

CONSISTENCY IN SENTENCING FOR FEDERAL OFFENCES - CHALLENGES FOR SENTENCING COURTS IN AN EVOLVING LANDSCAPE*

Justice Peter Johnson**

- 1 Once again, the topic of consistency in sentencing arises for consideration at a conference under the auspices of the National Judicial College of Australia and the Australian National University.¹ The topic is much discussed, but not well understood.
- 2 In this paper, I will consider the issue in the context of sentencing for federal offences in the Australian federal system. This specific topic has attracted the interest of the College and the University in the past.² It is not surprising that the topic attracts periodic attention, given developments in recent years. This paper attempts a 2012 snapshot of the relevant terrain.
- 3 In this paper, I will:
 - (a) refer briefly and somewhat superficially to historical developments in federal criminal law;
 - (b) provide an overview of measures to promote consistency in sentencing of federal offenders;
 - (c) examine recent judicial statements of the High Court of Australia concerning consistency in sentencing of federal offenders;

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** A Judge of the Supreme Court of New South Wales. The author is indebted to his Tipstaff, Sarah Khan, for her assistance in preparing this paper.

¹ See JJ Spigelman, “*Consistency and Sentencing*”, (2008) 8 *The Judicial Review* 45 (an edited version of the keynote address delivered at the Conference, 8 February 2008).

- (d) examine certain statutory devices relevant to overlapping federal and State offences;
 - (e) refer expressly to statutory provisions and decisions concerning federal and State serious drug offences; and
 - (f) examine more briefly federal and State offences and sentencing principles in the areas of child pornography, computer crime, identity crime and money laundering.
- 4 References to State law in this paper will usually relate to New South Wales offences, although it may be taken that there are offences under the laws of other States and the Territories which will overlap with federal offences as well.

Federal Criminal Law - A Brief Overview

- 5 Federal criminal law has undergone significant expansion in the latter part of the 20th century. The enactment of the *Criminal Code Act 1995 (Cth)*, (“the Code”) and the steady expansion of offences under the Code, has seen overlap between federal offences and State and Territory offences.
- 6 The constitutional debates indicated that the founders envisaged that the Commonwealth would have a limited role in criminal law.³ The Australian Constitution contains no specific power in relation to criminal law. The *Crimes Act 1914 (Cth)*, as enacted originally, created a number of new offences, but these were modest in scope and largely confined to the protection of Commonwealth interests.⁴ A range of statutory offences

² See W Kukulies-Smith, “*The Quest for Sentencing Consistency in the Federal System*”; D Adsett and M Pedley, “*Variations in Federal Sentencing*”, Sentencing Conference, 6-7 February 2010.

³ Sweeney and Williams, *Commonwealth Criminal Law*, Federation Press, 1990, page 1.

⁴ M Weinberg, *A Current and Proposed Criminal Jurisdiction of the Federal Court*, 5 September 2008, page 2.

came to be included in the *Crimes Act 1914 (Cth)* and in other federal statutes.

- 7 By the 1980s, substantial change was underway. The Australian Federal Police had been established by the *Australian Federal Police Act 1979 (Cth)*, taking over the functions previously performed by the Commonwealth Police and the Australian Capital Territory Police. The National Crime Authority was established by the *National Crime Authority Act 1984 (Cth)*. The Office of the Commonwealth Director of Public Prosecutions was established by the *Director of Public Prosecutions Act 1983 (Cth)*.⁵
- 8 These statutory developments occurred in the context of unprecedented levels of heroin importation into Australia and of the discovery of “*bottom of the harbour*” tax schemes.⁶
- 9 In 1989, the provisions of Part 1B of the *Crimes Act 1914 (Cth)* were enacted with respect to sentencing of federal offenders.
- 10 The path-finding work of the Model Criminal Code Officers Committee⁷ (“MCCOC”) saw the enactment in the Code of provisions concerning general principles of criminal responsibility, followed by provisions covering different classes of offences.
- 11 The general principles of criminal responsibility contained in Chapter 2 of the Code reflect a contemporary rewriting of criminal law principles which has been said to have had “*a profound impact upon conceptual thinking in the field of general principles of criminal responsibility*”.⁸ The Code now contains elaborate provisions for offences including people smuggling, terrorism, theft and property offences, offences against humanity (including

⁵ Sweeney and Williams, op cit, footnote 3, page 2.

⁶ M Weinberg, op cit, footnote 4, page 2.

⁷ M Goode, “*Constructing Criminal Law Reform and the Model Criminal Code*”, (2003) 26 Crim LJ 152; S Odgers, “*Principles of Federal Criminal Law*”, Lawbook Co, 2nd ed, 2010, pages 1-2.

⁸ M Weinberg, op cit, footnote 4, page 3.

slavery, sexual servitude and trafficking in persons), child sex offences outside Australia, offences involving child pornography material or child abuse material outside Australia, serious drug offences, identity crime, money laundering, telecommunication offences (including child pornography offences), computer offences and financial information offences.

- 12 In certain areas, State law has been amended in an effort to harmonise State law with the national model scheme proposed by the MCCOC. An example of this is identity crime, where the *Crimes Amendment (Fraud and Forgery) Act 2009 (NSW)* was designed to achieve this purpose.⁹
- 13 The Federal Court of Australia now has criminal trial jurisdiction with respect to cartel offences.¹⁰ Apart from this specific criminal jurisdiction, the prosecution of federal offences is undertaken in State or Territory courts.¹¹
- 14 It may be safely predicted that federal criminal law will continue to grow and, as Justice Mark Weinberg observed in 2008, this growth “*will increasingly cover the same ground as State offences*”.¹²
- 15 The issue of consistency in sentencing for federal offences falls to be considered in a context where State and Territory courts are overwhelmingly the trial and sentencing courts for these offences.

⁹ *Stevens v R* [2009] NSWCCA 260; 262 ALR 91 at 92-93 [1]-[7] (Spigelman CJ).

¹⁰ M Gordon, *Criminalisation of Cartel Conduct*, (2011) 34 Australian Bar Review 177; M Weinberg, *Criminalisation of Cartel Conduct - Some Pre-Trial Management Issues*, 3 April 2009.

¹¹ *Putland v The Queen* [2004] HCA 8; 218 CLR 174 at 178-179 [4].

¹² M Weinberg, *op cit*, footnote 4, page 29.

Measures to Promote Consistency of Sentencing for Federal Offences - What Has and Has Not Happened

- 16 The proposal for a Federal Sentencing Act, advanced by the Australian Law Reform Commission in 2006,¹³ has not come to pass. In his 2008 keynote address, Chief Justice James Spigelman observed that the comprehensive recommendations for a federal statute, if enacted, “*will assist in ensuring consistency in the exercise of the sentencing discretion by courts throughout Australia*”.¹⁴ However, such legislation has not been enacted. It is necessary to look to existing federal statute law for provisions relevant to sentencing.
- 17 Sentencing for federal offences is undertaken by reference to provisions in Part 1B *Crimes Act 1914 (Cth)* and relevant common law sentencing principles. Part 1B has been subjected to regular criticism, having been described as introducing “*convoluted and confusing provisions relating to ... sentencing*” and being “*unnecessarily complicated and opaque*”.¹⁵
- 18 Federal offences provide for a maximum penalty, which serves as an indication of the relative seriousness of the offence.¹⁶ The maximum penalty is a “*sentencing yardstick*”.¹⁷ However, there are some exceptions to this approach. Mandatory minimum sentencing has been enacted for certain people-smuggling offences.¹⁸ A further federal statutory mechanism which restricts sentencing discretion is the requirement for a minimum non-parole period of 75% of the head sentence for certain terrorism and related offences.¹⁹

¹³ ALRC, “*Same Crime, Same Time - Sentencing of Federal Offenders*”, Report 103, April 2006, paragraph 2-1ff.

¹⁴ JJ Spigelman, op cit, footnote 1, page 56.

¹⁵ *Putland v The Queen*, op cit, footnote 11, at 181 [11].

¹⁶ *Muldock v The Queen* [2011] HCA 39; 85 ALJR 1154 at 1163 [31].

¹⁷ *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at 372 [30]-[31].

¹⁸ Section 236B *Migration Act 1958 (Cth)*; *Bahar v The Queen* [2011] WASCA 249 at [35]-[60] (where at [54], it was said that the statutory minimum and statutory maximum penalties were “*the floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the general sentencing principles are to be applied*”).

¹⁹ Section 19AG *Crimes Act 1914 (Cth)*; *R (Cth) v Elomar and Ors* [2010] NSWSC 10 at [181]; *Hili v The Queen* [2010] HCA 45; 242 CLR 520 at 529-530 [29].

- 19 A number of practical tools are available to sentencing courts, some furnished by the Judicial Commission of New South Wales in discharge of its statutory function to assist courts to achieve consistency in sentencing.²⁰ The Commonwealth Sentencing Database²¹ provides statistical information and a valuable summary of principles and practice concerning federal sentencing.
- 20 Guideline judgments may not be made with respect to sentencing for federal offences.²² Nor (to the extent that it would be legally possible, in any event) are there statutory provisions allowing for the creation of Sentencing Guidelines as in the United Kingdom²³ or Federal Sentencing Guidelines as in the United States.²⁴
- 21 A further ALRC recommendation for the development of judicial exchange between States and Territories to promote greater consistency in sentencing of federal offenders²⁵ has seen limited and occasional action only, although its advantages have been emphasised.²⁶

Instinctive Synthesis and Consistency

- 22 The High Court of Australia has emphasised and re-emphasised the process of instinctive synthesis undertaken by a sentencing court, usually in contrast with a two-staged approach.²⁷ That process involves the sentencing judge identifying all the factors that are relevant to the sentence, discussing their significance and then making a value judgment

²⁰ Section 8(1) *Judicial Officers Act 1986 (NSW)*; *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at 591 [7]; JJ Spigelman, op cit, footnote 1, pages 51-52.

²¹ A joint project of the National Judicial College of Australia, the Commonwealth Director of Public Prosecutions and the Judicial Commission of New South Wales.

²² *Wong v The Queen*, op cit, footnote 20.

²³ Section 125 *Coroners and Justice Act 2009 (UK)*; see generally, A Ashworth, “*Departing From the Sentencing Guidelines*” (2012) Crim LR 81.

²⁴ United States Sentencing Commission; *Mistretta v United States* 488 US 361 (1989); *Kimbrough v United States* 552 US 85 (2007).

²⁵ ALRC Report 103, op cit, footnote 13, paragraph 19-4.

²⁶ JJ Spigelman, op cit, footnote 1, pages 57-61.

as to what is the appropriate sentence in all the circumstances of the case.²⁸

23 Whilst emphasising this aspect of sentencing, the High Court of Australia has also stressed the need for reasonable consistency in sentencing. Although all discretionary decision making carries with it the probability of some degree of inconsistency, there are limits beyond which such inconsistency itself constitutes a form of injustice so that the administration of criminal justice should be systematically fair and involve reasonable consistency.²⁹

24 The tension between the principle of individualised justice applied by a process of instinctive synthesis, and the principle of consistency has been stressed.³⁰

Achieving Consistency of Sentence for Federal Offences - *Hili v The Queen*

25 Against this background, the High Court of Australia took the opportunity in December 2010 to explain the concept of consistency in federal sentencing.

26 In *Hili v The Queen*,³¹ French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said:

“These reasons will show that the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence. Consistency in sentencing federal offenders is achieved by the proper application

²⁷ *Wong v The Queen*, op cit, footnote 20, at 611-613 [74]-[78]; *Markarian v The Queen*, op cit, footnote 17, at 373 [36], 377-378 [51].

²⁸ *Markarian v The Queen*, op cit, footnote 17, at 377-378 [51] (McHugh J); *Muldock v The Queen*, op cit, footnote 16, at 1162 [26].

²⁹ *Wong v The Queen*, op cit, footnote 20, at 591 [6]; *Hili v The Queen*, op cit, footnote 19, at 535 [47].

³⁰ JJ Spigelman, op cit, footnote 1, page 46; A Freiberg and S Krasnostein, “*Statistics, Damn Statistics and Sentencing*”, AIJA Criminal Justice in Australia and New Zealand - Issues and Challenges for Judicial Administration Conference, 7-9 September 2011.

³¹ Op cit, footnote 19, at 527 [18].

of the relevant statutory provisions, having proper regard not just to what has been done in other cases but why it was done, and by the work of the intermediate courts of appeal.”

- 27 The plurality in *Hili v The Queen* emphasised the provisions in Part 1B *Crimes Act 1914 (Cth)* (in particular, s.16A) as a fundamental starting point. Section 16A(1) requires a sentencing court to impose a proportionate sentence, namely one that is of a severity appropriate in all the circumstances of the case. The court must take into account the factors identified in s.16A(2) as are relevant and known to the court, in addition to any other matters. Section 16A does not codify sentencing principles.³² Concepts not referred to in the provision (such as general deterrence³³, totality³⁴, parity³⁵ and non-exculpatory duress³⁶) are pertinent to sentence.
- 28 The plurality in *Hili v The Queen*³⁷ cited with approval the statement of Gleeson CJ in *Wong v The Queen*³⁸ that the “*administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances*” and that it “*should be systematically fair, and that involves, amongst other things, reasonable consistency*”. The plurality emphasised the importance of consistency in principle and not mathematical equivalence:³⁹

[48] Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number

³² Op cit, footnote 19, at 528 [25].

³³ *Putland v The Queen*, op cit, footnote 11, 181 [12].

³⁴ *Hili v The Queen*, op cit, footnote 19, 528 [25].

³⁵ *Dwayhi v R* [2011] NSWCCA 67; 205 A Crim R 274 at 280-286 [20]-[44]; *Green v The Queen* [2011] HCA 49; 86 ALJR 36 at 44-46 [28]-[34].

³⁶ *Tiknius v R* [2011] NSWCCA 215 at [30]-[54].

³⁷ at 535 [47].

³⁸ at 591 [6].

³⁹ at 535-536 [48]-[49].

of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.

[49] *The consistency that is sought is consistency in the application of the relevant legal principles. And that requires consistency in the application of Pt IB of the Crimes Act. When it is said that the search is for 'reasonable consistency', what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form. That is why this court held in Wong that guidelines that the New South Wales Court of Criminal Appeal had determined should be used in sentencing those knowingly concerned in the importation of narcotics were inconsistent with s 16A of the Crimes Act. Those guidelines had made the weight of the narcotic the chief factor determining the sentence to be imposed, thus distracting attention from the several considerations set out in the non-exhaustive list of matters prescribed by s 16A(2) as matters 'the court must take into account' in fixing a sentence, if those matters are relevant and known to the court."*

29 The plurality turned to the permissible use of sentencing outcomes in other cases:⁴⁰

[53] *Next, in seeking consistency, sentencing judges must have regard to what has been done in other cases. In the present matter, the prosecution produced detailed information, for the sentencing judge and for the Court of Criminal Appeal, about sentences that had been passed in other cases arising out of tax evasion as well as cases of customs and excise fraud and social security fraud. Care must be taken, however, in using what has been done in other cases.*

[54] *In Director of Public Prosecutions (Cth) v De La Rosa, [[2010] NSWCCA 194; 243 FLR 28 at 98 [303]-[305]] Simpson J accurately identified the proper use of information about sentences that have been passed in other cases. As her Honour pointed out, a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. As her Honour said: 'Sentencing patterns are, of course, of considerable significance in that they result from the*

⁴⁰ at 536-537 [53]-[55].

application of the accumulated experience and wisdom of first instance judges and of appellate courts.’ But the range of sentences that have been imposed in the past does not fix ‘the boundaries within which future judges must, or even ought, to sentence’. Past sentences ‘are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence’ (emphasis added). When considering past sentences, ‘it is only by examination of the whole of the circumstances that have given rise to the sentence that ‘unifying principles’ may be discerned’.

[55] As the plurality said in Wong [at 606 [59]]:

‘[R]ecording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told why those sentences were fixed as they were.’”

30 Their Honours emphasised the importance of the rule of comity to be applied where intermediate courts of appeal were engaged in federal sentencing (emphasis added):⁴¹

“[56] Consistency in federal sentencing is to be achieved through the work of the intermediate courts of appeal. As was explained in Wong, the Court of Criminal Appeal was exercising federal jurisdiction in the present matters. That jurisdiction was invested in the court by s 68 of the Judiciary Act. The laws of the State respecting the procedure for the hearing and determination of appeals (here an appeal by the Director of Public Prosecutions of the Commonwealth) were to apply and be applied, subject to s 68 of the Judiciary Act, so far as they were applicable. The relevant State provisions engaged by s 68 of the Judiciary Act were those of s 5D of the Criminal Appeal Act 1912 (NSW). Section 5D provides that the Attorney-General or the Director of Public Prosecutions (in each case of the State) may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party,

⁴¹ at 537-538 [56]-[57].

and that the Court of Criminal Appeal ‘may in its discretion vary the sentence and impose such sentence as to the said court may seem proper’. And, as explained in *Wong*, the Attorney-General of the Commonwealth (and by operation of s 9(1) of the Director of Public Prosecutions Act 1983 (Cth), the Director) may also appeal against a sentence imposed for a federal offence.

[57] *In dealing with appeals against sentences passed on federal offenders, whether the appeal is brought by the offender or by the prosecution, the need for consistency of decision throughout Australia is self-evident. It is plain, of course, that intermediate courts of appeal should not depart from an interpretation placed on Commonwealth legislation by another Australian intermediate appellate court, unless convinced that that interpretation is plainly wrong. So, too, in considering the sufficiency of sentences passed on federal offenders at first instance, intermediate appellate courts should not depart from what is decided by other Australian intermediate appellate courts, unless convinced that the decision is plainly wrong.”*

- 31 This rule of comity has been referred to and applied in a number of decisions of intermediate appellate courts in the area of federal sentencing, both before and after the decision in *Hili v The Queen*.⁴²
- 32 The extracts from *Hili v The Queen* provide direct guidance concerning the manner in which courts ought seek to achieve consistency in the sentencing of federal offenders.
- 33 A sentencing judge’s remarks on sentence should expose the judge’s reasoning process. Having undertaken the process of instinctive synthesis mentioned at [22] above, sentence is passed on the offender. The principal purpose of remarks on sentence is to provide an oral explanation to the offender, the victim and persons in court at the time when sentence is being passed, as well as informing the community and an appellate court of the reasons for imposition of the sentence.⁴³ In turn, the reasons of intermediate appellate courts should have necessary content to facilitate

⁴² *R v Gent* [2005] NSWCCA 370; 162 A Crim R 29 at 36 [29]; *Director of Public Prosecutions (Cth) v D’Alessandro* [2010] VSCA 60; 26 VR 477 at 483 [21]; *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194; 243 FLR 28 at 48 [71], 74 [193]; *Nguyen v R* [2011] VSCA 32 at [30]; *R v Dehghani*; *Ex Parte Cth DPP* [2011] QCA 159 at [47].

⁴³ *R v Hamieh* [2010] NSWCCA 189 at [29]-[30].

the operation of the rule of comity in the area of sentencing of federal offenders. These purposes are of particular importance with respect to federal offences, given the statements of principle of the High Court of Australia in *Hili v The Queen*.

- 34 Intermediate appellate courts are entitled to expect assistance from the parties, being the Commonwealth Director of Public Prosecutions and defence counsel in federal appeals, to achieve the purposes referred to in *Hili v The Queen*. Not only should this assistance extend to pertinent decisions of other intermediate appellate courts, it should include information concerning sentencing outcomes in other cases to achieve the purpose identified in *Hili v The Queen*⁴⁴ where the plurality endorsed the approach of Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa* (see [29] above).

Some Statutory Devices Relevant to Overlapping Federal and State Offences

- 35 Both the Commonwealth and New South Wales have enacted provisions which reflect the fact that federal and State offences may arise from the same circumstances.
- 36 Section 30(2) *Acts Interpretation Act 1901 (Cth)* was enacted following the decision of the High Court of Australia in *Hume v Palmer*.⁴⁵ In 1987, s.30(2) was repealed and replaced by s.4C(2) *Crimes Act 1914 (Cth)*. Section 4C(2) provides that where an act or omission constitutes an offence under both the law of the Commonwealth and that of a State and the offender has been punished for that offence under the State law, the offender shall not be liable to be punished for the Commonwealth offence. It has been said that s.4C(2) is “*designed to avoid the injustice of exposure to double punishment in cases where the doing of a single act may involve*

⁴⁴ at 536-537 [53]-[55].

⁴⁵ [1926] HCA 50; 38 CLR 441.

the actor in the commission of an offence against federal and State law".⁴⁶

The effect of s.4C(2), when the occasion for its operation arises, is to achieve what has been called a "roll back" of the federal criminal law or its "withdrawal pro tanto".⁴⁷ Section 4C(2) can be engaged only if the relevant federal and State laws are both valid.⁴⁸

37 A mirror image provision is to be found in New South Wales legislation, in s.20 *Crimes (Sentencing Procedure) Act 1999 (NSW)*. This provision states that if an act or omission constitutes an offence under New South Wales law and an offence under a law of the Commonwealth or of some other State or Territory, and a penalty has been imposed on the offender in respect of the latter offence, the offender is not liable to any penalty for the New South Wales offence.

38 The Code utilises, as well, concurrent operation provisions. In those parts of the Code which create offences, provisions have been regularly (but not universally) inserted which state that the relevant Chapter or Division of the Code is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.⁴⁹ A more elaborate formula is used in s.300.4 of the Code concerning serious drug offences, to which reference will be made later in this paper. The role of provisions of this type in statutory construction, and the resolution of claims of inconsistency for the purpose of s.109 of the Commonwealth Constitution, has been considered in a number of cases.⁵⁰

⁴⁶ *Momcilovic v The Queen* [2011] HCA 34; 85 ALJR 957 at 1027 [254] (Gummow J).

⁴⁷ *Ibid* at 1001 [104] (French CJ), 1027 [254] (Gummow J).

⁴⁸ *Dickson v The Queen* [2010] HCA 30; 241 CLR 491 at 504 [21]; *Momcilovic v The Queen*, *op cit*, footnote 46, at 1045 [348] (Hayne J).

⁴⁹ See, for example, ss.70.6, 71.19, 72.5, 115.5, 261.1, 270.12, 271.12, 274.6, 360.4, 400.16, 472.1, 475.1(1) and 476.4 of the Code.

⁵⁰ *R v El Helou* [2010] NSWCCA 111 at [22]-[23]; *Dickson v The Queen*, *op cit*, footnote 48, at 508 [36]-[37]; *Standen v Director of Public Prosecutions (Cth)* [2011] NSWCCA 187; 254 FLR 467 at 478 [29]; *Momcilovic v The Queen*, *op cit*, footnote 46, at 1000-1003 [103]-[112] (French CJ), 1030-1031 [266]-[272] (Gummow J), 1099 [619], 1103-1104 [654] (Crennan and Kiefel JJ).

- 39 Apart from these statutory provisions, there remains available the capacity for an accused person to contend that the prosecution of more than one offence arising out of the same conduct constitutes an abuse of process, even if a plea in bar is not available.⁵¹ These principles apply whether two or more offences arise out of State law only (*Pearce v The Queen*), Commonwealth law only (*R (Cth) v Milne (No. 1)*) or a mixture of federal and State law (*R v Standen*). Where an offender is convicted of two or more counts involving overlapping crimes, it will be necessary for a sentencing court to determine the appropriate sentence on each count without double punishment of the offender, and bearing in mind principles of concurrency, accumulation and totality.⁵²
- 40 The present Australian federal and State criminal law regime is different to the United States where it is open to bring separate prosecutions for the same acts under State and federal law, based upon the theory that obligations are owed to each sovereign authority independently, the dual sovereignty principle.⁵³

Federal and State Serious Drug Offences - A Parallel or Concurrent Scheme

- 41 Far-reaching reform has flowed from the insertion of Part 9.1 into the Code by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005 (Cth)*.
- 42 The background to the serious drug offence provisions in the Code is touched upon by Ian Leader-Elliott in his paper.⁵⁴ The Report which led to

⁵¹ *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 at [29], [67]; *R (Cth) v Milne (No. 1)* [2010] NSWSC 932 at [72]-[177]; *R v Standen* [2011] NSWSC 1038; *Standen v Director of Public Prosecutions (Cth)*, op cit, footnote 50.

⁵² *R (Cth) v Milne (No. 1)*, op cit, footnote 51, at [174]; *R (Cth) v Milne (No. 6)* [2010] NSWSC 1467 at [182]-[198]; *R v Standen* [2011] NSWSC 1422 at [188]ff.

⁵³ *Bartkus v Illinois* (1959) 359 US 121; R Brown, "Federal Drug-Control Laws: Past and Future" (1977) 8 Federal Law Review 435 at 447; M Weinberg, op cit, footnote 4, pages 24-25.

⁵⁴ I Leader-Elliott, "Sentencing by Weight: Proposed Changes to the Commonwealth Code, 9.1 Serious Drug Offences", February 2012, pages 4ff.

the enactment of Part 9.1 of the Code pointed to a need for uniformity in this area.⁵⁵

“The illicit drug distribution system operates Australia wide and internationally. Australia has undertaken international obligations requiring severe criminal measures against individuals who play a significant commercial role in the organised traffic in drugs. Though there is room for variation in legislative measures directed to the control of use and minimisation of harm to users, the arguments for uniformity in measures directed against commercial exploitation in the illicit market are clear and compelling.”

43 Until the enactment of relevant provisions in the Code, serious drug offences under federal law were to be found, in particular, in s.233B of the *Customs Act 1901 (Cth)*. The history of drug provisions in the *Customs Act 1901 (Cth)* and the *Narcotic Drugs Act 1967 (Cth)*, their constitutional foundation by way of the external affairs power and relevant 1961 and 1967 Conventions, and public concern about proliferation of drugs in the community have been traced in several judgments and other publications.⁵⁶

44 Constitutional inconsistency was said to exist by reference to federal offences under s.233B *Customs Act 1901 (Cth)* and serious drug supply offences under the *Drug Misuse and Trafficking Act 1985 (NSW)*. What were perceived to be relevant distinctions between the federal and State statutory schemes were identified by Lee CJ at CL (Carruthers and Sharpe JJ agreeing) in the following way:⁵⁷

“The clear scheme of s 233B, in its references to possession of narcotics, being to facilitate the prohibition of the importation of narcotic goods, one may contrast that purpose with the evident purpose of the State Act which has nothing to do whatsoever with the question of importing of goods: its sole purpose is to control within New South Wales, the use of ‘prohibited drugs and

⁵⁵ MCCOC Report, “*Serious Drug Offences*”, Chapter 6, October 1998, page 2.

⁵⁶ *R v Peel* [1971] 1 NSWLR 247 at 250-258 (affirmed in *Peel v The Queen* [1971] HCA 59; 125 CLR 447); *R v Rawcliffe* [1977] 1 NSWLR 219 at 230-231; R Brown, op cit, footnote 53; T Carney, “*The History of Australian Drug Laws: Commercialism to Confusion?*” (1981) 7 Monash University Law Review 165 at 192-202; F Rinaldi and P Gillies, “*Narcotic Offences*”, Law Book Co Ltd, 1991, pages 1-3; P Zahra, R Arden, M Ierace and B Schurr, “*Drug Law in New South Wales*”, Federation Press, 2nd ed, 1998, pages 151-153.

⁵⁷ *R v Stevens* (1991) 23 NSWLR 75 at 82.

prohibited plants' as defined in s 3 and to create offences in respect thereof. The offences there are divided into summary offences (Div 1) and indictable offences (Div 2) and cover all aspects of use and misuse of prohibited drugs and prohibited plants. It is, of course, dealing with the narcotic goods covered by the Commonwealth Act but it is a measure designed to operate in respect of the narcotic goods to which it applies anywhere in New South Wales and irrespective of their origin, that is, whether they are imported or not. Its purpose is not in any way to operate as a control upon the importation of narcotics into New South Wales or Australia. The purpose of the two Acts is different, one being to control imports of narcotics, the other to control and create offences in respect of the possession and supply of narcotics in New South Wales for the benefit and protection of the community in New South Wales. The Commonwealth Act, it may be said, erects, in s 233B, a barrier or defence against narcotics coming into Australia, whilst the Drug Misuse and Trafficking Act is a measure which enables the State to police the use of and trafficking in narcotics in New South Wales. The two laws will, in given circumstances overlap and apply to the same sets of circumstances but the purpose of each remains fundamentally different. As the purpose of the two Acts is entirely different they are not, under s 109 of the Constitution, to be regarded as inconsistent."

- 45 The enactment of Part 9.1 of the Code has altered the statutory landscape concerning serious drug offences in a substantial way. The 2005 Act, which inserted Part 9.1, was enacted in the exercise of the Commonwealth's external affairs power.⁵⁸ Section 300.1(1) of the Code explains that the purpose of Part 9.1 was to *"create offences relating to drug trafficking and to give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988"*.
- 46 Part 9.1 contains broad definitions of the term *"traffics"*,⁵⁹ *"cultivate"*,⁶⁰ *"sell"*,⁶¹ *"supply"*,⁶² *"manufacture"*⁶³ and *"pre-traffics"*.⁶⁴ Offences of possession of drugs are contained in ss.308.1-308.4. Express provision is made as well for drug offences involving children.⁶⁵ What might be

⁵⁸ *Momcilovic v The Queen*, op cit, footnote 46, at 1099 [616].

⁵⁹ Sections 300.2 and 302.1.

⁶⁰ Sections 300.2 and 303.1.

⁶¹ Section 300.2.

⁶² Section 300.2.

⁶³ Sections 300.2 and 305.1.

⁶⁴ Sections 300.2 and 306.1.

⁶⁵ Sections 309.1-310.4.

regarded as the traditional drug importation offences form one portion only of Part 9.1 of the Code.⁶⁶

- 47 The traditional distinction between federal and State law in this area, as described in *R v Stevens*,⁶⁷ has passed into history. That there is a lively scope for overlap between Part 9.1 of the Code and State and Territory laws is recognised expressly in s.300.4 of the Code which states:

“300.4 Concurrent operation intended

- (1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.*
- (2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:*
 - (a) an act or omission that is an offence against a provision of this Part; or*
 - (b) a similar act or omission;**an offence against the law of the State or Territory.*
- (3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:*
 - (a) provides for a penalty for the offence that differs from the penalty provided for in this Part;*
 - (b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;*
 - (c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part.”*

- 48 Constitutional challenges based upon alleged inconsistency between provisions in Part 9.1 of the Code and State drug laws have been rejected by the courts.⁶⁸ That a number of offences created by Part 9.1 relate to conduct also covered by offence-creating provisions of State and Territory

⁶⁶ Sections 307.1-307.14.

⁶⁷ Op cit, footnote 57.

⁶⁸ *R v El Helou*, op cit, footnote 50; *Momcilovic v The Queen*, op cit, footnote 46.

laws was acknowledged by French CJ in *Momcilovic v The Queen*,⁶⁹ with that congruence raising the possibility of s.109 inconsistency.

- 49 The express reference in s.300.4 of the Code to the interrelationship between federal laws and State and Territory laws assisted the majority to conclude that s.109 inconsistency had not been established. Gummow J⁷⁰ observed that s.4C(2) *Crimes Act 1914 (Cth)* supplemented s.300.4 of the Code. His Honour stated that s.300.4 is *“best understood in light of various drafting devices which have been used by the Parliament from time to time to convey the notion that a federal law is to be construed so as to accommodate or not exclude the operation of State laws in specified respects”*.⁷¹ Gummow J concluded:⁷²

“The result is that a provision such as s 300.4 of the Code requires the federal law in question to be read and construed in a particular fashion, namely as not disclosing a subject-matter or purpose with which it deals exhaustively and exclusively, and as not immunising the rule of conduct it creates from qualification by State law. To the federal law so read and construed, s 109 then applies and operates to render inoperative any State law inconsistent with it. But by reason of the construction to be given to the federal law, there will be greater likelihood of a concurrent operation of the two laws in question.”

- 50 Crennan and Kiefel JJ referred to provisions of the 1988 Vienna Convention and the 1980 Report of the Australian Royal Commission of Inquiry Into Drugs, and observed that the context in which the Part 9.1 Code offence was created did not support an inference of intended exclusivity, but a contrary inference - *“the aim of prosecuting drug trafficking offences in Australia can only be aided by concurrent and parallel Commonwealth and State laws for that purpose”* so that the *“Commonwealth law enabling the prosecution of a drug trafficking offence is not detracted from, or impaired by, the concurrent State law which permits the same”*.⁷³ Their Honours observed that co-operative

⁶⁹ at 1000-1001 [103]-[104].

⁷⁰ at 1030-1031 [267]-[272].

⁷¹ at 1031 [269].

⁷² at 1031 [272] (French CJ and Bell J agreeing).

⁷³ at 1103 [650]-[652].

arrangements facilitating the exercise of concurrent laws and powers in respect of drug trafficking (although not determining a question of inconsistency if a real conflict between two laws exists) confirms “*the pragmatism of current, concurrent and parallel systems in respect of drug trafficking offences*”.⁷⁴ Crennan and Kiefel JJ concluded:⁷⁵

“It can be accepted that differences between a Commonwealth law creating an offence and a State law creating an offence, including a difference in penalty, might imply that the Commonwealth law is exhaustive or exclusive of State law in respect of the subject matter covered. However, there is nothing in the nature or subject matter of drug trafficking or in the express terms of Pt 9.1, including the terms of s 302.4, which implies or supports the conclusion that the purpose of s 302.4 is to exhaustively cover the subject matter of the offence of drug trafficking. Section 300.4 expressly counters such an implication. Moreover, the wider context of the introduction of Pt 9.1 into the Commonwealth Code supports the conclusion that Pt 9.1 is a concurrent scheme in respect of drug trafficking offences, operating in parallel to State offences in respect of the same subject matter.”

- 51 The fact that serious drug offences may be prosecuted under either federal law or State and Territory law has raised and will raise, a number of legal and practical issues. Charge selection is a matter for the exercise of prosecutorial discretion by the relevant Commonwealth, State or Territory Directors of Public Prosecutions. Unless the exceptional remedy of a stay for abuse of process can be established,⁷⁶ then it will be a matter for trial and sentencing courts to grapple with the consequences of charge selection in the particular case.
- 52 In some circumstances, federal and State serious drug offences may be prosecuted at the same time against the same accused person.⁷⁷
- 53 Where a court sentences an offender for a combination of federal and New South Wales offences, a number of general observations may be made.

⁷⁴ at 1103 [653].

⁷⁵ at 1004 [656].

⁷⁶ Applying the principles in the authorities referred to at footnote 51 above.

⁷⁷ See, for example, *R v Standen*, op cit, footnotes 50, 51.

- 54 A sentencing court dealing with an offender for federal and New South Wales offences must comply with Part 1B of the *Crimes Act 1914 (Cth)* and, in particular, s.16A whilst, at the same time, considering relevant provisions contained in ss.3A and 21A *Crimes (Sentencing Procedure) Act 1999 (NSW)*, the latter provision setting out aggravating and mitigating factors. The setting of non-parole periods where there is a combination of federal and State offences requires care. In New South Wales, the statutory formula in s.44 *Crimes (Sentencing Procedure) Act 1999 (NSW)* must be kept in mind. There is no such statutory formula for federal offences and the application of a common law norm concerning the proportion of the non-parole period to the head sentence has been rejected.⁷⁸
- 55 Federal law provides for the fixing of a single non-parole period with respect to several offences.⁷⁹ New South Wales law now provides for aggregate sentencing and the setting of a single non-parole period.⁸⁰ However, there is no provision for the setting of a single aggregate sentence or single non-parole period where a sentencing court is imposing sentences for a combination of federal and State offences.⁸¹
- 56 Some differences may be discerned between federal and New South Wales drug supply offences, which may bear upon the question of sentence. The present approach to determination of prescribed quantities under federal law is based upon the pure quantity of a drug, whilst the determination of prescribed quantity under New South Wales law is based upon total quantity, with the purity level being relevant to an assessment of objective gravity.⁸² Further, the New South Wales statutory scheme incorporates standard non-parole periods for offences of supplying a commercial or large commercial quantity of a prohibited drug.⁸³

⁷⁸ *Hili v The Queen*, op cit, footnote 19, at 532-534 [37]-[45].

⁷⁹ Section 4K *Crimes Act 1914 (Cth)*.

⁸⁰ Sections 44(2A) and 53A *Crimes (Sentencing Procedure) Act 1999 (NSW)*; *R v AB* [2011] NSWCCA 229; *R v AB (No. 2)* [211] NSWCCA 256.

⁸¹ *Fasciale v R* [2010] VSCA 337 at [27].

⁸² *Paxton v R* [2011] NSWCCA 242 at [127]-[129], [141].

⁸³ *Ibid* at [128].

57 A practical issue has arisen as a result of Code offences operating in an area previously occupied by a State offence only. The New South Wales Court of Criminal Appeal has been called upon to consider whether sentencing patterns for the State offence of manufacturing a commercial quantity of a prohibited drug were relevant in determining sentence for an offence of manufacturing, for a commercial purpose, a commercial quantity of a controlled drug contrary to s.305.3(1) of the Code.⁸⁴ In that case, Simpson J⁸⁵ analysed the submissions on this issue, in a manner which identified the desirability of consistency, and also the challenges for courts seeking to give practical recognition to it. Simpson J concluded:⁸⁶

“109 I have concluded that it is unnecessary to opt for one to the exclusion of the other. The argument highlights the difficulty with using statistics. Sentencing judges are entitled to have regard to both lines of sentencing; the true comparator will be offences having sufficient parallels with the offence for which a sentence is to be passed. To opt for one sentencing regime against another has, potentially, another consequence that is both unexpected and undesirable. Where, as here, state and federal legislation creates offences that are, relevantly, identical, a prosecutor would be given the option of prosecuting under the regime perceived to be the harsher.

110 The essential question for determination in this case is: were the sentences too low to reflect the gravity of the crimes, taking into account such mitigating factors as existed (and these were relatively few)?”

58 Simpson J answered this question in the negative and the Crown appeal was dismissed.

59 Intermediate appellate courts have applied principles of other equivalent courts in the sentencing of serious federal drug offenders. The Victorian Court of Appeal⁸⁷ has applied New South Wales decisions in *Director of*

⁸⁴ *R v Cheung and Choi* [2010] NSWCCA 244; 203 A Crim R 398 at 409-414 [72]-[110].

⁸⁵ *Ibid* at 412-414 [92]-[110] (McClellan CJ at CL and Buddin J agreeing).

⁸⁶ at 414 [109]-[110].

⁸⁷ *Nguyen v R*, *op cit*, footnote 42, at [29]-[39], but see [106]; *Lau v R* [2011] VSCA 324 at [38]-[40], see also [52]-[53].

Public Prosecutions (Cth) v De La Rosa and *R v Nguyen; R v Pham*.⁸⁸

However, concern about this approach has been expressed in a later decision of the Victorian Court of Appeal.⁸⁹ The Queensland Court of Appeal has applied the New South Wales decisions.⁹⁰ The flow of ideas engaged by the rule of comity appears to be alive.

Federal and State Child Pornography Offences

60 The Code makes provision for offences involving child pornography material or child abuse material outside Australia,⁹¹ offences relating to use of a postal or similar service for child pornography material or child abuse material⁹² and offences relating to the use of a telecommunications carriage service for child pornography material or child abuse material.⁹³

61 The criminal law of New South Wales provides for offences involving the production, dissemination or possession of child abuse material.⁹⁴

62 Thus, federal offences focus on the transmission or movement of child pornography over a carriage service (such as the internet or a mobile phone) and through the postal system while New South Wales offences focus on possession, production and distribution of the material.

63 A body of sentencing principles has developed in this area of the law with courts of the different States applying, directly or indirectly, the rule of comity applicable to intermediate appellate courts and federal sentencing law.⁹⁵ These principles have been applied where there is a combination of federal and State offences, federal offences only or State offences only.

⁸⁸ [2010] NSWCCA 238; 205 A Crim R 106 at 126-128 [70]-[72].

⁸⁹ *Trajkovski v R* [2011] VSCA 170 at [63]-[66].

⁹⁰ *R v Hill, Bakir, Gray and Broad; ex parte Cth DPP* [2011] QCA 306 at [9], [55], [277].

⁹¹ Sections 273.1-273.15.

⁹² Sections 471.16-471.23.

⁹³ Sections 474.19-474.24C.

⁹⁴ Sections 91FA-91HA *Crimes Act 1900 (NSW)*.

⁹⁵ See authorities referred to at footnote 42 above, together with *R v McGaffin* [2010] SASCFC 22 at [13]ff; *DPP v Smith* [2010] VSCA 215 at [23]; *DPP (Cth) v Ison* [2010] VSCA 286 at [25]; *Young*

The principles apply consistently given the subject matter of the offending behaviour.

- 64 The Judicial Commission of New South Wales has published a helpful analysis of sentencing principles and decisions concerning federal and State child pornography offences.⁹⁶ This publication draws together principles considered in decisions of various intermediate appellate courts so as to practically promote compliance with the rule of comity emphasised in *Hili v The Queen*.
- 65 A most useful examination of decisions of intermediate appellate courts, in the context of sentencing for a combination of federal and New South Wales child pornography offences, may be found in the decision of the New South Wales Court of Criminal Appeal in *Minehan v R*.⁹⁷
- 66 New South Wales law makes provision for the use of random sample evidence in child abuse material cases.⁹⁸ There is no such provision with respect to federal child pornography offences. Although this statutory distinction may not matter greatly where an offender pleads guilty and facts are agreed for the purpose of sentence, the absence of this provision in federal law may be significant for matters which proceed to trial. In addition, part of the rationale for the New South Wales provision was to reduce the burden upon law enforcement officers called upon to view potentially vast amounts of child pornography and child abuse material in the course of their duties. Similar reasoning would suggest that parallel reforms of federal law are warranted.⁹⁹

v State of Western Australia [2011] WASCA 13 at [36]-[40]; *Ponniah v R* [2011] WASCA 105 at [35]-[40] and *R v Hill* [2011] SASCFC 109 at [15]-[16].

⁹⁶ P Mizzi, T Gotsis and P Poletti, Judicial Commission of New South Wales, “*Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*”, Monograph 34, September 2010.

⁹⁷ [2010] NSWCCA 140; 201 A Crim R 243 at 257-262 [82]-[104].

⁹⁸ Section 289B *Criminal Procedure Act 1986 (NSW)*.

⁹⁹ Judicial Commission of New South Wales, *op cit*, footnote 96, page 44.

Federal and State Computer Crime

- 67 Part 10.7 of the Code enacts a number of federal computer offences.¹⁰⁰
The Code contains a statement that Part 10.7 is not intended to exclude or limit the operation of any other law of the Commonwealth, State or Territory.¹⁰¹
- 68 New South Wales criminal law makes provision for computer offences.¹⁰²
- 69 The scope of s.308B *Crimes Act 1900 (NSW)* has been considered recently.¹⁰³
- 70 Sentencing courts have emphasised the crucial role which computer technology plays in society and the importance of specific and general deterrence on sentence.¹⁰⁴

Federal and State Identity Offences

- 71 The Code makes provision for identity crime.¹⁰⁵ Some aspects of these provisions have attracted criticism.¹⁰⁶
- 72 New South Wales law also creates a number of identity offences.¹⁰⁷
- 73 The mischief resulting from identity crime has been emphasised, as has the importance of personal and general deterrence on sentence for identity

¹⁰⁰ Sections 476.1-478.4.

¹⁰¹ Section 476.4.

¹⁰² Sections 308-308I *Crimes Act 1900 (NSW)*.

¹⁰³ *Salter v DPP* [2011] NSWCA 190.

¹⁰⁴ *R v Stevens* [1999] NSWCCA 69 at [1], [54]. See generally RG Smith, P Grabowsky and G Urbas, “*Cyber Criminals on Trial*”, Cambridge University Press, 2004, pages 124-149 (Sentencing Cyber Criminals).

¹⁰⁵ Sections 370.1-375.4.

¹⁰⁶ I Leader-Elliott, “*Framing Preparatory Inchoate Offences in the Criminal Code: The Identity Crime Debacle*” (2011) 35 *Crim LJ* 80.

¹⁰⁷ Sections 192I-192M *Crimes Act 1900 (NSW)*; A Steel, “*New Fraud and Identity-Related Crimes in New South Wales*” (2010) 22 *Judicial Officers’ Bulletin* 17.

crime¹⁰⁸. The New South Wales Court of Criminal Appeal referred to the MCCOC Report concerning identity crime, the economic harm to the community resulting from identity fraud, the significant indirect effects on victims (the sense of invasion of privacy and the challenge to the sense of individuality), the ease with which identity crimes can be committed and the consequences if confidence is lost in the system of electronic banking because of a perceived vulnerability to identity crime, with all of these features serving to explain the need for personal and general deterrence for this class of offence.¹⁰⁹

Federal and State Money Laundering Offences

- 74 The Code makes provision for money laundering offences.¹¹⁰ Section 416 provides that Division 400 of the Code is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.
- 75 New South Wales law makes provision for money laundering offences.¹¹¹
- 76 Sentencing principles for money laundering offences under the Code have been stated in a number of decisions.¹¹²

Conclusion

- 77 Absent federal legislative reform concerning sentencing, the principal measure for promoting consistency in federal sentencing will continue to be found in the work of intermediate appellate courts, putting into practice

¹⁰⁸ *Van Haltren v R* [2008] NSWCCA 274; 191 A Crim R 53 at 79 [86]-[88]; *Stevens v R*, op cit, footnote 9, at 92-93 [1]-[8], 104 [79].

¹⁰⁹ *Stevens v R*, op cit, footnote 9, at 92-93 [1]-[8]; 104 [79]; see also P McClellan, “White Collar Crime: Perpetrators and Penalties”, page 12ff (keynote address, Fraud and Corruption in Government Seminar, Sydney, 24 November 2011).

¹¹⁰ Sections 400.1-400.16.

¹¹¹ Sections 193A-193G *Crimes Act 1900 (NSW)*.

¹¹² *R v Li* [2010] NSWCCA 125; 202 A Crim R 195 at 201-205 [25]-[44]; *R v Guo* [2010] NSWCCA 170; 201 A Crim R 403 at 414-419 [84]-[97]; *R (Cth) v Milne (No. 6)*, op cit, footnote 52, at [205]ff; *R (Cth) v Nguyen* [2010] NSWCCA 226 at [58]-[59].

the approach laid out in *Hili v the Queen*. This task will be undertaken in a developing landscape of interaction between parallel federal and State laws in areas of crime incorporated in the Code. No doubt, the occasion will arise again for a further snapshot examination of principles and practice surrounding consistency in sentencing for federal offences.
