HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA S126 of 2022
SYDNEY REGISTRY

BETWEEN: **EMMA-JANE STANLEY**
Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
First Respondent
DISTRICT COURT OF NEW SOUTH WALES
Second Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

2. Is a failure by a sentencing judge to undertake the assessment mandated by s 66(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (***CSP Act***) when considering whether to make an intensive corrections order (**ICO**) a jurisdictional error?

3. Did the sentencing judge undertake the assessment mandated by s 66(2) of the *CSP Act* in dismissing the appeal against the appellant's sentence?

Part III: Notice under s 78B of *Judiciary Act 1903*

4. No notice under s 78B of *Judiciary Act 1903* is required to be given.

Part IV: Statement of facts

5. The first respondent (the **respondent**) agrees with the appellant's narrative of facts in the appellant's written submissions (**AS**) at [5]-[21] and the appellant's chronology. There are aspects of the appellant's outline of the legislative framework

governing ICOs (AS [14]-[17]) with which the respondent takes issue. These are addressed in the respondent's statement of argument at [18] to [24] below.

Part V: Argument

The nature of jurisdictional error and the approach to questions of construction

6. A decision that involves jurisdictional error is a decision without legal foundation.[1] When a court fails to comply with a statutory obligation, whether the failure amounts to a jurisdictional error is to be ascertained through the process of statutory construction. That is so whether the relevant error is a failure to have regard to a statutory obligation that is "a condition of the court's jurisdiction,"[2] or a misapprehension of the nature or limits of the statutory function.[3] The question is whether, in application of the rules of statutory construction, the court is satisfied that Parliament is to be taken to have intended that non-compliance with the statutory obligation would deprive the court of its jurisdiction.[4]

7. The task of statutory construction is contextual:[5]

> "Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy."

8. In answering the question of whether Parliament intended that non-compliance with a statutory provision would result in invalidity, the majority in *Craig v South Australia* (***Craig***)[6] "drew a critical distinction between a statutory conferral of decision-making authority on a court and a statutory conferral of decision-making authority on a person or body other than a court",[7] the nature of which was that "the

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[1] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (***Bhardwaj***) at [51] per Gaudron and Gummow JJ.
[2] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [27] per Kiefel CJ, Gageler and Keane JJ; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [1].
[3] *Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCA 28 (***Katoa***) at [31] per Gordon, Edelman, Steward JJ.
[4] *Project Blue Sky Inc v Australian Broadcasting Authority* (***Project Blue Sky***) (1998) 194 CLR 355 at [41] per Brennan CJ (dissenting as to the outcome but not the approach), [91]-[93] per McHugh, Gummow, Kirby and Hayne JJ.
[5] *R v A2* (2019) 269 CLR 507 (***A2***) at [33] per Kiefel CJ and Keane J; see also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 (***CIC***) at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.
[6] (1995) 184 CLR 163.
[7] *Probuild Constructions (Australia) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at [73] per Gageler J.

ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine",[8] an administrative tribunal lacking such authority.

9. Parliament should be taken to have acted with the distinction between an inferior court and an administrative decision-maker in mind, not least because it is relevant for constitutional purposes,[9] but also because the nature of the court's authority is relevant to the construction of the powers of an inferior court when conferred by statute. Therefore, the principle in *Craig* that:[10]

> "a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error…"

informs the approach to be taken to the construction of provisions that govern the exercise of judicial functions,[11] because those provisions are inherently directed at the judicial task of making evaluative determinations of the law as it applies to the facts: see judgment below (**JB**) [48]-[50] per Bell P (CAB 107-108); JB [157] per Leeming JA (CAB 145); JB [195] per Beech-Jones JA (CAB 160). Section 66 of the *CSP Act*, being a part of the process of sentencing, is a provision that informs the undertaking of an inherently judicial function.

10. Contrary to the Appellant's submissions at AS [45]-[50], it is highly relevant to the construction exercise that the assessment task to be undertaken by a court in accordance with s 66 is an evaluative process involving consideration and weighing of a number of well-recognised principles of sentencing law. That is not to characterise the District Court's task on appeal at 'a higher level of generality' (AS [50]); rather, it is what the Court is required to do when applying s 66 in the course of conducting an appeal on sentence by way of rehearing. The fact that the s 66 task arises *after* the Court has reached a determination that the offender should be sentenced to imprisonment does not mean that the task undertaken by the District Court is not a process of instinctive synthesis as described in *Markarian v The*

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[8] *Craig* at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (***Kirk***) at [68]-[70].
[9] See eg *Burns v Corbett* (2018) 265 CLR 304; *Kable v DPP (NSW)* (1996) 189 CLR 51.
[10] *Craig* at 180.
[11] *Katoa* at [45] per Gordon, Edelman, Steward JJ.

Queen.[12] The non-determinative outcome of the s 66(2) exercise and the range of relevant matters to be considered in the Court's discretion pursuant to s 66(3) requires such a conclusion.

11. Other relevant contextual matters, in the exercise of statutory construction, include that: (a) many errors of courts in the misapplication of their statutory powers will be corrected on appeal or other referral or review mechanisms, where available, without resort to jurisdictional error;[13] but (b) the *CSP Act* is enacted against the background of a privative clause applying to decisions of the District Court on appeal from the Local Court that is expressly designed to limit the scope of review and in particular, to extinguish any rights of further appeal.[14] Privative clauses applying to District Court appeals have been in operation since before Federation.[15] Parliament can be taken to have been aware of this statutory reality when enacting the provisions of the *CSP Act* governing the making of ICOs, particularly where, as here, the sentences for which ICOs are available are within the jurisdictional limits of the Local Court[16] from which appeals lie to the District Court.[17] It can be expected that, in this context, Parliament would use clear and unambiguous language to express the intention, if it be so, that non-compliance with s 66(2) of the *CSP Act* should invalidate the sentence.

12. Another contextual factor is the mischief that the statute remedies; "what it is that the statute seeks to achieve."[18] It is recognised that "if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance."[19] In the present case, the object of the ICO regime is "to reduce an

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[12] (2005) 228 CLR 357 at [36]-[39] (Gleeson CJ, Gummow, Hayne and Callinan JJ); [69]-[84] (McHugh J), [133]-[135] (Kirby J). This appears to be acknowledged in AS [37].
[13] For example, where a person is convicted on indictment and an appeal lies with leave to the Court of Criminal Appeal: s 5(1)(c) *Criminal Appeal Act 1912* (NSW) – in which case, s 101A of the *CSP Act* operates so that declarations that a failure to comply with a provision of the *CSP Act* declared not to invalidate the sentence may still be considered on appeal. Similarly, a person who was a party to appeal proceedings in the District Court may request that a question of law arising on the appeal be referred on a case stated to the Court of Criminal Appeal, even where the appeal proceedings have been disposed of. In such proceedings, the Court of Criminal Appeal may quash any sentence of the District Court determined on the appeal.
[14] Section 176 *District Court Act 1973* (NSW), see *Jamal v Director of Public Prosecutions (NSW)* [2019] NSWCA 121 at [8].
[15] See the history set out in AS [18], fn 3.
[16] *Criminal Procedure Act 1986* (NSW), ss 267(2), 268 (1A), *CSP Act* ss 53B, 58(1), *Crimes (Appeal and Review) Act 2001* (NSW) s 71; cf *CSP Act* s 68.
[17] *Crimes (Appeal and Review) Act 2001* (NSW) s 11.
[18] *A2* at [33].
[19] *A2* at [37], quoting *CIC* at 408.

offender's risk of re-offending through the provision of intensive rehabilitation and supervision in the community".[20] It reflects the observation that:[21]

> "although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation."

13. Accordingly, the paramount consideration of "community safety" to which s 66(1) and (2) of the *CSP Act* are directed is, properly understood, the protection of the community which is an important purpose of the sentencing exercise. What the ICO provisions are directed to is consideration of an alternative mode of sentencing in appropriate cases, but one that accommodates the other objects of sentencing such as deterrence and denunciation, because those matters also achieve community safety. That is the function of s 66(3) of the *CSP Act*. It follows that a sentencing decision that prioritises matters other than the offender's prospects of reoffending will not necessarily offend the purpose of the legislation.[22]

14. Finally, the appellant makes reference to the gravity of the consequences for an offender if a decision on an application for an ICO in appropriate cases is affected by an error in the application of s 66(2). Three observations may be made about this submission.

15. *First*, as Leeming JA observes at JB [158] (CAB 145), a decision whether to order a short sentence be served by way of full-time custody or not is not the only decision of grave seriousness that courts are regularly required to make, and there is no sound Constitutional basis for treating the approach to jurisdictional error differently because the consequence is full-time imprisonment.

16. *Secondly*, there are any number of grave sentencing consequences contained in the *CSP Act* that will be the subject of appeals to the District Court.[23] Indeed, the *CSP Act* contemplates that many offenders will serve sentences of imprisonment who are

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[20] Second Reading Speech, Legislative Council, New South Wales, Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010, *Parliamentary Debates* (Hansard), 22 June 2010, p 24426.
[21] *R v Zamagias* [2002] NSWCCA 17 at [32], cited in New South Wales Law Reform Commission, Report 139, *Sentencing* (2013) at [2.24], which report preceded the introduction of the amendments that included s 66: *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).
[22] Cf AS [55].
[23] For example, the imposition of a conviction can have serious consequences for continued employment in some occupations; and the imposition of a fine can have a severe financial impact for some offenders.

not eligible for an ICO.[24] There is no sound reason for treating the law as it applies to offenders sentenced before the Local Court who happen to be eligible for an ICO as involving different jurisdictional consequences to sentences imposed on other offenders.

17. *Thirdly,* the appellant at AS [45] and [64]-[65] appears to exhort this Court to take a broad approach to the characterisation of jurisdictional error in respect of a single provision of the *CSP Act* concerning a narrowly available sentencing option *because* there is a privative clause and no appeal to the Supreme Court. When the text, purpose and context of s 66 is considered in the manner outlined above, such an approach would not encourage the coherent and proper application of the law in inferior sentencing courts. Rather, it would tend to create an effective avenue of further appeal in respect of a single mode of sentencing, in a manner that would frustrate the object of finality sought to be preserved in s 176 of the *District Court Act*: JB [30]-[31], [35]-[36] per Bell P (CAB 101-104).

The proper approach to construction of s 66 of the CSP Act

18. For present purposes, the following matters are relevant to the construction of s 66.

19. *First*, s 66 "applies in circumstances in which a court is considering, or has made, an intensive correction order": *CSP Act*, s 64. When a court undertakes each stage of the exercise in s 66, it acts as a "sentencing court".

20. *Secondly*, an ICO is a manner of serving a sentence of imprisonment: s 7(1). A sentence of imprisonment may become "the subject of an intensive correction order" in application of Pt 5: ss 5(5), 7(4). As McCallum JA noted in *Wany v DPP (NSW)* ***(Wany)***:[25]

> "An ICO is a way of serving a term of imprisonment; it cannot, at the same time, be an alternative to imprisonment. It is to be noted in this context that a breach of the conditions of an ICO can result in its revocation by the Parole Authority, whereupon the offender is taken into custody to serve the sentence imposed: s 164 of the *Crimes (Administration of Sentences) Act*."

21. *Thirdly*, the point at which the sentencing court considers whether to make an ICO is after all other aspects of the sentence of imprisonment have been determined,

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[24] *CSP Act*, ss 67-68.
[25] (2020) 103 NSWLR 620 at [18].

including questions of criminal culpability. Before deciding whether to make an ICO the sentencing court must know what term of imprisonment is to be imposed: ss 68, 70. The question then becomes "whether to make an intensive correction order": s 66(1).

22. *Fourthly*, an ICO is something the sentencing court "may make" in the exercise of its discretion. It is not required to make an ICO, rather, it has at most a duty to consider doing so where properly raised and where the entitling conditions in the *CSP Act* are otherwise satisfied, namely s 5(1) (the court is satisfied that no penalty other than imprisonment is satisfied), s 7(1) (offender has been sentenced to imprisonment), s 4B (in domestic violence offences, that the victim will be adequately protected); s 17D (sentencing assessment report has been ordered or there is otherwise sufficient information to justify making of an ICO), s 67 (offence is not one of the offences enumerated in the section), s 68 (term of imprisonment is within the periods set out in the section) and s 69(3) (offender is resident within New South Wales or prescribed State or Territory).[26] A court may "decline to consider imposing an ICO" in circumstances where it is "satisfied, not only that there is no alternative to a sentence of imprisonment, but also that factors not limited to deterrence and rehabilitation of the offender require no lesser sentence than one involving a full-time custodial term."[27]

23. The three-step process mandated by decisions such as *R v Zamagias*[28] involves determination of the imposition and length of a sentence of imprisonment followed by consideration of whether an ICO should be made and its terms. Part 4 of the *CSP Act* applies to the whole of that process (s 5(5)). Moreover, as part of the assessment process to which s 66(2) is directed, s 66(3) requires consideration of the purposes of sentencing described in s 3A and any relevant common law principles. Each of these stages involves the discretionary weighing up of overlapping and, at times, conflicting principles that is the hallmark of the sentencing process.[29]

24. *Fifthly*, s 66 is in Pt 5 Division 2 of the *CSP Act* which, relevantly to the construction

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[26] *Blanch v R* [2019] NSWCCA 304 at [68]–[69].
[27] *R v Fangaloka* [2019] NSWCCA 173 (***Fangaloka***) at [61] per Basten JA (Johnson J and Price J, agreeing).
[28] [2002] NSW CCA 17 at [23]-[26]. Note also *Fangaloka* at [44]-[45] per Basten JA (Johnson and Price JJ agreeing).
[29] *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476; *Muldrock v The Queen* (2011) 244 CLR 120 at [20], [26]; CA [73] per Basten JA (CAB 115); CA [153] per Leeming JA (CAB 144).

of s 66,[30] is headed "restrictions on power to make intensive correction orders".[31] Part 5 does not restrain the power to impose a sentence of imprisonment; rather, it is engaged "when the sentencing court is deciding whether to make an intensive correction order in relation to an offender": s 66(1). Two matters of significance emerge from this:

a. There is no obligation to make an ICO, or decline to make an ICO, in any of the circumstances set out in s 66, and in particular, the answer to the question posed by s 66(2) does not determine whether a sentencing court makes an ICO or not. For example, a sentencing court may be satisfied that serving the sentence of imprisonment in the community under an ICO is more likely to address the offender's risk of reoffending, but ultimately conclude, in the application of s 66(3), that the objective seriousness of the offending and the consequent need for general deterrence requires that an ICO not be made.

b. If the sentencing court declines to make the ICO, the offender stands sentenced to full-time detention of a defined term.

25. What follows from these considerations is that, as a matter of text and context, s 66 is directed at imposing specific mandatory considerations upon the making of a specific kind of sentencing order – namely, the sentencing of a person to serve a sentence of imprisonment in the form of an ICO in circumstances where the offender would otherwise be subject to full-time detention. What Pt 5 does is impose conditions on the matters to be assessed by the sentencing court before an ICO is made. That Pt 5 works in that way is equally apparent from ss 67 and 68, which also seek to restrain the imposition of an ICO.

26. Nothing about the text, context or purpose of s 66 suggests that it was intended by Parliament to invalidate a sentence of imprisonment in which a court declines to impose an ICO. This explains why s 66 does not contain words to the effect that "the failure of a court to comply with the requirements of this section does not invalidate the sentence." At the point at which s 66 is engaged, the court "has sentenced an offender to imprisonment": s 7(1). That is, there has already been a determination

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[30] See s 35(1)(a) of the *Interpretation Act 1987* (NSW), which treats headings to a Division of an Act as "part of the Act" for the purposes of construction; see further *Ellavale Engineering Pty Ltd v Pilgrim* (2005) 2 DDCR 744; [2005] NSWCA 272 at [3] per Handley JA (Campbell AJA agreeing); *Tannous v New South Wales* (2020) 103 NSWLR 183 at [26] per Basten JA (McCallum JJA and Simpson AJA agreeing).
[31] Cf AS [52].

that a sentence of full-time detention should be imposed and an appropriate term of imprisonment has been identified.

27. Section 66 does not purport to disturb or call into doubt the factors that go into such a sentence. In those circumstances, it is not consistent with the statutory scheme to treat non-compliance with s 66(2) as depriving the sentencing court of its jurisdiction and invalidating a sentence of imprisonment that the sentencing court has already decided to impose.

28. We turn to consider other matters relied on by the appellant as pointing to a Parliamentary intention that non-compliance with s 66(2) should invalidate the sentence. Contrary to the appellant's submission (AS [53]), the mandatory language deployed in s 66 is not determinative of whether the requirements of the provisions are conditions on the exercise of the jurisdiction. The mandatory language deployed in s 66(2) ("the sentencing court is to assess") may be contrasted with the negative stipulations in ss 4B, 17D, 67 and 68 (an ICO "must not be made … if/unless"). Those latter provisions are more readily characterised as conditions on the exercise of jurisdiction to make an ICO: JB [47] per Bell P (CAB 107); JB [94] per Basten JA (CAB 123); JB [193] per Beech-Jones JA (CAB 159), whereas provisions concerning what a sentencing court "is to do" such as ss 21A, 9(2), 10(3), 25D(6), 30K(2), 69 and 73A are not by themselves intended to impose conditions of validity: JB [97]-[99] per Basten JA (CAB 124-125).

29. The fact that s 66(2) is not determinative is in its statutory context, relevant to its characterisation as a non-jurisdictional aspect of the process of evaluation involved in the exercise of the sentencing discretion by a sentencing court as to the form a sentence of imprisonment should take. It follows that the appellant's criticism (AS [57]) of the Court of Appeal is misplaced. The Court of Appeal's approach does not disregard the principle of materiality. For a material error to be jurisdictional, it must first be the case that the underlying provision be one that is jurisdictional in its character – that is, it is a statutory obligation that is properly viewed as a condition of the court's jurisdiction or where non-compliance with the provision represents a misapprehension of the nature or limits of the statutory function.

30. Further, the appellant's reliance on the omission of a 'saving provision' in s 66 of the *CSP Act* and *expressio unius* reasoning (AS [54]) does not, on proper analysis, assist

in the construction of the section.[32]

31. Rules of construction such as *expressio unius*, are tools to be applied in a way that assists, and does not contradict, the purpose of the task of statutory construction, being to identify Parliament's intended operation of the statutory provision. The application of *expressio unius* is simply one indicator of the operation of the statute taken to have been intended by Parliament, as reflected in its text and context, and cannot and should not exclude other indicia of its intended operation (such as the broader context in which the statutory provision appears). Nor should rules of construction such as *expressio unius* operate to produce absurd results, or otherwise produce consequences that it is not sensible to take Parliament to have intended.[33]

32. As noted at [26] above, one reason why s 66 of the *CSP Act* does not expressly provide that non-compliance with its terms does not result in the invalidity of the sentence that has been imposed is because Pt 5 is engaged only at a point where the sentencing judge has concluded that a sentence of imprisonment is warranted; that is, the logic of the statutory scheme is that Pt 5 is engaged only *after* the exercise in s 5 of the *CSP Act* is undertaken.

33. In other words, s 66, going to the form a sentence of imprisonment is to take, operates on the assumption that it is appropriate to impose a sentence of imprisonment. It does not operate on the assumption that the factors set out in s 66(1)-(3), if not complied with, would unmake the anterior determination that a sentence of imprisonment should be imposed. In this way, s 66 – and Pt 5 generally – is distinguished from other parts of the *CSP Act*.

34. The appellant relies on a number of provisions (referred to by Bell P at JB [45] in support of her *expressio unius* argument, namely s 5(4), s 17I(2), s 17J(4), s 25F(8), s 53A(5) and s 100B(2) of the *CSP Act* (the **comparator provisions**). However, these provisions can relevantly be distinguished from s 66.

35. In this respect, several of the comparator provisions substantively concern the giving of notice that an order has been made and the giving of an explanation to an offender as to why that order has been made and the requirements for compliance: see s 17I(1),

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[32] Cf AS [54].

[33] *Adair v Morahan* (1986) 5 NSWLR 146 at 154E per Kearney J, referring to *Houssein v Under Secretary, Department of Industrial Relations and Technology NSW* (1982) 148 CLR 88 at 94; see also *Bruce v Cole* (1998) 45 NSWLR 163 at 173B-E per Spigelman CJ, referring to *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA.

s 17J(1), (3), s 100B(1). Those provisions reflect a concern of the importance of the need to promote compliance with the order, and that a failure to give adequate notice to an offender of an order (including an ICO), or an explanation of that order, would result in the order being invalidated is readily understandable in such context. Such a concern is not apposite to the different context that s 66 plays in the sentencing framework and sheds no light on Parliament's intent for non-compliance with s 66 in that regard.

36. Sections 5(4) (sentence of imprisonment where satisfied that no other penalty is appropriate), 25F(8) (discounts on guilty pleas to indictable offences) and 53A(5) (aggregate sentences of imprisonment) all involve considerations relevant to the imposition of a sentence of imprisonment and the setting of a term of imprisonment. In that regard, the sentencing court is to consider these provisions at a point that is logically anterior to the stage of sentencing involved in Pt 5 of the *CSP Act*. The distinction between ss 5(4), 25F(8) and 53A(5), on the one hand, and the provisions of Pt 5, on the other, is that at the time Pt 5 is engaged the sentencing court 'has sentenced an offender to imprisonment' and has set the term associated with that sentence.

37. As to s 5(1) of the *CSP Act*, the purpose of that provision is to reflect "the long standing and fundamental prescript that a sentence of imprisonment must only be imposed as a measure of last resort": *Sarhene v The Queen* [2022] NSWCCA 79 at [36] per Hamill J (Leeming JA and Ierace J, agreeing). As Bell P observed at JB [57] (CAB 111):

> "It would … be a most peculiar outcome if non-compliance with the prohibition in s 5(1) of the *CSP Act*, namely that "[a] court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate", did not result in invalidity (which is what s 5(4) of the Act expressly provides) but that noncompliance with the assessment process contemplated by s 66(2) did have that consequence."

38. Such an outcome would be peculiar because it would attribute to Parliament an intention that is seemingly incoherent or irrational. *First*, an intention not to treat as a jurisdictional error a failure to strictly adhere to a 'long standing and fundamental prescript' that imprisonment must be a measure of last resort. And yet, *secondly*, an intention to treat as a jurisdictional error a failure to have regard to a particular matter when determining the question of whether that sentence of imprisonment should be

served in the form of an ICO – in circumstances where s 66 is engaged only after a determination to impose a sentence of imprisonment has been reached and where the textual and contextual indicators in Pt 5 Division 2 suggest that Parliament's concern was to impose "restrictions on [the] power to make intensive correction orders."

39. In other words, in this peculiar scenario, the form a sentence of imprisonment should take would be more tightly constrained by the *CSP Act* than the fundamental decision whether to impose such a sentence. The latter would be a condition of jurisdiction, but the former would not. In those circumstances, it is difficult to see that Parliament would have wished to deprive the sentencing court of its jurisdiction when it selected the form that imprisonment would take without having regard to s 66(2).

40. Once Pt 5 generally, and s 66 in particular, is appreciated as being engaged at a distinct stage of the sentencing process – that is, at which the sentencing court has decided to impose a sentence of imprisonment and is then called upon to decide whether it should order that such a sentence be served in the form of an ICO – then it follows as a matter of statutory design that s 66 could not reasonably be considered to impact upon the legality of the underlying sentence. Section 66's place in the structure of the *CSP Act* distinguishes it from the comparator provisions and serves to explain why a provision as to the invalidity of sentence was not included.

Consequences[34]

41. The appellant attacks the reasoning of Bell P and Basten and Leeming JJA in relation to the consequences that may flow from non-compliance with s 66(2) making the sentence invalid, while at the same time praying in aid the potentially severe consequences if non-compliance is found not to be a jurisdictional error.[35]

42. A consideration of the potential consequences of invalidity is legitimate in construing the intention of Parliament, by reasoning that it is unlikely that Parliament intended for an act done in breach of a statutory provision to be invalid if public inconvenience would be a result of the invalidity of the act.[36] The majority of the Court of Appeal properly took the consequences of invalidity into account as part of the process of construction of s 66(2) in the full context of the Act and with an eye to determining

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[34] Cf AS [59]-[64].
[35] AS [64]-[65].
[36] *Project Blue Sky* at [97] per McHugh, Gummow, Kirby and Hayne JJ at [97]; see also *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 375-6, 391; *Clayton v Heffron* (1960) 105 CLR 214 at 247; *Bhardwaj* at [8] per Gleeson CJ; [51] per Gaudron and Gummow JJ.

objectively the intent of the legislature: JB [56] per Bell P (CAB 110-111); JB [127]-[137] per Basten JA (CAB 136-139); JB [157] per Leeming JA (CAB 145).[37] In particular, the matters referenced by Basten JA were reasonable consequences of invalidity in respect of cases beyond the case of the appellant.

43. In any event, it cannot be said on a fair reading of the reasons of the majority judges as a whole that this aspect of the construction of the section was afforded undue significance. The question was not, in any event, determinative to the majority of the Court of Appeal's reasoning on the question of whether a failure to undertake an assessment under s 66(2) constitutes jurisdictional error.

10 *Synthesis*

44. Having regard to the reasons above, and the analysis by the majority in the Court of Appeal, this Court would conclude that the Court of Appeal did not err in holding that a failure to undertake the assessment in s 66(2) is not a jurisdictional error. For this reason, the appeal should be dismissed.

Part VI: Argument on respondent's notice of contention

45. The Respondent contends that, on a fair reading of the sentencing judge's reasons, it can be inferred that the assessment required by s 66(2) of the *CSP Act* was made.

46. The issue is presently relevant in that a majority of the Court of Appeal did not determine it, but instead assumed for the purposes of disposition of the Summons
20 that the assessment has not been undertaken.[38] If, contrary to what is submitted in Part V of these submissions, a failure to undertake the assessment in s 66(2) is a jurisdictional error, it is necessary for the Court to determine whether there was such a failure in the present case.

47. This involves an assessment of the reasons given by the sentencing judge. The following considerations are evident.

48. *First*, the reasons for sentence should be considered as a whole, in the context of the submissions that were advanced by the parties. In *Re Henry; JL v Secretary,*

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[37] See also *Quinn v Director of Public Prosecutions (Cth)* (2021) 106 NSWLR 154 at [95]-[96].
[38] JB [24]-[25] per Bell P (CAB 100-101), JB [87] and [140] per Basten JA (CAB 121, 140) and JB [141], per Leeming JA (CAB 140), although Bell P indicated that he was minded to agree with Beech-Jones JA on the question. Beech-Jones JA and McCallum JA (the latter in dissent) held that the District Court judge had erred in the manner alleged by the appellant: JB [161] per McCallum JA (CAB 146), JB [189] per Beech-Jones JA (CAB 157).

Department of Family and Community Services[39] McColl JA observed (citations omitted):

> "There will be no error of law if it is apparent from the judge's decision, 'taken as a whole, that [the judge] did ... give particular attention to the particular principle'. The primary judge's reasons should not be 'construed with an eye finely tuned to error [but] ... read as a whole, fairly and in context'."

49. *Secondly*, applying this principle to consideration of a sentencing judge's reasons in relation to the making or refusing an ICO, "it does not follow from the requirement that those matters be *considered*, that each must be *specifically addressed* in the reasons given by the sentencing judge."[40]

50. *Thirdly*, where a sentencing judge does not expressly avert to s 66 of the *CSP Act* or to community safety in the remarks on sentence, but states that they have carefully considered the matters relevant to whether an ICO should be ordered, the court will infer that the considerations in s 66 were given appropriate weight, particularly where the ultimate reasoning of the sentencing judge was to grant or refuse an ICO on the basis of matters arising as part of the consideration in accordance with s 66(3).[41]

51. In the present case, on a fair reading of the sentencing judge's reasons as a whole and in the context of the submissions made by the Crown and for the defence at the appeal against sentence, it can be inferred that the sentencing judge *did* undertake the assessment mandated by s 66(2) when re-sentencing the appellant.

52. The appellant's written submissions in the District Court were centred on whether an ICO should be made (although s 66 was not expressly referred to).[42] The Crown addressed s 66 in written submissions that asserted that full time imprisonment was appropriate having regard to the objective seriousness of the offending and the consequent need for denunciation and specific and general deterrence.[43] In her Honour's reasons at J17 (CAB 64), the sentencing judge referred to the Crown's written submissions and it can thus readily be inferred that her Honour was aware of

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[39] [2015] NSWCA 89 at [146].
[40] *Mourtada v R* (2021) 361 FLR 96; [2021] NSWCCA 211 (***Mourtada***) at [37] per Adamson J (emphasis in original); see also Basten JA at [22]-[23] and [26] and Campbell J at [41]-[43]); *Blanch v R* [2019] NSWCCA 304 at [62] per Campbell J (Hoeben CJ at CL, Price J agreeing); *Chalhoub v R* [2021] NSWCCA 69 at [40]-[42] (Payne JA, Bellew and Button JJ agreeing).
[41] *Karout v R* [2019] NSWCCA 253 at [93] per Fullerton J (Hoeben CJ at CL agreeing at [2]) (***Karout***); *Mourtada* at [38] per Adamson J.
[42] Appellant's Book of Further Materials filed 16 September 2022 (**ABFM**) 141.
[43] ABFM 128 at 134, [25], see also Transcript of appeal to District Court, T33/33-37 (ABFM 36).

the need to consider s 66 as part of the exercise of determining whether the appellant's sentence should be served by way of an ICO.

53. Before the sentencing judge, the appellant's oral submissions expressly addressed the principles relevant to the making of an ICO, including the need for community safety and the appellant's prospects of reoffending and of rehabilitation, as set out in the sentencing assessment report.[44] Express reference was made to *Wany*.[45] Importantly, the appellant's legal representative expressly referred to the fact that community safety was more appropriately met by allowing her to participate in an ICO.[46] Immediately following this submission, he was met with the intervention of the sentencing judge seeking to be addressed on general deterrence, and remarking on the strictness of firearms laws in Australia and the seriousness of the appellant's offences, involving as they did knowing involvement in selling guns in the community.[47]

54. The remarks on sentence demonstrate that each of the matters that the sentencing judge was required to consider in order to undertake the assessment mandated by s 66 were considered. In this respect:

a. The sentencing judge referred at J9 (CAB 56) to the applicable sentencing principles in s 3A of the *CSP Act* as well as "the sentencing principles in the relevant legislation" and identified at an early stage that the s 5 threshold for a term of imprisonment had been crossed;

b. The sentencing judge referred to the sentencing assessment report at J15-17 (CAB 62-63) which assessed the appellant as having a medium risk of reoffending,[48] and her Honour made findings as to the appellant's prospects of rehabilitation, referring at J25 (CAB 72) to the appellant's "positive prospects of rehabilitation" and of matters that provided a "positive indication towards good prospects";

c. The sentencing judge assessed the objective seriousness of all of the offences at just below the mid-range (at J25 to 27, CAB 72-74) and concluded that assessment at J27 (CAB 74) by noting the danger to the community presented

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[44] Transcript of appeal to District Court, T25/40 (ABFM 28), T27/10-30 (ABFM 30).
[45] Ibid, T21/20-50 (ABFM 24).
[46] Ibid, T27/36-39 (ABFM 30).
[47] Ibid, T27/40-50, T28/10 (ABFM 30-31).
[48] Sentencing Assessment Report, p 4 (ABFM 126).

by the appellant's storage of the guns in proximity to the ammunition at a suburban residence;

d. The sentencing judge devoted a significant proportion of her reasons to the question of whether an ICO should be made, stating (twice) that she had given "very close consideration to the matters that were put before the Court" (at J27-28) (CAB 74-75), and referring to her awareness of the leading authorities on the application of s 66 of the *CSP Act*, including *Pullen*,[49] *Fangaloka*, *Karout* and *Casella*.[50] Her Honour then referred to the three step process to be engaged in when considering an ICO pursuant to s 7 of the *CSP Act* (see RS [23] above). When addressing the second of those steps, the sentencing judge made reference to general and specific deterrence, and indicated, in a manner that can be taken to be an imposition of such sentence, that a term of three years was appropriate (J28, CAB 75);

e. When addressing the third of those steps, the sentencing judge stated at J28-29 (CAB 75-76):

> "The third and final task that the Court must do in assessing whether or not an ICO is an appropriate term of imprisonment is to determine whether or not an ICO is an appropriate sentence taking into account all of the factors including community safety and rehabilitation. I have as I said given very close consideration to this. In my view community safety is of paramount consideration. There are a substantial number of firearms. The firearms in my view pose a significant risk to the people of Dubbo.
>
> Taking into account all of those matters I am not of the view that it is appropriate for the matter, for this sentence to be served by way of an Intensive Corrections Order."

55. The use, by the sentencing judge, of the words "*all of the factors including community safety and rehabilitation*" and "*community safety is of paramount consideration*" are clear references to the requirements of s 66(1) and (2) of the *CSP Act*. Taken with the sentencing judge's earlier findings regarding the appellant's positive prospects of rehabilitation and the assessment of a medium risk of reoffending in the sentencing assessment report, and having regard to the sentencing

[49] *R v Pullen* (2018) 275 A Crim R 509; [2018] NSWCCA 264.
[50] *Casella v R* [2019] NSWCCA 201.

judge's express reference in oral argument to the danger to the community presented by the offending and the need for general deterrence, it can be inferred that the sentencing judge considered the matters required to be addressed under s 66(1) and (2) and concluded that an ICO would not be more likely to address the risks of reoffending which in her Honour's view presented an unwarranted risk to community safety when regard is had to the nature of the offending and the consequent need for general and specific deterrence (the latter of which her Honour addressed when considering the Crown's submissions at J22, CAB 69). Consideration of the significance of general deterrence to community safety is an inherently forward-looking exercise, notwithstanding that it is informed by the nature of the offending (cf AS [33](a)).

56. The conclusions to be drawn from a fair reading of the sentencing judge's reasons as a whole, read with the submissions that the parties put to her Honour, are that the sentencing judge: (a) took into account the required considerations in s 66(1) and (2) of the *CSP Act*; and (b) determined, consistently with the aforementioned paragraphs and s 66(3), that the need for community safety in a general sense, the seriousness of the offences and the need for general and specific deterrence, outweighed the appellant's good prospects of rehabilitation and the favourable effect that this might have on the risk of reoffending while serving an ICO. That is the manner in which her Honour engaged with the task during oral argument, see [53] above.

57. Put another way, in the context of the sentencing judge's reasons read as a whole, one can conclude that her Honour considered that, notwithstanding the appellant's good prospects of rehabilitation, which might favour an ICO as a more appropriate order to address the prospects of reoffending, the offence was so serious that there must nonetheless be a fulltime sentence.[51] That is unsurprising when regard is had to the number of firearms offences with which the appellant was convicted and the fact they carried maximum penalties on indictment of between five and 14 years' imprisonment: JB [52] per Bell P (CAB 109).[52]

58. The above matters lead to a conclusion that on a fair reading of the reasons as a whole, the sentencing judge had regard to all of the matters she was required to when

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[51] *Karout* at [60] (Brereton JA).

[52] The policy of the legislature in enacting the offences in the *Firearms Act 1996* (NSW) and imposing such penalties is the achievement of general and specific deterrence: *R v Howard* [2004] NSWCCA 348 at [66]; *Thalari v R* (2009) 75 NSWLR 307 at [93]; *R v Krstic* [2005] NSWCCA 391 at [14].

considering whether to make an ICO pursuant to ss 5, 7 and 66 of the *CSP Act*, including the assessment contemplated by s 66(2), and that no error is shown.

59. Accordingly, the respondent's notice of contention should be accepted and the appeal should be dismissed.

Part VII: Estimate of time to present oral argument

60. The respondent estimates that 1½ hours will be required for her oral argument.

14 October 2022

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ANNEXURE – LIST OF LEGISLATIVE MATERIALS REFERRED TO

All provisions are as at 17 June 2021, when the District Court handed down judgment.

Legislation	**Provisions**	**Version**
Crimes (Sentencing Procedure) Act 1999 (NSW)	ss 3A, 4B, 5, 7, 9, 10, 17D, 17I, 17J, 21A, 25D, 25F, 30K, 53A, 53B, 58, 64, 66, 67, 68, 69, 70, 73A, 100B, 101A	No 92 of 1999, 27 March 2021 to 28 March 2022
Crimes (Appeal and Review) Act 2001 (NSW)	ss 11, 71	No. 120 of 2001, 27 March 2021 to 30 June 2021
Criminal Appeal Act 1912 (NSW)	s 5	No. 16 of 1912, 27 March 2021 to 30 June 2021
Criminal Procedure Act 1986 (NSW)	s 267, 268	No. 209 of 1986, 31 May 2021 to 31 August 2021
District Court Act 1973 (NSW)	s 176	Current (No. 9 of 1973, 1 March 2021 to present)
Interpretation Act 1987 (NSW)	s 35	No. 15 of 1987, 27 March 2021 to 19 October 2021