

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
EDELMAN, STEWARD, GLEESON AND JAGOT JJ

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**Matter No C7/2023**

RAYMOND JAMES CHOI HURT	APPELLANT
AND	
THE KING	RESPONDENT

**Matter No C8/2023**

RAYMOND JAMES CHOI HURT	APPELLANT
AND	
THE KING	RESPONDENT

**Matter No S44/2023**

ENRICO ROBERT CHARLES DELZOTTO	APPELLANT
AND	
THE KING	RESPONDENT

*Hurt v The King*  
*Hurt v The King*  
*Delzotto v The King*  
[2024] HCA 8  
*Date of Hearing: 9 November 2023*  
*Date of Judgment: 13 March 2024*  
C7/2023, C8/2023 & S44/2023



## **ORDER**

### **In Matter Nos C7/2023 and C8/2023:**

*Appeal dismissed.*

### **In Matter No S44/2023:**

*Appeal dismissed.*

On appeal from the Supreme Court of the Australian Capital Territory and the Supreme Court of New South Wales

### **Representation**

J White SC with K V Lee for the appellant in C7/2023 and C8/2023 (instructed by Legal Aid ACT)

R J Wilson SC with T D Anderson SC and N J Broadbent for the appellant in S44/2023 (instructed by Legal Aid NSW)

J T Gleeson SC and K M J Breckweg with C J Tran for the respondent in each matter (instructed by Commonwealth Director of Public Prosecutions)

North Australian Aboriginal Justice Agency appearing as amicus curiae, limited to its written submissions

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



## CATCHWORDS

**Hurt v The King**

**Hurt v The King**

**Delzotto v The King**

Criminal law – Sentencing – Appeal against sentence – Minimum sentences – Where s 16AAB of *Crimes Act 1914* (Cth), inserted by *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) ("Amendment Act"), provided for minimum terms of imprisonment, subject to limited exceptions, for offences – Where offences included s 474.22A(1) of *Criminal Code* (Cth) ("Possessing or controlling child abuse material obtained or accessed using a carriage service") – Where elements of offence included, relevantly, "the person has possession or control of material" and "the person used a carriage service to obtain or access the material" – Where transitional provision in Amendment Act required "relevant conduct ... engaged in" to take place on or after commencement of amendments, including insertion of s 16AAB – Whether minimum sentence provides yardstick for calculation of appropriate penalty in addition to restricting sentencing power – Whether "relevant conduct" concerns only "conduct" element of offence or also "circumstance in which conduct ... occurs".

Words and phrases – "appropriate penalty", "appropriate term of imprisonment", "child sexual abuse offence", "conduct", "double function", "engaged in", "relevant conduct", "restriction on power", "sentencing", "sentencing discretion", "statutory minimum sentence", "yardstick".

*Crimes Act 1914* (Cth), ss 16AAA, 16AAB, 16AAC.

*Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 6, items 3, 9.

*Criminal Code* (Cth), s 474.22A.



1 GAGELER CJ AND JAGOT J. Each appellant was convicted and sentenced for contravening s 474.22A of the *Criminal Code* (Cth) ("the Criminal Code"), titled "Possessing or controlling child abuse material obtained or accessed using a carriage service". Each contends that his sentence is subject to vitiating error.

2 First, the appellants contend that the minimum sentence provision which was applied to each appellant's sentence, s 16AAB of the *Crimes Act 1914* (Cth) ("the Crimes Act"), does not apply to them given the terms of the applicable transitional provision. Second, and if the minimum sentence provision does apply to them, the appellants contend that the appeal courts below misapplied the provision in reasoning that the specified minimum sentence reflects the Commonwealth Parliament's identification of the relative seriousness of a contravention of s 474.22A of the Criminal Code in a similar way to a specified maximum sentence.

3 Neither ground of alleged error is sustainable. The appeals must be dismissed.

### **Construction of the applicable transitional provision**

4 Section 16AAB, together with ss 16AAA and 16AAC, was inserted into the Crimes Act by item 2 of Sch 6 to the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) ("the Amendment Act"). These provisions commenced on 23 June 2020.<sup>1</sup> Section 16AAB provides that:

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

- (a) the person is convicted of a Commonwealth child sexual abuse offence (a **current offence**); and
- (b) the person has, at an earlier sitting, been convicted previously of a child sexual abuse offence.

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

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1 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 2(1), table items 7 and 9. See also s 2(1), table item 1, which identifies the commencement date as 22 June 2020 for ss 1 to 3 and anything not otherwise covered in the commencement table.

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imprisonment of at least the period specified in column 2 of that item."

- 5 Item 9 of Sch 6 to the Amendment Act inserted into the table in s 16AAB(2) item 24A as follows:

<b>Minimum penalty</b>		
<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b>Current offence</b>	<b>Sentence of imprisonment</b>
...	...	...
24A	offence against subsection 474.22A(1) of the <i>Criminal Code</i>	4 years
...	...	...

- 6 Item 3 ("Application provisions") of Sch 6 to the Amendment Act is the applicable transitional provision. It is in these terms:

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

- 7 As item 3 is in Pt 1 of Sch 6 to the Amendment Act, the words "on or after the commencement of this Part" in item 3(1) and (2) mean on or after 23 June 2020. Accordingly, item 3(1) provides that, relevantly, s 16AAB applies in relation to a conviction for a "Commonwealth child sexual abuse offence" where the "relevant conduct" was "engaged in" on or after 23 June 2020.



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8           Section 474.22A of the Criminal Code, which was inserted by the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth) and which commenced on 21 September 2019,<sup>2</sup> provides that:

"(1) A person commits an offence if:

- (a) the person has possession or control of material; and
- (b) the material is in the form of data held in a computer or contained in a data storage device; and
- (c) the person used a carriage service to obtain or access the material; and
- (d) the material is child abuse material.

Penalty: Imprisonment for 15 years.

(2) Absolute liability applies to paragraph (1)(c).

...

- (3) If the prosecution proves beyond reasonable doubt the matters mentioned in paragraphs (1)(a), (b) and (d), then it is presumed, unless the person proves to the contrary, that the person:
  - (a) obtained or accessed the material; and
  - (b) used a carriage service to obtain or access the material."

9           The appellants argue that, as item 3(1) of Sch 6 to the Amendment Act provides that the "amendments made by this Part apply in relation to conduct engaged in on or after the commencement of this Part", the amendments cannot apply to a conviction for an offence against s 474.22A if "the person used a carriage service to obtain or access the [child abuse] material" before 23 June 2020. In other words, the appellants contend that the "conduct engaged in" means "conduct" specified in both s 474.22A(1)(a) ("the person has possession or control of [child abuse] material") and s 474.22A(1)(c) ("the person used a carriage service to obtain or access the [child abuse] material"). The appellants' case is that if both classes of specified "conduct" occurred on or after 23 June 2020, the amendments

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2   *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth), s 2(1), table item 4.

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(including s 16AAB) apply. If, however, one class of the "conduct" forming an element of the offence occurs before 23 June 2020, the amendments do not apply.

10           The issue of statutory construction which this argument raises matters because, in the case of one appellant, Mr Hurt, the charges of which he was convicted and on the basis of which he was sentenced for offences against s 474.22A included child abuse material that he had used a carriage service to obtain before 23 June 2020. In the case of the other appellant, Mr Delzotto, the charges of which he was convicted and on the basis of which he was sentenced for offences against s 474.22A all involved child abuse material that he had used a carriage service to obtain before 23 June 2020.

11           The statutory construction issue must be resolved against the appellants.

12           The operative part of the applicable transitional provision in item 3 of Sch 6 to the Amendment Act is item 3(1) ("the amendments made by this Part apply in relation to conduct engaged in on or after the commencement of this Part"). Item 3(2), which refers to s 16AAB applying "in relation to a conviction for a Commonwealth child sexual abuse offence where the relevant conduct was engaged in on or after the commencement of this Part", is performing a different function. First, s 11B(2) of the *Acts Interpretation Act 1901* (Cth) operates so that the terms "Commonwealth child sexual abuse offence" and "child sexual abuse offence" as used in item 3(2) of Sch 6 to the Amendment Act have the meaning given in the Crimes Act. Second, the key words in item 3(2) are those which appear in the parentheses, "(regardless of whether the relevant previous conviction of the person for a child sexual abuse offence occurred before, on or after that commencement)". The function of item 3(2) is to make clear that s 16AAB(1)(b) ("the person has, at an earlier sitting, been convicted previously of a child sexual abuse offence"), on which the operation of s 16AAB depends, involves a conviction of any child sexual abuse offence at any time irrespective of the day on which "amendments made by this Part", as referred to in item 3(1) of Sch 6, commenced (that is, 23 June 2020). It follows that the relevant words are "conduct engaged in" in item 3(1) of Sch 6, and the words "where the relevant conduct was engaged in" in item 3(2) of Sch 6 must take the same meaning as the words "conduct engaged in".

13           Given that the principal effect of the "amendments made by this Part" in item 3 of Sch 6 is to introduce minimum sentences for child sex offences outside Australia (Div 272 of Ch 8 of the Criminal Code), and, more relevantly, child sex offences using postal or telecommunications services (Divs 471 and 474 of Ch 10 of the Criminal Code), it is necessary to consider the context within which item 3 of Sch 6 applies.

14           That context is set by the existing provisions contained in Ch 2 of the Criminal Code, the purpose of which is to "codify the general principles of criminal

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responsibility under laws of the Commonwealth"<sup>3</sup> and which apply to all offences against the Criminal Code.<sup>4</sup> The general principles include the division of all Commonwealth offences into physical elements and fault elements.<sup>5</sup> The physical elements may be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs.<sup>6</sup> "Conduct" means "an act, an omission to perform an act or a state of affairs", and "engage in conduct" means "do an act" or "omit to perform an act".<sup>7</sup>

15 Understood in this context, item 3 of Sch 6 to the Amendment Act refers to "conduct" that was "engaged in" and that was "relevant" to an offence against s 474.22A of the Criminal Code; it means the doing of an act specified in that section. It does not mean a specified circumstance in which such an act was done. It follows that "conduct" that was "engaged in" and that was "relevant" to the offence means the element of the offence specified in s 474.22A(1)(a) ("the person has possession or control of material"). It does not mean the element of the offence specified in s 474.22A(1)(c) ("the person used a carriage service to obtain or access the material"), which is to be understood as a circumstance in which the conduct specified in s 474.22A(1)(a) occurred and not as the doing of an act.

16 This construction is reinforced by other indicators. As noted, s 474.22A of the Criminal Code commenced on 21 September 2019. Before the commencement of s 474.22A, the relevant provisions included two existing offences, ss 474.22 and 474.23. Section 474.22 involves an offence of using a carriage service for child abuse material. Section 474.23 involves an offence of possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service. Section 474.22A, in criminalising the possession or control of child abuse material obtained or accessed using a carriage service, has a different focus from these existing offences. The focus of s 474.22A is the possession or control of child abuse material in the specified circumstances. Those specified circumstances are that "the material is in the form of data held in a computer or contained in a data storage device" (s 474.22A(1)(b)), and that "the person used a carriage service to obtain or access the material" (s 474.22A(1)(c)). In circumstances where using a carriage service for child abuse material had already been criminalised by s 474.22, s 474.22A is to be understood as criminalising different conduct from use of a

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3 *Criminal Code* (Cth), s 2.1.

4 *Criminal Code* (Cth), s 2.2(1).

5 *Criminal Code* (Cth), s 3.1(1).

6 *Criminal Code* (Cth), s 4.1(1).

7 *Criminal Code* (Cth), s 4.1(2).

carriage service as covered by s 474.22, being the conduct of possessing or controlling child abuse material in the specified circumstances.

17 Another indicator that s 474.22A(1)(c) refers not to conduct but to a circumstance in which conduct specified in s 474.22A(1)(a) occurs is the use of the past tense in s 474.22A(1)(c) ("the person *used* a carriage service to obtain or access the material")<sup>8</sup> compared to the use of the present tense in s 474.22A(1)(a) ("the person *has* possession or control of [the child abuse] material").<sup>9</sup> This indicates that the use of a carriage service is a fact that has occurred at some time (indeed, any time) whereas "possession or control of" the child abuse material is the conduct that is criminalised by s 474.22A, albeit depending on the other elements of the offence being satisfied.

18 A further indicator is the use of the past tense in s 474.22A(1)(c) compared to the present tense in s 474.22(1)(a) and (aa). Section 474.22(1)(a) refers to a person who "*accesses* material", "*causes* material to be transmitted to himself or herself", "*transmits, makes available, publishes, distributes, advertises or promotes* material", or "*solicits* material", and s 474.22(1)(aa) refers to the person doing so "*using* a carriage service".<sup>10</sup> This indicates that s 474.22(1) criminalises the conduct of accessing, causing to be transmitted, transmitting, or soliciting child abuse material using a carriage service in distinction from s 474.22A, which criminalises the conduct of possessing or controlling child abuse material which a person used a carriage service to obtain or access.

19 Yet another indicator is s 474.22A(3), which creates a presumption that the person obtained or accessed the material and used a carriage service to do so unless the person proves to the contrary. The existence of the presumption suggests that the element of the offence in s 474.22A(1)(c) is a required circumstance of the offence making the conduct of possession or control of child abuse material criminal rather than an aspect of the conduct which is criminalised. The presumption is also not temporally limited. The presumption operates unless the person proves to the contrary. It is not said, for example, that the presumption is displaced if the person merely proves they used a carriage service to obtain or access the child abuse material before s 474.22A commenced.

20 The requirement that the person who possesses or controls the child abuse material must be the same person who has obtained or accessed the material using a carriage service does not indicate that the obtaining or accessing of the material

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8 Emphasis added.

9 Emphasis added.

10 Emphasis added.

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is "conduct" for the purposes of the offence created by s 474.22A. Section 474.22A(1)(a) does not specify a fault element. Accordingly, s 5.6(1) of the Criminal Code applies and "intention is the fault element for that physical element". In ordinary English, this means that the possession or control of the child abuse material must be intentional. In contrast, s 474.22A(2) provides that absolute liability applies to s 474.22A(1)(c), meaning that there is no fault element for that physical element of the offence. In ordinary English, this means that the element is satisfied by the person having used a carriage service to obtain or access the child abuse material irrespective of their state of mind in so doing (ie, intentionally, recklessly, negligently, etc). This too suggests that the criminalised conduct is that in s 474.22A(1)(a), and that the physical element in s 474.22A(1)(c) is a necessary circumstance of the commission of the offence.

21 The extrinsic material confirms this understanding of the operation of s 474.22A. The Second Reading Speech for the *Combating Child Sexual Exploitation Legislation Amendment Bill 2019* (Cth) states that "[t]he bill will also introduce a new offence for possessing or controlling child abuse material in the form of data stored on a computer or data storage device".<sup>11</sup> The Explanatory Memorandum for the Bill is also consistent with this function of s 474.22A of the Criminal Code. According to the Explanatory Memorandum, the Bill "criminalise[s] the possession or control of child abuse material in the form of data that has been obtained or accessed using a carriage service".<sup>12</sup> It explains that "[t]he Bill introduces a new offence in Subdivision D of Division 474 of the Criminal Code for the possession or control of 'child abuse material' in the form of data held in a computer or contained in a data storage device and *that was obtained or accessed* via a carriage service".<sup>13</sup> This new offence is to "strengthen the Commonwealth's framework for criminalising online child abuse", as it "captures *the act of possessing* child abuse material *obtained through* a carriage service (eg the internet) *to ensure the possession itself is captured* under Commonwealth

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11 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 July 2019 at 823.

12 Australia, House of Representatives, *Combating Child Sexual Exploitation Legislation Amendment Bill 2019*, Explanatory Memorandum at 2 [3].

13 Australia, House of Representatives, *Combating Child Sexual Exploitation Legislation Amendment Bill 2019*, Explanatory Memorandum at 4 [17] (emphasis added).

criminal laws".<sup>14</sup> Further, the Explanatory Memorandum explains s 474.22A(1)(c) in these terms:<sup>15</sup>

"Paragraph 474.22A(1)(c) will require that the child abuse material *was obtained or accessed* by the defendant by the use of a carriage service. The use of a carriage service provides the relevant connection to the legislative power under section 51(v) of the Australian Constitution. ... [A]bsolute liability as outlined in section 6.2 of the Criminal Code will apply to paragraph 474.22A(1)(c) as it is a particular physical element, *being the jurisdictional element of the offence. The jurisdictional element of the offence is not central to the conduct or the culpability for the offence.*"

22 There is no reason to assume or infer that the Second Reading Speech and the Explanatory Memorandum do other than accurately convey the precise intention of the Commonwealth Parliament – the new offence is to criminalise a person's possession or control of child abuse material that has been (at any time) obtained or accessed by the person using a carriage service.

23 Contrary to the appellants' submissions, s 4F of the Crimes Act, which is a general transitional provision regulating when an increased or decreased penalty operates, is immaterial. That section operates on all increases or decreases in penalty for an offence. There is nothing surprising about the Commonwealth Parliament having decided to include a specific transitional provision for the suite of legislative reforms of which s 16AAB of the Crimes Act forms one part.

24 For these reasons, the appellants' construction of item 3 of Sch 6 to the Amendment Act in its application to s 474.22A of the Criminal Code must be rejected. The appeal courts below did not err in that respect.

### **The required approach to the minimum sentence**

25 Section 16AAB(1) of the Crimes Act establishes a temporal sequence which must exist to trigger the application of s 16AAB(2). The conviction of a "child sexual abuse offence" (meaning an offence defined to be a child sexual abuse offence in s 3(1) of the Crimes Act, which includes "a Commonwealth child sex offence" and "a State or Territory registrable child sex offence") must have

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14 Australia, House of Representatives, *Combating Child Sexual Exploitation Legislation Amendment Bill 2019*, Explanatory Memorandum at 4 [18] (emphasis added).

15 Australia, House of Representatives, *Combating Child Sexual Exploitation Legislation Amendment Bill 2019*, Explanatory Memorandum at 43 [144] (emphasis added).

occurred "at an earlier sitting" than the person's conviction of a "Commonwealth child sexual abuse offence" – the latter defined as the "current offence". If that temporal sequence is satisfied then, on the conviction of the person for the current offence, the specified minimum sentence provision is engaged.

26        Given that this temporal sequence is required by the terms of s 16AAB(1) to trigger the application of s 16AAB(2), it is irrelevant that the requirement may act in an arbitrary manner on one or other offender depending on the timing of the charge, the hearing, and the conviction of the child sexual abuse offence as defined in s 3(1) of the Crimes Act and the current offence as referred to in s 16AAB(1) of that Act. That potential arbitrariness of timing is inherent within the legislative provisions and therefore cannot be assumed or inferred to convey any direction or suggestion to a court about the application of the minimum sentence provision. The appellants' attempt to rely on the potential arbitrary operation of s 16AAB(2), in distinction from s 16AAA, must be rejected. Section 16AAA applies to any specified offence against a provision of the Criminal Code even if it is a first offence.

27        It was not in dispute that when a statute specifies a maximum sentence the specified maximum has two functions. It confines the power of the court to impose any sentence greater than the maximum. It also informs the sentencing process by conveying the Commonwealth Parliament's view of the relative seriousness of the offence. In *Markarian v The Queen*, for example, Gleeson CJ, Gummow, Hayne and Callinan JJ said that "careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick".<sup>16</sup> In other words, the maximum sentence reflects the Commonwealth Parliament's view of the appropriate sentence for the worst possible case constituting the offence.

28        The appellants submitted, however, that the same approach cannot be taken to a statutory minimum sentence because, contrary to a statutory maximum sentence, a statutory minimum sentence cannot function as a "yardstick" representing the least worst possible case warranting imprisonment against which the case before the court at the time can be measured if, as in the present case, the court retains discretions such as not to record any conviction and not to impose any sentence of imprisonment. This characteristic of a statutory minimum sentence, according to the appellants, makes it inherently unsuitable for performing any function other than specifying the minimum sentence of

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16    (2005) 228 CLR 357 at 372 [31]. Similar statements appear in *Muldrock v The Queen* (2011) 244 CLR 120 at 133 [31] and *Magaming v The Queen* (2013) 252 CLR 381 at 396 [48], 413-414 [104].

imprisonment to be imposed after the court has synthesised all other relevant factors. If it were otherwise, the appellants submitted, it would be impossible to articulate a logical function for the statutory minimum sentence in the process of synthesis.

29           The distinction sought to be drawn by the appellants between a statutory minimum sentence and a statutory maximum sentence is inconsistent with the general sentencing provisions set out in Pt IB of the Crimes Act. Those provisions include ss 16A(1) and (2) and 17A(1).

30           Section 16A(1) and (2) provide:

"(1)   In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

Note:           Minimum penalties apply for certain offences – see sections 16AAA, 16AAB and 16AAC.

(2)   In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

..."

31           Section 17A(1) provides:

"A court shall not pass a sentence of imprisonment on any person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case."

32           A statutory minimum sentence and a statutory maximum sentence are each "circumstances of the offence" and "circumstances of the case" of fundamental importance for the purposes of ss 16A(1) and 17A(1). A statutory minimum sentence and a statutory maximum sentence have to be considered in deciding if there is no sentence other than imprisonment that is "appropriate in all the circumstances of the case" and, if so, a sentence that is "of a severity appropriate in all the circumstances of the offence". To refuse to consider a statutory minimum sentence in deciding if there is no sentence other than imprisonment is appropriate in all the circumstances of the case and, if so, what sentence to impose or what order to make is irreconcilable with the directions in ss 16A(1) and 17A(1) of the Crimes Act. A statutory minimum sentence and a statutory maximum sentence are also "other matters" which a court must take into account by s 16A(2).



33 Accordingly, ss 16A(1) and (2) and 17A(1) do not speak against a statutory minimum sentence functioning as a yardstick representing the least worst possible case warranting imprisonment against which the case before the court at the time can be measured. To the contrary, they direct consideration of the statutory minimum sentence at all steps in the sentencing process, as opposed to the appellants' case, which confines the function of the statutory minimum sentence to a final check on the term of any sentence of imprisonment by operation of which any sentence below the mandated minimum must be increased to the minimum (before applying any discount for a guilty plea or cooperation with law enforcement agencies). In directing the consideration of the statutory minimum sentence at all steps in the sentencing process, the statutory minimum sentence is thereby adapted to the function of acting as a yardstick representing the least worst category of case for which a sentence of imprisonment is required (before applying any potential discounts for a guilty plea or cooperation with law enforcement agencies) against which the case before the court can be assessed.

34 The other "available sentences" referred to in s 17A(1) include, for example, the orders for which provision is made in: (a) s 19B(1) of the Crimes Act, which provides that, if satisfied that a charge is proved, the court may dismiss the charge or discharge the person without proceeding to conviction upon the person giving security by recognizance or otherwise ensuring compliance with specified conditions; (b) s 20(1)(a) of the Crimes Act, which enables a court to convict a person of an offence but order the release of the person without passing sentence on the person, upon the person giving security by recognizance or otherwise ensuring compliance with specified conditions; and (c) s 20(1)(b) of the Crimes Act, which enables a court to convict a person of an offence and sentence the person to imprisonment but direct, by order, that the person be released, upon giving the same kind of security, in accordance with the applicable criteria specified in s 20(1)(b)(i) to (iii).

35 That these provisions enable a court to impose less than the statutory minimum sentence in appropriate cases by an exercise of power under one or other of these provisions does not mean that the statutory minimum sentence is incapable of acting as a yardstick representing the Commonwealth Parliament's view of the least worst possible case warranting imprisonment against which the case before the court at the time can be measured. In saying that "if the person is convicted of a current offence described in column 1 of an item in the following table, the court must impose for the current offence a sentence of imprisonment of at least the period specified in column 2 of that item", s 16AAB(2) (and s 16AAA) presupposes both conviction and that the court has decided, first, to impose a sentence of imprisonment (thereby excluding s 19B and s 20(1)(a)), and, second, that the sentence of imprisonment is not to be subject to any direction under s 20(1)(b).

36           Section 16AAB(2) (and s 16AAA) refers to s 16AAC, which provides in part:

*"Reduction of minimum penalty*

- (2)   A court may impose a sentence of imprisonment of less than the period specified in column 2 of an item of a table in section 16AAA or subsection 16AAB(2) only if the court considers it appropriate to reduce the sentence because of either or both of the following:
  - (a)   the court is taking into account, under paragraph 16A(2)(g), the person pleading guilty;
  - (b)   the court is taking into account, under paragraph 16A(2)(h), the person having cooperated with law enforcement agencies in the investigation of the offence or of a Commonwealth child sex offence.
- (3)   If a court may reduce a sentence, the court may reduce the sentence as follows:
  - (a)   if the court is taking into account, under paragraph 16A(2)(g), the person pleading guilty – by an amount that is up to 25% of the period specified in column 2 of the applicable item in the relevant table;
  - (b)   if the court is taking into account, under paragraph 16A(2)(h), the person having cooperated with law enforcement agencies in the investigation of the offence or of a Commonwealth child sex offence – by an amount that is up to 25% of the period specified in column 2 of the applicable item in the relevant table;
  - (c)   if the court is taking into account both of the matters in paragraphs (a) and (b) – by an amount that is up to 50% of the period specified in column 2 of the applicable item in the relevant table."

37           Contrary to the appellants' submissions, the use of the expression in s 16AAC(3)(a) to (c), "if the court is taking into account" either a guilty plea or cooperation with law enforcement agencies, indicates nothing about the proper approach to the statutory minimum sentence. Nor does the fact that these are also required considerations under s 16A(2)(g) and (h).

38           Section 16A(2AAA), which requires the court also to consider the objective of rehabilitating the person, including, in determining the length of any sentence

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or non-parole period, sufficient time for the person to undertake a rehabilitation program, reinforces that the required approach is for the statutory minimum sentence to be considered throughout the sentencing process, and not just as a final step in the process if the sentence to be imposed is imprisonment – ignoring the statutory minimum sentence to that point – and the length of that sentence of imprisonment happens to be less than the statutory minimum sentence. The same understanding applies to s 16A(3), which requires the court to have regard to the nature and severity of the conditions that may be imposed on an offender under a sentence or order when determining the application of, relevantly, s 19B(1) or s 20(1) of the Crimes Act.

39        These provisions undoubtedly make the application of the statutory minimum sentence more complex than the application of a statutory maximum sentence. Again, however, they do not mean that the statutory minimum sentence is incapable of acting as a meaningful yardstick representing the Commonwealth Parliament's view of the least worst possible case warranting imprisonment against which the case before the court at the time can be measured. They mean only that there are more steps involved. In summary, if a person was 18 years or more when the "current offence" was committed,<sup>17</sup> is convicted of that offence, is to be subjected to a sentence of imprisonment, and is not to be subject to an order for release under and in accordance with s 20(1)(b), then the minimum sentence provision in s 16AAB(2) is engaged – the minimum sentence is the yardstick representing the Commonwealth Parliament's view of the least worst possible case warranting imprisonment against which the case before the court at the time can be measured. The sentence is to be determined recognising that yardstick as part of the synthesis of all other relevant factors. If the person has pleaded guilty or cooperated with law enforcement agencies, the court may reduce the sentence below the four year minimum (appropriate for the least worst possible case warranting imprisonment satisfying the qualifications described) in accordance with s 16AAC(3). Contrary again to the appellants' submissions, the reduction in s 16AAC(2) and (3) is available to all offenders who have pleaded guilty or who have cooperated with law enforcement agencies whether that reduction would decrease the sentence below the statutory minimum or not.

40        The parole and recognizance provisions, which operate as part of the statutory scheme, also do not undermine the role of the statutory minimum sentence functioning as a yardstick representing the Commonwealth Parliament's view of the least worst possible case warranting imprisonment against which the case before the court at the time can be measured (assuming the conditions described are satisfied). If a person is sentenced to imprisonment for a period exceeding three years then s 19AB(1) requires the court to fix a non-parole period (subject to s 19AB(3)). If a person is sentenced to imprisonment for a period that

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17    See s 16AAC(1).

does not exceed three years then s 19AC requires the court not to fix a non-parole period, and instead to make a single recognizance release order. These provisions are capable of operating with the statutory minimum sentence functioning as a yardstick against which the severity of the case before the court can be measured.

41 That the Commonwealth Parliament intended the statutory minimum sentence to function as a yardstick against which the severity of the case before the court could be measured is apparent from the extrinsic material. In the Second Reading Speech for the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019* (Cth), the Attorney-General made this intention plain, referring to the concept of a statutory maximum penalty as a yardstick as identified by the Court in *Markarian v The Queen*,<sup>18</sup> and saying that "if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick".<sup>19</sup>

42 It is also relevant that the Attorney-General said that "current sentencing practices for Commonwealth child sex offences are out of step with community expectations, they do not reflect the severity of the harm inflicted by these predators, and they fail to protect our children and communities from further offending. This government is completely committed to ensuring that the predators who commit these heinous crimes receive the sorts of sentences that the community would expect."<sup>20</sup> The Attorney-General said that "[l]ike many Australians, this government is fed up with lenient sentencing practices that fail to protect the community from child sex offenders. This bill will vastly improve justice outcomes and community safety through a range of measures", one of which was "mandatory minimum sentences for the most serious child sex offences and for recidivist offenders".<sup>21</sup> Section 16AAB, of course, concerns recidivist offenders. The Attorney-General also said that "[t]oo often, child sex offenders spend insufficient time in custody to undergo even treatment programs or receive any significant rehabilitation before being eligible for release back into the community" and that the Bill "addresses this unacceptable situation by introducing a sentencing presumption in favour of actual imprisonment, rebuttable only in

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18 (2005) 228 CLR 357 at 372 [30], cited in *Magaming v The Queen* (2013) 252 CLR 381 at 396 [48].

19 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4163.

20 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 September 2019 at 2445.

21 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 September 2019 at 2445.

exceptional circumstances".<sup>22</sup> He concluded by saying "[f]or too long, child sex offenders have been receiving inadequate sentences for their crimes that are completely out of step with community expectations. It is time for this to change."<sup>23</sup>

43 In the face of these statements, it cannot be doubted that the Commonwealth Parliament intended the statutory minimum sentence to increase the number and length of sentences of imprisonment for Commonwealth child sex offences overall. The only way in which the statutory minimum sentence can have that intended effect is for it to function as a yardstick against which the severity of the case before the court may be measured. If the statutory minimum sentence is considered in this way, and as part of the overall sentencing function, then judicial fidelity to the statutory provisions should result in both more people convicted of Commonwealth child sex offences being sentenced to a term of imprisonment and the length of the terms of imprisonment increasing. The powers and duties in other provisions, such as ss 16AAC, 19B, 20(1)(a) and (b), and 19AB(1) and (3), remain but, as noted, the court can perform and discharge those powers and duties with the statutory minimum sentence still functioning as a yardstick against which the severity of the case before the court may be measured.

44 The appellants' approach to the statutory minimum sentence, in contrast, confines its function to a form of final check at the end of the sentencing process. On this approach, once the person is convicted, and the court has determined both that the person is to be sentenced to imprisonment and the length of the term of imprisonment resulting from synthesising all relevant factors (excluding the statutory minimum sentence), then, if the sentence is below the statutory minimum sentence (leaving aside the reductions in sentence permitted by s 16AAC), the court applies the statutory minimum sentence to increase the sentence to, in the case of s 474.22A, four years. The reductions in sentence permitted by s 16AAC, if available, are then applied to that increased sentence of four years. This confined function, however, cannot fulfil the legislative intention to ensure both that more people convicted of Commonwealth child sex offences are sentenced to imprisonment and that the length of the terms of imprisonment is increased overall. To the contrary, on this approach, there should be no change to the proportion of people convicted of Commonwealth child sex offences being sentenced to a term of imprisonment. Further, the length of the terms of imprisonment will not increase overall. Rather, sentences at the lower end of the scale, below the period of four years, will be increased to four years (with the potential for reduction in accordance

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22 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 September 2019 at 2445.

23 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 September 2019 at 2448.

with s 16AAC). The result will be a clustering of sentences of four years or four years less the two potential 25 percent reductions, and potential 50 percent reduction, under s 16AAC.

45        These different approaches have been subject to previous judicial consideration.<sup>24</sup> The arguments in favour of the appellants' approach, however, remain unpersuasive. They work against fulfilment of the apparent legislative intention underlying the statutory minimum sentence. They confine the role of a statutory minimum sentence in a manner different from a statutory maximum sentence without any apparent textual, contextual, or purposive justification for so doing.

46        To say, as the appellants endorsed, that a statutory minimum sentence: (a) "says nothing about seriousness";<sup>25</sup> (b) if interpreted as doing so, "artificially distorts the sentences upwards";<sup>26</sup> and (c) must be confined in its operation to the last (or penultimate) step in the process of sentencing so as to do the "least violence to fundamental principles of criminal justice" and to maintain "as much as possible the important principle that offenders are not sentenced by the legislature but by independent courts",<sup>27</sup> in essence, involves a complaint about the policy of imposing a statutory minimum sentence for an offence. The policy of imposing a statutory minimum sentence for an offence is a matter for the legislature, not the courts. These cautionary statements do not emerge from an assessment of the text, context, and purpose of the imposition of a statutory minimum sentence, which is the exclusive province of the courts. Similarly, the principle of parity in sentencing, so that like offenders are generally treated alike,<sup>28</sup> does not weigh against the reasoning above in support of the Crown's approach to the statutory minimum sentence in this case.

47        Contrary to the appellants' arguments, the note to s 16A(1) (which forms part of the Act<sup>29</sup>), which says "[m]inimum penalties apply for certain offences –

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24    eg, *R v Pot* (unreported, Supreme Court of the Northern Territory, 18 January 2011), adopting the approach favoured by the appellants; cf *Bahar v The Queen* (2011) 45 WAR 100 and *Karim v The Queen* (2013) 83 NSWLR 268, adopting the approach favoured by the Crown.

25    *Dui Kol v The Queen* [2015] NSWCCA 150 at [12].

26    *Dui Kol v The Queen* [2015] NSWCCA 150 at [13].

27    *Dui Kol v The Queen* [2015] NSWCCA 150 at [14].

28    *Lowe v The Queen* (1984) 154 CLR 606; *Green v The Queen* (2011) 244 CLR 462.

29    *Acts Interpretation Act 1901* (Cth), s 13(1).

see sections 16AAA, 16AAB and 16AAC", does not assist them. If anything, this note reinforces the statutory direction in s 16A(1) and indicates that the minimum sentences are relevant to the assessment of the sentence or the making of an order that is of a severity appropriate in all the circumstances of the offence. The statement in the Explanatory Memorandum for the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, that the note "clarifies that, despite section 16A(1), there will be applicable minimum penalties for certain Commonwealth child sex offences under proposed sections 16AAA, 16AAB and 16AAC",<sup>30</sup> also does not support the appellants' approach. The word "despite" does not mean that the statutory minimum sentences are excluded from consideration under s 16A(1) and (2). Again, if anything, the Explanatory Memorandum is explaining the primacy of ss 16AAA, 16AAB and 16AAC in the sentencing process.

48 Further, *Garth v The Queen*,<sup>31</sup> upon which Mr Delzotto relied, is immaterial. The conclusion in that case, that a statutory minimum sentence "does not impose a punishment" but rather "operates to impose a constraint on the sentence which can be imposed",<sup>32</sup> reflects the issue which was being resolved, the validity and severability of s 25B of the *Crimes Act 1900* (NSW). It is immaterial to the proper approach of a sentencing court to a valid statutory minimum sentence.

49 The "principle of legality" is also not engaged.<sup>33</sup> The principle, that rights recognised to be fundamental by the common law are not to be abrogated or diminished other than by a law expressed with "irresistible clearness",<sup>34</sup> has nothing to do with legislative power to impose a statutory minimum sentence or statutory maximum sentence. While it is a common law principle of sentencing that a sentence is to be no more than necessary to achieve the purposes of sentencing,<sup>35</sup> an offender exposed to a sentence of imprisonment is vested with no personal common law or any other right to the shortest possible sentence of

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30 Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 46 [197].

31 (2016) 261 A Crim R 583.

32 *Garth v The Queen* (2016) 261 A Crim R 583 at 588 [24].

33 cf *R v Hurt [No 2]* (2021) 294 A Crim R 473 at 490 [75], 494 [91]-[93]; *Hurt v The Queen* (2022) 18 ACTLR 272 at 292-293 [79]-[85].

34 *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

35 eg, *Webb v O'Sullivan* [1952] SASR 65 at 66; *Boulton v The Queen* (2014) 46 VR 308 at 340 [140].

imprisonment in order to secure their right of liberty. This is why appellate courts do not interfere with the sentencing discretion other than on error being demonstrated, such as the sentence being "manifestly excessive".

50        Once this is accepted, the question is, what is the fundamental common law right being protected by the principle of legality in the case of a statutory minimum sentence being applied by a court? It cannot be a right to personal liberty or to the shortest possible sentence of imprisonment to minimise the deprivation of liberty. If it is the right to equality of treatment in equality of circumstances, confining the function of a statutory minimum sentence to the last (or penultimate) step in the process of sentencing does not achieve that object as effectively as the consideration of a statutory minimum sentence as a yardstick against which the case before the court can be assessed. If the former confined approach is taken, all sentences of imprisonment from one day to three years and 364 days are to be increased to the minimum four years (before any reduction in accordance with s 16AAC(2) and (3)). Under the latter approach, the clear objective of the Commonwealth Parliament to increase the proportion of Commonwealth child sex offenders sentenced to imprisonment and the term of their imprisonment will lead to a sentencing range for an offence under s 474.22A(1) between two years (for the least worst possible case warranting imprisonment with a full 50 percent discount under s 16AAC(2) and (3)) and 15 years (for the worst possible case).

51        The latter approach, described above, accords better with the principle of equal justice in equal circumstances than the former.<sup>36</sup> It also better enables individualised justice to be provided. While judicial fidelity to the Commonwealth Parliament's statutory mandates will lead both to a greater proportion of offenders for Commonwealth child sex offenders being imprisoned and to those imprisoned serving longer terms of imprisonment overall, that outcome is what the Commonwealth Parliament intended. Individualised justice is to be provided within those parameters.

52        For these reasons, the appeal courts below did not err in their approach to the mandatory minimum sentence provision in s 16AAB of the Crimes Act.

## Conclusion

53        The appeals must be dismissed.

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36    eg, *Karim v The Queen* (2013) 83 NSWLR 268 at 282-283 [45].



EDELMAN, STEWARD AND GLEESON JJ.

## Introduction

54 The principal issue in these appeals concerns the operation of s 16AAB of the *Crimes Act 1914* (Cth), which provides for a minimum term of imprisonment, subject to limited exceptions, for offences including possession of child abuse material under s 474.22A(1) of the *Criminal Code* (Cth). On one approach, the minimum serves a double function: (i) restricting sentencing power to the minimum period of imprisonment, subject to the exceptions; and (ii) providing a yardstick, the opposite of the maximum term of imprisonment, for the exercise of the sentencing discretion. As a yardstick that imposes an increased starting point for the appropriate term of imprisonment for the offence in the least serious circumstances, the minimum term operates to increase the appropriate term of imprisonment generally for that offence. This double function approach has now been adopted generally by trial and intermediate appellate courts throughout Australia.

55 The contrary approach treats the minimum as serving only the first function and therefore operating only as a restriction on power. This different approach, which frees the sentencing judge from the constraint of applying the minimum term as a yardstick, operates only to restrict sentencing power, to increase the term of imprisonment to the minimum term in any case in which the sentencing judge would otherwise have sentenced the offender to less than the minimum term. This alternative approach finds limited support in obiter dicta of some primary sentencing judges and in dissenting reasons in some appellate courts, including in the present appeals.

56 A threshold issue that arises in each of the present appeals concerns whether s 16AAB is applicable to convictions in circumstances in which a transitional provision provides that the "relevant conduct ... engaged in" must take place on or after the commencement of amendments including the insertion of s 16AAB into the *Crimes Act*. This threshold issue requires consideration of whether the "relevant conduct" concerns only the "conduct" element of the offence within the meaning of s 4.1(1) of the *Criminal Code* (relevantly here, possession of child abuse material) or whether the "relevant conduct" also includes another element of the offence that is "a circumstance in which conduct ... occurs" within s 4.1(1) (here, using a carriage service to obtain or access the material).

57 A majority of the Court of Appeal of the Supreme Court of the Australian Capital Territory (Kennett and Rangiah JJ) and a unanimous Court of Criminal Appeal of New South Wales (Adamson J; Beech-Jones CJ at CL and R A Hulme J agreeing) held that: (i) the relevant conduct was the possession of child abuse material and, for each conviction, the appellant had possession of the material after

the commencement date for s 16AAB; and (ii) the approach that should be followed, which has now been adopted generally by trial and intermediate appellate courts across Australia, is that which treats the minimum term of imprisonment as serving the double function of generally restricting sentencing power as well as providing a yardstick, corresponding with the maximum term of imprisonment, for the exercise of the sentencing discretion.

58 For the reasons which follow, each decision was correct in relation to both issues. Each appeal must be dismissed.

### **The central legislative provisions and the two issues**

59 On 23 June 2020, the *Crimes Act* was amended by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) ("the Amending Act"). The Amending Act introduced new sentencing provisions<sup>37</sup> including s 16AAB, a provision which, subject to narrow exceptions, created minimum terms of imprisonment for the second or subsequent commission by an offender of certain child sexual abuse offences, including possession of child abuse material.

60 Sub-sections (1) and (2) of s 16AAB of the *Crimes Act* provide, in effect, that if a person is convicted of a Commonwealth child sexual abuse offence and the person has been convicted previously of a child sexual abuse offence then, subject to exceptions in s 16AAC, the court must impose at least a particular minimum sentence of imprisonment if the person is convicted of an offence listed in the table provided in s 16AAB(2).

61 One of the offences for which provision is made in the table, for which a minimum sentence of four years is provided,<sup>38</sup> is s 474.22A(1) of the *Criminal Code*. Section 474.22A(1) provides that an offence is committed by a person when four requirements are satisfied: (a) the person has possession or control of material; (b) the material is in the form of data held in a computer or contained in a data storage device; (c) the person used a carriage service to obtain or access the material; and (d) the material is child abuse material.

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37 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 6.

38 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 6 item 9.

62 The Amending Act contains a transitional provision, item 3 of Sch 6, which provides:

- "(1) Subject to subitem (2), the amendments made by this Part [Pt 1 of Sch 6] apply in relation to conduct engaged in on or after the commencement of this Part.
- (2) Section 16AAB of the *Crimes Act 1914*, as inserted by this Part, applies in relation to a conviction for a Commonwealth child sexual abuse offence where the relevant conduct was engaged in on or after the commencement of this Part (regardless of whether the relevant previous conviction of the person for a child sexual abuse offence occurred before, on or after that commencement)."

63 Parts 1 and 3 of Sch 6, which include the minimum term provided for s 474.22A(1), commenced on 23 June 2020 ("the commencement date").<sup>39</sup>

64 The threshold issue that arises on these appeals concerns the meaning of "relevant conduct ... engaged in" in item 3(2) of Sch 6. In particular, if the relevant conduct includes every act that must be done for the purposes of an offence, then the relevant conduct for the purposes of s 474.22A(1) of the *Criminal Code* is not merely the act of having possession or control of child abuse material (s 474.22A(1)(a)) but also includes the act of using a carriage service to obtain or access the material (s 474.22A(1)(c)). An alternative approach, submitted by the respondent to the appeals, is that the meaning of the words "relevant conduct ... engaged in" should be interpreted consistently with the use of the word "conduct" in the definition of a physical element of an offence in the *Criminal Code*. On this approach, "conduct" relevantly describes the doing of an act and is distinct from both the result of an act and the circumstances in which an act occurred.<sup>40</sup> The "conduct" in s 474.22A(1) of the *Criminal Code* in this sense would be merely the act of having possession or control of child abuse material.

65 The principal issue that arises on these appeals concerns the operation of the minimum sentence provision in s 16AAB. Two options have been recognised for that operation. The first option, supported by the respondent to the appeals, treats the minimum as serving a double function as a restriction on power and also as a yardstick for the calculation of the appropriate penalty. In its operation as a yardstick, the minimum sentence functions as the opposite of the maximum

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39 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 2(1), Sch 6 items 7-9.

40 *Criminal Code* (Cth), s 4.1(1).

sentence. The second option, supported by the appellants, treats the minimum as operating only as a restriction on the power of the sentencing judge. This second option would mean that the typical process for determining a sentence would be largely unchanged, although if the sentencing judge determines that a sentence should be imposed that is lower than the minimum then, subject to any exceptions, the sentence must be increased to the minimum.

## **The background to the appeals**

### *The Hurt appeals*

66 Mr Hurt pleaded guilty to three offences committed in 2020 involving, respectively, transmitting,<sup>41</sup> accessing,<sup>42</sup> and possessing<sup>43</sup> child abuse material. His conviction for the possession offence, under s 474.22A(1), concerned three categories of child abuse material: (i) 357 photos and seven videos that were also the subject of the transmission offence (involving Mr Hurt transmitting that material to himself); (ii) a further 104 photos that were also the subject of the access offence (involving Mr Hurt accessing material stored on his phone); and (iii) an additional 25 photos and 48 videos that had come into Mr Hurt's possession after the commission of the transmission and access offences.

67 Mr Hurt's conviction for the possession offence was based upon his possession of the child abuse material on 29 July 2020 when a search warrant was executed at his home. But although this act of possession of the child abuse material occurred after the commencement date, 23 June 2020, it was agreed at Mr Hurt's sentencing hearing in the Supreme Court that, in respect of the possession offence, only the group of 25 photos had been obtained or accessed by use of a carriage service after the commencement date.

68 The primary sentencing judge (Mossop J) concluded that the use by Mr Hurt of a carriage service to obtain or access the relevant material involved "conduct" for the possession offence under s 474.22A(1) within the meaning of the transitional provision. His Honour treated the references to "conduct ... engaged in" in the transitional provision as meaning every act that must be done for the commission of the offence. Accordingly, his Honour only applied the minimum sentencing provisions in s 16AAB of the *Crimes Act* to that aspect of the

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41 *Criminal Code* (Cth), s 474.22(1)(a)(ii).

42 *Criminal Code* (Cth), s 474.22(1)(a)(i).

43 *Criminal Code* (Cth), s 474.22A(1).

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possession offence concerning the 25 photographs accessed after the commencement date.

69 Despite expressing considerable reservations about the double function approach, the primary sentencing judge adopted that approach to s 16AAB of the *Crimes Act* as a matter of precedent when sentencing Mr Hurt for the possession offence. But the primary sentencing judge only applied the yardstick function of s 16AAB to the 25 photos in the third category of the possession offence.

70 The starting point for the primary sentencing judge was a sentence of five years' imprisonment, which was reduced for Mr Hurt's plea of guilty. The primary sentencing judge would have made a reduction of 25 per cent (15 months) but considered that s 16AAC(3)(a) restricted the maximum discount for a plea of guilty to a discount of one year. Hence, his Honour imposed a penalty of four years' imprisonment. Mr Hurt's total sentence for the transmission, access and possession offences, with some degree of accumulation, was three days less than four years and ten months' imprisonment, with a non-parole period of two years and one month.

71 An appeal by the Crown was allowed, and an appeal by Mr Hurt was dismissed, by a majority of the Court of Appeal of the Australian Capital Territory. As to the transitional provision, the majority held that the transitional provision applied s 16AAB in a binary way to "a conviction for a Commonwealth child sexual abuse offence" so that s 16AAB applied to the offence as a whole, not just to aspects of it such as 25 photos, provided that all "relevant conduct" occurred on or after the commencement date. Their Honours held that the expression "the relevant conduct" in the transitional provision was concerned with conduct in the narrower sense of acts comprising what would be classified as a "conduct element" of the offence under the *Criminal Code* as distinct from the results or circumstances of those acts. In relation to the possession offence in s 474.22A(1) of the *Criminal Code*, the act comprising the conduct element of the offence was held to be the act of having possession or control of child abuse material. Since all of Mr Hurt's acts of possession had occurred after the commencement date, s 16AAB applied to the possession offence in its entirety.

72 The majority of the Court of Appeal also held that the correct approach to s 16AAB was the double function approach. In applying that approach to the possession offence in its entirety, the majority resentenced Mr Hurt with a starting point of six years' imprisonment, reduced to four years and six months' imprisonment as a consequence of Mr Hurt's plea of guilty. Unlike the primary sentencing judge, their Honours interpreted s 16AAC(3)(a) as restricting a discount for a plea of guilty only insofar as the discount cannot bring the final sentence more than 25 per cent below the minimum sentence. With a lesser amount of accumulation, the total sentence applied by the majority of the Court of Appeal

for Mr Hurt's commission of the transmission, access and possession offences was four years and ten months, only three days longer than the sentence imposed by the primary sentencing judge, with a non-parole period of two years and two months (one month longer than that imposed by the primary sentencing judge).

- 73 In dissent in the Court of Appeal, Loukas-Karlsson J rejected the double function approach, treating s 16AAB as merely a restriction on power. Without the minimum serving as a yardstick, her Honour adopted a starting point for the sentence for the possession offence of four years and nine months' imprisonment, which was reduced to three years, six months and 22 days' imprisonment after a 25 per cent discount for Mr Hurt's plea of guilty, a reduction below the minimum that is permitted by s 16AAC(3)(a). With accumulation, the overall sentence that her Honour would have imposed for the transmission, access and possession offences was three years and nine months' imprisonment.

*The Delzotto appeal*

- 74 On 25 June 2021, Mr Delzotto was convicted on his plea of guilty of two offences concerning child abuse material, respectively offences of accessing,<sup>44</sup> and possessing,<sup>45</sup> child abuse material. The accessing offence concerned six videos and one picture, with two similar offences taken into account under s 16BA of the *Crimes Act*. The possession offence concerned 142 videos and 2,511 images.

- 75 Mr Delzotto had previously been convicted of child sexual abuse offences within the meaning of s 16AAB.<sup>46</sup> Before the primary sentencing judge in the District Court of New South Wales (Judge Grant), no issue was raised by Mr Delzotto or the Crown about the operation of the transitional provision. The primary sentencing judge did not refer to this issue and assumed that the terms of s 16AAB of the *Crimes Act* applied to Mr Delzotto's possession offence under s 474.22A(1) of the *Criminal Code*.

- 76 The primary sentencing judge rejected the double function approach to s 16AAB and treated s 16AAB as merely a restriction on power. The starting point for the sentence imposed for the access offence was two years and two months, which was reduced to 18 months' imprisonment after a discount of 25 per cent for Mr Delzotto's plea of guilty and five per cent for his co-operation. The starting

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44 *Criminal Code* (Cth), s 474.22(1)(a)(i).

45 *Criminal Code* (Cth), s 474.22A(1).

46 A subsequent challenge by Mr Delzotto to this point was rejected by the Court of Criminal Appeal and was not reagitated in this Court.

point for the sentence imposed for the possession offence was four years, which was reduced to two years and nine months' imprisonment after a discount of 25 per cent for Mr Delzotto's plea of guilty and five per cent for his co-operation. The aggregate sentence imposed for both offences, after partial concurrency, was three years and three months with a non-parole period of two years and two months.

77 On his appeal to the Court of Criminal Appeal of New South Wales against sentence, Mr Delzotto submitted that the Crown could not prove that all of his "relevant conduct" for the purposes of the transitional provision was engaged in on or after the commencement date. In particular, he submitted that the Crown had not shown that the child abuse material had been obtained or accessed by Mr Delzotto on or after 23 June 2020 using a carriage service. The Court of Criminal Appeal held that the "relevant conduct" referred to in the transitional provision was the conduct element of an offence, separate from the circumstances in which the act occurred, which in s 474.22A(1) of the *Criminal Code* was the possession of child abuse material. Since Mr Delzotto's conviction under s 474.22A(1) was for possession on 1 July 2020, the entirety of the relevant conduct occurred after the commencement date.

78 As for the application of s 16AAB of the *Crimes Act*, the Court of Criminal Appeal held that the sentence imposed by the primary sentencing judge for the possession offence, and the aggregate sentence for both offences, were manifestly inadequate. One reason for the inadequacy may have been the failure of the primary sentencing judge to apply the double function approach which the Court of Criminal Appeal held should have been applied. The Court of Criminal Appeal applied that double function approach to s 16AAB and resented Mr Delzotto as follows. For the possession offence, the starting point was a sentence of six years' imprisonment, which, after a 25 per cent discount for his plea of guilty and five per cent discount for his co-operation, led to a sentence of four years and two months. For the access offence, the starting point was a sentence of 18 months' imprisonment, which was reduced to one year after the application of the same discount. The sentences were partly accumulated with an aggregate sentence of four years and six months' imprisonment and a non-parole period of three years.

**The threshold issue: the "relevant conduct" for the purpose of the transitional provision**

79 On these appeals, the appellants initially submitted that the "relevant conduct ... engaged in" in item 3(2) of Sch 6 means everything done by each appellant that is necessary for the commission of the offence and, therefore, extends to all aspects of the requirement in s 474.22A(1)(c), namely each appellant's use of a carriage service to obtain or access the child abuse material.

80 An ordinary or natural reading of "relevant conduct ... engaged in" could, in some contexts, involve the broad interpretation advanced by the appellants. In other contexts, an ordinary or natural meaning might be consistent with the narrower Crown submission that the expression is concerned only with acts rather than the results of those acts or the circumstances in which they occur. In the context of the transitional provision, the better meaning of the expression is the narrower one.

81 The narrower meaning is consistent with the closely related provisions of the *Criminal Code* upon which the *Crimes Act* operates. Section 4.1(2) of the *Criminal Code* relevantly defines "engage in conduct" as including to "do an act" and s 4.1(1) provides that "[a] physical element of an offence may be: (a) conduct; or (b) a result of conduct; or (c) a circumstance in which conduct, or a result of conduct, occurs". The effect of s 4.1 is therefore that a distinction must be drawn between acts done by a person and the circumstances in which those acts are done.

82 The requirements of s 474.22A(1)(c) are circumstances rather than conduct. The concern of 474.22A(1)(c) is not to identify the centrally harmful behaviour that s 474.22A(1) is intended to criminalise, namely a person's acts of possession or control of child abuse material (s 474.22A(1)(a)). Rather, para (c) is concerned to provide a source of jurisdiction for the Commonwealth Parliament to enact the offence.<sup>47</sup> Consistently with that jurisdictional nature, absolute liability attaches to s 474.22A(1)(c),<sup>48</sup> and the element of using a carriage service to "obtain or access" the material is presumed to exist if the prosecution proves beyond reasonable doubt the other elements of the offence in s 474.22A(1).<sup>49</sup> As was said in the Explanatory Memorandum to the legislation that introduced s 474.22A:<sup>50</sup>

"The use of a carriage service provides the relevant connection to the legislative power under section 51(v) of the Australian Constitution ... [A]bsolute liability as outlined in section 6.2 of the Criminal Code will apply to paragraph 474.22A(1)(c) as it is a particular physical element,

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47 See *Constitution*, s 51(v) and *Criminal Code* (Cth), Dictionary (definition of "carriage service") read with *Telecommunications Act 1997* (Cth), s 7 (definition of "carriage service").

48 *Criminal Code* (Cth), s 474.22A(2).

49 *Criminal Code* (Cth), s 474.22A(3).

50 Australia, House of Representatives, *Combating Child Sexual Exploitation Legislation Amendment Bill 2019*, Explanatory Memorandum at 43 [144].



being the jurisdictional element of the offence. The jurisdictional element of the offence is not central to the conduct or the culpability for the offence."

83 In oral argument, the appellants appeared to accept that the requirement in s 474.22A(1)(c) of the use by a person of a carriage service was not "conduct" but was merely a circumstance that provided the constitutional basis of power for the provision. But the appellants submitted that the use of the carriage service "to obtain or access the material" was conduct and not merely a circumstance. There is no justification for a bifurcation of s 474.22A(1)(c) in this way. The "use[] [of] a carriage service to obtain or access the material" is a composite expression that creates a single circumstance for jurisdictional reasons. If the provision were bifurcated, it would be hard to see any role for a separate element of obtaining or accessing material that had to be proved in addition to proving that the material was (intentionally) possessed. Indeed, the possession offence in s 474.22A(1) contrasts with a separate offence concerning "access" in s 474.22(1)(a)(i). As the Court of Appeal of the Supreme Court of Victoria said in *Allison (a pseudonym) v The Queen*,<sup>51</sup> the possession offence in s 474.22A differs from the access offence because, unlike the possession offence, for the access offence "the Crown must prove that the accused intentionally accessed the material and was reckless as to whether it was child abuse material".

84 The requirements of s 474.22A(1)(c) were the only elements of s 474.22A(1) that were not proved or accepted to have occurred or applied in relation to the appellants' offending on or after the commencement date. In each case, the conduct comprising possession or control of the child abuse material was proved or accepted to have occurred after that date. It follows that, by reason of the transitional provision, s 16AAB was capable of application to both appellants for the commission of the possession offences.

### **The principal issue: minimum sentences under the *Crimes Act***

85 The immediate context in which the principal issue of interpretation arises, concerning the minimum sentences provided by s 16AAB, is 16A(1) of the *Crimes Act*, which provides:

"In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

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51 (2021) 362 FLR 445 at 456 [42].

Note: Minimum penalties apply for certain offences—see sections 16AAA, 16AAB and 16AAC."

86 Section 16A(2) provides for a list of matters that the court must take into account if relevant and known to the court. Those matters include, by s 16A(2)(g), the fact of a plea of guilty, the timing of the plea and the degree to which that fact and the timing resulted in a benefit to the community, or any victim of, or witness to, the offence. They also include, by s 16A(2)(h), any co-operation with law enforcement agencies in the investigation of the offence or of other offences.

87 This typical regime for sentencing is modified by ss 16AAA and 16AAB, which provide for minimum sentences of imprisonment for certain offences. The section relevant to these appeals is s 16AAB, which provides for minimum sentences for certain second or subsequent offences where the person has previously been convicted of a child sexual abuse offence. Since each of the appellants had been convicted previously of a child sexual abuse offence, and since the "current offence" of which they were convicted under s 474.22A(1) was a "child sexual abuse offence" within s 16AAB(1), the terms of s 16AAB(2) applied:

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

88 The intended operation of the amendments to the *Crimes Act* was summarised in detail in the Second Reading Speech of the Amending Act. During the Second Reading Speech, after debate, the Attorney-General drew an analogy between the new minimum sentences and the "mandatory minimum penalties for people-smuggling offences [which] impose a mandatory minimum non-parole period as well as a mandatory minimum head sentence".<sup>52</sup> The Attorney-General quoted from the decision of this Court in *Magaming v The Queen*:<sup>53</sup>

"In *Markarian v The Queen*, the plurality observed that '[l]egislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks'. The prescription of a

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52 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4163.

53 (2013) 252 CLR 381 at 396 [48] (footnotes omitted), quoted in Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4163.

mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick."

The Attorney-General added, "[t]hese mandatory minimum penalties, consistent with the principle that I've just read from, set a sentencing yardstick for judges sentencing Commonwealth child sex offenders".<sup>54</sup>

89 At the time that s 16AAB was enacted, the yardstick approach to minimum penalties had been adopted consistently throughout Australia in relation to the "people-smuggling offences", to which the Attorney-General referred, in the *Migration Act 1958* (Cth).<sup>55</sup> Although the Supreme Court of the Northern Territory initially departed from that approach,<sup>56</sup> that Court had subsequently followed the rest of Australia.<sup>57</sup>

90 Despite the clarity of the parliamentary intention to adopt the minimum sentence as a yardstick as manifested in the Second Reading Speech, and despite the consistency throughout Australia regarding the same yardstick approach as taken under the *Migration Act*, the appellants submitted that the intent of the Commonwealth Parliament was that the minimum sentences in s 16AAB should serve only to restrict sentencing power and not to operate as a yardstick. The appellants relied on four submissions: (i) an asserted lack of legislative purpose to increase sentences generally; (ii) the presence of the note to s 16A(1) and a sentence in the Explanatory Memorandum; (iii) the existence, and operation, of exceptions to the prescribed minimum sentences; and (iv) the principle of legality. Each of these submissions can be addressed in turn. None detracts sufficiently, if at all, from the clear and unequivocal parliamentary intention manifested in the Second Reading Speech.

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54 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4164.

55 See *Bahar v The Queen* (2011) 45 WAR 100 at 113 [58]; *R v Karabi* (2012) 220 A Crim R 338 at 345 [35]; *R v Latif; Ex parte Director of Public Prosecutions (Cth)* [2012] QCA 278 at [20], [22]; *R v Selu; Ex parte Director of Public Prosecutions (Cth)* [2012] QCA 345 at [29]; *R v Nitu* [2013] 1 Qd R 459 at 473 [36]-[37]; *Director of Public Prosecutions (Cth) v Haidari* (2013) 230 A Crim R 134 at 144 [40]; *Karim v The Queen* (2013) 83 NSWLR 268 at 282 [44].

56 See *R v Pot* (unreported, Supreme Court of the Northern Territory, 18 January 2011).

57 *R v Deacon* (2019) 282 A Crim R 329 at 337 [17].

(i) *A lack of legislative purpose to increase sentences generally*

91 The appellants submitted that Parliament could not have intended to adopt the prescribed minimum sentences as a yardstick, since the effect of a minimum yardstick for an offence would be a tendency to increase sentences generally for the prescribed offences and, the appellants asserted, there was no evidence of a legislative purpose to increase sentences generally for the prescribed offences.

92 The appellants' assertion of a lack of a legislative purpose to increase sentences generally for the offences prescribed by s 16AAB is contradicted by the Second Reading Speech of the Attorney-General. During that speech, the Attorney-General remarked that the government was "fed up with lenient sentencing practices that fail to protect the community from child sex offenders".<sup>58</sup> Later in the speech he referred to the need to "shift sentencing practices" and "send a clear message that society will not tolerate sexual crimes against children and to ensure that criminal penalties appropriately reflect the gravity of the offending".<sup>59</sup>

93 The unlikelihood of a lack of legislative purpose to increase sentences generally is reinforced by the unlikelihood that Parliament could be taken to have intended the inconsistent consequences and potential denial of equal justice that would arise if the minimum sentences did not serve as a yardstick. "Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect."<sup>60</sup> If the minimum sentences prescribed did not serve as a yardstick then the same sentence might be given for one offender who committed the same offence as another but whose conduct and circumstances were objectively much less serious. The first offender might be sentenced to, say, two years' imprisonment and the second offender might be sentenced to four years' imprisonment. Without the minimum sentences serving as a yardstick, both sentences would be four years' imprisonment. As Allsop P said of a similar example in *Karim v The Queen*,<sup>61</sup> "[t]he statute, and through it the order of the Court, would be the instrument of unequal justice and, so, injustice".

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58 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 September 2019 at 2445.

59 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4162-4163.

60 *Wong v The Queen* (2001) 207 CLR 584 at 608 [65] (emphasis in original).

61 (2013) 83 NSWLR 268 at 283 [45].

*(ii) The note to s 16A(1) and the sentence in the Explanatory Memorandum*

94 The appellants submitted that the note to s 16A(1) of the *Crimes Act* and a sentence in the Explanatory Memorandum supported the general sentencing practice without any imposed minimum sentence as a yardstick and with s 16AAB imposing only a subsequent limit on sentencing power.

95 The note to s 16A does not support this submission. The note provides merely that "[m]inimum penalties apply for certain offences—see sections 16AAA, 16AAB and 16AAC". The note follows a typical practice of alerting the reader to other provisions. It says nothing about the application of provisions such as s 16AAB or the relationship between s 16AAB and s 16A.

96 The same is true of the sentence in the Explanatory Memorandum relied upon by the appellants. That sentence provides that "despite section 16A(1), there will be applicable minimum penalties for certain Commonwealth child sex offences under proposed sections 16AAA, 16AAB and 16AAC".<sup>62</sup> The sentence says nothing about how the minimum penalties modify the general sentencing practice that would otherwise have applied under s 16A(1).

*(iii) The existence and scope of exceptions to the prescribed minimum sentences*

97 Senior counsel for Mr Hurt and for Mr Delzotto submitted that the prescribed minimum sentences could not be a yardstick in the way that a maximum sentence is a yardstick because there are exceptional situations in which the court is not bound by the minimum sentence.

98 The first circumstance asserted to be exceptional was the class of cases in which the court exercises its powers under s 19B, s 20(1)(a) or s 20(1)(b) of the *Crimes Act*. The position of the appellants in relation to s 20(1)(a) was not uniform. In Mr Hurt's written submissions it was suggested that a recognizance release order under s 20(1)(a) was an exception to the application of the minimum penalty provisions. But in oral submissions, senior counsel for Mr Delzotto conceded that s 16AAB "would operate to override a capacity to make an order under [s] 20(1)(a)". For the reasons below, these issues need not be resolved on these appeals.

99 The exercise of a power under s 19B to discharge an offender without proceeding to conviction is not an exception to s 16AAB(2) at all. It is simply a

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62 Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 46 [197].

circumstance where the provision does not apply. Section 16AAB(2) will only apply if the requirements of s 16AAB(1) are satisfied, including that the person is convicted.<sup>63</sup> The existence of circumstances where the prescribed minimum sentence under s 16AAB does not apply reveals nothing about the proper approach to be taken when it does apply.

100 The same is true of the exercise of power under s 20(1)(a), which concerns the court's power to order an immediate release on conditions without passing sentence. If no sentence is passed then the provision is not an exception to a sentencing requirement of a minimum sentence. Hence, it is unnecessary on these appeals to consider any further the operation of s 20(1)(a) or to resolve any tension between the operation of s 20(1)(a) and s 16AAB.

101 As to s 20(1)(b), this provision empowers the court to sentence a person to imprisonment but order release upon security, including immediate release in exceptional circumstances for a person convicted of Commonwealth child sex offences.<sup>64</sup> But this provision is concerned with the point of release, not with the sentence imposed. It does not alter the prescribed minimum sentence. Hence, it is not necessary on these appeals to consider the detail of the operation of s 20(1)(b), when read together with ss 19AF(1) and 19AC in relation to sentences imposed by reference to s 16AAB.

102 The second exceptional circumstance arises from s 16AAC, to which s 16AAB(2) is subject. Section 16AAC(2) empowers a court to impose a sentence of imprisonment of "less than the [minimum] period specified" if the offender pleads guilty or co-operates with law enforcement agencies. Section 16AAC(3) places a cap on the extent of any reduction of sentence to ensure that the sentence does not fall 25 per cent below the minimum period specified for each of an offender's plea of guilty and co-operation with law enforcement agencies (or 50 per cent below if both factors apply).

103 The effect of s 16AAC(2), and the reason that s 16AAB(2) is made, relevantly, subject to s 16AAC(2), is that an offender's plea of guilty or an offender's co-operation with law enforcement agencies, or both, could result in the reduction of an offender's sentence below the prescribed minimum: there is a "discretion to deviate from the minimum terms set statutorily by up to 25 per cent each, to allow for the recognition of early guilty pleas and cooperation with law

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63 See also *Crimes Act 1914* (Cth), s 16AAC(1).

64 See *Crimes Act 1914* (Cth), s 20(1)(b)(iii).

enforcement".<sup>65</sup> Where, as here, the minimum sentence is four years' imprisonment, s 16AAC(3) has the effect that the discount for either a plea of guilty or co-operation cannot reduce the sentence below a floor of three years and the combined discount for both cannot reduce the sentence below a floor of two years.

104 The exceptional circumstances in which a discount can lead to a sentence of imprisonment below the minimum prescribed sentence do not detract from the role of the minimum sentence as a yardstick. Rather, the process contemplated by s 16AAC reinforces the yardstick role of the minimum sentence. The discretion in s 16AAC(2) applies where it is "appropriate to reduce the sentence", implying that a legitimate procedure will involve determining a *prima facie* sentence with the use of the prescribed minimum sentence as a yardstick, prior to considering the discount. The subsequent and transparent consideration of the discounts in s 16A(2)(g) (plea of guilty) and s 16A(2)(h) (co-operation with law enforcement agencies) reinforces the utilitarian goals underlying those considerations.

105 By contrast with the clarity of this operation, the peculiarity of the operation of s 16AAC on the approach submitted by the appellants reinforces the need for the prescribed minimum sentences under s 16AAB to operate as yardsticks for the sentencing process. Senior counsel for Mr Hurt submitted that the maximum discount provided by s 16AAC, as a percentage of the minimum period, meant that "[i]t is not sensible to apply that to any figure above four years" but did not explain why. If this were correct, s 16AAC would regulate the reduction of a sentence for a plea of guilty or co-operation with law enforcement agencies where an offender is sentenced to a term of four years' imprisonment (or a lesser period that is increased to four years' imprisonment) but not where an offender is sentenced to a term of four years and one day of imprisonment. Such an arbitrary operation would be contrary to the utilitarian goals of encouraging pleas of guilty and co-operation with law enforcement agencies.

(iv) *The principle of legality*

106 The principle of legality is a long-established principle of statutory interpretation which generally requires that a court be satisfied of a clear parliamentary intention before concluding that legislation abrogates common law

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65 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 September 2019 at 2446; see also Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 48 [210], [213].

rights, privileges or liberties.<sup>66</sup> The principle is one that will "vary with the context in which it is applied".<sup>67</sup> The required clarity increases the more that the rights are "fundamental" or "important" and the greater the abrogation of the rights to which the interpretation would lead.<sup>68</sup> But the principle of legality is ultimately only a principle of interpretation, concerned with the intention that Parliament is taken to have. It has therefore been said that the principle of legality "at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked".<sup>69</sup>

107        The sentencing context in which the appellants seek to rely on the principle of legality in these appeals is one in which, on any interpretation, the purpose of the provisions is to reduce liberty. The principle still has some force against an interpretation that treats the prescribed minimum sentences as yardsticks leading generally to a greater average sentence and greater abrogation of liberty.<sup>70</sup> But that limited force in the context of s 16AAB cannot overcome the clear and unequivocal legislative intention that the prescribed minimum sentences serve as a yardstick.

## Conclusion

108        Each appeal must be dismissed.

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66    *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437-438. See also *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 307-311 [307]-[314].

67    *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328 [19], citing *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284 [36]. See also *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310 [312].

68    *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34]. See also *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159].

69    *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310-311 [314].

70    *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 582 [11].



