The EAGP scheme: traps, tactics and ethics for defence lawyers

Richard Wilson SC, Deputy Senior Public Defender

Reasonable Cause Criminal CPD Conference

23 March 2024[1]

[1] This paper is an updated version of a paper first delivered at the Public Defenders Criminal Law Conference on 11 March 2023. The paper was updated on 14 February 2024.

Introduction

The Early Appropriate Guilty Plea scheme has now been with us for nearly six years[2]. It is a complex legislative scheme which involved a fundamental change in the process of committals for all criminal offences. It also introduced:

> "…a mandatory and exclusive code for the application of sentencing discounts for the utilitarian value of pleas of guilty to charges of indictable offences…"[3].

Assumed knowledge for those reading this paper

Any NSW criminal practitioner should be well aware of the basic concepts and operation of the scheme.[4] Such knowledge is assumed in this paper. This includes assumed knowledge that the discount code only applies to offenders:

a. who have committed a State offence;

b. as an adult; and

c. where the proceedings commenced on or after 30 April 2018.[5]

Also assumed is knowledge that the level of mandatory discounts for the utilitarian value of the plea (25%, 10% or 5%) largely turns on the timing of the plea and that, with some important exceptions, the maximum discount is reserved for pleas entered in the Local Court.

In this paper, I will attempt to provide guidance for defence lawyers about:

1. Traps: Aspects of the scheme which can, sometimes unexpectedly but often avoidably, lead to harsh results such as missing out on discounts;

2. Tactics: How best to protect and advance their client's interests; and

3. Ethics: How to do so ethically.

The paper is largely focused on the discount code and the central role of offers.

The prosecution brief and disclosure

The vexed questions of prosecution disclosure and the adequacy of the prosecution brief would be a paper in itself. My general advice on that topic is to hold the police and DPP to their duty of disclosure, which is in fact a duty owed to the court,[6] and not to hesitate to use subpoenas in the

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[2] The legislation commenced on 30 April 2018

[3] *Black v R* (2022) 107 NSWLR 225; [2022] NSWCCA 17 per Simpson AJA at [2].

[4] For basic information about the operation of the scheme, see the resources on the website of the Public Defenders or Legal Aid NSW.

[5] Schedule 2, Part 30 *Crimes (Sentencing Procedure) Act 1999*. Note: a new trial on indictment after a successful conviction appeal is, for the purposes of the application of the EAGP scheme, a continuation of the original proceedings. If those proceedings were commenced prior to 30 April 2018, the EAGP discount regime does not apply: *R v Tiriaki* [2023] NSWSC 1480 (Rothman J) at [16]-[38]. In that case, the proceedings were found to have commenced at least by the time of the original arraignment. However, it is highly likely, from the reasoning in *Richey v The Queen* (2021) 289 A Crim R 233; [2021] NSWCCA 93 and consistently with the EAGP scheme as a whole, that proceedings commence upon the filing of a Court Attendance Notice in the Local Court.

[6] See *Cannon v Tahche* (2002) 5 VR 317; [2002] VSCA 84 at [57]; cf *James v Keogh* (2008) 101 SASR 42; [2008] SASC 156 at [72], [76]

Local Court to obtain what is needed to advise clients. A defence lawyer's legitimate forensic purpose, in the Local Court, is to be in a position properly to advise the client, and take instructions, in accordance with the scheme.

Central to the committal process is the case conference and its purposes:

> The principal objective of a case conference is to determine whether there are any offences to which the accused person is willing to plead guilty. [7]

The importance of committal proceedings

Under the EAGP scheme, what happens at the committal stage will almost always affect whether or not the maximum mandatory discount is available. This was emphasised by Yehia J in *Coles v DPP* [2022] NSWSC 960, where a Magistrate was found to have erred by failing to ascertain, as required by s95(4) *Criminal Procedure Act 1986* whether or not an unrepresented accused person was willing to plead guilty to any of the offences before committing them for trial. Yehia J remitted the case to the Local Court because that was the only way to preserve the accused's right to a possible 25% discount.

In *Landrey v DPP* (NSW) (2022) 110 NSWLR 127; [2022] NSWCA 211, the Court of Appeal definitively stated the purpose of committal proceedings under the EAGP scheme:[8]

> the purpose of a committal proceeding is to ensure proper case management of the criminal process, with the dual intention that ***cases are not listed for trial until the possibilities of guilty pleas have been explored and, so far as possible, exhausted***, and, again to the extent possible, challenges to the evidence of prosecution witnesses have been explored, so as to limit the need for interruption to the trial to allow the accused to conduct a voir dire.

Keep it in the Local Court until the possibility of a plea has been exhausted

It is therefore your duty as defence lawyers to fully explore with your clients, before committal, whether or not there is any charge to which they may be willing to plead guilty or offer to do so.

***Trap**: allowing a magistrate to commit for trial before you are ready*

Many Magistrates notoriously try to push for committal as soon as possible. If your client is committed for trial before negotiations are complete or offers made then, unless the committal is quashed by the Supreme Court, the possibility of a 25% discount is lost forever. The following principles emerge from *Coles, Landrey* and three recent cases; *Hijazi v DPP* [2022] NSWSC 1218 (Button J); *Elwood v DPP* [2023] NSWSC 772 (Davies J) and *Tuxford v DPP* [2023] NSWSC 1300 (Weinstein J):[9]

1. A magistrate cannot commit for trial without first ascertaining "whether or not the accused person pleads guilty to the offences that are being proceeded with" as required by s95(4) *Criminal Procedure Act 1986*;[10]

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[7] s70(2) of the *Criminal Procedure Act 1986*
[8] At [31] per Basten AJA, Ward P and Simpson AJ agreeing (emphasis added).
[9] Note: *Elwood* does not appear to have been brought to the attention of Weinstein J in *Tuxford* but the reasoning and obiter dicta is consistent with *Elwood*.
[10] *Coles* at [26]; *Hijazi* at [13]-[14]; applied in *Tuxford* at [13]-[15]

2. Where a case conference certificate has not been filed, the court must consider *all three pathways* under s76 *Criminal Procedure Act 1986*, namely:[11]
    a. Discharging the accused if there was unreasonable failure by the prosecutor – s76(2)(a);
    b. Committing the accused for trial if there was unreasonable failure by the accused's legal representative – s76(3)(a); and
    c. Adjourning the proceedings - s76(2)(b) (prosecutor's fault) or s76(3)(b) (accused's legal representative's fault)
3. In considering whether to commit an accused person for trial for some kind of default, the court must take into account:
    a. the effect of committal on the accused – i.e. that they will lose the possibility of discounts;[12] and
    b. the purpose of committals as per *Landrey* above;[13]
4. Marking papers "no further adjournments", and then acting upon it on the next occasion without hearing evidence and submissions, is impermissible and prejudges the issue;[14]

Tactics: *press for adjournments where negotiations are ongoing, refer to the cases and appeal*

Where you need time to advise your client, take instructions or negotiate with the DPP, remind the court of the purposes of committal as per *Landrey* above. If the Magistrate is considering committal over your objection, put on evidence about why you need more time and make submissions based on the principles in the cases above. If the Magistrate commits regardless and your client wants to negotiate a plea, do not be afraid to seek to have the committal quashed in the Supreme Court.[15] This will generally be the only way to preserve the discount.

Trap: *failing unreasonably to complete or file a case conference certificate*

Section 76(3)(a) *Criminal Procedure Act 1986* means that your client can lose their chance of a full discount **because of a failure by you,** their lawyer, to ensure that a case conference certificate was filed.

Tactics: *do everything you need to do to complete and file the certificate and keep records*

You need to be aware of this and make sure that any default is not because of your conduct. You should keep careful records of any communications with the DPP so that you can demonstrate the steps you took to try to have conferences held and the certificate completed and filed.

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[11] *Elwood* at [63].
[12] *Elwood* at [63], referring to *Coles* and *Hijazi*.
[13] *Elwood* at [63], [66], noting that Davies J found that he could not be satisfied, on the evidence in that case, that the Magistrate had failed to take this into account.
[14] *Elwood* at [44]-[45].
[15] Either by an appeal under s55(3) *Crimes (Appeal and Review) Act 2001*, by seeking relief under s69(3) of the *Supreme Court Act 1970* or both.

Loss or reduction of the mandatory discount – s25F

A fundamental aspect of the scheme is that the discounts are not caps on a judge's discretion. The discounts are inflexible and mandatory – whether 25%, 10% or 5%. The otherwise mandatory discount can only be reduced by a judge's discretion in two specific circumstances.

Disputed Facts – s25F(4)

The first is by operation of s25F(4) of the *Crimes (Sentencing Procedure) Act 1999*, which provides:

> (4) **Exception to application of discount—disputed facts** The court may determine not to apply the sentencing discount, or to apply a reduced sentencing discount, if the court determines that the discount should not be applied or should be reduced because the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender.

There are several important features of this exception:

1. The reduction is discretionary and there need not be a reduction simply because there has been an unsuccessful dispute about facts;[16]
2. The discretion only arises if the court determines:
    a. that the utilitarian value of the plea *has been eroded* by a dispute as to the facts; and
    b. the dispute was not determined in favour of offender; and
    c. because of this, the discount should not be applied or should be reduced.

There is no definition of "a dispute on the facts" in the legislation. Obviously it includes a disputed facts hearing at sentence before a judge but it seems to have a wider meaning.

Trap: *facts can be disputed at trial, not just at sentence*

Where the offender is relying on a pre-trial offer to plead guilty to an alternative charge which is consistent with the verdict (about this, see below), the way in which the trial is run can amount to a dispute as to facts for the purposes of s25F(4): *Richey v The Queen* (2021) 289 A Crim R 233; [2021] NSWCCA 93.[17] This case is discussed in detail below under the topic of conditional offers.

Tactics*: focus on the extent to which the utilitarian value has been eroded*

The extent of any loss of discount depends on the extent to which the value of the plea is in fact eroded in comparison with avoiding a trial. In *R v Burns* (No.2) [2022] NSWSC 140 (McCallum JA) there was a two day disputed facts hearing and most, but not all, of the dispute was resolved against the offender. McCallum JA did not reduce the applicable mandatory discount (in that case 10%), holding at [38]:

> … I am not persuaded that it is appropriate to reduce the discount. Mr Burns' pleas remain of substantial utilitarian value. A trial has been avoided. I accept that Mr Burns had mixed success in the contested fact hearing. He was unsuccessful in establishing that he stabbed the victim accidentally. On the other hand, he was successful in establishing that the knife he armed himself with was not the large hunting knife that belonged in a box found by police at his home but rather a smaller pocketknife he was in the habit of carrying at that time. While there will no doubt be cases in which s 25F(4) has work to do, care must be taken not to exercise the discretion it confers in such a way as to subvert the object of the early plea scheme or to introduce unfairness. The object of the early appropriate guilty plea regime was to

[16] *R v Burns* (No.2) [2022] NSWSC 140 (McCallum JA) at [38]
[17] at [61]-[62] per Ierace J, Harrison J apparently agreeing and R A Hulme J agreeing only with the orders.

> address significant delays in the finalisation of indictable matters … A contested fact hearing will often produce a relatively small delay compared with the administrative burden of a trial. If contested fact hearings were taken too readily to erode the utilitarian value of a plea of guilty, there would be a risk of eliminating any incentive for some accused persons to plead guilty at all. There would also be a risk that accused persons would be tempted to make compromises in their instructions as to the facts so as to avoid losing the benefit of the discount.

See also *R v White* [2022] NSWSC 525 (Wilson J) at [80]-[82].

Arguably, where the dispute on facts merely involves a judge deciding about competing inferences to be drawn from a statement of agreed facts, there would never be an erosion of the value of the plea sufficient to warrant a reduction.

Extreme Culpability – s25F(2)

The second circumstance in which a court may reduce or decline to apply what would otherwise be the mandatory discount is in cases of extreme culpability. The discretion only arises if the court finds that the

> "level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met by the imposition of a penalty with no allowance for, or a reduction of, that discount".[18]

You need to be aware that this is not just a theoretical possibility. In practice, particularly in relation to murders and very serious drug offences, courts sometimes use this section to reduce discounts.[19]

In cases of murder the court should first consider, under s61 of the *Crimes (Sentencing Procedure) Act 1999* whether a life sentence is called for and, if not, then consider the possible application of s25F(2).[20]

Pursuant to s25F(3), where a case conferencing certificate has been filed, the prosecution cannot submit for such a reduction unless:

a) notice of the intention to do so was given to the offender's legal representatives at or before the conference; and

b) the case conference certificate records that fact

Trap: *even if prosecution does not give notice, the court can still decide of its own motion*

Keep in mind that, even if the prosecution are not permitted to make the submission, the court can still make a determination under s25F(2) of its own motion.[21]

Tactics: *make sure you file a case conference certificate*

The restriction on prosecution submissions under s25F(3) only applies where a case conferencing certificate has been filed. If you have a case which appears to be at a high level of culpability, ensure that a case conferencing certificate is filed even if there were no offers or meaningful discussions.

Tactics: *consider making an offer conditional on there being no s25F(3) notice*

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[18] s25F(2) *Crimes (Sentencing Procedure) Act 1999*
[19] See, for example, *R v Kovaleff* [2023] NSWSC 302 at [107]-[114] where Rothman J reduced the otherwise mandatory discount of 25% for the offender's plea of guilty to murder in the Local Court down to 15%.
[20] See *R v Ney* [2021] NSWSC 529 (Johnson J) at [196]-[202]; *Ney v R* [2023] NSWCCA 252 at [54]
[21] s25F(2) *Crimes (Sentencing Procedure) Act 1999*

In an appropriate case, a defendant might consider offering to plead guilty on condition that no notice is given by the prosecution in the case conferencing certificate, thus precluding a different prosecutor in future from making the submission.

In the rest of this paper, it should be taken as read that the s25F exceptions could apply to override the otherwise applicable mandatory discount.

Maximising the discount: an actual plea in the Local Court

With two exceptions, the only way to qualify for the mandatory discount of 25% is for the defendant to either plead guilty, or offer to plead guilty to an alternative charge, before committal. (The exceptions, which involve fitness to plead and charges laid *ex officio* arise only in certain circumstances and will be discussed separately.)

Whether as a result of an offer which is accepted, or by a plea of guilty as charged, a plea of guilty in the Local Court will trigger the mandatory discount of 25%. The only condition is that the plea must have been "accepted by the Magistrate in committal proceedings for the offence".[22]

The legislation does not specify the basis upon which a Magistrate may accept or reject a plea of guilty in general.

However, the scheme precludes a Magistrate from accepting a plea of guilty before a charge certificate has been filed, except with the consent of the prosecution.[23] Presumably, this is to prevent accused persons from taking advantage of "under-charging" by police.

Further, in *Black v R* (2022) 107 NSWLR 225; [2022] NSWCCA 17 the Court of Criminal Appeal held that it would be "quite inappropriate for a magistrate … to accept a guilty plea to an alternative count where the prosecution proposed to proceed to trial on the principal count."[24]

Apart from these two circumstances, it is doubtful that a Magistrate could refuse to accept a plea unless the Court Attendance Notice did not disclose an offence. This is because a plea of guilty is an admission to all of the elements of the offence[25] and, under the EAGP scheme, facts are no longer tendered on committal and the Magistrate does not make any decision about the charges or the evidence.[26]

Maximising the discount: offers which are not accepted by the prosecution

A central aspect of the scheme in the *Crimes (Sentencing Procedure) Act 1999* is the preservation of discounts, in certain circumstances, for offers which are:

a. refused by the prosecution but accepted later (s25E(2)); or

b. not accepted by the prosecution but consistent with the verdict at trial (s25E(1)).

These can be seen as exceptions to the basic rule that the level of discount is dictated by the timing of the entry of a plea of guilty. For each of the two exceptions, s25E(3) effectively provides for a

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[22] s25D(2)(a) *Crimes (Sentencing Procedure) Act 1999*
[23] ss97(3) and 95 *Criminal Procedure Act 1986*
[24] Per Simpson AJA at [49], Ierace and Dhanji JJ agreeing
[25] *Meissner v The Queen* (1995) 184 CLR 132 at 141, 157
[26] See *Landrey v DPP (NSW)* (2022) 110 NSWLR 127; [2022] NSWCA 211 at [64]-[68].

level of mandatory discount as if a plea had been entered and accepted at the time the offer was made: 25%, 10% or 5%.

Offer refused by prosecution but accepted later – s25E(2)

In addition to the preconditions which are common to both exceptions (see below), section 25E(2) requires that:

(a) The offer was refused but accepted by the prosecutor after the offender was committed for trial; and

(b) The offender pleaded guilty to the different offence at the first available opportunity able to be obtained by the offender.

Trap: *offer must have been refused*

If an offer is made and there is no response to it by the prosecution, this may not qualify as having been "refused".

Tactic*: require a response in writing*

Rather than hoping that a court will find that no response is a "refusal", defence lawyers should insist on a written response to all offers. Pre-committal, that response should be recorded in the case conference certificate. Remember, the onus of proof is on the offender to establish the preconditions for a mandatory discount at the sentencing hearing.[27]

Trap: *delay in actually entering the plea may disentitle to discount*

Section s25E(2)(d) appears to require active steps by the offender to obtain an opportunity for a plea to be entered. Doing nothing after the prosecution has accepted an offer and then entering the plea on the first day of trial may not be seen as doing this. A strict interpretation of similar requirements was taken by the Court of Criminal Appeal in *Green v R* [2022] NSWCCA 230, discussed below in relation to the requirements for obtaining a 10% discount for a plea before trial.[28]

Tactic*: take active steps to seek to relist the matter on the first available date*

Offer not accepted but consistent with verdict – s25E(1)

In addition to the requirements common to both exceptions (see below), the particular requirements of s25E(1) are:

(c) The offer was not accepted by the prosecutor;

(d) The offer was not subsequently withdrawn; and

(e) The offender was found guilty of the different offence or an offence that is reasonably equivalent to the different offence

The precondition "not accepted" in s25E(1)(c) is different from "refused" in s25E(2)(c). This section would therefore seem to apply whether or not there has been a response by the prosecutor.

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[27] s25F(5) *Crimes (Sentencing Procedure) Act 1999*

[28] This strict approach is also consistent with the approach to the legislation taken in *Stubbings v R* [2023] NSWCCA 69, discussed below in relation to s25D(5) (pleas of guilty by accused who become fit to plead).

Trap: *make sure the offer is not withdrawn*

The legislation provides no guidance about how an offer might be withdrawn. It is arguable that entering a plea of not guilty to a charge may amount to withdrawing an offer to plead. While it is not clear, this does not seem to be how the section has been interpreted.[29] The section does not appear to require an offer to be repeated, merely not withdrawn. In my opinion, entering a plea of not guilty to both the principal and alternative count is not inconsistent with an offer to plead guilty to the alternative. This argument is supported by the reasoning in *Black* that the availability of the discount should not depend upon whether or not the prosecution chooses to charge the defendant with an alternative offence which would be available as an alternative in any event.[30]

There is also a possible argument that an offer may be extinguished by refusal or a counter-offer. In my view, such an interpretation would be highly unlikely and contrary to the clear intention of the section.

Tactics: *make it clear that the offer remains open until withdrawn in writing*

For abundant caution, I suggest stating something like the following in relation to all offers:

> "This offer remains open until withdrawn in writing and remains open even if a plea of not guilty is entered to any offence including the offence the subject of the offer or if the prosecution rejects the offer or makes a counter offer."

Trap: *don't forget about the "reasonably equivalent offence" alternative*

The verdict exception extends not only to a verdict of guilty to the offence offered, but guilty to a "reasonably equivalent offence". The definition is in s25E(1):

> For the purposes of this subsection, an offence is reasonably equivalent to a different offence if—
>
> (a) the facts of the offence are capable of constituting the different offence, and
>
> (b) the maximum penalty for the offence is the same or less than the different offence.

There does not seem to have been any guidance in the case law about what "the facts of the offence are capable of constituting the different offence" actually means. However, it would seem to at least cover the situation where the accused is found guilty of an offence lower in the hierarchy of statutory alternatives: for example, a verdict of reckless wounding where recklessly causing

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[29] See *Richey v The Queen* (2021) 289 A Crim R 233; [2021] NSWCCA 93 per Ierace J at [17] where it appears that the accused had pleaded not guilty to all charges at trial. The only other cases on s25E(1) do not appear to deal directly with this question. In *Fuller v R* [2022] NSWCCA 203 and *R v Holmes (No.7)* [2021] NSWSC 570 (Campbell J) the accused had entered a plea of guilty to the alternative before the jury. In *R v Camilleri* [2021] NSWSC 221 (Wilson J) the accused appears to have been arraigned on a charge of murder only and may not have entered a plea to manslaughter. See also *R v Dilosa* [2023] NSWSC 1515 (Sweeney J) at [38]-[41]. In that case there was a pre-committal offer to PG to accessory after the fact to murder. The offender was charged only with murder at the first trial (aborted) and at the second trial (hung jury). During the jury deliberations at the second trial, and after it, he "renewed his offer to plead guilty to the accessory charge" (at [39]). The Crown rejected all these offers and, at a third trial, added accessory after the fact as an alternative. The Offender pleaded guilty to the alternative before the jury, the plea was not accepted and he was acquitted of murder and found guilty of the alternative. Both parties submitted, and the judge accepted, that s25E(1) applied to require a 25% discount. There is no question that this was correct. However, it does not answer the question of what would have happened if the offender had pleaded not guilty to *both* counts at the third trial. Also, the reference to "renewing" the offer must mean "repeating" it since there was no suggestion that it had otherwise been withdrawn. All of the other cases on s25E are about s25E(2) which does not specify that the plea must not have been withdrawn.

[30] At [40]

grievous bodily harm was offered as an alternative to wounding with intent to cause grievous bodily harm.

Trap: *don't forget: a s22A discount may be available in addition to a s25E(1) discount*

Because the discount under s25E(1) is necessarily applicable after trial, there is a possibility of a discount under s22A[31] for the extent of pre-trial disclosure and the manner in which the trial was run. In two sentencing cases the Supreme Court has allowed a s22A reduction in addition to a full s25E(1) discount.[32] Such a discount may be quantified but need not be.[33]

<u>*Requirements common to both exceptions*</u>

Both exceptions have the following preconditions[34]:

(a) The offender made an offer recorded in a negotiations document to plead guilty to an offence;

(b) That offence (the ***different offence***) was not the offence the subject of the proceedings when the offer was made.

Trap: *the offer must have been "recorded in a negotiations document"*

Recorded in a negotiations document means:

for offers made pre-committal: in the case conference certificate[35] (or filed, served and attached to it if made after filing of the certificate);[36] *and*

for offers made after committal: in writing and served on the prosecutor in the proceedings.[37]

In *Ke v R* [2021] NSWCCA 177, the Court of Criminal Appeal interpreted this requirement, for case conference certificates, as being satisfied if there was an offer which was not recorded in the case conferencing certificate, but which was required to have been.[38] The court noted that s75 of the *Criminal Procedure Act 1986* requires the recording in that certificate of "any offers made by the accused person to plead guilty to an offence specified in the charge certificate or to different offences".

In *Ke*, this saved the discount where a written offer had been made but, by omission on the part of both parties, not recorded in the case conference certificate. However, the reasoning in *Ke* is unlikely to extend to save an offer which was made *after committal* and was not in writing and served on the prosecution. This is because there is no *legal requirement* to create such a document.

Trap: *these exceptions might not cover existing additional or separate charges*

In *Black v R* (2022) 107 NSWLR 225; [2022] NSWCCA 17 the Court of Criminal Appeal clarified that "the offence the subject of the proceedings when the offer was made" means the principal

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[31] s22A *Crimes (Sentencing Procedure) Act 1999*
[32] *R v Eckersley* [2021] NSWSC 562 (Beech-Jones J) at [68]-[69]; *R v Warren Scott (No.3)* [2021] NSWSC 1646 (N Adams J) at [54]-[55].
[33] See *Droudis v R* [2020] NSWCCA 322 at [101]-[105].
[34] ss25E(1)(a), (b) / 25E(2)(a), (b) *Crimes (Sentencing Procedure) Act 1999*
[35] s25B(a)(i) *Crimes (Sentencing Procedure) Act 1999*
[36] s77 *Criminal Procedure Act 1986*
[37] s25B(a)(ii) *Crimes (Sentencing Procedure) Act 1999*
[38] At [339] per Bellew J, Adamson J agreeing. Brereton JA at [63] expressed it in as "ought to have been recorded" but the reasoning was substantially the same.

offence with which the prosecution is proceeding and that a "different offence" includes not only an offence which is not charged at all, but also an *alternative* charge existing at the time of the offer.[39] While *Black* concerned s25E(2), in this respect s25E(1) is identical.

The reasoning in *Black* means that these two exceptions may not apply to a charge which is an additional or separate charge existing at the time of the offer, since such an offence would be "the offence the subject of the proceedings". Thus, if a certified charge is not an alternative, the only way to preserve the discount would appear to be to enter a plea of guilty.

Tactics: *clarify whether a charge is in the alternative*

It is not always apparent whether certified charges are in the alternative or are additional.[40] Before making any final offer in the Local Court, if the charge certificate does not specify it, consider obtaining an answer in writing from the prosecution about which charges are alternatives.

Post-committal pleas and offers to plead – 10% or 5%?

Post-committal pleas – s25D(2)(b) and (c)

The general rule is that a plea of guilty entered after committal but at least 14 days before the first day of the trial attracts a mandatory 10% discount and a plea entered after that, 5%.[41]

Trap: *"first day of the trial" – specific meaning*

There is a definition of "the first day of the trial" in s25C(1) of the *Crimes (Sentencing Procedure) Act 1999:*

> *first day of the trial of an offender means the first day fixed for the trial of the offender or, if that day is vacated, the next day fixed for the trial that is not vacated.*

This was considered in *Gurin v R* [2022] NSWCCA 193 where the Court of Criminal Appeal held that "vacated" means "adjourned before the commencement of the trial".[42]

The court also spelt out what vacated, in this context, does *not* include:

> Where the first day of trial is vacated in the sense of being adjourned before the trial commences by presentation of the indictment and arraignment, the clock is reset, and the provision provides an offender with another opportunity to enter a plea of guilty 14 days before the next day fixed for trial. Once a trial commences, however, the opportunity to obtain a 10% reduction is lost. A plea of guilty entered after the commencement of a trial attracts the reduction of 5% in any sentence that would otherwise have been imposed in accordance with s 25D(2)(c). And this is so whether the trial is aborted before empanelment, the jury is discharged after empanelment, or a new trial is necessary because the jury are unable to reach a verdict. This is so even if after a successful conviction appeal to the Court of Criminal Appeal, a guilty verdict is set aside, and a new trial directed.[43]

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[39] At [36]

[40] See, for example, *R v Honeysett (No.2) (Sentence)* [2023] NSWSC 103 (Hamill J) at [27]-[34]. Although Hamill J's reasoning in this *ex tempore* judgement is somewhat opaque, it appears that the robbery charges must have been an alternative to murder. Otherwise, there would have been no basis upon which the prosecution could have refused to have accepted a plea to it. Note: The offender had been found fit to plead only days before he entered his plea of guilty (*see R v Honeysett (Fitness to stand trial)* [2023] NSWSC 76 (Hamill J)). Given the recent finding of fitness, it is curious that neither the parties nor the Judge appear to have referred to s25D(5)(a) which would have applied to mandate a 25% discount.

[41] s25D(1) and (2)(b) and (2)(c) *Crimes (Sentencing Procedure) Act 1999*

[42] At [32] per Campbell J, Beech-Jones CJ at CL and Adamson J agreeing.

[43] At [29] per Campbell J, Beech-Jones CJ at CL and Adamson J agreeing.

Trap: *"first day of the trial" – where early pre-trial hearings*

In *Gurin*, the trial was considered to have commenced upon arraignment for the purposes of conducting a *voir dire* (pre-trial legal argument) in the absence of the jury, pursuant to s130 of the *Criminal Procedure Act 1986*. In *Gurin*, the jury were to be empanelled shortly after the *voir dire*. However, the accused absconded and the trial was aborted.

In some cases, pre-trial hearings are listed many months before the date for trial by jury. During the COVID-19 pandemic, a number of trials were "vacated" but pre-trial hearings proceeded on the original trial date in order to make use of court time. The reasoning in *Gurin* may mean that the "first day of the trial" is the day on which the accused is arraigned at the commencement of a pre-trial hearing.

Tactic: *always assume that the first day of trial is the date fixed for any pre-trial hearing*

Post-committal pleas to the offence charged: if a plea cannot be entered 14 days before

If it is not possible to arrange for the plea to be entered at least 14 days before trial – for instance because the next District Court sittings are too far away - there are steps which can be taken to preserve the10% discount.

Section 25D(2)(b) of the *Crimes (Sentencing Procedure) Act 1999* provides for this if the offender:

> (ii) complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity able to be obtained by the offender

The pre-trial notice requirements are defined in s25C(2):

> an offender complies with the pre-trial notice requirements if the offender serves a notice on the prosecutor at least 14 days before the first day of the trial of the offender accepting an offer by the prosecutor to plead guilty to the offence or offering to plead guilty to the offence

The steps which must be complied with are therefore twofold:

1. Giving notice to the prosecutor at least 14 days before the first day of trial of the offer to plead guilty to the charge; and

2. Pleading guilty at the first available opportunity able to be obtained by the offender.

Although couched in terms of "offer", an accused person is entitled to plead guilty to a principal offence at any time. When the provision is being applied to principal offences, rather than alternatives, the offer is to plead guilty to the offence charged before trial.

Post-committal offers to plead guilty to alternatives will be discussed separately.

In *Green v R* [2022] NSWCCA 230 the Court of Criminal Appeal considered the section. In that case, the plea was entered 10 days before the trial. The successful ground of appeal was:

> The failure by the applicant's legal representatives to act in a timely manner on instructions to plead guilty caused a miscarriage of justice as it resulted in the applicant receiving only a 5% discount on sentence.[44]

The court noted that the sentencing judge

[44] At [26]

> … was not informed the applicant had provided instructions to plead guilty many weeks earlier and that the ODPP was so advised.

and went on to say

> As will be demonstrated, those facts were not relevant to the level of the discount because of the prescriptive nature of the provisions.[45]

From the findings of fact in the case, it is clear that the plea was not entered at least 14 days before the trial even though this could have been arranged. It is not explicitly stated in the decision, but it appears to have been accepted that the notice requirement of s25D(2)(b)(ii) (notice to the prosecution) was met within time. The findings of fact refer, twice, to the fact that there was delay in notifying the court that the case would resolve by a guilty plea. One of the stated reasons for upholding the ground of appeal was as follows:

> The precise timing of notifying the District Court of the plea, that is one day after the last day upon which the applicant would obtain the 10% sentencing discount, also suggests an unintended failure to meet a deadline, rather than a forensic strategy.[46]

There is no specific requirement in s25D(2)(c) that the sentencing court be notified of an intention to plead guilty. However, any attempt by an offender to "obtain" the first available opportunity to enter the plea would necessarily involve making contact with the trial court (or having the prosecution do it). The passage above may seem to imply that the efforts to obtain the first available opportunity to plead must be commenced by notice *to the court* at least 14 days before the trial. Given that the legislation has no such requirement, it should not be understood in that way.

However, because the onus of proof is on the offender to prove entitlement to a particular discount,[47] it may be hard to establish that the offender had pleaded guilty at the first available opportunity unless the court is notified as soon as the intention to plead has been notified to the prosecutor.

Trap: *failure to give notice to the prosecution of offer to plead guilty at least 14 days before trial*

Trap: *failure to seek to obtain the first available opportunity to plead guilty*

In *Green*, it was held that, due to the failures to comply with the strict requirements of the legislation, both the sentencing judge and the appeal court were precluded from allowing a discount of more than 5%.

Tactics: *give notice to the prosecution and the court at least 14 days before trial*

Post committal pleas: 5%

There are no conditions on the mandatory 5% discount for entry of a plea after committal. Section s25D(2)(c) simply provides that it applies if the other two (25% in (a) and 10% in (b)) do not. The level of discount is determined by s25D(2)(c) but the discount is applied by operation of s25D(1) which provides that it is to be applied by the court "if the offender pleaded guilty to the offence *at any time* before being sentenced".

Theoretically, a plea entered any time before verdict would carry a mandatory 5%. At first blush, this seems like anomaly. However in the light of *Richey*,[48] s25F(4) has work to do here. It is likely that a trial would be seen as "dispute as to facts which was not determined in favour of the offender".

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[45] At [26]
[46] At [44] point (9)
[47] s25F(5) *Crimes (Sentencing Procedure) Act 1999*
[48] *Richey v The Queen* (2021) 289 A Crim R 233; [2021] NSWCCA 93; See the discussion at p5 above

How much of the trial has run, and the manner in which it has been run, would inform the extent to which the utilitarian value of the plea has been eroded.

In rare cases there might be no reduction, even after the end of the evidence: for example where the trial is what criminal defence lawyers call a "long plea" (i.e. the trial runs and the defence version of facts is largely accepted but the offender enters a very late plea of guilty).

Post-committal offers to plead to an alternative

Where an accused person makes a post-committal offer to plead to an alternative count (or to an alternative, uncharged, offence), there are three provisions of the EAGP scheme which may apply.

1. Where the offer is initially refused by the prosecutor and later accepted, s25E(2) applies. (See above)
2. Where the offer is not accepted and there is a verdict consistent with the offer to plead, s25E(1) applies (See above)
3. Where the offer is accepted by the prosecutor, s25D(2)(b) applies in the same way as if the offer was to plead guilty to the principal offence, as discussed above. The only difference is that, until the prosecutor accepts the offer to plead to the alternative, the accused is not in a position to seek to obtain "the first available opportunity" to enter the plea.

   This may mean that, although the offer is made at least 14 days before the first day of trial, no steps may be taken to obtain the first available opportunity to enter the plea until the prosecution provides a response. This could be after the commencement of the trial.

Where a plea is entered and the offender is relying on an offer, whether under s25E(2) (offer refused and then accepted) or s25D(2) (offer accepted) the availability of the mandatory 10% discount is contingent on both:

1. the offer having been made in writing at least 14 days before the first day of trial; and
2. entry of the plea at the first available opportunity able to be obtained by the offender.

All of the following traps apply as discussed above:

Trap: *"first day of the trial" – specific meaning*

Trap: *"first day of the trial" – where early pre-trial hearings*

Trap: *failure to give notice to the prosecution of offer at least 14 days before trial*

Trap: *failure to seek to obtain the first available opportunity to plead guilty*

Post-committal prosecution offers to accept a plea – 10% discount

The 10% discount is also available under s25D(2)(b) if an offender accepts a prosecution offer at least 14 days before the first day of the trial. The requirements are relevantly the same:

1. written notice of acceptance of the offer must be served within 14 days; and
2. the plea must be entered at the first available opportunity able to be obtained by the offender.

The traps and tactics are the same as above.

New count offences – s25D(3)

Another exception to the usual mandatory level of discounts is for "new count offences" under s25D(3) of the *Crimes (Sentencing Procedure) Act 1999*. A "new count offence" is an offence the subject of an *ex officio* indictment or which has been added to an indictment by amendment.[49] The section provides for the usual three levels of mandatory discount: 25%, 10% and 5%. This provision only applies where a plea of guilty is actually entered.

New count offence: 25% discount

Section 25D(3)(a) provides for:

> a reduction of 25% in any sentence that would otherwise have been imposed, if an offer to plead guilty was made by the offender and recorded in a negotiations document as soon as practicable after the ex officio indictment was filed or the indictment was amended to include the new count

Note: Section 25D(3)(a1), which covers the extremely rare case of offenders who are discharged at committal for prosecution failure to file a charge certificate[50] is in relevantly identical terms. However, importantly, the exception to the availability of the 25% discount based on the contents of the brief (discussed below) does not apply to such an offender.

The only requirement is that an offer is made and recorded in a negotiations document (i.e. in writing sent to the prosecutor) "as soon as practicable" after the relevant indictment was filed or amended.

Perhaps surprisingly, there is no requirement to enter the plea at the first available opportunity. Curiously, s25D(6) provides that the court is to take into account the need for legal advice and instructions "for the purpose of determining under sub-section (3) … whether the offender pleaded guilty as soon as practicable after an ex officio indictment was filed or the original indictment amended". This appears to be a drafting error, and should probably be interpreted as meaning that those factors should be taken into account in determining whether the offer was made "as soon as practicable".

Trap: *failing to make an offer in writing as soon as practicable*

For the purposes of this section, an offer recorded in a negotiations document is one which is in writing and served on the prosecution.[51] Although there is no requirement to notify the court or to enter the plea within any particular timeframe, failing to send the prosecution the offer in writing as soon as practicable may disentitle the offender to the 25% discount. This applies whether the new count offence is a principal offence or an alternative to another count. Such a failure could occur, for example, if the indictment were amended in an arraignments list and a verbal indication of an offer to plead were given but not followed up in writing.

Since the discount is entirely based upon the timing of the offer, so long as a plea is entered at some stage, it does not seem to matter when the prosecutor accepts the offer (if the new count offence is an alternative), including whether it is initially rejected.

Tactics: *seek to have the plea entered at the first available opportunity*

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[49] Definition in s25B *Crimes (Sentencing Procedure) Act 1999*
[50] Pursuant to s68(2)(a) of the *Criminal Procedure Act 1986*
[51] Definition in s25B *Crimes (Sentencing Procedure) Act 1999*

Although not technically required, it is best to seek to have the plea entered at the first available opportunity. This will guard against a different interpretation of the tension between s25D(3) and s25D(6) and may form the basis of a submission that the offender is demonstrating a willingness to facilitate the administration of justice.[52]

Trap: *25% not available for verdict consistent with offer*

Since the new count provisions are based on a plea of guilty, they do not apply where there is a verdict consistent with an offer. Because s25E(3) only provides for 25% discounts for offers made before committal, the maximum discount for a verdict consistent with an offer for a new count offence under s25E(1) is 10%. This appears to be a lacuna in the legislation.

Possible Tactic: *seek new charge to be laid in the Local Court*

In the following circumstances it may be worth trying to protect the discount by insisting that charges are laid in the Local Court:

1. new count offences, including principal and alternative, are laid based on new evidence (and not subject to "the brief" exception below);
2. the accused offers to plead guilty to the alternative and the prosecution refuses.

The accused could argue that the failure to hold committal proceedings has caused prejudice by depriving the accused of the right to offer to plead guilty to the alternative in the Local Court and preserve the possibility of a 25% discount.[53] In those circumstances it is arguable that for the prosecution to proceed would be an abuse of process which might justify a temporary stay until committal proceedings are held.[54]

Another possible approach, which must be taken in advance, would be to oppose amendment of the indictment under s20 of the *Criminal Procedure Act 1986*.

Exception to the 25% discount for a new count offence – s25D(4)(a) – the brief

Section 25D(4)(a) provides that s25D(3)(a) (the 25% discount provision for new count offences) does not apply if:

> the facts or evidence that establish the elements of the new count offence are substantially the same as those contained in the brief of evidence or other material served on the offender by the prosecutor in committal proceedings relating to the original indictment and the penalty for the new count offence is the same as, or less than, the offence set out in the original indictment.

This provision has been considered in two decisions of single judges of the Supreme Court. The decisions are consistent with each other and the interpretation adopted by each means that, if evidence supportive of the "new count offence" was contained in the brief served during committal proceedings, then the 25% discount provision for new count offences does not apply. This "requires a finding of fact with respect to the relationship between the contents of the brief of evidence or other relevant material and the elements of the new offence"[55].

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[52] For which there is a separate, non-quantified, discount available in addition to the utilitarian value of the plea: see *Doyle v R* [2022] NSWCCA 81 at [16].
[53] This is consistent with the analysis of the EAGP scheme in *Coles*, *Hijazi, Elwood* and *Landrey*, discussed above.
[54] See *Barton v R* (1980) 147 CLR 75 where it was held that, while there is no requirement for committal proceedings to be held, a temporary stay would be available to prevent injustice as a result of there being no committal.
[55] Dhanji J in *R v French* [2021] NSWSC 1531 at [80]

This is the case whether the "new count offence" was laid as an alternative to another offence or whether it was an additional, and not alternative, count. In *R v Doudar* [2020] NSWSC 1262 (RA Hulme J) the offender pleaded guilty to a new count offence of being an accessory after the fact to murder in lieu of murder. In *R v French* [2021] NSWSC 1531 (Dhanji J) the offender pleaded guilty to manslaughter in lieu of murder *and* to a new count offence of disposal of a body.

In neither of these cases was there consideration of the requirement that the penalty for the new count offence be "the same as, or less than, the offence set out in the original indictment". This final requirement is difficult to understand except where a new count offence is added as an alternative to, or a direct replacement of, an existing count. Many indictments contain numerous counts.

If a new count is added as an *additional* count, it is not clear whether the exception would apply if the new count offence has a lesser penalty than (a) at least one of the offences on the original indictment or (b) all of them.

Tactic: *make pre-committal offers to various offences*

Where the brief discloses different possible offences, the only sure way to preserve the possibility of a 25% discount is for the accused to make pre-committal offers to plead guilty to all reasonably possible offences the elements of which are supported by the brief. In *French*, Dhanji J acknowledged the difficulty with this when an offence is relatively obscure.[56] The Public Defenders' publication (available on the website) *Table of Common Charge Options for State Offences* is designed to assist with this task.

Possible tactic: *add a general offer*

The legislation does not specify the manner in which an offer to plead guilty to an offence must be made. Depending upon the case, there would seem to be no reason why an accused person could not make a pre-committal offer to plead to specific, nominated offences, with something like the following added: "and any other offence with the same or lesser penalty arising from the evidence in the prosecution brief".

Exception to the 25% discount for a new count offence – s25D(4)(b) – prosecution offers

The other exception is under s25D(4)(b) which provides that the 25% discount does not apply if:

> the offender refused an offer to plead guilty to the new count offence that was made by the prosecutor in the committal proceedings relating to the original indictment and the offer was recorded in a negotiations document.

If *Doudar* and *French* are correct, it is unlikely that this provision would apply to any case where the first exception did not also apply. It is difficult to imagine a case where a prosecutor would make an offer to accept a plea of guilty to an offence for which there is no evidence in the brief.

New count offence: 10% discount

The 10% discount provided for in s25D(3) (b) is in relevantly identical terms to s25D(2)(b), the provision which applies to pleas entered after committal. However, s25D(3)(b) only applies if the 25% new count provision (s25D(3)(b)) does not.

[56] At [77]

The same considerations and traps apply as discussed above under the headings:

Post-committal pleas

Post-committal pleas to the offence charged: if a plea cannot be entered 14 days before trial

Post-committal offers to plead to an alternative

New count offence: 5% discount

This, like the other 5% discount provisions, is a "catch all" if the two higher levels do not apply. For new count offences, the new count offence provision only applies on a plea of guilty. Section 25E(1) would apply where there is a late offer to plead to a new count offence (not accepted by the prosecution) and a verdict consistent with that offer.

Mandatory discounts and fitness to plead

The EAGP scheme includes a provision for committal for trial where fitness is raised.[57] There is a facility to remit the matter to the Local Court if a defendant had been committed on that basis and either found fit or if the court is satisfied that the question of fitness is not going to be raised.[58]

Section 25D(5) of the *Crimes (Sentencing Procedure) Act 1999* provides for mandatory discounts in particular circumstances for offenders who are found fit to plead and then plead guilty. The level of discounts is the usual 25%, 10% and 5%, depending on the timing of the plea.

The provisions which result in a 10% or 5% discount are identical to the default provisions in s25D(b) and (c). The same traps and tactics apply.

Offender found fit to plead: 25% discount

Section 25D(5) relevantly provides:

> (5) **Discount variations—person found fit to be tried after committal for trial**
>
> The discount for a guilty plea by an offender who is found fit to be tried after the offender is committed for trial, and whose matter was not remitted to a Magistrate for continued committal proceedings, is as follows—
>
> (a) a reduction of 25% in any sentence that would otherwise have been imposed, if the offender pleaded guilty as soon as practicable after the offender was found fit to be tried.

The following prerequisites must be met before the discount applies:

1. the offender was committed for trial (whether in the normal way or because fitness was raised before the Magistrate);
2. the offender is found fit to be tried;
3. the matter was not remitted to a Magistrate for continued committal proceedings;
4. the offender pleaded guilty to the offence;

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[57] s93 *Criminal Procedure Act 1986*
[58] s52 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*

5. the plea was *entered as soon as practicable*[59] after the offender was found fit to be tried.

Section 25D(6) provides that a sentencing judge must take into account the need for legal advice and instructions when considering the question of "as soon as practicable".

While this appears relatively simple, there are some significant traps. Some of them arose in the case of *R v Camilleri* [2021] NSWSC 221 (***R v Camilleri***) before Wilson J. In that case, the accused was charged with murder and, as soon as reasonably practicable after her lawyers received expert advice confirming her fitness, she offered to plead guilty to manslaughter. At trial she was acquitted of murder and found guilty of manslaughter. She was found to be entitled to a 10% discount only.

(Note: Although this case has been successfully appealed on other grounds,[60] these did not involve challenging Wilson J's approach to the terms of s25D. On resentence, all three appeal judges adopted Wilson J's approach and applied a discount of 10% for the utilitarian value of the plea.)

More recently, in *Stubbings v R* [2023] NSWCCA 69, some further traps have come to light which highlight how surprisingly strict and technical this legislation can be.

Trap: *there must be an actual finding of fitness*

A finding of fitness can occur after a fitness inquiry[61] is held. It can also occur if the Tribunal finds that the person has become fit.[62] However, an offender is not "found fit" if there was no such inquiry and no such finding. As Wilson J found in *R v Camilleri*, "she was not found fit to be tried (the issue falling away upon further investigation by medical professionals)"[63].

Trap: *there must be a plea of guilty*

Section s25D(2) only applies where a plea is actually entered. Unless the plea is entered "as soon as practicable" (see below), the section does not apply. In *R v Camilleri,* the offender "did not enter a plea, but rather offered a plea to a different charge".[64]

Trap: *time for negotiations is not included in "as soon as practicable"*

A plea must be actually entered "as soon as practicable after the offender was found fit to be tried" – s25D(5)(a). A court is required to determine whether this happened, taking into account "whether the person had a reasonable opportunity to obtain legal advice and give instructions" – s25D(6).[65] As soon as practicable does not mean as soon as possible. Practical and other difficulties in lawyers and clients having the opportunity communicate will be taken into account.[66] However, this does not include time for negotiations with the prosecution, only advice and instructions as to whether to plead guilty as charged.[67] The effect of the decision in *Stubbings* is that, if negotiations are entered into, are unsuccessful, and a plea is then entered to the original charge, it will not have been entered "as soon as practicable".[68] Consistently with that reasoning it appears that, *even if*

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[59] The meaning of this phrase was considered in *Stubbings v R* [2023] NSWCCA 69
[60] *Camilleri v R* [2023] NSWCCA 106
[61] s46 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*
[62] See *Stubbings* at [12], [20], [25]-[26] and s50 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*
[63] At [67]
[64] At [67]
[65] *Stubbings* at [48]-[51].
[66] Stubbings at [49], [53].
[67] Stubbings at [53]-[55].
[68] *Stubbings* at [48]-[56].

negotiations are successful, a plea of guilty to an existing alternative which is accepted by the Crown might not be considered to have been entered as soon as practicable.[69]

Trap: *offers made as soon as practicable do not preserve the 25%*

The provisions of s25E(1) (verdict consistent with offer) and s25E(2) (offer refused and later accepted) cannot provide a 25% discount since that is only available for offers made before committal.[70]

Tactics: *deal with fitness at committal stage and remit to the Local Court if there are negotiations*

If fitness is a possible issue, get the expert assessments and if there is an issue, have the case *committed under s93* of the *Criminal Procedure Act 1986* before case conferencing. This will allow for remittal if the defendant is either found fit or if it becomes apparent that fitness is not an issue. The power to remit is in s52 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (**MHCIFPA**) and only applies if the person was committed under s93.

Remittal will restore the capacity of the accused to preserve the 25% discount by making offers, or pleading guilty, before committal. It is the only safe course if the accused, having been found fit or whose fitness is no longer an issue, wishes to negotiate a plea to lesser charges.[71]

Where the accused was committed under s93, remittal in those circumstances, for the purposes of a case conference, is as of right except if it is not in the interests of justice to do so.[72] If a case conference has already been held, this should not preclude remittal since there can be more than one case conference.[73]

Trap*: remittal is only available where committal was for fitness purposes under s93*

The power to remit exists only if committal was under s93 – see above. If the accused was committed for trial in the normal way, there does not appear to be any power to remit.[74]

Tactics: *where fitness is no longer an issue*

If there has been an issue about fitness but reports now indicate that the accused is fit, there are two main options to try to preserve the 25% discount:

Option 1: If the accused was committed under s93, seek remittal to the Local Court on the basis that fitness is no longer going to be raised (s52(4) MHCIFPA).

This option would allow the accused to either plead guilty in the Local Court and qualify for the 25% discount or make an offer which could be relied upon should the prosecution refuse and later accept it or if there is a verdict consistent with the offer.

Option 2: Seek to proceed to an inquiry and have the judge determine that the accused is fit.

This option, if successful, would make the 25% discount available if the accused were to promptly plead guilty to whatever the prosecution would accept. However, it will not preserve the discount if the prosecution does not promptly accept an offer plead. This appears to be the only option if the

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[69] This would depend on the timing: a matter of days might be acceptable but, in light of *Stubbings*, any longer might not be. It is arguable that a plea of guilty entered to a lesser offence after *successful* negotiations would be a plea entered as soon as practicable - so long as the plea were entered as soon as practicable after the Crown agreed to accept the plea. This is because, arguably, until the Crown agrees, the accused cannot plead guilty to an alternative. This is clearly so if there is a plea to a new charge which is laid as a result of negotiations.

[70] s25D(3)

[71] See generally the decision in *Stubbings.*

[72] s52(2) and (3) *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*

[73] s70(5) *Criminal Procedure Act 1986*

[74] There is a power to remit after committal for sentence: s101 *Criminal Procedure Act 1986*

accused has been committed for trial other than under s93. If the accused was committed under s93 and wants to negotiate about charges, remittal is the *only* safe course – see above.

There is a risk that the judge may determine that an inquiry is no longer needed and decline to hold one.[75] Given that a finding of fitness has a direct impact on the availability of the 25% discount, it is arguable that it would be unfair to an accused not to hold an inquiry even if the result is inevitable.[76] This is particularly so if the evidence suggests that the accused was unfit but has become fit, for example because of treatment.

Tactics: *where the client is found fit but the prosecution do not accept an offer*

If the accused is found fit after an inquiry and promptly makes an offer which is either refused or not responded to, the only way to preserve the possibility of a 25% discount is to seek remittal to the Local Court and have the offer included in a case conference certificate.

In light of *Stubbings*, the *only* safe course is to seek remittal at the same time as making any offer to the prosecution and to repeat the offer if the case is remitted.

Offers which do not specify the legal or factual basis of the plea

An important aspect of the EAGP scheme is that, where a verdict is consistent with an offer (s25E(1)), there is no need for the offender to have specified the factual basis for the offer in order to qualify for the mandatory discount: *Fuller v R* [2022] NSWCCA 203.[77]

This is in stark contrast to the position at common law, summarised in the recent case of *Merrick v R* [2017] NSWCCA 264. Under the common law, determination of a discount for a verdict consistent with an offer requires consideration of the legal and factual basis of the offer compared with the outcome at trial.

The reasoning in *Fuller* would also apply to an offer to plead guilty refused but later accepted (s25E(2). The discount is mandatory based on the timing of the offer or plea.

Conditional offers

The legislation does not say that offers may not be conditional. There is a possible question about the efficacy of conditional offers for the purposes of preserving discounts under the EAGP scheme.

The question is not amenable to a definitive answer in all circumstances because there are many possible types of offers, they are relied upon in different circumstances, and there is limited guidance in the case law.

Offers made on a particular legal or factual basis

Since, as discussed above, there is no requirement to specify a legal or factual basis for an offer to plead, it is arguably contrary to the purposes of the scheme if merely doing so, in order to seek charge resolution, would prejudice a defendant's entitlement to a discount. At least in relation to

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[75] s40 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*
[76] This reasoning is consistent with the approach in *Coles*, *Hijazi*, *Elwood* and *Landrey* above.
[77] Per N Adams J at [63]-[65], Brereton JA and Adamson J agreeing. The same approach was adopted in *R v Hamdach* [2023] NSWSC 298 by Campbell J at [75]-[77], albeit without reference to *Fuller*.

s25E(1) (verdict consistent with offer), the approach in *Richey*[78] illustrates how such an offer ought to be dealt with under the provisions of the legislation.

In that case, the offender made a pre-committal offer, recorded in a case conference certificate, to plead to an offence on two conditions:

1. that a particular factual basis for the offence be accepted; and
2. that all other charges be withdrawn. [79]

In the event, the verdicts precisely aligned with the offer, the offender only being found guilty of the offence offered. However, the trial judge found significantly different facts for the offence and declined to allow any discount. On appeal, there was a dispute about the correctness of the judge's decision and the significance of the two conditions on the offer.

The appeal court did not need to decide about the effect of the second condition, resolving the issue by reference to the dispute on the facts. Ierace J (Harrison J agreeing), held (at [61]-[62]):

> 61. These findings were contrary to the first pre-condition to the offer, that the proposed factual basis of the plea be accepted. The applicant's submission that differences between the factual basis of an offer by an accused person to plead to a particular offence and the facts found by the sentencing judge is not a material consideration, in my view, is inconsistent with a textual and purposive analysis of the legislation that was introduced by the amending Act. As noted above, s 25F(4) of the *Crimes (Sentencing Procedure) Act* entitles the sentencing court to either reduce the sentencing discount that is otherwise applicable, or not apply it at all, if the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender. The sentencing judge's findings in relation to the disputed accounts of the applicant and victim given at trial, in his Honour's view, entirely eliminated the subjective considerations and utilitarian value of the plea.
>
> 62. Accordingly, the sentencing judge acted within his discretion pursuant to s 25F(4) to not apply at all the sentencing discount.

It is apparent that the court considered that the differences between the factual basis for the offer and the judge's findings were material. However, they were material because the offender maintained his position and conducted the trial in accordance with it. The court did not find that the mandatory discount of 25% was inapplicable *because* the offer was conditional on a particular factual basis. The reason why the discount was not in fact applied was due to the operation of s25F(4). That section permits a judge "not to apply the sentencing discount, or to apply a reduced discount" only if there is a "dispute as to facts which is not determined in favour of the offender". The dispute as to facts was the conduct of the trial, not the making of the offer. The operation of s25F(4) presupposes that the mandatory sentencing discount – in this case pursuant to s25E(1) - would otherwise apply.

On this analysis, a pre-committal offer conditioned on a particular factual basis will attract the mandatory discount unless there is a dispute on the facts, whether at trial or on sentence, which is not determined in favour of the offender. In *Richey*, the offender would have been entitled to a 25% discount had he not, at trial, maintained the factual position in his offer.

In my opinion, the same rationale would apply to a conditional offer made to plead to an offence, later accepted by the prosecution. The mandatory discount would apply pursuant to s25E(2),

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[78] *Richey v The Queen* (2021) 289 A Crim R 233; [2021] NSWCCA 93.

[79] The case is complicated by the fact that the offered charge, alone, was laid before the commencement of the EAGP. However, Ierace J did not consider that this affected the ability of the offender to offer to plead guilty to a "different offence" and invoke s25E(1) – see [58]. It is also complicated by the fact that it was decided before *Black v R* (2022) 107 NSWLR 225; [2022] NSWCCA 17 and there were concessions made by counsel which are inconsistent with *Black*, adverse to the offender and, in hindsight, incorrect. They do not affect the reasoning in Ierace J's judgment.

potentially reduced pursuant to s25F(4) if there were a dispute as to the facts at the sentencing hearing. If the prosecution accepted the original condition, or if the offender abandoned it and either agreed with, or did not dispute, the prosecution facts there would be no reduction. Although there was no reference to *Richey* or *Fuller*, the decision in *R v Hamdach* [2023] NSWSC 298 (Campbell J) concerned an offer later accepted by the prosecution and is consistent with this reasoning.[80]

Offers conditional on withdrawal of other charges

It is recognised that a legitimate type of charge negotiation under the EAGP scheme is for a defendant to offer to plead guilty to certain charges if other charges are withdrawn.[81] This includes whether or not the charges arise from the same incident (eg sexual offences), are in a series of similar offences (eg a string of robberies) or are completely unrelated.

However it is not entirely clear whether all such offers, if made but not accepted, would preserve the discount applicable at the time of the offer.

In accordance with the reasoning in *Black*,[82] s25E(1) and s25E(2) may not apply to a principal offence, only to an offence which had not been charged or which was an alternative. A principal offence could not be a "different offence" under those sections. Leaving aside the fitness exception, the only way to obtain the maximum discount for a principal offence charged in the Local Court is probably by pleading guilty before a Magistrate.

A more difficult question is whether a conditional offer to plead to alternative counts, or uncharged offences, is effective when made conditional upon the withdrawal of charged separate offences. This is the question which was left open in *Richey*.[83]

By extension of the reasoning in *Richey*, an offer is an offer and the mandatory discount should apply unless one of the discretionary exceptions permits a judge to reduce or decline to apply it. In a particular case, this would depend upon the manner in which a trial or sentence hearing was run, in relation to the offence the subject of the offer. In some cases, a trial may amount to a "dispute as to facts that was not determined in favour of the offender". In others it may not. If the offender was convicted of any of the offences to which there was no offer to plead (i.e. those the subject of the condition to be withdrawn) obviously there would be no discount for those particular offences.

Trap: *offers conditional on the withdrawal of other charges might not preserve the discount*

There is a risk that offers to plead guilty on the basis that other charges are withdrawn might not preserve the mandatory sentencing discount. This is especially so if the offer is to plead guilty to a charged offence which is a principal offence and not an alternative.

[80] at [75]-[77].
[81] See *Stuart v R* [2022] NSWCCA 182 at [35]
[82] *Black v R* (2022) 107 NSWLR 225; [2022] NSWCCA 17
[83] *Richey v The Queen* (2021) 289 A Crim R 233; [2021] NSWCCA 93 at [63].

The central role of offers: legal and ethical obligations on defence lawyers

Legal Obligation

Section 72 of the *Criminal Procedure Act 1986* puts potentially onerous obligations on defence lawyers, effectively requiring lawyers to provide comprehensive advice about the effect of the EAGP scheme including the possible effects of various types of offers.

Ethical Obligations – genuine offers

Many of the rules applicable to both barristers[84] and solicitors[85] inform ethical conduct under the EAGP scheme. The following of the barrister's rules are relevant: 23, 35, 36, 37, 38, 39, 40 but there are two which are of particular significance to the making of offers:

> Rule 24 (cf 19.1 Solicitors' Rules)
>
> A barrister must not deceive or knowingly or recklessly mislead the court.
>
> Rule 49 (cf 22.1 Solicitors' Rules)
>
> A barrister must not knowingly make a false or misleading statement to an opponent in relation to the case (including its compromise).

Formal offers made by a legal practitioner under the EAGP scheme amount to an assertion that, at the time the offer is made, the client is willing to do what is offered: i.e. plead guilty to an offence or offences.

You therefore cannot make an offer unless your client is actually willing to plead. Otherwise, your offer would breach Rule 49. If the offer, or a record of it, is later presented to a court in order to seek to prove entitlement to a particular level of discount, that would be in breach of Rule 24.

Ethical trap: *it is only ethical to make an offer if the client is willing to enter the plea*

In my opinion, it is unethical for a lawyer to make an offer to plead guilty on behalf of a client unless the client has instructed that they are willing to enter the plea in accordance with the offer. Thus, an offer made in the following types of circumstances would be unethical:

1. Your client is not actually willing to plead to an alternative but wants to lock in the possibility of a 25% discount in case they are found guilty of it; or

2. Your client is not sure if they are willing to plead guilty but wants to find out the best that the prosecution will agree to before making up their mind.

Once having made an offer, however, the client is entitled to change their mind. Even if the prosecution accepts the offer, it is not binding. Obviously, however, if a defendant withdraws an offer they will get no present or future benefit from having made it.

Ethical Obligations – offers where the client is not admitting guilt

There are two other rules which need to be considered when taking instructions about offers:

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[84] *Legal Profession Uniform Conduct (Barristers Rules) 2015*
[85] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*

Rule 41 (no equivalent Solicitors' rule but reflects common law)

Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister:

(a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge,

(b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt in respect of all of the elements of the offence,

(c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty, and

(d) may otherwise continue to represent the client.

Rule 80 (cf 20.2 Solicitors' Rules)

A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:

[the rule sets out various restrictions on how the case may be run]

Rule 41 recognises the right of accused persons to plead guilty even if they believe that they are not actually guilty and provides guidance for barristers where those instructions are given. So long as a barrister complies with Rule 41, there is no ethical problem with making an offer on behalf of a client who is genuinely willing to plead guilty but who maintains their innocence.

Nor is there any difficulty with a client making a genuine offer to enter a "plea of convenience". Even where an offender is convicted of an offered alternative (such as manslaughter) but continues to maintain their innocence, they are entitled to rely on an earlier offer to plead guilty: *R v Blake Davis* [2021] NSWSC 235 (N.Adams J) at [96]-[98].

Further, merely providing instructions to make an offer to plead does not amount to giving instructions – one way or the other - about actual guilt. So long as the client is genuinely willing to plead and fully understands what a plea means, there is no need to obtain instructions about actual guilt before making an offer. This may avoid difficulties (a) which could arise with Rule 80 were a client to give instructions that they are in fact guilty, or (b) because a client is presently reluctant to talk about the allegations. However, in those circumstances, before taking instructions to make such an offer the client should be advised of the matters in Rule 41 (a), (b) and (c).

Tactic: *for clients who do not wish to give instructions or are concerned about making admissions*

For clients who are thinking about making an offer, but do not wish to give instructions about the allegations or maintain their innocence or are otherwise concerned that, by making an offer, they may be making an admission, I suggest proposing written instructions which cover the Rule 41 requirements and include a paragraph such as the following:

> I understand that I am entitled to plead guilty whether or not I believe I am actually guilty. By providing these instructions to make an offer to plead guilty to [offence] I am instructing my lawyers that I am willing to plead guilty to that offence. However, I am not instructing them, one way or the other, about my actual guilt or innocence.

Invitations to treat – suggestions or inquiries short of being an offer

The requirement that an offer must reflect a genuine willingness by your client to plead guilty does not apply to communications in negotiations which do not amount to offers. However, nothing said

should be misleading and no information from the client should be imparted to the prosecution without instructions. Such communications may take place as informal discussions or formal correspondence.

The DPP Guidelines, the EAGP scheme, offers and no bill applications

The Prosecution Guidelines of the Director of Public Prosecutions were amended in March 2021 and contain provisions relevant to the EAGP scheme.

The most significant guideline for the purposes of the EAGP scheme is Guideline 5.6 which relevantly provides (emphasis added):

> **5.6. Consultation resolving charges and discontinuing prosecutions**
>
> **The victim must be consulted prior to making any of the following decisions**, unless they have expressed a desire not to be consulted or their whereabouts cannot be ascertained after reasonable inquiry:
>
> **1. to substantially change the charges**
>
> **2. not to proceed with some or all of the charges**
>
> **3. to resolve the matter by accepting a plea to a less serious charge …**
>
> **Consultation with a victim regarding charge resolution requires an explanation of the full implications of proceeding on fewer or lesser charges, including:**
>
> 1. an explanation of the current charges and any proposed substitution of them
>
> 2. **a summary of the reasons why charge resolution is being considered**
>
> …
>
> **In advising a victim of a possible discontinuance of all charges, a summary of the reasons why discontinuance is being considered should be provided.**
>
> Providing a summary of reasons does not constitute a waiver of legal privilege.
>
> **Victims must be given adequate time to form their views, having regard to the nature and urgency of the decision. This includes giving victims the opportunity to obtain assistance from a parent or carer (other than the accused) or a support person, before providing their views.**
>
> The views of the victim must be taken into account and given due consideration but are not determinative. It is the public interest, not any private individual or sectional interest, that must be served**. The decision to proceed by way of charge resolution or to discontinue all charges rests with the Director or the Director's delegate.**

The possible implications for the EAGP scheme are as follows. If this guideline is followed then, in any case in which a defence offer is made, the victim may be consulted and may be provided with the reasons why the offer is being considered.

In considering any plea offer, the prosecutor will have to consider the prospects of conviction and, therefore, any weaknesses in the evidence – including any weaknesses or deficiencies in the alleged victim's evidence. If Guideline 5.6 is followed literally, the victim will be given a summary of the reasons why the charge resolution is being considered which might include considerations about their own evidence. If that happens there is a risk that the victim's evidence could be affected, at least subconsciously.

On the face of it, there appears to be some tension, in these circumstances, between the requirements of the guideline and the ethical duties of the lawyers involved. The relevant ethical rules are contained in Rules 69 and 70 of the Barristers Rules:

> **69 Integrity of evidence**
>
> A barrister must not:
>
> (a) advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so, or
>
> (b) coach a witness by advising what answers the witness should give to questions which might be asked.
>
> 70 A barrister does not breach rule 69 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

Rule 24 of the Solicitors Rules is in almost identical terms.

These rules are not as clearly expressed as they might be, but the obligation at common law has been clarified by the Western Australian Court of Appeal in *Majinksi v Western Australia* (2013) 226 A Crim R 552; [2013] WASCA 10 at [40] (emphasis added):

> …[C]onsistently with the authorities to which I have referred, there is nothing improper in a prosecutor showing to a prospective witness the recording of an earlier interview with that witness. Nor is there anything improper in a prosecutor inviting a witness to comment or respond to questions upon aspects of the evidence that he or she is to give. ***The boundary of impropriety is only crossed if the course taken by the prosecutor has the effect of suggesting to the witness the evidence that should be given, either expressly or implicitly. Implicit suggestion can occur in a variety of ways,*** including by the asking of questions that are leading in substance or perhaps by placing inappropriate emphasis upon aspects of the evidence to be given, or perhaps by inappropriate repetition of the statements previously made by the witness, thereby implicitly suggesting that it was important for the witness to adhere to those statements.

Ethical trap: *prosecution lawyers could inadvertently breach their ethical requirements*

A prosecution lawyer's duty to follow the Prosecution Guidelines is subject to an overriding duty to the court to maintain the integrity of evidence. Simply referring to the Barristers' or Solicitors' rules might not alert practitioners to the problem. There is apparent tension between what Guideline 5.6 requires and the risk of engaging in conduct which may inadvertently amount to implicitly making a suggestion to a victim (witness) about the evidence they should give.

If the offer is accepted, there is no prejudice to an accused person. If the offer is not accepted (whether because the person conducting the consultation does not recommend it or the person with delegation to make the decision decides to reject it), the matter may proceed to trial and the victim's evidence may possibly have been compromised without anyone necessarily realising it.

Trap: *making an offer where the alleged victim's evidence is controversial*

Because of the Prosecution Guidelines, every time an offer is made, there is a risk that the victim's evidence may be compromised, adversely to the accused. This includes pre-committal offers and offers made on the eve of trial.

Tactics: *before making an offer – mitigation of risk*

The client must be advised about these risks. It may be worth attempting to find out whether an offer is likely to be favourably considered. If an offer is to be made, the prosecution should be put on notice that the victim should not be told about any weaknesses in the victim's evidence in the course of any consultations. Consider referring them to the Barristers' and Solicitors' Rules above and to *Majinski*. Consider seeking a written undertaking that this will not be done.

Tactics: *if an offer has been made and refused and the case is going to trial*

In a case where an offer has been made, you should request disclosure of the conference notes of any consultation with the victim. If you are not satisfied with the level of disclosure, consider issuing a subpoena. If there is a claim of client legal privilege, consider insisting on production of the document to the court for the judge to decide the question of privilege and whether or not there has been proper disclosure.

These same considerations apply to no bill applications and any kind of representations about the withdrawal of one or more charges where the victim's evidence is important.

The suggested approach may appear to be somewhat extreme but, until the Guidelines are changed or clarified, it is the duty of defence lawyers to protect the interests of their clients by doing whatever they can (a) to mitigate the risk that a victim witness may be inadvertently "tipped off" about problems with their evidence and, (b) if that may have happened, to find out about it.

EAGP discounts are for utilitarian value only

In sentencing proceedings, remember that the EAGP discount is only for the utilitarian value of the plea and a client who pleads guilty may be entitled to a further, unquantified, discount for remorse and willingness to facilitate the administration of justice – *Doyle v R* [2022] NSWCCA 81.

Appeals where a judge fails to specify the discount under the EAGP scheme

In an appeal against sentence, it is a question of fact for the appeal court to determine whether the sentencing judge failed to apply a discount as required by the legislation: *Tran v R* [2020] NSWCCA 39. In *Tran,* the court found that, despite the absence of any reference to a discount in the sentencing judgment, the mandated discount had been applied. In the more recent case of *Borri v R* [2023] NSWCCA 166, the appeal court was not satisfied that the judge had applied the discount. More importantly, the court further found that failure to specify the discount was an appealable error in itself.[86]

Conclusion

In summary, the advice defence lawyers provide and the steps they take, and help their clients take, can be crucial to the level of discount available on sentence. In serious cases, this can make a difference of many years imprisonment. The EAGP is a mandatory and inflexible scheme in which offers are central. It is crucial that offers to be made are carefully and strategically considered. Practitioners should be aware of the strict timeframes and the notice and other requirements necessary to protect their client's interests.

All lawyers involved in an EAGP case should be fully briefed about the course of previous negotiations and offers. This includes trial counsel, who should always be briefed with a copy of the case conference certificate and any previous offers in case there are any further negotiations.

Finally, even though the majority of defendants end up pleading guilty to something, there are a vast number of cases where it is not appropriate for a defendant to plead guilty, or to offer to plead

[86] See [35] and [50]-[51].

guilty, to anything. Even in those cases, it is your legal[87] and ethical[88] duty to explain to your client the options under the EAGP scheme and to ensure that they understand them before being committed for trial.

Richard Wilson SC

List of Cases

NSW Court of Criminal Appeal

Merrick v R [2017] NSWCCA 264

Tran v R [2020] NSWCCA 39

Droudis v R [2020] NSWCCA 322

Richey v The Queen (2021) 289 A Crim R 233; [2021] NSWCCA 93

Ke v R [2021] NSWCCA 177

Black v R (2022) 107 NSWLR 225; [2022] NSWCCA 17

Doyle v R [2022] NSWCCA 81

Stuart v R [2022] NSWCCA 182

Gurin v R [2022] NSWCCA 193

Fuller v R [2022] NSWCCA 203

Green v R [2022] NSWCCA 230

Stubbings v R [2023] NSWCCA 69

Camilleri v R [2023] NSWCCA 106

Borri v R [2023] NSWCCA 166

Ney v R [2023] NSWCCA 252

NSW Court of Appeal

Landrey v DPP (NSW) (2022) 110 NSWLR 127; [2022] NSWCA 211

NSW Supreme Court

R v Doudar [2020] NSWSC 1262 (RA Hulme J)

R v Camilleri [2021] NSWSC 221 (Wilson J)

R v Blake Davis [2021] NSWSC 235 (N.Adams J)

R v Ney [2021] NSWSC 529 (Johnson J)

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[87] s72 *Criminal Procedure Act 1986*

[88] Rules 39-40 *Legal Profession Uniform Conduct (Barristers Rules) 2015;* Rule 7 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*

R v Eckersley [2021] NSWSC 562 (Beech-Jones J)

R v Holmes (No.7) [2021] NSWSC 570 (Campbell J)

R v French [2021] NSWSC 1531 (Dhanji J)

R v Warren Scott (No.3) [2021] NSWSC 1646 (N.Adams J)

R v Burns (No.2) [2022] NSWSC 140 (McCallum JA)

R v White [2022] NSWSC 525 (Wilson J)

Coles v DPP [2022] NSWSC 960 (Yehia J)

Hijazi v DPP [2022] NSWSC 1218 (Button J)

R v Honeysett (Fitness to stand trial) [2023] NSWSC 76 (Hamill J)

R v Honeysett (No.2) (Sentence) [2023] NSWSC 103 (Hamill J)

R v Hamdach [2023] NSWSC 298 (Campbell J)

R v Kovaleff [2023] NSWSC 302 (Rothman J)

Elwood v DPP [2023] NSWSC 772 (Davies J)

Tuxford v DPP [2023] NSWSC 1300 (Weinstein J)

R v Tiriaki [2023] NSWSC 1480 (Rothman J)

R v Dilosa [2023] NSWSC 1515 (Sweeney J)

Other Jurisdictions

Barton v R (1980) 147 CLR 75

Meissner v The Queen (1995) 184 CLR 132

Cannon v Tahche (2002) 5 VR 317; [2002] VSCA 84

James v Keogh (2008) 101 SASR 42; [2008] SASC 156

Majinksi v Western Australia (2013) 226 A Crim R 552; [2013] WASCA 10