About this paper

This paper deals with the sentencing of federal offenders in Victoria. The paper aims to explain the Commonwealth sentencing regime as it applies in Victoria and to draw attention to where the Commonwealth sentencing regime is different to the Victorian regime under the Sentencing Act 1991 (Vic). The paper includes practical examples of the application of the federal sentencing regime. The paper does not outline the relevant sentencing principles for individual federal offences but focuses on the sentencing regime.

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Recent changes

The Federal Sentencing in Victoria paper has been updated. The main changes are:

- **Plea of Guilty-the utilitarian benefit.**

  In *DPP (Cth) v Thomas; DPP (Cth) v Wu* [2016] VSCA 237 the Victorian Court of Appeal held that the utilitarian benefit of a plea of guilty must be taken into account when discounting a federal sentence that would otherwise have been imposed.

  As there is no national consistency on this issue the Commonwealth DPP has recommended to the Attorney-General’s Department that section 16A of the *Crimes Act 1914* (Cth) be amended to provide that when sentencing it is open to have regard to the utilitarian benefit of the plea of guilty and it is open to have regard to the timing of a guilty plea.

  (See paragraphs 102 – 106)

- **Relevance of possible deportation**

  Recent amendments to *the Migration Act 1958* (Cth) require that the Minister must cancel the visa of a person sentenced to and servicing a sentence of 12 months or more but also allow for the revocation of such a decision. The Victorian Court of Appeal has held that in order for a court to take into account the possibility of deportation as a mitigating factor the court must be satisfied not only as to the quantifiable risk that deportation will occur but also that deportation will, in fact, be a hardship to the offender: *Konamala v The Queen* [2016] VSCA 48; *Da Costa v The Queen* [2016] VSCA 49 and *Schneider v The Queen* [2016] VSCA 76.

  (See paragraphs 143 – 144)

- **Summary Aggregate Sentence**

  Federal charges can be joined in the one summons pursuant to a state law of procedure that is picked up and applied by section 68 of *the Judiciary Act 1903* (Cth). Some state procedural laws provide for wider joinder than section 4K(3) of the *Crimes Act 1914*. Where federal charges are joined under a broader state provision then those broader state provisions (that allow for an aggregate sentence of the charges so joined when dealt with summarily) will also apply - see *Janssen v McShane* [1992] TASSC 99. The obiter remarks of Perry J in *R v Jackson* (1998) 72 SASR 490 at 513 are not authority to the contrary. Also where federal offences are joined under a broader state law of procedure the decisions of *Cady v Smith* (1993) 117 FLR 132 and *Putland v The Queen* (2004) 218 CLR 174 have no application.

  (See paragraphs 357 - 360)
Suspended or partially suspended federal sentence - Pre-Sentence Detention

Pursuant to section 16E of the *Crimes Act 1914* (Cth) the general position is that state laws relating to the commencement of sentences and those relating to pre-sentence detention apply to federal offenders. The general position under section 18(1) of the *Sentencing Act 1991* (Vic) is that time served in custody is to be deducted from the sentence imposed unless the sentencing court otherwise orders. One consequence of the abolition of suspended sentences under Victorian law was the repeal of section 18(2)(c) of the *Sentencing Act 1991* (Vic). That provision provided that the general provision in section 18(1), namely that time served in custody was to be deducted from the sentence, didn’t apply where the sentence was wholly or partially suspended. Notwithstanding the repeal of section 18(2)(c) the practice in federal sentencing is otherwise ordered pursuant to section 18(1) pre-sentence detention is not deducted but rather the sentencer has regard to the period of pre-sentence detention when imposing a fully or partially suspended federal sentence so downwardly adjusting the fully or partially suspended sentence, pursuant to section 20(1)(b) of the *Crimes Act 1914* (Cth), and for the sentencer to state that in the sentencing reasons.

(See paragraphs 287, 321 – 323 and 380)
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Scope of Paper

1. This paper deals with sentencing of federal offenders in Victoria as set out in the *Crimes Act 1914* (Cth). The paper aims to explain the Commonwealth sentencing regime insofar as offenders in Victoria are concerned and, in particular, to draw attention to where the Commonwealth regime is different from the regime under the *Sentencing Act 1991* (Vic). The paper does not address the sentencing principles applicable to individual Commonwealth offences.

2. The sentencing regime for federal offenders was reviewed in 2006 by the Australian Law Reform Commission\(^1\) and is outlined in the Commonwealth Sentencing Database.\(^2\)

Federal Offender defined

3. A “federal offender” is defined by the *Crimes Act 1914* (Cth) as a person convicted of an offence against Commonwealth law.\(^3\)

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2. A joint collaboration by the National Judicial College, the NSW Judicial Commission and the CDPP (which provided the sentencing data).
3. See *Crimes Act 1914* (Cth), s 16(1). A conviction for contempt arising out of the inherent jurisdiction of a superior Court is not part of the Court’s federal jurisdiction (and so not an offence against federal law) even if the contempt arose in a proceeding where the Court was exercising federal jurisdiction see *R v B* [1972] WAR 129, in *Re Colina; Ex parte 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 was granted on 13 September 2002 by the High Court to *Haunga* on this point but the appeal was not pursued.
Federal Sentencing Scheme - Outline

4. The current federal sentencing scheme is an amalgam of:

- specific Commonwealth legislation, principally Part IB of the Crimes Act 1914 (Cth);
- adopted Victorian statutory provisions;
- common law principles, which fill the gaps in the federal provisions where they are not complete, but only if they are incomplete; and
- state procedural laws applied by s 68 and s 79 of the Judiciary Act 1903 (Cth).

5. The current federal sentencing scheme is substantially embodied in amendments to the Crimes Act 1914 (Cth) which were effective from 17 July 1990. Additional amendments have been made since then. The current federal sentencing regime increased the degree of uniformity of treatment of federal offenders throughout Australia but there is not complete uniformity. Sections 68 and 79 of the Judiciary Act 1903 (Cth), which in effect apply state and territory laws of procedure to the trial and conviction on indictment of those charged with a federal offence, result in some differences in the sentencing of federal offenders in the states and territories of Australia. The High Court has accepted that Commonwealth sentencing laws need not operate uniformly throughout Australia. Uniformity throughout the Commonwealth was not the policy chosen in the scheme, which requires the accused to be tried in the state where the offence was committed (s 80 Constitution) and invests state courts with federal jurisdiction which in general are required to apply state laws of procedure and evidence (sections 68 and 79 of the Judiciary Act 1903 (Cth)). Section 68 reflects a legislative preference for uniformity, as to the procedures for dealing with state and federal offences, within that state or territory.

6. The Crimes Act 1914 (Cth) is the repository of the sentencing options or sentencing alternatives in respect of federal offenders. The sentencing options available to the Federal Court are set out in the Competition and Consumer Act 2010 ['CCA'] for breaches of various provisions of that Act. This paper does not deal with the provisions in the CCA. The Crimes Act 1914 (Cth) also provides a mechanism through which a prescribed state or territory sentencing option can be made available in that state or territory.

7. State sentencing options and sentencing alternatives apply only to the extent that they are expressed to be applicable by virtue of a specific provision of the Crimes Act 1914 (Cth) or

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Regulations. For example, section 20AB of the *Crimes Act 1914* (Cth) and the regulations made under it adopt the Victorian Community Correction Order. This state option is available in respect of federal offenders.

**Federal sentencing options**

8. Leaving to one side the options in respect of mentally ill and intellectually disadvantaged offenders and young offenders, and the more limited options where a federal offender is convicted of a terrorism offence or a people smuggling offence (see below), there are 6 federal sentencing options following a finding of guilt:

1) **Dismiss the charge** – s 19B *Crimes Act 1914* (Cth)

2) **Bond without conviction** – s 19B *Crimes Act 1914* (Cth)

3) **Bond with conviction** – s 20(1)(a) *Crimes Act 1914* (Cth)

4) **Fine with conviction**

5) **Community Correction Order with conviction** – s 20AB *Crimes Act 1914* (Cth)

6) **Imprisonment** which can be fully or partially suspended, and depending on the length of the sentence will usually involve a release mechanism of a recognisance release order (a form of conditional bond) or a non-parole period.

9. A number of the federal sentencing options, including a suspended sentence, are not available where a federal offender is sentenced to imprisonment for some offences (terrorism, treachery, treason, espionage).

10. Where the federal offender is a "*child or young person*", a phrase which is not defined by the *Crimes Act 1914* (Cth), the full range of Commonwealth sentencing options (conviction and non-conviction based) set out in the *Crimes Act 1914* (Cth) and any additional state sentencing options are made available by s 20C of the *Crimes Act 1914* (Cth). Section 20C evinces a legislative intention that federal offenders be subject to applicable juvenile sentencing legislation. Section 20C was added to the *Crimes Act 1914* (Cth) in 1961. In December 2016, Justice Lasry of the Victorian Supreme Court decided that the specific provisions in the *Crimes Act 1914* (Cth) relating to sentencing for terrorism offences, for example, the so-called three quarters rule that requires a court to impose a non-parole period of not less than three quarters of the head sentence imposed for a terrorism offence/s applied to sentencing of an offender who was 17 when the terrorist offence was committed. The jurisdiction of the Children’s Court in Victoria now extends to

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7 *Crimes Act 1914* (Cth), s 20AB(6).
8 *R v Lovi* [2012] QCA 24 at [21].
9 *Crimes Act 1914* (Cth), s 19AG; *R v MHK* [2016] VSC 742.
offenders who are under 19 at the time of sentencing and from 1 July 2005 a Youth Training Centre Order can be made if the child is 15 or more but under 21.

11. State juvenile sentencing legislation is not uniform. For example in Queensland 17-year olds are dealt with as if they were adults\(^\text{10}\).

**State procedural laws apply**

12. Sections 68 and 79 of the *Judiciary Act 1903* (Cth), which make applicable state procedural laws to federal prosecutions, do not have the effect of making state sentencing options or alternatives available to federal offenders.\(^\text{11}\)

13. Sections 68 and 79 of the *Judiciary Act 1903* (Cth), in effect, provide that the procedure for sentencing federal offenders is to be the same as that for offenders sentenced in accordance with the procedures applicable in the state/territory in which the charges are brought.\(^\text{12}\) Sections 68 and 79 pick up and apply state criminal law procedure to federal prosecutions subject to the qualifications stated in those sections. The qualifications, which have been said to have little or any functional difference,\(^\text{13}\) are:

- so far as the state procedural law is applicable – s 68 *Judiciary Act 1903* (Cth);
- except as otherwise provided – s 79 *Judiciary Act 1903* (Cth).

14. So, to the extent to which federal law otherwise provides, state laws relating to sentencing are not picked up by ss 68 and 79.\(^\text{14}\)

**Applicability of the common law**

15. Section 80 of the *Judiciary Act 1903* (Cth) also makes applicable the common law as modified by state statutory law subject to the following qualifications:

- it applies so far as Commonwealth law is not applicable or insufficient to carry them into effect or to provide adequate remedies or punishment;
- it applies so far as it is applicable and not inconsistent with the Constitution or Commonwealth law.

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\(^{10}\) *R v Lovi* [2012] QCA 24 at [47]; see also paragraphs 333 and 334 of this paper.

\(^{11}\) *All Cars Ltd v McCann* (1945) 19 ALR 214 and *R v Mirkovic* [1966] VR 371.


\(^{13}\) *Putland v R* (2004) 218 CLR 174 at 179 (Gleeson CJ); see also *DPP (Cth) v Hunter* (2003) 7 VR 119 at [19] and *Solomons v District Court of NSW* (2002) 211 CLR 119.

16. The common law as modified by state statute law will apply if the qualifications set out in s 80 of the *Judiciary Act 1903* (Cth) are made out.

17. General common law sentencing principles (eg. totality) are ordinarily accommodated by s 16A of the *Crimes Act 1914* (Cth) and, unless modified by the federal law, apply to the sentencing of federal offenders. An example of where the *Crimes Act 1914* (Cth) has modified the common law relates to the relevance of the cultural background of the offender. For offences committed on or after 13 December 2006 it is no longer mandatory to have regard to a federal offender’s cultural background and where regard is had to it this cannot be as a mitigating or aggravating factor – see s 16A(2A) *Crimes Act 1914* (Cth).

18. The approach of the *Crimes Act 1914* (Cth) varies between the making of exhaustive provisions on some subjects and supplementing the common law on others. It is clear from its wording that s 16A of the *Crimes Act 1914* (Cth), in dealing with the matters to which the court is to have regard when passing sentence, is not exhaustive but rather it supplements common law principles as well as reflecting them on most but not all issues. For example, under common law principles regard must be had to the fact of the timing of a plea of guilty though there is no mention of that in s 16A. The fact that the offender has pleaded guilty is also relevant under common law principles and this is reflected in s 16A(2)(g) of the *Crimes Act 1914* (Cth). The totality principle of the common law is reflected in s 16B of the *Crimes Act 1914* (Cth). So when a federal offender is sentenced the court must have regard to any sentence (federal or state) already ordered and any sentence liable to be served because of revocation of parole (whether federal or state).

19. Leaving aside the possibility that a state procedural provision will be inconsistent with a law of the Commonwealth, in the manner covered by s 109 of the *Constitution* (Cth), a relevant state procedural law can apply to federal prosecutions where the Commonwealth legislative scheme is not complete on its face so that it leaves room for the state procedural provision to apply under s 68, s 79 or s 80.

20. The state procedural provisions will not apply where the Commonwealth provisions expressly, or by implication, are contrary to the state law being picked up or where the Commonwealth provisions on the subject are complete and leave no gap or room for the operation of the state provisions. Whether a state procedural provision applies under any of these three sections is a matter of statutory interpretation. For example, the *Crimes Act 1914* (Cth) [Division 4 of Part 1B] sets out a regime for setting non-parole periods and recognisance release orders. Accordingly, there is no gap or room for the application of state law on those subjects. Recently, the High Court decided that considerations of double jeopardy never applied in the federal context where

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15 Ibid, [25]; *Bui v DPP* (Cth) [2012] 244 CLR 638.
the CDPP had successfully appealed a sentence. There was no gap in s 16A of the Crimes Act 1914 for the common law doctrine of double jeopardy to apply.\(^{20}\)

21. The restrictions on the applications of state sentencing options was confirmed Atanackovic v The Queen 45 VR 179. The Court also held that neither s 16A of the Crimes Act 1914 (Cth) nor s 80 of the Judiciary Act 1903 (Cth) provides a legal foundation for the application of the guideline judgment on Community Correction Orders to the sentencing of Commonwealth offenders.\(^{21}\)

22. Set out below is a discussion of whether some specific state procedures and common law principles apply in the sentencing of a federal offender.

**Deferring a sentence**

23. The power of a Magistrate or County Court Judge to defer sentencing an offender for up to 12 months, under s 83A of the Sentencing Act 1991 (Vic) is most likely a matter of procedure picked up and made applicable to federal offenders by s 68 of the Judiciary Act 1903 (Cth). There is no express or implicit Commonwealth provision to the contrary and Commonwealth procedure does not deal with deferral of sentence so leaving room for the relevant state procedure to operate via the Judiciary Act 1903 (Cth). This conclusion is strongest where the accused is a “child or young person” as s 20C of the Crimes Act 1914 (Cth) provides that a “child or young person” (not defined) charged with a Commonwealth offence may be dealt with as if the federal offence were a state offence.

**Diversion**

24. Similarly, the “diversion program” operating in the Magistrates’ Court, under s 59 of the Criminal Procedure Act 2009 (Vic) [formerly under s 128A of the Magistrates’ Court Act 1989 (Vic)], permits a Magistrate to discharge an accused without a finding of guilt where he/she has completed a diversion program to the satisfaction of the Magistrate. This is a matter of procedure and seems to be picked up and made applicable to federal offenders by ss 68 and 79 of the Judiciary Act 1903 (Cth). Again, there is no express or implied contrary position in Commonwealth law, thus leaving room for the operation of that state law of procedure to be picked up and applied. A successfully completed diversion does not form part of a person’s criminal history or antecedents. [See paragraph 137]

**Aggregate sentence of imprisonment (summary and indictable matters)**

25. Similarly, the ability of the County and Supreme Courts to impose an aggregate period of

\(^{20}\) Bui v DPP (Cth) [2012] 244 CLR 638.

\(^{21}\) Boulton v the Queen 46 VR 308.
imprisonment on conviction on indictment from 15 August 2006 appears to be a matter of procedure picked up and made applicable to federal offenders by s 68 of the *Judiciary Act 1903* (Cth) and in respect of *Corporations Act* offences by s 1338B of that Act. [For a more detailed note on aggregate sentencing see paragraphs 240, 257-259, 355-363]

26. State and territory sentencing schemes which permit an aggregate sentence to be imposed on indictment (as currently is the situation in the Northern Territory, Tasmania and South Australia and now Victoria) are picked up by s 68(1) of the *Judiciary Act 1901*, or s 133B in respect of *Corporations Act* offences, and made applicable to federal offenders. The Commonwealth provision on the power to aggregate federal sentences (s 4K *Crimes Act 1914* (Cth)) applies to summary disposition and subsequent appeals. This leaves room for the state and territory regimes enabling aggregation on indictment to apply, via s 68 of the *Judiciary Act 1903* (Cth), where they exist. As well, s 4K does not preclude wider state provisions applying – see paragraphs 238 and 339.

**Sex offender registration applies to federal offenders**

27. The Victorian prohibition preventing a sentencing court from having regard to the consequences of registration under the *Sex Offenders Registration Act 2004* [s 5(2BC) *Sentencing Act 1999* (Vic)] applies to federal offenders by operation of one or other of s 68(1) or s 79(1) of the *Judiciary Act 1903* (Cth).

**Cost Certificates**

28. The Victorian regime for costs certificates under the *Appeal Costs Act 1998* (Vic) does not apply to federal prosecutions.

**Specifying a discount for a guilty plea – s 6AAA Sentencing Act 1991 (Vic)**

29. The requirement under Victorian law to quantify a specific sentencing discount for a plea of guilty – s 6AAA of the *Sentencing Act 1991* (Vic) – when imposing certain sentences (“custodial sentencing orders”) appears capable of being picked up and applied under s 68 and s 79 of the *Judiciary Act 1903* (Cth). The *Crimes Act 1914* (Cth) makes no provision for quantifying the discount for a plea. However, it is arguable that the Commonwealth regime on that subject is not complete on its face and there appears to be no contrary intention expressed in Commonwealth legislation. If it does apply, the failure to articulate the plea discount will not invalidate the sentence.

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22 See the amendments to s 9 of the *Sentencing Act 1991* (Vic) brought about by the *Courts Legislation (Jurisdiction) Act 2006* (Vic) effective from 15 August 2006 and ss 44 and 45 of the *Criminal Procedure Amendment Act 2012* (Vic).


24 *R v ONA* (2009) 24 VR 197. See also ss 5(2BC) and 5(2BD) of the *Sentencing Act 1991* (Vic) operative from 1 January 2010.

30. A number of Court of Appeal Judges have accepted, without deciding, that s 6AAA applies to federal offenders. Rather than specifying individual “but for” sentences they have stated what the total effective federal sentence and non-parole would have been had the offender not pleaded guilty.26 This is now the approach required by s 6AAA following an amendment in 2012.27

31. Sentences imposed under s 6AAA are “notional” sentences and are not part of the sentence imposed. A complaint that a “notional” sentence may be manifestly excessive cannot constitute a ground for appeal.28 However, it may constitute a particular of a ground of manifestly excessive or manifestly inadequate.29

32. In 2011 Justice Beach of the Victorian Supreme Court stated that, in his view, the court was required to comply with s 6AAA having regard to the Court of Appeal decisions in Scerri30 and Bui31 and the reasoning of the High Court in Putland.32 His Honour also noted the difficulty in doing so is multiplied where the court is also required to state a ‘but for’ discount in respect of future cooperation pursuant to section 21E (now renumbered s 16AC as of 27 November 2015) of the Crimes Act 1914 (Cth).33 His Honour stated that “[I]n the circumstances of this case, it is not realistic to provide a but for sentence under s 6AAA that does not take into account the issue of cooperation. Cooperation was, in this case, inextricably linked, and not necessarily involved, with the pleas of guilty”.

Double Jeopardy – disregarding it on successful Crown appeal

33. Pursuant to the Criminal Procedure Act 2009 (Vic) an appeal court must not take into account any element of “double jeopardy” if a Crown sentence appeal in respect of a state sentence is allowed.34 An issue arose as to whether these provisions applied in respect of federal offenders pursuant to ss 68, 79 and/or 80 of the Judiciary Act 1903 (Cth). Prior to the 2012 High Court decision in Bui35 it was generally assumed that “double jeopardy” in re-sentencing following a successful CDPP appeal applied pursuant to the common law36 before the commencement of Criminal Procedure Act 2009 (Vic). Therefore, the assumption was that the statutory modification of that common law principle, applied as a matter of procedure. It was also assumed that the statutory modification precluded regard being had to double jeopardy, applied on a successful

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26 Cooper v R [2012] VSCA 32, [38]; DPP (Cth) v Cornish [2012] VSCA 45, [56].
27 See s 6AAA(2) and (5) Sentencing Act 1991 (Vic). See s 43 Criminal Procedure Amendment Act 2012 (Vic).
31 DPP (Cth) v Bui [2011] VSCA 61.
33 R v Emini & Blumberg [2011] VSC 336 at footnote [10].
34 Criminal Procedure Act 2009 (Vic), ss 259(3), 262(3), 289(2) and 290(3).
35 Bui v DPP (Cth) [2012] 244 CLR 638.
Commonwealth DPP appeal pursuant to s 80\(^{37}\) of \textit{Judiciary Act 1903} (Cth) as there was no inconsistency with s 16A of the \textit{Crimes Act 1914} (Cth). The Court of Appeal had earlier decided that the statutory modification of the common law now precluding regard being had to double jeopardy applied to DPP appeals for Victorian offences.\(^{38}\) In February 2012 the High Court decided in \textit{Bui}, in effect, that considerations of double jeopardy had never applied to a CDPP appeal against a federal sentence, as s 16A of the \textit{Crimes Act 1914} (Cth) was complete in this respect and left no room for that principle.\(^{39}\)

### Criminal history

34. In Victoria the common law as to when the criminal history of an offender is relevant has been replaced by legislation. Only “previous character” is now relevant under s 5(2)(f) of the \textit{Sentencing Act 1991} (Vic). This Victorian statutory modification to the common law does not apply to federal offenders pursuant to s 80 of the \textit{Judiciary Act 1903} (Cth) as it is inconsistent with Commonwealth law. Section 16A(2)(m) of the \textit{Crimes Act 1914} (Cth) requires the court to take into account the “character and antecedents” of the federal offender where relevant and known.

### Mental illness dispositions

35. A state law that enables a person to be dealt with by a court of summary jurisdiction, otherwise than in accordance with law, if the accused was suffering from a mental illness at the time of the offence even if he/she was no longer suffering from a mental illness at the time of the hearing will not apply in the federal context. This is because the Commonwealth legislative scheme dealing with the summary options where an accused is mentally ill (s 20BQ of the \textit{Crimes Act 1914} (Cth)) is complete on its face and is limited to the situation where the person is suffering from mental illness at the time of the hearing.\(^{40}\)

### Proceeds of Crime – relevance of automatic forfeiture

36. In 2011, the Victorian Court of Appeal decided that the common law principle which required a sentencing court to take into account the mitigating fact of automatic forfeiture of property that was not the proceeds of crime applied in the federal context as this was not excluded by federal legislation.\(^{41}\)

37. The court also decided that an offender’s withdrawing of an application to exclude property from the restraining order could amount to cooperation under s 320(a) of the \textit{Proceeds of Crime Act}

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\(^{39}\) \textit{Bui v DPP (Cth)} [2012] 244 CLR 638.

\(^{40}\) \textit{Kelly v Saadat-Taalab} (2008) 72 NSWLR 305.

\(^{41}\) On 31.07.09 the High Court refused special leave to appeal that decision (\textit{ST v Kelly} [2009] HCA Trans 175).

2002 (Cth) so long as the offender satisfied the court that it was a deliberate decision to cooperate. If so satisfied, the weight to be given to this in mitigation will depend on the circumstances. [See paragraphs 147 - 176 for a more detailed discussion]

State laws on setting non-parole periods

38. The provisions in the Crimes Act 1914 (Cth) relating to the setting of non-parole periods were designed to provide a separate regime for Commonwealth offenders rather than relying on applied state/territory legislation. So the state law relating to the setting of the non-parole period to federal offences do not apply. The state law has no application to the setting of the federal non-parole period or a recognisance release period under a recognisance release order (partially suspended sentence).

Dealing with summary offences in a superior court

39. Sections 145 and 243 of the Criminal Procedure Act 2009 (Vic) are picked up and made applicable in the Commonwealth context by s 68 of the Judiciary Act 1903 (Cth). Prior to 13 October 1999, s 68(3) of the Judiciary Act 1903 (Cth) restricted the power to exercise summary jurisdiction in respect of federal offenders to Magistrates. This had the effect of precluding the County Court or Supreme Court from exercising jurisdiction over a Commonwealth summary offence. Now, 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.

Fitness to be tried

40. As noted below from paragraphs 345 - 352 state law regulates the mode of determining whether a person is fit to stand trial and the Crimes Act 1914 (Cth) regulates the consequence flowing from such a finding.

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42 HAT & Ors v R [2011] VSCA 427, [56].
43 Explanatory Memorandum, Crimes Legislation Amendment Bill (No.2) 1989 (Cth); R v Mirkovic [1966] VR 371.
44 Hili v R (2010) 242 CLR 520; Atanackovic v The Queen 45 VR 179.
45 Law and Justice Amendment Act 1999; Item 3 of Schedule 10.
Options not available in sentencing Federal Offenders

41. Currently the sentencing options under Victorian law are significantly wider than under Commonwealth law. In particular, the following options are not available in sentencing federal offenders:

- Convicting and discharging;
- Community Correction Order without conviction;
- Fine without conviction; and
- Drug Treatment Order

Convicting and discharging

42. This option is not available in respect of a federal offender.46 If a federal offender is convicted something more than the conviction itself must occur (i.e. a s 20(1)(a) bond or a fine).

Without conviction ordering a Community Correction Order

43. This option is not available in respect of a federal offender. See s 20AB(1) of the Crimes Act 1914 (Cth) which makes a CCO applicable only on conviction.47

Without conviction imposing a fine

44. This option is not available in respect of a federal offender.48 Section 19B of the Crimes Act 1914 (Cth) only permits the imposition of certain types of payments as a condition of a non-conviction bond – namely, reparation, restitution, compensation or costs.

Drug Treatment Order (DTO)

45. This option, which is available to the Drug Court in relation to state offences, is not made applicable under the Crimes Act 1914 (Cth) or its regulations.

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46 See Lanham & Anor v Brake (1983) 34 SASR 578, 580 (Cox J); Mulcahy v Clark [1991] Tas R 115 (Zeeman J), following the reasoning of the WA Full Court in Walsh v Giumelli [1975] WAR 114.

47 That s 20AB(1) applies prescribed State sentencing options only on conviction was confirmed in DPP v Meyers (Unreported, Supreme Court of Victoria, Balmford J, 26 April 1996).

48 Commissioner of Taxation v Doudle (2005) 195 FLR 76.
Philosophy of Current Sentencing Scheme

46. The philosophy of the current federal sentencing scheme (introduced in 1990) is to create a separate sentencing regime and one which relies less on the state regimes than did the previous federal regime. Some aspects of the state regimes apply as a result of being made applicable by the Crimes Act 1914 (Cth) or by virtue of ss 68, 79 and 80 of the Judiciary Act 1903 (Cth).

47. As noted above the federal sentencing regime remains an amalgam of exhaustive Commonwealth provisions on some issues, the common law (if there is a gap in the federal provisions) and some state sentencing options and procedures where either specifically adopted or picked up and applied by ss 68, 79 and 80 of the Judiciary Act 1903 (Cth).

48. The current scheme endeavours to achieve a greater degree of uniformity, but not total uniformity, in the sentencing of federal offenders throughout the Commonwealth and to provide certainty in relation to any term of imprisonment to be served, whilst ensuring that harsher or longer prison terms do not result. The High Court has noted that uniformity of treatment of federal offenders was not explicitly stated to be a goal in the relevant explanatory memorandum. As noted above, by investing state courts with federal jurisdiction and generally applying state laws of procedure, the Judiciary Act 1903 (Cth) reflects the policy choice of reasonable national consistency of treatment of federal offenders rather than consistency with state/territory offenders in the particular state or territory.

Reasonable consistency in sentencing

49. In recent times courts have given greater attention to achieving “reasonable consistency in sentencing” but not so as to fetter judicial discretion. “Reasonable consistency” was described by Gleeson CJ as a requirement of justice. As well, the view has been expressed that consistency with decisions of courts exercising federal jurisdiction in other States is desirable. In 2010, the High Court said that the need for consistency of decisions in relation to federal offenders was self-evident. Justice Redlich, of the Victorian Court of Appeal, has said that it is necessary to achieve a broad level of conformity with sentences imposed on federal offenders in other states as well as Victoria. Comparisons between decisions have become clearer now that all States and Territories no longer have remissions from sentences and s 16G of the Crimes Act 1914 (Cth) was repealed on

16 January 2003 (see Appendix 3).\textsuperscript{56}

**Principles on consistency in federal sentencing**

50. In 2010, in the decision of *Hili v The Queen* the High Court set out six principles on consistency in federal sentencing:\textsuperscript{57}

i. Consistency is not demonstrated by, and does not require numerical equivalence. Therefore, presentation of graphs of sentences is not useful;

ii. The consistency that is sought is in the application of relevant legal principles and in the application of Part 1B of the *Crimes Act 1914* without being distracted or influenced by other and different provisions that do not relate to federal offenders;

iii. Reasonable consistency is the treatment of like cases alike and different cases differently;

iv. In seeking consistency judges must have regard to what has been done in other cases. Past sentences are no more than a yardstick against which to examine a proposed sentence and the past range does not fix the boundaries within which future judges must, or ought to sentence;

v. Consistency in federal sentencing is to be achieved through the work of the intermediate Courts of Appeal; and

vi. The need for consistency in federal sentencing is self-evident and intermediate appellate courts should not depart from what has been decided by other Australian intermediate appellate courts, unless convinced that the decision is plainly wrong.

51. Since 1990, the number of differences between the Commonwealth and Victorian sentencing regimes have reduced with the result that the treatment of federal and state prisoners in Victoria is now very similar, though differences still exist. One area where there is not national consistency is whether the discount given to a federal offender for pleading guilty should include a component attributable to the objective utilitarian benefit of the plea. That is, should the discount include both the objective utilitarian benefit and subjective factors such as remorse, contrition and the willingness to facilitate the course of justice. This is set out in greater detail in paragraphs 101 – 108.

**Main elements of the introduction of Part 1B of the *Crimes Act 1914* (Cth)**

52. The main elements of the changes brought in 1990 to the federal sentencing regime were:

\textsuperscript{56} See *R v Tran* (2007) 172 A Crim R 436, [31]-[35].

\textsuperscript{57} *Hili v R* (2010) 242 CLR 520, [46]-[57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
Federal Sentencing in Victoria
Philosophy of Current Sentencing Scheme

a) abandoning the previous approach of adopting the various state laws relating to the fixing of federal non-parole periods;\(^58\)

b) establishing a requirement, beyond 17 July 1990, that any effective term of imprisonment to be served is reflected in the non-parole period or the period of imprisonment the release of the offender set under the recognisance release order (a form of bond). It did so by stating in effect in s 19AA that such terms do not attract remissions, notwithstanding any state law other than remissions arising out of warder's strikes. Warder’s remissions still operate under the federal scheme to reduce the non-parole period as they do under the Victorian scheme;\(^59\)

c) stating that remissions that reduce the head sentence would continue to apply, if available under state law.\(^60\) Amendments made to s 19AA(1) now ensure that strike remissions are the only types of remissions available on federal non-parole and pre-release periods of imprisonment. In states/territories where remissions on the head sentence were not available (Victoria from 22 April 1992) the court was specifically required by s 16G of the Crimes Act 1914 (Cth) (now repealed) to take this into account and adjust the sentence so that federal offenders did not serve longer sentences than their state and territory counterparts because of the abolition of remissions on head sentences;

d) as the non-parole period or pre-release period in respect of federal prisoners is determined by reference to the adjusted head sentence, there was a flow-on effect from s 16G to the non-parole or pre-release period under a recognisance release order (a form of bond); and

e) in 1990, when the current federal sentencing regime came into operation, only New South Wales had abolished remissions on sentences. Now all states and territories have abolished general remissions on sentencing.

53. Section 16G of the Crimes Act 1914 (Cth) not only had the effect of ensuring federal prisoners did not serve longer than their state/territory counterparts but, given the majority of states/territories abolished remissions, it had the effect in most jurisdictions, including Victoria, that federal prisoners served shorter sentences than their state/territory counterparts. This was because s 16G had the effect in the majority of jurisdictions, including Victoria, of reducing the maximum available

\(^{58}\) See Commonwealth Prisoners Act 1967 (Cth), s 4. This Act, now repealed, sought to achieve uniformity of treatment of federal and state offenders within a particular state or territory. It did so by adopting the state/territory law relating to the fixing of non-parole periods. The High Court in Leeth v Commonwealth (1992) 174 CLR 455 decided by a majority of 4:3 that s 4 was a valid law. The challenge against the section was made that as the state laws relating to the setting of non-parole periods varied two persons convicted of the same federal offence in two states could receive vastly different non-parole periods. The majority decided that in the circumstances under consideration, the Commonwealth could give a varying application to its laws by reference to the state/territory mechanism for setting non-parole periods.

\(^{59}\) Crimes Act 1914 (Cth), s 19AA(4).

\(^{60}\) Crimes Act 1914 (Cth), s 19AA(1).
penalty by approximately one third.  

Repeal of s 16G

54. Given the unintended effect of s 16G, in creating a disparity of treatment between federal and state/territory prisoners in the same jurisdiction, the Commonwealth Director of Public Prosecutions recommended to the Commonwealth Attorney-General's Department that s 16G be repealed. That recommendation was accepted and s 16G was repealed from 16 January 2003. Now, no regard is had to the absence of remissions in sentencing federal offenders.

55. The repeal of s 16G brought federal sentencing practice into line with current Victorian sentencing practice on whether the court can have regard to the absence of remissions. That is, the absence of remissions cannot be taken into account. The effect of the repeal of s 16G is summarised in paragraphs 324 – 327 and a summary of how s 16G operated is in Appendix 3.

Imprisonment is a penalty of last resort

56. The federal sentencing scheme introduced in 1990 also sought to strengthen the requirement that imprisonment be the punishment of last resort. Moreover, s 17B of the Crimes Act 1914 (Cth) places a restriction on the availability of imprisonment where an offender, who has not previously been sentenced to imprisonment, is convicted of one or more specified federal offences relating to property, money or both whose total value does not exceed $2,000. A qualification to this principle exists from 2004 in relation to some offences of people smuggling contrary to the Migration Act 1958 and in certain circumstances s 236B of that Act provides for a mandatory minimum penalty of imprisonment.

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Sentencing Methodology

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

57. The Full Court of the Victorian Supreme Court, the Victorian Court of Appeal and the High Court have stated that the correct approach to sentencing is to consider all the relevant matters and to arrive at an “instinctive synthesis” of them in determining the appropriate sentence.65

58. 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.

59. A number of Justices of the High Court have criticised the “two-stage approach” to sentencing as being apt to give rise to error and stated that the practice departs from principle.66 The majority’s criticism softened in 2005 as in Markarian v R67 a number of Justices emphasised that the law favours transparency. The majority in that decision reasoned that making a specific quantifiable allowance, say for a plea of guilty, did not of itself reveal error. Justice McHugh expressed his continued favour for the “instinctive synthesis” approach over the two-tiered approach. Justice Kirby stated that he remained of the view that the distinction between the two approaches was a matter of semantics, not substance.

60. As is set out in the Judicial College of Victoria’s Victorian Sentencing Manual at [2.2.1] there is no prohibition on a sentencing judge taking a sequential approach to sentencing. A sentencing court may engage in a process of synthesis of all relevant considerations and, having done so, specify the impact of one consideration or a number of them. The central rule is that the sentencer must not attempt to identify a sentence that represents the “objective” gravity of the offending and then modify it by reason of the “subjective” circumstances of the offender to arrive at a sentence.

61. In 2001 a majority of the High Court in Wong v R stated that the guideline judgment of the Court of Criminal Appeal of New South Wales for drug importation offences, which guideline was declared by reference to the quantity of drug imported, was contrary to s 16A of the Crimes Act 1914 (Cth). In 2000, Winneke P of the Victorian Court of Appeal referred to the New South Wales guideline judgment on drug importation offences as being of limited use and as a “sounding board” or

65 R v Williscroft & Ors [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; and Markarian v R (2005) 228 CLR 357. In Markarian McHugh J of the High Court 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.


67 Markarian v R (2005) 228 CLR 357.
“check” against the exercise of the judge’s discretion. A majority in that case also called into question the practice, adopted in some states (now in Victoria), of identifying a precise reduction for a plea of guilty. In the later decision of Markarian v R the majority of the High Court stated that to do so did not itself reveal error. In Victoria this is now required by legislation – Sentencing Act 1981 (Vic) – s 6AAA depending on the sentence imposed and where the sentence is reduced by reason of the plea of guilty.

62. The Courts of Criminal Appeal in New South Wales, South Australia and the Northern Territory have rejected criticism of the practice of quantifying the discount for a plea of guilty on the basis that the sentencing regime that operates in these states requires the court to not only have regard to the plea of guilty but the timing of the plea. Intermediate appellate courts in some states, including New South Wales and South Australia, have also taken the view that it is proper for a court to identify the reduction for a plea of guilty and that it is appropriate to base that reduction, in the absence of contrition, on the public interest in saving the community the expense of a contested hearing.

63. In 2005 four Justices of the High Court in Markarian v R (Gleeson CJ, Gummow, Hayne and Callinan JJ) acknowledged that there may be some occasions when an articulated arithmetical approach may better serve the ends of transparency and accessibility. They also stated that there was no universal rule rejecting the so called “sequential” or “two-tiered” sentencing in favour of “instinctive synthesis”.

64. Their Honours further stated that the fact that the sentences quantified the allowance made for a plea of guilty (or assistance to the authorities as required by the former s 21E – now s 16AC of the Crimes Act 1914 (Cth)) – did not reveal an error in the sentencing process. Rather, where the penalty is not fixed by statute, the court must arrive at the appropriate sentence after weighing all the relevant factors in arriving at the conclusion that a particular penalty should be imposed.

65. The majority in Markarian v R also emphasised that sentencing was a discretionary judgment and that there was no single correct sentence. In Wong v R Gleeson CJ stated that allowing for the tolerance implicit in the individual discretion of the sentence meant that reasonable consistency in sentencing is a requirement of justice. Courts are giving greater attention to achieving reasonable consistency in sentencing while at the same time emphasising that reasonable

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68 R v Ngui [2000] 1 VR 579, 584. Recently the NSW CCA also said in R v Whyte (2002) 55 NSWLR 252 that guideline judgments were a “check” or “sounding board” or “guide” but not a “rule” or “presumption”.

69 Sentencing Act 1991 (Vic), s 6AAA.


71 As of 27 November 2015, s 21E was repealed when it was replaced by s 16AC of the Crimes Act 1914 (Cth).

72 Markarian v R (2005) 228 CLR 357.


consistency cannot fetter judicial discretion.\textsuperscript{75} Courts are also showing greater interest in sentencing patterns for federal offences in other states and territories.\textsuperscript{76}

66. Intermediate appellate court in some states, including New South Wales and South Australia, have also taken the view that it is proper for a court to identify the reduction for a plea of guilty and that it is appropriate to base that reductions, in the absence of contrition, on the public interest in saving the community the expense of a contested hearing.\textsuperscript{77} Now in Victoria courts sentencing state offenders are required to identify a precise reduction for a plea of guilty depending on the sentence imposed.\textsuperscript{78}

**Prosecution not permitted or obliged to submit range of sentences**

67. The practice of the prosecution being obliged to assist the sentencing court by providing a submission about the bounds of the available range of sentences as set out in the decision of \textit{R v MacNeil-Brown} has been overruled by the High Court in \textit{Barbaro and Zirilli v R} (2014) 253 CLR 58. In 2015 the High Court decided that the decision in \textit{Barbaro and Zirilli} did not preclude a court from receiving a submission later decided (agreed or otherwise) as to penalty in a civil penalty proceeding.\textsuperscript{79}

68. The Victorian Court of Appeal has decided that the defence is able to make a submission on the appropriate range and where it does so, it is permissible for the Crown to respond, to tell the judge whether in the Crown’s submission it would be open to sentence with that range and if not rely on comparative cases, current sentencing practice and other relevant considerations in support of that contention.\textsuperscript{80}

69. In the 2014 decision of \textit{DPP v Holder}, which was delivered after the High Court’s decision in \textit{Barbaro and Zirilli}, the Victorian Court of Appeal held 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.\textsuperscript{81} The prohibition on a prosecutor from making submissions on a sentence range did not relieve the prosecutor from his/her obligation to assist the court.

\textsuperscript{75} \textit{R v Ngui} (2001) 1 VR 579, 583; \textit{R v Harkness} [2001] VSCA 87.
\textsuperscript{78} \textit{Sentencing Act 1991} (Vic), s 6AAA.
\textsuperscript{80} \textit{Matthews v R; Vu v R; Hashmi v R} (2014) 44 VR 280 at [22] – [25].
\textsuperscript{81} \textit{DPP v Holder} [2014] VSCA 61 at [32], [34].
Two Stage Approach

70. While the “instinctive synthesis” is the accepted approach to sentencing in Victoria, in two important respects the current federal sentencing scheme requires the sentencer to depart from it and adopt a “two-stage approach or sequenced approach” in two ways.

Section 16AC Crimes Act 1914 (Cth) – future co-operation

71. The first departure is where the sentencer is sentencing a federal offender who 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 is required by s 16AC (previously s 21E) of the Crimes Act 1914 (Cth) to specify the sentence (and non-parole period where imposed) that would have been imposed but for that reduction. It has long been accepted that the “but for” exercise required by s 16AC (previously s 21E) does not constitute impermissible two-tiered sentencing.82

Section 6AAA Sentencing Act 1991 (Vic) – plea of guilty

72. The second situation is in quantifying a precise reduction for a plea of guilty in the circumstances set out in s 6AAA of the Sentencing Act 1991 (Vic). Section 6AAA appears to be a state procedural provision capable of being picked up and applied by ss 68 and 79 of the Judiciary Act 1903 (Cth). However, to date judicial opinion on that has been divided.83

73. Prior to the enactment of s 6AAA of the Sentencing Act 1991 (Vic) it was not common to quantify a sentencing discount for a plea of guilty though to do so was not necessarily an error.84 The Crimes Act 1914 (Cth) does not require this and the Australian Law Reform Commission in its 2006 report “Same Crime Same Time” has recommended that Commonwealth law adopt this requirement [Recommendation 11-1].

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83 Judicial opinion on this issue has been divided. See Scerri v R [2010] VSCA 287 and DPP (Cth) v Bui [2011] VSCA 61 where the Court of Appeal stated the federal sentences that would have been imposed but for the plea of guilty. See also R v Emini & Blumberg [2011] VSC 336 footnote, [10] per Beach J.
Sentencing Principles

Part 1B of the Crimes Act 1914

74. The central sentencing principles in respect of federal offenders are set out in Part 1B of the Crimes Act 1914 (Cth). As noted above on some issues the Crimes Act 1914 (Cth) sets out exhaustive provisions and on other issues establishes supplementary provisions to common law sentencing principles. The High Court has stated that the sentencing principles developed at common law rather than the principles set down in state legislation apply to the sentencing of federal offenders.85 However, regard needs also to be had to ss 68, 79 and 80 of the Judiciary Act 1903 (Cth). For example, if the qualifications set out in s 80 are made out and there is a gap, the common law as modified by Victorian statute will apply [see above at paragraphs 15 – 40]. The first question to consider is whether there is a gap in the Commonwealth provisions.

75. In 2013, in Elias v R; Issa v R the High Court considered the application of the common law principle of sentencing known as the Liang principle that required a sentencing judge to 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. Before the Court of Appeal the respondents had submitted that the Liang principle did not apply to Commonwealth offences. Before the Court of Appeal the first respondent contended that the principle was not known to the law. On appeal the High Court held that the Liang principle was without foundation, and 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’.86

76. Part 1B 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 recognisance 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

85 John v R [2004] 78 ALJR 616, [15].
86 Elias v R; Issa v R (2013) 298 ALR 637 at [37].
Central sentencing principles

77. The central sentencing principles of the Crimes Act 1914 (Cth) are:

Proportional sentence to offending – s 16A(1)

78. Most importantly 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)). This has been referred to by the Western Australian Court of Criminal Appeal as “the primary obligation” which is reinforced by s 16A(2)(k) which requires the court to take into account the need to ensure the person is “adequately punished for the offence”.87

79. The High Court in R v Wong & Anor,88 Weininger v R89 and R v Hili90 have emphasised the primacy of giving effect to the principle in s 16A(1) and to all the matters listed in s 16A(2) where they are “relevant and known to the court”. In R v Wong & Anor, four of the Justices of the High Court decided that the New South Wales Court of Appeal guideline judgment on the importation of narcotics was contrary to the Customs Act 1901, which was declared by reference to the quantity of drug imported and was therefore inconsistent with s 16A. In R v Hili91 the High Court stated that giving effect to the principle that the severity of the sentence be appropriate in all the circumstances meant that there was no judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period of imprisonment a federal offender should serve in prison before being released.

80. In Weininger v R the majority of the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) commented 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 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”.

81. The majority of the High Court also commented that not every matter urged on the judge has to be, or can be, fit into one of the two categories (i.e. aggravating or mitigating facts and the absence of persuasion about a fact in mitigation is not the equivalent of persuasion of the opposite fact in aggravation).

91 Ibid, [44].
Other sentences not yet served – s 16B

82. Section 16B requires a Court in sentencing a federal offender to have regard to any sentence (state, federal 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. This reflects the common law totality principle.

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

83. Section 16A(2) of the Crimes Act 1914 (Cth) 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;
(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.
84. 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. Therefore, in general, matters relevant under common law principles relating to sentencing, even though not listed in s 16A(2), remain relevant to the sentencing of federal offenders.

85. 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 sentencer to refer in sentencing to each of the matters specified when sentencing; it requires only that the “relevant and known” matters be taken into account.\(^{92}\)

86. Section 16A(2) is based on s 10 of the *Criminal Law (Sentencing) Act 1988* (SA). In *Adami v R*\(^{93}\) Bollen J commented that s 10 of the South Australian Act declared what has always been the law. In *R v Sinclair*\(^{94}\) Malcolm CJ of the Western Australian Court of Criminal Appeal expressed the view that s 16A did not intend to change the common law. Kennedy and Pidgeon JJ agreed.

87. That the list of matters set out in s 16A(2) is non-exhaustive is apparent from the prefatory phrase in s 16A(2) namely “*In addition to any other matters ...*”. This was confirmed in *DPP v El Karhani*\(^{95}\). The matters set out in s 16A(2) have been referred to as a "checklist".\(^{96}\) Promised future cooperation is one relevant matter not listed in s 16A(2) and the section does not address the relevance of forfeiture of property. Section 272.30 of the *Criminal Code Act 1995* (Cth), not s 16A(2), requires the Court to have regard to the age and maturity of the victim of child sex tourism offences where “relevant and known”.

88. Set out below are some notes, by no means complete, on some of the factors commonly relied on in sentencing federal offenders:

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

89. 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 *R v Olbrich*\(^{97}\) 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.

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\(^{93}\) *Adami v R* (1989) 51 SASR 229, 233.


\(^{95}\) *DPP v El Karhani* (1990) 21 NSWLR 370.

\(^{96}\) *Postiglione v R* [1991] 24 NSWLR 584, 594 (Grove J).

\(^{97}\) *R v Olbrich* (1999) 199 CLR 270.
90. A majority of the court (Gleeson CJ, Gaudron, Hayne and Callinan JJ) stated that 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. The majority commented that 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 what the offender had done and who he/she was.

91. In 1998 the Victorian Court of Appeal explained that a sentencing judge’s task was to do the best with the facts known to the court and that where additional facts are to be established, whether aggravating or mitigating, they are to be established in accordance with the principles in R v Storey [1998] 1 VR 359. It follows that a sentencing judge is entitled, in the absence of precise evidence as to the nature of the offender’s participation, to treat proven offences of possession and attempting to obtain possession of trafficable or commercial quantities of narcotic substances contrary to the Customs Act 1901 (Cth) as very serious offences.

92. In a similar vein, a majority of the High Court in Weininger v R stated in 2003 that some disputed facts cannot be resolved in a way that goes either to increase or to decrease the sentence to be imposed. The majority went on to say that there may be issues where the material available to the sentencing judge will not permit the judge to categorise in that way and that the sentencing judge may be unpersuaded of matters urged in mitigation or aggravation.

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

93. The personal circumstances of the victim must be taken into account. In R v Nahlous 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. The Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013 (Cth) came into effect on 29 June 2013. The Act amended the Crimes Act 1914 (Cth) to:

(a) provide a scheme for the use of victim impact statements in the sentencing of federal offenders [new s 16AAA];

(b) extend existing vulnerable witness protections available to child witnesses to apply to adult victims of slavery, slavery-like and human trafficking offences, as well as witnesses who apply

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101 Ibid.
to a court to be recognised as ‘special witnesses’ because of a particular personal characteristic, in certain cases; and

(c) add a new category of vulnerable witness protections to assist victims of child sex-related, slavery, slavery-like and human trafficking offences give evidence in retrials and subsequent trials for those offences.

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

94. Prior to 29 June 2013, the Commonwealth sentencing regime was silent as to victim impact statements (“VIS”) and had no specific legislation governing the tendering of VIS. The court has a general power at common law to receive information as it thinks fit to enable it to impose a proper sentence. A court sentencing a federal offender may have been able to rely on this general common law power for the tendering of VIS. The CDPP has also relied on sections 16A(2)(d) and (e) of the *Crimes Act 1914* and state and territory legislation to enable the victim impact statements to be tendered in court.

95. Since 29 June 2013 there is a scheme to provide for the use of VIS in the sentencing of federal offenders. The amendments regarding VIS only apply to offences committed, or alleged to have been committed, on or after 29 June 2013.

96. There is no prescribed form for a Commonwealth VIS but a pro forma has been developed by the CDPP. The definition of who can provide a victim impact statement and what it can contain are set out in s 16AAA(1) of the *Crimes Act 1914* (Cth). Unlike the Victorian provisions which require that a VIS be in writing and in the form of a statutory declaration, a Commonwealth VIS may be oral or in writing but must be signed or otherwise acknowledged by the maker of the statement.

97. Section 16AB of the *Crimes Act 1914* (Cth) sets out a number of matters relating to VIS such as:

- 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.

98. 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) that the court must have regard to.

**Degree to which contrition is shown – s 16A(2)(f)**
99. Where the plea of guilty or other action of the defendant such as making reparation reflects contrition this must be taken into account separately under s 16A(2)(f).\textsuperscript{103}

100. Where there is evidence of remorse and if that remorse is genuine, it is important as it enhances the prospects of rehabilitation and reduces the need for specific deterrence.\textsuperscript{104} The Victorian Court of Appeal stated in \textit{Barbaro} that sentencing discounts, especially significant sentencing discounts, ought not be given unless remorse is established by proper evidence or unless on a proper basis the judge is prepared to relieve the offender of the need to discharge the burden. The court went on to say that a judge was not bound to accept second hand evidence of what the offender said to a psychologist or psychiatrist let alone testimonials or statements from the Bar table.\textsuperscript{105}

\textbf{Guilty plea to the charge – that fact – s 16A(2)(g)}

101. A guilty plea must be taken into account under the \textit{Crimes Act 1914} (Cth).

102. Under Victorian law a guilty plea must always be taken into account even if it is motivated solely by self-interest and even where it is a plea to lesser offences than originally charged.\textsuperscript{106} A sentencing judge has a wide discretion and must take into account a range of matters including the strength of the Crown case, the fact victims are spared the trauma of the trial and any demonstrated remorse of the offender.\textsuperscript{107} The courts have recognised that a mandatory term of imprisonment can create complications for reduction in sentence for mitigating factors, such as for a plea of guilty.\textsuperscript{108}

103. In 2016, the Victorian Court of Appeal in the decision of \textit{DPP (Cth) v Thomas; DPP (Cth) v Wu} [2016] VSCA 237, held that the utilitarian benefit of a plea of guilty - the benefit to the community in saving the expense of a trial and the need to call witnesses - must be taken into account when discounting a federal sentence that would otherwise be imposed.\textsuperscript{109} The decision settled the question, in Victoria, as to whether a discount on this basis alone was available for federal offences in light of the High Court decision of \textit{Cameron v The Queen}\textsuperscript{110} and the earlier decision of the Victorian Court of Appeal in \textit{Phillips v R} (2012) 37 VR 594.\textsuperscript{111}


\textsuperscript{104} \textit{Barbaro} v R; \textit{Zirilli} v R [2010] VSCA 288, [39].

\textsuperscript{105} \textit{Barbaro} v R; \textit{Zirilli} v R [2010] VSCA 288, [38].


\textsuperscript{107} \textit{Giordano} v R [2010] VSCA 101.

\textsuperscript{108} \textit{Teakle v The State of Western Australia} [2007] WASCA 15; (2007) 33 WAR 188, [19]. See also \textit{Atherden v The State of Western Australia} [2010] WASCA 33.

\textsuperscript{109} \textit{DPP (Cth) v Thomas; DPP (Cth) v Wu} [2016] VSCA 237 [7]. The Court decided that the NSW Court of Criminal Appeal decision of \textit{Tyler v The Queen} (2007) 173 A Crim R 458 was plainly incorrect and therefore would not be followed in Victoria. In \textit{Tyler} the Court decided that the High Court decision of \textit{Cameron v R} (2002) 209 CLR 339 prohibited a court from discounting a sentence upon a plea of guilty where that portion of the discount was attributable to the utilitarian benefit of that plea of guilty.

\textsuperscript{110} \textit{Cameron v R} (2002) 209 CLR 339.

\textsuperscript{111} \textit{Phillips v R} (2012) 37 VR 594.
In 2002, a majority of the High Court in Cameron v R expressed the view that it is incorrect to base the discount for a guilty plea on the fact that the community is spared the expense of a trial (or the utilitarian value of the plea of guilty). Rather, the court held, it should be accepted on the basis that the defendant has expressed a “willingness to facilitate the course of justice”. The majority said this rationale enables reconciliation of the requirement that a person not be penalised for pleading not guilty and the rule that a plea of guilty may be taken into account in mitigation.\(^{112}\)

A number of appellate decisions in New South Wales and South Australia have disagreed with the approach in Cameron v R.\(^{113}\) Those courts decided that under those states’ sentencing regimes, in the absence of subjective criteria such as contrition, it is sufficient to base the reduction on the public interest in saving the community the expense of a contested hearing.\(^{114}\) This was the approach adopted in Victoria as well, prior to the High Court’s decision in Cameron v R. Traditionally, courts in Victoria have accepted that there are strong utilitarian reasons for taking into account a plea of guilty such as saving the community the expense of a contested trial. Recently there has been greater acceptance, especially in New South Wales, of the High Court’s view that permitted recognition of a plea of guilty by a federal offender is by reference to 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.\(^{115}\) It appears though that there is a significant overlap as both advert to the kinds of matters relevant to assessing the willingness of the offender to facilitate the course of justice.\(^{116}\) Given the contradictory approaches as between different state jurisdictions, the Commonwealth DPP has approached the Attorney-General’s Department with a recommendation that s 16A of the Crimes Act 1914 (Cth) be amended to provide that it is open to have regard to the utilitarian benefit of the plea of guilt when sentencing a federal offender and it is open to a court to consider the timing of a guilty plea.

It is not the case that a plea of guilty will always result in a discount but it must always be taken into account and the weight to be attached to it will depend upon the circumstances. A significant consideration is whether the plea was entered at the first reasonable opportunity.\(^{117}\) Where it is unlikely that the guilt would have been discovered and established, other than through the disclosure by the offender, a considerable degree of leniency will apply.\(^{118}\)

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\(^{113}\) In DPP (Cth) v Thomas; DPP (Cth) v Wu [2016] VSCA 237, [83] – [101], the Court analysed a number of appellate decisions since Cameron in which the court continued to grant a discount for the utilitarian benefit of a plea of guilty. For example see Director of Public Prosecutions (Cth) v Gow (2015) 298 FLR 397 and R v Harrington (2016) ACTCR 215.


\(^{116}\) Danial v R [2008] NSWCCA 15, [30].


\(^{118}\) R v Ellis [1986] 6 NSWLR 603; Walker v R [2008] NTCCA 7, [38].
107. In 2000, the Court of Appeal in New South Wales handed down a guideline judgment on the effect of a plea of guilty. The court stated it was not relevant to Commonwealth offences and the reasons of the court were not intended to be applicable to Commonwealth offences. The High Court in 2001 stated that this guideline judgment should not be taken as applying to Commonwealth matters and the majority (Gaudron, Gummow and Hayne JJ) criticised the practice of articulating the discount provided on a plea of guilty. Later in 2005 a majority of the High Court said that articulating the discount for a plea of guilty did not amount to a sentencing error. The Court of Criminal Appeal in South Australia has confirmed that the approach in that state is to identify a specific reduction in sentence due to the plea of guilty. A confession where the other evidence would amount to no case to answer adds considerable weight to the plea and co-operation.

108. Quantifying discount: There is no requirement in the Crimes Act 1914 (Cth) for a quantification of a discount for a plea of guilty. As noted above (see paragraphs 29 – 32) s 6AAA of the Sentencing Act 1991 (Vic), which requires the Court in imposing particular types of sentences to quantify the discount for the plea of guilty, is a law of state procedure which appears capable of being picked up and applied in sentencing federal offenders pursuant to ss 68 and 79 of the Judiciary Act 1903 (Cth). However, judicial opinion is currently divided on that issue.

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

109. There are essentially two types of cooperation that can be relevant – past co-operation and promised future co-operation. Section 16A(2)(h) is the provision that deals with past co-operation whereas s 16AC (formerly s 21E) deals with promised future co-operation.

110. The degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or other offences must be taken into account under s 16A(2)(h). The word “offence” is defined in s 16 of the Crimes Act 1914 (Cth) to mean a federal, state or territory offence. It has been said that the discount to be given to a “true informer” will be considerable but the weight depends on the facts and must be balanced against other considerations including the seriousness of the offending and any circumstances of aggravation.

111. In sentencing, the court is not required to identify the extent of the reduction of the sentence for co-operation with law enforcement agencies in respect of relevant assistance already rendered prior to the imposition of sentence i.e. past co-operation.

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120 Wong v R (2001) 207 CLR 584.
121 Markarian v R (2005) 228 CLR 357.
124 Charkawi v R [2008] NSWCCA 159, [14].
112. Where s 16A(2)(h) is relevant, the effect upon the sentence is to be considered as but one of the various matters within the “instinctive synthesis” of the sentencing process. The preferred approach in sentencing a federal offender in Victoria is not to specify a discount allowed for past co-operation of the type covered in s 16A(2)(h), but to have regard to this along with all other relevant matters in arriving at the appropriate sentence which is the “instinctive synthesis” of all those relevant matters. A different approach applies in New South Wales in relation to sentencing on state offences due to a guideline judgment. That guideline judgment does not apply to federal offenders.  

113. In the Commonwealth context the distinction between past and future co-operation is important as they are dealt with differently and where both are relevant they need to be dealt with separately. Promised future co-operation must be treated separately from past co-operation. Promised future co-operation in proceedings (including confiscation proceedings) relating to an offence, is one of the other matters in addition to those expressly referred to in s 16A(2) to be taken into account by the sentencing judge. Promised future co-operation is relevant under s 16AC (until 27 November 2015 the relevant provision was s 21E of the Crimes Act 1914).

114. Where there is an undertaking for future co-operation, the court must quantify the discount given as this is explicitly required by s 16AC whereas for other types of co-operation this is not required. This reflects the accepted approach that sentencing is an “instinctive synthesis” of all relevant matters and so it is not necessary that the court specify the discount for cooperation other than for promised future co-operation.

115. It is not the case that past co-operation with law enforcement authorities will always result in a sentencing discount. The benefit which has flowed from co-operation is a relevant factor to be taken into account, as is the need to encourage offenders to provide full and frank co-operation with the authorities whether or not the information supplied turns out to be effective. The Victorian Court of Appeal has commented that in order to merit a discount the co-operation ought be such as could significantly assist the authorities.

**General principles applicable to discounts for assistance provided**

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127 The Crimes (Sentencing Procedure) Act 1999 (NSW) empowers the NSW Court of Criminal Appeal to promulgate judgments containing guidelines that either apply generally or apply to particular courts, particular offenders, classes of offences and classes of penalties. In *R v Thomson & Houlton* (2000) 49 NSWLR 383, at [160], the NSW Court of Criminal Appeal issued guidelines regarding the manner in which a sentencer may take into account a guilty plea by quantifying its effect and that a discount of 10 – 25% discount should be accorded for the utilitarian benefit of the plea.


129 Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015 amended the Crimes Act 1914 (Cth) and commenced operation on 27 November 2015.

130 *R v Tae* [2005] NSWCCA 29.


116. Some broad and general principles applicable to the sentencing discount to be given for assistance provided to the authorities were set out by the New South Wales Court of Criminal Appeal in 1989 in *R v Cartwright*.\textsuperscript{134} The Victorian Court of Appeal has agreed with these principles.\textsuperscript{135} The main principles are set out in the following paragraphs:

i. Where information and co-operation is identifiable, it must be of such a nature that it could significantly assist authorities;\textsuperscript{136}

ii. The effectiveness of the information provided is a relevant matter to be taken into account;\textsuperscript{137}

iii. The risk of retributive violence in prison needs to be factored into the discount;\textsuperscript{138}

iv. The risk to personal safety is also a relevant matter to be taken into account as is the need to ensure that the reduction does not result in a sentence, which is “an affront to community standards”;\textsuperscript{139}

v. Where assistance has been given to the prosecuting authorities by a prisoner, he/she is entitled to leniency including where the assistance has been given in connection with an unrelated offence and where the prisoner is both a competent and compellable witness in respect of that unrelated offence. This is so either under s 16(2)(h) or under general sentencing principles imported under s 16A;\textsuperscript{140}

vi. The New South Wales Court of Appeal noted that there could not be a discount in accordance with the relevant principles if no co-operation was given, regardless of how much the particular prisoner may have been prepared to co-operate if able to do so;\textsuperscript{141}

vii. Where the assistance provided is not full and frank there is an unresolved issue as to whether a discount is allowable or whether this is relevant to the amount of the discount.\textsuperscript{142} In Victoria, the degree of completeness of the assistance provided is relevant to the amount

\textsuperscript{134} *R v Cartwright* (1989) 17 NSWLR 243, 252-253 (Hunt and Badgery-Parker JJ).


\textsuperscript{139} *R v Gladkowski* (2000) 115 A Crim R 446, 448.

\textsuperscript{140} *R v Rostom* [1996] 2 VR 97, 104 (Charles JA).

\textsuperscript{141} *R v Ferrer-Esis* (1991) 55 A Crim R 231.

\textsuperscript{142} See the discussion by the Victorian Court of Appeal in *R v Tang* [1998] 3 VR 508; (1997) 96 A Crim R 550, 573 and *R v YLC* [2005] NSWCCA 394, [29] (Spigelman CJ).
of discount.\textsuperscript{143} In Western Australia ordinarily a discount will be given even if the offender has not co-operated fully by disclosing everything he or she knows.\textsuperscript{144} Moreover, there is no tariff for a discount for past co-operation as the discount provided will be determined by the sentencer having regard to the circumstances of the case;\textsuperscript{145}

vii. It is the genuine co-operation of the person furnishing the assistance that is important whether or not the assistance turns out to be effective. The information must be such as could significantly assist the authorities but a discount for such evidence should not be lost because the person does not have to give evidence, because the person - the subject of the information, pleads guilty\textsuperscript{146} or where more cogent evidence from another source emerges.\textsuperscript{147} On the other hand a discount may not be awarded where the information is not acted upon where the accused has deliberately delayed in providing information or has destroyed evidence with the result that what is supplied is of little effective value or benefit;\textsuperscript{148}

ix. The fact that a person could not give evidence against more than one person and that there are others higher in the drug enterprise should not have a significant impact on the discount given for co-operation; and\textsuperscript{149}

x. An offer of co-operation may be disregarded in sentencing if it is given in the knowledge that it will not be called upon.

**Undertaking to co-operate in future proceedings – s 16AC**

117. Where the court is sentencing a federal offender who 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 sentence is reduced as a result of that undertaking, the court is required by s 16AC to specify that the sentence is being reduced for that reason and to state what the sentence would have been but for that reduction.\textsuperscript{150} The failure to comply with s 16AC does not, by itself, invalidate the sentence imposed.\textsuperscript{151}

118. As stated above, the position under s 16A(2)(h) (past co-operation) is to be contrasted with, and kept segregated from, promised future co-operation in s 16AC. Co-operation with authorities

\textsuperscript{143} Ruiz v R [2013] VSCA 313.
\textsuperscript{145} MSO v Western Australia [2015] WASCA 78.
\textsuperscript{146} R v Freeman (2001) 20 A Crim R 398.
\textsuperscript{148} Assafiri (No.2) v R [2007] NSWCCA 356
\textsuperscript{149} R v Scerri [2010] VSCA 287.
\textsuperscript{150} R v Hodgson (2002) 84 SASR 168.
\textsuperscript{151} R v Tae [2005] NSWCCA 29, [20].
generally is required to be taken into account under s 16A(2)(h). This need not be quantified as a sentencing discount as this type of co-operation is one of the matters in sentencing that is to be considered as part of the “instinctive synthesis” approach in arriving at the appropriate sentence. Where a prisoner awaiting sentence undertakes to co-operate with law enforcement authorities in future proceedings, the extent of the reduction in sentence consequent upon such future co-operation must be specifically stated and exclusively linked to that undertaking.

119. Section 16AC permits the Commonwealth DPP to appeal against the reduced sentence in the event the undertaking is not carried into effect by the person who has been sentenced. 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. The onus of proving beyond reasonable doubt that the failure was without reasonable excuse is on the Commonwealth DPP.

120. That a federal offender is frightened or apprehensive about the consequences to him and perhaps others of his giving evidence cannot by itself be treated as a reasonable excuse.

121. Where a court finds that a federal prisoner has, without reasonable excuse, partially failed to comply with his/her undertaking the court has a discretion as to the sentence to be imposed not exceeding the sentence which the sentencing judge would have imposed but for the undertaking. Where an offender is to be re-sentenced for a breach of the undertaking and has at that point been released from custody the discretionary sentencing consideration that ordinarily applies to work against the re-imprisonment of the offender does not apply. The court has no discretion if it finds the person has entirely failed to comply. Section 16AC does not empower a court re-sentencing an offender, following a successful CDPP appeal, to consider the appropriateness of the original sentence.

122. Promised future co-operation 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 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

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156 DPP (Cth) v Johnson [2012] VSCA 38.
offender’s promise of co-operation does not preclude a discount, although it might reduce it.\textsuperscript{158}

\textit{Both past and future co-operation present}

123. Where both past and future co-operation give rise to a two-fold basis for mitigation of penalty, the sentencing judge should not combine them to produce a global reduction for “co-operation with authorities”.\textsuperscript{159} Instead, any reduction in the penalty consequent upon past co-operation must be incorporated within the overall sentence and/or non-parole period. \textit{Any additional} reduction referable to an undertaking for future assistance must be specifically quantified in accordance with s 16AC.\textsuperscript{160}

124. Where a federal sentence or non-parole period is reduced by the sentencing court because the offender has undertaken to co-operate with law enforcement agencies in relation to any proceedings, including confiscation proceedings, relating to any offence, the sentencing court must, in accordance with s 16AC as follows:

(a) specify that the sentence and/or non-parole period is being reduced consequent upon the undertaking of such future co-operation; and

(b) provide the sentence and/or non-parole period which would otherwise have been imposed but for such reduction(s).

125. As noted in paragraph 32, Justice Beach of the Victorian Court of Appeal has commented on the difficulty of specifying the separate discounts for the plea of guilty and promised future co-operation.\textsuperscript{161}

126. In some circumstances a sentence may not be discounted for promised future co-operation but past co-operation is taken into account under s 16A(2)(h).\textsuperscript{162}

\textit{Sentencing for both federal and state offences in a single hearing}

127. Where a prisoner who has undertaken to co-operate with law enforcement authorities is to be sentenced upon both state and federal offences alleged in a single indictment, the court should generally not seek to differentiate between the offences so as to provide a discount for one category of offence, and no discount for the other. Rather, the sentence upon the state offences should be reduced upon traditional mitigatory principles of the common law, whilst the court must

\textsuperscript{158} R v Kokkinos [1998] 4 VR 574.

\textsuperscript{159} R v McGee (Unreported, Supreme Court of Victoria, Crockett, Hampel and Hansen JJ, 25 November 1994); R v Ngui [2000] 1 VR 579.


\textsuperscript{162} In R v Gangelhoff [1998] VSCA 20 at [15] – [21] the Victorian Court of Appeal wagered with the decision of the sentencing judge to not give a s 21E (the predecessor of s 16AC) discount for promised future co-operation against two co-conspirators N and R but only for past co-operation - assistance given against another person, G.
128. Where a federal offender is to be sentenced and undertakes to give evidence in criminal proceedings for a state offence as well as for a Commonwealth offence and there is a connection between the state and Commonwealth offence for which co-operation has been promised, it is appropriate to take into account the offender’s promise of co-operation in respect of the related state offence in determining the appropriate sentence for the Commonwealth offence. So if the state and Commonwealth offences for which the offender has undertaken to co-operate in future proceedings are intertwined, it may be relevant to take into account the promised co-operation in respect of the state offence in determining the appropriate Commonwealth sentence.

Co-operation on one or some offences but not all

129. Where an offender co-operates in respect of one or a number of offences but not all offences the sentence need not give a reduction for every offence the offender is to be sentenced for.

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

130. From 27 November 2015 general deterrence is now specifically listed in s 16A(ja) as a matter to be taken into account. This provision reflects the common law. The maximum sentence available for the offence can underscore the relevance of general deterrence and serves as a basis of comparison between the case before the Court and the worst possible case. Recently, the High Court confirmed that general deterrence should often be given very little weight in the

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166 The Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015 amended the Crimes Act 1914 (Cth) and commenced operation on 27 November 2015.
167 DPP v El Karhani (1990) 21 NSWLR 370; R v Pauli (1990) 20 NSWLR 427; R v Oancea (1990) 51 A Crim R 141; R v Carroll [1991] 2 VR 509, 512; Commissioner of Taxation v Baffsky (2001) 122 A Crim R 568. In R v Sinclair (1990) 51 A Crim R 418 the WA CCA decided that whilst s 16A did not specifically refer to general deterrence the imposition of a sentence “of a severity appropriate in all the circumstances”, as required by s 16A(1), would necessitate general deterrence being taken into account as would s 16A(2)(k) which referred to “the need to ensure that the person is adequately punished for the offence”. The Victorian Court of Appeal in R v Robison (1992) 62 A Crim R. 374 stated that though general deterrence is relevant it is not without significance that it is not expressly mentioned. The Court said that the evident purpose of the current federal sentencing scheme was to ensure that custodial sentences were not imposed where alternatives might achieve, amongst others, realistic measures of specific deterrence and rehabilitation. In Tapper v R (1992) 39 FCR 243 the Full Federal Court agreed with the comments of the NSWCCA in DPP v El Karhani and added there was nothing in s 16A to suggest that general deterrence should be accorded less importance than the other factors mentioned and that s 16A had not ousted the general principles of sentencing law which placed significance on general deterrence. See also R v Phillips (2008) 188 A Crim R 133; [2008] QCA 284, [4] and [68].
case of an offender suffering from mental illness or intellectual handicap. Various appellate courts have held that in matters involving the accessing and possession of child pornography general deterrence is the paramount sentencing consideration.

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

131. In 2003 a majority of the High Court in *Weininger v R* commented that under this paragraph the fundamental sentencing fact was what was known about the character and antecedents of the offender.

132. **Absence of prior convictions:** The court decided that it was correct for the sentencing judge to give some recognition to the absence of prior convictions where there were none. But the majority said this did not demonstrate the absence of prior criminal behaviour in circumstances where the offender had told an undercover police officer before his arrest that he was involved in a continuing cocaine importation syndicate. The majority of the court said 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, this would have entitled the judge to take that into account as warranting the imposition of a heavier sentence than otherwise warranted. Justice Kirby dissented on this point and Callinan J agreed with the majority.

133. **Good character:** A number of High Court Justices, and a majority in the case of *Ryan v R* below, have decided that a sentencing judge had erred when he stated that a defendant’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. In particular, Justice McHugh stated that 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 will depend on all the circumstances of the case.

134. It appears though that good character will have less significance for some types of offences, such as importing drugs, using a carriage service to procure a person under 16 for sexual purposes,

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170 Muldrock v R (2011) 244 CLR 120, [53]-[54]; Naysmith v R [2013] WASCA 32; See also R v Sokaluk (2013) A Crim R 189.


174 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. Also R v Fraser [2004] VSCA 147, [31] where Batt JA stated that good character has only a minor role in sentencing for these offences. The other members of the Court agreed. See also R v Ceissman (2001) 119 A Crim R 535 and R v Barrientos [1999] NSWCCA 1 (drug importations) to the same effect, and Sukkar v R (No.2) (2008) 178 A Crim R 433.
child pornography offences\textsuperscript{176} or where repeated offences have taken place over a long time.\textsuperscript{177}

135. The approach of the \textit{Crimes Act 1914} (Cth) is to adopt the common law approach without the modifications in s 5(2)(f) of the \textit{Sentencing Act 1991} (Vic). Accordingly, the state modifications will not apply to federal offenders under s 80 of the \textit{Judiciary Act 1903} (Cth).

136. **Antecedents:** “Antecedents” in s 16A(2)(m) incorporates a reference to more than just prior convictions and it covers a person’s history.\textsuperscript{178} This reflects the common law and not the narrower state law which refers only to prior convictions pursuant to s 5(2)(f) \textit{Sentencing Act 1991} (Vic). Convictions recorded after the offending (subsequent convictions) are antecedents and where “relevant and known” they must be taken into account in respect to federal offenders. Subsequent convictions cannot increase the penalty range to a higher range applicable in respect of a second or subsequent offence. The use that can be made of subsequent convictions is limited and there is also the issue of whether they are relevant in the circumstances of the case before the court.\textsuperscript{179}

137. **Diversion:** Where the offender has had the benefit of a charge being diverted under s 59 of the \textit{Criminal Procedure Act 2009} (Vic), (formerly s 128A of the \textit{Magistrates’ Court Act 1989}), this does not involve a finding of guilt (s 128A(4)) and so the diverted charge is “unjudged conduct”.\textsuperscript{180} So the diversion of a charge cannot be taken into account in sentencing (as an aspect of character or antecedent) as if it was established criminal conduct. The existence of a completed diversion will be relevant to ensure the Court is not misled if the offender’s behaviour is represented to be out of character or an aberration.\textsuperscript{181}

138. **Cultural background:** For offences committed on or after 13 December 2006 it is no longer mandatory to take into account the defendant’s cultural background.\textsuperscript{182} 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 s 16A(2A) \textit{Crimes Act 1914} (Cth).\textsuperscript{183} The relevant Explanatory Memorandum makes clear that the court may take into account an offender’s cultural background,\textsuperscript{184} should this be appropriate, other than as a mitigating or

\textsuperscript{175} \textit{R v Gajjar} (2008) 192 A Crim R 76; [2008] VSCA 268, [27].


\textsuperscript{178} \textit{Lacco v R} [1984] WAR 153, 155 (Burt CJ).

\textsuperscript{179} \textit{R v McInerney} (1986) 42 SASR 111 (King CJ) and 123-125 (Cox J).

\textsuperscript{180} \textit{Burman v Commonwealth Services Delivery Agency} [2004] SASC 224.

\textsuperscript{181} \textit{Lari v Pavlos} (Unreported, Supreme Court of Western Australia, Owen J, 17 May 1996).

\textsuperscript{182} See \textit{Crimes Amendment (Bail and Sentencing) Act 2006} (Cth) effective from 12 December 2006 – Item 4 in Schedule 1.

\textsuperscript{183} See \textit{HAT & Ors v R} [2011] VSCA 427 and \textit{Pham v R} [2012] VSCA 101 for cases where cultural practice was taken into account for offending prior to 13 December 2006.

\textsuperscript{184} The Australian Law Reform Commission, \textit{Same Crime, Same Time: Sentencing of Federal Offenders} Report No 103 (2006) included the recommendation that cultural background should be considered when sentencing and that legislation should endorse the practice of considering traditional law and customs where relevant in sentencing Aboriginal and Torres Strait Islander offenders.
aggravating factor. Under the amendment the court is no longer expressly required to consider a person’s “cultural background” when passing sentence for a federal offence.\(^{185}\)

139. 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 as crimes of violence and sexual abuse are generally more within the province of states/territories. The Act also applies the prohibition on taking customary law or cultural practice as mitigation on the question of bail.

140. **Physical/Mental condition**: The court is required to take into account the physical or mental condition of the defendant.\(^{186}\) In 2011, the High Court considered the relevance of mental illness and intellectual handicap to sentencing and restated the well-known principle that when sentencing a person suffering from mental illness, an assessment must be made of the causal relation between the mental illness and the offence. Where there is a connection the offender’s moral culpability or the offence is substantially lessened because of his or her lack of capacity to reason when compared with an ordinary person.\(^{187}\) Accordingly, 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.\(^{188}\)

**Effect on Family – s 16A(2)(p)**

141. Unless exceptional (where the plea for mercy is seen as irresistible so that to refuse it would be inhumane),\(^{189}\) the effect of a sentence on dependents is not to be taken into account in fixing sentence.\(^{190}\) This reflects the common law position.\(^{191}\) If not exceptional, the court has no

\(^{185}\) Explanatory Memorandum - *Crimes Amendment (Bail and Sentencing) Bill 2006* (Cth).


\(^{187}\) Muldrock v R (2011) 244 CLR 120, [53]-[54]; *Naysmith v R* [2013] WASCA 32; See also *DPP v Sokaluk* (2013) A Crim R 189.

\(^{188}\) Muldrock v R (2011) 244 CLR 120, [54].

\(^{189}\) *R v Causer* [2010] VSC 341, [33].

“residual discretion of mercy”. Family 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.\(^{192}\) The Victorian Court of Appeal has repeatedly stated that the separation of an offender in custody from their friends and family, when they come to Australia solely to offend, whilst not irrelevant, will not carry great weight. The effect on the offender of the hardship caused to their family by his/her imprisonment raises different considerations and is not subject to the exceptional circumstances.\(^{193}\)

142. In one Western Australian Court of Criminal Appeal decision, a majority of the court decided that a sentencing judge would be committing an error if the judge did not take steps to obtain the necessary relevant information relating to the probable effect an order of imprisonment would have on the defendant’s family or dependents, which is a matter listed in s 16A(2), by presentence report even though defence counsel had not raised the matter.\(^{194}\) The Victorian Court of Appeal has allowed an appeal against sentence on the basis that it was a rare case where the high hurdle of exceptional circumstances were made out so that family hardship operated to require a sentence be reduced.\(^{195}\)

*Deportation/extradition*

143. Subject to evidence, the prospect of deportation (as opposed to a possibility) of the offender is a proper matter for consideration in sentencing.\(^{196}\) Absent evidence of this mitigating factor, or a crown concession, there will be no error in a Judge declining to take into account the possibility of deportation.\(^{197}\) The Victorian authorities establish clearly that in order for a sentencing court to take into account the possibility of deportation as a mitigating factor, the judge must be satisfied not only as to the quantifiable risk that deportation will occur, but relevantly, that deportation will in fact be a hardship for the particular offender.\(^{198}\) This is the same approach that applies in relation to the confiscation of property following conviction – see the next section of this paper.

\(^{191}\) *Adami v R* (1989) 51 SASR 229; *R v Sinclair* (1990) 51 A Crim R 418; *R v Carmody* (1998) 100 A Crim R 41; *R v Togias* (2001) 127 A Crim R 23, 25-6 and the cases cited there. In *R v Zerafa* [2013] NSWCCA 222 the majority of the NSW Court of Criminal Appeal rejected an application to overrule or depart from the approach taken in *Togias* and *R v Hinton* [2002] NSWCCA 405; 134 A Crim R 286. Hoeben CJ at CL noted that the ‘exceptional hardship’ approach had been followed in Queensland and Victoria, and to a limited extent in SA and WA, noting it was only in the ACT that the court refused to follow that line of authority. Beech-Jones J [diss.] expressed the view at [144] that the line of authority was plainly wrong.

\(^{192}\) *Markovic v R* [2010] VSCA 105, [15]; *DPP (Cth) v Bui* [2011] VSCA 61, [27]; *HAT & Ors v R* [2011] VSCA 427, [68]-[71].

\(^{193}\) *Markovic v R* [2010] VSCA 105, [5].


\(^{195}\) *El-Hage v R* [2012] VSCA 309.


\(^{197}\) Ibid, [29].

\(^{198}\) *DPP (Cth) v Peng* [2014] VSCA 128 at [23]. The position in Queensland is the same see *R v Schelvis; R v Hildenbrand* [2016] QCA 294 but different to New South Wales where the prospect of deportation is generally to be disregarded, see *Ali v R* [2014] NSWCCA 40 at [1], [47] and [51] and Western Australia where the prospect of deportation is not a relevant consideration, see *Hickling v The State of Western Australia* [2016] WASCA 124.
144. Despite the recent amendments to the *Migration Act 1958* (Cth) which require that the Minister must cancel the visa of a person sentenced to (and serving) a sentence of imprisonment of 12 months or more, the Victorian Court of Appeal held in *Konamala v The Queen*,199 *Da Costa v The Queen*200 and *Schneider v The Queen*201 that the approach outlined in the previous paragraph still applies, as it cannot be assumed that the Minister will not revoke his/her decision to do so based on further representations.

**Delay**

145. The key principle in respect of delay in the finalisation of proceedings is that it can operate unfairly upon the offender who had the sentence hanging over him/her for a period of time.202 Although delay can occur in a number of ways, its effect can constitute a factor in mitigation on sentence unless the delay was occasioned by the actions of the offender.203 Delay can be of particular significance to mitigate a sentence where an offender demonstrates that he/she has rehabilitated between the detection of the offence and sentencing such that the need for specific deterrence (as a component of the penalty) may be reduced.204

146. However, there will be instances involving large-scale prosecutions where delay is the inevitable result of the amount of evidence gathered and the complexity of the case. In such instances delays of four to five years, while mitigating sentence, may not be found to be extraordinary and inordinate.205 [See also Part 11.6 of the Judicial College of Victoria’s *Victorian Sentencing Manual* for an explanation of the various considerations relevant to the assessment of delay and its effect on penalty.]

**Forfeiture/Pecuniary penalty**

147. One of the factors not included in s 16A(2) of the *Crimes Act 1914* (Cth) is the relevance to sentencing of the forfeiture or likely forfeiture, including property, that has been derived by the federal offender from or associated with illegal activity and the relevance of a pecuniary penalty, whether imposed by court order or administrative action.206

148. As a matter of general principle the court should be advised of the forfeiture or likely forfeiture or the imposition of a pecuniary penalty order. Whether a court can have regard to a forfeiture order

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200 [2016] VSCA 49.
201 [2016] VSCA 76.
202 Nikodevic [2004] VSCA 222 at [22].
203 Whyte (2004) 7 VR 397 at [25] - [27] where delay was not attributable to the prosecution.
204 R v M.W.H [2001] at VSCA 196, [18].
or pecuniary penalty order made or arising from the *Proceeds of Crime Act 2002 (Cth)* prior to sentencing of the offender is now determined by s 320 of that Act.

149. Section 320 is not however a complete code and where the actual or potential outcome falls outside of the situations covered by the section, regard must be had to the rationale underlying the section as reflected in state cases and the general common law principles as reflected in state cases.

150. The approach adopted in Commonwealth and Victorian confiscation legislation is similar in most respects but not identical. The Victorian scheme makes specific provision for the relevance to sentencing of particular confiscation orders made under the *Confiscation Act 1997* in s 5(2A) of the *Sentencing Act 1991 (Vic)*.

151. Neither Act addresses the relevance to sentencing of the likelihood that confiscation will occur in the future. This is particularly important as forfeiture may occur automatically under the *Proceeds of Crime Act 2002 (Cth)* 6 months to 15 months (if extended) after a conviction and under the *Confiscation Act 1997 (Vic)* 60 days after conviction (when no application for exclusion is made).

152. Case law determines whether regard can be had to the possibility of confiscation occurring in the future. Where the order is not made, or settlement reached, before sentence, it is appropriate for the court to be informed that confiscation is a possibility. It is clearly difficult for the court to take into account the potential of future confiscation in the sentencing process. Currently a court will have to have regard to whether it is likely, the characterisation of the property to be confiscated and the likely effect on the offender.

153. Similarly, where automatic forfeiture may occur by operation of the Act, the sentencing court should be informed that forfeiture may occur (see below for more detail). However, there is no certainty regarding actual forfeiture as up until 6 months (or 15 months if extended) after conviction the defendant or a third party may successfully exclude property from the restraining order with the result that the property will not be subject to automatic forfeiture.

*Approach prior to the Proceeds of Crime Act 2002 (Cth)*

154. 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.\(^{207}\)

155. 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.

\(^{207}\) *Proceeds of Crime Act 1987 (Cth)*, s 18(2).
156. The weight which was attributable to the order varied greatly depending upon the specific circumstances under consideration.\textsuperscript{208}

157. 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 \textit{Allen v R}\textsuperscript{209} 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 \textit{R v McDermott},\textsuperscript{210} 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 \textit{Tapper v R},\textsuperscript{211} 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 unlikely to impact on the offender or his assets. In that matter the prospect of recovery was unlikely.

158. 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.

159. Where condemnation of “forfeited goods” has occurred under the \textit{Customs Act 1901} (Cth) or the \textit{Excise Act 1901} (Cth), this may also be relevant to the sentencing of a particular offender affected by it and this should be brought to the court’s attention. In addition, the Victorian Court of Appeal confirmed that if property/money is likely to be forfeited this is also relevant to sentencing and must be taken into account where it is known.\textsuperscript{212} Changes made to the \textit{Customs Act} regime and the regime established under the \textit{Proceeds of Crime Act 2002} mean that forfeiture and condemnation action under the \textit{Customs Act} now occurs infrequently.


\textsuperscript{209} \textit{Allen v R} (1989) 41 A Crim R 51.

\textsuperscript{210} \textit{R v McDermott} (1990) 49 A Crim R 105.

\textsuperscript{211} \textit{Tapper v R} (1992) FCR 243.\textit{Ibid.}

Approach under Proceeds of Crimes Act 2002 (Cth) – from 1 January 2003

160. The Proceeds of Crime Act 2002 (Cth), which operates from 1 January 2003, like s 5(2A) of the Sentencing Act 1991 (Vic), sets out the effect on sentencing of the confiscation scheme. It does not deal with the relevance of orders or confiscation that may occur after sentencing.

161. The scheme of the Proceeds of Crime Act 2002 (Cth) makes specific provision for those events a court can take into account on sentencing. However, like the Victorian Act it does not cover all the situations that could be relevant to sentencing.

162. The rationale underlying s 320 Proceeds of Crime Act 2002 (Cth) 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, but to permit regard to be had to the confiscation of property not representing the proceeds of crime such as things or property used in the commission of the crime, which property may have been acquired lawfully.

163. Accordingly, s 320 of the Proceeds of Crime Act 2002 (Cth):

i. precludes a sentencing judge from having regard to the forfeiture of the proceeds of crime of the offence the person is convicted of or any pecuniary penalty order or literary proceeds order relating to that offence; and

ii. on the other hand, the scheme requires the sentencing judge to have regard to the forfeiture of other property that is not proceeds of the offence the person is convicted of, such as instruments of crime used in the commission of the offence, e.g. a mobile phone used in a drug importation. It also permits the sentencing judge to have regard to any cooperation by the offender in resolving any action taken against the offender under the Act.

164. 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.

*forfeiture order is defined in s 338 as an order under Division 1 of Part 2-2 of the Act that
remains in force.

*proceeds of 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 situated outside Australia.

*pecuniary penalty order* is defined in s 338 as an order under s 116.

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

165. Section 321 of the *Proceeds of Crime Act 2002* (Cth) enables the court to defer sentencing pending the determination of a confiscation order where the court is satisfied that it is reasonable to do so in all the circumstances. Like its predecessor in the 1987 Commonwealth Act, the provision allows the court to defer sentencing so that confiscation action can be concluded and any confiscation orders be taken into account in sentencing, if relevant.

166. Section 320 of the *Proceeds of Crime Act 2002* (Cth) is silent as to whether automatic forfeiture, which may occur at a point 6 to 15 months after conviction by operation of s 92 of that Act, can be taken into account in sentencing. The provision that relates to the ability of a court to defer sentencing (s 321) is worded in a way that only applies to the situation where a confiscation order may be made, and so is not applicable to the situation where automatic forfeiture may occur by the operation of the Act rather than an order. In any event, to defer sentencing for six months or longer may not be practical. (It should be borne in mind that s 333 operates to make the day on which the court passes sentence for the offence, as the conviction day for the purposes of the Act.)

167. In 2011, the Victorian Court of Criminal Appeal decided that s 320 has no application in relation to automatic forfeiture of property but that the common law principles stated in *R v McLeod* applied including that ordinarily the offender will bear the onus of establishing a mitigating fact. These common law principles were not excluded by federal legislation.

168. So the automatic forfeiture of property, that was *not* the proceeds of crime, if so established by the offender, is a mitigating factor to be taken into account.

169. In addition, if an offender was to abstain from making an application to exclude property from a restraining order or if they were to abandon such an application, this could amount to co-operation under s 320(a) of the *Proceeds of Crime Act 2002* (Cth) provided the offender satisfied the court it was a deliberate decision to co-operate.

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213 *HAT & Ors v R* [2011] VSCA 427, [61]-[67].
214 *HAT & Ors* at [66].
215 *HAT & Ors* at [56].
Commonwealth DPP’s approach where automatic forfeiture may occur

170. Consistent with the need to bring the court’s attention to events which are likely to occur and which may so operate as a mitigating factor on sentencing, the Commonwealth DPP has adopted the following approach to the situation where automatic forfeiture may take place in the future:

a) The court should be informed of the status of the proceeds proceedings and whether automatic forfeiture is a possibility;

b) To advise the court that it is within the power of the accused and third parties to apply to exclude property from the restraining order to avoid automatic forfeiture;

c) To submit to the court that it should take into account the prospect, where this is likely, of automatic forfeiture extending to property other than the proceeds of the offence the defendant is convicted of notwithstanding it may be difficult to attribute weight to this in the circumstances; and

d) To submit to the court that the offender bears the onus of establishing that automatic forfeiture is likely to occur and the effect of such an outcome on him/her.

171. The same general approach would be applied to other situations where a confiscation order is likely and, in particular, it is appropriate to submit to the court that regard should be had to the rationale underlying s 320.

172. It is also possible under the Proceeds of Crime Act 2002 (Cth) for non-conviction based forfeiture and pecuniary penalty orders to be made, the relevance of which to sentencing are not specifically covered by s 320. In these circumstances the Commonwealth DPP will also adopt an approach which has regard to the rationale underlying s 320 and those cases relevant to future automatic forfeiture.

The approach under Victorian law

173. This approach is not inconsistent with general comments made in recent years by the Victorian Court of Appeal dealing with the situation where forfeiture under state law may occur in the future. The main points from these recent Victorian cases are:

- a sentencing judge ought to have regard to the likely forfeiture of the offender’s property where this is so;
- where 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 as the administration of justice would not be well served by a sentencing judge speculating as to the likely forfeiture and/or punitive component;

- an offender who relies on forfeiture (whether in the past or anticipated) as a mitigating circumstance will ordinarily bear the onus of establishing that it should be so regarded. The sentencing judge is not required to speculate as to whether or to what extent the property in question was lawfully acquired or, alternatively, represented profit which the offender derived from his/her activity. It is for the offender to present “credible material” identifying the source of the property so as to permit the sentencing judge to form a positive conclusion that at least some substantial portion of the property has been lawfully acquired. Likewise, where an offender seeks to rely in mitigation on the loss of “benefits in excess of profits derived from the commission of the offence”, the offender must produce evidence to enable a positive determination to be made on the balance of probability.

174. It must be borne in mind that an accused’s co-operation with authorities in proceeds proceedings must be taken into account under s 320. It may also be relevant in itself as an expression of contrition or reflecting co-operation in the investigation of the offence or other offences under s 16A(2)(f) and (h) of the Crimes Act 1914 (Cth).

175. As noted above, recently the Victorian Court of Appeal has decided that the principles relating to Victorian forfeiture, expressed in R v McLeod, apply to the federal forfeiture provisions save to the extent there is any statutory provision to the contrary. Accordingly, the onus of proof rested on an offender who contended that their conduct amounted to co-operation, which should mitigate the severity of their sentence.

176. The Victorian Court of Appeal has decided that events, such as forfeiture, subsequent to the sentencing, could be taken into account by an appeal court provided that the requirements for “fresh evidence on appeal” were met. The court suggested that the Victorian Act be amended to allow the lower court to resentence in those circumstances. The appeal provisions in the Criminal Procedure Act 2009 (Vic) permit the Court of Appeal to remit a matter for sentencing following a successful appeal.

Crimes (Superannuation Benefits) Act 1989 (Cth)

177. A court, in sentencing, 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. A superannuation order is an order forfeiting the Commonwealth’s contribution to the superannuation of a Commonwealth Public Servant or a member of the

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217 HAT & Ors v R [2011] VSCA 427, [55]-[57].
219 Criminal Procedure Act 2009 (Vic), s 282.
220 Crimes (Superannuation Benefits) Act 1989 (Cth), s 43 and also the Australian Federal Police Act 1979 (Cth), s 55.
Australian Federal Police.\textsuperscript{221}

\textsuperscript{221} For example see \textit{DPP v Dwayhi} [2009] NSWSC 1025.
Commonwealth Sentencing Options

178. Generally, there are six sentencing options in relation to a federal offender once the Court has found the charge proved. Wider options apply to “children and young offenders” under s 20C Crimes Act 1914. Mentally ill or intellectually disadvantaged offenders have a separate regime (ss 20BQ - 20BY). The sentencing range is more limited in respect of offences contrary to the Migration Act 1958 in certain circumstances and for offences of terrorism, treachery, treason and espionage.

6 general sentencing options

179. The six general federal sentencing options in Victoria, following a finding of guilt, are:

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1. Dismiss charge – s 19B Crimes Act 1914

180. Section 19B enables the court to dismiss a charge or charges (see below) but the discretion to do so is limited.
2. **Bond without conviction – s 19B Crimes Act 1914**

181. Under s 19B(1) (with 2006 amendments deleting cultural background) where the court is satisfied that a federal offence 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, the court may dismiss the charge or charges or discharge the person, on giving security with or without sureties without proceeding to conviction on a recognisance of a period not exceeding 3 years on conditions.

**Length of bond**

182. Up to 3 years with conditions including the payment of reparation, restitution, compensation or other order (s 19B(1)(d)) and other conditions may be imposed “as the Court thinks fit to specify in the order”.

**Payment to Court Fund or a Charity**

183. In Victoria, prior to the 2013 decision of Justice John Dixon in *Brittain v Mansour*\(^\text{222}\), it had not been uncommon for Magistrates to impose a condition requiring the payment of money to the court fund as a condition of a s 19B bond or state bonds. Justice John Dixon has decided that the Victorian sentencing option of fining an offender without imposing a conviction is not a sentencing option in respect of federal offenders and this explains the prevalence of such a condition under s 19B of the *Crimes Act 1914* (Cth).

184. Following that decision the Victorian Government passed the *Justice Legislation Amendment Act 2013*, whereby the definition of ‘fine’ in the *Sentencing Act 1991* (Vic) was amended to enable the courts to continue to order payments to charities and the Court Fund as a condition of a bond. That legislation has no application to federal matters. ‘Fine’ is defined in s 3(2) of the *Crimes Act 1914* to include a reference to costs or other amounts ordered to be paid by offenders. Based upon the reasoning of Dixon J in *Brittain v Mansour* and the non-applicability to federal offenders of the amendments to the *Sentencing Act 1991* (Vic) to redress the effect of that judgment, it is the view of

\(^{222}\) *Brittain v Mansour* [2013] VSC 50.
the CDPP that consequently a court cannot impose as a condition of a section 19B or a section 20 recognisance a condition to pay a monetary amount to a charitable organisation or to the Court Fund.

**Cannot order drug treatment or work order**

185. It is also doubtful that a condition could be imposed under s 19B for a work order or to undergo treatment for drug addiction – see the discussion on s 20 below. The suitability of conditions of a bond that an offender convicted of threatening a public official not contact any politician without the permission of a SA corrections officer and obey the directions of such officer, in relation to psychological or psychiatric or counselling, has been considered in the context of s 20.223

**Form of bond**

186. This is a prescribed form under the *Crimes Regulations 1990*. A state bond form should not be used.224 This prescribed form requires that a monetary amount of security be given by the offender.225 There is no statutory or common law limit that can be fixed and there is some variation around Australia in the amounts chosen.226 A bond can also involve a surety though a surety is almost never required.

**Relevant factors**

187. The particular factors which s 19B requires the court to have regard to (“the character, antecedents, age, health or mental condition ‑‑”) are alternatives rather than cumulative.227

188. From 12 December 2006 reference to the “cultural background” of the defendant was deleted from the list of factors to be taken into account under s 19B. In addition, (for offences committed on or after 13 December 2006) the Court is now precluded from taking into account any form of customary law or practice as a mitigating or aggravating factor.228

**The 2-stage test**

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225 *Assafiri (No. 2) v R* [2007] NSWCCA 356.
228 See the *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth).
189. The discretion conferred on a sentencer by s 19B has been held to consist of two stages.229

- Firstly, one or more of the factors specified in s 19B(1) must be identified.

- The second stage is to consider 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 ...”. In considering a disposition under s 19B, regard should also be had (as part of this second stage) to factors such as the seriousness of the offence, its prevalence, the difficulty in detecting breaches and the need for deterrence and the other factors in s 16A.230

190. The exercise of the discretion under s 19B has been described as “exceptional”, “rare”, “special” or “singular”.231 The decisions state that there must be something to distinguish the particular case from what may be regarded as a typical breach.232 Good prospects of rehabilitation do not necessarily lead to the conclusion that a s 19B disposition is appropriate.233 The decided cases suggest that s 19B should not be used in cases involving dishonesty or offenders holding high public office and that it is generally inappropriate where general deterrence is important.234 Where offending is serious, usually a s 19B bond will be inappropriate notwithstanding the personal circumstances of the offender.235 The cases also suggest that an exercise of the discretion under s 19B will be exceptional in cases involving fraudulent or deliberately deceptive conduct.236 One case decided that it could not be said that there was no scope for s 19B’s application to the offence of using a telecommunications service to menace another contrary to s 474.17(1) of the Criminal Code.237 In another case, medical and psychological material was relied on as justifying a s 19B bond for offences of failing to furnish a tax return.238 In 2009, Justice Terry Forrest of the Victorian Supreme Court commented that s 19B is probably being overused in Victoria in the context of welfare fraud.239 An order under s 19B is not open for a people smuggling offence against ss 233B, 233C or 234A of the Migration Act 1958 unless the offender was under 18 at the time of the offending; see section 236A of the Migration Act 1958.


233 Warnakulasuriya v R [2009] WASC 257, [65].


239 DPP v Moroney [2009] VSC 584, [31].
Corporations

191. The provisions of section 19B [and section 20] apply to a corporation as well as to a natural person.\textsuperscript{240}

Obligation on the court

192. The court must:

- provide a copy of the order to the offender;

- 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 recognisance may be discharged or varied under s 20AA.

Breach action – s 20A(1A) Crimes Act 1914 (Cth)

193. Section 20A(1A) of the Crimes Act 1914 provides that breach action must be taken before the end of the period of the bond only 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.\textsuperscript{241} Where the breach is occasioned by the commission of an offence during the period of the bond breach, action need not be taken before the end of the period of the bond.

194. Breach action is initiated by summons or information and warrant that can only be issued by a Magistrate pursuant to s 20AC.

195. 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.


\textsuperscript{241} The Crimes and Other Legislation Amendment Act 1995 (Cth) became operational on 16 January 1995. The Commonwealth DPP’s office decided that if the period of the bond had expired before this amending legislation became operational, then the amendments did not now permit breach proceedings to be taken.
3. **Bond with conviction – s 20 Crimes Act 1914 (Cth)**

196. Section 20 enables the court to release a federal offender on a bond with conviction upon giving security with or without sureties and conditions.

**Length: for a period up to 5 years**

197. A conviction bond may be imposed for up to 5 years with conditions (s 20(1)(a)(i)) which may include payment of reparation, restitution, compensation costs or pecuniary penalty (see s 20(5) for maximum amount).

**Other conditions: for a period of up to 2 years**

198. Other conditions may be imposed for up to 2 years - s 20(1)(a)(iv). Under this sub-paragraph the court can impose conditions “as the court thinks fit to specify in the order”. Despite the expansive words used the court should not impose any condition impossible of being complied with or one which is beyond the power of the court to impose. Any condition imposed must not be inconsistent with the release of the person. So s 20 must be read down, accordingly. 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 direction.243

**Form of bond**

199. There is a prescribed form under the Crimes Regulations 1990. A state bond form should not be used.244 A section 20 bond needs to specify the monetary amount of security to be given by the offender.245 The section and the common law does not limit the amount. A bond can also involve a surety but this is almost never required.

**People smuggling offences**

200. A section 20 (or section 19B) bond cannot be imposed on an offender found guilty of a people smuggling offence contrary to the Migration Act 1958 unless the offender was not over 18 at the time of the offence – see section 233B Migration Act 1958.

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243 *R v Theodossio* [2000] 1 QdR 299. This case also discusses other limitations to s 20 of the Crimes Act 1914 (Cth).
244 See *DPP v Cole* (2005) 91 SASR 480.
245 *Assafiri (No.2) v R* [2007] NSWCCA 356.
Community work order as a condition of the bond?

201. In Victoria it is very doubtful that a court could impose a condition to perform unpaid community work as a condition of a bond. In Victoria there is no separate sentencing order amounting to an unpaid community work order. While a requirement to perform unpaid community work can form part of a Community Correction Order in Victoria this is a separate sentencing option picked up under s 20AB of the Crimes Act 1914 (Cth). The better view, insofar as a federal offender to be sentenced in Victoria is concerned, is that an unpaid community work order cannot be imposed as a condition of a bond but can form part of the program conditions of a CCO where a CCO is imposed on a federal offender.

Payment of Court Fund or Charity?

202. It is the view of the CDPP that the amendments to the Sentencing Act 1991 (Vic) which were made to redress the effect of Justice John Dixon’s decision in Brittain v Mansour (see paragraph 183 above), do not apply to federal offenders. Accordingly, a court cannot impose a condition (of the recognisance release order) requiring an offender to pay an amount to the Court Fund or to a charity.

Drug treatment as a condition of the bond?

203. In R v Jones Burt CJ doubted but did not decide whether 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. This was presumably on the basis that this may have been inconsistent with an order releasing the person without passing sentence.

A condition prohibiting contact with any politician and to obey the directions of a corrections officer in relation to psychological or psychiatric counselling?

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246 In Bantick v Blunden [1981] Tas R (NC) N9, Green CJ of the Tasmanian Supreme Court decided that a work order could not be imposed as a condition of a bond. In a more recent decision following amendments to s 20 of Adams v Carr (1987) 47 SASR 205, the South Australian Court of Criminal Appeal distinguished Bantick v Blunden and decided that in South Australia conditions of community service and an associated order that the offender comply with the lawful direction of a community service officer could be imposed under s 20 and carried out in South Australia by the arrangements contained in s 3B of the Crimes Act 1914 (Cth).

247 See Shambayati v R (1999) 105 A Crim R 373, where the Queensland Court of Appeal decided that a CBO could not be a condition of a s 20 bond as s 20 does not pick up state legislation as s 20AB does.

248 R v Jones [1984] WAR 175, 180. See also R v Manolakis (2008) 255 LSJS 150 relating to appropriateness of a condition to obey the directions of a corrections officer as to psychological or psychiatric treatment or counselling.
204. Such conditions were considered unsuitable by the court in *R v Manolakis*.  

Obligation on court

205. A court is obliged to provide a copy of the order and to also explain the order.

Breach action – s 20A(1A) *Crimes Act 1914* (Cth)

206. Breach action must be taken before the end of the period of the bond only 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 outside the period of the bond.

207. 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*.

208. 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 $1,100;
- revoke the order and deal with the person as if no order had been made. 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); or
- take no action.

4. Fine/Pecuniary penalty

209. Under the *Crimes Act 1914* (Cth) a reference to a “fine” is defined in s 3(2) 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*,

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250 *Crimes Act 1914* (Cth), ss 20(2) and (4).
251 See *Crimes and other Legislation Amendment Act 1995* (Cth), which became operational on 16 January 1995. The Commonwealth DPP has decided that if the period of the bond had expired before this amending legislation became operational, then the amendments did not now permit breach proceedings to be taken (s 20A(1A)).
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).

**Penalty unit value**

210. The *Crimes Act 1914* (Cth) adopts a penalty unit system of describing the maximum permissible fine. A *penalty unit* means (s 4AA):

- **$180** for offences committed on or after 31 July 2015;
- **$170** for offences committed between 28 December 2012 and 30 July 2015;\(^{252}\) and
- **$110** for offences committed between 7 April 1997 and 27 December 2012.

**Imprisonment converted into a fine formula – s 4B Crimes Act 1914 (Cth)**

211. Section 4B of the *Crimes Act 1914* (Cth) permits the court to impose a pecuniary penalty, the rate of which is determined by that section where there is no contrary intention and where an accused, who is a natural person, has been convicted of an offence punishable by imprisonment only. The formula for calculating the maximum number of pecuniary penalty units to be imposed is the maximum term of imprisonment (expressed in months) multiplied by 5. Here, the court can impose a pecuniary penalty instead of or in addition to imprisonment.\(^{253}\)

**Corporation**

212. 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.\(^{254}\)

**Maximum fine on summary disposition – s 4J Crimes Act 1914 (Cth)**

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\(^{252}\) 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*.

\(^{253}\) *Crimes Act 1914* (Cth), s 4B(2).

\(^{254}\) *Crimes Act 1914* (Cth), s 4B(3).
213. Section 4J, in general terms, sets out the maximum level of fine that may be imposed when an indictable offence is dealt with on summary conviction. Where the offence is punishable by imprisonment for a period:

i. **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; or

ii. **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.

214. Where an indictable offence carries a pecuniary penalty only, a court of summary jurisdiction can now hear and determine offences where the pecuniary penalty is not more than 600 penalty units (for an individual) or 3000 penalty units (for a body corporate) where both prosecution and defence consent.255

215. The maximum penalty that can be imposed summarily on an individual for a single offence is 60 penalty units, where the maximum penalty for the indictable offence is 300 penalty units for an individual. 300 penalty units is the maximum a summary court can impose on a body corporate where the relevant maximum penalty for a body corporate is 1500 penalty units.

216. Where the maximum pecuniary penalty is 600 penalty units (for an individual) or 3000 penalty units (for a body corporate) and the offence is punishable on indictment, the maximum penalty a court of summary jurisdiction can impose is 120 or 600 penalty units respectively.

217. Section 4JA only applies where there is no contrary intention in the law creating the offence. It applies only to proceedings initiated after 3 June 2003. It does not apply to indictable offences which already are able to be determined summarily or to offences the property value of which is $5,000 or less because these are already able to be determined summarily under s 4J(4) of the *Crimes Act 1914* (Cth).

**Obligation on court**

218. The court is obliged to have regard to the ability of the offender to pay any fine or pecuniary penalty - s 16C(1) - in addition to any other factors that the court is permitted or required to take into account. In one case involving a company, the court held that s 16C did not prevent the imposition of a fine that an offender was unable to pay and that capacity to pay should not assume prominence in the sentencing discretion.256 A court is not precluded from imposing a fine if the financial circumstances of the offender cannot be ascertained (s 16C(2)).

**Fine and imprisonment**

255 *Crimes Act 1914* (Cth), s 4JA.

219. Some Commonwealth offences are punishable by a fine and/or imprisonment. Note also the effect of s 4B referred to above which enables a court to impose a pecuniary penalty in addition to imprisonment where the offence is punishable by imprisonment only. For a discussion of the circumstances in which it may be appropriate to both fine and imprison for the same offence see Richard G. Fox and Arie Frieberg, *Sentencing – State and Federal Law in Victoria* (Oxford University Press, 3rd Ed, 2014), 469 – 472.

Enforcement – s 15A *Crimes Act 1914* (Cth)

220. Section 15A adopts the state law relating to enforcement of fines.257

5. **Community Correction Order**

221. The Community Correction Order is made available by s 20AB of the *Crimes Act 1914* (Cth) and Reg 6 of the *Crimes Regulations* from 15 March 2012.258

222. It should be noted that s 20AB(3) provides a limitation to the extent to which the State law provisions dealing with CCOs apply. They apply only “so far as those provisions are capable of application and are not inconsistent with the laws of the Commonwealth”.

CCO and no conviction?

223. Where a federal offender is not convicted it is not possible to impose a CCO. Section 20AB(1) makes prescribed state sentencing options applicable to a federal offender only on conviction.259

CCO plus a fine/pecuniary penalty order?

224. A CCO can be imposed in addition to a fine or a pecuniary penalty in accordance with s 20AB(4)(a) of the *Crimes Act 1914* (Cth).

CCO plus reparation/restitution/compensation

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257 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. It does so by ensuring that fine enforcement procedures of a judicial nature (e.g. ordering imprisonment or forfeiture of property including driver’s licence) are only performed by judicial officers. The Commonwealth Constitution requires that judicial power may only be exercised by a Court. The amendments apply irrespective of whether the fine was imposed before or after 29 June 1998.

258 The date after the *Crimes Amendment Regulation 2012 (No.2)* was registered.

259 *DPP v Meyers* (Unreported, Supreme Court of Victoria, Balmford J, 26 April 1996).
225. A CCO can be imposed in addition to an order for reparation or restitution or compensation in accordance with s 20AB(4)(b) of the Crimes Act 1914 (Cth).

**CCO and imprisonment cannot be imposed for a single federal offence**

226. While under Victorian law a CCO can be imposed for an offence in addition to a term of imprisonment not exceeding two years involving immediate incarceration pursuant to s 44(1) of the Sentencing Act 1991 (Vic), in relation to a federal offender a combination sentence of a term of imprisonment and a CCO is not available.

227. In Atanackovic, the Victorian Court of Appeal held that the legislative scheme established by Part 1B, Division 4 of the Crimes Act 1914 (Cth) leaves no room for the operation of either ss 11 or 44 of the Sentencing Act 1981 (Vic). Accordingly, a combination sentence of a term of imprisonment and a CCO for a single federal offence is not available.\(^{260}\)

**CCO and imprisonment can be imposed for separate federal offences**

228. Where a federal offender is to be sentenced for more than one federal offence it is technically open to impose a period of imprisonment for one offence and a CCO on another or other offences, which would operate upon release from custody. In this way, it is possible to achieve what s 44 of the Sentencing Act 1991 (Vic) provides in respect of state offenders where a federal offender is sentenced for two or more federal offences. Pursuant to s 38(2) of that Act the CCO must not commence more than 3 months after it was made (the date the sentence was imposed).

**Imprisonment for a federal offence and CCO for a state offence**

229. 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.

**CCO and Victorian guideline judgment of Boulton v The Queen**

\(^{260}\) Atanackovic v The Queen (2015) 45 VR 179 at [82] – [87].
230. In *Atanackovic*, the Court also held that the guideline judgement in *Boulton v The Queen*,\(^\text{261}\) cannot be accommodated by s 16A of the *Crimes Act 1914* (Cth), does not satisfy the requirements of s 80 of the *Judiciary Act 1903* (Cth) and, accordingly, does not apply to the sentencing of federal offenders.\(^\text{262}\) This is so because the guideline principle in *Boulton* cannot be accommodated by s 16A of the *Crimes Act 1914* (Cth) nor could it be picked up by s 80 of the *Judiciary Act 1903* (Cth).\(^\text{263}\)

**CCOs and a condition to pay money as a bond**

231. From 1 May 2013 under s 48JA of the *Sentencing Act 1991* (Vic), a court may attach a condition requiring an offender to pay an amount by way of a bond under a CCO, and s 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 federal offenders.

**CCOs and ‘suspended’ sentences**

232. As a result of the decision of the Court of Appeal in *Director of Public Prosecutions (DPP) v Leys & Leys*,\(^\text{264}\) 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 recognisance release order 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.

233. 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 recognisances 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 recognisance pursuant to s 20(1)(b).

\(^{261}\) *Boulton v the Queen* (2014) 46 VR 308.

\(^{262}\) *Atanackovic v The Queen* (2015) 45 VR 179 136, [94].

\(^{263}\) *Atanackovic v The Queen* (2015) 45 VR 179, [95]. At [98] and [99] the Court stated that the guideline judgment of *Boulton* espouses an approach to sentencing which emphasises the advantages of a CCO compared to imprisonment and requires sentencing judges to take into account those advantages before concluding that imprisonment is the only sentencing option. This is so because this approach to sentencing is not a matter that harmoniously supplements the matters set out in s 16A(2) in the same way as principles of totality and proportionality. The s 16A(2) factors are inherently relevant to instinctive synthesis as they point to favourable and unfavourable considerations applicable to an offender. In contrast, *Boulton* is directed at supplying a process of reasoning for preferring one sentencing option over another.

\(^{264}\) *DPP v Leys & Leys* (2012) 44 VR 1.
234. On this interpretation, imposing a CCO on a state charge and a recognisance release order 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**

235. 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 recognisance release order for federal offenders.

236. A CCO and a recognisance release order are different sentencing dispositions and cannot both be imposed for the one offence. Therefore, a Justice Plan cannot be part of a recognisance for a federal offence.

237. The CDPP view is that the Court cannot impose a Justice Plan as part of a CCO for a federal offence. The Justice Plan regime is located in Part 3BA of the *Sentencing Act 1991* (Vic). This Part is not prescribed for the purposes of s 20AB of the *Crimes Act 1914* (Cth). Furthermore, 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.

238. There would not however appear to be a prohibition upon the Court making some aspects of a Justice Plan as a condition of a Commonwealth recognisance.

**One CCO for multiple Commonwealth offences**

239. **Summary matters:** It is clear that a court can impose a single CCO for multiple Commonwealth offences when dealt with summarily. This follows from s 4K(4) of the *Crimes Act 1914* (Cth) and the wording of s 20AB which in effect provides that where, under state law, the Court can impose a CCO it can do so in respect of a federal offender. Section 40 of the *Sentencing Act 1991* (Vic) permits that.

240. **On indictment:** Whether a single CCO can be imposed for multiple Commonwealth offences on indictment is open to argument. However, the better view is that it can. While s 4K(4) of the *Crimes Act 1914* (Cth) does not enable an aggregate sentence to be imposed on indictment, that section does not preclude the court doing this where the state law permits this in a sentencing option that is picked up under s 20AB of the *Crimes Act 1914* (Cth) in respect of federal offenders. It is open for the court to impose one CCO on indictment for multiple Commonwealth offences, notwithstanding s
This follows from the reasoning of cases such as the majority in *R v Jackson* and the High Court’s decision in *Putland v R*. In *R v Jackson*, the majority decided that the procedure for sentencing defendants convicted of Commonwealth offences was determined by s 68 of the *Judiciary Act 1903* (Cth) which provides for these offenders to be sentenced in accordance with procedures applicable in the state or territory where the charges are brought. In *Putland v R* the High Court decided that s 4K(4) of the *Crimes Act 1914* (Cth) did not cover the field to exclude a state provision that allowed an aggregate sentence on indictment. So, it seems that a single CCO can be imposed for multiple federal offences on indictment because this is implicit in the CCO option which has been prescribed as a federal sentencing option under s 20AB.

**Obligation on court**

241. 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.

**Breach action**

242. Breach action is initiated by summons or information and warrant that can only be issued by a Magistrate pursuant to s 20AC. Where an offender fails to comply with a CCO, s 20AC instead of the breach provisions of the *Sentencing Act 1991* (Vic), sets out the court’s sentencing options. The options are set out in s 20AC(6) as follows:

- impose a pecuniary penalty not exceeding 10 penalty units;
- revoke the original order and re-sentence; or
- take no action.

**6. Imprisonment**

**Last resort – s 17A *Crimes Act 1914* (Cth)**

243. Imprisonment is only to be imposed where a court is satisfied that no other penalty is appropriate in the circumstances of the case. The Victorian Court of Criminal Appeal in *R v Carroll* noted that this restated the established common law position. In *Atanackovic v The Queen* the Court stated that

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267 *Crimes Act 1914* (Cth), s 20AC(6)(a). In *Grimm v R* (1995) 124 FLR 372; (1995) 83 A Crim R 259 there was general consensus 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. Where a court revokes the original sentence, it cannot also impose a pecuniary penalty order.
268 *Crimes Act 1914* (Cth), s 17A(1).
s 17A requires consideration of all other available sentences and all the circumstances of the case. If the court imposes a sentence of imprisonment it is required by s 17A to give reasons and have them entered in the record of the court. Failure to do so does not invalidate the sentence. Where a mandatory minimum sentence of imprisonment is imposed, pursuant to legislation, this is inconsistent with s 17A as the requirement to impose a mandatory minimum sentence of imprisonment prevails over it.

Restrictions – s 17B(1) Crimes Act 1914 (Cth)

244. Section 17B(1) imposes a restriction on the imposition of imprisonment where a person is convicted of one or more federal offences relating to property, money or both, the total value of which does not exceed $2,000 and the person has not previously been sentenced to imprisonment. Here, the court is precluded from passing a sentence of imprisonment unless the court considers that there are exceptional circumstances that warrant imprisonment.

245. From 24 May 2001 the specific restrictions on imprisonment, where the value of the property/money does not exceed $2,000 (ss 17B(1)(a) and 17B(1)(b)), are confined to an offence against:

- s 29 of the Crimes Act 1914 (Cth);
- ss 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; and
- to prescribed offences against federal law (As at December 2016, no offences have been prescribed.).

246. Again, unless exceptional circumstances exist, imprisonment is precluded. Prior to 24 May 2001 the restriction also applied to offences against ss 29A, 29B, 29C, 29D, 71 and 72 of the Crimes Act 1914 (Cth).

No backdating of federal sentences

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270 Atanackovic v The Queen 45 VR 179; (2015) 297 FLR 87 at [103].
271 Crimes Act 1914 (Cth) s 17A(2) and Janssen v McShane (Unreported, Supreme Court of Tasmania, Zeeman J, 9 June 1992).
273 Defined in Crimes Act 1914 (Cth) s 16 to mean an offence against the law of the Commonwealth.
276 See Crimes Act 1914 (Cth), s 17B(3).
247. There is no power to backdate a federal sentence in Victoria to start from a date earlier than its imposition.\(^{277}\) This does not apply when the Court of Appeal\(^{278}\) or County Court\(^{279}\) is re-sentencing after a successful appeal.

**Commencement of sentences**

248. Section 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 terms of imprisonment imposed in relation to federal offences. Section 16E(1) is subject to s 16E(2) and (3).

249. Section 16E(2) provides that where a law of a state or territory has the effect that a sentence of imprisonment is to commence on the day in which a person was taken into custody for that offence, that will apply to federal sentences of imprisonment. That is the position in Victoria.\(^{280}\)

250. Section 16E(3) provides that where a state law does not have the effect mentioned in (2), then a court imposing a federal term of imprisonment must take into account any period that the person has spent in custody in relation to the offence concerned.

251. Section 17 of the *Sentencing Act 1991* (Vic) provides that a sentence of imprisonment commences on the day that it is imposed unless the offender is not in custody in which case the sentence commences when the offender is arrested on a warrant of apprehension. Section 17 is subject to sections 16 and 18.

252. Section 16 of the *Sentencing Act 1991* (Vic) provides that a sentence of imprisonment is to be served concurrently unless the court otherwise directs. It is under this provision that a state term of imprisonment can be directed to be served cumulatively or partly cumulatively. Section 16 does not apply to federal terms of imprisonment as s 19 of the *Crimes Act 1914* (Cth) addresses how federal sentences are to be made concurrent or cumulative.

253. Section 18 of the *Sentencing Act 1991* (Vic) does apply to federal sentences of imprisonment by virtue of s 16E(2) of the *Crimes Act 1914* (Cth). It provides that any period during which an offender was held in custody in relation to:

- proceedings for the offence for which the offender is sentenced, or
- proceedings under section 31 (sentence on a breach of a state suspended sentence)

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\(^{278}\) *R v Jennings* [1999] 1 VR 352, 368-9, [64]-[66]. In *R v Rich (No.2)* (2002) 4 VR 155, 164-5 [101] it was decided the Court of Appeal could if it thought appropriate declare the non-parole period to run from the date it re-sentenced rather than from the date of the original sentence appealed from.

\(^{279}\) *Criminal Procedure Act 2009* (Vic), s 256(4).

\(^{280}\) *Sentencing Act 1991* (Vic), s 18
must be reckoned as a period of imprisonment already served under the sentence unless the court otherwise orders. Section 18(2) has certain exclusions to s 18(1) including, where the time in which the offender was in custody has already been declared under s 18 as time served for another sentence (s 18(2)(d)).

254. Accordingly, a state term of imprisonment is to commence on the date on which it is imposed, is to be served concurrently unless otherwise ordered and any time spent by the offender in custody in relation to the offence for which the offender is to be sentenced must be reckoned as time served under the sentence unless the court otherwise orders. Federal sentencing is different by reason of s 19(2) of the Crimes Act 1914 (Cth). In sentencing a federal offender for two or more federal sentences the court must direct when each sentence commences.

255. In The Queen v Singh the Victorian Court of Criminal Appeal considered the operation of the sentencing regime in the Crimes Act 1914 (Cth) and the then relevant state provisions. The relevant state provisions were sections 14 and 16 of the Penalties and Sentences Act 1985 (Vic). Section 14 mirrored the current section 17 of the Sentencing Act 1991 (Vic) and section 16 mirrored the current section 18. The Court held that section 14 of the Penalties and Sentences Act 1985 (Vic) had the effect that a sentence commences on the day that it is imposed and the sentencing judge who had directed that the sentence commence on the day that the offender was remanded into custody rather than the day of sentence was in error. The Court held that '[the sentencing judge] had no power to backdate the sentence'. The Court then referred to section 16E(2) and held that section 16 of the Penalties and Sentences Act 1985 (Vic) was a state provision that did provide for a term of imprisonment to be reduced by time in custody. The offender in that case was therefore entitled to have the period in custody reckoned as a period already served under the sentences imposed.

256. In R v Nagy McGarvie J of the Victorian Court of Criminal Appeal noted that after Nagy had been sentenced, the Court had held in R v Singh that there is no power to backdate a federal sentence to a date earlier than the date of its imposition but that the sentence would be reduced by the period the offender had been in custody for the offence as a result of the combined operation of section 16E(2) of the Crimes Act 1914 (Cth) and section 16(1) of the Penalties and Sentences Act 1985 (Vic). McGarvie J stated that while that technical error would not have vitiated entirely the sentences before the Court, the error should be corrected.

Aggregate imprisonment

257. An aggregate sentence of imprisonment can be imposed on indictment for a number of federal offences via s 9 of the Sentencing Act 1991 (Vic) as applied by s 68 of the Judiciary Act 1903 (Cth), or s 1338B of the Corporations Act in respect of offences under that Act (see paragraphs 25 - 26 above). Section 9 of the Sentencing Act 1991 (Vic) contains some qualifications particularly that an aggregate

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sentence is not open when one or more of the offences is committed whilst on parole. In *DPP v Felton,* the Victorian Court of Appeal decided that as a matter of sentencing discretion it was inappropriate to impose an aggregate sentence where counts were “rolled up” as it makes the sentence more opaque. In addition, the court decided that if there was an element of cumulation in the aggregate sentence this should be expressed clearly to ensure transparency. Alternatively, if the court decides to impose an aggregate on the basis that all sentences are concurrent this should be explained. In 2012, the limitations imposed by *Felton* were removed by statute.

258. An aggregate sentence of imprisonment or other available sentencing option can be imposed summarily for a number of federal offences by virtue of s 4K(4) *Crimes Act 1914* (Cth). Section 4K(4) also contains some qualifications.

259. It is not possible to impose a single aggregate period of imprisonment when sentencing on both Commonwealth and state offences.

Non-parole period or recognisance release order?

260. The Commonwealth sentencing regime has its own scheme relating to non-parole periods and the state regime does not apply to federal sentences.

261. The federal sentencing regime has a different approach to the state regime in covering the situation where the offender is ordered to serve an immediate custodial sentence, primarily caused by the availability of the Recognisance Release Order:

- **6 months or less** - where the sentence is 6 months or less the court has a discretion not to order a recognisance release order;

- **3 years or less** - where the sentence imposed is for a period of imprisonment of 3 years or less the release mechanism is a recognisance release order (defined in s 3 of the *Crimes Act 1914* (Cth) as an order under s 20(1)(b)). This is effectively a partially suspended sentence where conditions can be attached to the recognisance release order to apply upon release – s 19AC *Crimes Act 1914*;

- **3 years or more** - where the sentence imposed is for a period of imprisonment of in excess of 3 years, the release mechanism is a parole order – s 19AB(1) *Crimes Act 1914*. Parole entails a greater degree of supervision than a recognisance release order. Participation in the sex offender program can be accommodated in either release mechanism as a condition.

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285 See s 44 and s 45 of *Criminal Procedure Amendment Act 2012* (Vic).
262. Section 19AB of the *Crimes Act 1914* (Cth) requires a single non-parole period to be made where the sentence for a federal offence or aggregate sentence exceeds 3 years. Where a sentence or aggregate of the sentences is not more than 3 years (i.e. 3 years or less) a non-parole period must not be set.\(^{288}\) As noted above it is not possible to impose a single non-parole period in respect of both federal and state sentences.

263. Section 19AB(3) provides that a court may decline to fix a non-parole period if “*the court is satisfied that a non-parole period is not appropriate having regard to: the nature and circumstances of the offence or offences and to the antecedents of the person*”. The discretion granted by s 19AB(3) is a wide one having regard to the nature and circumstances of the federal offence but also to the offender’s antecedents (which includes state sentences). The discretion of s 19B(3) will be relevant where the federal sentence is to be served concurrently with a state sentence imposed at the same time or where at the date of sentencing the federal offender is serving a state sentence.\(^{289}\)

264. Whether the Court is empowered or required to impose a recognisance release order under s 20(1)(b) or a non-parole period in respect of a term of imprisonment for a federal offence which is not fully suspended, depends principally upon the length of the effective sentence or sentences.\(^{290}\)

265. There are two situations faced by a court imposing a term of imprisonment on a federal offender. The first is sentencing a federal offender not presently undergoing a federal sentence and the second is sentencing a federal offender presently undergoing a federal sentence.

*\(a\)* Where federal offender is not undergoing a federal term of imprisonment

\(i\). Where a court is sentencing a federal offender who is not undergoing a federal sentence of imprisonment, the issue of whether a single non-parole period or single recognisance release order is required depends on the length of the sentence imposed or the effective aggregate of the sentences of imprisonment imposed. The position can be demonstrated by the following table:

<table>
<thead>
<tr>
<th>Sentence or aggregate sentences</th>
<th>Required option</th>
<th>Crimes Act 1914 (Cth)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not exceeding 6 mths</td>
<td>Recognisance release order is not necessary. Straight sentence possible.</td>
<td>19AC(3)</td>
</tr>
<tr>
<td>Greater than 6 mths but not greater than 3 yrs</td>
<td>Single recognisance release order not non-parole period.</td>
<td>19AC(1)</td>
</tr>
</tbody>
</table>

\(^{288}\) *Crimes Act 1914* (Cth) ss 19AB and 19AC; *R v Fulop* [2009] VSCA 296.

\(^{289}\) *Hancock v R* [2012] NSWCCA 200, [45] - [51].

\(^{290}\) *Crimes Act 1914* (Cth), ss 19AB and 19AC.
i. Exceptions: Where the court would otherwise be required to impose a non-parole period or recognisance release order the court may decline to do so where 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, it is satisfied that such an order is not appropriate.\textsuperscript{291} If a court is so satisfied the court must state its reasons for so deciding and cause the reasons to be entered into the records of the court.\textsuperscript{292} Where a federal offender is imprisoned but will have to serve a significant state sentence following the federal term this has been held as an appropriate reason for not imposing a federal non-parole period or recognisance release order.\textsuperscript{293} Where the offender is already serving a state term or is sentenced to imprisonment for both state and federal sentences, this can enliven the discretion to impose a non-parole period or recognisance release order.\textsuperscript{294}

ii. Where the sentence or aggregate Commonwealth sentence is not more than 3 years (i.e. 3 years or less) a non-parole period cannot be imposed.\textsuperscript{295}

iii. Where an offender is sentenced on both state and federal sentences separate non-parole periods for the state and federal offences must be imposed if a non-parole period is required and is to be imposed. It is not possible to have a single non-parole period in respect of both state and federal offences which require a non-parole period.\textsuperscript{296}

iv. The possibility of deportation does not preclude the fixing of a non-parole period.\textsuperscript{297} See also \textit{R v Shrestha} (1991) 173 CLR 48,\textsuperscript{298} which although decided before s 19AK was enacted, is still relevant to the principles applicable.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Sentence or aggregate sentences} & \textbf{Required option} & \textbf{Crimes Act 1914 (Cth)} \\
\hline
Greater than 3 yrs & single non-parole period. & 19AB(1) \\
\hline
\end{tabular}
\end{table}

\textsuperscript{291} \textit{Crimes Act 1914 (Cth)}, ss 19AB(3) and 19AC(4).
\textsuperscript{292} \textit{Crimes Act 1914 (Cth)}, ss 19AB(4) and 19AC(5).
\textsuperscript{293} \textit{Carroll v R} [2011] VSCA 150, [54]-[56].
\textsuperscript{294} \textit{R v Hancock} [2012] NSWCCA 200, [45]-[51].
\textsuperscript{295} \textit{Crimes Act 1914 (Cth)}, s 19AC(1); \textit{Hunt v DPP} [2009] SASC 116.
\textsuperscript{296} \textit{Crimes Act 1914 (Cth)}, s 19AC(1); \textit{R v Fulop} (2009) 236 FLR 376; [9]; \textit{Colbourn v R} [2009] TASSC 108, [21]-[22].
\textsuperscript{297} \textit{Crimes Act 1914 (Cth)}, s 19AK.
vi. The absence of acceptable evidence as to antecedents cannot properly warrant a conclusion that a non-parole period 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 non-parole period.\textsuperscript{299}

vii. Where a court imposes a non-parole period/recognisance release order it must explain or cause to be explained the purpose and consequence of fixing, and non-compliance with, a non-parole order/recognisance release order.\textsuperscript{300}

\textit{(b) Where the offender is already undergoing a federal term of imprisonment}

i. Where a federal offender is already subject to a non-parole period s 19AD sets out the court’s options – see paragraphs 399 - 402. If the federal offender is already subject to a recognisance release order s 19AE is the applicable section – see paragraphs 403 - 405.

\textbf{Maximum length of the recognisance under a recognisance release order}

266. There is conflicting judicial authority as to whether the bond or undertaking which is a part of the recognisance release period imposed under s 20(1)(b) could extend beyond the completion of the sentence. The Western Australian Court of Criminal Appeal in \textit{Selimoski v Picknoll} (Unreported, Supreme Court of Western Australia, Malcolm CJ, Murray and White JJ, 9 October 1992)\textsuperscript{301} said it could not while the Victorian Court of Criminal Appeal in \textit{O’Brien v R} said it could. In \textit{O’Brien v R} the court did not extend the bond beyond the end of the federal sentence for practical reasons.

267. In \textit{Walsh v R}\textsuperscript{303} this conflict of opinion was drawn to the Victorian Court of Appeal’s attention. The court stated it did not consider the decision in \textit{O’Brien v R} was incorrect.

268. As a consequence, the present position in Victoria, as established by the decisions in \textit{O’Brien} and \textit{Walsh}, is that a recognisance imposed as part of a recognisance release order under s 20(1)(b) of the \textit{Crimes Act 1914} (Cth) can extend beyond the length of the head sentence.

269. Federal parole is at the discretion of the Commonwealth Attorney-General and arrangements are administered by the Federal Offender’s Unit of the Attorney-General’s Department. When a federal offender’s parole date is approaching a report is requested from the state parole service and consideration is given to all matters set out in that report.\textsuperscript{304}

\textsuperscript{299} \textit{Wangsaimas v R} (1996) 6 NTLR 14
\textsuperscript{300} \textit{Crimes Act 1914} (Cth), s 16F.
\textsuperscript{301} (Unreported, Supreme Court of Western Australia, Malcolm CJ, Murray and White JJ, 9 October 1992).
\textsuperscript{303} \textit{Walsh v R} (1993) 69 A Crim R 579.
\textsuperscript{304} \textit{Crimes Act 1914} (Cth), s 19AL.
270. Where an offender is sentenced for both state and federal offences separate sentences must be imposed. The legislation does not permit the imposition of a single non-parole period in respect of the federal and state sentences. Separate non-parole orders must be made where a non-parole period is to be imposed for both federal and state sentences.\(^{305}\)

271. A failure to fix either a non-parole period or a recognisance release order does not “affect the validity of the sentence” and the Attorney-General or the Commonwealth Director of Public Prosecutions may apply at any time to have the order corrected.\(^{306}\)

**Length of non-parole period/pre-release period and relationship to the head sentence\(^{307}\)**

272. In general the Commonwealth sentencing regime, set out in Part 1B of the *Crimes Act 1914* (Cth), does not provide any detailed guidance as to the length of the non-parole period (or pre-release period under a recognisance release order). There is an exception in relation to offences of terrorism, treachery, treason and espionage. As noted above, s 16A(1) establishes the fundamental obligation to impose a sentence or order that is of a severity appropriate in all the circumstances of the offence. There is no generally applicable Commonwealth statute that requires the non-parole period/pre-release period to bear any proportion in relation to the head sentence.\(^{308}\)

273. The common law and case law provides that guidance.\(^{309}\) That is, the non-parole period provides for mitigation of the punishment of the prisoner in favour of rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time a judge determines justice requires that he/she must serve having regard to the circumstances of the offence.\(^{310}\) An exception exists to the application of the common law in relation to offences of terrorism, treachery, treason or espionage (see below) where the *Crimes Act 1914* (Cth) specifies the minimum ratio and for people smuggling offences where the *Migration Act 1958* (Cth) specifies this (see below).

274. The New South Wales Court of Criminal Appeal stated that sentencing principle requires that the non-parole period or recognisance release period be fixed after the sentence that meets the requirements of s 16A(1) is imposed (i.e. a proportionate sentence that is of a severity appropriate in all the circumstances of the offence).\(^{311}\) That is, the non-parole period or pre-release period under a recognisance release period, is only set once the head sentence has been determined.

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\(^{305}\) *Crimes Act 1914* (Cth), s 19AJ; *R v Fulop* [2009] VSCA 296, [9]; *Colbourn v R* [2009] TASSC 108, [21].

\(^{306}\) *Crimes Act 1914* (Cth), s 19AH.

\(^{307}\) See generally D. Adsett and M. Pedley “Variations in Federal Sentencing” paper presented at National Judicial College Conference 6-7 February 2010 but note this paper was presented before *R v Hili* (2010) 242 CLR 520.

\(^{308}\) *R v Selim* [1998] NSWSC 165, [8] (more often than not in NSW the non-parole period is more than 50% of the head sentence and is ordinarily in the order of 60% - 66½% of it). Drug sentences for federal offences tend to follow that practice – eg *R v Phong* (2005) 12 VR 17; *R v Thomas* [1999] VSCA 204; *R v Ngui* [2000] 1 VR 579. However, it does not seem that any similar uniformity has developed in respect of Commonwealth offences that do not involve drugs – *R v Mokoena* [2009] Qd R 351; [2009] QCA 36 at [10].


\(^{310}\) *Power v R* (1974) 131 CLR 623, [10].

275. The approach to determining the relationship of the non-parole period to the head sentence imposed for a federal offence has not been wholly consistent throughout the various jurisdictions.\(^\text{312}\) The High Court decided in 2010 that, because of the obligation to sentence in accord with s 16A(1) of the *Crimes Act 1914* (Cth), there is not a judicially determined norm or starting point (whether expressed as a percentage of the head sentence or otherwise) for the period of imprisonment that a federal offender should actually serve before release.\(^\text{313}\)

276. In Victoria there is no state legislation that determines the relationship of any non-parole period to the head sentence other than the requirements that the non-parole period be at least six months less than the head sentence.\(^\text{314}\) The Victorian Court of Appeal has said that there is no standard non-parole period, standard proportion or standard gap as the setting of a non-parole period is a matter of judicial discretion.\(^\text{315}\) This approach applies in practice to both Commonwealth and state matters and is in line with the approach endorsed by the High Court in 2010 (see above).

277. In 2006, Justice Redlich of the Victorian Court of Appeal agreed with the observations of Callaway JA that “[i]n the majority [of cases] the proposition is between two-thirds and three quarters but both shorter and longer periods are found”.\(^\text{316}\)

278. Commonwealth law now in effect requires a minimum non-parole period to be imposed for a federal offender convicted and sentenced for offences of terrorism, treachery, treason or espionage. Here the minimum non-parole period is to be at least \(\frac{3}{4}\) of the sentence of imprisonment imposed by the court, though the court retains the discretion to impose a longer non-parole period if this is considered appropriate in the circumstances. That law also has the effect of precluding the making or confirming a recognisance release order where the sentence imposed is not more than three years and taking away the discretion not to fix a non-parole period in those circumstances. Some people smuggling offences attract a mandatory head sentence and non-parole period.\(^\text{317}\)

279. The principles governing the fixing of the length of the non-parole period are generally applicable to the fixing of a pre-release period under a recognisance release order,\(^\text{318}\) but it should be noted that a recognisance release order can result in the offender being released immediately.

*Wholly suspended/partially suspended imprisonment – s 20(1)(b) *Crimes Act 1914* (Cth)*

280. It is possible to impose a federal sentence that is in effect a fully suspended sentence of imprisonment.\(^\text{319}\) If the sentence is (or aggregate sentences are) greater than 6 months but does not

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\(^{312}\) David Adsett and Mark Pedley, *‘Variations in Federal Sentencing’* (paper presented at the National College of Judicial Administration and Australian National University Sentencing Conference, 6 February 2010).

\(^{313}\) Hili v R (2010) 242 CLR 520, [44].

\(^{314}\) *Sentencing Act 1991* (Vic), s 11(3).


\(^{317}\) See paragraphs 55, 196 and 254 above.

exceed 3 years, some of the period must be suspended. That requires a recognisance release order (an order under s 20(1)(b)) to be made unless, having regard to the nature and circumstances of the offence or offences concerned and to the antecedents of the person, the court is satisfied that such an order is not appropriate.

281. Where a number of federal sentences of imprisonment are imposed which are to be, in effect, fully suspended, one order in the prescribed form releasing the offender “forthwith” is made.

282. The process of consideration as to whether to release a federal offender “forthwith” under s 20(1)(b) of the Crimes Act 1914 (Cth) (that is, to fully suspend the period of imprisonment) has been described as involving three steps:

- All the relevant sentencing factors (notably those in s 16A) must be taken into account in deciding whether to order imprisonment and, if so, the length;
- It may be necessary for the court to consider whether, pursuant to s 19AC(4), the court should decline to make a recognisance release order; 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.

283. Where a sentence is partially suspended it seems clear from the wording of s 20(1)(b) that the bond imposed as part of the recognisance release order commences on the release of the person from prison and not the imposition of the period of imprisonment. If a form of recognisance relevant to state offences is entered this will be ineffective. The prescribed Commonwealth form must be used. This applies to both fully suspended and partially suspended sentences. This bond includes an amount for security and can be with surety but it is not the current practice to require a surety. The Crimes Act 1914 (Cth) has its own statutory framework and case law relevant to the question of whether a federal sentence should be suspended in whole or in part.

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319 Crimes Act 1914 (Cth), s 20(1)(b).
320 Crimes Act 1914 (Cth), s 19AC(1).
321 Crimes Act 1914 (Cth), ss 19AC(1), (3) and (4).
325 Form 12 of Schedule 3 of the Crimes Regulations 1990 (Cth).
326 Assafiri (No.2) v R [2007] NSWCCA 356
284. 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.

285. By way of example, a court can impose conditions of a Recognisance Release Order requiring an offender to participate in a Sex Offender Treatment Program. Although not mandated by the *Crimes Act 1914* (Cth) or appropriate regulations, agreement has been reached between the CDPP and the Victorian Office of Corrections that in appropriate Commonwealth cases, the following conditions may be imposed as conditions of a s 20(1)(b) *Crimes Act 1914* (Cth) recognisance:

- 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.

286. A court’s ability to impose a fully or partially suspended sentence is restricted where the offence is a terrorism offence, treachery, espionage or treason. Here it is not possible to fully or partially suspend a sentence of imprisonment under s 20(1)(b). Rather a non-parole period of at least ¾ of the sentence must be imposed. As noted above a mandatory minimum head sentence and non-parole period are to be imposed for some people smuggling offences contrary to the *Migration Act 1958*.

Pre-sentence detention

287. The practice in Victoria is that pre-sentence detention need not be specified, declared or deducted from a fully or partially suspended sentence (see paragraphs 321 – 323, 380).

Breach action for fully suspended or partially suspended sentence

288. Breach action is initiated by summons or information and a warrant that can only be issued by a Magistrate under s 20A. Note breach action must be taken before the end of the period of the bond unless the breach is another offence. Where the breach results from another offence breach action can be taken after the period of the bond.

289. Where the court is satisfied that the person released on a fully or partially suspended sentence has without reasonable excuse failed to comply with a condition the sentencing options for breach of a

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328 *Crimes Act 1914* (Cth), s 20(6).
329 *Crimes Act 1914* (Cth), s 20A(5)(c).
330 *Crimes Act 1914* (Cth), s 20AC(1).
fully suspended sentence or a partially suspended sentence/recognition release order are set out in ss 20A(5)(c), 20A(5A) and (5B). They are:

- take no action;
- extend the order but not so that the order exceeds 5 years;\(^{331}\)
- revoke the order and order that the person serve that part of the sentence not served at the time of release from custody. But note that imprisonment cannot be imposed for failure to pay reparation or costs that were a condition of the order - s 20(2A);
- impose a monetary penalty not exceeding $1,100;\(^{332}\)
- amend the order to extend the period of supervision (which must not exceed 5 years); or
- revoke the order and impose one of the applied state sentencing options under s 20AB.

290. Where a court exercises the power under s 20A(5)(c) the court does not have the power to shorten the length of imprisonment which stands to be served.\(^{333}\)

**Intensive Correction Order (ICO) [no longer available]**

291. The option of ordering a period or aggregate period of imprisonment of not more than 12 months to be served by way of intensive correction in the community (an Intensive Correction Order – s 19 Sentencing Act 1991 (Vic)) was a sentencing option available for federal offenders until 15 January 2012. This was made available, until 15 January 2012, by s 20AB of the Crimes Act 1914 (Cth) and Reg 6(c) of the Crimes Regulations 1990 (Cth). This option is no longer available. The provisions of the Sentencing Act 1991 (Vic) relating to ICOs apply to federal offenders "so far as those provisions are capable of application and are not inconsistent with the laws of the Commonwealth",\(^{334}\)

**Breach action for ICO**


\(^{332}\) 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 now the view of the CDPP that a monetary penalty imposed pursuant to s 20A(5)(c)(ia) is enforceable.


\(^{334}\) Crimes Act 1914 (Cth), s 20AB(3).
292. Breach action is initiated by summons or information and warrant that can only be issued by a Magistrate under s 20AC. Section 20AC Crimes Act 1914 (Cth) applies not s 26 of Sentencing Act 1991 (Vic).

*Home Detention Order [no longer available]*

293. Home detention, both as an initial sentencing option and as a pre-release scheme for prisoners, was abolished on 16 January 2012. So home detention is no longer available to a federal offender in Victoria.

294. Between 1 January 2004 and 15 January 2012 a home detention order under the Sentencing Act 1991 (Vic) was a sentencing option available for federal offenders as it is prescribed under s 20AB of the Crimes Act 1914 (Cth). A necessary precondition under the Sentencing Act 1991 (Vic) was that the offender be sentenced to imprisonment for 12 months or less. That is home detention was a term of imprisonment to be served in a particular manner. A single order could be made in respect of multiple Commonwealth offences so long as the person was sentenced to 12 months or less.

295. An exception to the court’s ability, between 1 January 2004 and 15 January 2012, to impose a Home Detention Order was where the offence was a terrorism offence, treachery or treason. Here it was not possible to order the imprisonment to be served by way of a Home Detention Order. Rather, a mandatory minimum non-parole period was required for such a sentence of imprisonment. As noted above a mandatory minimum term of imprisonment must be imposed for specified people smuggling offences committed by a person 18 years or over.

296. Breach action of a Home Detention Order was initiated by summons or information and warrant that can only be issued by a Magistrate under s 20AC. As noted above home detention no longer exists in Victoria from 16 January 2012.

*Specifying the sentence reduction for a plea of guilty – s 6AAA Sentencing Act 1991 (Vic)*

297. Section 6AAA of the Sentencing Act 1991 (Vic) requires a court to specify the reduction in sentence by reason of a guilty plea when some sentences are imposed. The Crimes Act 1914 (Cth) makes no such provision requiring the Court to specify the discount or the provision of reasons for any discount allowed. The question arises as to whether s 6AAA is picked up and applied by ss 68 and 79 of the Judiciary Act 1903 (Cth) on the basis that the Commonwealth regime is not complete on its face and

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336 Crimes Amendment Regulation 2012 (No.2).
337 Crimes Regulations 1990 (Cth), Reg 6(ca).
338 Sentencing Act 1991 (Vic), s 18ZT.
339 Crimes Act 1914 (Cth), s 20AB(6).
there is no contrary intention in Commonwealth law. The Australian Law Reform Commission has recommended such a provision be included in federal law.

Penalty reduction for promised future co-operation under s 16AC Crimes Act 1914

298. In *DPP (Cth) v Couper* the Victorian Court of Appeal considered the interaction of the separate discounts for the undertaking to co-operate (pursuant to s 16AC of the *Crimes Act 1914*) and the plea of guilty. Tate JA, with whom Harper JA and Williams AJA agreed, stated at [144] that it would be wrong to consider that there is only one methodology or sequence that is faithful to the requirements of the two sections, but that 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. [See paragraphs 71 and 117 - 129 regarding discounts given for undertaking to co-operate in the future.]

Commencement of federal sentences – concurrent or cumulative – s 19 Crimes Act 1914 (Cth)

299. “Sentence” in s 19 of the *Crimes Act 1914* refers to head sentence and in effect sets the limits to which the federal sentences imposed can be cumulative. It is the orders made directing when the sentences imposed commence that determine the effective head sentence/aggregate sentence.

300. The *Crimes Act 1914* (Cth) does not specify when a federal sentence is to commence and, unlike Victorian law, does not express the general approach of stating that sentences will be concurrent unless ordered otherwise.

301. The method by which a federal sentence is made concurrent or cumulative (including in part) is different from under Victorian law. Section 19 of the *Crimes Act 1914* (Cth) governs the situation. It deals with the imposition of federal sentences of imprisonment and requires the court “by order to direct” when each federal sentence imposed commences (when more than one is imposed). Where an aggregate federal sentence is imposed this requirement will not apply. Section 19 relates to

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341 Whilst there has been some judicial disagreement as to whether s 6AAA applies to federal matters, the preponderance of authority suggests it does – see footnote [10] of the judgment of Beach J in *R v Emini & Blumberg* [2011] VSC 336 where his Honour stated: “I take the view that the Court is required to comply with s 6AAA of the *Sentencing Act* having regard to the decisions of the Court of Appeal in *Scerri v R* [2010] VSCA 287 and *DPP (Cth) v Bui* [2011] VSCA 61 and the reasoning of the High Court in *Putland v R* (2004) 218 CLR 174. However, it must be said that the difficulties referred to by Kaye J in *R v Flaherty (No 2)* (2008) 19 VR 305 in applying s 6AAA are multiplied in a case like the present, where the Court is also required to state a but for sentence in respect of future cooperation pursuant to s 21E of the *Crimes Act*”. Also note in *Cooper v R* [2012] VSCA 32 at [38] the Court of Appeal noted there is some doubt as to whether s 6AAA applies to federal sentences, but on the assumption it does then declared the ‘but for’ sentence.


343 *DPP (Cth) v Couper* [2013] VSCA 72.

344 *Sentencing Act 1991* (Vic), s 16.

345 *DPP v AB (No.2)* (2006) 198 FLR 449
federal sentences imposed not the non-parole period or recognisance release period.\textsuperscript{346} So, orders are to be made as to interrelationship between non-parole periods where there is both a federal and state sentence. The orders relating to the commencement of the (head) sentences will determine the effective non-parole period. This will flow from the orders made in respect of the (head) sentence.

302. Section 19 of the \textit{Crimes Act 1914} (Cth) covers a range of federal sentencing situations. It covers:

a) where the person is already the subject of a state sentence - s 19(1);

b) where two or more federal sentences are imposed - s 19(2); and

c) where a person is sentenced for state and federal offences at the same time - s 19(3).

303. Where an offender is sentenced to imprisonment for a state offence and the person is undergoing a federal sentence – the converse of the situation is covered by s 19(1) – the court must direct when the state sentence is to commence – s 16(4) \textit{Sentencing Act 1991} (Vic). An offender is said to be undergoing a federal sentence when a federal sentence is announced first when sentenced and the offender is then sentenced for a state offence on the same day.\textsuperscript{347}

304. In each of those sentencing scenarios s 19 of the \textit{Crimes Act 1914} (Cth), and s 16(4) of the \textit{Sentencing Act 1991} (Vic), requires that a sentence imposed not commence later than the end of another existing sentence or sentence(s) imposed. This is to prevent a situation where there is a gap in time between the ending of one sentence and the commencement of another thereby avoiding the potential problem of the offender being released and then having to return to serve the next sentence.

305. A single federal non-parole period or a recognisance release order is imposed in light of the length of the effective head sentence/aggregate sentence for the federal offences pursuant to s 19AB of the \textit{Crimes Act 1914} (Cth).\textsuperscript{348}

306. The prohibition in s 19 aims to ensure that a hiatus does not result between the head sentences thus requiring the release and return of an offender to prison to serve the next sentence. That section does not require all the head sentences to commence before the non-parole period or pre-release period under a recognisance release order expires. A short non-parole period or pre-release period may be set where the circumstances justify it and s 19 does not require all the head sentences imposed to have commenced by the time the non-parole period or pre-release period has expired.\textsuperscript{349}

307. In general, Victorian law\textsuperscript{350} relating to the commencement of sentences and non-parole periods

\textsuperscript{346} \textit{R v DS} (2005) 153 A Crim R 194, [15].

\textsuperscript{347} \textit{R v Fulop} (2009) 236 FLR 376 [8].


\textsuperscript{349} \textit{R v DS} (2005) 153 A Crim R 194.

\textsuperscript{350} \textit{Sentencing Act 1991} (Vic), ss 16, 17 and 18.
applies to federal offenders. In general, under state law a sentence of imprisonment commences on the day it is imposed unless the offender is not then in custody. A Victorian sentence can be ordered to commence on a day other than the day on which it is imposed, if the state sentence is to be cumulative or partially cumulative on an existing sentence. This also applies to federal sentences and can be done by date or by reference to the commencement of other sentences. Where a state or federal sentence is to commence at a future time so as to be cumulative or partly cumulative with a federal sentence the sentencer is required to turn his/her mind to the commencement date and specify it. There is no general power to backdate a federal sentence in Victoria to a date earlier than the date of its imposition. The Court of Appeal and the County Court, when determining an appeal, are able to backdate a sentence.

308. The non-parole period in respect to a federal sentence or sentences commences to run from commencement of the (first) sentence.

Concurrency/cumulation

309. When considering questions of concurrency and cumulation, general common law principles apply to the exclusion of Victorian statutory principles in s 16(1) of the Sentencing Act 1991 (Vic). Fundamental in this context is whether the offender’s conduct involves “truly two or more incursions into criminal activity” or “one multi-faceted course of criminal conduct”.

310. Where the offending involves both state and federal offences, there is no general rule as to whether cumulative or concurrent sentences should be imposed.

311. The considerations that are relevant to determining the issue of cumulation/concurrency are set out in the judgment of Wells J in the case of A-G v Tichy. When two offences involve common facts or

351 Crimes Act 1914 (Cth), s 16E(1).
352 Sentencing Act 1991 (Vic), s 17(1).
355 See Trandy v R [2009] VSCA 321. If the partly cumulative or cumulative sentence is state see Corrections Act 1991 (Vic), s 16(4); if a federal sentence see Crimes Act 1914 (Cth), s 19. See also R v Fulop [2009] VSCA 296, [8].
357 Criminal Procedure Act 2009 (Vic), s 256(4).
elements or aspects and cumulative sentences are imposed, appropriate weight must be given to all the matters the two offences have in common. This is not to say that concurrent sentences must be imposed for offences that have substantial common elements.\(^\text{363}\)

312. In cases where there are multiple terms of imprisonment imposed, the appropriate approach is to impose the correct sentence for each count and then, having regard to the principle of totality, 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 that principle or any other relevant sentencing principle.\(^\text{364}\)

**Principles of Federal Parole (including breach of parole)**

313. In the context of the federal sentencing regime the following principles on parole, which are different in a number of important respects to Victorian principles,\(^\text{365}\) apply:

1) Prior to 4 October 2012 the maximum period to be served on federal parole was 5 years except where the federal prisoner is 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;\(^\text{366}\)

2) If sentenced to life imprisonment, the parole periods ends at the later of 5 years after release from prison or at the end of any later day specified in the parole order, not being a day earlier than 5 years after the expected release date;\(^\text{367}\)

3) Again prior to 4 October 2012, federal parole, unlike Victorian parole, was automatically granted where the federal sentence was more than 3 years but less than 10 years unless the prisoner was serving a state sentence when the federal non-parole period expired.\(^\text{368}\) Now parole is not automatic for any sentence of imprisonment and the Attorney General must, before the end of a non-parole period fixed for one or more federal sentences, make or refuse to make an order directing that a person be released from prison on parole;\(^\text{369}\)

4) Section 19AKA and 19ALA specify the purposes of parole and set out factors that the Attorney-General may consider when deciding if a federal offender should be released on parole;


\(^{365}\) *DPP v Dickson* [2011] VSCA 222 for a summary of the state principles.

\(^{366}\) *Crimes Legislation Amendment (Powers and Offences) Act 2012* (Cth).

\(^{367}\) *Crimes Act 1914* (Cth), s 19AMA.

\(^{368}\) See *Crimes Act 1914* (Cth), ss 19AL(1) and 19AM [pre 4 October 2012].

\(^{369}\) See *Crimes Act 1914* (Cth), s 19AL. Also note the ‘transitional ‘ provision in clause 12 of Schedule 7 of the amending Act – the amendments apply 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.
5) Section 19AL(3A) fixed an administrative inefficiency in the making of parole orders for joint Commonwealth and state matters and allows a 30-day early release on federal parole in appropriate circumstances;

6) Section 19APA enables the Attorney-General to amend either conditions or technical errors in a parole order or licence after it has been made;

7) Parole will be revoked automatically when a federal offender released on parole is sentenced to an immediate term of imprisonment (whether state/territory or federal) of more than 3 months where the sentence is not wholly suspended.\(^{370}\) As well the federal Attorney-General has the authority to revoke parole where the federal offender has not complied with a parole condition or there are reasonable grounds to suspect that the offender has failed to comply;\(^{371}\)

8) A prisoner is not to be released on federal parole if still serving a state or territory sentence.\(^{372}\) A prisoner must be released on parole (for the federal offence) on the same day he or she is released from prison (including on parole) for the state/territory offence.\(^{373}\)

9) When a federal prisoner is released on parole, he/she is still taken as under sentence and not to have served the balance of the sentence on release unless the parole order ends without being revoked.\(^{374}\) Where it is automatically revoked the offender is to be taken to still be under sentence and not to have served any part of the non-parole period;\(^{375}\)

10) If at the time of the imposition of the sentence for an offence committed within the federal parole period, the federal parole period has already ended, the federal parole period is to be taken to have been revoked from the time immediately before the end of the non-parole period.\(^{376}\) The outstanding balance of federal parole remains to be served;

11) Sections 19AA(2) and 19AQ of the *Crimes Act 1914* (Cth) provide for the allowance for “street time” on federal parole if the state law provides for this. Under state law in Victoria it is a discretionary matter for the Parole Board\(^{377}\) and so Victorian law does not provide for allowance for “street time”. However, where the breach is federal offending, in sentencing the court must have regard to “street time” where state law does not provide for that allowance, in fixing a new non-parole period where the new aggregate head sentence is more than 3 years or recognisance release order where the new aggregate head sentence is 3 years or

\(^{370}\) *Crimes Act 1914* (Cth), s 19AQ.

\(^{371}\) *Crimes Act 1914* (Cth), s 19AU. See also *R v Novak* (2003) 141 A Crim R 507.

\(^{372}\) *Crimes Act 1914* (Cth), s 19AM.

\(^{373}\) *Crimes Act 1914* (Cth), s 19AM(2).

\(^{374}\) *Crimes Act 1914* (Cth), s 19A2C(1).

\(^{375}\) *Crimes Act 1914* (Cth), s 19A2C(2).

\(^{376}\) *Crimes Act 1914* (Cth), s 19AQ(2).

\(^{377}\) *Corrections Act 1986* (Vic), s 77(7).
Where federal parole is revoked the offender is liable to serve that part of the sentence that remains outstanding. There is no possibility that the unserved federal balance will be reduced by executive action. Where the breach is federal offending the *Crimes Act 1914* (Cth) sets out how a new non-parole period, or recognisance release order where the unserved part of the outstanding sentence is or aggregates to 3 years or less, is to be determined by the court. The court retains a discretion to decide that it is inappropriate to fix a non-parole period or to make a recognisance release order.

If the court sets a new federal non-parole period it cannot fix a single non-parole period in respect of both federal and state sentences of imprisonment if a non-parole period is to apply to both.

Where federal parole is revoked (automatic or by the Attorney-General) the whole of the unserved federal balance falls to be served first. In Victoria, for state offences the order is opposite as the term unaccompanied by a non-parole order or new state non-parole period is served first (not the unserved balance) and then the offender may serve the balance of the existing state parole order subject to the decision of the Parole Board. Unlike in Victoria there is no federal executive action (Parole Board discretion) that can affect the length of the unserved federal balance. It follows that a court should have regard to this, “clean street time”, and the totality principle in sentencing on the offences which result in the automatic revocation of federal parole.

By way of contrast s 5(2AA)(a) of the *Sentencing Act 1991* (Vic) (which precludes the sentencing Judge from having regard to the totality principle where, in future, the length of custody may be affected by “executive action” eg a Parole Board decision) does not apply in the federal context to federal parole breaches.

Where federal parole is revoked on the imposition of another sentence of more than 3 months the service of the balance of the federal sentence commences on the date the offender is

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378 By contrast, under state law the imposition of a new global non-parole period is not permitted – see *R v Bradley* [2010] VSCA 70. *Crimes Act 1914* (Cth), ss 19AA(2) and 19AR(2).

379 *Crimes Act 1914* (Cth), s 19AR(4).

380 *Crimes Act 1914* (Cth), s 19AJ.

381 *Crimes Act 1914* (Cth), s 19AQ and s 19AS(1)(d).


384 It is clear that in the state context that if the Parole Board has already decided to revoke parole and require the balance of the sentence to be served that the totality principle is not precluded where the offender is to be sentenced for the breaching offence – see *R v Hunter* (2006) 14 VR 336; [2006] VSCA 129 at [28] and *R v Piacentino* (2007) 15 VR 501, [65].
sentenced for the other offence.\textsuperscript{385} This is opposite to the rule that applies for breaches of state parole.\textsuperscript{386}

16) Considerations of totality apply to federal parole breaches and regard is to be given to “clean street time”.\textsuperscript{387} If amelioration of the total effective sentence is appropriate this can be achieved in setting the federal new single non-parole period or pre-release period under a recognisance release order;

17) If the outstanding portion of the federal sentence to be served on the parole breach is three years or less a new recognisance release order (rather than a non-parole period) must be imposed. However, if the outstanding portion of the federal sentence to be served is more than 3 years a new non-parole period must be imposed. In setting a new recognisance release order or non-parole period for federal offences the court must have regard to the common law totality principle;\textsuperscript{388}

18) Section 19AS of the \textit{Crimes Act 1914} (Cth) requires the court to issue a warrant of detention\textsuperscript{389} 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;

19) Federal parole may be breached by further state offending. Where the breaching offence is a state one there is a rebuttable presumption arising from state legislation that the state sentence will be cumulative unless otherwise ordered because of exceptional circumstances.\textsuperscript{390} Where the breaching offence on federal parole is also a federal offence there is no legislative presumption that the sentences will be cumulative.

314. Amendments to the \textit{Corrections Act 1986} (Vic) effective from 20 May 2013, have the effect that for offenders on parole for a sexual or serious violent offence [as defined] who are convicted of a further sexual or violent offence [as defined] parole will be automatically cancelled.\textsuperscript{391} These amendments have only a limited application to federal offences. The new scheme does not apply to automatically cancel parole for federal offenders, but a conviction for a qualifying federal offence can automatically cancel state parole.\textsuperscript{392}

\textbf{Mandatory sentencing}

\textsuperscript{385} \textit{R v Piacentino} (2007) 15 VR 501; \textit{Crimes Act 1914} (Cth), s 19AS(1)(d).
\textsuperscript{386} \textit{Sentencing Act 1991} (Vic), s 15(2).
\textsuperscript{387} \textit{Crimes Act 1914} (Cth), s 16B, s 19AA(3), and s 19AR(2). See \textit{R v Piacentino} (2007) 15 VR 501.
\textsuperscript{388} \textit{Crimes Act 1914} (Cth), s 19AR(2).
\textsuperscript{389} See the form of warrant in form 2 of Schedule 3 of the \textit{Crimes Regulations 1990} (Cth).
\textsuperscript{390} \textit{Sentencing Act 1991} (Vic), s 16(3B).
\textsuperscript{391} \textit{Corrections Act 1986} (Vic), s 77(6).
\textsuperscript{392} \textit{Corrections Act 1986} (Vic), s 77(9)(e).
315. In general federal legislation does not provide for mandatory penalties. An exception is s 236B of the Migration Act 1958 which requires a minimum head sentence and non-parole period to be imposed for an aggravated offence of people smuggling involving exploitation or danger of death or serious harm (s 233B), an aggravated offence of people smuggling – at least 5 people (s 233C) or an aggravated offence of false documents and false or misleading information...relating to at least 5 non-citizens (s 234A). Section 236B(2) provides that s 236B does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.

316. Under s 236B of that Act, where a person is convicted of an offence against s 233B, or a repeat offence against s 233C or s 234A the court is required to impose a sentence of at least 8 years, with a non-parole period of at least 5 years. If a person is convicted of a non-repeat offence against s 233C or s 234A the Court must impose a sentence of at least 5 years with a non-parole period of at least 3 years.

317. These provisions are inconsistent with s 17A of the Crimes Act 1914 and prevail over s 17A. In 2011 a decision of the Western Australian Court of Appeal decided that the statutory minimum and maximum penalties are the floor and ceiling respectively within which the sentence has a discretion and to which general sentencing principles are to be applied.393

318. The High Court in Magaming v R394 held that legislative prescription of a mandatory minimum term of imprisonment is not inconsistent with Chapter III of the Constitution.

319. In 2004, the Crimes Act 1914 (Cth) was amended with the effect of requiring the court to impose a mandatory minimum non-parole period of at least $\frac{3}{4}$ of the head sentence where an offender is convicted and sentenced to imprisonment for a terrorism offence, treachery, treason or espionage.395

320. Federal parole is at the discretion of the Commonwealth Attorney-General. The Federal Offender’s Unit of the Commonwealth Attorney-General’s Department administers federal parole. When a federal offender’s parole date is approaching a report is requested from the state parole service and consideration is given to all matters set out in that report by the Attorney in exercising the discretion to grant parole pursuant to s 19AL of the Crimes Act 1914 (Cth). Where an offender is sentenced for both state and federal offences separate sentences must be imposed and in particular the legislation does not permit the imposition of a single non-parole period in respect of the federal and state sentences. Separate non-parole orders must be made where a non-parole period is to be imposed for both federal and state sentences.396

Pre-sentence detention

394 Magaming v R (2013) 252 CLR 381 at [49].
395 Crimes Act 1914 (Cth), s 19AG.
321. The relevant state law (s 18 of the **Sentencing Act 1991** (Vic)) applies by virtue of s 16E(2) **Crimes Act 1914** (Cth) which requires pre-sentence detention to be reckoned as served, unless the court otherwise orders. This can include time spent in immigration detention or in custody pursuant to the **Fisheries Management Act 1991** (Cth). In sentencing for a state offence a sentencer is obliged to consider, as part of the instinctive synthesis, a period served while remanded in custody on an unrelated count (i.e. pre-sentence detention not covered by s 18 of the **Sentencing Act 1991** (Vic)). Courts have adopted the same approach in sentencing federal offenders.

322. The court has a discretion under s 18 of the **Sentencing Act 1991** (Vic) to order otherwise. That discretion (to otherwise order) has been exercised where the offender had already received the benefit of that pre-sentence detention. It appears that normally time in custody awaiting extradition ought to be reckoned but in one case only part of the time an accused was in custody overseas was credited on the basis that he had prolonged challenges to extradition beyond what was reasonably necessary.

323. Pre-sentence detention is not specified where the sentence of imprisonment is partially or fully suspended. Rather the practice is to “otherwise order” i.e. but otherwise have regard to the pre-sentence detention in deciding whether to fully suspend or to partially suspend the sentence length.

**Inapplicability of remissions is now irrelevant**

324. Prior to 16 January 2003 a sentencing court was required to have regard to the absence of remissions and to adjust the sentence (head sentence) accordingly. Section 16G was repealed from 16 January 2003 and for sentences imposed from that date there is no legislative authority to have regard to the absence of remissions and adjust the sentence downwards by reason of that fact. See Appendix 3 for a summary as to how s 16G operated before its repeal.

325. There have been a number of Court of Criminal Appeal decisions in NSW that discuss the effect of the repeal of s 16G. The case of *R v Bezan*, Wood CJ, with whom Buddin and Shaw JJ agreed,

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397 *Yusup v R* [2005] NTCCA 19; and note that the **Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013**, effective 29 June 2013, amended the **Migration Act 1958** to provide that the time spent in immigration detention or on remand prior to sentencing is recognised in the sentencing of those convicted of people smuggling offences. *R v Mohamed* [2016] VSC 581 at [59].


400 The reasoning in *Bui v DPP (Cth)* [2012] 244 CLR 638 suggests this may be open to doubt.

401 *Tsang v DPP (Cth)* (2011) 35 VR 240.


403 **Sentencing Act 1991** (Vic), s 18(2)(c) which applies pursuant to s 16E of the **Crimes Act 1914** (Cth).

404 **Crimes Act 1914** (Cth), s 16G.
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). 

326. 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%. 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. 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 sentencing or will be likely to result in an increase over the pre-repeal pattern though adjustment for the repeal of s 16G should not be made automatically by use of a mathematical formula or fixed percentage.

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407 *R v Dujeu* (2004) 146 A Crim R 121; [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). 
327. A number of cases have confirmed the propositions summarised in the case of *R v Bezan*.411

*Home detention, pre-release and leave of absence*

328. In general Victorian laws relating to leave of absence and pre-release apply to federal prisoners.412 Home detention is no longer available (from 16 January 2012) as a sentencing option or as a pre-release scheme for a federal offender in Victoria.413 On 16 January 2012 home detention, both as an initial sentencing option and as a pre-release scheme for prisoners was abolished in Victoria.414 Before 1992, a pre-release permit under Victorian law415 was made applicable to federal offenders (except those liable to deportation or those who would become an unlawful non-citizen if they participated or if they were already subject to a recognisance release order in relation to the offence) in Victoria by Reg 5 of the *Crimes Regulations 1990* (Cth). The Victorian pre-release scheme was repealed on 22 April 1992416 and accordingly that particular scheme remains applicable only to those federal offenders sentenced prior to that date.417

329. Between 1 January 2004 and 15 January 2012 a federal prisoner was able to be released under a home detention order made under the *Corrections Act 1986* (Vic). In summary, a prisoner was able to be considered if he/she has served at least two thirds of the minimum (non-parole) period and the prisoner will be eligible for release in six months or less.418

330. The Commonwealth Attorney-General has a discretion to release an offender up to 30 days earlier than before the end of the non-parole period.419

*Release on licence*

331. A federal prisoner can be released on licence. This is a form of discretionary conditional release exercised by the Commonwealth Attorney-General or his/her delegate in exceptional circumstances.420 Section 19AP(4A) has been inserted into the *Crimes Act 1914* (Cth) and provides examples of grounds on which the Attorney-General may consider granting early release on licence. Grounds for the release on licence include where the prisoner is ill and requires treatment which is not available in the prison system or where the prisoner has assisted law enforcement authorities

412 *Crimes Act 1914* (Cth), s 19AZD.
413 *Crimes Amendment Regulation 2012* (No.2).
416 See *Corrections (Remissions) Act* 1991 (Vic), s 5.
418 *Corrections Act 1986* (Vic), s 59.
419 *Crimes Act 1914* (Cth), s 19AL(3A).
420 *Crimes Act 1914* (Cth), s 19AP.
but this was not taken into account in sentencing or where the prisoner co-operated with law enforcement agencies after sentencing. A licence sets out the conditions that must be complied with including a condition requiring the person to be of good behaviour.

332. When released on licence an offender is taken to still be under sentence and not to have served any time that remained at the beginning of the licence period i.e. street time unless the licence period ends without being revoked.421

421 Crimes Act 1914 (Cth), s 19A2C(1).
Specific Sentencing Situations

Children and Young Persons

333. Section 20C of the *Crimes Act 1914* (Cth) incorporates all the state sentencing options available for children or young persons where a federal offender is a “child or young person”. Therefore, in respect of a “child or young person”, which is not defined, the federal options and any addition state sentencing options in respect to a child or a young person are available. The CDPP takes the view that the terms of s 20C do not exclude the operation of the federal sentencing regime set out in Part 1B of the *Crimes Act 1914* (Cth). It seems clear as a matter of statutory interpretation (see paragraph 10 above) that s 20C will give way to more specific sentencing provisions in the *Crimes Act 1914* (Cth). As noted above the jurisdiction of the Children’s Court in Victoria has been extended so that an offender under 19 years of age can be sentenced in that court.

334. The power of a Magistrates' Court to defer sentencing an offender aged 18 or more but under 25 under s 83A of the *Sentencing Act 1991* (Vic) applies as a matter of procedure which is picked up by s 68 of the *Judiciary Act 1903* (Cth).

Applied State Offences Committed on Commonwealth Places

335. Where state offences apply to a Commonwealth place (such as Melbourne International Airport) by virtue of the *Commonwealth Places (Application of Laws) Act 1970* (Cth), the offences are “federalised” but the Commonwealth sentencing options do not apply. Section 5(3) of that Act makes the sentencing options in the *Crimes Act 1914* (Cth) inapplicable. Where offences are committed in a Commonwealth place the Victorian sentencing options set out in the *Sentencing Act 1991* (Vic) apply.

Mental Illness or Intellectual Disability

336. Section 16A(2)(m) of the *Crimes Act 1914* (Cth) requires the Court, in sentencing, to have regard to the mental condition of the person. The *Crimes Act 1914* (Cth) also establishes a separate regime of federal dispositions for persons suffering from mental illness or intellectual disability.

337. The *Crimes Act 1914* (Cth) includes a disposition regime in relation to:

- persons declared unfit to be tried (ss 20B – 20BI); and
- persons acquitted because of mental illness (ss 20BJ – 20BP).
338. It also sets out a regime of sentencing and disposition options in relation to persons suffering from mental illness (within the meaning of the civil law of the state or territory) or intellectual disability (which is not defined).\textsuperscript{422}

339. The Victorian disposition/sentencing options do not apply in respect of federal offenders suffering from mental illness or intellectual disability, as the Commonwealth provisions were intended to be exhaustive as to the consequences that follow from such a finding, and so ss 68 and 79 of the \textit{Judiciary Act 1903} (Cth) do not operate to pick up any State provisions that set out the consequences of such a finding.

340. However, it is important to note that federal law does not set out the procedure for determining whether the accused is suffering from mental illness or intellectual disability\textsuperscript{423} and so State law applies to determine that issue.

\textbf{Commonwealth sentencing/disposition options}

341. The regime of Commonwealth sentencing/disposition options relating to those suffering from mental illness or intellectual disability are:

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<thead>
<tr>
<th>Section</th>
<th>Outcome</th>
<th>Summary/Indictable Disposition</th>
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<tr>
<td>20BQ</td>
<td>Summary disposition by discharge or conditional release</td>
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<tr>
<td></td>
<td>Summary only – where it appears to the court the defendant is suffering from a mental illness or an intellectual disability. Where a defendant is conditionally released there is no mechanism for breach action.</td>
<td></td>
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<tr>
<td>20BS</td>
<td>Hospital Order</td>
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<tr>
<td></td>
<td>On indictment only – where defendant convicted and person suffering from mental illness which contributed to offence.</td>
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<tr>
<td>20BV</td>
<td>Psychiatric Probation Order</td>
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<tr>
<td></td>
<td>Summary/Indictable – where defendant convicted and suffering from mental illness which contributed to offence.</td>
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</tbody>
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342. Section 20BQ leaves no room for the operation of state summary dispositions available where a person is no longer suffering from mental illness at the time of the hearing.

\textsuperscript{422} \textit{Crimes Act 1914} (Cth), ss 20BQ – 20BY.

343. In relation to s 20BQ, Gray J of the South Australian Supreme Court has expressed the view that the section is limited to cases where no plea has been entered and authorises “a diversionary process in the case of mental illness”, but these are not the only circumstances where s 20BQ has been applied.

344. Section 20BQ was described as requiring a two-stage process, similar to the process under s 19B, which requires considering firstly whether the person is suffering from a mental illness and secondly whether it would be more appropriate to deal with the person under the section. For a more detailed outline see Chapter 28 of the ALRC Report, Same Crime, Same Time Report No 103 (2006).

Fitness to be Tried

345. What follows is a very brief summary of how the issue of a person’s fitness to be tried is dealt with and in particular the interrelationship between Commonwealth and state law on this point. For a more detailed outline see Chapter 28 of the ALRC Report, Same Crime, Same Time Report No 103 (2006).

346. In Kesavarajah v R, the High Court decided that state law regulated the mode of determining whether a person was fit to stand trial and the Crimes Act 1914 (Cth) regulated the consequences that flowed from that finding in respect of persons charged with federal offences. Here, the Commonwealth and state provisions work together.

347. The South Australian Court of Appeal has explained that s 20B of the Crimes Act 1914 (Cth) sets out the consequences of a preliminary finding that a person is unfit to be tried but does not prescribe a procedure for determining the question of whether a person is fit to be tried for an offence against the Commonwealth. As a result the state procedure applies to determine that issue of fact.

348. In this context s 79 of the Judiciary Act 1903 (Cth) has the effect of picking up the state procedure to determine that fact including the state test to be applied in determining whether an accused is fit to be tried on a Commonwealth offence. However, s 79 of the Judiciary Act 1903 (Cth) picks up the state laws of procedure only insofar as that state law is not inconsistent with the Constitution or other Commonwealth legislation.

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426 Potts v Bonnici (2009) 104 SASR 313.
428 See Part 2 of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) which codified the common law criteria set out in R v Presser [1958] VR 45.
429 R v Sexton (2000) 77 SASR 405. The Court also decided that s 20B of the Crimes Act 1914 (Cth) did not abrogate the Court’s inherent power to grant a permanent stay.
430 Ibid.
349. The South Australian Court of Appeal also decided that the Crimes Act 1914 (Cth) did not abrogate the inherent jurisdiction of the court to grant a permanent stay for an offence against the Commonwealth. It is clear from the cases that the existence of the regime in Division 6 of Part 1B is relevant to the question of whether a stay should be granted.\textsuperscript{431} 

350. In Victoria the Crimes Mental Impairment (Fitness to be Tried) Act 1997 (Vic) regulates the procedure and test to be applied in determining whether an accused, charged with a federal offence is fit to stand trial. Pursuant to that Victorian Act a person may only be unfit to stand trial by reason of mental disorder or impairment and that procedure and test applies only in relation to trials and committals.

351. A deficiency in s 20BC of the Crimes Act 1914 (Cth) has come to light. This is the section that deals with the judge’s options when a person has been found not fit to be tried and is unlikely to be fit within the next 12 months. One of the options is to detain the person in a hospital but the power is qualified by “if the person does not object”. The other options are to detain the person in a prison or release the person on condition. Judge Gullaci of the County Court of Victoria has pointed out that the qualification was inappropriate where a determination had been made that the person was not fit to be tried. This deficiency has been brought to the attention of the Attorney-General’s Department.

352. In Victoria the question of a person’s fitness to stand trial is determined by a jury empanelled specifically for that purpose.\textsuperscript{432} 

\textbf{Summary offences} 

353. The approach in respect of persons charged with Commonwealth summary offences or indictable offences to be determined summarily is different. There is no state test or procedure for determining fitness to be tried. The Crimes Act 1914 (Cth) provides a regime of dispositions/sentencing options that relate to those suffering from mental illness (or intellectual disability). The relevant sections for Commonwealth matters proceeding summarily are ss 20BQ [summary disposition by discharge or conditional release], 20BV [on conviction – a Psychiatric Probation Order] and 20BY [on conviction – a Program Probation Order]. As noted above the Commonwealth regime is intended to be exhaustive and leaves no room for the state provisions providing dispositions to be picked up and applied pursuant to ss 68 and 79 of the Judiciary Act 1903 (Cth).

354. It should also be noted that s 7.3 of the Criminal Code Act 1995 (Cth) creates the defence of mental impairment that applies to all Commonwealth offences. Mental impairment is defined to include

\textsuperscript{431} See Agoston v R [2008] NSWCCA 116 and the cases cited therein. 
\textsuperscript{432} Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), s 7(3)(b) requires a Special Hearing to be conducted.
senility, intellectual disability, mental illness, brain damage and severe personality disorder. This defence applies whether a matter is prosecuted summarily or on indictment.

Aggregate Penalty

355. A Court has the power to impose an aggregate penalty in respect of federal offences in some circumstances. When a matter proceeds summarily the source of this power is s 4K(4) of the Crimes Act 1914 (Cth), or s 219 of the Social Security (Administration) Act 1999 (Cth) in respect of social security charges. When a matter proceeds on indictment an aggregate sentence of imprisonment can be imposed by virtue of s 9 of the Sentencing Act 1991 (Vic) which is picked up and applied to Commonwealth prosecutions as a matter of procedure pursuant to ss 68 and 79 of the Judiciary Act 1903 (Cth). Amendments to the Sentencing Act 1991 (Vic) in 2012 negated the previous requirement that the court in imposing an aggregate sentence must still articulate the individual terms and the extent of concurrency and cumulation and now an aggregate term is open where charges are “rolled-up” or representative.

356. The amendments to section 9 also made clear that an aggregate sentence of imprisonment may be imposed in relation to a rolled up charge or representative charge. The option of an aggregate sentence of imprisonment is not available where the offender is a “serious offender” under state law or where one of the offences was committed while on parole.

Aggregate penalty for summary offences – s 4K Crimes Act 1914 (Cth)

357. To avoid the need to impose multiple penalties for numerous separate charges under the same section, where those offences are of a similar nature, s 4K(4) of the Crimes Act 1914 (Cth) provides that where an offender is convicted of more than one offence against the same provision of a Commonwealth law and the charges 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 one penalty for all of the offences. Where one penalty is imposed, the penalty is not to exceed the sum of the maximum penalties that could be imposed if each offence was penalised separately.

Example 1: Two summary offences

An accused is to be sentenced in the Magistrates’ Court on two summary charges of obtaining financial

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433 See Criminal Procedure Amendment Act 2012 (Vic), s 44.
435 For example Irvine v Hanna-Rivero (1991) 23 IPR 295 where one sentence was imposed for four summary charges of possession of infringing copies of computer programs contrary to the Copyright Act 1968 s 132.
advantage by deception contrary to s 135.2 of the Criminal Code. These summary offences carry a maximum penalty of 12 months and/or $10,800\(^{436}\) (60 penalty units).\(^{437}\) 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 $21,600.

**Example 2: CCO for two summary offences**

In the above example, should a Magistrate wish to impose a Community Correction Order in relation to both offences, s 4K(4) could be used to impose one CCO with a maximum number of 375 hours of unpaid community work of 18 months. For one such offence a CCO with a maximum number of 250 hours over 12 months could be imposed.

**Example 3: Two indictable charges proceeding summarily**

An accused 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 ($21,600) or both – s 4J(3)(b) Crimes Act 1914 (Cth).

Section 4K Crimes Act 1914 does not permit aggregate penalty for multiple offences against different provisions

358. Further, s 4K(4) of the Crimes Act 1914 (Cth) only permits the imposition of an aggregate penalty where the offences are “against the same provision of a law of the Commonwealth”.\(^{438}\) So it is not possible, pursuant to s 4K(4), to impose a single sentence when Commonwealth offences contrary to the Social Security (Administration) Act 1999 and the Criminal Code (Cth) are heard together. However state procedural laws may permit this – see paragraph 360 below. Single aggregate sentences can however be imposed for each type of federal offence under s 4K. There is authority that s 4K is merely permissive leaving unaffected the application of state/territory summary provisions that provide for joinder and an aggregate sentence in wider circumstances.\(^{439}\) It is not possible to impose a single aggregate for federal and state offences.\(^{440}\)

**Aggregate sentences for offences against Social Security (Administration) Act 1999 (Cth)**

\(^{436}\) As of 31 July 2016, a penalty unit under s 4AA of the Crimes Act 1914 (Cth) increased to $180. Also see footnote 448 regarding the indexing of the value of each penalty unit from 2018.

\(^{437}\) See Crimes Act 1914 (Cth), s 4B(2) which provides that the number of applicable penalty units is calculated by multiplying the maximum penalty of imprisonment (expressed in months) by 5.

\(^{438}\) Cady v Smith (1993) 117 FLR 132.


\(^{440}\) Fasciale v R (2010) 30 VR 643, [27].
359. The Social Security (Administration) Act 1999 (Cth), which was effective from 20 February 2000, has its own provisions permitting the joinder of charges and the imposition of an aggregate sentence. There were equivalent provisions in the previous Social Security Act 1991 (Cth). Section 220 permits the joinder of several charges against s 217 of the Social Security (Administration) Act 1999. Section 219 of the current Act permits the court to impose one penalty for all offences contrary to s 217 of the Act, but again the penalty must not exceed the sum of the maximum penalties that could be imposed for each offence if separate penalties were imposed.

Example 4: Two offences contrary to s 217 Social Security (Administration) Act 1999

An accused 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 $10,800 [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 $21,600.

Example 5: CCO for two offences

In the above example should a magistrate 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.

Effect of state/territory joinder provisions

360. However, section 4K(3) of the Crimes Act 1914 (Cth) has been held to be permissive, leaving unaffected state or territory provisions that permit more than one charge to be joined in the one complaint, information or summons. Pursuant to s 56 of the Criminal Procedure Act 2009 (Vic) a charge sheet may contain more than one charge. Pursuant to s 9 of the Sentencing Act 1991 (Vic), if 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, and similarly may impose an aggregate fine pursuant to s 51 of the Sentencing Act 1991 (Vic). Where charges are joined pursuant to the wider and more permissive state/territory provisions, that are not limited to offences against the same provision, s 4K(4) of the Crimes Act 1914 (Cth) has no application.

Aggregate penalty for charges on Indictment

361. Section 4K of the Crimes Act 1914 (Cth) does not permit a court to impose one penalty in respect of charges "founded on the same facts, or form, or are part of, a series of offences of the same or similar character" where the charges proceed on indictment. It is only where such charges are included in

441 Social Security Act 1991 ss 1353 and 1354 which was effective until 20 March 2000.
an "information, complaint or summons" that one penalty can be imposed. In Victoria and New South Wales an indictment is not an "information, complaint or summons". Section 4K(4) is therefore inapplicable to matters proceeding on indictment in Victoria and New South Wales.  

362. Where the state and territory sentencing scheme permits an aggregate sentence to be imposed on indictment (as currently is the situation in Victoria, the Northern Territory, Tasmania and South Australia) this is picked up by s 68(1) of the *Judiciary Act 1901* (and s 133B(2) of the *Corporations Act* in relation to charges under that Act), and is made applicable to federal offenders. Part 1B of the *Crimes Act 1914* (Cth), which includes s 4K(4), does not cover the field and so leaves room for a state provision that enables an aggregate sentence on indictment to apply via the *Judiciary Act 1903* (Cth).  

363. Section 9 of the *Sentencing Act 1991* (Vic) permits an aggregate period of imprisonment to be imposed on indictment in certain circumstances. Section 9 applies where an offender is convicted of two or more offences that are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character. As noted above there are also some in-built limitations in section 9. They include that the option is not open where one or more of the offences is committed whilst on parole. Case law limitations that required, in a general way, the individual terms and the extent of any cumulation/concurrency are to be outlined have been overcome by legislation. An aggregate penalty may now be imposed where the offences are “rolled up” or where the charge is representative. Section 9 is picked up and made applicable to the prosecution of federal offences by section 68 of the *Judiciary Act 1903* (Cth) and in respect of offences against the *Corporations Act (Cth)* by s 133B(2) of that Act. As noted above it is not possible to impose a single aggregate sentence of imprisonment for both federal and state offences.

**Taking other federal offences into account**

364. Section 16BA enables other federal offences, but not state offences, to be taken into account in sentencing a federal offender where the person is convicted of a federal offence. “Federal offence” is defined in s 16 of the *Crimes Act 1914* (Cth) as an offence against a law of the Commonwealth. This section does not apply unless the offender is convicted.  

365. Although the terms of section 16A suggests that other offences can be taken into account in respect of more than one federal offence, it is not the intention that more than one federal sentence could

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442 *Crimes Act 1914* (Cth), s 4K(3).


be increased by taking into account the same other offence. The other offences should be taken into account in respect of one offence only.\textsuperscript{446}

**Dealing with summary offences in superior courts - application of ss 145 and 243 Criminal Procedure Act 2009 (Vic)**

366. Section 145 of the *Criminal Procedure Act 2009* (Vic) requires a Magistrate, on committing an accused, to order that all related summary offences be transferred to the court that the accused has been committed to. Section 243 also permits the Supreme Court and County Court to hear and determine an unrelated summary offence under certain circumstances.

367. Sections 145 and 243 are picked-up and made applicable in the Commonwealth context by s 68 of the *Judiciary Act 1903* (Cth). Prior to 13 October 1999, s 68(3) of the *Judiciary Act 1903* (Cth) restricted the power to exercise summary jurisdiction in respect of federal offenders to Magistrates. This had the effect of precluding the County Court or Supreme Court from exercising jurisdiction over a Commonwealth summary offence. Now, 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.\textsuperscript{447}

368. In *Adams v The State of Western Australia* [2014] WASCA 191, the majority held that these types of State sentencing provisions are procedural in nature, do not conflict with s 16BA of the *Crimes Act 1914* (Cth) and fall within the definition in s 68 of the *Judiciary Act 1903* (Cth). As there were no equivalent Commonwealth provisions, they determined that the provisions were ‘picked up’. The majority held that both s 68(2)(c) and s 79 of the *Judiciary Act 1903* (Cth) apply to give effect to the Western Australian procedural provisions to Commonwealth matters.

369. 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.\textsuperscript{448} So summary offences against the *Corporations Act 2001* (Cth) cannot be transferred to the County or Supreme Courts at present.

**Reparation – s 21B Crimes Act 1914 (Cth)**

370. Section 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” where a person is convicted of a federal offence or placed on a bond under s 19B. A similar provision specifically dealing with

\textsuperscript{446} Assafiri (No.2) v *R* [2007] NSWCCA 356. See also *R v Nguyen* [2010] NSWCCA 238 where a federal offence carrying life imprisonment was taken into account.

\textsuperscript{447} *Law and Justice Amendment Act 1999*; Item 3 of Schedule 10.

\textsuperscript{448} *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 County Court or Supreme Court Judge.
371. 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”.449

372. Reparation is not part of the punishment but a means of making an order for compensation.450 A court has a discretion whether it makes a reparation order and it has also been said that the court has a discretion as to the amount of the order. In exercising that discretion the court must act judicially and may have regard to the personal circumstances and means of the offender.451 The High Court however has left open the question of whether the means of the offender are relevant to the discretion as to the amount of any reparation order.452 A person cannot be imprisoned for failing to pay a reparation order.453

373. As noted above, in sentencing a federal offender the court is required, by s 16A(2)(f) of the Crimes Act 1914 (Cth), to take into account 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. The equivalent provision in the Sentencing Act 1991 (Vic) also allows the court to have regard to lack of remorse as well as remorse.

374. Section 21B(1)(d) of the Crimes Act 1914 (Cth) was amended by the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth) (effective from 8 March 2013) so that an individual victim of a federal offence is eligible for reparation in the same circumstances as the Commonwealth or a public authority of the Commonwealth.

Sex Offenders Registration

375. Where a court sentences (which is defined very widely in s 3 of the Sex Offenders Registration Act 2004 (Vic) and includes such dispositions as diversion) a federal offender for a registrable offence under that Act, the consequences set out in that Act apply.

376. Some federal offences are contained in the Class 1 list (Schedule 1) and Class 2 offence list (Schedule 2) of the Act. Attempts, conspiracy or incitement to commit any such offence are also covered. See the list of Commonwealth offences covered by that Act in Appendix 2 of this paper.

377. The prohibition preventing a court in sentencing from having regard to the consequence of registration applies to federal offenders by operation of one or other of ss 68(1) or 79(1) of the

449 R v Foster [2009] 1 QdR 53.
453 Crimes Act 1914 (Cth), s 21B(2); Social Security (Administration) Act 1999 (Cth), s 218(2).
Judiciary Act 1903 (Cth).454  

454  R v ONA (2009) 24 VR 197
Imprisonment factual situations

378. There are three main situations where the task of sentencing a federal offender to imprisonment will arise. They are, where the offender falls to be sentenced:

1. On one or more federal offences where the offender is not already undergoing sentence.
   a. Single sentence
   b. Multiple and aggregate sentences

2. For federal and state offences at the same sitting where the offender is not undergoing sentence.

3. For a federal offence or offences where the offender is undergoing sentence including where parole is breached.
   a. Undergoing a state sentence
   b. Undergoing a federal sentence

Sentencing an offender to imprisonment on one or more federal offences when already not undergoing sentence

a. Single Sentence

379. The requirements in respect of a single sentence of imprisonment for a federal offence are set out above including the circumstances that determine whether a single non-parole period or a single recognisance release order should be imposed – (see paragraphs 260 - 265).

380. Central requirements: The central requirements in the imposition of a single term of imprisonment on a federal offender are:

   i. The determination of a proportionate sentence “that is of a severity appropriate in all the circumstances of the offence”;\(^{455}\)

   ii. In determining that sentence is proportionate to the offending the Court must have regard to the matters in s 16A(2) insofar as they are “relevant and known” along with matters under applicable common law principles not set out in s 16A(2). Additionally, regard must be had to any sentence (state, federal or territory) yet to be served and any sentence liable to be served because of the revocation of a parole order or licence;\(^{456}\)

\(^{455}\) Crimes Act 1914 (Cth), s 16(1).

\(^{456}\) Crimes Act 1914 (Cth), s 16B.
iii. Determining that no other sentence apart from imprisonment is appropriate in all the circumstances, stating the reasons and having them entered in the court’s records unless the offence is one carrying mandatory imprisonment;\textsuperscript{457} 

iv. Where only one federal sentence is imposed the sentence will commence from the date of its imposition unless the offender is in custody.\textsuperscript{458} Where multiple federal sentences are imposed the Court must “by order direct” when each federal sentence commences. This process requires the Court to specify a date or a time by reference to another sentence imposed – see below.\textsuperscript{459} 

v. Any pre-sentence detention for the offence sentenced must be declared unless the federal sentence is fully or partially suspended – s 18 of the \textit{Sentencing Act 1991} (Vic) as applied by s 16E of the \textit{Crimes Act 1914} (Cth). Where a federal sentence is fully or partially suspended the practice is not to declare pre-sentence detention but to “otherwise order” pursuant to s 18(1). This practice came about as a result of s 18(2)(c) of the \textit{Sentencing Act 1991} (Vic) [now repealed] but the practice has continued in taking the period of prior custody into account in determining whether to fully suspend the federal sentence or partially suspend the length of the sentence and any pre-release period. It is essential for the sentencer to state it has been taken into account and its impact. In sentencing federal offenders, courts have had regard to custody not covered by s 18 as they do in respect of state offenders – see paragraph 321 and \textit{R v Renzella} and \textit{R v Wade};\textsuperscript{460} 

vi. Depending on the sentence imposed, the Court must set a non-parole period or a recognisance release order unless it exercises the discretion not to impose such a period or order.\textsuperscript{461} 

vii. There is no starting point (expressed in percentage terms or otherwise) of the head sentence the offender should be ordered to serve before being released on parole or a recognisance release order.\textsuperscript{462} 

b. Multiple & Aggregate Sentences 

381. As previously noted, in Victoria, where a matter proceeds summarily (or in a County Court appeal arising from that hearing), s 4K(4) of the \textit{Crimes Act 1914} (Cth) permits a court to impose a single aggregate penalty in certain circumstances.

\textsuperscript{457} \textit{Crimes Act 1914} (Cth), s 17A. 
\textsuperscript{458} \textit{Sentencing Act 1991} (Vic), s 17(1) as applied by s 16E \textit{Crimes Act 1914} (Cth). 
\textsuperscript{459} \textit{Crimes Act 1914} (Cth), s 19(2). 
\textsuperscript{460} \textit{R v Wade} [2005] VSCA 276. 
\textsuperscript{461} \textit{Crimes Act 1914} (Cth), ss 19AB and 19AC. 
\textsuperscript{462} \textit{R v Hili} (2010) 242 CLR 520.
382. In respect of charges found in the same summons or information “if those charges are founded on the same facts, or form, or a part of a series of offences of the same or similar character” s 4K permits the court to impose a single aggregate penalty. The Social Security Act 1991 (Cth) and the Social Security (Administration) Act 1999 (Cth) have an equivalent provision dealing with multiple offences. The relevant state or territory procedural provision may be relied upon where it is broader than s 4K(4).

383. Where a matter proceeds on indictment in Victoria, s 4K will be inapplicable. However, the court will be able to impose a single aggregate sentence of imprisonment as a result of s 9 of the Sentencing Act 1991 (Vic), which is picked up and applied in Commonwealth prosecutions by s 68(1) of the Judiciary Act 1903 (Cth). As noted above, a Community Correction Order can be imposed in respect of a number of Commonwealth offences (see the section above on CCOs).

384. In such a case involving multiple sentences of imprisonment, the court is required, by s 19(2) of the Crimes Act 1914 (Cth), to “direct by order”, when each of the sentences imposed is to commence. As noted below, this may be done either by nominating a date or a time by reference to another sentence e.g. “2 months prior to the expiration of the sentence on count 3”. In this way, the court can determine the required degree of cumulacy or concurrency between the terms of imprisonment imposed. Where an aggregate sentence of imprisonment is imposed s 19(2) will not apply.

385. In R v Nagy Justice McGarvie stated that concurrency and cumulation between sentences is to be achieved by having the same or different dates for the commencement of the sentences. Simply stating only that sentences are to be concurrent, cumulative or cumulative to a nominated degree will not satisfy the legislative requirement in s 19 and such a statement will be ineffective. The requirement in s 19 may be met by directing that a sentence commence on a specified date so long as this does not have the effect of backdating a federal sentence to a date earlier than its imposition (noting that this limitation does not apply to the Court of Appeal or County Court when resentencing on an appeal – in those circumstances, the court may backdate a sentence). Alternatively, where there are a number of sentences to be served, the sentence to be served first can be stated to commence on a nominated date and the other sentences can be directed to commence by reference to the start date of another sentence or the end of another sentence. For example:


Prior to the existing sentencing scheme it was not possible for a Court to achieve the effect that one federal sentence was partially cumulative or concurrent on another federal sentence. See Rumpf v R [1988] VR 466; De Zylva v R (1988) 33 A Crim R 44.

See DPP v AB (No.2) (2006) 198 FLR 449.


Sentence on count 1 to commence today.
Sentence on count 2 to commence 3 months after commencement of sentence on count 1.
Sentence on count 3 to commence 6 months after commencement of sentence on count 2.

Section 19(2) of the *Crimes Act 1914* (Cth) imposes another limitation on the court’s direction to determine when sentences commence: no sentence can be directed to commence later than the end of a sentence the commencement of which has already been fixed. The purpose of this limitation is to ensure that there is no gap as between the service of one sentence and the commencement of another which would see the prisoner released only to be returned to prison at a later stage to serve the remaining sentence.\(^{470}\)

However, s 19 does not require all sentences announced to have commenced before the non-parole period is reached.\(^{471}\)

**Example 1: Totally cumulative federal sentences**

Where a federal offender is sentenced on 1 February 2016 to 4 years’ imprisonment on charge one and is sentenced to 18 months on charge two. Where the court wishes the second sentence to be wholly cumulative on the first the court should direct that the sentence on the second count commence on the day following the day on which the sentence on the first charge will end – s 19(2) *Crimes Act 1914* (Cth). This was the formulation used by the court in *R v Carroll* above.

Another appropriate formulation would be to direct that the second sentence commence at the expiration of the sentence on the first – see *R v Alimic* [2006] VSCA 273, [6]-[7]. Where the court wishes the second sentence to be wholly cumulative on the first sentence it could direct alternatively that the second sentence commence on 1 February 2020. As the first sentence may expire before then due to the influence of strike remissions [*Crimes Act 1914* (Cth), s 19AA(4)] or the effect of pre-sentence detention [*Crimes Act 1914* (Cth), s 16E(2) and *Sentencing Act 1991* (Vic), s 18] the approaches outlined in *Carroll* and *Alimic* are preferable. Where a date is specified in a sentence that is affected by strike remissions, Corrections will adjust the date to give effect to strike remissions that arise so either formulation will achieve the desired outcome.

In this example a single non-parole period would have to be imposed rather than a recognisance release order, as the sentence imposed exceeds three years - see s 19AB and *R v Alimic* [2006] VSCA 273, [6] - [7].

[In sentencing federal offenders from 16 January 2003 the court no longer has to have regard to the absence of remissions in setting the head sentence because s 16G was repealed from that date. Prior to 16 January 2003 this downwards adjustment to the head sentence had an impact on the non-parole period or pre-release period as this is set by reference to the head sentences. Now federal law on this issue is in line with s 5(2AA) of the *Sentencing Act 1991* (Vic).]


Example 2: Partially cumulative/concurrent sentences

In the factual situation set out in example 1, the court could achieve partial cumulacy/concurrency between the sentences in two ways.

a) It could do so by fixing the commencement of both sentences on specified dates – s 19(2) Crimes Act 1914 (Cth). For example, directing that the 18 month sentence commence on the date of sentencing, say 1 February 2016, and the sentence of 4 years to commence on 1 November 2016. The effective head sentence would be 4 years 9 months.

b) Alternatively, after fixing the commencement of the 18 month sentence on the date of sentencing say 1 February 2016, the sentence of 4 years can be directed to commence a number of months after the commencement of the sentence on count 1. For example, directing that the 18 month sentence commence on the date of sentencing, say 1 February 2016 and the sentence of 4 years commence 9 months after the commencement of the sentence on count 1.

Either of these two methods will satisfy the legislative requirements of s 19(2) and result in an effective head sentence of 4 years 9 months.

In this example a single non-parole period will have to be imposed rather than a recognisance release order as the sentence imposed exceeds three years - see s 19AB and R v Alimic [2006] VSCA 273, [6] - [7].

[In sentencing federal offenders from 16 January 2003 the court no longer has to have regard to the absence of remissions in setting the head sentence because s 16G was repealed from that date. Prior to 16 January 2003 this downwards adjustment to the head sentence had an impact on the non-parole period or pre-release period as this is set by reference to the head sentences. Now federal law on this issue is in line with s 5(2AA) of the Sentencing Act 1991 (Vic).]

Example 3: Partially cumulative/concurrent federal sentence

- An offender is sentenced on 1 February 2016 to three federal terms of imprisonment. The sentences are of 3 years, 6 years and 7 years. To achieve an effective sentence of 9 years with a non-parole period of 5 years the following orders could be made pursuant to s 19(2) Crimes Act 1914 (Cth). The sentence of 3 years to commence on the date of sentencing, say 1 February 2016, the 6 years to commence on 1 September 2017 and the 7 year sentence to commence on 1 February 2018. A single non-parole period of 5 years in respect of all federal sentences would be fixed – see s 19AB. See R v Nagy [1992] 1 VR 637, 651.

[In sentencing federal offenders from 16 January 2003 the court no longer has to have regard to the absence of remissions in setting the head sentence because s 16G was repealed from that date. Prior to 16 January 2003 this downwards adjustment to the head sentence had an impact on the non-parole
Sentencing an offender to imprisonment on federal and state charges at the same sitting where offender not undergoing sentence

388. Leaving to one side the availability of an aggregate sentence for multiple federal offences (see the section on aggregate sentences above), here a separate sentence will need to be imposed for each federal offence. The commencement date of the federal sentence(s) of imprisonment - and so its interrelation with the state sentence(s) - must be specified in an appropriate manner as detailed below. It needs to be borne in mind that in Victoria, leaving aside the Court of Appeal and County Court on appeal, it is not possible to backdate a federal sentence of imprisonment by ordering it to commence on a day earlier than the day of its imposition.\footnote{R v Nagy [1992] 1 VR 637; R v Singh (Unreported, Supreme Court of Victoria, Young CJ, Crockett and Smith JJ, 26 March 1991).} Within certain parameters it is possible to make an order the effect of which is that the federal sentence(s) of imprisonment commence at a future time or date so having the effect of making it/them partially or fully cumulative.

389. A separate single non-parole period or recognisance release order must also be imposed in respect of the federal sentence(s) where the length of the sentence and circumstances require this subject to the overarching discretion in s 19AB(3) and s 19AC(4). A court cannot impose a single non-parole period or recognisance release order in respect of both federal and state terms of imprisonment.\footnote{Commonwealth Prisoners Act 1967 (Cth) s 9AJ; R v Fulop (2009) 236 FLR 376, [9]; Colburn v R [2009] TAS SC 108, [21]-[22].} Even if the same period length is to apply in respect of the federal and state sentences separate orders need to be made. This requirement also existed under the previous Commonwealth legislation dealing with sentencing, the \textit{Commonwealth Prisoners Act 1967} (Cth).\footnote{R v Thomas (1986) 41 SASR 566.}

390. Section 19(3) of the \textit{Crimes Act 1914} (Cth) requires that, where a court sentences an offender to imprisonment on both federal and state offences at the one sitting, the court must “\textit{direct by order}” when the federal sentence imposed commences. The \textit{Crimes Act 1914} (Cth) does not specify when a federal sentence is to commence but, via s 16E, the federal sentencing regime picks up and applies state legislation in relation to the commencement of sentences. In the Commonwealth context stating only that the sentences are to be cumulative or concurrent will be ineffective and not satisfy the legislative requirement in s 19(3). See \textit{R v Nagy}, \textit{O’Brien v R}, \textit{R v Carroll}, \textit{R v Alimic}, \textit{R v Scerri and Fasciale v R} above as to how this legislative requirement can be satisfied.

391. Where a state sentence is imposed on a person already undergoing a federal term – this seems to include where a federal sentence is announced first on the same day – and the state sentence is to commence sometime in the future, s 16(4) of the \textit{Sentencing Act 1991} (Vic) requires the court to direct when the state sentence is to commence. This requires the court to specify its
commencement date of the state sentence in that context.\textsuperscript{475}

392. Section 19(3) of the \textit{Crimes Act 1914} (Cth) imposes a limit on the direction a court can make in respect of a federal sentence. A federal sentence can be directed to commence at a future point in time beyond the date of sentencing but an outer limit exists, as a direction cannot be so that a federal sentence commences later than at the end of the sentence(s) the commencement of which has already been fixed or the last of those sentences.\textsuperscript{476} If a non-parole period applies in respect of a state sentence and the court wishes to impose a federal sentence which is cumulative on that state sentence, the court cannot order the federal sentence to commence later than the expiration of the state non-parole period.\textsuperscript{477} The maximum degree of cumulacy possible is where the court orders that the federal sentence of imprisonment commences immediately after the end of the state non-parole period.\textsuperscript{478} Again, this limitation on the direction that a court can make is in place to ensure that there is no gap between sentences.\textsuperscript{479}

393. The law governing the commencement of state sentences is set out in ss 16 - 18 of the \textit{Sentencing Act 1991} (Vic). It is possible to order that a state sentence commence after the commencement of a federal sentence at a time fixed by reference to the commencement of the federal sentence e.g. six months after the commencement of the federal sentence or by a date.\textsuperscript{480}

\begin{itemize}
\item \textbf{Example 4: Cumulacy and concurrency for joint federal & state offender}
\end{itemize}

A joint federal/state offender is sentenced to 3 years with a non-parole period of 1 year on the state offence. The court imposes a sentence of 4 years with a non-parole period of 2 years on the federal offence. The maximum degree of cumulacy which is permitted is for the federal term to commence immediately after the end of the minimum non-parole for the state offence i.e. immediately after the expiration of the 1 year minimum imposed in respect of the state offence - see \textit{Crimes Act 1914} (Cth) s 19(3)(d). To achieve a lesser degree of cumulacy, the court could direct that the federal sentence commence on a nominated date before the expiration of the 1 year minimum.

This formulation was used in \textit{R v Carroll} to achieve partially cumulative/concurrent state and federal sentences. Alternatively, the federal sentence can be fixed to commence by reference to the commencement of the state sentence. For example, by directing, pursuant to s 19(3) \textit{Crimes Act 1914}, that the federal sentence commence 6 months after the commencement of the state sentence. In this example this would achieve a total effective sentence of 4½ years with a non-parole period of 2½ years.

\textsuperscript{475} \textit{R v Fulop} (2009) 236 FLR 376 at [8].  
\textsuperscript{476} \textit{Crimes Act 1914} (Cth), s 19(3)(c).  
\textsuperscript{477} \textit{Scerri v The Queen} [2010] VSCA 289; \textit{Fasciale v R} (2010) 30 VR 643, [34].  
\textsuperscript{478} \textit{Crimes Act 1914} (Cth), s 19(3)(d).  
\textsuperscript{479} See \textit{Kidd v R} [1972] VR 728.  
\textsuperscript{480} \textit{O’Brien v R} (1991) 57 A Crim R 80 which was decided before the \textit{Sentencing Act 1991} (Vic); \textit{R v Fulop} (2009) 236 FLR 376, [8].
Example 5: Commonwealth fully suspended sentences & state custodial term

In a joint federal/state matter, the sentencer may consider it appropriate to impose terms of imprisonment for each offence, but fully suspend only the federal sentence(s). As noted above s 19AG means that it is not open to a court to fully suspend or partially suspend a period of imprisonment imposed for a terrorism offence, treachery, espionage or treason. Leaving aside the capacity to impose an aggregate sentence (see above), a separate sentence must be imposed for each federal offence. To fully suspend a federal sentence or sentences an ancillary order under s 20(1)(b) of the Crimes Act 1914 (Cth) releasing the offender “forthwith” on an undertaking in the prescribed form (not the state form) must be made.

For example, a term of 8 months’ imprisonment for a state offence may be ordered to commence on its imposition on 1 February 2016 and sentences of 4 months and 3 months may be imposed on federal offences. To fully suspend, such federal terms requires one accompanying order in the prescribed form – see Form 12 of Schedule 3 to the Crimes Regulations 1990 (Cth) – releasing the offender “forthwith” on the federal sentences.

If it is intended in the example above that the fully suspended federal sentences commence at the expiration of the state sentence that can be done by ordering, pursuant to s 19(3) Crimes Act 1914 (Cth), either that the federal sentence(s) commence at the expiration of the state sentence or on the relevant date namely 1 November 2016. In this example it is important that the commencement date of the federal sentences or an order for the federal sentences to commence after the expiration of the state sentence be included in an order under s 20(1)(b). If that order is made, the federal sentences will not commence until the expiration of the State sentence, and pursuant to the order under s 20(1)(b) the offender will then be released “forthwith” on the federal sentence(s).

Alternatively if it was intended that the state and federal sentences run concurrently, the federal sentences would be ordered to commence on the same day as the state sentence i.e. 1 February 2016. This would result in the offender being imprisoned on the state offence alone. If the federal sentence of imprisonment is fully suspended the recognisance/undertaking would commence on the same day i.e. 1 February 2016, i.e. while the offender is serving the state sentence. The offender will not be released until the state sentence is served and is undergoing the federal recognisance while serving the state sentence.

Note: The practice is not for pre-sentence detention in a fully (or partially) suspended sentence to be reckoned as already served but to specify it and to state it has been taken into account in deciding whether to fully or partially suspend the sentence and the length of the sentence and any pre-release period – see paragraph 380.

Sentencing an offender to imprisonment on federal charge(s) where offender is already undergoing a state sentence or undergoing a federal sentence

a. **Undergoing a state sentence**

394. Here, the court, in imposing the federal sentence (including aggregate sentence of imprisonment) or
individual sentences, must direct when the federal sentence or sentences imposed is/are to commence.\(^{481}\) Again, merely stating that the federal sentence is to be cumulative or concurrent will be ineffective and not satisfy the legislative requirement.\(^{482}\)

395. Limits are imposed so that no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or commences later than the end of those sentences.\(^{483}\) The effect is to impose an outer limit to the extent of cumulacy of sentences. If a non-parole period applies in respect of an existing state sentence, it is not possible to order that a federal sentence commence later than immediately after the end of the state non-parole period.\(^{484}\) That is, the maximum degree of cumulacy permitted is that the first federal sentence to be served must commence immediately after the end of the state non-parole period or minimum term. Otherwise there would be a gap between the two sentences and the prisoner would be released only to be returned to prison at a later time.

396. In *Mercanti v The Queen*\(^{485}\) Hall J, with whom McLure P and Buss JA agreed, noted that in *The Queen v Dobie* [2004] 2 Qd R 537\(^{486}\) the Queensland Court of Appeal had held that s 19(1)(b) had no application where an offender fell to be sentenced for federal offences when serving a state sentence if the state non-parole period had passed. Hall J expressed the view that the interpretation expounded in *Dobie* appeared to be correct and was consistent with the purposes of the subsection.

397. See also *R v Knight* [2013] QCA 277\(^{487}\) where the learned sentencing judge had directed the federal sentences to commence ‘upon the expiration of his incarceration for the current term of imprisonment being served’. Atkinson J, with whom Muir JA and Fraser JA agreed, stated that ‘It is open to doubt that a sentencing judge may direct a sentence to commence on a date that is uncertain or that is dependent upon a decision of a State administrative body’. But the court did not determine that issue, as under the Queensland *Corrective Services Act 2006* there was no provision for a prisoner to be granted parole in order to commence a sentence of imprisonment.

398. The requirement that a non-parole period or recognisance release order be ordered in respect of the federal sentence is subject to the overarching discretion in ss 19AB(3) and 19AC(4) of the *Crimes Act 1914* (Cth).\(^{488}\)

| Example 6: **Offender already serving state sentence** |

\(^{481}\) *Crimes Act 1914* (Cth), s 19(1)(b).


\(^{483}\) *Crimes Act 1914* (Cth), s 19(1)(a).

\(^{484}\) *Crimes Act 1914* (Cth), s 19(1)(b).

\(^{485}\) *Mercanti v The Queen* (2011) 210 A Crim R 213.

\(^{486}\) *The Queen v Dobie* [2004] 2 Qd R 537.

\(^{487}\) *R v Knight* [2013] QCA 277.

\(^{488}\) *Hancock v R* [2012] NSWCCA 200, [45] - [51].
An offender is serving a state sentence of 3 months imprisonment imposed on 1 February 2016. This offender, during the period of the state sentence, is sentenced on 1 March 2016 to imprisonment of 2 months on a federal charge. If a totally cumulative federal sentence is to be imposed the court must direct, pursuant to the Crimes Act 1914 (Cth), s 19(1), that the federal sentence commence at the expiration of the state sentence. A partially cumulative/concurrent sentence would be achieved by directing that the federal sentence commence on a specified date, for example 1 April 2016. Such an order would result in 1 month of the state sentence being cumulative on the 2 month federal sentence. (If the state sentence had a non-parole period the maximum degree of cumulacy permitted would arise where the federal sentence was ordered to commence immediately after the expiration of the state non-parole period – s 19(1)(b).)

Ordinarily a federal sentence of imprisonment of 3 years or less must be accompanied by a recognisance release order the effect of which is to fully or partially suspend the federal sentence. For federal sentences not exceeding 6 months a straight sentence can be imposed and a recognisance release order is not required – Crimes Act 1914 (Cth), s 19AC(3). There is an overarching discretion not to impose a recognisance release order – see s 19AC(4).

**Example 7: Federal sentence breaching state parole**

If a federal sentence of imprisonment is imposed on a person who is on state parole the following principles apply:

- The Victorian Parole Board has a discretion to breach and as to how much of the outstanding state parole will be required to be served, and this may not be known at the time of sentencing for the federal offence. This is to be contrasted with a breach of federal parole occasioned by the imposition of more than 3 months imprisonment (not fully suspended) where federal parole is automatically revoked – Crimes Act 1914 (Cth) s 19AU and the federal balance is required to be served from that time – Crimes Act 1914 (Cth), s 19AQ.

- If the Victorian Parole Board has revoked the parole, the court in sentencing the offender for the subsequent federal offence must have regard to the sentence liable to be served because of the revocation of state parole – s 16A Crimes Act 1914 (Cth). If the attitude of the Victorian Parole Board is not known at the time and revocation is possible, adjourning the matter might be viable. If the further offending had been state offending, the court would be precluded from having regard to the principle of totality in imposing a sentence for the subsequent offence – s 5(2AA) Sentencing Act 1991 (Vic) but equally if it had been clear that the Parole Board had decided to revoke the state parole and require the balance to be served the totality principle would not be precluded.

- Where state parole is breached by a federal sentence the new (federal) sentence is served first and then the unserved balance or as much of it is as the Parole Board requires follows – s 15(2) Sentencing Act 1991 (Vic). As the new (federal) sentence is served first it should be declared to commence on the date it is imposed pursuant to Crimes Act 1914 (Cth), s
b. Undergoing a federal sentence

399. Again, the Court must not only “direct by order” when the federal sentence(s) imposed commences, but ensure that no federal sentence commences later than the end of a sentence the commencement of which has already been fixed.489

**Example 8: Offender already serving federal term with non-parole period**

An offender is sentenced on 1 February 2016 for a federal offence to 4 years imprisonment with a non-parole period of 2 years. If that offender is sentenced to a further term of imprisonment in respect of a federal offence of 3 months on 1 April 2016 the court must direct when the 3 month sentence is to commence – s 19(1) Crimes Act 1914 (Cth). In this example a specified date should be nominated. The second sentence cannot commence later than the end of the existing sentence – s 19(1) Crimes Act 1914 (Cth). It also cannot be backdated if imposed at first instance. See R v Nagy and R v Singh above.

In this example, a new single non-parole period (in respect of the two federal sentences) must be imposed – see above.

400. Where the federal offender sentenced to a further federal term or terms is already the subject of a non-parole order or a recognisance release order, the Crimes Act 1914 (Cth) requires that the court give consideration to imposing a new global non-parole order or recognisance release order.

401. Where the offender is already the subject of an existing non-parole order s 19AD applies. Section 19AD(2) requires the court, after considering the relevant circumstances, to either:

i. make an order confirming the existing non-parole period, or

ii. fix a new single non-parole period in respect of all the federal sentences to be served or completed but the court cannot make a recognisance release order.490 Any new non-parole period fixed must not have the result of permitting the offender to be released earlier than would be the case if no further sentence is imposed,491 or

iii. cancel the existing non-parole period and decline to fix a new one if the court decides in the circumstances a non-parole period is not appropriate. Reasons must be stated and entered into the records of the court.

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489 Crimes Act 1914 (Cth), s 19(1)(a).

490 Crimes Act 1914 (Cth), s 19AD(4). In the state context there is also an obligation to set a new single non-parole period where a state offender who has a non-parole period is sentenced to another term of imprisonment – see Sentencing Act 1991 (Vic), s 14(1) and Mak v R [2011] VSCA 5.

491 Crimes Act 1914 (Cth), s 19AD(3)(b).
Example 9: Offender already serving federal term of imprisonment with a non-parole period

An offender is sentenced on 1 February 2016 for federal offences and sentenced to a total effective sentence of 4 years imprisonment with a non-parole period of 2 years. If that offender is sentenced on 1 June 2016 to a further term of 8 months in respect of a federal offence and

a. the 8 months is to be totally cumulative on the existing federal sentence
   i. an order, pursuant to Crimes Act 1914 (Cth) s 19(1), would be made that the 8 months sentence commence at the expiration of the non-parole period imposed for the earlier federal offence; and
   ii. a new non-parole period would be made pursuant to Crimes Act 1914 (Cth), s 19AD(2). That is in this case 2 years and 4 months i.e. 2 years 8 months less the 4 months of the earlier sentence already served.

b. the 8 months is to be totally concurrent
   i. an order would be made that the 8 months sentence commence on the day of sentencing, say 1 June 2016 pursuant to Crimes Act 1914 (Cth), s 19(1); and
   ii. an order would be made confirming the existing non-parole period which specifies a non-parole period of 2 years (from 1 February 2016). If imposed in June 2013 the new non-parole period would be 20 months i.e. 2 years less the 4 months already served. Such a totally concurrent sentence will not offend Crimes Act 1914 (Cth), s 19AD(3).

402. The effect of s 19AD is qualified where the subsequent offence is one of terrorism, treachery, treason or espionage, because when an offender is imprisoned for any of these offences, the court is required to impose a mandatory minimum non-parole period – see s 19AG of the Crimes Act 1914 (Cth).

403. Where the offender is already subject to an existing recognisance release order and before being released the court imposes a further federal sentence on the offender, s 19AE applies. Here, the court, after considering the relevant circumstances, is required to do one of the following:

- make an order confirming the existing recognisance release order;\(^\text{492}\)
- make a new recognisance order in respect of all federal sentences the person is to serve or complete;\(^\text{493}\)

\(^{492}\) Crimes Act 1914 (Cth), ss 19AE(2)(d).
\(^{493}\) Crimes Act 1914 (Cth), ss 19AE(2)(b) and (3)(a).
- where the new aggregate sentence does not exceed 6 months, the court need not make a recognisance release order;\textsuperscript{494}

- where, as a result of the sentence imposed, the person has to serve, in the aggregate, more than three years (not 3 years or less), the court must fix a non-parole period rather than impose another recognisance release order because of the effect of s 19AB (which prohibits recognisance release orders being made where a sentence of imprisonment of 3 years or more is imposed);\textsuperscript{495}

- if the court imposes a new recognisance release order or non-parole period, this must not be so as to release the person earlier than if the further sentence had not been imposed;\textsuperscript{496} or

- where the court considers that neither a recognisance release order or a non-parole period is appropriate, cancel the existing recognisance release order and decline to make a new one. Reasons must be stated and entered into the court records.\textsuperscript{497}

\textsuperscript{494} Crimes Act 1914 (Cth), s 19AD(3).
\textsuperscript{495} Crimes Act 1914 (Cth), s 19AE(2)(f).
\textsuperscript{496} Crimes Act 1914 (Cth), s 19AD(3).
\textsuperscript{497} Crimes Act 1914 (Cth), s 19AE(5).
Example 10: **Offender already serving federal sentence with recognisance release order**

An offender is sentenced on 1 February 2016 for a federal offence to 2 years imprisonment with an order that he/she be released after 1 year (1 February 2017) (a recognisance release order). If that offender is sentenced to a further term of 8 months in respect of a federal offence on 1 June 2016 and

a. the 8 months is to be totally cumulative
   i. an order would be made, pursuant to *Crimes Act 1914* (Cth) s 19(1)), that the 8 months sentence commence at the expiration of the existing pre-release period imposed under the recognisance release order for the earlier federal sentence. Another appropriate way would be to specify the precise date i.e. 1 February 2016, though the effect of any subsequent strike remissions will mean that the non-release period will expire before the specified. Corrections would bring forward the date administratively so that the offender got the benefit of the strike remissions and not be disadvantaged; and
   ii. a new recognisance release order would be made i.e. in this case stating an effective sentence of 2 years 4 months with a pre-release period of 1 year 4 months. That is 1 year 8 months less the 4 months of the earlier sentence served.

b. the 8 months is to be totally concurrent
   i. an order would be made, pursuant to *Crimes Act 1914* (Cth) s 19(1), that the 8 months sentence commence on the day of sentencing, say 1 June 2016, for example; and
   ii. an order would be made confirming the existing recognisance release order which specifies a pre-release period of 1 year from 1 February 2016 i.e. 1 February 2017.

404. In the above example if the resulting unserved aggregate sentence was more than 3 years the court would have to impose a new single non-parole period rather than a new single recognisance release order.498

405. The effect of s 19AE is qualified where the subsequent offence is one of terrorism, treachery, treason or espionage and the court is required to impose a new single non-parole period.499

**Automatic breach of federal parole by being sentenced to a further term of imprisonment of more than three months**

406. Where a federal offender is on parole and is sentenced to a term of imprisonment of more than 3 months for a state, territory or federal offence (other than a fully suspended sentence) the breach of federal parole is automatic – see s 19AQ of the *Crimes Act 1914* (Cth). Where the imprisonment is 3 months or less or more than 3 months but fully suspended, the Attorney-General may decide to breach the offender’s parole – see s 19AU of the *Crimes Act 1914* (Cth).

407. As previously noted (see paragraphs 313 - 314) the principles that apply to sentencing in the context

498 *Crimes Act 1914* (Cth), s 19AE(2)(f).
499 *Crimes Act 1914* (Cth), s 19AG.
of breach of parole depend on whether the parole breached is federal or state. The principles set out in the next example apply equally where parole is automatically revoked by a further sentence or revoked by the federal Attorney-General.

408. The example below deals with a breach of federal parole by a subsequent sentence in excess of 3 months where it is not fully suspended.

<table>
<thead>
<tr>
<th>Example 11: Breach of federal parole by sentence of more than 3 months (but not fully suspended)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A federal offender is sentenced to 6 years with a non-parole period of 4 years on 1 February 2010 and is released on federal parole on 1 February 2014. On 1 February 2015 the offender is sentenced to 2 years for another offence (state, territory or federal). See the principles below.</td>
</tr>
</tbody>
</table>

409. **Principles:** The principles that apply to the breach of federal parole are:

i. On federal parole the offender is taken to be under sentence and not to have served the balance of the sentence on release unless the parole order ends without it being revoked;\(^{500}\)

ii. Federal parole is revoked automatically by a sentence in excess of 3 months if not fully suspended;\(^ {501}\)

iii. If at the time of the imposition of such a sentence for an offence committed within the parole period the federal parole period has already ended s 19AQ(2) has the effect that the parole order is taken to have been revoked from the time immediately before the end of the parole period;

iv. The court imposing the new sentence that revokes the federal parole is required to issue a warrant authorising the detention of the offender;\(^ {502}\)

v. Where federal parole is breached the whole of the unserved balance falls to be served first,\(^ {503}\) unlike for breach of state parole where the unserved balance is served after the new sentence;\(^ {504}\)

vi. The unserved balance of the federal parole (2 years in this example) commences on the day the offender is sentenced to more than 3 months, in this example 1 February 2015;

\(^{500}\) *Crimes Act 1914 (Cth), s 19A2C(1).*  
\(^{501}\) *Crimes Act 1914 (Cth), s 19AQ(1).*  
\(^{502}\) *Crimes Act 1914 (Cth), s 19AS.*  
\(^{503}\) *Crimes Act 1914 (Cth), s 19AQ(5).*  
\(^{504}\) *Sentencing Act 1991 (Vic), s 15(2).*
vii. In sentencing on a federal offence(s) where parole has been revoked the court has to have regard to the totality principle as reflected in Crimes Act 1914 (Cth) ss 16B and 19AR(2). Section 16B requires the court to have regard to the sentence an offender is liable to serve because of the revocation of a parole order made and s 19AR(2) requires the court in sentencing to have regard to the total period the person will have to serve including as a result of the parole breach;

viii. In sentencing for a federal offence the court also has to have regard to “clean street time” in fixing the new non-parole period or pre-release period under a recognisance release order (where the new aggregate sentence does not exceed 3 years);\(^5\)05

ix. If the breaching sentence(s) is federal, unlike if it was a state offence, there is no presumption that the breaching federal sentence will be cumulative. If the breaching offence is a state offence there is a presumption of cumulacy;\(^5\)06

x. A commencement date for the imprisonment imposed for the breaching offence (assuming it is federal) must be specified (Crimes Act 1914 (Cth) s19(1)) and this is how the degree of cumulation/concurrency is specified bearing in mind the requirement to have regard to totality and to take into account clean street time whilst on parole;

xi. In this example, assuming the new federal sentence of two years is ordered to commence one year after the date of sentence i.e. on 1 February 2016 the new total effective sentence will be 4 years (4 years uncompleted parole plus 2 years being the new sentence commencing after the first year). A release mechanism of a non-parole period applies because the new aggregate federal sentence is more than 3 years - s 19AR(2)(d) Crimes Act 1914 (Cth). Where the new sentence and the unserved part of the outstanding sentence aggregate to three years or less a recognisance release order may be made – s 19AR(2)(e) Crimes Act 1914 (Cth) and s 19AE(2)(d).


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\(^5\)05 Crimes Act 1914 (Cth), ss 19AA(3) and 19AR.

\(^5\)06 Sentencing Act 1991 (Vic), s 5(2AA).
APPENDIX 1

FEDERAL SENTENCING CHECKLIST

<table>
<thead>
<tr>
<th>Crimes Act section</th>
<th>Effect of provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>4AA</td>
<td>One <strong>Penalty unit</strong> is valued at: $507</td>
</tr>
<tr>
<td></td>
<td>• $180 for offences committed on or after 31 July 2015 $508,</td>
</tr>
<tr>
<td></td>
<td>• $170 for offences committed between 28 December 2012 $509 and 30 July 2015; and</td>
</tr>
<tr>
<td></td>
<td>• $110 for offences committed between 7 April 1997 and 27 December 2012.</td>
</tr>
<tr>
<td>4B(2)</td>
<td>Where an offence is punishable by imprisonment only a <strong>pecuniary penalty</strong> 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.</td>
</tr>
<tr>
<td>4J</td>
<td>This section enables certain <strong>indictable offences to be dealt with summarily</strong> and establishes the maximum sentences when an offence is dealt with summarily.</td>
</tr>
<tr>
<td>4JA</td>
<td>This section enables certain indictable offences that are punishable by a <strong>pecuniary penalty only</strong> to be dealt with summarily.</td>
</tr>
<tr>
<td>4K</td>
<td><strong>Aggregate penalties</strong></td>
</tr>
<tr>
<td></td>
<td>Permits a court to impose one penalty in respect of charges against the same provision of a law of the Commonwealth “founded on the same facts, or form, or are part of, a series of offences of the same or similar character”.</td>
</tr>
<tr>
<td></td>
<td>Section 4K <strong>does not enable an aggregate sentence of imprisonment to be imposed in Victoria where the charges proceed on indictment</strong> though this is possible as a result of the amendment to s 9 of the Sentencing Act 1991 (Vic). This is picked up and applied to federal matters by ss 68 and 79 of the Judiciary Act 1903 (Cth) and s 1338B of the Corporations Act 2001 in relation to offences under that Act. One penalty can also be imposed for a number of offences on indictment where this is open under a state sentencing option that is applied by s 20AB of the Crimes Act 1914 (Cth).</td>
</tr>
<tr>
<td></td>
<td>Notwithstanding s 4K a state law of procedure may apply pursuant to the Judiciary Act 1903</td>
</tr>
</tbody>
</table>

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$507$ Penalty units are reviewed every three years.

$508$ 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.

$509$ 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.
<table>
<thead>
<tr>
<th><strong>Crimes Act</strong> section</th>
<th><strong>Effect of provision</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(Cth) and joinder of offences against different provisions and that may permit a single penalty to be imposed. See paragraphs 358 - 363. But one penalty cannot be imposed for state and federal offences.</td>
<td></td>
</tr>
<tr>
<td>16A(1)</td>
<td>The primary obligation on a sentencing court is to impose a sentence or order that is <strong>of a severity appropriate in all the circumstances</strong> of the offence – <em>R v Hili</em> (2010) 242 CLR 520. So there is not a judicially determined norm or starting point in terms of how much of the sentence of imprisonment should be served in prison before release.</td>
</tr>
<tr>
<td>16A(2)</td>
<td>This is a non-exhaustive list of matters to which the court is to have regard where relevant and known when passing sentence. The list is supplemented by relevant common law principles. Note that the court is precluded from taking customary law or cultural practice into account to either mitigate or aggravate the seriousness of the criminal behaviour.</td>
</tr>
<tr>
<td>16A(3)</td>
<td>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.</td>
</tr>
<tr>
<td>16AB</td>
<td>Sets out matters relevant to reliance on victim impact statements such as: - 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.</td>
</tr>
<tr>
<td>16B</td>
<td>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). This is particularly relevant where an offender is to be sentenced when he/she has breached federal parole.</td>
</tr>
<tr>
<td>16BA</td>
<td>The Court can take other federal/external territory offences into account. Sets out a range of rules and qualifications where this is to occur.</td>
</tr>
<tr>
<td>16C</td>
<td>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.</td>
</tr>
</tbody>
</table>

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510 *Crimes Act 1914* (Cth), s 16A(2A) .
<table>
<thead>
<tr>
<th>Crimes Act section</th>
<th>Effect of provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>19B</td>
<td><strong>Bond without conviction</strong></td>
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<td></td>
<td>If the conditions in s 19B(1)(b) have been met, the court:</td>
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<td>- dismiss the charge/s – s 19B(1)(c); or</td>
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<td></td>
<td>- discharge the person without conviction for a period not exceeding 3 years – s 19B(1)(d)</td>
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<tr>
<td></td>
<td>- may order compliance with conditions for a period not exceeding 2 years – s 19B(1)(d)(iii)</td>
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<tr>
<td></td>
<td>- shall 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 recognisance may be varied – s 19B(2)</td>
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<tr>
<td></td>
<td>- shall provide a copy of the bond to the offender – s 19B(4)</td>
</tr>
<tr>
<td>20(1)(a)</td>
<td><strong>Bond with conviction</strong></td>
</tr>
<tr>
<td></td>
<td>- period of order may not exceed 5 years – s 20(1)(a)(i)</td>
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<tr>
<td></td>
<td>- may also order compliance with conditions for a period not exceeding 2 years</td>
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<tr>
<td></td>
<td>Note that a fully suspended or partially suspended federal sentence or sentences requires an ancillary order being made under s 20(1)(b).</td>
</tr>
<tr>
<td>20(1)(b)</td>
<td><strong>Imprisonment suspended forthwith or after serving some time</strong> (the equivalent of a state suspended sentence)</td>
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<tr>
<td></td>
<td>Not open in respect of sentences of imprisonment imposed for a terrorism offences, treachery, espionage or treason – s 19AG Crimes Act 1914 (Cth)</td>
</tr>
<tr>
<td>20A</td>
<td>Deals with breaches of bonds (imposed pursuant to ss 19B and 20(1)(a)) that have been fully suspended and partially suspended sentences.</td>
</tr>
<tr>
<td>20AA</td>
<td>Empowers a court to discharge or vary conditions of a bond imposed under ss 19B or 20(1).</td>
</tr>
<tr>
<td>20AB</td>
<td>Enables the Commonwealth to pick up and apply prescribed state sentencing options such as CCOs. S 20AB only allows state sentencing options on conviction to be prescribed. The Community Correction Order has been prescribed from 14 March 2012.</td>
</tr>
</tbody>
</table>
### Crimes Act section | Effect of provision
---|---
20AC | Deals with a **breach** of prescribed state sentencing options that have been picked up under s 20AB. Provides options to the sentence for dealing with the breach by for example: - taking no action - revoking the order and re-sentencing - imposing a pecuniary penalty not exceeding 10 penalty units
20C | This section incorporates all the state sentencing options for children or young persons. In respect of a “child or young person” which is not defined, the full range of federal options and any additional state sentencing options are available.

### Imprisonment

17B(1) | **Imprisonment not permitted for certain offences**
Imprisonment precluded if convicted of one or more property/money offences against ss 29 and 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 (and before 24 November 2001 to ss 29, 29A, 29B, 29C, 29D, 71 and 72 of the Crimes Act 1914 (Cth)) 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.

17A | 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.
### Crimes Act section | Effect of provision
--- | ---
**16E** | Commencement of sentences and pre-sentence detention
This section adopts the law on the commencement of sentences and non-parole periods for federal offenders. However, the *Crimes Act 1914* (Cth) has its own regime for determining when a non-parole period or recognisance release order ought to be made - see ss 19AB to 19AJ. State legislation has no application as to when a non-parole period of recognisance release order ought to be made.

Pre-sentence detention for the offence must be taken into account. Sections 16E(2) & (3) adopt s 18 of the *Sentencing Act 1991* (Vic) in respect of the pre-sentence which is to be reckoned as served unless ordered otherwise for the offence. The current practice is that unrelated pre-sentence detention (i.e., outside of s 18 *Sentencing Act 1991* (Vic)) must be considered for federal offenders as it is for state offenders – *R v Renzella* [1997] 2 VR 88 and *R v Wade* [2005] VSCA 276.

The current practice is not to reckon pre-sentence detention where the sentence is fully or partially suspended but to otherwise order under s 18(1) of the *Sentencing Act 1991* (Vic) as applied by s 16E of the *Crimes Act 1914* (Cth) by specifying the period and stating it has been taken into account in the decision to fully suspend or partially suspend and on the term of imprisonment and any pre-release period.

**16F** | If the court imposes a federal sentence and fixes a non-parole period or a recognisance 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.

**16G** | Repealed from 16 January 2003
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.

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:

- 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.

See the section of the paper on Imprisonment, which sets out a note on how s 16G operated prior to its repeal and the effect of its repeal.
**Effects of provision**

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>19(2)</td>
<td>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. This can be done by stating when each sentence will commence by reference to a date or by reference to the commencement of the other sentences – R v Alimic [2006] VSCA 273. Where an aggregate term of imprisonment is imposed this requirement will not apply – DPP v AB (No.2) (2006) 198 FLR 449. Section 19(2) relates to the head sentence(s) not the non-parole period – see R v DS (2005) 153 A Crim R 194. The non-parole period will commence on the commencement of the first head sentence. Federal sentences imposed at first instance cannot be backdated to a date earlier than the date of its imposition – R v Nagy and R v Smith (Unreported, Supreme Court of Victoria, Young CJ, Crockett and Smith JJ, 26 March 1991) The Court of Appeal and the County Court on appeal can backdate a sentence. See s 256(4) of the Criminal Procedure Act 2009 (Vic).</td>
</tr>
<tr>
<td>19(3)</td>
<td>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. Section 16(4) of the Sentencing Act 1991 (Vic) is relevant to the commencement of the state sentence – R v Nagy; O’Brien v R; R v Carroll; R v Alimic; Scerri v The Queen and Fasciale v The Queen.</td>
</tr>
<tr>
<td>19AB</td>
<td>Provides for situations in which a court must impose a non-parole period 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. s 19AB(3) – court may decline to impose a non-parole period on certain grounds s 19AB(4) – court must give reasons for failing to impose a non-parole period.</td>
</tr>
<tr>
<td>19AD</td>
<td>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 sentences for terrorism, treachery, treason or espionage.</td>
</tr>
</tbody>
</table>
### Crimes Act section | Effect of provision
---|---
19AC | Provides for situations in which a court must fix a **recognition release order (RRO)**

- **s 19AC(1)** – where the period of imprisonment does **not exceed 3 years** must make an RRO;

- **s 19AC(3)** – where period of imprisonment is **under 6 months** not required to make an RRO;

- **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 *Hancock v R* [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.

19AE | This section is relevant where the offender is already subject to a federal recognition release order when sentenced but it is qualified by **s 19AG** in relation to sentences for terrorism, treachery, treason or espionage.

19AJ | Separate sentences must be imposed for federal/state offences. That is a single sentence cannot be imposed for both state and federal offences.

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 *R v Novak* (2003) 141 A Crim R 507 and *R v Piacentino* [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.

16AC (formerly 21E) | 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.

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 co-operation with authorities. Those are distinct and separate.
FEDERAL OFFENCES WHICH ARE REGISTRABLE SEX OFFENCES

UNDER THE SEX OFFENDERS REGISTRATION ACT 2004 (VIC)

Class 1 offences (s 7(3)) includes the following federal offences

- Child Tourism offences under the *Crimes Act 1914* (Cth):
  - Section 50BA
  - Section 50BB
  - Section 50DA
  - Section 50DB

- Sexual Servitude offences:
  - Offences against s 270.6 of the *Criminal Code Act 1995* (Cth)

- An offence of attempting, or conspiracy or incitement to commit such an offence.

Class 2 offences (s 7(3)) includes the following federal offences

- Child Tourism offences against the *Crimes Act 1914* (Cth):
  - Section 50BC
  - Section 50BD

- Offences against s 270.7 (deceptive recruiting for sexual services) of the *Criminal Code Act 1995* (Cth) where the victim is a child

- Offences against s 271.4 of the *Criminal Code Act 1995* (Cth) (trafficking in children) or s 271.7 (domestic trafficking in children) in circumstances where the purpose of the exploitation is to provide sexual services.

- Offences relating to the use of telecommunications against the *Criminal Code*, namely:
  - Section 474.19(1) – using a carriage service for child pornography material
  - Section 474.20(1) – possession of child pornography material through a carriage service
  - Section 474.22(1) – using a carriage service for child abuse material
  - Section 474.23(1) – possessing ... child abuse material through carriage service
  - Section 474.26 – use of carriage service to procure person under 16
  - Section 474.27 – use of carriage service to groom person under 16

- Offences under *Customs Act 1901* (Cth) s 233BAB (importing prohibited imports) involving items of child pornography or of child abuse material.

- An offence of attempting, or conspiracy or incitement to commit such an offence.
THE PROCESS OF ADJUSTMENT WHEN SECTION 16G APPLIED

**i.e. PRE 16 JANUARY 2003**

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”.

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.

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”.

Section 16G was initially considered to apply to cases where the court considered an indeterminate life sentence to be the appropriate sentence. The High Court decided that s 16G, when it operated, had no application to life sentences.

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