# FEDERAL COURT OF AUSTRALIA

## DTO21 v Australian Crime Commission [2022] FCAFC 190

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| Appeal from: | *Australian Crime Commission v DTO21 (No 2)* [2022] FCA 934 |
| File number: | NSD 748 of 2022 |
| Judgment of: | **WIGNEY, BROMWICH AND ABRAHAM JJ** |
| Date of judgment: | 30 November 2022 |
| Catchwords: | **CONTEMPT OF COURT** – refusal by appellant to answer certain questions in Australian Crime Commission examination – refusal constituted contempt under s 34A(a)(ii) of the *Australian Crime Commission Act 2002* (Cth) – appellant sentenced to 12 months' imprisonment with liberty to apply – whether primary judge erred in finding there was continued prospect of appellant purging contempt – relevance of coercion in fixing sentences for contempt – whether primary judge considered suspended sentence – whether sentence was manifestly excessive – no error established – appeal dismissed |
| Legislation: | *Australian Crime Commission Act 2002* (Cth) s 34A(a)(ii) |
| Cases cited: | *Anderson v BYF19* [2019] FCA 1959<br>*Anderson v DKH18* [2018] FCA 1571<br>*Anderson v EVA20* [2022] FCA 1165<br>*Anderson v GPY18* [2019] FCA 954<br>*Anderson v XLVII* (2015) 319 ALR 139; [2015] FCA 19<br>*Australian Crime Commission v DTO21 (No 2)* [2022] FCA 934<br>*Australian Crime Commission v DTO21* [2022] FCA 288<br>*Hannaford v HH (No 2)* (2012) 203 FCR 501; [2012] FCA 560<br>*He v Sun* [2021] NSWCA 95; 104 NSWLR 518<br>*Hili v The Queen* [2010] HCA 45; 242 CLR 520<br>*House v The King* [1936] HCA 40; 55 CLR 499<br>*Lusty v CRA20* [2020] FCA 1737<br>*R v Olbrich* [1999] HCA 54; 199 CLR 270<br>*Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309<br>*Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21 |

*Tracey v The Queen* [2020] ACTCA 51
*Veen v The Queen (No 2)* (1988) 164 CLR 465
*Von Doussa v Owens (No 3)* (1982) 31 SASR 116
*Wood v Galea* (1995) 79 A Crim R 567
*Wood v Galea* (1996) 84 A Crim R 274
*Wood v Galea* (1997) 92 A Crim R 287
*Wood v Staunton (No 5)* (1996) 86 A Crim R 183

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| Division: | General Division |
| Registry: | New South Wales |
| National Practice Area: | Federal Crime and Related Proceedings |
| Number of paragraphs: | 65 |
| Date of hearing: | 27 October 2022 |
| Counsel for the Appellant: | Mr K Ginges with Mr J Donnelly |
| Solicitor for the Appellant: | William O'Brien & Ross Hudson Solicitors |
| Counsel for the Respondent: | Ms J Single SC with Mr M Varley |
| Solicitor for the Respondent: | Australian Government Solicitor |

# ORDERS

**NSD 748 of 2022**

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| **BETWEEN:** | **DTO21**<br>Appellant |
| **AND:** | **AUSTRALIAN CRIME COMMISSION**<br>Respondent |

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| **ORDER MADE BY:** | **WIGNEY, BROMWICH AND ABRAHAM JJ** |
| **DATE OF ORDER:** | **30 NOVEMBER 2022** |

**THE COURT ORDERS THAT:**

1. The appeal be dismissed.

2. The appellant pay the respondent's costs as assessed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

## WIGNEY J:

1 I have had the benefit of reading, in draft, the reasons of Bromwich and Abraham JJ. I agree with their Honours that the appeal should be dismissed. I also generally agree with their Honours' reasons, though I wish to add a few observations of my own, particularly in relation to ground 1 of the appeal and the relevance of coercion when it comes to fixing a penalty for a contempt of the sort under consideration in this matter.

2 I gratefully adopt Bromwich and Abraham JJ's comprehensive summary of the relevant facts, the judgments of the primary judge, the grounds of appeal and the arguments advanced by the parties.

### Ground 1 – the prospect of DTO21 purging his contempt and coercion

3 In relation to ground 1(a) of the appeal, I am not persuaded that the primary judge erred in finding that there was "a continued prospect of [DTO21] purging his contempt". Nor do I accept DTO21's contention that there was no evidentiary basis for that finding. It was in my view open to the primary judge to infer, from the evidence as a whole, that ongoing incarceration might cause DTO21's obduracy or recalcitrance to wane to the point where he may capitulate and answer the questions which had been put to him during the examination.

4 It is important to emphasise that DTO21 did not say, in terms, that he would never purge his contempt by answering the questions. He said nothing whatsoever on that topic in his evidence in chief. In the course of cross-examination, DTO21 agreed that he had not "as yet" purged his contempt. He was then asked if he intended to purge his contempt. He did not directly answer that question. His response was: "my situation hasn't changed". That was far from an emphatic response and really said nothing about whether his "situation" might change in the future. It is true that the four and a half months that DTO21 had spent in prison in harsh conditions had not caused him to change his mind. That, however, did not compel the primary judge to find that further prison time would not, or was unlikely to, change DTO21's mind.

5 That disposes of the first limb of ground 1 of the appeal. It also effectively disposes of ground 1 in its entirety, particularly given that the second limb of ground 1 appears to flow from or hinge on a finding that the primary judge erred in finding that there remained a prospect that

DTO21 might purge his contempt in the future. I nevertheless wish to address an issue potentially raised by the second limb of ground 1.

6 The second limb of ground 1 is that the primary judge erred "by incorporating into the length and nature of the sentence imposed, a 'significant consideration' of ongoing coercion for [DTO21] to purge his contempt". That contention raises the question of the extent to which coercion is or may be a relevant consideration in sentencing a contemnor in a case such as this.

7 I have some concerns about the primary judge's approach to that question.

8 There are some indications in the primary judge's reasons that, in determining what was an appropriate term of imprisonment to impose, his Honour took into account the purpose of coercing DTO21 to purge his contempt. In particular, in the final paragraph of his reasons, the primary judge said that "[i]n fixing that sentence [a fixed sentence of 12 months' imprisonment], and reserving liberty to apply in the event that DTO21 chooses to purge his contempt, I have taken into account the coercion of the contemnor as an important consideration": *Australian Crime Commission v* ***DTO21 (No 2)*** [2022] FCA 934 at [24]. His Honour referred, in that context, to [34] of his earlier judgment (*Australian Crime Commission v DTO21* [2022] FCA 288 – ***DTO21 (No 1)***) where he referred with apparent approval to the observation made by White J in *Anderson v* ***DKH18*** [2018] FCA 1571 at [29] that "the coercion of the contemnor in a context like the present is a particularly important consideration": see also *DTO21 (No 2)* at [24].

9 There is ample authority for the proposition that, where a person has been held in contempt for refusing to answer questions when required to do so, the contemnor may be committed to prison for an indefinite period in order to coerce him or her to answer those questions: see *Anderson v* ***XLVII*** (2015) 319 ALR 139; [2015] FCA 19 at [49] (White J); *Wood v Galea* (1995) 79 A Crim R 567 at 573 (Hunt CJ at CL); *Wood v Galea* (1996) 84 A Crim R 274 at 283-284 (Hunt CJ at CL); *Von Doussa v Owens (No 3)* (1982) 31 SASR 116 at 117-118 (King CJ); *Anderson v EVA20* [2022] FCA 1165 at [39]-[44] (Wigney J).

10 What is considerably less clear is whether coercion is a relevant consideration when it comes to fixing a determinate sentence to punish a contemnor in respect of a contempt arising from them refusing to answer questions when required to do so. I would incline to the view that, save in a very limited respect, it is not.

11 In ***Wood v Staunton*** *(No 5)* (1996) 86 A Crim R 183 at 185, Dunford J identified a number of considerations which are generally thought to be relevant in determining an appropriate punishment for a contempt involving a failure or refusal to answer questions when compelled to do so. The case before Dunford J involved a refusal to answer questions at a Royal Commission. The relevant considerations include "the seriousness of the contempt proved"; "whether the contemnor was aware of the consequences" to him or her of the act giving rise to the contempt; "the actual consequences of the contempt on the relevant trial or jury"; "whether the contempt was committed in the context of serious crime"; "the reason for the contempt"; "whether there has been any apology or public expression of contrition"; "the character and antecedents of the contemnor"; "general and personal deterrence"; and "denunciation of the contempt".

12 That list of relevant considerations identified by Dunford J in *Wood v Staunton* has been cited and applied in numerous cases. The list obviously should not be treated as exhaustive or set in stone. It is, however, noteworthy that coercion is not included within it.

13 In *DHK18* at [29], White J added coercion to the list of considerations relevant to sentencing for a contempt involving the refusal to answer questions when required to do so. Similarly, in *XLVII* at [49], White J stated that the "purposes of punishment for a contempt constituted by a refusal to answer questions in a Court or Commission of Enquiry are said to be retribution for the contempt, *coercion of the person into answering the question*, and the deterrence of others" (emphasis added). The cases his Honour cited in support of that proposition, however, were all cases where coercion was said to be relevant to whether the contemnor should be committed to prison indefinitely until the contempt was purged. They do not support the proposition that coercion is one of the purposes of *punishment* for contempt. *DHK18* was itself a case where the contemnor was imprisoned until further order.

14 While White J's statement in *XLVII* that the purposes of punishment for contempt arising from the refusal to answer questions include coercion has been cited with approval in a number of subsequent cases in this Court, there has been no detailed discussion in those cases of the role that coercion may play in fixing a determinate sentence to punish for contempt. There is no doubt that coercion is a relevant consideration in determining whether a contemnor should be imprisoned indefinitely until the contemnor has purged his or her contempt, or answers to the questions are no longer required, or the Court is satisfied that the contemnor will not purge his contempt. In my view, however, there is a real issue as to the extent to which coercion is a

relevant consideration when it comes to fixing a determinate sentence to punish a contemnor in respect of the contempt committed by them.

15 This issue was not the subject of any extensive argument at the hearing of the appeal. Neither party referred the Court to any authority for the proposition that coercion is relevant when it comes to fixing a determinate or fixed sentence to punish for a contempt of the type in question, other than the two judgments of White J (*DKH18* and *XLVII*) and cases in this Court that have cited those judgments.

16 The general principles of sentencing tend to suggest that coercion is not ordinarily considered to be a purpose of criminal punishment. The recognised purposes of criminal punishment are retribution, denunciation, the protection of society, rehabilitation and deterrence: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 473-476 (Mason CJ, Brennan, Dawson and Toohey JJ) (proportionality and protection); *Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21 at [46] (McHugh J) (retribution) and [118] (Kirby J) (denunciation). I cannot see any principled reason why the purposes of punishment for contempt should be seen as different: see *Hannaford v HH (No 2)* (2012) 203 FCR 501; [2012] FCA 560 at [29], citing *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 313-314 (Kirby P).

17 It also seems to me that it would be wrong in principle to impose a longer term of imprisonment on a contemnor than would otherwise be appropriate for the purpose of coercion, or because the longer sentence would be more likely to coerce the contemnor to purge their contempt. Some support for that proposition may be found in the judgment of Hunt CJ at CL in *Wood v Galea* (1997) 92 A Crim R 287. In that case, Mr Galea had been found to be in contempt of a Royal Commission because he had refused to answer questions that were put to him. He was committed to prison until further order. When the Royal Commission terminated, Mr Galea applied to be released on the basis that no good purpose would be served for keeping him in custody. Hunt CJ at CL responded to that application in the following terms (at 288-289):

> That argument is wrong. It confuses the two different purposes of punishment for contempt - as coercion to answer the questions (where the incarceration is used in order to compel obedience) and as punishment in the usual sense - that is, without regard to coercion - for the contempt which was committed (where the incarceration is used to punish the disobedience). I previously described such punishment in the usual sense as what should be imposed as retribution for the contempt or by way of expiation on the part of the offender. *It is not the law that a person in contempt should never be released so long as he remains in contempt; the law is that he should not be kept in custody for any period longer than would be appropriate as punishment for the contempt without regard to coercion.* Conversely, and as a matter of common sense, if the appropriate period for which the person in contempt should be kept in custody as punishment in

> the usual sense is longer than the life of the proceedings in relation to which the contempt was committed, the fact that he can no longer be coerced does not mean that he should not be kept in custody for that appropriate period.
>
> (Emphasis added.)

18 I would incline to the view that, save perhaps in two relatively minor respects, coercion is not a relevant purpose, or relevant consideration, when it comes to fixing an appropriate determinate sentence to punish for contempt, particularly where the sentence involves a fixed term of imprisonment. Coercion might be relevant in the sense that the court may fix an appropriate term of imprisonment while indicating, as the primary judge did in this case, that there was a possibility of early release if the contemnor were to purge their contempt. Holding out the prospect of early release might be said to amount to a form of coercion. Coercion might also be relevant in those circumstances where the question arises whether the sentence of imprisonment should be suspended in whole or in part. The court may consider it inappropriate to suspend the sentence in whole or in part because the contemnor might reasonably be thought to be less likely to purge their contempt if their sentence of imprisonment is suspended. Beyond that, I find it difficult to see how or why coercion could be seen to be a relevant consideration in determining the appropriate length of a sentence of imprisonment.

19 It is, however, unnecessary for me to make a final or definitive finding in relation to this issue. That is so for at least two reasons. First, DTO21's arguments concerning his first ground of appeal focussed on the contention that it was not open to the primary judge to find that there was a continued prospect of him purging the contempt. He did not squarely argue that coercion was an irrelevant consideration in fixing the appropriate punishment for his contempt. Second, and more fundamentally, I am not in any event satisfied, on my reading of the primary judge's reasons, that his Honour impermissibly took coercion into account in fixing the sentence of 12 months' imprisonment.

20 At [23] of *DTO21 (No 2)*, the primary judge indicated that he considered that a fixed sentence of 12 months' imprisonment was appropriate having regard to: first, "the relevant factors referred to in *DTO21 (No 1)* at [33]"; second, "the events as described in *DTO21 No 1*"; and third, "the events since that judgment". Importantly, the list of "relevant factors" in [33] of *DTO21 (No 1)* does not include coercion.

21 It is true that at [24] of *DTO21 (No 2)* the primary judge said that he had taken into account "the coercion of the contemnor as an important consideration". In my view, however, it is readily apparent that that observation was primarily directed at the fact that his Honour had

reserved liberty to apply in the event that DTO21 purged his contempt. In that regard, at least, the sentence imposed continued to have a coercive effect. That is particularly apparent when [24] is read in conjunction with [22], where his Honour said that he did not think that there was a "significantly greater chance of DTO21 purging his contempt by the continuation of an indeterminate sentence as opposed to the chances of him purging his contempt in circumstances where he has a fixed sentence with the possibility of early release in the event he were to purge his contempt". His Honour did not err in having regard to coercion in that regard.

22 It follows that, like Bromwich and Abraham JJ, I consider that ground 1 of DTO21's appeal must fail.

**Ground 2 – suspended sentence**

23 I agree with Bromwich and Abraham JJ that it cannot be inferred or concluded that the primary judge failed to consider whether any part of the sentence of 12 months of imprisonment could or should be suspended. The primary judge had initially considered, but rejected, the option of imposing a fixed but fully or partially suspended sentence of imprisonment: *DTO21 (No 1)* at [77] and [89]. There is no indication that, when the matter was relisted and *DTO21* pressed for the imposition of a determinate sentence, DTO21 expressly put to the primary judge that it would be appropriate to fully or partially suspend the sentence. It is hardly surprising, in those circumstances, that the primary judge's reasons in *DTO21 (No 2)* do not expressly refer to the option of suspending the sentence of imprisonment his Honour imposed.

24 When the primary judge's two judgments are read together, it is tolerably clear that his Honour did not consider that it was appropriate to suspend the sentence of imprisonment he imposed. There may, of course, be some cases where the circumstances are such that it might be considered appropriate to wholly or partially suspend a sentence of imprisonment imposed in respect of a contempt of the sort in question in this case. It does not follow that that will always be the case, or that this was a case where a suspended sentence was necessarily appropriate. I am unable to accept that the circumstances of this case were such that a fully or partially suspended sentence was appropriate, or that his Honour erred in imposing a sentence that did not involve any element of suspension.

25 I agree with Bromwich and Abraham JJ that ground 2 of the appeal must fail

**Ground 3 – manifestly excessive**

26 I agree with Bromwich and Abraham JJ that there is no basis for finding that the sentence imposed by the primary judge was manifestly excessive. The so-called comparative cases are of no assistance because they are not truly comparable and in any event do not establish that the sentence imposed by the primary judge was so outside the range of sentences imposed in those cases as to manifest an error of principle. Indeed, to the extent that the cases relied on by DTO21 could be said to establish a sentencing range, the sentence imposed by the primary judge was within that range.

27 The sentence imposed by the primary judge could perhaps be said to be a harsh sentence in all the circumstances. The harshness of the sentence does not, however, itself indicate or manifest any error of principle. The contempt in question was contumacious and deliberate. DTO21 knew what he was doing and knew the potential consequences. He was and remains unrepentant. His attempts to justify his actions were fairly unpersuasive. There were little in the way of mitigating circumstances. Deterrence is almost always a particularly weighty consideration in the case of contempts involving the refusal to answer questions under compulsion. This case was no exception.

28 This ground of appeal must fail.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate: 

Dated: 30 November 2022

## REASONS FOR JUDGMENT

### BROMWICH AND ABRAHAM JJ:

29 This is an appeal from orders made by a judge of this Court whereby his Honour effectively replaced an indeterminate prison sentence that he had imposed for contempt of the respondent, the Australian Crime **Commission**, with a fixed term of 12 months, effectively backdated to when the appellant was first taken into custody.

30 On 17 June 2021, pursuant to a summons to give evidence, the appellant attended an examination conducted by an examiner of the Commission. He refused to answer certain questions, expressing fears as to the consequences of doing so, without referring to any specific threat. That refusal constituted a contempt of the Commission under s 34A(a)(ii) of the *Australian Crime Commission Act 2002* (Cth). He was given an opportunity to purge the contempt, but did not do so. He was prosecuted, pleaded guilty before the primary judge, was declared guilty, and was sentenced to an indeterminate sentence of imprisonment to commence on the date of judgment, 28 March 2022: *Australian Crime Commission v DTO21* [2022] FCA 288 (***DTO21 No 1***), delivered orally three days after the hearing.

31 In that judgment, which is not challenged in this appeal, the primary judge, after setting out the legal regime under which the Commission operates and the background facts, summarised the legal principles applicable to sentencing for contempt in relation to refusal to answer questions under an obligation to do so, including at [32] quoting *Anderson v XLVII* [2015] FCA 19; 319 ALR 139 where White J had said at [49(2)]:

> The purposes of punishment for a contempt constituted by a refusal to answer questions in a Court or Commission of Enquiry are said to be retribution for the contempt, coercion of the person into answering the question, and the deterrence of others: *Wood v Galea* (1995) 79 A Crim R 567 at 571; *Von Doussa v Owens (No 3)* (1982) 31 SASR 116 at 118; *Hannaford v HH* [2010] FCA 1214, (2010) 205 A Crim R 366 at [39];

32 The primary judge summarised the evidence before him and what it established, both as to what the appellant had done in terms of refusing to answer questions and his subjective circumstances, including the conditions of his incarceration and the medical and related evidence in some detail. His Honour also considered a number of comparative cases in this Court in which both indeterminate and fixed prison sentences had been imposed, as well as older decisions of the New South Wales Supreme Court in relation to witnesses called at the

1990s **Wood Royal Commission** into the NSW Police, some of which are addressed below because they directly deal with the question of purging of contempt. His Honour concluded:

> [89] I am not satisfied that there is no chance that the respondent will purge his contempt. I think it less likely that the respondent will purge his contempt if a fixed sentence is imposed rather than an indeterminate sentence. I think it unlikely that the respondent would purge his contempt if a fixed but wholly and immediately suspended sentence is imposed, as was urged on his behalf.
>
> [90] The applicant submitted that having regard, in particular, to the need to coerce the respondent into purging his contempt, as well as the purposes of retribution for the contempt and the deterrence of others, an immediate and indefinite custodial sentence was appropriate in the circumstances. That submission should be accepted. As noted earlier, the importance of the coercive purpose underlying punishment for contempt means that an order for imprisonment for an indefinite period will often be appropriate – see: [37] above. The respondent has not purged his contempt. The summons requiring his examination has not been discharged and the ACIC still wants to obtain answers to the questions giving rise to the contempt for the purposes of an operation which is continuing. The examination is part of an investigation of significant importance conducted for the protection of the community. Illicit drug use and supply has serious adverse impacts on the community. Parliament has imposed an obligation on persons properly summonsed to an examination to answer questions at the examination and to do so truthfully. Considerations of general deterrence are also important.
>
> [91] The Court exercises caution before imposing a sentence of imprisonment, and it is reluctant to impose sentences of imprisonment of indefinite duration. Nevertheless, the Court should do what it can to induce the respondent to comply with his lawful obligations: *DKH18* at [78].
>
> **SENTENCE**
>
> [92] A sentence of imprisonment until further order is appropriate and that is the sentence I impose. There is no scope for a form of suspension of that sentence. I will reserve liberty to apply in the event that the respondent seeks to purge his contempt. If the respondent seeks to purge or purges his contempt, the respondent's imprisonment should be reviewed. I will also reserve liberty to apply generally – see: *Allbeury* at [12].

33 After some four months in custody, by email the appellant exercised the general liberty to apply granted by the primary judge, requesting his Honour to "*finalise the proceedings by ... imposing a [fixed] sentence*". The proceeding was listed for the application to be made, which was done orally: see *Australian Crime Commission v DTO21* (No 2) [2022] FCA 934 (***DTO21 No 2***) at [2]. His Honour expressly said that this second judgment was to be read with the first. The appellant's argument, supported by an affidavit from his solicitor and his own affidavit (upon which he was cross-examined), was summarised by the primary judge at [2] as:

> (1) it should be accepted on the basis of the events which have occurred to date that he will not purge his contempt and, therefore, that no useful purpose is served by continuing the indeterminate sentence;

(2) the time which has been served is sufficient punishment for the contempt and, therefore, DTO21 should now be released; and

(3) if the time served to the date of judgment on this application is not considered by the Court to be sufficient, a further fixed sentence should be imposed.

The appellant does not dispute the accuracy of the above summary.

34 The primary judge did not accept the first or second argument advanced by the appellant, but accepted the third argument. Importantly, no argument was advanced to the effect that the primary judge should depart from his Honour's prior conclusion that it was "*unlikely that the respondent would purge his contempt if a fixed but wholly and immediately suspended sentence is imposed, as was urged on his behalf*", or that any degree of suspension of the fixed sentence sought in the alternative to immediate release was necessary or appropriate: *DTO21 No 1* at [89], see also [36] and [75].

35 On 12 August 2022, his Honour ordered that, further to the order of imprisonment made on 28 March 2022, the appellant be imprisoned until 27 March 2023 and again reserved liberty to apply in the event the respondent purges his contempt. In reaching that conclusion his Honour:

(a) found that it was still necessary to obtain the appellant's answers, given he had not been discharged from the summons, the investigation was continuing, and the Commission considered he was in possession of relevant and necessary information, a finding that is not challenged on appeal: [4];

(b) did not accept that there was no chance that the appellant would purge his contempt, and considered that the coercive purpose of punishment remained ***a*** relevant consideration: [5];

(c) noted that in refusing to answer questions at the time of the examination, the appellant stated that the reason he refused to answer was due to a fear of reprisals against him and his family, a position maintained at the hearing of the contempt charges and addressed in *DTO21 No 1* at [23], [61], reproducing an extract of the appellant's affidavit evidence on that topic: [6]-[7];

(d) observed that the appellant did not give express evidence that he would not purge his contempt for fear of reprisals and had never given evidence of any specific threat: [8];

(e) summarised the evidence as to the conditions of the appellant's incarceration, and reproduced a substantial portion of the appellant's affidavit evidence as to medical conditions and the difficulties he had experienced in obtaining treatment, accepting that

the appellant's experiences in prison had been at the least unpleasant and difficult, made more difficult by his medical conditions and the isolation of his incarceration made worse by the COVID-19 pandemic: [9]-[20];

(f) having considered the matters detailed above, thought there was a continued prospect of the appellant purging his contempt: [21];

(g) did not consider that there was (by then) a significantly greater chance of the appellant purging his contempt by the continuation of an indeterminate sentence as opposed to a fixed sentence with the possibility of early release if he were to purge his contempt: [22];

(h) having regard to:

(i) the relevant sentencing factors for criminal contempt referred to in *DTO21 No 1* at [33] (drawn from *Wood v Staunton (No 5)* (1996) 86 A Crim R 183 at 185, and listed);

(ii) the events described in *DTO21 No 1*; and

(iii) the events since that judgment,

concluded that a fixed sentence of 12 months was now appropriate, having considered the cases referred to in *DTO21 No 1* and in particular *Anderson v GPY18* [2019] FCA 954, *Anderson v BYF19* [2019] FCA 1959 and *Lusty v CRA20* [2020] FCA 1737: [23];

(i) said that in fixing that sentence and (again) reserving liberty to apply, his Honour had taken into account coercion of the appellant as ***an*** important consideration, and also placed particular weight on the seriousness of the contempt, the appellant's awareness of the consequences of what he did, and the fact that the contempt occurred in the context of serious crime and considerations of general deterrence: [24].

**Notice of appeal**

36 By a notice of appeal dated and filed 8 September 2023, the appellant advances the following grounds of appeal:

> [1] The learned sentencing judge erred, and thereby occasioned a miscarriage of justice,
> (a) by finding, without an evidentiary basis, that there was a continued prospect of the Appellant purging his contempt, and
> (b) by incorporating into the length and nature of the sentence imposed, a 'significant consideration' of ongoing coercion for the Appellant to purge his contempt.
> [2] The learned sentencing judge erred in:

(a) failing to consider whether any part of the determinate sentence imposed could be suspended, and
(b) failing to order that some, or all, of the sentence imposed so be suspended.

[3] The sentence imposed is manifestly excessive.

**Ground 1**

37 The appellant submits in writing, as developed and enlarged upon in oral submissions, that:

(a) the historic facts all pointed to him not purging his contempt, referring to his history of refusal to answer the questions even when warned, his failure to take the opportunity to purge his contempt, the lack of any express evidence that he would purge his contempt, the basis for refusing to answer questions in the first place, and his continued refusal to purge his contempt despite the hardship he experienced in prison;

(b) there was no evidence to the contrary to indicate that he might purge his contempt, such that the primary judge erred in finding that there was a continuing prospect of that taking place, and erred in considering coercion as being an important consideration in exercising the discretion in setting the nature and duration of the determinate sentence;

(c) as coercion had reduced relevance when he was sentenced for a finite period, greater weight should have been given to his circumstances of incarceration;

(d) there was no evidentiary basis to support any finding of a reasonable prospect that he would purge his contempt, such that placing weight on coercion did little to give effect to remaining sentencing considerations, including protecting the effective administration of justice, his subjective circumstances and proportionality with the offending conduct.

38 As those arguments were developed orally, the appellant contends that, contrary to the conclusion reached by the primary judge that there was a prospect that he would purge his contempt, there was compelling evidence that he would not do so including that, at the time of the hearing which gave rise to *DTO21 No 2*, he had spent four and half months in harsh and oppressive custody, knowing at that time that he could bring it all to an end simply by purging his contempt, and had given evidence that his situation had not changed.

39 The appellant submits that the Commission bore the onus of establishing, as a fact, that it was likely that coercive action would result in him purging his contempt, relying upon the observations of Hunt CJ at CL in *Wood v Galea* (1996) 84 A Crim R 274 (***Wood v Galea No 2***) at 284 (which in part refer back to *Wood v Galea* (1995) 79 A Crim R 567 (***Wood v***

***Galea No. 1***) at 574) and further asserting that *R v* ***Olbrich*** [1999] HCA 54; 199 CLR 270 at [27], cited by White J in *Anderson v XLVII* at [35], meant that this onus had to be discharged beyond reasonable doubt. The appellant contends that his Honour provided no reason or explanation for the impugned contrary finding, and as such, that insufficient reasons were given for the conclusion that was reached.

40 The Commission's written submissions, again developed and enlarged upon in oral submissions, direct attention to the detail in the primary judge's reasons in both *DTO21 No 1* and in *DTO21 No 2*. The Commission characterises the burden of ground 1(a) as being that there was no evidence at all relevant to the conclusion that the appellant might yet purge his contempt, and submits that the impugned conclusion reached by the primary judge involved factual findings leading to a discretionary judgment that was supported by the overall facts and circumstances proven, and that no error of the kind identified in *House v The King* [1936] HCA 40; 55 CLR 499 at 505 had been identified or established. As to ground 1(b), the Commission submits that there was no error on the part of the primary judge in taking into account coercion as an important consideration amongst other considerations, in line with authorities on the topic. More generally, the Commission submits that it is impossible for it to prove beyond reasonable doubt that someone will do something, and accordingly it could not be the case, as a matter of logic, that this was required.

***Consideration***

41 Given the appellant's reliance on the observations in both *Wood v Galea No 1* and *Wood v Galea No 2,* it is appropriate at the outset to address those authorities.

42 *Wood v Galea No 1* is one of a number of cases on contempt sentencing arising out of the refusal of Mr Bruce Galea, a witness called at the Wood Royal Commission to answer questions. Hunt CJ at CL at 571, in the course of addressing an argument that there was no power to impose an indeterminate sentence, said that three possible specific purposes of an action in contempt were retribution, coercion and deterrence. At 574, his Honour concluded that he did not believe that Mr Galea's "*obduracy is of such a nature that it is unlikely he will change his mind … On the contrary, I am satisfied that it is likely that coercive action against [Mr Galea] will eventually produce the information sought by the [Royal] Commissioner*". This conclusion was evidently based on the facts and circumstances leading to the charge of contempt being brought against him as detailed earlier in the reasons, including his refusal to

answer questions, and his very poor health. His Honour was therefore referring to the overall circumstances proven to exist.

43 There is nothing in *Wood v Galea No. 1* to suggest that there was any direct evidence that Mr Galea would purge his contempt; and as noted below, in *Wood v Galea No. 2* reference was made to a letter from him in which he said he would not, with this being found not to be enough. Moreover, Hunt CJ at CL's prediction was proved wrong, because Mr Galea served several years in prison, to the end of the Royal Commission, and never succumbed.

44 Thus, it is clear that one of the tasks of a judge in sentencing for contempt of the kind in this case in the first place is making a prediction of the likelihood of the occurrence of a future event, namely, the purging of contempt by answering the questions. However, reaching that original conclusion does not require proof of that likelihood being realised as an ascertainable fact, let alone a circumstance of aggravation requiring that to be proved beyond reasonable doubt, such that *Olbrich* does not apply. If such an evidentiary requirement does not apply at the first stage of imposing a sentence for contempt, as a matter of logic it cannot apply at any later stage of deciding whether that conclusion remains sound.

45 In *Wood v Galea No 2* at 283-284, Hunt CJ at CL, in considering whether or not to continue an indeterminate sentence of imprisonment his Honour had imposed over seven months earlier in *Wood v Galea No. 1*:

(a) referred to Mr Galea's age, the fact that this was the first time he had been in custody and the circumstances of his incarceration, but said that the contumacious nature of his offence was such as to deny him leniency on that basis;

(b) said he did not believe it was appropriate to indicate at that stage a particular sentence because, in the circumstances of that case, this would effectively destroy the coercive effect of an indeterminate punishment to force him to answer the questions;

(c) found that an appropriate term without regard to coercion would be considerably longer than seven and a half months (being the time already served, and almost the time already served by the appellant in this case), such that the time already spent in custody did not yet provide any reason for setting a fixed term;

(d) noted that coercive punishment was not appropriate where answers to the questions are no longer necessary or if for any other reason there is no good purpose to be served by detaining any further;

(e) posed the question of whether there was such a good purpose to be served by continuing to coerce Mr Galea to purge his contempt, noting that there was no suggestion that any means other than indeterminate punishment would achieve this;

(f) referred to the finding in his Honour's original sentence judgment, *Wood v Galea No. 1*, that the Royal Commission bore the onus of establishing that it was likely that coercive action would eventually produce the information sought;

(g) referred to a letter from Mr Galea in which he said that he has not changed his mind, asking his Honour to find that upon that basis there is no likelihood that he will eventually purge his contempt, his Honour noting that the mere say so does not automatically lead to a conclusion that no good purpose will be served by continuing to coerce him.

46 Hunt CJ at CL at 284 in *Wood v Galea No 2* then considered that although the contemnor does not bear the onus of proof to establish whether there is any likelihood that he will purge his contempt, there is at least an evidentiary burden to provide evidence or to point to circumstances which may alter the conclusion which was formed at the time when the original sentence was imposed, in that case being an indeterminate sentence. The predictive finding that coercion is likely to produce the information required had already been made, and the issue is whether there is now a reason to depart from that finding.

47 Thereafter, if the sentence imposed is revisited, as occurred in *Wood v Galea No 2*, as occurred in this case, and as will likely occur whenever a contemnor has received an indeterminate sentence and asserts that he or she not only has not had a change of heart, but will not do so, the task of the sentencing judge as to the element of coercion is to ascertain whether the provision of the information, or other conduct sought, is still required and if so, whether the prediction previously made that a purging of contempt likely still holds good. The question of whether that prediction remains sound is based on the facts established by the evidence, but it is not of itself a fact. The appellant contends that this is not a mere prediction, but a finding of fact as to whether an element of coercion is likely to bring about the result of the purging of contempt by answering the questions. That is just another way of describing the prediction required, which cannot be a fact in the sense of determining, at that time, whether purging will or will not take place.

48 Returning to this case, at the time the primary judge was first called upon to sentence the appellant, the facts and circumstances proven and relied upon by the Commission had to

provide a reasonable foundation for a conclusion being reached that it was at least realistically possible that he could be coerced into purging his contempt and answering the questions for the advancement of that purpose to be taken into account, along with retribution and deterrence. His Honour was satisfied that was so. That original conclusion is not challenged.

49 When the question of the contempt sentence returned to the primary judge on the appellant's application, his Honour's task was to evaluate the evidence before him, and ascertain whether there was still a need for the questions to be answered, and whether the original prediction of a likelihood of the appellant purging his contempt was still open. That is the task that his Honour performed, finding the answers were still needed by the Commission, and concluding that the need for an indeterminate sentence no longer prevailed over a fixed sentence to provide the necessary coercive effect, but that coercion might still be effective. The substance of the appellant's complaint is not that any aspect of the evidence was overlooked, but rather, that too much weight (or as at times submitted orally, that any weight) was given to the conclusion that coercion still had a role to play; and that too little weight was given to the countervailing factors, including his stance as revealed in his evidence, and the conditions of his incarceration. The appellant's argument turns on the characterisation of the primary judge's finding that there was a continued prospect of him purging his contempt as being a fact that was capable of being conclusively and undisputedly disproved by the evidence that was before his Honour, rather than being the product of a judicial evaluation and assessment of the likelihood something occurring in the future that could not, at least ordinarily and in this case, be conclusively proved either way.

50 The reasoning of Hunt CJ at CL in *Wood v Galea No. 1* and in *Wood v Galea No. 2* has been followed in numerous decisions of this Court involving contempt prosecutions brought by the Commission, including in *DTO21 No 1* where the primary judge referred to *Wood v Galea No. 1* both directly at [37] and [85] and indirectly in quoting from a decision of this Court in which it had been referred to at [32]. The reasons given by Hunt CJ in both *Wood v Galea* decisions in predicting the likelihood that Mr Galea would purge his contempt were no more expansive than those of the primary judge, with both being more than adequate for the task at hand.

51 No error on the part of the primary judge has been established. The appellant's arguments do not rise higher than mere emphatic disagreement with the predictive conclusions his Honour reached. As the Commission points out, while historic facts are relevant to the evaluation and

assessment, the question of the prospects of the appellant purging his contempt necessarily turns on impression and inference as to the future.

52 Nor did the primary judge make any error in considering the coercive effect of continued incarceration on a decision by the appellant as to whether or not to purge his contempt. It was plainly a relevant and indeed a weighty consideration. No error is suggested in the findings made by the primary judge that it was still necessary to get the answers sought, which justified continued application of any coercion found to have a prospect of being effective, and no direct evidence was given by the appellant that he would not purge his contempt or of any specific threats, or in relation to the unpleasant circumstances of incarceration.

53 In those circumstances, it was for the appellant to point to evidence and other material that might satisfy the primary judge that he would be immune to coercion to the point of not succumbing and purging his contempt during any further period of custody, as contemplated by the third submission he advanced below, which is summarised by the primary judge in the passage reproduced at [5] above. The appellant failed to do so. The matters relied on before the primary judge, and repeated in this Court, are not such as to require such a conclusion. Indeed, as apparent from the authorities, it is accepted that experience has shown that time can coerce a contemnor to purge his contempt.

54 This ground of appeal must fail.

**Ground 2**

55 The appellant contends that by not expressly referring to a suspended sentence and by reason of that being a sentencing option by reference to a range of authority, the primary judge erred in failing to consider this to be an option. The balance of the argument is largely directed to the reasons why a suspended sentence could have been found to be appropriate.

56 The first point is that the primary judge clearly did have regard to the option of a suspended sentence, because he continued to rely upon *DTO21 No 1*, where that option, which was urged upon his Honour at that stage, was referred to or considered at [36], [75], [77] and [89], but the option of immediate suspension was rejected. There is nothing to indicate that his Honour abandoned any of that reasoning. He should be taken at his word. In any event, as Chief Justice Bell pointed out when President of the New South Wales Court of Appeal in *He v Sun* [2021] NSWCA 95; 104 NSWLR 518 at [43], there is no general obligation on a sentencing judge to expressly state that consideration had been given to how a sentence of imprisonment should be

imposed. That reasoning is not confined to the particular sentencing legislation being considered.

57 In any event, this ground of appeal proceeds upon the false premise that the primary judge was obliged to have regard to a wholly unrealistic sentencing option, which necessarily could not have contributed to the appellant having any incentive to purge his contempt, let alone any coercive effect in achieving that objective. It proceeds upon the unstated premise that his expressed unwillingness thus far to purge his contempt should be treated as a reason to abandon altogether trying to achieve that objective. His Honour was fully entitled to focus on what was likely to produce the desired outcome, and to decide that the time had come to move from an indeterminate sentence to a fixed term of still some reasonable duration, in the evident hope that this might work when an indeterminate sentence thus far had not.

58 This ground of appeal must fail.

**Ground 3**

59 The appellant's argument that the fixed sentence imposed is manifestly excessive expressly does not take issue with the key factual findings made by the primary judge, but contends that once all of those factors are properly taken into account the sentence of 12 months imprisonment was unreasonable or plainly unjust.

60 As was pointed out by the Supreme Court of the Australian Capital Territory in *Tracey v The Queen* [2020] ACTCA 51 (Murrell CJ, Burns and Abraham JJ) at [37]:

> The principles in relation to assessing whether a sentence is manifestly excessive are well-established. Appellate intervention is not justified simply because an appellate court may have a different view as to the most appropriate sentence (*Lowndes v The Queen* [1999] HCA 29; 195 CLR 665 at [15]; *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [28]) or where the sentence is markedly different from sentences that have been imposed in other cases (*Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [58] (*Wong*); *Hili v The Queen; Jones v The Queen* [2010] HCA 45; 242 CLR 520 at [58]) (*Hili*). Rather, the appellant must demonstrate that the sentence is such that it may be inferred that there was a misapplication of principle by the sentencing judge, although when and how the error occurred is not apparent from the judge's reasons: *Wong* at [58]; *Hili* at [58]–[59], [75]–[76].

61 A number of other determinate sentences are referred to by the appellant, with this being said to be well out of step with those decisions. A careful consideration of those other sentences does not support that submission. That consideration was carried out with ***Hili*** *v The Queen* [2010] HCA 45; 242 CLR 520 at [54]-[55] firmly in mind. As *Hili* makes clear, past contempt sentences are no more than historical statements of what has happened in the past, providing

this Court with some guidance and a yardstick against which to examine the impugned sentence. Intervention by this Court is only warranted where any identified difference between the sentence in this case and that imposed in other cases is such that it is possible to conclude that there must have been some misapplication of principle even if it is not otherwise apparent, being a conclusion that does not require any lengthy exposition: *Hili* at [59].

62 As the Commission correctly submitted, the comparative sentence cases relied upon by the appellant in which a lighter sentence was imposed were factually distinguishable because of features such as, to pick a few, the examination summons having been discharged, although the respondent there could still choose to purge his contempt *(Lusty v CRA20* [2020] FCA 1737; 8 month fixed term, suspended after 4 months), and the contempt having been purged such that the element of coercion had no part to play in the implementation of an appropriate penalty (*Anderson v XLVII*; sentence of 4 months imprisonment). The 12 month sentence in this case was in any event not outside the range produced by those cases taken as a whole, noting that such a range does not establish any upper or lower limit in any event and does not of itself fix any sentencing boundaries within which a sentence must or even ought to impose: *Hili* at [54].

63 The comparative cases relied upon by the appellant afford no sufficient basis for concluding that the determinate sentence imposed by the primary judge was manifestly excessive. It is not necessary to consider those cases in any further detail. The effective 12 month sentence imposed by his Honour, while undoubtedly stern, cannot fairly be characterised as excessive, let alone manifestly so.

64 There is nothing to indicate that converting an indeterminate sentence, after some four and a half months, into a fixed term of 12 months was other than properly and appropriately reasoned and arrived at. There was nothing particularly remarkable about the duration arrived at by his Honour. It follows that this ground of appeal must fail.

**Conclusion**

65 As none of the grounds of appeal have succeeded, the appeal must be dismissed.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Bromwich and Abraham.

Associate: 

Dated: 30 November 2022