IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

No 2025/0085681

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
Applicant

PD
Respondent

OUTLINE OF SUBMISSIONS OF THE CONTRADICTOR

Introduction

1. By summons filed on 5 May 2025 [**WF Tab 2**], the Applicant (**DPP**) seeks leave to appeal from orders made by Basten AJ.[1] The case raises a narrow question of statutory construction: whether the Children's Court of New South Wales has the power to impose an aggregate control order of more than two years pursuant to s 33(1)(g) of the *Children (Criminal Proceedings) Act 1987* (NSW) (**CCPA**). Acting Justice Basten concluded that the Children's Court had no such power.

2. The application for leave to appeal and the putative appeal have been listed for a concurrent hearing. The DPP filed submissions on 5 May 2025 (**AS**). In circumstances where the Respondent has indicated (by way of his Response dated 2 June 2025 - **WF Tab 16**) that he does not oppose the orders sought by the DPP and has been excused from attending the hearing, the Court has made provision for the appointment of a contradictor.

3. For the reasons that follow, there is no appealable error in the judgment of Basten AJ. His Honour was correct in concluding that the Children's Court has no power to make an aggregate control order of more than two years' duration. While the DPP should be given leave to appeal from his Honour's orders, the (putative) appeal should be dismissed.

Procedural history

Judgment of the Children's Court

4. On 18 March 2024, the Respondent, having entered pleas of guilty, was sentenced by the Children's Court for 19 offences. The President of the Children's Court sentenced the Respondent to an aggregate control order of three years' duration, with a non-parole period of 18 months [**WF Tab 14, pp 172-173; Tab 15**]. There is no longer any dispute in this proceeding that the objective seriousness of the totality of the Respondent's offending was such that a control order of three years was appropriate.

Judgment of Basten AJ

5. The Respondent appealed from the judgment of the Children's Court to the District Court. That appeal was taken to be an appeal to the Supreme Court by force of s 22A of the *Children's Court Act 1987* (NSW). The appeal was heard by Basten AJ on 4 February 2025. His Honour concluded that the Children's Court did not have power to impose an aggregate control order for three years (J [45]).

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1 *PD v Director of Public Prosecutions (NSW)* [2025] NSWSC 16 [**WF Tab 7**] (**J**).

6. His Honour re-sentenced the Respondent to two separate aggregate control orders with a combined period of three years, and an effective non-parole period of 18 months. The structure of those orders is correctly set out at AS [7].

Relevant legislative provisions

7. Part 3 of the CCPA contains provisions applicable to any criminal proceedings before the Children's Court. Division 4 of that Part concerns penalties that the Children's Court may impose on a person and applies to "any offence for which proceedings are being dealt with summarily …" (s 32).

8. Section 33(1), which is contained in Division 4 of Part 3, empowers the Children's Court to make various orders if a person is found guilty of "an offence to which this Division applies". It relevantly provides as follows:

> (g) [The Court] may, subject to the provisions of the *Crimes (Sentencing Procedure) Act 1999*, make an order committing the person for such period of time (not exceeding 2 years) as it thinks fit—
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> (i) in the case of a person who is under the age of 21 years, to the control of the Minister administering the *Children (Detention Centres) Act 1987*, or
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> (ii) in the case of a person who is of or above the age of 21 years, to the control of the Minister administering the *Crimes (Administration of Sentences) Act 1999*.

9. By reason of s 33(2), the Children's Court "shall not deal with a person under subsection (1)(g) unless it is satisfied that it would be wholly inappropriate to deal with the person under subsection (1)(a)-(f1)". Put another way, a control order under s 33(1)(g) is a penalty of last resort. Where the Children's Court deals with a person under s 33(1)(g), it must record "the reason for which it considered that it would have been wholly inappropriate to deal with the person under [s] 33(1)(a)-(f1)" (s 35(b)). The gravity of the imposition of such a penalty is reinforced by s 34(1), which relevantly provides that a control order "shall not be made … in respect of an offence unless the penalty provided by law in respect of the offence is imprisonment".

10. A control order under s 33(1)(g) takes effect when it is made (s 37(1)), unless the Children's Court makes an order that it take effect at a specified time (in which case the control order takes effect at that time) (s 37(2)). A control order ceases to have effect at the end of the period specified in the order, subject to ss 32 and 38A of the *Children (Detention Centres) Act 1987* (NSW) (s 37(3)).

11. Section 33A of the CCPA concerns "Cumulative or concurrent orders etc". Given its relevance to the issue falling for determination in this proceeding, it is desirable to set out the section in full:

> (1) In this section, ***control order*** means an order referred to in section 33(1)(g).
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> (2) Unless a direction is given under this section, the period for which a person is required to be detained under a control order commences when the order takes effect.
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> (3) If the Children's Court so directs, the period for which a person is required to be detained under a control order commences when the period for which the person is required to be detained under another control order or other control orders expires.
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> (4) The Children's Court must not make a new control order, or give a direction under this section, if the order or direction would have the effect of requiring a person to be detained for a continuous period of more than 3 years (taking into account any other control orders relating to the person).
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> (5) Subsections (2) and (3) are subject to section 57 of the *Crimes (Sentencing Procedure) Act 1999*, as applied by section 33C.
>
> (6) This section does not apply to a control order to which section 33AA applies.

12. Section 33AA(2) of the CCPA makes particular provision for a control order (described as a "new control order") in relation to an offence involving assault, or any other offence against the person, on a juvenile justice officer where the person is subject to one or more control orders at the time (described as an "existing control order") at the time the new control order is made. In such a case, absent specific judicial direction due to special circumstances, a new control order must commence upon the expiry of an existing control order (ss 33AA(3)-(4)). However, s 33AA(5) prohibits the Children's Court from making a new control order, or giving a direction under s 33AA(3), if it "would have the effect of requiring a person to be detained for a continuous period of more than 3 years (taking into account any other control orders relating to the person)".

13. Section 33C(1) of the CCPA provides that, subject to the CCPA and s 27(4A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSPA**), the provisions of Parts 3 and 4 of the CSPA "apply to the Children's Court in the same way as they apply to the Local Court", with specified modifications as to terminology.

14. Part 4 of the CSPA contains aggregate sentencing provisions which were first introduced in 2011.[2] Section 53A(1) of the CSPA confers power on a court, "in sentencing an offender for more than one offence, [to] impose an aggregate sentence of imprisonment with

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2 See item 14 in Sch 2 to the *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW), which commenced on 14 March 2011.

respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each."

15. Section 53B of the CSPA provides that "[f]or the avoidance of doubt, the Local Court may impose an aggregate sentence of imprisonment that does not exceed 5 years". The provision was introduced in 2016 to, as it says, "avoid doubt".[3] In that connection, it should be noted that, at that time, s 58(1) already provided, in the context of consecutive sentences, that "[t]he Local Court may not impose a new sentence of imprisonment to be served consecutively (or partly concurrently and partly consecutively) with an existing sentence of imprisonment if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began."

Application for leave to appeal and putative appeal

16. The question of principle raised by the proposed appeal is one of general importance and application. For that reason, a grant of leave is appropriate and will allow appellate resolution of that question. That is notwithstanding that the outcome of the putative appeal will not disturb the Respondent's individual release on parole or otherwise impact his service of the balance of his sentence.

Statutory construction: applicable principles

17. The principles of statutory construction to be applied in this appeal are well-established, and the contradictors do not understand them to be in dispute.

18. Consistently with those principles, the starting point for construing the CCPA is the text of the statute having regard to its context and purpose (including by reference to legislative history and extrinsic material).[4] The text must be accorded primacy and is the surest guide to legislative intention.[5] Thus, it has been said by the High Court that "the task of statutory construction must begin and end with the text of the statute".[6]

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3 See item 4 in Part 1.6 in Sch 1 to the *Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016* (NSW), which commenced on 25 October 2016.

4 See, for example, *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75 at [86] (Gordon, Edelman, Steward and Gleeson JJ).

5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***) at [69]-[71] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ).

6 *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [64] (Gageler J, as his Honour then was), referring to *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 (***Consolidated Media Holdings***) at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

19. Context may assist in fixing meaning to statutory text, but extrinsic materials cannot displace the meaning of that statutory text.[7] As French CJ and Hayne J observed in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*:[8]

> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted.
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> … The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.

20. Further, although context sometimes favours the implication of words from the statutory text, the words implied may only ever be those of explanation of the text. The task of statutory construction "remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention".[9] It is no function of a court to fill gaps in legislation.[10]

Text

21. The text of s 33(1)(g) of the CCPA is intractable. It provides that the Children's Court has power to "make an order committing the person for such period of time (not exceeding 2 years) as it thinks fit." That is, the power of the Children's Court to make a control order under s 33(1)(g) is limited to the making of an order for a period not exceeding two years.

22. The text says nothing about the number of offences which may be covered by an order under that sub-section. It does not draw any distinction between a control order in respect of one offence or multiple offences. That is so notwithstanding the words "[i]f the Children's Court finds a person guilty of an offence …" in the chapeau to s 33(1) (*cf* AS [19]). Those words merely identify the precondition to the enlivenment of the power of the Children's Court to make any of the orders set out in ss 33(1)(a)-(g). If a person is found guilty of multiple offences, that condition precedent is equally satisfied and the power to impose a penalty under the sub-section is enlivened. (In any event, as

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7 *Consolidated Media Holdings* (2012) 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

8 (2012) 248 CLR 378 at [25]-[26] (French CJ and Hayne J). See also at [41].

9 *Taylor v Owners – Strata Plan 11564* (2014) 253 CLR 531 (***Taylor***) at [65] (Gageler and Keane JJ); *HFM043 v Republic of Nauru* (2018) 92 ALJR 817 at [24] (Kiefel CJ, Gageler and Nettle JJ).

10 *Taylor* (2014) 253 CLR 531 at [38] (French CJ, Crennan and Bell JJ); *Minogue v Victoria* (2018) 264 CLR 252 at [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

discussed below, s 33C(1)(a), to the extent that it picks up s 53A of the CSPA, operates to empower the Children's Court to make an aggregate control order under s 33(1)(g).)

23. This construction does not involve adding any words to the statutory text, and there is no indication in the text of an intention to depart from that meaning. The DPP's suggested construction would have the effect of allowing the Children's Court to make a single control order exceeding two years' duration, contrary to the plain language of s 33(1)(g).

24. Section 33(1)(g) contains the words "subject to the provisions of the [CSPA]". Those words do not imply that some "other or more extensive power" is conferred on the Children's Court by the CSPA (J [8]). In particular, as Basten AJ reasoned and as discussed below, those words do not pick up s 53B of the CSPA and thereby permit aggregate sentences of up to five years' duration to be made.

25. The DPP does not rely on s 53B of the CSPA in support of her suggested construction; instead, she relies primarily on s 33A(4) of the CCPA, combined with s 33C of the CCPA and Part 4 of the CSPA. None of those provisions operates to permit the Children's Court to make a control order exceeding two years.

26. Section 33A(3) allows the Children's Court to direct that a control order, made in addition to an existing control order, may be served cumulatively or concurrently with the existing order. Section 33A(4) contains an express limitation on the power to make a control order in s 33(1)(g) or a direction under s 33A(3), providing that a "new control order" or a direction must not have the effect of requiring continuous detention for three years or more. No part of s 33A(4) can properly be construed as directed towards a single control order of more than two years' duration. So much is apparent from the prohibition on detention for "a *continuous period* of more than 3 years" and the requirement that the Children's Court take into account any other control orders relating to the person in deciding what new control order or direction to make (emphasis added). Those words would have no work to do if the DPP's suggested construction were correct.

27. Moreover, s 33A(1) provides that "control order" means an order referred to in s 33(1)(g). That is significant: it confirms that s 33A(4) contemplates that the duration of any single control order cannot exceed two years.

28. Section 33A(4) is therefore necessarily concerned with a situation in which multiple control orders are made, and provides a limit upon cumulation. Section 33A was introduced in 1989 to reflect a decision by the legislature that "it is appropriate to specifically provide" that the Children's Court may impose maximum cumulative orders of three years (AS [21]).

But that does not mean that the Children's Court has the power to make a single control order – whether for one offence or multiple offences – in breach of s 33(1)(g).

29. As Basten AJ correctly observed at J [31], s 33A(4) could only operate in the present case if the phrase "a new control order" referred to "any control order being imposed by the Children's Court, in contrast, perhaps, to the variation of an existing control order". Such a construction cannot be reconciled with the words of the provision, for the reasons given above and by his Honour at J [32]. In particular, s 33A(4) predates the introduction of the aggregate sentencing provisions in the CSPA in 2011 (J [32]), and its meaning cannot be understood to have changed upon the introduction of those provisions (see J [42], which correctly notes that s 33A(4) has not since been amended).

30. Section 33A(4) can apply to an aggregate control order (*cf* AS [13]). None of the foregoing submissions prevents or inhibits such an operation. It does so on its terms by applying to any "new control order", whether imposed for an individual offence or multiple offences (J [38]). But in order for s 33A(4) to operate, the person sentenced must be serving a period of detention pursuant to an existing control order.

31. This Court should conclude that a single control order of more than two years' duration would be contrary to the plain words of s 33(1)(g). The submission at AS [30] that Basten AJ "placed too great an emphasis upon the textual language of s 33A" highlights the central difficulty with the DPP's position. It is axiomatic that the task of statutory construction begins and ends with the text. Here, there is no ambiguity in the text of s 33(1)(g) (or, for that matter, s 33A).

Context and purpose

32. While the text of ss 33(1)(g) and 33A forecloses the result for which the DPP contends, considerations of context and purpose also militate against her suggested construction of those provisions.

33. As mentioned above, the DPP places emphasis on the role of s 33C(1) of the CCPA, which operates to 'pick up' the provisions of Parts 3 and 4 of the CSPA in the same way as they apply to the Local Court. Importantly, however, the application of those provisions to the Children's Court is "[s]ubject to th[e] [CCPA]". Thus, the provisions in the CSPA must give way to those in the CCPA if, for example, there is any inconsistency.

34. By dint of s 33C(1), s 53A of the CSPA applies to the Children's Court and empowers it to impose an aggregate control order pursuant to s 33(1)(g). That has been accepted by

the DPP (AS [31]). In that connection, it should be noted that s 33C(1)(a) of the CCPA provides that the reference in the CSPA to "sentencing of an offender to imprisonment" is to apply as if it were a reference to "the making of a control order". However, the power in s 53A of the CSPA as it applies to the Children's Court remains "subject to" the provisions of the CCPA, including the limitation in s 33(1)(g) that a control order shall not exceed two years. In those circumstances, there is no scope for s 53B of the CSPA to be picked up by s 33C(1) of the CCPA and apply to the Children's Court. Indeed, the DPP does not suggest that the Children's Court can impose an aggregate control order of five years' duration.

35. The DPP's argument must instead be that some legislative intention can be discerned that the maximum duration of an aggregate control order can or should match the maximum duration of cumulative or partly concurrent control orders set out in s 33A(4). As put by the DPP (AS [30]), aggregate sentencing should be available "to the full extent of the jurisdictional limit" applicable to cumulative sentences in the Children's Court. Absent specific provision to bring about that outcome, however, there is no contextual or purposive (or textual) hook for such a process of reasoning.

36. As Basten AJ reasoned (J [32]), there were no amendments made to s 33 of the CCPA at the time the aggregate sentencing provisions were introduced in 2011. It would have been open to the legislature to make consequential amendments to the CCPA, considering that some of the provisions in the CSPA would be picked up by the Children's Court.

37. If the construction advanced by the DPP were correct, a provision such as that in s 53B of the CSPA would be expected. It could have made express that the Children's Court can impose an aggregate control order of more than two years' duration. The absence of such a provision (or any consequential amendment to s 33) is consistent with the position emerging from the text of s 33(1)(g) that a single control order made by the Children's Court, whether for an individual offence or multiple offences, cannot exceed two years.

38. This interpretation of s 33(1)(g) is reinforced by the fact that the legislature turned its attention to whether the introduction of aggregate sentencing made it appropriate to extend the constraint on the length of a sentence which could be imposed by the Local Court, making its will on that matter express by way of s 53B. That was done in circumstances where the CSPA already contained a provision dealing with consecutive sentences imposed by the Local Court which was analogous to s 33A(4) of the CCPA (J [37], [45]). Thus, s 58 operated to prevent the Local Court from imposing a "new

sentence of imprisonment" if the "date on which the new sentence would end is more than 5 years after the date on which the existing sentence" began.

39. Further, AS [32] tends to mischaracterise the subject matter and purpose of s 33A. Contrary to the DPP's submission, the subject matter of s 33A is not "sentencing for multiple offences"; if it were, the power in s 33(1)(g) could not be exercised to make an aggregate control order – a proposition at odds with at least s 33C(1)(a) (read with s 53A of the CSPA) and the DPP's concession at AS [31]. Rather, as Basten AJ reasoned, the subject matter of s 33A is multiple control orders, not multiple offences (J [40]). Nor is the purpose of s 33A(4) "to extend the jurisdictional limit from 2 years to 3 years when sentencing an offender for multiple offences" (AS [32]; see also at [33]); rather, it is to permit the Children's Court to impose a second or further control order which is to be served cumulatively upon, or partly concurrently with, an existing control order so as to create a continuous period of detention limited to a maximum period of three years (J [32], [36]). The DPP's interpretation of s 33A(4) is in tension with s 33A(1) and would confine exercises of power under s 33(1)(g) to control orders for individual offences.

40. The construction favoured by Basten AJ gives effect to the purpose and language of ss 33(1)(g), 33A and 33C(1) of the CCPA; the DPP's construction does not (*cf* AS [34]).[11]

Other matters raised by the DPP

41. The DPP relies on practical considerations in aid of her suggested construction of s 33A. At AS [13], for example, the DPP submits that without the power to impose a single aggregate sentence of up to three years, the Children's Court is "far more likely to be required to engage in a more difficult and complex 'traditional' sentencing task in the very cases for which aggregate sentencing provides the greatest benefit".

42. It may be accepted that the introduction of aggregate sentencing into the CSPA was intended to "ameliorate the difficulties that arose when sentencing for multiple offences" (AS [23]). That does not give license, however, to disregard the words of s 33(1)(g) on the basis that they can be "adapted" to be consistent with some hypothesised "beneficial" intention of Parliament compared with traditional sentencing (*cf* AS [33]-[34]).[12]

43. Significantly, the construction favoured by Basten AJ does not foreclose, in any practical sense, any sentencing outcome; it merely affects the form that a sentence may take. As a

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11 *Project Blue Sky* (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby and Hayne JJ).

12 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [28] (French CJ, Hayne, Kiefel and Bell JJ) ("[i]n construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose").

result, the DPP can point to no real prejudice or injustice even potentially arising from that construction.[13] In particular, the construction advanced by the DPP cannot be said to be "beneficial" to juvenile offenders in any meaningful sense.

44. The issue is, at its highest, one of administrative inconvenience for those presiding over the Children's Court. Even if, unlike the circumstances of this case (see J [52]), a person's offending cannot be separated into distinct groups for the purposes of cumulating two or more aggregate control orders, individual control orders could still be imposed for various offences and directed to be served cumulatively or concurrently as the Children's Court determines is appropriate, subject to the three-year limitation in s 33A(4) of the CCPA.

45. The other matter identified by the DPP, both before Basten AJ (J [64]-[65]) and before this Court (AS [37]), is that making multiple, cumulative control orders may result in individual orders where the parole and non-parole periods depart from the statutory ratio (in ss 44(2) and (2B) of the CSPA) "to such a degree" as to "not adequately reflect the objective seriousness" of the offences. The primary judge was correct to conclude that this outcome "requires a finding of special circumstances and an explanation". That was a common outcome prior to the introduction of aggregate sentencing.

46. Once again, the DPP does not demonstrate that any real prejudice or injustice would arise from the effective requirement to explain that finding of special circumstances. It is similarly only a matter going to administrative convenience in the sentencing task, which of itself cannot justify the departure from the statutory text and context urged by the DPP.

Conclusion

47. For the foregoing reasons, leave to appeal should be granted but the appeal dismissed.

48. This outline of submissions is in a form suitable for publication on the internet.

Dated: 18 August 2025 (amended 4 September 2025)

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13 Put another way, there is no warrant to rely on the presumption against unreasonable consequences (where different constructions of a statutory provision are open): see, for example, *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305 (Gibbs CJ), 320-322 (Mason and Wilson JJ).