correction order. The same cannot be said of s 66 or s 69(1), however. They are evaluative obligations within jurisdiction.

192 It is also apparent that mandatory language is not a safe guide to the question whether any provision of the *Crimes (Sentencing Procedure) Act* involves a jurisdictional limit. All obligations are expressed in mandatory terms. The issue is whether the consequence of non-compliance is invalidity by reason of lack of jurisdiction. In the present case, the matter said by the appellant to be outside of the jurisdiction of the District Court is the sentence of imprisonment itself. Characterising the case as one in which s 66(2) is a jurisdictional pre-condition to the making of an intensive correction order (contrary to the appellant's argument) does not assist. As discussed, the underlying scheme of the *Crimes (Sentencing Procedure) Act* is that a sentence of imprisonment is to be served by way of full-time detention unless another order is made directing the sentence be served in another way. Accordingly, an error in respect of an evaluative provision relevant to the decision whether or not to make that other order is necessarily one the sentencing court has jurisdiction to make.

193 A related point is this. The proposition of McCallum JA in the Court below, that s 5(4) of the *Crimes (Sentencing Procedure) Act* applies only to a failure of a court to indicate its reasons as required by s 5(2)¹⁵¹, cannot be accepted. Section 5(4), in terms, applies to a "failure to comply with this section". In contrast, other provisions to similar effect in the *Crimes (Sentencing Procedure) Act* are expressly confined to a failure to give reasons or perform some other procedural function¹⁵². Effect must be given to the clear language of s 5(4) as applying to any failure to comply with s 5 (as a whole), not any failure to comply with s 5(2). The appellant did not suggest to the contrary.

194 The proposition also assumes that s 5(4) operates to protect against all forms of jurisdictional error, which is constitutionally impossible¹⁵³. In any event, s 5(4) is a statement of legislative intention and is to be construed in accordance with the principles of statutory construction, which will impose limits on the scope of the section. Those limits need not be addressed here.

195 Accordingly, Bell P was right below to conclude that it would be most peculiar if s 5(4) protected a sentence of imprisonment affected by certain kinds of jurisdictional error (eg, a failure to fulfil the pre-condition to the required state of satisfaction of "having considered all possible alternatives"), but the same sentence of imprisonment could be invalidated by a mere failure to discharge a subsequent obligation (to consider making an order for an intensive correction order), relevant only to the way in which that sentence is to be served (not the fact of the custodial sentence). It would be more than peculiar if an assessment of one issue under s 66(2), amongst a raft of issues required to be considered under ss 66(3) and 69(1), could place the same sentence of imprisonment outside jurisdiction.

196 Certain other considerations also reinforce these conclusions.

197 First, there may be a duty to consider the making of an intensive correction order in a particular case, but that duty arises from the circumstances of the case and not from the terms of s 7 of the *Crimes (Sentencing Procedure) Act*, which is expressed in permissive, not mandatory, terms¹⁵⁴.

198 Second, s 64 of the *Crimes (Sentencing Procedure) Act* provides that Pt 5 applies "in circumstances in which a court is considering, or has made, an intensive

151 *Stanley* (2021) 107 NSWLR 1 at 41 [170].

152 See, eg, ss 17I(2), 17J(4), 23(6), 32(6), 44(3), 45(4), 48(3), 54C(2), 73A(1B), 100A(2C), 100B(2), and 100P(2) of the *Crimes (Sentencing Procedure) Act*.

153 eg, *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 494 [37], 508 [83]; *Kirk* (2010) 239 CLR 531 at 581 [99]-[100].

154 *Blanch v The Queen* [2019] NSWCCA 304 at [68]-[69].

correction order". Further, under s 66, the assessment required by s 66(2) is embedded in an overall evaluative process required by the whole of s 66, as well as s 69(1). A statutory function required to be performed as part of a subsequent evaluative process is unlikely to be capable of resulting in the sentencing court acting without jurisdiction in respect of the sentence of imprisonment. And, as discussed, unless some other order directing a different manner of service is made, the underlying logic of the legislation is that the sentence of imprisonment is to be served by way of full-time detention and, by s 62(1), as soon as practicable after sentencing an offender to imprisonment, the court "must" issue a warrant for the committal of the offender to a correctional centre.

199 Third, the assessment in s 66(2) is to be the paramount consideration, as s 66(1) requires, but the concept of "community safety" is not exhausted by the assessment under s 66(2) and that assessment is not necessarily determinative of the outcome of the making of an intensive correction order.

200 If the s 66(2) assessment were intended to be exhaustive of the concept of "community safety" or to be determinative of the outcome of the making of an intensive correction order, then there would be no need for sub-ss (1) and (2) of s 66 to be separately expressed – it would be sufficient if a single sub-section said words to the effect that "the paramount consideration in deciding whether to make an intensive correction order is whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending". Indeed, there would be no need to refer to the concept of "community safety" at all.

201 Further, if the s 66(2) assessment were intended to be exhaustive of the concept of "community safety" or to be determinative of the outcome of the making of an intensive correction order, it would be impossible for a sentencing court to consider the provisions of s 3A and any relevant common law sentencing principles, and other matters the court thinks relevant, as required by s 66(3). And there would be no purpose in the court having regard to the contents of an assessment report or evidence from a community corrections officer as required by s 69.

202 Fourth, if an intensive correction order is to be made, ss 73, 73A and 73B provide that "at the time of sentence" the court must or may impose certain conditions on that order. In context, this means at the time of sentencing an offender to a term of imprisonment which the sentencing court directs to be served by way of intensive correction in the community. It does not mean that if no intensive correction order is made, whether as a result of legal error or not, a sentence of imprisonment to be served by way of full-time detention is thereby imposed outside jurisdiction.

203 Overall, I consider it impossible to extract from this statutory scheme support for the proposition that s 66(2) is a jurisdictional pre-condition to any

sentencing function of a sentencing court. Section 66(2) does not impose any condition precedent to the imposition of a sentence of imprisonment to be served by way of full-time detention in accordance with Pt 4. It does not even dictate if an intensive correction order should be made. So understood, any failure to carry out the assessment required by s 66(2) involves a legal error, but not a jurisdictional error.

204 On this basis, the difference between ss 66(2), 66(3) and 69(1) is not one of legal character (jurisdictional or non-jurisdictional); the difference is merely that in the hierarchy of relevant considerations, s 66(1) and (2) prescribe the consideration which is to be the paramount consideration. In the context of ss 66(3) and 69(1), the paramount consideration created by s 66(1) and (2) is necessarily the most important single, but not necessarily the determinative, consideration for the making of an intensive correction order. As Leeming JA said in *Quinn v Commonwealth Director of Public Prosecutions*, "[w]hatever force the word 'paramount' in s 66(1) carries, it does not turn community safety into a trump which defeats all the other purposes, some overlapping and some conflicting, regard to which is *also* mandated by s 66(3)"¹⁵⁵.

205 Characterising s 66(2) as a jurisdictional pre-condition to any sentencing function is also difficult to reconcile with long-established authority in New South Wales, not challenged by the appellant, about the process for making such an order. For example, it has been said that it "would be wrong to start with an intention to make an ICO and then to select the sentence in order to bring it within s 68 and activate s 7. A principled approach requires that the term of the sentence be first determined. If, and only if, that sentence (if an aggregate one) does not exceed 3 years (ie, is 3 years or less) or 2 years (for a single offence) consideration may be given to ordering that it be served by way of an ICO."¹⁵⁶ This accords with the fact that an intensive correction order involves a subsequent and separate consideration within the jurisdiction of the sentencing court.

206 Inconvenience of result is also relevant to the characterisation of error as jurisdictional or not¹⁵⁷. This accords with the principle that characterising a class of error as jurisdictional involves a process of statutory construction directed to ascertaining a legislative intention to invalidate all decisions affected by that class

155 (2021) 106 NSWLR 154 at 178 [94] (emphasis in original).

156 *Mandranis v The Queen* (2021) 289 A Crim R 260 at 266 [35]; see also at 273 [65], 273-274 [66].

157 *Parisienne Basket* (1938) 59 CLR 369 at 391.

of error¹⁵⁸. The practical consequences of all orders of an inferior court imposing a sentence of imprisonment without discharging the task of assessment imposed by s 66(2), as part of the overall evaluative process required by the whole of s 66, being void are significant. They are the kinds of consequences entitled to legitimate weight in the process of statutory construction, albeit that Beech-Jones JA was right in the Court below to warn that the concept of practical inconvenience has its limits¹⁵⁹. It may be accepted that, like other approaches to statutory construction, the concept of practical inconvenience in the context is potentially a "dangerous master"¹⁶⁰. In the present case, however, the significance of the practical consequences needs to be recognised.

207 As explained, if the obligation of assessment imposed by s 66(2) is a jurisdictional pre-condition to a sentence of imprisonment, as the appellant argued, then every failure to discharge that obligation will mean that an order of an inferior court imposing a sentence of imprisonment to be served by way of full-time detention will be void, not voidable. That failure might result from a failure to perform the required task of assessment in accordance with s 66(2) at all. It might result from some other misunderstanding of the nature of the task. Whatever the cause of the failure to comply with the requirements of s 66(2), a resulting order of an inferior court imposing a sentence of imprisonment would be a nullity. The appellant's attempts to narrow the effects of her argument by distinguishing between a total failure to perform the task required by s 66(2) and some other kind of failure to perform that task involves a misconception about the nature of jurisdictional error. If the statutory provision is a jurisdictional pre-condition, the exercise of power is either within or outside jurisdiction.

208 This consequence, on the appellant's argument, of nullity of the sentence of imprisonment must be considered in a context where:

- (1) given ss 67 and 68 of the *Crimes (Sentencing Procedure) Act*, an intensive correction order is primarily available for kinds of offences likely to be capable of being dealt with summarily by an inferior court;
- (2) it may be inferred that, in New South Wales, the Local Court and District Court deal each year with a large number of offences capable of being the subject of an intensive correction order;

158 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-391 [91]-[93].

159 *Stanley* (2021) 107 NSWLR 1 at 48-50 [199]-[202].

160 *Colquhoun v Brooks* (1888) 21 QBD 52 at 65.

- (3) while the manifest purpose of intensive correction orders is to give precedence to ameliorating the risk of reoffending for offenders who would otherwise be subject to relatively short-term sentences of imprisonment to be served by way of full-time detention¹⁶¹, that precedence does not dictate that an intensive correction order must be made. Accordingly, the Local Court and District Court must impose many sentences of imprisonment to be served by way of full-time detention despite the potential to make an intensive correction order;
- (4) as Leeming JA observed in *Quinn*, it "is to be borne firmly in mind that the District Court will commonly give an *ex tempore* judgment, that the judicial officer who imposes sentence is apt to have done so many times before, and that the essential task is to bring to bear all sentencing considerations so as to reach the instinctive synthesis explained in *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 and *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25"¹⁶².

Even if the reasons are not given *ex tempore*, they will usually be given orally (as in the present case) and relatively soon after completion of oral submissions. In circumstances where the *Crimes (Sentencing Procedure) Act* imposes no express obligation to state reasons for a decision to impose or not to impose an intensive correction order¹⁶³, the fact and nature of consideration of the requirements of s 66 may be left to inference (as in the present case), despite the serious consequences for the administration of justice in New South Wales resulting from such an error being jurisdictional and any resulting sentence of imprisonment to be served by way of full-time detention being a nullity;

- (5) a person detained under purported authority of such an order affected by this class of error may well have a claim in tort (eg, false imprisonment or trespass to the person) against those who detained them and used any kind of physical compulsion which would

161 See, eg, the Second Reading Speech for the 2017 Amending Act: New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 October 2017 at 273-274.

162 (2021) 106 NSWLR 154 at 179 [98].

163 In contrast to other provisions in the *Crimes (Sentencing Procedure) Act* requiring reasons, such as ss 5(2), 17I(1), 23(4), 45(2), 53A(2), 54B(4), 54C(1), 73A(1B), 100A(2B), 100B(1), and 100P(1).

otherwise have been authorised by statute for dealing with a person so sentenced¹⁶⁴;

- (6) in any such case, it would always be open to a person so sentenced, at any time and without regard to the 28 day time limit for appeal imposed by s 11(2) of the *Crimes (Appeal and Review) Act*, to apply to the Supreme Court for relief under s 69 of the *Supreme Court Act*; and
- (7) for errors within this class, the statutory scheme of a full *de novo* right of appeal to the District Court, but no further appeal from the District Court to the Supreme Court, would be circumvented.

209 A construction "which brings about such a result almost provides its own refutation"¹⁶⁵.

210 Characterising s 66(2) as a jurisdictional pre-condition to the making of an intensive correction order also cannot be reconciled with the legislative scheme. The appeal to the District Court involved a hearing *de novo* requiring the District Court to sentence the appellant afresh. As noted above, this is why the District Court ordered the sentence of imprisonment to commence on 17 June 2021, the date of the District Court's order (as the appellant was on bail pending determination of her appeal). It is that order – the sentence of imprisonment – the appellant sought to quash. The appellant had to seek to quash the sentence of imprisonment. Otherwise, if a sentence of imprisonment remains and is not the subject of an intensive correction order, the scheme of the *Crimes (Sentencing Procedure) Act* means that the sentence is to be served by way of full-time detention and the duty on the court in s 62(1) operates to require the court to issue a warrant for the committal of the offender to a correctional centre. The irreconcilability of the duty in s 62(1) and the sentence of imprisonment remaining exposes that s 66(2) cannot be characterised as a jurisdictional pre-condition to the making of an intensive correction order.

211 Accordingly, s 66, including s 66(2), does not "touch the jurisdiction or the capacity of the tribunal to adjudicate; ... [it] regulat[es] the proper course of procedure in matters incident to the jurisdiction of the justices and over which they have jurisdiction"¹⁶⁶. Such an error is one within jurisdiction and the resulting order

¹⁶⁴ eg, compulsory drug testing, confiscation of property, and control of inmates under ss 57, 75 and 79 of the *Crimes (Administration of Sentences) Act*.

¹⁶⁵ *Parisienne Basket* (1938) 59 CLR 369 at 376.

¹⁶⁶ *Parisienne Basket* (1938) 59 CLR 369 at 386 (citations omitted).

of the District Court for the appellant to serve a sentence of imprisonment is not void.

The District Court's order – affected by error?

212 In the Court below, only Beech-Jones JA (McCallum JA agreeing)¹⁶⁷ dealt with the question whether the District Court judge erred in the manner the appellant proposed, by failing to perform the function of assessment required by s 66(2) of the *Crimes (Sentencing Procedure) Act*. Beech-Jones and McCallum JJA accepted that the District Court judge did so err.

213 The starting point, as noted, is that the assessment function required under s 66 is to be performed by the District Court as part of a hearing *de novo* requiring that Court to exercise the sentencing discretion afresh. While the reasons of the District Court are styled as a "judgment" in that they also dispose of the appeal from the Local Court, the reasons, insofar as they involve a fresh exercise of the sentencing evaluation task, are remarks on sentence. While there is some debate apparent in the authorities in respect of the status of remarks on sentence¹⁶⁸, this descriptor accurately conveys that the remarks are intended to be delivered orally at the time of sentence, to explain to the offender, any victim, and the community, as clearly and as briefly as possible, why the sentence is being imposed.

214 In this context, it has been said that remarks on sentence serve an important function¹⁶⁹, but it is also "important to recognise ... that there is a practical tension between the principles requiring oral reasons, delivered in plain English and with brevity (usually in a busy list) and the need for reasons to satisfy the requirements of the law in the particular case"¹⁷⁰. Spigelman CJ was right to observe that the "conditions under which District Court judges give such reasons are not such as to permit their remarks to be parsed and analysed"¹⁷¹. The desirability of remarks on sentence being given with despatch and as briefly as possible has prompted experienced sentencing judges to say that these circumstances may mean that the

167 *Stanley* (2021) 107 NSWLR 1 at 46-47 [189]-[192] per Beech-Jones JA, 39 [161], 45-46 [181]-[186] per McCallum JA.

168 eg, *R v Hamieh* [2010] NSWCCA 189 at [29]-[32]; *R v Speechley* (2012) 221 A Crim R 175 at 180-181 [34]; *Maxwell v The Queen* [2020] NSWCCA 94 at [139]-[147]; cf *You v The Queen* [2020] NSWCCA 71 at [21].

169 *R v Hamieh* [2010] NSWCCA 189 at [29].

170 *R v Hamieh* [2010] NSWCCA 189 at [32].

171 *R v McNaughton* (2006) 66 NSWLR 566 at 577 [48], 578 [60], 580 [76], [80].

"remarks are not as robustly structured as they might otherwise have been"¹⁷². As Simpson J has put it, "[e]x tempore judgments not infrequently lack the order and precision of language that can be incorporated into a judgment after the luxury of time for consideration, refinement of expression, and polishing"¹⁷³. This observation equally might apply to oral reasons given by a busy court such as the District Court, even if the oral reasons are delivered some weeks after the hearing. This said, the remarks on sentence must still be adequate¹⁷⁴. A material argument specifically put must be addressed one way or another¹⁷⁵.

215 The course of the hearing, particularly the arguments put to the judge, may also be relevant. While propositions put by a judge in argument can never form part of the judge's reasons for the purpose of establishing error, I agree that submissions put to the judge may demonstrate the issues which had to be determined and may be used to supplement the judge's reasons if the reasons are brief and if "the adversely affected party is fully apprised of the judge's thinking from recent exchanges"¹⁷⁶. The course of the hearing may also assist in understanding a judge's reasons, particularly if given orally and soon after the hearing. This must be so given the nature of the business of an inferior court dealing with numerous cases for which remarks on sentence must be given orally and as quickly and efficiently as possible.

216 The District Court judge's reasons in the present case were not given *ex tempore*. However, they were delivered orally about three weeks after the hearing. While, in one sense, the oral reasons might be described as comprehensive, it is important to recognise that in giving the reasons, the judge repeatedly referred to submissions put during the hearing. Given this, it is legitimate to have regard to the hearing to determine, at the least, the issues which had to be determined.

217 The transcript of the hearing in the District Court on 28 May 2021 records that the appellant's counsel said that the appeal was about "one issue", being the appropriateness of an intensive correction order. The appellant's counsel referred

172 *Simkhada v The Queen* [2010] NSWCCA 284 at [24].

173 *Rotner v The Queen* [2011] NSWCCA 207 at [57].

174 *R v Thomson* (2000) 49 NSWLR 383 at 394 [42].

175 *Blanch v The Queen* [2019] NSWCCA 304 at [69].

176 eg, *Mohindra v The Queen* [2020] NSWCCA 340 at [37]. See also *Hay v Director of Public Prosecutions (NSW)* [2020] NSWCA 75 at [29]; *DK v Director of Public Prosecutions (NSW)* (2021) 105 NSWLR 66 at 77 [46]-[47], 79 [56]; *Mourtada v The Queen* (2021) 290 A Crim R 514 at 520-521 [19], 521-522 [22], 525 [40]-[41].

to the three step process set out in *R v Zamagias*¹⁷⁷. The submissions by the appellant's counsel otherwise focused on the appellant's remorse and good prospects of rehabilitation, as well as the supervision plan proposed as part of the assessment report if an intensive correction order was to be made.

218 The District Court judge said in her oral reasons:

"I turn now to the submissions that were made. Firstly in short form Mr Fren on behalf of the appellant submitted that this was an appeal really as to whether or not an ICO could effectively replace a full time custodial sentence. It was submitted that an ICO was the most appropriate sentence.

...

Mr Fren respectfully submitted to the Court that taking all of the relevant factors into account on the sentencing exercise including recent appellant authorities on ICOs, community safety and what he submitted was a powerful subjective case that the purposes of sentencing were more appropriately met by the imposition of an ICO."

219 Accordingly, it is beyond doubt that the District Court judge understood that the only issue was the making of an intensive correction order. No complaint was made about the sentence of imprisonment or its term. The only issue was the way in which that sentence should be served – by way of full-time detention or by way of intensive correction in the community. This issue called up for consideration a limited number of provisions of the *Crimes (Sentencing Procedure) Act* – ss 7, 66, 69, and 73 to 73B. No issue about any other provision, such as s 67 or s 68, arose.

220 In the context of the objective seriousness of the offences and the relevance of general and specific deterrence, the District Court judge quoted *Truong v The Queen* as follows¹⁷⁸:

"Events in Australia and overseas demonstrate the ghastly consequences of illicit lethal weapons being at large in the community. Parliament has indicated by way of the maximum penalty and standard non-parole period that those who profit from trading in lethal weapons should receive condign punishment."

177 [2002] NSWCCA 17 ("*Zamagias*").

178 [2013] NSWCCA 36 at [66].

221 The District Court judge also quoted from *R v Howard*, where Spigelman CJ said¹⁷⁹:

"Where it appears that there are elements within the community who refuse to accept that firearms offences must be regarded as serious, the objectives of general and personal deterrence are entitled to substantial weight in sentencing for such offences. The availability of such weapons poses a major threat to the community particularly where, as here, an accused is completely indifferent to the persons who were to acquire them. The community has determined that trade in such weapons on any other than a strictly regulated basis is to be regarded as a serious offence. That must be reflected in the sentence imposed."

222 The primary judge also recorded in her oral reasons that:

"It was submitted [by the Crown] that given all of those factors that the objective seriousness of the offending warranted a full time custodial situation particularly to denounce the appellant's conduct and to deter the appellant and others from similar offending. ...

With respect to objective seriousness I have had close regard to the submissions made by the Crown with respect to where I would find the objective seriousness of each of the offences."

223 Accordingly, it is also beyond doubt that the District Court judge understood that the Crown's case was that the objective seriousness of the offences and considerations of general and specific deterrence were such that the sentence of imprisonment (which the appellant's counsel accepted had to be imposed) should be served by way of full-time detention despite the appellant's risk of reoffending being characterised in the assessment report as "medium" and the other subjective circumstances weighing in favour of the making of an intensive correction order.

224 In the concluding part of her oral reasons, the District Court judge said:

"I have given very close consideration to the matters that were put before the Court, particularly in respect to the appropriateness of an ICO. I am very aware of the law which prescribes the availability of an ICO including such cases as *Pullen*, *Fangaloka*, *Karout* and *Casella*. I am aware of the three step process that must be followed by the Court in assessing whether or not an ICO is appropriate. In all the circumstances I am of the view that a sentence of three years as imposed by the learned Local Court magistrate is completely appropriate and I would not cavil with that. The

179 [2004] NSWCCA 348 at [66].

second step is to determine – I beg your pardon the first step is to determine whether a sentence of imprisonment is appropriate.

In all the circumstances there is no question that the s 5 threshold has been crossed. Accordingly I determine that a term of imprisonment is appropriate. The next step is to determine the length in all the circumstances taking into account all the matters that the Court must consider in the sentencing exercise particularly general deterrence which must loom large particularly specific deterrence and of course community safety and denunciation. I am of the view that a sentence imposed of three years is an appropriate sentence.

The third and final task that the Court must do in assessing whether or not an ICO is an appropriate term of imprisonment is to determine whether or not an ICO is an appropriate sentence taking into account all of the factors including community safety and rehabilitation. I have as I said given very close consideration to this. In my view community safety is of paramount consideration. There are a substantial number of firearms. The firearms in my view pose a significant risk to the people of Dubbo.

Taking into account all of those matters I am not of the view that it is appropriate for the matter, for this sentence to be served by way of an Intensive Corrections Order.

Taking into account all of the factors that have been submitted to me by both the Crown and by Mr Fren I have formed the view that the appeal should be dismissed."

225 The three step process to which the District Court judge referred in her oral reasons is explained in *Zamagias*¹⁸⁰. In that case, Howie J explained that step one is whether "the court is satisfied, having considered all possible alternatives, that no other penalty other than imprisonment is appropriate"¹⁸¹. If the answer is yes, step two is to determine what the term of that sentence should be¹⁸². Step two is answered "without regard to whether the sentence will be immediately served or the manner in which it is to be served", as the alternatives "can only be considered once the sentence has been imposed"¹⁸³. Step three is "whether any alternative to

180 [2002] NSWCCA 17.

181 *Zamagias* [2002] NSWCCA 17 at [25].

182 *Zamagias* [2002] NSWCCA 17 at [26].

183 *Zamagias* [2002] NSWCCA 17 at [26].

full-time imprisonment is available in respect of that term and whether any available alternative should be utilised"¹⁸⁴.

226 In *R v Pullen*¹⁸⁵, referred to in the District Court judge's oral reasons as a case about "the law which prescribes the availability of an ICO" of which her Honour was "very aware", Harrison J quoted the relevant provisions, including s 66¹⁸⁶, and said¹⁸⁷:

"In determining whether an ICO should be imposed, s 66(1) makes 'community safety' the paramount consideration. The concept of 'community safety' as it is used in the Act is broad. As s 66(2) makes plain, community safety is not achieved simply by incarcerating someone. It recognises that in many cases, incarceration may have the opposite effect. *It requires the Court to consider whether an ICO or a full-time custodial sentence is more likely to address the offender's risk of re-offending.* The concept of community safety as it is used in the Act is therefore inextricably linked with considerations of rehabilitation. It is of course best achieved by positive behavioural change and the amendments recognise and give effect to the fact that, in most cases, this is more likely to occur with supervision and access to treatment programs in the community."

227 In *R v Fangaloka*¹⁸⁸, referred to in the District Court judge's oral reasons as another case about "the law which prescribes the availability of an ICO" of which her Honour was "very aware", after quoting the relevant provisions, including s 66¹⁸⁹, Basten JA said that¹⁹⁰:

"[T]he paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender's risk of reoffending."

184 *Zamagias* [2002] NSWCCA 17 at [28].

185 (2018) 275 A Crim R 509.

186 (2018) 275 A Crim R 509 at 528 [77].

187 (2018) 275 A Crim R 509 at 530 [84] (emphasis added).

188 [2019] NSWCCA 173.

189 [2019] NSWCCA 173 at [47].

190 [2019] NSWCCA 173 at [63] (emphasis added); see also at [65].

228 In *Karout v The Queen*¹⁹¹, referred to in the District Court judge's oral reasons as a further case about "the law which prescribes the availability of an ICO" of which her Honour was "very aware", Brereton JA quoted s 66¹⁹² and said¹⁹³:

"This has the effect that in making a decision whether to make an intensive correction order, *community safety – including whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending – is the paramount, though not the only, consideration*. An ICO may be appropriate where prospects of rehabilitation are good and the risk of re-offending may be better managed in the community."

229 The final case which the District Court judge identified in her oral reasons as one about "the law which prescribes the availability of an ICO" of which her Honour was "very aware" was *Casella v The Queen*¹⁹⁴. In that case, Beech-Jones J quoted s 66¹⁹⁵ and said¹⁹⁶:

"On its face, s 66(2) *only requires an assessment of whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending*."

230 Lest it be assumed that the present case is one in which the result itself, the sentence of imprisonment for an aggregate term of three years with a non-parole period of two years, exposes the alleged error¹⁹⁷ of a failure to comply with s 66(2) of the *Crimes (Sentencing Procedure) Act*, the statement of agreed facts should be considered.

231 The appellant was one of four accused (the other co-accused being Gray, Harvey and Webb). Gray was under investigation by police for the unlawful supply of firearms. Harvey (accepted elsewhere to be the appellant's cousin) introduced

191 [2019] NSWCCA 253.

192 [2019] NSWCCA 253 at [54].

193 [2019] NSWCCA 253 at [55] (emphasis added, footnotes omitted), cf Hoebe CJ at CL and Fullerton J at [2] and [80]-[95] respectively.

194 [2019] NSWCCA 201 ("*Casella*").

195 *Casella* [2019] NSWCCA 201 at [106].

196 *Casella* [2019] NSWCCA 201 at [108] (emphasis added); see also at [110]-[111].

197 eg, *House v The King* (1936) 55 CLR 499 at 505.

and stored numerous firearms, firearm parts and ammunition at the appellant's home without her knowledge.

232 The appellant subsequently became aware of the firearms stored at her home. She and Gray agreed that she would hold the firearms, firearm parts and ammunition for Harvey and Webb until Gray supplied them to a known male person. She also spoke with Harvey and indicated to Gray that Harvey would accept \$2,500 for all the items. Gray agreed and told the appellant he would try to get \$3,000 and would give her \$500 for allowing the items to be stored at her home.

233 The appellant liaised with Gray, Webb and the known male person to inspect the firearms stored at her home and Gray sold the firearms, firearm parts and ammunition to the known male person.

234 Police seized the firearms, firearm parts and ammunition that were supplied to the known male person. The items amounted to eight firearms, 12 firearm parts and ammunition. The eight firearms (some of which were missing parts) included single shot and repeating rifles, including three shortened rifles, and shotguns.

235 The appellant pleaded guilty to 10 offences involving possession and sale of firearms and firearm parts, including three offences relating to shortened firearms, each carrying a maximum sentence of imprisonment of two years if dealt with summarily by the Local Court.

236 These circumstances provided a proper basis for the District Court judge to reach a rational and reasonable conclusion that the appellant's risk of reoffending was more likely to be addressed by not making an intensive correction order and the appellant instead serving her sentence of imprisonment in full-time detention.

237 It must be accepted that in her reasons, the District Court judge did not refer to s 66 of the *Crimes (Sentencing Procedure) Act*. But the question of an alleged (complete) failure to perform the function in s 66(2) involves an inference. Whether that inference should be drawn requires consideration of all of the circumstances.

238 As noted, the only issue in the appeal before the District Court judge was whether an intensive correction order should be made. The District Court judge could not have given "very close consideration" to the issue whether the sentence of imprisonment should be served by way of an intensive correction order and could not have been "very aware" of the cases about "the law which prescribes the availability of an ICO" to which she referred without recognising not only that community safety was the paramount consideration (as provided for in s 66(1)), but that in considering community safety the Court was required to assess whether making the order or serving the sentence by way of full-time detention would be more likely to address the appellant's risk of reoffending (as provided for in s 66(2)).

239 It is one thing to conclude that the District Court judge's reasons were inadequate. It is another to infer that in these circumstances the District Court judge did not assess at all whether making the intensive correction order or requiring the appellant to serve the sentence by way of full-time detention was more likely to address the appellant's risk of reoffending. The phrases "community safety" and "paramount consideration", which the District Court judge used in her reasons, are taken directly from s 66. It is difficult to accept that the District Court judge could have been "very aware" of "the law which prescribes the availability of an ICO" in the four cases identified and could have used these two phrases which appear in s 66(1), and yet infer that her Honour overlooked s 66(2), despite it being quoted in full and explained in all four cases.

240 The better inference is that, in saying that "community safety is of paramount consideration", in the context in which she did, the District Court judge performed the task required by s 66(2). It should be inferred that the District Court judge assessed either that: (a) the appellant serving the sentence of imprisonment by way of full-time detention was more likely to address the appellant's risk of reoffending than making an intensive correction order; or (b) if making the intensive correction order was more likely to address the appellant's risk of reoffending, this paramount consideration and other subjective circumstances in the appellant's favour did not outweigh the objective seriousness of the offences and the factors of general and specific deterrence.

241 I accept that it is not possible to infer from the District Court judge's reasons which of these two conclusions her Honour reached. I accept also that this means the District Court judge has not adequately discharged her obligation to give reasons for her decision. But inadequacy of reasons is not the complaint made, presumably because, in the statutory context of the *Crimes (Sentencing Procedure) Act*, such an error would not be jurisdictional. The argument that is put – that, despite what the District Court judge did say and the context in which the judge said it, she did not undertake the assessment required by s 66(2) at all – to my mind is untenable.

242 For these reasons, I would have dismissed the appeal.

