

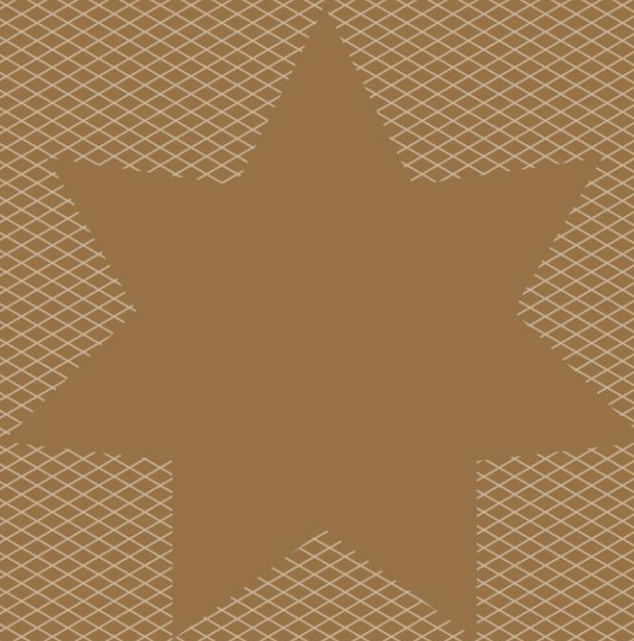


CDPP

Australia's Federal Prosecution Service

Sentencing of federal offenders in Australia: a guide for practitioners

Second edition, 2020



About this guide

This guide is published by the office of the Commonwealth Director of Public Prosecutions (CDPP), a statutory authority of the Commonwealth of Australia established under the *Director of Public Prosecutions Act 1983* (Cth).

The guide outlines the law relating to the sentencing of federal offenders in Australia (that is, persons being dealt with for offences against the laws of the Commonwealth). It is intended to be a resource for CDPP lawyers, other legal practitioners, judicial officers, court staff, and others who deal with the sentencing of federal offenders throughout Australia. It is intended that it will be updated periodically.

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The first edition of this guide was written by Desmond Lane of the Victorian Bar and settled by CDPP.

It drew upon an earlier CDPP publication, *Federal Sentencing in Victoria*. The earlier publication, *Federal Sentencing in Victoria*, was originally written in the early 1990s by Mark Pedley, then Deputy Director in the Melbourne office of CDPP, and was revised and updated by lawyers in the Melbourne office over many years. Their work is gratefully acknowledged.

This second edition includes updates and revisions and some new sections. It was prepared by Desmond Lane. Michael Wilson of the Victorian Bar assisted with revision of parts 4.5.13, 5.11 and 8.4-8.6 and related appendices. Suggestions and comments by each of the following are gratefully acknowledged: Andrea Pavleka, Lisa West, Megan Voller, Jody Nunn and Mathew Challen.

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Foreword to the second edition by the CDPP

I am very pleased to introduce this second edition of the Federal Sentencing Guide.

This second edition has both new and substantially revised sections, which I hope will provide assistance in understanding the complexities of federal sentencing laws. We will continue to update the Guide on a regular basis so that it remains as current and relevant as we can make it.

Judging by the feedback received following publication of the first edition, I fully expect that this new edition will be a valuable resource for judges and practitioners alike.

Sarah McNaughton SC
Commonwealth Director of Public Prosecutions

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1 About this guide

1.1 Scope of the guide

1. This guide summarises the major legislative provisions and leading authorities relating to the sentencing of federal offenders in Australia.
2. “*Federal offender*” is defined by the *Crimes Act 1914* (Cth) as a person convicted of a federal offence, that is, an offence against a law of the Commonwealth.¹ The term is generally used in this guide in a wider sense, to include a person who has pleaded guilty to, or has been found guilty of, an offence against a law of the Commonwealth, whether or not the court has proceeded to conviction. The wider usage is necessary because of the availability of sentencing options and ancillary orders which do not involve a conviction. Where conviction (rather than merely a finding of guilt) is a precondition of an order, specific reference is made in this guide to that requirement.
3. This guide also describes some circumstances in which a court trying an offence against a law of the Commonwealth may deal with a person otherwise than by sentencing – for example following a finding that the person is unfit to be tried.
4. The guide focuses on the law applicable throughout Australia. That body of law is complemented by particular State or Territory laws which are applied by Commonwealth statutes to the sentencing of a federal offender in that State or Territory. For example, s.20AB of the *Crimes Act 1914* picks up specified State and Territory sentencing options and applies them to the sentencing of a federal offender in the relevant State or Territory. Some references are made (often by way of examples) to aspects of applied State or Territory laws, including their interaction with Commonwealth law, but such references do not purport to be comprehensive.
5. This guide does not deal with punishments for contempt of court (other than where the contempt constitutes an offence against a law of the Commonwealth), in relation to either a federal court² or a State or Territory court exercising federal jurisdiction.³ Nor does it deal with civil penalty regimes, such as those under the *Corporations Act 2001* (Cth) or the *Competition and Consumer Act 2010* (Cth).

¹ See *Crimes Act 1914* (Cth), s 16(1). In some circumstances, the trial of a person for an offence against State or Territory law is an exercise of federal jurisdiction. An example is the prosecution by a State of a person who is ordinarily resident in another State. The trial of such a matter involves the exercise of the “*federal diversity jurisdiction*” under s 75(iv) of the *Constitution*; the court hearing the proceeding is exercising federal jurisdiction, vested in a State court by s 39(2) of the *Judiciary Act 1903* (Cth). However the exercise of federal diversity jurisdiction does not affect the character of the offence; the offence is not thereby converted into an offence against a law of the Commonwealth: see *Rizeq v R* (2017) 262 CLR 1.

² A person who is punished for contempt of the Federal Court of Australia is not thereby a “*federal offender*” and such a contempt is not a “*federal offence*” within the meaning of the *Crimes Act 1914* (Cth): *Hannaford v HH* (No 2) (2012) 203 FCR 501.

³ A conviction for contempt of a court of a State or Territory is not (usually) a conviction for an offence against a law of the Commonwealth, even when the contempt arises from the court’s exercise of federal jurisdiction. There are two reasons for this. First, in punishing for contempt, a State court is exercising State jurisdiction, even if the contempt arises in relation to the exercise of federal jurisdiction: see *R v B* [1972] WAR 129; *Re Colina*; *Ex parte*

1.2 Other resources

6. Other valuable resources in relation to the sentencing of federal offenders include:

- the 2006 report by the Australian Law Reform Commission on the sentencing of federal offenders⁴
- the Commonwealth Sentencing Database⁵
- Judicial Commission of New South Wales, *Sentencing Bench Book*⁶
- the textbook, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (published by Thomson Reuters)

Some of these resources deal with sentencing principles applicable to individual Commonwealth offences, which are beyond the scope of this guide.

1.3 Case citations

7. Case citations have been standardised in this edition of the guide. Case citations are given in the following order of precedence:

- Authorised report: e.g. *Hili v R* (2010) 242 CLR 520
- For High Court decisions, ALJR report: e.g. *Johnson v R* (2004) 78 ALJR 616
- Media-neutral citation: e.g. *Larkin v R* [2012] WASCA 238
- Unauthorised report (before media-neutral citations): e.g. *R v Ferrer-Esis* (1991) 55 A Crim R 231
- Unreported decision: e.g. *DPP v Meyers* (Vic SC (Balmford J), 26 April 1996, unreported)

8. References are given to paragraph numbers, if available: e.g. *Bui v DPP (Cth)* (2012) 244 CLR 638, [26]-[27]. If not, references are to pages: e.g. *Mill v R* (1988) 166 CLR 59, 62–63.

9. This edition contains, in the table of authorities, a comprehensive list of cases cited in the guide.

1.4 What's new

10. For this second edition, the guide has been updated and revised. The following sections are new or have been substantially re-written:

- 2.1.2 Constitutional power to define or invest federal jurisdiction

Torney (1999) 200 CLR 386; *Pattison (Trustees) in the matter of Bell (Bankrupt) v Bell* [2007] FCA 137; and *DPP v Haunga* [2001] 4 VR 285 (special leave to appeal to the High Court was granted on 13 September 2002 but the appeal was not pursued). Second, although contempt of court is, historically, a common law misdemeanour capable of being punished upon indictment or presentment, it has long been the custom of superior courts to invoke the Court's power to punish contempts by use of a summary procedure civil in character: *Rich v Attorney-General* [1999] VSCA 14, [4]. A person punished under such a procedure is not thereby found guilty of, or convicted of, "an offence".

⁴ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006).

⁵ A collaboration between the National Judicial College, the NSW Judicial Commission and the CDPP (which provides the sentencing data).

⁶ https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_commonwealth_offenders.html

- 2.2 Federal jurisdiction and the sentencing of federal offenders
- 2.6 Commonwealth provisions which apply relevant State and Territory laws
- 2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79
- 3.1.5 Finding of other uncharged offences
- 4.2.1 Appropriate severity and the consideration of factors listed in s.16A(2)
- 4.2.2 Requirements of s 16A also apply to fixing period of imprisonment to be served
- 4.2.3 No scope for presumption of imprisonment for an offence
- 4.4.8 The fact of a guilty plea to the charge – s 16A(2)(g)
- 4.4.9 Co-operation with law enforcement agencies (past cooperation) – s 16A(2)(h)
- 4.5.2 Parity
- 4.5.6 “Extra-curial punishment” generally
- 4.5.13 Registration of sexual offenders and other offenders
- 5.4.1 The 2-stage process
- 5.6.7 Enforcement of fines – Crimes Act 1914, s 15A
- 5.7.3 Types of State or Territory sentences or orders which are applied by s 20AB
- 5.7.4 Corresponding cases
- 5.8.11 Correction of error in sentence of imprisonment
- 5.9.2 Whether sentences should be concurrent or cumulative
- 5.10.11 Obligation on court to explain NPP
- 5.10.18 Obligation on court to explain RRO
- 5.11 Imprisonment: federal parole
- 7.4 Court-supervised restorative justice schemes
- 7.12 Power of sentencing court to correct error in sentence
- 7.13 Post-sentence monitoring and detention of offenders under State laws
- 8.4 Fitness to be Tried
- 8.5 Dispositions following acquittal because of mental illness
- 8.6 Disposition of persons suffering from mental illness/intellectual disability
- Appendix 2: Federal offences triggering State and Territory sex offender registration legislation
- Appendix 4: Orders applied by Crimes Act 1914 (Cth), s 20AB: jurisdiction-specific issues
- Appendix 5: Fitness to plead and fitness to be tried: procedures and orders

1.5 Currency

11. This edition of the guide reflects the law as at 1 July 2019.

2 Federal sentencing scheme – an outline

2.1 The Constitutional basis of Commonwealth sentencing

2.1.1 Commonwealth offences under the Constitution

12. The Constitution of the Commonwealth of Australia contemplated the creation of Commonwealth offences, including indictable offences, and their punishment by imprisonment.
13. The Constitution contains three provisions (ss 44, 80 and 120) which refer to offences against, or punishable under, the law of the Commonwealth:
 - Section 44 provides that conviction for an offence punishable under the law of the Commonwealth by imprisonment for one year or longer is one of the circumstances which disqualifies a person from being chosen or sitting as a senator or a member of the House of Representatives.
 - Section 80 provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.
 - Section 120 requires the States to make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and empowers the Parliament of the Commonwealth to make laws to give effect to this provision.
14. Section 80 empowers the Parliament to prescribe the place of trial on indictment for an offence against the laws of the Commonwealth if the offence was not committed within any State,⁷ and s.120 empowers the Parliament to make laws to give effect to that section.⁸
15. However the Constitution confers no other specific power on the federal Parliament to make laws with respect to crimes or the sentencing of offenders. The power of the Commonwealth Parliament to make such laws derives principally from the incidental power (s.51(xxxix)) and from other heads of legislative power (for example, the postal and telecommunications services power (s.51(v)) and the external affairs power (s.51(xxix))).

2.1.2 Constitutional power to define or invest federal jurisdiction

16. Sentencing for federal offences involves the exercise of the judicial power of the Commonwealth, which is governed by Chapter III (ss 71-80) of the Constitution.

⁷ Provision to give effect to this power is made in the *Judiciary Act 1903* (Cth); see particularly ss.70 and 70A.

⁸ In *R v Turnbull; ex parte Taylor* (1968) 123 CLR 28, 37, Barwick CJ said that s.120 “contemplates that the Parliament will make the necessary detailed provision at least for all these matters, authority to remove, authority to hold and the legality of the detention, not merely as between the Commonwealth and the State but vis-a-vis the person presented for detention by the State gaoler, and the persons concerned in the removal and in that detention.”

17. Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court of Australia, other federal courts and other courts that the Parliament of the Commonwealth vests with federal jurisdiction.
18. One implication from this provision is that the judicial power cannot be vested in a body which is not a “court” within the meaning of Chapter III. That is, the separation of the judicial power of the Commonwealth from legislative or executive power which is implicit in Chapter III means that:
 - only a “court” can exercise the judicial power;⁹ and
 - a court cannot be invested with a non-judicial power or function except to the extent that it is auxiliary or incidental to the exercise of the judicial power of the Commonwealth.¹⁰
19. These limitations affect the sentencing of federal offenders. For example, it has been held that a State law which provided for a child to be dealt with for an offence by a non-judicial panel could not be picked up and applied by federal law to the sentencing of a federal offender.¹¹
20. Sections 75 and 76 of the Constitution provide for the jurisdiction of the High Court. Section 75 confers original jurisdiction on the Court in certain matters. Section 76 provides that the Parliament may make laws conferring original jurisdiction on the High Court in specified classes of matters; they include “*any matter ... [a]rising under any laws made by the Parliament*” (s 76(ii)). This includes the trial and punishment of offences against Commonwealth statutes.¹²
21. Section 77 empowers the Parliament to make laws, with respect to any matter mentioned in s 75 or s 76, investing or defining the jurisdiction of other courts. Such laws may define the jurisdiction of any federal court other than the High Court (s 77(i)), define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States (s 77(ii)) or invest any court of a State with federal jurisdiction (s 77(iii)).
22. The term “federal jurisdiction” is used to refer to the authority to exercise, within the limits permitted by or under s 75, s 76 or s 77 of the Constitution, the judicial power of the Commonwealth,¹³ including the authority to decide matters arising under federal laws.¹⁴
23. The power of the Parliament, under s.77(iii) of the Constitution, to make laws investing a State court with federal jurisdiction with respect to any of the matters mentioned in s.75 or s.76 is (like other powers

⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁰ *British Medical Association v Commonwealth* (1949) 79 CLR 201, 236; *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151-152; *Hilton v Wells* (1985) 157 CLR 57, 68; *Murphy v R* (1985) 158 CLR 596, 614-5; *Grollo v Bates* (1994) 53 FCR 218; *Kable v DPP (NSW)* (1996) 189 CLR 51, 66, 103, 115, 135; *Application of Pearson* [1999] NSWSC 143; *Re Grinter; ex parte Hall* (2004) 28 WAR 427.

¹¹ *Newman v A (a child)* (1992) 9 WAR 14.

¹² *Ah Yick v Lehmert* (1905) 2 CLR 593; *R v Bull* (1974) 131 CLR 203; *R v Murphy* (1985) 158 CLR 596, 617; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [130] (Kirby J); *Macleod v ASIC* (2002) 211 CLR 287, [8]-[9].

¹³ *Rizeq v R* (2017) 262 CLR 1, [52].

¹⁴ *Ah Yick v Lehmert* (1905) 2 CLR 593; *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J); *Gould v Brown* (1998) 193 CLR 346, 379; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [53] (McHugh J).

vested in the Parliament by Chapter III) exclusive of the powers of State legislatures; that is, a State legislature has no power to confer, define or invest federal jurisdiction,¹⁵ whether in relation to a federal court¹⁶ or a court of that State.¹⁷ Any State law which purported to confer, define or invest federal jurisdiction would be invalid.¹⁸ The invalidity results from the absence of legislative power, not from inconsistency with a law of the Commonwealth.¹⁹

24. The Commonwealth Parliament has, however, made comprehensive provision in relation to conferring and defining the jurisdiction of federal courts and investing federal jurisdiction in State courts, including in relation to the sentencing of federal offenders (see “2.2 Federal jurisdiction and the sentencing of federal offenders”). The Commonwealth legislative scheme includes provisions which apply relevant State laws as “*surrogate federal law*” (see “2.6 Commonwealth provisions which apply relevant State and Territory laws”).
25. The Constitution confers a separate legislative power in relation to the territories (s 122). Controversy remains about the extent to which a court of a territory is a “federal court” for the purposes of Chapter III of the Constitution, but territory courts have been treated as capable of being vested with federal jurisdiction.²⁰

2.2 Federal jurisdiction and the sentencing of federal offenders

26. Under s 77 of the Constitution, the Commonwealth Parliament may confer jurisdiction on either a federal court or a State court with respect to any matter mentioned in s 75 or s 76 of the Constitution. This includes jurisdiction in relation to the sentencing of federal offenders.
27. The power of the Parliament to define or invest federal jurisdiction in relation to federal offences was first exercised by the enactment of the *Punishment of Offences Act 1901* (Cth). That Act was a temporary measure pending the establishment of the High Court of Australia. The Act conferred federal jurisdiction in criminal matters on State courts and applied State laws of a procedural character to the trial on indictment of persons charged with offences against the laws of the Commonwealth. Although only a temporary measure, the Act provided an enduring legislative model for the trial and punishment of Commonwealth offences in State court.

¹⁵ *MZOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, [20].

¹⁶ *Pedersen v Young* (1964) 110 CLR 162, 165 (Kitto J), 167 (Menzies J); *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65, 79, 84, 87, 93; *Kruger v Commonwealth* (1997) 190 CLR 1, 135 (Gaudron J); *Commonwealth v Mewett* (1997) 191 CLR 471, 552-3 (Gummow and Kirby JJ); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [35]; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [21].

¹⁷ *Solomons v District Court (NSW)* (2002) 211 CLR 119, [21]; *R v Gee* (2003) 212 CLR 230, [100]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [230]; *Hili v R* (2010) 242 CLR 520, [21]; *Rizeq v R* (2017) 262 CLR 1, [15], [21], [23] (Kiefel CJ), [57]-[63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

¹⁸ *Pedersen v Young* (1964) 110 CLR 162, 167 (Menzies J); *Rizeq v R* (2017) 262 CLR 1, [60]-[61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

¹⁹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, [58]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [230]; *MZOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, [20]; *Rizeq v R* (2017) 262 CLR 1, [60].

²⁰ See P Hanks, F Gordon and G Hill, *Constitutional Law in Australia* (4th edition, 2018), [9.125]-[9.128].

28. In 1903, the Parliament enacted the *Judiciary Act*, which replaced the *Punishment of Offences Act 1901*. Like its temporary precursor, the *Judiciary Act* vested in State courts jurisdiction to try persons for, and to sentence offenders for, offences against laws of the Commonwealth.²¹ The Act also applied State laws (including laws relating to evidence and procedure) to courts exercising federal jurisdiction and applied State laws relating to criminal proceedings to proceedings against persons for Commonwealth offences.²² The *Judiciary Act* also vested wide general jurisdiction on State courts in relation to federal matters.²³
29. As Gleeson CJ said in *Gee*,²⁴ the *Judiciary Act* 1903 (Cth) reflected a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter. The effect was that the laws and practices which governed the sentencing of federal offenders in a State or Territory were assimilated more closely to the sentencing of other offenders in that jurisdiction than to the sentencing of Commonwealth offenders in other jurisdictions. (This is sometimes referred to as vertical or intra-jurisdictional assimilation, in contrast to horizontal or inter-jurisdictional assimilation.)
30. An inevitable result was that considerable disparity applied to the sentencing of federal offenders across Australia. However the High Court has held that such disparity did not inherently offend against constitutional principle.²⁵
31. Parliament has also conferred limited jurisdiction on federal courts to deal with federal offences. In particular, since 2009, the Federal Court of Australia has been invested with jurisdiction with respect to the trial on indictment of cartel offences.²⁶

2.3 The development of Commonwealth sentencing law

32. Offences under Commonwealth law were created by the first Parliament.²⁷ The most significant were those in the *Customs Act 1901* (Cth).

²¹ *Judiciary Act 1903* (Cth), s 68(2).

²² *Judiciary Act 1903* (Cth), s 68(1), 79. See “2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79”.

²³ *Judiciary Act 1903* (Cth), s 39(2). The relationship between the vesting of jurisdiction by s 39(2) and by s 68(2) is yet to be authoritatively determined: see, e.g., *Ah Yick v Lehmert* (1905) 2 CLR 593, 607-608; *Adams v Cleeve* (1935) 53 CLR 185; *R v Bull* (1974) 131 CLR 203; *Brown v R* (1986) 160 CLR 171, 197; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [16], [92]; *R v Gee* (2003) 212 CLR 230, [66]-[67], [119].

²⁴ *R v Gee* (2003) 212 CLR 230, [7].

²⁵ *Leeth v Commonwealth* (1992) 174 CLR 455 (concerning the *Commonwealth Prisoners Act 1967* (Cth), s 4, which adopted State and Territory law relating to the fixing of non-parole periods); *Putland v R* (2004) 218 CLR 174, [25] (Gleeson CJ), [59] (Gummow and Heydon JJ).

²⁶ *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth).

²⁷ The first offences were created by the *Audit Act 1901* (Cth).

33. It was not until the passage of the *Crimes Act 1914* (Cth) that a federal statute made provision of a general nature for the prosecution or sentencing of federal offenders. Even then, provision relating to federal sentencing was sparse.
34. For more than 70 years following the enactment of the *Crimes Act*, relatively few changes were made to federal sentencing law. By amendments in 1960, additional non-conviction sentencing options were made available (*Crimes Act 1914*, s.19B), and State or Territory options were made available for the sentencing of young offenders (*Crimes Act 1914*, s.20C). In 1973, the death penalty (previously provided for treason and some other serious offences) was abolished. Amendments in 1982 empowered courts sentencing federal offenders to impose certain State or Territory non-custodial sentences, such as community service orders and periodic detention (*Crimes Act 1914*, s.20AB). However, the essential features of the legislative scheme remained constant.
35. The position has changed considerably since the late 1980s. Major amendments to the *Crimes Act* were enacted in 1989.²⁸ Those amendments included extensive provisions relating to the sentencing of Commonwealth offenders.²⁹ A number of further significant amendments have been made since then.³⁰ The result is that Commonwealth law now makes direct provision for a far wider range of matters relating to the sentencing of federal offenders. That trend is unlikely to be reversed.
36. Over the same period, there has been extensive reform of Commonwealth criminal law generally. This has included the enactment of many new offences and the codification of the law by the *Criminal Code* (Cth).³¹
37. The body of case law relating to the sentencing of federal offenders has also expanded considerably, and there is now an extensive (and rapidly expanding) jurisprudence of the High Court and of State and Territory superior courts on the subject. In a series of decisions, the High Court has articulated how national consistency is to be achieved in the sentencing of federal offenders.³²

²⁸ *Crimes Legislation Amendment Act (No.2) 1989* (Cth), which came into effect on 17 July 1990.

²⁹ In *Putland v R* (2004) 218 CLR 174, [19], Gleeson CJ explained that the impetus for the amendments was “the difficulty that arose by reason of the truth in sentencing legislation introduced in New South Wales in 1989. ... there was a radical alteration in the system of remissions, and the relationship between minimum terms and head sentences. Parity of sentencing, including parity in relation to State and federal offences, became a major problem.”

³⁰ The most significant subsequent amendments have been brought about by the *Crimes Legislation Amendment (No.2) Act 1991* (effective 20 September 1991); the *Crimes Legislation Amendment Act 1992* (effective 8 January 1993); the *Crimes and Other Legislation Amendment Act 1994* (effective 16 January 1995); the *Law and Justice Legislation Amendment Act 1999*, Schedule 10 (effective 13 October 1999); the *Crime Amendment (Bail and Sentencing) Act 2006* (effective 12 December 2006); and the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (effective 27 November 2015).

³¹ *Criminal Code Act 1995* (Cth).

³² *Hili v R* (2010) 242 CLR 520; *Barbaro v R* (2014) 253 CLR 58; *R v Pham* (2015) 256 CLR 550. See “3.4 Reasonable consistency in sentencing”.

38. Although the overwhelming majority of proceedings for federal offences continue to be brought in, and dealt with by, State and Territory courts, there have been some steps towards expanding the jurisdiction of federal courts to deal with federal offences. One such development has been creating the legislative framework and the facilities for cartel offences to be tried on indictment in the Federal Court of Australia. There have also been proposals for the Federal Court to be empowered to try on indictment national security offences.³³
39. Amongst the factors which have been driving these changes have been a greater emphasis on the need for consistency in the treatment of federal offenders, the creation of new crimes and an increase in the number and scope of federal offences, a sharp rise in the number of prosecutions for such offences, the growth of cross-border crime, the establishment and development of Commonwealth investigative and prosecution agencies (notably the Australian Federal Police and the CDPP), the emergence of new sentencing options, and an increasing legislative preference for more structured – and sometimes more prescriptive – laws to govern sentencing of federal offenders.
40. As a result of legislative changes, the sentencing of federal offenders is now governed to a much greater extent by federal statutes.

2.4 The major Commonwealth provisions relating to sentencing of federal offenders

41. The most important repository of laws governing the sentencing of federal offenders now is Part IB of the *Crimes Act 1914* (Cth). That Part is of central importance in the sentencing of federal offenders. In seeking to identify the applicable law, Part IB should be the first port of call.³⁴
42. Part IB of the *Crimes Act 1914* (Cth) is entitled “*Sentencing, imprisonment and release of federal offenders*” and comprises the following Divisions:
- Division 1 – Interpretation*
 - Division 2 – General sentencing principles*
 - Division 3 – Sentences of imprisonment*
 - Division 4 – The fixing of non-parole periods and the making of recognizance release orders*
 - Division 5 – Conditional release on parole or licence*
 - Division 6 – Unfitness to be tried*
 - Division 7 – Acquittal because of mental illness*
 - Division 8 – Summary disposition of persons suffering from mental illness or intellectual disability*
 - Division 9 – Sentencing alternatives for persons suffering from mental illness*
 - Division 9A – Sharing information relevant to federal offenders*
 - Division 10 – Miscellaneous*
43. Part IB deals with such diverse matters as:
- the applicable principles in sentencing a federal offender (s.16A),

³³ Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), [8.106]–[8.128].

³⁴ See *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [36].

- victim impact statements (s.16AB),
- reductions of sentence for undertaking to co-operate with law enforcement authorities (s.16AC),
- the principle that imprisonment is a sentence of last resort (s.17A),
- the commencement of federal sentences (s.16E),
- cumulation and concurrency of sentences (s.19),
- the fixing of non-parole periods or recognizance release orders (Division 4),
- non-conviction dispositions in certain circumstances (s.19B),
- release on recognizance after conviction (s.20),
- the availability of particular State sentencing options for sentencing federal offenders generally (s.20AB),
- reparation (s.21B),
- disposition of persons who are unfit to be tried (Division 6) or acquitted because of mental illness (Division 7),
- additional dispositions for offenders suffering from a mental illness or intellectual disability (Divisions 7 and 8), and
- the availability of State sentencing options for sentencing a child or young person (s.20C).

A checklist summary of the key provisions is set out in Appendix 1 to this guide.

44. The 1989 amendments, which introduced a number of these provisions, were intended to provide certainty in relation to any term of imprisonment to be served, whilst ensuring that harsher or longer prison terms did not result.³⁵ Although greater uniformity in the sentencing of federal offenders throughout the Commonwealth was not a stated goal of the legislation,³⁶ the amendments have also had the effect of producing a greater degree of uniformity.
45. Both the policy and the drafting of Part IB have been the subject of considerable judicial comment since the 1989 amendments,³⁷ and the provisions continue to be a fertile source of contention in criminal proceedings.
46. Examples of other Commonwealth laws which may affect sentencing of federal offenders in particular circumstances include:
 - the *Proceeds of Crime Act* 2002 (Cth),
 - provisions in various Acts for forfeiture³⁸ or disqualification³⁹ following conviction for an offence, and

³⁵ See Second Reading Speech on the *Crimes Legislation Amendment Bill (No.2) 1989* (Cth): *Commonwealth Parliamentary Debates*, Senate, 21 November 1989, 2895.

³⁶ *Putland v R* (2004) 218 CLR 174, [21]-[22] (Gleeson CJ).

³⁷ For a summary, see Justice Mark Weinberg, “The Labyrinthine Nature of Federal Sentencing” [2012] VicJSchol 1.

³⁸ For example, s.101 of the *Fisheries Management Act* 1991 (Cth) permits a court, upon convicting a person of a specified offence against the Act, to order forfeiture of a boat or other specified item which was connected with the commission of the offence.

³⁹ For example, s.206B of the *Corporations Act* 2001 (Cth) provides for disqualification from managing a corporation if a person is convicted of an offence described in the section.

- provisions in the *Migration Act 1958* (Cth) for the deportation of offenders in certain circumstances⁴⁰ and for mandatory minimum sentences for certain offences against that Act.⁴¹

47. Commonwealth laws dealing with matters relating to the sentencing of federal offenders are complemented by:

- common law principles, which fill gaps where provisions in federal statutes are not complete (see “2.5 Applicability of the common law”); and
- State and Territory laws which are applied by Commonwealth statutory provisions as “*surrogate federal law*” (see “2.6 Commonwealth provisions which apply relevant State and Territory laws”).

2.5 Applicability of the common law

48. Section 80 of the *Judiciary Act 1903* (Cth) provides for the application of the common law to all courts exercising federal jurisdiction, in the exercise of their jurisdiction.

49. The provision makes applicable “*the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held*”.

50. The common law is so applied only “[s]o far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment”.

51. Section 80 thus gives the common law a residual application, to fill gaps in Commonwealth law.⁴²

52. Commonwealth law does leave room for the application of general principles of common law to the sentencing of federal offenders. In particular, s 16A of the *Crimes Act 1914* (Cth), which sets out principles governing the sentencing of federal offenders, and specifies matters to which a court must have regard, does not purport to be exhaustive. The essential requirement in s.16A(1) is merely that a court “*must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*”. Moreover s.16A(2), which specifies matters to which a court must have regard, is prefaced with the words, “*In addition to any other matters ...*”; this too makes clear that the considerations listed in s 16A(2) are not exhaustive.

53. The generality of the requirement in s.16A(1) and the non-exhaustive nature of the list in s.16A(2) leaves room for the application of general principles of common law (such as proportionality, totality and parity) in sentencing a federal offender.⁴³ Section 16A is able to accommodate judicially-developed sentencing principles where such principles give relevant content to the statutory expression in s 16A(1)

⁴⁰ See *Migration Act 1958* (Cth), ss.200-206, 501-501H. As to the relevance (if any) of these provisions to the sentencing of federal offenders, see “4.5.7 Prospect of visa cancellation and deportation”.

⁴¹ See “8.1.2 Mandatory imprisonment for certain people-smuggling offences”.

⁴² *Bui v DPP (Cth)* (2012) 244 CLR 638, [26]-[27].

⁴³ *Johnson v R* (2004) 78 ALJR 616, [15]; *Hili v R* (2010) 242 CLR 520, [25]; *Bui v DPP (Cth)* (2012) 244 CLR 638, [18].

“of a severity appropriate in all the circumstances of the offence”, as well as expressions such as “the need to ensure that the person is adequately punished for the offence”, which appears in s 16A(2)(k).⁴⁴

54. Conversely, to the extent that s 16A or other provisions of Part IB of the *Crimes Act 1914* (Cth) specifically or impliedly provide for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the *Crimes Act* is exclusive.⁴⁵
55. In *Bui*,⁴⁶ the High Court held that s 16A left no room for the application of what the appellant contended was the common law doctrine of double jeopardy; that is, a common law requirement that a court resentencing an offender following a successful prosecution appeal mitigate the sentence to allow for the presumed distress and anxiety suffered by a respondent as a result of such an appeal. There was no gap in s 16A of the *Crimes Act 1914* for the common law doctrine of double jeopardy to apply.⁴⁷ The High Court in *Bui* also observed that application of an automatic sentence discount (pursuant to a judge-made principle of law) would not be consistent with the requirement of s 16A(1) that a sentence be appropriate in its severity in all the circumstances of the case.⁴⁸
56. In *Atanackovic*,⁴⁹ the Victorian Court of Appeal observed that, following *Bui*, in order for a State common law sentencing principle to apply to sentencing for federal offences, it must be “accommodated” by s 16A of the *Crimes Act 1914* (Cth) or be “picked up” by s 80 of the *Judiciary Act 1903* (Cth). The Court of Appeal in *Atanackovic* held that neither s 16A nor s 80 provided a legal foundation for the application to the sentencing of Commonwealth offenders of an earlier guideline judgment given by the Court⁵⁰ on the use of community correction orders in sentencing.
57. If a common law principle is applied by s 80 (to fill a gap in Commonwealth law), it would appear that the application of that principle could have the effect of excluding the application of a State or Territory law pursuant to s 68 or s 79 of the *Judiciary Act*.⁵¹ Therefore it is necessary to consider whether common law principles apply before considering the application of any relevant State or Territory statute.

⁴⁴ *Hili v R* (2010) 242 CLR 520, [25]; *Bui v DPP (Cth)* (2012) 244 CLR 638, [18].

⁴⁵ *R v Pham* (2015) 256 CLR 550, [22]. See “4.1.3 Limited scope for applying sentencing principles under State/Territory legislation”.

⁴⁶ *Bui v DPP (Cth)* (2012) 244 CLR 638.

⁴⁷ *Bui v DPP (Cth)* (2012) 244 CLR 638, [27]-[28].

⁴⁸ *Bui v DPP (Cth)* (2012) 244 CLR 638, [19].

⁴⁹ *Atanackovic v R* (2015) 45 VR 179, [47].

⁵⁰ *Boulton v R* (2014) 46 VR 308.

⁵¹ The relationship between the application of the common law under s 80 of the *Judiciary Act 1903* (Cth) and the application of State or Territory law as surrogate federal law under ss 68 and 79 of the Act has not been the subject of extensive judicial consideration. However it is clear from the judgments in *Blunden v Commonwealth* (2003) 218 CLR 330, [18], [91], that s 80 is one of the laws of the Commonwealth to which s 79 is expressly excepted. It must follow that s 80 may also be a law of the Commonwealth which renders State or Territory law inapplicable under s 68 of the Act. That is, a State or Territory law of a kind described in s 68(1) may be rendered inapplicable because, as a result of the application of a common law principle by s 80, Commonwealth law made contrary provision to the State or Territory law, or was complete on its face, or left no room for the operation of the State or Territory law. A State or Territory law of a kind described in s 79(1) could similarly be excluded from applying on the basis that the laws of the Commonwealth (that is, including s 80) “otherwise provided”. This reasoning may underlie the observation in *Johnson v R* (2004) 78 ALJR 616, [15], that, except to the extent stated in ss 16A and

2.6 Commonwealth provisions which apply relevant State and Territory laws

58. State and Territory laws relating to the sentencing of offenders can have no application of their own force to the sentencing of a federal offender.⁵² However such laws may be applied as “*surrogate federal law*”⁵³ to the sentencing of a federal offender if a law of the Commonwealth so provides.⁵⁴ A number of Commonwealth laws do so; those laws take various forms.⁵⁵
59. In relation to the sentencing of federal offenders, the most important Commonwealth provisions which apply State and Territory laws are ss 68 and 79 of the *Judiciary Act 1903* (Cth). These provisions are discussed in “2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79”)
60. Other important Commonwealth provisions which apply State/Territory laws in particular circumstances include:
- s 15A of the *Crimes Act 1914*, which applies State/Territory laws relating to the enforcement of fines to a fine imposed on a federal offender (see “5.6.7 Enforcement of fines – Crimes Act 1914, s 15A”);
 - s 20AB of the *Crimes Act 1914*, which applies certain State/Territory sentencing options (see “5.7 Orders applied by Crimes Act 1914, s.20AB”);
 - s 16E of the *Crimes Act 1914*, which applies State or Territory law relating to the credit to be given for pre-sentence custody for the offence (see “5.8.9 Credit for pre-sentence custody for the offence”);
 - S 20C of the *Crimes Act 1914*, which allows for a child or young person charged with or convicted of a Commonwealth offence to be “*tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory*” (see “8.2 Children and young persons”);

2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79

61. The most important provisions for the application of State and Territory law as surrogate federal law in relation to the sentencing of federal offenders are ss 68 and 79 of the *Judiciary Act 1903* (Cth).

16B of the *Crimes Act 1914* (Cth), “*general common law and not peculiarly local or state statutory principles of sentencing are applicable*” to the sentencing of federal offenders.

⁵² *Solomons v District Court (NSW)* (2002) 211 CLR 119, [21]; *R v Gee* (2003) 212 CLR 230, [100]; *Hili v R* (2010) 242 CLR 520, [21]; *Rizeq v R* (2017) 262 CLR 1, [15], [21], [57], [60]-[61].

⁵³ The term “*surrogate Commonwealth law*”, to describe the way State or Territory laws are applied by provisions of the *Judiciary Act 1903* (Cth), appears to have been coined by Murphy J in *Maguire v Simpson* (1977) 139 CLR 362, 408. The term “*surrogate Commonwealth law*” or “*surrogate federal law*” has since been used in a number of decisions of the High Court. In *Rizeq v R* (2017) 262 CLR 1, [81], the plurality pointed out that “*the adjective “surrogate” adds nothing to the analysis*”. (Cf *Pedersen v Young* (1964) 110 CLR 162, 165, where Kitto J referred to State laws binding a federal court “*as federal law*”.) Nevertheless the term “*surrogate federal law*” has gained wide currency and for that reason continues to be used throughout this guide.

⁵⁴ *Hili v R* (2010) 242 CLR 520, [21].

⁵⁵ *Mok v DPP (NSW)* (2016) 257 CLR 402, [84].

62. The purpose of these provisions is “to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State, and to avoid the establishment of two independent systems of criminal justice.”⁵⁶

2.7.1 The terms of s 68(1) and (2) and s 79(1)

63. Section 68(1) of the *Judiciary Act 1903* (Cth) provides:

- (1) *The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:*
- (a) *their summary conviction; and*
 - (b) *their examination and commitment for trial on indictment; and*
 - (c) *their trial and conviction on indictment; and*
 - (d) *the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;*
- and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.*

64. Section 68(2) provides:

- (2) *The several Courts of a State or Territory exercising jurisdiction with respect to:*
- (a) *the summary conviction; or*
 - (b) *the examination and commitment for trial on indictment; or*
 - (c) *the trial and conviction on indictment;*
- of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.*

65. Section 68(7) is also relevant to the construction of s 68(1) and (2). It provides:

- (7) *The procedure referred to in subsection (1) and the jurisdiction referred to in subsection (2) shall be deemed to include procedure and jurisdiction in accordance with provisions of a law of a State or Territory under which a person who, in proceedings before a court of summary jurisdiction, pleads guilty to a charge for which he or she could be prosecuted on indictment may be committed to a court having jurisdiction to try offences on indictment to be sentenced or otherwise dealt with without being tried in that court, and the reference in subsections (1) and (2) to any such trial or conviction shall be read as including any conviction or sentencing in accordance with any such provisions.*

66. Section 79(1) provides:

⁵⁶ *Williams v R [No 2]* (1934) 50 CLR 551, 560 (Dixon J).

- (1) *The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.*

2.7.2 The conferral of jurisdiction and the application of laws

67. Sections 68(1) and (2) and s 79 have two distinct effects. The effect of s 68(2) is to *confer jurisdiction* on State and Territory courts; that is, s 68(2) is concerned with the ambit of the jurisdiction rather than the content of the powers to be exercised under it.⁵⁷ By contrast, the effect of s 68(1) and s 79 is to *apply State and Territory laws* to courts exercising federal jurisdiction.
68. There is an important link between the application of laws under s 68(1) and the conferral of jurisdiction under s 68(2). Section 68(1) applies laws of the kind specified (that is, broadly speaking, State and Territory criminal procedure laws) to persons charged with Commonwealth offences, “*in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section*”. That is, the laws are applied by reference to the jurisdiction conferred on State or Territory courts by s 68.
69. Section 68(2) confers jurisdiction by analogy with the jurisdiction of the State or Territory court at the relevant time.⁵⁸ The section operates on State and Territory courts exercising jurisdiction with respect to the various kinds of criminal proceedings referred to. The criminal proceedings referred to are those with respect to State or Territory offences. Section 68(2) confers on those court “*the like jurisdiction*” with respect to persons who are charged with offences against the laws of the Commonwealth, subject to s 68 itself and to section 80 of the Constitution. The ambulatory nature of s 68(2) enables it to pick up procedural changes and developments as they occur in the particular State or Territory from time to time.⁵⁹
70. The federal jurisdiction conferred by s.68(2) extends to a State or Territory court exercising jurisdiction “*with respect to ... the summary conviction ... or ... the trial and conviction on indictment*” of a person charged with an offence. This includes a court sentencing an offender.⁶⁰ Thus s 68(2) confers “*the like jurisdiction*” on the court with respect to sentencing for a federal offence. For example, if a State court exercises jurisdiction with respect to the sentencing of State offenders on indictment, s 68(2) confers “*the like jurisdiction*” on the court with respect to the sentencing of federal offenders on indictment (subject to s 68 itself and to section 80 of the Constitution).
71. “Like jurisdiction” is the authority to decide “matters” arising under federal laws in a manner similar to the authority of the court to decide matters arising under State or Territory law after allowance is made

⁵⁷ *Solomons v District Court (NSW)* (2002) 211 CLR 119, [19].

⁵⁸ *Williams v R [No 2]* (1934) 50 CLR 551, 560 (Dixon J).

⁵⁹ *R v Gee* (2003) 212 CLR 230, [6]-[7] (Gleeson CJ).

⁶⁰ *Williams v R [No 2]* (1934) 50 CLR 551, 560; *Putland v R* (2004) 218 CLR 174; *Hili v R* (2010) 242 CLR 520.

for the fact that the State or Territory jurisdiction arises under State or Territory law and federal jurisdiction arises under federal law.⁶¹

72. Like s 68(1), s 79(1) does not itself confer jurisdiction. It renders State or Territory laws binding on a court “*exercising federal jurisdiction in that State or Territory*”. That is, s 79(1) applies only if the court is exercising federal jurisdiction – that is, jurisdiction vested by the Constitution or by a law of the Commonwealth. The jurisdiction may be that exercised by a federal court or by a State or Territory court. It includes jurisdiction conferred on a State or Territory court by s 68(2), or on a federal court by or under the Constitution.
73. Since proceedings for a federal offence, including sentencing, always involve the exercise of federal jurisdiction, one of the effects of s 79(1) is to make State or Territory laws binding on a court sentencing a federal offender, subject to the limitations in s 79(1) itself.
74. There is therefore a substantial overlap between the application of State or Territory laws under s 68(1) and their application under s 79(1).

2.7.3 Which laws are picked up and applied?

75. Section 68(1) applies “*[t]he laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for ... their summary conviction ... their examination and commitment for trial on indictment ... their trial and conviction on indictment ... the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith ... and for holding accused persons to bail*”.
76. This description embraces a wide range of aspects of criminal procedure. It includes laws relating to the sentencing of offenders.⁶²
77. Section 79(1) renders “*[t]he laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, ... binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable*”.
78. Although s 79(1) refers specifically to “*laws relating to procedure, evidence, and the competency of witnesses*”, it is not confined to those laws. But since s 79(1) is directed to courts exercising federal jurisdiction the laws must be of a kind which are capable of being binding on them; the section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under State laws.⁶³ Nor does it have any application to officers of the executive governments of the States or Territories.⁶⁴

⁶¹ *Solomons v District Court (NSW)* (2002) 211 CLR 119, [41] (McHugh J).

⁶² *Williams v R [No 2]* (1934) 50 CLR 551, 560; *Putland v R* (2004) 218 CLR 174; *Hili v R* (2010) 242 CLR 520.

⁶³ *Solomons v District Court (NSW)* (2002) 211 CLR 119, [23] (Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ).

⁶⁴ *Solomons v District Court (NSW)* (2002) 211 CLR 119, [25] (Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ), [57] (McHugh J).

2.7.4 Qualifications on the application of State and Territory laws

79. Sections 68(1) and 79(1) pick up and apply State and Territory laws described in those sub-sections, subject to the stated qualifications. The qualifications are:
- the laws of a State or Territory to which s 68(1) refers apply “*so far as they are applicable*”; and
 - the operation of s.79(1) is qualified by the use of the words “*except as otherwise provided by the Constitution or the laws of the Commonwealth*”.
80. In *Putland*,⁶⁵ Gleeson CJ said that there was “*little, if any, functional difference between the two forms of qualification*”.
81. Therefore, in determining whether a State or Territory law is picked up and applied by s 68(1) or s 79(1) of the *Judiciary Act*, it is necessary to consider whether the Constitution or any Commonwealth law has the effect of excluding the application of the State or Territory law.
82. A State or Territory law of the kind described in s 68(1) or s 79(1) would not be picked up and applied if “*a Commonwealth law expressly or by implication made contrary provision, or if there were a Commonwealth legislative scheme ... which was “complete upon its face” and can “be seen to have left no room” for the operation of*” the State or Territory law.⁶⁶

2.7.5 Legislative schemes which leave no room for the operation of State/Territory laws

83. Whether, for the purposes of s 68(1) or s 79(1) of the *Judiciary Act 1903* (Cth), a Commonwealth law makes contrary provision or whether a Commonwealth legislative scheme is complete on its face or leaves no room for the operation of a State or Territory law often raises difficult issues of statutory interpretation.
84. In relation to the fixing of non-parole periods for federal offences, it has been held that the scheme in Division 4 of Part IB of the *Crimes Act 1914* (Cth) was complete upon its face and left no room for the application of State law.⁶⁷
85. Similarly, the sentencing options set out in the *Crimes Act 1914* (together with any other options provided by other Commonwealth laws) constitute a code; neither s 68 nor s 79(1) has the effect of making State or Territory sentencing options or alternatives available in the sentencing of federal offenders.⁶⁸ (However some State or Territory sentencing options are specifically picked up and applied by other Commonwealth provisions, notably s 20AB and s 20C of the *Crimes Act 1914*.)

⁶⁵ *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ).

⁶⁶ *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ); see also *Solomons v District Court (NSW)* (2002) 211 CLR 119; *Bui v DPP (Cth)* (2012) 244 CLR 638, [25].

⁶⁷ *Hili v R* (2010) 242 CLR 520.

⁶⁸ *All Cars Ltd v McCann* (1945) 19 ALJR 129; *R v Mirkovic* [1966] VR 371; *Harrex v Fraser* [2011] ACTSC 172, [38]-[39]. See also *R v Tran* [2019] SASCF 5, [50].

86. The extensive nature of the provisions of Part 1B of the *Crimes Act 1914*, and particularly s 16A, generally leaves limited scope for State or Territory laws which specify relevant or irrelevant considerations in sentencing, or which otherwise affect the exercise of sentencing discretion, to be applied by the provisions of the *Judiciary Act 1903* (Cth) to the sentencing of federal offenders. See “4.1.3 Limited scope for applying sentencing principles under State/Territory legislation”.
87. Part 1B will more often leave scope for the application of State and Territory laws which relate to procedural matters. For example, in relation to the imposition of an aggregate sentence on a federal offender, the High Court has held that provision in s.4K of the *Crimes Act 1914* for the imposition of an aggregate sentence by a court of summary jurisdiction did not prevent a Territory law which allowed for an aggregate sentence to be imposed on indictment from being applied as surrogate federal law to the sentencing of a federal offender.⁶⁹ Similarly, a limited power in s 19AH of the *Crimes Act 1914* to correct a failure to properly fix a non-parole period or to make a recognizance release order has been held not to prevent the application of a general provision under State law allowing for an erroneous sentence to be recalled and corrected.⁷⁰

2.7.6 State or Territory laws not applied if the Constitution provides otherwise

88. An express exception in s 79(1) to the application of State or Territory laws arises where the Constitution otherwise provides. A similar limitation is implicit in s 68(1).⁷¹
89. One significant consequence is that a State or Territory law cannot be applied by s 68(1) or s 79(1) if its operation as surrogate federal law would be contrary to Chapter III of the Constitution.⁷² That could arise if, for example, the State or Territory law invested judicial power in a body other than a court⁷³ or if it invested in a court a non-judicial power or function which is not auxiliary or incidental to the exercise of judicial power.⁷⁴

2.7.7 “Applicable” laws

90. The specification in s 68(1) that relevant State or Territory laws apply “*so far as they are applicable*” has an echo in the provision in s 79(1) that State or Territory laws are binding on courts exercising federal jurisdiction in that State or Territory “*in all cases to which they are applicable*”.
91. The mere fact that a State or Territory law in its own terms is directed to the sentencing of a State or Territory offender does not necessarily prevent it from being “applicable” as surrogate federal law under s 68(1) or s 79(1). For example, a State procedural law may refer to proceedings for an “offence”. On ordinary principles of construction, such a reference will usually mean only an offence against the law

⁶⁹ *Putland v R* (2004) 218 CLR 174. See “7.10.7 Aggregate penalty for charges on indictment”.

⁷⁰ *DPP (Cth) v Wallace* (2011) 43 WAR 61, [25]-[34]. See “7.12 Power of sentencing court to correct error in sentence”.

⁷¹ *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ).

⁷² *Solomons v District Court (NSW)* (2002) 211 CLR 119, [24], [28].

⁷³ E.g. *Newman v A (a child)* (1992) 9 WAR 14.

⁷⁴ See the authorities cited in fn 10.

of that State or Territory.⁷⁵ State or Territory laws must not be regarded as inapplicable for that reason alone; otherwise many laws relating to criminal procedure would be rendered incapable of being picked up and applied to a court dealing with proceedings for a Commonwealth offence and the efficacy of s 68(1) and s 79(1) would be severely impaired.⁷⁶

92. It is well established that, except to the extent necessary to give the law federal application, s 79 of the Judiciary Act picks up State or Territory laws with their meaning unchanged; s 79 does not operate to give a State or Territory law a new or extended meaning when it is made applicable in federal jurisdiction.⁷⁷ The same must be true of s 68(1).⁷⁸
93. The provisions of the *Judiciary Act* will often operate to apply some provisions of a State or Territory law but not others.⁷⁹ For example, while provisions of a State or Territory law relating to sentencing procedure may be generally applicable, particular provisions may be rendered inapplicable because Part IB of the *Crimes Act 1914* makes contrary provision or leaves no room for their operation.⁸⁰ However s 68(1) and s 79 do not operate to apply only part, but not the whole, of an integrated legislative regime so as to give an altered meaning or effect to that severed part of State or Territory legislation.⁸¹

2.8 Maximum penalties for Commonwealth offences

94. The maximum penalty for a Commonwealth offence is usually specified in the provision which creates the offence, or sometimes in another provision of the legislation which creates the offence. If a penalty is set out at the foot of a provision of the Act, it indicates (unless the contrary intention appears) that contravention of the provision is an offence, punishable on conviction by a penalty not exceeding the penalty set out.⁸²
95. The penalty specified is typically a period of imprisonment, or a fine, or both. In the absence of contrary provision, these represent the maximum penalty, not a fixed penalty. Different penalties are often provided depending on whether the offence is committed by a natural person or by a body corporate.

⁷⁵ *Seaeegg v R* (1932) 48 CLR 251, 255; *Grollo v Bates* (1994) 53 FCR 218; *Wallace v Debs* [2009] VSC 355. The usual construction may be excluded if a contrary intention appears: e.g. *D151 v New South Wales Crime Commission* (2017) 94 NSWLR 738.

⁷⁶ *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, [141]; (McHugh J); *Solomons v District Court (NSW)* (2002) 211 CLR 119, [59] (McHugh J); cf [81], [113] (Kirby J); *DPP (Cth) v Wallace* (2011) 43 WAR 61, [31]. The NT statute which was held in *Putland v R* (2004) 218 CLR 174 to apply to the sentencing of a Commonwealth offender conferred power to impose an aggregate sentence on an offender for two or more “offences” (that is against the law of the NT); there was no suggestion that the statute was thereby rendered inapplicable for the purposes of s 68(1).

⁷⁷ *Solomons v District Court (NSW)* (2002) 211 CLR 119, [60] (McHugh J).

⁷⁸ Cf. *Thomas v Ducret* (1984) 153 CLR 506 (concerning what is now s 15A of the *Crimes Act 1914* (Cth)).

⁷⁹ *Re Grinter; ex parte Hall* (2004) 28 WAR 427, [70].

⁸⁰ For example, s 19 of the *Crimes Act 1914* (Cth), which deals with the means by which cumulation or concurrency of federal sentences is to be achieved, leaves no room for the application of State or Territory laws on the subject: see “5.9.1 The mechanism for cumulation or concurrency of sentences on a federal offender: Crimes Act 1914, s 19”.

⁸¹ *Putland v R* (2004) 218 CLR 174, [38]; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [24].

⁸² *Crimes Act 1914* (Cth), s.4D.

96. An offence is not punishable by imprisonment unless a penalty of imprisonment is applicable to the offence.
97. Even if the only penalty specified is imprisonment, a fine may be imposed, up to a maximum calculated in accordance with s.4B of the *Crimes Act 1914* (Cth) (unless the contrary intention appears). Other alternatives to imprisonment which are provided for by or under the *Crimes Act* will generally also apply.
98. Sentencing options under State or Territory laws do not apply unless, and only to the extent that, those laws are picked up and applied by Commonwealth law.
99. If the offence is an indictable offence, a lesser maximum penalty will apply if it is determined summarily: see “5.6.3 Maximum penalties on summary disposition of an indictable offence – *Crimes Act 1914*, ss 4J and 4JA”.

2.9 Federal sentencing options

100. In sentencing a federal offender for an offence which is punishable by imprisonment, there are generally **6 federal sentencing options** available following a finding of guilt:

- | | |
|---|---|
| 1) Dismiss the charge | – s 19B <i>Crimes Act 1914</i> (Cth) |
| 2) Bond without conviction | – s 19B <i>Crimes Act 1914</i> (Cth) |
| 3) Bond with conviction | – s 20(1)(a) <i>Crimes Act 1914</i> (Cth) |
| 4) Fine with conviction | |
| 5) Particular State/Territory options, with conviction | – s 20AB <i>Crimes Act 1914</i> (Cth) |
| 6) Imprisonment , by way of a straight sentence or subject to release on parole or pursuant to a recognizance release order (either forthwith or after service of a specified period). | |

Each of these options is discussed in detail in Chapter 5 of this guide.

101. For some offences, particular options may be excluded. For example, for some **national security offences** (such as terrorism, treason and espionage), certain federal sentencing options, including release under a recognizance release order, are not available where a federal offender is sentenced to imprisonment.⁸³ For certain **people-smuggling offences**, a term of imprisonment is mandatory.⁸⁴
102. On the other hand, in particular circumstances, **additional dispositions are available** in dealing with a federal offender:

⁸³ *Crimes Act 1914* (Cth), s 20AB(6). See “8.1.1 Terrorism and other national security-related offences”.

⁸⁴ *Migration Act 1958* (Cth), s 236B. See “8.1.2 Mandatory imprisonment for certain people-smuggling offences”.

- Section 20C of the *Crimes Act 1914* (Cth) allows for a federal offender who is a **child or young person** to be punished or otherwise dealt with as if the offence were an offence against a law of the relevant State or Territory.
- Divisions 6, 7, 8 and 9 of Part IB of the Act provide for disposition options in relation to persons who are **unfit to be tried, or acquitted by reason of mental illness**, or who are suffering from a **mental illness or intellectual disability**.

These provisions are described in more detail below: see “8 Specific sentencing situations”.

3 Sentencing methodology

103. This Chapter addresses three topics relating to the methodology of sentencing a federal offender:

- fact-finding for sentencing;
- the appropriate method for synthesising factors relevant to sentencing; and
- how sentencing courts are to ensure reasonable consistency in the sentencing of federal offenders.

3.1 Fact-finding in federal sentencing

3.1.1 The statutory regime

104. Commonwealth statutes are not generally prescriptive about the procedures for fact-finding by a court sentencing a federal offender. Procedures and evidentiary rules in the relevant State or Territory, whether pursuant to common law or local statutes, are generally applied by the provisions of the *Judiciary Act 1903* (Cth) to the sentencing of federal offenders.

105. Section 16A(2) of the *Crimes Act 1914* (Cth) requires a court sentencing a federal offender to take into account such of a number of listed matters “*as are relevant and known to the court*”. This requirement is not prescriptive of the ways in which such matters may become “*known to the court*”, but in some circumstances precludes a sentencing court from acting upon a mere presumption: see “3.1.3 Relevant matters “known to the court”: *Crimes Act 1914*, s 16A(2)”.

3.1.2 Fact-finding following a jury trial

106. The constitutional guarantee that the trial on indictment of any offence against any law of the Commonwealth shall be by jury (*Constitution*, s 80) does not require more than that, on a trial, the jury must determine whether *the elements of the offence* are made out. Matters of aggravation may be made elements of the offence (for example, as in the offence of aggravated robbery in s 132.3 of the *Criminal Code* (Cth)), or may instead go only to penalty (for example, as in s 141.1(6) of the *Criminal Code* (Cth)). Facts which are not elements of the offence - including matters which may substantially affect the applicable penalty - may be determined by a sentencing judge alone.

107. *Kingswell*⁸⁵ provides an illustration. The provisions of the *Customs Act 1901* (Cth) there under consideration provided higher penalties for the offence of conspiring to import prohibited imports which are narcotic goods, if “the Court” was satisfied that the narcotic goods consisted of a trafficable quantity or a commercial quantity. The majority of the High Court in *Kingswell* held that the statute did not create separate offences depending on the quantity; it construed the reference to “the Court” as a reference to the sentencing judge alone, and held that reposing in the judge alone the determination of the relevant quantity did not contravene s 80 of the Constitution.

⁸⁵ *Kingswell v R* (1985) 159 CLR 264. In *Cheng v R* (2000) 203 CLR 248, the High Court (by majority) declined to reconsider the decision in *Kingswell*.

108. If a person is found guilty of a federal offence by a jury, the verdict determines only that the elements of the offence (and any circumstances of aggravation pleaded in the indictment which have been presented as a condition of a guilty verdict) have been proven beyond reasonable doubt. It is for the sentencing judge to find the relevant facts of the offending, beyond reasonable doubt, for the purposes of sentencing. A sentencing judge is entitled to consider all the conduct of the accused, including that which would aggravate the offence of which the person has been found guilty. However the judge cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence than that charged.⁸⁶ The judge's factual findings must not be inconsistent with the verdict of the jury, or with any findings of fact which are necessarily implicit in the verdict (including verdicts on other charges in the same trial), but a sentencing judge is not required to sentence on the basis of a view of the facts most favourable to the offender.⁸⁷ So, for example, in a conspiracy case the sentencing judge is entitled not only to make findings about the formation of the agreement, but also about what was done in furtherance of the agreement, even if that includes the commission of the substantive offence which was the object of the conspiracy.⁸⁸

3.1.3 Relevant matters "known to the court": Crimes Act 1914, s 16A(2)

109. All the matters listed in s 16A(2) must be taken into account where "*relevant and known*" to the court. The sub-section does not require the sentencing court to refer to each of the matters specified; it requires only that the "*relevant and known*" matters be taken into account.⁸⁹

110. In *Weininger*⁹⁰ the majority (Gleeson CJ, McHugh, Gummow and Hayne JJ) observed that the phrase "*known to the court*" rather than "*proved in evidence*" or some equivalent expression suggests strongly that s 16A was not intended to require formal proof of matters before they could be taken into account in sentencing. Put another way, the majority said that the phrase "*known to the court*" should not be construed as imposing a universal requirement that matters urged in sentencing hearings be either formally "*proved*" or "*admitted*".

111. So, for example, a court may properly act on the basis that, as a matter of human behaviour, a person who is prepared to risk a long prison sentence by engaging in large-scale drug offending will only do so in the expectation of substantial profit or reward.⁹¹

112. However one significant limiting effect of the requirement in s 16A(2) that a listed matter be "*known to the court*" has been identified in the authorities. In *Bui*,⁹² the High Court dealt with a contention that the presumed stress and anxiety of a respondent to a successful Crown appeal against sentence should

⁸⁶ *R v De Simoni* (1981) 147 CLR 383, 389. See "3.1.5 Finding of other uncharged offences".

⁸⁷ *Isaacs v R* (1997) 41 NSWLR 374; *Cheung v R* (2001) 209 CLR 1, [14]; *Agius v R* [2015] NSWCCA 200, [1100].

⁸⁸ *Savvas v R* (1995) 183 CLR 1.

⁸⁹ *Johnson v R* (2004) 78 ALJR 616, [24] (Gummow, Callinan and Heydon JJ); *R v Ferrer-Esis* (1991) 55 A Crim R 231, 237 (Hunt J) (NSW CCA).

⁹⁰ *Weininger v R* (2003) 212 CLR 629.

⁹¹ *R v Ruzehaji* [2018] SASFC 139.

⁹² *Bui v DPP (Cth)* (2012) 244 CLR 638.

be taken into account in re-sentencing. In rejecting the contention, the Court held that the requirement in s 16A(2) that a sentencing court must have regard to the “*mental condition*” of an offender if “*known to the court*” referred only to the actual mental condition of the offender, not a presumed condition, and that such actual condition “*must be demonstrated before the provision applies*”.⁹³ In *Pratten (No 2)*⁹⁴ the New South Wales Court of Criminal Appeal held that, in accordance with *Bui*, a court sentencing a federal offender should not act on a presumption that undue delay had caused or exacerbated stress, anxiety or depression in the offender. Not only should these “*be established as actual, not presumed, conditions*”,⁹⁵ but the Court proceeded on the basis that a relevant causal link must also be established.⁹⁶ Similarly, in *Besim and MHK (No 3)*,⁹⁷ the Victorian Court of Appeal held (applying *Bui*) that, “*absent specific evidence*”, it was “*not necessarily evident*” that the prospect of being subject to a continuing detention order at the completion of the respondents’ sentences would make imprisonment more burdensome for them.

113. By parity of reasoning, the same approach should be adopted whenever it is suggested that an offender’s physical or mental condition should be treated as a factor in mitigation: for example, where it is said that anxiety about the prospect of deportation will make imprisonment more burdensome for an offender (assuming that such a prospect may ever be treated as potentially mitigating: see “4.5.7 Prospect of visa cancellation and deportation”).

3.1.4 Findings of fact relating to aggravating or mitigating circumstances

114. In *Olbrich*,⁹⁸ the majority endorsed the following statement of principle by the Victorian Court of Appeal in *Storey*⁹⁹ about fact-finding for sentencing:

[T]he judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities.

115. In *Storey*, the Court emphasised that the test was not whether the tag “aggravating” or “mitigating” should be applied to any particular fact but *what use the judge proposed to make of the fact in relation to the offender*.¹⁰⁰

⁹³ See *Bui v DPP (Cth)* (2012) 244 CLR 638, [21]-[23],[25],[28], endorsing the view of Simpson J in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 11, [279]-[280].

⁹⁴ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194.

⁹⁵ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [96].

⁹⁶ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [97]-[113].

⁹⁷ *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [60].

⁹⁸ *R v Olbrich* (1999) 199 CLR 270, [27].

⁹⁹ *R v Storey* [1998] 1 VR 359, 369 (emphasis in original).

¹⁰⁰ *R v Storey* [1998] 1 VR 359, 369.

116. Although the quoted passage from *Storey* refers to “facts” relevant to sentencing, the principles stated are not confined to “facts” in a narrow sense; the principles apply to assessment of such matters as the risk of re-offending and the prospects of rehabilitation.¹⁰¹
117. Care is required in the application of the principles in *Storey* and *Olbrich*, for a number of reasons.
118. First, it is crucial to characterise accurately the use which is to be made of a disputed fact in order to assign the onus of proof correctly. *Besim*¹⁰² illustrates the danger of failing to do so. The offender pleaded guilty to an offence of doing acts in preparation for, or planning, a terrorist act. A crucial question of fact in sentencing was whether the offender had since renounced the commitment to the violent jihadist ideology which was inherent in the offending (as this went to questions of remorse, the prospects of rehabilitation, the need for specific deterrence and the need for community protection). The offender did not give evidence on the plea. In purported application of the principles in *Storey*, the judge found that he was neither persuaded by the offender on the balance of probabilities that the offender had renounced the ideology, nor persuaded by the prosecution beyond reasonable doubt that he had not. On appeal by the CDPP, the Director contended that the judge’s reasoning was erroneous. The Court of Appeal agreed.¹⁰³ The Crown bore no onus of proving that the offender’s adherence to jihadist ideology continued; it was wrong to approach the matter as if it were, in the classic sense, an aggravating factor.¹⁰⁴ It was for the offender to make good a submission that he no longer held jihadist views; his failure to discharge that onus left the sentencing judge with nothing but the proven fact of the offender’s state of mind at the time of the commission of the offence.
119. Second, as was pointed out by the High Court in *Weininger*,¹⁰⁵ not all disputed issues of fact related to sentencing must be resolved for or against the offender. Some disputed issues of fact cannot be resolved in a way that goes either to increase or to decrease the sentence that is to be imposed. There may be issues which the material available to the sentencing judge will not permit the judge to resolve in that way.
120. *Olbrich*¹⁰⁶ itself provides an illustration. In that case, the sentencing judge had rejected evidence given by an offender that his role in a heroin importation was that of a mere courier, but on the evidence presented was unable to be satisfied of what the offender’s role in the enterprise was, other than being the person who imported the drugs. On appeal, it was contended that as the prosecution was unable to prove beyond reasonable doubt that the role of the offender extended beyond that of a mere courier, the judge was required to sentence the offender on a view of the facts most favourable to the offender. The majority of the High Court rejected that contention. It would have been incongruous to require the sentencing judge to sentence the offender on the basis that he was a mere courier when the judge had

¹⁰¹ *R v Pickard* [1998] VSCA 50, [3]-[5].

¹⁰² *DPP (Cth) v Besim* [2017] VSCA 158.

¹⁰³ *DPP (Cth) v Besim* [2017] VSCA 158, [108]-[109].

¹⁰⁴ *DPP (Cth) v Besim* [2017] VSCA 158, [108]-[109].

¹⁰⁵ *Weininger v R* (2003) 212 CLR 629, [19].

¹⁰⁶ *R v Olbrich* (1999) 199 CLR 270.

disbelieved his evidence to that effect.¹⁰⁷ The majority held that the offender was to be sentenced for what he had done;¹⁰⁸ the offender had properly been sentenced on the basis that nothing further was known of his role.¹⁰⁹

121. Third, there is no clear dichotomy between aggravating and mitigating matters. The majority in *Weininger*¹¹⁰ made this crucial point as follows:

Many matters that must be taken into account in fixing a sentence are matters whose proper characterisation may lie somewhere along a line between two extremes. That is inevitably so. The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.

122. The majority also pointed out that a sentencing hearing is not an inquisition into all that may bear upon the circumstances of the offence or matters personal to the offender.¹¹¹

123. Fourth, findings about such matters as the offender's prospects of rehabilitation or the risk of re-offending do not always need to be articulated in terms of a standard of proof; for example, "*assessment by the judge of the risk of a prisoner re-offending is not a feat which requires any refinement of thought process.*"¹¹²

3.1.5 Finding of other uncharged offences

124. A central principle of sentencing is that an offender may not be punished for other criminal conduct for which he or she is not then being sentenced.¹¹³

125. However, in considering the circumstances or context of the instant offence, or in making factual findings about a matter relied upon in mitigation of sentence, a sentencing court is often presented with evidence of other offending. Such other offending may be relevant in various ways. The following are examples:

- The occurrence of other offending may be relevant to determining whether the offending was an isolated incident or was committed as part of an ongoing criminal enterprise.¹¹⁴

¹⁰⁷ *R v Olbrich* (1999) 199 CLR 270, [24].

¹⁰⁸ *R v Olbrich* (1999) 199 CLR 270, [19]-[21].

¹⁰⁹ *R v Olbrich* (1999) 199 CLR 270, [22]. If the offender sought to mitigate the sentence on the basis that his role was merely that of courier, the onus was on him to establish that fact ([26]).

¹¹⁰ *Weininger v R* (2003) 212 CLR 629, [22]. See also *Xiao v R* (2018) 96 NSWLR 1, [131]-[136].

¹¹¹ *Weininger v R* (2003) 212 CLR 629, [23].

¹¹² *R v Pickard* [1998] VSCA 50, [4].

¹¹³ *R v Olbrich* (1999) 199 CLR 270, [18].

¹¹⁴ E.g. *R v Jackson* (1998) 72 SASR 490, [112]; *R v Ceissman* [2001] NSWCCA 73, [24]-[28]; *R v Tran* [2011] SASFC 153. Note that under s 16A(2)(c) of the *Crimes Act 1914* (Cth), a court sentencing a federal offender is required to take into account (if relevant and known to the court) "*if the offence forms part of a course of conduct consisting of a*

- In a conspiracy case, it may be necessary to make findings about what was done in furtherance of the agreement, even if that includes the commission of other offences, because it is necessary for a sentencing court to have regard to “*considerations which advert to the content and duration and reality of the conspiracy*”.¹¹⁵
- The occurrence of other offending may also be relevant in ascertaining the “character” or “antecedents” of the offender (*Crimes Act 1914*, s 16A(2)(m)),¹¹⁶ or in rebuttal of a submission that the offender has good prospects of rehabilitation ((*Crimes Act 1914*, s 16A(2)(n)) or that there is little need for specific deterrence of the offender (*Crimes Act 1914*, s 16A(2)(j)).

126. In *De Simoni*,¹¹⁷ Gibbs CJ (with whom Mason and Murphy JJ concurred) reconciled the requirement for a sentencing court to consider relevant matters and the requirement not to punish for other offending for which the offender was not then to be sentenced as follows:

[T]he general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted ... The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

127. That is, *De Simoni* recognises that a sentencing court may properly have regard to other offending if it is relevant to sentencing. But the court must not “*take into account circumstances of aggravation which would have warranted a conviction for a more serious offence*”.¹¹⁸ So, for example, a court sentencing an offender for an offence of attempted possession of prohibited drugs must not sentence the offender as if the offender were also party to the importation of the drugs, if the offender is not also charged with and being sentenced for that offence.¹¹⁹

series of criminal acts of the same or a similar character”. In *Weininger v R* (2003) 212 CLR 629, Kirby J (at [57]) expressed the view that s 16A(2)(c) did not allow regard to be had to uncharged offences, whereas Callinan J (at [122]) implied that the paragraph did allow for consideration of uncharged offences.

¹¹⁵ *Savvas v R* (1995) 183 CLR 1, quoting with approval from *R v Kane* [1975] VR 658, 661. Note also s 16A(2)(a) of the *Crimes Act 1914* (Cth), which requires a court sentencing a federal offender to have regard to “*the nature and circumstances of the offence*”, if “*relevant and known to the court*”.

¹¹⁶ *Weininger v R* (2003) 212 CLR 629.

¹¹⁷ *R v De Simoni* (1981) 147 CLR 383, 389. See also *R v D* [1996] 1 Qd R 363, where relevant authorities are comprehensively reviewed.

¹¹⁸ The principle also prohibits a court from taking into account, as a matter of aggravation, the commission of another uncharged offence of equal seriousness to the instant offence: *R v Guju* (2002) 129 A Crim R 387, [30]-[38]; *R v Tranter (No 2)* (2014) 119 SASR 480, [43]-[44].

¹¹⁹ E.g. *Tu v R* [2011] NSWCCA 31. In that case, the fact that the sentencing judge had treated the uncharged importation offence as aggravating the instant attempted possession offence could be inferred from the fact that the judge had imposed the maximum penalty and had made some findings that the offender had participated in the ‘China end’ of the operation. Such a case is to be distinguished from a case in which the sentencing court does no more than assess the nature and duration of the offender’s involvement in the charged offence or the context in which the charged offence occurred: see *El-Ghourani v R* [2009] NSWCCA 140, [15]-[37]; *Schanker v R* [2018] VSCA 94, [188]-[210].

128. The *De Simoni* principle does not prevent a sentencing court from treating as an aggravating circumstance facts that constitute a lesser offence than the instant offence.¹²⁰
129. Nor does the *De Simoni* principle preclude a court sentencing a federal offender from doing no more than taking other criminal conduct into account in negating matters relied upon by the offender in mitigation¹²¹ or in determining the duration and nature of the offender's involvement in the instant offence.¹²²
130. The crucial point is that the sentencing court must not lose the focus on the precise offence charged.¹²³
131. A statutory procedure by which one or more federal offences may be taken into account in sentencing a federal offender (on the basis of an admission by the offender) is provided for by s 16BA of the *Crimes Act 1914* (Cth).¹²⁴ Taking into account other offences is also specifically contemplated by s 16A(2)(b) of the *Crimes Act 1914* (Cth).¹²⁵ The imposition of a more severe sentence as a result of taking another offence into account pursuant to statutory authority does not inherently infringe the *De Simoni* principle.¹²⁶

3.1.6 Hearsay assertions about an offender's state of mind

132. Although sentencing courts are usually not bound by the rules of evidence,¹²⁷ the practice of offenders relying on a hearsay account (such as statements recounted in a report of a psychologist or psychiatrist) of their state of mind on important matters (such as the existence of remorse, or the renunciation of a terrorist ideology) has frequently been deprecated.¹²⁸ The same criticisms have been made of the practice in relation to the sentencing of federal offenders, and it has been held that a sentencing judge

¹²⁰ *DPP v McMaster* (2008) 19 VR 191, [41] and the cases cited there; *R v Cook* [2018] TASCCA 20, [46]-[47].

¹²¹ *Weininger v R* (2003) 212 CLR 629, [33], [117], [122]; *R v Bukvic* (2010) 107 SASR 405; *R v Tran* [2011] SASFC 153; *Sabel v R* [2014] NSWCCA 101, [227]-[229]. But note the contrary view expressed (in relation to a State offender) in *DPP v McMaster* (2008) 19 VR 191, [35]-[58].

¹²² E.g. *El-Ghourani v R* [2009] NSWCCA 140, [15]-[37]; *Ly v R* (2014) 227 FCR 304, [89]-[100]; *Schanker v R* [2018] VSCA 94, [181]-[210].

¹²³ *El-Ghourani v R* [2009] NSWCCA 140, [15]-[37]; *R v Tranter (No 2)* (2014) 119 SASR 480.

¹²⁴ See "7.5 Taking other federal offences into account".

¹²⁵ See "4.4.2 Other offences taken into account – s 16A(2)(b)".

¹²⁶ *Abbas v R* [2013] NSWCCA 115.

¹²⁷ Under s 4 of the uniform *Evidence Acts* (which apply to federal courts and to courts in NSW, Victoria, Tasmania, the ACT, the NT and Norfolk Island), the Acts do not apply to a proceeding which relates to sentencing, unless the court so directs. In other jurisdictions, statutes also provide that the rules of evidence (at least presumptively) do not apply to sentencing proceedings: see, e.g., *Sentencing Act 2017* (SA), s 12.

¹²⁸ For example, *R v Qutami* (2001) 127 A Crim R 369, [58]-[59]; *Mun v R* [2015] NSWCCA 234; *Halac v R* [2015] NSWCCA 121, [106]. Assertions in statements and letters by an offender should also be treated with considerable circumspection and may be deserving of little or no weight: *R v Palu* [2002] NSWCCA 381, [40]-[41]; *R v Elfar* [2003] NSWCCA 358, [25]; *R v McGourty* [2002] NSWCCA 335, [24]-[25]; *Newman v R* [2018] NSWCCA 208, [25]; *IM v R* [2019] NSWCCA 107, [20]. See the summary of relevant principles in *Imbornone v R* [2017] NSWCCA 144, [57].

may decline to act on such evidence in the absence of sworn evidence from the offender which is subject to cross-examination.¹²⁹

3.2 “Instinctive synthesis” not the “two-stage approach”

133. The weight of authority is that the preferable approach to sentencing, including the sentencing of a federal offender, is to consider all the relevant matters and to arrive at an “*instinctive synthesis*” of them in determining the appropriate sentence.¹³⁰
134. A corollary is that neither the sentence nor the relevant range of sentences can helpfully be determined by singling out one factor as presumptively dictating the starting point.
135. The “instinctive synthesis” approach is contrasted with the approach that aims to reduce the sentencing method into stages or component parts or quantifiable elements that can be specified and go to make up the sentence. This contrasting approach is often referred to as the “two-stage approach”. An example of a “two-stage approach” would be to consider the “objective” elements to arrive at a sentence and after that modify it by reason of “subjective” elements.
136. In *Wong*,¹³¹ the High Court held that a guideline judgment of the Court of Criminal Appeal of New South Wales relating to drug importation offences, which guideline was declared by reference to the quantity of the drug imported, was contrary to s 16A of the *Crimes Act 1914* (Cth). In their joint judgment, Gaudron, Gummow and Hayne JJ criticised the “two-stage approach” to sentencing as a departure from principle and apt to give rise to error.¹³² Subsequent decisions provide examples of ways in which a sequential approach to sentencing may be productive of error.¹³³ Therefore identifying a sentence in stages should usually be undertaken only when a statute so requires.¹³⁴ For relevant statutory requirements, see “3.3 Where a two-stage approach is required by statute”.

¹²⁹ For example, *R v Benbrika* [2009] VSC 21, [148]-[151] (endorsed on appeal: *Benbrika v R* (2010) 29 VR 593, [586]); *Alvares v R* [2011] NSWCCA 33, [31]-[69]; *Barbaro v R* [2012] VSCA 288, [38]; *Elomar v R* [2014] NSWCCA 303, [815]-[818]; *Islam v R* [2016] NSWCCA 233, [95]-[103]; *R v Roe* [2017] NTCCA 7, [107]; *Obiekwe v R* [2018] NSWCCA 55, [38]-[40], [55]-[58]; *Singh v R* [2018] NSWCCA 60, [31]; *Baladjam v R* [2018] NSWCCA 304, [275]-[277]. See also *DPP (Cth) v Besim* [2017] VSCA 158, [73]-[78], [83], [108]-[109], [113].

¹³⁰ *R v Williscroft* [1975] VR 292; *R v Young* [1990] VR 951, *R v Ngui* [2000] 1 VR 579, 584; *AB v R* (1999) 198 CLR 111; *Johnson v R* (2004) 78 ALJR 616; *Markarian v R* (2005) 228 CLR 357. In *Markarian*, McHugh J (at [51]) described instinctive synthesis as the method of sentencing in which the judge identifies all the relevant factors to sentencing, discusses their significance and then makes a value judgment as to what the appropriate sentence is in light of all the facts of the case.

¹³¹ *Wong v R* (2001) 207 CLR 584.

¹³² *Wong v R* (2001) 207 CLR 584, [74]-[78]. In *AB v R* (1999) 198 CLR 111 (161 A Crim R 45) McHugh J expressed a similar view to the plurality in *Wong*. See also *Markarian v R* (2005) 228 CLR 357; *Muldock v R* (2011) 244 CLR 120, [54].

¹³³ E.g. *R v Baldock* [2010] WASCA 170, [14]-[21]; *DPP (Cth) v Gregory* (2011) 34 VR 1, [32]-[36].

¹³⁴ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [24].

137. Nevertheless it is common practice in some jurisdictions for a court sentencing a federal offender to specify the extent to which the sentence has been reduced as a result of a plea of guilty, even in the absence of a statutory requirement to do so. See “7.8 Specifying a discount for a guilty plea”.
138. In *Markarian*,¹³⁵ the majority held that making a specific quantifiable allowance for a particular factor (e.g. for a plea of guilty, when such quantification was not required by statute) did not of itself reveal error. Gleeson CJ, Gummow, Hayne and Callinan JJ said that there was no universal rule rejecting “sequential” or “two-tiered” sentencing in favour of “instinctive synthesis”, and acknowledged that there may be some occasions when an articulated arithmetical approach may better serve the ends of transparency and accessibility.

3.3 Where a two-stage approach is required by statute

139. Specification of the sentence that would have been imposed but for a particular factor has been described as antithetical to the “instinctive synthesis” approach to sentencing,¹³⁶ which is generally preferred over a “two-stage” or sequenced approach in sentencing of a federal offender. Nevertheless it must be done if, and to the extent that, it is required by statute.¹³⁷ There are two significant examples of such statutory requirements.

3.3.1 Crimes Act 1914, s 16AC – future cooperation

140. The first example of a statutory requirement for two-stage sentencing is where a federal offender has undertaken to co-operate with law enforcement agencies in future proceedings (including confiscation proceedings). In that situation, if the sentence is reduced by that undertaking, the court sentencing the offender is required by s 16AC of the *Crimes Act 1914* (Cth)¹³⁸ to specify the sentence (and non-parole period where imposed) that would have been imposed but for that reduction. The operation of this provision is described below: see “7.7 Specifying a reduction for undertaking to co-operate in future - *Crimes Act 1914* s 16AC”.

¹³⁵ *Markarian v R* (2005) 228 CLR 357.

¹³⁶ See, e.g., *Saab v R* [2012] VSCA 165, [59]; *Cummins (a pseudonym) v R* (2013) 40 VR 319, [41]-[48]; *Zogheib v R* [2015] VSCA 334, [62]-[64]. But see *Markarian v R* (2005) 228 CLR 357, [74]; *Xiao v R* (2018) 96 NSWLR 1, [279]-[280].

¹³⁷ *Markarian v R* (2005) 228 CLR 357; *R v Baldock* [2010] WASCA 170, [14]-[21]; *Nguyen v R* [2011] VSCA 32, [100].

¹³⁸ Section 16AC of the *Crimes Act 1914* (Cth) came into effect on 27 November 2015. It replaced s 21E of the Act, which was in similar terms. Section 21E was described by Chernov JA in *R v Li* [1998] 1 VR 637, [18], as imposing “an artificial process ... upon the sentencing judge which runs counter to the fact that the sentencing involves the judge’s intuitive and instinctive synthesis of all facets of the sentencing process”.

3.3.2 Statutory requirements to specify a sentence reduction for a plea of guilty

141. The second example of a statutory requirement for two-stage sentencing is where the court is required by statute to specify any sentence reduction for a guilty plea. Although the *Crimes Act 1914* (Cth) makes no such provision,¹³⁹ some State or Territory laws do so.¹⁴⁰
142. As procedural laws, these State and Territory laws apply as surrogate federal laws to the sentencing of federal offenders, pursuant to ss 68 and 79 of the *Judiciary Act 1903* (Cth), if there is no Commonwealth law which “*expressly or by implication made contrary provision*”, and no Commonwealth legislative scheme which is “*complete upon its face*” and could be “*be seen to have left no room*” for the operation of the State or Territory law.¹⁴¹
143. In Victoria,¹⁴² a sentencing court must specify the sentence it would have imposed but for the guilty plea. Although it has not been authoritatively determined whether this requirement applies to the sentencing of a federal offender, in a number of cases the Victorian Court of Appeal has proceeded on the assumption that it does.¹⁴³
144. Like the relevant provision in Victoria, the *Sentencing Act 1995* (WA), s 9AA(5), requires a court to state the extent of a reduction of sentence for a guilty plea. However, the Western Australian provision is significantly different from that in Victoria. Section 9AA(5) applies only if the court reduces a head sentence *under s 9AA(2) of the Act*. That sub-section permits a court to reduce the head sentence for the offence in order to recognise the benefits to the State, and to any victim of or witness to the offence. Sub-section 9AA(4) of the Act imposes a limit (in percentage terms) on the permissible extent of the reduction if the head sentence for an offence is or includes a fixed term. In *Ngo*,¹⁴⁴ the Western Australian Court of Appeal held that s 9AA(5) did not apply to the sentencing of a federal offender, because the detailed and exhaustive provision in s 9AA relating to the reduction of sentence for a guilty plea was inconsistent with the general and unqualified provision in s 16A(2)(g) of the *Crimes Act 1914* (Cth). That is, there was no room in the Commonwealth legislative scheme embodied in Part IB of the *Crimes Act* for the operation of s 9AA.

¹³⁹ *Charkawi v R* [2008] NSWCCA 159. In 2006, the Australian Law Reform Commission recommended that Commonwealth law require a sentencing court to specify the discount given for a plea of guilty: *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), recommendation 11-1. That recommendation has not been acted upon.

¹⁴⁰ *Sentencing Act 1991* (Vic), s 6AAA; *Sentencing Act 1995* (WA), s 9AA; *Crimes (Sentencing) Act 2005* (ACT), ss 35 and 37.

¹⁴¹ *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ); see also *Solomons v District Court (NSW)* (2002) 211 CLR 119; *Bui v DPP (Cth)* (2012) 244 CLR 638, [25]. See “2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79”.

¹⁴² *Sentencing Act 1991* (Vic), s 6AAA.

¹⁴³ E.g. *Scerri v R* [2010] VSCA 287, [58]; *DPP (Cth) v Bui* (2011) 32 VR 149; *Cooper v R* [2012] VSCA 32, [38]; *DPP (Cth) v Cornish* [2012] VSCA 45, [56]; *Saab v R* [2012] VSCA 165, [29]-[62]; *DPP (Cth) v Couper* (2013) 41 VR 128; *DPP (Cth) v MHK* [2017] VSCA 157, [76]; *DPP (Cth) v Besim* [2017] VSCA 158, [122]. See also *R v Emini & Blumberg* [2011] VSC 336, footnote [10].

¹⁴⁴ *Ngo v R* [2017] WASCA 3.

145. The decision in *Ngo* did not suggest that a requirement under State or Territory law to specify the sentence reduction for a guilty plea is itself necessarily inconsistent with s 16A of the *Crimes Act 1914*. The inconsistency identified in that case arose from the prescriptive nature of the legislation under consideration as to the reduction of sentence for a plea of guilty, not merely from the existence of a requirement to specify the extent of the reduction.
146. The position in the ACT is uncertain. Section 35 of the *Crimes (Sentencing) Act 2005* (ACT) provides for reduction of sentences for an offender who has pleaded guilty. Section 37 of that Act requires a court which has (amongst other circumstances) imposed a lesser penalty for an offence under s 35 to state the penalty it would otherwise have imposed. Like the provision in Western Australia, s 35 is to some extent prescriptive of the circumstances in which, and the extent to which, a court may reduce a sentence for a plea of guilty. For example, s 35(4) provides that the court must not make any significant reduction for the fact that the offender pleaded guilty if, based on established facts, the court considers that the prosecution's case for the offence was overwhelmingly strong. It is at least arguable that the conclusion reached in *Ngo* would be equally applicable to the ACT provision.
147. Procedural issues relating to these provisions, to the extent that they are applicable to the sentencing of a federal offender, are discussed below: see "7.8 Specifying a discount for a guilty plea" and "7.9 Interaction between sentencing discount for guilty plea and discount for undertaking to co-operate".

3.4 Reasonable consistency in sentencing

148. Sentencing is a discretionary judgment; generally there is no single correct sentence.¹⁴⁵ Some variation in sentencing is therefore inevitable. The variation may be magnified by the vesting of federal criminal jurisdiction in State and Territory courts, rather than in a single federal court.
149. In recent years, however, courts have emphasised the need to ensure greater consistency in the sentencing of federal offenders, while preserving the scope for discretionary judgment. In *Wong*,¹⁴⁶ Gleeson CJ said,
- [6] ... All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.
- [7] Most sentencing of offenders is dealt with as a matter of discretionary judgment. Within whatever tolerance is required by the necessary scope for individual discretion, reasonable consistency in sentencing is a requirement of justice.
150. In sentencing federal offenders, courts must take into account sentencing practice throughout Australia. It is an error for a court sentencing a federal offender to give priority to achieving reasonable consistency

¹⁴⁵ *Markarian v R* (2005) 228 CLR 357, [27].

¹⁴⁶ *Wong v R* (2001) 207 CLR 584, [6]-[7].

with sentencing for offences against the laws of that State or Territory over achieving reasonable consistency with sentencing for Commonwealth offences.¹⁴⁷

151. Greater consistency in sentencing, both within and between jurisdictions, requires that sentencing courts are better informed about sentences imposed in comparable federal cases. The need for such information has imposed greater demands and responsibilities, not only on sentencing courts, but also on the parties, and particularly on the prosecution.
152. The CDPP is in a unique position, as it is the major prosecution authority for federal offences, and therefore has access to a large body of information about sentences imposed for such offences. Expectations of the assistance to be provided to a sentencing court by the CDPP have increased accordingly. See further, “7.1 Role of the prosecution in a sentence hearing”.
153. In *Hili*,¹⁴⁸ the High Court set out six principles on consistency in federal sentencing. In *Pham*,¹⁴⁹ those principles were reiterated, with slight modifications, by the plurality as follows (citations omitted):¹⁵⁰
- (1) *Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.*
 - (2) *The consistency that is sought is consistency in the application of the relevant legal principles.*
 - (3) *Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts.*
 - (4) *Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.*
 - (5) *For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.*
 - (6) *When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.*
 - (7) *Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.*
154. Reasonable consistency in the application of relevant legal principles does not require adherence to a range of sentences that is demonstrably contrary to principle.¹⁵¹

¹⁴⁷ *R v Pham* (2015) 256 CLR 550.

¹⁴⁸ *Hili v R* (2010) 242 CLR 520, [46]-[57].

¹⁴⁹ *R v Pham* (2015) 256 CLR 550.

¹⁵⁰ *R v Pham* (2015) 256 CLR 550, [28]. See also the compendious summary of the applicable principles in *Lieu v R* [2016] VSCA 277, [46].

¹⁵¹ *DPP v Dalgleish (a pseudonym)* (2017) 91 ALJR 1063, [50] (Kiefel CJ, Bell and Keane JJ); see also at [83] (Gageler and Gordon JJ). *Dalgleish* was concerned with a statutory requirement to have regard to “current sentencing practices” in sentencing a State offender, but the principle would seem equally applicable to the sentencing of a federal offender.

155. The plurality in *Pham* said that intermediate appellate courts “*must have regard to sentencing decisions of other intermediate appellate courts in comparable cases as “yardsticks” that may serve to illustrate (although not define) the possible range of sentences available ... unless there is a compelling reason not to do so.*”¹⁵² A fortiori, a sentencing court must also have regard to relevant decisions of intermediate appellate courts in other jurisdictions in relation to the sentencing of federal offenders.
156. Moreover in their joint judgment in *Pham*,¹⁵³ Bell and Gageler JJ accepted the Director’s submission that
-
- comparable cases decided by the intermediate courts of appeal provide the most useful guidance to a sentencing judge. An appellate court’s reasons reveal the mix of factors that were taken into account and will usually involve consideration of the appropriateness of the sentence imposed at first instance.*
157. Accordingly, while reference to first instance sentences may be of some value to sentencing courts and to appellate courts (for example, when few sentences have been imposed for the relevant offence), particular attention should be paid to the decisions of intermediate appellate courts, not only as to the principles which those decisions reveal, but also as a “yardstick” to illustrate the possible range of sentences available.
158. In some jurisdictions, appellate courts “*may seek to identify the applicable range by characterising the objective seriousness of the offence as falling within the low, mid or the high range of seriousness of the offence*”.¹⁵⁴ The practice is also used by first instance courts in some jurisdictions to assist in sentencing. In New South Wales, very fine nuances of categorisation are sometime adopted.¹⁵⁵ The Victorian Court of Appeal has warned that such categorisation “*may lead to sentencing judges unconsciously limiting their instinctive synthesis of a particular case by sentences in other cases classified within a particular range, rather than considering the individual facts of comparable cases.*”¹⁵⁶ The Court considered that it is more consistent with the principles in *Pham* “*to avoid categorising cases as falling within a particular ‘range’ and, instead, for sentencing judges to have regard to relevantly comparable, and current, cases as ‘yardsticks’.*”¹⁵⁷

¹⁵² *R v Pham* (2015) 256 CLR 550, [29].

¹⁵³ *R v Pham* (2015) 256 CLR 550, [50].

¹⁵⁴ In *Nguyen v R* [2016] VSCA 198, [73] (Redlich JA, with whom Tate and Whelan JJA agreed).

¹⁵⁵ E.g. *R v Hutchinson* [2018] NSWCCA 152, [58]-[63], [87], where the Crown’s characterisation of the objective seriousness of the offending as “*around about the middle of the range*” was said to represent a departure from its submission on the plea hearing that it was “*above the low range*”.

¹⁵⁶ *DPP v Weybury* [2018] VSCA 120, [33] (Maxwell P and Hargrave JA); see also at [54] (Priest JA, dissenting in the result).

¹⁵⁷ *DPP v Weybury* [2018] VSCA 120, [34] (Maxwell P and Hargrave JA). See also *Dirbass v R* [2018] VSCA 272, [60]; *Woldesilassie v R* [2018] VSCA 285, [30]-[32].

4 Sentencing factors

4.1 The sources of sentencing principles

4.1.1 Part IB of the *Crimes Act 1914*

159. Sentencing of any federal offender must begin with a consideration of the applicable legislation.¹⁵⁸ The central sentencing principles in respect of federal offenders are set out in Part IB of the *Crimes Act 1914* (Cth), and particularly in s 16A of the Act.

4.1.2 The interaction between Part IB and common law sentencing principles

160. Where the provisions of Part IB leave a gap in the law, common law principles will apply, pursuant to s 80 of the *Judiciary Act 1903* (Cth).¹⁵⁹ Thus, except to the extent stated in ss 16A and 16B of the *Crimes Act 1914* (Cth), “*general common law and not peculiarly local or state statutory principles of sentencing are applicable*” to the sentencing of federal offenders.¹⁶⁰ Those general common law principles may give content to the central requirement imposed by s 16A(1) of the *Crimes Act 1914* (Cth), that a court sentencing a federal offender must impose a sentence or make an order that is of a “*severity appropriate in all the circumstances*”.¹⁶¹

4.1.3 Limited scope for applying sentencing principles under State/Territory legislation

161. Of their own force the laws of the States or Territories with respect to the sentencing of offenders could have no operation with respect to the sentencing of offenders against laws of the Commonwealth; any relevant operation is by reason of a federal law (such as s 68 or s 79 of the *Judiciary Act 1903* (Cth)) which “picks up” State or Territory law and applies it to the sentencing of a federal offender.¹⁶²

162. The regime in s 16A, supplemented by common law principles, generally leaves little room for general sentencing principles set down in State or Territory legislation to be applied as surrogate federal law to the sentencing of federal offenders.

163. In *Pham*,¹⁶³ the plurality observed, “*To the extent that Pt IB of the Crimes Act 1914 (Cth) specifically or impliedly provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the Crimes Act is exclusive.*”¹⁶⁴

¹⁵⁸ *Weininger v R* (2003) 212 CLR 629, [16].

¹⁵⁹ *Bui v DPP* (Cth) (2012) 244 CLR 638, [26]-[27].

¹⁶⁰ *Johnson v R* (2004) 78 ALJR 616, [15].

¹⁶¹ *Johnson v R* (2004) 78 ALJR 616, [15].

¹⁶² *Hili v R* (2010) 242 CLR 520, [21]. See “2.5 Applicability of the common law” and “2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79”.

¹⁶³ *R v Pham* (2015) 256 CLR 550.

¹⁶⁴ *R v Pham* (2015) 256 CLR 550, [22] (French CJ, Keane and Nettle JJ; Bell and Gageler JJ agreeing on this ground). The plurality went on to say ([23]) that a law of Victoria which provided for a sentencing judge to take current sentencing practices into account was “*to some extent ... capable of operating consistently with Pt IB of the*

164. An example of the way in which sentencing considerations set out in s 16A of the *Crimes Act 1914* (Cth) preclude the application of State law to the sentencing of a federal offender is provided by *Ngo*.¹⁶⁵ In that case, the Western Australian Court of Appeal held that a State law which made detailed and exhaustive provision as to the circumstances in which, and the extent to which, a court could give a sentence discount for a plea of guilty was incapable of applying to the sentencing of a federal offender, because it was inconsistent with s 16A(2)(g) of the *Crimes Act 1914* (Cth), which made general and unqualified provision to the effect that, if an offender has pleaded guilty, the sentencing court must take the guilty plea into account in determining the sentence to be passed.
165. In general, scope will only arise for a specific State or Territory law relating to the exercise of sentencing discretion to be picked up and applied to the sentencing of federal offenders where Part IB (supplemented by the common law) makes no provision in relation to the matter dealt with by the State or Territory law. A (rare) example of such a case is *ONA*.¹⁶⁶ That case concerned a State law which provided that in sentencing an offender a court must not have regard to any consequences that may arise from the registration of the offender as a sexual offender. The State law was held not to be inconsistent with the provisions of s 16A of the *Crimes Act 1914* (Cth), and was held to apply to the sentencing of a federal offender by (at least) s 79 of the *Judiciary Act 1903* (Cth).

4.1.4 Guideline judgments on the exercise of sentencing discretion

166. In some jurisdictions, an appellate court is empowered under State or Territory law to issue guideline judgments on matters relating to sentencing.¹⁶⁷ It is at least doubtful whether such a guideline judgment can be given specifically in relation to the sentencing of federal offenders, or whether a guideline judgment in general terms could be rendered applicable by federal law to the sentencing of federal offenders.
167. In *Wong*,¹⁶⁸ the New South Wales Court of Criminal Appeal had promulgated guidelines that were specific to Commonwealth drug offences. In the High Court, a majority (Gaudron, Gummow, Kirby and Hayne JJ) doubted whether the power of the NSW CCA to issue guidelines extended to guidelines relating to the sentencing of federal offenders. In any event, the High Court held that the guidelines in that case (which gave primacy to the quantity of the drug in question) were inconsistent with the scheme of s 16A of the *Crimes Act 1914* (Cth).

Crimes Act". The plurality added, however, that the State law necessarily directed attention to current sentencing practices in Victoria, whereas it was "implicit in Pt IB of the *Crimes Act* that a sentencing judge must have regard to current sentencing practices throughout the Commonwealth." Although the plurality did not say so explicitly, the implication appears to be that the State provision was not made applicable to the sentencing of federal offenders by s 68(1) or s 79 of the *Judiciary Act 1903* (Cth) because it was inconsistent with the requirements of s 16A of the *Crimes Act*.

¹⁶⁵ *Ngo v R* [2017] WASCA 3.

¹⁶⁶ *R v ONA* (2009) 24 VR 197. Cf. *Sabel v R* [2014] NSWCCA 101, [206]-[209].

¹⁶⁷ Examples are: *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3, Div 4; *Sentencing Act 1991* (Vic), Part 2AA; *Penalties and Sentences Act 1992* (Qld), Part 2A; *Sentencing Act 1995* (WA), s 143.

¹⁶⁸ *Wong v R* (2001) 207 CLR 584.

168. In *Atanackovic*,¹⁶⁹ the Victorian Court of Appeal considered whether a previous guideline judgment of the Court relating to the use of community correction orders in sentencing was applicable to the sentencing of federal offenders. The Court held that it was not: the guideline judgment could not be accommodated by s 16A of the *Crimes Act 1914* (Cth), did not satisfy the requirements of s 80 of the *Judiciary Act 1903* (Cth) and, accordingly, did not apply to the sentencing of federal offenders.

4.2 Severity appropriate in all the circumstances – s 16A(1)

169. The overarching requirement in s 16A of the *Crimes Act 1914* (Cth) is that, in sentencing a federal offender, a court must impose a sentence or make an order that is of a “*severity appropriate in all the circumstances*” of the offence (s 16A(1)).

4.2.1 Appropriate severity and the consideration of factors listed in s.16A(2)

170. In a series of decisions, the High Court has explained the effect of the requirement in s 16A(1) for a sentencing court to impose a sentence or make an order of a “*severity appropriate in all the circumstances*” and its interaction with the requirement in s 16A(2) to have regard to such of the matters listed as are “*relevant and known to the court*”.

171. In *Wong*,¹⁷⁰ the majority held that it was impermissible, in a drug importation case, to single out the quantity of the drug as the chief determinant of the seriousness of an offence and a starting point for assessing the sentence; such an approach was contrary to s 16A. Gaudron, Gummow and Hayne JJ observed that s 16A provides no guidance about the accommodation that is to be made between the general requirement in s 16A(1) that the sentence be of a severity appropriate in all the circumstances of the offence and the very diverse list of matters in s 16A(2). The sentencing court must have regard to all the matters listed in s 16A(2), to the extent that they are relevant and known to the court. To fasten upon only some of the factors that are mentioned would depart from the legislative command.¹⁷¹

172. In *Johnson*,¹⁷² the Court held that s 16A leaves room for the application of general common law principles, such as the principle of totality, except to the extent stated in s 16A or s 16B of the Act. In *Hili*,¹⁷³ after referring to *Johnson*, the plurality added that s 16A accommodates the application of some judicially developed general sentencing principles because those principles give relevant content to the statutory expression “*of a severity appropriate in all the circumstances of the offence*” used in s 16A(1), as well as some of the expressions used in s 16A(2), such as “*the need to ensure that the person is adequately punished for the offence*” (s 16A(2)(k)).

¹⁶⁹ *Atanackovic v R* (2015) 45 VR 179.

¹⁷⁰ *Wong v R* (2001) 207 CLR 584.

¹⁷¹ *Wong v R* (2001) 207 CLR 584, [71]–[72].

¹⁷² *Johnson v R* (2004) 78 ALJR 616, [15].

¹⁷³ *Hili v R* (2010) 242 CLR 520, [25].

173. In *Bui*,¹⁷⁴ the Court emphasised that common law sentencing principles could only be accommodated, in accordance with s 80 of the *Judiciary Act 1903* (Cth), where s 16A left a gap for such principles to fill. See “2.5 Applicability of the common law”.
174. In rejecting a contention that an offender was entitled to a reduction of sentence upon a successful Crown appeal against sentence because of presumed stress or anxiety, the Court in *Bui* said, “*Application of an automatic discount would not be consistent with the requirement of s 16A(1) [of the Crimes Act 1914] that a sentence be appropriate in its severity in all the circumstances of the case*”.¹⁷⁵
175. In *Pham*,¹⁷⁶ the plurality said that, to the extent that Part IB of the *Crimes Act 1914* (Cth) (which includes s 16A) specifically or impliedly provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the *Crimes Act* is exclusive.¹⁷⁷
176. In *Hili*,¹⁷⁸ the Court held that giving effect to the principle that the severity of the sentence be appropriate in all the circumstances meant that, when a sentence of imprisonment is imposed, there is no judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period, or minimum period, a federal offender should serve in prison before being released.
177. In *Weininger*,¹⁷⁹ the Court considered the implications of the requirement in s 16A(2) that the sentencing court must take into account such of the listed matters “as are relevant and known to the court”. See “3.1.3 Relevant matters “known to the court”: Crimes Act 1914, s 16A(2)”.

4.2.2 Requirements of s 16A also apply to fixing period of imprisonment to be served

178. The reference in s 16A to an “order” includes a non-parole period or recognizance release order period.¹⁸⁰ That is, if a custodial sentence is to be imposed, the requirement in s 16A(1) for a sentence or order to be of a “*severity appropriate in all the circumstances*” (as well as the requirement to take into account the matters listed in s 16A(2) to the extent that they are relevant and known to the court) governs the determination not only of the appropriate head sentence but also of any non-parole period or recognizance release order period.¹⁸¹

¹⁷⁴ *Bui v DPP (Cth)* (2012) 244 CLR 638.

¹⁷⁵ *Bui v DPP (Cth)* (2012) 244 CLR 638, [19].

¹⁷⁶ *R v Pham* (2015) 256 CLR 550.

¹⁷⁷ *R v Pham* (2015) 256 CLR 550, [22] (French CJ, Keane and Nettle JJ; Bell and Gageler JJ agreeing on this ground).

¹⁷⁸ *Hili v R* (2010) 242 CLR 520, [44].

¹⁷⁹ *Weininger v R* (2003) 212 CLR 629.

¹⁸⁰ *R v Ruha; ex parte DPP (Cth)* [2011] 2 Qd R 456, [45]; approved in *Hili v R* (2010) 242 CLR 520, [40].

¹⁸¹ *Hili v R* (2010) 242 CLR 520, [40]–[41].

4.2.3 No scope for presumption of imprisonment for an offence

179. In *Kovacevic*,¹⁸² a five-member bench of the Full Court of the Supreme Court of South Australia considered the proper approach to the sentencing of an offender for sustained and deliberate fraud on the Commonwealth. The plurality (Doyle CJ, Mullighan, Bleby and Martin JJ) affirmed that it is part of the function of an appellate court to set standards for sentencing and that in performing that function, the court may indicate that a certain type of offending is likely to attract a certain type of punishment (in particular imprisonment) and indicate an appropriate sentence range for particular types of offending.¹⁸³ But a sentencing standard cannot dictate a result in every case, or remove the need for consideration of the facts of each case and the application of the relevant considerations to those facts.¹⁸⁴ While it was proper to say, for example, that for a particular type of offence an immediate term of imprisonment is ordinarily likely to be required (in order to give effect to the relevant sentencing principles), it was not appropriate to say that such a sentence is required absent truly exceptional circumstances.¹⁸⁵

180. A similar approach was taken by the New South Wales Court of Criminal Appeal, in relation to the sentencing of State offenders, in *Parente*.¹⁸⁶ An appellate court must not cross the boundary between (properly) identifying the 'unifying principles' to be applied in any sentencing decision and (impermissibly) imposing an unlegislated judicially-created constraint on the sentencing discretion.¹⁸⁷

4.2.4 Assessing the seriousness of the offence by reference to the maximum penalty

181. The maximum penalty is one of many factors that bear upon the ultimate discretionary determination of the sentence for the offence. The maximum penalty represents the legislature's assessment of the seriousness of the offence and for this reason provides a sentencing yardstick.¹⁸⁸

182. The maximum sentence available for the offence can underscore the relevance of general deterrence¹⁸⁹ and serves as a basis of comparison between the case before the Court and the worst category of case.¹⁹⁰

183. An offence may fall into the worst category of case, and therefore warrant the imposition of the maximum prescribed penalty, notwithstanding that it is possible to imagine an even worse instance of

¹⁸² *Kovacevic v Mills* (2000) 76 SASR 404.

¹⁸³ *Kovacevic v Mills* (2000) 76 SASR 404, [30]–[31], [35].

¹⁸⁴ *Kovacevic v Mills* (2000) 76 SASR 404, [32]. Compare *Wong v R* (2001) 207 CLR 584; *Hili v R* (2010) 242 CLR 520; *Barbaro v R* (2014) 253 CLR 58, [41]; *R v Pham* (2015) 256 CLR 550.

¹⁸⁵ *Kovacevic v Mills* (2000) 76 SASR 404, [39]–[45].

¹⁸⁶ *Parente v R* (2017) 96 NSWLR 633. See also *R v Stamatov* [2017] QCA 158, [93]–[100].

¹⁸⁷ *Robertson v R* [2017] NSWCCA 205, [89] (Simpson JA); approved in *Parente v R* (2017) 96 NSWLR 633, [105].

¹⁸⁸ *Markarian v R* (2005) 228 CLR 357, [30]–[31]; *Elias v R* (2013) 248 CLR 483, [27].

¹⁸⁹ *R v Lambert* (1990) 51 A Crim R 160.

¹⁹⁰ *Markarian v R* (2005) 228 CLR 357, [39]; *Lodhi v R* [2007] NSWCCA 360.

the offence.¹⁹¹ However sentencing judges should avoid referring to an offence as being, or not being, within the “worst category”, as the term may be confusing, may be misunderstood and may lead to error; where relevant, the judge should state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty.¹⁹²

4.2.5 The availability of another offence with a lesser maximum penalty

184. In *Liang*,¹⁹³ the Victorian Court of Appeal held that a sentencing judge must take into account in mitigation of sentence that there was a ‘less punitive offence’ on which the prosecution could have proceeded and which was ‘as appropriate or even more appropriate’ to the facts than the charge for which the offender fell to be sentenced.

185. In *Elias*,¹⁹⁴ the High Court disapproved the decision in *Liang*, and held that ‘*There is no warrant under the common law of sentencing for a judge to take into account the lesser maximum penalty for an offence for which the offender could have been, but had not been, convicted*’.¹⁹⁵

186. Accordingly, a sentence to be imposed on a federal offender should not be mitigated on the basis that the offender could have been charged with a less serious offence (whether against a law of the Commonwealth or a law of a State or Territory).

4.3 Other sentences not yet served – s 16B (totality principle)

187. Section 16B of the *Crimes Act 1914* (Cth) requires a Court in sentencing a federal offender to have regard to any sentence (federal, state or territory) that the offender has not served, or any sentence liable to be served through the revocation of a parole order or licence granted.

188. The Act accommodates the application of the common law principle of totality:¹⁹⁶ that is, the requirement that the sentencing judge impose an appropriate sentence for each offence and structure the sentences such that the overall sentence is just and appropriate to the totality of the offending behaviour.¹⁹⁷ The principle requires consideration not only of all sentences imposed on the same occasion, but also to sentences imposed previously to which the offender is still subject. That includes sentences imposed in another State or Territory.¹⁹⁸

¹⁹¹ *R v Kilic* (2016) 259 CLR 256, [18].

¹⁹² *R v Kilic* (2016) 259 CLR 256, [19]-[20].

¹⁹³ *R v Liang* (1995) 124 FLR 350.

¹⁹⁴ *Elias v R* (2013) 248 CLR 483.

¹⁹⁵ *Elias v R* (2013) 248 CLR 483, [37].

¹⁹⁶ *Johnson v R* (2004) 78 ALJR 616; *Hili v R* (2010) 242 CLR 520, [25]. The principle of totality is implicit not only in s 16B but also in some provisions of s 16A of the *Crimes Act 1914*, such as s 16A(2)(c) (course of conduct): see “4.4.3 Course of conduct – s 16A(2)(c)”.

¹⁹⁷ *Mill v R* (1988) 166 CLR 59, 62–63.

¹⁹⁸ *Mill v R* (1988) 166 CLR 59.

189. The totality principle is not enlivened when the defendant has completed the other sentence by the time of sentencing,¹⁹⁹ even if the earlier sentence was completed only while the defendant was being held on remand for the federal offence for which the defendant then falls to be sentenced.²⁰⁰ However the fact that the defendant has finished a term of imprisonment shortly before a sentence for different offending is to be imposed may be a relevant factor for the sentencing judge to take into account.²⁰¹

190. See also “5.9.2 Whether sentences should be concurrent or cumulative”.

4.4 Non-exhaustive list of matters – s 16A(2)

191. Section 16A(2) of the *Crimes Act 1914* (Cth) sets out a non-exhaustive list of matters to which the court must have regard when passing sentence. It provides:

- (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:*
- (a) *the nature and circumstances of the offence;*
 - (b) *other offences (if any) that are required or permitted to be taken into account;*
 - (c) *if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;*
 - (d) *the personal circumstances of any victim of the offence;*
 - (e) *any injury, loss or damage resulting from the offence;*
 - (ea) *if an individual who is a victim of the offence has suffered harm as a result of the offence—any victim impact statement for the victim;*
 - (f) *the degree to which the person has shown contrition for the offence:*
 - (i) *by taking action to make reparation for any injury, loss or damage resulting from the offence; or*
 - (ii) *in any other manner;*
 - (fa) *the extent to which the person has failed to comply with:*
 - (i) *any order under subsection 23CD(1) of the Federal Court of Australia Act 1976; or*
 - (ii) *any obligation under a law of the Commonwealth; or*
 - (iii) *any obligation under a law of the State or Territory applying under subsection 68(1) of the Judiciary Act 1903;*
 - about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;*
 - (g) *if the person has pleaded guilty to the charge in respect of the offence—that fact;*
 - (h) *the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;*
 - (j) *the deterrent effect that any sentence or order under consideration may have on the person;*

¹⁹⁹ At common law, the principle of totality applies when a custodial sentence is to be imposed which will be cumulative upon, or which will overlap with, *an existing custodial sentence*: *R v Gordon* (1994) 71 A Crim R 459, 466; *Tiba v R* [2013] VSCA 302, [3], [35]. Section 16B embodies the same principle: *Postiglione v R* (1997) 189 CLR 295, 307-9.

²⁰⁰ As in *Visser v R* [2015] VSCA 168, [160]-[168].

²⁰¹ *Tiba v R* [2013] VSCA 302, [37]; *Visser v R* [2015] VSCA 168, [165].

- (ja) *the deterrent effect that any sentence or order under consideration may have on other persons;*
- (k) *the need to ensure that the person is adequately punished for the offence;*
- (m) *the character, antecedents, age, means and physical or mental condition of the person;*
- (n) *the prospect of rehabilitation of the person;*
- (p) *the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.*

192. Section 16A(2) was based on s 10 of the *Criminal Law (Sentencing) Act 1988* (SA), which has been described as having declared what had always been the position at common law.²⁰²

193. The matters set out in s 16A(2) have been referred to as a “checklist”.²⁰³ As is plain from the opening words of the subsection (“*In addition to any other matters ...*”), the list does not purport to be exhaustive.²⁰⁴

194. Section 16A, on its proper construction, accommodates the application of common law principles of sentencing, such as the principle of “totality” and some other judicially developed general sentencing principles, because those principles give relevant content to the statutory expression “*of a severity appropriate in all the circumstances of the offence*” used in s 16A(1), as well as some of the expressions used in s 16A(2), such as “*the need to ensure that the person is adequately punished for the offence*” (s 16A(2)(k)).²⁰⁵

195. As the chapeau to s 16A(2) makes clear, a sentencing court is required to have regard to the factors listed in s 16A(2) only if they are “*relevant and known to the court*”. For further discussion of this requirement, see “3.1.3 Relevant matters “known to the court”: *Crimes Act 1914*, s 16A(2)”.

4.4.1 Nature and circumstances of offence – s 16A(2)(a)

196. The nature and circumstances of the offence are required to be taken into account pursuant to s 16A(2)(a) but only to the extent that they are relevant and known to the court. In *Olbrich*²⁰⁶ the High Court considered this paragraph in the context of a federal offender who had imported 1.1 kg of heroin in his luggage and who pleaded guilty to importing the heroin contrary to s 233B of the *Customs Act 1901*. It was unclear to the sentencing judge what precise role or position the offender held in the criminal hierarchy relating to the importation of the drug.

197. A majority of the court (Gleeson CJ, Gaudron, Hayne and Callinan JJ) did not accept that the identification of the precise nature of the offender's involvement in an act of importation of prohibited imports was

²⁰² *Adami v R* (1989) 51 SASR 229, 233. Compare *R v Sinclair* (1990) 51 A Crim R 418, 430.

²⁰³ *Postiglione v R* (1991) 24 NSWLR 584, 594 (Grove J).

²⁰⁴ *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370; *Hili v R* (2010) 242 CLR 520, [24].

²⁰⁵ *Hili v R* (2010) 242 CLR 520, [25].

²⁰⁶ *R v Olbrich* (1999) 199 CLR 270.

an essential aspect of the sentencing process.²⁰⁷ The sentencing judge was required by s 16A(2)(a) to take into account the nature and circumstances of the offence only to the extent that these were “known to the court”.²⁰⁸ While an offender’s role in the criminal enterprise was relevant, the task of sentencing was often required to be undertaken when it was not possible to establish the precise role or position of the offender in the criminal hierarchy. In those circumstances, the sentencing judge should concentrate on who the offender was and what the offender had done.²⁰⁹

198. It follows that a sentencing judge is entitled to treat proven offences of possession and attempting to obtain possession of illicit drugs as very serious offences, even in the absence of precise evidence as to the nature of the offender’s participation.²¹⁰

199. If the charge is a rolled-up charge (that is a charge that would be objectionable for duplicity, as it alleges more than one offence),²¹¹ the nature and circumstances of the offence for which the offender is to be sentenced will include more than one criminal act; the sentencing court must assess the criminality of the conduct as particularised.²¹² The more contraventions or episodes of criminality that form part of the rolled up charge, the more objectively serious the offence is likely to be.²¹³ However the offender is exposed only to the maximum penalty applicable to a single offence.²¹⁴

4.4.2 Other offences taken into account – s 16A(2)(b)

200. Section 16BA of the *Crimes Act 1914* (formerly s 21AA) provides a procedure by which one or more federal offences may be taken into account in sentencing a federal offender. For a description of s 16BA, see “7.5 Taking other federal offences into account”. The power to take an offence into account in sentencing a federal offender is discretionary (s 16BA(2)). Taking an offence into account does not affect the applicable maximum penalty (s 16BA(4)).

201. The principles applicable to sentencing an offender when another offence is taken into account have been authoritatively stated by the New South Wales Court of Criminal Appeal.²¹⁵ Those principles apply to the sentencing of a federal offender.²¹⁶ Although an offender is not to be punished for the admitted offence which is taken into account, offences taken into account may increase the penalty otherwise appropriate, by giving greater weight to the need for specific deterrence and to the community’s

²⁰⁷ *R v Olbrich* (1999) 199 CLR 270, [13].

²⁰⁸ *R v Olbrich* (1999) 199 CLR 270, [17].

²⁰⁹ *R v Olbrich* (1999) 199 CLR 270, [19]–[22]. See also “3.1 Fact-finding in federal sentencing”.

²¹⁰ *R v Nicholas* [2000] 1 VR 356; *De La Espriella-Velasco v R* (2006) 31 WAR 291.

²¹¹ *R v Jones* [2004] VSCA 68, [12]–[13].

²¹² *R v Knight* [2004] NSWCCA 145, [25]–[26].

²¹³ *R v Richard* [2011] NSWSC 866, [65](f); *R v Glynatsis* [2013] NSWCCA 131, [66]; *R v De Leeuw* [2015] NSWCCA 183, [116]; *DPP (Cth) v Phan* [2016] VSCA 170, [60].

²¹⁴ *R v Jones* [2004] VSCA 68, [13]; *R v Donald* [2013] NSWCCA 238, [85].

²¹⁵ *Attorney General’s Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146; *Abbas v R* [2013] NSWCCA 115.

²¹⁶ *R v Lamella* [2014] NSWCCA 122, [48]; *DPP (Cth) v KMD* [2015] VSCA 255, [82]–[88]; *Soyke v R* [2016] NSWCCA 112, [67]; *Le v R* [2017] NSWCCA 26.

entitlement to extract retribution for serious offences.²¹⁷ Therefore the practical effect of taking an offence into account is that a more severe sentence, or a sentence of a more severe type, will usually result.

202. There is no requirement to quantify the effect, or to specify the sentence that would otherwise have been imposed; taking the other offence into account is merely a relevant factor to be considered in the instinctive synthesis.
203. Apart from the procedure in s 16BA for taking other offences into account, another way in which a sentencing court may have regard to other offending (for which the offender does not fall to be sentenced) is by the practice of treating a charge as a representative charge²¹⁸ (that is, as representative of other admitted offending of the same type). See “4.4.3 Course of conduct – s 16A(2)(c)”.

4.4.3 Course of conduct – s 16A(2)(c)

204. Where an offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character, regard must be had to that course of conduct.²¹⁹ A course of conduct within paragraph 16A(2)(c) may consist of conduct within one hour²²⁰ or over a number of years.²²¹
205. The fact that offending forms part of such a course of criminal conduct may be relevant in more than one way.²²²
206. First, it may be relevant to the application of the principle of totality.²²³ If the offender is to be sentenced for offences which form part of a course of conduct, and is being sentenced or has been sentenced for other offences committed as part of the same course of conduct, the sentencing court must have regard to the totality of the offending conduct in fixing sentence.²²⁴ The principle acts as a check on the sentence to be imposed.

²¹⁷ *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [42].

²¹⁸ As to the differences between a rolled-up charge and a representative charge, see *R v Jones* [2004] VSCA 68, [12]-[13].

²¹⁹ This paragraph does not apply merely because a single offence under consideration itself consists of a course of conduct: *R v Jousif* [2017] NSWSC 1299, [258]. (Although this sentence was overturned on appeal in *Elomar v R* [2018] NSWCCA 224, the decision of the NSW CCA does not affect the validity of this observation.) However the fact that a single offence is committed over a period of time and involves a number of discrete acts is relevant to assessing the seriousness of the offence: see “4.4.1 Nature and circumstances of offence – s 16A(2)(a)”.

²²⁰ E.g. *R v Copeland (No 2)* (2010) 108 SASR 398.

²²¹ E.g. *Fitzgerald v R* [2015] NSWCCA 266.

²²² Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [6.59]-[6.66].

²²³ *Putland v R* (2004) 218 CLR 174., [91] (Kirby J, dissenting); *Weininger v R* (2003) 212 CLR 629, [57] (Kirby J, dissenting); Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [6.65].

²²⁴ See, e.g., *Mill v R* (1988) 166 CLR 59, 63; *Postiglione v R* (1997) 189 CLR 295, 308; *Pearce v R* (1998) 194 CLR 610, 623. Although the totality principle is not explicitly referred to in s 16A of the *Crimes Act 1914*, common law totality principles are applicable to the sentencing of a federal offender: *Johnson v R* (2004) 78 ALJR 616. The principle is

207. Second, while the existence of a course of conduct does not permit double punishment of the offender,²²⁵ the fact that the instant offending formed part of a course of criminal conduct may be relevant in putting the offending in context. Such a course of conduct may show that the offending for which the offender is to be sentenced was not an isolated incident, or was planned and premeditated and not spontaneous or opportunistic,²²⁶ or it may cast light on the motivation, commitment or role of the offender or the scale of the offending²²⁷ - matters which are relevant to considering the nature and circumstances of the offence (s 16A(2)(a)), ensuring that the offender is adequately punished for the offence (s 16A(2)(k)), and determining the need for specific deterrence (s 16A(2)(j)).
208. Third, offending as part of a course of criminal conduct may also reduce or negate mitigating factors that would otherwise have applied. For example, it may undermine a claim that the offending was out of character²²⁸ or was prompted by temporarily impaired mental functioning (see s 16A(2)(m)) or that the offender was contrite (s 16A(2)(f)), or had good prospects of rehabilitation (s 16A(2)(n)). A course of conduct may be relevant to assessing the weight to be given to specific deterrence (s 16A(2)(j)), or to a guilty plea (s 16A(2)(g)) or to cooperation (s 16A(2)(h)). Any of these examples (which are by no means exhaustive) ultimately go to ensuring that the sentence is appropriate (s 16A(1)).
209. There is controversy over whether the course of conduct referred to in s 16A(2)(c) may include offences of which the offender has not been found guilty. In *Weininger*,²²⁹ Callinan J expressed the view, *obiter dicta*, that it could; his Honour considered that the difference in the language used in s 16A(2)(b) and s 16A(2)(c) implied that the reference to “a series of criminal acts of the same or a similar character” in the latter was not confined to offences of which the offender had been found guilty. Kirby J in the same case, in dissent, expressed a contrary view.²³⁰
210. The view of the CDP is that, at the least, other criminal conduct which the offender has admitted, or which has been proven beyond reasonable doubt, could constitute “criminal acts of the same or a similar character” within 16A(2)(c). In this way, a sentencing judge may properly deal with charges which are treated, by agreement, as representative charges, that is, as examples of a series of criminal acts constituting a course of conduct rather than merely as single instances.²³¹ Courts in sentencing federal

also reflected in the requirement in s 16B to take into account other sentences not yet served: see “4.3 Other sentences not yet served – s 16B (totality principle)”.

²²⁵ See, e.g., *Baumer v R* (1988) 166 CLR 51.

²²⁶ E.g. *Kovacevic v Mills* (2000) 76 SASR 404, [37]; *R v Host* [2015] WASCA 23, [145](c); *Ngo v R* [2017] WASCA 3, [63](c).

²²⁷ E.g. *Ngo v R* [2017] WASCA 3, [63](a).

²²⁸ *Weininger v R* (2003) 212 CLR 629, [25]-[29]. It is sometimes said that over the course of a period of offending, the offender ceased to be a person of good character, but was merely a criminal who had not yet been caught: cf. *R v Ruggiero* (1998) 104 A Crim R 358, 364; *R v Schneider* (1988) 37 A Crim R 395, 397.

²²⁹ *Weininger v R* (2003) 212 CLR 629, [112], [122].

²³⁰ *Weininger v R* (2003) 212 CLR 629, [57].

²³¹ The conceptual basis for representative charges is described by Batt JA in *R v SBL* [1999] 1 VR 706, 725-6.

offenders have often dealt with charges as representative counts;²³² s 16A(2)(c) provides a sound foundation for doing so.²³³

4.4.4 Circumstances of any victim – s 16A(2)(d)

211. The personal circumstances of the victim must be taken into account. In *Nahlous*²³⁴ the court confined the meaning of ‘victim’ in s 16A(2)(d) *Crimes Act 1914* (Cth), in the context of a grooming offence, to the primary victim, not family members. The court did recognise that there are Commonwealth offences where the categories of victims may be large or diffuse groups, such as insider trading and customs offences.

212. The circumstances of any victim will often be relevant as part of the nature and circumstances of the offence (s 16A(2)(a)). A court sentencing a federal offender is also required to have regard to any injury loss or damage resulting from the offence (s 16A(2)(e)) and any victim impact statement (s 16A(2)(ea)).

213. In determining the sentence to be passed on an offender who has committed a sexual offence against a child overseas, contrary to the child sex tourism provisions of the *Criminal Code Act 1995* (Cth), the court is required by s 274.30 of the *Code* (previously s 50FD *Crimes Act 1914* (Cth)) to take into account the age and maturity of the victim so far as these matters are “relevant and known” to the court. This requirement is in addition to the matters set out in s 16A(2) of the *Crimes Act 1914*.

4.4.5 Injury, loss or damage resulting from the offence – s 16A(2)(e)

214. A wide range of matters may be taken into account under this heading. They include:
- injury, loss or damage caused to individual victims,²³⁵ even if the individual victims or their individual losses cannot be identified;²³⁶
 - financial or other property loss to the Commonwealth or a public authority, including public revenue foregone;²³⁷
 - damage to the Australian economy caused by cartel activities;²³⁸
 - damage to the integrity of markets caused by insider trading or market manipulation,²³⁹ or by the bribery of foreign officials (even if no bribe is ultimately paid);²⁴⁰ or

²³² An example is *DPP v Chatterton* [2014] VSCA 1.

²³³ See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [6.66].

²³⁴ *R v Nahlous* [2013] NSWCCA 90.

²³⁵ E.g. *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, [55], [94].

²³⁶ *Kamay v R* (2015) 47 VR 475, [46]-[52].

²³⁷ E.g. *R v Alimic* [2006] VSCA 273, [10]; *R v Host* [2015] WASCA 23, [145](e). Offences against the revenue are not victimless crimes; everybody suffers: *DPP (Cth) v Milne* [2001] VSCA 93, [12]; *Aitchison v R* [2015] VSCA 348, [79].

²³⁸ E.g. *DPP (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [250]-[252], [298], [300].

²³⁹ E.g. *R v Curtis (No 3)* [2016] NSWSC 866, [24].

²⁴⁰ E.g. *Elomar v R* [2018] NSWCCA 224, [72]-[87].

- damage to the reputation or integrity of an important public institution.²⁴¹

215. Injury, loss or damage to property or financial interests must be assessed in a realistic way.²⁴² If voluntary reparation has been made, it should be taken into account in assessing the loss to the victim; the position may be different where the payment is made under compulsion.²⁴³

216. In the case of joint offenders, each offender may be regarded as severally responsible for the whole of any resulting loss or damage.²⁴⁴

217. “Injury, loss or damage resulting from the offence” does not encompass injury, loss or damage to the offender, such as expenditure incurred (and not recovered) in connection with the commission of the offence.²⁴⁵

4.4.6 Victim impact statements – s 16A(2)(ea)

218. This paragraph requires a court to have regard to any victim impact statement (VIS) for an individual who has suffered harm as a result of the offence.²⁴⁶

219. The definition of who can provide a VIS and what it can contain are set out in s 16AAA(1) of the *Crimes Act 1914* (Cth). In contrast to some State provisions, a Commonwealth VIS may be oral or in writing, but must be signed or otherwise acknowledged by the maker of the statement.

220. Under s 16AB of the *Crimes Act 1914* (Cth):

- only one VIS can be given per victim, unless the court grants leave;
- no implication is to be drawn from the absence of a VIS; and
- the accused may test the facts in a VIS by cross examining the maker only if leave is granted by the court.

221. There is no prescribed form of VIS but a pro forma Commonwealth VIS has been developed by the CDPP.

²⁴¹ E.g. *Kamay v R* (2015) 47 VR 475, [50].

²⁴² For example, in *Billis v R* (WA CCA, 24 February 1997, unreported), the conduct of the offender led to a considerable fall in the market price of shares held by the victim. Had the victim then sold the shares, there would have been a considerable loss. But by the time the victim sold the shares, the market price had recovered, and the victim sold them for a profit. In those circumstances, the Court held that the sentencing judge had erred in treating as a serious aggravating factor the fact that the offending had damaged the victim by causing a reduction in the value of the shares.

²⁴³ *R v Host* [2015] WASCA 23, [24]-[25].

²⁴⁴ *R v Boughen* [2012] NSWCCA 17, [55]-[56]; *R v Melrose* [2016] QCA 202, [16]-[17].

²⁴⁵ *Whisson v Mead* (2006) 95 SASR 124.

²⁴⁶ The paragraph was inserted in 2013. It applies to offences committed, or alleged to have been committed, on or after 29 June 2013. Previously any use of victim impact statements in sentencing of federal offenders was based on State and Territory procedural laws applied as surrogate federal law, together with s 16A(2)(d) and (e) of the *Crimes Act 1914*.

4.4.7 Degree to which contrition is shown – s 16A(2)(f)

222. This paragraph requires consideration of “*the degree to which the person has shown contrition for the offence ... by taking action ... or in any other manner*”. That is, contrition must be “shown” by the offender. Actions will often speak louder than words.
223. A plea of guilty or the making of reparation is usually accepted as a demonstration of contrition; if so, it must be taken into account under s 16A(2)(f).²⁴⁷ Genuine contrition also enhances the offender’s prospects of rehabilitation (s 16A(2)(n)) and reduces the need for specific deterrence (s 16A(2)(j)).²⁴⁸
224. Contrition, if relied upon and not conceded by the prosecution, must be established by the offender.²⁴⁹ A judge is not bound to accept hearsay evidence of what the offender said to a psychologist or psychiatrist, let alone testimonials or assertions from the Bar table.²⁵⁰ Nothing in s 16A(2)(f) requires a sentencing judge to place any particular weight on untested statements made by an offender to a psychologist or other third party.²⁵¹
225. Payments made pursuant to a pecuniary penalty order under the *Proceeds of Crime Act* 2002 (Cth) cannot be taken into account as showing contrition.²⁵² In *Host*,²⁵³ two reasons were given for this conclusion. First, s 16A(2)(f) of the *Crimes Act* 1914 (Cth) only refers to voluntary action on the part of the offender (and not to payments made pursuant to a legal obligation).²⁵⁴ Second, s 320(d) of the *Proceeds of Crime Act* 2002 (Cth) precludes a sentencing court from having regard to a pecuniary penalty order under the Act. On its proper construction, s 320(d) not only precludes a court from having regard to the mere fact of a pecuniary penalty order but also to any action taken in consequence of it.²⁵⁵ Paragraph 16A(2)(f) of the *Crimes Act* 1914 (Cth) is to be read subject to s 320(d) of the *Proceeds of Crime Act*.²⁵⁶
226. A sentencing judge is entitled to have regard to a plea of not guilty as relevant to an assessment of contrition or lack of contrition; to do so does not offend the principle that an offender is not to be penalised by reason of pleading not guilty.²⁵⁷

²⁴⁷ *Wangsaimas v R* (1996) 6 NTLR 14; *R v Lovel* [2007] QCA 281.

²⁴⁸ *Barbaro v R* [2012] VSCA 288, [39].

²⁴⁹ Cf. *Newman v R* [2018] NSWCCA 208, [29]-[31].

²⁵⁰ *Barbaro v R* [2012] VSCA 288, [38]. See also “3.1.6 Hearsay assertions about an offender’s state of mind”. If received at all, untested self-serving assertions by an offender in the form of a letter, statement or affidavit should also be treated with considerable circumspection and scepticism, and may be deserving of little or no weight: see the summary of relevant principles in *Imbornone v R* [2017] NSWCCA 144, [57].

²⁵¹ *Baladjam v R* [2018] NSWCCA 304, [277]; cf. *Singh v R* [2018] NSWCCA 60, [31].

²⁵² *R v Host* [2015] WASCA 23.

²⁵³ *R v Host* [2015] WASCA 23.

²⁵⁴ *R v Host* [2015] WASCA 23, [115](c), [190]-[191].

²⁵⁵ *R v Host* [2015] WASCA 23, [2]-[19], [103]-[110], [194]-[196].

²⁵⁶ *R v Host* [2015] WASCA 23, [22]-[23], [197]; see also the construction adopted by Buss JA, [111]-[115].

²⁵⁷ *R v Shatku* [2018] SASCF 77, [10], [36]-[41].

4.4.8 The fact of a guilty plea to the charge – s 16A(2)(g)

227. If the offender has pleaded guilty, that fact must be taken into account: *Crimes Act 1914* (Cth), s 16A(2)(g).
228. Although s 16A(2) does not refer to the converse circumstance, where the offender pleads not guilty, it is well-established that a plea of not guilty is not to be treated as an aggravating factor.²⁵⁸
229. If a sentencing court has taken into account a plea of guilty as a mitigating factor, it should make clear that it has done so. Generally an appellate court will not infer from the failure of a sentencing court to refer to a sentencing factor, without more, that the factor has been overlooked; the same approach has been taken in relation to the failure to refer to a plea of guilty.²⁵⁹ However in *Noble*,²⁶⁰ the New South Wales Court of Criminal Appeal held that the failure of a court sentencing a federal offender to refer at all to a plea of guilty as a material consideration constitutes error. It remains to be determined whether such a strict approach will be applied in other jurisdictions.
230. **Subjective value of a plea:** A guilty plea may be an indication of contrition or remorse, and may be mitigating in that way: see “4.4.7 Degree to which contrition is shown – s 16A(2)(f)”. It may also be taken into account as evincing a willingness on the part of the offender “*to facilitate the course of justice*”,²⁶¹ for example by bringing an early end to criminal proceedings, by sparing witnesses the strain of giving evidence, and by saving the community the cost of a trial. These *subjective factors* – focusing on the state of mind of the offender – are often considered by a sentencing court in assessing the offender’s prospects of rehabilitation (s 16A(2)(n)) and the need for specific deterrence (s 16A(2)(j)). The circumstances of the case, including the timing of the plea and the strength of the prosecution case, may support an inference as to the state of mind which underlies the offender’s guilty plea; in particular, a strong Crown case may justify the conclusion that the plea has resulted from the recognition of the inevitable and so qualifies the extent of genuine contrition.²⁶²
231. **Utilitarian value of a plea:** The issue about the relevance of a guilty plea which has proven more controversial is whether it is also mitigating purely for its *utilitarian (or objective) value*. A guilty plea usually has beneficial effects, such as avoiding the cost and delay of a trial, bringing finality to criminal proceedings and sparing witnesses the ordeal of giving evidence. A plea may have such utilitarian value even if the offender lacks any contrition or remorse, and pleads guilty only in the face of a strong

²⁵⁸ *Siganto v R* (1998) 194 CLR 656; *Cameron v R* (2002) 209 CLR 339, [12], [41], [65](3).

²⁵⁹ The Victorian Court of Appeal has repeatedly held that the failure of a court to refer in its sentencing remarks to the fact of a guilty plea will not, without more, warrant an inference that it was overlooked: e.g. *R v Brooks* [2000] VSCA 188, [12]-[13]; *R v Gillick* [2001] VSCA 201, [12]-[18], [22]-[24], [27]; *R v James* [2003] VSCA 13, [21]-[25]; *R v Berry* [2007] VSCA 60, [18]; *Cuthbertson v R* [2019] VSCA 104, [40]-[59]. The issue arises less frequently in Victoria since courts have been required by statute to specify the extent of a reduction of sentence for a plea of guilty: see “7.8.1 Specifying the sentence reduction for a guilty plea, pursuant to State or Territory laws”.

²⁶⁰ *Noble v R* [2018] NSWCCA 253, [10]. [41]. The Court applied the approach taken in State cases in NSW.

²⁶¹ *Cameron v R* (2002) 209 CLR 339.

²⁶² *Phillips v R* (2012) 37 VR 594, [15]-[18], [36], [61], [64], [68]-[74]; *DPP (Cth) v Thomas* (2016) 53 VR 546, [5].

prosecution case and in the hope of receiving a lesser sentence.²⁶³ The strength of the prosecution case is irrelevant to an assessment of the utilitarian value of the plea.²⁶⁴

232. In *Cameron*,²⁶⁵ a majority of the High Court held that, apart from remorse or acceptance of responsibility, the only rationale for a plea of guilty being taken into account in mitigation was if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice, and not on the basis that the plea has saved the community the expense of a contested hearing.²⁶⁶
233. The position regarding sentencing of federal offenders has been somewhat uncertain following *Cameron*.
234. In *Tyler*,²⁶⁷ the New South Wales Court of Criminal Appeal held that (in the absence of contrary statutory provision), *Cameron* specifically precluded a court from taking into account the utilitarian value of a plea of guilty; accordingly arguments that the sentence imposed on a federal offender should be reduced purely for its utilitarian benefits could not be sustained. *Tyler* was applied in a number of subsequent decisions in New South Wales,²⁶⁸ until 2018, when the decision in *Xiao*²⁶⁹ was handed down.
235. In *Harrington*,²⁷⁰ a majority of the ACT Court of Appeal followed and applied *Tyler* in relation to the sentencing of a federal offender.
236. In *Thomas*,²⁷¹ the Victorian Court of Appeal held that, contrary to *Tyler*, the utilitarian benefit of a plea of guilty must be taken into account in sentencing a federal offender. The Court held that the decision in *Cameron* did not mandate a contrary conclusion.
237. In *Xiao*,²⁷² a five-member bench of the New South Wales Court of Criminal Appeal declined to follow *Tyler* and instead followed the decision in *Thomas*.
238. There appears to be no decision of an appellate court in any other State or Territory which would bind a sentencing court in that jurisdiction to decline to have regard to the utilitarian benefit of a guilty plea

²⁶³ *Phillips v R* (2012) 37 VR 594.

²⁶⁴ *Phillips v R* (2012) 37 VR 594, [64]-[65]; *Nicholls v R* [2016] VSCA 300, [26].

²⁶⁵ *Cameron v R* (2002) 209 CLR 339.

²⁶⁶ *Cameron v R* (2002) 209 CLR 339, [11]-[15].

²⁶⁷ *Tyler v R* [2007] NSWCCA 247, [110]-[114].

²⁶⁸ E.g. *Danial v R* [2008] NSWCCA 15, [27]-[29]; *Isaac v R* [2012] NSWCCA 195, [24]-[27]; *C v R* [2013] NSWCCA 81, [33]. See also *R v Saleh* [2015] NSWCCA 299, [5].

²⁶⁹ *Xiao v R* (2018) 96 NSWLR 1.

²⁷⁰ *R v Harrington* (2016) 11 ACTLR 215.

²⁷¹ *DPP (Cth) v Thomas* (2016) 53 VR 546.

²⁷² *Xiao v R* (2018) 96 NSWLR 1.

in sentencing a federal offender.²⁷³ The decisions in *Thomas* and *Xiao* have been followed and applied by appellate courts in Queensland²⁷⁴ and Tasmania²⁷⁵ in relation to the sentencing of federal offenders.

239. In the ACT, sentencing courts continue to be bound by the decision in *Harrington* while that decision stands or until its effect is reversed by legislation. But in each other jurisdiction, in the view of the CDP, the weight of authority is that the utilitarian value of a guilty plea, as well as its subjective significance (if any), must be taken into account in sentencing a federal offender.
240. **Assessing the weight to be given to a plea:** Although a guilty plea cannot automatically attract a sentence reduction,²⁷⁶ only in exceptional cases will no reduction be warranted.²⁷⁷
241. The weight to be attached to a guilty plea as a mitigating factor will always depend upon the circumstances of the case. A significant consideration is whether the plea was entered at the first reasonable opportunity.²⁷⁸
242. Ordinarily, there will be no material difference between the discount to be allowed for a plea of guilty by reference to subjective or objective considerations, but it is important that the utilitarian benefit be adequately reflected.²⁷⁹ If a court is required to have regard to the utilitarian benefits of a plea, failure to do so may constitute an appealable error.²⁸⁰

²⁷³ See the comprehensive review of the authorities in *DPP (Cth) v Thomas* (2016) 53 VR 546 and in *Xiao v R* (2018) 96 NSWLR 1, [223]–[280]. Most of the cases referred to did not concern federal offenders. In those which do (in jurisdictions other than NSW, Victoria or the ACT), observations which might be taken to suggest a similar approach to that in *Tyler* were *obiter dicta*: e.g. *Wangsaimas v R* (1996) 6 NTLR 14; *Bahar v R* (2011) 45 WAR 100, [41]. In *R v Place* (2002) 81 SASR 395, [74]–[78], the South Australian Court of Criminal Appeal expressed a tentative view that cognate South Australian legislation (upon which s 16A was largely based) permitted a sentence reduction on purely utilitarian grounds.

²⁷⁴ *R v KAT* [2018] QCA 306, [61]

²⁷⁵ *Dunning v Tasmania* [2018] TASCCA 21, [22]–[25].

²⁷⁶ An automatic discount would be inconsistent with the requirement of s 16A(1) of the *Crimes Act 1914* that a sentence be appropriate in its severity in all the circumstances of the case: cf. *Bui v DPP (Cth)* (2012) 244 CLR 638, [19].

²⁷⁷ There may be cases in which the maximum penalty is warranted notwithstanding a plea of guilty: see *Moody v French* (2008) 36 WAR 393, [29]–[38]. This is but one example of a circumstance in which there may be no reduction of sentence for a plea of guilty: *Royer v Western Australia* [2009] WASCA 139, [57]–[58]. See *Phillips v R* (2012) 37 VR 594, [24], [36], [55], [59], [67], [93]. A mandatory minimum penalty may also have the effect of preventing a reduction of sentence for a plea of guilty: *Atherden v Western Australia* [2010] WASCA 33, [42]–[43], approved in *Bahar v R* (2011) 45 WAR 100, [56]–[57].

²⁷⁸ *R v Donnelly* [1998] 1 VR 645; *R v Duncan* [1998] 3 VR 208; *Wangsaimas v R* (1996) 6 NTLR 14, 171; *R v Pajic* [2009] VSCA 53; *Graziosi v DPP (Cth)* [2011] VSCA 418, [15]. As to what constitutes the first reasonable opportunity, see *Cameron v R* (2002) 209 CLR 339.

²⁷⁹ *DPP (Cth) v Thomas* (2016) 53 VR 546, [5], [7], [29]–[30], [144]–[149]; *Nicholls v R* [2016] VSCA 300, [24]; *Huang v R* [2018] NSWCCA 70, [15].

²⁸⁰ NSW courts have taken a strict approach to this question. In *Huang v R* [2018] NSWCCA 70, [9], Bathurst CJ said that to fail to take into account the utilitarian value of a plea in sentencing a federal offender constitutes error. Following the decision in *Xiao v R* (2018) 96 NSWLR 1, appeals have been upheld in relation to a number of pre-*Xiao* sentences in NSW, on the basis that the sentencing judge (in accordance with previous authority) made no allowance for the utilitarian value of the plea: see *Naizmand v R* [2018] NSWCCA 25; *Obiekwe v R* [2018] NSWCCA 55; *Huang v R* [2018] NSWCCA 70; *Peters v R* [2018] NSWCCA 126; *Kristensen v R* [2018] NSWCCA 189; *Musa v R*

243. A sentencing court will not necessarily err in failing to differentiate between a reduction in sentence which reflects the willingness of the offender to facilitate the course of justice, and a reduction which reflects that willingness together with the utilitarian benefit derived from the plea, because there will generally be no difference in the reduction.²⁸¹ However, some distinction between the subjective and objective criteria will usually be desirable if the strength of the prosecution case has been taken into account in assessing the weight to be given to the guilty plea, to demonstrate that it has only been taken into account in relation to the subjective criteria.²⁸²
244. Where it is unlikely that the guilt of the offender would have been discovered and established, other than through the offender's voluntary disclosure, a considerable degree of leniency will apply.²⁸³
245. A State or Territory law which provides for a sentence reduction of, or up to, a particular extent upon a plea of guilty is inconsistent with s 16A(2)(g) of the *Crimes Act 1914* (Cth) and is incapable of being applied as surrogate federal law to the sentencing of a federal offender.²⁸⁴
246. **Quantifying the sentence reduction:** There is no requirement in the *Crimes Act 1914* (Cth) that a sentencing court quantify any sentence reduction for a plea of guilty.²⁸⁵ However some State or Territory laws permit or require a sentencing court to state the extent of the discount given for the plea of guilty. Such laws may be picked up and applied as surrogate federal laws in sentencing federal offenders, pursuant to ss 68 and 79 of the *Judiciary Act 1903* (Cth): see "3.3.2 Statutory requirements to specify a sentence reduction for a plea of guilty".
247. As to the appropriate approach where a court is required to specify the reduction of a sentence for a guilty plea and is also required to specify the reduction of a sentence for an undertaking to co-operate under s 16AC of the *Crimes Act 1914*, see "7.9 Interaction between sentencing discount for guilty plea and discount for undertaking to co-operate".
248. In the absence of a statutory requirement to do so, quantification of a discount for a plea of guilty has traditionally been regarded as a departure from the preferred process of instinctive synthesis in sentencing. Nevertheless appellate courts have held that to do so is not necessarily erroneous, and is often desirable. See "7.8 Specifying a discount for a guilty plea".

[2018] NSWCCA 192; *Noble v R* [2018] NSWCCA 253; *Gwardys v R* [2019] NSWCCA 62; *IM v R* [2019] NSWCCA 107. But such an error does not necessarily warrant the imposition of a lesser sentence: see, e.g., *Naizmand v R* [2018] NSWCCA 25; *Noble v R* [2018] NSWCCA 253; *Obiekwe v R* [2018] NSWCCA 55; *Gwardys v R* [2019] NSWCCA 62.

²⁸¹ *Nicholls v R* [2016] VSCA 300, [29].

²⁸² *Phillips v R* (2012) 37 VR 594, [73]; *Nicholls v R* [2016] VSCA 300, [29].

²⁸³ *R v Ellis* [1986] 6 NSWLR 603; *Walker v R* [2008] NTCCA 7, [38].

²⁸⁴ *Ngo v R* [2017] WASCA 3, [15]-[33].

²⁸⁵ *Charkawi v R* [2008] NSWCCA 159, [14]; *Xiao v R* (2018) 96 NSWLR 1, [280].

4.4.9 Co-operation with law enforcement agencies (past cooperation) – s 16A(2)(h)

249. Under s 16A(2)(h), the degree to which the offender has co-operated with law enforcement agencies in the investigation of the offence or other offences must be taken into account. The word “*offence*” is defined in s 16 of the *Crimes Act 1914* (Cth) to mean a federal, State or Territory offence.

250. The *Crimes Act 1914* distinguishes between two types of cooperation by the offender that can be relevant to sentencing:

- *cooperation with law enforcement agencies in respect of relevant assistance already rendered prior to the imposition of sentence* (i.e. past cooperation); and
- *an undertaking by the offender to co-operate in future*, including in confiscation proceedings (future co-operation).

251. Section 16A(2)(h) deals with *past cooperation* whereas promised *future cooperation* is dealt with in s 16AC²⁸⁶ of the *Crimes Act 1914* (Cth). For more detail about s 16AC, see “7.7 Specifying a reduction for undertaking to co-operate in future - *Crimes Act 1914* s 16AC”.

252. The distinction between the two types of co-operation is important. *Past co-operation* (that is, prior to sentencing) is a matter to be considered as part of the “instinctive synthesis” of all relevant matters. Therefore the court is not required to identify the extent of the reduction of the sentence for cooperation provided to date.²⁸⁷ By contrast, *where the offender has given an undertaking to cooperate in future*, the sentencing court is required by s 16AC of the *Crimes Act* to specify the sentence that would have been imposed but for the undertaking.²⁸⁸ By this means, the extent of the sentence reduction provided by reason of the undertaking is made explicit.

253. The obligation to take into account past co-operation applies even if the sentencing court specifies a reduction for future co-operation, in accordance with s 16AC. The sentencing court must have regard to both matters (if applicable) in determining the sentence, although the extent of the reduction for past co-operation need not be specified.²⁸⁹

254. The following general principles in relation to the sentencing discount to be given for assistance provided to the authorities can be gleaned from the decision of the New South Wales Court of Criminal Appeal in *Cartwright*²⁹⁰ and from other authorities:

- (a) It is in the public interest that criminals with information about the activities of other criminals with whom they are associated should be encouraged to give information to the police.²⁹¹

²⁸⁶ Section 16AC was inserted by *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015*, with effect from 27 November 2015. It replaced s 21E of the *Crimes Act 1914* (Cth) which was materially identical.

²⁸⁷ *R v Sahari* (2007) 17 VR 269.

²⁸⁸ *R v Tae* [2005] NSWCCA 29.

²⁸⁹ *R v Gladkowski* [2000] QCA 352.

²⁹⁰ *R v Cartwright* (1989) 17 NSWLR 243, 252-253 (Hunt and Badgery-Parker JJ). *Cartwright* has been followed in *R v Su* [1997] 1 VR 1, 79; *R v Carey* [1998] 4 VR 13. See also the summary of principles in *Isaac v R* [2012] NSWCCA 195, [44]-[49], [52].

²⁹¹ *R v Lowe* (1977) 66 Cr App R 122; *R v Perez-Vargas* (1986) 6 NSWLR 559, 562.

- (b) It is in the public interest that criminals should be persuaded not to trust one another and discounting the sentence of a person who provides such assistance facilitates such distrust.²⁹²
- (c) Leniency through a discount for assistance to police marks, or rewards, the good inherent in the conduct of the provider of the assistance.²⁹³
- (d) There is no standard discount; the assessment of an appropriate discount cannot be approached in a mechanical or mathematical way.²⁹⁴
- (e) The weight to be given to the cooperation must be determined by having regard to all the circumstances of the case.²⁹⁵
- (f) Assistance to authorities may overlap with other mitigating factors, including a plea of guilty and an expression of remorse or contrition, as these matters are often part of a complex of inter-related considerations.²⁹⁶
- (g) The application of a discount for assistance should not result in the imposition of a sentence which is so lenient that it would be disproportionate to the objective gravity of a particular offence and the circumstances of a particular offender.²⁹⁷ The overriding obligation is always to impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence (*Crimes Act 1914* (Cth), s 16A(1)).
- (h) The discount to be given to a “true informer” may be considerable,²⁹⁸ but the weight to be given depends on the facts and must be balanced against other considerations including the seriousness of the offending and any circumstances of aggravation.²⁹⁹
- (i) The assistance may concern an unrelated offence.³⁰⁰
- (j) A discount could not be accorded if no cooperation was given, regardless of how much the particular prisoner may have been prepared to co-operate if able to do so.³⁰¹
- (k) Assistance actually rendered, for example by entrapping co-offenders or giving evidence, has a stronger claim than assistance which an offender was prepared to give but was not called upon to give.³⁰²
- (l) However, if the offender actually provides cooperation, the weight given to the offender’s cooperation should not be reduced merely because the offender was not ultimately required to give evidence, for example because the person about whom the information was provided pleaded guilty³⁰³ or because more cogent evidence from another source emerged.³⁰⁴

²⁹² *R v James* (1913) 9 Cr App R 142; *R v Golding* (1980) 24 SASR 161, 162.

²⁹³ *R v Golding* (1980) 24 SASR 161, 172-173.

²⁹⁴ *Rosales (a pseudonym) v R* [2018] VSCA 130, [25]. Cf. *MXP v Western Australia* (2010) 41 WAR 149, [54].

²⁹⁵ *MSO v Western Australia* [2015] WASCA 78.

²⁹⁶ *R v Gallagher* (1991) 23 NSWLR 220, 228.

²⁹⁷ *R v Sukkar* [2006] NSWCCA 92, [54].

²⁹⁸ *R v McMahon* (1988) 40 A Crim R 95.

²⁹⁹ *R v Nguyen* [2000] VSCA 209, [25].

³⁰⁰ *R v Rostom* [1996] 2 VR 97, 104.

³⁰¹ *R v Ferrer-Esis* (1991) 55 A Crim R 231.

³⁰² *R v Sukkar* [2005] NSWCCA 55, [52]; *Isaac v R* [2012] NSWCCA 195, [52].

³⁰³ *R v Freeman* [2001] VSCA 37.

³⁰⁴ *R v Cartwright* (1989) 17 NSWLR 243, 253.

- (m) If the offered assistance is genuine, but has little or no practical value, it may still be relevant as an indication of contrition (s 16A(2)(g)).³⁰⁵
- (n) Where information and cooperation is identifiable, it must be of such a nature that it could significantly assist authorities.³⁰⁶
- (o) The utility or effectiveness of the information provided is an important factor to be taken into account.³⁰⁷
- (p) The fact that the offender could not give evidence against more than one person, or that there are others higher in the criminal enterprise, should not have a significant impact on the discount given for cooperation.³⁰⁸
- (q) A discount may be given even if the offender has not co-operated fully by disclosing everything he or she knows,³⁰⁹ but cooperation which is not full and frank will usually be given little or no weight.³¹⁰
- (r) A discount may not be awarded where the accused has deliberately delayed providing information or has destroyed evidence with the result that what is supplied is of little effective value or benefit.³¹¹
- (s) An offer of cooperation may be disregarded in sentencing if it is given in the knowledge that it will not be called upon.
- (t) The risk of retributive violence in prison needs to be factored into the discount.³¹²
- (u) A person who has provided assistance will often, but not always, whilst a prisoner, be confined for his or her own protection in much harsher conditions than the general prison population.³¹³ But it is no longer regarded as axiomatic that a person who has provided assistance to authorities will serve the sentence under harsher and more onerous conditions when compared to an ordinary prisoner.³¹⁴
- (v) Hardship may also be occasioned to a prisoner upon their release into the community.³¹⁵
- (w) The risk to personal safety should not result in a sentence which is “an affront to community standards”.³¹⁶

³⁰⁵ *R v Sukkar* [2005] NSWCCA 55, [53].

³⁰⁶ *R v Cartwright* (1989) 17 NSWLR 243, 253; *R v Carmody* (1998) 100 A Crim R 41.

³⁰⁷ *R v Gallagher* (1991) 23 NSWLR 220; *Wangsaimas v R* (1996) 6 NTLR 14; *R v Su* [1997] 1 VR 1; *R v Dinic* (1997) 149 ALR 488 (information provided too late to be of value); *R v El Hani* [2004] NSWCCA 162, [73]; *Assafiri (No.2) v R* [2007] NSWCCA 356; *MEG v R* [2017] WASCA 161, [13].

³⁰⁸ *R v Scerri* [2010] VSCA 287.

³⁰⁹ *Nannup v Western Australia* [2011] WASCA 257, [34]-[38]; *MXP v Western Australia* (2010) 41 WAR 149; *A Child v Western Australia* [2007] WASCA 285.

³¹⁰ *R v Tang* [1998] 3 VR 508; *MA v R* [2001] WASCA 325, [62], [112]-[114]; *R v YLC* [2005] NSWCCA 394, [29]; *Ungureanu v R* [2012] WASCA 11, [33]; *Ruiz v R* [2013] VSCA 313; *R v Phelps* [2018] NSWCCA 191, [77].

³¹¹ *Assafiri (No.2) v R* [2007] NSWCCA 356.

³¹² *R v Gladkowski* [2000] QCA 352; *R v Pivdor* [2002] VSCA 174, [30].

³¹³ *R v Cartwright* (1989) 17 NSWLR 243, 250; *R v Gallagher* (1991) 23 NSWLR 220, 227; *R v Sukkar* [2006] NSWCCA 92, [55].

³¹⁴ *R v Sukkar* [2006] NSWCCA 92, [4]-[5]; *FS v R* [2009] NSWCCA 301, [21]; *Isaac v R* [2012] NSWCCA 195, [47].

³¹⁵ *R v Perez-Vargas* (1986) 6 NSWLR 559; *R v Sukkar* [2006] NSWCCA 92, [55].

³¹⁶ *R v Gladkowski* [2000] QCA 352, 448.

4.4.10 Deterrent effect on the offender – s 16A(2)(j)

255. The court must take into account the deterrent effect that any sentence or order under consideration may have on the person. This is known as specific deterrence. Its purpose is to discourage the offender from committing further offences, by demonstrating to them the adverse consequences of their criminal activity.
256. Assessment of the need for specific deterrence involves an examination of (amongst other things) the nature and circumstances of the offence (s 16A(2)(a)), the offender's character, antecedents and age (s 16A(2)(m)), the offender's current circumstances and prospects of rehabilitation (s 16A(2)(n)), and the likelihood of re-offending.³¹⁷ The presence or absence of remorse or contrition (s 16A(2)(f)) is often a significant consideration.³¹⁸
257. While an offender is not to be punished disproportionately merely because of his or her previous criminal history, such history is relevant *"to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law."*³¹⁹ The need for specific deterrence may be greater *"given the failure of more moderate penalties as a deterrent"*.³²⁰ Conversely, however, specific deterrence may be a factor deserving weight even if the offender has no previous convictions and good prospects of rehabilitation.³²¹
258. As with general deterrence, where a term of imprisonment is imposed, the need for specific deterrence must be adequately reflected in both the head sentence and in the period of actual custody.³²²

4.4.11 Deterrent effect on other persons – s 16A(2)(ja)

259. At common law, general deterrence (the need to impose punishment sufficient to deter other potential offenders from engaging in similar offending) has long been regarded as one of the principal purposes

³¹⁷ E.g. *R v Pickard* [1998] VSCA 50.

³¹⁸ *Barbaro v R* [2012] VSCA 288, [39].

³¹⁹ *Veen v R (No 2)* (1987) 164 CLR 465, 477.

³²⁰ *R v O'Brien* [1997] 2 VR 714, 718. Cf *R v Perrier (No 2)* [1991] 1 VR 717; *DPP (Cth) v Latif* [2012] QCA 278, [28]; *R v Selu; ex parte Cth DPP* [2012] QCA 345; *Dui Kol v R* [2015] NSWCCA 150, [22]; *Ngo v R* [2017] WASCA 3, [63](j). The need for specific deterrence may be particularly great if the offence is committed on parole, or soon after completion of another sentence: e.g. *Chol v R* [2016] VSCA 252, [10].

³²¹ *Alavy v R* [2014] VSCA 25, [7]-[18].

³²² E.g. *R v Ruha; ex parte DPP (Cth)* [2011] 2 Qd R 456, [45]; *DPP (Cth) v Latif* [2012] QCA 278, [28].

of punishment.³²³ Although general deterrence is a quintessentially utilitarian principle, its origins as a sentencing principle of the common law long pre-date Mill or Bentham.³²⁴

260. Prior to the enactment of s.16A, it was “perfectly clear” that a court sentencing a federal offender was required to have regard to the need for general deterrence.³²⁵
261. As originally enacted, s.16A did not refer to general deterrence (even though it did refer, in s.16A(2)(j), to specific deterrence). However, despite the omission, s.16A was construed as preserving the requirement for a court sentencing a federal offender to have regard to the need to deter others, through the requirement in s.16A(1) to impose a sentence “*of a severity appropriate in all the circumstances*”, and the requirement in s 16A(2)(k) to have regard to “*the need to ensure that the person is adequately punished for the offence*”.³²⁶
262. Following the insertion of paragraph (ja) in s.16A(2) (with effect from 27 November 2015),³²⁷ general deterrence is now expressly listed as a matter to be taken into account. In *Aitchison*,³²⁸ the Victorian Court of Appeal held that the listing of general deterrence in s.16A(2)(ja) effected no change to the law, and did not support any inference that general deterrence was not previously a factor in the sentencing of a federal offender.

³²³ In *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 378C, the principle of general deterrence was described as “*a fundamental principle of sentencing, inherited from the ages*”. In an oft-quoted passage in *R v Radich* [1954] NZLR 86, 87, it was said that “[i]n all civilised countries, in all ages”, the main purpose of punishment has been “*to protect the public from the commission of ... crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.*”

³²⁴ For example, general deterrence was cited as a principal, or the principal, end of punishment by Francis Bacon (*The Use of the Law* (1630), p.4: “*All Punishment is for Examples sake*”), Edward Coke (*The Third Part of the Institutes of the Laws of England* (1644), p.4: “*the principal end of punishment is, That others by his example may fear to offend*”), Matthew Hale (*The History of the Pleas of the Crown* (1736), Volume 1, p.13: “*the true, or at least, the principal end of punishments is to deter men from the breach of laws*”) and William Blackstone (*Commentaries on the Laws of England* (1765-1769), Book 4, Chapter 18: “*all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example: all of which conduce to one and the same end, of preventing future crimes, whether that be effected by amendment, disability, or example*”).

³²⁵ *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 377F-378B. Examples of references, in cases before the enactment of s.16A, to the need for general deterrence in sentencing federal offenders are *R v Tait* (1979) 24 ALR 473, 485-6; *R v Van Tung Luu* (NSW CCA, 7 December 1984, unreported); and *Laxton v Justice* (1985) 38 SASR 376.

³²⁶ *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370; *R v Paull* (1990) 20 NSWLR 427; *R v Sinclair* (1990) 51 A Crim R 418; *R v Oancea* (1990) 51 A Crim R 141; *R v Carroll* [1991] 2 VR 509, 512; *Tapper v R* (1992) 39 FCR 243; *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332; *R v Phillips* [2008] QCA 284, [4], [68].

³²⁷ The amendment was made by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) and commenced operation on 27 November 2015.

³²⁸ *Aitchison v R* [2015] VSCA 348, [57]-[70]. In refusing special leave to appeal to the High Court (which was sought on this issue), Bell and Gageler JJ said that there was no reason to doubt the correctness of the conclusion of the Court of Appeal: *Aitchison v R* [2016] HCASL 75.

263. General deterrence must be given considerable weight where the offending is of a kind which can cause great harm, including terrorism,³²⁹ serious drug offences,³³⁰ serious frauds on the Commonwealth and its agencies,³³¹ illegal importation of firearms for commercial gain,³³² insider trading and market manipulation,³³³ and offences involving the accessing and possession of child pornography.³³⁴
264. General deterrence is often given particular weight in sentencing for offences committed for financial gain and characterised by premeditation and calculation of risk, because the perpetrators of such offences “are likely to be rational, profit seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished”.³³⁵
265. Where imprisonment is required to give effect to the need for general deterrence, it must be reflected in both the head sentence and in any provision for earlier release from custody; the period that the offender must actually serve in custody is a matter of first importance in ensuring appropriate deterrence and punishment.³³⁶
266. On the other hand, general deterrence should often be given less weight in the case of an offender suffering from mental illness or intellectual handicap.³³⁷ Considerations of general deterrence are also

³²⁹ *R v Demirian* [1989] VR 97, 129-30, 137; *R v Roche* [2005] WASCA 4; *R v Lodhi* [2006] NSWSC 691, [66], [89]-[92], and on appeal in *Lodhi v R* [2007] NSWCCA 360, [78]-[110], [210]-[214], [215], [263]-[277]; *R v Benbrika* [2009] VSC 21, [149], approved on appeal in *Benbrika v R* (2010) 29 VR 593, [557]; *R v Elomar* [2010] NSWSC 10, [77]-[79], cited with approval by the CCA in *Elomar v R* [2014] NSWCCA 303, [640]-[641]; *R v Fattal* [2011] VSC 681, [97] (King J), and on appeal in *DPP (Cth) v Fattal* [2013] VSCA 276, [173]; *DPP (Cth) v MHK* [2017] VSCA 157, [51]-[53]; *DPP (Cth) v Besim* [2017] VSCA 158, [112]; *IM v R* [2019] NSWCCA 107, [50]-[54].

³³⁰ E.g. *R v Tait* (1979) 24 ALR 473, 485-6; *Wong v R* (2001) 207 CLR 584, [64]; *R v Chen* [2002] NSWCCA 174, [286]; *R v Riddell* [2009] NSWCCA 96, [57]-[58]; *Nguyen v R* (2011) VR 673, [34]; *DPP (Cth) v Bui* (2011) 32 VR 149, [38]-[39].

³³¹ E.g. *R v Rossi* (1988) 4 WAR 463, 467; *Kovacevic v Mills* (2000) 76 SASR 404, [37]-[45]; *R v Howe* [2000] NSWCCA 405, [13]-[14]; *R v Milne* [2001] VSCA 93, [12]-[13]; *DPP (Cth) v Alateras* [2004] VSCA 214, [26]; *R v Aller* [2004] NSWCCA 378, [7]-[10]; *R v Hurst* [2005] QCA 25; *R v Alimic* [2006] VSCA 273, [26]; *DPP (Cth) v Rowson* [2007] VSCA 176, [24]; *McGuinness v R* [2008] NSWCCA 80, [44]; *DPP (Cth) v Gregory* (2011) 34 VR 1, [51]-[57], [66]; *R v Huston; ex parte DPP (Cth)* [2011] QCA 350, 213-215, 217 [10]-[21], [33]; *Milne v R* [2012] NSWCCA 24, [296]-[297]; *R v Boughen* [2012] NSWCCA 17, 486-495 [59]-[91], [96]-[98]; *De Faria v Western Australia* [2013] WASCA 116, [159]; *Keefe v R* [2014] VSCA 201, [77]; *Zaky v R* [2015] NSWCCA 161, [49].

³³² E.g. *DPP (Cth) v Munro* [2019] VSCA 89, [91].

³³³ *R v Rivkin* (2004) 59 NSWLR 284; *R v Doff* [2005] NSWCCA 119; *R v Glynatsis* [2013] NSWCCA 131; *Khoo v R* [2013] NSWCCA 323; *Kamay v R* (2015) 47 VR 475.

³³⁴ *DPP v D'Alessandro* (2010) 26 VR 477; *Fitzgerald v R* [2015] NSWCCA 266; *DPP (Cth) and DPP v Watson* [2016] VSCA 73.

³³⁵ *DPP (Cth) v Gregory* (2011) 34 VR 1, [53].

³³⁶ *R v Whitnall* (1993) 42 FCR 512, 518-519; *R v Nguyen* [1997] 1 VR 386, 389; *DPP (Cth) v Carter* [1998] 1 VR 601; *R v Ruha; ex parte DPP (Cth)* [2011] 2 Qd R 456, [45], cited with approval in *Hili v R* (2010) 242 CLR 520, [25], [41]; *DPP (Cth) v Gregory* (2011) 34 VR 1, [66]. Compare *DPP v Bulfin* [1998] 4 VR 114, 131-132.

³³⁷ *Muldrock v R* (2011) 244 CLR 120, [53]-[54]; *Naysmith v R* [2013] WASCA 32. See also *DPP v Sokaluk* [2013] VSCA 48.

commonly moderated in sentencing a young offender,³³⁸ although less so when the offender has been involved in serious and dangerous offending, particularly where the offending has all the hallmarks of adult offending.³³⁹ In sentencing a young offender, the greater the objective gravity of an offence, the less likely it is that general deterrence (or denunciation or retribution) will cede to the interests of rehabilitation.³⁴⁰

4.4.12 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)

267. Paragraph (m) of s 16A(2) requires the sentencing court to have regard to “*the character, antecedents, age, means and physical or mental condition*” of the offender, so far as they are “*relevant and known to the court*”. This diverse collection of considerations, which requires “*an overall personal assessment of the offender as part of the sentencing process*”,³⁴¹ raises a range of issues.

268. **Character - good character:** In *Ryan*,³⁴² the majority held that the sentencing judge had erred when he stated that the offender’s prior good character did not entitle him to “any leniency whatsoever” in circumstances where as a priest he had sexually assaulted young boys over an extensive period of time. If an offender is of otherwise good character the sentencing judge must take that fact into account, but the weight to be given to that fact will depend on all the circumstances of the case.³⁴³

269. Character must be assessed by reference to all the circumstances, not merely the existence or non-existence of previous convictions. So, for example, evidence which establishes that the offender has made a positive contribution to society and has demonstrated a consistent history of philanthropy may carry more weight than a claim to good character based solely upon an absence of previous offending.³⁴⁴ Conversely the fact that a person is a member of a criminal organisation may itself support a conclusion that he or she is of bad character with poor prospects for rehabilitation notwithstanding an otherwise moderate or good prior criminal record.³⁴⁵

270. The weight to be given to previous good character will depend, amongst other things, on the nature and seriousness of the offending. Previous good character will tend to have less significance for some types of offences; examples are importing drugs,³⁴⁶ using a carriage service to procure a person under 16 for

³³⁸ That is, because the offender’s youth is recognised as diminishing the offender’s moral culpability (*DPP v SJK* [2002] VSCA 131, [61]) and because the rehabilitation of young offenders is of substantial, if not primary, importance, not only in the interests of the offender, but also in the interests of the community (*R v Mills* [1998] 4 VR 235, 241).

³³⁹ *DPP (Cth) v MHK* [2017] VSCA 157, [56]-[60], [65]-[67], [73]; *DPP (Cth) v Besim* [2017] VSCA 158, [115]-[116].

³⁴⁰ *DPP (Cth) v Besim* [2017] VSCA 158, [116]. See also *DPP (Cth) v MHK* [2017] VSCA 157, [56]-[60], [65]-[67], [73].

³⁴¹ *Smith v Elliot* [2007] ACTSC 65, [11].

³⁴² *Ryan v R* (2001) 206 CLR 267.

³⁴³ *Ryan v R* (2001) 206 CLR 267 (McHugh, Kirby and Callinan JJ; Gummow and Hayne JJ contra). See also *Wakim v R* [2016] VSCA 301.

³⁴⁴ *Elomar v R* [2018] NSWCCA 224, [116].

³⁴⁵ *R v Pishdari* [2018] SASFC 94, [23]-[24] (Nicholson J, Kourakis CJ agreeing).

³⁴⁶ *R v Leroy* (1984) 2 NSWLR 441, 446 (Street CJ) on the basis that drug couriers are often selected because their past is not likely to attract suspicion. See also *R v Fraser* [2004] VSCA 147, [31]; *R v Ceissman* [2001] NSWCCA 73; *R v Barrientos* [1999] NSWCCA 1; *Sukkar v R (No.2)* [2008] WASCA 2..

sexual purposes³⁴⁷ or child pornography offences.³⁴⁸ The reduced weight given to previous good character (or other factors personal to the offender) is a corollary of the heightened need for general deterrence, denunciation and adequate punishment which generally arises for such offences. Previous good character is generally accorded little weight where the offending has consisted of a course of conduct over a long period of time³⁴⁹ or where it was, directly or indirectly, instrumental in the commission of the offence (for example, if the offence was committed in the course of practice as a solicitor or a tax agent, eligibility for which depended upon good character, or in breach of trust that would not otherwise have been reposed in the offender, or if the offender exploited their standing and reputation to commit the offence).³⁵⁰

271. **Antecedents generally:** “Antecedents” in s 16A(2)(m) refers to more than just prior convictions; it covers a person’s history.³⁵¹

272. The word ‘antecedents’ is wide enough to include all aspects, favourable and unfavourable, of an offender’s background, past life, personal, family, social, employment and vocational circumstances, and of the offender’s current way of life and its interaction with the lives and welfare of others.³⁵² For example, the professional status of an offender or the hardship caused by their bankruptcy may form part of their antecedents.³⁵³ The future effects of a conviction, such as limitations on travel, do not form part of the antecedents of the offender.³⁵⁴

273. **Character and antecedents – other offending:** Although an offender is not to be punished for offending on other occasions, such offending may be relevant to sentencing in a number of ways. For example, an offender’s criminal history may show persistent disregard for the law and the rights of other citizens and negate matters relied upon in mitigation.³⁵⁵ It may cast doubt on the offender’s remorse or contrition. It may be highly relevant to the assessment of the offender’s prospects of rehabilitation and the need for specific deterrence. It may require a focus on community protection.

274. Convictions recorded after the offending (subsequent convictions) form part of the offender’s antecedents and where “*relevant and known*” they must be taken into account.³⁵⁶ A subsequent

³⁴⁷ *R v Gajjar* [2008] VSCA 268, [27].

³⁴⁸ *R v Gent* [2005] NSWCCA 370, [65]-[66].

³⁴⁹ *R v Hermann* (1988) 37 A Crim R 440, 448; *R v Schneider* (1988) 37 A Crim R 395, 397; *R v Ruggiero* (1998) 104 A Crim R 358, 364; *Ryan v R* (2001) 206 CLR 267; *R v Gent* [2005] NSWCCA 370.

³⁵⁰ See, e.g., *Ryan v R* (2001) 206 CLR 267; *DPP (Cth) v Gregory* (2011) 34 VR 1, [53]-[58]; *Dickson v R* [2016] NSWCCA 105, [169].

³⁵¹ This reflects the common law: *Lacco v R* [1984] WAR 153, 155. It should be contrasted with the narrower approach under some State laws (such as *Sentencing Act 1991* (Vic), s 5(2)(f)) which refer only to prior convictions.

³⁵² *Jones v Morley* (1981) 29 SASR 57, 63–65, quoted with approval in *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [27]. Although *Baffsky* was concerned with the term “antecedents” as used in s.19B(1)(b)(i) of the *Crimes Act 1914* (Cth), the Court (at [35]) treated the term as having the same meaning in s.16A(2)(m).

³⁵³ *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [34]-[35], [60]-[61].

³⁵⁴ *R v Barany* [2018] QCA 137, [41].

³⁵⁵ E.g. *Blango v R* [2018] VSCA 210, [54].

³⁵⁶ As to the relevance of such convictions, see *R v McInerney* (1986) 42 SASR 111.

conviction cannot increase the penalty range to a higher range applicable in respect of a second or subsequent offence.

275. **Character and antecedents - diversion:** Where the offender has had the benefit of a charge being diverted rather than adjudicated upon by a court,³⁵⁷ there will be no finding of guilt. The diverted charge is “unjudged conduct”.³⁵⁸ So the diversion of a charge cannot be taken into account in sentencing (as an aspect of character or antecedents) as if it were established criminal conduct.
276. However the existence of a completed diversion may be relevant to ensure the court is not misled if the offender’s behaviour is represented to be out of character or an aberration.³⁵⁹
277. **Character and antecedents - absence of prior convictions:** In *Weininger*,³⁶⁰ the appellant had no prior convictions, but there was evidence (including his statements to an undercover police officer before his arrest) that he was involved in a continuing cocaine importation syndicate. The majority of the High Court held that the sentencing judge was not in error to treat what was known of the offender’s character and antecedents as neither working in his favour nor against him in those circumstances. The majority also added that in the circumstances of the particular case, if the sentencing judge had found beyond reasonable doubt that the offender had previously been knowingly concerned in the importation of cocaine, even though he had no prior convictions, the judge would have been entitled to take the finding into account as warranting the imposition of a heavier sentence.
278. **Age – young offender:** In sentencing young offenders, courts should generally give more weight to rehabilitation, and less weight to general deterrence and denunciation as considerations in sentencing, principally because more severe punishment may in fact lead to further offending.³⁶¹ Young offenders are also commonly more impressionable and more impulsive. These principles may apply to an offender who is more than 21 years of age, but their force diminishes as the age in question increases.³⁶²
279. However, the weight to be given to the youth of an offender, as a mitigating circumstance, generally is reduced where the offence committed by the offender is serious. In such cases, it is recognised that the youth of the offender, while still relevant as a mitigating circumstance, must to a material degree give way to the requirements of general deterrence, specific deterrence and denunciation.³⁶³ The youth of

³⁵⁷ See, e.g., *Criminal Procedure Act 2009* (Vic), s 59.

³⁵⁸ *R v Mills* [1998] 4 VR 235.

³⁵⁹ *Lari v Pavlos* (WA SC (Owen J), 17 May 1996, unreported).

³⁶⁰ *Weininger v R* (2003) 212 CLR 629.

³⁶¹ *R v Mills* [1998] 4 VR 235, 241.

³⁶² *R v Mills* [1998] 4 VR 235. Mitigation may be extended to an offender who is sentenced as an adult for an offence committed as a juvenile, at least where the offender has achieved a significant degree of rehabilitation and there has been no further offending in the meantime, because the assessment of the nature and gravity of the crime, and of the offender’s moral culpability, should take into account that what was done was done as a child, or as a person of immature years: *R v Boland* (2007) 17 VR 300, [16].

³⁶³ *DPP (Cth) v MHK* [2017] VSCA 157, [57]-[60]; *DPP (Cth) v Besim* [2017] VSCA 158, [115]-[116]; *Papachristodoulou v R* [2017] VSCA 284, [37].

an offender has been accorded less significance in sentencing for serious drug offences,³⁶⁴ for terrorism offences,³⁶⁵ and for other offences which have the hallmarks of adult offending (for example, insider trading where the offender was operating in the adult sphere of business and commerce³⁶⁶).

280. **Age – mature-aged offender:** Although the age of an offender is never determinative,³⁶⁷ age may be relevant in sentencing an offender of mature years, in a variety of ways. For example, the need for specific deterrence (s 16A(2)(j)) may be reduced; the offender may have a long period of good character to draw upon; or the offender may suffer from age-related infirmity or ill-health which would make service of the sentence more burdensome.

281. At common law, the age of the offender (particularly if coupled with ill-health) may be a weighty mitigating consideration if it means that a proportionate sentence would result in the offender serving the whole or a very substantial portion of the remainder of their life in custody; in such a case, moderation of other sentencing considerations on compassionate grounds may be warranted.³⁶⁸ Although it is often contended that a sentencing court should avoid a “crushing” sentence – that is, one which would induce a feeling of hopelessness and destroy any expectation of a useful life after release³⁶⁹ – old age and ill health do not justify the imposition of an unacceptably lenient sentence; and the proper application of the principles of general deterrence, denunciation and just punishment may require the imposition of a sentence which will have the effect that the offender may well spend the whole of his or her remaining life in custody.³⁷⁰

282. The same principles have been applied in the sentencing of federal offenders.³⁷¹

283. **Means:** The means of the offender are particularly relevant to the imposition of a financial penalty. However they may also be relevant to assessing the gravity of the offending generally, for example, in determining whether or not the offending was motivated by financial hardship. Such an assessment may result in either mitigation or aggravation of a sentence.

284. Before imposing a fine on a federal offender,³⁷² a court is required to take into account the “financial circumstances” of the offender, in addition to any other matters that the court is required to take into account: *Crimes Act 1914 (Cth)*, s 16C(1). Therefore, before imposing a fine, the court must take into

³⁶⁴ E.g. *R v Ceissman* [2001] NSWCCA 73, [34]-[35]; *Kao v R* [2019] VSCA 84, [61]-[63].

³⁶⁵ E.g. *DPP (Cth) v MHK* [2017] VSCA 157; *DPP (Cth) v Besim* [2017] VSCA 158; *IM v R* [2019] NSWCCA 107, [53]-[56], [61], [64].

³⁶⁶ E.g. *Hartman v R* [2011] NSWCCA 261, [93]; *Kamay v R* (2015) 47 VR 475, [53]-[56].

³⁶⁷ *Barbaro v R* [2012] VSCA 288, [55].

³⁶⁸ *Vella v R* [2001] VSCA 174, [18]; *R v RLP* [2009] VSCA 271, [32]-[39]; *Ljuboja v R* [2011] WASCA 143, [102].

³⁶⁹ *R v Yates* [1985] VR 41, 48; *R v MAK* [2006] NSWCCA 381, [97].

³⁷⁰ *R v RLP* [2009] VSCA 271; *Ljuboja v R* [2011] WASCA 143, [103].

³⁷¹ E.g. *R v Sopher* (1993) 70 A Crim R 570; *R v Hart* [1999] NSWCCA 204; *Barbaro v R* [2012] VSCA 288, [55]; *De Faria v Western Australia* [2013] WASCA 116, [164]-[168]; *Dickson v R* [2016] NSWCCA 105, [198].

³⁷² Section 3(2) of the *Crimes Act 1914 (Cth)* provides that a reference to a “fine” in the Act includes a reference to a pecuniary penalty (other than a pecuniary penalty imposed under Division 3 of Part XIII of the Customs Act 1901, or certain orders under confiscation legislation) and to costs or other amounts ordered to be paid by offenders.

account not only the “means” of the offender (pursuant to s 16A(2)(m)) but also their “financial circumstances” generally. As to the nature and effect of this requirement, see “5.6.4 Means and financial circumstances of offender”.

285. **Physical or mental condition:** The court is required to take into account the physical or mental condition of the defendant, to the extent that it is relevant and known to the court.
286. The requirement in the opening words of s 16A(2) that the matters listed must be taken into account if “*relevant and known to the court*” leaves no room for acting merely on a *presumption* of the existence of a mental condition; the *actual* mental condition of the offender “*must be demonstrated before the provision applies*”.³⁷³ By parity of reasoning, the same principle must apply in relation to a physical condition.
287. It has long been accepted that the physical ill-health of an offender “*will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender’s health*”.³⁷⁴ The principle is applicable to any physical condition, including a physical disability.³⁷⁵ The comparison to be made is not whether the burden of the sentence would be greater for the offender than it would be if the offender were not subject to the sentence, but whether the burden would be greater for the offender than for a person without that condition.³⁷⁶
288. Impaired mental functioning, whether due to acquired brain injury,³⁷⁷ intellectual disability³⁷⁸ or a mental illness,³⁷⁹ may also be relevant to sentencing in a variety of ways. The main ways were summarised by the Victorian Court of Appeal in *Verdins*³⁸⁰ as follows:

Impaired mental functioning, whether temporary or permanent (“the condition”), is relevant to sentencing in at least the following six ways:

1. *The condition may reduce the moral culpability of the offending conduct, as distinct from the offender’s legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.*

³⁷³ *Bui v DPP (Cth)* (2012) 244 CLR 638, [21]-[23],[25],[28]. See also *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194. Under common law principles, it has been said that cogent evidence, normally in the form of an expert opinion, is necessary to establish the existence of the relevant mental impairment (either at the time of the offence, or at sentence, or both) and the nature, extent and effect of the mental impairment experienced by the offender at the relevant time: see *DPP v O’Neill* (2015) 47 VR 395, [77], and the cases cited there.

³⁷⁴ *R v Smith* (1987) 44 SASR 587, 589; cited with approval in *Muldrock v R* (2011) 244 CLR 120, [19].

³⁷⁵ *R v Van Boxtel* (2005) 11 VR 258, [29]-[34].

³⁷⁶ *R v Van Boxtel* (2005) 11 VR 258, [32]-[32], disapproving a contrary view expressed in *R v Boyes* (2004) 8 VR 230.

³⁷⁷ E.g. *R v Scott* [2003] NSWCCA 28.

³⁷⁸ *Ryder v R* [2016] VSCA 3.

³⁷⁹ As to whether a personality disorder should be regarded as capable of constituting impaired mental functioning for the purposes of sentencing, see *DPP v O’Neill* (2015) 47 VR 395.

³⁸⁰ *R v Verdins* (2007) 16 VR 269, [32], reformulating principles previously summarised in *R v Tsiaris* [1996] 1 VR 398.

2. *The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.*
3. *Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.*
4. *Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.*
5. *The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.*
6. *Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.*

289. The principles summarised in *Verdins* have been applied frequently throughout Australia,³⁸¹ including in the sentencing of federal offenders.

290. In order for the first, second, third and fourth principles set out in *Verdins* to have application to the sentencing task, there must be a connection between the impairment to mental functioning and the offender's moral culpability or the need for general and specific deterrence. If the mental impairment existed at the time of the offending, it must have some 'realistic connection' with the offending; or have 'caused or contributed' to the offending; or be 'causally linked' to the offending.³⁸² To show such a connection, the offender must establish that the mental impairment affected the offender's ability to appreciate the wrongfulness of the conduct, or obscured the offender's intent to commit the offence, or impaired the offender's ability to make calm and rational choices or to think clearly at the time of the offence.³⁸³

291. In *Muldrock*,³⁸⁴ which concerned an intellectually-disabled offender, the High Court observed that the question of a causal relation between the condition and the offending was "*less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence.*"³⁸⁵

³⁸¹ E.g. *Leach v R* [2008] NSWCCA 73, [10]-[12]; *Devaney v R* [2012] NSWCCA 285, [74]-[84]; *R v Yarwood* [2011] QCA 367; *Kriestorac v Western Australia* [2010] WASCA 35, [17]-[19]; *Gok v R* [2010] WASCA 185, [53]-[61]; *Suleiman v Western Australia* [2017] WASCA 26, [59]-[62]; *R v Flentjar* [2013] SASCFC 11, [39]-[44]; *DPP v CBF* [2016] TASSCA 1, [36]-[42]; *Millard v R* [2016] ACTCA 14, [30]-[35]; *R v Summerfield* [2018] ACTCA 20, [90]-[104].

³⁸² *DPP v O'Neill* (2015) 47 VR 395, [74].

³⁸³ *DPP v O'Neill* (2015) 47 VR 395, [75].

³⁸⁴ *Muldrock v R* (2011) 244 CLR 120.R

³⁸⁵ *Muldrock v R* (2011) 244 CLR 120, [54]. See also *Naysmith v R* [2013] WASCA 32; *DPP v Sokaluk* [2013] VSCA 48.

292. A main reason why general deterrence may carry less weight in sentencing an offender with impaired mental functioning is that “*such an offender is not an appropriate medium for making an example to others*”.³⁸⁶ Similarly, the retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally disabled offender and to the needs of the community.³⁸⁷ However, “[w]here the mental condition arises as a reaction to the discovery of the offender’s crimes or to the prospect of incarceration, little or no moderation of general deterrence should be allowed in the instinctive synthesis.”³⁸⁸

293. The mental condition of an offender can also be relevant to sentencing in ways that do not mitigate the sentence, as Brennan J pointed out in an oft-cited passage in *Channon*:³⁸⁹

Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender’s psychiatric abnormality. An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem on one view to lead towards a lenient sentence, and on another to a sentence which is severe. That is not an unusual phenomenon in sentencing, where the court must fashion a sentence which either reconciles or balances the various objectives of sentencing, sometimes giving emphasis to one of the objectives of sentencing, sometimes giving emphasis to another. Although the court necessarily adopts a pragmatic approach, the judicial discretion is not at large, without guidance from principle. That guidance is found in the basic purpose which is to be served by the exercise of the sentencing power.

294. The mental condition of a federal offender may, for example, underlie a lack of contrition (s 16A(2)(f)), or contribute to an adverse assessment of the offender’s prospects of rehabilitation (s 16A(2)(n)), or heighten the need for specific deterrence (s 16A(2)(j))³⁹⁰ or affect the determination of a sentence which provides effective protection of the community.³⁹¹

4.4.13 Prospects of rehabilitation – s 16A(2)(n)

295. One of the long-standing aims of sentencing is to promote the rehabilitation of offenders. It is often of particular significance in the sentencing of young offenders. Although assessment of an offender’s

³⁸⁶ *R v Mooney* (Vic CCA, 21 June 1978, unreported), 5 (Young CJ), quoted with approval in *Muldrock v R* (2011) 244 CLR 120, [53]-[54]. But reduced mental capacity will not necessarily be such as to preclude the full application of the principles of general deterrence: *Qui v R* [2019] VSCA 147, [76].

³⁸⁷ *Muldrock v R* (2011) 244 CLR 120, [54] (paraphrasing what Lush J said in *R v Mooney* (Vic CCA, 21 June 1978, unreported)).

³⁸⁸ *R v RLP* [2009] VSCA 271, [30].

³⁸⁹ *Channon v R* (1978) 33 FLR 433, 436-437.

³⁹⁰ *DPP (Cth) v Beattie* [2017] NSWCCA 301, [202]-[205].

³⁹¹ *Veen v R (No 2)* (1987) 164 CLR 465. See “4.5.1 Community protection”.

prospects of rehabilitation is often linked to an assessment of the need for specific deterrence (s 16A(2)(j)), the two factors are distinct.

296. Assessment of the prospects of rehabilitation is often difficult, especially when there is little evidence independent of the offender on which to base the assessment.
297. The weight to be given to an offender's prospects of rehabilitation will depend on all the circumstances. If general deterrence and denunciation are primary considerations in sentencing for the particular offence, even good prospects of rehabilitation will not preclude the imposition of a stern sentence. On the other hand, if at the time of sentencing an offender is well advanced on the path to rehabilitation, a sentencing court may be reluctant to impose a sentence which interrupts that progress. That is a factor of particular significance when an appellate court, on a prosecution appeal, is considering whether to impose an immediate custodial sentence on an offender who is not then in custody.³⁹²

4.4.14 Effect on Family – s 16A(2)(p)

298. Unlike other factors listed in s 16A(2) of the *Crimes Act 1914*, the “*the probable effect that any sentence or order under consideration would have on any of the person's family or dependants*” (s 16A(2)(p)) is concerned with neither the offence nor the offender, but with the consequences of punishment for a third party. It is not a mitigating factor, properly so called; it is in substance an appeal for mercy.³⁹³
299. Adverse consequences for family or dependants are a commonplace incident of sentencing (and an almost inevitable consequence of imprisonment).³⁹⁴ Reduction of punishment because of the effect on a third party tends to cause unequal treatment of offenders and to be contrary to the purposes of sentencing. For these and other reasons the common law has long treated such hardship as warranting mitigation only in exceptional circumstances.³⁹⁵ The plea for mercy must be irresistible, so that to refuse it would be inhumane.³⁹⁶ The occasions for reducing a sentence on this basis will be rare.³⁹⁷
300. The provision on which s 16A(2)(p) was based, s 10(n) of the *Criminal Law (Sentencing) Act 1988* (SA),³⁹⁸ had been interpreted in light of the common law history as preserving the common law position, rather

³⁹² E.g. *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, [72]-[73].

³⁹³ *Markovic v R* (2010) 30 VR 589; *DPP (Cth) v Bui* (2011) 32 VR 149, [21]-[22].

³⁹⁴ *R v Wirth* (1976) 14 SASR 291, 295-6; *R v Edwards* (1996) 90 A Crim R 510, 515. Similarly, other inherent consequences of a sentence, such as sex offender registration (*DPP v Ellis* (2005) 11 VR 287), or uncertainty and anxiety about relationships and future prospects (*Hickling v Western Australia* [2016] WASCA 124, [60]), do not ordinarily constitute mitigating circumstances.

³⁹⁵ See, e.g., *R v Wirth* (1976) 14 SASR 291.

³⁹⁶ *R v Wirth* (1976) 14 SASR 291, 295-6; *R v Edwards* (1996) 90 A Crim R 510, 515; *Markovic v R* (2010) 30 VR 589, [6]-[13].

³⁹⁷ *Markovic v R* (2010) 30 VR 589, [77].

³⁹⁸ *R v Berlinksy* [2005] SASC 316, [30].

than removing the requirement for exceptional circumstances.³⁹⁹ Section 16A(2)(p) was enacted against that background.

301. Appellate courts in New South Wales,⁴⁰⁰ Victoria,⁴⁰¹ Queensland,⁴⁰² Western Australia⁴⁰³ and South Australia,⁴⁰⁴ and single judges of the Supreme Court of Tasmania,⁴⁰⁵ have all construed s 16A(2)(p) as preserving the common law requirement of exceptional circumstances. Only the ACT Court of Appeal has adopted a contrary construction, that exceptional circumstances are not required;⁴⁰⁶ and that decision was made without reference to many of the contrary authorities, or to the history of the provision, or to the policy considerations underlying it.

302. Paragraph 16A(2)(p) requires that hardship to family or dependants must be “*the probable effect*” of the sentence or order; a merely possible effect is not sufficient.⁴⁰⁷ It is an error to refer to the existence of exceptional circumstances in the context of family hardship in terms of risk; such matters are to be assessed on the balance of probabilities.⁴⁰⁸ If necessary, the court may defer sentencing to enable assessment of the probable effect;⁴⁰⁹ in some cases, it may be an error not to do so.⁴¹⁰

303. As is the case at common law, reductions of sentence under s 16A(2)(p) will be rare.⁴¹¹ Hardship must, on its own rather than in combination with other factors, be judged to be exceptional before it can be taken into account as a sentencing factor under s 16A(2)(p).⁴¹²

³⁹⁹ *R v Adami* (1989) 51 SASR 229. This decision has been followed and applied many times in the construction of the South Australian statute.

⁴⁰⁰ *R v Ceissman* [2001] NSWCCA 73, [36]; *R v Togias* [2001] NSWCCA 522, [8]-[17], [69]-[88], and the cases cited there; *R v Hinton* [2002] NSWCCA 405; *Le v R* [2006] NSWCCA 136, [25]; *Van Eeden v R* [2012] NSWCCA 18; *R v Zerafa* [2013] NSWCCA 222; *R v Lin* [2014] NSWCCA 254, [71]; *Huynh v R* [2015] NSWCCA 167, [33]-[34]. Despite minority judgments or *obiter dicta* in some recent cases favouring a contrary view (e.g. *R v Zerafa* [2013] NSWCCA 222, [107]-[149]; *Elshani v R* [2015] NSWCCA 254, [35], [40]-[41]; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [45]-[64], [162], [164]; *Kaveh v R* [2017] NSWCCA 52, [5]-[6]), *Togias* continues to be binding authority.

⁴⁰¹ *R v Matthews* (1996) 130 FLR 230; *R v Carmody* (1998) 100 A Crim R 41, 45; *DPP (Cth) v Gaw* [2006] VSCA 51; *Markovic v R* (2010) 30 VR 589; *DPP (Cth) v Bui* (2011) 32 VR 149, [20]-[30].

⁴⁰² *R v Huston; ex parte DPP (Cth)* [2011] QCA 350, [46]-[51].

⁴⁰³ *R v Sinclair* (1990) 51 A Crim R 418.

⁴⁰⁴ *R v Berlinksy* [2005] SASC 316, [30]; *R v Constant* [2016] SASCFC 87, [53]-[67].

⁴⁰⁵ *McAree v Barr* [2006] TASSC 37, [21]; *Lewis v Duffin* [2012] TASSC 58, [29].

⁴⁰⁶ *DPP v Ip* [2005] ACTCA 24, [60]-[61].

⁴⁰⁷ *R v Togias* [2001] NSWCCA 522, [10].

⁴⁰⁸ *DPP (Cth) v Bui* (2011) 32 VR 149, [28].

⁴⁰⁹ *R v Togias* [2001] NSWCCA 522, [6]-[7], [66]-[67].

⁴¹⁰ E.g. *Togias* [2001] NSWCCA 522; *Nguyen v R* [2001] WASCA 72, [12], [70]-[72]. *Nguyen* should be understood as based on the overriding duty of a court to prevent a miscarriage of justice, in spite of the failure of defence counsel to provide necessary information and assistance.

⁴¹¹ *Markovic v R* (2010) 30 VR 589, [77]. The Court there cited many cases of undoubted hardship which had been held by appellate courts to fall short of exceptional circumstances (see also *DPP (Cth) v Bui* (2011) 32 VR 149), and (at [78]) a much smaller number of cases in which exceptional circumstances were made out. See also *El-Hage v R* [2012] VSCA 309; *Elshani v R* [2015] NSWCCA 254.

⁴¹² *Markovic v R* (2010) 30 VR 589, [15]; *DPP (Cth) v Bui* (2011) 32 VR 149, [27]; *TAN v R* (2011) 35 VR 109, [68]-[71].

304. In *Gaw*,⁴¹³ Callaway JA (with whom Eames and Ashley JJA agreed) said “*Hardship, even exceptional hardship, to children or other dependants is not a passport to freedom. It is simply a factor to be taken into account. In some cases it is entitled to great weight, in others to hardly any weight at all.*”
305. If hardship to family is taken into account, it may affect either the type of sentence imposed or the duration of any period of imprisonment to be served. In some cases, the gravity of the offending may be such as to require that the offender serve a term of imprisonment despite a finding of exceptional hardship to a family member, but the exceptional hardship may warrant a reduction of the period of imprisonment to be served.⁴¹⁴
306. If the relevant circumstances are not shown to be exceptional, so that s 16A(2)(p) is not engaged, there can be no ‘residual discretion’ to exercise mercy on grounds of family hardship.⁴¹⁵
307. *The effect on the offender* of the hardship which their imprisonment will cause to their family raises different considerations and may be taken into account even if there are no exceptional circumstances.⁴¹⁶ This is a matter that may fall for consideration under, for example, s 16A(2)(j), s 16A(2)(m) or s 16A(2)(n).

4.5 Other matters not referred to in s 16A(2)

308. The list of factors in s.16A(2) is not exhaustive of the matters which must be taken into account in sentencing a federal offender. As noted earlier, s 16A(2) accommodates the application of some judicially-developed principles of sentencing. Such principles will not apply, however, if they are inconsistent with the requirements of s 16A on its proper construction, or with other Commonwealth laws, or if Commonwealth law leaves no gap to be filled by common law principles.⁴¹⁷
309. The following are some matters which are not referred to in s 16A(2), and which have been argued to be applicable in the sentencing of federal offenders.

4.5.1 Community protection

310. All the main purposes of punishment tend ultimately towards protection of the community from crime. However references to the need to protect the community as a purpose of sentencing usually advert more specifically to the purpose of preventing the offender from committing a further offence, or reducing the risk that the offender will do so – not indirectly, by seeking to deter or to rehabilitate the offender, but directly, by incarceration or other measures to make commission of further offences impossible, or at least more difficult. In appropriate cases, the need to protect the community by such direct means (often referred to as incapacitation) is a legitimate purpose of sentencing, independent of other purposes such general or specific deterrence, or denunciation, or rehabilitation, and may warrant

⁴¹³ *DPP (Cth) v Gaw* [2006] VSCA 51, [21].

⁴¹⁴ Examples are *R v Pennant* [1998] 2 VR 453 and *Zhou v R* [2014] VSCA 123, [18]-[19], [21].

⁴¹⁵ *Markovic v R* (2010) 30 VR 589, [5], [12]-[19].

⁴¹⁶ *Markovic v R* (2010) 30 VR 589, [5], [20].

⁴¹⁷ *Bui v DPP (Cth)* (2012) 244 CLR 638.

a more severe sentence. However (except as provided by statute) the need to protect the community does not permit the imposition of a sentence which is disproportionate to the seriousness of the offending.⁴¹⁸

311. This well-established common law principle has been applied in the sentencing of federal offenders, especially for preparatory terrorism offences.⁴¹⁹ Community protection will be of particular importance in sentencing those who commit such offences. Such offenders pose a very real danger to the community.⁴²⁰ The sentencing court is not simply concerned with future criminal conduct of a recidivist character, but with the possibility of perfection of the very crime for the preparation of which the offender has been found guilty.⁴²¹ In such cases the element of protection of society must be given substantial weight.⁴²²

312. However the relevance of the principle of incapacitation or community protection is not confined to a particular class of offence. The protection of the community may be an important consideration in sentencing an offender whenever the nature and circumstances of the offending and of the offender are such as to suggest that the offender presents a danger to the community.

4.5.2 Parity

313. It is well-established that the common law requirements for a sentencing court to avoid unjustified disparity in the sentences imposed on co-offenders⁴²³ apply to the sentencing of federal offenders.⁴²⁴

314. Whether there is unjustified disparity is to be assessed by an objective comparison with the co-offender's case. Matters which must be considered include factors personal to the offender (such as age, background, criminal history and general character) and the part each has played in the relevant criminal conduct or enterprise.⁴²⁵

315. The foundation of the parity principle in the norm of equality before the law requires that its application be governed by consideration of substance rather than form; therefore the comparison is not confined

⁴¹⁸ *Veen v R (No 2)* (1987) 164 CLR 465, 473-6.

⁴¹⁹ *Lodhi v R* [2007] NSWCCA 360, [87]-[88], [92], [274]; *Elomar v R* [2014] NSWCCA 303, [699]-[704]; *DPP (Cth) v Fattal* [2013] VSCA 276, [181], [218], [231]; *DPP (Cth) v MHK* [2017] VSCA 157, [51], [54], [66]; *DPP (Cth) v Besim* [2017] VSCA 158, [112]-[114]; *IM v R* [2019] NSWCCA 107, [50]-[54].

⁴²⁰ *DPP (Cth) v MHK* [2017] VSCA 157, [54]. If, when sentenced, the offender has not renounced the views that underlay the offending, the continuing danger is particularly great: compare *Lodhi v R* [2007] NSWCCA 360, [82]-[83], [88]; *DPP (Cth) v Fattal* [2013] VSCA 276, [181], [218]; *DPP (Cth) v Besim* [2017] VSCA 158, [112]-[114].

⁴²¹ *Lodhi v R* [2007] NSWCCA 360, [108].

⁴²² *Lodhi v R* [2007] NSWCCA 360, [109]; *DPP (Cth) v MHK* [2017] VSCA 157, [54].

⁴²³ *Lowe v R* (1984) 154 CLR 606; *Green v R* (2011) 244 CLR 462.

⁴²⁴ *Postiglione v R* (1997) 189 CLR 295.

⁴²⁵ *Green v R* (2011) 244 CLR 462, [31].

to offenders charged with the same offence.⁴²⁶ This approach also applies in the sentencing of federal offenders.⁴²⁷

316. The proper limits of the application of principles of parity and equal justice to persons who are not co-offenders in the conventional sense is the subject of conflicting authority. In Victoria, parity (or equal justice) comparisons may be made with offenders who are neither co-offenders nor parties to the same criminal enterprise, if there is some other connection such as a common victim.⁴²⁸ Courts in Queensland⁴²⁹ and New South Wales⁴³⁰ have refused to extend parity (or equal justice) comparisons so far.

317. The greater the differences in nature and seriousness between the crimes charged, the more difficult the application of the parity principle will become, to the point where the differences are so great that the principle can no longer be applied.⁴³¹

4.5.3 Delay

Common law principles

318. Delay between the detection of the offending and the bringing of charges, or in the hearing and determination of charges, or in sentencing, is not, of itself, a mitigating factor.⁴³² However delay (that is, delay which is undue, unwarranted or inordinate in the particular circumstances⁴³³) may be relevant to sentence in two principal ways.

319. First, as a result of the delay, the offender may have made progress towards rehabilitation, and the need for specific deterrence may accordingly be moderated.⁴³⁴ Where there has been a relatively lengthy process of rehabilitation, insofar as circumstances permit, that process should not be jeopardised.⁴³⁵ If, on the other hand, the offender has engaged in further offending since the detection of the initial offending, such mitigatory effect as the lapse of time between detection and sentencing might have produced may be diminished, if not extinguished.⁴³⁶

⁴²⁶ *Green v R* (2011) 244 CLR 462, [30].

⁴²⁷ E.g. *Jimmy v R* (2010) 77 NSWLR 540; *DPP (Cth) v Gregory* (2011) 34 VR 1, [26]-[28]; *DPP (Cth) v Peng* [2014] VSCA 128, [33].

⁴²⁸ *Farrugia v R* (2011) 32 VR 140.

⁴²⁹ The Queensland Court of Appeal has declined to follow *Farrugia*: see *R v Leathers* [2014] QCA 327; *R v Hughes* [2018] 2 Qd R 134.

⁴³⁰ *Baladjam v R* [2018] NSWCCA 304, [146]-[149].

⁴³¹ *Jimmy v R* (2010) 77 NSWLR 540, [203]; *DPP (Cth) v Gregory* (2011) 34 VR 1, [26]-[28].

⁴³² *Prehn v R* [2003] TASSC 55, [21]; *Scook v R* [2008] WASCA 114, [31], [58].

⁴³³ In *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [93], Basten JA (with whom S Campbell and N Adams JJ agreed) observed, “in order to characterise a lapse of time as involving unwarranted delay, it may be necessary to form some judgment about what can reasonably be expected of the criminal justice system in its application to the particular circumstances of the proceedings.”

⁴³⁴ *Duncan v R* (1983) 9 A Crim R 354, 356-7; *R v MWH* [2001] VSCA 196, [18].

⁴³⁵ *R v Cockerell* [2001] VSCA 239, [10]; *Fattah v R* [2016] VSCA 43, [8], [37]-[48]; *Hicks v R* [2016] VSCA 162, [23].

⁴³⁶ *Sergi v DPP (Cth)* [2015] VSCA 181, [43].

320. Second, fairness dictates that the fact that an offender has been kept in suspense as to his or her fate should be taken into account in mitigation.⁴³⁷ Further, if during the period of delay the offender has adopted a reasonable expectation that he or she would not be charged, or that a pending prosecution would not proceed, and the offender has ordered his or her affairs on the faith of that expectation, fairness may require mitigation of the sentence.⁴³⁸ Underlying this approach is the notion that the consequences of the delay (particularly stress or anxiety) may, in effect, constitute additional punishment of the offender.⁴³⁹
321. When considering whether a delay requires an element of fairness to be taken into account as a mitigating factor, the court must have regard to the degree to which the accused had control over the length of that delay.⁴⁴⁰ An accused person is not to be regarded as at fault merely for exercising the right to contest a charge.⁴⁴¹ If the delay is no more than an inevitable consequence of the length or complexity of the offending, or the steps taken by the offender to prevent detection, or the refusal of the offender to co-operate in the investigation of a complex fraud, or the resulting scale of the investigation or the prosecution case, it will often carry little or no weight in mitigation.⁴⁴² Moreover, to the extent that delay is directly attributable to the conduct of an accused person (for example, by absconding, or by lying to investigators, or by obstructive tactics in the trial), it would often be contrary to the public interest to mitigate the sentence because of the delay.⁴⁴³
322. Some authorities proceed on the basis that fairness to the offender does not require that delay (although excessive) which is merely the inevitable consequence of an overburdened criminal justice system be treated as mitigating.⁴⁴⁴ In other cases, however, courts have proceeded on the basis that stress and anxiety resulting from any undue delay which is caused by the prosecutorial process or the administration of the courts (and not attributable to the actions of the offender) may be treated as a factor in mitigation.⁴⁴⁵

⁴³⁷ *R v Todd* [1982] 2 NSWLR 517, 519; *Mill v R* (1988) 166 CLR 59, 66; *R v Cockerell* [2001] VSCA 239, [10]; *R v Tiburcy* [2006] VSCA 244; *Arthars v R* (2013) 39 VR 613, [25]. However see *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194 (discussed below) as to the relevance of stress or anxiety resulting from delay in the sentencing of a federal offender.

⁴³⁸ *R v Schwabegger* [1998] 4 VR 649; *Scook v R* [2008] WASCA 114, [32], [63].

⁴³⁹ E.g. *R v Katsoulis* [2008] VSCA 278, [13]-[14]; *R v Cox* [2013] QCA 10, [101].

⁴⁴⁰ *Arthars v R* (2013) 39 VR 613, [28].

⁴⁴¹ *Arthars v R* (2013) 39 VR 613, [27]; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [92].

⁴⁴² See *R v Nikodjevic* [2004] VSCA 222, [20]; *Scook v R* [2008] WASCA 114, [59]-[60]; *Day v R* [2011] VSCA 243, [11]-[22]; *Giourtalis v R* [2013] NSWCCA 216, [1791]; *Zhou v R* [2014] VSCA 123; *Sergi v DPP (Cth)* [2015] VSCA 181, [44]-[48].

⁴⁴³ *R v Shore* (1992) 66 A Crim R 37, 47; *R v Whyte* (2004) 7 VR 397, [25]-[27]; *R v ONA* (2009) 24 VR 197, [4].

⁴⁴⁴ E.g. *Scook v R* [2008] WASCA 114, [33], [61]; *Longworth v R* [2017] NSWCCA 119, [33]-[37]. Cf. *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [105].

⁴⁴⁵ *Crawley v R* (1981) 36 ALR 241, 244, 247-8, 255; *R v Cockerell* [2001] VSCA 239, [10]; *R v Melrose* [2016] QCA 202, [25]-[27]. But, in relation to the sentencing of federal offenders, see *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, which is discussed below.

323. There is no automatic discount in every case of asserted delay; the reasons and circumstances surrounding any delay need to be examined in each case.⁴⁴⁶ In the general run of cases, delay will attract a significant discount only where the sentencing court concludes that there has been real progress towards rehabilitation as such or where other favourable factors have positively emerged in the time between the offences and the passing of sentence.⁴⁴⁷

324. An offender who relies upon delay as a factor in mitigation of sentence bears the onus of establishing, on the balance of probabilities, the basis upon which mitigation is said to be warranted.⁴⁴⁸

Interaction with Crimes Act 1914, s 16A

325. Although the common law principles regarding delay have frequently been applied in the sentencing of federal offenders,⁴⁴⁹ there has been relatively little analysis of the consistency of those principles with the provisions of s 16A of the *Crimes Act 1914* (Cth), which is the starting point in ascertaining the considerations relevant to the sentencing of a federal offender.

326. In *Scook*,⁴⁵⁰ McLure JA (with whom Buss and Miller JJA agreed) said,
Delay itself is not one of the mandatory sentencing matters listed in s 16A(2) of the *Crimes Act 1914* (Cth). Its relevance or otherwise to the sentencing of Commonwealth offenders will depend on the circumstances of the case. The principles articulated by State courts in sentencing State and Commonwealth offenders serve as a guide.

327. In *Pratten (No 2)*,⁴⁵¹ Basten JA (with whom S Campbell and N Adams JJ agreed) referred to a number of factors specified in s 16A(2)⁴⁵² as examples of ways in which delay may be relevant in the sentencing of a federal offender. His Honour made two significant points about those statutory factors.

328. First, Basten JA referred to passages in some of the authorities involving the sentencing of federal offenders which suggest that mitigation should be accorded where delay is attributable to the dilatoriness or neglect on the part of the state or its instrumentalities.⁴⁵³ His Honour noted that, in relation to the sentencing of a federal offender, such a suggestion “*has not been located squarely within any of the factors listed in s 16A(2). Nor does it self-evidently have such a home.*”⁴⁵⁴ Absent statutory

⁴⁴⁶ *R v Merrett* (2007) 14 VR 392, [34]; *Day v R* [2011] VSCA 243, [19]-[21]; *Arthurs v R* (2013) 39 VR 613, [29]-[30]; *Zhou v R* [2014] VSCA 123, [22]. Cf. *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [89]-[100].

⁴⁴⁷ *Bell v R* [2001] WASCA 40, [8].

⁴⁴⁸ *Sabra v R* [2015] NSWCCA 38, [47]; *Hill v R* [2017] NSWCCA 136, [226].

⁴⁴⁹ For example, *R v Schwabegger* [1998] 4 VR 649; *R v Kearnes* [2003] NSWCCA 367; *Prehn v R* [2003] TASSC 55; *Scook v R* [2008] WASCA 114; *Giourtalis v R* [2013] NSWCCA 216; *Zhou v R* [2014] VSCA 123; *Sergi v DPP (Cth)* [2015] VSCA 181; *Sabra v R* [2015] NSWCCA 38; *R v Melrose* [2016] QCA 202.

⁴⁵⁰ *Scook v R* [2008] WASCA 114, [16].

⁴⁵¹ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194.

⁴⁵² Basten JA instanced paragraphs (fa), (g), (h), (m) and (n) of s 16A(2): *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [96], [100].

⁴⁵³ *R v Schwabegger* [1998] 4 VR 649; *Scook v R* [2008] WASCA 114, [21], [64]. See also *Crawley v R* (1981) 36 ALR 241, 244, 247-8, 255; *R v Blanco* [1999] NSWCCA 121, [17]; *R v Cockerell* [2001] VSCA 239, [10].

⁴⁵⁴ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [100].

authority, in sentencing a federal offender the severity of the penalty should not be reduced as an expression of disapproval of the conduct of the prosecutor or investigating authority.⁴⁵⁵

329. Second, with regard to stress or anxiety resulting from delay, Basten JA pointed out that stress and anxiety are a natural consequence of being charged and then convicted of serious criminal offences.⁴⁵⁶ If they are to affect the severity of the sentence of a federal offender, it will be through the considerations referred to in s 16A(2).⁴⁵⁷ The relevant factors in s 16A(2) are the “*physical or mental condition*” of the offender (s 16A(2)(m)).⁴⁵⁸ In accordance with the High Court decision in *Bui*,⁴⁵⁹ his Honour said, these should be established as actual, not presumed, conditions.⁴⁶⁰ In other words, it follows from *Bui*⁴⁶¹ that if delay is invoked in mitigation, on the basis that it has caused or exacerbated the offender’s stress, anxiety, depression or other “*physical or mental condition*”, neither the condition nor its cause can be presumed, and must be established by evidence (or concession).

4.5.4 Cooperation in the conduct of criminal proceedings against the offender

330. Cooperation with law enforcement agencies is specified as a factor in s 16A(2)(h), but cooperation in the conduct of criminal proceedings against the offender (for example, by making admissions to avoid putting the prosecution to proof of particular matters) is not.

331. Cooperation of the latter kind may show remorse or contrition (s 16A(2)(f)) and may be mitigating to that extent. But even if remorse has not been shown, cooperation with the prosecution and facilitation of the conduct of criminal proceedings against the offender may be taken into account as a mitigating factor in sentencing for its utilitarian value.⁴⁶²

332. There is no automatic entitlement to a reduction in sentence for cooperation; each case will depend upon its own circumstances.⁴⁶³ For example, mere compliance with a statutory obligation to take steps to identify the real issues in dispute, to reduce the length of the trial and to avoid the calling of witnesses

⁴⁵⁵ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [100].

⁴⁵⁶ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [113].

⁴⁵⁷ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [113].

⁴⁵⁸ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [96].

⁴⁵⁹ *Bui v DPP (Cth)* (2012) 244 CLR 638.

⁴⁶⁰ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [96]. In *Pratten*’s case itself, there was evidence that the offender had long-standing symptoms of depression, chronic stress, anxiety and low self-esteem, and that the length of the unresolved proceedings was an important contributing factor to his condition ([106]-[112]). The Court of Criminal Appeal concluded that to the extent that stress and anxiety may be due in part to periods of unwarranted delay in the prosecution of the proceedings, “*some allowance should be made*” in determining the appropriate sentence, but that “*the effect would not be of great significance*” ([113]).

⁴⁶¹ See *Bui v DPP (Cth)* (2012) 244 CLR 638, [21]-[23], endorsing the view of Simpson J in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 11, [279]-[280].

⁴⁶² *R v Doff* [2005] NSWCCA 119, [58]; *R v Maya* [2012] QCA 123; *Karam v R* [2015] VSCA 50, [145]-[156]; *Higgs v R* [2015] VSCA 223, [50]-[52].

⁴⁶³ *Karam v R* [2015] VSCA 50, [156]; *Stipkovich v R* [2018] WASCA 63, [53]. Compare *Bui v DPP (Cth)* (2012) 244 CLR 638, [19], where the court said (in relation to a claimed entitlement to a reduction in sentence in another context), “*Application of an automatic discount would not be consistent with the requirement of s 16A(1) [of the Crimes Act 1914] that a sentence be appropriate in its severity in all the circumstances of the case*”.

whose evidence was not in dispute or whose presence was not essential would only warrant a reduction in sentence in exceptional circumstances.⁴⁶⁴ Also, if admissions were made for strategic reasons (e.g. in the conduct of a “confess and avoid” defence, or because there was no forensic advantage in prolonging a trial by putting in issue matters that the Crown was plainly in a position to prove), there may be no real utilitarian benefit and therefore no justification for mitigation.⁴⁶⁵

333. Conversely, an offender’s *lack of cooperation*, or even obstruction, in the conduct of criminal proceedings cannot generally be treated as itself an aggravating factor in sentencing.⁴⁶⁶ However it may be relevant in various ways, such as in determining whether contrition is shown (*Crimes Act 1914*, s 16A(2)(f)), in assessing the offender’s prospects of rehabilitation (s 16A(2)(n)), and in determining the weight to be given to specific deterrence (s 16A(2)(j)).

334. Also, a court sentencing a federal offender is required (by s 16A(2)(fa)) to have regard to the extent to which the offender has failed to comply with an order of the Federal Court, or an obligation under a law of the Commonwealth or a State or Territory law applied by s 68(1) of the *Judiciary Act 1903* (Cth), about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence.

4.5.5 Cultural background of the offender

335. For offences committed on or after 13 December 2006 it is no longer mandatory to take into account the defendant’s cultural background (which was previously one of the matters listed in s 16A(2)(m) of the *Crimes Act 1914* (Cth)).⁴⁶⁷ In addition, for offences committed on or after that date, the court must not take into account any form of customary law or cultural practice in mitigation or aggravation of the offending – see *Crimes Act 1914* (Cth), s 16A(2A).⁴⁶⁸

336. These amendments arose out of a decision by the Council of Australian Governments in July 2006 that laws should reflect the principle that no customary law or cultural practice lessens the seriousness of violence or sexual abuse. The Act appears to be designed as a model to encourage States and Territories to adopt similar provisions. The Act also applies the prohibition on taking customary law or cultural practice as mitigation on the question of bail.

4.5.6 “Extra-curial punishment” generally

337. At common law, a sentencing court may have regard to “extra-curial punishment”, that is loss or detriment imposed on an offender by persons other than the sentencing court for the purpose of

⁴⁶⁴ *Deakes v R* [2002] VSCA 136, [35]–[39]. As to *non-compliance* with such an obligation, see *Crimes Act 1914* (Cth), s 16A(2)(fa).

⁴⁶⁵ *Karam v R* [2015] VSCA 50, [156]–[159]; *Higgs v R* [2015] VSCA 223, [50]–[52].

⁴⁶⁶ *R v Gray* [1977] VR 225, 231; *Yam v R* (1991) 55 A Crim R 116, 117; *Billis v R* (WA CCA, 24 February 1997, unreported), 11; *Siganto v R* (1998) 194 CLR 656, 663–664.

⁴⁶⁷ See *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) effective from 12 December 2006 – Item 4 in Schedule 1. The relevant Explanatory Memorandum makes clear that the court may take into account an offender’s cultural background, should this be appropriate, other than as a mitigating or aggravating factor.

⁴⁶⁸ See *TAN v R* (2011) 35 VR 109 and *Pham v R* [2012] VSCA 101 for cases where cultural practice was taken into account for offending prior to 13 December 2006.

punishing the offender for the offence or at least by reason of the offender having committed the offence.⁴⁶⁹ The paradigm example is retributive assault.⁴⁷⁰

338. The term “extra-curial punishment” has not been applied with rigour and has been used on occasions in a manner which extends beyond its proper reach: for example, it is doubtful whether legal consequences of a kind which flow directly from the conviction or the sentence, such as disqualification from holding an office, remaining in an occupation or holding a licence, should be regarded as extra curial punishment.⁴⁷¹
339. Detection and punishment of a criminal offence may have a range of adverse consequences for an offender. For example it may lead to a loss of employment or destruction of a business,⁴⁷² disqualification from public office, the loss of superannuation benefits,⁴⁷³ banning or disqualification from the management of a corporation,⁴⁷⁴ suspension or cancellation of an occupational licence or a right to practise a profession,⁴⁷⁵ cancellation of a visa or deportation,⁴⁷⁶ penalty taxes,⁴⁷⁷ or the forfeiture or other confiscation of property pursuant to statute.⁴⁷⁸ Sentencing courts have often treated such matters as “extra-curial punishment”, even when the label is inapposite.⁴⁷⁹
340. In principle, adverse consequences should not be treated as “extra-curial punishment” unless they can be shown to be causally related to the offending,⁴⁸⁰ and to be more than an ordinary incident or inevitable consequence of the sentence imposed.⁴⁸¹
341. Since abuse of a professional position is usually an aggravating factor, disqualification from holding such a position which results from such abuse will not generally be a significant mitigating factor, especially if the disqualification is primarily intended to ensure the protection of the public rather than to punish

⁴⁶⁹ *R v Silvano* [2008] NSWCCA 118, [29].

⁴⁷⁰ E.g. *R v Silvano* [2008] NSWCCA 118. See the authorities cited in *Einfeld v R* [2010] NSWCCA 87, [87].

⁴⁷¹ *Einfeld v R* [2010] NSWCCA 87, [86].

⁴⁷² E.g. *Cargnello v DPP (Cth)* [2012] NSWCCA 162, [57]-[62].

⁴⁷³ E.g. *R v Wright (No 2)* [1968] VR 174, 180; *R v Bulger* [1990] 2 Qd R 559.

⁴⁷⁴ E.g. *R v Rivkin* [2003] NSWSC 447, [54] (referred to with apparent approval on appeal: *R v Rivkin* (2004) 59 NSWLR 284, [211]-[212]).

⁴⁷⁵ E.g. *Einfeld v R* [2010] NSWCCA 87, [85]-[97]; *Parente v R* (2017) 96 NSWLR 633, [32], [126].

⁴⁷⁶ See “4.5.7 Prospect of visa cancellation and deportation”.

⁴⁷⁷ E.g. *R v Ronen* [2006] NSWCCA 123.

⁴⁷⁸ See “4.5.8 Orders under Proceeds of Crime Act 2002 (Cth)”, “4.5.9 Prospect of a future order under Proceeds of Crime Act 2002 (Cth)”, “4.5.11 Forfeiture by operation of law” and “4.5.12 Superannuation order”.

⁴⁷⁹ *Einfeld v R* [2010] NSWCCA 87, [89].

⁴⁸⁰ *R v Silvano* [2008] NSWCCA 118, [34]-[35].

⁴⁸¹ *R v Stanbouli* [2003] NSWCCA 355, [81]; *Cargnello v DPP (Cth)* [2012] NSWCCA 162, [60]. In *Einfeld v R* [2010] NSWCCA 87, [89], Basten JA (with whom Hulme and Latham JJ agreed) observed, “Taking account of the economic consequences (including loss of employment) which inevitably follow from imprisonment, may mean that those previously in employment will receive shorter sentences than those who were unemployed.”

the offender.⁴⁸² In *Talia*,⁴⁸³ the Victorian Court of Appeal distinguished between occupational disqualification resulting from criminal conduct in the course of the employment from which the offender was disqualified (as occurred in that case) and occupational disqualification resulting from criminal conduct remote from that employment. In the former circumstance, the disqualification was not necessarily mitigating or carried modest weight; in the latter there might be a stronger argument for the incidental loss of employment being treated as a circumstance of mitigation.⁴⁸⁴

342. In *Ryan*,⁴⁸⁵ McHugh J and Hayne J doubted that public opprobrium or stigma resulting from an offence should be treated as a mitigating factor in sentencing, while Kirby J and Callinan J considered that it should. Their Honours' observations were *obiter dicta* and the issue remains to be authoritatively resolved.⁴⁸⁶
343. The weight, if any, to be given to matters treated as "extra-curial punishment" will depend on the circumstances. Relevant considerations may include the nature and size of the administrative or other extra-curial punishment, the extent to which the penalty relates to the conduct the subject of the offence, the capacity of the offender to pay, the effect that the administrative penalty had in real terms on the offender and other questions of hardship.⁴⁸⁷
344. In assessing the weight to be given to such matters as the actual or prospective loss of property, income, professional status or social standing, a sentencing court should bear in mind that "*it is not generally appropriate that those who are wealthier, or who have a higher public profile, should receive lesser sentences because they have more to lose as a result of conviction.*"⁴⁸⁸ If such matters are taken into account, care must be taken to avoid double counting (for example, loss of good standing in the community and favourable consideration for prior good character).⁴⁸⁹
345. If extra-curial punishment is a relevant factor in sentencing, it must be weighed against other relevant factors, such as the need for adequate punishment (s 16A(2)(k)), general deterrence (s 16A(2)(ja)) and

⁴⁸² *R v TA* (2003) 57 NSWLR 444, [32].

⁴⁸³ *R v Talia* [2009] VSCA 260. The offender in that case was dealt with for State offences but there does not appear to be any reason why the same principles should not apply in sentencing a federal offender.

⁴⁸⁴ *R v Talia* [2009] VSCA 260, [25]-[30]. *Poynder v R* [2007] NSWCCA 157 and *Parente v R* (2017) 96 NSWLR 633, where solicitors were disqualified from practice as a consequence of offending unrelated to the offender's legal practice, can be seen as examples of cases falling within the latter category.

⁴⁸⁵ *Ryan v R* (2001) 206 CLR 267, [52]-[55] (McHugh J), [123] (Kirby J), [157] (Hayne J), [177] (Callinan J).

⁴⁸⁶ In *Sabel v R* [2014] NSWCCA 101, [211], the Court held that adverse social consequences that an offender may suffer from being convicted of accessing and possessing child pornography was not a mitigating factor; it was a direct result of the offending conduct, the underlying nature of which is exploitative of children. On the other hand, opprobrium may be taken into account as additional punishment in an exceptional case where it reaches such proportion that it has had some physical or psychological effect on the offender: *Kenny v R* [2010] NSWCCA 6, [49].

⁴⁸⁷ *DPP (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [277]. If an offender is unlikely to pay an administrative penalty, the imposition of the penalty may carry no weight in mitigation: *Bransby v R* [2010] WASCA 165, [40]-[43].

⁴⁸⁸ *Cargnello v DPP (Cth)* [2012] NSWCCA 162, [60]. Compare the observations of McHugh J in *Ryan v R* (2001) 206 CLR 267, [53].

⁴⁸⁹ *Einfeld v R* [2010] NSWCCA 87, [89].

specific deterrence (s 16A(2)(j)) and the overarching obligation to impose a sentence or to make an order of a “*severity appropriate in all the circumstances*” of the offence (s 16A(1)).

346. See also the following discussions of particular issues:

- “4.5.7 Prospect of visa cancellation and deportation”
- “4.5.8 Orders under Proceeds of Crime Act 2002 (Cth)”
- “4.5.9 Prospect of a future order under Proceeds of Crime Act 2002 (Cth)”
- “4.5.11 Forfeiture by operation of law”
- “4.5.12 Superannuation order”
- “4.5.13 Registration of sexual offenders and other offenders”
- “4.5.14 Control orders and continuing detention orders”

4.5.7 Prospect of visa cancellation and deportation

347. A court sentencing a federal offender is not precluded from fixing a non-parole period in respect of a federal sentence merely because the person is, or may be, liable to be deported from Australia.⁴⁹⁰ Nor should a sentencing court decline to do so on this basis. A primary benefit of parole is rehabilitation of the offender and a non-resident non-citizen offender who is likely to be deported should also receive this benefit by being eligible for release on parole.⁴⁹¹

348. Australian authority is divided on the question whether the prospect that an offender’s visa will be cancelled and that he or she will be deported can ever be a mitigating factor in sentencing, and if so in what circumstances.

349. Under the provisions of the *Migration Act 1958* (Cth), whether an offender is deported as a consequence of committing an offence depends upon the exercise of executive discretion (even though there is a presumption in favour of deportation in some circumstances). Appellate courts have held, in a number of contexts, that ordinarily a sentencing court should not engage in speculation about the possible future exercise of an administrative or a judicial discretion that might affect, or relate to, an offender at the completion of the offender’s non-parole period, or after service of the whole sentence.⁴⁹²

350. Appellate courts in New South Wales,⁴⁹³ Western Australia,⁴⁹⁴ and the Northern Territory⁴⁹⁵ have held that the prospect of deportation, without more, is not a mitigating factor in sentencing. Amongst the reasons for this approach are that “*the prospect of deportation ... is the product of an entirely separate*

⁴⁹⁰ *Crimes Act 1914* (Cth), s 19AK.

⁴⁹¹ *R v Shrestha* (1991) 173 CLR 48; *Schneider v R* [2016] VSCA 76.

⁴⁹² See *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [48]-[58].

⁴⁹³ *R v Chi Sun Tsui* (1985) 1 NSWLR 308, 311; *R v Latumetan* [2003] NSWCCA 70, [19]; *Ali v R* [2014] NSWCCA 40, [1], [47] and [51]; *R v Pham* [2005] NSWCCA 94, [13]; *Khanchitanon v R* [2014] NSWCCA 204, [28]; *AC v R* [2016] NSWCCA 107, [79]; *Kristensen v R* [2018] NSWCCA 189, [23]-[36], [43]-[44].

⁴⁹⁴ *Dauphin v R* [2002] WASCA 104; *Houghton v Western Australia* (2006) 32 WAR 260; *R v Ponniah* [2011] WASCA 105; *Hickling v Western Australia* [2016] WASCA 124; *Brewerton v Western Australia* [2017] WASCA 191, [32]-[36].

⁴⁹⁵ *R v MAH* [2005] NTCCA 17, [41], [64].

legislative policy area of the regulation of society”,⁴⁹⁶ that deportation is entirely a matter for the executive government,⁴⁹⁷ that the possible exercise of a discretionary executive power does not affect the duty of a court in determining an appropriate sentence,⁴⁹⁸ and that it is an affront to the proper administration of criminal justice that offenders who are liable to deportation might be treated more leniently than Australian citizens.⁴⁹⁹ Courts in these jurisdictions have also denied that an offender’s anxiety about possible deportation should be treated as mitigatory, any more than should unavoidable uncertainty about other consequences of a sentence.⁵⁰⁰

351. By contrast, appellate courts in Victoria⁵⁰¹ and Queensland⁵⁰² have held that the prospect of deportation can be a mitigating factor, on either or both of two bases: that deportation consequent upon offending will constitute an additional punishment, by the offender losing the opportunity to settle permanently in Australia; or that uncertainty about the prospect of deportation will make the service of a sentence of imprisonment more onerous for the particular offender.

352. However even in those jurisdictions a mere “*speculative possibility*” of deportation will not suffice.⁵⁰³ The prospect of deportation can only be mitigating (on either basis) if there is *both* sufficient evidence (or a concession by the prosecution) “*to permit a sensible quantification of that risk to be undertaken*”⁵⁰⁴ and an evidentiary foundation for concluding that deportation will in fact be a hardship for the particular offender.⁵⁰⁵ If the offender will not be eligible for parole for some years,⁵⁰⁶ or if deportation will depend

⁴⁹⁶ *R v Chi Sun Tsui* (1985) 1 NSWLR 308, 311 (Street CJ). In *Guden v R* (2010) 28 VR 288, [16]-[24], Maxwell P said that this dictum of Street CJ only related to a decision whether to fix a non-parole period, and was not of general application.

⁴⁹⁷ *R v Pham* [2005] NSWCCA 94, [13].

⁴⁹⁸ *Hickling v Western Australia* [2016] WASCA 124, [58]-[59]; cf *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [43]-[59].

⁴⁹⁹ *Dauphin v R* [2002] WASCA 104, [22], quoting with approval *R v Simard* [2003] 1 Qd R 76, [6].

⁵⁰⁰ *Hickling v Western Australia* [2016] WASCA 124, [60] (Mazza JA and Mitchell J). McLure P in that case said (at [11]) that because the prospect of deportation is generally irrelevant, an offender who contends that leniency should be extended because the prospect of deportation would make imprisonment more burdensome faces a “*high, if not insurmountable, obstacle*”.

⁵⁰¹ *Guden v R* (2010) 28 VR 288; *Darcie v R* [2012] VSCA 11; *DPP (Cth) v Peng* [2014] VSCA 128, [23].

⁵⁰² *R v UE* [2016] QCA 58; *R v Schelvis*; *R v Hildebrand* [2016] QCA 294; *R v Norris*; *Ex parte Attorney-General (Qld)* [2018] QCA 27.

⁵⁰³ *Guden v R* (2010) 28 VR 288, [28]; *R v Schelvis*; *R v Hildebrand* [2016] QCA 294, [71]-[72]; *R v Lincoln* [2017] QCA 37, [68]-[70].

⁵⁰⁴ *Guden v R* (2010) 28 VR 288, [29]; *R v Schelvis*; *R v Hildebrand* [2016] QCA 294, [71]-[72].

⁵⁰⁵ *Guden v R* (2010) 28 VR 288, [29]; *DPP (Cth) v Peng* [2014] VSCA 128, [21]-[25]; *R v UE* [2016] QCA 58, [19]-[21]; *R v Pearson* [2016] QCA 212, [22]; *R v Schelvis*; *R v Hildebrand* [2016] QCA 294, [71]-[72]; *R v Pearson* [2016] QCA 212, [22]-[23]; *R v Lincoln* [2017] QCA 37, [68]-[70]. An offender who, at the time of offending, did not have an existing visa to reside in Australia (for example, an offender whose visa had expired or who was otherwise in Australia unlawfully) and had only a diminished prospect of settling in Australia rather than a sense of real loss will not suffer real hardship: *Nguyen v R* [2016] VSCA 198, [35]. If the offender has come to Australia for the sole purpose of criminal activity, and has no interest in making Australia their home, deportation to their country of origin may impose no burden upon them at all: *Konamala v R* [2016] VSCA 48, [34].

⁵⁰⁶ Compare *De Costa v R* [2016] VSCA 49, [53]; *R v Schelvis*; *R v Hildebrand* [2016] QCA 294, [81].

upon an administrative decision weighing many factors,⁵⁰⁷ the assessment of the prospect of deportation will often be particularly speculative. The mere existence of the statutory regime under s.501CA of the *Migration Act 1958* (Cth), by which certain offenders are presumptively liable to deportation (subject to the exercise of administrative discretion), does not entitle such an offender to a reduced sentence.⁵⁰⁸ Moreover it is impermissible for a judge to reduce an otherwise appropriate sentence to avoid the risk of deportation.⁵⁰⁹

353. The position in South Australia remains to be authoritatively determined, as a result of conflicting decisions of the Full Court of the Supreme Court.⁵¹⁰ The issue does not appear to have been authoritatively decided by an appellate court in Tasmania⁵¹¹ or the ACT.⁵¹²

354. In considering whether the prospect of deportation is a mitigating factor, appellate courts have not distinguished between offenders against State or Territory law on the one hand and federal offenders on the other. In jurisdictions in which possible deportation is not regarded as mitigatory, courts have applied the same approach in relation to the sentencing of a federal offender.⁵¹³ In jurisdictions in which possible deportation is regarded as mitigatory, it has also been treated as a potentially mitigating factor in the sentencing of a federal offender.⁵¹⁴

⁵⁰⁷ *Darcie v R* [2012] VSCA 11, [29]-[45]. Williams AJA (with whom Buchanan JA agreed) observed (at [44]) that a factor which further complicated assessment of the prospects of deportation was that the decision whether or not to deport the offender could be taken by the Minister, and that the Minister was not bound by a published direction (summarised at [32]-[35]) which set out and weighted relevant considerations.

⁵⁰⁸ *Konamala v R* [2016] VSCA 48; *Da Costa v R* [2016] VSCA 49; *Schneider v R* [2016] VSCA 76; *R v Schelvis*; *R v Hildebrand* [2016] QCA 294, [74]-[82]; *R v Lincoln* [2017] QCA 37, [68]-[70]. In *Schelvis*, [78]-[79], Fraser JA (with whom Morrison JA and Peter Lyons J agreed) preferred the reasoning in *Da Costa* to a contrary dictum in *Zhuang v R* [2015] VSCA 96, [54].

⁵⁰⁹ *R v MAO*; *Ex parte Attorney-General (Qld)* [2006] QCA 99.

⁵¹⁰ In *R v Berlinsky* [2005] SASC 316, [27], the Full Court of the Supreme Court of South Australia held that the prospect of deportation, as such, was an irrelevant consideration in sentencing. However in *R v Zhang* [2017] SASCFC 5, [110]-[113], the Court approved of the analysis in *R v Schelvis*; *R v Hildebrand* [2016] QCA 294, and thereby accepted that the prospect of deportation could be a mitigating factor. In *R v Leka* [2017] SASCFC 77, [27]-[29], Stanley J (with whom Peek and Hinton JJ agreed) noted that *Berlinsky* had not been cited in *Zhang*, and observed that *Zhang* may have been decided *per incuriam*. Hinton J (with whom Peek J also agreed) added (at [37]) that “resolution of the question of the relevance or not of the likelihood of deportation to sentencing can await another day”. In *R v Taheri* [2017] SASCFC 115, [41]-[42] and in *R v Arrowsmith* [2018] SASCFC 47, [32]-[38], the Court also referred to, but found it unnecessary to resolve, the conflict in the authorities.

⁵¹¹ In *MAC v Tasmania* [2018] TasCCA 19, [196], the Court proceeded on the assumption that the prospect of deportation could be a mitigating factor in some circumstances, but no authorities were referred to and the Court did not need to decide the point.

⁵¹² In *Islam v R* [2006] ACTCA 21, the ACT Court of Appeal (at [35]) cited with apparent approval a passage from the judgment of Doyle CJ in *R v Berlinsky* [2005] SASC 316, [27] which denied that deportation could affect the sentencing process, but added (at [37]) that (by reason of the ACT counterpart of s 16A(2)(p)) “it may go too far to say that the probability of deportation is an irrelevant consideration in the sentencing process”. That is, the Court suggested, *obiter dicta*, that deportation may be taken into account in sentencing to the extent that it impacts on the offender’s family. (The Court has adopted a very wide construction of s 16A(2)(p) of the *Crimes Act 1914* (Cth), contrary to appellate decisions in other jurisdictions: see “4.4.14 Effect on Family – s 16A(2)(p)”.)

⁵¹³ E.g. *R v Latumetan* [2003] NSWCCA 70; *R v Ponniah* [2011] WASCA 105. See also *R v Berlinsky* [2005] SASC 316; *R v Simard* [2003] 1 Qd R 76.

⁵¹⁴ *DPP (Cth) v Peng* [2014] VSCA 128; *R v UE* [2016] QCA 58; *R v Schelvis*; *R v Hildebrand* [2016] QCA 294.

355. However even in jurisdictions in which the prospect of deportation can be mitigatory, in light of the High Court decision in *Bui*,⁵¹⁵ and cases which have applied the same principle in other contexts,⁵¹⁶ s 16A(2) of the *Crimes Act 1914* would seem to preclude a court sentencing a federal offender from acting on a mere *presumption* that uncertainty about the prospect of deportation would cause the offender stress or anxiety such as to warrant mitigation of the sentence. Rather, "*a condition of distress or anxiety must be demonstrated*",⁵¹⁷ and it must be causally linked to the prospect of deportation⁵¹⁸ (as distinct from distress or anxiety which is an incident of imprisonment and the uncertainties which flow from it⁵¹⁹).

4.5.8 Orders under *Proceeds of Crime Act 2002* (Cth)

356. There is no reference in s 16A(2) of the *Crimes Act 1914* (Cth) to the making of a pecuniary penalty order against the offender, or a forfeiture order in relation to property of the offender, under the *Proceeds of Crime Act 2002* (Cth). However s 320 of the *Proceeds of Crime Act 2002* (Cth), which operates from 1 January 2003, makes specific provision for matters which a court may or may not take into account in sentencing in relation to those matters.

357. Section 320 of the *Proceeds of Crime Act 2002* (Cth) provides:

Effect of the confiscation scheme on sentencing

*A court passing sentence on a person in respect of the person's conviction of an *indictable offence:*

- (a) *may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and*
- (b) *must not have regard to any *forfeiture order that relates to the offence, to the extent that the order forfeits *proceeds of the offence; and*
- (c) *must have regard to the forfeiture order to the extent that the order forfeits any other property; and*
- (d) *must not have regard to any *pecuniary penalty order, or any *literary proceeds order, that relates to the offence.*

Relevant terms used in this section are defined in the Act as follows:

indictable offence is defined in s 338 (Dictionary) to mean an offence against a law of the Commonwealth, or a *non-governing Territory, that may be dealt with as an indictable offence (even if it may also be dealt with as a summary offence in some circumstances);

forfeiture order is defined in s 338 (Dictionary) as an order under Division 1 of Part 2-2 of the Act that remains in force;

proceeds of the offence is defined in ss 338, 329 and 330 as wholly or partially derived or realised, whether directly or indirectly, from the commission of the offence whether the property is

⁵¹⁵ *Bui v DPP (Cth)* (2012) 244 CLR 638.

⁵¹⁶ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194; *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [60].

⁵¹⁷ *Bui v DPP (Cth)* (2012) 244 CLR 638, [22]-[23], approving the view of Simpson J in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 11, [279]-[280].

⁵¹⁸ Cf. *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [97]-[113].

⁵¹⁹ Cf. *Hickling v Western Australia* [2016] WASCA 124, [60]; *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [62].

situated outside Australia;

pecuniary penalty order is defined in s 338 as an order under s 116; and

literary proceeds order is defined in s 338 as an order under s 152.

358. In summary, therefore, s 320:

- *permits* a court sentencing a federal offender for an indictable offence to have regard to any cooperation by the offender in resolving any action taken against the offender under the Act (s 320(a));
- *precludes* the sentencing court from having regard to the forfeiture of the proceeds of the offence the person is convicted of (s 320(b)) or any pecuniary penalty order or literary proceeds order that relates to that offence (s 320(d)); and
- *requires* the sentencing court to have regard to the forfeiture of other property that is not proceeds of the offence the person is convicted of (such as real property or a motor vehicle used in the commission of the offence) (s 320(c)).

359. The broad scheme of s 320 of the *Proceeds of Crime Act 2002* (Cth) (consistently with that under other legislative confiscation schemes⁵²⁰) is that no regard is to be had to any order the effect of which would strip the benefits of the crime from the offender,⁵²¹ but regard must be had to the court-ordered forfeiture of property which does not represent the proceeds of crime (such as property used in the commission of the crime or property mixed with proceeds of crime), which property may have been acquired lawfully. The underlying rationale for this distinction is that the latter may constitute a penalty (and is therefore relevant in ensuring that the total punishment is proportionate to the offending), whereas the former does not. The obligation to disgorge the proceeds of crime is not to be treated as a penalty, but merely as a means of preventing unjust enrichment;⁵²² whereas forfeiture of property which is not proceeds of crime constitutes a separate penalty and may therefore be relevant to sentencing.⁵²³

360. The prohibition in s 320(d) on a court having regard to any pecuniary penalty order that relates to the offence renders that matter an irrelevant consideration in sentencing an offender for a Commonwealth indictable offence.⁵²⁴ On its proper construction, s 320(d) precludes a sentencing court from having regard not only to the mere fact of a pecuniary penalty order but also to any action taken in consequence of it, such as the payment of money pursuant to an order.⁵²⁵

361. However a sentencing court may have regard to the offender's cooperation in relation to any action under the *Proceeds of Crime Act* (s 320(a)), even an action relating to an order (such as a pecuniary

⁵²⁰ See *R v McLeod* (2007) 16 VR 682, [14]-[23].

⁵²¹ The provision was intended to reverse the effect of *R v McDermott* (1990) 49 A Crim R 105, under which a sentencing court was required to have regard to a pecuniary penalty: see the account of the history of s 320 which is given in *R v Host* [2015] WASCA 23, [11]-[22], [107]-[110].

⁵²² *R v McLeod* (2007) 16 VR 682, [16]; *R v Host* [2015] WASCA 23, [13], [109].

⁵²³ See *R v McLeod* (2007) 16 VR 682, [14]-[23].

⁵²⁴ *R v Host* [2015] WASCA 23, [17], [103], [194].

⁵²⁵ *R v Host* [2015] WASCA 23, [2]-[19], [103]-[110], [194]-[196]; *R v Jafari* [2017] NSWCCA 152, [38]-[39].

penalty order) which the court is precluded from have regard to in sentencing: see “4.5.10 Cooperation in resolving action under Proceeds of Crime Act 2002 (Cth)”.

362. Some uncertainty remains about the scope of the requirement (in s 320(c)) for a sentencing court, in relation to an indictable offence, to have regard to a forfeiture order to the extent that the order forfeits property other than proceeds of crime. Where, under State legislation, a sentencing court *may* have regard to forfeiture to the extent that the forfeited property is not proceeds of crime, it has been held that the offender bears an onus of establishing that the forfeiture should be regarded as mitigating; this means that the offender must establish not only that the forfeited property was not the proceeds of the relevant offence, but also that it was lawfully acquired.⁵²⁶ In *TAN*,⁵²⁷ the Court left open the question whether the same approach necessarily applies under s 320(c), by which the sentencing court *must* have regard to forfeiture of property which was not proceeds of crime.

363. Section 320 of the *Proceeds of Crime Act 2002* (Cth) is silent as to whether *automatic forfeiture* of property, by operation of the Act rather than pursuant to an order of a court, or the prospect of such forfeiture in future, can be taken into account in sentencing.⁵²⁸ The relevance of such forfeiture is discussed below: see “4.5.11 Forfeiture by operation of law”.

4.5.9 Prospect of a future order under *Proceeds of Crime Act 2002* (Cth)

364. Pursuant to s 320(a) of the *Proceeds of Crime Act 2002* (Cth), a sentencing court may have regard to any cooperation by an offender in relation to any action taken against the offender under the Act: see “4.5.10 Cooperation in resolving action under Proceeds of Crime Act 2002 (Cth)”. This may include cooperation which has occurred in relation to an application for a forfeiture order, a pecuniary penalty order or a literary proceeds order which is still pending at the time of sentencing.

365. However s 320 is silent as to whether *the prospect that a forfeiture order, a pecuniary penalty order or a literary proceeds order will be made in future* can be taken into account.

366. Section 321 of the *Proceeds of Crime Act 2002* (Cth) enables the court to defer sentencing pending the determination of an application for a confiscation order which has been made to that court, where the court is satisfied that it is reasonable to do so in all the circumstances. (A confiscation order means a forfeiture order, a pecuniary penalty order, a literary proceeds order or an unexplained wealth order under the Act: see the Dictionary to the Act.) Section 321 does not empower a sentencing court to defer sentencing where an application for a confiscation order has been made to another court, or where an application for a confiscation order has not yet been made.

367. In many cases, it will not be practicable or appropriate to defer sentencing pursuant to s 321. Since a sentencing court is precluded by s 320 of the *Proceeds of Crime Act 2002* (Cth) from taking into account

⁵²⁶ *R v McLeod* (2007) 16 VR 682.

⁵²⁷ *TAN v R* (2011) 35 VR 109, [67].

⁵²⁸ The references in s 320(b) and (c) to a “forfeiture order” is a reference to an order under Division 1 of Part 2-2 of the Act, that is, court-ordered forfeiture. It does not include automatic forfeiture under Part 2-3 of the Act: *TAN v R* (2011) 35 VR 109, [59]-[62].

the fact that *a pecuniary penalty order or literary proceeds order* has been made, the only reason to defer sentencing (pursuant to s 321) because an application for such an order is pending would be to assess whether the offender should be given any credit (pursuant to s 320(a) of the Act) for co-operating in relation to the application. On the other hand, if the pending application is for *a forfeiture order*, the sentencing court may consider deferring sentencing in order to see not only whether and to what extent the offender co-operates, but also whether the order is ultimately made and if so whether and to what extent the property is determined to be *proceeds of the offence*. Even in such a case, however, a sentencing court may consider the deferral of sentence to be inappropriate if, for example, resolution of the application for a forfeiture order is unlikely in the near future,⁵²⁹ or is unlikely to involve a determination of the extent to which the property is or is not proceeds of the offence, or if deferral of sentencing of one offender may have undesirable consequences for the sentencing of other offenders.⁵³⁰

368. Where sentencing is not deferred pursuant to s 321, a sentencing court may have regard to the prospect that a confiscation order may be made in future, but only in limited circumstances.⁵³¹

369. In the first place, the prospect that *a pecuniary penalty order or literary proceeds order* may be made against the offender in relation to the offence should not, as such, be treated as a mitigating factor. If such an order is made prior to sentencing, the sentencing court is precluded from taking the order into account (*Proceeds of Crime Act 2002* (Cth), s 320(d)). It would be wrong in principle to take the prospect of such an order into account when the fact of such an order having been made cannot be taken into account.

370. Second, the prospect that *a forfeiture order may be made against the offender in relation to proceeds of the offence* should not be treated as a mitigating factor. If such an order is made prior to sentencing, the sentencing court is precluded from taking the order into account (*Proceeds of Crime Act 2002* (Cth), s 320(b)). Again, it would be wrong in principle to take the prospect of such an order into account when the fact of such an order cannot be taken into account.

371. Third, in relation to the prospect that *a forfeiture order will be made against the offender in relation to property which is not proceeds of the offence*, it will often be difficult for a sentencing court to assess the likelihood that an order will be made and the extent to which it forfeits property of that character. A sentencing court is not required to speculate about whether a forfeiture order will be made, or whether (or to what extent) the property the subject of such an order is not proceeds of crime.⁵³² An offender who relies on the prospect of such forfeiture as a mitigating factor must satisfy the court accordingly. That is, the offender must persuade the court that property is likely to be forfeited, and

⁵²⁹ Cf *R v Phillips* [1991] 2 VR 207.

⁵³⁰ In *R v Phillips* [1991] 2 VR 207, an applicant for leave to appeal against sentence sought an adjournment pending the resolution of confiscation proceedings. The Court of Criminal Appeal refused to adjourn the application, in part on the basis that it would cause unwarranted delay in hearing applications for leave to appeal by two co-offenders, particularly when the appeals raised considerations of parity.

⁵³¹ Compare, in relation to forfeiture under State legislation, *R v Yacoub* [2006] VSCA 203; *R v Tabone* [2006] VSCA 238; *R v Le* [2005] VSCA 284; *R v McLeod* (2007) 16 VR 682. The same principles apply to the federal forfeiture provisions, save to the extent there is any statutory provision to the contrary: *TAN v R* (2011) 35 VR 109, [55]-[57].

⁵³² Cf. *R v Tabone* [2006] VSCA 238, [10]-[14].

that at least some of the property is not proceeds of the crime. If the information available is insufficient to enable the sentencing judge to make an assessment of the likelihood of forfeiture or its likely effect there will be no error in declining to take this into account.⁵³³

372. The making of a forfeiture order after sentencing may constitute fresh evidence on appeal, where the prospect of forfeiture has not been taken into account in sentencing, and sometimes require re-sentencing.⁵³⁴ Appellate courts have called for legislative change to allow review of the sentence by the sentencing court without the need for an appeal.⁵³⁵

4.5.10 Cooperation in resolving action under *Proceeds of Crime Act 2002* (Cth)

373. Pursuant to s 320(a) of the *Proceeds of Crime Act 2002* (Cth), a court sentencing an offender for an indictable offence “*may have regard to any cooperation by the person in resolving any action taken against the person under*” the Act. The cooperation may relate to any type of action under the Act, including freezing orders (Part 2-1A), restraining orders (Part 2-1), court-ordered forfeiture (Part 2-2), automatic forfeiture (Part 2-3), pecuniary penalty order (Part 2-4), literary proceeds orders (Part 2-5) or unexplained wealth orders (Part 2-6).

374. This provision is to be read broadly.⁵³⁶ Cooperation in resolving any action under the Act may include: withdrawing or refraining from making an application for exclusion of property from a restraining order or from an order for forfeiture;⁵³⁷ consenting to an order, particularly when done earlier rather than later;⁵³⁸ and taking steps to aid the enforcement of an order, such as by obtaining loans or otherwise.⁵³⁹

375. Although a wide range of actions may constitute cooperation, cooperation requires a deliberate decision by the offender to facilitate the course pursued in the action under the *Proceeds of Crime Act*.⁵⁴⁰ The offender bears the onus of establishing that their conduct amounted to cooperation which mitigated the severity of the sentence.⁵⁴¹ If the sentencing court is not satisfied that the offender’s decision was deliberately made for reasons that disclose a willingness to co-operate, the fact that (for example) an application for exclusion was not made or was withdrawn will not amount to cooperation.⁵⁴²

376. The weight, if any, to be given to cooperation will depend upon the circumstances. A decision not to pursue a hopeless application for exclusion of property from a confiscation order should receive less

⁵³³ Cf. *R v Tabone* [2006] VSCA 238, [10]-[14].

⁵³⁴ *R v McLeod* (2007) 16 VR 682; *Atkinson v R* [2013] NTCCA 5.

⁵³⁵ *R v McLeod* (2007) 16 VR 682, [40]-[43]; endorsed in *Atkinson v R* [2013] NTCCA 5, [14]-[15].

⁵³⁶ *R v Host* [2015] WASCA 23, [20], [193].

⁵³⁷ *TAN v R* (2011) 35 VR 109, [56].

⁵³⁸ *R v Host* [2015] WASCA 23, [20], [115](d).

⁵³⁹ *R v Host* [2015] WASCA 23, [20], [193].

⁵⁴⁰ *TAN v R* (2011) 35 VR 109, [56].

⁵⁴¹ *TAN v R* (2011) 35 VR 109, [55].

⁵⁴² *TAN v R* (2011) 35 VR 109, [56].

weight than one where the offender does not pursue an arguable claim or where the circumstances are complicated and would involve protracted litigation.⁵⁴³

377. Cooperation may be treated as mitigating whether or not it is indicative of contrition or remorse.⁵⁴⁴

4.5.11 Forfeiture by operation of law

378. Many Commonwealth statutes provide for the forfeiture of property, by operation of law, in particular circumstances.⁵⁴⁵ Such forfeiture may occur independently of whether a person is convicted of an offence. The legislation providing for forfeiture often provides a means for the “condemnation” of forfeited property, that is, a determination by a court or the occurrence of an event that has the legal effect of confirming the forfeiture.

379. More general provision for forfeiture by operation of law is made by the *Proceeds of Crime Act 2002* (Cth). Part 2-3 of the Act provides for a scheme by which, if a person is convicted of a “serious offence” (a term which is given a complex definition in s 338 of the Act), property that is subject to a restraining order relating to the offence is forfeited to the Commonwealth unless the property is excluded from forfeiture. (The scheme is separate from the power of a court under Part 2-2 of the Act to order forfeiture of property.) Under Part 2-3, forfeiture occurs at the end of a specified period after a person is convicted of a serious offence (s 92). The specified period is either 6 months, or a longer period (up to 15 months after the conviction day) which is fixed by a court under s 93.

380. The person whose conviction triggers the forfeiture by operation of law under Part 2-3 of the *Proceeds of Crime Act 2002* (Cth) need not be the owner, or the sole owner, of the property. For example, a restraining order may apply to property of another person which is merely under the effective control of the relevant offender, or if there are reasonable grounds to suspect that the property is proceeds of the offence or an instrument of the offence (s 17). Such property will be forfeited unless excluded from the restraining order or from forfeiture.

381. At common law, a sentencing court is required to take into account, as a factor in mitigation, the fact that property of the offender that was not the proceeds of crime has been forfeited.⁵⁴⁶ The offender bears the onus of establishing that the forfeiture should be treated as mitigatory; this means, amongst other things, that the offender must establish that the property was not proceeds of crime. The common law principles apply in sentencing a federal offender, as they are not excluded by or inconsistent with federal legislation.⁵⁴⁷

⁵⁴³ *TAN v R* (2011) 35 VR 109, [54]-[56].

⁵⁴⁴ *R v Host* [2015] WASCA 23, [20], [193].

⁵⁴⁵ E.g. *Customs Act 1901*, ss 228-230; *Excise Act 1901*, s 116; *Migration Act 1958*, s 261A; *Biosecurity Act 2015*, s 627-630; *Fisheries Management Act 1991*, ss 106A, 106AA.

⁵⁴⁶ *TAN v R* (2011) 35 VR 109, [66].

⁵⁴⁷ *TAN v R* (2011) 35 VR 109, [61]-[62].

382. In addition, if property which is not proceeds of crime is likely to be forfeited this is also relevant to sentencing and must be taken into account where it is known.⁵⁴⁸ However, it will often be difficult for a sentencing court to assess the likelihood that property of the offender will be subject to forfeiture by operation of law or the extent to which such property is not the proceeds of crime.⁵⁴⁹ A sentencing court is not required to speculate about these matters.⁵⁵⁰ An offender who relies on the prospect of such forfeiture as a mitigating factor must satisfy the court accordingly. That is, the offender must persuade the court that property is likely to be forfeited, and that at least some of the property is not proceeds of the crime. If the information available is insufficient to enable the sentencing judge to make an assessment of the likelihood of forfeiture or its likely effect there will be no error in declining to take this into account.⁵⁵¹

383. The weight (if any) to be given to the forfeiture, or likely forfeiture, of property that is not proceeds of crime will depend upon all the circumstances.

4.5.12 Superannuation order

384. The *Crimes (Superannuation Benefits) Act 1989* (Cth) provides for the making of a superannuation order. In summary, a superannuation order is an order forfeiting the Commonwealth's contribution to the superannuation of a Commonwealth public servant who has been convicted of a corruption offence.⁵⁵² Part VA of the *Australian Federal Police Act 1979* (Cth) similarly provides for the making of a superannuation order in relation to an employee or member of the Australian Federal Police.

385. A court sentencing a federal offender is precluded from taking into account the possibility that a superannuation order may be made, where a person is convicted of an offence punishable by imprisonment for a term longer than 12 months.⁵⁵³

4.5.13 Registration of sexual offenders and other offenders

386. Each State and Territory has laws which provide for statutory consequences following from the sentencing of a person for sexual offences against children.⁵⁵⁴ Some such laws cover other sexual offences as well; some also cover offences of violence against children. The laws generally provide for the inclusion of offenders on a register, and for the imposition of reporting and other obligations.

⁵⁴⁸ *R v Campbell* [1999] VSCA 177, following *Pastras v R* (1993) 65 A Crim R 584.

⁵⁴⁹ Compare *R v Yacoub* [2006] VSCA 203; *R v Tabone* [2006] VSCA 238; *R v Le* [2005] VSCA 284; *R v McLeod* (2007) 16 VR 682.

⁵⁵⁰ Cf. *R v Tabone* [2006] VSCA 238, [10]-[14].

⁵⁵¹ Cf. *R v Tabone* [2006] VSCA 238, [10]-[14].

⁵⁵² For example see *DPP v Dwayhi* [2009] NSWSC 1025.

⁵⁵³ *Crimes (Superannuation Benefits) Act 1989* (Cth), s 43 and also the *Australian Federal Police Act 1979* (Cth), s 55.

⁵⁵⁴ *Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2004* (Vic); *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2004* (WA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offender Reporting and Registration) Act 2004* (NT).

387. In most jurisdictions,⁵⁵⁵ the registration and reporting obligations arise automatically (with very limited exceptions⁵⁵⁶) once the court imposes sentence for a listed offence.⁵⁵⁷ That is, there is no need for any further court order beyond the sentence. The provisions generally give courts power to make orders imposing registration or reporting obligations on a person who is sentenced for other specified offences.
388. Legislation in each State and Territory lists federal offences among the various offences which trigger registration and reporting requirements. The legislation in each jurisdiction is broadly similar in structure, and in terms of the types of federal offences listed.⁵⁵⁸
389. A list of federal offences which are “registrable offences” for the purposes of each jurisdiction’s sex offender registration legislation is set out in Appendix 2 to this guide.
390. In cases involving offences to which such laws apply, the prosecution should take care to ensure that the sentencing court is informed of any relevant obligations, and that any necessary orders to give effect to the laws are sought.
391. The laws of some jurisdictions preclude a court in sentencing an offender from having regard to the consequences of sexual offender registration. In *ONA*,⁵⁵⁹ such a provision in the *Sentencing Act 1991* (Vic) was held to apply to the sentencing of a federal offender by operation of 79(1) (and possibly also s 68(1)) of the *Judiciary Act 1903* (Cth). The Court held that nothing in s 16A of the *Crimes Act 1914* (Cth) was inconsistent with or otherwise precluded the application of the State provision to the sentencing of a federal offender. In *Sabel*,⁵⁶⁰ a similar conclusion was reached in relation to a cognate provision under New South Wales law.
392. Even in the absence of such a provision, or if such a provision were not picked up and applied as surrogate federal law to the sentencing of a federal offender, the prospect of registration or reporting requirements or other restrictions consequent upon conviction or sentencing is not ordinarily to be treated as a mitigating factor in sentencing.⁵⁶¹

⁵⁵⁵ Tasmania is the notable exception, where a specific order is required. Section 6 of the *Community Protection (Offender Reporting) Act 2005* (Tas) requires the Court to make such an order, unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future.

⁵⁵⁶ For example, some jurisdictions do not impose mandatory registration if the offender was a child, or if the offence was a single class 2 offence.

⁵⁵⁷ Most jurisdictions refer to the relevant offences as “class 1” or “class 2” offences. Since 2014, the Queensland legislation refers instead to “prescribed offences”.

⁵⁵⁸ In contrast to provisions in other jurisdictions, the list of Commonwealth offences in the *Community Protection (Offender Reporting) Act 2004* (WA), Schedules 1 and 2, refers to repealed offences under the *Crimes Act 1914* (Cth) and does not refer to relevant offences under the *Criminal Code* (Cth).

⁵⁵⁹ *R v ONA* (2009) 24 VR 197.

⁵⁶⁰ *Sabel v R* [2014] NSWCCA 101, [206]–[209].

⁵⁶¹ *DPP v Ellis* (2005) 11 VR 287, [16]; *Muldock v R* (2011) 244 CLR 120, [61]; *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [55]–[58], [62].

4.5.14 Control orders and continuing detention orders

393. Division 104 of the *Criminal Code* (Cth) provides for the making of control orders in order to protect the public from a terrorist act, or to prevent the provision of support for or the facilitation of a terrorist act, or to prevent the provision of support for, or the facilitation of the engagement in, a hostile activity in a foreign country. The making of a control order in relation to a person is not conditioned upon the person being convicted or found guilty of an offence.
394. Division 105A of the *Criminal Code* (Cth) provides for the making of a continuing detention order (CDO) in relation to a terrorist offender who is in custody and serving a sentence of imprisonment for a specified terrorism offence or foreign incursion offence. A CDO requires the continuing detention of an offender beyond the completion of his or her sentence. In sentencing for a terrorist offence, the sentencing court must warn the offender that an application may be made under Division 105A for a CDO requiring the person to be detained in a prison after the end of the person's sentence for the offence: see "7.11 Requirement to warn a terrorism offender about the possibility of a continuing detention order".
395. Courts have declined to treat as a mitigating factor in sentencing the possibility that an offender will be subject to a control order⁵⁶² or CDO.⁵⁶³ In *Besim and MHK (No 3)*, the Victorian Court of Appeal emphasised not only that the possibility of a CDO was merely a matter of speculation at the time of sentencing, but also that such a possibility did not affect the sentencing court's synthesis of considerations of general deterrence, denunciation, protection of the community and rehabilitation.⁵⁶⁴ Moreover the Court rejected a contention that the prospect of a CDO should mitigate the sentence on the basis that it would make imprisonment more burdensome. Not only was there no evidence to support the contention in that case, but also the prospect of a CDO was merely an incident of the offending and of the sentences imposed, and was therefore not mitigating.⁵⁶⁵

4.5.15 "Double jeopardy" in resentencing on prosecution appeal

396. In resentencing an offender following a successfully prosecution appeal, appellate courts have often treated as a mitigating factor the stress and anxiety of the respondent to the appeal while the appeal is pending.⁵⁶⁶ This is sometimes said to involve an element of "double jeopardy".⁵⁶⁷ In most jurisdictions

⁵⁶² *R v Benbrika* [2009] VSC 21, [242]-[244].

⁵⁶³ *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303.

⁵⁶⁴ *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [43]-[59].

⁵⁶⁵ *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [60]-[62].

⁵⁶⁶ E.g. *Dinsdale v R* (2000) 202 CLR 321, [62]; *R v Fincham* [2008] VSCA 186, [28]; *DPP v Page* [2006] VSCA 224, [55].

⁵⁶⁷ See, e.g., *R v JW* (2010) 77 NSWLR 7, [54]; *DPP v Karazisis* [2010] VSCA 350.

(including NSW,⁵⁶⁸ Victoria,⁵⁶⁹ Western Australia,⁵⁷⁰ South Australia⁵⁷¹ and the ACT⁵⁷²), this practice has been reversed by statute.

397. In *Bui*,⁵⁷³ the Commonwealth Director contended that a State statute which precluded an appeal court from having regard to any “*element of double jeopardy*” in resentencing the respondent following a successful prosecution appeal was applied to the sentencing of a federal offender by the provisions of the *Judiciary Act 1903* (Cth). In its decision, however, the High Court went further. The Court held that the so-called principle of double jeopardy was a principle of judge-made law which was not accommodated by s 16A of the *Crimes Act 1914* (Cth), and was not picked up or applied by s 80 of the *Judiciary Act 1903* (Cth) to a court exercising federal jurisdiction, as there was no gap in federal law. Therefore, the Court held, no question of picking up the State provisions which excluded elements of double jeopardy arose, because the judge-made rule did not apply.
398. The effect of the decision in *Bui* is that an appellate court (in any Australian State or Territory) in resentencing a federal offender following a successful Crown appeal must not have regard to any element of double jeopardy (that is, the court must not have regard to the *presumed distress or anxiety* of the respondent), whether or not that element has been excluded by statute in that jurisdiction.⁵⁷⁴
399. An appellate court is not, however, necessarily precluded from having regard to any evidence of *actual distress or anxiety* experienced by the respondent.⁵⁷⁵ The weight (if any) to be accorded to such evidence will vary from case to case.⁵⁷⁶

⁵⁶⁸ *Crimes (Appeal and Review) Act 2001* (NSW), s 68A. See *R v JW* (2010) 77 NSWLR 7.

⁵⁶⁹ *Criminal Procedure Act 2009* (Vic), ss 259(3), 262(3), 289(2) and 290(3). See *DPP v Karazisis* [2010] VSCA 350

⁵⁷⁰ *Criminal Appeals Act 2004* (WA), s 41(4).

⁵⁷¹ *Criminal Law Consolidation Act 1935* (SA), s 340. See *R v Harkin* (2011) 109 SASR 334; *R v V* [2012] SASFC 10.

⁵⁷² *Crimes Sentencing Act 2005* (ACT), s7; *R v Chatfield* [2012] ACTCA 32.

⁵⁷³ *Bui v DPP (Cth)* (2012) 244 CLR 638.

⁵⁷⁴ *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [43].

⁵⁷⁵ Compare *Bui v DPP (Cth)* (2012) 244 CLR 638, [24]. See “4.4.12 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)”.

⁵⁷⁶ *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 11, [279]-[280]; cited with apparent approval in *Bui v DPP (Cth)* (2012) 244 CLR 638, [22]-[23]. In *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, evidence of actual anxiety and distress, in combination with other circumstances, led the Court of Appeal to dismiss the Director’s appeal in the exercise of its residual discretion, notwithstanding the manifest inadequacy of the original sentence.

5 Commonwealth sentencing options

5.1 Introduction

400. **There are six sentencing options which apply generally in relation to a federal offender** once the Court has found the charge proved. Those six options are described in this Chapter.
401. Of course, for some offences only some of these options are available: for example, for summary offences for which the maximum penalty is a fine, imprisonment is not available as a sentencing option. Conversely, there are statutory restrictions on the availability of some non-custodial options in relation to sentencing for particular offences: see “8.1 Offences to which a prescriptive sentencing regime applies”.
402. State or Territory sentencing options do not apply to the sentencing of a federal offender of their own force, nor are they picked up and applied as surrogate federal laws by ss 68 and 79 of the *Judiciary Act 1903* (Cth).⁵⁷⁷ State or Territory options are, however, picked up and applied in some circumstances by other Commonwealth laws. Notable examples are:
- community service orders and the like, which are picked up and applied by **s 20AB of the *Crimes Act 1914***, as one of the six general options (see “5.7 Orders applied by *Crimes Act 1914*, s.20AB”); and
 - State and Territory dispositions in relation to **children and young persons** which are applied by s 20AC of the *Crimes Act 1914*. These options are described in a later Chapter: see “8.2 Children and young persons”.
403. Particular additional options apply to the sentencing of **mentally-ill or intellectually-disabled offenders**: see “8.6 Disposition of persons suffering from mental illness/intellectual disability”.
404. As to the options for dealing with persons charged with a federal offence who are found to be **unfit to be tried**, see “8.4 Fitness to be Tried”.
405. The options for dealing with persons charged with a federal offence who are found **not guilty by reason of mental illness** are also described in a later Chapter: see “8.5 Dispositions following acquittal because of mental illness”.
406. Examples of common State or Territory **sentencing options which are not generally available** in sentencing a federal offender are set out in “5.12 Options not generally available in sentencing a federal offender”.

⁵⁷⁷ *All Cars Ltd v McCann* (1945) 19 ALJR 129; *R v Mirkovic* [1966] VR 371.; *Harrex v Fraser* [2011] ACTSC 172, [38]-[39].

5.2 Six general sentencing options

407. The following table summarises the six general federal sentencing options, following a finding of guilt:

<i>Option</i>	<i>Specific criteria (in addition to s 16A)</i>	<i>Crimes Act 1914 sections Imposition</i>	<i>Breach</i>
1. Dismiss charge(s)	Having regard to: <ul style="list-style-type: none"> the character, antecedents, age, health or mental condition of the person; or the extent (if any) to which the offence is of a trivial nature; or the extent (if any) to which the offence was committed under extenuating circumstances 	s 19B(1)(c)	-
2. Bond without conviction	it is inexpedient to inflict any punishment Having regard to: <ul style="list-style-type: none"> the character, antecedents, age, health or mental condition of the person; or the extent (if any) to which the offence is of a trivial nature; or the extent (if any) to which the offence was committed under extenuating circumstances it is inexpedient to inflict any punishment other than a nominal punishment. The person must give security, with or without sureties, by recognizance or otherwise that he or she will be of good behaviour for up to 3 years and comply with other specified conditions	s 19B(1)(d)	s 20A
3. Bond with conviction	Conviction appropriate The court thinks fit. The person must give security, with or without sureties, by recognizance or otherwise that he or she will be of good behaviour for up to 5 years and comply with other specified conditions	s 20(1)(a)	S 20A
4. Fine (with conviction only)	Offence is punishable by a fine Conviction appropriate	ss 4B, 4D	S 15A State law generally

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<i>Option</i>	<i>Specific criteria (in addition to s 16A)</i>	<i>Crimes Act 1914 sections</i>	
		<i>Imposition</i>	<i>Breach</i>
	Must have regard to means and financial circumstances of offender		
	Lower maxima for offences dealt with summarily		
	Different maxima for natural persons and bodies corporate		
5. State/Territory post-conviction orders (e.g. community based orders, periodic/weekend detention, etc)	Conviction appropriate Sentence or order can only be made if: <ul style="list-style-type: none"> under the law of the State or Territory, a court is empowered to pass such a sentence, or make such an order, in respect of a State or Territory offender in corresponding cases; and the order is of a kind referred to in the provision (e.g. community based order, community service/work, community correction, attendance centre, periodic or weekend detention)⁵⁷⁸ 	s 20AB; Crimes Regulations 2019 , reg 15	s 20AC
6. Imprisonment	Offence is punishable by imprisonment Conviction appropriate Imprisonment is mandatory; or no other sentence is appropriate in all the circumstances of the case Must be exceptional circumstances for certain minor property offences	s 17A(1) s 17B	

408. Key features of the regime for fixing a sentence of imprisonment are as follows:

<i>Option</i>	<i>Specific criteria (in addition to s 16A)</i>	<i>Crimes Act 1914 sections</i>	
		<i>Imposition</i>	<i>Breach</i>
Head sentence/total effective	Individual sentences to be fixed.		

⁵⁷⁸ See “5.7.3 Types of State or Territory sentences or orders which are applied by s 20AB”.

<i>Option</i>	<i>Specific criteria (in addition to s 16A)</i>	<i>Crimes Act 1914 sections</i> Imposition Breach	
sentence	Total effective sentence to be fixed by orders for concurrency/cumulation	s 19	
Period to be served	Commencement according to State law Governed by various factors, including length of head sentence and whether serving another federal sentence.	s 16E	
4 options:			
• To be released forthwith under recognizance release order (RRO)	RRO requires entry into recognizance to be of good behaviour for up to 5 years, other conditions may be imposed ⁵⁷⁹	s 20(1)(b) s 19AC s 19AE s 19AR(2)(e)	s 20A
• To be released on RRO after serving specified period	RRO generally only if head sentence or aggregate for federal offences is 3 years or less	s 20(1)(b) s 19AC s 19AE s 19AR(2)(e)	s 20A
• Non-parole period (NPP)	NPP generally only if head sentence or aggregate for federal offences is more than 3 years For certain national security offences, must be $\frac{3}{4}$ of head sentence or aggregate. For certain people smuggling offences, mandatory minimum NPP Otherwise period to be served to be determined by general sentencing principles.	s 19AB s 19AD s 19AG	Div 5 of Pt IB (breach of parole)
• Straight sentence	• RRO/NPP not appropriate having regard to the nature and circumstances of the offence or offences concerned and to the antecedents of the person; or	s 19AB(3) s 19AC(4) s 19AD(2) s 19AE(2) s 19AR(4)	

⁵⁷⁹ See “5.10.4 Non-parole period (NPP) or recognizance release order (RRO)?”

<i>Option</i>	<i>Specific criteria (in addition to s 16A)</i>	<i>Crimes Act 1914 sections Imposition Breach</i>
	<ul style="list-style-type: none"> the person is expected to be serving a State/Territory sentence on the day after the end of the federal sentence. <p>Open discretion not to make RRO if head sentence or aggregate for federal offences is 6 months or less</p>	s 19AC(3)

409. Other sentencing options and orders which are available in particular circumstances are described in Chapters 6 and 8. The present Chapter deals with the six general sentencing options.

5.3 Dismiss charge – Crimes Act 1914, s 19B

410. Where a person is charged before a court with a federal offence or federal offences, the court may, pursuant to s 19B(1)(c), dismiss the charge or charges, if it is satisfied of the criteria in the two-stage test set out in that sub-section.

411. As to the applicable criteria, see “5.4.1 The 2-stage process”.

412. The dismissal of a charge under s 19B cannot be subject to any conditions.⁵⁸⁰

⁵⁸⁰ *R v Matijevic* [1997] FCA 992.

5.4 Bond without conviction – *Crimes Act 1914*, s 19B

413. Section 19B of the *Crimes Act 1914* (Cth) empowers a court to discharge without conviction a person charged with one or more federal offences, where the charge is proved, upon the person giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he or she will comply with specified conditions.

414. The section requires that the person give “security ... *by recognizance or otherwise*”. In practice, security is invariably given by recognizance (that is, a bond), and such an order is therefore commonly referred to as a s 19B bond.

5.4.1 The 2-stage process

415. The criteria for making an order under s 19B(1) of the *Crimes Act 1914* are set out in the section. It provides that the court may make such an order where—

- (a) *a person is charged before a court with a federal offence or federal offences; and*
- (b) *the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:*
 - (i) *the character, antecedents, ~~cultural background~~ [deleted in December 2006], age, health or mental condition of the person;*
 - (ii) *the extent (if any) to which the offence is of a trivial nature; or*
 - (iii) *the extent (if any) to which the offence was committed under extenuating circumstances;**that it is inexpedient to inflict any punishment or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation ...*

416. The discretion conferred on a sentencer by s 19B has been held to consist of two stages.⁵⁸¹

- First, one or more of the factors specified in s 19B(1)(b)(i), (ii) or (iii) must be identified.
- Second, consideration must be given to whether, in light of that factor or factors and taking into account the principles and matters specified in s 16A of the Act, “*it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation*”.

417. **First-stage consideration:** The first stage involves identification of one or more of the factors set out in sub-paragraphs (i), (ii) or (iii) of s 19B(1)(b). The sub-paragraphs are alternatives.

⁵⁸¹ *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332; *DPP v Moroney* [2009] VSC 584, [15]; *Morrison v Behrooz* [2005] SASC 142.

418. Sub-paragraph (i) refers to “*the character, antecedents, age, health or mental condition*” of the person.⁵⁸² This reflects the considerations listed in s 16A(2)(m) of the Act: see “4.4.12 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)”.
419. The consequences which would flow from a conviction (such as restrictions on entry into foreign countries or disqualification from being an officer of a corporation) do not form part of a person’s antecedents.⁵⁸³
420. Sub-paragraph (ii) refers to “*the extent (if any) to which the offence is of a trivial nature*”.
421. Sub-paragraph (ii) refers to “*the extent (if any) to which the offence was committed under extenuating circumstances*”. Extenuating circumstances are circumstances which “*serve to make the offence seem less serious*”, “*lessen, or seem to lessen, the seeming magnitude of (guilt or offence) by partial excuses*”, or excuse, in any appreciable degree, the commission of the offence charged.⁵⁸⁴ The provision does not allow the court to have regard to extenuating circumstances generally; there must be some link between the extenuating circumstances relied on and the commission of the offence.⁵⁸⁵
422. Not all mitigating matters are capable of falling within (i), (ii) or (iii). In particular, the considerations listed do not include consequences that would flow from conviction for the offence. Nor does the list in the sub-paragraphs encompass other mitigating factors such as a plea of guilty, contrition, reparation or co-operation with law enforcement agencies. The factors relevant to the first stage are thus more confined than under the New South Wales counterpart of s 19B.⁵⁸⁶
423. The mitigating factors referred to in sub-paragraphs (i), (ii) or (iii) are not mere pegs on which to hang leniency dictated by some extraneous and idiosyncratic consideration. One or more of the mitigating matters listed must provide a sufficient ground to hold that it would be expedient to extend the leniency which the statute permits.⁵⁸⁷
424. **Second-stage consideration:** The second stage consideration involves a determination whether “*it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation*”.

⁵⁸² An additional reference to the “cultural background” of the defendant was deleted from the list of factors to be taken into account under s 19B with effect from 12 December 2006: *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth). In addition, for offences committed on or after 13 December 2006, a sentencing court is precluded from taking into account any form of customary law or practice as a mitigating or aggravating factor.

⁵⁸³ *R v Barany* [2018] QCA 137, [41].

⁵⁸⁴ *Mansfield v Evans* [2003] WASCA 193, [20].

⁵⁸⁵ *Mansfield v Evans* [2003] WASCA 193, [20].

⁵⁸⁶ *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [12]-[13]. The NSW counterpart of s 19B is s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁵⁸⁷ *Cobiack v Liddy* (1969) 119 CLR 257, 276 (Windeyer J). Cf. *Guerrero v Dickson* [2013] WASC 246, [32]-[25]; *DPP (Cth) v Ede* [2014] NSWCA 282, [27]; *R v Barany* [2018] QCA 137, [38]-[46].

425. That is, an order for dismissal of a charge or a bond without conviction (not involving probation) implicitly involves imposing *no punishment*, or only *nominal punishment*. Such an order may only be made if it is expedient to do so.
426. Determination that such an outcome (that is, no punishment or only nominal punishment) is expedient requires consideration of a wide range of factors in addition to the mitigating factors relied upon at the first stage to enliven the discretion.
427. An order under s 19B(1) is an “order” within the meaning of s 16A(1);⁵⁸⁸ therefore all matters under s 16A of the *Crimes Act 1914* which are relevant and known to the court must be considered in deciding whether to make an order under s 19B.⁵⁸⁹
428. It follows that, in considering whether it is expedient to make an order under s 19B(1), the court must consider, amongst other things, the nature and circumstances of the offence (s 16A(2)(a)), whether it forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character (s 16A(2)(c)), the personal circumstances of any victim (s 16A(2)(d)), any victim impact statement (s 16A(2)(ea)) and any injury loss or damage from the offence (s 16A(2)(e)), to the extent that they are relevant and known to the court. The court must also consider at the second stage matters in mitigation, including matters which do not fall within sub-paragraphs (i), (ii) or (iii) of s 19B(1)(b), such as the likely consequences of a conviction,⁵⁹⁰ to the extent that they are relevant and known to the court.
429. The overarching obligation of the sentencing court remains: the court “*must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*” (*Crimes Act 1914*, s.16A(1)). The court *must* give proper weight to considerations of general deterrence (s.16A(2)(ja)), specific deterrence (s.16A(2)(j)), denunciation and adequate (that is, proportionate) punishment (s.16A(2)(k)). An order which involves *no punishment* or only *nominal punishment* necessarily accords little or no weight to such purposes.
430. **Exercise of the discretion:** The circumstances in which an order under s 19B(1) will be appropriate have been described as “exceptional”, “rare”, “unusual”, “atypical”, “special” or “singular”⁵⁹¹ and as requiring something to distinguish the instant case from what may be regarded as a typical breach.⁵⁹² These terms are not substitutes for the language of the statute,⁵⁹³ but describe the effect of applying the law. That is, unless the offence is trivial, an order which involves *no punishment* or only *nominal punishment* will rarely be an order “*of a severity appropriate in all the circumstances of the offence*” (s 16A(1)) or will rarely give sufficient effect to the requirement for adequate punishment (s 16A(2)(k)) or take sufficient account of the need for general deterrence (s 16A(2)(ja)) or denunciation.

⁵⁸⁸ *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [15].

⁵⁸⁹ *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [15]-[29].

⁵⁹⁰ *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [38].

⁵⁹¹ *Matta v ACCC* [2000] FCA 729, [3]; *R v Hooper* [2008] QCA 308, [27]; *R v Weller* (1988) 37 A Crim R 349, 350, 355-356; *Uznanski v Searle* (1981) 26 SASR 388, 394 and *Stark v Plant* [2010] WASCA 74. See *Guerrero v Dickson* [2013] WASC 246, [31], where relevant authorities are collected.

⁵⁹² *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332 [72]; *DPP v Moroney* [2009] VSC 584, [27].

⁵⁹³ *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [70]-[77].

431. For these reasons, it has been held that an exercise of the discretion under s 19B will be unusual or exceptional in cases involving fraudulent or deliberately deceptive conduct⁵⁹⁴ or in other cases in which general deterrence is important. Examples are a case involving dishonesty by a public official (even though the benefit dishonestly obtained was relatively small)⁵⁹⁵ and a case involving the unauthorised writing of prescriptions by a medical practitioner (despite the practitioner receiving no personal benefit from doing so).⁵⁹⁶ Similarly, where offending is serious, a s 19B bond will usually be inappropriate notwithstanding the personal circumstances of the offender.⁵⁹⁷

432. In *Moroney*,⁵⁹⁸ T Forrest J observed that s 19B is probably being overused in Victoria in the context of welfare fraud.⁵⁹⁹

5.4.2 Single bond may be ordered for two or more federal offences

433. In general, the imposition of a single penalty in relation to more than one offence is permitted only to the extent that it is clearly authorised by statute. Commonwealth legislation provides for aggregate penalties only in limited circumstances. The main provision permitting aggregate penalties in courts of summary jurisdiction is s 4K(4) of the *Crimes Act 1914* (Cth). That sub-section permits an aggregate penalty only for offences against the same provision of a law of the Commonwealth which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character. Section 4K(4) only relates to the aggregation of post-conviction penalties, not a non-conviction order such as an order under s 19B(1)(d). (See further “7.10 Aggregate penalty”.)

434. In its own terms, s 19B applies whenever a person is charged before a court with one or more federal offences. It is implicit that a single order may be made in relation to more than one of the offences with which the person is charged. By contrast with s 4K, there is no explicit requirement that the charges be for the same offence, or for offences against the same provision of the Commonwealth law, or for offences of the same or similar nature, or that they be contained in the same charge-sheet or information. The better view would appear to be that the power to make a single order under s 19B in relation to multiple offences is not subject to any such implied limitations.

435. It should be noted, however, that there is no power to combine an order under s 19B with any kind of bond or order in relation to State or Territory offences.

⁵⁹⁴ *Matta v ACCC* [2000] FCA 729; *Moreland v Snowden* [2007] WASC 137, [46].

⁵⁹⁵ *R v Matijevic* [1997] FCA 992.

⁵⁹⁶ *R v Price* [2008] QCA 330, [16]-[17].

⁵⁹⁷ *Sau v DPP* [2009] SASC 47; *Warnakulasuriya v R* [2009] WASC 257; *RLG v Donnelly* [2012] WASC 230.

⁵⁹⁸ *DPP v Moroney* [2009] VSC 584, [31].

⁵⁹⁹ The most commonly-prosecuted offence for welfare fraud is the offence in s 135.2(1) of the *Criminal Code* (Cth). In the 5 years to 31 January 2019, s.19B orders were made in 30% of all cases under s.135.2(1) of the Code dealt with in Victoria, compared with 1.95% of all such cases in the rest of Australia.

5.4.3 Length of good behaviour period under s 19B

436. A recognizance (or other security) under s 19B may be (and almost always is) conditional on the person being of good behaviour for a specified period, not exceeding 3 years.

5.4.4 Reparation, restitution, compensation or costs as a condition of a bond

437. In accordance with s 19B(1)(d)(ii), a court may impose a condition of a s 19B bond that the offender make reparation or restitution, or pay compensation or costs, on or before a specified date, or by specified instalments. The condition may be for any making of reparation or restitution, or payment of compensation or costs that the court is otherwise empowered to order.

438. It is usually more appropriate for reparation to be the subject of a separate order, rather than made a condition of a recognizance.⁶⁰⁰ As to the making of a reparation order, see “6.1 Reparation – Crimes Act 1914, s 21B”.

5.4.5 Probation as a condition of a bond

439. In accordance with s 19B(1)(d)(iii), a s 19B bond may include a condition that the person will, during the period so specified, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed. However there do not appear to be any statutory mechanisms or administrative arrangements that would allow State or Territory probation officers to perform functions under such an order.

5.4.6 Other conditions of bond

440. In accordance with s 19B(1)(d)(iii), a court may impose such other conditions in a s 19B bond “as the Court thinks fit to specify in the order”. Despite the apparent breadth of this provision, it is subject to implied limitations.⁶⁰¹ One such limitation is the general law principle that a person who has not been convicted of an offence should not be punished by a court; in the absence of clear statutory authority, a condition may not be imposed if it would amount to punishment.⁶⁰²

441. Any condition imposed must “*be expressed in unambiguous and definitive language, so that the person submitting to it is left in no doubt as to what are the precise obligations to be satisfied*”.⁶⁰³

5.4.7 No power to order community work as a condition of a bond

442. The power in s 19B(1)(d)(iii) to impose conditions does not permit a condition to perform unpaid community work.⁶⁰⁴

⁶⁰⁰ See *Hayes v R* [2014] VSCA 309, [9], [26].

⁶⁰¹ For an example of unwarranted conditions of a bond, see *R v Manolakis* [2008] SASC 129.

⁶⁰² *DPP (Cth) v Ede* [2014] NSWCA 282, [34]-[36].

⁶⁰³ *Temby v Schulze* (1991) 57 A Crim R 284, 289.

⁶⁰⁴ *DPP (Cth) v Ede* [2014] NSWCA 282. See also “5.5.7 Condition requiring unpaid work as a condition of a bond”.

5.4.8 Payment of money as condition of a bond

443. In *Brittain v Mansour*⁶⁰⁵, it was held that there was no power to impose as a condition of a bond under the *Sentencing Act 1991* (Vic) a requirement that the offender pay money to the court fund or to a nominated charity. Such a condition was, in substance, a fine. The power to impose conditions on a bond did not extend to the imposition of such a monetary impost.⁶⁰⁶

444. The reasoning in *Brittain v Mansour* would seem to apply equally to orders under s 19B of the *Crimes Act 1914* (Cth). It is therefore the view of the CDPP that a court cannot impose as a condition of a section 19B bond a condition to pay a monetary amount to a charitable organisation or to a court fund. The only power to order payment of money as a condition of a bond is the power in s 19B(1)(d)(ii) to require that the offender make reparation or restitution, or pay compensation or costs.

5.4.9 Form of bond

445. No particular form of bond under s 19B is required by statute. The section itself provides (in s 19B(1)(d)) that the court may, by order, “*discharge the person, without proceeding to conviction ... upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court ...*”. The essential requirement, therefore is “*security ... to the satisfaction of the court*”. The form of security is not specified, but in practice is invariably a specified sum. There is no statutory limit on the sum that can be fixed and there is some variation around Australia in the amounts chosen.⁶⁰⁷ In practice a surety is rarely, if ever, required.

446. A form of s 19B bond is prescribed as Form 10 under the *Crimes Regulations 2019* (Cth), although the use of the prescribed form is optional. A State or Territory bond form should not be used for a s 19B bond.⁶⁰⁸

5.4.10 Section 19B bond not available for certain people-smuggling offences

447. A s 19B (or s 20) bond cannot be imposed on an offender found guilty of certain people smuggling offence contrary to the *Migration Act 1958* (Cth), unless the offender was not over 18 at the time of the offence. See “8.1.2 Mandatory imprisonment for certain people-smuggling offences”.

⁶⁰⁵ *Brittain v Mansour* [2013] VSC 50.

⁶⁰⁶ The effect of the decision in *Brittain v Mansour* [2013] VSC 50 has since been reversed for State offences by statute in Victoria by the *Justice Legislation Amendment Act 2013*.

⁶⁰⁷ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), 832.

⁶⁰⁸ *DPP (Cth) v Cole* (2005) 91 SASR 480.

5.4.11 Corporations

448. The provisions of s 19B (and s 20) apply to a corporation as well as to a natural person.⁶⁰⁹

5.4.12 Obligation on the court

449. The court must:

- explain or cause to be explained the purpose of the order, the consequences which may follow if it is not complied with and that the recognizance may be discharged or varied under s 20AA (s 19B(2)); and
- provide a copy of the order to the offender (s 19B(4)).

5.4.13 Breach action – *Crimes Act 1914*, s 20A(1A)

450. Section 20A(1A) of the *Crimes Act 1914* provides that breach action (in relation to an order under either s 19B or s 20) may only be taken before the end of the period of the bond if the breach involves a failure to comply with a condition of an order other than a failure constituted by the commission by the person of an offence. Where the breach is occasioned by the commission of an offence during the period of the bond breach, proceedings for breach may be brought either within or outside the period of the bond.

451. Breach action is initiated by summons or information and warrant that can only be issued by a Magistrate pursuant to s 20AC.

452. Where the court is satisfied that the person has without reasonable excuse failed to comply with a condition, the sentencing options are set out in s 20A(5)(a). They are:

- revoke the order and convict the person and deal with the person in a manner as if the order had not been made; or
- take no action.

⁶⁰⁹ *John C. Morish Pty Ltd v Luckman* (1977) 16 SASR 143; *Sheen v Geo Cornish Pty Ltd* [1978] 2 NSWLR 162; *Lanham v Brambles – Ruys Pty Ltd* (1984) 37 SASR 16.

5.5 Bond with conviction – *Crimes Act 1914*, s 20(1)(a)

453. Section 20 enables the court to release a federal offender on a bond with conviction upon giving security with or without sureties and conditions.

5.5.1 Single bond may be ordered for two or more federal offences

454. In general, the imposition of a single penalty in relation to more than one offence is permitted only to the extent that it is clearly authorised by statute. Commonwealth legislation provides for aggregate penalties only in limited circumstances. The main provision permitting aggregate penalties in courts of summary jurisdiction is s 4K(4) of the *Crimes Act 1914* (Cth). That sub-section permits an aggregate penalty only where charges against the same person for any number of offences against the same provision of a law of the Commonwealth have been joined in the same information, complaint or summons on the basis that the charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character. (See further “7.10 Aggregate penalty”.)

455. In its own terms, s 20 applies whenever a person is convicted of one or more federal offences. It is implicit that a single order may be made in relation to more than one of the offences with which the person is charged. By contrast with s 4K, there is no explicit requirement that the charges be for the same offence, or for offences against the same provision of the Commonwealth law, or for offences of the same or similar nature, or that they be contained in the same charge-sheet or information. The better view would appear to be that the power to make a single order under s 20 in relation to multiple offences is not subject to any such implied limitations.

456. It should be noted, however, that there is no power to combine an order under s 20 with any kind of bond or order in relation to State or Territory offences.

5.5.2 Length of good behaviour period

457. An order under s 20(1)(a), without passing sentence, that the offender be released may be conditional on the offender being of good behaviour for a specified period, not exceeding 5 years.

5.5.3 Reparation, restitution, compensation or costs as a condition of a bond

458. In accordance with s 20(1)(a)(ii), a court may impose a condition of a s 20(1)(a) order that the offender make reparation or restitution, or pay compensation or costs, on or before a specified date, or by specified instalments. The condition may be for any making of reparation or restitution, or payment of compensation or costs that the court is otherwise empowered to order. The offender is not to be imprisoned for failure to comply with the condition (s 20(2A)).

459. It is usually more appropriate for reparation to be the subject of a separate order, rather than made a condition of a recognizance.⁶¹⁰ As to the making of a reparation order, see “6.1 Reparation – Crimes Act 1914, s 21B”.

5.5.4 Pecuniary penalty as a condition of a bond

460. Pursuant to s 20(1)(a)(iii), a court may impose a condition of a s 20(1)(a) order that the offender will pay to the Commonwealth such pecuniary penalty (if any) as the court specifies in the order, on or before a date specified in the order or by specified instalments as provided in the order. The maximum pecuniary penalty is that specified in s 20(5). If the offence is punishable by a fine, the maximum pecuniary penalty is the amount of the maximum fine that the court is empowered to impose on the person for the offence. If not, the maximum pecuniary penalty is 60 penalty units in the case of a court of summary jurisdiction, or 300 penalty units otherwise.

5.5.5 Other conditions: for a period of up to 2 years

461. Other conditions may be imposed for up to 2 years: s 20(1)(a)(iv). Under this sub-paragraph the court can impose such conditions “*as the court thinks fit to specify in the order*”.

462. Despite the expansive words used in s 20(1)(a)(iv), a condition imposed must not be inconsistent with the release of the person, and must be reasonably capable of compliance; s 20(1)(a)(iv) must be read down accordingly.⁶¹¹ A condition must also “*be expressed in unambiguous and definitive language, so that the person submitting to it is left in no doubt as to what are the precise obligations to be satisfied*”.⁶¹²

5.5.6 Condition requiring treatment or probation

463. An example given in the legislation of a condition which may be specified under s 20(1)(a)(iv) is a condition that “*the person will undertake a specified counselling, education or treatment program during a specified part of, or throughout, the specified period*”.

464. Section 20 also contemplates a condition that the person “*be subject to the supervision of a probation officer appointed in accordance with the order*” and “*obey all reasonable directions of the probation officer*”, because such a condition is referred to in s 20(1A). Under that sub-section, if the court imposes such a condition it “*must also specify the condition that the person will not travel interstate or overseas without the written permission of the probation officer.*” However there do not appear to be any statutory mechanisms or administrative arrangements that would allow State or Territory probation officers to perform functions under such an order.

⁶¹⁰ See *Hayes v R* [2014] VSCA 309, [9], [26].

⁶¹¹ See *R v Keur* (1973) 7 SASR 13, 15.

⁶¹² *Temby v Schulze* (1991) 57 A Crim R 284, 289. As to the other requirements for a valid condition of a bond, see *Dunn v Woodcock* [2003] NTSC 24, [7].

465. In *Jones*,⁶¹³ Burt CJ doubted that a condition requiring the defendant to “undergo such treatment for your drug addiction as the probation officer shall direct” was a valid condition under s 20. Although it is now clear that a condition requiring treatment for drug addiction would be valid, the area for doubt is whether a condition could be imposed that left to the discretion of another person the nature and extent of the treatment; that is, such a condition might be regarded as akin to impermissible sub-delegation, or be too uncertain in what it requires of the offender.

5.5.7 Condition requiring unpaid work as a condition of a bond

466. It is at least doubtful whether a court can impose a condition to perform unpaid community work as a condition of a s 20 bond.

467. In *Adams v Carr*,⁶¹⁴ the South Australian Court of Criminal Appeal held that a condition for performance of community service and an associated order that the offender comply with the lawful direction of a community service officer could validly be imposed under s 20(1)(a) of the *Crimes Act 1914* (Cth) and carried out in South Australia by arrangements under s 3B of the Act.

468. However the weight of authority is that unpaid work cannot be required as a condition of a s 20 recognizance, at least where community service is provided for as a separate sentencing option under State legislation which is applied by s 20AB of the *Crimes Act 1914* (Cth).⁶¹⁵ In *Shambayati*,⁶¹⁶ the Queensland Court of Appeal held that a condition of a recognizance under s 20(1)(a) that the offender perform 50 hours community service was invalid. The Court observed that although the terms of s 20(1)(a)(iv) are wide enough to include community service, “community service” had no meaning or regime for its performance except relevantly as a separate sentencing option under State legislation, which was not incorporated by s 20.⁶¹⁷ The Court distinguished *Adams v Carr* on the basis that under the State legislation considered in that case, community service could be imposed only as a condition of a recognizance.⁶¹⁸ The Court in *Shambayati* concluded that the only way in which community service could be imposed for a federal offence in Queensland was by an order made pursuant to s20AB.⁶¹⁹

⁶¹³ *R v Jones* [1984] WAR 175, 180. See also *R v Manolakis* [2008] SASC 129 relating to appropriateness of a condition to obey the directions of a corrections officer as to psychological or psychiatric treatment or counselling.

⁶¹⁴ *Adams v Carr* (1987) 47 SASR 205. See also *Dowling v Hamlin* [2006] ACTSC 117, [32]-[34]; but note that in *Dimech v Watts* [2016] ACTSC 221, [19]-[22], another judge of the ACT Supreme Court declined to follow *Dowling v Hamlin* on this point.

⁶¹⁵ *Bantick v Blunden* [1981] Tas R (NC) N9; *Shambayati v R* (1999) 105 A Crim R 373; *Dimech v Watts* [2016] ACTSC 221. See also *DPP (Cth) v Ede* [2014] NSWCA 282, in which it was held that the performance of unpaid work could not be made a condition of a bond without conviction under s 19B of the *Crimes Act 1914* (Cth).

⁶¹⁶ *Shambayati v R* (1999) 105 A Crim R 373.

⁶¹⁷ *Shambayati v R* (1999) 105 A Crim R 373, [16].

⁶¹⁸ *Shambayati v R* (1999) 105 A Crim R 373, [17].

⁶¹⁹ *Shambayati v R* (1999) 105 A Crim R 373, [17].

5.5.8 Payment of money to charity as condition of a bond

469. In *Brittain v Mansour*⁶²⁰, it was held that there was no power to impose as a condition of a bond under the *Sentencing Act 1991* (Vic) a requirement that the offender pay money to the court fund or to a nominated charity. Such a condition was, in substance, a fine. The power to impose conditions on a bond did not extend to the imposition of such a monetary impost.⁶²¹

470. The view of the CDP is that, for similar reasons, a court cannot impose as a condition of a section 20 recognizance a condition to pay a monetary amount to a charitable organisation or to a court fund. The only powers to order payment of money as a condition of a s 20 recognizance are those in s 20(1)(a)(ii) (reparation, restitution, compensation or costs that the court is otherwise empowered to order) and s 20(1)(a)(iii) (payment to the Commonwealth of a pecuniary penalty).

5.5.9 Other impermissible conditions of a s 20 bond

471. A condition imposed on an offender found guilty of social security fraud that she not apply for a sole parent's pension for two years was beyond the limits of sound sentencing discretion.⁶²²

472. In *Manolakis*,⁶²³ conditions which prohibited contact with any politician and required the offender to obey the directions of a corrections officer in relation to psychological or psychiatric counselling were considered unsuitable, in the particular circumstances of the case.

5.5.10 Form of bond

473. A form of bond under s 20(1)(a) is prescribed as Form 11 under the *Crimes Regulations 2019* (Cth), although the use of the prescribed form is optional. A state bond form should not be used.⁶²⁴ A s 20 bond must specify the monetary amount of security to be given by the offender.⁶²⁵ The section does not limit the amount. A bond can also involve a surety but this is rarely, if ever, required.

5.5.11 When a s 20 bond is not available

474. A section 20 (or section 19B) bond cannot be imposed on an offender found guilty of certain people smuggling offence contrary to the *Migration Act 1958* (Cth), unless the offender was not over 18 at the time of the offence. See "8.1.2 Mandatory imprisonment for certain people-smuggling offences".

⁶²⁰ *Brittain v Mansour* [2013] VSC 50.

⁶²¹ The effect of the decision in *Brittain v Mansour* [2013] VSC 50 has since been reversed by statute for State offences in Victoria by the *Justice Legislation Amendment Act 2013*.

⁶²² *R v Theodossio* [2000] 1 Qd R 299. This case also discusses other limitations to s 20 of the *Crimes Act 1914* (Cth).

⁶²³ *R v Manolakis* [2008] SASC 129.

⁶²⁴ See *DPP (Cth) v Cole* (2005) 91 SASR 480.

⁶²⁵ *Assafiri (No.2) v R* [2007] NSWCCA 356, [1].

5.5.12 Obligation on court

475. If a person is released by order under s 20(1)(a) of the *Crimes Act 1914* (Cth), the court must:

- before making the order, explain or cause to be explained the purpose and effect of the order, the consequences which may follow if it is not complied with and that the recognizance may be discharged or varied under s 20AA (s 20(2)); and
- provide a copy of the order to the offender as soon as practicable (s 20(4)).

5.5.13 Breach action – *Crimes Act 1914*, s 20A(1A)

476. Breach action may only be taken before the end of the period of the bond if the breach involves a failure to comply with a condition of an order other than a failure constituted by the commission by the person of an offence. Where the breach is occasioned by further offending, breach action can be taken either within or outside the period of the bond.⁶²⁶

477. Breach action is initiated by summons or information and a warrant that can only be issued by a Magistrate pursuant to s 20AC of the *Crimes Act 1914*.

478. Where the court is satisfied that the person has without reasonable excuse failed to comply with a condition the sentencing options are set out in s 20A(5)(b). They are:

- continue the order and impose a pecuniary penalty not exceeding 10 penalty units;
- revoke the order and deal with the person as if no order had been made; or
- take no action.

A person is not to be imprisoned for failure to pay an amount of reparation or costs as a condition of a bond: s 20(2A).

⁶²⁶ See, e.g., *DPP (Cth) v Fabri* [2008] NSWSC 655.

5.6 Fine/pecuniary penalty

479. A reference in the *Crimes Act 1914* (Cth) to a “fine” is defined in s 3(2) of the Act to include a reference to a pecuniary penalty other than:

- (a) a pecuniary penalty imposed under Division 3 of Part 13 of the *Customs Act 1901*,
- (b) a pecuniary penalty order under the *Proceeds of Crime Act 1987* (Cth), and from 1 January 2003, a pecuniary penalty order or a literary proceeds order under the *Proceeds of Crime Act 2002* (Cth); or
- (c) a superannuation order made under the *Australian Federal Police Act 1979* or the *Crimes (Superannuation Benefits) Act 1989* (Cth).

5.6.1 Penalty unit value

480. The *Crimes Act 1914* (Cth) adopts a penalty unit system of describing the maximum permissible fine. Penalty unit is defined in s 4AAA of the Act. A *penalty unit* means:

- **\$210** for offences committed on or after 1 July 2017;
- **\$180** for offences committed between 31 July 2015 and 30 June 2017;
- **\$170** for offences committed between 28 December 2012 and 30 July 2015;⁶²⁷ and
- **\$110** for offences committed between 7 April 1997 and 27 December 2012.

481. The value of a penalty unit is subject to indexation under s 4AA(3) of the *Crimes Act 1914*.

5.6.2 Imprisonment converted into a fine formula – *Crimes Act 1914*, s 4B

482. If an offence is punishable by imprisonment only (that is, a fine is not specified as an alternative or additional penalty), s 4B of the *Crimes Act 1914* (Cth) permits the court to impose a pecuniary penalty, instead of or in addition to imprisonment, on a natural person who has been convicted of the offence.⁶²⁸

483. Section 4B contains a formula for calculating the maximum fine, by reference to the number of penalty units. The relevant number of penalty units is the maximum term of imprisonment (expressed in months) multiplied by 5. For example, if the offence is punishable by imprisonment for 12 months, the maximum fine is 60 penalty units.

484. Where a corporation is convicted of a federal offence and the contrary intention does not appear, the maximum pecuniary penalty that can be imposed is five times the amount that could be imposed on a natural person convicted of the same offence.⁶²⁹

⁶²⁷ Section 3 and Schedule 3 to *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act No.167 of 2012*. Section 2 to *Crimes Legislation Amendment (Penalty Unit) Act 2015*.

⁶²⁸ *Crimes Act 1914* (Cth), s 4B(2).

⁶²⁹ *Crimes Act 1914* (Cth), s 4B(3). See *Gold Coast Boats Pty Ltd v Nixon* [2018] QCA 221.

5.6.3 Maximum penalties on summary disposition of an indictable offence – Crimes Act 1914, ss 4J and 4JA

485. Section 4J sets out the maximum fine, and maximum term of imprisonment, that may be imposed when **an indictable offence against a law of the Commonwealth which is punishable by imprisonment is determined summarily**.⁶³⁰ If the offence relates to property whose value does not exceed \$5,000, the offence may be dealt with summarily on the request of the prosecutor, if the court thinks fit (s 4J(4)); in such a case, the maximum penalty which may be imposed on summary conviction is 12 months' imprisonment or a fine of 60 penalty units or both (s 4J(5)). In any other case, the maximum penalty on summary conviction for an indictable offence is determined by the maximum penalty for the offence generally, as follows:

- *If the maximum penalty for the offence is a term of imprisonment not exceeding 5 years, the maximum sentence when imposed on summary conviction is imprisonment for 12 months and/or a fine not exceeding 60 penalty units; and*
- *If the maximum penalty for the offence is a term of imprisonment exceeding 5 years but not exceeding 10 years, the maximum sentence for the offence when imposed summarily is 2 years imprisonment and/or 120 penalty units.*

(No provision is made in relation to an offence punishable by a term of imprisonment exceeding 10 years because generally speaking such an offence cannot be determined summarily.)

486. Section 4JA, sets out the maximum fine that may be imposed when **an indictable offence against a law of the Commonwealth which is not punishable by imprisonment**⁶³¹ **is determined summarily** (subject to the power in s 4J(4) and to any contrary intention indicated by the law creating the offence). The maximum fine on summary conviction is determined by the maximum fine for the offence generally, as follows:

- *if the offence would be punishable on indictment by a pecuniary penalty of not more than 300 penalty units for an individual, the maximum pecuniary penalty which may be imposed on an individual on summary conviction is 60 penalty units;*
- *if the offence would be punishable on indictment by a pecuniary penalty of not more than 600 penalty units for an individual, the maximum pecuniary penalty which may be imposed on an individual on summary conviction is 120 penalty units;*
- *if the offence would be punishable on indictment by a pecuniary penalty of not more than 1500 penalty units for a body corporate, the maximum pecuniary penalty which may be imposed on a body corporate on summary conviction is 300 penalty units;*
- *if the offence would be punishable on indictment by a pecuniary penalty of not more than 3000 penalty units for a body corporate, the maximum pecuniary penalty which may be imposed on a body corporate on summary conviction is 600 penalty units;*

⁶³⁰ Section 4J(7) provides that the section does not apply to certain national security offences: an offence against s 79(2) or s 79(5) (official secrets etc) of the *Crimes Act 1914* (Cth), or to an offence against Division 80 (treason etc), 82 (sabotage), 91 (espionage) or 92 (foreign interference) of the *Criminal Code* (Cth).

⁶³¹ Note that s 4G of the *Crimes Act 1914* provides that an offence punishable by imprisonment for a period exceeding 12 months is an indictable offence, unless the contrary intention appears.

(No provision is made in relation to an offence punishable by a pecuniary penalty exceeding 600 penalty units for an individual or 3000 penalty units for a body corporate because generally speaking such an offence cannot be determined summarily.)

487. None of these provisions permits a court of summary jurisdiction to impose a sentence of imprisonment or a fine which is greater than that which could have been imposed on indictment (ss 4J(6), 4JA(2)), or to impose both a sentence of imprisonment and a fine if the offence is not punishable by both on indictment (s 4J(6)).

5.6.4 Means and financial circumstances of offender

488. In sentencing a federal offender, the court is required to have regard to the “means” of the offender: *Crimes Act 1914* (Cth), s 16A(2)(m). In addition to this and to any other factors that the court is permitted or required to take into account, before imposing a fine on a federal offender, the court must have regard to the “financial circumstances” of the offender: *Crimes Act 1914* (Cth), s 16C(1).⁶³² However a court is not precluded from imposing a fine if the financial circumstances of the offender cannot be ascertained by the court: s 16C(2).

489. The requirement to take financial circumstances into account does not dictate that the financial circumstances will determine the fine that is to be imposed.⁶³³ The financial circumstances of the offender is a mandatory consideration, but, expressly, there are other considerations; the capacity of the offender to pay is relevant but not decisive.⁶³⁴ A fine or pecuniary penalty which exceeds the capacity of the offender to pay is not necessarily excessive, and may be entirely appropriate (to satisfy the requirements of general and specific deterrence) where the offence was committed for financial gain.⁶³⁵

490. Consideration of the financial circumstances of the offender may increase, rather than decrease, a fine in order for it to be a deterrent for the offender.⁶³⁶

5.6.5 Aggregate fine for multiple offences

491. There is no general power to impose a single aggregate fine for multiple federal offences. There are, however, particular circumstances in which a court may impose an aggregate fine in sentencing a federal offender: see “7.10 Aggregate penalty”. In no circumstances can a court impose a single aggregate fine for a Commonwealth offence and a State offence.

⁶³² In its report *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), the Australian Law Reform Commission recommended (recommendation 28-5) that the reference to “means” in s 16A(2)(m) be amended to “financial circumstances”, consistently with s 16C. The recommendation has not been acted on.

⁶³³ *Jahandideh v R* [2014] NSWCCA 178, [15].

⁶³⁴ *Darter v Diden* (2006) 94 SASR 505, [29]-[32]; *Jahandideh v R* [2014] NSWCCA 178, [16].

⁶³⁵ *Customs v Rota Tech Pty Ltd* [1999] SASC 64, [35]-[36]; *Customs v Labrador Liquor Wholesale Pty Ltd* [2006] QCA 558, [95]-[98].

⁶³⁶ *Jahandideh v R* [2014] NSWCCA 178, [17].

5.6.6 Fine and imprisonment

492. Some Commonwealth offences are specifically punishable by both a fine and imprisonment. Moreover, the effect of s 4B of the *Crimes Act 1914* (Cth) is that whenever an offence is punishable by imprisonment only, a court has power to impose a pecuniary penalty instead of, or in addition to, imprisonment.

493. The most common circumstance in which a fine is imposed in addition to a term of imprisonment is where the offender has profited from the offending.⁶³⁷

5.6.7 Enforcement of fines – *Crimes Act 1914*, s 15A

494. Section 15A adopts State/Territory law relating to enforcement of fines.⁶³⁸ Section 15A(1) provides:

- (1) *A law of a State or Territory relating to the enforcement or recovery of a fine imposed on an offender applies to a person convicted in the State or Territory of an offence against a law of the Commonwealth. The law applies:*
 - (a) *so far as it is not inconsistent with a law of the Commonwealth; and*
 - (b) *with the modifications (if any) made by or under this section.*

495. The provision is comparable to s 79 of the *Judiciary Act 1903* (Cth).⁶³⁹ State/Territory laws apply notwithstanding that in their terms they are confined to persons convicted in courts of the State/Territory of offences against the laws of the State/Territory. To that extent, and to that extent only, the State laws are given an expanded meaning. Otherwise the laws are applied with their meaning unchanged.⁶⁴⁰

496. Like the cognate provisions of the *Judiciary Act*, s 15A does not apply State or Territory law to the extent that to do so would be contrary to the Constitution or inconsistent with a law of the Commonwealth. To avoid inconsistency with the requirements of Chapter III of the Constitution, s 15A includes provisions to ensure that, in the application of State or Territory law, the judicial power of the Commonwealth is not exercised other than by a court and that a court is not vested with a non-judicial power or function which is not auxiliary or incidental to the exercise of judicial power. To this end s 15A modifies State or Territory law as applied so that only a court may impose a penalty for failure to pay a fine (s 15A(1AA)) and provides for the enforcement of fines other than by a court (s 15A(1ACB) and (1AD)).

497. If a court imposes a sentence or sentences of imprisonment on a person in respect of a failure to pay a fine or fines imposed for a federal offence or offences, the court must direct that the sentence, or all

⁶³⁷ See *Fox & Freiberg's Sentencing – State and Federal Law in Victoria* (Thomson Reuters, third ed, 2014), [7.25].

⁶³⁸ Section 15A was amended by the *Crimes Amendment (Enforcement of Fines) Act 1998*. The purpose of the amendment, which commenced on 29 June 1998, is to ensure that the full range of state fine enforcement procedures apply in respect of federal offenders. The amendments apply irrespective of whether the fine was imposed before or after 29 June 1998.

⁶³⁹ *Thomas v Ducret* (1984) 153 CLR 506. See “2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79”.

⁶⁴⁰ *Thomas v Ducret* (1984) 153 CLR 506.

the sentences, commence to be served from the earliest practicable day despite the fact that the person may, on that day, already be serving another sentence of imprisonment for a federal, State or Territory offence (s 15A(3)). However the court may order whole or partial cumulation where it is of the opinion that, in all the circumstances of the case, it is more appropriate to do so (s 15A(4)).

5.7 Orders applied by *Crimes Act 1914*, s.20AB

5.7.1 The power conferred by s 20AB

498. Section 20AB of the *Crimes Act 1914* (Cth) was inserted in 1982.⁶⁴¹ The then Attorney-General said that the purpose of the section was to “*make available to the courts, when dealing with Commonwealth offenders, sentencing options such as community service orders now available in relation to State and Territory offenders*”.⁶⁴² The section enables a court sentencing a federal offender to impose a State or Territory order of a specified type.

499. Subsection 20AB(1) provides:

- (1) *A court may pass a sentence, or make an order, in respect of a person convicted before the court in a participating State or participating Territory of a federal offence, if:*
 - (a) *subsection (1AA) applies to the sentence or order; and*
 - (b) *under the law of the State or Territory, a court is empowered to pass such a sentence, or make such an order, in respect of a State or Territory offender in corresponding cases; and*
 - (c) *the first-mentioned court is:*
 - (i) *empowered as mentioned in paragraph (b); or*
 - (ii) *a federal court.*

500. As to the meaning of “participating State” and “participating Territory” see “5.7.2 Participating State or Territory”. Each State and Territory is a participating State or participating Territory.

501. Section 20AB (1AA) describes the relevant types of sentences or orders. See “5.7.3 Types of State or Territory sentences or orders which are applied by s 20AB”.

502. The effect of s 20AB is that if a court in a State or Territory has power to pass a sentence or to make an order of a kind described in s 20AB(1AA) in respect of a State or Territory offender in corresponding cases, the court may pass such a sentence or make such an order in respect of a person convicted before the court of a federal offence.

503. Section 20AB is an ambulatory provision; it is intended to apply, as far as practicable, State or Territory sentencing options of the kinds described in s.20AB(1AA) under State or Territory laws as in force from time to time.⁶⁴³

⁶⁴¹ *Crimes Amendment Act 1982* (Cth), s 8. The new section did not come into operation until 16 December 1985.

⁶⁴² Second Reading Speech of the Attorney-General (Senator Durack) on the Crimes Amendment Bill 1981, *Hansard (Senate)*, 15 October 1981, 1291.

⁶⁴³ *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [22].

5.7.2 Participating State or Territory

504. An order of a kind described in s 20AB(1AA) is only available in sentencing a federal offender in a “participating State” or “participating Territory”. “Participating State” and “participating Territory” are defined in s 3(1) of the *Crimes Act 1914* (Cth) as having the meanings given by s 3B(2). Section 3B(2) provides that a State is a participating State, and the Australian Capital Territory or Northern Territory is a participating Territory, if an arrangement is in force under s 3B(1). A territory other than the ACT or the NT is a participating Territory: s 3B(2)(b)(i).

505. Sub-section 3B(1) provides for the making of arrangements between the Governor-General and the Governor of a State, or the Government of the ACT, or the Administrator of the NT, for officers of the State or Territory to exercise powers and perform functions, and facilities and procedures of the State or Territory to be made available, in relation to the carrying out or enforcement under this Act of orders made under this Act or another Act.

506. Relevant arrangements under s 3B(1) of the *Crimes Act 1914* (Cth) have been in place between the Commonwealth and each State, the ACT and the NT since at least 1990 (earlier in relation to some jurisdictions).⁶⁴⁴

507. Therefore each State is a participating State, and the ACT, the Northern Territory and each other Territory is a participating Territory for the purposes of s 20AB.

5.7.3 Types of State or Territory sentences or orders which are applied by s 20AB

508. The orders which are applied by s 20AB are specified in s 20AB(1AA), which provides:

(1AA) This subsection applies to a sentence or order that is:

(a) known as any of the following:

- (i) an attendance centre order or attendance order;*
- (ii) a community based order;*
- (iii) a community correction order;*
- (iv) a community custody order;*
- (v) a community service order;*
- (vi) a community work order;*
- (vii) a drug or alcohol treatment order or rehabilitation order;*
- (viii) a good behaviour order;*
- (ix) an intensive correction order;*
- (x) an intensive supervision order;*
- (xi) a sentence of periodic detention or a periodic detention order;*
- (xii) a sentence of weekend detention or a weekend detention order;*
- (xiii) a work order; or*

(b) similar to a sentence or order to which paragraph (a) applies; or

(c) prescribed for the purposes of this subsection.

⁶⁴⁴ *Adams v Carr* (1987) 47 SASR 205; *Winchester v R* (1992) 58 A Crim R 345; *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [14]; *Dowling v Hamlin* [2006] ACTSC 117.

509. The list in s 20AB(1AA)(a) describes various orders which are, or have been, provided for by State or Territory laws. Paragraph (b) extends the list of applied orders to include a sentence or order that is “*similar to a sentence or order to which paragraph (a) applies*”. Paragraph (c) allows for other sentences or orders to be prescribed by regulations.

510. The following orders are prescribed, for the purposes of s 20AB, by regulation 15 of the *Crimes Regulations 2019* (Cth) (which commenced on 27 July 2019):

Item	Prescribed order	Law under which order is made
1	Home detention order	Subdivision 1 of Division 7 of Part 3 of the Sentencing Act 2017 (SA), as in force at the commencement of this instrument
2	Home detention order	Part 5A of the Sentencing Act 1997 (Tas.), as in force at the commencement of this instrument
3	Home detention order	Subdivision 2 of Division 5 of Part 3 of the <i>Sentencing Act</i> (NT), as in force at the commencement of this instrument

511. By virtue of a combination of the prescriptions in the *Crimes Regulations* and the operation of s 20AB(1AA)(a) and (b) of the Act, at least the following current options under State or Territory laws are applied by s 20AB:

- **New South Wales:** intensive correction orders and community correction orders;⁶⁴⁵
- **Victoria:** community correction orders;⁶⁴⁶
- **Queensland:** community service orders and intensive correction orders;⁶⁴⁷
- **Western Australia:** community based orders and intensive supervision orders;⁶⁴⁸ and
- **South Australia:** home detention orders and intensive correction orders;⁶⁴⁹
- **Australian Capital Territory:** good behaviour orders;⁶⁵⁰
- **Northern Territory:** community work orders, community based orders, home detention orders and community custody orders;⁶⁵¹
- **Tasmania:** home detention orders and community service orders.⁶⁵²

⁶⁴⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) (C(SP) Act), ss 7, 8.

⁶⁴⁶ *Sentencing Act 1991* (Vic), Part 3A; see *Atanackovic v R* (2015) 45 VR 179.

⁶⁴⁷ *Penalties and Sentences Act 1992* (Qld), Part 5 Div 2, Part 6.

⁶⁴⁸ *Sentencing Act 1995* (WA) Part 9, Part 10.

⁶⁴⁹ *Sentencing Act 2017* (SA), Part 3, Div 7, sub-div 1 and 2. Although not prescribed, a sentence of community service under the Act may also be available, on the basis that it is similar to a community service order.

⁶⁵⁰ *Crimes (Sentencing) Act 2005* (ACT), Ch 6 Part 6.1; see *Dowling v Hamlin* [2006] ACTSC 117.

⁶⁵¹ *Sentencing Act 1995* (NT), Part 3 div 4, Part 3 div 4A, Part 3 div 5 sub-div 2, Part 3 div 5 sub-div 2A.

⁶⁵² *Sentencing Act 1997* (Tas), Part 5A, Part 4.

512. There is some uncertainty about the extent to which State or Territory orders for the treatment of drug or alcohol abuse (which are distinct from the orders listed in the regulations) are picked up by s 20AB. Despite not being listed in the regulations, such an order under State or Territory law would be picked up and applied by s 20AB(1AA) if it can be characterised as a sentence or order known as “*a drug or alcohol treatment order or rehabilitation order*” (within s 20AB(1AA)(a)(vii)) or “*similar to a sentence or order to which paragraph (a) applies*”. Whether a particular option under State or Territory law is “*similar to a sentence or order to which paragraph (a) applies*” is a question of degree, which must be considered in the context of the legislation as a whole, and in particular Part 1B, and in the light of the legislative purpose to extend sentencing options.⁶⁵³
513. Section 20AB only picks up State or Territory *sentences or orders*. A sentencing option under State law which provided for an offender to perform community work only as a condition of a recognizance, rather than directly pursuant to an order of the sentencing court, might be incapable of being applied by s 20AB.⁶⁵⁴

5.7.4 Corresponding cases

514. A court sentencing a federal offender may impose a sentence or make an order of a kind described in s 20AB(1AA) only if, under the law of the relevant State or Territory, “*a court is empowered to pass such a sentence, or make such an order, in respect of a State or Territory offender in corresponding cases*” (s 20AB(1)(b)).
515. This limitation requires a comparison between the instant federal case and the powers of the court “*in respect of a State or Territory offender in corresponding cases*”. The comparison in question is concerned with the powers of a court in “cases” generally, not with a single hypothetical State or Territory offender whose case corresponds with that of the federal offender. Close attention must be paid to the circumstances in which, under State/Territory law, a court may pass the relevant sentence or make the relevant order in corresponding cases.
516. *Tran*⁶⁵⁵ provides an example of the application of this comparison. In that case, the sentencing judge imposed a sentence of imprisonment for a Commonwealth offence and ordered that the offender serve a period of that sentence in home detention and then be released on a recognizance release order (RRO) under s 20(1)(b) of the *Crimes Act 1914*. Although home detention under State sentencing legislation was an order of a kind described in s 20AB(1AA), the Full Court of the Supreme Court held that s 20AB did not empower the sentencing judge to make the order because the court was not empowered to make such an order in corresponding State cases. That was because under the State Act, a home detention order was not available in relation to that part of a partially suspended sentence which was

⁶⁵³ *Adams v Carr* (1987) 47 SASR 205.

⁶⁵⁴ *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [23]. In that case it was held that a State order which was interim or provisional was not similar to a community service order, which was necessarily a final order.

⁶⁵⁵ *R v Tran* [2019] SASCFC 5. That decision concerned a home detention order under the *Criminal Law (Sentencing) Act 1988* (SA). In *R v Medalian* [2019] SASCFC 40, the reasoning in *Tran* was applied to an order under the successor to that Act, the *Sentencing Act 2017* (SA), which was not materially different.

to be served before the release of the offender, which was the disposition which corresponded with a RRO under s 20(1)(b).⁶⁵⁶

5.7.5 Pre-conditions for an order under State/Territory law

517. Some State or Territory laws contain a pre-condition for the making of an order of a kind described in s 20AB(1AA) that the court must first pass another sentence or make another order (including a suspended sentence or order). A court sentencing a federal offender is relieved of such a pre-condition by virtue of s 20AB(1A). That is, the court may pass a sentence or make an order applied by s 20AB without first passing the other sentence or making the other order. For example, if a State law requires that a court must first fix an appropriate term of imprisonment before considering whether it should be served by way of periodic detention, s 20AB(1B) is effective to remove that requirement.⁶⁵⁷

518. However s 20AB(1A) only relieves a court sentencing a federal offender of a “requirement” under State or Territory law to first pass another sentence or make another order. In *Togias* (2001),⁶⁵⁸ Spigelman CJ said that s 20AB(1A) should not be read as if the words “*requires that a court must first pass another sentence*” encompass both a negative and positive formulation, as these words are negative rather than positive in effect. They did not have the effect of removing a qualification under State law that a sentence of periodic detention was available only in relation to a sentence of imprisonment not exceeding three years.⁶⁵⁹

519. A court sentencing a federal offender is not otherwise relieved of pre-conditions under State or Territory law that apply to the imposition of a sentence or making of an order applied by s 20AB. For example, if a State law requires the consent of the offender to the making of the order, the same requirement would apply to the sentencing of a federal offender.⁶⁶⁰ Similarly, if State law requires a prior assessment that the offender would be suitable for a particular type of order, the same requirement would apply to the sentencing of a federal offender.⁶⁶¹

5.7.6 State/Territory laws apply in respect to a sentence or order under s 20AB(1)

520. If a sentence or order under s 20AB(1) of the *Crimes Act 1914* (Cth) is passed or made in respect of a federal offender, provisions of the laws of the relevant State or Territory with respect to such a sentence or order apply to and in relation to the sentence or order: s 20AB(3).

521. The State or Territory provisions referred to in s 20AB(3) apply “*so far as those provisions are capable of application and are not inconsistent with the laws of the Commonwealth*” (s 20AB(3)). The limitation is

⁶⁵⁶ *R v Tran* [2019] SASCFC 5, [50]-[63].

⁶⁵⁷ *R v Togias* [2002] NSWCCA 363, [22]-[23].

⁶⁵⁸ *R v Togias* [2001] NSWCCA 522, [24].

⁶⁵⁹ *R v Togias* [2001] NSWCCA 522, [24]; see also per Grove J, [100]-[107]; *Johnsson v R* [2007] NSWCCA 192, [17]-[24].

⁶⁶⁰ *Shambayati v R* (1999) 105 A Crim R 373, [15].

⁶⁶¹ E.g. *Fedele v R* [2015] NSWCCA 286, [71]-[73], [100]-[101].

similar to those which apply under ss 68 and 79 of the *Judiciary Act 1903* (Cth): see “2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79”.

522. In *Atanackovic*,⁶⁶² the Victorian Court of Appeal held that a State provision in relation to a community correction order (an order of a kind prescribed for the purposes of s 20AB(1AA)) which permitted such an order to be combined with a term of imprisonment was not applicable to the sentencing of a federal offender as it was inconsistent with Part 1B of the *Crimes Act 1914* (Cth).

523. Provisions of State or Territory law which are applied by s 20AB(3) are referred to in s 20AC(1) as “*applied provisions*”. Proceedings may be brought under s 20AC if (amongst other things) an offender fails to comply “*with any requirements made in relation to the sentence or order by or under the applied provisions*” (see s 20AC(2), (6)).

5.7.7 Orders without conviction are not available

524. Section 20AB(1) makes prescribed state sentencing options applicable to a federal offender only on conviction. Therefore even if, under State or Territory law, a court may make an order of the relevant type without conviction, there is no power to do so in sentencing a federal offender.⁶⁶³

5.7.8 Order may be combined with a fine/pecuniary penalty order

525. If a court passes a sentence or makes an order under s 20AB(1), it may also impose any fine or other pecuniary penalty that the court is empowered to impose on the person for the offence: *Crimes Act 1914* (Cth), s 20AB(4)(a).

5.7.9 Order may be combined with an order for reparation, restitution or compensation

526. If a court passes a sentence or makes an order under s 20AB(1), it may also make any order requiring the person to make reparation or restitution, or pay compensation, in respect of the offence that the court is empowered to make: *Crimes Act 1914* (Cth), s 20AB(4)(b).

527. The main power to order a federal offender to make reparation or restitution or to pay compensation is set out in s 21B of the *Crimes Act 1914* (Cth). See “6.1 Reparation – Crimes Act 1914, s 21B”.

5.7.10 Order may be combined with another order

528. If a court passes a sentence or makes an order under s 20AB(1), it may also “*make any other order that the court is empowered to make*”: *Crimes Act 1914* (Cth), s 20AB(4)(c). This may include, for example, orders for forfeiture or disqualification.

⁶⁶² *Atanackovic v R* (2015) 45 VR 179, [54]-[55], [59], [80]-[87].

⁶⁶³ *DPP v Meyers* (Vic SC (Balmford J), 26 April 1996, unreported); *DPP (Cth) v Ede* [2014] NSWCA 282, [34].

529. It is doubtful whether s 20AB(4)(c) empowers a court to combine an order picked up by s 20AB with an additional sentencing option (such as an order under s 20(1)(a), or an additional State or Territory option applied under s 20AB) for the same offence.⁶⁶⁴

5.7.11 Order cannot be combined with a term of imprisonment for the same offence

530. Some State or Territory laws permit an order of the kind described in s 20AB(1AA) to be combined with a term of imprisonment.

531. An example is the *Sentencing Act 1991* (Vic), which was considered in *Atanackovic*.⁶⁶⁵ Section 44(1) of the Act permitted a community correction order (CCO) to be imposed in addition to a term of imprisonment not exceeding two years involving immediate incarceration. If the court imposed a term of imprisonment of between one and two years, it was required by s 11 of the Act to fix a non-parole period. The Victorian Court of Appeal held that the legislative scheme established by Part IB, Division 4 of the *Crimes Act 1914* (Cth) left no room for the operation of either s 11 or s 44 of the *Sentencing Act 1991* (Vic). Accordingly, a combination sentence of a term of imprisonment and a CCO for a single federal offence was not available.⁶⁶⁶

532. The Court in *Atanackovic* left open the question whether (except as expressly provided) two sentencing options could ever be combined in sentencing for a single federal offence.⁶⁶⁷

5.7.12 Order for one offence can be coupled with a term of imprisonment for another

533. If a federal offender is to be sentenced for more than one federal offence, it is open to impose a period of imprisonment for one offence and an order applied by s 20AB for one or more other offences.⁶⁶⁸

534. The commencement of the order applied by s 20AB would need to be fixed in accordance with State or Territory law. For example, s 38(2) of the *Sentencing Act 1991* (Vic) requires that a CCO must not commence more than 3 months after it was made (that is, the date the sentence was imposed).⁶⁶⁹

⁶⁶⁴ In *Atanackovic v R* (2015) 45 VR 179, the Court held that a community correction order under the *Sentencing Act 1991* (Vic) could not be combined with a sentence of imprisonment. However at [88]–[93], the Court left open the question whether, under the *Crimes Act 1914* (Cth), two sentencing options could be combined in a sentence for a single offence.

⁶⁶⁵ *Atanackovic v R* (2015) 45 VR 179.

⁶⁶⁶ *Atanackovic v R* (2015) 45 VR 179, [82]–[87].

⁶⁶⁷ *Atanackovic v R* (2015) 45 VR 179, [88]–[93]. See also *R v Tran* [2019] SASFC 5, [48], [54].

⁶⁶⁸ *Atanackovic v R* (2015) 45 VR 179, [78]–[79]. An example of such a sentence is that imposed on re-sentencing in *Alam v R* [2015] VSCA 48, [21]–[22].

⁶⁶⁹ An exception is provided in s 44(3) of the *Sentencing Act 1991* (Vic) where a CCO is combined with a term of imprisonment under s 44 of the Act (in which case, the CCO commences on the offender's release or, if the offender is released on parole, on the completion of the parole period). But that exception could have no application in relation to a term of imprisonment imposed for a federal offence, because s 44 is not applicable in such a case: *Atanackovic v R* (2015) 45 VR 179.

5.7.13 Application of a guideline judgment regarding use of an order applied by s 20AB

535. In *Boulton*,⁶⁷⁰ the Victorian Court of Appeal issued a guideline judgment⁶⁷¹ on the use of community correction orders (CCOs) under Part 3A of the *Sentencing Act 1991* (Vic). *Boulton* espoused an approach to sentencing which emphasised the advantages of a CCO compared to imprisonment and which required sentencing judges to take into account those advantages before concluding that imprisonment is the only sentencing option. In *Atanackovic*,⁶⁷² the Court of Appeal held that the guideline judgment in *Boulton* could not be accommodated by s 16A of the *Crimes Act 1914* (Cth), did not satisfy the requirements of s 80 of the *Judiciary Act 1903* (Cth) and, accordingly, did not apply to the sentencing of federal offenders.⁶⁷³

5.7.14 Whether a single order can be imposed for more than one federal offence

536. A single order applied by s 20AB of the *Crimes Act 1914* (Cth) may be imposed for two or more federal offences (that is, as an aggregate sentence) if the sentencing court is permitted to do so either by a law of the Commonwealth or by a State or Territory law which is applied as surrogate federal law to the sentencing of a federal offender.

537. **Commonwealth laws permitting aggregate sentences:** The principal Commonwealth provision which empowers a court to impose an aggregate sentence for two or more offences is s 4K(4) of the *Crimes Act 1914*. In summary, it empowers a court exercising summary jurisdiction to impose a single sentence for two or more Commonwealth offences against “*the same provision of a law of the Commonwealth*”, where charges for the offences have been joined in the same information, complaint or summons. See “7.10.5 Aggregate penalty for offences dealt with summarily – Crimes Act 1914, s 4K”.

538. Some Commonwealth Acts also empower a court to impose a single sentence for a particular offence or offences against that Act. The most commonly-used of these provisions is s 219 of the *Social Security (Administration) Act 1999* (Cth). See “7.10.4 Aggregate penalties permitted for particular Commonwealth offences”.

539. Either of these provisions would appear apt to permit a single order applied by s 20AB to be imposed for two or more federal offences, if the relevant pre-conditions are satisfied.

540. **State/Territory laws permitting aggregate sentence:** The existence of provisions in Commonwealth law which permit aggregate sentencing do not preclude the application of general State/Territory laws which permit aggregate sentencing in proceedings on indictment.⁶⁷⁴ Nor (probably) do they preclude

⁶⁷⁰ *Boulton v R* (2014) 46 VR 308.

⁶⁷¹ That is, “*a judgment that is expressed to contain guidelines to be taken into account by courts in sentencing offenders*”: *Sentencing Act 1991* (Vic), s 6AA.

⁶⁷² *Atanackovic v R* (2015) 45 VR 179.

⁶⁷³ The definition of “guideline judgment” in *Sentencing Act 1991* (Vic), s 6AA, now expressly excludes Commonwealth offences as the subject of a guideline judgment.

⁶⁷⁴ *Putland v R* (2004) 218 CLR 174. See “7.10.7 Aggregate penalty for charges on indictment”.

the application of State/Territory laws which permit the imposition of an aggregate sentence in proceedings determined summarily.⁶⁷⁵

541. Some State/Territory laws make specific provision for an order of a kind applied by s 20AB to be imposed for more than one offence. Such laws would appear to be picked up and applied to the sentencing of a federal offender in a corresponding case, either by s 68 or s 79 of the *Judiciary Act 1903* (Cth) or by s 20AB(1) and (3) of the *Crimes Act 1914* (Cth), except to the extent that they are incapable of application or inconsistent with a law of the Commonwealth. There does not appear to be any law of the Commonwealth which would generally preclude the application of such a law to the sentencing of a federal offender. See “7.10.3 Single sentence or order under State/Territory option applied by Crimes Act s 20AB”.

5.7.15 A single order cannot be imposed for a federal offence and a State/Territory offence

542. It is not permissible to impose a single aggregate penalty for a federal offence and a State or Territory offence.⁶⁷⁶ Therefore a court could not impose a single order of a kind applied by s 20AB of the *Crimes Act 1914* for both a Commonwealth offence and a State/Territory offence.

5.7.16 Obligation on court to explain the order

543. A court must explain the effect of the order, consequence of non-compliance and variation possibility (s 20AB(2)) and give a copy of the order to the offender (s 20AB(5)).

5.7.17 Breach of an order applied by s 20AB

544. Where an offender fails to comply with an order applied by s 20AB, s 20AC sets out the consequences. Breach action is initiated by summons or information and warrant (s 20AC(2)), to compel the attendance of the person before the court which passed the sentence or made the order under s 20AB. A summons or warrant can only be issued by a magistrate.

545. If the court is satisfied that the person has, without reasonable cause or excuse, failed to comply with the sentence or order or with any requirements made in relation to the sentence or order by or under the applied provisions, it may (pursuant to s 20AC(6)):

- impose a pecuniary penalty not exceeding 10 penalty units;⁶⁷⁷
- revoke the original order and re-sentence the offender; or
- take no action.

⁶⁷⁵ See “7.10.6 State/Territory provisions permitting aggregate sentences in matters determined summarily”.

⁶⁷⁶ *Fasciale v R* (2010) 30 VR 643, [27].

⁶⁷⁷ *Crimes Act 1914* (Cth), s 20AC(6)(a). In *Grimm v R* (1995) 124 FLR 372 the Court proceeded on the basis that the option to impose a pecuniary penalty order for breaching of a NSW community service order pursuant to s 20AC(6) of the *Crimes Act 1914* (Cth) was limited to circumstances where the court did not alter the original sentence. If a court revokes the original sentence, it cannot also impose a pecuniary penalty order.

546. The provisions in s 20AC operate to the exclusion of any provisions of State or Territory law relating to a breach of the applied order. So, for example, State provisions which allow a parole authority to cancel periodic detention and have the offender taken back into custody do not apply.⁶⁷⁸ Underlying s 20AC is the constitutional requirement that the federal judicial power can only be exercised by a court; to have permitted an administrative body to revoke or vary an order might have infringed this requirement.⁶⁷⁹

547. A court is not precluded from passing a sentence, or making an order, under s 20AB(1) only because the court is empowered under s 20AC to take action on failure to comply that is, or may be, inconsistent with action that the State or Territory court may take for such a failure by a State or Territory offender: s 20AB(1B).⁶⁸⁰

5.7.18 Issues relating to orders applied by s 20AB specific to a particular State or Territory

548. Issues relating to orders applied by s 20AB which are specific to a particular State or Territory are discussed in Appendix 4 to this guide.

⁶⁷⁸ *Lewis v Chief Executive Department of Justice and Community Safety* [2013] ACTSC 198, [45]–[46].

⁶⁷⁹ *Lewis v Chief Executive Department of Justice and Community Safety* [2013] ACTSC 198, [46].

⁶⁸⁰ This sub-section overcomes a limitation identified in *Adams v Carr* (1987) 47 SASR 205.

5.8 Imprisonment: head sentence

5.8.1 Imprisonment available only if applicable to the offence

549. An offender may only be sentenced to a term of imprisonment if the offence is punishable by imprisonment. (See “2.8 Maximum penalties for Commonwealth offences”.) The authority to impose a sentence of imprisonment comes from the statutory prescription that the offence is punishable by imprisonment, not from any provision in Part 1B of the *Crimes Act 1914*.⁶⁸¹

550. Some offences are only punishable by imprisonment in certain circumstances: for example, for a repeat offence. If such a condition applies, the court must be satisfied beyond reasonable doubt that that it is met before it may impose such a sentence.

5.8.2 Imprisonment as a sentence of last resort – *Crimes Act 1914*, s 17A

551. Section 17A(1) of the *Crimes Act 1914* (Cth) 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.

552. This provision restates the established common law position that imprisonment is a sentence of last resort.⁶⁸² Before imposing a sentence of imprisonment, the court must consider “all other available sentences” and “all the circumstances of the case”.⁶⁸³

553. If the court imposes a sentence of imprisonment, it is required by s 17A(2) to give reasons and have them entered in the record of the court. The obligation to give reasons does not require that the sentencing court give separate and distinct reasons, or run through a checklist of possibilities and state why each of them is not appropriate; the reasons need only adequately explain why no other sentence but one of imprisonment is considered appropriate.⁶⁸⁴

554. Failure to comply with the provisions of s 17A does not invalidate the sentence⁶⁸⁵ (in the sense that it does not render it a nullity⁶⁸⁶), but if the sentencing court is shown to have erroneously considered that

⁶⁸¹ *R v Tran* [2019] SASCFC 5, [43]-[44].

⁶⁸² *R v Carroll* [1991] 2 VR 509; see also *R v Robison* (1992) 62 A Crim R 374, 381.

⁶⁸³ *Atanackovic v R* (2015) 45 VR 179, [103].

⁶⁸⁴ *Dadson v O'Brien* [1998] TASSC 75; *Warnakulasuriya v R* [2009] WASC 257, [31]-[35]; *R v Engeln* [2014] QCA 313, [46]-[53]; *Fedele v R* [2015] NSWCCA 286, [28]-[36], [39].

⁶⁸⁵ *Crimes Act 1914* (Cth) s 17A(2); *Janssen v McShane* [1992] TASSC 99.

⁶⁸⁶ *Freeman v Pulford* (1988) 92 FLR 122; *Clayton v Mulcahy* [1990] TASSC 25.

no other sentencing option could be imposed it will constitute a vitiating error in the exercise of the sentencing discretion.⁶⁸⁷

555. Section 17A applies subject to any contrary intention in the law creating the offence: *Crimes Act 1914* (Cth), s 17A(4). A statutory requirement for a mandatory minimum sentence of imprisonment⁶⁸⁸ is inconsistent with, and prevails over, s 17A.⁶⁸⁹

5.8.3 Restriction on imprisonment for certain minor offences – *Crimes Act 1914*, s 17B(1)

556. Section 17B(1) imposes a restriction on the imposition of a sentence of imprisonment for minor examples of specified federal property offences (a “section 17B offence”). By s 17B(3), a “section 17B offence” is defined to mean:⁶⁹⁰

- an offence against s 29 of the *Crimes Act 1914* (Cth);
- an offence against s 131.1, 132.1, 132.6, 132.7, 134.1, 134.2, 135.1, 135.2, 135.4, 145.4 or 145.5 of the *Criminal Code* (Cth); or
- a prescribed offence against federal law. (No offences have been prescribed.)

557. If a person is convicted of one or more s 17B offences relating to property, money or both, the total value of which does not exceed \$2,000,⁶⁹¹ and the person has not previously been sentenced to imprisonment, the court convicting the person is not to pass a sentence of imprisonment for that offence, or for any of those offences, unless the court is satisfied that there are exceptional circumstances that warrant it: s 17B(1).

5.8.4 Maximum period of imprisonment for an indictable offence determined summarily

558. If an indictable offence punishable by imprisonment is heard and determined by a court of summary jurisdiction, a lesser maximum penalty will apply: see “5.6.3 Maximum penalties on summary disposition of an indictable offence – *Crimes Act 1914*, ss 4J and 4JA”.

5.8.5 Mandatory imprisonment

559. In general federal legislation does not provide for mandatory penalties.

⁶⁸⁷ *Freeman v Pulford* (1988) 92 FLR 122; *Warnakulasuriya v R* [2009] WASC 257, [31]-[34]; *R v Engeln* [2014] QCA 313, [45]; *Fedele v R* [2015] NSWCCA 286, [26].

⁶⁸⁸ See “5.8.5 Mandatory imprisonment”.

⁶⁸⁹ *Bahar v R* (2011) 45 WAR 100, [53] (people smuggling offence to which a mandatory sentence of imprisonment applied).

⁶⁹⁰ The list of offences was amended by Item 148 of Schedule 2 to *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, with effect from 24 May 2001. Prior to the amendment, the restriction in s 17B also applied to offences against ss 29A, 29B, 29C, 29D, 71 and 72 of the *Crimes Act 1914* (Cth).

⁶⁹¹ For the purposes of calculating the total value, if a s 17B offence is taken into account, it is to be treated as if the person has been convicted of it: *Crimes Act 1914* (Cth), s 17B(2).

560. An exception is s 236B of the *Migration Act 1958* which requires a minimum head sentence and non-parole period to be imposed for certain offences related to people smuggling. See “8.1.2 Mandatory imprisonment for certain people-smuggling offences”.

5.8.6 Aggregate sentence of imprisonment for multiple federal offences

561. There is no general power to impose a single aggregate term of imprisonment for multiple federal offences. There are, however, particular circumstances in which a court may impose an aggregate penalty, including an aggregate sentence of imprisonment, in sentencing a federal offender: see “7.10 Aggregate penalty”.

5.8.7 Aggregate sentence of imprisonment for federal and State offences is not permitted

562. It is not possible to impose a single aggregate period of imprisonment when sentencing on both Commonwealth and State offences.⁶⁹²

5.8.8 Commencement of sentences

563. There is no single nationally-applicable law relating to the commencement of a federal sentence of imprisonment.⁶⁹³ Instead, s 16E(1) *Crimes Act 1914* (Cth) provides that the law of a State or Territory relating to the commencement of sentences and of non-parole periods applies to a person who is sentenced in that State or Territory for a federal offence in the same way as it applies to a person who is sentenced in that State or Territory for a State or Territory offence.

564. Section 16E(1) is subject to s 16E(2) and (3), which relate to the effect of pre-sentence custody for the offence: see “5.8.9 Credit for pre-sentence custody for the offence”.

565. The purpose of picking up and applying State or Territory laws relating to the commencement of a sentence of imprisonment is “to avoid the problem of an offender who is sentenced to joint State and federal terms (eg a drug offender) commencing the terms on different dates”.⁶⁹⁴

566. In most jurisdictions, by default a sentence of imprisonment commences on the day on which the offender is taken into custody, or if already in custody, when sentence is imposed.⁶⁹⁵ Laws in some States and Territories provide for a sentence to be backdated, either automatically or pursuant to a

⁶⁹² *Fasciale v R* (2010) 30 VR 643, [27].

⁶⁹³ In its report *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), the Australian Law Reform Commission recommended (recommendation 10-1) that federal sentencing legislation should provide that a federal sentence commences on the day on which it is imposed, subject to any court order directed to the consecutive service of sentences. The recommendation has not been acted upon.

⁶⁹⁴ *Crimes Legislation Amendment Bill (No 2) 1989* (Cth), *Explanatory Memorandum (Senate)*, 8.

⁶⁹⁵ For example, the *Sentencing Act 1991* (Vic), s 17(1) provides that (subject to particular exceptions) a sentence of imprisonment commences on the day that it is imposed unless the offender is not then in custody, in which case it commences on the day he or she is apprehended under a warrant to imprison issued in respect of the sentence.

direction of the court, to account for periods of pre-sentence custody for the offence.⁶⁹⁶ In some jurisdictions, a court may direct that a sentence commence at a later date, at the completion of other sentences.⁶⁹⁷ Such State or Territory laws are generally picked up and applied by s 16E.

567. The application of State and Territory laws relating to the commencement of a sentence of imprisonment is subject to an implicit but important qualification under s 19 of the *Crimes Act 1914* (Cth). That provision requires a court sentencing a federal offender to direct when the sentence for a federal offence commences, if the offender is sentenced to imprisonment for more than one offence (including a State or Territory offence) or is already serving a sentence of imprisonment. By that means, cumulation or concurrency of sentences is achieved. See “5.9 Imprisonment: concurrency or cumulation of sentences”.

568. Although State and Territory laws generally apply in relation to *the commencement of a federal sentence of imprisonment* (that is, the head sentence), the *Crimes Act 1914* (Cth) makes comprehensive provision (to the exclusion of State and Territory laws⁶⁹⁸) for the making of orders governing the period, or minimum period, to be served. See “5.10 Imprisonment: period to be served”.

569. A non-parole period for one or more federal offences cannot be fixed to commence earlier than the commencement date of the head sentence(s).⁶⁹⁹

5.8.9 Credit for pre-sentence custody for the offence

570. In general, a federal offender who is sentenced to imprisonment will be given credit for pre-sentence custody for the offence. Sub-sections 16E(2) and (3) of the *Crimes Act 1914* (Cth) provide for ways in which such credit may be given.

571. Section 16E(2) provides that where a law of a state or territory has the effect that a sentence of imprisonment may be reduced by the period that the person has been in custody for the offence or is to commence on the day in which a person was taken into custody for that offence, that law applies in the same way to a federal sentence imposed on a person in that State or Territory or to a non-parole period fixed in respect of that sentence.

572. Examples of State or Territory laws which plainly fall within s 16E(2) are laws which provide for:

- a sentencing court to **backdate a sentence** to the commencement of custody for the offence to allow for the offender’s pre-sentence custody for the offence;⁷⁰⁰ or

⁶⁹⁶ See “5.8.9 Credit for pre-sentence custody for the offence”.

⁶⁹⁷ E.g. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 47(2)(b). This provision is applied to the sentencing of federal offenders by s 16E of the *Crimes Act 1914* (Cth): *Payda v R* [2013] NSWCCA 109, [52]-[60]; *Burbridge v R* [2016] NSWCCA 128, [11].

⁶⁹⁸ *Hili v R* (2010) 242 CLR 520, [21]-[22], [52].

⁶⁹⁹ *R v TW (No 2)* [2014] ACTCA 37.

⁷⁰⁰ E.g. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 47(2)(a) (see *R v McHugh* (1985) 1 NSWLR 588; *Assafiri v R* [2007] NSWCCA 159; *Danial v R* [2008] NSWCCA 15, [22]; *Starmer v R* [2008] NSWCCA 27, [10]-[12]; *R v Zeng* [2008] NSWCCA 183, [75]-[77]; *Shi v R* [2017] NSWCCA 126, [6]); *Sentencing Act 1995* (WA) s 87(d) (see *Mercanti v R* [2011] WASCA 120, [22]-[24]); *Sentencing Act 2017* (SA), s 44(2)(b); *Sentencing Act 1997* (Tas), s 16(1); *Crimes*

- a sentencing court to **reduce the sentence** to be imposed on an offender by a period corresponding to the offender's pre-sentence custody for the offence.⁷⁰¹

573. As the Australian Law Reform Commission noted in its 2006 report on federal sentencing,⁷⁰² s 16E(2) does not expressly refer to State or Territory laws (notably in Victoria and Queensland) that allow for **time spent in pre-sentence custody to be declared as time already served** under the sentence.⁷⁰³ Courts have, however, treated such laws as being picked up and applied to the sentencing of federal offenders by s 16E.⁷⁰⁴ In sentencing federal offenders, the practice of courts in Victoria and Queensland is to allow for pre-sentence custody for the offence by declaring the time already served, in the same way as they would in sentencing a State offender.

574. Section 16E(3) provides that where the law of the State or Territory does not have the effect mentioned in s 16E(2), a court imposing a federal term of imprisonment or non-parole period must take into account any period that the person has spent in custody in relation to the offence concerned.⁷⁰⁵ This residual provision operates to ensure that pre-sentence time in custody for the offence is taken into account in fixing sentence, if the law of the relevant State or Territory does not make provision for it to be credited towards the service of a sentence in one of the ways referred to in s 16E(2). This might arise if, for example, a period in custody was of a kind which is “custody for the offence” within s 16E, but is not custody of a kind which, under the law of the State or Territory, may be taken into account in backdating a sentence or in declaring a period of custody as time already served.⁷⁰⁶

(*Sentencing Act 2005* (ACT), s 63; *Sentencing Act 1995* (NT), s 63(5)). If a court has power to backdate a sentence it may do so even though the offender was not in custody throughout the period since the backdated commencement date: *R v Newman* [2004] NSWCCA 102, [25]-[32]; *R v Tilley* [2010] SASCF 73; *Rodgers v R* [2018] NSWCCA 47, [65]-[78].

⁷⁰¹ E.g. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 24(a); *Sentencing Act 1995* (WA) s 87(c); *Sentencing Act 2017* (SA) s 44(2)(a). If a court has power either to backdate a sentence or to reduce the sentence to account for time spent in custody for the offence, backdating is usually the preferable course: *R v Newman* [2004] NSWCCA 102, [24]-[36]; *Assafiri v R* [2007] NSWCCA 159, [11]; *R v Franceschini* (2015) 123 SASR 396, [23]-[61].

⁷⁰² *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [10.16].

⁷⁰³ E.g. *Sentencing Act 1991* (Vic), s 18; *Penalties and Sentences Act 1992* (Qld), s 161(1). The history of the practice for accounting for time in custody for the instant offence in Victoria is recounted in *R v Jennings* [1999] 1 VR 352. The law in Victoria does not permit the backdating of a sentence (*R v Singh* (Vic CCA, 26 March 1991, unreported), 13-14; *R v Nagy* [1992] 1 VR 637), except that in re-sentencing on appeal, the County Court (*Criminal Procedure Act 2009* (Vic), ss 256(4), 259(4); *Children, Youth and Families Act 2005* (Vic), ss 426(4), 429(7)), the Trial Division of the Supreme Court (*Children, Youth and Families Act 2005* (Vic), ss 426(4), 429(7)) or the Court of Appeal (see *Barbat v R* [2014] VSCA 202) may backdate a sentence to the date of the original sentence.

⁷⁰⁴ *R v Singh* (Vic CCA, 26 March 1991, unreported), 12 (in relation to s 16 of the *Penalties and Sentences Act 1985* (Vic), the ancestor of s 18 of the *Sentencing Act 1991* (Vic)); *R v Hill; ex parte DPP (Cth)* [2011] QCA 306, [278]-[279]. Were these laws not picked up under s 16E(2) of the *Crimes Act 1914* (Cth), sentencing courts in these States would be required to reduce the sentence imposed to take account of pre-sentence custody for the offence, pursuant to s 16E(3).

⁷⁰⁵ It is notable that s 16E(3) makes no reference to the fixing of a recognizance release order (RRO) under s 20(1)(b) of the *Crimes Act 1914* (Cth). That is, if s 16E(3) applies, while a court is required to take into account a period of custody for the offence in fixing the head sentence and the non-parole period (if applicable), it is not required to do so in fixing the period to be served under a RRO. It is not apparent why this should be so.

⁷⁰⁶ The authorities cited below establish that even certain periods of pre-charge custody or periods of immigration detention may be regarded as “custody for the offence” within s 16E. However under State or Territory law, such periods may not be of a kind which could be taken into account in backdating a sentence or in declaring a period

575. In *Alimudin*,⁷⁰⁷ the Northern Territory Court of Appeal held that the references in s 16E to “*custody for the offence*” should be construed broadly.⁷⁰⁸ The Court held that a period of *pre-charge detention* of the offender (pursuant to the *Fisheries Management Act 1991* (Cth) and in immigration detention) which arose from the offending (pending consideration of whether charges for the offence should be laid) should be treated as “*custody for the offence*” within s 16E, and that Territory law which permitted backdating of a sentence if the offender had been “*in custody on account of his or her arrest*” for the offence should be taken to apply.
576. The Court in *Alimudin* also observed that it was sufficient “*that there is conformity between the conduct that led to the arrest and the conduct for which the person was ultimately sentenced to imprisonment*”.⁷⁰⁹ It follows that if, for example, the offender was originally arrested and held in custody on a charge for a State drug offence, but ultimately charged with and sentenced for a Commonwealth drug offence arising from the same conduct, the custody for the State offence may be treated as custody for the Commonwealth offence for the purposes of s 16E, and credited in sentencing the offender for the Commonwealth offence either in accordance with the law applied by s 16E(2) or under s 16E(3).
577. Where an offender’s visa was cancelled as a result of the relevant offending and the offender was then taken into immigration detention, the period of immigration detention has been treated by sentencing judges as “*custody for the offence*” within the meaning of s 16E.⁷¹⁰
578. Custody in another country while awaiting extradition for the offence may also be treated as “*custody for the offence*” within s 16E.⁷¹¹ However the period for which credit is given may be reduced on the basis that the offender had prolonged challenges to extradition beyond what was reasonably necessary.⁷¹²
579. Credit for pre-sentence custody may be denied where an allowance has been made for the same period of custody in sentencing the offender for another offence, including in another jurisdiction.⁷¹³

already served. For example, a person held in immigration detention as a result of arrest for the instant offence is not “*held in custody in relation to ... proceedings for the offence*”, within the meaning of s 18 of the *Sentencing Act 1991* (Vic): *Sahhitanandan v R* [2019] VSCA 115, [29]-[31]. In those circumstances, the court would be required, under s 16E(3) to “take into account” that period in fixing the head sentence and the non-parole period. In Victoria, the result is similar to the position which applies in sentencing for a State offence (*Sahhitanandan v R* [2019] VSCA 115, [32]-[38]), but the result would be different if under State or Territory law a period of immigration detention would not be regarded as warranting a reduction in sentence.

⁷⁰⁷ *Alimudin v McCarthy* [2008] NTCA 7.

⁷⁰⁸ Cf. *PNJ v R* (2009) 83 ALJR 384, [17]-[19], concerning a similar provision in a South Australian statute.

⁷⁰⁹ *Alimudin v McCarthy* (2008) 23 NTLR 102, [28].

⁷¹⁰ E.g. *R v Aniezue* [2016] ACTSC 82; *R v Mohamed* [2016] VSC 581, [31]-[32]. Note also that a court sentencing an offender for an offence of people smuggling or a related offence is required to take into account certain periods of immigration detention: *Migration Act 1958* (Cth), s 236B.

⁷¹¹ *R v Lau* [2009] WASCA 99.

⁷¹² *R v Lau* [2009] WASCA 99. Special leave to appeal was refused: *Lau v R* [2009] HCATrans 275.

⁷¹³ E.g. *Tsang v DPP (Cth)* (2011) 35 VR 240, [169]-[171].

5.8.10 Taking into account other pre-sentence custody

580. Section 16E of the *Crimes Act 1914* (Cth) provides various means for taking into account pre-sentence “custody for the offence” for which the offender is sentenced (see “5.8.9 Credit for pre-sentence custody for the offence”). The reference to “custody for the offence” is to be construed broadly; there does not need to be a nexus with a specific offence but rather a nexus between the conduct giving rise to the arrest and detention and the offence or offences for which the person is to be sentenced.⁷¹⁴
581. If pre-sentence custody cannot be so characterised (that is, as “custody for the [Commonwealth] offence” for which the offender is sentenced), neither s 16E(2) nor s 16E(3) will apply.⁷¹⁵
582. Pre-sentence custody *for another offence* may fall to be taken into account under the totality principle.⁷¹⁶ Common law principles of totality apply to the sentencing of a federal offender.⁷¹⁷ In relation to other sentences which the offender has not yet served, see “4.3 Other sentences not yet served – s 16B (totality principle)”.
583. Courts in some jurisdictions have recognised a residual discretion for a sentencing court in fixing sentence to take into account pre-sentence custody which is not required to be taken into account under the totality principle or as pre-sentence custody for the instant offence.⁷¹⁸ The discretion is sometimes called the *Renzella* discretion.⁷¹⁹ The other period of custody may include custody in another jurisdiction.⁷²⁰ The other period of custody may be taken into account in various ways, including by reduction of the head sentence, or the period to be served, or both. The allowance to be made is within the discretion of the sentencing court, and the exercise is not a mathematical one.⁷²¹
584. An example of the exercise of the *Renzella* discretion is *Karpinski*,⁷²² where the offender had been held in custody for a period of time solely on another unrelated charge, proceedings for which were ultimately discontinued. In re-sentencing the offender for the instant offence, the Victorian Court of Appeal held that allowance should be made for the “*unallocated pre-sentence detention*” or “*dead time*” spent in custody on the unrelated charge.
585. In *Karpinski*, Weinberg JA expressed the view that the law (that is, in Victoria) regarding the credit to be given for pre-sentence detention in respect of unrelated custody is in an unsatisfactory state, and that

⁷¹⁴ *Alimudin v McCarthy* (2008) 23 NTLR 102, [28].

⁷¹⁵ See, e.g., *Mercanti v R* [2011] WASCA 120, [22]-[25].

⁷¹⁶ See *Tsang v DPP (Cth)* (2011) 35 VR 240, [172]-[177].

⁷¹⁷ *Johnson v R* (2004) 78 ALJR 616.

⁷¹⁸ See *R v Renzella* [1997] 2 VR 88; *Narkle v Hamilton* [2008] WASCA 31; *R v Fabre* [2008] QCA 386; *Geale v Tasmania* [2009] TASSC 28; *Karpinski v R* (2011) 32 VR 85; *R v Hill; ex parte DPP (Cth)* [2011] QCA 306, [280]-[282].

⁷¹⁹ Referring to *R v Renzella* [1997] 2 VR 88.

⁷²⁰ *Tsang v DPP (Cth)* (2011) 35 VR 240, [170]-[171]; *R v Hill; ex parte DPP (Cth)* [2011] QCA 306, [280]-[282].

⁷²¹ *Warwick v R* [2010] VSCA 166, [10].

⁷²² *Karpinski v R* (2011) 32 VR 85. The case concerned sentencing for State offences, not a federal offence.

the credit for such detention “is often now invoked in circumstances where its application is difficult to justify, either as a matter of logic, or in principle.”⁷²³

586. Courts in New South Wales have declined to recognise the existence of the residual discretion as part of the common law of that State.⁷²⁴ Courts in South Australia appear to have taken a similar view.⁷²⁵

587. Although it has been assumed that the *Renzella* discretion applies to the sentencing of a federal offender,⁷²⁶ there does not appear to have been any judicial consideration of whether the legislative scheme under the *Crimes Act 1914* (Cth) (particularly ss 16A,⁷²⁷ 16B and 16E) can accommodate the *Renzella* discretion, in the sense that it leaves a gap to be filled by the application of the common law principle.⁷²⁸

5.8.11 Correction of error in sentence of imprisonment

588. The *Crimes Act 1914* (Cth) contains two powers for a sentencing court to correct errors in relation to a sentence of imprisonment imposed on a federal offender:

- Section 19AHA confers a power for a sentencing court to rectify an error of a technical nature made by the court or a defect of form or an ambiguity in an order imposing a sentence of imprisonment or an order fixing a non-parole period (NPP) or a recognizance release order (RRO). The section also preserves the validity of the order despite the error, defect or ambiguity. See “7.12.2 Power to correct error in sentence of imprisonment: Crimes Act 1914, s 19AHA”.
- Section 19AH provides a mechanism by which a court may, on application, correct a failure to fix, or properly to fix, a NPP, or to make, or properly to make, a RRO, under the Act. The section also preserves the validity of the order despite the error. See “7.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH”.

⁷²³ *Karpinski v R* (2011) 32 VR 85, [2]-[8].

⁷²⁴ *R v Niass* (NSW CCA, 16 November 1988, unreported); *Hampton v R* [2014] NSWCCA 141, [18]-[39].

⁷²⁵ *R v Hughey* [2007] SASC 452, [6]-[7]; *R v Galgey* [2010] SASC 134, [10]; *R v Sprecher* (2015) 123 SASR 15, [28]-[32]. However in *R v Hudson* [2016] SASCFC 60 it was held that a period when the offender was subject to home detention bail for the instant offence could be taken into account in fixing sentence for a federal offence, even though the offender was not entitled to credit for that period as “time in custody in respect of” the offence under State law (as applied by s 16E of the *Crimes Act 1914*).

⁷²⁶ E.g. *Tsang v DPP (Cth)* (2011) 35 VR 240, [164]-[172]; *R v Hill; ex parte DPP (Cth)* [2011] QCA 306, [280]-[282].

⁷²⁷ Nothing in s 16A(2) of the Act appears to accommodate taking into account custody on an unrelated charge, unless such custody can be considered as an aspect of the “antecedents” of the offender within s 16A(2)(m) (cf. *R v Hudson* [2016] SASCFC 60, [16]-[21]). A sentence reduction for custody on an unrelated charge might be said (at least in some circumstances) to run counter to the requirement for a court sentencing a federal offender to take into account “the need to ensure that the person is adequately punished for the offence” (s 16A(2)(k)).

⁷²⁸ Cf. *Bui v DPP (Cth)* (2012) 244 CLR 638, [26]-[27]. State courts have held that a statutory power to take into account custody for the instant offence does not implicitly exclude a residual discretion to take into account custody on an unrelated charge (*R v Renzella* [1997] 2 VR 88; *Narkle v Hamilton* [2008] WASCA 31, [30]-[31]; *Geale v Tasmania* [2009] TASSC 28, [49]-[52]), but those decisions do not necessarily answer the question whether the *Renzella* discretion (in those jurisdictions which recognise it) is applied by s 80 of the *Judiciary Act 1903* (Cth) to the sentencing of a federal offender. See “2.5 Applicability of the common law”.

5.9 Imprisonment: concurrency or cumulation of sentences

5.9.1 The mechanism for cumulation or concurrency of sentences on a federal offender: *Crimes Act 1914*, s 19

589. The mechanism by which a sentence imposed on a federal offender is to be served cumulatively upon or concurrently with one or more other federal sentences or sentences for State/Territory offences (whether imposed at the same time or previously, and whether or not imposed by the same court) is governed by s 19 of the *Crimes Act 1914* (Cth). State and Territory laws do not apply directly.⁷²⁹

590. In contrast to the position in a number of States and Territories,⁷³⁰ in the sentencing of a federal offender there is no default rule that a sentence is to be served concurrently with or cumulatively upon another sentence. Instead, whether a sentence for a federal offence is to be served concurrently with or (wholly or partly) cumulatively upon another sentence (whether imposed at the same time or previously) is to be determined by the sentencing court. The court is required to make orders for the commencement of each federal sentence, which effectively provide for concurrency or cumulation of the sentence.⁷³¹ This mechanism has been criticised as “unnecessarily cumbersome, confusing and prone to error”.⁷³² (As to the exercise of the discretion whether to order cumulation or concurrency, see “5.9.2 Whether sentences should be concurrent or cumulative”.)

591. Section 19 of the *Crimes Act 1914* (Cth) covers a range of federal sentencing situations. It applies:

- (a) where the offender is *already the subject of a State/Territory sentence* - s 19(1);
- (b) where *two or more federal sentences* are imposed - s 19(2); or

⁷²⁹ *DPP v Swingle* [2017] VSCA 305, [67]. A State or Territory procedural law cannot directly bind a court exercising federal jurisdiction; it binds such a court only if it is applied as surrogate federal law by a Commonwealth law, such as a provision of the *Judiciary Act 1903* (Cth): see “2.1.2 Constitutional power to define or invest federal jurisdiction”. For this reason, a State law which purports, of its own force, to direct a court sentencing a federal offender as to orders to be made for the cumulation of sentences would be invalid. Section 6E of the *Sentencing Act 1991* (Vic) appears to be an example of such a law. Section 6E creates a presumption of cumulation for every sentence of imprisonment imposed on a “serious offender” for a “relevant offence”. “Serious offender” is defined to include a “serious sexual offender” (s 6B(3)). A person convicted of any of the Commonwealth offences listed in cl 1 of Schedule 1 of the Act would fall within the definition of “serious sexual offender” (s 6B(2)). An offender may therefore be a “serious offender” merely from having been convicted of a specified Commonwealth offence (including at the same sitting). That is, in its own terms, the State law purports to direct a court sentencing an offender for a federal offence to impose cumulative sentences in certain circumstances. This anomaly was not referred to in *Swingle* and does not seem to have been the subject of judicial comment.

⁷³⁰ E.g. *Sentencing Act 1991* (Vic), s 16, which provides that (subject to specified exceptions) a sentence of imprisonment is to be served concurrently with any uncompleted sentence or sentences of imprisonment, unless the court otherwise directs.

⁷³¹ Section 19 relates to federal sentences imposed (that is, head sentences of imprisonment), not to the non-parole period or recognizance release period: *R v DS* (2005) 153 A Crim R 194, [15]. Pursuant to s 19AB of the *Crimes Act 1914* (Cth), a single federal non-parole period or a recognizance release order (commencing when the first federal sentence of imprisonment commences) is imposed in light of the length of the effective head sentence/aggregate sentence for the federal offences: *R v DS* (2005) 153 A Crim R 194, [14]–[15]; *Lodhi v R* [2007] NSWCCA 360, [255]–[262].

⁷³² *Truong v R* [2016] VSCA 228, [43] (Priest JA). Compare *Nguyen v R* [2017] VSCA 262, [2](fn 1).

(c) where an offender is sentenced for *State/Territory and federal offences at the same time* - s 19(3).

592. The requirement in s 19(2) is not enlivened by *a single aggregate sentence of imprisonment* for two or more federal offences.⁷³³

593. In any of the situations in which s 19 applies, the court must “*by order direct*” when each federal sentence imposed (that is, the head sentence of imprisonment) commences.⁷³⁴ In *Swingler*,⁷³⁵ the Victorian Court of Appeal expressed the view that this requirement can be complied with by any of the following techniques:

- fixing a particular date (for example, ‘16 April 2019’);
- describing a period (for example, ‘12 months after the commencement of the sentence on charge 1’, or ‘nine months before the expiry of the sentence on charge 2’);⁷³⁶ or
- identifying a triggering event (for example, ‘at the completion of the sentence imposed on charge 1’).

However merely to order that a federal sentence “*be served cumulatively upon*” another sentence may not be sufficient to comply with the requirements of s 19.⁷³⁷ Nor is it sufficient merely to order that a recognizance release order commence on a particular date; the obligation is to direct the date for commencement of *the sentence of imprisonment* (that is, the head sentence).⁷³⁸ And it is at least doubtful whether a sentence can be validly directed to commence on a date that is uncertain or that is dependent upon a decision of a State administrative body (such as the date on which the offender will be granted parole for a State offence).⁷³⁹

594. In each situation to which s 19 applies, the commencement of each federal sentence of imprisonment must be fixed so that no federal sentence commences “*later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences*”. The reference to “*a sentence the commencement of which has already been fixed*” includes a reference to another sentence imposed at the same time: s 19(4).

⁷³³ *DPP (Cth) v AB (No.2)* [2006] SASC 112.

⁷³⁴ In view of the mandatory terms of s 19, failure to give the required direction will normally invalidate a sentence. However in *R v Petrovic* [1998] VSCA 95, [17], the failure to declare a commencement date for a Commonwealth sentence did not invalidate the sentence where the sentencing court ordered complete concurrency and the effect was that all sentences were to commence immediately.

⁷³⁵ *DPP v Swingler* [2017] VSCA 305, [72]. See also *R v Alimic* [2006] VSCA 273, [5]-[7].

⁷³⁶ Compare *R v Scerri* [2010] VSCA 287, [56], in which the Court of Appeal, in re-sentencing the appellant for one State offence and one Commonwealth offence, said, “*The sentence on the Commonwealth count is to commence upon the expiration of the first twelve months of the non-parole period of the State sentence.*” See also *DPP (Cth) v Watson* [2016] VSCA 73, [99], in which in re-sentencing the respondent, the majority of the Court of Appeal fixed the commencement date for each Commonwealth offence as a certain number of months after the commencement of the sentence on another specified charge (e.g. “43 months after commencement of charge 6”).

⁷³⁷ The weight of authority is that it does not: *R v O’Brien* (1991) 57 A Crim R 80; *R v Daswani* [2005] QCA 167, [10], [22]-[27]; *R v NK* [2008] QCA 403, [99]; *Mercanti v R* [2011] WASCA 120, [26]-[28]. Dicta to the contrary in *DPP (Cth) v AB (No 2)* [2006] SASC 112, [26], and *Rajabizadeh v R* [2017] WASCA 133, [24], should be treated with caution; in neither case did the court refer to any of the relevant authorities.

⁷³⁸ *DPP (Cth) v Couper* (2013) 41 VR 128, [125]-[127].

⁷³⁹ *R v Knight* [2013] QCA 277, [20]-[23].

595. The object of the requirements in s 19 is to ensure that there is no gap between the end of a sentence which an offender is serving at the time when he or she is convicted for a federal offence and the commencement of the sentence for that federal offence.⁷⁴⁰ That is, s 19 is designed to prevent a hiatus which results in the offender being released and subsequently returned to prison to serve the next sentence.⁷⁴¹
596. The requirement in s 19(1)(a) that no federal sentence commence “*later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences*” does not mean that *all federal sentences* must commence no later than the end of the pre-existing sentences. It requires only that there must be no gap between the pre-existing sentence and the first federal sentence to be imposed. The same obligation to avoid a gap will apply to each further federal sentence to be imposed. Suppose, for example, when an offender is sentenced for two federal offences, the offender is subject to a pre-existing State sentence to which no non-parole period applies, which will expire in one year’s time. In accordance with s 19(1)(a), the court must direct that the first federal sentence commence no later than the date on which the pre-existing State sentence expires. The second federal sentence must commence no later than the date when the pre-existing State sentence expires, or when the first federal sentence expires, whichever is the later.
597. If a non-parole period⁷⁴² applies in respect of any State or Territory sentences that the offender is serving or subject to when sentenced for the federal offence(s) (that is, any State or Territory non-parole period which has not expired when the federal sentence is imposed⁷⁴³), the first federal sentence to commence after the end of that non-parole period must be fixed so that it commences immediately after the end of the State or Territory non-parole period: *Crimes Act 1914* (Cth), s 19(1)(b) and s 19(3)(d). The references to the Commonwealth sentence commencing “*immediately after*” the State or Territory non-parole period is not a prescription that this is what must occur; it is only a bar to any later commencement date being fixed, so as to avoid the creation of a “gap” in incarceration.⁷⁴⁴ In other words, the sentencing court may direct that the first federal sentence commence on a date during the currency of the State or Territory non-parole period or at the expiration of that period, but not later.
598. If, at the time of sentencing, the federal offender is serving or subject to a State or Territory sentence, but any non-parole period for that sentence has expired, the requirement in s 19(1)(b) of the *Crimes Act 1914* has no application. That is, the requirement that a federal sentence (or the first of the federal sentences) commence no later than immediately after the end of the State or Territory non-parole

⁷⁴⁰ *R v Dobie* [2004] 2 Qd R 537, [21]; *R v DS* (2005) 153 A Crim R 194, [15].

⁷⁴¹ *Mercanti v R* [2011] WASCA 120, [14]-[16].

⁷⁴² “Non-parole period” is defined in s 16(1) of the *Crimes Act 1914* (Cth) to mean, in relation to a sentence or sentences of imprisonment, “*that part of the period of imprisonment for that sentence or those sentences during which the person is not to be released on parole, whether that part of the period is fixed or recommended by a court or fixed by operation of law*”. It applies both to a period at the end of which a prisoner *must be released* and to a period at the end of which the prisoner *may apply for release*; and it applies both to a period nominated by a court (whether by fixing or recommending) and to one fixed by operation of law: *R v MacCormack* [2005] QSC 49, [16].

⁷⁴³ *R v Dobie* [2004] 2 Qd R 537; *R v MacCormack* [2005] QSC 49; *Mercanti v R* [2011] WASCA 120, [17]-[20].

⁷⁴⁴ *Fasciale v R* (2010) 30 VR 643, [24]-[37].

period arises only if a non-parole period “applies” at the time of sentencing of the federal offender. No non-parole period “applies” if the non-parole period date has passed. The scheme does not contemplate that the commencement of the federal sentence which is to be cumulative or concurrent can or should be backdated.⁷⁴⁵

599. The requirement that a sentence for a Commonwealth offence commence not later than immediately after a State or Territory non-parole period may have the practical effect of precluding any cumulation of the federal head sentence on the head sentence for the State or Territory offence(s).⁷⁴⁶ For example if an offender is sentenced for a State offence to 3 years’ imprisonment with a non-parole period of 2 years, and at the same sitting is sentenced to 12 months’ imprisonment for a federal offence, it is impossible to achieve cumulation of any part of the federal sentence on the head sentence for the State offence, because the federal sentence must be directed to commence no later than immediately after the State non-parole period. That is, in this example, even if the latest permissible commencement date is chosen, the federal sentence will be completed at the same time as the completion of the State sentence. In some jurisdictions, it may be possible to overcome this limitation by making appropriate orders for the State sentence to be served cumulatively (or partly cumulatively) upon the federal sentence,⁷⁴⁷ but whether there is power to do so would depend upon State law.⁷⁴⁸
600. It is open to a court sentencing a federal offender to impose a federal sentence which operates beyond the State or Territory non-parole period, even though it does not extend beyond the State or Territory head sentence.⁷⁴⁹
601. If, at the time of sentencing, the offender is serving or subject to a federal sentence of imprisonment, the sentencing court must comply with the applicable requirements of s 19AB, s 19AC, s 19AD, s 19AE or s 19AR of the *Crimes Act 1914* (Cth) (as the case may be). Those provisions govern the fixing of a non-parole period or recognizance release order or the decision to decline to do so. For an overview of these requirements, see “5.10.4 Non-parole period (NPP) or recognizance release order (RRO)?”.

⁷⁴⁵ *R v Dobie* [2004] 2 Qd R 537, [21]; *Mercanti v R* [2011] WASCA 120, [21]-[29].

⁷⁴⁶ *R v O’Brien* (1991) 57 A Crim R 80; *R v Daswani* [2005] QCA 167, [10], [22]-[27].

⁷⁴⁷ *R v O’Brien* (1991) 57 A Crim R 80; *Carroll v R* [2011] VSCA 150, [48].

⁷⁴⁸ In Victoria, s 16(4) of the *Sentencing Act 1991* (Vic) permits a court to make orders which have the effect of cumulating a State sentence on a federal sentence in certain circumstances. However in *DPP v Swingle* [2017] VSCA 305, [78]-[87], the Court doubted whether s 16(4) applies if the Commonwealth sentence is imposed at the same sitting as the State sentence. The position in some other States is even more uncertain. See “5.9.5 Fixing cumulation or concurrency in sentencing for Commonwealth and State/Territory offences in the same indictment”.

⁷⁴⁹ *Fasciale v R* (2010) 30 VR 643, [32]-[33]. In that case, the offender was convicted of both State and Commonwealth offences. He was sentenced to a total effective sentence of 6 years for the State offences, with a non-parole period of 4 years. For the Commonwealth offences, he was sentenced to concurrent straight sentence of 6 months’ imprisonment, to commence immediately after the expiry of the State non-parole period. The effect was that although he would become eligible for parole on the State offences after 4 years, he would remain in custody for a further 6 months on the Commonwealth offences, but the total length of the head sentence was not affected. The Court of Appeal held that such a sentence, although unusual, was open, provided that the ratio between the total effective head sentence and the minimum period of incarceration was appropriate.

5.9.2 Whether sentences should be concurrent or cumulative

602. Determination of questions of concurrency and cumulation of federal sentences is governed by common law principles of totality,⁷⁵⁰ to the exclusion of principles in State or Territory statutes. That is, the overall sentence must reflect the total criminality of all the offences for which the offender is sentenced.

603. An important question in determining whether sentences should be at least partly cumulative is whether the offender's conduct involves "truly two or more incursions into criminal activity" or "one multi-faceted course of criminal conduct".⁷⁵¹ But questions of cumulation or concurrency are not to be answered solely by characterising the offending as one or the other, as Howie J (with whom Adams and Price JJ agreed) succinctly explained in *Cahyadi*:⁷⁵²

[T]here is no general rule that determines whether sentences ought to be imposed concurrently or consecutively. The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.

5.9.3 Different means of giving effect to the requirements of totality

604. In cases where there are multiple terms of imprisonment imposed, the orthodox approach to give effect to the requirements of totality is to impose individually appropriate sentences for each offence and then to work out the total effective sentence, making such limited orders for cumulation as are fair in order to reach an overall sentence which is not in breach of the principle of totality or any other relevant sentencing principle.⁷⁵³ The alternative approach (known as 'moderate and cumulate'⁷⁵⁴) is to accommodate the principle of totality by reducing the individual sentences imposed, but ordering a

⁷⁵⁰ *Johnson v R* (2004) 78 ALJR 616. See the discussion of those principles and their conceptual basis in *DPP (Cth) v Beattie* [2017] NSWCCA 301 [26]-[45] (Basten JA).

⁷⁵¹ *A-G v Tichy* (1982) 30 SASR 84, 92-3. See also *R v Mantini* [1998] 3 VR 340, 349 (Callaway JA). This does not mean that concurrent sentences must be imposed for offences that have substantial common elements: *Johnson v R* (2004) 78 ALJR 616; *Colbourn v R* [2009] TASSC 108.

⁷⁵² *Cahyadi v R* [2007] NSWCCA 1, [27].

⁷⁵³ *Johnson v R* (2004) 78 ALJR 616, [26]. See also *DPP (Vic) v Grabovac* [1998] 1 VR 664; *R v Lomax* [1998] 1 VR 551; *R v Koukoulis* (2003) 7 VR 45, [32]; *R v Cook* [2018] TASCCA 20, [3], [51]-[56].

⁷⁵⁴ *R v Izzard* (2003) 7 VR 480, [21]-[23].

greater measure of cumulation.⁷⁵⁵ The first (orthodox) approach should be departed from only when some special feature of the case requires such a departure.⁷⁵⁶

5.9.4 Cumulation or concurrency of a State/Territory sentence imposed after a federal sentence

605. Section 19 of the *Crimes Act 1914* (Cth) provides for (amongst other things) the cumulation of a federal sentence on, or concurrency with, a State or Territory sentence of imprisonment, whether that State or Territory sentence has been imposed previously and is being served at the time of sentencing for the federal offence, or is imposed at the same time.

606. Section 19 does not govern the converse situation, where an offender who is undergoing a federal sentence is sentenced to imprisonment for a State or Territory offence. In that situation, the law of the State or Territory governs the manner in which concurrency or cumulation of the sentence is achieved.

607. The laws of some jurisdictions specifically provide for the cumulation or concurrency of a State sentence for an offender who is serving a federal sentence. In Victoria, for example, specific provision is made in s 16(4) of the *Sentencing Act 1991* (Vic), in broadly similar terms to those in s 19 of the *Crimes Act 1914* (Cth). It requires that when a court imposes a sentence of imprisonment for a Victorian offence on “*a person already undergoing a sentence or sentences of imprisonment*” for a Commonwealth offence, the court “*must direct when the new term commences*” (instead of providing for a presumption of concurrency or cumulation as would ordinarily be the case). Section 16(4) does not permit a sentencing court to work backwards from the total effective sentence which the court intends to achieve and fix upon a starting point for the State sentence to fit that aim; the judge must address the commencement date of the State sentence and specify it in terms.⁷⁵⁷ The sub-section requires that the commencement date for the State sentence “*be no later than immediately after ... the completion of that sentence or those sentences if a non-parole period or pre-release period (as defined in Part 1B of the Crimes Act 1914 of the Commonwealth) was not fixed in respect of it or them; or ... the end of that period if one was fixed*”. As is the case with s 19 of the Commonwealth Act, the evident purpose of s 16(4) of the *Sentencing Act 1991* (Vic) is to ensure that there is no gap between the respective periods of incarceration.

608. Section 16(4) of the *Sentencing Act 1991* (Vic) contains no counterpart of ss 19(3) and 19(4) of the *Crimes Act 1914* (Cth). As a result it is at least doubtful whether s 16(4) of the *Sentencing Act 1991* (Vic) applies to the sentencing of an offender for a State offence merely because the offender is also sentenced for a Commonwealth offence on the same indictment; even if the Commonwealth sentence is pronounced first, it may not be possible to regard the offender (for that reason alone) as “*a person already undergoing a sentence ... of imprisonment*” for a Commonwealth offence.⁷⁵⁸

⁷⁵⁵ *Mill v R* (1988) 166 CLR 59, 62–63.

⁷⁵⁶ *DPP (Cth) v KMD* [2015] VSCA 255, [89]–[96].

⁷⁵⁷ *R v Fulop* [2009] VSCA 296 [7]–[8].

⁷⁵⁸ *DPP v Swingler* [2017] VSCA 305, [79]–[81]. Under s 19(3) of the *Crimes Act 1914* (Cth), provision is made for ordering concurrency or cumulation of a federal sentence on a State sentence imposed at the same sitting. Pursuant to s 19(4), the State sentence would be treated as having “already been fixed”, for the purposes of s 19. The sentencing court is therefore required to direct when the federal sentence commences s 19(4). The time for

609. In jurisdictions which have no counterpart of s 16(4) of the *Sentencing Act 1991* (Vic), the position may be even less clear. Unless explicitly provided for, State or Territory provisions which permit or require the cumulation of a State/Territory sentence on a pre-existing sentence may not be expressed in a way which makes them capable of applying if the pre-existing sentence is for a federal offence.⁷⁵⁹
610. State or Territory law which provides for the presumptive or mandatory cumulation of sentences for certain offences against State or Territory law may also be triggered by a conviction or sentence for a particular Commonwealth offence. For example, in Victoria s 6C(3) of the *Sentencing Act 1991* (Vic) provides (amongst other things) that a conviction for a particular Commonwealth offence which is 'substantially similar to' the relevant State offence may trigger the operation of s 6E of the *Sentencing Act*, which provides for the presumptive cumulation of sentences imposed on various classes of serious offender.⁷⁶⁰

5.9.5 Fixing cumulation or concurrency in sentencing for Commonwealth and State/Territory offences in the same indictment

611. It should be apparent from the foregoing summary that in imposing terms of imprisonment on an offender charged on a joint indictment (that is, where the offender is to be sentenced for both Commonwealth and State/Territory offences), pitfalls abound (particularly, but not exclusively, with regard to ordering cumulation or concurrency of sentences of imprisonment). As the Victorian Court of Appeal observed in *Swingler*,⁷⁶¹ "*This entire area is fraught with unnecessary complexity, and is full of hidden traps for the unwary.*"
612. In *Swingler*, the Court identified three possible approaches to be taken by a sentencing court in such a case:⁷⁶²
1. *The judge can simply sentence for each offence on the indictment, in the order in which each offence is listed. He or she can then differentiate between them by making orders as to cumulation or concurrency with regard to the State offences and orders as to commencement with regard to the Commonwealth offences. ...* [The Court noted that the sentencing judge's adoption of this approach in the instant case "was not an unqualified success".]

commencement of the federal sentence must comply with s 19(3)(c) and (d). But these provisions contain no requirements or powers relating to fixing cumulation or concurrency of a State sentence on a federal sentence.

⁷⁵⁹ E.g. *R v McMillan* [2005] QCA 93, [22]; *R v NK* [2008] QCA 403, [78].

⁷⁶⁰ *DPP v Swingler* [2017] VSCA 305, [67]. Although not referred to in *Swingler*, a conviction for one of a number of specified Commonwealth offences can also trigger the operation of the "serious offender" provisions in Part 2A of the *Sentencing Act 1991* (Vic): see the definitions of "relevant offence" and related terms in s 6B. Apart from presumptive cumulation of sentences (under s 6E), an additional consequence of an offender being sentenced as a "serious offender", is that, pursuant to s 6D of the Act, community protection must be regarded as the primary purpose of sentencing, even if the sentence is thereby made disproportionate to the objective gravity of the offence.

⁷⁶¹ *DPP v Swingler* [2017] VSCA 305, [82]. Compare *Burbridge v R* [2016] NSWCCA 128, [45], in which Rothman J (with whom MacFarlan JA and Bellew J agreed) referred to "*complexities created by the interaction of the State and Commonwealth sentencing regimes, made more complex by the casuistry in the Commonwealth Crimes Act.*"

⁷⁶² *DPP v Swingler* [2017] VSCA 305, [78] (footnotes omitted).

2. *The judge can group all the State offences together, and first sentence upon them individually. This has the advantage of enabling the sentences for the Commonwealth offences to be directed to commence at, for example, the expiration of the relevant State non-parole period. That avoids any gap in the custodial term, and seemingly simplifies the process, by ensuring that relevant rules as to cumulation and concurrency are applied appropriately, and within the proper sphere of each sentencing regime.*
3. *The judge can group all the Commonwealth offences together, and deal with them first. This potentially gives rise to the difficulty that State offences ordinarily operate from the date of sentence, as per s 17(1) of the Sentencing Act [i.e. Sentencing Act 1991 (Vic)]. They cannot, as a general proposition, be made to commence at the expiration of a Commonwealth sentence, subject only to s 16(4).” [The Court then set out the terms of that provision and (at [79]-[81]) proceeded to identify difficulties in interpreting s 16(4) in a way that would apply when an offender is sentence for Commonwealth and State offences at the same sitting.]*

613. The position may be no less fraught in other jurisdictions, in the absence of clear power to order that a State or Territory sentence commence at a later date, or be cumulative upon a sentence for a federal offence.

614. Ordinarily, therefore, unless the sentences for Commonwealth offences are to be served wholly concurrently with sentences for State/Territory offences, or there is clear power under State/Territory law to proceed effectively by the third approach,⁷⁶³ the safest course for a sentencing court in these circumstances is generally to proceed in accordance with the second approach identified in *Swingler*. That is, a State/Territory sentence should be the base sentence,⁷⁶⁴ any other State/Territory sentences should be grouped appropriately, and the time of commencement for each federal sentence should be fixed to create appropriate cumulation upon the State/Territory sentences. This is an appropriate method of overcoming some of the complexities created by the interaction of the State and Commonwealth sentencing regimes.⁷⁶⁵

615. The last step (fixing the time of commencement for each federal sentence) requires a direction which complies with s 19 of the *Crimes Act 1914* (Cth).⁷⁶⁶ In particular, the direction must have the effect that:

⁷⁶³ In *Rodgers v R* [2018] NSWCCA 47, the sentencing judge made orders for the commencement of sentences which had the effect that a sentence for a State offence was to be served partly cumulatively upon a shorter sentence for a Commonwealth offence; the judge did so because otherwise the Commonwealth sentence would have been subsumed by the State sentence and would have failed to reflect the additional criminality. The NSW CCA (at [75]) described this course as “a principled and appropriate response to the difficult task of sentencing an offender in respect of Commonwealth and State offences.” In that case, cumulation of the State sentence upon the Commonwealth sentence could be effectively achieved by backdating the commencement of the Commonwealth and State sentences to different dates.

⁷⁶⁴ That is, the sentence upon which other sentences of imprisonment are to be served wholly or partly cumulatively, or by reference to which other sentences of imprisonment are to be served concurrently. At least in Victoria, whenever more than one sentence of imprisonment is imposed, there must be a base sentence: *R v Nikodjevic* [2004] VSCA 222, [34]-[39]. A base sentence may also be chosen when sentencing for multiple Commonwealth offences: *DPP v Swingler* [2017] VSCA 305, [74].

⁷⁶⁵ *Burbridge v R* [2016] NSWCCA 128, [45].

⁷⁶⁶ See “5.9.1 The mechanism for cumulation or concurrency of sentences on a federal offender: Crimes Act 1914, s 19”.

- there is no gap between any State/Territory non-parole period and the first federal sentence, or if no such non-parole period applies, that there is no gap between the completion of a State/Territory sentence and the commencement of the first federal sentence; and
- no gap between periods of incarceration can otherwise occur.

616. Usually, the most severe sentence should be chosen as the base sentence,⁷⁶⁷ but this practice is not mandatory. It would seem to be open to a court to proceed by the second approach even though the base sentence chosen (for a State/Territory offence) is less severe than one or more of the federal sentences, particularly if the reason for doing so is uncertainty about the power under State/Territory law to proceed by the third approach described in *Swingler*.⁷⁶⁸ A court may direct that a sentence for a State/Territory offence and one for a federal offence be served in the order which is most practical and appropriate.⁷⁶⁹

617. An incidental consequence of making a State or Territory sentence rather than a Commonwealth sentence the base sentence is that it might affect the application of a State or Territory law which abrogates, modifies or restricts the operation of the totality principle in relation to the relevant State or Territory offence.⁷⁷⁰ The order of sentences might therefore affect the degree of cumulation and the total effective sentence. It remains an open question whether this consideration is relevant in determining the appropriate order of sentences.⁷⁷¹

⁷⁶⁷ *R v MDB* [2003] VSCA 181, [14].

⁷⁶⁸ An example is *R v Falconi* [2014] QCA 230, [14], in which, “after discussing the sentencing requirements under the *Crimes Act 1914 (Cth)*” the sentencing judge “considered it prudent to first sentence the applicant on the *Queensland offences and then make the Commonwealth sentence cumulative*”, even though the sentences for the Commonwealth offences exceeded those for the Queensland offences. An application by the offender for an extension of time to appeal was refused.

⁷⁶⁹ *R v O’Brien* (1991) 57 A Crim R 80, 96.

⁷⁷⁰ E.g. *Sentencing Act 1991* (Vic), s 6E; see *DPP v Morris* [2015] VSCA 155, [68]–[69]. That section provides for presumptive cumulation of sentences and consequent modification of the totality principle for certain “serious offenders”. The provision would apply if a State sentence for a “relevant offence” is imposed cumulatively on a Commonwealth sentence for another “relevant offence” (which, pursuant to the definitions in s 6B of the Act, includes a number of specified Commonwealth offences) in the same class which is imposed at the same time. However the State law could not operate to require that any Commonwealth sentence be presumptively cumulative upon a State sentence or to modify the operation of the principle of totality in relation to sentencing for the Commonwealth offence.

⁷⁷¹ See *Barbat v R* [2014] VSCA 202 as to the effect of the choice of base sentence on the operation of s 6E.

5.10 Imprisonment: period to be served

5.10.1 Determining the length of the period of incarceration

618. A court which imposes a sentence of imprisonment for a federal offence must also determine the period, or minimum period, of that sentence (if any) for which the offender is to be incarcerated. The mechanisms for fixing that period (non-parole period, recognizance release order or what is known as a straight sentence), and the complex provisions which govern them, are described later in this chapter. It is first necessary to summarise the principles which apply to the fixing of the period to be served.
619. State or Territory laws which prescribe how periods, or minimum periods, of incarceration for offenders sentenced to imprisonment are to be fixed do not apply to the sentencing of federal offenders. Such laws cannot apply of their own force, and the exhaustive regime in Part IB of the *Crimes Act 1914* (Cth) leaves no room for such State or Territory laws to be applied as surrogate federal law.⁷⁷²
620. The fixing of periods or minimum periods of imprisonment to be served by a federal offender is governed by Part IB of the *Crimes Act 1914* (Cth), together with common law principles applied by s 80 of the *Judiciary Act 1903* (Cth).
621. With the exception of specific provisions relating to sentencing for certain national security offences⁷⁷³ and for certain people-smuggling offences,⁷⁷⁴ Commonwealth law generally does not contain prescriptive requirements for any particular ratio or proportion between the head sentence of imprisonment imposed on a federal offender and the period or minimum period to be served.⁷⁷⁵ Nor (apart from the exceptions mentioned) does Commonwealth law otherwise mandate any particular minimum period to be served. In some circumstances, a court sentencing a federal offender to imprisonment has power to order that a federal offender be released “forthwith” (with the effect that the offender is not required to serve any of the sentence, subject to entering into and complying with a recognizance); in others, it may require the offender to serve the whole of the sentence in prison. Usually, however, the court will fix a period, or minimum period, to be served and has a wide (although not unfettered) discretion in setting that period.
622. Discretionary judgments about whether or not to fix a period or minimum period of incarceration for a federal offence, or the length of any such period, must be made according to the same general principles that govern other aspects of the sentencing of a federal offender. The fundamental obligation of a court

⁷⁷² *Hili v R* (2010) 242 CLR 520, [21]-[22], [52].

⁷⁷³ The relevant offences include offences relating to terrorism, treason and espionage: see “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”.

⁷⁷⁴ See “8.1.2 Mandatory imprisonment for certain people-smuggling offences”.

⁷⁷⁵ The existence of a rule that for certain national security offences a sentencing court must fix a non-parole period (NPP) of at least three-quarters of the head sentence (“5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”) does not impose any implicit limit on the ratio between the head sentence and the NPP in sentencing for any other offences: *Stipkovich v R* [2018] WASCA 63, [36]-[37] (disapproving dicta in *Lam v R* [2014] WASCA 114, [56]).

in sentencing a federal offender is to impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence (*Crimes Act 1914* (Cth), s 16A(1)). As the High Court emphasised in *Hili*,⁷⁷⁶ s 16A(1) and (2) make it plain that all of the circumstances, including the matters listed in s 16A(2), must be taken into account in fixing the period, or minimum period, to be served, just as they must be taken into account in imposing a sentence of imprisonment. (The same is true in relation to a decision whether to release the offender forthwith, or conversely to impose a straight sentence.) The relevant factors may be differently weighted at each stage of the exercise because there are different purposes behind each function.⁷⁷⁷

623. One consequence of the application of the sentencing principles in s 16A of the *Crimes Act 1914* (Cth) is that there is no scope for any presumptive approach, or “norm”, in determining the appropriate period or minimum period which the offender should be required to serve.⁷⁷⁸ The High Court in *Hili* held that statements by the New South Wales Court of Criminal Appeal⁷⁷⁹ which purported to dictate, as a “norm” to be departed from only in special circumstances, that the period or minimum period to be served should represent a particular proportion of the head sentence, were erroneous.⁷⁸⁰ The plurality in *Hili* observed that s 16A “does not permit the making of generalisations across all forms of federal offence about how individual sentences are to be fixed.”⁷⁸¹

624. The plurality in *Hili*⁷⁸² also said that, in fixing a period or minimum period of incarceration, what is the “severity appropriate” (within the meaning of s 16A(1)) is to be determined having regard to the general principles identified in *Power*,⁷⁸³ *Deakin*⁷⁸⁴ and *Bugmy*.⁷⁸⁵ Those cases establish that the purpose of fixing a minimum period of incarceration is to provide for mitigation of the punishment of the offender in favour of his or her rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a sentencing court determines justice requires that the offender must serve, having regard to all the circumstances of the offence.⁷⁸⁶ In determining what period justice

⁷⁷⁶ *Hili v R* (2010) 242 CLR 520, [23]-[25], [40].

⁷⁷⁷ *Bugmy v R* (1990) 169 CLR 525, 531; *R v Ruha; ex parte DPP (Cth)* [2011] 2 Qd R 456, [46]; *De Faria v Western Australia* [2013] WASCA 116, [58]-[59].

⁷⁷⁸ *Hili v R* (2010) 242 CLR 520, [12]-[13], [25], [36]-[45].

⁷⁷⁹ *Jones v R* [2010] NSWCCA 108, [39].

⁷⁸⁰ *Hili v R* (2010) 242 CLR 520, [12]-[13], [36]-[45]. Similar observations to those made by the NSW CCA in *Jones* must also be regarded as wrong in light of the decision in *Hili*; they include *R v CAK and CAL; ex parte Cth DPP* [2009] QCA 23, [18]; *R v Martinsen* [2003] NSWCCA 144, [14]; *Ly v R* [2007] NSWCCA 28, [16]. Pre-*Hili* sentencing decisions in NSW must be treated with caution as comparators in determining the appropriate length of a NPP or RRO period, because they may have been affected, to some extent, by the problematic “norm”: *Aboud v R* [2017] NSWCCA 140, [36].

⁷⁸¹ *Hili v R* (2010) 242 CLR 520, [25] (emphasis in original).

⁷⁸² *Hili v R* (2010) 242 CLR 520, [40].

⁷⁸³ *Power v R* (1974) 131 CLR 623.

⁷⁸⁴ *Deakin v R* (1984) 58 ALJR 367.

⁷⁸⁵ *Bugmy v R* (1990) 169 CLR 525.

⁷⁸⁶ *Power*, *Deakin* and *Bugmy* were each concerned with the fixing of a non-parole period, that is, the minimum period to be served before the offender is eligible for release. However *Hili* was a case involving a recognizance release order, that is, an order which itself fixed the period to be served. It is implicit in the judgment of the plurality in *Hili* ((2010) 242 CLR 520, [39]-[44]) that the same central principles apply (with necessary modifications) to the

requires, the objective gravity of the offending and the interests of the community, which imprisonment is designed to serve, must be taken into account.⁷⁸⁷

625. It follows from these principles that the period, or minimum period, to be served must be fixed after determination of the head sentence.⁷⁸⁸

626. Sentencing courts must endeavour to ensure reasonable consistency in the sentencing of federal offenders, including in the fixing of the period, or minimum period, to be served, but “*consistency is not demonstrated by, and does not require, numerical equivalence*”.⁷⁸⁹ What is required is consistency in the application of sentencing principle.⁷⁹⁰ In seeking consistency, sentencing judges must have regard to what has been done in other cases,⁷⁹¹ but the range of sentences that have been imposed in the past does not fix the boundaries within which future judges must, or even ought, to sentence.⁷⁹² Past sentences can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence.⁷⁹³

627. In practice, in the sentencing of federal offenders there is considerable variation, both within and between jurisdictions, in the ratio between the length of the head sentence (or total effective sentence in the case of sentencing for multiple offences) and the period fixed as the period, or minimum period, to be served. Broadly speaking, the ratio in most cases is between one-third and three-quarters. Ratios at the lower end are found more commonly where the head sentence is shorter and a release period is fixed.⁷⁹⁴ Where the head sentence is greater than 3 years, and a minimum term is imposed, ratios are typically between 50% and 75%. The ratio tends to be greater (sometimes higher than 80%⁷⁹⁵) for very serious offending, when the head sentence or total effective sentence is particularly long. This summary is not only very general but no more than descriptive. It must be emphasised that the proportion which the period to be served in prison bears to the whole term is not itself a separate and distinct object of any part of the sentencing exercise, but is the result of discretionary determination after taking into

fixing of a period to be served or to a minimum period to be served. In *DPP (Cth) v Haynes* [2017] VSCA 79, [26], referring to the principles applicable to fixing a recognizance release order, the Court said, “*The rationale applicable to the determination of a non-parole period is substantially applicable to the ascertainment of the proportion of the sentence, if any, which should be suspended*”; see also at [65]. Cf. *R v Ruha; ex parte DPP (Cth)* [2011] 2 Qd R 456, [46]; *R v Host* [2015] WASCA 23, [177].

⁷⁸⁷ *Kumova v R* (2012) 37 VR 538, [27], referring to the principles established by *Power*, *Deakin* and *Bugmy*. The fixing of a period or minimum period of imprisonment to be served which is not proportionate to the seriousness of the offending, or which fails to give adequate weight to general deterrence, may constitute an appellable error: e.g. *DPP (Cth) v Page* [2006] VSCA 224, [53]–[54]; *DPP (Cth) v Coory* [2011] VSCA 316.

⁷⁸⁸ *Bugmy v R* (1990) 169 CLR 525, 531; *Lodhi v R* [2007] NSWCCA 360, [255]–[262].

⁷⁸⁹ *Hili v R* (2010) 242 CLR 520, [48].

⁷⁹⁰ *Hili v R* (2010) 242 CLR 520, [49].

⁷⁹¹ *Hili v R* (2010) 242 CLR 520, [53].

⁷⁹² *Hili v R* (2010) 242 CLR 520, [54].

⁷⁹³ *Hili v R* (2010) 242 CLR 520, [54]. See further “3.4 Reasonable consistency in sentencing”.

⁷⁹⁴ See *R v Robertson* [2008] QCA 164, [17]–[18], [37]–[42]; *R v Ruha; ex parte DPP (Cth)* [2011] 2 Qd R 456, [26]–[30], [64]–[66], [69].

⁷⁹⁵ E.g. *Lam v R* [2014] WASCA 114, in which a NPP equivalent to 85.7% of the head sentence was held not to be manifestly excessive in the circumstances.

account all of the circumstances of the offence, rather than by applying or making adjustments to any rule of thumb.⁷⁹⁶

628. The tendency of courts to impose higher ratios in relation to very serious offending has been attributed to the need to avoid inordinately long parole periods and to ensure that the period to be served properly reflects the gravity of the offending and gives sufficient weight to the need for relevant purposes of sentencing, such as general deterrence and protection of the community.⁷⁹⁷ In such cases, just as the needs of denunciation, deterrence, condign punishment and community protection demand a head sentence of a higher order, so too are they likely to dictate that the non-parole period be a higher percentage of the head sentence.⁷⁹⁸

629. On the other hand, a minimum term of imprisonment cannot be fixed so close to the head sentence that it may fail to give effect to the prisoner's prospects for rehabilitation and so mitigate punishment. The prospect of early release also serves as an incentive to the prisoner to behave within the prison setting and to pursue rehabilitative programmes.⁷⁹⁹

5.10.2 Credit for pre-sentence detention in relation to period to be served

630. In fixing the period, or minimum period, of a sentence of imprisonment which must be served (and/or the head sentence), credit may be given for pre-sentence detention for the instant offence. The way in which, and the extent to which, such credit may be given is governed by State or Territory law, which is applied by s 16E of the *Crimes Act 1914* (Cth). See "5.8.9 Credit for pre-sentence custody for the offence".

631. In some circumstances credit may also be given (in relation to either the head sentence or period to be served or both) for other periods in custody. See "5.8.10 Taking into account other pre-sentence custody".

5.10.3 The mechanisms for setting the period of imprisonment to be served for a federal offence

632. Commonwealth law provides for a self-contained regime relating to the fixing of periods of imprisonment, or minimum periods of imprisonment, to be served for federal offences. State law governing the setting of minimum periods of imprisonment (whether by non-parole period or otherwise) has no application.⁸⁰⁰ It is an error for a sentencing judge to apply State law rather than federal law to the fixing of a period or minimum period of incarceration for a federal offender.⁸⁰¹

⁷⁹⁶ *R v Ruha; ex parte DPP (Cth)* [2011] 2 Qd R 456, [57].

⁷⁹⁷ *Romero v R* (2011) 32 VR 486, [25]; *Kumova v R* (2012) 37 VR 538, [14], [19], [28].

⁷⁹⁸ *Kumova v R* (2012) 37 VR 538, [19].

⁷⁹⁹ *Kumova v R* (2012) 37 VR 538, [28]. The same incentive does not apply if the period of imprisonment is fixed, for example, under a recognizance release order.

⁸⁰⁰ *Hili v R* (2010) 242 CLR 520; *Atanackovic v R* (2015) 45 VR 179.

⁸⁰¹ E.g. *Elshani v R* [2015] NSWCCA 254, [1], [17]–[22], [39]; *Voronov v R* [2017] NSWCCA 241.

633. The regime for federal offenders is complex, and is different from that in any State or Territory. The complexity and uniqueness of the regime are, unfortunately, often productive of error; very careful attention must be paid to the legislative requirements.
634. There are three mechanisms by which a court sentencing a federal offender to a term of imprisonment may determine the period, or the minimum period, of imprisonment which must be served by the offender.
635. The first mechanism is a **recognizance release order (RRO)**, that is, an order for the conditional release of the offender under s 20(1)(b) of the *Crimes Act 1914* (Cth).⁸⁰² That provision empowers a court which sentences an offender to imprisonment for one or more federal offences to direct, by order, that the person be released, upon giving security by recognizance or otherwise, either *forthwith* or *after he or she has served a specified period of imprisonment for the offence(s)*. The required security is in practice invariably provided by recognizance. The recognizance is subject to a standard condition that the offender will, upon release, be of good behaviour for such period (up to 5 years) as the court specifies. Other conditions (such as the payment of reparation or compensation, or participation in a treatment or rehabilitation program) may also be fixed. Unless required to be held in custody on some other basis, the offender must be released on the appointed day,⁸⁰³ provided the security required by the court has been given.⁸⁰⁴ *Generally speaking,*⁸⁰⁵ *a RRO is only available if the federal sentence of imprisonment imposed (or if more than one, the total effective sentence for the federal offences, or if there are other federal sentences, the total unserved period) is 3 years or less.*⁸⁰⁶
636. The second mechanism is a **non-parole period (NPP)**. A NPP fixes the minimum period of imprisonment which the offender must serve before being eligible for parole. Whether the offender is released on parole after that period is determined at the discretion of the Commonwealth Attorney-General.⁸⁰⁷ Parole entails a greater degree of supervision than a RRO. Parole may be revoked by the Attorney-General if the offender has breached a condition of the parole order, or if there are reasonable grounds for suspecting that the offender has done so (*Crimes Act 1914* (Cth), s 19AU). Parole is also automatically revoked if the parolee commits an offence on parole and is sentenced to more than 3 months' imprisonment for that offence (*Crimes Act 1914* (Cth), s 19AQ). *Generally speaking, a NPP is only available if the federal sentence of imprisonment imposed (or if more than one, the total effective*

⁸⁰² "Recognizance release order" is defined in s 16(1) of the Act as an order under s 20(1)(b) of the Act.

⁸⁰³ *Selimoski v Picknoll* (WA SC (Full Court), 9 October 1992, unreported).

⁸⁰⁴ Although similar in effect to a suspended sentence of imprisonment, a RRO is materially different in a number of ways: see *Frost v R* (2003) 11 Tas R 460; *DPP (Cth) v Cole* (2005) 91 SASR 480.

⁸⁰⁵ An exception may arise by virtue of s 19AE: see Table 3 at [648] below.

⁸⁰⁶ Until 2015, a RRO was also available as an option in relation to longer sentences. This option was removed by amendments to the *Crimes Act 1914* (Cth) made by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015*. The relevant amendments came into effect on 27 November 2015 and apply in relation to a federal sentence imposed on or after that date: see the amending Act, Schedule 7, Part 4, clause 16.

⁸⁰⁷ *Crimes Act 1914* (Cth), s 19AL. Prior to amendments which came into effect on 4 October 2012, s 19AL required the Attorney-General to make a parole order if the head sentence was 10 years or less and a NPP had been fixed, unless the offender was or would be serving a State or Territory sentence. For a summary of the law governing federal parole see "5.11 Imprisonment: federal parole, leave and licence".

sentence for the federal offences, or if there are other federal sentences, the total unserved period) is greater than 3 years.

637. The circumstances in which a RRO is available and those in which a NPP is available are almost entirely mutually exclusive: in only one (uncommon) factual circumstance can a sentencing court choose between them.⁸⁰⁸
638. In certain circumstances, Part IB of the *Crimes Act 1914* (Cth) also provides for what is commonly known as a **straight sentence** to be imposed: that is, a sentence of imprisonment with no provision for release during the period of imprisonment.
639. The relevant provisions of the *Crimes Act 1914* (Cth) are prescriptive about when a RRO or NPP may or must be imposed, and about the exercise of the discretion to impose a straight sentence instead of making a RRO or fixing a NPP. The requirements are summarised in the following sections of this chapter.

5.10.4 Non-parole period (NPP) or recognizance release order (RRO)?

640. The options available for fixing the period, or the minimum period, of imprisonment to be served by a federal offender who is sentenced to imprisonment are determined by a matrix of legislative provisions. The following is a brief overview of those requirements; they are described in more detail later.
641. Specific provisions apply if the offender is to be sentenced for:
- a minimum non-parole period offence (that is, any of the national security-related offences listed in s 19AG(1)), or
 - a people-smuggling offence to which s 236B of the *Migration Act 1958* (Cth) applies.
- In these circumstances prescriptive requirements apply, and options which would otherwise be available are excluded. For details of the prescriptive requirements see “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences” and “8.1.2 Mandatory imprisonment for certain people-smuggling offences” (respectively).
642. The following summary describes the law which is applicable generally (that is, when the offender is not sentenced for one of these offences).
643. The general provisions governing the fixing of periods or minimum periods of imprisonment to be served by a federal offender distinguish between *sentencing a federal offender not presently undergoing a federal sentence* and *sentencing a federal offender who is presently undergoing a federal sentence of imprisonment*. Specific provision is also made for sentencing an offender for *an offence committed while the offender was on parole or was released on licence* for a federal offence.
644. In sentencing a **federal offender who is not presently serving or subject to a federal sentence** (even if the offender is undergoing a State/Territory sentence of imprisonment), a NPP will be required, or a RRO will be permitted or required, depending on the length of the sentence to be imposed, although a

⁸⁰⁸ The exception is a case to which s 19AE of the *Crimes Act 1914* (Cth) applies: see [669] below.

straight sentence may instead be imposed in specified circumstances.⁸⁰⁹ Table 1 summarises the requirements:

Table 1: Fixing period to be served by federal offender who is not presently serving or subject to a federal sentence of imprisonment

<i>Sentence/aggregate sentences</i>	<i>Required option</i>	<i>Crimes Act 1914 (Cth) section</i>
Not exceeding 6 mths	Single RRO is optional. NPP not available. Discretion to order immediate release. Discretion to decline to make RRO (ie to impose straight sentence).	19AC(3) 20(1)(b) 19AC(4)
Greater than 6 mths but not greater than 3 yrs	Single RRO required. NPP not available. Discretion to order immediate release. Discretion to decline to make RRO (ie to impose straight sentence).	19AC(1) 20(1)(b) 19AC(4)
Greater than 3 yrs	Single NPP required. RRO not available. Discretion to decline to fix NPP (ie to impose straight sentence).	19AB(1) 19AB(3)

645. For more detail on these requirements, see “5.10.5 Where federal offender is not undergoing a federal term of imprisonment: NPP, RRO or straight sentence”.

646. In sentencing a federal offender who is presently serving or subject to a federal sentence (whether or not the offender is also serving a State/Territory sentence of imprisonment), the applicable requirements depend on whether or not the offender is subject to an existing RRO or (federal) NPP.

647. If the offender is presently serving or subject to a federal sentence but is not subject to an existing RRO or federal NPP, a RRO or NPP (or neither in certain circumstances) will be imposed, according to the aggregate length of the sentences which will remain to be served (including the unserved portion of the existing sentence and the new head sentence(s)). Table 2 summarises the applicable requirements:

Table 2: Fixing period to be served by federal offender who is presently serving or subject to a federal sentence of imprisonment, but who is not subject to an existing RRO or federal NPP

<i>Aggregate period to serve (including new sentence(s))</i>	<i>Required option</i>	<i>Crimes Act 1914 (Cth) section</i>
Not exceeding 6 mths	Single RRO is optional. NPP not available. Discretion to order immediate release. Discretion to decline to make RRO (ie to impose straight sentence).	19AC(3) 20(1)(b) 19AC(4)
Greater than 6 mths but not greater than 3 yrs	Single RRO required. NPP not available. Discretion to order immediate release. Discretion to decline to make RRO (ie to impose straight sentence).	19AC(2) 20(1)(b) 19AC(4)

⁸⁰⁹ Crimes Act 1914 (Cth), ss 19AB and 19AC.

<i>Aggregate period to serve (including new sentence(s))</i>	<i>Required option</i>	<i>Crimes Act 1914 (Cth) section</i>
Greater than 3 yrs	Single NPP required. RRO not available. Discretion to decline to make RRO (ie to impose straight sentence).	19AB(2) 19AB(3)

648. If the offender is subject to an existing RRO or (federal) NPP, the court is required to make orders to deal with the existing order as well as the new sentence(s). The orders will involve either confirming the existing NPP or RRO or replacing it with a single NPP or RRO applicable to all the federal sentences or with a straight sentence (*Crimes Act 1914*, ss 19AD and 19AE). Table 3 summarises the applicable requirements:

Table 3: Fixing period to be served by federal offender who is presently serving or subject to a federal sentence of imprisonment and is subject to an existing RRO or federal NPP

<i>Circumstance</i>	<i>Options</i>	<i>Crimes Act 1914 (Cth) section</i>
Existing RRO – where aggregate of unserved portion of existing RRO and further sentence(s) is 3 years or less	<ul style="list-style-type: none"> • Make order confirming existing RRO • Make a new RRO in respect of all federal sentences the offender is to serve or complete • Cancel existing RRO and decline to make new RRO 	19AE
Existing RRO – where aggregate of unserved portion of existing RRO and further sentence(s) is greater than 3 years	<ul style="list-style-type: none"> • Make order confirming existing RRO • Make a new RRO in respect of all federal sentences the offender is to serve or complete • Fix a single NPP in respect of in respect of all federal sentences the offender is to serve or complete • Cancel existing RRO and decline to make new RRO 	19AE
Existing NPP	<ul style="list-style-type: none"> • Make order confirming existing NPP • Fix a single NPP in respect of all federal sentences the offender is to serve or complete • Cancel existing NPP and decline to make new NPP 	19AD

649. For more detail on these requirements, see “5.10.6 Where the offender is already undergoing a federal term of imprisonment”.

650. Specific provision is also made in s 19AR of the *Crimes Act 1914* (Cth) for the fixing of periods, or minimum periods, to be served by **an offender who commits an offence (including a State or Territory offence) while on federal parole or while released on licence** in relation to a sentence for a federal offence. (The former will be referred to as “the breaching offence” and the latter “the outstanding sentence”.) The provisions are intended to ensure that orders are made in relation to the outstanding sentence, if the breaching offence has the effect of requiring the unserved portion of the outstanding sentence to be served. That will arise whenever the offender is sentenced to imprisonment, or a total period of imprisonment, for more than 3 months for the breaching offence(s) (*Crimes Act 1914*, s 19AQ),

even if the sentence is imposed after the completion of the sentence for the original federal offence(s). The requirements are summarised in Table 4:

Table 4: Sentences or orders to be made when sentencing an offender for federal, State or Territory offence committed while the offender was on federal parole or while released on federal licence

Breaching offence	Requirements	Crimes Act 1914 (Cth) section
Federal offence(s) – sentence of life imprisonment, or sentence or total sentence of more than 3 years	<ul style="list-style-type: none"> Fix a single NPP in respect of the sentence for the breaching offence(s) and the outstanding sentence(s) 	19AR(1)
	<ul style="list-style-type: none"> May decline to fix a NPP 	19AR(4)
Federal offence(s) – sentence or total sentence of 3 years or less	<ul style="list-style-type: none"> If one of the outstanding sentences is life imprisonment - fix a single NPP in respect of the sentence for the breaching offence(s) and the outstanding sentence(s) If the aggregate of the unserved portion of the outstanding sentences and the sentence(s) for the breaching offence(s) is more than 3 years - fix a single NPP in respect of the sentence for the breaching offence(s) and the outstanding sentences If the aggregate of the unserved portion of the outstanding sentence(s) and the sentence(s) for the breaching offence(s) is 3 years or less – may make a RRO (and must not fix a NPP) in respect of the sentence(s) for the breaching offence(s) and the outstanding sentence(s) 	19AR(2)
	<ul style="list-style-type: none"> May decline to fix a NPP 	19AR(4)
State or Territory offence(s)	<ul style="list-style-type: none"> If one of the outstanding sentences is life imprisonment - fix a single NPP in respect of the outstanding sentence(s) If the aggregate of the unserved portion of the outstanding sentence(s) is more than 3 years - fix a single NPP in respect of the outstanding sentence(s) If the aggregate of the unserved portion of the outstanding sentence(s) is 3 years or less – may make a RRO (and must not fix a NPP) in respect of the outstanding sentence(s) 	19AR(3)
	<ul style="list-style-type: none"> May decline to fix a NPP 	19AR(4)

651. See further “5.11 Imprisonment: federal parole, leave and licence”.

652. Other key aspects of the legislative regime governing fixing of periods, or minimum periods, to be served include the following:

- The requirements relating to the period of a federal sentence of imprisonment which must be served **apply regardless of whether or not the offender is or will be serving a State/Territory**

sentence. (Service of a State/Territory sentence may, however, be a reason for declining to fix a NPP or RRO.)

- If the offender is sentenced for more than one federal offence at the same sitting, **a single NPP must be fixed or a single RRO ordered in respect of all federal sentences** then imposed (except to the extent that the court imposes straight sentences).
- **A NPP can never be imposed in conjunction with a RRO** for any combination of federal sentences (including a NPP or RRO imposed on a previous occasion).
- **It is not possible to impose a single NPP in respect of both federal and State/Territory sentences.**
- **It is not possible to combine a RRO with an order in relation to a State/Territory sentence.**
- Subject to mandatory minimum requirements for certain national security offences and people smuggling offences, **there is no fixed (or “normal”) ratio between the head sentence and the period to be served.** The minimum period to be served must be determined according to general sentencing principles.
- Whenever a RRO is open, **it can provide that the offender be released (on that sentence) “forthwith”** upon entering into a recognizance. That is, a RRO can operate in a similar way to a wholly suspended sentence.
- A court may only **decline to fix a NPP or to make a RRO (that is, impose a straight sentence) when it would otherwise be required to do so if it is satisfied of particular statutory criteria.**
- **Whenever the court declines to fix a NPP or to make a RRO, it must state its reasons** for doing so and cause them to be entered in the records of the court.

653. The succeeding parts of this chapter describe these requirements in more detail.

5.10.5 Where federal offender is not undergoing a federal term of imprisonment: NPP, RRO or straight sentence

654. If the offender is to be sentenced for one of the people-smuggling offences to which s 236B of the *Migration Act 1958* (Cth) applies, mandatory requirements apply to the fixing of both the head sentence and NPP. See “8.1.2 Mandatory imprisonment for certain people-smuggling offences”.

655. If the offender is to be sentenced for one of the national security related offences which is a “minimum non-parole period offence”, sentencing is governed by s 19AG of the *Crimes Act 1914* (Cth), which overrides other provisions relating to the fixing of periods, or minimum periods of imprisonment. See “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”.

656. In any other case, the fixing of a period, or minimum period, to be served for one or more federal offences by an offender who is not already serving or subject to a federal sentence (that is, a sentence

of imprisonment for a federal offence: see the definitions of “*federal sentence*” and “*sentence*” in s 16(1) of the *Crimes Act 1914*) is governed by ss 19AB(1) or 19AC(1) of the Act (whichever is applicable), subject to the exceptions provided in those sections.

657. These provisions apply even if the offender is undergoing a State or Territory sentence of imprisonment. (The only significance of whether the offender is serving a State or Territory sentence is that it may affect the order to be made for the federal offence(s).⁸¹⁰)

658. When an offender is to be sentenced to a term of imprisonment for one or more federal offences, the applicable requirements under the *Crimes Act 1914* (Cth) relating to NPPs or RRO periods turn on the length of the head sentence for those federal offences. If there is more than one federal offence, the requirements depend on the aggregate of those sentences. “*Aggregate*” is defined in s 16(1) of the *Crimes Act 1914* (Cth) to mean, in relation to two or more sentences of imprisonment, the total effective sentence, having regard to whether the sentences are to be served cumulatively, partly cumulatively, or concurrently.

659. The requirements in relation to an offender who is not serving or subject to a federal sentence, by reference to the head sentence or total effective sentence imposed for the federal offences, are as follows:

- **6 months or less:** If the federal sentence is, or sentences are in the aggregate, for a period of imprisonment of 6 months or less, there is no power to fix a NPP⁸¹¹ (except if one of the offences is a “minimum non-parole period offence” in which case a NPP is mandatory⁸¹²). *The court may, but is not required to, make a RRO (Crimes Act 1914, ss 19AC(3), 20(1)(b)).* That is, the court may either make a RRO or impose a straight sentence.
- **More than 6 months up to 3 years:** If the federal sentence imposed is, or sentences are in the aggregate, for a period of imprisonment of more than 6 months but not more than 3 years, there is no power to fix a NPP (except if one of the offences is a “minimum non-parole period offence” in which case a NPP is mandatory⁸¹³). *The court is required to make a RRO (ss 19AC(1), 20(1)(b)), unless it exercises the discretion to decline to fix a RRO (that is, to impose a straight sentence) in the circumstances set out in s 19AC(4).*
- **More than 3 years (including a life sentence):** If the federal sentence imposed is for imprisonment for life or (alone or in the aggregate) for a period of imprisonment in excess of 3 years, *the court must fix a single NPP (Crimes Act 1914, s 19AB(1)), subject to the discretion to decline to do so (that is, to impose a straight sentence) in the circumstances set out in s 19AB(3).*

⁸¹⁰ *Hancock v R* [2012] NSWCCA 200, [45].

⁸¹¹ *R v Fulop* [2009] VSCA 296; *Hunt v DPP* [2009] SASC 116, [10]. This is subject to the exception referred to above, if one or more of the offences is a “minimum non-parole period offence” (that is, one of a number of national security offences specified in s 19AG(1)). In such a case, a RRO is not available (s 20(6)), and a NPP of at least three-quarters of the length of the regardless of the length of the head sentence (or aggregate sentence) for the minimum non-parole period offence(s): s 19AG(2).

⁸¹² See “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”.

⁸¹³ See “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”.

660. As to the criteria for, and the exercise of, the discretion to decline to make a RRO or to decline to fix a NPP (that is, to impose a straight sentence), see “5.10.8 Discretion to decline to fix a NPP or RRO (straight sentence)”.

661. Where a court imposes a NPP/RRO it must explain or cause to be explained the purpose and consequence of fixing, and non-compliance with, a non-parole order/RRO.⁸¹⁴

5.10.6 Where the offender is already undergoing a federal term of imprisonment: NPP, RRO or straight sentence

662. If the offender is to be sentenced for one of the people-smuggling offences to which s 236B of the *Migration Act 1958* (Cth) applies, mandatory requirements apply to the fixing of both the head sentence and NPP. See “8.1.2 Mandatory imprisonment for certain people-smuggling offences”.

663. If the offender is to be sentenced for one of the national security related offences which is a “minimum non-parole period offence”, sentencing is governed by s 19AG of the *Crimes Act 1914* (Cth), which overrides other provisions relating to the fixing of periods, or minimum periods of imprisonment. See “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”.

664. In any other case, the fixing of a period, or minimum period, to be served for one or more federal offences by an offender who is already serving or subject to a sentence of imprisonment for a federal offence is governed by s 19AB(2), 19AC(2), 19AD or 19AE of the Act (whichever is applicable).

665. **Offender in prison and serving or subject to a federal sentence of imprisonment but not subject to an existing RRO or NPP:** Sections 19AB(2) and 19AC(2) govern a case in which an offender who is in prison and serving or subject to a federal sentence of imprisonment but is not subject to an existing RRO or NPP is to be sentenced for one or more further federal offences. In such a case, the applicable requirements relating to NPPs or RRO periods depend upon the aggregate length of the *unserved portions of federal sentences* which will result from the imposition of the further sentence(s).

666. The unserved portions of the existing sentence must be calculated at the time of sentencing for the further federal offence(s). For example, suppose the offender to be sentenced for federal offences is already serving a federal sentence of 3 years for previous offences, but is not subject to a NPP or RRO.⁸¹⁵ At the time of sentencing for further federal offences, the offender has served 2 years’ imprisonment. The unserved portion of the existing sentence is one year. The applicable requirement in relation to fixing a NPP or RRO (or imposing a straight sentence) for the further offences will depend on the aggregate of the unserved portion of the existing sentence (1 year in this instance) and the total effective sentence (head sentence) for the further offences.

⁸¹⁴ *Crimes Act 1914* (Cth), s 16F. Failure to comply with the requirements of this section does not invalidate a sentence: *R v Hutton* [2004] NSWCCA 60, [17]-[28].

⁸¹⁵ This might come about in various ways. A common example would be where the existing federal sentence was a straight sentence to be served concurrently with or partly cumulatively upon a sentence for a State or Territory offence. Another is where the offender has served a NPP for the existing federal offence but has not been released on parole.

667. In summary, the respective requirements relating to the unserved portions of federal sentences in such a case are as follows:

- **6 months or less:** If the unserved portions of the federal sentences (including the additional sentences to be imposed) will, in the aggregate, not exceed 6 months, there is no power to fix a NPP⁸¹⁶ (except if one of the offences is a “minimum non-parole period offence” in which case a NPP is mandatory⁸¹⁷). *The court may, but is not required to, make a RRO (Crimes Act 1914, ss 19AC(3), 20(1)(b)).* That is, the court may either make a RRO or impose a straight sentence.
- **More than 6 months up to 3 years:** If the unserved portions of the federal sentences (including the additional sentences to be imposed) will, in the aggregate, be more than 6 months but not more than 3 years, there is no power to fix a NPP (except if one of the offences is a “minimum non-parole period offence” in which case a NPP is mandatory⁸¹⁸). *The court is required to make a RRO (ss 19AC(2), 20(1)(b)), unless it exercises the discretion to decline to fix a RRO (that is, to impose a straight sentence) in the circumstances set out in s 19AC(4).*
- **More than 3 years (including a life sentence):** If the offender is or will be subject to a federal life sentence, or if the unserved portions of the federal sentences (including the further sentences to be imposed) will, in the aggregate, be in excess of 3 years, *the court must fix a single NPP (Crimes Act 1914s 19AB(2)), subject to the discretion to decline to do so (that is, to impose a straight sentence) in the circumstances set out in s 19AB(3).*

668. **Offender in prison and serving or subject to a federal sentence of imprisonment and subject to an existing NPP:** If an offender who is serving an existing NPP for one or more federal sentences is to be sentenced for one or more federal offences, the court must take one of the steps required by s 19AD(2). The court’s options (under s 19AD(2)), after considering the relevant circumstances, including the existing NPP, the nature and circumstances of the offence(s) concerned and the antecedents of the person, are:⁸¹⁹

- make an order confirming the existing NPP;
- fix a new single NPP in respect of all federal sentences the person is to serve or complete; or
- where the court decides that, in the circumstances, a NPP is not appropriate, cancel the existing NPP and decline to fix a new NPP (that is, in effect, impose a straight sentence).

669. **Offender in prison and serving or subject to a federal sentence of imprisonment and subject to an existing RRO:** If an offender who is subject to an existing RRO and has not been released under that RRO is to be sentenced for one or more further federal offences, the court must take one of the steps required by s 19AE(2). The court’s options (under s 19AE(2)), after considering the relevant

⁸¹⁶ *R v Fulop* [2009] VSCA 296; *Hunt v DPP* [2009] SASC 116, [10]. This is subject to the exception referred to above, if one or more of the offences is a “minimum non-parole period offence” (that is, one of a number of national security offences specified in s 19AG(1)). In such a case, a RRO is not available (s 20(6)), and a NPP of at least three-quarters of the length of the regardless of the length of the head sentence (or aggregate sentence) for the minimum non-parole period offence(s): s 19AG(2).

⁸¹⁷ See “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”.

⁸¹⁸ See “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”.

⁸¹⁹ Subject to the prescriptive requirements in relation to certain people-smuggling or national security offences referred to above.

circumstances, including the existing RRO, the nature and circumstances of the offence(s) concerned and the antecedents of the person, are:⁸²⁰

- make an order confirming the existing RRO;
- fix a new single RRO in respect of all federal sentences the person is to serve or complete;
- fix a single NPP in respect of all federal sentences that the person is to serve or complete, if, as a result of the further federal sentences, the person is to serve or complete either a federal life sentence, or the aggregate of the unserved portions of federal sentences that the person is to serve or complete exceeds 3 years, and the court decides that it is appropriate to fix a NPP; or
- where the court decides that, in the circumstances, a RRO is not appropriate, cancel the existing RRO and decline to make a new RRO (that is, in effect, impose a straight sentence).

670. If the court fixes a new single NPP under either s 19AD(2)(e) or s 19AE(2)(f), or makes a new RRO under s 19AE(2)(e), *it must not be such as to allow the person to be released earlier than would have been the case if the further sentence had not been imposed* (s 19AD(3)(b), s 19AE(3)(b) and s 19AE(4)(b)). The new NPP or RRO is to be treated as having superseded the existing order (s 19AD(3)(a), s 19AE(3)(a) and s 19AE(4)(a)).

671. As to the criteria for, and the exercise of, the discretion to decline to make a RRO or to decline to fix a NPP (that is, to impose a straight sentence) in any of these circumstances, see “5.10.8 Discretion to decline to fix a NPP or RRO (straight sentence)”.

672. Where a court imposes a NPP/RRO it must explain or cause to be explained the purpose and consequence of fixing, and non-compliance with, a non-parole order/RRO.⁸²¹

5.10.7 Correction of error in fixing NPP/RRO

673. Section 19AH of the *Crimes Act 1914* (Cth) provides that where a court fails to fix, or properly to fix, a NPP, or to make, or properly to make, a RRO, under the Act, “*that failure does not affect the validity of any sentence*”. The section also empowers the court to correct the error upon application to it. See “7.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH”.

674. Section 19AHA confers an additional power for a sentencing court to rectify an error of a technical nature made by the court or a defect of form or an ambiguity in an order imposing a sentence of imprisonment, an order fixing a NPP or a RRO. The section also preserves the validity of the order despite the error, defect or ambiguity. See “7.12.2 Power to correct error in sentence of imprisonment: Crimes Act 1914, s 19AHA”.

⁸²⁰ Subject to the prescriptive requirements in relation to certain people-smuggling or national security offences referred to above.

⁸²¹ *Crimes Act 1914* (Cth), s 16F. Failure to comply with the requirements of this section does not invalidate a sentence: *R v Hutton* [2004] NSWCCA 60, [17]-[28].

5.10.8 Discretion to decline to fix a NPP or RRO (straight sentence)

675. A discretion to decline to make a RRO (that is, in effect, to impose a straight sentence) is conferred by s 19AC(4) of the *Crimes Act 1914*. A similar discretion to decline to make a NPP is conferred by s 19AB(3). The criteria in each provision are the same. In either case, the court may decline to make the order (RRO or NPP) if either:

- the court is satisfied that it is not appropriate having regard to the nature and circumstances of the offence or offences concerned and to the antecedents of the person, or
- the person is expected to be serving a State/Territory sentence on the day after the end of the federal sentence.

676. Corresponding discretions apply under s 19AE(2)(g) to decline to make a RRO in relation to an offender who is already subject to an existing RRO when sentenced for a further Commonwealth offence, under s 19AD(2)(f) to decline to make a NPP in relation to an offender who is already subject to an existing federal NPP, and under s 19AR(4) in relation to an offender who is sentenced for an offence committed while on federal parole or while released on federal licence. Under each of those provisions, the court must consider the relevant circumstances, including the existing RRO/NPP, the nature and circumstances of the offence or offences concerned and the antecedents of the person, and may decline to make a RRO or fix a NPP (as the case may be) if the court decides that, in the circumstances, a RRO/NPP is not appropriate.

677. If a court declines to make a RRO or a NPP under any of these provisions it must state its reasons for so deciding and cause the reasons to be entered into the records of the court.⁸²² The reasons must reveal the process of reasoning, by reference to the statutory criteria and any other applicable principles and the facts of the case, which led the court to conclude that a RRO or NPP (as the case may be) was inappropriate.⁸²³ The absence of such reasons may demonstrate a miscarriage of the sentencing discretion.⁸²⁴

678. The statutory discretion to decline to fix a NPP or to decline to make a RRO was introduced in 1990. The Explanatory Memorandum for the relevant bill said that the provision was “*intended for those cases where the crime is so serious or where there is a history of repeated offences which would require the offender to serve the full sentence*”.⁸²⁵

679. The discretion has been exercised where the federal offender would be required to serve a significant State sentence cumulatively on the federal sentence⁸²⁶ or where the federal sentence is to be served

⁸²² *Crimes Act 1914* (Cth), ss 19AB(4), 19AC(5), 19AD(5), 19AE(5), 19AR(5).

⁸²³ *Spreitzer v R* (1991) 58 A Crim R 114, 120.

⁸²⁴ *Spreitzer v R* (1991) 58 A Crim R 114, 120.

⁸²⁵ *Crimes Legislation Amendment Bill (No 2) 1989* (Cth), Explanatory Memorandum (House of Representatives), 17 (regarding proposed new section 19AE).

⁸²⁶ *Carroll v R* [2011] VSCA 150, [54]-[56].

concurrently with a long State sentence imposed at the same time.⁸²⁷ In such circumstances a RRO or NPP would be inappropriate because it would be futile.⁸²⁸

680. Circumstances relevant to the exercise of the discretion may include other offences committed by the offender contemporaneously with the federal offences.⁸²⁹ However the absence of acceptable evidence as to antecedents cannot properly warrant a conclusion that a NPP should not be fixed. The nature and circumstances of the offence should not dominate the consideration of the question of whether or not to fix a NPP.⁸³⁰

681. The possibility of deportation does not preclude the fixing of a NPP⁸³¹ or a RRO⁸³² (that is, it does not require that a court impose a straight sentence).

682. In *Spreitzer*,⁸³³ the Western Australian Court of Appeal observed that (despite the contrary indication in the passage from the Explanatory Memorandum quoted above) the discretion could also be exercised to effect rehabilitation of the offender. In that case it was held that the rehabilitation of an offender who was a foreign national who spoke little English and had no ties with, or future prospects in, Australia warranted a short straight sentence rather than a sentence with a RRO, so as to permit the offender to return to his home country.

683. *Spreitzer* was an unusual case and should be applied with care. It is implicit in the scheme of Part IB of the *Crimes Act 1914* that the determination of the appropriate length of the head sentence should be made independently of the determination of the period of imprisonment (if any), or the minimum period of imprisonment, to be served. It would seem wrong in principle to reduce a head sentence merely because all of it would be required to be served, just as it would be wrong in principle to increase a head sentence merely because none of it would be required to be served.⁸³⁴

684. As noted above, if the sentence for a federal offence, or the aggregate sentence for federal offences, is 6 months or less, the court may, but is not required to, impose a RRO;⁸³⁵ that is, the court may impose a straight sentence. A similar discretion applies:

⁸²⁷ *Hancock v R* [2012] NSWCCA 200, [45]-[51].

⁸²⁸ *Hancock v R* [2012] NSWCCA 200, [50].

⁸²⁹ *Hancock v R* [2012] NSWCCA 200, [47].

⁸³⁰ *Wangsaimas v R* (1996) 6 NTLR 14.

⁸³¹ *Crimes Act 1914* (Cth), s 19AK. See also *R v Shrestha* (1991) 173 CLR 48 (although decided before s 19AK was enacted, the decision is still relevant to the principles applicable). As to the relevance of the prospect of deportation as a factor in sentencing generally, see “4.5.7 Prospect of visa cancellation and deportation”.

⁸³² *Spreitzer v R* (1991) 58 A Crim R 114.

⁸³³ *Spreitzer v R* (1991) 58 A Crim R 114.

⁸³⁴ *Cf R v Currey* [1975] VR 647, 651, 655; *R v Zamagias* [2002] NSWCCA 17, [26]-[29]; *De Hollander v R* [2012] WASCA 127, [86].

⁸³⁵ See “5.10.5 Where federal offender is not undergoing a federal term of imprisonment: NPP, RRO or straight sentence”.

- when the offender is serving a federal sentence but is not subject to a RRO or NPP and the unserved portion of that sentence, together with the further sentence(s), total 6 months or less;⁸³⁶ or
- in certain circumstances when a court is sentencing an offender for an offence committed while on parole or released on licence for a federal offence.⁸³⁷

In any of these circumstances, the discretion whether or not to impose a RRO is not fettered by statutory criteria. A straight sentence, rather than a RRO, may be appropriate in such a case because (bearing in mind that the duration of the recognizance period is limited to the period of sentence), the period of any RRO would be so short as to serve no useful purpose.⁸³⁸

5.10.9 The three-quarters rule in fixing a NPP for certain national security offences

685. Section 19AG of the *Crimes Act 1914* (Cth) (introduced in 2004) creates what has become known as “the three-quarters rule”. It applies if a person is convicted and sentenced (that is, to a term of imprisonment⁸³⁹) for a “*minimum non-parole offence*”, which is defined in s 19AG(1) to mean:⁸⁴⁰

- a terrorism offence (as defined in s 3(1) of the Act);
- an offence against Division 80 of the *Criminal Code* (Cth) (treason, urging violence, advocating terrorism, etc); or
- an offence against s 91.1(1) or 91.2(1) of the *Criminal Code* (Cth) (intentional espionage offences).

686. In sentencing such a person, the court must fix a single NPP of at least three-quarters of the sentence for the minimum non-parole offence. (For this purpose, a sentence of life imprisonment is taken to be a sentence of 30 years’ imprisonment.) For example, if the offender is sentenced to 10 years’ imprisonment for the offence, the court must fix a NPP of at least 7 years and 6 months.

687. If two or more sentences have been imposed on the person for minimum non-parole offences (whether or not at the same sitting), the court must fix a single NPP of at least three-quarters of the aggregate of those sentences. For example, if the offender is sentenced to 8 years’ imprisonment on each of two minimum non-parole period offences, and 2 years of the second sentence is effectively cumulative on the first sentence, the aggregate (total effective sentence) will be taken as 10 years’ imprisonment, and the court must fix a NPP of at least 7 years and 6 months.

688. If the offender has been sentenced for a federal offence which is not a minimum non-parole period offence as well as one or more minimum non-parole period offences, the minimum non-parole period

⁸³⁶ See “5.10.6 Where the offender is already undergoing a federal term of imprisonment: NPP, RRO or straight sentence”.

⁸³⁷ *Crimes Act 1914* (Cth), s 19AR(2)(e) and s 19AR(3)(e).

⁸³⁸ E.g. *R v Hogan* [2015] SASFC 102, [76]–[78].

⁸³⁹ See the applicable definition of “sentence” in s 16(1) of the *Crimes Act 1914* (Cth).

⁸⁴⁰ The definition was amended by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth), with effect from 30 June 2018. Prior to the amendments, “minimum non-parole period offence” also included other offences against Division 91 of the *Criminal Code* (espionage, etc) and an offence against s 24AA of the *Crimes Act 1914* (treachery).

applies to that offence also (s 19AG(2) and (3)), but is calculated only by reference to the minimum non-parole period offence or, if more than one, the aggregate of them. Suppose, for example, an offender is sentenced to 6 years' imprisonment for each of two terrorism offences (which are minimum non-parole period offences), with 2 years of the sentence for the second offence to be cumulative on the first, and 2 years' imprisonment for an offence of possession of a forged document (*Criminal Code (Cth)*, s 145.2(1)) (which is not a minimum non-parole period offence), with 12 months of that sentence to be served cumulatively on the second terrorism sentence. Although the total effective sentence is 9 years, in calculating the application of the three-quarters rule, the sentence for possession of a forged document must be disregarded. The aggregate sentence for the terrorism offences is 8 years, so the minimum NPP is 6 years. That minimum NPP is a single period applicable to the sentences for all the offences (s 19AG(2)), including the sentence for the offence which is not a minimum non-parole period offence (s 19AG(3)(b)(iii)).

689. The single NPP must be fixed in respect of all federal sentences the person is to serve or complete (s 19AG(2)), whether or not they are imposed at the same sitting (s 19AG(3)(b)) and supersedes any existing RRO (s 19AG(4)). Other provisions relating to the fixing of a NPP or RRO are made subject to the requirements of s 19AG (see *Crimes Act 1914*, s 19AG(5)).

690. One consequence of s 19AG is that the sentencing court must impose a NPP even if it would otherwise have had a discretion to make or confirm a RRO, or to decline to fix a NPP (see the legislative note to s 19AG(5)). This means, amongst other things, that s 19AG may result in a short NPP being fixed when a RRO would otherwise have been made. Another consequence of s 19AG is that the court cannot impose a straight sentence when it could otherwise have done so under s 19AB(3), s 19AC(1) or (2) or s 19AD(2)(f)) of the *Crimes Act 1914*.

691. It is not permissible for a sentencing court to discount the head sentence to compensate for, or offset, the effect of s 19AG. Section 19AG does not detract in any way from the obligation of a sentencing judge to first impose a proportionate sentence before considering the non-parole period.⁸⁴¹

5.10.10 No power to fix a single NPP for both federal and State/Territory offences

692. In sentencing an offender for both federal offences and for State/Territory offences, a court may not fix a single NPP for both types of offences, even if under State/Territory law a single NPP may be fixed for multiple offences.⁸⁴² Separate non-parole orders must be made where a NPP is to be imposed for both federal and State/Territory sentences.⁸⁴³

⁸⁴¹ *Lodhi v R* [2007] NSWCCA 360, [255]–[262].

⁸⁴² *Crimes Act 1914* (Cth), s 19AJ; *Street v Tasmania Police* [2016] TASSC 52, [8].

⁸⁴³ *Crimes Act 1914* (Cth), s 19AJ; *R v Fulop* [2009] VSCA 296, [9]; *Colbourn v R* [2009] TASSC 108, [21].

5.10.11 Obligation on court to explain NPP

693. A court which fixes a NPP must explain or cause to be explained to the offender, in language likely to be readily understood by them, the purpose and consequences of fixing that NPP (*Crimes Act 1914*, s 16F(1)), including an explanation:

- that service of the sentence will entail a period of imprisonment of not less than the non-parole period and, if a parole order is made, a period of service in the community, called the parole period, to complete service of the sentence; and
- that if a parole order is made, the order will be subject to conditions; and
- that the parole order may be amended or revoked; and
- of the consequences that may follow if the person fails, without reasonable excuse, to fulfil those conditions.

694. Failure of a court to comply with the requirements of s 16F does not invalidate a sentence⁸⁴⁴ and may be corrected by the court on an application under s 19AH of the *Crimes Act 1914*: see “7.12.3 Power to correct error in fixing NPP or making RRO: *Crimes Act 1914*, s 19AH”.

5.10.12 Immediate release under RRO – *Crimes Act 1914*, s 20(1)(b)

695. Subject to any statutory requirements to the contrary, whenever a sentencing court has power to make a RRO under s 20(1)(b) of the *Crimes Act 1914* (Cth) in relation to a sentence of imprisonment for a federal offence, the court may (in accordance with that paragraph) make a RRO which directs that the offender be released either “forthwith” or after a specified period. The effect of an order (by RRO) that an offender be released “forthwith” is akin to that of a wholly suspended sentence of imprisonment.

696. Any such order must (like any other RRO) provide for the offender to be released on the offender “*giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court*” that the offender will comply with specified conditions (*Crimes Act 1914* (Cth), s 20(1)(a)). The core condition is that the offender “*will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order*” (*Crimes Act 1914* (Cth), s 20(1)(a)(i)). Other conditions referred to in s 20(1)(a) may also be imposed.⁸⁴⁵

697. If the offender is to be released “forthwith” in relation to a number of federal sentences of imprisonment, a single order in the prescribed form releasing the offender should be made.

698. The process of consideration as to whether to release a federal offender “forthwith” under s 20(1)(b) of the *Crimes Act 1914* (Cth) has been described as involving three steps:⁸⁴⁶

- All the relevant sentencing factors (notably those in s 16A) must be taken into account in deciding whether to impose a sentence of imprisonment and, if so, the length;

⁸⁴⁴ *R v Hutton* [2004] NSWCCA 60, [17]-[28]; *Tu v R* [2011] NSWCCA 31, [111]-[112]. See also *Crimes Act 1914*, s 19AH(1)(a).

⁸⁴⁵ The available conditions are the same as those for a bond with conviction under s 20(1)(a). See the discussion of the various conditions in “5.5 Bond with conviction – *Crimes Act 1914*”.

⁸⁴⁶ *De Hollander v R* [2012] WASCA 127 [86]; *Larkin v R* [2012] WASCA 238 [75]-[76].

- It may be necessary for the court to consider whether, pursuant to s 19AC(4), the court should decline to make a RRO; and
- In deciding whether to release the offender “forthwith” the court must consider the same factors applicable to the imposition and fixing of the term of imprisonment. However, the weight to be accorded to these factors and the manner in which they are relevant will differ as a result of the different purpose underlying each function.

5.10.13 Form of RRO

699. There is a prescribed form of RRO in the *Crimes Regulations 2019* (Cth).⁸⁴⁷ The prescribed form is applicable whether the offender is to be released forthwith or after serving a specified period of imprisonment. A State/Territory bond form is ineffective and should not be used.⁸⁴⁸

700. A RRO, like any other s 20 order, must specify the monetary amount of security to be given by the offender.⁸⁴⁹ The section does not limit the amount. A bond can also involve a surety but this is rarely, if ever, required.

701. If the offender is to be released under a RRO after serving a period of imprisonment, it seems clear from the terms of s 20(1)(b) that the bond imposed as part of the RRO commences on the release of the person and not on the making of the order. On that construction, an offence committed before the offender is released would not be a breach of the condition to be of good behaviour.

5.10.14 Single or multiple RROs for federal offences?

702. Each of the provisions relating to the making of a RRO contemplates the making of a single order in respect of multiple federal sentences of imprisonment. For example:

- Section 20(1)(b) of the *Crimes Act 1914* (Cth), which empowers a court to impose a RRO, applies where a person is convicted before a court of a federal offence or federal offences. The court may “*sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released, upon giving security of the kind referred to in paragraph (a) either forthwith or after he or she has served a specified period of imprisonment in respect of that offence or those offences that is calculated in accordance with subsection 19AF(1)*” [emphasis added]
- If a court sentences an offender for two or more federal offences to imprisonment which in the aggregate is for more than 6 months but not exceeding 3 years, and the offender is not already serving or subject to a federal sentence, s 19AC of the *Crimes Act 1914* (Cth) requires that “*the court must make a recognizance release order in respect of that sentence or sentences and must not fix a non parole period*” [emphasis added].
- If at the time of sentence for one or more federal offences, an offender is subject to an existing RRO, and the offender is sentenced to a term of imprisonment, one of four courses of action

⁸⁴⁷ Form 12 of Schedule 1 of the *Crimes Regulations 2019* (Cth).

⁸⁴⁸ *DPP (Cth) v Cole* (2005) 91 SASR 480; *R v Woods* (2009) 24 NTLR 77.

⁸⁴⁹ *Assafiri (No.2) v R* [2007] NSWCCA 356, [1].

provided for by s 19AE(2) of the Act (depending on the circumstances) is for the court to “make a new recognizance release order in respect of all federal sentences the person is to serve or complete” [emphasis added].

703. That is, whenever a RRO is made in respect of more than one federal sentence of imprisonment, a single RRO must be made in respect of all of those sentences. It is an error to make separate RROs in respect of each sentence of imprisonment.⁸⁵⁰

5.10.15 Duration of pre-release period of a RRO

704. In making a RRO, the court must direct, by order, that the person be released, upon giving security by recognizance or otherwise, either forthwith or after he or she has served a specified period of imprisonment for the offence(s): *Crimes Act 1914* (Cth), s 20(1)(b). The period of imprisonment to be served is referred to in the Act as the pre-release period (see the definition of “*pre-release period*” in s 16(1)). The maximum duration of the pre-release period, whenever a court is required to make a RRO, is set by s 19AF(1). That subsection requires that the pre-release period must end not later than the end of the sentence, or the last to be served of the sentences, as reduced by any remissions or reductions under s 19AA.

5.10.16 Maximum length of the recognizance under a RRO

705. Although s 19AF of the *Crimes Act 1914* (Cth) makes it clear that *the pre-release period* under a RRO must end not later than the end of the head sentence, or the last of the head sentences, to which it relates (less any remissions), the legislation does not specify the maximum period which a recognizance (or other security) under a RRO may remain in force following the release of the offender.

706. In *O’Brien*⁸⁵¹ (which was followed in *Walsh*⁸⁵²), the Victorian Court of Criminal Appeal proceeded on the basis that a recognizance under a RRO can extend beyond the completion of the sentence (or, if more than one, the total effective sentence). However in *Selimoski v Picknoll*,⁸⁵³ the Western Australian Court of Criminal Appeal held that it could not.

707. Under s 20(1) of the Act, a recognizance (or other security) under a RRO may be subject to a condition that the offender will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order. Given that the duration of the head sentence or total effective sentence in relation to which a RRO may be fixed will usually be no more than 3 years, if that period limited not only the duration of the pre-release period but the duration of the entire RRO, a good behaviour period would be so constrained as to be of little value in many cases.

⁸⁵⁰ *R v Schultz* [2008] NSWCCA 199, [13]; *DPP (Cth) v Couper* (2013) 41 VR 128, [122]–[129]; *R v Hutchinson* [2018] NSWCCA 152, [65].

⁸⁵¹ *O’Brien v R* (1991) 57 A Crim R 80. In *O’Brien*, for practical reasons the court did not in fact extend the bond beyond the end of the federal sentence.

⁸⁵² *Walsh v R* (1993) 69 A Crim R 579. See also *Edwards v Pregnell* (1994) 74 A Crim R 509, 511–513; *R v Woods* [1999] ACTSC 60, [92], in which the decisions in *O’Brien* and *Walsh* were followed.

⁸⁵³ *Selimoski v Picknoll* (WA SC (Full Court), 9 October 1992, unreported).

708. Nevertheless, the Court in *Selimoski v Picknoll* concluded that, despite the provision for a good behaviour condition to extend for up to 5 years, a recognizance under s 20(1)(b) could not extend beyond the sentence. It based that conclusion on s 20A of the Act. On the Court's interpretation of that section, proceedings for breach of a RRO could not be commenced after the completion of the sentence. By contrast, the Court in *O'Brien* did not construe s 20A as imposing such a limitation.

709. Whatever the correct construction of s 20A as then in force, following later amendments (with effect from 16 January 1995) it is now clear that proceedings for breach of a RRO can be brought after the completion of the head sentence or total effective sentence, and indeed in some cases after the good behaviour period under the RRO.⁸⁵⁴ In light of those amendments, there is no reason to read the power to impose a RRO as subject to the implied limitation referred to in *Selimoski v Picknoll*.

710. In *Smith*,⁸⁵⁵ the Queensland Court of Appeal distinguished *Selimoski v Picknoll* on the basis of the amendments, and held that a recognizance (or other security) under a RRO may be conditional on the offender being of good behaviour for up to 5 years, and that the RRO may continue in force for the whole of that period. That approach has been adopted in a number of other cases following the amendments.⁸⁵⁶ The issue now appears to be settled, in accordance with the decision in *Smith*.

5.10.17 Conditions which may be imposed under a RRO

711. Section 16A(3) of the *Crimes Act 1914* (Cth) requires that, in determining whether an order under s 20(1) is the appropriate sentence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender under that sentence or order.

712. The conditions which may be imposed under a RRO are set out in s 20(1)(a) of the Act. A core condition is that the offender "*will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order*" (s 20(1)(a)(i)). As noted above ("5.10.16 Maximum length of the recognizance under a RRO"), it is now clear that such a good behaviour period may extend beyond the completion of the sentence of imprisonment. If the recognizance takes effect from the date of release of the offender, the good behaviour period may extend for up to 5 years from that date.

713. Other conditions which may be imposed are:

- the payment of reparation, restitution, compensation or costs (s 20(1)(a)(ii) - see "5.5.3 Reparation, restitution, compensation or costs as a condition of a bond");
- the payment to the Commonwealth of a pecuniary penalty (s 20(1)(a)(iii)), the maximum of which is fixed by s 20(5) (generally the maximum fine applicable to the offence – see "5.5.4 Pecuniary penalty as a condition of a bond"); or
- that the offender will, during a period not exceeding 2 years, comply with such other conditions (if any) as the court thinks fit to specify (s 20(1)(a)(iv)).

⁸⁵⁴ See "5.10.21 Breach of RRO".

⁸⁵⁵ *R v Smith* [2004] QCA 417, [3]-[9].

⁸⁵⁶ *R v Campbell* (1997) 95 A Crim R 391, 397-8; *Fowler v Gualberto* [2006] ACTSC 106, [12]-[16]; *R v MB* [2014] ACTSC 399, [32].

714. Although the court is empowered to order payment of reparation, restitution, compensation or costs as a condition of a recognizance, the offender is not to be imprisoned for failure to comply with the condition (s 20(2A)). It will therefore generally be more appropriate to make a separate order for such a payment, pursuant to s 21B of the *Crimes Act* or other applicable power, rather than make payment a condition of a recognizance.⁸⁵⁷
715. The residual power to impose other conditions applicable for up to 2 years (s 20(1)(a)(iv)) is broad but not unlimited (see “5.5.9 Other impermissible conditions of a s 20 bond”). It probably does not permit an order for the payment of money, since the circumstances in which such payments may be ordered are exhaustively dealt with in sub-paragraphs (ii) and (iii) (see “5.5.8 Payment of money to charity as condition of a bond”). It is doubtful whether unpaid work may be required (see “5.5.7 Condition requiring unpaid work as a condition of a bond”). A condition imposed must not be inconsistent with the release of the person, and must be reasonably capable of compliance.⁸⁵⁸ A condition must also “*be expressed in unambiguous and definitive language, so that the person submitting to it is left in no doubt as to what are the precise obligations to be satisfied*”.⁸⁵⁹
716. The legislation itself gives, as an example of a condition which may be specified under s 20(1)(a)(iv), a condition that “*the person will undertake a specified counselling, education or treatment program during a specified part of, or throughout, the specified period*”. By way of example, the following conditions are used in Victoria (by agreement with State authorities) to require participation in the State sex offenders program:
- To be under the supervision of the Deputy Commissioner, Community Correctional Services and Sex Offender Management or his or her nominee; and*
To attend, undertake and complete the Sex Offender’s Program within a period of 2 years; or
To attend for assessment and, if assessed as suitable, treatment for sex offender programs or programs to reduce re-offending as directed by Deputy Commissioner, Community Correctional Services and Sex Offender Management or his or her nominee.
717. Section 20 also contemplates that a condition under s 20(1)(a)(iv) may specify that the person “*be subject to the supervision of a probation officer appointed in accordance with the order*” and “*obey all reasonable directions of the probation officer*”, because such a condition is referred to in s 20(1A). Under that sub-section, if the court imposes such a condition it “*must also specify the condition that the person will not travel interstate or overseas without the written permission of the probation officer.*” However State or Territory probation officers could only perform functions under such an order if appropriate arrangements were in place.
718. The good behaviour period fixed under s 20(1)(a)(i) should be at least as long as (and preferably longer than) the period of the condition under s 20(1)(a)(iv), because proceedings for breach of a condition

⁸⁵⁷ See *Hayes v R* [2014] VSCA 309, [9], [26]. As to the general power to make a reparation order, see “6.1 Reparation – Crimes Act 1914, s 21B”.

⁸⁵⁸ See *R v Keur* (1973) 7 SASR 13, 15 (Zelling J).

⁸⁵⁹ *Temby v Schulze* (1991) 57 A Crim R 284, 289. As to the other requirements for a valid condition of a bond, see *Dunn v Woodcock* [2003] NTSC 24, [7].

(except a breach constituted by the commission of an offence) cannot be brought after the good behaviour period (s 20A(1A)).

5.10.18 Obligation on court to explain RRO

719. A court which makes a RRO must explain or cause to be explained to the offender, in language likely to be readily understood by them, the purpose and consequences of making that RRO (*Crimes Act 1914*, s 16F(2)), including an explanation:

- that service of the sentence will entail a period of imprisonment equal to the pre-release period (if any) specified in the order and a period of service in the community equal to the balance of the sentence; and
- of the conditions to which the order is subject; and
- of the consequences that may follow if the person fails, without reasonable excuse, to fulfil those conditions; and
- that any recognizance given in accordance with the order may be discharged or varied under section 20AA.

720. Failure of a court to comply with the requirements of s 16F does not invalidate a sentence⁸⁶⁰ and may be corrected by the court on an application under s 19AH of the *Crimes Act 1914*: see “7.12.3 Power to correct error in fixing NPP or making RRO: *Crimes Act 1914*, s 19AH”.

5.10.19 Release under a RRO

721. If an offender is sentenced to a term of imprisonment for a federal offence and a recognizance release order (RRO) under s 20(1)(b) of the *Crimes Act 1914* (Cth) is made, the offender must be released from custody immediately upon the completion of the pre-release period, unless there is some other lawful basis for the continuing detention of the offender,⁸⁶¹ provided the security required by the court (usually by recognizance) has been given.

722. Once released, the offender must comply with a condition under the RRO to be of good behaviour and with any other applicable conditions. The offender is not, by reason of the sentence or the RRO, subject to control or supervision, except as required by a condition of the RRO.

723. A court may discharge or vary a RRO: see “5.10.20 Discharge or variation of RRO”.

724. As to the consequences of a breach of a RRO, see “5.10.21 Breach of RRO”.

⁸⁶⁰ *R v Hutton* [2004] NSWCCA 60, [17]-[28]; *Tu v R* [2011] NSWCCA 31, [111]-[112]. See also *Crimes Act 1914*, s 19AH(1)(a).

⁸⁶¹ *Selimoski v Picknoll* (WA SC (Full Court), 9 October 1992, unreported).

5.10.20 Discharge or variation of RRO

725. Section 20AA provides a mechanism for an application to be made to the court which made a RRO for (amongst other things) discharge of a recognizance pursuant to a RRO or for variation of its terms. An application may be made by:

- an authorised person (defined in s 20AA(12) to mean “*the Attorney-General, the Director of Public Prosecutions or a person appointed under section 69 of the Judiciary Act 1903 to prosecute indictable offences against the laws of the Commonwealth*”),
- the person who entered into the recognizance,
- a surety or
- a probation officer.

726. On such an application, the court may, amongst other things, reduce or extend (up to 5 years from when the recognizance was entered into) the recognizance, alter the conditions, insert conditions or reduce an amount to be paid under it (s 20AA(3)).

5.10.21 Breach of RRO

727. The procedure for dealing with a breach of a RRO is governed by s 20A of the *Crimes Act 1914* (Cth).

728. Breach action is initiated by information laid before a magistrate alleging that the person has, without reasonable cause or excuse, failed to comply with a condition of the order (s 20A(1)). The magistrate may issue a summons directing the person to appear, on a date, and at a time and place fixed in the summons, before the court by which the order was made (s 20A(1)(a)).

729. If the information is laid on oath and the magistrate is satisfied that proceedings by summons might not be effective, the magistrate may issue a warrant for the apprehension of the person (s 20A(1)(b)). Provision is made for bail or remand of the person following their arrest (s 20A(4)).

730. If the person fails to attend before the court as required, the court may issue an arrest warrant (s 20A(2)).

731. The information must be laid before the end of the period for which the person is required by the order to give security to be of good behaviour, unless the failure to comply is constituted by the commission of an offence (s 20A(1A)).

732. If the court which made the RRO is satisfied that the person has without reasonable cause or excuse failed to comply with a condition of the order, **the options available to the court** are set out in s 20A(5)(c) (read in conjunction with s 20A(5A) and (5B)). They are:

- impose a monetary penalty not exceeding \$1,000 (s 20A(5)(c)(ia));⁸⁶² or

⁸⁶²

It was previously considered that any monetary penalty imposed pursuant to s 20A(5)(c)(ia) would be unenforceable, as the provision that provides for imposition of a pecuniary penalty is limited to those imposed under s 20A(5)(b)(i) – see s 20A(9). However, s 3(2) expands the definition of ‘fine’ to include a reference to a pecuniary penalty imposed or to ‘costs or other amounts ordered to be paid by offenders’. It is the view of the CDPP that a monetary penalty imposed pursuant to s 20A(5)(c)(ia) is now enforceable.

- amend the order to *extend the good behaviour period* (s 20A(5)(c)(ib)),⁸⁶³ but not so as to be more than 5 years (s 20A(5A));⁸⁶⁴ or
- *revoke the order and make an order under s 20AB* (s 20A(5)(c)(ic)); or
- revoke the order and deal with the person for the offence or offences in respect of which the order was made by *ordering that the person be imprisoned* for that part of each sentence of imprisonment fixed under s 20(1)(b) that the person had not served at the time of his or her release (s 20A(5)(c)(i));⁸⁶⁵ or
- *take no action* (s 20A(5)(c)(ii)).

733. The court may also order that any recognizance or surety be estreated, or that any other security be enforced (s 20A(7)).

734. Where a court exercises the power under s 20A(5)(c)(i) the court does not have the power to reduce the period of imprisonment which stands to be served.⁸⁶⁶ If the court proceeds under that sub-paragraph, the offender must be ordered to serve the whole of the unserved portion of the sentence.

735. Under s 20A(5)(c)(ic), the court may “*revoke the order and make an order under section 20AB*”. (Section 20AB applies certain State and Territory sentencing options to the sentencing of a federal offender: see “5.7 Orders applied by *Crimes Act 1914*, s.20AB”.) The power in s 20A(5)(c)(ic) has been subject to different interpretations by inferior courts. Some courts have treated it as, in effect, a power to re-sentence the offender. The view of the CDPP is that s 20A(5)(c)(ic) does not empower a court to re-sentence the offender or otherwise to interfere with the sentence of imprisonment. Paragraph (c) applies “*in the case of a person who has been released by an order made under paragraph 20(1)(b)*”. That paragraph provides that where a person is convicted of a federal offence or federal offences, the court before which he or she is convicted may, if it thinks fit, “*sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released*” upon giving security. The paragraph distinguishes between the sentencing of the offender to imprisonment (the head sentence) and the making of an order that the offender be released (either forthwith or after a specified period) upon giving security of the required kind (a RRO). The power in s 20A arises where the court is satisfied that the offender “*has, without reasonable cause or excuse, failed to comply with a condition of the order*” – that is, the RRO pursuant to which the offender is released. Sub-paragraph s 20A(5)(c)(ic) empowers a court in such a case to revoke only “*the order*” (that is, the RRO for the offender’s release). It does not confer, either expressly or by implication, any power to revoke or vary in any way the sentence of imprisonment imposed on the offender. As is the case with the cognate power in s 20A(5)(c)(i), the power in sub-paragraph (ic) to revoke the RRO leaves the sentence of

⁸⁶³ It would appear that each of the options in s 20A(5) is exclusive of the others, so that the court may not both impose a pecuniary penalty under sub-paragraphs (ia) and extend the good behaviour period under sub-paragraph (ib).

⁸⁶⁴ If the order is so extended, security given under the RRO is taken to be security to be of good behaviour for the amended period: s 20A(5B).

⁸⁶⁵ However imprisonment cannot be imposed for failure to pay reparation, restitution, compensation or costs that were a condition of the RRO: s 20(2A).

⁸⁶⁶ *R v Campbell* (1997) 95 A Crim R 391, 398; *Sweeney v Corporate Security Group* (2003) 86 SASR 425; *Ferenczy v DPP* [2004] SASC 208.

imprisonment in place. The power to revoke the RRO and make an order under s 20AB provides an alternative consequence to the immediate service of the unserved portion of the sentence.

736. Under s 20AB, a State or Territory order may be made in relation to a federal offender in a particular case only if two conditions are met. First, the order must be an order of a kind described in, or prescribed under, s 20AB(1A). Second, a court must be empowered, under the law of the State or Territory, to make such an order "*in corresponding cases*". The result is that a State or Territory order can be made under s 20A(5)(c)(ic) only if it falls within s 20AB(1A) and if, under the law of that State or Territory, such an order could be made in cases corresponding to the instant case.

5.11 Imprisonment: federal parole, leave and licence

5.11.1 Parole decisions

737. Federal parole is granted at the discretion of the Commonwealth Attorney-General or their delegate,⁸⁶⁷ pursuant to s 19AL of the *Crimes Act 1914* (Cth).⁸⁶⁸ Federal parole is administered by the Commonwealth Parole Office in the Commonwealth Attorney-General's Department (CPO), although practical supervision of federal parolees is performed by duly authorised State or Territory officers.⁸⁶⁹
738. Before the end of a non-parole period (NPP) fixed for one or more federal sentences, the Attorney-General must make (or refuse to make) an order directing that the person be released from prison on parole.⁸⁷⁰ However, if the person would still be in prison under a State or Territory sentence after the expiry of the federal NPP, the Attorney-General is not required to make a decision about parole until the time of the person's release (or expected release) from prison under the State or Territory sentence.⁸⁷¹ A prisoner cannot be released on federal parole if still serving a State or Territory sentence, although they can still be granted federal parole ahead of time.⁸⁷² A prisoner who is granted federal parole, but is still serving a State or Territory sentence, must be released on parole (for the federal offence) on the same day she or he is released from prison (including on parole) for the State/Territory offence.⁸⁷³
739. If parole is refused, the Attorney-General must give the prisoner written notice of refusal within 14 days, including a statement of reasons, and advising that parole will be reconsidered within 12 months.⁸⁷⁴ Merits review is not available, but judicial review is available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁸⁷⁵
740. In practice, when a federal offender's parole eligibility date is approaching, the CPO requests a report from the relevant State or Territory parole service and considers the matters in that report in order to provide advice to the Attorney, to assist him or her to exercise the discretion to grant or refuse parole.

⁸⁶⁷ See *Duxerty v Minister for Justice and Customs* [2002] FCA 1518, [10]-[15]; *Jackson v Minister for Justice* [2011] FCA 831, [4]. See also *Law Officers Act 1964* (Cth), s 17(2). References in this part of the guide to the Attorney-General are, unless the context requires otherwise, references to the Commonwealth Attorney-General or her or his delegate.

⁸⁶⁸ The power to grant or refuse parole must be exercised with procedural fairness, and is subject to judicial review: see *Duxerty v Minister for Justice and Customs* [2002] FCA 1518, [22].

⁸⁶⁹ *Crimes Act 1914* (Cth), s 21F.

⁸⁷⁰ *Crimes Act 1914* (Cth), s 19AL(1). Prior to 4 October 2012, federal parole was automatically granted if the federal sentence was more than 3 years but less than 10 years, unless the prisoner was serving a state sentence when the federal NPP expired: see *Crimes Act 1914* (Cth), ss 19AL(1) and 19AM. Under the transitional provision in clause 12 of Schedule 7 of the amending Act, the Act as amended applies to persons for whom a non-parole period was fixed whether sentenced before, at, or after the commencement date, unless a parole order had been made under s 19AL.

⁸⁷¹ *Crimes Act 1914* (Cth), s 19AL(5)-(6).

⁸⁷² *Crimes Act 1914* (Cth), s 19AM.

⁸⁷³ *Crimes Act 1914* (Cth), s 19AM(2).

⁸⁷⁴ *Crimes Act 1914* (Cth), s 19AL(2).

⁸⁷⁵ *Duxerty v Minister for Justice and Customs* [2002] FCA 1518.

741. State or Territory laws which restrict the availability of parole or which specify consequences for breaches of parole do not apply to federal offenders. However State or Territory law may provide that a conviction or finding of guilt for particular offences (defined to include certain federal offences) can result in the cancellation of parole for a State or Territory offender.⁸⁷⁶

5.11.2 Purposes of parole

742. The purposes of parole are protection of the community, rehabilitation of the offender, and reintegration of the offender into the community.⁸⁷⁷ When deciding whether a federal offender should be released on parole, the Attorney-General may consider any of the matters (where known and relevant) in the following non-exhaustive list:⁸⁷⁸

- (a) the risk to the community of releasing the person on parole;
- (b) the person's conduct while serving his or her sentence;
- (c) whether the person has satisfactorily completed programs ordered by a court or recommended by the relevant State or Territory corrective services or parole agency;
- (d) the likely effect on the victim, or victim's family, of releasing the person on parole;
- (e) the nature and circumstances of the offence to which the person's sentence relates;
- (f) any comments made by the sentencing court;
- (g) the person's criminal history;
- (h) any report or information in relation to the granting of parole that has been provided by the relevant State or Territory corrective services or parole agency;
- (i) the behaviour of the person when subject to any previous parole order or licence;
- (j) the likelihood that the person will comply with the conditions of the parole order;
- (k) whether releasing the person on parole is likely to assist the person to adjust to lawful community life;
- (l) whether the length of the parole period is sufficient to achieve the purposes of parole;
- (m) any special circumstances, including the likelihood that the person will be subject to removal or deportation upon release.

5.11.3 Nature of parole orders

743. A parole order must be in writing and must specify whether or not the person is to be released subject to supervision.⁸⁷⁹ If the supervision period is to end before the end of the parole period, the order must specify the day when supervision ends.⁸⁸⁰

⁸⁷⁶ E.g. *Corrections Act 1986* (Vic), s 77(6).

⁸⁷⁷ *Crimes Act 1914* (Cth), s 19AKA.

⁸⁷⁸ *Crimes Act 1914* (Cth), s 19ALA(1). Sub-s (2) makes clear that the Attorney-General is not limited by the matters listed in sub-s (1). Section 19ALA was introduced by Schedule 7 of the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth). The relevant Explanatory Memorandum states that the purposes of these changes are to: support procedural fairness of decisions; support production of reasons for decisions; inform the community at large of the roles and responsibilities of parole authorities; and promote consistent and transparent parole-related outcomes.

⁸⁷⁹ A supervision condition is not mandatory, but is almost invariably included in a parole order.

⁸⁸⁰ *Crimes Act 1914* (Cth), s 19AL(3).

744. The Attorney-General may, if she or he considers it appropriate, specify in a parole order that the offender is to be released up to 30 days before the end of the NPP.⁸⁸¹
745. The Attorney-General may, by written order, amend the conditions of, or correct technical errors in, a parole order (or licence) after it has been made, at any time before the parole (or licence) period ends.⁸⁸²
746. A parole order is subject to the conditions that the offender must, during the parole period:
- (a) be of good behaviour and not violate any law,
 - (b) be subject to supervision (if ordered), and
 - (c) be subject to any other conditions specified in the order.⁸⁸³

5.11.4 Parolees are still under sentence

747. A federal prisoner who is released on parole is taken to be still under sentence and not to have served the balance of the sentence owing on release unless the parole order ends without being revoked.⁸⁸⁴ This means that where the parole order is revoked (including by automatic revocation following a sentence imposed after the end of the parole period, for an offence committed during the parole period), the parolee becomes liable to serve *the entire balance* of the federal parole period that was owing at the time of release on parole.
748. This rule operates subject to significant qualifications (discussed in more detail below):
- (a) State and Territory legislation which provides for crediting of “street time” (i.e. time spent on parole in the community before parole was revoked) reduces the balance of the federal sentence to be served.⁸⁸⁵
 - (b) Where State and Territory legislation does not credit “street time” (with the result that the offender does not get the benefit of a reduced balance to serve), courts fixing federal non-parole periods following breach of parole must have regard to time spent in the community before revocation of the parole.⁸⁸⁶
 - (c) The totality principle applies when a court make orders following revocation of parole.

5.11.5 Duration of parole period

749. For an offender sentenced to life imprisonment, the parole period ends 5 years after release from prison, or any later day specified in the parole order.⁸⁸⁷

⁸⁸¹ *Crimes Act 1914* (Cth), s 19AL(3A). This provision commenced on 27 November 2015, and applies only to parole orders made on or after that date (see Act No. 153 of 2015). The Explanatory Memorandum for the amending Bill refers to this provision reinstating the previous legislative basis for early release.

⁸⁸² *Crimes Act 1914* (Cth), s 19APA.

⁸⁸³ *Crimes Act 1914* (Cth), s 19AN.

⁸⁸⁴ *Crimes Act 1914* (Cth), s 19APB(1).

⁸⁸⁵ *Crimes Act 1914* (Cth), s 19AQ(5) and s 19AA(1)-(2).

⁸⁸⁶ *Crimes Act 1914* (Cth), s 19AA(3).

⁸⁸⁷ *Crimes Act 1914* (Cth), s 19AMA(3)(b).

750. For non-life sentences, the parole period ends at the end of the last day of any federal sentence being served or to be served (after deducting any applicable remission or reduction).⁸⁸⁸

5.11.6 Revocation of parole

751. A federal parole order may be revoked in either of two ways:

- (a) automatically when a further sentence of more than 3 months' imprisonment (other than a wholly suspended sentence) is imposed following the commission of an offence by the parolee during the parole period: s 19AQ (automatic revocation); or
- (b) at the discretion of the Attorney-General, where the parolee fails to comply with a condition of the parole order: s 19AU (discretionary revocation).

752. In either case, if a parole order has been revoked in relation to a particular offence, an offender can still be granted another parole order or licence in relation to that same offence.⁸⁸⁹

5.11.7 Automatic revocation of parole

Revocation upon sentencing for an offence committed on parole

753. Parole is revoked automatically (i.e. the Attorney-General does not need to make a revocation order) when a federal offender who has been released on parole is sentenced to life imprisonment or to a sentence of, or sentences aggregating, more than 3 months in respect of a federal, State or Territory offence committed during the parole period.⁸⁹⁰ The only exception is if the sentence of imprisonment, or each sentence of imprisonment, is suspended (that is, wholly suspended).⁸⁹¹

754. If at the date of sentence for the new offence, the federal parole period has already ended, the parole order is taken to have been revoked from the time immediately before the end of the parole period.⁸⁹²

755. Upon the automatic revocation of parole, the parolee is regarded as still under sentence and becomes liable to serve that part of the sentence or each sentence for a federal offence that had not been served at the time of his or her release under the parole order,⁸⁹³ subject to any credit to be allowed for "street time" and subject (except in the case of a life sentence) to any further remission or reduction of that sentence. Credit to be allowed for "street time" (that is, a period spent on parole before parole was revoked) is governed by s 19AQ(5) and s 19AA(2)-(3) of the *Crimes Act 1914* (Cth): see "5.11.9 Credit for "street time"".

⁸⁸⁸ *Crimes Act 1914* (Cth), s 19AMA(3)(a). Prior to 4 October 2012 the maximum period to be served on federal parole was 5 years except if the federal prisoner was serving a life sentence. The definition of 'parole period' has been amended so as to abolish that restriction for offenders not sentenced to life imprisonment: *Crimes Legislation Amendment (Powers and Offences) Act 2012* (Cth).

⁸⁸⁹ *Crimes Act 1914* (Cth), s 19AZB.

⁸⁹⁰ *Crimes Act 1914* (Cth), s 19AQ(1). The reference to the period of 3 months must be taken to refer to the head sentence or total effective sentence, not the period to be served: see the definitions of "aggregate" and "sentence" in s 16(1) of the Act.

⁸⁹¹ *Crimes Act 1914* (Cth), s 19AQ(6).

⁸⁹² *Crimes Act 1914* (Cth), s 19AQ(2).

⁸⁹³ *Crimes Act 1914* (Cth), s 19AQ(5); *R v Novak* [2003] VSCA 46, [63].

756. The service of that balance of the federal sentence commences on the date the offender is sentenced for the new offence.⁸⁹⁴

Fixing a new NPP or making a new RRO following automatic revocation of parole

757. Where parole is automatically revoked by a sentence for further offences committed during the parole period ('the new sentence'), s 19AR of the *Crimes Act 1914* (Cth) makes provision for the fixing of a new non-parole period (NPP) or recognizance release order (RRO), in relation to the unserved part of the original federal sentence ('the outstanding sentence') and also in relation to the new sentence, as follows:⁸⁹⁵

- Where **the new sentence is more than 3 years for a federal offence/s**, the court must⁸⁹⁶ fix a single new NPP in respect of the new sentence and the outstanding sentence, having regard to the total period of imprisonment that the person is liable to serve.⁸⁹⁷
- Where **the new sentence is 3 years or less for a federal offence/s**, and either (i) the outstanding sentence is **life imprisonment**, or (ii) **the outstanding sentence and the new sentence aggregate more than 3 years**, the court must⁸⁹⁸ fix a single new NPP in respect of the new sentence and the outstanding sentence, having regard to the total period of imprisonment that the person is liable to serve.⁸⁹⁹
- Where **the new sentence is 3 years or less for a federal offence**, and **the outstanding sentence and the new sentence aggregate 3 years or less**, the court must not fix a NPP but may make a RRO in respect of the new sentence and the outstanding sentence, having regard to the total period of imprisonment that the person is liable to serve.⁹⁰⁰
- Where **the new sentence is more than 3 months for a State/Territory offence/s**, and **the outstanding federal sentence is more than 3 years**, the court must⁹⁰¹ fix a single new NPP in respect of the outstanding federal sentence.⁹⁰²
- Where **the new sentence is more than 3 months for a State/Territory offence**, and **the outstanding federal sentence is 3 years or less**, the court must not fix a NPP, but may make a RRO in respect of the outstanding federal sentence.⁹⁰³

⁸⁹⁴ *R v Piacentino* (2007) 15 VR 501; *Crimes Act 1914* (Cth), s 19AS(1)(d).

⁸⁹⁵ See also Table 4 in "5.10.4 Non-parole period (NPP) or recognizance release order (RRO)?".

⁸⁹⁶ Subject to the Court's power to decline to set a NPP in certain circumstances – see *Crimes Act 1914* (Cth), s 19AR(4)-(7).

⁸⁹⁷ *Crimes Act 1914* (Cth), s 19AR(1).

⁸⁹⁸ Subject to the Court's power to decline to set a NPP in certain circumstances – see *Crimes Act 1914* (Cth), s 19AR(4)-(7).

⁸⁹⁹ *Crimes Act 1914* (Cth), s 19AR(2)(d).

⁹⁰⁰ *Crimes Act 1914* (Cth), s 19AR(2)(e).

⁹⁰¹ Subject to the Court's power to decline to set a NPP in certain circumstances – see *Crimes Act 1914* (Cth), s 19AR(4)-(7).

⁹⁰² *Crimes Act 1914* (Cth), s 19AR(3)(d). There is no express requirement to have regard, in fixing the new federal NPP, to the total period of imprisonment that the person is liable to serve. But s 16A of the *Crimes Act* applies to the fixing of the new NPP. That section accommodates common law principles of totality: *Johnson v R* (2004) 78 ALJR 616.

⁹⁰³ *Crimes Act 1914* (Cth), s 19AR(3)(e). There is no express requirement to have regard, in deciding whether to make the new RRO, to the total period of imprisonment that the person is liable to serve. But s 16A of the *Crimes Act*

758. A court sentencing for an offence which constitutes a breach of parole should take into account the fact that (subject to remissions and to any credit for “street time”) the whole of the original federal sentence is liable to be served, regardless of whether a NPP or a RRO has also been fixed. The court should also have regard to the totality principle.⁹⁰⁴

759. In New South Wales, Queensland, Western Australia and South Australia, the period which the offender remains liable to serve will be automatically reduced, in accordance with State law as applied by s 19AA(2) of the *Crimes Act 1914* (Cth), to allow for “street time” prior to the revocation of parole.⁹⁰⁵ However in Victoria, Tasmania, the Australian Capital Territory and the Northern Territory, no such automatic reduction applies to the period which the offender remains liable to serve. Instead, in those jurisdictions, in fixing a new NPP under s 19AR, a court must have regard to the period of time spent by the person on parole before that parole order was revoked or was taken to have been revoked: *Crimes Act 1914* (Cth), s 19AA(3). See “5.11.9 Credit for “street time””.

760. If the court fixes a new federal NPP it cannot fix a single NPP in respect of both federal and State/Territory sentences of imprisonment. If a NPP is to apply to the State/Territory offence, it must be fixed separately.⁹⁰⁶

Warrant of detention

761. Section 19AS of the *Crimes Act 1914* (Cth) requires the court to issue a warrant of detention⁹⁰⁷ where, because of the imposition of a new sentence for the breaching offence, the parole order is taken to have been revoked. The warrant authorises the person to be detained in prison to undergo imprisonment in that State/Territory for the unserved part of the outstanding sentence. The CDPP can apply for a warrant if the court fails to issue one.

Correcting an omission or error in fixing NPP or making RRO

762. If the court sentencing the offender for the new offence fails to fix a NPP or make a RRO in accordance with the requirements of s 19AR, it may be possible to correct the error or omission under s 19AH or s 19AHA of the *Crimes Act*: see “7.12 Power of sentencing court to correct error in sentence”.

5.11.8 Discretionary revocation of parole by the Attorney-General

When the Attorney-General may revoke a parole order

763. The Attorney-General may (at any time before the end of the parole period) revoke a parole order where the offender has failed to comply with a parole condition, or there are reasonable grounds to suspect

applies to the decision whether to make the new RRO. That section accommodates common law principles of totality: *Johnson v R* (2004) 78 ALJR 616.

⁹⁰⁴ *R v Arico (No 2)* [2002] VSCA 230, [8]-[11]; *R v Piacentino* (2007) 15 VR 501, [106]-[108].

⁹⁰⁵ The automatic reduction does not apply to reduce the NPP or pre-release period under a RRO: *Crimes Act 1914* (Cth), s 19AA(1A).

⁹⁰⁶ *Crimes Act 1914* (Cth), s 19AJ and s 19AR(6).

⁹⁰⁷ See the form of warrant in form 2 of Schedule 1 of the *Crimes Regulations 2019* (Cth).

the offender has failed to comply.⁹⁰⁸ The revocation must be in writing and must specify the condition breached, or suspected to have been breached.

Arrest and appearance before magistrate

764. If the Attorney-General revokes parole, a constable may arrest the parolee without warrant (or the Attorney-General or CDPP may apply for an arrest warrant) and the parolee must be brought before a “prescribed authority” for a hearing as soon as practicable.⁹⁰⁹ “Prescribed authority” means a magistrate of a State or Territory.⁹¹⁰

765. If the magistrate cannot complete the hearing immediately, they may issue a warrant to remand the parolee pending completion of the hearing.⁹¹¹

766. Section 19AW details the relevant procedure at the hearing. If the magistrate is satisfied that the person before them is the person named in the revocation order, that the person was duly notified by the Attorney-General of the proposal to make the revocation order and that the revocation order is still in force, the magistrate must issue a warrant of detention in the prescribed form.⁹¹² A warrant of detention authorises a constable to take the parolee to a specified prison in the State or Territory where they were arrested to undergo imprisonment for the unserved part of the sentence the person was serving or had yet to serve at the time of their release (‘the outstanding sentence’).⁹¹³

Calculation by the magistrate of the unserved part of each outstanding sentence

767. The magistrate must specify in the warrant the particulars of the unserved part of each outstanding sentence (s 19AW(4)). This will require a calculation of the period which the parolee is liable to serve.

768. The calculation will be affected by any remissions and by whether the parolee is entitled to any credit for “street time” (that is, a period spent on parole before parole was revoked): see “5.11.9 Credit for “street time””. In New South Wales, Queensland, Western Australia and South Australia, the period which the offender remains liable to serve will be automatically reduced, in accordance with State law as applied by s 19AA(2) of the *Crimes Act 1914* (Cth), to allow for “street time” prior to the revocation of parole. However in Victoria, Tasmania, the Australian Capital Territory and the Northern Territory, no such automatic reduction applies in the calculation of the unserved part of each outstanding sentence.⁹¹⁴

769. The calculation will also be affected by any period of remand pending the completion of the hearing under s 19AW, as the unserved part of any outstanding sentence or sentences that the person was

⁹⁰⁸ *Crimes Act 1914* (Cth), s 19AU. See also *R v Novak* [2003] VSCA 46. Subject to certain exceptions, before the Attorney-General revokes parole, the parolee will be notified of the alleged breach and given 14 days in which to submit reasons as to why parole should not be revoked.

⁹⁰⁹ *Crimes Act 1914* (Cth), s 19AV.

⁹¹⁰ See the definition of “prescribed authority” in *Crimes Act 1914* (Cth), s 16(1).

⁹¹¹ *Crimes Act 1914* (Cth), s 19AW(2).

⁹¹² Form 5 in Schedule 1 to the *Crimes Regulations 2019* (Cth).

⁹¹³ *Crimes Act 1914* (Cth), s 19AW(1)(e).

⁹¹⁴ In those jurisdictions, the magistrate must instead have regard to street time in fixing a new NPP: see below.

serving or had yet to serve at the time of his or her release is to be reduced by any such period of remand (s 19AW(6)).

Fixing a new NPP by the magistrate

770. Once the unserved part of each outstanding sentence is calculated (taking into account any remissions or reductions), the magistrate must fix a NPP in respect of the outstanding sentence, unless either the magistrate considers it “*inappropriate to do so because of the nature of the breach of the conditions of the order ... that led to its revocation*” or the unserved part of the outstanding sentence aggregates 3 months or less (s 19AW(3)).⁹¹⁵

771. In those jurisdictions in which no automatic reduction in the period to be served for “street time” is provided (Victoria, Tasmania, the ACT and the NT), in fixing a new NPP under s 19AW, a magistrate must have regard to the period of time spent by the person on parole before that parole order was revoked or was taken to have been revoked: *Crimes Act 1914* (Cth), s 19AA(3). See “5.11.9 Credit for “street time””.

772. In fixing a new NPP, the magistrate may also have regard to any delay between the revocation of parole and the issuing of the warrant.⁹¹⁶

773. If the magistrate fixes a new NPP, it must also be specified in the warrant of detention (s 19AW(4)).

Procedure where Attorney-General revokes parole without notification

774. Where the person on parole was not notified of the revocation, s 19AX details the relevant procedure. If the parolee is brought before the magistrate, and the magistrate is not satisfied that the parolee was notified by the Attorney-General of the proposal to make the revocation order, the magistrate must:

- (a) immediately notify the Attorney-General that the parolee has been brought before the magistrate; and
- (b) order that the parolee be detained in custody.

The period of detention in custody is until:

- the Attorney-General orders that the revocation order be rescinded (in which case the parolee is to be released again on parole), or
- the completion of a hearing of the type detailed in s 19AW (in circumstances where the Attorney-General had decided, after hearing any relevant submissions from the parolee, not to rescind the revocation order).

Appeal rights

775. Where a magistrate issues a warrant under s 19AW, the parolee may appeal to the Supreme Court of the State/Territory in which the person was arrested against the issue of the warrant, the calculation of the unserved part of the outstanding sentence, or the fixing of (or refusal to fix) a NPP (*Crimes Act 1914*

⁹¹⁵ In *Dobie v Commonwealth* [2013] FCA 1224, Rangiah J observed (at [40]) that the discretion under s 19AW(3)(a) not to fix a NPP is apt to be exercised if the nature of the relevant breach of the conditions of the parole order or licence is so serious that the magistrate considers that the offender should not be released on parole.

⁹¹⁶ *Dobie v Commonwealth* [2013] FCA 1224, [75].

(Cth), s 19AY). The appeal is by way of rehearing but the court may have regard to any evidence given before the prescribed authority (s 19AY(3)).⁹¹⁷

5.11.9 Credit for “street time”

The regime for crediting “street time”

776. A parolee whose parole is revoked (whether automatically or by the Attorney-General) is generally liable to serve the balance of the sentence that was outstanding at the time of his or her release on parole. However ss 19AA and 19AQ(5) of the *Crimes Act 1914* (Cth) provide for credit to be given for a period between the parolee’s release on parole and the revocation of parole (which is often referred to as “street time” or “clean street time”). Depending on the law of the relevant State or Territory,⁹¹⁸ that period of “street time” may be credited in reducing the outstanding period of the sentence to be served.⁹¹⁹ If it is not so credited, the period may be taken into account in the fixing of a new non-parole period (NPP) following the revocation of parole (under s 19AR or s 19AW, as the case may be).

777. Section 19Q(5) provides:

Where the parole order or licence relating to a person is revoked under subsection (1) or (3) [i.e. the automatic revocation provisions], the person becomes liable to serve that part of the sentence or each sentence for a federal offence that the person had not served at the time of his or her release under that order or licence, subject to the operation of subsection 19AA(2) and subject (except in the case of a life sentence) to any further remission or reduction of that sentence. [emphasis added]

778. Section 19AA relevantly provides:

- (1) *A law of a State or Territory that provides for the remission or reduction of State or Territory sentences applies in the same way to the remission or reduction of a federal sentence in a prison of that State or Territory.*
- ...
- (2) *Where a law of a State or Territory provides that a person is to be taken to be serving a State or Territory sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked, the law:*
 - (a) *is, for the purposes of subsection (1), to be taken to be providing for the remission or reduction of sentences; and*
 - (b) *applies to any calculation of the part of a federal sentence remaining to be served at the time of a federal offender’s release under a federal parole order or licence as if the sentence were a State or Territory sentence.*
- (3) *Where a federal offender who is released on parole or licence and whose parole order or licence has subsequently been revoked does not get the benefit of subsection (2) in calculating the part of any federal sentence of imprisonment remaining to be served at the time of release:*

⁹¹⁷ As to the nature of the appeal, see *Cant v DPP* (Cth) [2014] QSC 62, [16]-[19].

⁹¹⁸ The relevant State/Territory is the one in which the offender is serving his or her sentence at the time of release on federal parole, or (possibly) the State/Territory in which the offender has been on parole with the permission of the relevant Commonwealth authority at the time the calculation falls to be performed: *DPP (Cth) v Wallace* (2011) 43 WAR 61, [46] (Martin CJ).

⁹¹⁹ The automatic reduction does not apply to reduce the NPP or pre-release period under a RRO: *Crimes Act 1914* (Cth), s 19AA(1A).

- (a) a court fixing a new non-parole period in respect of such a person under section 19AR; or
(b) a prescribed authority fixing a non-parole period in respect of such a person under section 19AW;
must have regard to the period of time spent by the person on parole or licence before that parole order or licence is revoked or is to be taken to have been revoked.

779. Under these provisions, any entitlement to credit for “street time” depends upon whether the law of the relevant State or Territory “provides that a person is to be taken to be serving a State or Territory sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked” (s 19AA(2)) and for that reason is to be taken to (or otherwise does) relevantly provide “for the remission or reduction of State or Territory sentences” (s 19AA(1)).

Which jurisdictions have laws which provide for reduction for “street time”?

780. The regimes under State or Territory law are as follows:

- (a) New South Wales, Queensland, Western Australia and South Australia each has legislation⁹²⁰ of a type which falls within s 19AA(2). That is, those provisions directly provide that a person is taken to be serving a sentence between the time of release on parole and the time of revocation of the parole.
- (b) The legislation in the Northern Territory and the ACT do not so provide.⁹²¹ Those laws do not give any credit for “street time”.
- (c) The position in Victoria and Tasmania is less clear, but the laws in those States do not appear to be of a kind described in s 19AA(1) or (2). The relevant State laws⁹²² provide no entitlement to credit for “street time”. Instead, any credit to be given for time on parole to be treated as time served is a matter within the discretion of the State parole board. That is, the State laws do not themselves provide “that a person is to be taken to be serving a State ... sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked” (s 19AA(2)); they do no more than allow a parole authority to make a direction to that effect. Nor can the State laws be said otherwise to ‘provide for’ the remission or reduction of State sentences within s 19AA(1). The scheme of ss 19AA(1) and (2) and 19Q(5) of the *Crimes Act 1914* is, relevantly, to apply State or Territory laws which make specific provision for crediting “street time”, not *executive decisions* under State laws. It is necessary that the period of time which remains to be served upon the automatic revocation of parole be capable of calculation with certainty from the moment of revocation. The court which sentences the offender for the breaching offence must know the period which remains to be served, in order to comply with the applicable requirements of s 19AR and s 19AA(3) and in order to apply the principle of totality. In a case of revocation by the Attorney-General, the period remaining to be

⁹²⁰ **NSW:** *Crimes (Administration of Sentences) Act 1999* (NSW), s 132. **Qld:** *Corrective Services Act 2006* (Qld), s 211(2). **WA:** *Sentence Administration Act 2003* (WA), s 71 (which specifically uses the term “clean street time”). **SA:** *Correctional Services Act 1982* (SA), s 75(2). See also *DPP (Cth) v Wallace* (2011) 43 WAR 61, [55]; *DPP (Cth) v WJB* (2000) 78 SASR 44.

⁹²¹ **ACT:** *Crimes (Sentence Administration) Act 2005* (ACT), s 160 and s 139. See also *Turrise v Hunter* [2008] ACTSC 128, [15]-[21]. **NT:** *Parole of Prisoners Act 1971* (NT), s 14.

⁹²² **Vic:** *Corrections Act 1986* (Vic), s 77A. **Tas:** *Corrections Act 1997* (Tas), s 79(5).

served must be capable of calculation by the magistrate under s 19AW, both for specification in the warrant of detention and in order to fix a new NPP. Therefore the scheme cannot be read as applying State laws which provide for determination of these matters by a State administrative body.

Calculating the “street time” where an automatic reduction applies

781. Where State law provides for “street time” to be credited, a further issue may arise as to the basis of calculation in cases of automatic revocation. In its 2006 report on federal sentencing,⁹²³ the Australian Law Reform Commission noted that “street time” for federal offenders is calculated from the date of release on parole to the date of revocation. Automatic revocation of a federal parole order occurs, not at the time of committing the offence while on parole, but only when the offender is actually sentenced for that offence. If sentencing for a breaching offence occurs after expiry of the parole period, revocation is deemed to have occurred at the end of the parole period. The practical effect is that, in those jurisdictions whose laws provide for automatic credit for “street time” (New South Wales, Queensland, Western Australia and South Australia), if the offender is sentenced for a breaching offence (that is, an offence committed during the parole period) after the expiry of the parole period, the whole (expired) parole period will be automatically credited as “street time”.

782. This position may be contrasted with the position which applies to State offenders. For example, in New South Wales, a State offender’s parole is deemed to have been revoked at the time of the first breach of parole conditions. Therefore the offender will be credited with “street time” only from the date of release on parole to the date of the first offence committed on parole. If the State offender commits an offence on the first day of release on parole, the offender may be entitled to no credit for any time on parole. By contrast, if a federal offender in New South Wales commits an offence on the first day of release on parole, any automatic revocation of parole will not occur until the offender is sentenced for that offence; the whole of the intervening period will be credited to the offender as “street time”. In a case in which the sentencing does not occur until after the expiry of the parole period, the practical effect may be that the whole of the period on parole will be automatically credited to the offender and that no period will remain to be served.⁹²⁴

Position when State/Territory provisions do not provide for reduction for “street time”

783. Where the relevant State/Territory law does not give the offender the benefit of a reduction for “street time” (that is, in Victoria, Tasmania, the ACT and the NT), a sentencing court fixing a NPP under s 19AR or a magistrate fixing a NPP under s 19AW “*must have regard to the period of time spent by the person on parole or licence before that parole order or licence is revoked or is to be taken to have been revoked*” (s 19AA(3)).

784. The requirement is only that the court or magistrate “have regard to” the period on parole. The parolee has no entitlement to any specific numerical deduction. Circumstances which may be relevant in

⁹²³ ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* [2006] ALRC 103, [24.28]-[24.29].

⁹²⁴ Although s 19AA(2) of the *Crimes Act 1914* refers to the relevant State law applying to the calculation of the balance of the federal sentence (which might suggest that the lesser reduction permitted under the State law would apply rather than the more generous federal provisions), obiter observations by Martin CJ in *DPP (Cth) v Wallace* [2011] WASC 286, [59], suggest the contrary.

determining the extent of any allowance to be made for the period spent on parole may include the duration and seriousness of any offending or other conduct in breach of parole conditions. For example, the allowance to be made may be reduced to the extent that the offender has used the period on parole to engage in serious offending or other serious breaches of parole.

5.11.10 Pre-release and leave of absence

785. In general State/Territory laws relating to leave of absence and pre-release apply to federal prisoners.⁹²⁵

786. The Commonwealth Attorney-General has a discretion to release an offender up to 30 days before the end of the NPP.⁹²⁶

5.11.11 Release on licence

787. A federal prisoner can be released on licence. This is a form of discretionary conditional release exercised by the Commonwealth Attorney-General or their delegate in exceptional circumstances.⁹²⁷

788. Section 19AP(4A) of the *Crimes Act 1914* (Cth) provides examples of grounds on which the Attorney-General may consider granting early release on licence. Grounds for release on licence include:

- where the prisoner is ill and requires treatment which is not available in the prison system;
- where the prisoner has assisted law enforcement authorities but this was not taken into account in sentencing; or
- where the prisoner co-operated with law enforcement agencies after sentencing.

789. A licence sets out the conditions that must be complied with, including a condition requiring the person to be of good behaviour.

790. When released on licence an offender is taken to be still under sentence and not to have served any time that remained at the beginning of the licence period, unless the licence period ends without being revoked.⁹²⁸

791. Like a parole order, a licence is subject to automatic revocation under s 19AQ or revocation by the Attorney-General under s 19AU of the *Crimes Act 1914* (Cth). See the discussion of the automatic or discretionary revocation of parole above for the relevant procedures and consequences.

⁹²⁵ *Crimes Act 1914* (Cth), s 19AZD.

⁹²⁶ *Crimes Act 1914* (Cth), s 19AL(3A).

⁹²⁷ *Crimes Act 1914* (Cth), s 19AP.

⁹²⁸ *Crimes Act 1914* (Cth), s 19AZC(1).

5.12 Options not generally available in sentencing a federal offender

793. A number of options which are commonly available for sentencing State or Territory offenders are not generally available in sentencing a federal offender. Examples are:

- convicting and discharging;
- fine without conviction;
- community correction order and the like without conviction; and
- combinations of sentences.

794. These options may, however, be picked up and applied to the sentencing of a child or young person for a federal offence pursuant to s 20C of the *Crimes Act 1914* (Cth), provided they are not inconsistent with other provisions of the *Crimes Act* or other Commonwealth laws. See “8.2 Children and young persons”.

5.12.1 Convicting and discharging

795. Upon conviction of a federal offender something more than the conviction itself must occur (such as a s 20(1)(a) bond or a fine). Options under State or Territory law for convicting and discharging an offender, without more, are not available in respect of a federal offender.⁹²⁹

5.12.2 Without conviction, imposing a fine

796. This option is not available in respect of a federal offender.⁹³⁰ Powers to impose a fine for a federal offence apply only on conviction.⁹³¹ Section 19B of the *Crimes Act 1914* (Cth), which provides for non-conviction dispositions, only permits the imposition of certain types of payments as a condition of a non-conviction bond – namely, reparation, restitution, compensation or costs – and not fines.

5.12.3 Without conviction, ordering a community correction order or like order

797. The State and Territory sentencing options referred to in s 20AB of the *Crimes Act 1914* (Cth) are only available in sentencing a federal offender on conviction.⁹³²

5.12.4 Combinations of sentences

798. A number of federal laws permit a court to impose both a fine and a sentence of imprisonment on a federal offender for a single offence.⁹³³ A fine can also be combined with a State or Territory sentencing option which is picked up and applied by s 20AB of the *Crimes Act 1914* (Cth).⁹³⁴ However, apart from

⁹²⁹ See *Lanham v Brake* (1983) 34 SASR 578, 580 (Cox J); *Mulcahy v Clark* [1991] Tas R 115 (Zeeman J), applying the reasoning of the WA Full Court in *Walsh v Giumelli* [1975] WAR 114.

⁹³⁰ *Commissioner of Taxation v Doudle* [2005] SASC 442.

⁹³¹ See particularly *Crimes Act 1914* (Cth), ss 4B and 4E.

⁹³² *DPP v Meyers* (Vic SC (Balmford J), 26 April 1996, unreported).

⁹³³ E.g. *Crimes Act 1914* (Cth), ss 4B, 4J and 4JA.

⁹³⁴ *Crimes Act 1914* (Cth), s 20AB(4).

such specific provisions, there is (in the view of the CDPP) no power to combine different sentencing options, as there is in some circumstances under State or Territory laws.⁹³⁵

⁹³⁵ In *Atanackovic v R* (2015) 45 VR 179, [55]-[58], [79]-[80]. [88]-[93], the Court left open the question whether (absent statutory authority) two sentencing options could be imposed for a single offence. See also *R v Tran* [2019] SASCFC 5, [48], [54].

6 Other orders on sentencing

6.1 Reparation – *Crimes Act 1914*, s 21B

799. If a person is convicted of a federal offence or placed on a bond under s 19B, s 21B of the *Crimes Act 1914* (Cth) enables the court to make a reparation order in respect of any loss suffered or expenses incurred “*by reason of the offence*”. A similar provision deals specifically with offences under s 217 of the *Social Security (Administration) Act 1999* (Cth): see s 218 of that Act. A court may also make a reparation order in relation to an offence which is taken into account under s 16BA of the *Crimes Act 1914*: s 16BA(5).

800. A reparation order may be made in favour of the Commonwealth or a public authority under the Commonwealth, by way of money payment or otherwise (s 21B(1)(c)). A court may also order reparation “*to any person, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the person by reason of the offence*” (s 21B(1)(d)).⁹³⁶ That is, a court has the same power to order reparation to an individual victim of a federal offence as it does to order reparation to the Commonwealth or a public authority of the Commonwealth.-

801. Before a reparation order can be made there must be “*a close or significant connection*” between the loss and the offence which caused it. This will not be made out where a “*secondary loss occurs by way of a ripple effect*”.⁹³⁷

802. In the case of joint offenders, each offender may be regarded as severally responsible for the whole of any resulting loss or damage, and a reparation order for the whole of the loss or damage may be made against one of the offenders.⁹³⁸

803. Reparation is not part of the punishment but a means of making an order for compensation.⁹³⁹ A court has a discretion whether to make a reparation order and as to the amount of the order.

804. In *Vlahov*,⁹⁴⁰ the Full Court of the Supreme Court of Western Australia held that, in deciding whether to make an order under s 21B and the amount of any such order, the court may have regard to the personal circumstances and means of the offender. However in *Hookham*,⁹⁴¹ the High Court left open that question.

⁹³⁶ This power was conferred by an amendment made by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth), which took effect on 8 March 2013.

⁹³⁷ *R v Foster* [2009] 1 Qd R 53, [74].

⁹³⁸ *R v Melrose* [2016] QCA 202, [16]-[17].

⁹³⁹ *R v Braham* [1977] VR 104; *R v Allen* (1989) 41 A Crim R 51, 56; *Customs v Labrador Liquor Wholesale Pty Ltd* [2006] QCA 558, [103]; *R v Foster* [2009] 1 Qd R 53.

⁹⁴⁰ *Vlahov v Commissioner of Taxation* (1993) 93 ATC 4501. See also *Liaver v Errington* [2003] QCA 5.

⁹⁴¹ *Hookham v R* (1994) 181 CLR 450. If the making of a reparation order is regarded as part of a sentence or order within s 16A of the *Crimes Act 1914* (Cth), it is arguable that a court sentencing a federal offender is required by s 16A(2)(m) to have regard to the means of the offender.

805. A person cannot be imprisoned for failing to pay a reparation order.⁹⁴²

806. The making of reparation may be relevant to sentencing. In particular, in sentencing a federal offender the court is required to take into account:

- any injury, loss or damage resulting from the offence (see “4.4.5 Injury, loss or damage resulting from the offence – s 16A(2)(e)”); and
- the degree to which a person has shown contrition for the offence by, amongst other things, taking action to make reparation for any injury, loss or damage resulting from the offence (see “4.4.7 Degree to which contrition is shown – s 16A(2)(f)”).

6.2 Forfeiture of property

807. Some Commonwealth statutes empower a court, upon convicting a person of a particular offence, to order forfeiture of property. An example is s.106 of the *Fisheries Management Act 1991* (Cth), which permits a court which convicts a person of a specified offence against the Act to order the forfeiture of a fishing boat or fishing equipment used in the commission of the offence, and fish on board the boat, or the proceeds of sale of such fish.

808. In addition, there are broad powers for a court to order forfeiture following conviction, pursuant to Part 2-2 of the *Proceeds of Crime Act 2002* (Cth).⁹⁴³ As a matter of practice, however, applications for such forfeiture are usually dealt with separately from a sentencing hearing.

6.3 Orders for banning, licence cancellation and disqualification

809. Some Commonwealth statutes empower a court, upon convicting a person of a particular offence, to make ancillary orders for banning or disqualifying a person from particular conduct, or for cancelling a licence or permit. An example is s.98 of the *Fisheries Management Act 1991* (Cth), which permits a court which convicts a person of a specified offence against the Act:

- to ban the offender from being on a boat in the Australian Fishing Zone (AFZ) with the intention of engaging in commercial fishing,
- to ban the offender from being on any Australian-flagged boat outside the AFZ for the purposes of commercial fishing, or
- to cancel or suspend a fishing concession.

Authority is divided on whether such an order may be backdated.⁹⁴⁴

810. Many State and Territory laws permit a court, following a conviction or finding of guilt, to make orders relating to the suspension or cancellation of a licence or permit, or disqualification of a person from an office, or from seeking or obtaining some licence, permit or authority. The most commonly used examples are provisions relating to licences and permits to drive a motor vehicle. Such powers are

⁹⁴² *Crimes Act 1914* (Cth), s 21B(2); *Social Security (Administration) Act 1999* (Cth), s 218(2).

⁹⁴³ Court-ordered forfeiture under Part 2-2 of the Act is distinct from forfeiture which occurs by operation of law following a conviction, pursuant to Part 2-3 of the Act.

⁹⁴⁴ *Stevenson v Dix* (1995) 81 A Crim R 167.

usually triggered by a conviction for, or finding of guilt of, a specified offence against the law of the particular jurisdiction; but in some instances, the power may arise where the offence is of a kind described more generically, or which involves conduct of a particular type. For example, s.55 of the *Sentencing Act 1997* (Tas) empowers a court that convicts an offender of a “motor vehicle offence” to order that the offender be disqualified from driving; “motor vehicle offence” is defined to include (amongst other things) “*an indictable offence ... in the commission of which a vehicle was used or the commission of which was facilitated by a motor vehicle*”. It is unclear whether such a power would be picked up and applied by the provisions of the *Judiciary Act 1903* (Cth) to the sentencing of a federal offender in the relevant jurisdiction.

7 Some procedural issues

7.1 Role of the prosecution in a sentence hearing

7.1.1 Prosecution not permitted or obliged to submit range of sentences

811. In *Barbaro*,⁹⁴⁵ the High Court overruled the decision of the Victorian Court of Appeal in *R v MacNeil-Brown*,⁹⁴⁶ which had required that, upon request by a sentencing court, the prosecution was obliged to provide a submission about the bounds of the available range of sentences (e.g. by submitting that a head sentence of between x and y years with a non parole period of between a and b years is appropriate). The plurality in *Barbaro* deprecated the practice required by the decision in *MacNeil-Brown*. The plurality held that the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge, as it was not a submission of law but merely a statement of opinion. The plurality said that it was “*neither the role nor the duty of the prosecution to proffer some statement of the specific result which ... should be reached or a statement of the bounds within which that result should fall.*”⁹⁴⁷

812. Subsequent decisions have strictly confined the application of the decision in *Barbaro*.

813. The High Court has held that its decision in *Barbaro* does not preclude a court from receiving a submission (agreed or otherwise) as to penalty in a civil penalty proceeding.⁹⁴⁸ The Court has also affirmed (by reference to its earlier decision in *Everett*⁹⁴⁹) that a prosecutor has a duty to assist a sentencing court to avoid appealable error.⁹⁵⁰

814. In *Castle*,⁹⁵¹ the Queensland Court of Appeal held that a submission by the prosecutor that the sentencing court should make a serious violent offence declaration, or should declare a later date for parole eligibility, would not have been inconsistent with the decision in *Barbaro*.

815. In *Holder*,⁹⁵² the Victorian Court of Appeal held that the prohibition on a prosecutor making submissions on a sentence range did not relieve the prosecutor from their obligation to assist the court, and that the failure of the prosecutor to offer appropriate assistance to a sentencing judge may be determinative of the result of a Crown sentence appeal. The prosecutor was not precluded from submitting to a sentencing court that sentences imposed on co-offenders were so low as to reduce or negate the

⁹⁴⁵ *Barbaro v R* (2014) 253 CLR 58.

⁹⁴⁶ *R v MacNeil-Brown* (2008) 20 VR 677.

⁹⁴⁷ *Barbaro v R* (2014) 253 CLR 58, [39].

⁹⁴⁸ *Commonwealth v Fair Work Building Industry Inspectorate* (2015) 258 CLR 482.

⁹⁴⁹ *Everett v R* (1994) 181 CLR 295.

⁹⁵⁰ *CMB v Attorney-General (NSW)* (2015) 256 CLR 356, [38], [64].

⁹⁵¹ *R v Castle; ex parte Attorney-General* [2014] QCA 276, [20].

⁹⁵² *DPP v Holder* (2014) 41 VR 467, [32], [34].

operation of the principle of parity, and in that case the failure of the prosecutor to do so precluded the Crown from so submitting on appeal.⁹⁵³

816. In *Matthews*,⁹⁵⁴ the Victorian Court of Appeal reaffirmed that *Barbaro* did not change the pre-existing practice regarding the duties of the Crown, other than by proscribing the submission of a quantified sentencing range. In particular, the Court held that nothing said in *Barbaro* detracts from the Crown's obligation to make clear what type of sentencing disposition, whether imprisonment or otherwise, it contends is necessary or appropriate.⁹⁵⁵
817. A majority of the Court in *Matthews* also held that the prohibition on counsel contending for a sentence within a particular range did not apply to defence counsel.⁹⁵⁶ The majority held that if defence counsel does make such a submission, it is permissible for the Crown to respond by telling the judge whether in the Crown's submission it would be open to sentence with that range; if the Crown contends that it would not, it may rely on comparative cases, current sentencing practice and other relevant considerations in support of that contention. However the Crown may not respond to a defence range by putting an alternative range.
818. In *Haynes*,⁹⁵⁷ the Victorian Court of Appeal said that *Barbaro* made clear that, although the prosecution should not express an 'opinion' as to the numerical terms of the appropriate sentencing range, it has a duty to assist the sentencing court to avoid appealable error. That duty includes identifying the kind of sentence disposition that is appropriate or inappropriate, such as a suspended sentence of imprisonment.⁹⁵⁸ Since in the instant case the prosecutor on the plea hearing failed to submit that a recognizance release order (RRO) under s.20(1)(b) of the *Crimes Act 1914* (Cth) was not a disposition reasonably open to the sentencing judge, the Director was not permitted to contend on appeal that the period to be served was manifestly inadequate.⁹⁵⁹
819. The effect of the decision in *Haynes* is that if the prosecution considers that the making of a RRO would be inappropriate or unavailable, it has a duty to make such a submission to the sentencing court. A RRO is generally unavailable if the head sentence or total effective sentence (TES) for a federal offence or offences is more than 3 years' imprisonment.⁹⁶⁰ The logic of the decision in *Haynes* is that if the prosecution considers that a RRO is not available because a head sentence or TES of more than 3 years is required for the federal offence(s), the prosecutor has a duty to make that submission to the

⁹⁵³ *DPP v Holder* (2014) 41 VR 467, [27]-[34].

⁹⁵⁴ *Matthews v R* (2014) 44 VR 280.

⁹⁵⁵ *Matthews v R* (2014) 44 VR 280, [27].

⁹⁵⁶ *Matthews v R* (2014) 44 VR 280, [22] – [25] (Warren CJ, Nettle and Redlich JJA). It is arguable that this part of the majority judgment was *obiter dicta*. Priest JA and Lasry AJA (at [162]) found it unnecessary to decide the point.

⁹⁵⁷ *DPP (Cth) v Haynes* [2017] VSCA 79.

⁹⁵⁸ *DPP (Cth) v Haynes* [2017] VSCA 79, [58]-[59], referring to *Malvaso v R* (1989) 168 CLR 227 and *Everett v R* (1994) 181 CLR 295.

⁹⁵⁹ *DPP (Cth) v Haynes* [2017] VSCA 79, [60]-[62],

⁹⁶⁰ See "5.10.4 Non-parole period (NPP) or recognizance release order (RRO)?".

sentencing court. It is implicit in *Haynes* that the Court considered that *Barbaro* does not preclude – and indeed requires – such a submission.⁹⁶¹

820. In some jurisdictions, legislation has also affected the application of the decision in *Barbaro*. In Queensland, the effect of *Barbaro* has been reversed by statute for State offences. A sentencing court is now specifically empowered to receive a sentencing submission made by a party stating the sentence, or range of sentences, the party considers appropriate for the court to impose.⁹⁶²

7.1.2 Duties of the prosecution on a plea hearing

821. The duties of the prosecution in relation to the sentencing of a federal offender are a manifestation of its wider duties. Those general duties are succinctly summarised in the *Prosecution Policy of the Commonwealth* as follows:⁹⁶³

[T]hroughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice. In the final analysis the prosecutor is not a servant of government or individuals - he or she is a servant of justice.

It is also important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context and seek to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the Court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.

822. The performance of the prosecution's duty to the court ensures that the defendant knows the nature and extent of the case against him or her, and thus has a fair opportunity of meeting it.⁹⁶⁴

823. In relation to a plea hearing, aspects of these duties may be conveniently grouped under these headings: disclosure; fact-finding; submissions generally; comparable cases; and submissions relating to sentencing dispositions.

824. **Disclosure:** The prosecution has continuing obligations of disclosure. In particular, subject to recognised exceptions, the prosecution must disclose to an offender (usually by disclosure to the offender's legal representatives) matters that may be reasonably regarded as relevant to sentencing. These may

⁹⁶¹ See also "7.1 Role of the prosecution in a sentence hearing". This aspect of the decision in *Haynes* has not yet been considered by the High Court or by an intermediate appellate court outside Victoria.

⁹⁶² *Penalties and Sentences Act 1992* (Qld), s 15. The position of the CDPP is that this provision is not picked up by the terms of the *Judiciary Act 1903* (Cth) as surrogate federal law and is therefore not applicable to the sentencing of federal offenders.

⁹⁶³ *Prosecution Policy of the Commonwealth* (2005 revision), p 2. See also the ethical duties imposed on legal practitioners by the rules of conduct for barristers and for solicitors in each jurisdiction, as they relate to the conduct of a prosecution. In jurisdictions which have adopted the uniform national rules, the applicable rules are the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, as applied by laws in each participating jurisdiction.

⁹⁶⁴ *R v Tait* (1979) 24 ALR 473, 477. The Court there added, "A failure by the Crown to discharge that duty may not only contribute to appealable error affecting the sentence, but may tend to deprive the defendant of a fair opportunity of meeting a case which might ultimately be made on appeal."

include, for example, full details relating to the known antecedents of the offender, details of charges and dispositions in relation to co-offenders or other persons where the dispositions may raise issues of parity, and any information or material that may affect an assessment of the moral culpability of the offender.

825. Disclosure obligations are dealt with in detail in the CDDP's "*Statement on Disclosure*" (March 2017).

826. **Fact-finding:** Fact-finding is a crucial aspect of sentencing, which may greatly affect the sentence to be imposed.⁹⁶⁵ In summary, the duties of the prosecution in relation to fact-finding include making an adequate presentation of the facts, identifying any aggravating features and admitting any mitigating features, fair testing of the offender's case, correcting any error of fact which emerges in the course of the plea and drawing attention to the offender's antecedents, including any sentence of imprisonment currently being served.⁹⁶⁶

827. What constitutes "an adequate presentation of the facts" depends on what is fair, reasonable and practical in the circumstances of the particular case.⁹⁶⁷ The duty is not limited to the facts of the offence; the court must be given a balanced view of the facts relevant to sentencing generally.⁹⁶⁸

828. In plea hearings, the rules of evidence usually do not apply and courts commonly receive and act on evidence that would not be admissible if they did. This approach is consistent with s 16A of the *Crimes Act 1914* (Cth).⁹⁶⁹ But that does not mean that a sentencing court must accept or act upon all assertions from the bar table or all material put forward on a plea hearing.⁹⁷⁰ If an assertion or evidence of a fact is challenged by an opposing party, the position at common law is that it can only be established by admissible evidence.⁹⁷¹ Therefore if an assertion or evidence is put forward by the offender which the prosecution wishes to contest or put in issue, the prosecutor has a responsibility to object to it. A common example is hearsay evidence relating to the offender's state of mind on a matter of significance⁹⁷² that the prosecution does not concede, when the offender has not given, and will not give, evidence. If the offender seeks to put forward such material, in relation to a matter that is disputed or not conceded by the prosecution, the prosecutor should object to its reception. Similarly if a self-serving statement by an offender (whether in the form of a letter to the court, a statement or an

⁹⁶⁵ *R v Olbrich* (1999) 199 CLR 270, [1].

⁹⁶⁶ *R v Tait* (1979) 24 ALR 473, 477; *R v Rumpf* [1988] VR 466, 476; *Matthews v R* (2014) 44 VR 280, [27], [153]. The duty to correct any error of fact which might have emerged in the course of the plea must be applied in a common sense way; it does not mean that the prosecutor is obliged to traverse every proposition put on behalf of an accused person in a lengthy sentencing hearing: *DPP v Bulfin* [1998] 4 VR 114, 123.

⁹⁶⁷ *R v Rumpf* [1988] VR 466, 472.

⁹⁶⁸ *R v Rumpf* [1988] VR 466, 472.

⁹⁶⁹ *Weininger v R* (2003) 212 CLR 629, [21].

⁹⁷⁰ *GAS v R* (2004) 217 CLR 198, [30]-[31].

⁹⁷¹ *R v Rumpf* [1988] VR 466, 471. Under s 4 of the Uniform Evidence Acts, while the rules of evidence do not apply to a sentencing hearing, the court may apply them. For an example of a case in which the rules of evidence were applied on the application of the prosecutor see *DPP (Cth) v Besim* [2017] VSCA 158, [74].

⁹⁷² Such as the existence and extent of contrition, the motive for the offending, whether the offender was affected by duress, or, in a terrorism case, the offender's renunciation of the ideology which motivated the offending. See "3.1.6 Hearsay assertions about an offender's state of mind".

affidavit) on a matter in issue is sought to be tendered on a plea hearing, the prosecutor should object to its reception, in the absence of viva voce evidence by the offender; or if it is received should seek to cross-examine the offender (at least if the evidence is in the form of an affidavit).⁹⁷³ In either circumstance (that is, whether hearsay or self-serving material is tendered), if the material is received in evidence, and the offender is not called to give evidence, the prosecutor should make clear that the matter is not conceded, and should contend (if appropriate) that no weight should be given to the material in the absence of evidence by the offender from the witness box.⁹⁷⁴

829. The prosecution should make any submissions necessary to assist the court in fact-finding.⁹⁷⁵ This may include identifying which facts are agreed or undisputed and which asserted facts are contested or not conceded. In relation to the latter, the prosecution should assist the court by identifying the evidence relevant to those facts, and by making clear and cogent submissions about what factual findings should or should not be made, and about whether (and if so how) the asserted facts are or are not relevant or significant.

830. **Submissions generally:** The Crown has a duty to assist the sentencing judge to avoid appealable error.⁹⁷⁶ Errors which may cause the sentencing discretion to miscarry include acting upon a wrong principle, mistaking the facts, failing to take into account some material consideration or being guided or affected by extraneous or irrelevant matters.⁹⁷⁷ The breadth of the range of errors which may cause the sentencing discretion to miscarry provides guidance as to the nature of the assistance which the prosecution must give the court.

831. The prosecutor must make appropriate submissions on relevant questions of law, including statutorily prescribed maximum penalties⁹⁷⁸ or minimum penalties,⁹⁷⁹ and by an appropriate reference to any legislation⁹⁸⁰ or special principles of sentencing which might reasonably be thought to be relevant to

⁹⁷³ The importance of the prosecutor objecting to such evidence is illustrated by *Van Zwam v R* [2017] NSWCCA 127 (a case involving a federal offence), in which it was held (by majority) that the sentencing judge was not entitled to disregard entirely evidence in an affidavit by the offender, when the prosecutor neither objected to its reception nor sought to cross-examine the offender. In *Imbornone v R* [2017] NSWCCA 144, [3]-[9], [57], the Court emphasised that the error in *Van Zwam* was that the sentencing judge disregarded the affidavit entirely, and that a sentencing court properly may give such evidence (especially when served late) little weight; but the decision in *Van Zwam* highlights the need for prosecutors to be effective contradictors in plea hearings. See also *R v Succarieh* [2017] QCA 85, [104]-[124].

⁹⁷⁴ See the summary of relevant principles in *Imbornone v R* [2017] NSWCCA 144, [57].

⁹⁷⁵ *Barbaro v R* (2014) 253 CLR 58, [39].

⁹⁷⁶ *R v Tait* (1979) 24 ALR 473, 477; *CMB v Attorney-General (NSW)* (2015) 256 CLR 356, [38]. This duty is a corollary of the conferral of appeal rights on the prosecution: *R v Tait* (1979) 24 ALR 473, 477; *DPP v Bulfin* [1998] 4 VR 114, 134. A material failure to fulfil the duty may lead an appellate court to dismiss a prosecution appeal, despite error being shown.

⁹⁷⁷ *House v R* (1936) 55 CLR 499, 505.

⁹⁷⁸ *R v Travers* (1983) 34 SASR 112, 115-6.

⁹⁷⁹ *R v Ireland* (1987) 49 NTR 10, 21.

⁹⁸⁰ *R v Travers* (1983) 34 SASR 112, 115-6.

the case in hand⁹⁸¹ (except to the extent that the legislation or principles are trite⁹⁸² or well-known to the sentencing judge⁹⁸³).

832. **Comparable cases:** The prosecution must assist the court to fulfil its duty to give proper consideration to previous sentencing decisions.⁹⁸⁴ A court sentencing a federal offender has a duty “*to have regard to what has been done in comparable cases throughout the Commonwealth*”.⁹⁸⁵ Consistency in sentencing for federal offenders is achieved through the work of the intermediate appellate courts (ie not first instance decisions).⁹⁸⁶ Reference to comparable cases has two purposes. First, it “*can and should provide guidance as to the identification and application of relevant sentencing principles*”.⁹⁸⁷ Second, it “*may yield discernible sentencing patterns and possibly a range of sentences against which to examine a proposed ... sentence*”;⁹⁸⁸ that is, examination of comparable cases may provide a “*yardstick*”.⁹⁸⁹ However sentences are not binding precedents, and do not necessarily disclose the correct range or otherwise determine the upper and lower limits of sentencing discretion.⁹⁹⁰ These principles must underlie prosecution references to comparable cases.

833. The prosecution must ensure that the sentencing court is “*properly informed*” about comparable sentences. The authorities provide guidance on how that duty is, and is not, to be fulfilled. In *Pham*, the plurality emphasised that “*presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided*”.⁹⁹¹ This precept is directed to the use of “*bare statistics*” about sentences passed, which tell the sentencing judge “*very little that is useful if the sentencing judge is not also told why those sentences were fixed as they were*”.⁹⁹² A table of sentences imposed in other cases “*is useful if, but only if, it is accompanied by an articulation of what are seen as the unifying principles which those disparate sentences may reveal*”.⁹⁹³

⁹⁸¹ *R v Tait* (1979) 24 ALR 473, 477.

⁹⁸² *Matthews v R* (2014) 44 VR 280, [153] (Priest JA and Lasry AJA).

⁹⁸³ *R v Travers* (1983) 34 SASR 112, 115-6.

⁹⁸⁴ *R v Ogden* [2014] QCA 89, [7]; *DPP (Cth) v Thomas* (2016) 53 VR 546, [179].

⁹⁸⁵ *R v Pham* (2015) 256 CLR 550, [24]. In *Pham*, the High Court held that it is an error for a State court sentencing a federal offender to sentence in accordance with the sentencing practices of that State to the exclusion of sentencing practices in other Australian jurisdictions. However in *R v Nakash* [2017] NSWCCA 196, [18], Simpson JA observed that nothing in the judgment of the plurality in *Pham* prevents reference to sentences imposed in respect of comparable offences under State law, and that such reference may be particularly necessary where there is no relevant pattern of sentencing in respect of the Commonwealth offence.

⁹⁸⁶ *R v Pham* (2015) 256 CLR 550, [29], [50]; *R v Mitric* [2017] SASCF 178, [32]; *R v Burt* [2018] SASCF 5, [64]-[65].

⁹⁸⁷ *R v Pham* (2015) 256 CLR 550, [27].

⁹⁸⁸ *R v Pham* (2015) 256 CLR 550, [27].

⁹⁸⁹ *Hili v R* (2010) 242 CLR 520, [54]; *R v Pham* (2015) 256 CLR 550, [29].

⁹⁹⁰ *R v Pham* (2015) 256 CLR 550, [27].

⁹⁹¹ *R v Pham* (2015) 256 CLR 550, [28]. This echoes what was previously said in *Hili v R* (2010) 242 CLR 520, [48].

⁹⁹² *Wong v R* (2001) 207 CLR 584, [59] (emphasis in original). See the analysis in *DPP (Cth) v Thomas* (2016) 53 VR 546, [179].

⁹⁹³ *DPP (Cth) v Thomas* (2016) 53 VR 546, [179], referring to *Wong v R* (2001) 207 CLR 584, [59].

834. A table or schedule of previous sentencing decisions can be of great assistance to judges, but only if it offers considerably more than numerical information.⁹⁹⁴ It must be accurate⁹⁹⁵ and it must contain sufficient information about the features of each case to enable useful comparisons to be drawn.⁹⁹⁶ Its function is to provide a sound basis from which the judge may determine whether there is a relevant sentencing pattern to be discerned from the history of sentences available.⁹⁹⁷ In sentencing for quantity-based drug offences, reference to the relevant quantities in other cases by use of a common denominator (such as the proportion of a commercial quantity) is essential for meaningful comparisons.⁹⁹⁸
835. For a table of decisions provided by the prosecution to be of assistance, the prosecution must, in addition to providing necessary information about the cases, make clear how each case is relied upon:⁹⁹⁹ that is, whether it is comparable,¹⁰⁰⁰ or whether its relevance is that it is so different that the sentence imposed there would not lie within a sound exercise of the discretion in the present case.¹⁰⁰¹
836. The mere fact that the number of relevant comparable cases is limited does not lessen the need for the prosecution to make clear its position as to where the sentencing range fell; that could be done by reference to broadly ‘like’ or ‘unlike’ cases.¹⁰⁰² If there are no directly comparable cases, courts adopt *“the conventional common law method of reasoning by analogy and extrapolation from the available sentencing information ... and applying established sentencing principles”*.¹⁰⁰³ If there is no established

⁹⁹⁴ *DPP (Cth) v Thomas* (2016) 53 VR 546, [179]. See also *Noble v R* [2018] NSWCCA 253, [56].

⁹⁹⁵ *DPP (Cth) v Thomas* (2016) 53 VR 546, [181].

⁹⁹⁶ *DPP (Cth) v Thomas* (2016) 53 VR 546, [180].

⁹⁹⁷ *DPP (Cth) v Thomas* (2016) 53 VR 546, [182].

⁹⁹⁸ *DPP (Cth) v KMD* [2015] VSCA 255, [54]–[57]. However, care must be taken not to treat the quantity as if it were the chief factor in fixing the sentence: see *Wong v R* (2001) 207 CLR 584, [67]–[78].

⁹⁹⁹ *DPP (Cth) v Thomas* (2016) 53 VR 546, [186].

¹⁰⁰⁰ In *Nguyen v R* [2016] VSCA 198, [73], Redlich JA (with whom Tate and Whelan JJA agreed) observed, *“Cases are likely to be comparable where the objective seriousness of the offender’s conduct is similar to that of the subject offence. ... [A]ppellate courts ... may seek to identify the applicable range by characterising the objective seriousness of the offence as falling within the low, mid or the high range of seriousness of the offence”*. As to the danger of inappropriate use of such categorisation, see *DPP v Weybury* [2018] VSCA 120, [33]–[34], [54]. See also “3.4 Reasonable consistency in sentencing”.

¹⁰⁰¹ *DPP (Cth) v Thomas* (2016) 53 VR 546, [180]. Although in *Thomas*, the Victorian Court of Appeal said (at [182]) that the table will be of limited assistance if it *“does not on its face illuminate the relevance of the cases listed”* (emphasis added), in *DPP (Cth) v Haynes* [2017] VSCA 79, [35], the Court cited *Thomas* as authority for the proposition that *“statistics and tables of cases can only be of assistance to a sentencing judge if they are spoken to by counsel; that is, if their precise relevance for the sentencing task is actually explained”* (emphasis added). Similarly, in *DPP (Cth) v Masange* [2017] VSCA 204, [49], the Court said, *“In order to discharge its duty to assist the sentencing judge to avoid appealable error, the prosecution must speak to such a schedule and articulate the unifying principles revealed by the cases referred to”* (emphasis added). There does not seem to be any reason in principle why the prosecution could not explain the relevance or significance of a case cited in a table either in written or oral submissions, rather than only in the table itself.

¹⁰⁰² *DPP (Cth) v Haynes* [2017] VSCA 79, [35].

¹⁰⁰³ *DPP (Cth) v KMD* [2015] VSCA 255, [127]. The absence of comparable authorities does not leave open a wider range of permissible sentences than otherwise would be the case: *R v Goodwin; ex parte Attorney-General (Qld)* [2014] QCA 345, [5].

pattern of sentences for the instant offence, guidance may be obtained from sentencing for another offence which carries the same maximum penalty and involves similar conduct.¹⁰⁰⁴

837. Tables summarising decisions of intermediate appellate courts on sentencing for the subject offence (or related offences) may be particularly helpful, if they provide sufficient information about the features of each case to enable useful comparisons to be drawn.¹⁰⁰⁵ If there are decisions of intermediate appellate courts which summarise sentences imposed in other cases for the relevant offence (or related offences), those decisions should be referred to.¹⁰⁰⁶

838. **Submissions relating to sentencing dispositions:** Since the decision of the High Court in *Barbaro*,¹⁰⁰⁷ the prosecution is precluded from stating to a sentencing court the bounds of an “available range” of sentences, or from proffering “some statement of the specific result” of the exercise of sentencing discretion. However subsequent decisions have clarified that *Barbaro* does not limit the scope of the Crown’s pre-existing duties in relation to submissions concerning the exercise of the sentencing discretion. See “7.1.1 Prosecution not permitted or obliged to submit range of sentences”.

839. The obligations of the prosecution include the following:

- (a) The prosecution must make clear what type of sentencing disposition, whether imprisonment or otherwise, it contends is necessary or appropriate.¹⁰⁰⁸
- (b) If it is submitted for an offender that he or she should receive a non-custodial disposition or a suspended term of imprisonment, or if the sentencing judge indicates that he or she is considering such a course, the prosecution should make clear whether it contends, and if so why, a disposition of the kind proposed would not be a proper exercise of sentencing discretion.¹⁰⁰⁹ For example, opposition to a wholly-suspended sentence may be expressed by submitting that, for specified reasons, an immediate custodial sentence is the only appropriate option.¹⁰¹⁰

¹⁰⁰⁴ *Schanker v R* [2018] VSCA 94, [224].

¹⁰⁰⁵ *DPP (Cth) v Brown* [2017] VSCA 162, [71]. The table provided by the prosecution in that case is attached as an Appendix to the judgment.

¹⁰⁰⁶ See *DPP (Cth) v KMD* [2015] VSCA 255, [67]-[81].

¹⁰⁰⁷ *Barbaro v R* (2014) 253 CLR 58.

¹⁰⁰⁸ *Matthews v R* (2014) 44 VR 280, [27]. The reference to “necessary or appropriate” appears to countenance a submission in every case that a particular sentence type would be appropriate, or would be more appropriate than another sentence type. That is, the prosecution is not restricted to submitting in terms that imposing a sentence of another particular type would constitute appealable error. See also *Matthews* at [22]-[25]; *R v Malvaso* (1989) 50 SASR 503, 509. The submission may be expressed by reference to the requirements of the *Crimes Act 1914* (Cth), s 16A(1) (sentence or order must be “of a severity appropriate in all the circumstances of the offence”), s 16A(2)(k) (the need to ensure that the offender is “adequately punished”) or s 17A (sentence of imprisonment to be imposed only if the court is satisfied, after having considered all other available sentences, that “no other sentence is appropriate” in all the circumstances of the case).

¹⁰⁰⁹ *Malvaso v R* (1989) 168 CLR 227; *Everett v R* (1994) 181 CLR 295. See also *R v Jermyn* (1985) 2 NSWLR 194, 197-8, 203-5; *DPP v Waack* (2001) 3 VR 194. This principle continues to apply after *Barbaro*: *Matthews v R* (2014) 44 VR 280, [27]; *DPP (Cth) v Haynes* [2017] VSCA 79, [58]-[59]. In *CMB v Attorney-General (NSW)* (2015) 256 CLR 356, [64], Keifel, Bell and Keane JJ said, “Where the sentencing judge indicates the form of proposed sentencing order and the prosecutor considers that such a penalty would be manifestly inadequate, the prosecutor discharges his or her duty to the court by so submitting.”

¹⁰¹⁰ *DPP v Gany* [2006] VSCA 148, [24]. The submission may be expressed by reference to the requirements of s 17A of the *Crimes Act 1914*.

- (c) If the prosecution contends that a sentence of imprisonment is the only appropriate option, the prosecution should also make clear (if applicable) that the appropriate head sentence or aggregate sentence should be such that a recognizance release order is not available, or that a recognizance release order is presumptively required (as the case may be).¹⁰¹¹
- (d) If it is submitted for an offender that an aggregate penalty should be imposed for two or more offences, or if the sentencing judge indicates that he or she is considering such a course, the prosecution should make clear whether it contends, and if so why, such an aggregate penalty would not be a proper exercise of sentencing discretion.¹⁰¹²
- (e) If defence counsel contends for a particular sentence, or for a sentence within a particular range, it is permissible for the prosecution to respond by telling the judge whether in its submission it would be open to sentence within that range; if the prosecution contends that it would not, it may rely on comparative cases, current sentencing practice and other relevant considerations in support of that contention. However the prosecution may not respond to a defence range by putting an alternative range.¹⁰¹³

840. The prosecution is required to make its submissions as to sentence fairly and in an even-handed manner; the Crown does not, as an adversary, press for a heavy sentence.¹⁰¹⁴

7.2 Deferring a sentence

841. Some State or Territory laws permit a sentencing court to defer sentencing an offender for a period of time.¹⁰¹⁵ Since there is no express or implicit Commonwealth provision to the contrary, and since such powers can be characterised as matters of procedure, such State or Territory laws are probably picked up and made applicable to the sentencing of federal offenders by s 68 or s 79 of the *Judiciary Act 1903* (Cth) or (if the offender is “a child or young person”) by s 20C of the *Crimes Act 1914* (Cth).

842. In addition, subject to any statutory requirement, a court has power to defer sentencing for any proper purpose affecting the sentencing task.¹⁰¹⁶

¹⁰¹¹ *DPP (Cth) v Haynes* [2017] VSCA 79. As to when a sentencing court has an open discretion to impose, or is presumptively required to impose, a RRO, or conversely when it is precluded from doing so, see “5.10.4 Non-parole period (NPP) or recognizance release order (RRO)?”. In most cases a RRO is *optional* if the sentence of imprisonment, or total effective sentence (or total period including other unserved periods of imprisonment for a federal offence) for federal offences, is 6 months or less, is *presumptively required* if it is more than 6 months but not more than 3 years, and *precluded* (in favour of a non-parole period) if it is more than 3 years. Therefore the implication of the decision in *Haynes* is that the prosecution should consider into which of the relevant bands the sentence or total effective sentence (or total including other unserved periods) should fall, or below which it should not fall, and should frame its submission in relation to a RRO, straight sentence or non-parole period accordingly, by reference to the applicable legislation. Failure to do so may preclude such a submission being made on appeal.

¹⁰¹² *DPP v Frewstall Pty Ltd* (2015) 47 VR 660, [113]-[124]. As to when an aggregate penalty is appropriate, see “7.10.8 When an aggregate penalty is or is not appropriate”.

¹⁰¹³ *Matthews v R* (2014) 44 VR 280, [22]-[25].

¹⁰¹⁴ *R v Tait* (1979) 24 ALR 473, 477.

¹⁰¹⁵ E.g. *Sentencing Act 1991* (Vic), s 83A, which permits a court to defer sentencing for up to 12 months.

¹⁰¹⁶ *R v Togias* [2001] NSWCCA 522, [6].

7.3 Diversion

843. Statutory diversion programs under State or Territory law (for example, s 59 of the *Criminal Procedure Act 2009* (Vic)) which do not involve the imposition of a sentence are also probably picked up and applied to the sentencing of federal offenders by ss 68 and 79 of the *Judiciary Act 1903* (Cth) or (if the offender is “a child or young person”) by s 20C of the *Crimes Act 1914* (Cth). There does not appear to be any express or implied contrary provision in Commonwealth law, thus leaving room for state procedural law to be picked up and applied.

844. A successfully completed diversion does not form part of a person’s criminal history or antecedents.

845. A diversion regime under State or Territory law is incapable of being applied to federal offenders if it involves the exercise of judicial power by a person or body other than a court under Chapter III of the Constitution.¹⁰¹⁷

7.4 Court-supervised restorative justice schemes

846. A number of States and Territories have schemes by which offenders may participate in meetings with victims of the offence or their families in a supervised setting. Such schemes are generally known as restorative justice schemes.

847. The schemes vary in relation to:

- The classes of offenders who are eligible for the scheme. Some schemes are available only to young offenders, or to indigenous offenders. Some schemes are unavailable for particular types of offences.
- The procedures for entry into the scheme.
- Whether admission to the offending is a pre-condition for entry into the scheme.
- Whether participation in the scheme affects criminal charges against the offender.
- Whether participation or non-participation in the scheme affects any sentence imposed for the offence, and if so in what way.

848. Given the variety of State and Territory schemes it is not possible to generalise about whether they apply in relation to federal offences. Consideration must be given to whether the particular scheme is applied by a law of the Commonwealth (such as s 68 or s 79 of the *Judiciary Act 1903* (Cth))¹⁰¹⁸ or s 20C of the *Crimes Act 1914* (Cth)) or (if not) whether the law of the State or Territory applies in its own terms to a federal offence. In the latter case, a question may arise whether any such law is to that extent invalid (pursuant to s 109 of the Constitution) due to inconsistency with Part 1B of the *Crimes Act 1914* or

¹⁰¹⁷ *Newman v A (A Child)* (1992) 9 WAR 14.

¹⁰¹⁸ See “2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79”.

another law of the Commonwealth, or whether the law is within the power of the State or Territory legislature.¹⁰¹⁹

849. The CDPP has considered whether the restorative justice scheme of the ACT (*Crimes (Restorative Justice) Act 2004* (ACT)) applies in relation to federal offences. The view of the CDPP is that the legislation does not apply in its own terms and that it is not picked up and applied as surrogate federal law by a law of the Commonwealth.

7.5 Taking other federal offences into account

850. Section 16BA of the *Crimes Act 1914* (Cth) enables other federal offences (but not State/Territory offences) to be taken into account in sentencing a federal offender. The provision applies only where the person is convicted of the primary offence (and not if a non-conviction order is made, such as a s 19B bond¹⁰²⁰).

851. The procedural steps necessary for exercising this power are set out in s 16BA. The statutory requirements are mandatory.¹⁰²¹ The procedure begins with the CDPP preparing, filing and serving a document in the prescribed form which lists the offence(s) which it seeks to have taken into account (s 16BA(1)).¹⁰²² There is no requirement that the offender has been charged with the offence which is sought to be taken into account. An offence may not be taken into account unless the offender admits guilt to the offence (s 16BA(2)). The maximum penalty for the offence on which the offender is sentenced is not affected by taking into account another offence (s 16BA(4)).¹⁰²³

852. If an offence is taken into account under s 16BA, the consequences are that:

- no proceeding may be taken or continued in respect of that offence, unless the conviction for the offence in respect of which the offence is taken into account is quashed or set aside (s 16BA(8));
- the offender's admission of guilt is not admissible in proceedings for that offence or another offence listed in the form (s 16BA(9)); and
- the offence taken into account is not to be regarded for any purpose as an offence of which a person has been convicted (s 16BA(10)).

853. It is an error for a sentencing court to record a conviction for an offence which is taken into account.¹⁰²⁴

¹⁰¹⁹ State and Territory laws cannot, of their own force, bind a court exercising federal jurisdiction: *Solomons v District Court (NSW)* (2002) 211 CLR 119, [21]; *R v Gee* (2003) 212 CLR 230, [100]; *Hili v R* (2010) 242 CLR 520, [21]; *Rizeq v R* (2017) 262 CLR 1, [15], [21], [57], [60]-[61].

¹⁰²⁰ *R v Boulous* (1988) 37 A Crim R 461; *Dreezer v Duvnjak* (1996) 6 Tas R 294.

¹⁰²¹ *McMillan v Bierwirth* (1987) 49 SASR 403.

¹⁰²² The prescribed form is Form 1 in the *Crimes Regulations 2019* (Cth).

¹⁰²³ The reference to the maximum penalty must be taken as a reference to the maximum penalty provided by statute, not the maximum that could properly be imposed having regard to the circumstances of the offending: cf. *Abbas v R* [2013] NSWCCA 115, [46]-[48].

¹⁰²⁴ *R v Cook* [2018] TASCCA 20, [6]-[7], [27], [80].

854. In *Assafiri*,¹⁰²⁵ the court observed that, although the terms of s 16BA might suggest that a federal offence can be taken into account when sentencing for more than one federal offence, it cannot have been the intention of the legislature that more than one sentence could be increased by taking into account the same offences, as that would result in double counting the matters being taken into account. Therefore, despite the terms of the section, the form pursuant to s 16BA should refer to only one offence, being that to which the matters taken into account should apply.¹⁰²⁶ This construction does not prevent more than one federal offence being taken into account in sentencing for one federal offence.
855. In relation to a cognate provision in New South Wales, it has been held that an offence which is taken into account in sentencing for an offence cannot be used as a basis for wholly or partly cumulating the sentence upon another sentence, as that would involve double counting of the offence being taken into account.¹⁰²⁷ It remains to be determined whether a similar limitation applies in taking an offence into account under s 16BA.¹⁰²⁸
856. There is nothing in s 16BA to preclude summary offences being taken into account by a court sentencing an offender on indictment. However the converse is prohibited: a sentencing court may not take into account under this section any indictable offence that it would not have jurisdiction to try (even if the prosecution so requested and the defendant so consented) (s 16BA(3)). Therefore a magistrate may not take into account an indictable offence under the s 16BA procedure, even if the offence would be triable summarily. But this provision does not prevent a court from taking into account an indictable offence where the court has jurisdiction to sentence a person charged with that offence (s 16BA(3A)). This exception allows, for example, a superior court in one State to take into account an indictable federal offence committed in another State, even though the court would not have jurisdiction (by reason of s 80 of the Constitution) to try the offence.
857. Apart from the limitation imposed by s 16BA(3), on its face s 16BA allows any federal offence to be taken into account in sentencing an offender for any other federal offence.¹⁰²⁹ Pursuant to s 16BA(2), a sentencing court has a discretion whether to take an offence into account. At common law, it has generally been regarded as inappropriate to take into account offences which differ greatly in gravity or

¹⁰²⁵ *Assafiri v R* [2007] NSWCCA 159, [8]-[9]. The observations were *obiter dicta*.

¹⁰²⁶ *Assafiri v R* [2007] NSWCCA 159, [8]-[9].

¹⁰²⁷ *Sparos v R* [2013] NSWCCA 223.

¹⁰²⁸ Under the State legislation considered in *Sparos v R* [2013] NSWCCA 223, a sentencing court could take an offence into account in “*dealing with the offender for the principal offence*”. Fullerton J (with whom Beazley P agreed) considered (at [5]) that that power was “*intended to operate at the time that the sentence for that offence is imposed and not at the next stage in the sentencing process, when questions of accumulation or concurrency are considered and before the sentencing order is ultimately made.*” By contrast, s 16BA(2) provides that a court sentencing a federal offender may, if it thinks fit, take the offence or offences into account “*in passing sentence on him or her for the offence or offences of which he or she has been convicted*”. It seems at least arguable that “*passing sentence*” includes the making of orders for the commencement of a sentence, or fixing the degree of concurrency or cumulation of a sentence, for the principal offence.

¹⁰²⁹ In *R v Nguyen* [2010] NSWCCA 238 two federal offences, each punishable by life imprisonment, were taken into account in sentencing the offender for another offence punishable by life imprisonment.

type from the offence for which the offender is to be sentenced.¹⁰³⁰ But it may be proper to take into account offending of a different type if it is related to the offending for which the offender is to be sentenced: for example, in relation to sentencing for a drug offence, a money laundering offence committed as part of the same criminal enterprise.¹⁰³¹

858. As to the effect on sentencing of taking an offence into account, see “4.4.2 Other offences taken into account – s 16A(2)(b)”.

859. It is unclear whether s 16BA implicitly precludes a State or Territory law which allows an offence to be taken into account in sentencing from applying (by virtue of s 68 or s 79 of the *Judiciary Act 1903* (Cth)) to the sentencing of a federal offender. That is, it is uncertain whether there is any means by which a State or Territory offence may be taken into account in sentencing a federal offender.¹⁰³²

860. It is also unclear whether s 16BA would have the effect of covering the field or otherwise excluding the operation of a State or Territory law which permitted a federal offence to be taken into account in sentencing for a State or Territory offence.¹⁰³³

7.6 Dealing with summary offences in a superior court

861. There is no general provision in Commonwealth law which deals with the power of a superior court to impose a sentence for a summary offence. Whether a State or Territory law which permits a superior court to sentence an offender for a summary offence in certain circumstances therefore depends upon the provisions of the *Judiciary Act 1903* (Cth).

862. Prior to 13 October 1999, s 68(3) of the *Judiciary Act 1903* (Cth) conferred the power to exercise summary jurisdiction in respect of federal offenders only on magistrates. This had the effect of precluding superior court judges from exercising jurisdiction over a Commonwealth summary offence. However, following an amendment to s 68(3),¹⁰³⁴ a judge before whom a person appears on an indictable Commonwealth offence can also hear and determine a Commonwealth summary offence (apart from *Corporations Act* offences).

¹⁰³⁰ *R v White* (1981) 28 SASR 9, 11–12; *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [46]–[57].

¹⁰³¹ E.g. *R v Nakash* [2017] NSWCCA 196. Another example is *R v Lamella* [2014] NSWCCA 122, in which corruption offences were taken into account in sentencing a Customs officer for his participation in a drug importation.

¹⁰³² See generally *Adams v Western Australia* [2014] WASCA 191, where relevant authorities are collected.

¹⁰³³ The decision in *Adams v Western Australia* [2014] WASCA 191 may be read as supporting a conclusion that it can, but the majority in that case (Buss and Newnes JJA) emphasised the differences between the legislation there under consideration and legislation authorising offences to be taken into account.

¹⁰³⁴ *Law and Justice Amendment Act 1999*; Item 3 of Schedule 10.

863. State and Territory laws provide for circumstances in which a superior court can determine a summary offence.¹⁰³⁵ In *Adams*,¹⁰³⁶ the majority (Buss and Newnes JJA; Mazza JA contra on this point) held that a State law which permitted a pending charge to be dealt with summarily was procedural in nature, and did not conflict with s 16BA of the *Crimes Act 1914* (Cth). The Court held that the State law was applied by s 68 and s 79 of the *Judiciary Act 1903* (Cth) as surrogate federal law in relation to the sentencing of a federal offender.

864. It should also be noted that where the summary offence is against the *Corporations Act 2001* (Cth), only a magistrate, rather than a judge, can exercise summary jurisdiction.¹⁰³⁷ So summary offences against the *Corporations Act 2001* (Cth) cannot be transferred to a superior court.

865. The Victorian Court of Appeal has doubted whether an uplifted summary charge can be dealt with as part of an aggregate sentence imposed on indictment.¹⁰³⁸

7.7 Specifying a reduction for undertaking to co-operate in future - Crimes Act 1914 s 16AC

7.7.1 The requirements of Crimes Act 1914, s 16AC

866. If a federal offender has undertaken to co-operate with law enforcement agencies in future proceedings (including confiscation proceedings) relating to any offence (defined as a federal, state or territory offence), and the severity of the sentence is reduced as a result of that undertaking, the court sentencing the offender is required by s 16AC(2) of the *Crimes Act 1914* (Cth):

- to state that the sentence is being reduced for that reason and
- to specify what the sentence would have been but for that reduction.¹⁰³⁹

867. The requirements of s 16AC(2) apply regardless of whether the reduction is reflected in the severity of the sentence or order or a reduction in the non-parole period (s 16AC(1)). That is, the section applies whether the sentence type is reduced (e.g. from imprisonment to an order applied under s 20AB of the *Crimes Act*), the length of a sentence of imprisonment is reduced, or the length of the period, or minimum period, of imprisonment to be served is reduced. The “but for” sentence must specify all the reductions given.

¹⁰³⁵ For example, s 145 of the *Criminal Procedure Act 2009* (Vic) requires a magistrate, on committing an accused for trial, to order that all related charges for summary offences be transferred to the court that the accused has been committed to. Section 243 of the Act also permits the Supreme Court and County Court to hear and determine an unrelated summary offence under certain circumstances.

¹⁰³⁶ *Adams v Western Australia* [2014] WASCA 191.

¹⁰³⁷ *Corporations Act 2001* (Cth), s 1338B(2) which is of the same effect as the *Judiciary Act 1903* (Cth), s 68(3) prior to its amendment in 1999. Consequently summary offences against the *Corporations Act* cannot be dealt with by a judge of a District Court, the County Court or a Supreme Court.

¹⁰³⁸ *Fitzpatrick v R* [2016] VSCA 63, [51].

¹⁰³⁹ See *R v Hodgson* (2002) 84 SASR 168, regarding s.21E of the *Crimes Act 1914* (Cth), as then in force. Section 21E was repealed with effect from 27 November 2015 and replaced by s 16AC, which is in similar terms.

868. If the offender fails to cooperate in accordance with the undertaking, the CDPP may appeal against the inadequacy of the reduced sentence (s 16AC(3)). The appeal court may increase the sentence up to the “but for” sentence stated by the sentencing court (s 16AC (4)).¹⁰⁴⁰

869. Section 16AC is predicated on the granting of a designated benefit in consideration of a promise which is sufficiently certain in its terms that a breach of it can be the subject of an appeal. While the promise or undertaking does not have to be expressed in a particular fashion, it must be given in clear terms and be given in contemplation of the possible institution of some proceeding.¹⁰⁴¹ The CDPP practice in most jurisdictions is to require the offender to sign a written undertaking and then call the offender at the plea hearing to give the undertaking under oath.

7.7.2 Distinction between past and future cooperation

870. The position under s 16AC is to be contrasted with, and kept separate from, taking into account past cooperation in accordance with s 16A(2)(h) of the *Crimes Act 1914*.

871. **Any cooperation with authorities prior to sentence** is required to be taken into account in sentencing under s 16A(2)(h).¹⁰⁴² Nothing in the *Crimes Act* requires a court to quantify the effect of taking such cooperation into account, and it is generally taken into account as simply one of the matters to be considered as part of the instinctive synthesis of relevant considerations in arriving at the appropriate sentence.¹⁰⁴³

872. By contrast, if a person sentenced for a federal offence has **undertaken to co-operate with law enforcement authorities in future proceedings**, the extent of the reduction in sentence consequent upon such future cooperation must be specifically stated and exclusively linked to that undertaking, in accordance with s 16AC.

873. If both past and future cooperation give rise to a two-fold basis for mitigation of penalty, the sentencing judge should not combine them to produce a global reduction for “cooperation with authorities”.¹⁰⁴⁴ Instead, any reduction in the penalty consequent upon *past cooperation* must be taken into account generally in fixing the sentence or making any order. Any *additional* reduction referable to an undertaking for *future assistance* must be specifically quantified in accordance with s 16AC.¹⁰⁴⁵

7.7.3 Determining the reduction to be given under s 16AC

874. Promised future cooperation ought not be wholly disregarded simply because the authorities are not able to immediately use the testimony. The discount is not just a price fixed by the value of the

¹⁰⁴⁰ See “7.7.7 Consequences of breach of an undertaking to co-operate”.

¹⁰⁴¹ *R v Burns* (Vic CCA, 9 November 1992, unreported); *R v Gangelhoff* [1998] VSCA 20; *DPP v Parsons* (1992) 74 A Crim R 172.

¹⁰⁴² See “4.4.9 Co-operation with law enforcement agencies (past cooperation) – s 16A(2)(h)”.

¹⁰⁴³ Note however that in NSW the practice of the courts is to specify the discount given.

¹⁰⁴⁴ *R v McGee* (Vic CCA, 25 November 1994, unreported); *R v Ngui* [2000] 1 VR 579.

¹⁰⁴⁵ *R v Tan* (1995) 78 A Crim R 300; *DPP (Cth) v AB* (2006) 94 SASR 316.

information or testimony that can be given, as the existence of a discount serves to encourage those charged with criminal offences to give as much information as they can to implicate other offenders. It should not be considered that the aim is best served by always requiring tangible results before a discount is given. The fact that it is unlikely that the authorities will call upon the offender's promise of cooperation does not preclude a discount, although it might reduce it.¹⁰⁴⁶

875. An undertaking for future cooperation may be taken into account even if there is no link at all between the instant offence and the offences in respect of which cooperation has been promised.

7.7.4 Sentencing for both federal and State/Territory offences

876. If a federal offender undertakes to give evidence in criminal proceedings for a State/Territory offence as well as for a Commonwealth offence, the offender's promise of cooperation in respect of the related State/Territory offence may be taken into account in determining the appropriate sentence for the Commonwealth offence.¹⁰⁴⁷

7.7.5 Specifying a s 16AC discount and a discount for a guilty plea

877. In some jurisdictions a sentencing court is required by law to specify the extent of the reduction of sentence for a guilty plea (usually by specifying what the sentence would have been but for the plea).¹⁰⁴⁸ If such a requirement is applied as surrogate federal law to the sentencing of a federal offender, the task for a sentencing court will be more complex if the court is also required by s 16AC of the *Crimes Act 1914* (Cth) to specify the sentence reduction that follows from the offender's undertaking to co-operate. For a discussion of the appropriate procedure to be followed in such a case, see "7.9 Interaction between sentencing discount for guilty plea and discount for undertaking to co-operate".

7.7.6 Failure to comply with s 16AC in sentencing

878. The authorities are not consistent as to whether failure to comply with s 16AC vitiates the exercise of the sentencing discretion. In *Tae*,¹⁰⁴⁹ the New South Wales Court of Criminal Appeal held that such an error does not, by itself, invalidate the sentence imposed. However in *Dagher*,¹⁰⁵⁰ in which no reference was made to *Tae*, the Court held that the failure of the sentencing judge to comply with s 16AC "*had the effect that the sentence had not been imposed according to law*", was "*an error of law which requires correction*", and that for that reason alone it was necessary to re-sentence the applicant.

¹⁰⁴⁶ *R v Kokkinos* [1998] 4 VR 574.

¹⁰⁴⁷ *R v Kokkinos* [1998] 4 VR 574.

¹⁰⁴⁸ See "3.3.2 Statutory requirements to specify a sentence reduction for a plea of guilty".

¹⁰⁴⁹ *R v Tae* [2005] NSWCCA 29, [20].

¹⁰⁵⁰ *Dagher v R* [2017] NSWCCA 258, [5]-[11].

7.7.7 Consequences of breach of an undertaking to co-operate

879. Section 16AC(3) permits the CDPP to appeal against the inadequacy of the reduced sentence if the offender, without reasonable excuse, does not cooperate in accordance with the undertaking and the Director is of the opinion that appealing is in the interests of the administration of justice.
880. In the absence of an admission by the offender, the CDPP must prove beyond reasonable doubt that the offender failed to fulfil the undertaking¹⁰⁵¹ and that the failure was without reasonable excuse.¹⁰⁵²
881. Fear or apprehension about the consequences (for the offender or perhaps for others) of giving evidence cannot by itself be treated as a reasonable excuse.¹⁰⁵³
882. If the appeal court finds that the offender has, without reasonable excuse, *entirely failed to cooperate in accordance with the undertaking*, the court must substitute for the reduced sentence, reduced order or reduced non-parole period the sentence, order or non-parole period that would have been imposed, made or fixed but for that reduction (that is, the “but for” sentence) (s 16AC(4)(a)). Section 16AC does not empower a court re-sentencing an offender, following a successful CDPP appeal, to consider the appropriateness of the original sentence.¹⁰⁵⁴
883. If the appeal court finds that the offender has, without reasonable excuse, *failed in part to cooperate in accordance with the undertaking*, the court may substitute any sentence, order or non-parole period (as the case may be) not exceeding in severity the “but for” sentence (s 16AC(4)(b)). In other words, the court has a discretion as to the sentence to be substituted, up to the sentence which the sentencing judge would have imposed but for the undertaking.¹⁰⁵⁵
884. If, by the time of the determination of the appeal, the offender has been released from custody, the discretionary sentencing consideration that ordinarily applies to work against the re-imprisonment of the offender does not apply.¹⁰⁵⁶

7.8 Specifying a discount for a guilty plea

885. Although s 16A(2) requires that the fact of a plea of guilty be taken into account in sentencing, nothing in s 16A requires a sentencing court to quantify any reduction given in sentence for a plea of guilty.¹⁰⁵⁷

¹⁰⁵¹ *DPP (Cth) v Carey* [2012] VSCA 15, [37]. The court held (at [39]-[41]) that, in determining whether the offender had failed to fulfil the undertaking when giving evidence in a trial, an appellate court is entitled to take into account the view of the trial judge.

¹⁰⁵² *R v YZ* [1999] NSWCCA 48; *R v Springer* [2009] NSWCCA 144, [45]; *DPP v Cheun Minh* [2011] NSWCCA 5.

¹⁰⁵³ *DPP v Parsons* (1992) 74 A Crim R 172.

¹⁰⁵⁴ *DPP v Haunga* [2001] 4 VR 285.

¹⁰⁵⁵ *R v YZ* [1999] NSWCCA 48; *DPP v Haunga* [2001] 4 VR 285; *DPP (Cth) v Johnson* [2012] VSCA 38, [22]-[23].

¹⁰⁵⁶ *DPP (Cth) v Johnson* [2012] VSCA 38.

¹⁰⁵⁷ *Charkawi v R* [2008] NSWCCA 159, [14]; *Xiao v R* (2018) 96 NSWLR 1, [280].

7.8.1 Specifying the sentence reduction for a guilty plea, pursuant to State or Territory laws

886. The laws of some jurisdictions require a court sentencing an offender to specify the extent to which a sentence has been reduced as a result of a plea of guilty. These provisions operate as statutory exceptions to the general preference for an “instinctive synthesis” of relevant considerations, rather than a two-tier or staged approach to sentencing under which the weight given to individual factors is quantified.¹⁰⁵⁸
887. The application of these laws to the sentencing of federal offenders is discussed above: see “3.3 Where a two-stage approach is required by statute”. The Western Australian Court of Appeal has held that the laws in that State relating to the discounting of sentences for guilty pleas (including the specification of the extent of any reduction given under those requirements) are, because of their prescriptive nature, inconsistent with the *Crimes Act 1914* (Cth) and therefore inapplicable to the sentencing of Commonwealth offenders. The position regarding a somewhat similar law in the ACT is uncertain. However in Victoria, where more general and less prescriptive provisions relating to sentence reductions for guilty pleas apply, the Court of Appeal has proceeded on the assumption that the requirement under State law to specify the sentence that would have been imposed but for the guilty plea does apply to the sentencing of a federal offender.¹⁰⁵⁹
888. The requirements under the relevant laws differ in their application and the precise requirements. The ACT provisions (*Crimes (Sentencing) Act 2005* (ACT), ss 35 and 37) apply only if, “*based on the information currently available to the court, the court considers that there is a real likelihood that it will sentence the offender to imprisonment*”.¹⁰⁶⁰ If the court imposes a lesser penalty under s 35, it must state the penalty (including any shorter nonparole period) it would otherwise have imposed.¹⁰⁶¹
889. Under the Victorian provision (*Sentencing Act 1991* (Vic), s 6AAA), if a court imposes a less severe sentence than it would otherwise have imposed because the offender pleaded guilty to the offence, and the sentence is either a sentence of imprisonment or other custodial order, or a community correction order for two years or more, or a fine exceeding 10 penalty units, or an aggregate fine exceeding 20 penalty units, the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.¹⁰⁶² If the offender is sentenced for more than one offence, the court must state the total effective sentence and non-parole period (if any) it would have imposed, and need not state the sentence in respect of each offence.¹⁰⁶³
890. Failure to comply with a requirement to specify the sentence that would have been imposed but for the guilty plea does not invalidate the sentence.¹⁰⁶⁴

¹⁰⁵⁸ *Scerri v R* [2010] VSCA 287, [23].

¹⁰⁵⁹ See the authorities cited in fn 143.

¹⁰⁶⁰ *Crimes (Sentencing) Act 2005* (ACT), s 35(1).

¹⁰⁶¹ *Crimes (Sentencing) Act 2005* (ACT), s 37.

¹⁰⁶² *Sentencing Act 1991* (Vic), s 6AAA(1) and (2). If any other sentence is imposed, it may do so: s 6AAA(4).

¹⁰⁶³ *Sentencing Act 1991* (Vic), s 6AAA(3).

¹⁰⁶⁴ *Scerri v R* [2010] VSCA 287; *Mokbel v R* [2011] VSCA 34, [20]-[35].

891. It is wrong in principle to use a statement of the “but for” sentence in relation to a co-offender as some kind of benchmark in sentencing a co-offender who has been convicted after pleading not guilty.¹⁰⁶⁵
892. A statement under s 6AAA of the *Sentencing Act 1991* (Vic) is a “notional sentence” only; it is not itself appellable.¹⁰⁶⁶ The difference between the notional sentence and the actual sentence is not examinable for specific error,¹⁰⁶⁷ except possibly in the rare case where it reveals an error in principle.¹⁰⁶⁸ The notional sentence may be relied upon in support of a contention that a sentence is manifestly inadequate or manifestly excessive; but it can never be conclusive of the issue, since a complaint of manifest excess or manifest inadequacy falls to be considered only in relation to the sentence actually imposed.¹⁰⁶⁹
893. Additional complexities arise where the sentencing court is required to specify not only the sentence reduction for a plea of guilty but also the reduction for giving an undertaking to co-operate, under s 16AC of the *Crimes Act 1914* (Cth). The interaction of these requirements is discussed below: see “7.9 Interaction between sentencing discount for guilty plea and discount for undertaking to co-operate”.

7.8.2 Discretion to specify reduction for guilty plea

894. Since sentencing should usually be undertaken by an instinctive synthesis of all relevant factors, it has been said that isolating the reduction in sentence which is attributable to a particular factor (including a guilty plea) should only be undertaken when a statute so requires.¹⁰⁷⁰
895. Nevertheless it is common practice in some jurisdictions for courts to do so, even in the absence of any statutory requirement, particularly where the reduction is attributable to utilitarian considerations such as the encouragement of early pleas and the public interest in saving the community the expense of a contested hearing,¹⁰⁷¹ rather than subjective factors such as contrition or willingness to facilitate the course of justice.
896. In *Xiao*,¹⁰⁷² the New South Wales Court of Criminal Appeal expressed the view that it is desirable, in the interests of transparency, that any discount given for a guilty plea in the sentencing of a federal offender be specified. The Court added that there was no obligation on the sentencing judge to do so, and that a failure to do so would not of itself amount to error.¹⁰⁷³ However if a sentencing judge does so, the

¹⁰⁶⁵ *Waugh v R* [2013] VSCA 36, [23].

¹⁰⁶⁶ *R v Burke* (2009) 21 VR 471.; *Kalofolias v R* [2017] VSCA 308, [44].

¹⁰⁶⁷ *Scerri v R* [2010] VSCA 287; *R v Burke* (2009) 21 VR 471, [30]–[31]; *Saab v R* [2012] VSCA 165, [58]; *Gosland v R* [2013] VSCA 269, [10]; *Zogheib v R* [2015] VSCA 334, [62]–[64].

¹⁰⁶⁸ *Saab v R* [2012] VSCA 165, [44]–[62].

¹⁰⁶⁹ *Scerri v R* [2010] VSCA 287, [24]; *Saab v R* [2012] VSCA 165, [34]–[43]; *Cummins (a pseudonym) v R* (2013) 40 VR 319, [41]–[48].

¹⁰⁷⁰ *Wong v R* (2001) 207 CLR 584, [74]–[78]; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [24].

¹⁰⁷¹ *R v Sharma* (2002) 54 NSWLR 300; *R v Place* (2002) 81 SASR 395; *DPP (Cth) v AB* (2006) 94 SASR 316. See *Markarian v R* (2005) 228 CLR 357.

¹⁰⁷² *Xiao v R* (2018) 96 NSWLR 1, [279]–[280].

¹⁰⁷³ *Xiao v R* (2018) 96 NSWLR 1, [280]; applied in *R v KAT* [2018] QCA 306, [61]. Cf *Clarkson v Western Australia* [2006] WASCA 250, [31].

extent of the discount should be specified with precision; for a sentencing judge to indicate the degree of discount by reference to a percentage range may constitute appellable error.¹⁰⁷⁴

7.9 Interaction between sentencing discount for guilty plea and discount for undertaking to co-operate

897. In some jurisdictions, State/Territory legislation requires a court sentencing an offender who has pleaded guilty to specify the sentence which would have been imposed but for the guilty plea.¹⁰⁷⁵

898. In *DPP (Cth) v Couper*¹⁰⁷⁶ the Victorian Court of Appeal considered the interaction of the separate requirements to specify a sentencing reduction for a plea of guilty (pursuant to s 6AAA of the *Sentencing Act 1991* (Vic), applied as surrogate federal law pursuant to the *Judiciary Act 1903* (Cth)), and a sentence reduction for an undertaking to co-operate (formerly s 21E and now s 16AC of the *Crimes Act 1914* (Cth)). Tate JA (with whom Harper JA and Williams AJA agreed) held that the sentencing judge in that case had erred in failing to indicate how the discount for the undertaking related to the discount for the guilty plea, and in failing to specify what period, if any, of the head sentence would have been suspended and for what period, but for the undertaking.

899. Tate JA observed (at [138]) that although each statutory provision required only separate specification of the sentence that would have been imposed but for the relevant factor, merely to do so would fail to indicate to an offender the full extent of the reduction given by reason of both factors and could be potentially misleading. What is significant to an offender and provides guidance for future cases is the actual reduction from which the offender has benefited as a result of having given an undertaking to co-operate, and, separately, the actual reduction from which the offender has benefited as a result of having given a plea of guilty. For this purpose, her Honour considered (at [141]), a sentencing judge should identify the number of months (or days, weeks, or years) from which an offender has benefited both by co-operating and by pleading guilty. That is, a sentencing judge should not only specify what sentence would have been imposed but for the undertaking to co-operate and the plea of guilty, but also identify what specific reduction has been given with respect to each of those matters.

900. Tate JA observed (at [144]) that the statutory requirements could be complied with either by specifying the reduction for the undertaking first, or by specifying the reduction for the guilty plea first; whatever sequence is adopted, it is important that the actual sentence imposed reflects the fact that the offender has had the benefit of both forms of reduction.

¹⁰⁷⁴ *Huang v R* [2018] NSWCCA 70.

¹⁰⁷⁵ Such requirements exist in Victoria (*Sentencing Act 1991* (Vic), s 6AAA), the ACT (*Crimes (Sentencing) Act 2005* (ACT), ss 35 and 37) and Western Australia (*Sentencing Act 1995* (WA), s 9AA(5)). In *Ngo v R* [2017] WASCA 3, the WA Court of Appeal held that (because of the terms of the section) s 9AA(5) of the WA Act was not applicable to the sentencing of a federal offender. Courts in Victoria have proceeded on the assumption that the (less prescriptive) provision in Victoria is applied to the sentencing of a federal offender pursuant to s 68 or s 79 of the *Judiciary Act 1903* (Cth). See “3.3 Where a two-stage approach is required by statute” and “7.8 Specifying a discount for a guilty plea”.

¹⁰⁷⁶ *DPP (Cth) v Couper* (2013) 41 VR 128, [132]–[149].

901. In re-sentencing the respondent in *Couper*, Tate JA specified (at [153]-[154]), in addition to the actual sentence, the sentence that would have been imposed but for both the plea of guilty and the undertaking, the sentence that would have been imposed but for the plea of guilty alone, and the sentence that would have been imposed but for the undertaking alone.

7.10 Aggregate penalty

7.10.1 Overview

902. The common law does not permit aggregate sentences.¹⁰⁷⁷ If an offender is found guilty of more than one offence, a sentencing court must impose a separate sentence for each offence, except to the extent that aggregation of sentences is authorised or required by statute.

903. A court has the power, pursuant to statute, to impose an aggregate penalty in respect of two or more federal offences in some circumstances. In summary, the circumstances are as follows:

- **A single bond without conviction under s 19B** of the *Crimes Act 1914* (Cth) may be ordered in relation to any number of Commonwealth offences.
- **A single bond with conviction under s 20(1)(a)** of the *Crimes Act 1914* may be ordered in relation to any number of Commonwealth offences.
- **An order under State/Territory law which is applied by s 20AB** of the *Crimes Act 1914* may be imposed in relation to more than one Commonwealth offence if the law of that State/Territory so permits.
- **Particular Commonwealth Acts permit the imposition of a single aggregate penalty for two or more offences against the particular Act.** The most significant example is s 219 of the *Social Security (Administration) Act 1999* (Cth), which permits a single penalty to be imposed for more than one offence against s 217 of that Act.
- **If charges for more than one offence against the same provision of a law of the Commonwealth offence are joined in a single “information, complaint or summons” (but not indictment) under s 4K(3) of the Crimes Act 1914 (Cth),** a court may, upon conviction, impose one penalty in respect of those offences, pursuant to s 4K(4) of the *Crimes Act*.
- **If the law of the particular State or Territory permits a court sentencing an offender summarily to impose a single penalty for more than one offence,** the law can (so far as it is applicable) be picked up and applied to the sentencing of a federal offender by ss 68 and 79 of the *Judiciary Act 1903* (Cth). The specific power in s 4K(4) of the *Crimes Act 1914* (Cth) probably does not preclude the application of such a law. (The reason for hesitation about this conclusion is that the only supporting authority for it appears to be *obiter dicta*.)
- **If the law of the particular State or Territory permits a court sentencing an offender on indictment to impose a single penalty for more than one offence,** the law will (so far as it is applicable) be picked up and applied to the sentencing of a federal offender by ss 68 and 79 of the *Judiciary Act 1903* (Cth). The specific power in s 4K(4) of the *Crimes Act 1914* (Cth) (which does not apply to a proceeding by indictment) does not preclude the application of such a law.¹⁰⁷⁸

¹⁰⁷⁷ *Ryan v R* (1982) 149 CLR 1, 4, 25.

¹⁰⁷⁸ See *Putland v R* (2004) 218 CLR 174.

904. Neither in summary proceedings nor in proceedings on indictment can a single penalty be imposed for a Commonwealth offence and a State or Territory offence.¹⁰⁷⁹

905. The following parts of this guide describe in more detail the various circumstances in which aggregate penalties are permitted.

7.10.2 Single s 19B or s 20(1)(a) bond for multiple offences

906. In its own terms, each of s 19B and s 20(1)(a) of the *Crimes Act 1914* permits a single order to be made under that provision in relation to more than one offence.

907. There is no explicit requirement (as there is in other provisions permitting aggregate penalties, such as s 4K(4) of the *Crimes Act 1914*) that the charges be for the same offence, or for offences against the same provision of the Commonwealth law, or for offences of the same or similar nature, or that they be contained in the same charge-sheet or information. There does not appear to be any reason to read the power to make a single order under s 19B or s 20(1)(a) as being subject to the more limited power in s 4K, or subject to any other implied limitations.

7.10.3 Single sentence or order under State/Territory option applied by Crimes Act s 20AB

908. Section 20AB of the *Crimes Act 1914* (Cth), which picks up certain State or Territory sentencing options and applies them to the sentencing of a federal offender, does not specify whether or not a single such sentence or order may be made in relation to more than one offence. However some State laws specifically authorise the imposition of a single order of a kind applied by s 20AB in relation to two or more offences.¹⁰⁸⁰

909. The view of the CDPP is that nothing in any law of the Commonwealth precludes the making of a single sentence or order under s 20AB for more than one federal offence, if the law of the State or Territory permits the making of a single such sentence or order in relation to multiple offences.¹⁰⁸¹ Such State or Territory law is picked up and applied to the sentencing of a federal offender either by s 20AB(1) and (3) of the *Crimes Act 1914*, or by s 68 or s 79 of the *Judiciary Act 1903*, or both.¹⁰⁸² Courts have proceeded on this basis.¹⁰⁸³

¹⁰⁷⁹ *Fasciale v R* (2010) 30 VR 643, [27].

¹⁰⁸⁰ For example, s 40 of the *Sentencing Act 1991* (Vic) permits a single community correction order to be imposed for two or more offences “which are founded on the same facts or form or are part of a series of offences of the same or a similar character”. See also *Crimes (Sentencing Procedure) Act 1999* (NSW), s 53A.

¹⁰⁸¹ Section 4K of the *Crimes Act 1914* does not preclude the application, in a proceeding on indictment, of a State or Territory law which permits aggregate sentences: *Putland v R* (2004) 218 CLR 174. The position in relation to summary proceedings is less clear, but the better view seems to be that s 4K also does not preclude the application of State or Territory provisions that permit aggregate sentencing in other circumstances: see the authorities cited in fn 1097.

¹⁰⁸² If the offender is a child or young person, the relevant State or Territory law would also be applied by s 20C of the *Crimes Act 1914*.

¹⁰⁸³ An example is *Wilkinson v Morrissey* [2000] WASCA 241.

910. In addition, whether or not State or Territory law permits the making of a single sentence or order for more than one offence under an option applied by s 20AB, a single sentence or order may be imposed if any specific Commonwealth law (such as s 4K(4) of the *Crimes Act 1914* or s 219 of the *Social Security (Administration) Act 1999*) so permits.

7.10.4 Aggregate penalties permitted for particular Commonwealth offences

911. A number of Commonwealth Acts contain a provision which permits the imposition of an aggregate penalty upon conviction for two or more offences against that Act.¹⁰⁸⁴ The most commonly-used of these provisions is s 219 of the *Social Security (Administration) Act 1999* (Cth).¹⁰⁸⁵ Typically of such provisions, s 219(2) provides that a single penalty imposed under that section must not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed for each offence.

912. Although s 220 of the *Social Security (Administration) Act 1999* (Cth) enables the joinder of charges for offences against s 217 of the Act “in one complaint, information or declaration” in certain circumstances, the power in s 219 of the Act to impose a single penalty is not conditioned on such joinder. The power to impose an aggregate penalty arises whenever a person is convicted of more than one offence against s 217 of the Act, regardless of whether or not the charges are joined in a single complaint or information. Also, since the offence in s 217 consists of contravention of a provision of Division 2 of Part 6 of the Act (that is, any of ss 212-216), the aggregate penalty may be imposed for offences of quite a different nature.

913. The following are examples of the operation of s 219:

Example 1: Two offences contrary to s 217 Social Security (Administration) Act 1999

An offender is to be sentenced in the Magistrates’ Court on two social security offences contrary to s 217 of the *Social Security (Administration) Act 1999*. The maximum penalty for each offence is 12 months and/or 60 penalty units [s 4B(2) *Crimes Act 1914*]. Accordingly, the maximum aggregate penalty which would apply for the two offences is 24 months imprisonment and/or a fine of 120 penalty units.

Example 2: Community Correction Order (CCO) for two offences

In the above example should a magistrate in Victoria wish to impose a CCO s 219 could be used to impose one CCO with a maximum number of 500 hours of unpaid community work over 2 years. For one offence a CCO with a maximum number of 250 hours over 6 months could be imposed.

¹⁰⁸⁴ Examples are: *A New Tax System (Family Assistance) (Administration) Act 1999*, s 179; *Commonwealth Electoral Act 1918*, s 315(10); *Veterans’ Entitlements Act 1986*, s 209. See also s 1338B of the *Corporations Act 2001* (Cth), which picks up State and Territory legislation which provides for aggregate sentences, and applies these in relation to offences against the *Corporations Act*.

¹⁰⁸⁵ Similar powers existed under the ancestor to the current Act, namely the *Social Security Act 1991* (Cth), ss 1353 and 1354, which was in force until 20 March 2000.

7.10.5 Aggregate penalty for offences dealt with summarily – *Crimes Act 1914*, s 4K

914. Section 4K of the *Crimes Act 1914* makes more general provision for the joinder of charges for similar offences and the imposition of an aggregate penalty in relation to charges for such offences. Sub-sections (3) and (4) of s 4K provide:

- (3) *Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.*
- (4) *If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence.*

915. The following points should be noted about these provisions:

- An aggregate penalty is only authorised by s 4K(4) if a person is convicted of two or more offences referred to in s 4K(3). The two sub-sections must be read together.¹⁰⁸⁶
- The offences must be against “*the same provision of a law of the Commonwealth*”. If the charges are for different offences, s 4K(4) has no application.¹⁰⁸⁷ So, for example, s 4K(4) does not apply if the offender is sentenced for an offence against s 217 of the *Social Security (Administration) Act 1999* and an offence against the *Criminal Code* (Cth).
- Sub-section 4K(3) only permits charges for offences to be joined if they are “*founded on the same facts, or form, or are part of, a series of offences of the same or a similar character*”. So not only must the charges be for offences against the same provision, but they must also have a factual connection of the kind described.
- The joinder power in s 4K(3) only relates to the joinder of charges in “*the same information, complaint or summons*”. It does not empower the joinder of charges in an indictment,¹⁰⁸⁸ even in jurisdictions such as South Australia and the ACT in which an “*information*” was traditionally one of the means of commencing proceedings on indictment.¹⁰⁸⁹ That is, s 4K(3) applies only to proceedings in summary jurisdiction (whether for summary or indictable offences).
- The power in s 4K(4) to impose an aggregate penalty has been construed as being limited in the same way as s 4K(3) to sentencing in summary proceedings.¹⁰⁹⁰ It does not apply to proceedings

¹⁰⁸⁶ *Putland v R* (2004) 218 CLR 174, [14].

¹⁰⁸⁷ *Cady v Smith* (1993) 117 FLR 132.

¹⁰⁸⁸ *R v Bibaoui* [1997] 2 VR 600; *Putland v R* (2004) 218 CLR 174. It has been explained that there was no need for s 4K(3) to apply to proceedings on indictment, as joinder of counts on an indictment was permissible in all Australian jurisdictions: *Putland v R* (2004) 218 CLR 174, [14], [47]-[50]

¹⁰⁸⁹ *R v Jackson* (1998) 72 SASR 490.

¹⁰⁹⁰ *R v Bibaoui* [1997] 2 VR 600; *Putland v R* (2004) 218 CLR 174.

on indictment,¹⁰⁹¹ even if an “information” is a permissible means by which proceedings on indictment may be commenced in the particular jurisdiction.¹⁰⁹²

- If a single aggregate penalty is imposed under s 4K(4), the penalty may not exceed the sum of the maximum penalties that could be imposed if each offence were to be penalised separately.

916. The following examples illustrate the operation of s 4K.

Example 3: Two summary offences

An offender is to be sentenced in the Magistrates’ Court on two summary charges of obtaining financial advantage by deception contrary to s 135.2 of the *Criminal Code*. These summary offences carry a maximum penalty of 12 months and/or 60 penalty units. Accordingly, the maximum aggregate penalty which could be imposed by a Magistrate for the two offences is 24 months imprisonment and/or a fine of 120 penalty units.

Example 4: State/Territory order applied by s 20AB for two summary offences

In the above example, should a Magistrate wish to impose a Community Correction Order, or another State or Territory order applied by s 20AB of the *Crimes Act 1914* (Cth), in relation to both offences, a single order could be made, pursuant to s 4K (whether or not State/Territory law would permit it to be done for a State/Territory offence).

Example 5: Two indictable charges proceeding summarily

An offender is to be sentenced in the Magistrates’ Court on two indictable charges of obtaining property by deception contrary to s 134.1 of the *Criminal Code Act 1995* (Cth). When dealt with summarily, the maximum penalty for each offence is 2 years imprisonment or a fine not exceeding 120 penalty units or both – s 4J(3)(b) *Crimes Act 1914* (Cth).

917. Although the question has not been authoritatively settled, if a law of a State or Territory which allows for the imposition of an aggregate penalty in summary proceedings in other circumstances, the better view appears to be that s 4K(4) does not preclude the State/Territory law from being picked up and applied to the sentencing of a federal offender by s 69 or s 79 of the *Judiciary Act 1903* (Cth): see “7.10.6 State/Territory provisions permitting aggregate sentences in matters determined summarily”.

918. With regard to proceedings on indictment, it has been authoritatively determined by the High Court in *Putland*¹⁰⁹³ that s 4K(4) does not preclude the application to the sentencing of a federal offender of a State or Territory law which permits the imposition of an aggregate penalty for two or more offences: see “7.10.7 Aggregate penalty for charges on indictment”.

¹⁰⁹¹ *R v Bibaoui* [1997] 2 VR 600; *R v Pearce* [2001] NSWCCA 447; *Thompson v R* [2002] NSWCCA 149; *Johnsson v R* [2007] NSWCCA 192, [32]-[37]. In *Putland v R* (2004) 218 CLR 174 the Court affirmed the correctness of the decision in *Bibaoui*.

¹⁰⁹² *R v Jackson* (1998) 72 SASR 490.

¹⁰⁹³ *Putland v R* (2004) 218 CLR 174.

919. However nothing in s 4K, or any other law of the Commonwealth, permits a single aggregate penalty to be imposed for a federal offence and a State or Territory offence.¹⁰⁹⁴

7.10.6 State/Territory provisions permitting aggregate sentences in matters determined summarily

920. In all States and Territories provision is made for the joinder of charges in summary proceedings or proceedings determined summarily. Such provisions are generally wider than s 4K(3) of the *Crimes Act 1914*, in that joinder is not restricted to charges for the same offence. A number of State and Territory laws permit the making of a single order, or the imposition of a single sentence, where charges are so joined, or in other circumstances.¹⁰⁹⁵

921. Such State or Territory procedural laws are of a kind which are capable of being picked up and applied to the sentencing of federal offenders by s 68 or s 79 of the *Judiciary Act 1903* (Cth).¹⁰⁹⁶ The only impediment to them doing so would be if s 4K of the *Crimes Act 1914* (Cth) were regarded as rendering the State or Territory laws inapplicable.

922. Although the point has not been authoritatively decided, it has been accepted, *obiter dicta*, that s 4K does not preclude the application of such State or Territory laws to sentencing in summary proceedings.¹⁰⁹⁷ The better view appears to be that such State or Territory laws permitting aggregate penalties do apply to the sentencing of a federal offender in summary proceedings in circumstances in which s 4K(4) of the *Crimes Act 1914* (Cth) is inapplicable (e.g. if the offender is charged with different offences).

923. However it is not permissible to impose a single aggregate penalty for a federal offence and a State or Territory offence.¹⁰⁹⁸

¹⁰⁹⁴ *Fasciale v R* (2010) 30 VR 643, [27].

¹⁰⁹⁵ For example, in Victoria, if a person is convicted of two or more offences which are founded on the same facts or form or are part of a series of offences of the same or similar character the court may impose an aggregate sentence of imprisonment (*Sentencing Act 1991* (Vic), s 9), a single community correction order (*Sentencing Act 1991* (Vic), s 40), or an aggregate fine (*Sentencing Act 1991* (Vic), s 51). This provision applies to sentencing in summary proceedings or on indictment.

¹⁰⁹⁶ See also s 1338B of the *Corporations Act 2001* (Cth), in relation to offences against that Act.

¹⁰⁹⁷ *Janssen v McShane* [1992] TASSC 99 (Zeeman J); *R v Jackson* (1998) 72 SASR 490, [64]-[66] (Millhouse J). In *Jackson*, at [139], Perry J (with whom Nyland J agreed), *obiter dicta*, doubted whether a magistrate had power to impose a single sentence for different Commonwealth offences when the pre-conditions for joinder in s 4K(3) of the *Crimes Act 1914* were not met. However his Honour did not develop the point and did not refer to the possibility that a single sentence may be justifiable under State law which could be applied by the provisions of the *Judiciary Act 1903* (Cth). With respect, the approach taken by Zeeman J and Millhouse J appears to be the better view.

¹⁰⁹⁸ *Fasciale v R* (2010) 30 VR 643, [27].

7.10.7 Aggregate penalty for charges on indictment

924. It is well-established that s 4K of the *Crimes Act 1914* (Cth) (which permits the imposition of an aggregate penalty in certain circumstances) has no application to proceedings on indictment.¹⁰⁹⁹

925. In *Putland*,¹¹⁰⁰ the High Court held that nothing in s 4K, or in Part IB of the *Crimes Act*, precluded a Territory law which permitted a court, in sentencing an offender on indictment, to impose one penalty for two or more offences from being picked up and applied (pursuant to the provisions of the *Judiciary Act 1903* (Cth)) to the sentencing of a federal offender.

926. Therefore, if State or Territory law permits an aggregate sentence to be imposed on indictment (as currently is the situation in New South Wales,¹¹⁰¹ Victoria,¹¹⁰² South Australia,¹¹⁰³ Tasmania¹¹⁰⁴ and the Northern Territory¹¹⁰⁵) the law is picked up by s 68(1) of the *Judiciary Act 1903* (and s 1338B(2) of the *Corporations Act* in relation to charges under that Act), and is made applicable to the sentencing of federal offenders.

927. It is not permissible to impose a single aggregate penalty for a federal offence and a State or Territory offence.¹¹⁰⁶

7.10.8 When an aggregate penalty is or is not appropriate

928. Even if a court has a discretion to impose an aggregate penalty, the discretion must be exercised consistently with general sentencing principles.¹¹⁰⁷

¹⁰⁹⁹ *R v Bibaoui* [1997] 2 VR 600, *R v Jackson* (1998) 72 SASR 490; *R v Pearce* [2001] NSWCCA 447, [152]; *Thompson v R* [2002] NSWCCA 149, [64]-[68]; *Johnsson v R* [2007] NSWCCA 192, [32]-[37]. In *Putland v R* (2004) 218 CLR 174 the Court affirmed the correctness of the decision in *Bibaoui*.

¹¹⁰⁰ *Putland v R* (2004) 218 CLR 174.

¹¹⁰¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s.53A; see *DPP (Cth) v Beattie* [2017] NSWCCA 301, [146].

¹¹⁰² *Sentencing Act 1991* (Vic), ss 9 (imprisonment), 40 (CCO) and 51 (fines), which apply to sentencing in all courts in Victoria, if an offender is convicted by a court of two or more offences which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character. Since 2012, restrictions on the availability of an aggregate term of imprisonment where charges are “rolled-up” or representative charges have been removed: see now s 9(4A). The 2012 amendment also removed a previous requirement that the court in imposing an aggregate sentence must articulate the individual terms and the extent of concurrency and cumulation: see now s 9(4); *Saxon v R* [2014] VSCA 296. Prior to the amendments in 2012, these restrictions frequently led to error: see, e.g., *DPP (Vic) v Felton* (2007) 16 VR 214; *R v Wong* (2007) 178 A Crim R 192; *R v Rout* [2008] VSCA 87; *R v Grossi* (2008) 23 VR 500. Such pitfalls may remain in other jurisdictions.

¹¹⁰³ *Sentencing Act 2017* (SA), s 26.

¹¹⁰⁴ *Sentencing Act 1997* (Tas), s 11.

¹¹⁰⁵ *Sentencing Act 1995* (NT), s 52(1).

¹¹⁰⁶ *Fasciale v R* (2010) 30 VR 643, [27].

¹¹⁰⁷ *R v Nixon* (1993) 66 A Crim R 83, 85-86; *DPP v Rivette* [2017] VSCA 150, [85]-[86], [89].

929. The imposition of an aggregate penalty for two or more offences is an exception to the general principle that a separate sentence should be imposed for each offence. In his dissenting judgment in *Putland*,¹¹⁰⁸ Kirby J, voicing concerns which have been expressed in other cases,¹¹⁰⁹ gave the following reasons for maintaining the conventional approach, in sentencing a federal offender on indictment:

- Only if specific sentences are identified for federal indictable offences will the transparency of the sentencing process be fully upheld.
- Aggregate sentencing may mask error in sentencing.
- A single undifferentiated aggregate sentence carries a risk of injustice by making the task of challenging the unidentified components of the aggregate sentence much more difficult.
- An aggregate sentence risks depriving the offender of the provision of adequate reasons for the components of the sentence.
- An aggregate sentence risks undermining the objective of identifying differential sentences for specific federal crimes so that their content might be known and compared throughout the Commonwealth.
- An aggregate sentence diminishes the effectiveness of the deterrent value of particularised sentences.
- An aggregate sentence reduces the utility and availability of effective appellate review addressed to consistency throughout Australia in the sentencing of federal offenders for particular offences.

930. An aggregate sentence should not be imposed where an indictment contains only a small number of counts, or where the counts vary significantly in their seriousness or the manner in which the offences were committed.¹¹¹⁰

931. A particular issue may arise in relation to rolled up and representative charges. In *Felton*,¹¹¹¹ Kellam JA observed that “to aggregate a series of “rolled up counts” into an aggregate sentence, is to impose an aggregation upon something that has already been aggregated by being the subject of a rolled up count.” Since *Felton*, legislation in Victoria has been amended specifically to permit an aggregate sentence to include a sentence for a rolled-up or representative charge;¹¹¹² nevertheless, the added layer of opacity may be a reason for reticence in imposing an aggregate penalty.

932. The Victorian Court of Appeal has doubted whether an uplifted summary charge can be dealt with as part of an aggregate sentence imposed on indictment.¹¹¹³

¹¹⁰⁸ *Putland v R* (2004) 218 CLR 174, [116].

¹¹⁰⁹ E.g. *R v Bibaoui* [1997] 2 VR 600, 603; *R v Beaumont* [2000] VSCA 214, [6]-[7]; *DPP v Felton* [2007] VSCA 65; *DPP v Frewstall Pty Ltd* (2015) 47 VR 660, [115].

¹¹¹⁰ *DPP v Felton* [2007] VSCA 65, [2], 19; *R v Grossi* (2008) 23 VR 500, [39]; *Fitzpatrick v R* [2016] VSCA 63, [48]; *DPP v Rivette* [2017] VSCA 150, [87]-[88]. The reference to variation in the seriousness of counts is a reference to “the objective gravity of the conduct, not the maximum penalty which the offence carries”: *Kerapa v R* [2017] VSCA 56, [12].

¹¹¹¹ *DPP v Felton* [2007] VSCA 65, [42].

¹¹¹² *Sentencing Act 1991* (Vic), s 9(4A).

¹¹¹³ *Fitzpatrick v R* [2016] VSCA 63, [51].

933. Aggregate sentences were originally introduced in order to simplify the task of sentencing for multiple offences, especially where orders for concurrency, partial concurrency, and cumulation could become complex and productive of error.¹¹¹⁴ Aggregate sentencing has been considered appropriate on indictment:

- where there is such a large number of charges that the application of the normal principles governing cumulation and concurrency would produce an inappropriate total effective sentence; an aggregate sentence may then be more readily understood;¹¹¹⁵ or
- where the number, similarity and proximity in time of the offences is such that it would be an artificial exercise to impose individual sentences and then, by means of modest orders for cumulation, to arrive at a total effective sentence proportionate to the total criminality.¹¹¹⁶

934. The imposition of aggregate sentences in summary proceedings is far more common than it is on indictment. In particular, aggregate fines may be very convenient in a busy Magistrates' Court.¹¹¹⁷ In summary hearings, reasons for sentence are usually given orally and in summary form, and an aggregate sentence does not create such difficulties for appeals, because appeals generally proceed by way of rehearing.¹¹¹⁸

935. One circumstance in which a single aggregate penalty may be appropriate is where, in relation to offences dealt with summarily, the division of the overall offending into more than one offence is merely fortuitous.¹¹¹⁹

936. If a court is considering imposing an aggregate penalty, it is the duty of a prosecutor to oppose such a penalty, by reference to authority, if it would be inappropriate or beyond the power of the court in the circumstances (for example where statutory preconditions for the exercise of the power were not satisfied).¹¹²⁰

7.11 Requirement to warn a terrorism offender about the possibility of a continuing detention order

937. Division 105A of the *Criminal Code* (Cth) provides for a court, on the application of the Attorney-General, to make a continuing detention order (CDO) in relation to a terrorist offender. A CDO requires the offender to be detained in a prison after the end of his or her sentence. "*Terrorist offender*" means a person who has been convicted of certain terrorism or foreign incursion and recruitment offences described in s 105A.3(1) of the *Criminal Code*.

¹¹¹⁴ *R v Copeland (No 2)* (2010) 108 SASR 398, [15]-[30]; *Fitzpatrick v R* [2016] VSCA 63, [45]; *DPP v Rivette* [2017] VSCA 150, [82].

¹¹¹⁵ *DPP v Felton* [2007] VSCA 65, [2]; *Fitzpatrick v R* [2016] VSCA 63, [48].

¹¹¹⁶ *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [44]; cf. *DPP (Cth) v Beattie* [2017] NSWCCA 301, [28].

¹¹¹⁷ *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [115].

¹¹¹⁸ *R v Bibaoui* [1997] 2 VR 600, 603-4, 607; *R v Beaumont* [2000] VSCA 214; *DPP v Felton* [2007] VSCA 65, [48].

¹¹¹⁹ E.g. *Irvine v Hanna-Rivero* (1991) 23 IPR 295.

¹¹²⁰ *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [35]; *DPP v Rivette* [2017] VSCA 150, [91]-[93].

938. Section 105A.23(1) of the Criminal Code requires that a court that is sentencing a terrorist offender must warn the person that an application may be made under Division 105A for a CDO requiring the person to be detained in a prison after the end of the person's sentence for the offence. The requirement to give such a warning applies to the sentencing of any terrorist offender from 7 June 2017, regardless of when the offence was committed.¹¹²¹

939. Failure to give a warning under s 105A.23(1) does not affect the validity of a sentence or prevent an application from being made for a CDO: s 105A.23(2).

940. As to whether the prospect of a CDO being made is relevant in sentencing, see "4.5.14 Control orders and continuing detention orders".

7.12 Power of sentencing court to correct error in sentence

7.12.1 Functus officio principle

941. Once a judgment or final order of a court has passed into record, subject to contrary statutory provision, the court is *functus officio* – that is, its powers in relation to the matter have expired. The principle applies to criminal proceedings as well as to civil proceedings and to both superior courts and inferior courts.¹¹²² The only qualification at common law was the "slip rule" by which the record of a sentence or order could be corrected, pursuant to the court's implied or inherent jurisdiction, to reflect what the court intended to do.¹¹²³

942. In *Edwards*,¹¹²⁴ the sentencing judge had mistakenly imposed a suspended sentence without power to do so and, upon discovering the error (after the sentence had passed into record), had purported to substitute a different sentence. The Court of Appeal (Weinberg JA and Williams AJA; Warren CJ dissenting) held that the sentencing court had no power to correct the original sentence, as the sentencing judge was then *functus officio*. The Court held that the fact that a sentencing court had acted without power in imposing a sentence did not operate as an exception to the principle of *functus officio*. The error could only be corrected on appeal.

943. The *functus officio* principle is subject to statutory exceptions. The *Crimes Act 1914* (Cth) creates two powers to correct errors in relation to a sentence of imprisonment imposed on a federal offender:

- s 19AHA: see "7.12.2 Power to correct error in sentence of imprisonment: Crimes Act 1914, s 19AHA"
- s 19AH: see "7.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH"

¹¹²¹ *Criminal Code* (Cth), s 106.8(8), inserted by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), and which came into operation on 7 June 2017. See *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 3)* (2017) 52 VR 303. In that case, the Court of Appeal, in resentencing the respondents, gave the warning orally on their attendance by video link; however it is arguable that a warning may be given by including it in the orders of the Court: compare *ZZ v R* [2013] NSWCCA 83, [149].

¹¹²² See *DPP v Edwards* (2012) 44 VR 114 and the authorities cited there.

¹¹²³ *R v De Zylva* (1988) 33 A Crim R 44; *R v Saxon* [1998] 1 VR 503.

¹¹²⁴ *DPP v Edwards* (2012) 44 VR 114.

944. Wider powers to recall and correct errors in sentences under State and Territory laws may also be picked up and applied as surrogate federal law: see “7.12.4 Statutory powers to correct or recall a sentence under State or Territory law”.

7.12.2 Power to correct error in sentence of imprisonment: Crimes Act 1914, s 19AHA

945. Section 19AHA of the Act (which was inserted with effect from 27 November 2015) applies if “a sentencing order” made by a court under Part 1B of the Act in relation to a person “*reflects an error of a technical nature made by the court ... or ... has a defect of form ... or ... contains an ambiguity*” (s 19AHA(1)). “Sentencing order” is defined to mean an order imposing, or purporting to impose, a sentence (that is, a sentence of imprisonment: see the definition of “sentence” in s 16(1)), an order fixing a NPP or a RRO (s 19AHA (3)).

946. Such an error does not not affect the validity of any sentence imposed on the person (s 19AHA(2)).

947. The section empowers the court, on its own initiative, at any time, by order, to amend the sentencing order to rectify the error, defect or ambiguity (s 19AHA(3)).

948. Section 19AHA also provides for an application by the Attorney-General, the CDPP or the offender to the court to correct the error (s 19AHA(4)). Such an application may be made at any time. On such an application, the court must, by order, amend the sentencing order to rectify the error, defect or ambiguity (s 19AHA(4)).

949. The court which hears the application may be differently constituted (s 19AHA(5)).

950. An amendment made under s 19AHA is taken to have had effect from the date of effect of the sentencing order unless the court orders otherwise (s 19AHA(7)). An amendment does not affect any right of appeal against a sentence (s 19AHA(6)).

951. A provision such as s 19AHA should not be unduly circumscribed by restrictive interpretation, but does not permit the re-opening of the sentencing discretion or the making of changes arising from further consideration of the appropriateness of the sentence.¹¹²⁵ It does not, for example, permit the substitution of one sentence type for another because the original sentence was not authorised by law for the particular offence.¹¹²⁶

¹¹²⁵ Cf. *DPP v Green* (2007) 17 VR 293, [12], referring to a similar power in s 104A of the *Sentencing Act 1991* (Vic).

¹¹²⁶ Cf. *DPP v Edwards* (2012) 44 VR 114.

952. The legislation was plainly intended to allow the correction of an arithmetical error.¹¹²⁷ For example, a sentencing order which is based upon a miscalculation of a period of pre-sentence custody might be said to reflect “*an error of a technical nature made by the court*” within s 19AHA(1).¹¹²⁸

7.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH

953. Section 19AH(1)(a) of the *Crimes Act 1914* (Cth) (which was inserted with effect from 17 January 1990) provides that where a court fails to fix, or properly to fix, a NPP, or to make, or properly to make, a RRO, under the Act, that failure does not affect the validity of any sentence.

954. The section also provides for an application by the Attorney-General or the CDPP to the court to have the order corrected (*Crimes Act 1914* (Cth), s 19AH(1)(b)). Such an application may be made at any time. The court which hears the application may be differently constituted (s 19AH(3)). On such an application, the court must, by order, set aside any NPP or RRO that was not properly fixed or made and fix a NPP or make a RRO under the Act (s 19AH(1)(b)).

955. The effect of s 19AH is to preserve from total invalidity a sentence affected by the failure to fix, or properly fix, a NPP or to make, or properly make, a RRO, so that when that failure is corrected the whole sentence is and remains valid.¹¹²⁹

956. The power in s 19AH can be used to correct a failure to explain the conditions of a RRO (as required by s 16F(2) of the Act),¹¹³⁰ the use of the wrong form for a RRO,¹¹³¹ or the imposition of a NPP when a RRO was required¹¹³² or vice versa.¹¹³³

7.12.4 Statutory powers to correct or recall a sentence under State or Territory law

957. The laws of most states and territories confer wider powers on courts to recall a sentence or to correct error, even though the sentence has passed into record.¹¹³⁴

¹¹²⁷ The Explanatory Memorandum for the Bill which inserted s 19AHA said that the new section “*clarifies the powers of courts to correct Commonwealth sentencing orders in situations where, for example, an arithmetical mistake has been made in calculating a sentence commencement date or expiry date or a sentencing order has been made using the incorrect form*”: *Crimes Legislation Amendment (Powers, Offences And Other Measures) Bill 2015* (Cth), Replacement Explanatory Memorandum (House of Representatives), [445].

¹¹²⁸ Such an error may be corrected under the *Sentencing Act 1991* (Vic), s 104A: *DPP v Green* (2007) 17 VR 293. But it should be noted that that provision, unlike s 19AHA, specifically permits correction of “*a material miscalculation of figures*”.

¹¹²⁹ *R v Suarez-Mejia* [2002] WASCA 187, [74].

¹¹³⁰ *Weinert v DPP (Cth)* [1999] SASC 34; *DPP (Cth) v Cole* (2005) 91 SASR 480, [44]-[53].

¹¹³¹ *DPP (Cth) v Cole* (2005) 91 SASR 480, [44]-[53].

¹¹³² *Smith v Elliot* [2007] ACTSC 65.

¹¹³³ *Minehan v R* [2010] NSWCCA 140, [12].

¹¹³⁴ E.g. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 43; *Penalties and Sentences Act 1992* (Qld), s 188; *Sentencing Act 1995* (WA), s 37; *Sentencing Act 1997* (Tas), s 94; *Crimes (Sentencing) Act 2005* (ACT), s 61; *Sentencing Act 1995* (NT), s 112. These powers have been construed broadly: see the extensive review of the authorities in *Achurch v R (No 2)* (2013) 84 NSWLR 328.

958. Powers under State or Territory laws which permit a sentencing court to correct errors in relation to sentences may be picked up and applied to the sentencing of a federal offender by s 68 or s 79 of the *Judiciary Act 1903* or by s 20AB(3) of the *Crimes Act 1914*. The existence of specific powers in ss 19AH and 19AHA of the *Crimes Act 1914* in relation to sentences of imprisonment will not necessarily preclude other powers under State or Territory law from being applied as surrogate federal law.¹¹³⁵

959. But in relation to a sentence of imprisonment, the power in s 19AH or s 19AHA, if applicable, should be invoked before resorting to any power under State or Territory law to recall or correct a sentence.¹¹³⁶

7.13 Post-sentence monitoring and detention of offenders under State laws

960. Laws in some jurisdictions establish a regime for the monitoring or detention of certain classes of offenders upon the completion of a sentence of imprisonment. For example, the *Crimes (High Risk Offenders) Act 2006* (NSW) and the *Serious Offenders Act 2018* (Vic) each provides for court-ordered post-sentence detention or supervision of offenders who have served a term of imprisonment for a serious sexual offence or offence of violence. Each of those Acts lists Commonwealth offences amongst the offences which render an offender subject to the making of an order. The New South Wales Act provides for orders to be made upon an application by the State of NSW. The Victorian Act provides for an application to be made by the Director of Public Prosecutions (Victoria) or (in some circumstances) by the Secretary to the Department of Justice and Regulation (Victoria).

961. The view of the CDPP is that these regimes are not picked up and applied as federal law by s 68 or s 79 of the *Judiciary Act 1903* (Cth) or by s 20AB of the *Crimes Act 1914* (Cth). Nor, in the view of the CDPP, does any federal law operate to confer power on the CDPP or any other Commonwealth authority to make an application for an order under the State Acts. The State Acts apply to Commonwealth offenders according to their own terms.¹¹³⁷

7.14 Costs certificates

962. A State regime for costs certificates does not apply to federal prosecutions.¹¹³⁸

¹¹³⁵ *DPP (Cth) v Wallace* (2011) 43 WAR 61, [25]-[34]. Martin CJ held that the limited power in s 19AH to correct the failure to fix, or to properly fix, a NPP or RRO did not prevent the more general power under State law from being applied by the provisions of the *Judiciary Act 1903* (Cth). It seems unlikely that the later insertion of s 19AHA was intended to reverse that position.

¹¹³⁶ See *R v Hudson* [2016] SASFC 60, [25].

¹¹³⁷ As to whether a State Parliament can validly make such a law, see *Re Macks; Ex parte Saint* (2000) 204 CLR 158, [25] (Gleeson CJ), [59]-[60] (Gaudron J), [107] (McHugh J), [208] (Gummow J) and [347]-[348] (Hayne and Callinan JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [73]-[74] (Gummow J); *D151 v New South Wales Crime Commission* (2017) 94 NSWLR 738, [16]-[26], [35]-[42] (Basten JA, with whom Beazley ACJ and Simpson JA agreed on this point).

¹¹³⁸ *Solomons v District Court (NSW)* (2002) 211 CLR 119; *DPP v Hunter* (2003) 7 VR 119.

8 Specific sentencing situations

8.1 Offences to which a prescriptive sentencing regime applies

963. In general, federal legislation does not provide for mandatory penalties or minimum penalties, or mandatory cumulation of sentences, or a mandatory ratio between a head sentence of imprisonment and a period to be served. The following are exceptions.

8.1.1 Terrorism and other national security-related offences: the three-quarters rule

964. Section 19AG of the *Crimes Act 1914* (Cth) (introduced in 2004) creates what is known as “the three-quarters rule”. It requires a court which sentences an offender to imprisonment for a “*minimum non-parole offence*” to fix a single non-parole period which is at least three-quarters of the head sentence (or the aggregate sentence for those offences, if more than one). “*Minimum non-parole period offence*” is defined in s 19AG(1) to mean:¹¹³⁹

- a terrorism offence (as defined in s 3(1) of the Act);
- an offence against Division 80 of the *Criminal Code* (Cth) (treason, urging violence, advocating terrorism, etc); or
- an offence against s 91.1(1) or 91.2(1) of the *Criminal Code* (Cth) (intentional espionage offences).

965. Section 19AG applies only if the offender is sentenced to imprisonment. It does not affect the availability of other sentencing options. Nor does it affect the obligation of the court in fixing the head sentence to impose a sentence “*that is of a severity appropriate in all the circumstances of the offence*” (*Crimes Act 1914*, s 16A(1)). It is not permissible for a sentencing court to discount the head sentence to compensate for, or offset, the effect of s 19AG.¹¹⁴⁰

966. As to the operation of the three-quarters rule, see “5.10.9 The three-quarters rule in fixing a NPP for certain national security offences”. As regards the need for a court to warn an offender about the ability of the Attorney-General to make an application for the detention of an offender beyond the expiration of the NPP, see “7.11 Requirement to warn a terrorism offender about the possibility of a continuing detention order”.

8.1.2 Mandatory imprisonment for certain people-smuggling offences

967. Section 236B of the *Migration Act 1958* (Cth) provides for a mandatory term of imprisonment, a mandatory minimum duration of that term, and a mandatory minimum non-parole period for certain specified people-smuggling offences. The only exception to the mandatory requirements is if it is

¹¹³⁹ The definition was amended by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth), with effect from 30 June 2018. Prior to the amendments, “minimum non-parole period offence” also included other offences against Division 91 of the *Criminal Code* (espionage, etc) and an offence against s 24AA of the *Crimes Act 1914* (treachery).

¹¹⁴⁰ *Lodhi v R* [2007] NSWCCA 360, [255]–[262].

established on the balance of probabilities that the offender was aged under 18 years when the offence was committed (s236B(2)).

968. The mandatory requirements apply if a person is convicted of an offence against any of the following provisions of the *Migration Act 1958* (Cth):

- s 233B (aggravated people smuggling, involving cruel, inhuman or degrading treatment, or conduct giving rise to a danger of death or serious harm to the person);¹¹⁴¹
- s 233C (aggravated people smuggling, involving a group of at least 5 unlawful non-citizens); or
- s 234A (offence relating to forged or false documents, or false or misleading statements or documents, relating to a group of 5 or more non-citizens or a member of such a group).

Each offence is punishable by 20 years' imprisonment or a fine of 2,000 penalty units or both.

969. If a person is convicted of an offence against s 233B, or a repeat offence for a relevant people smuggling offence,¹¹⁴² the court is required to impose a sentence of at least 8 years (s 236B(3)(a) and (b)), with a non-parole period of at least 5 years (s 236B(4)(a)). If a person is convicted of an offence against s 233C or s 234A (other than a repeat offence) the court must impose a sentence of at least 5 years (s 236B(3)(c)) with a non-parole period of at least 3 years (s 233B(4)(b)).

970. These provisions are inconsistent with, and prevail over, s 17A of the *Crimes Act 1914*. The statutory minimum and maximum penalties are the floor and ceiling respectively within which the sentencer has a discretion and to which general sentencing principles are to be applied.¹¹⁴³ The statutory maximum and minimum penalties dictate the seriousness of the offence for the purpose of s 16A(1) of the *Crimes Act 1914*.¹¹⁴⁴ Where there is a mandatory minimum sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate.¹¹⁴⁵

971. In *Magaming*,¹¹⁴⁶ the High Court held that legislative prescription of a mandatory minimum term of imprisonment is not inconsistent with Chapter III of the Constitution.

¹¹⁴¹ On 27 August 2012, the then Attorney-General issued a direction to the CDPP, pursuant to s 8 of the *Director of Public Prosecutions Act 1983* (Cth), which limited the circumstances in which the CDPP should institute, carry on or continue to carry on a prosecution for an offence against s 233B of the *Migration Act 1958* (Cth). On 4 March 2014, the direction was revoked by the then Attorney-General.

¹¹⁴² "Repeat offence" is defined in s 236B(5) of the *Migration Act 1958* (Cth). It refers to a conviction for an offence against s 233B, s 233C or s 234A of the Act by a person who, in the same proceedings or previous proceedings, has been convicted of or found to have committed another such offence or who has, after 27 September 2001, been convicted of or found to have committed an offence against s 232A or s 233A of the Act.

¹¹⁴³ *Bahar v R* (2011) 45 WAR 100, [54]. See also *Karim v R* [2013] NSWCCA 23; *R v Latif; ex parte DPP (Cth)* [2012] QCA 278. The authority of these decisions is unaffected by dicta of Adams and McCallum JJ in *Dui Kol v R* [2015] NSWCCA 150 which criticised the approach taken in *Bahar*, *Karim* and other cases. *Bahar* has since been followed and applied in *R v Abbas* [2019] WASCA 64.

¹¹⁴⁴ *Bahar v R* (2011) 45 WAR 100, [54].

¹¹⁴⁵ *Bahar v R* (2011) 45 WAR 100, [58].

¹¹⁴⁶ *Magaming v R* (2013) 252 CLR 381.

8.2 Children and young persons

972. Section 20C of the *Crimes Act 1914* (Cth) makes general provision for dealing with young offenders against Commonwealth law. It provides:

A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.

973. The provision was inserted by the *Crimes Act 1960* (Cth). The purpose of s 20C was “to enable a Court hearing a charge against a child or young person for an offence against Commonwealth law to deal with that defendant in the same way as it would deal with a young person if the offence were an offence against a law of the State or Territory in which the Court is sitting.”¹¹⁴⁷ Courts have also characterised the provision as enabling.¹¹⁴⁸

974. The most significant effect of s 20C is that State or Territory sentencing or disposition options which would not otherwise be available are made applicable to the sentencing of a child or young person for a Commonwealth offence.¹¹⁴⁹ These options may include, for example, orders relating to probation or supervision, or detention in a juvenile facility, whether provided for under State or Territory legislation relating specifically to children,¹¹⁵⁰ or provided for in relation to young offenders more generally under State or Territory sentencing legislation.¹¹⁵¹

975. There is no applicable definition of “child” or “young person” for the purposes of s 20C.¹¹⁵² The provision is intended to be ambulatory in applying State or Territory laws. Those laws differ in their application

¹¹⁴⁷ Sir Garfield Barwick (Attorney-General), Second Reading speech on the *Crimes Bill 1960*, *Hansard* (House of Representatives), 8 September 1960, p.1022. The Attorney-General went on to say (at 1024) that the relevant clause of the amending bill “provides for special treatment for juvenile offenders, by courts officials and institutions of the States similar to the treatment afforded under State law to offenders against the laws of the States. This Parliament cannot, of course, directly impose some of these obligations upon State officials. The new provisions in these respects will be merely enabling, and the concurrence of the States will have to be obtained for their implementation. But I anticipate no difficulties in this regard, the degree of ready co-operation between this Government and those of the States being notable and significant.”

¹¹⁴⁸ *Newman v A (A Child)* (1992) 9 WAR 14, 18; *R v Lovi* [2012] QCA 24, [21].

¹¹⁴⁹ In substance, s 20C applies State or Territory law as surrogate federal law. The form of such provisions is not fixed (*Mok v DPP (NSW)* (2016) 257 CLR 402, [84]) but, subject to clear contrary provision, State or Territory laws so applied will not operate to exclude or override other Commonwealth laws. Section 20C does not purport to so operate. Many provisions in the *Crimes Act 1914* render one provision of the Act subject to another, or exclude the operation of a particular provision if another applies; s 20C does neither of those things. This is consistent with its evident purpose of operating merely as an enabling provision.

¹¹⁵⁰ E.g. *Children, Youth and Families Act 2005* (Vic), Part 5.3.

¹¹⁵¹ E.g. *Sentencing Act 1991* (Vic), s 32.

¹¹⁵² “Child” is defined in ss 3(1) and 15YA of the *Crimes Act 1914* (Cth), but neither of those definitions is applicable to the term as it is used in s 20C. The omission of a definition of “child” or “young person” must be taken to be intentional. As originally enacted, the references to “child” and “young person” in s 20C(1) (now s 20C) stood in contrast to s 20C(2), which ensured that the death penalty did not apply to “a person under the age of 18 years”. (Sub-section 20C(2) was repealed as obsolete by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2018* (Cth), with effect from 25 August 2018, and s 20C(1) was re-numbered as s 20C.)

to offenders of a particular age. The breadth of the terms used in s 20C is more apt to allow for the application of State or Territory laws in their own terms.

976. Section 20C applies State or Territory law to a child or young person who is “*charged with or convicted of an offence*”. That is, the application of State or Territory law depends upon the person being a “*child or young person*” when charged or convicted. This is consistent with the approach under State or Territory law in most jurisdictions. However in some jurisdictions the relevant age is the age of the person *at the time of the offending* and an offender who is dealt with many years later for a serious offence committed while under 18 years old still falls to be sentenced as a “child”.¹¹⁵³ It is doubtful whether s 20C would operate to apply State or Territory laws if, when charged or convicted, the offender is no longer a “*child or young person*” within the meaning of s 20C.
977. Nothing in s 20C purports to exclude or override the application of other provisions of Part IB of the *Crimes Act 1914* which apply to the sentencing of federal offenders generally; nor are those other provisions expressed to be subject to s 20C. The provisions must therefore be read together, so far as possible.¹¹⁵⁴ So, for example, sentencing options under s 19B (discharges and bonds without conviction)¹¹⁵⁵ and s 20(1)(a) (bond with conviction) are equally available in sentencing a child or young person as they are in sentencing any other federal offender. If a Commonwealth statute prescribes that an offence is punishable by imprisonment or by a fine, those penalties also apply.¹¹⁵⁶ Provisions of the *Crimes Act* which govern sentencing factors (e.g. s 16A), the procedures relating to taking other offences into account (s 16BA), provisions relating to undertakings to co-operate (s 16AC), and many other matters which apply generally to the sentencing of federal offenders also apply in the sentencing of children or young persons for Commonwealth offences, whether under State or Territory law they are sentenced as a child or as an adult.¹¹⁵⁷ There is no room for the application of State or Territory laws under s 20C to the extent that they are inconsistent with Commonwealth laws which apply generally to the sentencing of federal offenders.¹¹⁵⁸

¹¹⁵³ See, e.g., *Children’s Court of Western Australia Act 1988* (WA), s 19; *Young Offenders Act 1993* (SA), ss 4(1) (definition of “youth”), 16; *Youth Justice Act 2005* (NT), s 52.

¹¹⁵⁴ *Ross v R* (1979) 141 CLR 432, 448.

¹¹⁵⁵ Section 19B was also introduced by the *Crimes Act 1960* (Cth). Since neither provision is expressed to be subject to the other, their simultaneous enactment strengthens the inference that ss 19B and 20C must be read together. Each can be given effect according to its terms, by accepting that s 19B applies to the sentencing of a young federal offender, and that s 20C enables a court to apply additional options under State law.

¹¹⁵⁶ See, e.g., *R v Lovi* [2012] QCA 24, [35].

¹¹⁵⁷ See, e.g., *IM v R* [2019] NSWCCA 107, [43].

¹¹⁵⁸ In particular, to the extent that Part IB of the *Crimes Act 1914* (Cth) expressly or by implication provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the *Crimes Act* is exclusive: *R v Pham* (2015) 256 CLR 550, [22]. Some State and Territory laws specify that in sentencing a child or young person, a court *must not have regard* to particular considerations, such as the need for general or specific deterrence (see, e.g., *R v QTV* (2003) 87 SASR 378, [47]-[58]; *CNK v R* (2011) 32 VR 641). Such provisions may be irreconcilable with the requirements in s 16A of the *Crimes Act 1914* that in sentencing a federal offender the court *must have regard* to those factors, to the extent that they are relevant and known to the court. Moreover to the extent that such State and Territory laws operate as a self-contained code, directed exclusively at consideration of the effect of the proposed sentence on the child (compare *Poutai v R* [2011] VSCA 382, [20]-[26]; *Webster (a pseudonym) v R* [2016] VSCA 66, [23]-[28]), they may also be inconsistent with s 16A. In most cases, applying s 16A rather than contrary State or Territory provisions would have little practical

978. The range of sentencing options available in sentencing a young offender may be significantly affected by whether or not the proceedings are heard and determined in a State or Territory court with specialist jurisdiction in relation to children and young offenders. Such courts typically have no power, or very limited power, to sentence an offender to imprisonment, and may only sentence an offender to a form of detention for a limited period and in limited circumstances. Limitations of this kind may, in serious cases, warrant the offender being dealt with as an adult. State or Territory laws relating to young offenders typically provide for serious charges to be dealt with on indictment in specified circumstances.¹¹⁵⁹ In addition, Commonwealth law provides powers of direct indictment that override any contrary limitations imposed by State or Territory laws.¹¹⁶⁰

979. As to the significance of youth and immaturity in sentencing a federal offender, see “4.4.12 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)”.

8.3 Applied State offences committed on Commonwealth places

980. The *Commonwealth Places (Application of Laws) Act 1970* (Cth) (the CP Act) provides for the application of State laws in Commonwealth place (such as a number of Australia’s major airports). In sentencing for an offence under such an applied State law, a State court is exercising federal jurisdiction, but pursuant to s 5(3) of the CP Act, sentencing options in the *Crimes Act 1914* (Cth) are inapplicable. State sentencing options and State sentencing procedures apply.¹¹⁶¹

8.4 Fitness to be Tried

8.4.1 Unfitness in committal proceedings and on indictment

981. Division 6 of Part IB of the *Crimes Act 1914* (Cth) sets out the consequences of a preliminary finding that a person is unfit to be tried or unfit to plead.¹¹⁶² (“Fit to be tried”, the term used in Division 6, is defined

significance, because in determining the weight to be given to such matters as general and specific deterrence and rehabilitation, the sentencing court would take into account (as it is required to do under s 16A(2)(m)) the age of the offender.

¹¹⁵⁹ See, e.g., *K v Children’s Court of Victoria* [2015] VSC 645. In that case, at the age of 17 years, K was charged with a terrorism offence punishable by life imprisonment. Under the applicable State legislation, because of his age, K was a “child”. The State legislation required the Children’s Court of Victoria to hear and determine summarily a charge against a child for an indictable offence (other than a specified State offence), unless by reason of exceptional circumstances the charge was unsuitable to be determined summarily. The Children’s Court held that the charge was unsuitable to be determined summarily. On judicial review, the Supreme Court found no error in the decision of the Children’s Court. T Forrest J held that the nature and gravity of the offending, the insufficiency of the penalties available on summary determination, and the fact that the offender was aged 17 (and was therefore close to the threshold for prosecution as an adult) all warranted, and even “demanded”, that determination. Ultimately the offender was sentenced by the Supreme Court, and re-sentenced by the Court of Appeal on an appeal by the CDPP, to a substantial term of imprisonment: *DPP (Cth) v MHK* [2017] VSCA 157.

¹¹⁶⁰ E.g. *Judiciary Act 1903* (Cth), s 71A; *Director of Public Prosecutions Act 1983* (Cth), s 6. See *R v Duffield* (1992) 28 NSWLR 638.

¹¹⁶¹ See, e.g., *Cameron v R* (2002) 209 CLR 339, [4], [17], [46], [88]-[89].

¹¹⁶² For a detailed outline see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), Chapter 28.

in s 16 of the Act to include fit to plead.) However, Division 6 does not prescribe a procedure for empanelling a jury to determine the preliminary question of fitness.

982. In *Kesavarajah*,¹¹⁶³ Mason CJ, Toohey and Gaudron JJ observed that, where a question whether the accused was fit to be tried arose during the course of a trial on indictment for a federal offence, State law regulated the mode of determining the initial question and s 20B of the *Crimes Act* regulated the consequences that flowed from a finding of fitness or unfitness.

983. When the question whether a person is fit to be tried for a Commonwealth offence is first raised during a committal or trial, s 79 of the *Judiciary Act 1903* (Cth) has the effect of picking up any applicable State or Territory procedure to determine that fact. This appears to include the State/Territory test to be applied in determining whether an accused is fit to plead or to be tried.¹¹⁶⁴

984. However, s 79 of the *Judiciary Act 1903* (Cth) only picks up the the State or Territory procedural law to the extent that it is not inconsistent with the Constitution or other Commonwealth legislation, including Division 6 of Part IB of the *Crimes Act*.¹¹⁶⁵

985. Various State and Territory laws¹¹⁶⁶ provide for the determination of a person's fitness to be tried in a proceeding on indictment. In most jurisdictions, the question is determined by a jury empanelled specifically for that purpose.¹¹⁶⁷

986. The provisions of Division 6 of Part IB of the *Crimes Act*, insofar as they relate to *dispositions following a finding of unfitness to be tried*, including the determination of whether a prima face case exists and whether the defendant may become fit to be tried in the future, appear to provide a comprehensive

¹¹⁶³ *Kesavarajah v R* (1994) 181 CLR 230.

¹¹⁶⁴ *R v Sexton* (2000) 77 SASR 405. There are unresolved issues in relation to committals. Refer to the footnotes to box 1 in Appendix 5 to this guide.

¹¹⁶⁵ *Putland v R* (2004) 218 CLR 174, [24] (Gleeson CJ). See "2.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79".

¹¹⁶⁶ **NSW:** *Mental Health (Forensic Provisions) Act 1990* (NSW), Part 2 - the criteria for unfitness are not defined in the legislation, and must be determined by reference to the common law. **Vic:** *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), Part 2 - the criteria for unfitness are set out in s 6. **Qld:** *Criminal Code 1889* (Qld), ss 613 and 645 - the criteria for unfitness are not defined in the legislation, and must be determined by reference to the common law. **WA:** *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), Part 3 - the criteria for unfitness are set out in s 9. **SA:** *Criminal Law Consolidation Act 1935* (SA), Part 8A - the criteria for unfitness are set out in s 269H. **Tas:** *Criminal Justice (Mental Impairment) Act 1999* (Tas), Part 2 - the criteria for unfitness are set out in s 8. **ACT:** *Crimes Act 1900* (ACT), Divisions 13.2 and 13.6 - the criteria for unfitness are set out in s 311. **NT:** *Criminal Code Act 1983* (NT), Schedule 1, Part IIA - the criteria for unfitness are set out in s 43J.

¹¹⁶⁷ The exceptions are New South Wales and Western Australia, where the question of unfitness is determined by judge alone: see *Mental Health (Forensic Provisions) Act 1990* (NSW), s 11; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 12. In South Australia, unfitness is determined by a jury, unless the defendant has elected to have the matter determined by judge alone; see *Criminal Law Consolidation Act 1935* (SA), s 269B. In *R v Baladjam (No 13)* [2008] NSWSC 1437 (which concerned proceedings for a federal offence), Whealy J ruled that, in the circumstances, s 80 of the Constitution did not preclude determination of fitness by judge alone.

regime, which precludes the application of State/Territory laws relating to the same subject matter. In *Sharrouf (No 2)*,¹¹⁶⁸ Whealy J summarised the process as follows:

5. *The question of the accused's fitness having been raised, the parties agree that there is a three-stage process to be followed. First, there is an initial determination as to fitness or unfitness. As there is no Commonwealth legislation governing the procedure to be followed on this issue, the provisions of the Mental Health (Criminal Procedure) Act 1990 (NSW) apply to this first stage. I have earlier decided that this issue may be determined on a Judge-alone basis. ...*
6. *Secondly, in the event of a finding of unfitness, there is Commonwealth legislation dealing with the second stage process to be followed. This is to be found in s 20B(3) of the Crimes Act 1914 Cth ("the Act") and Division 6 of the Act generally. Essentially, the second stage requires the Court to determine whether a prima facie case has been established.*
7. *The third stage process arises if a prima facie case has been established and the Court does not otherwise determine that the charge should be dismissed. In that situation, the Act imposes on the Court the need to make a determination as to whether the accused is likely to be fit within a 12-month period (s 20BB of the Act). In that event, the Court must also decide what must be done with the accused in terms of his remaining in custody, his hospitalisation, or release on bail. That question itself involves issues relating to the future treatment of the accused.*

987. That is, State law applied to the first stage (initial determination of fitness or unfitness), but the second and third stages are dealt with solely under the Commonwealth provisions.

988. Appendix 5 to this guide sets out the pathways that apply if a question arises as to the fitness to stand trial of a person charged with a federal indictable offence, whether the matter arises during committal proceedings or in a trial on indictment.

989. The common law test applies to deciding whether a question as to a person's fitness has arisen initially (s 20B(1) and (2)), and also whenever a court is making a determination of fitness under ss 20BA-20BC after it has found that a prima facie case exists.¹¹⁶⁹

990. The *Crimes Act 1914* (Cth) does not abrogate the inherent jurisdiction of a State or Territory court to grant a permanent stay of proceedings for an offence against a law of the Commonwealth.¹¹⁷⁰ The existence of the regime in Division 6 of Part IB is relevant to the question whether a stay should be granted.¹¹⁷¹

¹¹⁶⁸ *R v Sharrouf (No 2)* [2008] NSWSC 1450, [5]-[7].

¹¹⁶⁹ See *R v Presser* [1958] VR 45; *R v Sharrouf (No 2)* [2008] NSWSC 1450, [9]-[11]; *R v Ogawa* [2011] 2 Qd R 350, [90].

¹¹⁷⁰ *R v Sexton* (2000) 77 SASR 405.

¹¹⁷¹ See *Agoston v R* [2008] NSWCCA 116 and the cases cited therein.

8.4.2 Unfitness in summary proceedings

991. Commonwealth law makes no provision, in relation to a proceeding for a summary offence or the summary determination of an indictable offence, for determining that the defendant is unfit to plead or to stand trial.¹¹⁷² Nor does the common law.¹¹⁷³

992. However s 20BQ of the *Crimes Act 1914* (Cth) provides a court of summary jurisdiction with power to deal with a defendant who is mentally-ill or intellectually-disabled. Section 20BQ provides:

20BQ Person suffering from mental illness or intellectual disability

- (1) *Where, in proceedings in a State or Territory before a court of summary jurisdiction in respect of a federal offence, it appears to the court:*
 - (a) *that the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and*
 - (b) *that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under this Division than otherwise in accordance with law;*

the court may, by order:

 - (c) *dismiss the charge and discharge the person:*
 - (i) *into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years; or*
 - (ii) *on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or*
 - (iii) *unconditionally; or*
 - (d) *do one or more of the following:*
 - (i) *adjourn the proceedings;*
 - (ii) *remand the person on bail;*
 - (iii) *make any other order that the court considers appropriate.*
- (2) *Where a court makes an order under paragraph (1)(c) in respect of a person and a federal offence with which the person has been charged, the order acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence.*
- (3) *Where a court makes an order under subsection (1) in respect of a person and a federal offence with which the person has been charged, the court must not make an order under section 19B, 20, 20AB or 21B in respect of the person in respect of the offence.*

993. On its face, s 20BQ is capable of being applied at any stage of a summary proceeding (including a proceeding involving the summary determination of an indictable offence) and is capable of being used in relation to a defendant who is unfit to plead or unfit to be tried, by reason of mental illness or

¹¹⁷² See *Berg v DPP (Qld)* [2015] QCA 196, [36] (and the cases there referred to), as to the distinction between fitness to plead and fitness to stand trial. In short, the latter is broader in scope and extends to the defendant's ability to follow and meaningfully participate in the course of the proceedings.

¹¹⁷³ *Pioch v Lauder* (1976) 13 ALR 266; *Ebatarinja v Deland* (1998) 194 CLR 444, [31]; *CL v DPP* [2011] VSCA 227.

intellectual disability. However in two decisions of the Supreme Court of South Australia,¹¹⁷⁴ Gray J has read down s 20BQ; his Honour held that it applies only when no plea has been entered and that it has no application where a defendant is fit to plead. The correctness of these decisions is open to doubt. A strong line of authority in relation to a cognate provision in New South Wales, upon which s 20BQ appears to have been based, holds that the provision may be used at any stage of a summary proceeding and may be used in an appropriate case in relation to a person suffering from mental illness or intellectual disability, including a person who is unfit to plead or unfit to be tried.¹¹⁷⁵ It seems to be at least arguable that s 20BQ is open to a similar construction.

994. On any view, the power in s 20BQ provides an expeditious procedure for dealing with a case in which a person appears to be unfit to plead by reason of mental illness or intellectual disability.
995. The section does not require any causal link between the mental illness or intellectual disability and the offending. The focus is on the condition of the defendant at the time of the proceedings.
996. Section 20BQ has been described as requiring a two-stage process (similar to the process under s 19B): first considering whether the person is suffering from a mental illness or intellectual disability; and secondly considering whether it would be more appropriate to deal with the person under the section.¹¹⁷⁶
997. Laws in some States and Territories provide for a determination of unfitness in summary proceedings.¹¹⁷⁷ However, in view of the enactment of s 20BQ, it is uncertain whether such laws are applied as surrogate federal law to proceedings for Commonwealth offences by s 68 or s 79 of the *Judiciary Act 1903* (Cth).¹¹⁷⁸
998. As to post-conviction orders see “8.6 Disposition of persons suffering from mental illness/intellectual disability” below.

¹¹⁷⁴ *Morrison v Behrooz* [2005] SASC 142; *Boonstoppel v Hamidi* [2005] SASC 248.

¹¹⁷⁵ See *DPP v El Mawas* (2006) 66 NSWLR 93 and the cases cited there. In *DPP v Seymour* [2009] NSWSC 555, Simpson J found it unnecessary to decide whether *Morrison v Behrooz* [2005] SASC 142 was correctly decided on this point.

¹¹⁷⁶ *Potts v Bonnici* (2009) 104 SASR 313.

¹¹⁷⁷ **Qld:** *Mental Health Act 2016* (Qld), s 172 – the criteria for unfitness are not defined in the legislation, and must be determined by reference to the common law. **WA:** *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), Part 3 – the criteria for unfitness are set out in s 9. **SA:** *Criminal Law Consolidation Act 1935* (SA), Part 8A – the criteria for unfitness are set out in s 269H. **Tas:** *Criminal Justice (Mental Impairment) Act 1999* (Tas), Part 2 – the criteria for unfitness are set out in s 8. **ACT:** *Crimes Act 1900* (ACT), Divisions 13.2 and 13.6 – the criteria for unfitness are set out in s 311.

¹¹⁷⁸ In *Kelly v Saadat-Talab* (2008) 72 NSWLR 305, the NSW CA held that s 20BQ rendered similar State provisions incapable of being applied to proceedings for a Commonwealth offence. Special leave to appeal was refused by the High Court: *ST v Kelly* [2009] HCATrans 175.

8.5 Dispositions following acquittal because of mental illness

8.5.1 Power to make an order

999. Section 7.3 of the *Criminal Code* (Cth) creates the defence of mental impairment that applies to all Commonwealth offences, whether a matter is prosecuted summarily or on indictment. Mental impairment is defined to include senility, intellectual disability, mental illness,¹¹⁷⁹ brain damage and severe personality disorder (*Criminal Code*, s 7.3(8)).

1000. The provision requires that the person was suffering from a mental impairment at the time of carrying out the conduct constituting the offence, and this had the effect that:

- the person did not know the nature and quality of the conduct;
- the person did not know that the conduct was wrong; or
- the person was unable to control the conduct.

1001. In its report explaining the rationale for relevant provisions of the *Criminal Code*, the Criminal Law Officer's Committee noted that Section 7.3 is based on the common law defence of insanity, under the McNaghten rules. Under those rules, it must be established that the defendant had a "disease of the mind". This was a general term – it captured situations where a defendant labours under "*such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong*".¹¹⁸⁰ The determination of this question has been left to juries.

1002. The common law did not require an examination into the precise categorisation of the clinical reason for the disease of the mind. Times have changed in terms of how human behaviour and mental dysfunction are described. Medical science now distinguishes between mental illness, intellectual disability and personality disorder, amongst other states, in terms of their nature, whether they are treatable, and whether considered an illness. The McNaghten rules and subsequent common law cases were not concerned with these questions of classification, but with establishing a test for criminal responsibility based on (lack of) capacity to reason.¹¹⁸¹ The Committee noted in its report that it was appropriate to have an inclusive definition in the Code based on modern terminology of what may amount to disease of the mind, now described as "mental impairment".

1003. If a special verdict of "not guilty because of mental impairment" is returned, the court's powers to deal with the defendant are found in Division 7 of Part IB of the *Crimes Act 1914* (Cth). That Division provides for orders in proceedings on indictment for a Commonwealth offence, following the acquittal of a person *because of mental illness at the time of the offence* (s 20BJ(1) and (4)).

¹¹⁷⁹ The reference to "mental illness" in s 7.3(8) is defined as a reference to "*an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli*": *Criminal Code* (Cth), s 7.3(9).

¹¹⁸⁰ *Stapleton v R* (1952) 86 CLR 358, 367-8.

¹¹⁸¹ E.g. *Willgoss v R* (1960) 105 CLR 295, regarding a person with a personality disorder.

1004. Section 20BJ was enacted before the *Criminal Code*, when the common law McNaghten rules applied to federal offences. At that time the reference to “mental illness” was understood to encompass all situations where the McNaghten defence was made out. If the defence of “unsoundness of mind” was made out, the court was empowered by s 20BJ to order that the defendant be detained. That was its purpose.
1005. The ancestor of this provision (then s 20B of the *Crimes Act*) applied where “*the person is acquitted by reason of unsoundness of mind at the time of the commission of the offence*”.
1006. Whether the phrase used by Parliaments at given points in time has been “unsoundness of mind”, or “mental illness”, the relevant provision has been intended to apply following a finding of not guilty under the McNaghten test. That, is, both phrases were another way of referring to the relevant “disease of the mind” at common law.
1007. It is likely that s 20BJ would be read widely to cover all cases where a finding is made that a person is not guilty by reason of mental impairment, under s 7.3 of the *Criminal Code*. That is, the references in s 20BJ to “*acquittal ... because of mental illness at the time of the offence*” must be taken as references to all forms of “mental impairment” within s 7.3(8) of the Code, not merely “mental illness” as defined in s 7.3(9). Such an interpretation is consistent with the purpose of the provision and its history as relating to all forms of “unsoundness of mind”. Mental illness can be given a wide meaning as it is not defined narrowly in the provision.¹¹⁸²
1008. Further, s 20BJ(5) provides that if the court orders the release, rather than detention, of the person acquitted, conditions of release may require an “*assessment of the person’s mental illness, mental condition or intellectual disability*” for the purposes of treatment. If “mental illness” in s 20BJ(1) were to be read narrowly to exclude “mental condition” and “intellectual disability”, this power to order assessments for the latter two situations could still have residual meaning (as a person could be “mentally ill” and also have an intellectual disability). However, it is more likely that the provision illustrates an intention that the primary power to make orders upon acquittal in s 20BJ(1) applies to persons found not guilty by reason of mental illness in its broadest sense, encompassing not only mental illness as defined in civil law but also other forms of mental conditions and intellectual disability, consistent with the common law.

8.5.2 Detention or release

1009. Generally the court must order that the person be detained in safe custody in prison or in a hospital for a period specified in the order, not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: *Crimes Act 1914* (Cth), s 20BJ(1).
1010. However the court may, if in the court’s opinion it is more appropriate to do so, order the person’s release from custody either absolutely or subject to conditions: s 20BJ(4). Any such conditions apply for

¹¹⁸² See S Odgers, *Principles of Federal Criminal Law* (LBC, 4th edition, 2019), [7.3.260].

such period as the court specifies in the order, not exceeding 3 years. The conditions may include remaining in the care of a responsible person or attending for treatment: s 20BJ(5).

1011. If the court makes an order under s 20BJ(1), the length of the detention period should represent an estimate of the sentence which would have been imposed if the person had been found guilty of the offence charged, and no account should be taken of that person's mental illness or any state of mind aggravated by that mental illness.¹¹⁸³ The court must have regard to ordinary sentencing principles in making that estimate.¹¹⁸⁴ If the person has been found not guilty by reason of mental illness in relation to more than one Commonwealth offence, the judge should fix the period of the detention order so that it takes account of each federal offence of which the accused person has been acquitted on the ground of mental illness as if a total custodial sentence were being imposed after conviction.¹¹⁸⁵
1012. If an order is made under s 20BJ(1), the Attorney-General must conduct periodic reviews, and may order the person's release: see *Crimes Act*, ss 20BK-20BP.

8.6 Disposition of persons suffering from mental illness/intellectual disability

8.6.1 Non-conviction disposition in summary proceedings

1013. Section 20BQ of the *Crimes Act 1914* (Cth) creates a non-conviction disposition option for dealing with a defendant who is suffering from mental illness or intellectual disability in summary proceedings (including the summary determination of proceedings on indictment).
1014. As to the scope and operation of s 20BQ, see "8.4.2 Unfitness in summary proceedings". It has been held that the provision is available only when no plea has been entered and that it has no application where a defendant is fit to plead.¹¹⁸⁶ However it is arguable that, contrary to these decisions, a disposition option under s 20BQ is available, according to the terms of the section itself, whenever a defendant in summary proceedings is suffering from a mental illness or intellectual disability.

8.6.2 Post-conviction dispositions

1015. Division 9 of Part 1B of the *Crimes Act 1914* (Cth) provides for post-conviction dispositions for federal offenders suffering from mental illness (within the meaning of the civil law of the State or Territory) or intellectual disability.¹¹⁸⁷

¹¹⁸³ *R v Goodfellow* (1994) 33 NSWLR 308; *R v G* [2019] SASCFC 71. In *R v Robinson* (2004) 11 VR 165, Kellam J followed *Goodfellow* but held that the mental illness of the person was relevant to culpability and the sentence which would have been imposed had the person been found guilty.

¹¹⁸⁴ *R v G* [2019] SASCFC 71.

¹¹⁸⁵ *R v Goodfellow* (1994) 33 NSWLR 308.

¹¹⁸⁶ *Morrison v Behrooz* [2005] SASC 142; *Boonstoppel v Hamidi* [2005] SASC 248.

¹¹⁸⁷ *Crimes Act 1914* (Cth), ss 20BQ – 20BY. For a more detailed outline, see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), Chapter 28.

1016. Commonwealth post-conviction disposition options relating to those suffering from mental illness or intellectual disability are:

<i>Section</i>	<i>Outcome</i>	<i>Summary/Indictable Disposition</i>
20BS	Hospital Order	On <u>indictment only</u> – where defendant convicted and person suffering from mental illness which contributed to offence.
20BV	Psychiatric Probation Order	<u>Summary/Indictable</u> – where defendant convicted and suffering from mental illness which contributed to offence.
20BY	Program Probation Order	<u>Summary/Indictable</u> – where defendant convicted and suffering from intellectual disability which contributed to offence.

Appendix 1: Federal Sentencing Checklist

Crimes Act section	Effect of provision
4AA	<p>Value of penalty unit.</p> <p>One Penalty unit is valued at:¹¹⁸⁸</p> <ul style="list-style-type: none"> • \$210 for offences committed on or after 1 July 2017; • \$180 for offences committed between 31 July 2015 and 30 June 2017;¹¹⁸⁹ • \$170 for offences committed between 28 December 2012¹¹⁹⁰ and 30 July 2015; and • \$110 for offences committed between 7 April 1997 and 27 December 2012.
4B(2)	Where an offence is punishable only by imprisonment, a pecuniary penalty can be imposed instead of or in addition to imprisonment. The section sets out the formula to be used in determining the maximum pecuniary penalty available.
4J	This section enables certain indictable offences to be dealt with summarily and establishes the maximum sentences when an offence is dealt with summarily.
4JA	This section enables certain indictable offences that are punishable by a pecuniary penalty only to be dealt with summarily, and specifies the applicable maximum fines.
4K	<p>Aggregate penalties for summary matters</p> <p>Permits a court to impose one penalty in respect of charges against the same provision of a law of the Commonwealth “<i>founded on the same facts, or form, or are part of, a series of offences of the same or similar character</i>”.</p> <p>Other powers also apply; see “7.10 Aggregate penalty”.</p> <p>A single penalty cannot be imposed for State/Territory and federal offences.</p>
16A(1)	<p>The primary obligation on a sentencing court is to impose a sentence or order that is of a severity appropriate in all the circumstances of the offence – <i>R v Hili</i> (2010) 242 CLR 520. There is no judicially determined norm or starting point in terms of how much of the sentence of imprisonment should be served in prison before release.</p>

¹¹⁸⁸ Penalty units are reviewed every three years.

¹¹⁸⁹ Section 2 of the *Crimes Legislation Amendment (Penalty Unit) Act 2015* (Cth) replaced the definition of “penalty unit” in s 4AA(1) with the words *means the amount of \$180 (subject to indexation under subsection (3))*. The amending provisions inserted subsections (3) – (8), which provide a mechanism for indexing penalty units by reference to the Consumer Price Index every 3 years commencing 2018.

¹¹⁹⁰ Section 3 and Schedule 3 to *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act No.167 of 2012*; *Crimes Legislation Amendment (Penalty Unit) Act 2015*, s 2.

Crimes Act section	Effect of provision
16A(2)	This is a non-exhaustive list of matters to which the court is to have regard where <i>relevant and known</i> when passing sentence. The list is supplemented by relevant common law principles.
16A(2A)	The court is precluded from taking customary law or cultural practice into account to either mitigate or aggravate the seriousness of the criminal behaviour.
16A(3)	In determining whether a non-custodial sentence or order is appropriate regard must be had to the nature or severity of the conditions that may be imposed or may apply to the offender under the order.
16AB	Sets out matters relevant to reliance on victim impact statements such as: <ul style="list-style-type: none"> - no implication is to be drawn from an absence of a victim impact statement; - the statement can be read by the victim or by someone on behalf of the victim; and - the offender may only cross examine the maker of the victim impact statement with leave of the court.
16AC (formerly 21E)	<p>Court is to quantify reduction of sentence if an undertaking by an offender as to future co-operation in proceedings is given. Court is required to say that the reduction is made for this reason.</p> <p>For s 16AC to operate there must be a clear undertaking and it must be given in contemplation of the possible institution of some proceeding. A s 16AC reduction is not to include any mitigation of penalty consequent upon application of s 16A(2)(h) which relates to general cooperation with authorities. Those are distinct and separate.</p>
16B	In sentencing, a court must have regard to any sentence (state, federal or territory) that the offender has not served or any sentence liable to be served through revocation of parole or licence (the totality principle).
16BA	The Court can take other federal/external territory offences into account. Sets out a range of rules and qualifications where this is to occur.
16C	When imposing a fine , the court must have regard to the ability of the offender to pay. The court is not prevented from imposing a fine because the financial circumstances of the offender cannot be ascertained by the court.

Crimes Act section	Effect of provision
19B	<p>Bond without conviction</p> <p>If the conditions in s 19B(1)(b) have been met, the court:</p> <ul style="list-style-type: none"> • may dismiss the charge/s – s 19B(1)(c); or • may discharge the person without conviction for a period not exceeding 3 years – s 19B(1)(d) • may order compliance with conditions for a period not exceeding 2 years – s 19B(1)(d)(iii) • must explain or cause to be explained the purpose of the order, the consequences which may follow if it is not complied with and that the recognizance may be varied – s 19B(2) • must provide a copy of the bond to the offender – s 19B(4)
20(1)(a)	<p>Bond <u>with</u> conviction</p> <ul style="list-style-type: none"> • period of order may not exceed 5 years – s 20(1)(a)(i) • may also order compliance with conditions for a period not exceeding 2 years <p>Note that a fully suspended or partially suspended federal sentence or sentences requires an ancillary order being made under s 20(1)(b).</p>
20(1)(b)	<p>Recognizance release order (RRO)– court may order that offender be released forthwith or after specified period of imprisonment on recognizance</p> <p>Not open in respect of sentences of imprisonment imposed for terrorism and certain other national security offences – s 19AG <i>Crimes Act 1914</i> (Cth)</p>
20A	Deals with breaches of bonds (imposed pursuant to ss 19B and 20(1)(a) or (b))
20AA	Empowers a court to discharge or vary conditions of a bond imposed under ss 19B or 20(1).
20AB	Enables the Commonwealth to pick up and apply particular State or Territory sentencing options . S 20AB only allows State sentencing options on conviction to be prescribed. For the list of the options which are picked up, see “5.7.3 Types of State or Territory sentences or orders which are applied by s 20AB”.
20AC	Deals with a breach of State or Territory sentencing options that have been picked up under s 20AB.
20C	This section incorporates all the State sentencing options for children or young persons. In respect of a “ <i>child or young person</i> ” which is not defined, the full range of federal options and any additional State/Territory sentencing options are available (if not inconsistent with Commonwealth law).

<i>Crimes Act</i> section	<i>Effect of provision</i>
Imprisonment	
17B(1)	<p>Imprisonment not permitted for certain offences</p> <p>Imprisonment precluded if convicted of one or more specified property offences where the total value of the property/money does not exceed \$2,000 and the defendant has not previously been sentenced to imprisonment, unless exceptional circumstances exist.</p>
17A	<p>Where a court is satisfied that no other penalty is appropriate in the circumstances of the case. The court must state this and reasons must be entered in court records though failure to do so will not invalidate any sentence.</p>
16E	<p>Commencement of sentences and pre-sentence detention</p> <p>This section adopts the law on the commencement of sentences and non-parole periods for federal offenders. However, the <i>Crimes Act 1914</i> (Cth) has its own regime for determining when a non-parole period or recognizance release order ought to be made - see ss 19AB to 19AJ. State legislation has no application as to when a non-parole period of recognizance release order ought to be made.</p> <p>Pre-sentence detention for the offence must be taken into account. Sections 16E(2) & (3) adopt State/Territory laws for giving credit for pre-sentence detention (whether by backdating the sentence or by reducing the sentence imposed). Laws in Victoria and Queensland by which a sentencing court may declare pre-sentence custody as time served (<i>Sentencing Act 1991</i> (Vic), s 18; <i>Penalties and Sentences Act 1992</i> (Qld), s 161(1)) are also treated as applying to federal offenders.</p>
16F	<p>If the court imposes a federal sentence and fixes a non-parole period or a recognizance release order it must explain, or cause to be explained, the purpose and consequence of fixing and non-compliance with such a period or order. (Failure to comply with the requirements of this section does not invalidate a sentence: <i>R v Hutton</i> [2004] NSWCCA 60, [17]-[28].)</p>
16G	<p>Repealed from 16 January 2003</p> <p>Until repealed in 2003, this section required that the absence of remissions be taken into account in determining the length of the head sentence and for the sentences to be adjusted accordingly.</p> <p>Notwithstanding the repeal of s 16G in respect of sentences imposed from 16 January 2003, there are some situations where the court needed to have regard to the previous effect of that provision:</p> <ul style="list-style-type: none"> • in re-sentencing on an appeal after 16 January 2003 where the sentence appealed from was imposed before that date; and • in considering parity where a co-accused was sentenced before 16 January 2003 and another co-accused is to be sentenced on or after 16 January 2003.

Crimes Act section	Effect of provision
19(2)	<p>Where multiple federal sentences are imposed the court must “by order direct” when each federal sentence imposed commences - simply stating only that sentences are to be concurrent, cumulative or cumulative to a nominated degree will not satisfy this section.</p> <p>Section 19(2) relates to the head sentence(s) not the non-parole period – see <i>R v DS</i> (2005) 153 A Crim R 194. The non-parole period will commence on the commencement of the first head sentence.</p>
19(3)	<p>Where a State sentence is imposed as well as a federal sentence(s) the court must “by order direct” when each federal sentence commences so there are no gaps in the sentence. Commencement of a State/Territory sentence is governed by State law (e.g. <i>Sentencing Act 1991</i> (Vic), s 16(4)). See <i>DPP v Swingle</i> [2017] VSCA 305.</p>
19AB	<p>Provides for situations in which a court must impose a non-parole period</p> <p>s 19AB(1) – where the period of imprisonment exceeds 3 years (i.e. 3 years and 1 day) and the offender is not undergoing a federal term of imprisonment, a single non-parole period must be imposed.</p> <p>s 19AB(3) – court may decline to impose a non-parole period on certain grounds</p> <p>s 19AB(4) – court must give reasons for failing to impose a non-parole period.</p>
19AD	<p>This section is relevant where the offender is already subject to a federal non-parole period when sentenced but is qualified by s 19AG in relation to sentencing for terrorism offences and certain other national security offences.</p>
19AC	<p>Provides for situations in which a court must fix a recognizance release order (RRO)</p> <p>s 19AC(1) – where the period of imprisonment does not exceed 3 years must make a RRO;</p> <p>s 19AC(3) – where period of imprisonment is under 6 months not required to make a RRO;</p> <p>s 19AC(4) - Court may decline to impose a RRO where it is otherwise required to do so having regard to the nature and circumstances of the offence(s) and to the antecedents – see <i>Hancock v R</i> [2012] NSWCCA 200, [45]-[51]. Where the court considers that this is not appropriate reasons are to be stated and recorded in the court records.</p>
19AE	<p>This section is relevant where the offender is already subject to a federal recognizance release order when sentenced but it is qualified by s 19AG in relation to sentences for national security offences (including terrorism, treason or espionage).</p>
19AJ	<p>Separate sentences must be imposed for federal/State offences. That is, a single sentence cannot be imposed for both State and federal offences.</p>

Crimes Act section	<i>Effect of provision</i>
19AK	A court is not precluded from imposing a non-parole period merely because the offender is liable to be deported.
19AQ	Deals with the situation where a federal parole order or licence is automatically revoked by the imposition of a sentence or sentences of more than 3 months – see <i>R v Novak</i> [2003] VSCA 46 and <i>R v Piacentino</i> (2007) 15 VR 501, [106]-[108].
19AR	Deals with the fixing of a new non-parole period where a parole order or licence is automatically revoked.
19AS	Requires a court imposing a sentence that revokes federal parole to issue a warrant of detention for the unserved part of the sentence.
19AU	Deals with the situation where the federal Attorney-General decides to revoke federal parole.

Appendix 2: Federal offences triggering State and Territory sex offender registration legislation

A2.1 New South Wales: Registrable federal offences under the Child Protection (Offenders Registration) Act 2000 (NSW)

Class 1 offences include the following federal offences (listed in section 3)

- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
 - section 272.8 (sexual intercourse with child under 16 outside Australia, or causing such activity in defendant's presence);
 - section 272.10 (aggravated offence—child with mental impairment or under care, supervision or authority of defendant) where involving sexual intercourse
 - section 272.11 (persistent sexual abuse of child outside Australia);
- Offences of benefiting from (s 272.18), encouraging (s 272.19) or preparing for or planning (s 272.20) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*) if it relates to another Class 1 offence as elsewhere defined in section 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence an element of which is an intention to commit an offence of a kind listed in the definition of "Class 1 Offence" in section 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in the definition of "Class 1 Offence" in section 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence that, at the time it was committed:
 - was a Class 1 offence for the purposes of the *Child Protection (Offenders Registration) Act 2000* (NSW), or
 - in the case of an offence occurring before the commencement of this definition [27/6/2000], was an offence of a kind listed in the definition of "Class 1 Offence" in section 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW).

Class 2 offences include the following federal offences (listed in section 3)

- Offences against the following provisions of the *Criminal Code*:
 - section 271.4 (trafficking in children)
 - section 271.7 (domestic trafficking in children)
 - section 272.9 (sexual activity (other than sexual intercourse) with child under 16 outside Australia or causing such activity in defendant's presence);
 - section 272.10(1) (aggravated offence—child under 16 with mental impairment or under care, supervision or authority of defendant) where not involving sexual intercourse;
 - section 272.11 (persistent sexual abuse of child outside Australia);
 - section 272.12 (sexual intercourse with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
 - section 272.13 (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);

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- section 272.14(1) (procuring child to engage in sexual activity outside Australia);
 - section 272.15(1) ("grooming" child to engage in sexual activity outside Australia).
-
- Offences of benefiting from (s 272.18), encouraging (s 272.19) or preparing for or planning (s 272.20) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*) if it relates to another Class 2 offence as elsewhere defined in section 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW).
-
- Offences against the *Criminal Code* relating to child pornography and child abuse material outside Australia:
 - section 273.5 (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia);
 - section 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia);
 - section 273.7 (aggravated offending relating to child pornography or child abuse material outside Australia).
-
- Offences against the *Criminal Code* relating to the use of a postal or similar service:
 - section 471.16 (using a postal or similar service for child pornography material);
 - section 471.17 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service);
 - section 471.19 (using a postal or similar service for child abuse material);
 - section 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service);
 - section 471.22 (aggravated offending relating to child pornography or child abuse material).
 - section 471.24 (using a postal or similar service to procure persons under 16);
 - section 471.25 (using a postal or similar service to "groom" persons under 16);
 - section 471.26 (using a postal or similar service to send indecent material to person under 16).
-
- Offences against the *Criminal Code* relating to the use of a carriage service:
 - section 474.19 (using a carriage service for child pornography material);
 - section 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service);
 - section 474.22 (using a carriage service for child abuse material);
 - section 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material through a carriage service)
 - section 474.24A (aggravated offence involving child abuse material through a carriage service);
 - section 474.25A (using a carriage service for sexual activity with person under 16);
 - section 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant);
 - section 474.26 (using a carriage service to procure persons under 16);
 - section 474.27 (using a carriage service to "groom" persons under 16);
 - section 474.27A (using a carriage service to transmit indecent communication to person under 16).

- Offences against section 270.6¹¹⁹¹ or 270.7 (deceptive recruiting for labour or services) of the *Criminal Code* where the victim is a child.¹¹⁹²
- Offences under s 233BAB of the *Customs Act 1901* (Cth) involving items that are child pornography or child abuse material.
- An offence an element of which is an intention to commit an offence of a kind listed in the definition of “Class 2 Offence” in section 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in the definition of “Class 2 Offence” in section 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence that, at the time it was committed:
 - was a Class 2 offence for the purposes of the *Child Protection (Offenders Registration) Act 2000* (NSW), or
 - in the case of an offence occurring before the commencement of this definition [27/6/2000], was an offence of a kind listed in the definition of “Class 2 Offence” in section 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW).

¹¹⁹¹ Section 270.6 originally provided for “sexual servitude” offences. The *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (which came into effect on 8 March 2013) repealed s 270.6, re-enacted servitude offences as s 270.5, and substituted a new s 270.6 which contained only definition provisions.

¹¹⁹² The New South Wales provisions appear to apply to forced labour and deceptive recruitment of children even if it does not relate to sexual services.

A2.2 Victoria: Registrable federal offences under the Sex Offenders Registration Act 2004 (Vic)

Class 1 offences (s 7(2)) include the following federal offences (listed in Schedule 1)

- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
 - section 272.8(1) and (2) (sexual intercourse with child under 16 outside Australia, or causing such activity in defendant's presence);
 - section 272.9(1) and (2) (sexual activity (other than sexual intercourse) with child under 16 outside Australia, or causing such activity in defendant's presence);
 - section 272.10(1) (aggravated offence—child under 16 with mental impairment or under care, supervision or authority of defendant);
 - section 272.11(1) (persistent sexual abuse of child under 16 outside Australia);
 - section 272.12(1) and (2) (sexual intercourse with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
 - section 272.13(1) and (2) (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
 - section 272.14(1) (procuring child to engage in sexual activity outside Australia);
 - section 272.15(1) ("grooming" child to engage in sexual activity outside Australia).
- An offence an element of which is an intention to commit an offence of a kind listed in Schedule 1 to the *Sex Offenders Registration Act 2004* (Vic).
- An offence that, at the time it was committed¹¹⁹³—
 - was a Class 1 offence for the purposes of the *Sex Offenders Registration Act 2004* (Vic); or
 - if committed before 1 October 2004, was an offence of a kind listed in Schedule 1 to the *Sex Offenders Registration Act 2004* (Vic).
- An offence of attempting, or conspiracy or incitement to commit an offence listed in Schedule 1 to the *Sex Offenders Registration Act 2004* (Vic).

Class 2 offences (s 7(3)) include the following federal offences (listed in Schedule 2)

- Offences against section 270.7 of the *Criminal Code* where the victim is a child and the conduct involves deceptive recruiting for sexual services.
- Offences against section 271.4 (trafficking in children) or section 271.7 (domestic trafficking in children) of the *Criminal Code* in circumstances where the purpose of the exploitation is to provide sexual services.
- Offences of benefiting from, encouraging or preparing for sexual offences against children outside Australia (under Division 272 of the *Criminal Code*):
 - section 272.18(1) (benefiting from offence against Division 272);
 - section 272.19(1) (encouraging offence against Division 272);
 - section 272.20(1) and (2) (preparing for or planning offence against Division 272);

¹¹⁹³ The Explanatory Memorandum to the *Sex Offenders Registration Amendment (Miscellaneous) Bill 2017* (Vic), states, by way of example, that historical offences against the now repealed section 270.6 of the *Criminal Code* (sexual servitude offences) will continue to be Class 1 offences.

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- Offences against the *Criminal Code* relating to child pornography and child abuse material outside Australia:
 - section 273.5(1) (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia);
 - section 273.6(1) (possessing, controlling, producing, distributing or obtaining child abuse material of a sexual nature outside Australia);
 - section 273.7(1) (aggravated offending relating to child pornography or child abuse material of a sexual nature outside Australia).
- Offences against the *Criminal Code* relating to the use of a postal or similar service:
 - section 471.16 (using a postal or similar service for child pornography material);
 - section 471.17 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service);
 - section 471.19 (using a postal or similar service for child abuse material of a sexual nature);
 - section 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material of a sexual nature for use through a postal or similar service);
 - section 471.22 (aggravated offending relating to child abuse material of a sexual nature).
 - section 471.24 (using a postal or similar service to procure persons under 16);
 - section 471.25 (using a postal or similar service to "groom" persons under 16);
 - section 471.26 (using a postal or similar service to send indecent material to person under 16).
- Offences against the *Criminal Code* relating to the use of a carriage service:
 - section 474.19(1) (using a carriage service for child pornography material);
 - section 474.20(1) (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service);
 - section 474.22(1) (using a carriage service for child abuse material);
 - section 474.23(1) (possessing, controlling, producing, supplying or obtaining child abuse material of a sexual nature through a carriage service)
 - section 474.24A (aggravated offence involving child abuse material of a sexual nature through a carriage service);
 - section 474.25A (using a carriage service for sexual activity with person under 16);
 - section 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant);
 - section 474.26 (using a carriage service to procure persons under 16);
 - section 474.27 (using a carriage service to "groom" persons under 16);
 - section 474.27A(1) (using a carriage service to transmit indecent communication to person under 16).
- Offences under s 233BAB of the *Customs Act 1901* (Cth) involving items that are child pornography or child abuse material of a sexual nature.
- An offence an element of which is an intention to commit an offence of a kind listed in Schedule 2 to the *Sex Offenders Registration Act 2004* (Vic).
- An offence that, at the time it was committed—
 - was a Class 2 offence for the purposes of the *Sex Offenders Registration Act 2004* (Vic); or

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- if committed before 1 October 2004, was an offence of a kind listed in Schedule 2 to the *Sex Offenders Registration Act 2004* (Vic).

- An offence of attempting, or conspiracy or incitement to commit an offence listed in Schedule 2 to the *Sex Offenders Registration Act 2004* (Vic).

A2.3 Queensland: Registrable federal offences under the Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld)

Prescribed offences include the following federal offences (listed in Schedule 1)

- Offences against the following provisions of the *Criminal Code*, as in force from time to time before being amended by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) —
 - section 270.6 (Sexual servitude offences)
 - section 270.7 (Deceptive recruiting for sexual services)in circumstances where:
 - the victim is a child; or
 - the police commissioner reasonably believes the offender believed that the victim was a child.
- An offence against any of the following provisions of the Criminal Code:
 - section 271.4 (Offence of trafficking in children)
 - section 271.7 (Offence of domestic trafficking in children)
 - section 272.8 (Sexual intercourse with child outside Australia)
 - section 272.9 (Sexual activity (other than sexual intercourse) with child outside Australia)
 - section 272.10 (Aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
 - section 272.11 (Persistent sexual abuse of child outside Australia)
 - section 272.12 (Sexual intercourse with young person outside Australia—defendant in position of trust or authority)
 - section 272.13 (Sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority)
 - section 272.14 (Procuring child to engage in sexual activity outside Australia)
 - section 272.15 (“Grooming” child to engage in sexual activity outside Australia)
 - section 272.18 (Benefiting from offence against Division 272)
 - section 272.19 (Encouraging offence against Division 272)
 - section 272.20 (Preparing for or planning offence against Division 272)
 - section 273.5 (Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia)
 - section 273.6 (Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia)
 - section 273.7 (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
 - section 471.16 (Using a postal or similar service for child pornography material)
 - section 471.17 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service)
 - section 471.19 (Using a postal or similar service for child abuse material)
 - section 471.20 (Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service)
 - section 471.22 (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
 - section 471.24 (Using a postal or similar service to procure persons under 16)
 - section 471.25 (Using a postal or similar service to “groom” persons under 16)
 - section 471.26 (Using a postal or similar service to send indecent material to person under 16)
 - section 474.19 (Using a carriage service for child pornography material)

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- section 474.20 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service)
 - section 474.22 (Using a carriage service for child abuse material)
 - section 474.23 (Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service)
 - section 474.24A (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
 - section 474.25A (Using a carriage service for sexual activity with person under 16 years of age)
 - section 474.25B (Aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
 - section 474.26 (Using a carriage service to procure persons under 16 years of age)
 - section 474.27 (Using a carriage service to “groom” persons under 16 years of age)
 - section 474.27A (Using a carriage service to transmit indecent communication to person under 16 years of age).
- An offence against any of the following provisions of the *Crimes Act 1914* (Cth), as in force from time to time before being repealed¹¹⁹⁴ by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) —
 - section 50BA (Sexual intercourse with child under 16)
 - section 50BB (Inducing child under 16 to engage in sexual intercourse)
 - section 50BC (Sexual conduct involving child under 16)
 - section 50BD (Inducing child under 16 to be involved in sexual conduct)
 - section 50DA (Benefiting from offence against this Part)
 - section 50DB (Encouraging offence against this Part)
 - An offence against the *Customs Act 1901* (Cth), section 233BAB that involves child pornography or child abuse material.
 - An offence an element of which is an intention to commit an offence listed in Schedule 1.
 - An offence of attempting, or of conspiracy or incitement, to commit an offence listed in Schedule 1.
 - An offence that, at the time it was committed, was a class 1 offence or a class 2 offence within the meaning of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) as in force immediately before the commencement¹¹⁹⁵ of the *Child Protection (Offender Reporting) and Other Legislation Amendment Act 2014* (Qld).

¹¹⁹⁴ Repeal of these sections occurred on 15 April 2010.

¹¹⁹⁵ Operative provisions commenced on 22 September 2014, substituting a new Schedule 1 containing “prescribed offences” as compared to “Class 1” and Class 2” offences in the previous Schedule 1.

A2.4 Western Australia: Registrable federal offences under the Community Protection (Offender Reporting) Act 2004 (WA)

Class 1 offences include the following federal offences (listed in s 10 and Schedule 1)

- An offence against section 50BA¹¹⁹⁶ of the *Crimes Act 1914* (Cth) (sexual intercourse with child under 16).
- An offence against section 50BB¹¹⁹⁷ of the *Crimes Act 1914* (Cth) (inducing child under 16 to engage in sexual intercourse).
- An offence an element of which is an intention to commit an offence of the above kind.
- An offence of attempting, or of conspiracy or incitement, to commit an offence of the above kind.
- An offence that, at the time it was committed:
 - was a Class 1 offence; or
 - if the offence was committed before the commencement date – was an offence of a kind referred to above;

Class 2 offences include the following federal offences (listed in s 11 and Schedule 2)

- An offence against section 50BC¹¹⁹⁸ of the *Crimes Act 1914* (Cth) (sexual conduct involving child under 16).
- An offence against section 50BD¹¹⁹⁹ of the *Crimes Act 1914* (Cth) (inducing child under 16 to be involved in sexual conduct).
- An offence against section 50DA or 50DB of the *Crimes Act 1914* (Cth) (benefiting from offence and encouraging offence, respectively)¹²⁰⁰
- Offences under s 233BAB of the *Customs Act 1901* (Cth) involving items that are child pornography or child abuse material.
- An offence an element of which is an intention to commit an offence of the above kinds.
- An offence of attempting, or of conspiracy or incitement, to commit an offence of the above kinds.
- An offence that, at the time it was committed:
 - was a Class 2 offence; or

¹¹⁹⁶ Section 50BA was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

¹¹⁹⁷ Section 50BB was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

¹¹⁹⁸ Section 50BC was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

¹¹⁹⁹ Section 50BD was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

¹²⁰⁰ Sections 50DA and 50DB were repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

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- if the offence was committed before the commencement date – was an offence of the kind referred to above.

A2.5 South Australia: Registrable federal offences under the Child Sex Offenders Registration Act 2006 (SA)

Class 1 offences include the following federal offences (listed in Part 2 of Schedule 1)

- Offences against section 270.6¹²⁰¹ of the *Criminal Code*.
- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
 - section 272.8 (sexual intercourse with child under 16 outside Australia, or causing such activity in defendant's presence);
 - section 272.10 (aggravated offence—child under 16 with mental impairment or under care, supervision or authority of defendant);
 - section 272.11 (persistent sexual abuse of child under 16 outside Australia);
 - section 272.12 (sexual intercourse with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
 - section 272.13 (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
 - section 272.14 (procuring child to engage in sexual activity outside Australia);
- Offences of benefiting from (s 272.18) or encouraging (s 272.19) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*).
- An offence against a law of the Commonwealth previously in force that corresponds to any of the above offences.

Class 2 offences include the following federal offences (listed in Part 3 of Schedule 1)

- Offences against section 270.7 (deceptive recruiting) of the *Criminal Code* where the victim is a child.
- Offences against section 271.4 (trafficking in children) or section 271.7 (domestic trafficking in children) of the *Criminal Code*.
- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
 - section 272.9 (sexual activity (other than sexual intercourse) with child under 16 outside Australia, or causing such activity in defendant's presence);
 - section 272.20 (preparing for or planning sexual offences against children outside Australia under Division 272 of the *Criminal Code*)
- Offences against the *Criminal Code* relating to child pornography and child abuse material outside Australia:
 - section 273.5 (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia);

¹²⁰¹ Section 270.6 originally provided for “sexual servitude” offences. The *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (which came into effect on 8 March 2013) repealed s 270.6, re-enacted servitude offences as s 270.5, and substituted a new s 270.6 which contained only definition provisions.

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- section 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia);
- section 273.7 (aggravated offending relating to child pornography or child abuse material outside Australia).
- Offences against the *Criminal Code* relating to the use of a postal or similar service:
 - section 471.16 (using a postal or similar service for child pornography material);
 - section 471.17 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service);
 - section 471.19 (using a postal or similar service for child abuse material);
 - section 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service);
 - section 471.22 (aggravated offending relating to child pornography or child abuse material).
 - section 471.24 (using a postal or similar service to procure persons under 16);
 - section 471.25 (using a postal or similar service to "groom" persons under 16);
 - section 471.26 (using a postal or similar service to send indecent material to person under 16).
- Offences against the *Criminal Code* relating to the use of a carriage service:
 - section 474.19 (using a carriage service for child pornography material);
 - section 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service);
 - section 474.22 (using a carriage service for child abuse material);
 - section 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material through a carriage service)
 - section 474.24A (aggravated offence involving child abuse material through a carriage service);
 - section 474.25A (using a carriage service for sexual activity with person under 16);
 - section 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant);
 - section 474.26 (using a carriage service to procure persons under 16);
 - section 474.27 (using a carriage service to "groom" persons under 16);
 - section 474.27A (using a carriage service to transmit indecent communication to person under 16).
- An offence against a law of the Commonwealth previously in force that corresponds to any of the above offences.
- Offences under s 233BAB of the *Customs Act 1901* (Cth) involving items that are child pornography.

A2.6 Tasmania: Registrable federal offences under the Community Protection (Offender Reporting) Act 2005 (Tas)

Class 1 offences include the following federal offences (listed in s 13 and Schedule 1)

- An offence against section 233BAB of the *Customs Act 1901* (Cth), that involves child exploitation material.
- An offence against any of the following provisions of the Criminal Code:
 - section 273.5 (Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia)
 - section 273.6 (Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia)
 - section 471.16 (Using a postal or similar service for child pornography material)
 - section 471.17 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service)
 - section 471.19 (Using a postal or similar service for child abuse material)
 - section 471.20 (Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service)
 - section 471.24 (Using a postal or similar service to procure persons under 16)
 - section 471.25 (Using a postal or similar service to “groom” persons under 16)
 - section 471.26 (Using a postal or similar service to send indecent material to person under 16)
 - section 474.19 (Using a carriage service for child pornography material)
 - section 474.20 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service)
 - section 474.22 (Using a carriage service for child abuse material)
 - section 474.23 (Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service)
 - section 474.25A (Using a carriage service for sexual activity with person under 16)
 - section 474.26 (Using a carriage service to procure persons under 16)
 - section 474.27 (Using a carriage service to “groom” persons under 16)
 - section 474.27A (Using a carriage service to transmit indecent communication to person under 16).
- An offence an element of which is an intention to commit such an offence.
- An offence of attempting, or of conspiracy or incitement, to commit such an offence.
- An offence that, at the time it was committed:
 - was a Class 1 offence; or
 - if the offence was committed before the commencement date – was an offence of a kind referred to in s 13.

Class 2 offences include the following federal offences (listed in s 14 and Schedule 2)

- Offences against any of the following provisions of the *Criminal Code*:
 - section 272.9 (Sexual activity (other than sexual intercourse) with child outside Australia)
 - section 272.12 (Sexual intercourse with young person outside Australia—defendant in position of trust or authority)
 - section 272.13 (Sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority)

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- section 272.14 (Procuring child to engage in sexual activity outside Australia)
 - section 272.15 (“Grooming” child to engage in sexual activity outside Australia)
 - section 272.20 (Preparing for or planning offence against Division 272)
 - section 273.7 (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
 - section 471.22 (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
 - section 474.24A (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
 - section 474.25B (Aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
- An offence an element of which is an intention to commit such an offence.
 - An offence of attempting, or of conspiracy or incitement, to commit such an offence.
 - An offence that, at the time it was committed:
 - was a Class 2 offence; or
 - if the offence was committed before the commencement date – was an offence of a kind referred to in s 14.

Class 3 offences include the following federal offences (listed in s 15 and Schedule 3)

- Offences against any of the following provisions of the *Criminal Code*:
 - section 272.8 (Sexual intercourse with child outside Australia)
 - section 272.10 (Aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
 - section 272.11 (Persistent sexual abuse of child outside Australia)
 - section 272.18 (Benefiting from offence against Division 272)
 - section 272.19 (Encouraging offence against Division 272)
- An offence an element of which is an intention to commit such an offence.
- An offence of attempting, or of conspiracy or incitement, to commit such an offence.
- An offence that, at the time it was committed:
 - was a Class 3 offence; or
 - if the offence was committed before the commencement date – was an offence of a kind referred to in s 15;

A2.7 Australian Capital Territory: Registrable federal offences under the Crimes (Child Sex Offenders) Act 2005 (ACT)

Class 1 offences include the following federal offences (listed in Part 1.2 of Schedule 1)

- Offences against section 270.6¹²⁰² of the *Criminal Code* where the victim is a child.
- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
 - section 272.8(1) and (2) (sexual intercourse with child under 16 outside Australia, or causing such activity in defendant's presence);
 - section 272.10(1) (aggravated offence—child under 16 with mental impairment or under care, supervision or authority of defendant);
 - section 272.11 (persistent sexual abuse of child under 16 outside Australia);
 - section 272.12 (sexual intercourse with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
- Offences of benefiting from (s 272.18) or encouraging (s 272.19) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*).

Class 2 offences include the following federal offences (listed in Part 2.2 of Schedule 2)

- Offences against section 270.7 (deceptive recruiting) or 270.8 (aggravated slavery-like offence) of the *Criminal Code* where the offending involves sexual services.
- Offences against section 271.4 (trafficking in children) or section 271.7 (domestic trafficking in children) of the *Criminal Code* in circumstances where the offender intends or is reckless as to whether the victim will be used/exploited for sexual services.
- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
 - section 272.9(1) and (2) (sexual activity (other than sexual intercourse) with child under 16 outside Australia, or causing such activity in defendant's presence);
 - section 272.13(1) and (2) (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
 - section 272.14(1) (procuring child to engage in sexual activity outside Australia);
 - section 272.15(1) ("grooming" child to engage in sexual activity outside Australia).
- Offences of preparing for or planning (s 272.20) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*)
- Offences against the *Criminal Code* relating to child exploitation material and child abuse material outside Australia:

¹²⁰² Section 270.6 originally provided for "sexual servitude" offences. The *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (which came into effect on 8 March 2013) repealed s 270.6, re-enacted servitude offences as s 270.5, and substituted a new s 270.6 which contained only definition provisions.

Sentencing of Federal Offenders in Australia: a guide for practitioners

Appendix 2: Federal offences triggering State and Territory sex offender registration legislation

- section 273.5 (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia);
 - section 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia);
 - section 273.7 (aggravated offending relating to child pornography or child abuse material outside Australia).
- Offences against the *Criminal Code* relating to the use of a postal or similar service:
 - section 471.16 (using a postal or similar service for child pornography material);
 - section 471.17 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service);
 - section 471.19 (using a postal or similar service for child abuse material);
 - section 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service);
 - section 471.22 (aggravated offending relating to child pornography or child abuse material).
 - section 471.24 (using a postal or similar service to procure persons under 16);
 - section 471.25 (using a postal or similar service to "groom" persons under 16);
 - section 471.26 (using a postal or similar service to send indecent material to person under 16).
- Offences against the *Criminal Code* relating to the use of a carriage service:
 - section 474.19 (using a carriage service for child pornography material);
 - section 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service);
 - section 474.22 (using a carriage service for child abuse material);
 - section 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material through a carriage service)
 - section 474.24A (aggravated offence involving child abuse material through a carriage service);
 - section 474.25A (using a carriage service for sexual activity with person under 16);
 - section 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant);
 - section 474.26 (using a carriage service to procure persons under 16);
 - section 474.27 (using a carriage service to "groom" persons under 16);
 - section 474.27A (using a carriage service to transmit indecent communication to person under 16).
- Offences under s 233BAB(5) and s 233BAB(6) of the *Customs Act 1901* (Cth) involving importing/exporting items that are child pornography or child abuse material.

A2.8 Northern Territory: Registrable federal offences under the Child Protection (Offender Reporting and Registration) Act 2004 (NT)

Class 1 offences include the following federal offences (listed in Schedule 1)

- An offence against section 50BA¹²⁰³ of the *Crimes Act 1914* (Cth) (sexual intercourse with child under 16).
- An offence against section 50BB¹²⁰⁴ of the *Crimes Act 1914* (Cth) (inducing child under 16 to engage in sexual intercourse).
- An offence an element of which is an intention to commit an offence of the above kind.
- An offence of attempting, or of conspiracy or incitement, to commit an offence of the above kind.
- An offence that, at the time it was committed:
 - was a Class 1 offence; or
 - if the offence was committed before the commencement date – was an offence of a kind referred to in Schedule 1;

Class 2 offences include the following federal offences (listed in Schedule 2)

- An offence against section 50BC¹²⁰⁵ of the *Crimes Act 1914* (Cth) (sexual conduct involving child under 16).
- An offence against section 50BD¹²⁰⁶ of the *Crimes Act 1914* (Cth) (inducing child under 16 to be involved in sexual conduct).
- An offence against section 50DA or 50DB of the *Crimes Act 1914* (Cth) (benefiting from offence and encouraging offence, respectively)¹²⁰⁷
- Offences against section 271.4 (trafficking in children to provide sexual services) or section 271.7 (domestic trafficking in children to provide sexual services) of the *Criminal Code*.
- Offences against the *Criminal Code* relating to the use of a carriage service:
 - section 474.19 (using a carriage service for child pornography material);
 - section 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service);
 - section 474.26 (using a carriage service to procure persons under 16);
 - section 474.27 (using a carriage service to "groom" persons under 16);

¹²⁰³ Section 50BA was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

¹²⁰⁴ Section 50BB was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

¹²⁰⁵ Section 50BC was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

¹²⁰⁶ Section 50BD was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

¹²⁰⁷ Sections 50DA and 50DB were repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

- An offence an element of which is an intention to commit an offence of the above kind.
- An offence of attempting, or of conspiracy or incitement, to commit an offence of the above kind.
- An offence that, at the time it was committed:
 - was a Class 2 offence; or
 - if the offence was committed before the commencement date – was an offence of a kind referred to in Schedule 2;

Appendix 3: Historical aspects of sentencing federal offenders

This Appendix describes matters relating to the sentencing of a federal offender which are no longer applicable. One reason for including them is to assist in understanding old decisions relating to the sentencing of federal offenders.

A3.1 Remissions: *Crimes Act 1914* (Cth), s 16G, as in force before 16 January 2003

Section 16G of the *Crimes Act 1914* (Cth), as in force prior to 16 January 2003, provided:

“If a federal sentence is to be served in a prison of a State or Territory where State or Territory sentences are not subject to remission or reduction, the court imposing the sentence must take that fact into account in determining the length of the sentence and must adjust the sentence accordingly.”

The section was enacted in response to State legislation which abolished remissions of reductions of sentences of imprisonment. The section required a court sentencing a federal offender to a term of imprisonment to adjust the sentence accordingly.

In the process of adjustment, when it applied, it was appropriate to take into account the rate of remissions previously attracted, namely one third. This was referred to as “an appropriate starting point”.¹²⁰⁸

But in the process of adjustment it was impermissible to substitute a mathematical calculation for a discretion to make the required adjustment. The sentence fixed had to reflect the adjustment required by s 16G but that discount was not necessarily to be applied as a precise reduction to reflect the proportion of the sentence by which remissions, if granted, would previously have reduced it.¹²⁰⁹

Further, it appears that there was a “shading out” of the weight to be given to the “starting point” the longer the sentence was and that where a very long sentence of imprisonment was warranted it was open to the sentencing judge to moderate the s 16G adjustment as part of the “instinctive synthesis”.¹²¹⁰

Section 16G was initially considered to apply to cases where the court considered an indeterminate life sentence to be the appropriate sentence.¹²¹¹ The High Court decided that s 16G, when it operated, had no application to life sentences.¹²¹²

A3.2 Remissions: Effect of the repeal of *Crimes Act 1914* (Cth), s 16G (from 16 January 2003)

As noted above, s 16G of the *Crimes Act 1914* (Cth), which required a court sentencing a federal offender to imprisonment to take into account the absence of remissions, was repealed with effect from 16 January

¹²⁰⁸ *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370.

¹²⁰⁹ *Ibid*; *R v Corbett* (1991) 52 A Crim R 112; *O’Brien v R* (1991) 57 A Crim R 80; *R v Carroll* [1991] 2 VR 509; *Shore v R* (1992) 66 A Crim R 37; *R v Bradley* (1997) 137 FLR 314; *R v Li* [1998] 1 VR 637.

¹²¹⁰ *R v Majeric* [2001] VSCA 15. See also *R v Sweet* [2001] NSWCCA 445.

¹²¹¹ *R v Yook* (1995) 122 FLR 109.

¹²¹² *Lee Vanit v R* (1997) 190 CLR 378.

2003.

There have been a number of Court of Criminal Appeal decisions in NSW that discuss the effect of the repeal of s 16G. In *Bezan*,¹²¹³ Wood CJ (with whom Buddin and Shaw JJ agreed) summarised the effect as follows:

- while the repeal of s 16G is likely to result in an increase in the current and future sentencing pattern, the proper approach is to set a sentence that meets the requirements of s 16A(1) of the *Crimes Act 1914* (Cth) and the relevant objectives of sentencing, without giving a s 16G discount;
- it would be inappropriate to approach the sentencing exercise upon a broad arithmetic approach that would require the pre-repeal sentencing range to be adjusted by some bare arithmetic formula, let alone one that would call for its increase by a factor of 50% in order to restore an equivalence with the pre-repeal range;
- Starting points selected in pre-repeal cases involving federal offenders would not necessarily have been the same had s 16G not been in force as judges were aware that it was a somewhat beneficial provision;
- Care needs to be taken when reference is made to any material relating to pre-repeal decisions; and
- The approach now required by s 16A(1) is that a sentence be imposed that “is of a severity appropriate to all of the circumstances of the case”, including those identified in ss 16A(2) and (3).

Two justices of the NSW Court of Criminal Appeal dissented from this view and considered that the majority view substantially understated what should be the effect of the repeal of s 16G. Their view was that the repeal should lead to increases in sentences of approximately 50%.¹²¹⁴ However, the majority view in the NSW Court of Criminal Appeal is that the correct approach is to determine the sentence without taking into account that s 16G existed and has now been repealed, and it would be unfair and crude to increase federal sentences by 50% to accommodate the repeal of s 16G.¹²¹⁵ It has been recognised by the NSW Court of Criminal Appeal that the repeal of s 16G will normally lead to the imposition of a heavier sentence than discernible in the pre-repeal pattern of sentencing¹²¹⁶ or will be likely to result in an increase over the pre-repeal pattern¹²¹⁷ though adjustment for the repeal of s 16G should not be made automatically by use of a mathematical formula or fixed percentage.¹²¹⁸

¹²¹³ *R v Bezan* [2004] NSWCCA 342.

¹²¹⁴ *R v Kevenaar* [2004] NSWCCA 210 (Hulme J, with whom Simpson J agreed).

¹²¹⁵ *R v Dujeu* [2004] NSWCCA 237, [20]-[43]. See also *R v A* [2004] NSWCCA 292 where Wood CJ said that to automatically adjust sentences upwards in the order of 50% would be to resort to a mathematical approach, which is inappropriate. The task is to impose a sentence of a severity appropriate in all the circumstances of the case (s 16A(1)) including those identified in ss 16A(2) and (3).

¹²¹⁶ *R v Rivadavia* (2004) 61 NSWLR 63, [72]; *Okeke v R* [2005] NSWCCA 444, [20] and *R v Liu* [2005] NSWCCA 378.

¹²¹⁷ *R v Tsiaousis* [2005] NSWCCA 240.

¹²¹⁸ *R v SC* [2008] NSWCCA 29.

A number of cases have confirmed the propositions summarised in the case of *R v Bezan*.¹²¹⁹

A3.3 The effect on sentencing of a forfeiture or pecuniary penalty order under the *Proceeds of Crime Act 1987* (Cth)

The Commonwealth *Proceeds of Crime Act 1987* (Cth) was silent on the relevance of confiscation orders to sentencing. The *Proceeds of Crime Act 1987* (Cth) did however permit the sentencing court to defer sentencing until a confiscation application had been determined.¹²²⁰

In the absence of specific provisions and having regard to relevant authority, the Commonwealth adopted the approach, when dealing with the 1987 Act, that such orders are part of the overall punishment imposed upon an offender and should be taken into account in determining sentence. The approach was that, if possible, any application should be made prior to sentencing to allow the court to take any such order into account.

The weight which was attributable to the order varied greatly depending upon the specific circumstances under consideration.¹²²¹

The principles which emerged in the cases established that weight should be afforded to a forfeiture order representing property “used in or in connection with” the commission of an offence in contrast to proceeds of the crime. The situation was more complex where the confiscation order was a forfeiture order or pecuniary penalty order representing proceeds or benefit derived from the offence.

- For example, in 1989 the Victorian Court of Appeal in *R v Allen*¹²²² considered that a forfeiture order was “part of the retribution exacted from offenders on behalf of the community” and that the order, if made before sentence, should be taken into account, but that the weight to be attributed to the making of the order would vary depending upon the circumstances.
- In 1990 in *R v McDermott*,¹²²³ the Full Federal Court considered that a pecuniary penalty order relating entirely to the profits of the crime had a significant punitive and deterrent effect if enforced against the only available asset, or against future earnings.
- By contrast, in 1992 in *Tapper v R*,¹²²⁴ the Full Federal Court found that whilst such a pecuniary penalty order must be taken into account, it might have little or no impact on sentence if it was

¹²¹⁹ *R v J* (2005) 152 A Crim R 152; *Clarkson v R* [2007] NSWCCA 70; *R v Tran* [2007] QCA 221; *Korgbara v R* (2007) 71 NSWLR 187; *R v Chea* [2008] NSWCCA 78.

¹²²⁰ *Proceeds of Crime Act 1987* (Cth), s 18(2).

¹²²¹ *R v McDermott* (1990) 49 A Crim R 105 and *Tapper v R* (1992) 39 FCR 243, following the reasoning of the Victorian CCA in *R v Allen* (1989) 41 A Crim R 51.

¹²²² *R v Allen* (1989) 41 A Crim R 51.

¹²²³ *R v McDermott* (1990) 49 A Crim R 105.

¹²²⁴ *Tapper v R* (1992) 39 FCR 243.

unlikely to impact on the offender or his assets. In that matter the prospect of recovery was unlikely.

Where confiscation action was resolved prior to sentencing the court was able to take into account the impact of the order on the sentence. Where however the confiscation action was not resolved before the sentencing the court, where advised of the situation, would have regard to the likelihood of an order being made or automatic forfeiture occurring in the future.

Appendix 4: Orders applied by *Crimes Act 1914* (Cth), s 20AB: jurisdiction-specific issues

A4.1 Victoria

Community correction order (CCO) and a condition to pay money as a bond

Under s 48JA of the *Sentencing Act 1991* (Vic) (in force from 1 May 2013), a court may attach a condition requiring an offender to pay an amount by way of a bond under a CCO. Section 83AS(4) sets out the consequences for a contravention. Whilst such a condition could be included as one of the ‘any other conditions as the court thinks fit to specify’ (s 48 *Sentencing Act 1991* (Vic)), it may be effectively unenforceable in relation to federal matters as any breach would be dealt with pursuant to s 20AC(6) of the *Crimes Act 1914* (Cth). Hence, it is the view of the CDPP that it is preferable that a bond should not be made a condition of a CCO in relation to a federal offender.

CCO and ‘suspended’ sentences

As a result of the decision of the Court of Appeal in *DPP v Leys*,¹²²⁵ s 44 of the *Sentencing Act 1991* (Vic) was amended to make it clear that a CCO cannot be imposed with a suspended sentence. The question remains whether the reasoning in this decision applies to a recognizance release order (RRO) under s 20(1)(b) of the *Crimes Act 1914*. There is no authority dealing with the application of s 44 to the Commonwealth provision.

Subdivision 3 of the *Sentencing Act* outlines numerous provisions dealing with the conditions for imposition of a suspended sentence and the consequences of failure to comply. These provisions are distinct from those provisions in Part IB of the *Crimes Act 1914* (Cth) dealing with recognizances and support an interpretation of s 44 that limits the reference to suspended sentences so that it does not extend to Commonwealth sentences involving immediate release on a recognizance pursuant to s 20(1)(b).

On this interpretation, imposing a CCO on a State charge and a RRO on a federal charge would not be prohibited. The *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic), assented to on 4 June 2013, has the effect of abolishing the option of directing sentences imposed in higher courts on State offences to be suspended for offences committed on or after 1 September 2013.

CCOs and a Justice Plan for Intellectually Disabled Offenders

Under the *Sentencing Act 1991* (Vic) [Division 2 of Part 3BA], a court considering making a CCO or releasing an offender on adjournment may attach a condition directing the offender to participate in a Justice Plan.

It is the view of the CDPP that such a plan cannot be made as a condition of a CCO or recognizance release order for federal offenders.

¹²²⁵ *DPP v Leys* (2012) 44 VR 1.

The CDPP view is that the Court cannot impose a Justice Plan as part of a CCO for a federal offence. Division 2 of Part 3BA of the *Sentencing Act 1991* (Vic) is entitled: *Division 2 – Intellectually disabled offenders*.

The *Crimes Act 1914* (Cth) has otherwise provided for the sentencing of persons suffering from mental illness or intellectual disability. Division 9 of the *Crimes Act 1914* (Cth) is entitled “*sentencing alternatives for persons suffering from mental illness or intellectual disability*”.

It sets out a regime for sentencing persons with such conditions in ss 20BS – 20BY. These provisions impliedly exclude the operation of alternative State laws relating to the sentencing of persons suffering from an intellectual disability.

Imprisonment for a federal offence and CCO for a State offence

Where a term of imprisonment is imposed for one federal offence and a CCO ordered for a State offence (to which s 44 applies), the question of the commencement date of that CCO arises. Section 38(2) of the *Sentencing Act 1991* (Vic) contains an exception to the 3-month deadline for the commencement of CCOs in circumstances where a combination sentence (in accordance with s 44) is imposed for a State offence. The exception is set out in s 44(3) which provides that the 3-month rule is not applicable where a person is serving a term of imprisonment pursuant to a s 44 combination sentence. In those circumstances, the CCO commences upon release from imprisonment regardless of whether it is more than 3 months from the date of sentence. Accordingly, the CCO imposed as part of a s 44 combination sentence on a State offence would commence upon the release of a person from imprisonment independent of the end date of the imprisonment imposed for the federal offence.

Appendix 5: Fitness to plead and fitness to be tried: procedures and orders

Division 6 of Part IB of the *Crimes Act 1914* (Cth) sets out procedures and powers when issues of fitness to plead or fitness to be tried arise in committal proceedings and proceedings on indictment for federal offences. These procedures and powers are summarised in the following boxes. The text should be read in conjunction with the general discussion in “8.4.1 Unfitness in committal proceedings and on indictment”.

Box 1: Question of fitness to be tried arises at committal stage – assessing fitness

1. If the prosecution, defendant or defendant’s lawyer raises the question of the defendant’s fitness to be tried in a committal for a federal offence on indictment, the magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person been committed for trial (“the court”) (s 20B(1)).
2. The magistrate may order the defendant’s detention in prison or hospital but only for so long as is reasonably necessary to allow the court to deal with the matter (s 20B(4)).
3. If the court finds the defendant fit to be tried, it must remit proceedings to the magistrate and the committal must continue as soon as practicable (s 20B(2)).
4. The court will decide the question of fitness (s 20B(2) and (3)). If the State/Territory law provides a procedure for determining unfitness when it is raised during committal, it may apply, provided there is no inconsistency with Commonwealth law.¹²²⁶
5. If the defendant is found to be unfit, Commonwealth law provides for the next steps, as set out in box 3 onwards below.

¹²²⁶

In *Kesavarajah v R* (1994) 181 CLR 230, 243, Mason CJ, Toohey and Gaudron JJ observed that the reference to the “court” in s 20B(2) (in the context of a referral from a committal) finding a person *fit to be tried* refers to a judge making this decision. This is compared with a finding that a person is *unfit* to be tried, which is set out in section 20B(3) and is said to pick up the relevant Victorian legislation at the time, which meant that fitness was to be determined by a jury.

The laws of some States or Territories make provision in relation to questions of fitness arising in a committal hearing. Whether such provisions are capable of being applied will depend upon the terms of the relevant State/Territory law. Different views have been expressed as to whether and if so how State laws can apply at the committal stage.

- *DPP v Galea* [2018] VSC 30, [18]-[19], appears to accept that the test of unfitness in the Victorian legislation could be determined by a jury (on referral from a magistrate), even though the Victorian legislation does not provide for fitness questions to be resolved at committal stage (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 8).
- In contrast, in *R v Sexton* (2000) 77 SASR 405 the court stated that a “...number of the provisions under the state statutory scheme appear to be in direct conflict with the Crimes Act. For example, s20B of the Crimes Act provides that where in proceedings for the commitment of a person for trial a question of a person’s fitness to be tried arises, the proceedings must be referred to the court where the trial will take place. Under s269J(4) of the Criminal Law Consolidation Act provision is made for the referral of the issue of mental unfitness but leaving a discretion for the preliminary examination to be continued. The Criminal Law Consolidation Act allows the Court to try the objective elements of the offence before determining the issue of unfitness for trial. Such a course would not be open on the trial of a federal offence. S269L, s269M and s269N would appear to be substantially inconsistent with the terms of s20B of the Crimes Act.” Also see *Agoston v R* [2008] NSWCCA 116, 70.

On the question of whether a State or Territory law is capable of applying, see *R v Ogawa* [2011] 2 Qd R 350, [90]-[93], where the *Mental Health Act* (Qld) stated it did not apply to Commonwealth offences. Provisions in the Queensland *Criminal Code* were applied instead.

On referral from a magistrate in *R v Kaczmarek* [2011] ACTSC 177, Refshauge ACJ decided that the defendant was fit to be tried, solely under s 20B(2). It appears that it was not thought necessary to apply ACT legislation.

Box 2: Question of fitness to be tried arises in trial on indictment – assessing fitness

1. The issue of fitness can be raised by prosecution, defence or on a court's own motion.
2. The court will decide the question of fitness (s 20B(2) and (3)).
3. State/Territory law applies to the procedure for determining a question of fitness raised in a proceeding on indictment (to the extent the law is not inconsistent with Commonwealth law), where it is capable of applying.¹²²⁷
4. The court has an inherent power to determine that there not be a fitness investigation, where circumstances have changed such that the investigation is unnecessary.¹²²⁸
5. If defendant is found to be fit, the trial must be commenced or resumed in accordance with normal trial procedures.¹²²⁹
6. If the defendant is found to be unfit, the court may order that the person be detained in prison or hospital for so long as is reasonably necessary to allow the court to deal with the matter (s 20B(5)).
7. Commonwealth law provides for the next steps, as set out in box 3 onwards below.

¹²²⁷ *Kesavarajah v R* (1994) 181 CLR 230, 241-243. The "court" will be the jury in all States, except NSW and WA (and SA if a defendant has elected to have judge decide the issue). In *Agoston v R* [2008] NSWCCA 116, [70], the court expressed the view that decisions under the Commonwealth provisions are to be made by a court (that is a judge). This may only have been meant to apply after the preliminary finding of unfitness is made, at least where that question arises on indictment. See also *R v Baladjam (No 1)* [2008] NSWSC 72.

¹²²⁸ See *DPP v Galea* [2018] VSC 30, [18]-[19] (Hollingworth J).

¹²²⁹ For example, In Victoria, a new jury must be empaneled for the trial, because the jury which decided fitness cannot decide any other matters: see *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 11(6). In South Australia, the same jury will continue in the trial unless the trial judge thinks there are special reasons to have separate juries: see *Criminal Law Consolidation Act 1935* (SA), s 269B.

Box 3: Assessing whether there is a prima facie case against a defendant found to be unfit to be tried and subsequent orders

1. The following procedure applies whether the question of fitness arose during the committal (box 1) or trial (box 2). In either case, if the defendant has been found to be unfit to be tried, the remaining steps are to be taken by the court (ie judge) under sections 20B-20BC.¹²³⁰
2. The first of these steps is to determine whether there has been established a prima facie case that the defendant committed the offence concerned (s 20B(3)).
3. This requires a finding as to whether "there is evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds to put the person on trial in relation to the offence" (s 20B(6)).¹²³¹
4. In proceedings to determine this question:
 - The person may give evidence or make an unsworn statement;
 - The person may raise any defence that could properly be raised if the proceedings were a trial for that offence; and
 - The court may seek such other evidence, whether oral or in writing, as it considers likely to assist (s 20B(7)).
5. If the court determines that there has not been established a prima facie case, the court must dismiss the charge and release the person from custody (s 20BA(1)).
6. If the court determines that a prima facie case has been established but it is of the opinion, having regard to-
 - the character, antecedents, age, health or mental condition of the person, or
 - the extent (if any) to which offence is of a trivial nature; or
 - the extent (if any) to which the offence was committed under extenuating circumstances-that it is inappropriate to inflict any punishment, or to inflict any punishment other than a nominal punishment, the court must dismiss the charge and order their release (s 20BA(2)).
7. If the court determines that there is a prima facie case, and does not dismiss the charge in accordance with s 20BA(2) because it would be appropriate to inflict punishment (other than nominal punishment), the court must make further findings, as outlined in box 4.

¹²³⁰ *Kesavarajah v R* (1994) 181 CLR 230, 241-243. See also *Agoston v R* [2008] NSWCCA 116, [70]; *R v Sharrouf (No 2)* [2008] NSWSC 1450

¹²³¹ For a discussion about this requirement, see *R v Sharrouf (No 2)* [2008] NSWSC 1450, [26] et seq. In addition, the Explanatory Memorandum to the Bill which inserted this provision into the *Crimes Act 1914* (Cth) states that this means that "...the court must be satisfied that the person engaged in the conduct constituting the offence. Any mental element or mens rea attaching to the offence is irrelevant to the finding of a prima facie case..." (Explanatory Memorandum to the *Crimes Legislation Amendment Bill (No 2)*, Senate, Clause 15).

Box 4: Prima facie case established and punishment would be appropriate – inquiry as to future fitness.

1. The court (ie judge) must undertake two inquiries in this situation.¹²³²
2. **Inquiry 1:** The first question for the court to determine is whether, on the balance of probabilities, the person will become fit to be tried for the offence within the period of 12 months after the day the person was found to be unfit to be tried (s 20BA(4)).
3. A court may only make this determination about future fitness after considering evidence from a duly qualified psychiatrist and one other duly qualified medical practitioner (s 20BA(5)). It can also obtain other evidence as appropriate (s 20BA(6)).
4. **Inquiry 2:** This inquiry is required to determine what custodial/bail arrangements are to be made for the person.
 - The court must first determine whether the person is suffering from a mental illness or condition, for which treatment is available in a hospital, and
 - If this is the case, the court must ascertain whether the person objects to being detained in a hospital.(This is required under s 20BB(1) if the defendant is found to be fit to be tried within the period, and s 20BC(1) if they are found unfit to be tried.)
5. A range of orders are possible, depending on the answers to these inquiries.
6. If the court finds that the person-
 - will not become fit to be tried within the 12 month period, refer to box 5
 - will become fit to be tried within the 12 month period, refer to box 6.

¹²³² *Kesavarajah v R* (1994) 181 CLR 230, 241-243. For an example of the process see *R v Sharrouf (No 2)* [2008] NSWSC 1450.

Box 5: Finding that the person will not become fit to be tried within the 12 month period

1. If the court finds the person will not become fit to be tried within the 12 month period, it must make orders regarding custody or release.
2. The court must order the detention of the person as follows:
 - that the person be detained in a hospital - but only if the person is suffering from a mental illness or mental condition for which treatment is available in a hospital, and the person does not object to detention in a hospital; or
 - otherwise - that the person be detained in another place, including a prison.

The period of detention specified in the order must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged (s 20BC(2)).

OR

If in the court's opinion it is more appropriate to do so, the court may release the person from custody either absolutely or subject to conditions, for a period not exceeding 3 years (s 20BC(5)).

The conditions of release may include:

- that the person remain in the care of a responsible person nominated in the order;
 - that the person attend upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability, and where appropriate, for treatment;
 - any other condition that the court thinks fit (s 20BC(5) and (6)).
3. The previous determination that there is a prima facie case for the commission of the offence charged acts as a stay against any proceedings, or any further proceedings, against the person, in respect of the offence (s 20BC(8)).

Box 6: Finding that the person will become fit to be tried within the 12 month period.

1. If the court finds that the person will become fit within the 12 month period and:
 - is suffering from a mental illness or condition, for which treatment is available in a hospital, and
 - if so, does not object to being detained in a hospital-the court must order the person be detained in a hospital until the person becomes fit to be tried¹²³³ (s 20BB(2)).
2. In other situations where the court finds that the person will become fit within the 12 month period the court must:
 - order the person's detention in a place other than a hospital (including a prison); or
 - grant bail on condition that the person live at an address or place specified by the court-until the person becomes fit to be tried¹²³⁴ (s 20BB(2)).

¹²³³ Or subsequently, if it transpires that the person is not fit within the 12 month period, until the court makes an order for detention or release.

¹²³⁴ Or subsequently, if it transpires that the person is not fit within the 12 month period, until the court makes an order for detention or release.

Box 6: Finding that the person will become fit to be tried within the 12 month period.

See box 7

Box 7: Resolution if person expected to become fit to be tried within the 12 month period

1. If the court has found that the person will become fit within 12 months (see box 6), and the person duly becomes fit within that period-
 - if the person had been indicted on the charge before being found unfit, the proceedings on the indictment must be continued as soon as practicable (s 20BB(3)(a)); or
 - if the matter of fitness arose during the committal, the committal proceedings must continue before the magistrate as soon as practicable (s 20BB(3)(b)).
2. If the person does not become fit within the 12 month period, at the end of that period the court must make an order as to the detention or release of the person.
3. The court must order the detention of the person as follows:
 - that the person be detained in a hospital - but only if the person is suffering from a mental illness or mental condition for which treatment is available in a hospital, and the person does not object to detention in a hospital; or
 - otherwise - that the person be detained in another place including a prison.

The period of detention specified in the order must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged (s 20BC(2) applied by s 20BB(4)).

In fixing the period of detention the court must have regard to any period of detention already served under section 20BB(2) (s 20BB(5)).

OR

If in the court's opinion it is more appropriate to do so, the court may release the person from custody either absolutely or subject to conditions, for a period not exceeding 3 years ((20BC(5) applied by s 20BB(4)).

If it is appropriate to release the person, and the person is already on bail, the court must continue the person's release on bail (s 20BB(5)).

Conditions of release may include:

- That the person remain in the care of a responsible person nominated in the order;
- That the person attend upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability, and where appropriate, for treatment;
- Any other condition that the court thinks fit (s 20BC(5) and (6) applied by s 20BB(4)).

In fixing the period of the person's release for which conditions apply, the court must have regard to any period of detention already served under section 20BB(2) (s 20BB(5)).

4. The previous determination that there is a prima facie case for the commission of the offence charged acts as a stay against any proceedings, or any further proceedings, against the person, in respect of the offence (s 20BB(6)).