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| Case Name: | R v Porte |
| Medium Neutral Citation: | [2015] NSWCCA 174 |
| Hearing Date(s): | 13 May 2015 |
| Decision Date: | 2 July 2015 |
| Before: | Leeming JA at [1]; Johnson J at [2]; Beech-Jones J at [165] |
| Decision: | 1. Crown appeals allowed. 2. Sentences imposed in the Sydney District Court on 14 November 2014 are set aside. 3. In their place: (i)   for the offence of accessing child pornography material contrary to s.474.19(1)(a)(i) Criminal Code (Cth), the Respondent is sentenced to imprisonment for a period of 12 months commencing on 21 November 2014 and expiring on 20 November 2015, (ii)   for the offence of possession of child abuse material contrary to s.91H(2) Crimes Act 1900 (NSW), the Respondent is sentenced to imprisonment comprising a non-parole period of 15 months commencing on 21 February 2015 and expiring on 20 May 2016, with a balance of term of 15 months, commencing on 21 May 2016 and expiring on 20 August 2017, (iii)   for the offence of possession of a prohibited weapon under s.7(1) Weapons Prohibition Act 1988 (NSW), the Respondent is convicted but no other penalty is imposed in accordance with s.10A Crimes (Sentencing Procedure) Act 1999 (NSW). 4. In accordance with s.50 Crimes (Sentencing Procedure) Act 1999 (NSW), the Respondent should be released to parole on 21 May 2016. |
| Catchwords: | CRIMINAL LAW - Crown appeals - sentencing - Respondent pleaded guilty to using a carriage service to access child pornography material (s.474.19(1)(a)(i) Criminal Code (Cth)), possession of child abuse material (s.91H(2) Crimes Act 1900 (NSW)) and possession of a prohibited weapon (s. 7(1) Weapons Prohibition Act 1988 (NSW)) - Respondent possessed more than 34,000 items of child abuse material - concurrent terms of 18 months’ imprisonment for each offence to be served by way of Intensive Correction Order - consideration of sentencing principles applicable to child pornography offences - importance of general deterrence and denunciation - failure to assess objective seriousness of the offending - failure to explain how the sentences were arrived at - failure to give principled consideration to questions of concurrency and accumulation - impermissible approach to the use of an Intensive Correction Order - sentences for child pornography offences manifestly inadequate - residual discretion to resentence the Respondent exercised - appeals allowed - Respondent sentenced to terms of fulltime imprisonment for child pornography offences - some accumulation appropriate as between State and Commonwealth child pornography offences |
| Legislation Cited: | Crimes (Sentencing Procedure) Act 1999 (NSW) Crimes Act 1900 (NSW) Crimes Act 1914 (Cth) Criminal Procedure Act 1986 (NSW) Weapons Prohibition Act 1988 (NSW) Criminal Code (Cth) |
| Cases Cited: | Cahyadi v R [2007] NSWCCA 1; 168 A Crim R 41 CMB v Attorney General for NSW [2015] HCA 9; 89 ALJR 407 Corby v R [2010] NSWCCA 146 Currie v R [2013] NSWCCA 267 Director of Public Prosecutions (Cth) v D’Alessandro [2010] VSCA 60; 26 VR 477 Director of Public Prosecutions (Cth) v Guest [2014] VSCA 29 Director of Public Prosecutions (Cth) v Zarb [2014] VSCA 347 Director of Public Prosecutions v Smith [2010] VSCA 215 Gallant v R [2006] NSWCCA 339 Heathcote (A Pseudonym) v R [2014] VSCA 37 Hili v The Queen [2010] HCA 45; 242 CLR 520 Hill v State of Western Australia [2009] WASCA 4 House v The King [1936] HCA 40; 55 CLR 499 James v R [2009] NSWCCA 62 James v R [2015] NSWCCA 97 Markarian v The Queen [2005] HCA 25; 228 CLR 357 Martin v R [2014] NSWCCA 124 Minehan v R [2010] NSWCCA 140; 201 A Crim R 243 Mouscas v R [2008] NSWCCA 181 Pearce v The Queen [1998] HCA 57; 194 CLR 610 R v Booth [2009] NSWCCA 89 R v Coffey [2003] VSCA 155; 6 VR 543 R v Cook; Ex parte Director of Public Prosecutions (Cth) [2004] QCA 469 R v Dodd (1991) 57 A Crim R 349 R v Fulop [2009] VSCA 296; 236 FLR 376 R v Gent [2005] NSWCCA 370; 162 A Crim R 29 R v Gordon [2009] QCA 209; (2011) 1 Qd R 429 R v Hinchliffe [2013] NSWCCA 327 R v Jones [1999] WASCA 24; 108 A Crim R 50 R v Jongsma [2004] VSCA 218; 150 A Crim R 386 R v Linardon [2014] NSWCCA 247 R v Martin [2014] NSWCCA 283 R v McGourty [2002] NSWCCA 335 R v Oliver [2003] 1 Cr App R 28 R v Pogson; R v Lapham; R v Martin [2012] NSWCCA 225; 82 NSWLR 60 R v West [2014] NSWCCA 250 Saddler v R [2009] NSWCCA 83; 194 A Crim R 452 Smit v State of Western Australia [2011] WASCA 124 Zreika v R [2012] NSWCCA 44; 223 A Crim R 460 |
| Texts Cited: | Mizzi, Gotsis and Poletti, “Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences”, Judicial Commission of New South Wales, Monograph 34, September 2010   Warner, “Sentencing for Child Pornography” (2010) 84 ALJ 384 |
| Category: | Principal judgment |
| Parties: | Regina (Appellant) David Fernando Porte (Respondent) |
| Representation: | Counsel: Mr PR McGuire (Appellant) Mr WJ Hunt (Respondent)   Solicitors: Commonwealth Director of Public Prosecutions (Appellant) Joe Weller & Associates (Respondent) |
| File Number(s): | 2013/75421 |
| Publication Restriction: | --- |
| Decision under appeal: |  |
| Court or Tribunal: | Sydney District Court |
| Citation: | --- |
| Date of Decision: | 14 November 2014 |
| Before: | Judge Maiden SC |
| File Number(s): | 2013/75421 |

Judgment

1. **LEEMING JA**: I have read the judgment of Johnson J in draft. I agree with his Honour's reasons. I agree that all grounds of appeal have been made out, that the discretion to resentence should be exercised, and that a fulltime custodial sentence is appropriate for the Commonwealth and State child pornography offences. I agree with the sentences proposed by his Honour.
2. **JOHNSON J**: These are Crown appeals with respect to sentences imposed upon the Respondent, David Ferdinand Porte, at the Sydney District Court on 14 November 2014.

The Offences and Sentences

1. The Respondent had pleaded guilty on 11 March 2014 to the following three offences:
2. between 5 and 12 March 2013, he used a carriage service to access child pornography material contrary to s.474.19(1)(a)(i) *Criminal Code (Cth)*, an offence punishable by imprisonment for 15 years;
3. on 12 March 2013, he possessed child abuse material contrary to s.91H(2) *Crimes Act 1900 (NSW)*, an offence punishable by imprisonment for 10 years, and
4. on 12 March 2013, he possessed a prohibited weapon without a permit contrary to s.7(1) *Weapons Prohibition Act 1988 (NSW)*, an offence punishable by imprisonment for 14 years with a standard non-parole period of three years.
5. On 14 November 2014, his Honour Judge Maiden SC sentenced the Respondent to concurrent terms of 18 months’ imprisonment on each count and directed that the terms of imprisonment be served by way of an Intensive Correction Order (“ICO”) commencing on 21 November 2014.

The Crown Appeals

1. On 12 December 2014, the Commonwealth Director of Public Prosecutions filed a Notice of Appeal under s.5D *Criminal Appeal Act 1912 (NSW)* with respect to the sentence imposed for the Commonwealth offence. Thereafter, the Deputy Director of Public Prosecutions (NSW) filed a s.5D appeal with respect to sentences passed for the New South Wales offences.
2. On 24 April 2015, Further Amended Notices of Appeal were filed on behalf of each of the Commonwealth and State Directors. The Commonwealth Director relied upon the following grounds of appeal:
3. Ground 1 - his Honour failed to take into account the matters set out in Part 1B of the *Crimes Act 1914 (Cth)*, in particular s.16A;
4. Ground 2 - his Honour erred in ordering full concurrency with the remaining sentences;
5. Ground 3 - his Honour erred in ordering an ICO assessment before evidence and submissions were complete;
6. Ground 4 - his Honour failed to apply the provisions of s.7(1) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* when ordering that the sentence be served by way of an ICO; and
7. Ground 5 - the sentence was manifestly inadequate.

Particulars

\*   his Honour erred in ordering that the sentence be served by way of ICO;

\*   his Honour failed to have due regard to totality in sentencing;

\*   his Honour failed to have due regard to general and specific deterrence;

\*   his Honour erred in giving undue weight to the offender’s physical and mental health; and

\*   his Honour erred in ordering the sentence be served concurrently with the remaining sentences.

1. The New South Wales Director relied upon Grounds 2 to 5 in similar terms to the Commonwealth Director. However, Ground 1 in the New South Wales appeal asserted that his Honour failed to take into account the matters set out in s.21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*.

Facts of Offences

1. An Agreed Statement of Facts was tendered in the District Court which revealed the following.
2. The Australian Federal Police (”AFP”) were investigating child pornography material being shared or downloaded over the Internet, using *“peer-to-peer”* file sharing technology, which is an Internet network that allows a group of computer users with the same networking program to connect with each other and directly access files from one another’s hard drives.
3. As part of that investigation, the AFP identified that, between 28 October 2011 and 20 January 2013, an Internet Protocol address subscribed in the name of the Respondent was being used to download child pornography videos and images.

Execution of Search Warrant on 12 March 2013

1. On 12 March 2013, members of the AFP executed a search warrant at the Respondent’s premises in Kenthurst. The Respondent (then 47 years old) was present at the time of execution of the search warrant.
2. Upon execution of the warrant, the AFP located and seized a number of computer hardware devices and numerous hard drive storage devices. The seized items included a laptop computer, a desktop computer, 14 external hard disk drives and a compact disk. Also located was a packaged canister of *“Mace”* which was subsequently seized (giving rise to the charge under s.7(1) *Weapons Prohibition Act 1988 (NSW)*).
3. Whilst executing the warrant, AFP Agents noticed that a laptop computer located in the Respondent’s bedroom was operating and a *“peer-to-peer”* file sharing program was running and in the process of downloading approximately 916 files. The file names of many of the files being downloaded were indicative of child pornography material. One of the video files, which had fully downloaded, was viewed and identified by AFP Agents as child pornography material (see [28] below).
4. In addition to the video referred to in the preceding paragraph, the Respondent was shown another video which had been located on one of the external hard disk drives found near the laptop (see [29] below).
5. When questioned in recorded conversations conducted during the execution of the search warrant, the Respondent stated the following:
6. he had stored child pornography on his laptop computer and on a number of the external hard disk drives;
7. he had downloaded child pornography to his laptop computer using a *“peer-to-peer”* file sharing program;
8. he was interested in girls aged between 12 and 15 years of age who looked like women, but not engaged in sexual acts;
9. he had used search terms related to girls to locate and download the images, and he downloaded files in bulk;
10. he was not sure of the legal definition of child pornography material, but understood it was illegal to download and to possess it;
11. he had started to download the files some time ago, and when his laptop computer became full, he would transfer them to one of the external hard disk drives;
12. he had previously watched the video referred to at [14] (and [29]), but said that he had not watched it all the way through;
13. he had been caught by his wife deleting some child pornography material several weeks before, and as a result intended to delete all his child pornography material.
14. Material identified by the AFP as child pornography is classified into categories according to the Australian National Victim Image Library (“ANVIL”) Schema, also known as the Child Exploitation Tracking System (“CETS”) scale. The CETS scale classifies the activity depicted in child pornography material as follows:
15. Category 1 - nudity or sexually suggestive posing with no sexual activity;
16. Category 2 - non-penetrative sexual activity between children, or solo masturbation by a child;
17. Category 3 - non-penetrative sexual activity between adult(s) and child(ren);
18. Category 4 - penetrative sexual activity between children or adult(s) and child(ren);
19. Category 5 - sadism, humiliation or bestiality; and
20. Category 6 - animated or virtual depictions of children engaged in sexual poses or activity.
21. ANVIL is a database of child pornography material which has been previously identified by officers from Australian law enforcement agencies. The child pornography material on the database is already classified into the above categories, together with their unique hash values. These hash values can be utilised for the analysis of electronic files. This database is continuously updated as new child pornography material is identified and classified.

Possession on 12 March 2013 of Child Abuse Material - s.91H(2) *Crimes Act 1900 (NSW)*

1. Subsequent examination of the seized devices revealed child pornography and child abuse material stored on the laptop computer, and on seven of the external hard disk drives.
2. In total, 34,143 items, which have been classified as *“child abuse material”* as defined in s.91FB(1) *Crimes Act 1900 (NSW)* (see [80] below), were found on the devices in the Respondent’s possession. These items have been classified, according to the CETS scale of objective seriousness, into the following categories:
3. a total of 27,720 images and videos were classified within Category 1;
4. a total of 1,156 images and videos were classified within Category 2;
5. a total of 2,161 images and videos were classified within Category 3;
6. a total of 2,567 images and videos were classified within Category 4;
7. a total of 240 images and videos were classified within Category 5; and
8. a total of 299 images and videos were classified within Category 6.
9. Out of the total number of 34,143 items possessed, 2,260 were videos. Of those videos, using the CETS scale:
10. 88 were classified within Category 3;
11. 493 were classified within Category 4; and
12. 27 were classified within Category 5.

Using a Carriage Service Between 5 and 12 March 2013 to Access Child Pornography Material - s.474.19(1)(a)(i) *Criminal Code (Cth)*

1. Subsequent examination of the seized laptop computer revealed that the Internet had been used to access and download 17 child pornography images and 48 child pornography videos. All of these constituted *“child pornography material”* as defined in s.473.1 *Criminal Code (Cth)* (see [81] below).
2. On 11 March 2013, the day before the execution of the search warrant, the Internet had been accessed on the laptop computer and Google chrome web browser had been used to access 17 child pornography images. These 17 images were each classified within Category 1 on the CETS scale.
3. Between 9 and 12 March 2013, the Internet had been accessed on the laptop computer, via the use of a *“peer-to-peer”* file sharing program, and 48 child pornography videos were accessed and downloaded. Using the CETS scale, these videos were classified into the following categories:
4. 31 videos were classified within Category 1;
5. 5 videos were classified within Category 2;
6. 3 videos were classified within Category 3; and
7. 9 videos were classified within Category 4.

Possession on 12 March 2013 of a Prohibited Weapon Without a Permit - s.7(1) *Weapons Prohibition Act 1988 (NSW)*

1. Forensic examination of the seized canister of *“Mace”* revealed that the canister was a *“Mace”* brand pepper spray, which contained chemical compounds commonly known as tear gas (or CN) and oleoresin capsicums (or OC).
2. The definition of *“prohibited weapon”* includes any defence or anti-personnel spray that is capable of discharging, by any means, any irritant matter comprising or containing any one or more of a number of substances in liquid, powder, gas or chemical form - including chloroacetophenone (known as CN) and oleoresin capsicum (known as OC), clause 22, Schedule 1; s.7(1) *Weapons Prohibition Act 1998 (NSW)*.
3. The Respondent did not have any permit to possess this prohibited weapon.
4. The Respondent told the author of the presentence report that he had acquired the *“Mace”* in 2003 at a trade fair in the USA, and that he believed it was legal to retain it. He gave evidence to a similar effect (AB11). There was no evidence that the Respondent possessed the *“Mace”* for any criminal purpose.

Child Pornography Material Shown to the Respondent During AFP Questioning

1. The child pornography video which was downloading on the laptop computer as the AFP Agents executed the search warrant (see [13] above), depicted a girl of Asian appearance between approximately 10 and 12 years of age in her underwear. According to the statement of facts, the girl poses *“erotically”* for the camera, removes her bra and continues to pose in her underpants. This item fell within Category 1 on the CETS scale.
2. The video shown to the Respondent by AFP Agents during the execution of the warrant (see [14] above), depicted a girl of Asian appearance, between approximately eight and 10 years of age, engaged in oral sex and sexual intercourse with an adult male who was wearing a black balaclava. This item fell within Category 4 on the CETS scale.

The Respondent’s Subjective Circumstances

1. The Respondent was 47 years old at the time of the offences and 49 years old at the time of sentence.
2. His criminal history involved an offence in 1986 of malicious injury for which he was fined $50.00.
3. The Respondent was born in Chile and, at about the age of five, he relocated with his family to the United States of America and about a year later, migrated to Australia. He left school at the age of 15 and then undertook further business studies. He was self-employed between 2001 and 2011 in the import and marketing of industrial hardware. However, this business collapsed. As a result of a work-related injury in 2008, the Respondent was unemployed for a number of years. The Respondent had secured part-time employment in a management capacity for a metal fabrication company between the time of his arrest and sentence.
4. The Respondent and his wife had been in a relationship for about 30 years and were married for some 21 years. They resided at their home at Kenthurst since 2003. There were no children of the relationship.
5. Before the sentencing court were a presentence report dated 30 May 2014 prepared by a Community Corrections Officer, a report of Dr Olav Nielssen, psychiatrist, dated 11 October 2014, a letter from the Respondent’s wife and a number of reports concerning the Respondent’s health.
6. The Respondent gave evidence at the sentencing hearing on 24 October 2014.
7. The presentence report recorded the Respondent’s acknowledgement that his interest in the downloaded material related to girls in their mid-to-late adolescent years. He denied that he had intended to access offensive material involving younger girls, stating that such material was automatically included in bulk downloaded files. He told the Community Corrections Officer that he was deeply embarrassed and ashamed by his offending which he denied stemmed from seeking sexual gratification from viewing such material of younger girls. He stated that, in hindsight, he was aware that his actions contributed to the exploitation of young girls, something that he now regrets.
8. Dr Nielssen diagnosed the Respondent as suffering from depression and a hoarding disorder, and commented that he was not thought to have a disorder of abnormal sexual interest, such as heterosexual paedophilia.
9. The report of Dr Nielssen recorded the following matters:
10. the Respondent agreed that he had told the police that he was attracted to teenage girls;
11. the search terms that the Respondent used included *“girls”*, *“dorm girls”*, *“teenage girls”* and *“cheer leaders”*;
12. the Respondent did not use pornography more than once a week;
13. although he *“didn’t seek them* [images of children] *out”*, he had viewed such images and had intended to delete them, but *“didn’t delete them like I should have”*;
14. he had a further 200,000 files on his computer devices which were not classified as child pornography;
15. he was interested in *“pretty girls who look like women”*.
16. Other medical evidence tendered by the defence on sentence established that:
17. the Respondent suffered from spinal degeneration caused by trauma which required surgical intervention;
18. he was scheduled for surgical evaluation on 15 January 2015;
19. he was prescribed anti-coagulant medication following a pulmonary embolism and he was scheduled to continue taking that medication until 10 December 2014;
20. because of the effects of the anti-coagulant medication, he should avoid activities which may cause lacerations or haemorrhaging.
21. The Respondent’s wife continued to be very supportive. Her letter indicated the assistance which she had provided to the Respondent and her intention to continue that assistance.
22. The Crown tendered a psychological report dated 21 October 2014 prepared by psychologists employed by Forensic Psychology Services, Sex Offender Programs within Justice Health. The authors of this report assessed the Respondent as falling into the low-risk category for sexual reoffending.
23. The Crown also tendered a report of Dr Suresh Badami of Justice Health dated 5 November 2014, which stated that facilities existed in custody which could cater for the Respondent’s medical conditions and provide the management and medication he required.

The Course of Proceedings in the District Court

1. To assist an understanding of the grounds of appeal, it is appropriate to outline briefly the course of proceedings in the District Court.
2. The Respondent pleaded guilty to the present charges on 11 March 2014 at the Parramatta Local Court and was committed to the District Court for sentence.
3. He appeared before his Honour Judge Maiden SC at the Parramatta District Court on 18 August 2014. After the sentencing hearing had proceeded some way, it was adjourned part heard before his Honour to 24 October 2014.
4. The hearing resumed on 24 October 2014 at the Sydney District Court and the Respondent gave evidence. At the conclusion of the Respondent’s evidence, his Honour raised with the legal representatives *“with the State offences if I was to find that imprisonment was under two years should I consider an ICO?”* (AB38.24). Discussion ensued, leading to his Honour requesting an ICO assessment with the proceedings being adjourned until 14 November 2014. His Honour did not give reasons for taking that course.
5. It should be noted that at all times, the Crown had submitted both in writing and orally that a full-time sentence of imprisonment was the only appropriate sentence in this case.
6. In the course of the sentencing hearing, the Crown tendered material including the Statement of Facts (to which reference has been made), a folder containing sample images possessed by the Respondent (CETS scale images in Categories 1 to 6) together with a detailed written submission on sentence.
7. When the hearing resumed on 14 November 2014, a copy of the ICO assessment report was made available. The report stated that the Respondent had been assessed as suitable for an ICO. After a brief discussion with counsel, the sentencing Judge enquired of counsel (AB42-43):

*“HIS HONOUR: How long did I indicate last time that I’d say?*

*HEATHCOTE* [Defence Counsel]*: You said not more than two years.*

*GRODZICKI* [Crown]*: Your Honour, my understanding is that it was something less than two years but that your Honour hadn’t fully determined whether it would be by ICO but that one was ordered in order to essentially save time I think in case that was going to be the --*

*HIS HONOUR: I’ll make it for a period of 18 months to date from seven days from today. It’s Parramatta or where would --*

*HEATHCOTE: Hornsby has been where he's been going.*

*HIS HONOUR: Okay, seven days at Hornsby. In respect of the matter my short reasons are that the Court is satisfied that having read the material produced on behalf of Mr Porte--*

*GRODZICKI: Your Honour, I hate to interrupt but can I just raise one thing. On the last occasion the Crown made an application to adjourn to try and get some medical evidence.*

*HIS HONOUR: Did you, I’m sorry?*

*GRODZICKI: Yes, we did obtain some - it’s only very basic material your Honour but I think I should tender it, from Justice Health, and I think my friend has a short report possibly also to hand up.*

*HEATHCOTE: Just a little bit of an update so far as his medication regime is concerned, your Honour. I tender a report from Dr Hon dated 4 November 2014 and also a report from Dr Patrick Ao dated 12 November 2014.*

*GRODZICKI: There's no objection to those your Honour.*

*HEATHCOTE: I've seen the Crown document.*

*GRODZICKI: Your Honour there’s essentially just a copy of my request to the agencies and then a letter from Justice Corrective Services which doesn’t say very much and then there’s a letter from Justice Health. It essentially just says that they think they can manage the medical conditions that he has. It’s not detailed in any way. So just for completeness your Honour I tender those.”*

The last document mentioned was the report of Dr Suresh Badami referred to at [42] above. That report related to the Crown submission that the Respondent’s health difficulties could be treated and managed in custody. It formed part of the ongoing Crown submission that the Respondent should be sentenced to a term of full-time imprisonment.

1. The sentencing Judge proceeded immediately to deliver short remarks on sentence, which are set out below in their entirety (AB44-46):

*“HIS HONOUR: In this matter the offender has pleaded guilty to three charges; one under the Commonwealth legislation, s 474.19(1) of the Criminal Code 1995, being use carriage service to access child pornography. That matter, how long does that carry Mr Crown, is that 20 years?*

*GRODZICKI: 15 years for the Commonwealth charge; ten years for the possess charge.*

*HIS HONOUR: 15 years. There are two State matters, namely a matter under s 91H of the New South Wales Crimes Act 1900, which carries a maximum term of ten years. The third matter is a matter under s 7, the firearms, that carries 15 years, which involved the use of a can of mace.*

*This is a most unfortunate matter on the factual scene. It relates to a man who had been what might be described as very successful in his life involving lengthy work career and in particular being in sales in the provision of technical equipment. He was a married man and has a close and supporting relationship with his wife. His wife is a nurse and her reference, given on behalf of the offender, is most impressive. It shows a capacity to understand the matters that I am required to deal with, in particular in respect of issues of general deterrence and specific deterrence. This lady has shown her insight into these matters and no doubt through her professional experience.*

*The perhaps unusual factor in this matter is that this man is without any prior criminal history and but for these matters is a person who would be classed as a person of good character. He has at the moment debilitating illnesses, namely a degenerating spine which has gone to the extent that surgical intervention is required and most likely to be carried out in the new year. That surgical intervention will most likely involve the fusion of a number of the vertebra of his spine. He also has at the moment a number of other illnesses which have required him to use blood thinners to avoid, as I assume, the risk of stroke or heart attack. That particular affliction does cause difficulty with the surgery that is proposed. In one of the medical reports the doctor states that if he was assaulted in custody this could cause him to die.*

*I have read now the report provided to me by the Crown in respect of the forensic health and although the report sets out in great detail the facilities offered to inpatients it does not specifically deal with this issue, that is, would the system be able to keep him from being assaulted. I do not propose to deal with that issue but to say that I do find in this case that there are exceptional circumstances, namely:*

*1    The support of the offender's wife.*

*2.   His prior good history.*

*3.   The medical and psychiatric evidence where I will make the finding that he is unlikely to offend or reoffend again in respect of these matters.*

*There is also the further matter which relates to his ongoing medical difficulties which he will need to deal with. In all of those circumstances I am of the view that this matter would ordinarily carry a fulltime custodial sentence but taking into account what I have said and the reports I am of the view that his sentence should be served by way of an Intensive Correction Order, that order to be for a period of 18 months, taking into account his 25% for his plea of guilty at the earliest time.*

*The order of the Court will be that the offender is to serve a period of imprisonment by way of an Intensive Correction Order of 18 months commencing seven days from today. He is to report to the Hornsby Probation Service within that time.*

*Are there any other orders, gentlemen?*

*GRODZICKI: Yes your Honour, is that the--*

*HEATHCOTE: The three charges your Honour.*

*HIS HONOUR: Sorry, I will make them in respect of each one, entirely concurrent. Thank you.”*

Some General Observations Concerning Sentencing Under Commonwealth and New South Wales Law for Child Pornography Offences

1. Before moving to consider the grounds of appeal, it is appropriate to make some general observations concerning sentencing for this class of offences.
2. There are few areas where the age of the Internet has impacted upon the criminal law more severely than in the field of child pornography offences.
3. A number of early cases which had commented upon this phenomenon were referred to in *R v Gent* [2005] NSWCCA 370; 162 A Crim R 29 at 36-40 [29]-[43], a decision now almost 10 years old.
4. As mentioned in *R v Gent* at 37 [32], amendments made in 2005 created several new offences in the *Criminal Code (Cth)*, including s.474.19, an offence relevant to this appeal. The Second Reading Speech for the relevant 2004 Bill stated that the Bill *“continues the Australian government’s proactive approach to updating criminal laws in light of rapid technological change”*: *R v Gent* at 37 [32].

A Mixture of Commonwealth and State Offences

1. It is not uncommon to encounter the circumstances present in this case - a combination of a Commonwealth access offence under s.474.19 *Criminal Code (Cth)* and an offence under relevant State legislation with respect to possession of child abuse material. In *R v Gordon* [2009] QCA 209; (2011) 1 Qd R 429, Keane JA (as his Honour then was) (De Jersey CJ and Margaret Wilson J agreeing) said at 436-437 [37]:

*“The Queensland offence* [of possession] *did not involve use of the internet. It cannot be said that the use of the internet to procure the images adds little to the criminality involved in their possession. Such a view would fail to recognise that the vice attacked by the Commonwealth legislation is the use of the internet to access the market for child pornography and the consequent boost to that market of which internet access is such an important element.”*

1. The interrelationship between Commonwealth and State offences was addressed in *R v Fulop* [2009] VSCA 296; 236 FLR 376, where Buchanan JA (Nettle JA agreeing) said at 379 [11]-[13]:

*“11    The elements of the offences overlapped but they were not identical. While the appellant was able to obtain possession of the pornographic material through a carriage service, the service also enabled users to disseminate the material. The Commonwealth offence concentrates upon the internet because, as the Parliamentary Secretary to the Minister said in his Second Reading Speech:*

*Law enforcement agencies estimate that around 85% of child pornography seized in Australia is distributed via the internet. By focusing on the internet, these new Federal offences target the very heart of the abhorrent child pornography industry.*

*12    On the other hand, the state offence is not concerned with the means by which the offender gains possession of pornographic material. The appellant could gain access to the material without possessing it. In this case, he took a further step by downloading the material and thereby obtained possession of it. The Commonwealth offence was concerned with the images found on the hard drive of the appellant's computer. The state offence was constituted by the CDs and DVDs made and retained by the appellant. In my opinion, the offences did not overlap to such an extent that it rendered inappropriate the degree of cumulation ordered by the sentencing judge.”*

Increasing Maximum Penalties for Commonwealth and New South Wales Offences

1. Until 2010, an offence under s.474.19 was punishable by a maximum penalty of 10 years’ imprisonment. The maximum penalty for this and other offences was increased to imprisonment for 15 years by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Cth)*, which commenced on 14 April 2010. The Explanatory Memorandum with respect to the 2010 amendments explained the increase in maximum penalties in the following way (page 81):

*“Sections 474.19, 474.20, 474.22 and 474.23 are currently punishable by a maximum penalty of 10 years imprisonment. However, it is evident that the Internet is creating ever greater demands for new material of ever greater levels of depravity and corruption. The Internet is being used to access and distribute child pornography on a massive global scale and offending has become pervasive and widespread. As a result, offending behaviour is becoming increasingly destructive. Children, in addition to being victims of the initial abuse required for the production of the material, are exploited on a massive scale through the repeated distribution of the image, or images, throughout international networks.*

*Maximum penalties set by the Government are intended to reflect a worst case scenario. They are also intended to indicate to the courts the Government’s position on the level of seriousness which it believes the particular conduct involves. Accordingly, the amendments will increase the maximum penalties for using a carriage service for child pornography or child abuse material, or possessing such material for use through a carriage service, from 10 years imprisonment to 15 years imprisonment.”*

1. In New South Wales, an increase in the maximum penalty occurred in 2008 for the offence of possession of child abuse material contrary to s.91H(2) *Crimes Act 1900 (NSW)*. The maximum penalty for that offence was increased from five years’ imprisonment to 10 years’ imprisonment. In explaining this increase in the maximum penalty, the Attorney General, Mr Hatzistergos, said in the Second Reading Speech for the *Crimes Amendment (Sexual Offences) Bill 2008* (Hansard, Legislative Council, 26 November 2008):

*“The New South Wales offences are currently split into possession, which carries a five-year penalty, and production or dissemination, which carries a 10-year penalty. The bill increases the maximum penalty for possession of child pornographic material to 10 years. These substantial penalties send a strong message to the courts that child pornography should not be tolerated. This penalty reflects the seriousness of this crime. Any person who knowingly possesses images of a child being sexually abused is perpetuating such abuse and also providing a continuing market for such material. The Government is of the view that the criminality involved in that behaviour is the same as if the offender had produced the material themselves.”*

Sentencing Principles for Child Pornography Offences

1. At the same time as maximum penalties for these offences have been increased, the courts have made clear that the ready availability of material of this type has warranted substantial penalties with general deterrence and denunciation being paramount considerations.
2. The comity principle has been applied in establishing sentencing principles with respect to child pornography offences: *R v Gent* at 36 [29]. In *Director of Public Prosecutions (Cth) v D’Alessandro* (*“D’Alessandro”*) [2010] VSCA 60; 26 VR 477, Harper JA (Redlich JA and Williams AJA agreeing) said at 483-484 [21] (references omitted):

*“When construing and applying Commonwealth legislation, this Court follows principles of comity in according respect to the decisions of intermediate appellate courts of other jurisdictions concerning the same legislation. It is therefore worth recording that there seems to be unanimous support across the jurisdictions for a number of propositions. First, that the problem of child pornography is an international one. Secondly, that the prevalence and ready availability of pornographic material involving children, particularly on the internet, demands that general deterrence must be a paramount consideration. Thirdly, that those inclined to exploit children by involving them in the production of child pornography are encouraged by the fact that there is a market for it. Fourthly, that those who make up that market cannot escape responsibility for such exploitation. Fifthly, that limited weight must be given to an offender’s prior good character. Sixthly, that a range of factors bear upon the objective seriousness of the offences to which the respondent in this case pleaded guilty. They include:*

*(a) the nature and content of the pornographic material - including the age of the children and the gravity of the sexual activity portrayed;*

*(b) the number of images or items of material possessed by the offender;*

*(c) whether the possession or importation is for the purpose of sale or further distribution;*

*(d) whether the offender will profit from the offence.”*

1. These principles have been frequently repeated since *D’Alessandro*: *Minehan v R* [2010] NSWCCA 140; 201 A Crim R 243 at 261-262 [96]-[101]; *Director of Public Prosecutions v Smith* [2010] VSCA 215 at [23]; *Director of Public Prosecutions (Cth) v Guest* [2014] VSCA 29at [25]; *Heathcote (A Pseudonym) v R* [2014] VSCA 37 at [40]; *R v Linardon* [2014] NSWCCA 247 at [58]; *R v Martin* [2014] NSWCCA 283 at [37].
2. A helpful 2010 publication, issued by the Judicial Commission of New South Wales, observed that intermediate appellate courts had recognised that the prevalence of child pornography offences justified strongly deterrent sentences, and that the Internet accounts for the increase in offending: Mizzi, Gotsis and Poletti, *“Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences”*, Judicial Commission of New South Wales, Monograph 34, September 2010, paragraph 2.2.
3. After a thorough examination of authorities in *Minehan v R* (a case dealing with Commonwealth and State offences, including dissemination and grooming charges as well as access and possession offences), RA Hulme J (Macfarlan JA and myself agreeing) said at 260-261 [94]-[95]:

*“94    Drawing primarily from the authorities to which I have referred, the following matters may be relevant to an assessment of the objective seriousness of offences involving the possession or dissemination/transmission of child pornography:*

*1.    Whether actual children were used in the creation of the material.*

*2.    The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.*

*3.    The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.*

*4.    The number of images or items of material – in a case of possession, the significance lying more in the number of different children depicted.*

*5.    In a case of possession, the offender’s purpose, whether for his/her own use or for sale or dissemination. In this regard, care is needed to avoid any infringement of the principle in The Queen v De Simoni (1981) 147 CLR 383.*

*6.    In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.*

*7.    Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission.*

*8.    The proximity of the offender’s activities to those responsible for bringing the material into existence.*

*9.    The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material.*

*10.    Whether the offender acted alone or in a collaborative network of like-minded persons.*

*11.    Any risk of the material being seen or acquired by vulnerable persons, particularly children.*

*12.    Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.*

*13.    Any other matter in s 21A(2) or (3) Crimes (Sentencing Procedure) Act (for State offences) or s 16A Crimes Act 1914 (for Commonwealth offences) bearing upon the objective seriousness of the offence.*

*95    This list of factors is, of course, not closed. Individual cases may always produce further matters relevant to the assessment of their objective seriousness.”*

1. The *Minehan v R* factors have been applied in a number of later decisions: *R v Linardon* at [53]; *R v Martin* at [34]; *James v R* [2015] NSWCCA 97 at [23].
2. A number of additional propositions should be kept in mind.
3. In this case, the Respondent was to be sentenced for accessing child pornography material and possession of child abuse material. He was not charged with sale, distribution or dissemination of material. The absence of features of this type do not operate to mitigate penalty for a possession offence: *Saddler v R* [2009] NSWCCA 83; 194 A Crim R 452 at 464-465 [49]-[50]; *R v Booth* [2009] NSWCCA 89at [46]; Warner, *“Sentencing for Child Pornography”* (2010) 84 ALJ 384 at 385.
4. The possession of child pornography material creates a market for the continued corruption and exploitation of children: *R v Coffey* [2003] VSCA 155; 6 VR 543 at 552 [30]; *R v Cook; Ex parte Director of Public Prosecutions (Cth)* [2004] QCA 469 at [21]; *R v Jongsma* [2004] VSCA 218; 150 A Crim R 386 at 395 [14]; *Heathcote (A Pseudonym) v R* at [40].
5. The courts have stressed that possession of child pornography is not a victimless crime: *R v Jones* [1999] WASCA 24; 108 A Crim R 50 at 52 [9]; *R v Gent* at 38 [33]; *D’Alessandro* at 484 [23]; *R v Martin* at [43].
6. An additional feature of harm done to victims of child pornography offences was referred to by Professor Kate Warner (as her Excellency then was) in *“Sentencing for Child Pornography”* (2010) 84 ALJ 384 at 385 (references omitted):

*“The damage done to the children so abused can be, and undoubtedly often is, profound. In addition to the physical and psychological harm from the abuse itself, the New South Wales Sentencing Council has explained that harm may also result from the knowledge, as they grow older, that the material may remain in circulation, heightening the shame and distress associated with being exploited when young and vulnerable.”*

1. In an extract cited frequently in later decisions, Simpson J (as her Honour then was) (with the agreement of McClellan CJ at CL and Howie J), encapsulated in *R v Booth* at [39]-[44], the particular vice of child pornography offences and the sentencing principles which have been deployed as a response by the Courts:

*“39    A number of previous decisions of this and other appellate courts have found that, in respect of offences of child pornography, general deterrence is, at least, a significant element of the sentencing process: R v Gent; Assheton v R [2002] WASCA 209; 132 A Crim R 237; Mouscas v R [2008] NSWCCA 181. In Assheton, indeed, general deterrence was said to be ‘the paramount consideration’. This view was endorsed in Gent.*

*40    I would add my further endorsement to that view. It seems to me that possession of child pornography is an offence which is particularly one to which notions of general deterrence apply. Possession of child pornography is a callous and predatory crime.*

*41    In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the world. Often this is in underdeveloped or disadvantaged countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse, and upon the poverty of the children the subject of the material.*

*42    What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes.*

*43    And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.*

*44    It is for that reason that this is a crime in respect of which general deterrence is of particular significance.”*

1. A common feature on sentence for this class of offence is the tender of material (and often substantial material) concerning steps taken with respect to counselling and treatment in aid of rehabilitation. Evidence of this type is important to the exercise of the sentencing discretion: s.16A(2)(n) *Crimes Act 1914 (Cth)*; s.21A(3)(h) *Crimes (Sentencing Procedure) Act 1999 (NSW)*. However, it is important to keep in mind the further observations of Simpson J in *R v Booth* at [47]:

*“Examination of the Remarks on Sentence satisfies me that undue focus was placed upon the respondent’s need for counselling at the expense of other legitimate and important sentencing considerations. While I do not dissent from the importance of achieving prevention of further offences by such means, it is not the only matter to be considered. As I have made clear, the need to deter others from involving themselves in child pornography by signalling that such behaviour will be met by significant penalties is an important consideration. So also is denunciation of those who engage in this callous and predatory crime.”*

1. Citing this passage from *R v Booth*, it has been said that, given the predominance of general deterrence and denunciation in the sentencing process for offences of this type, rehabilitation may have reduced significance, with the weight to be attributed to rehabilitation depending upon the seriousness of the particular offence: Mizzi, Gotsis and Poletti, *“Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences”*, paragraph 2.4.

Classification of Images, Inspection of Sample Images and Statutory Definitions

1. A common feature on sentence for this class of offence is classification of at least some of the material in accordance with a scale used to assess the objective seriousness of the images. Scales used have included the COPINE Scale (Combatting Paedophile Information Networks in Europe) and the Oliver Scale (drawn from *R v Oliver* [2003] 1 Cr App R 28): Mizzi, Gotsis and Poletti, *“Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences”*, paragraph 3.3.
2. The ANVIL or CETS scale (see [16]-[17] above), as applied in the present case, is the method presently used for this purpose: *Director of Public Prosecutions (Cth) v Guest* at [9]; *Heathcote (A Pseudonym) v R* at [13]-[14]; *R v Martin* at [10]; *Director of Public Prosecutions (Cth) v Zarb* (*“Zarb”*) [2014] VSCA 347 at [7].
3. There is no statutory provision concerning the use of classification scales of this type. However, experience in this country, and in other jurisdictions, has demonstrated that it is a helpful way to assist a sentencing court to form a view concerning the nature and gravity of the material.
4. Further, it is appropriate (as occurred in this case) for sample images to be made available to the sentencing court, and to this Court on appeal, to allow an impression to be formed of the material and its degree of depravity: *R v Oliver* at [10]; *R v Jongsma* at 404 [35]. In *Smit v State of Western Australia* [2011] WASCA 124, McLure P (Pullin JA and Mazza J agreeing) explained, at [17], the purpose to be served by a sentencing court viewing sample images in this class of case:

*“It is not suggested by the English Court of Appeal* [in R v Oliver] *that its classification list is intended to be a substitute for the sentencing judge viewing the pornographic material the subject of the conviction. Nor should it. The relative perversion and debauchery of the pornographic material is a relevant sentencing factor. Viewing a representative sample (as identified or agreed by the parties) of the material will ordinarily be necessary for the proper performance of the sentencing judge's duties. Judges involved in the administration of the criminal law are frequently exposed to material that is deeply offensive in a myriad of different ways whilst being required to retain their objectivity and sense of proportion. Moreover, this court is assisted by findings as to the nature of the pornographic material such as those made by the sentencing judge in this case which went well beyond the limited description in the DPP's list. The classification levels can only be of marginal assistance to courts involved in imposing or reviewing sentences for offences involving child pornography.”*

1. The classification of material in accordance with the CETS scale assists the process of assessment of the objective seriousness of an offence. Although Categories 1 to 5 on the CETS scale involve escalating gravity of the conduct depicted in the images, it should not be assumed that Category 1 material is mild in content. Despite being the lowest classification level, Category 1 material itself is capable of possessing significant gravity. In *Zarb*, Neave and Kyrou JJA observed at [30], after viewing images:

*“Although level 1 covers images which are not as depraved and abusive as the images allocated to higher levels, some of the images we viewed involved dreadful examples of the abuse of the child victims, who were arranged in sexualised poses displaying their genitalia. The images at the higher end of the CETS Scale depicted horrifying degradation and exploitation of young children.”*

1. I will return to this topic when considering the sample images provided to the Court in this case (see [116]-[121] below).
2. The use of random sample evidence in child abuse material cases is permitted under s.289B *Criminal Procedure Act 1986 (NSW)*, a process which provides further assistance to a sentencing court.
3. For the assessment of objective seriousness of a s.91H offence, it is appropriate, as well, to keep in mind the statutory definition of *“child abuse material”* as contained in s.91FB *Crimes Act 1900 (NSW)*:

*“91FB Child abuse material - meaning*

*(1)    In this Division:*

***child abuse material*** *means material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive:*

*(a)    a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or*

*(b)    a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or*

*(c)    a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or*

*(d)    the private parts of a person who is, appears to be or is implied to be, a child.*

*(2)    The matters to be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive, include:*

*(a)    the standards of morality, decency and propriety generally accepted by reasonable adults, and*

*(b)    the literary, artistic or educational merit (if any) of the material, and*

*(c)    the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest, and*

*(d)    the general character of the material (including whether it is of a medical, legal or scientific character).*

*(3)    Material that depicts a person or the private parts of a person includes material that depicts a representation of a person or the private parts of a person (including material that has been altered or manipulated to make a person appear to be a child or to otherwise create a depiction referred to in subsection (1)).*

*(4)    The private parts of a person are:*

*(a)    a person’s genital area or anal area, or*

*(b)    the breasts of a female person.”*

1. Section 473.1 *Criminal Code (Cth)* contains a definition of *“child pornography material”*, the term relevant to offences under s.474.19 of the Code. That term is defined in the following way in s.473.1:

*“****child pornography material*** *means:*

*(a)    material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:*

*(i)    is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or*

*(ii)    is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;*

*and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*

*(b)    material the dominant characteristic of which is the depiction, for a sexual purpose, of:*

*(i)    a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or*

*(ii)    a representation of such a sexual organ or anal region; or*

*(iii)    the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;*

*in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*

*(c)    material that describes a person who is, or is implied to be, under 18 years of age and who:*

*(i)    is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or*

*(ii)    is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;*

*and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*

*(d)    material that describes:*

*(i)    a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or*

*(ii)    the breasts of a female person who is, or is implied to be, under 18 years of age;*

*and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.”*

Ground 1 in the Commonwealth and State Appeals - Failure to Take Into Account Matters Set Out in s.16A Crimes Act 1914 (Cth) and s.21A Crimes (Sentencing Procedure) Act 1999 (NSW)

1. In the context of this appeal, these grounds may be dealt with relatively shortly.
2. The crux of the Crown submission was that the remarks on sentence failed in fundamental respects to fulfil the function of sentencing remarks, and in particular to address sentencing factors under the relevant Commonwealth and State legislation.
3. Mr Hunt, counsel for the Respondent, emphasised that the remarks on sentence were delivered ex tempore immediately following the sentencing hearing. In oral submissions, Mr Hunt recognised, in a practical way, the difficulty in meeting a submission based upon the brevity of the sentencing remarks. His resistance to the Crown appeal was, in truth, to be found in other aspects of the case.

Decision

1. In *Gallant v R* [2006] NSWCCA 339, Howie J (McClellan CJ at CL and Adams J agreeing) said at [69]:

*“The sentencing remarks were very brief, requiring only two double spaced pages of transcript. While that is not itself an indication of error, there is the risk that a Judge in the avoidance of prolixity will go too far the other way and fail adequately to refer to or discuss matters of significance in the determination of sentence: see R v Thomas [2006] NSWCCA 313.”*

1. These observations in *Gallant v R* have application to the present case.
2. This Court takes into account the ex tempore nature of remarks on sentence delivered immediately after a sentencing hearing: *Currie v R* [2013] NSWCCA 267 at [50]-[51]. However, there are minimum requirements which were not met in this case. The following observations of Adamson J (Hoeben CJ at CL and RA Hulme J agreeing) in *R v West* [2014] NSWCCA 250 at [28] are apposite:

*“In the present case, the remarks on sentence contain no assessment of the objective seriousness of the offending conduct. Nor is there any assessment of the offender's moral culpability. I do not discern in his Honour's remarks on sentence anything that might permit the conclusion that these matters were taken into account. It is not satisfactory that an appeal court is left to undertake an analysis of exchanges between the bench and counsel during submissions in an attempt to ascertain a judicial officer's reasons for determination: Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Limited [2006] NSWSC 343; 67 NSWLR 402 at [19]. The latitude that is afforded to remarks on sentence given ex tempore by busy judges does not, in my view, entitle this Court to infer that a matter as fundamental to the sentencing process as the assessment of objective seriousness was taken into account when it was not addressed in the remarks.”*

1. The sentencing remarks in this case (at [50] above) focused almost exclusively upon the Respondent’s subjective case. No attempt was made to grapple with or assess the objective seriousness of the Respondent’s offences. A passing, but inappropriate, reference was made to specific and general deterrence. No mention at all was made to s.16A *Crimes Act 1914 (Cth)* or s.21A *Crimes (Sentencing Procedure) Act 1999 (NSW)* or the factors mentioned in those provisions. There was a clear and fundamental failure to explain how the sentence to be imposed had been arrived at.
2. Apart from nothing being said about the objective seriousness of the offences, there was no indication that his Honour had considered the folder of sample images provided by the Crown during the sentencing hearing (see [48] above).
3. The primary task for a sentencing court is to impose a sentence for a Commonwealth offence that is of a severity appropriate in all the circumstances of the case: s.16A(1) *Crimes Act 1914 (Cth)*. An important purpose of sentencing under New South Wales law is to ensure that the offender is adequately punished for the offence: ss.3A(a), 21A *Crimes (Sentencing Procedure) Act 1999 (NSW)*. There must be a reasonable proportionality between the sentences imposed and the objective gravity of the offence itself: *R v Dodd* (1991) 57 A Crim R 349 at 354. This fundamental task cannot be exercised without some assessment of the objective seriousness of the offences. It is an essential element of the process of instinctive synthesis: *Zreika v R* [2012] NSWCCA 44; 223 A Crim R 460 at 473 [46]. It did not happen in this case.
4. The Crown has made good the first ground of appeal in each of the Commonwealth and State appeals.

Ground 2 - Claim of Error in Ordering that the Sentences be made Wholly Concurrent

1. The Crown submits that the manner in which the sentencing Judge came to determine that identical 18-month sentences should be served concurrently, demonstrated that there had been a failure to comply with the relevant principles concerning accumulation and concurrency. The Crown submitted, as it had before the District Court, that the accessing and possession offences were different so that some measure of accumulation was appropriate as between those offences: *James v R* [2009] NSWCCA 62 at [16]. It was submitted, in particular, that there was a difference between accessing a small number of images and possessing some 34,000 images. The Crown submitted, as well, that there was a difference in relation to the systematic saving and the way in which and the time over which the images were accessed, using peer-to-peer technology, and saved to various hard drives (T7, 13 May 2015).
2. Mr Hunt submitted that the Commonwealth and State offences were inextricably linked and that the offences should be considered part of the same episode of criminality. In these circumstances, it was submitted that there was no error in directing that the sentences be served concurrently. In oral argument, Mr Hunt submitted that this is a case where, in terms of the totality principle, there was a proper basis on which sentences for the accessing and possession offences ought be concurrent (T11, 13 May 2015).

Decision

1. Although the sentence Judge had received written submissions from the Crown which dealt with a wide range of issues, including accumulation and concurrency, the sentencing Judge did not advert to these topics in the remarks on sentence.
2. The clear inference (see [49]-[50] above) is that his Honour had determined to impose an intensive correction order for a period of 18 months and, only when reminded by counsel, did he fix an identical and entirely concurrent sentence of 18 months’ imprisonment on each count.
3. This Court has been critical of the imposition of a *“one size fits all”* set of sentences in circumstances where there is a clear failure to comply with the principles in *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 and to make an assessment concerning issues of concurrence, accumulation and totality: *Corby v R* [2010] NSWCCA 146 at [59]-[60].
4. That no attention to these matters occurred in this case is best illustrated by the sentence of 18 months’ imprisonment for the possession of *“Mace”* offence. Although not a trivial example of an offence under s.7(1) *Weapons Prohibition Act 1988 (NSW)*, it did not warrant the sentence imposed at first instance. It is clear that no separate consideration was given to issues of accumulation, concurrency and totality for these three offences.
5. The Crown has demonstrated that the sentencing Judge failed to give principled consideration to the question of concurrency and accumulation. There was, in reality, no proper exercise of discretion in this regard.
6. Where sentences of imprisonment are to be imposed for Commonwealth and State offences, it is necessary to comply with s.19(3) *Crimes Act 1914 (Cth)*. This leads to consideration of issues of concurrency and accumulation. The question whether sentences should be concurrent or, to some extent, cumulative involves consideration whether a sentence for one offence can comprehend and reflect the criminality for the other offence. If it can, the sentences ought be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality for the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentences will fail to reflect the total criminality for the two offences: *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41 at 47 [27].
7. Determination of whether sentences for the Commonwealth and State child pornography offences in this case ought be concurrent or partly accumulated involves a number of considerations. The offences are directed at different vices (see [55]-[56]). The offences overlap, but are not identical. In this case, there are features of the Respondent’s offences, as identified by the Crown (at [92] above), which point to the need for some measure of accumulation to reflect the differing criminality contained in the two offences. I will return to this issue should the Court determine that the Respondent should be resentenced for these offences.
8. The Crown has made good this ground of appeal.

Grounds 3 and 4 - Grounds Alleging Errors With Respect to the Ordering of an ICO

1. The Crown submitted that the sentencing Judge made a referral for ICO assessment on 24 October 2014 during the sentencing hearing, and at a time when the evidence and submissions had not been completed. It was submitted that making a referral for assessment before the evidence had been completed was in breach of s.69(2) *Crimes (Sentencing Procedure) Act 1999 (NSW)*.
2. The Crown submitted further, in support of Ground 4, that the sentencing Judge failed to apply the provisions of s.7(1) *Crimes (Sentencing Procedure) Act 1999 (NSW)* when ordering that the sentences be served by way of an ICO.

Decision

1. Section 69 *Crimes (Sentencing Procedure) Act 1999 (NSW)* provides as follows:

*“69    Referral of offender for assessment*

*(1)    Before imposing a sentence of imprisonment on an offender, the court may refer the offender for assessment as to the suitability of the offender for intensive correction in the community.*

*(2)    A court is not to refer an offender for such an assessment unless satisfied, having considered all the alternatives, that no sentence other than imprisonment is appropriate and that the sentence is likely to be for a period of no more than 2 years.”*

1. It is clear from the course of the sentencing proceedings that the sentencing Judge did not engage in the stepped process required when use of an ICO is under consideration: *Zreika v R*  at 474-475 [56]-[59]. Rather, his Honour determined to proceed by way of an ICO, and then selected a period of imprisonment that fell below the two-year threshold to facilitate that outcome.
2. I am satisfied that Grounds 3 and 4 have been established.

Ground 5 - The Claim of Manifest Inadequacy

1. The real area of contest on this appeal falls under this ground. The findings already made reveal a series of clear errors. It remains necessary to consider this ground.
2. The Crown submits that a sentencing order involving the use of an ICO was manifestly inadequate in this case. The Crown submitted, as it did at first instance, that the only appropriate sentence for these offences was a period of imprisonment to be served by way of full-time custody.
3. Whilst acknowledging the leniency involved, Mr Hunt submitted that it was open to the sentencing Judge, in the circumstances of this case, to proceed by way of an ICO.

Decision

1. In circumstances where the sentencing Judge did not engage in any real assessment of the objective seriousness of the Respondent’s crimes, nor any process of instinctive synthesis where such a finding was taken into account with all other relevant features, it falls effectively to this Court to undertake that process to allow an assessment as to whether the sentences imposed were manifestly inadequate.
2. At the outset, and as noted in the context of Ground 2, it is clear that a sentence of 18 month’s imprisonment for the Respondent’s offence under s.7(1) *Weapons Prohibition Act 1988 (NSW)* is entirely excessive, given the objective circumstances of that offence, the Respondent’s explanation for his possession of that item and his subjective factors relevant to sentence.
3. However, the focus of attention on sentence, for the purpose of this ground of appeal, is directed to the child pornography offences under Commonwealth and State law.
4. An assessment of the nature and number of the images possessed or accessed by the Respondent leads to a finding of substantial objective seriousness in this case. Consideration of the images in accordance with the CETS scale fortifies this conclusion (see [16] above).
5. In addition, the folder of sample images, falling within the various categories on the CETS scale, assists this Court by providing visual examples to be taken with the written description of the categories (see [76]-[77] above). This Court was informed that the folder provided to this Court was the same folder which had been handed to the sentencing Judge in the District Court (T17-18, 13 May 2015). This provides a sentencing court with something more than a formulaic classification, which may not communicate the true nature of the offending material. Young children are involved, with even the Category 1 images being significantly depraved in their content.
6. As an examination of the sample folder escalates through the other categories (up to Category 5), an understanding of the gross depravity involved and the abuse of young children, both physical and psychological, becomes clear.
7. To amplify these conclusions, it is appropriate to provide a short description of some of the images contained in the sample folder.
8. There are nine Category 1 images depicting naked prepubescent girls (aged between about eight to 11 years) in sexual poses displaying their genitalia. In two images, there are two girls interacting in the display. The observations of Neave and Kyrou JJA in *Zarb* (at [77] above) have equal application to the Category 1 material in this case.
9. There are nine Category 2 images depicting naked prepubescent girls (and three boys) engaged in joint or solo masturbation or fellatio.
10. The nine Category 3 images depict, amongst other things:
11. an adult male licking the vagina of an infant;
12. an erect penis which has ejaculated onto the face of a very young girl (about three years old);
13. erect penises in the vicinity of the genitalia of a baby or young children.
14. The nine Category 4 images reveal, amongst other things:
15. adult males having vaginal intercourse with very young children (in one photo where the head of the male can be seen, it is covered with a hood);
16. young girls (aged about three to seven years) performing fellatio upon adult males;
17. digital penetration by an adult into the anus of a baby girl.
18. Category 5 images include the following:
19. naked young children in various states of bondage and suspension;
20. an adult male (wearing a hood to cover his face) having vaginal intercourse with a young girl who is bound;
21. a dog engaged in a sexual pose with a young girl.
22. It is not necessary to refer to the Category 6 images which depict animated or virtual images of children engaged in sexual poses or activity.
23. The s.91H(2) offence involved possession of a very large number of images (see [19] above) which had been stored on multiple devices (see [12] above). Although it is not possible, on the material before this Court, to precisely quantify the number of children involved, it can be said that many children are depicted in the sample images alone. It may be inferred, safely, that the number of children depicted far exceed the number in the sample images.
24. The s.474.19(1)(a)(i) offence involved accessing material over a period of time. It involved a course of conduct. Far from desisting from this conduct, the Respondent had continued to access material in the days before the execution of the search warrant (see [13], [22]-[23], [28] above). His interest in child pornography material continued despite his interaction with his wife on this issue (see [15](h) above).
25. The Respondent was still actively involved in his pursuit of child pornography even at the time of their AFP attendance on his premises on 12 March 2013.
26. The Respondent had a number of factors operating in his favour on the subjective side of the case, including his health. His prior good character was to be afforded limited weight: *R v Gent* at 40-44 [48]-[69]; *D’Alessandro* at 483-484 [21] cited at [60] above. Prior good character is not unusual in this area of offending. Positive personal antecedents and a reduced or absent need for personal deterrence are relatively commonplace amongst offenders in possession of child pornography: *Hill v State of Western Australia* [2009] WASCA 4 at [28]. Significant weight is to be given to general deterrence and correspondingly less weight to matters personal to the offender: *Hill v State of Western Australia* at [28].
27. The Court must bear in mind the maximum penalties for these respective offences, being imprisonment for 10 years for the State offence and 15 years for the Commonwealth offence. In addition, the repeated statements of Courts throughout Australia with respect to the paramount importance of general deterrence and denunciation must loom large on sentence for these offences (see [60]-[72] above).
28. Steps taken by the Respondent to progress his rehabilitation are important on sentence. However, the sentences actually imposed must be reasonably proportionate to the crimes which the Respondent committed: *R v Booth* at [47] (cited at [71] above). It is important that the subjective circumstances of an offender not overshadow the objective gravity of the crimes for which sentence is to be passed: *R v Dodd* at 354.
29. This Court has emphasised the significant degree of leniency involved in the use of an ICO as a sentence. Although statements made in *R v Pogson; R v Lapham; R v Martin* [2012] NSWCCA 225; 82 NSWLR 60at 85-87 [112]-[123] (in the joint judgment of McClellan CJ at CL and myself) point to the breadth to the concept of rehabilitation, and the capacity of an ICO to operate as a form of punishment, it is necessary not to lose sight of the need for an appropriate level of punishment, in the form of immediate incarceration, in cases of serious child pornography offences such as this.
30. The decision in *R v Pogson; R v Lapham; R v Martin* should not be utilised to pass an entirely inappropriate sentence, which sees an offender such as the Respondent with his magnitude of offending, being dealt with by way of an ICO.
31. To proceed by way of an ICO in this case meant that concepts of general deterrence and denunciation *“slip through almost without trace”*: *D’Alessandro* at 484 [24].
32. Entirely concurrent sentences of 18 months’ imprisonment for the s.91H(2) and s.474.19 offences disclose error which is magnified by the order that the terms be served by way of ICO. Having regard to the quantity and nature of the images and videos accessed and possessed by the Respondent in this case, the sentences imposed are unjustifiably lenient.
33. I am satisfied that the sentencing orders in this case were unreasonable or plainly unjust: *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at 370 [25]. I have reached this conclusion having considered all matters relevant to the fixing of sentence: *Hili v The Queen* [2010] HCA 45; 242 CLR 520 at 539 [60]. The only sentences which were reasonably open were full-time sentences of imprisonment.
34. The explanation for the imposition of manifestly inadequate sentences in this case may be found largely in the various errors identified in the earlier grounds of appeal, culminating in a finding that the sentences imposed were manifestly inadequate. It is appropriate to repeat the statement of Wood CJ at CL (Giles JA and Levine J agreeing) in *R v McGourty* [2002] NSWCCA 335 at [34]-[35]:

*“34    Clearly it was a* [sic] *necessary and appropriate for his Honour to take the subjective matters into account, but they had to be kept in perspective. They should not have become the reason for imposing a sentence which, in my view, was weakly merciful and which did not properly reflect the objectives of punishment, retribution and deterrence, both general and personal.*

*35    The result, so it seems to me, was to produce a sentence - whether suspended or not - that was not reasonably proportionate to the crime. Rather, it was of the kind which offends the principles enunciated in decisions such as Regina v Dodd (1991) 57 A Crim R 349 and the earlier decision in Regina v Rushby (1977) 1 NSWLR 594.”*

1. The Crown has made good this ground of appeal.

Should the Discretion to Resentence the Respondent be Exercised?

1. The Crown has established error. Accordingly, the first hurdle on a Crown appeal has been cleared. It remains incumbent on the Crown to demonstrate that the discretion to resentence the Respondent should be exercised: *CMB v Attorney General for NSW* [2015] HCA 9; 89 ALJR 407 at 415 [33].
2. Mr Hunt read the affidavit of the Respondent affirmed 11 May 2015, to be taken into account on the exercise of the residual discretion and resentencing.
3. The Crown read the affidavit of Stephen John Grodzicki affirmed 12 May 2015 to explain elements of delay between the filing of the Crown appeals and the hearing of the appeals in this Court.
4. The evidence before this Court indicates that the Respondent is taking steps to further his rehabilitation. The Respondent has been complying with the conditions of his ICO. He is required to attend Hornsby Community Corrections on Thursday of each week to perform activities, including the covering of text books and reading books for schools.
5. The Respondent’s affidavit speaks, as well, of the substantial anxiety affecting himself and his wife since he learned of the Crown appeal.
6. The Respondent has secured employment, which presents good prospects for him in the long term. It is said that a sentence of full-time imprisonment will endanger the family home given his wife’s limited income. The Respondent has been seeing a psychologist, who has been assisting him with respect to aspects of his personal life.
7. The Respondent’s affidavit does not expand in any detail upon his health problems. It is clear from the affidavit that he has been able to work. There is evidence of the Respondent’s concerns about the risk of being assaulted in custody. He has been taking blood-thinning medication which will need to continue for some time, if not indefinitely.
8. With respect to delay in the hearing of the Crown appeal, the affidavit of Mr Grodzicki indicates efforts being made by the Crown to obtain material for the purpose of the appeal. It was only on 14 April 2015 that the Crown received a copy of the sentencing Judge’s remarks on sentence of 14 November 2014.
9. I do not consider that delay by the Crown in this case operates adversely to the Crown. The appeals were filed promptly and the Respondent was aware that the appeals were on foot. It was agreed in this Court that an email was sent by the Crown to the Respondent’s legal representative on 14 November 2014 indicating that a Crown appeal was being considered. The Crown took reasonable steps to bring on the hearing of the appeals.
10. It was submitted for the Respondent that the approach taken by the Crown in the District Court operated against the Crown on the exercise of the residual discretion. I do not agree. The Crown advanced a submission that a sentence of full-time imprisonment was the only appropriate sentence in this case. The Crown did not acquiesce in the use of an ICO. Until the end, the Crown was placing evidence before the sentencing Court concerning the capacity of Justice Health to manage and treat the Respondent’s health problems in custody.
11. It is not uncommon, in sentencing cases for child pornography offences, for there to be a body of evidence available to the Court with respect to counselling and rehabilitation. Material of this sort can provide a solid body of evidence favourable to the subjective circumstances of the offender.
12. However, as the cases have made clear, prior good character has a lesser role to play on sentence in this class of offending. Further, it is important that an offender’s subjective circumstances, including prospects of rehabilitation and rehabilitative steps already underway, not be allowed to overshadow the objective seriousness of the offences for the purpose of sentence, nor the need for a sentence to reflect general deterrence and denunciation: *R v Booth* at [47] (cited at [71] above); *Hill v State of Western Australia* at [28] (see [126] above).
13. I am satisfied that a *“substantial wrong”* has occurred in this case, arising from error under the final category in *House v The King* [1936] HCA 40; 55 CLR 499 at 506; *D’Alessandro* at 487 [39].
14. Where a manifestly inadequate sentence has been imposed, giving rise to a substantial wrong, that is a strong factor in favour of this Court proceeding to resentence on a Crown appeal. The interests of justice call for the imposition of appropriate sentences for these offences.
15. I am persuaded that this Court should proceed to resentence the Respondent in the circumstances of this case.

Resentencing the Respondent

1. At first instance, the Crown referred to a series of sentencing decisions to inform a range of sentences for this class of offending. Of course, caution must be exercised in any use of s.91H(2) sentencing cases for offences before 2008 or s.474.19 cases for offences before 2010, given the increase in the respective maximum penalties (see [57]-[58] above).
2. The cases referred to below included the following:

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| **Case** | **Charges** | **Volume of Material and Classification** | **Sentence** |
| *Mouscas v R* [2008] NSWCCA 181 | Possess child pornography - s.91H(3) *Crimes Act 1900 (NSW)* (one count)  Use carriage service to access child pornography material - s.474.19(1)(a)(i) *Criminal Code (Cth)* (one count) | 41,923 image files and 251 video files  Images at upper end of objective seriousness | Imprisonment for two years and six months with a non-parole period of 18 months (offender’s appeal dismissed) |
| *James v R* [2009] NSWCCA 62 | Possess child pornography - s.91H(3) (one count)  Use carriage service to access child pornography material under s.474.19(1)(a)(i) (one count) | Over 130,000 images on compact disks and hard drives, videos and movie files  Most images at upper end of seriousness | Imprisonment for 18 months with recognisance release order after 12 months  (Offender’s appeal dismissed) |
| *Saddler v R* [2009] NSWCCA 83 | Possess child pornography material - s.91H(3) (three counts) (other offences on a Form 1) | Over 36,500 images | Imprisonment for six years with non-parole period of four years and six months  (Offender’s appeal allowed - resentenced to total effective sentence of four years’ imprisonment with a non-parole period of two years and nine months) |
| *DPP (Cth) v Guest* [2014] VSCA 29 | Use carriage service to access - s.474.19(1)(a)(i) (one count)  Use carriage service to transmit - s.474.19  Possession of child pornography material - s.70 *Crimes Act 1958 (Vic)* | About 10,000 pictures, videos and text files, of which about 8,000 fell within Category 1 of the CETS scale | County Court - Community Corrections Order for three years and six months  On Crown appeal - sentences manifestly inadequate - resentenced to imprisonment for 18 months with recognisance release order after six months |

1. In this Court, the Crown relied upon the following recent decisions of this Court:

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| **Case** | **Charges** | **Volume of Material and Classification** | **Sentence** |
| *R v Linardon* [2014] NSWCCA 247 | Possession offence under s.91H(2)  Transmission and accessing offences under s.474.19  Aggravated transmission under s.474.24A *Criminal Code (Cth)* | Possession charge related to 4,530 images and 40 videos and the access charge concerned 130 images and videos  Images and videos included material within the most serious category | District Court - total effective sentence of imprisonment for three years and four months with a non-parole period of one year and 10 months  On appeal - Crown appeal allowed - total term of five years’ imprisonment with a non-parole period of three years |
| *R v Martin* [2014] NSWCCA 283 | Possession - s.91H(2) (one count)  Accessing - s.474.19, (two counts)  Producing child abuse material - s.91H(2) (one count)  Making available child pornography material - s.474.19 (one count) | Possession of about 13,000 images  Make material available count involved sharing over 47,000 prohibited files over six months | District Court - total effective sentence of three years’ imprisonment with a non-parole period of 18 months  On appeal - Crown appeal allowed - Offender resentenced to total effective sentence of five years and six months’ imprisonment with an effective non-parole period of three years and six months |

1. Although care must be exercised in considering the circumstances and sentences imposed in other cases, these sentencing decisions serve to fortify a conclusion of manifest inadequacy in this case and inform issues relating to the resentencing of the Respondent. Further support for this conclusion may be found in another recent decision of this Court in *Martin v R* [2014] NSWCCA 124, a decision relating only to offences under s.91H(2) *Crimes Act 1900 (NSW).* These sentences operate as yardsticks, to be taken into account on sentence: *Hili v The Queen* at 537 [54].
2. For the purpose of resentencing the Respondent, I have regard to all the evidence before the District Court and before this Court, with respect to the objective gravity of these offences and the Respondent’s subjective circumstances. I will not repeat the matters set out earlier in this judgment which bear upon these aspects of the case.
3. As in the District Court, a 25% discount will be applied for the Respondent’s pleas of guilty to the State matters and for his facilitation of the course of justice on the Commonwealth charge. The sentences to be passed take into account these discounts. I am satisfied that sentences of imprisonment involving full-time custody are the only appropriate sentences to be imposed for the Commonwealth and State child pornography offences.
4. Issues of concurrency and accumulation were addressed with respect to Ground 2. Where sentences are being imposed for Commonwealth and State offences, it is necessary for the Court to comply with s.19(3) *Crimes Act 1914 (Cth).* I have concluded that there ought be some measure of accumulation with respect to the sentences to be imposed for those two offences (see [98]-[100] above). The offences overlap, but they are not identical. The Respondent gained access to the material through a carriage service. However, as the Crown submitted, he undertook systematic saving, utilising peer-to-peer technology to access and then save material to various hard drives. The different vices to which the offences are directed remain significant (see [55]-[56] above). The Respondent’s criminality for the two offences requires some measure of accumulation, subject to application of the totality principle. A level of accumulation of three months is appropriate in this case: *James v R* at [16]; *R v Fulop* at 378-379 [10]-[12] (see [56] above).
5. As noted earlier, a sentence of 18 months’ imprisonment is excessive with respect to the offence of possession of *“Mace”*. The Respondent’s account for possession of this substance was not challenged. He did not possess it for any criminal purpose. Having regard to the Respondent’s subjective case, a non-custodial penalty should have been imposed at first instance. The appropriate course to adopt in this Court is to convict the Respondent, but impose no other penalty under s.10A *Crimes (Sentencing Procedure) Act 1999 (NSW)*.
6. It is necessary for the Court to adopt the different sentencing regimes applicable under Commonwealth and New South Wales law. It was common ground before this Court that any sentence of imprisonment to be imposed should commence on 21 November 2014, to take into account the period during which the Respondent has been subject to an ICO with associated restrictions upon his liberty. This approach has been adopted by this Court on successful Crown appeals where an ICO was ordered at first instance: *R v Hinchliffe* [2013] NSWCCA 327 at [304].
7. In this case, a greater sentence should be imposed for the s.91H(2) offence which involved possession of a very substantial amount of child abuse material (see [18]-[20] above). The offence under s.474.19(1)(a)(i) is more limited in its scope (see [21]-[23] above).
8. A term of imprisonment of 12 months should be imposed for the Commonwealth offence. As the effective non-parole period to be imposed will attach to the State offence, it is not appropriate to make a recognizance release order with respect to this sentence: s.19AB(3) Crimes Act 1914 (Cth).
9. For the s.91H(2) offence, a sentence of imprisonment for two years and six months should be fixed. I find special circumstances resulting from the Respondent’s health issues and the level of accumulation to be applied. A non-parole period of 15 months will be set.
10. The total effective sentence will comprise a head sentence of two years and nine months with an effective minimum term of one year and six months, with both periods to date from 21 November 2014.
11. I propose the following orders:
12. Crown appeals allowed;
13. sentences imposed in the Sydney District Court on 14 November 2014 are set aside;
14. in their place:
15. (i)   for the offence of accessing child pornography material contrary to s.474.19(1)(a)(i) *Criminal Code (Cth)*, the Respondent is sentenced to imprisonment for a period of 12 months commencing on 21 November 2014 and expiring on 20 November 2015,
16. (ii)   for the offence of possession of child abuse material contrary to s.91H(2) *Crimes Act 1900 (NSW)*, the Respondent is sentenced to imprisonment comprising a non-parole period of 15 months commencing on 21 February 2015 and expiring on 20 May 2016, with a balance of term of 15 months, commencing on 21 May 2016 and expiring on 20 August 2017,
17. (iii)   for the offence of possession of a prohibited weapon under s.7(1) *Weapons Prohibition Act 1988 (NSW)*, the Respondent is convicted but no other penalty is imposed in accordance with s.10A *Crimes (Sentencing Procedure) Act 1999 (NSW)*,
18. in accordance with s.50 *Crimes (Sentencing Procedure) Act 1999 (NSW)*, the Respondent should be released to parole on 21 May 2016.
19. **BEECH-JONES J**: I agree with Johnson J and the orders His Honour proposes.

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