

# **THE BASICS OF COMMONWEALTH CRIME**

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## **Overview**

The practise of criminal law is one of the more demanding areas of professional practice for any lawyer. A thorough knowledge and understanding of the principles of criminal law, including the laws of criminal procedure, evidence law and more than a fleeting familiarity with the various statutes creating particular criminal offences and defences is necessary for competent practice in this field.

Whilst many barristers experienced in the practice of criminal law may rightly claim a comprehensive knowledge and understanding of the New South Wales criminal law, there are few that can claim the same level of comprehension in respect of federal criminal law and the range of often obscure offences against the laws of the Commonwealth of Australia. Understanding the criminal law that applies to the laws of the Commonwealth can be difficult. The complexity and size of the legislation that may create a particular offence or the peculiarities of the way in which federal offences are investigated and prosecuted, often leave practitioners bewildered and wishing they were able to return to the relative comfort of the criminal law that they are familiar with.

The purpose of this paper, and the related presentation, is to provide an overview of the machinations of federal criminal law and to provide a basic understanding of the main principles of Commonwealth crime and of the crucial legislation that practitioners should be aware of when dealing with offences against the laws of the Commonwealth. Where applicable, references to State laws herein will be references to New South Wales. It is beyond the scope of this paper to provide anything more than a basic introduction to each particular topic, however, it is hoped that the brief synopsis herein will provide a useful starting point for practitioners when confronted with a matter involving Commonwealth criminal law.

## **Federal Criminal Law**

With the advent of Federation on 1 January 1901, the Commonwealth of Australia came into being.<sup>1</sup> Each of the then six Australian colonies, which immediately prior to that time had existed as independent colonies, formed a union that established the federal system of government that presently exists in Australia. The former colonies became the six States of a federated Australia. A necessity arose almost immediately for the new Commonwealth of Australia to enact appropriate laws for the peace, order and good government of the people of the new Federation.

Whilst in Australia it is the case that federal, State and Local governments make up the three tiers of government, generally speaking, under the federal system of government in Australia there are two spheres of government that are competent to make laws and govern, being the governments of the States and Territories on the one hand and the Commonwealth government on the other.

Within the federal structure, each of the various States and Territories continue to make laws and govern, generally within the ambit of their respective geographical bounds, whilst the Commonwealth government may make laws and govern in respect of those matters for which it has responsibility, or a specific head of power, under either s 51 or some other express provision of the Commonwealth constitution. Accordingly, the federal system provides for the coexistence of governments, each governing and legislating within their respective spheres of responsibility.

Under the Australian federal system therefore, the Commonwealth government may make laws in respect of those specific matters under the Constitution that are expressly stated to be the province of the federal parliament. Pursuant to the specific heads of power provided for within s 51, the Commonwealth government may make laws ‘...for the peace, order, and good government of the Commonwealth...’ with respect to the various subject matter enumerated.

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<sup>1</sup> Established by the British Act of parliament, the *Commonwealth of Australia Constitution Act 1900*.

Since Federation, countless laws of the Commonwealth have been enacted pursuant to either the express legislative powers set out in the Constitution, or the specific heads of powers granted under s 51. It is to be noted that there is no express power within the Commonwealth Constitution providing a legislative basis for criminal law. Rather, under the Constitution the power of the Commonwealth to make such laws derives from either the exercise of:

- an implied power arising from laws made according to an express provision; or
- an implied power arising from laws made according to a head of power within s 51; or
- from the express incidental power within s 51(xxxix); or
- as an exercise of the executive powers within s 61.

Whilst the Commonwealth parliament may enact legislation dealing with criminal law either by implication or as a matter incidental to the power to enact laws with respect to some other matter, any such laws must always be referable to a grant of legislative power under the Constitution. Examples of such legislation are:

- *Bankruptcy Act 1966* (Cth) – s. 269(1)(a) creates the offence of obtaining credit without disclosing the fact that the person is an undischarged bankrupt. The *Bankruptcy Act* is an enactment of the Commonwealth parliament, pursuant to the specific head of power contained in s 51(xvii), which permits the Commonwealth to make laws in respect of ‘*bankruptcy and insolvency*’;
- *Customs Act 1901* (Cth) – s. 231(1)(c) creates the offence of exporting prohibited exports. The *Customs Act* is enacted pursuant to the express power contained in s. 90, which gives exclusive power to the Commonwealth power in respect of, *inter alia*, ‘...*the imposition of uniform duties of customs...to impose duties of customs and of excise...*’;
- *Migration Act 1958* (Cth) – s. 197A creates the offence of unlawful escape from an immigration detention centre. The *Migration Act* is

enacted pursuant to the specific head of power in s 51(xxvii) of the Constitution, which provides that the Commonwealth may make laws in respect of *'immigration and emigration.'*

The main pieces of federal legislation dealing with criminal law, such as the *Crimes Act 1914* and the *Criminal Code Act 1995*, are examples of laws made by the Commonwealth parliament in the exercise of the incidental powers and/or the executive powers discussed above. These statutes are discussed in further detail below.

It should be noted that where the Commonwealth Constitution does not provide a specific grant of authority to the Commonwealth to legislate in that area, and therefore the States and Territories retain legislative responsibility, the Commonwealth may assume legislative responsibility pursuant to s 51(xxxvii), where States and Territories refer such responsibility to the federal parliament. In recent times the raft of criminal legislation dealing with terrorism offences is an example of legislation made by the Commonwealth according to a matter referred by the States and Territories.

The present reach of the laws of the Commonwealth, as competent and constitutionally valid enactments of the federal parliament, is extensive and it is likely that the range of Commonwealth laws will continue to expand in the future. Accordingly, it is anticipated that the federal sphere of responsibility will continue to grow, with the result being an increase in concomitant federal criminal laws.

### **Courts that Exercise Federal Jurisdiction in Criminal Matters**

When discussing the operation of federal criminal law in practice, a question commonly asked is:

*If this offence is an offence against a federal law then why isn't the prosecution of this matter conducted in the Federal Court?*

The short answer to this question is that in general State and Territory courts exercise conferred federal jurisdiction to hear and determine such matters. Whilst there are

federal courts in the Australian judicial hierarchy, those courts generally do not generally hear and determine Commonwealth criminal cases in the exercise of their original jurisdiction as trial courts. Trials, whether summary or upon indictment, of criminal offences against the laws of the Commonwealth are mainly conducted in the relevant State courts within the State court system.

Unlike other jurisdictions with a federal system of government, in Australia there is no comprehensive federal judicial system of designated federal courts constituted to deal with federal criminal matters entirely separate from State and Territory criminal matters. Instead, in Australia, the federal judicial system in respect of criminal matters relies upon the system of State and Territory courts, which are given federal jurisdiction to determine Commonwealth criminal matters.

The *Judiciary Act 1903* (Cth) permits State and Territory courts to exercise federal jurisdiction in respect of certain matters. Part X of the *Judiciary Act* contains provisions dealing with ‘Criminal Jurisdiction’. Pursuant to s 68(2), within Part X, and in combination with respective State or Territory legislation granting criminal jurisdiction to a court, the State and Territory courts that have jurisdiction with respect to summary conviction, committal proceedings and trials on indictment of persons charged with offences against the laws of the relevant State or Territory, are invested with ‘like jurisdiction’ in respect of persons charged with offences against the laws of the Commonwealth.

Section 68 and the meaning of the phrase ‘like jurisdiction’ have been considered in a number of cases. When exercising ‘like jurisdiction’ in respect of the determination of a Commonwealth offence the court applies the relevant procedural laws of the State ‘by way of analogy’.<sup>2</sup>

Under this arrangement, whilst there is a federal court structure, that includes the High Court of Australia, the Federal Court of Australia and the Federal Magistrates Court, those courts do not usually hear criminal trials. Obviously, the High Court of Australia, as the ultimate appellate court in Australia, may hear and determine appeals

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<sup>2</sup> See *Williams v R (No. 2)* (1933) 50 CLR 551; *Peel v R* (1971) 125 CLR 447; *Solomons v District Court of New South Wales* [2002] HCA 47.

in respect of criminal cases, subject to special leave being granted. The Federal Court of Australia does exercise original jurisdiction in respect of some Commonwealth offences where specific provision is made by statute for the court to have such jurisdiction. Generally, however, the original jurisdiction of federal courts to hear and determine Commonwealth criminal matters is quite limited.

So the answer to the question – why aren't trials of Commonwealth offences heard before a federal court, such as the Federal Magistrates Court or the Federal Court of Australia, is answered thus:

- a. The criminal jurisdiction of those courts is necessarily limited by virtue of the statutes that create those courts and the range of matters of a criminal nature that may be heard by those courts (ie: those courts do not have a general grant of jurisdiction to hear and determine criminal matters involving offences under the laws of the Commonwealth); and
- b. The relevant State and Territory courts that normally hear and determine summary or indictable offences against the laws of the State or Territory are given federal jurisdiction to similarly hear and determine summary and indictable offences against the laws of the Commonwealth, pursuant to s 68(2) of the *Judiciary Act*.

Accordingly, in New South Wales, a Local Court has jurisdiction in respect of offences against the laws of the Commonwealth that may be dealt with summarily. A Local Court may therefore conduct committal proceedings in respect of Commonwealth indictable offences, may hear and determine summary hearings and may sentence offenders who have pleaded guilty to an offence against the laws of the Commonwealth. Similarly, the District Court and/or the Supreme Court of New South Wales may deal with trials upon indictment of persons charged with indictable offences against the laws of the Commonwealth and the sentencing of such offenders.

### **Federal Criminal Procedure and Rules of Evidence**

Another common question often asked is:



*As this is a Commonwealth offence does that mean that the Evidence Act 1995 (Cth) applies and not the NSW version?*

The short answer to that question is no - the applicable laws relating to evidence and arrest, bail, and criminal procedure in respect of offences against the laws of the Commonwealth are generally the respective laws of the relevant State or Territory.

There is no federal legislation dealing with criminal procedure in a comprehensive fashion as such. The main piece of Commonwealth legislation that contains some aspects of procedural law regulating criminal proceedings in respect of Commonwealth matters is the *Crimes Act 1914*. By virtue of certain provisions of the *Judiciary Act* however, relevant State or Territory laws of procedure are adopted and applied as if they were laws of the Commonwealth.

Pursuant to s 68(1) of the *Judiciary Act*, when exercising federal jurisdiction the State or Territory court applies, so far as they are applicable, the respective State or Territory laws with respect to the relevant criminal procedure. In addition to s 68(1), s 79 of the *Judiciary Act* also adopts the laws of procedure of the relevant State or Territory in respect of certain matters. Under this arrangement the relevant State or Territory laws in respect of the following matters will specifically apply to Commonwealth offences (subject to the Constitution and save where Commonwealth laws have otherwise provided):

- Arrest, bail and custody of offenders or persons charged with offences;
- Summary conviction of offenders or persons charged with summary offences, or indictable offences that may be dealt with summarily;
- Committal proceedings in respect of persons charged with offences;
- Trial upon indictment of persons charged with indictable offences;
- Appeals arising out of any such trial, conviction or proceeding connected with the above proceedings.
- Laws relating to procedure;
- Laws of evidence and the competency of witnesses.

Except as otherwise provided by the Constitution or the laws of the Commonwealth, the State or Territory laws applicable will be binding on all Courts exercising federal jurisdiction in that State or Territory. Under s 79 of the *Judiciary Act* the laws of the State are ‘picked up’ and applied as if they were laws legislated by the Commonwealth. The State laws therefore apply as federal laws.<sup>3</sup>

In addition to these specific areas, s 79 of the *Judiciary Act* states generally that the laws of the State or Territory shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in the relevant State or Territory in all cases in which they are applicable.

Pursuant to s 68(1) and s 79 of the *Judiciary Act* therefore, the laws relating to criminal procedure in New South Wales will apply to Commonwealth criminal matters. Accordingly, the provisions of the *Criminal Procedure Act 1986* (NSW), the principal legislation dealing with criminal procedure in this State, apply to both summary and indictable offences against the laws of the Commonwealth, save where Commonwealth legislation has otherwise provided.

Similarly, the applicable legislation with respect to the rules of evidence that would apply in the trial of a person charged with an offence against the laws of the Commonwealth is the *Evidence Act 1995* (NSW). It should be noted however that pursuant to s 5 of the *Evidence Act 1995* (Cth) there are a number of provisions of the Commonwealth *Evidence Act* that do apply in all proceedings in any Australian court. The relevant provisions are:

- Subsection 70(2) Evidence of tags and labels in Customs prosecutions and Excise prosecutions
- Section 143 Matters of law
- Section 150 Seals and signatures
- Section 153 Gazettes and other official documents

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<sup>3</sup> *Pederson v Young* (1964) 110 CLR 162 at 165; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 610; [130]; *Solomons v District Court of New South Wales* at [21].

- Section 154 Documents published by authority of Parliaments etc.
  - Section 155 Official records
  - Section 155A Commonwealth documents
  - Section 157 Public documents relating to court processes
  - Section 158 Evidence of certain public documents
  - Section 159 Official statistics
  - Section 163 Proof of letters having been sent by Commonwealth agencies
  - Section 182 Commonwealth records, postal articles sent by Commonwealth agencies and certain Commonwealth documents
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Further, several other section of the Commonwealth Act have application in certain instances. Those sections are:

- Section 185 – Faith and credit to be given to documents properly authenticated;
- Section 186 – Swearing of affidavits before justices of the peace, notaries public and lawyers;
- Section 187 - Abolition of the privilege against self-incrimination for bodies corporate

As will be noted, these provisions generally relate to the admissibility of certain Commonwealth records and official documents or the means by which certain matters may be proved.

Despite the general application of the State or Territory laws of procedure in Commonwealth criminal matters it should be noted that both the Commonwealth Constitution and the various laws of the Commonwealth do ‘otherwise provide’ for a

specific procedure in many instances. Some of the more important and common provisions are:

- Section 80 Commonwealth Constitution requires a trial upon indictment to be a trial by jury. There can be no trial of a Commonwealth indictable offence by a judge sitting alone. There can be no majority verdict in a Commonwealth trial.<sup>4</sup>
- The *Crimes Act* contains some provisions dealing with summary proceedings and the disposal of indictable offences summarily (eg. s 4J and 4JA). Therefore, the provisions of the *Criminal Procedure Act* that are otherwise ‘inconsistent’ do not apply to Commonwealth offences.
- Part 1B of the *Crimes Act* provides a significant framework for sentencing of federal offenders. When sentencing a federal offender a court is required to apply the provisions of Part 1B and not the provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW). For example, in sentencing a federal offender a court must have regard to the relevant matters pertaining to the offenders subjective factors and the objective seriousness of the offence as set out in s 16A(2) and not the mitigating or aggravating features set out in s 21A of the *Crimes (Sentencing Procedure) Act*.
- As noted above, under the *Evidence Act 1995* (Cth), certain provisions with respect to Commonwealth documents, records and proof of certain matters will apply in any Australian Court.

## **Federal Institutions and Agencies**

Unlike the system of courts able to exercise federal jurisdiction in respect of Commonwealth criminal matters in Australia, there is a comprehensive array of federal bodies and organisations that are empowered to investigate and prosecute alleged offences against the laws of the Commonwealth under the respective legislation by which they are established and/or for which they are responsible. When

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<sup>4</sup> *Jury Act 1977* (NSW) s 55F(4)

dealing with a prosecution of a Commonwealth offence therefore it is always advisable to determine which agency is the ‘informant’ and whether the matter is being prosecuted by that agency or by the office of the Commonwealth Director of Public Prosecutions (the CDPP).

A brief overview of some of the more relevant Commonwealth entities or agencies is set out below:

### Commonwealth Director of Public Prosecutions

The office of the CDPP is established by the *Director of Public Prosecutions Act 1983* as an independent prosecuting agency.<sup>5</sup> Although the office of the CDPP formally falls within the ambit of the Commonwealth Attorney-General’s Department, the office of the CDPP exercises its prosecutorial functions independently.

The Commonwealth Director of Public Prosecutions, presently Damian Bugg AM QC, heads the office of the CDPP. The head office of the CDPP is located in Canberra and is responsible amongst other things for co-ordinating a national approach to policy and practice management. The CDPP has offices in each State and Territory in Australia and employs legal officers, including barristers and solicitors to carry out its prosecution functions. The Sydney office of the CDPP is the largest office and employs approximately one hundred lawyers.

The CDPP is responsible for the prosecution of offences against the laws of the Commonwealth and has various functions conferred by s 6 of the *Director of Public Prosecutions Act*. Principally, the CDPP may:

- Institute and carry on prosecutions on indictment in respect of indictable offences against the laws of the Commonwealth
- Institute and carry on summary prosecutions in respect of offences against the laws of the Commonwealth

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<sup>5</sup> Section 5 *Director of Public Prosecutions Act*

- Institute and carry on committal proceedings in respect of offences against the laws of the Commonwealth
- Where authorised, institute and carry on prosecutions in respect of offences against the laws of a State
- Institute and carry on proceedings for the confiscation of the proceeds of Commonwealth crime

The main offences prosecuted by the CDPP involve drug importations and related drug offences, offences against corporate law, fraud on the Commonwealth in its various guises (such as tax fraud, medifraud and social security fraud), money laundering, people smuggling, people trafficking (including sexual servitude and slavery matters), terrorism, and a range of regulatory offences.

The CDPP prosecutes in accordance with the guidelines set out in the document titled, 'Prosecution Policy of the Commonwealth', a copy of which is available on the CDPP website.<sup>6</sup>

The CDPP is not simply involved in the litigation aspects of any given prosecution. Rather, the CDPP is actively involved in many of the preliminary stages of the prosecution process, from advising on appropriate investigations, drafting and advising in respect of search warrants, drafting initiating process, assessing briefs of evidence and advising on appropriate charges.

Barristers appearing in respect of Commonwealth prosecutions in New South Wales should note the following practical matters with respect to the CDPP and Commonwealth prosecutions conducted by the CDPP:

- Commonwealth prosecutions commenced by Court Attendance Notice in the Sydney area will generally receive a first return date on a Tuesday in Court 5.5 in the Downing Centre Local Court. Court 5.5 is

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<sup>6</sup> 'Prosecution Policy of the Commonwealth – Guidelines for the making of decisions in the prosecution process', 2<sup>nd</sup> edn., Commonwealth of Australia, 1990. Available at [www.cdpp.gov.au/Prosecutions/Policy](http://www.cdpp.gov.au/Prosecutions/Policy)

the designated ‘Commonwealth matters’ court. In other courts, regular ‘list days’ will usually be set.

- Whilst the CDPP retains some barristers to prosecute as Crown Prosecutors in many cases the CDPP will brief private counsel to appear who will be instructed by a solicitor from the CDPP. The CDPP will always brief counsel (either its own or private counsel) to appear in trials on indictment. For summary prosecutions, CDPP legal officers routinely appear as prosecutors, particularly where the matter is less serious or less complicated, however, often counsel is briefed to appear in summary matters as well.
- Unlike the New South Wales Office of the Director of Public Prosecutions, the CDPP does not generally engage in any ‘charge bargaining’ process. Generally the CDPP will not initiate any negotiations to seek a plea to a lesser charge. If an accused wishes to plead guilty to some other or lesser offence than that with which he/she is charged, the CDPP will only enter into discussions where the person’s legal representative (where represented) has obtained clear instructions to put a particular proposition. Generally that proposition will need to be communicated to the CDPP in writing for further consideration. The CDPP will not discuss mere possibilities or enter into negotiations in the absence of instructions given by an accused.
- Where an investigation is conducted by a Commonwealth agency and both Commonwealth and related State offences are charged, generally the CDPP will be entitled to, and will, prosecute the related State offence. On occasion however, the State matter may be referred to the NSW DPP to continue the prosecution.

### Australian Federal Police (AFP)

The AFP is a specific police service constituted by the *Australian Federal Police Act 1979*.<sup>7</sup> The functions of the AFP are set out in s 7 of the Act and include the provision of ‘police services’, in relation to:

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<sup>7</sup> Section 6 *Australian Federal Police Act*

- the Australian Capital Territory (where the AFP act the same as any other State or Territory police service);
- the laws of the Commonwealth;
- property of the Commonwealth (including Commonwealth places) and property of authorities of the Commonwealth;
- the investigation of State offences that have a ‘federal aspect’.

‘Policing services’ is defined in the Act to include services by way of the prevention of crime and the protection of persons from injury or death, and property from damage, whether arising from criminal acts or otherwise.<sup>8</sup>

In general, where there has been a suspected breach of a law of the Commonwealth, it is the AFP that will investigate the matter, either directly, or in support of some other investigative agency of the Commonwealth.

In discharging their policing duties in respect of Commonwealth offences the AFP are bound to comply with the requirements of the *Australian Federal Police Act* and the *Crimes Act*. The *Crimes Act* specifically sets out a comprehensive framework for the investigation of Commonwealth offences. As this is an area where the Commonwealth parliament has specifically ‘otherwise provided’, the provisions of this legislation will necessarily apply, rather than some other relevant law of a State or Territory, in respect of the investigation of a contravention of a law of the Commonwealth.

In particular the *Crimes Act* makes provision for matters such as:

- Obtaining and executing of search warrants
- Powers of arrest
- Powers of detention
- Rights of persons detained
- Electronic recording of confessions and admissions

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<sup>8</sup> Section 4 *Australian Federal Police Act*



- Conducting controlled operations to obtain evidence of the commission of Commonwealth offences
- Forensic procedures (ie: such as body searches and taking samples of blood, hair, saliva, DNA etc...)

Barristers undertaking Commonwealth criminal matters should make sure to acquaint themselves with the provisions of Part 1C of the *Crimes Act*, which sets out the powers of arrest and detention that may be exercised by authorised officers and the obligations that investigating officials have in terms of cautioning suspects, advising suspects of their rights and the tape recording of confessions and admissions. Where the AFP arrest or detain a person for a Commonwealth offence the provisions of Part 1C, and the other relevant provisions of the *Crimes Act*, will apply, rather than some other provision of the law of the relevant State/Territory dealing with the same subject matter.

For example, where a person has been arrested upon suspicion of committing a federal offence and the AFP wish to interview that person, the AFP would be required to ensure they comply with s 23V of the *Crimes Act* to electronically record the interview, rather than the provisions of s 281 of the *Criminal Procedure Act 1986* (NSW).

### ASIC

The Australian Securities and Investments Commission ('ASIC') is statutory body corporate established by the *Australian Securities and Investments Commission Act 2001* with various functions, particularly in respect of the administration of the 'corporations legislation' (ie: the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*). ASIC is a regulatory and law enforcement agency with specific functions to promote market integrity and consumer protection within the financial services sector in Australia.

As such, ASIC has general investigative powers in respect of the due administration of the corporations legislation where ASIC suspects that there may have been:

- a contravention of the corporations legislation;
- a suspected contravention of a law of the Commonwealth or a State or Territory that concerns the management or affairs of a body corporate or managed investment scheme;
- a suspected contravention of a law of the Commonwealth or a State or Territory that involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products.<sup>9</sup>

ASIC may commence a prosecution where as a result of any investigation or hearing conducted by ASIC it appears that an offence may have been committed against the corporations legislation and that a person should be prosecuted for the offence.<sup>10</sup>

Practitioners should be aware that ASIC has certain coercive powers to assist it in its investigations, which permit ASIC to issue notices requiring the persons to appear for an examination, or require the person to produce certain documents or things, and to request a person provide all reasonable assistance in respect of a prosecution.<sup>11</sup>

Although ASIC has a general prosecutorial function, in practice ASIC will only carry on prosecutions for summary/regulatory matters. ASIC will commence the prosecution process, (in New South Wales by filing and serving a Court Attendance Notice) in respect of all offences, however, where the offence is more serious ASIC will prepare a brief of evidence for the CDPP to continue to carry on the prosecution.

Where, in the course of an investigation for a breach of the corporations law, ASIC detects a suspected contravention of some other general law of the Commonwealth, or of a State or Territory, ASIC will refer the matter to the AFP or the relevant State or Territory police for further investigation.

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<sup>9</sup> Section 13 *Australian Securities and Investments Commission Act*

<sup>10</sup> Section 49 *Australian Securities and Investments Commission Act*

<sup>11</sup> See *Australian Securities and Investments Commission Act*, Part 3 – Investigations and Information Gathering

## Medicare

Medicare Australia is a Commonwealth agency established by the *Medicare Australia Act 1973* with responsibility for the administration of various government health programs, including functions under the *Health Insurance Act 1973*.<sup>12</sup> Medicare has investigative powers conferred by s 8P of the *Medicare Australia Act* to investigate possible offences under a variety of health related legislation, such as:

- the *Health Insurance Act 1973*
- the *National Health Act 1953*
- the *Health and Other Services (Compensation) Act 1995*
- the *Medical Indemnity Act 2001*

Medicare may also exercise investigative functions in respect of general fraud and dishonesty offences under the *Criminal Code Act*, such s 134 and 135 and the making of false or misleading statements under s 136 or use of false or misleading documents or information, where the subject matter of the alleged fraud or dishonesty relates to a claim for payment for professional services by a medical practitioner or an indemnity scheme payment on behalf of a medical practitioner.

In carrying out its investigative functions, Medicare may, by serving written notice, require a person to provide information or produce a document that may relate to the commission of an offence that Medicare is entitled to investigate.<sup>13</sup> It is an offence to fail or refuse to comply with such a notice without reasonable excuse.<sup>14</sup>

Authorised officers of Medicare may obtain and execute search warrants in order to enter premises, search for and seize evidence potentially relevant to an offence for which Medicare may investigate.<sup>15</sup>

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<sup>12</sup>See ss 4, 6 and 7 *Medicare Australia Act*

<sup>13</sup>Section 8P *Medicare Australia Act*

<sup>14</sup>Section 8R *Medicare Australia Act*

<sup>15</sup>See ss 8U – 8ZQ *Medicare Australia Act*

Whilst Medicare, as the 'Health Insurance Commission' acts as the 'informant' for the purposes of criminal prosecutions commenced subsequent to a Medicare investigation, Medicare does not carry on any such prosecution. All such matters are referred to the CDPP for carriage of the relevant prosecution.

#### Centrelink/Commonwealth Services Delivery Agency (CSDA)

One of the more common areas of Commonwealth crime is the area sometimes referred to as 'social security fraud'. In general the phrase is applicable to the commission of any type of offence that involves defrauding the Commonwealth through the fraudulent receipt of government benefits to which a person is not properly entitled. Prior to the amendment of relevant legislation, including the implementation of the *Criminal Code Act* and the harmonisation of various other laws of the Commonwealth in order to adopt the Code principles in respect of offences, social security fraud commonly involved the claiming and receipt of benefits from the Department of Social Security ('DSS'), hence the phrase 'social security fraud'.

As most people would be aware, this type of offence typically arises where a person fraudulently or dishonestly claims some form of government benefit, usually by submitting a completed claim form to the relevant government agency, and subsequently commences to receive periodic payment of such benefits. The defrauding commonly involves either receiving payments in two names, receiving payments whilst working (and therefore not meeting means tests requirements for the payment of the benefit) or receiving a benefit where the reasons for entitlement to the benefit have changed (such as a sole parent now living in a *de facto* relationship).

Although still used, nowadays the phrase 'social security fraud' is not entirely apt. Centrelink, also known as the CSDA, is now the Commonwealth government agency responsible for the administration and payment of most of the benefits formerly administered by the former DSS. The CSDA is established by s 6 the *Commonwealth Service Delivery Agency Act 1997*. Centrelink is an 'umbrella agency' and presently administers government services and benefits provided by a number of Commonwealth departments. In particular, Centrelink is the entity responsible for administration and payment of the following benefits:

- Youth Allowance and Newstart payments (unemployment benefits)
- Parenting Payments (such as payments for sole parents and Family Tax Benefit payments)
- Age Pensions
- Disability Support Pensions
- AUSTUDY/ABSTUDY payments

The principal pieces of legislation with which one should be familiar when dealing with a social security fraud case are:

- The *Social Security Act 1991* (which sets out the legislative basis for entitlement to payments such as Newstart, Youth Allowance, Parenting Payments, AUSTUDY/ABSTUDY, Disability Support Pensions etc...)
- The *Social Security (Administration Act) 1999* (which sets out the administrative requirements for making claims and receiving social security benefits and now provides for the various specific fraud offences for receiving these types of benefits)

Depending on the seriousness, usually determined by the amount of payments received or the sophistication of the defrauding, offences involving social security fraud are either charged as discrete offences under the specific offence created by the social security legislation (less serious) or under provisions relating to general defrauding of the Commonwealth (more serious).

Prior to the enactment of the *Social Security (Administration) Act*, social security offences were contained in the *Social Security Act* itself. Offences involving the fraudulent receipt of benefits were commonly prosecuted under s 1347 (payment knowingly obtained where not payable) of the *Social Security Act* for the less serious social security offences. The more serious cases were prosecuted under s 29B (imposition upon the Commonwealth) or 29D (defrauding the Commonwealth) of the *Crimes Act*.

The less serious social security offences are now generally prosecuted under the specific offences provided for by the *Social Security (Administration) Act*, such as s 215 (obtaining payment that is not payable). The more serious offences are now prosecuted as offences under Part 7.3 of the *Criminal Code Act*, such as s 134.1 (obtaining property by deception) or s 135.1 (dishonestly obtaining a gain). These offences, and others, replace the now repealed s 29B and 29D of the *Crimes Act*.<sup>16</sup>

It should be noted however, that the older offences are still encountered from time to time where there has been a course of offending dating back in time prior to the repeal of the older offences. Accordingly, practitioners should ensure they are familiar with the older offence and take care to determine which offence/s will apply to a particular instance of alleged defrauding.

Social security fraud investigations and prosecutions are instigated by the CSDA, however, the conduct of such prosecutions are undertaken by the CDPP. Centrelink has its own investigators and routinely undertakes investigations, including the conduct of interviews of suspected offenders, in relation to alleged social security offences. Where premises are to be searched, Centrelink will investigate matters cooperatively with the AFP, who will undertake the execution of a search warrant under s 3E of the *Crimes Act*.

It should be noted however, that in the course of investigating an offence, the Secretary of the relevant Department responsible for the provision of a benefit may require a person to give information or produce a document.<sup>17</sup> It is an offence for a person to fail to comply with such a request.<sup>18</sup> Similarly, where a person is in receipt of benefits, the Secretary may serve a notice requiring that person provide information or a statement regarding a specified event or change of circumstances.<sup>19</sup> It is an offence to fail to comply with such a notice.<sup>20</sup> These types of notices often appear in advice letters from Centrelink regarding payments of benefits (commonly appearing in small print on the reverse side of the letter).

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<sup>16</sup> Sections 29B and 29D were repealed as of 23 May 2001 by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*

<sup>17</sup> Section 192 *Social Security (Administration) Act*

<sup>18</sup> Section 197 *Social Security (Administration) Act*

<sup>19</sup> Section 68(2) *Social Security (Administration) Act*

<sup>20</sup> Section 74 *Social Security (Administration) Act*

## Australian Taxation Office (ATO)

The Commissioner of Taxation, through the ATO, is responsible for the collection of taxes payable to the Commonwealth and for the administration of taxation laws under the following legislation:

- *Income Taxation Assessment Act 1936*,
- *Income Taxation Act 1997* (a rewriting and restructuring of the *Income Taxation Assessment Act 1936*)
- *Taxation Administration Act 1953*
- *A New Tax System (Goods and Services Tax Administration) Act 1999*
- *A New Tax System (Pay As You Go) Act 1999*

It should be noted that as with social security fraud offences, the more serious offences of taxation fraud may be prosecuted as offences against the general fraud and dishonesty offences under the Criminal Code. The most commonly encountered taxation offences are to be found in the *Taxation Administration Act*, ss 8A – 8ZN.

The ATO has its own investigations unit and may initiate prosecutions in the name of the Commissioner in respect of a taxation offence.<sup>21</sup> The ATO has its own prosecutors who routinely conduct the less serious summary prosecutions for taxation offences. The type of prosecutions handled by the ATO ‘in house’, cover matters of a regulatory nature such as failing to lodge tax returns and failing to comply with the Commissioner’s requests for information relating to tax returns. Generally, the CDPP will conduct prosecutions for the more serious or complicated taxation offences or in any matter that is to proceed as a defended summary hearing.

Like many other Commonwealth entities or authorities, the ATO (Commissioner) has general powers to obtain or request the provision of information in order to investigate possible breaches of taxations laws. Practitioners should be aware of the following in particular:

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<sup>21</sup> Section 8ZJ *Taxation Administration Act*.

- Section 263 of the *Income Tax Assessment Act* – gives the Commissioner and authorised officers power to access premises, books and documents for the purposes of the *Income Tax Assessment Act* and permits copies of any such books and documents to be made
- Section 264 of the *Income Tax Assessment Act* – allows the Commissioner to serve a notice upon a person which requires the person to either furnish information or to attend a hearing and produce books and documents concerning that person, or any other person's, income or tax assessment..

### **Principles of Criminal Responsibility – The *Criminal Code Act 1995***

Any barrister dealing with Commonwealth offences must be aware of the existence and effect of the *Criminal Code Act 1995* (Cth) (the Code). In addition to the *Crimes Act*, the Code is the other major piece of Commonwealth legislation dealing with the criminal law. The Code sets out the relevant principles of criminal responsibility applicable in respect of all offences against the laws of the Commonwealth. The Code also now provides for a significant number of offences that were formerly contained within other Commonwealth legislation.

In 1987, the federal government established a Committee, to consider the state of the Commonwealth criminal law. The Committee, which was chaired by former Chief Justice of the High Court of Australia, Sir Harry Gibbs, (the Gibbs Committee) produced a number of reports canvassing various aspects of the Commonwealth criminal law. At the time the Gibbs Committee was reporting, the principles of criminal responsibility applicable to Commonwealth offences varied depending on whether the offence in question was an offence under the *Crimes Act* or an offence under some other Commonwealth legislation. Common law principles of criminal responsibility applied to offences under the *Crimes Act*, while the principles of criminal responsibility applicable in the relevant State or Territory where the offence was prosecuted would apply if the offence was under some other Commonwealth legislation.



As a result of these discrepancies, in 1990 the Gibbs Committee recommended the any proposed consolidation of Commonwealth criminal law should include a comprehensive restatement of the principles of criminal responsibility applicable to all offences against the laws of the Commonwealth to ensure consistency throughout the Commonwealth.

At about the same time as the Gibbs Committee recommended the consolidation of principles of Commonwealth criminal responsibility, the Standing Committee of Australian Attorneys-General had established a further committee to review the criminal law in each Australian jurisdiction with a view to developing a uniform Model Criminal Code that could be adopted and implemented throughout Australia. The Model Criminal Code Officers Committee, (the MCCOC) report on 'General principles of Criminal Responsibility', released in December 1992, was subsequently adopted by the Commonwealth through the enactment of the *Criminal Code Act*.

The *Criminal Code Act 1995* (Cth), was given Royal Assent on 15 March 1995 and was proclaimed to commence on 1 January 1997. The Code was to commence operation in respect of all Commonwealth offences from 16 March 2000, however, the date for its application was postponed and eventually took effect from 15 December 2001. In general, the Code now applies to all federal offences alleged to have been committed after 15 December 2001.<sup>22</sup>

## **Principles of Criminal Responsibility**

Chapter 2 of the Code now codifies the general principles of criminal responsibility that are to apply to Commonwealth offences.<sup>23</sup> Practitioners used to dealing with common law principles of criminal responsibility are familiar with the concepts of *actus reus* (the act) and *mens rea* (guilty mind) and understand that proof of the commission of a criminal offence will generally require proof of some particular prohibited act together with the requisite culpable mental state at the same time. The Code implements a major departure for those under to analysing criminal offences in

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<sup>22</sup> Section 2.2 *Criminal Code Act*.

<sup>23</sup> Section 2.1 *Criminal Code Act*.

this manner. The Code sets out a comprehensive framework of the principles of criminal responsibility for Commonwealth criminal law. Although the Code is intended to simplify the relevant principles of criminal responsibility, the general impression amongst practitioners and courts alike appears to be that the Code has had the opposite effect and unduly complicates matters.

Under the Code, an offence consists of ‘physical elements’ and ‘fault elements’.<sup>24</sup> Proof of the commission of a Commonwealth offence now requires proof of the ‘physical element/s’ of an offence together with the applicable ‘fault element/s’ for each physical element.<sup>25</sup> Accordingly, the concepts of *actus reus* and *mens rea* are in effect now dealt with under the Code as ‘physical elements’ and ‘fault elements’.

Physical elements under the Code may be either:

- a. conduct (defined as an act, an omission to perform an act or a state of affairs)
- b. a result of conduct
- c. a circumstance in which conduct, or a result of conduct, occurs.<sup>26</sup>

Fault elements under the Code may be either:

- a. intention
- b. knowledge
- c. recklessness
- d. negligence.<sup>27</sup>

Sections 5.2, 5.3, 5.4 and 5.5 of the Code define what is required to establish the particular fault element for the respective physical element.

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<sup>24</sup> Section 3.1 *Criminal Code Act*. However, it should be noted that pursuant to s 3.1(2), a law creating an offence may provide that there is no fault element for one or more physical elements of the offence.

<sup>25</sup> Section 3.2 *Criminal Code Act*.

<sup>26</sup> Section 4.1 *Criminal Code Act*.

<sup>27</sup> Section 5.1 *Criminal Code Act*.

Whilst the general dichotomy between physical elements and fault elements appears relatively simple on its face, in practice the distillation of the relevant elements of an offence and their respective fault and physical elements is often a very difficult task. In part, the difficulty in this respect arises because not all offences clearly state what are the relevant fault and physical elements for the offence. The divination of the appropriate physical and fault elements is further complicated because of the somewhat cumbersome definitions provided for by the Code which do not always lend themselves to a seamless application to the case at hand.

### **Finding the Elements of the Offence – An Example: s 233B *Customs Act***

An illustration of the difficulties that the Code has created in this regard is to be found in the interpretation of former s 233B of the *Customs Act 1901*, prior to the repeal of that section and the replacement of serious drug offences within Part 9.1 of the Code.<sup>28</sup>

Consider the act of importing a quantity of heroin into Australia. Prior to the commencement of the application of the Code to all Commonwealth offences on 15 December 2001, s 233B(1)(b) of the *Customs Act* was in the following terms [the offence of importation being then under s 233B(1)(b) highlighted in bold]:

**(1) Any person who:**

(a) *without any reasonable excuse (proof whereof shall lie upon him) has in his possession, on board any ship or aircraft, any prohibited imports to which this section applies; or*

(aa) *without reasonable excuse (proof whereof shall lie upon the person) brings, attempts to bring, or causes to be brought, into Australia any prohibited imports to which this section applies;*

**(b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies; or**

(c) *without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which*

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<sup>28</sup> The various narcotics offences contained in s 233B of the *Customs Act* were repealed by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth) which received Royal Assent on 8 November 2005. A range of new serious drug offences were inserted in the Code by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* and commenced operation on 6 December 2005.

*this section applies which have been imported into Australia in contravention of this Act; or*

- (caa) without reasonable excuse (proof whereof shall lie upon him) conveys, or attempts to convey, any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act; or*
- (ca) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act; or*
- (cb) conspires with another person or other persons to import, bring, or cause to be brought, into Australia any prohibited imports to which this section applies or to export from Australia any prohibited exports to which this section applies; or*
- (d) aids, abets, counsels, or procures, or is in any way knowingly concerned in, the importation, or bringing, into Australia of any prohibited imports to which this section applies, or the exportation from Australia of any prohibited exports to which this section applies; or*
- (e) fails to disclose to an officer on demand any knowledge in his possession or power concerning the importation or intended importation, or bringing or intended bringing, into Australia of any prohibited imports to which this section applies or the exportation or intended exportation from Australia of any prohibited exports to which this section applies;*

***shall be guilty of an offence.***

*(1A) On the prosecution of a person for an offence against the last preceding subsection, being an offence to which paragraph (c) of that subsection applies, it is not necessary for the prosecution to prove that the person knew that the goods in his possession or of which he attempted to obtain possession had been imported into Australia in contravention of this Act, but it is a defence if the person proves that he did not know that the goods in his possession or of which he attempted to obtain possession had been imported into Australia in contravention of this Act.*

*(1B) On the prosecution of a person for an offence against subsection (1), being an offence to which paragraph (ca) of that subsection applies, it is a defence if the person proves that the goods were not imported into Australia or were not imported into Australia in contravention of this Act.*

*(1C) Any defence for which provision is made under either of the last 2 preceding subsections in relation to an offence does not limit any defence otherwise available to the person charged.*

*(2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods and the prohibited exports to which this section applies are prohibited exports that are narcotic goods.*

*(3) A person who is guilty of an offence against subsection (1) of this section is punishable upon conviction as provided by section 235.*

*(4) This section shall not prevent any person from being proceeded against for an offence against any other section of this Act, but he shall not be liable to be punished twice in respect of any one offence.*

Prior to the application of the Code, which commenced on 15 December 2001, the offence in s 233B(1)(b) required proof of the following elements:

- a. an act of importing goods into Australia (actus reus);
- b. with the intention/knowledge that the goods being imported were narcotic goods (mens rea)

This analysis was consistent with judgment of Brennan J in *The Queen v He Kaw Teh*.<sup>29</sup> Under the law as it stood before 15 December 2001, with respect to the mental element to be proved, the Crown was required to prove that the person who imported the goods had intended to bring into Australia narcotics. Proof of such an intention could be shown by establishing that the person had knowledge that the goods being imported were in fact narcotics. Consistent with the views expressed by the High Court in *Kural v R*<sup>30</sup>, the Crown could also establish such an intention by proving that the person was aware of the likelihood, in the sense that there was a real or significant chance, that the goods were narcotics. Proof of actual knowledge, or such awareness, would be sufficient to establish the fact that the person did intend to bring in narcotics

In many trials for offences of importing prohibited imports, being narcotics, it is often the case that it is only the mental element that is in issue. The Crown case is typically circumstantial and the Crown must prove the requisite intention/knowledge by establishing the circumstances and inviting the jury to conclude that the accused person must have had the relevant intention/knowledge in respect of the goods as that is the only rational hypothesis available on the facts established. In the pre-Code days, the Crown could argue that the circumstances established proved that the person must have been aware of the likelihood, in the sense of a real or significant chance, that the goods were narcotics.

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<sup>29</sup> (1985) 157 CLR 523, at 563 et seq.

<sup>30</sup> (1987) 162 CLR 502

From 15 December 2001, s 233B was amended so as to provide a degree of harmonisation with the Code.<sup>31</sup> The offence of importing prohibited imports in s 233B then read as follows:

**(1) Any person who:**

- (a) *without any reasonable excuse (proof whereof shall lie upon him) has in his possession, on board any ship or aircraft, any prohibited imports to which this section applies; or*
- (aa) *without reasonable excuse (proof whereof shall lie upon the person) brings into Australia any prohibited imports to which this section applies;*
- (b) imports into Australia any prohibited imports to which this section applies or exports from Australia any prohibited exports to which this section applies; or**
- (c) *without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act; or*
- (caa) *without reasonable excuse (proof whereof shall lie upon him) conveys any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act; or*
- (ca) *without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act; or*
- (cb) *[repealed]*
- (d) *[repealed]*
- (e) *fails to disclose to an officer on demand any knowledge in his possession or power concerning the importation or intended importation, or bringing or intended bringing, into Australia of any prohibited imports to which this section applies or the exportation or intended exportation from Australia of any prohibited exports to which this section applies;*

**shall be guilty of an offence.**

(1AA) *For the purposes of an offence against paragraph (1)(a), absolute liability applies to the physical element of circumstance of the offence, that the relevant possession is on board any ship or aircraft.*

*Note:* For **absolute liability**, see section 6.2 of the Criminal Code.

(1AB) *For the purposes of an offence against paragraph (1)(c) or (caa), absolute liability applies to the physical element of circumstance of the offence, that the prohibited imports have been imported into Australia in contravention of this Act.*

*Note:* For **absolute liability**, see section 6.2 of the Criminal Code.

(1AC) *For the purposes of an offence against paragraph (1)(ca), absolute liability*

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<sup>31</sup> Section s 233B was amended by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) which commenced 15 December 2001. It appeared that one of the principal purposes of amending the section was to define some of the applicable physical and fault elements for some of the offences created by s 233B.

*applies to the physical element of circumstance of the offence, that the prohibited imports are reasonably suspected of having been imported into Australia in contravention of this Act.*

*Note: For **absolute liability**, see section 6.2 of the Criminal Code.*

*(1A) On the prosecution of a person for an offence against subsection (1), being an offence to which paragraph (c) of that subsection applies, it is a defence if the person proves that he or she did not know that the goods in his or her possession had been imported into Australia in contravention of this Act.*

*(1B) On the prosecution of a person for an offence against subsection (1), being an offence to which paragraph (ca) of that subsection applies, it is a defence if the person proves that the goods were not imported into Australia or were not imported into Australia in contravention of this Act.*

*(1C) Any defence for which provision is made under either of the last 2 preceding subsections in relation to an offence does not limit any defence otherwise available to the person charged.*

*(2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods and the prohibited exports to which this section applies are prohibited exports that are narcotic goods.*

*(3) A person who is guilty of an offence against subsection (1) of this section is punishable upon conviction as provided by section 235.*

*(4) This section shall not prevent any person from being proceeded against for an offence against any other section of this Act, but he shall not be liable to be punished twice in respect of any one offence.*

As can be seen from the amended version of the section as at 15 December 2001, ss 233(1AA), 233(1AB) and 233B(1AC), clearly stated that for some offences there was to be a physical element of circumstance in respect of some matters, with a fault element of absolute liability, for some of the offences. In making the amendments however the legislature failed to clearly set out that physical and fault elements applicable in respect of each offence under s 233B. As a result, at this time there was some confusion as to what now were the proper elements of the offence created by s 233B(1)(b).

On one view of it, which appears to be the intended rationale behind the amendment, the elements of the offence to be proved in accordance with the application of the Code were now:

- a. an act of importing into Australia goods (Physical Element – conduct/  
Fault Element – Intention)

- b. that the goods imported were prohibited imports (Physical Element – circumstance/Fault Element - recklessness)

Accordingly, a person would be guilty of the offence if the Crown were able to prove that by some act the person intentionally brought goods into the country in circumstances where the person either intended to bring in narcotics, or knew that they were bringing in narcotics or, more controversially, where the person was aware that there was a substantial risk that the goods imported were in fact narcotics and in the circumstances known to the person it was unjustifiable to take that risk.

The introduction of the concept of recklessness appeared to perhaps pose a lesser mental element that was previously required to be proved in the pre Code days. Rather than having to prove intention to establish the fault element, the Crown could now apparently prove the mental element by establishing the fault element of recklessness. The concept of recklessness and the pre-Code law as stated in *Kural* appeared to be at odds.

In *R v Ismail* (26 May 2003, District Court of New South Wales) a District Court judge decided that the amendment to s 233B(1) did not achieve the apparent purpose of creating two physical elements, with two distinct fault elements as set out above. The judge instead decided that the section 233B(1)(b) offence consisted of a physical element of conduct but without an accompanying element of circumstance. Accordingly, the prosecution was required to prove that an accused intentionally imported into Australia a prohibited import, where the fault element of intention attached to both the act (conduct) of importation and the fact (circumstance) that the thing was in fact a prohibited import. The elements of the offence were therefore:

- a. an act of importing into Australia goods that were prohibited imports (Physical Element – conduct/ Fault Element – Intention)

Under this analysis, the judge found that the concept of recklessness did not apply, as under the Code the default fault element for the physical element of intention is intention. Accordingly, the Crown could not rely upon the concept of recklessness and seek to perhaps prove something less than actual knowledge, or at least a



likelihood of an awareness in the *Kural* sense. The law effectively remained unchanged on the interpretation arrived at by the judge in this instance.

Subsequently, in *R v Saengsai-Or* [2004] NSWCCA 108, the New South Wales Court of Criminal Appeal determined the proper construction of s 233B following the amendments that commenced on 15 December 2001. On an appeal against conviction, the Crown contended that the amendment to s 233B(1) meant that there were two physical elements to the offence of importation, with the attendant fault elements as set out above. The Crown further submitted that although recklessness was now available as the fault element with respect to the physical element of circumstance that the thing imported was a prohibited import (ie: narcotic goods), that under the Code, recklessness was not a radical departure from the law that had previously applied by virtue of *Kural* and *Teh*. The Court rejected this argument.

The Court held that the concept of recklessness did impose a mental element that would be more readily proven. As a result, the Court held that the offence of importing prohibited imports under the amendments s 233B(1) could not have created two physical elements and two fault elements and instead, the offence remained one with one physical element, being the act of importing prohibited goods that were narcotics, with a fault element of intention. In other words, the Crown was still required to prove that by importing some particular goods the person intended to import narcotics.<sup>32</sup>

In particular Bell J (with whom Wood CJ at CL and Simpson J agreed) stated at [71] – [72]:

*I do not accept the Crown's submission that the analysis of s 233B(1)(b) for which it contends does not involve a significant change in terms of the mental or fault elements of the offence. Recklessness as defined by the Criminal Code is more readily susceptible of proof than is proof of intention by reference to common law principles as explained in *Teh* and *Kural* (or as defined in s 5.2(1)). The circumstance that s 233B was amended in anticipation of the application of the Criminal Code to it and that the legislature did not make clear that it was an offence comprising both a physical element of conduct and a physical element of circumstance tells against the construction for which the Crown contends. If the legislature had intended to make proof of the offence*

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<sup>32</sup> See also *Chi Thanh Cao v R* [2006] NSWCCA 89

*less burdensome for the Crown it might be expected to have done so in clear terms: Krakouer v R [1998] HCA 43; 194 CLR 202 per McHugh J at 233, [63].*

*I consider that the physical element of the offence created by s 233B(1)(b) is one of conduct: the act of importing into Australia any prohibited import to which the section applies. In respect of this physical element, which consists only of conduct, the provisions of s 5.6(1) of the Criminal Code apply. Intention is the fault element.*

...and further at [74]:

*It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code to provide assistance as to how (in the absence of an admission) the Crown may establish intention by inferential reasoning in the same way as intention may be proved at common law. Intention to import narcotic goods into Australia may be the inference to be drawn from circumstances that include the person's awareness of the likelihood that the thing imported contained narcotic goods.*

Despite the amendments the law with respect to s 233B with application of the Code principles of criminal responsibility did not really change.

As a result of this apparent lack of judicial recognition of the intended construction of the elements within s 233B, a further amendment was then made to the section, commencing 28 September 2004. The further amended s 233B read:

***(1) A person commits an offence if:***

***(a) the person:***

*(i) possesses goods on board a ship or aircraft; or*

*(ii) brings goods into Australia; or*

***(iii) imports goods into Australia; or***

*(iv) possesses goods that have been imported into Australia in contravention of this Act; or*

*(v) conveys goods that have been imported into Australia in contravention of this Act; or*

*(vi) possesses goods that are reasonably suspected of having been imported into Australia in contravention of this Act; or*

*(vii) fails to disclose to an officer on demand any knowledge in his or her possession or power concerning the importation or intended importation, or bringing or intended bringing, into Australia of goods; and*

***(b) the goods are a prohibited import to which this section applies.***

*(IAAB) Subparagraph (1)(a)(i), (ii), (iv), (v) or (vi) does not apply if the person proves that the person had a reasonable excuse for doing the act referred to in that*

*subparagraph.*

*(IAAC) A person commits an offence if:*

*(a) the person:*

*(i) exports goods from Australia; or*

*(ii) fails to disclose to an officer on demand any knowledge in his or her possession or power concerning the exportation or intended exportation from Australia of goods; and*

*(b) the goods are a prohibited export to which this section applies.*

*(IAA) For the purposes of an offence against subparagraph (1)(a)(i), absolute liability applies to the physical element of circumstance of the offence, that the relevant possession is on board any ship or aircraft.*

*Note: For **absolute liability**, see section 6.2 of the Criminal Code.*

*(IAB) For the purposes of an offence against subparagraph (1)(a)(iv) or (v), absolute liability applies to the physical element of circumstance of the offence, that the prohibited imports have been imported into Australia in contravention of this Act.*

*Note: For **absolute liability**, see section 6.2 of the Criminal Code.*

*(IAC) For the purposes of an offence against subparagraph (1)(a)(vi), absolute liability applies to the physical element of circumstance of the offence, that the prohibited imports are reasonably suspected of having been imported into Australia in contravention of this Act.*

*Note: For **absolute liability**, see section 6.2 of the Criminal Code.*

*(IA) On the prosecution of a person for an offence against subsection (1), being an offence to which subparagraph (1)(a)(iv) applies, it is a defence if the person proves that he or she did not know that the goods in his or her possession had been imported into Australia in contravention of this Act.*

*(IB) On the prosecution of a person for an offence against subsection (1), being an offence to which subparagraph (1)(a)(vi) applies, it is a defence if the person proves that the goods were not imported into Australia or were not imported into Australia in contravention of this Act.*

*(IC) Any defence for which provision is made under either of the last 2 preceding subsections in relation to an offence does not limit any defence otherwise available to the person charged.*

*(2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods and the prohibited exports to which this section applies are prohibited exports that are narcotic goods.*

*(3) A person who is guilty of an offence against subsection (1) of this section is punishable upon conviction as provided by section 235.*

*(4) This section shall not prevent any person from being proceeded against for an offence against any other section of this Act, but he shall not be liable to be punished twice in respect of any one offence.*

Although again not clearly stating what were the physical elements for the offence, the further amendment to the legislation appeared to make it quite clear that there were indeed two physical elements for the offence, namely conduct being the act of importation and circumstance being the fact that the act of importing involved bringing in goods that were in the nature of narcotic goods. According to the application of the Code to the section as amended, intention would be the fault element for the conduct of importing the goods and recklessness would be the fault element for the circumstance that the thing imported was actually narcotics.

As can be seen from the above example, it can be extremely difficult to determine even the starting point for analysis of a Commonwealth criminal offence under the Code provisions.

### **Offences under the Code**

The Code also contains a range of offences that previously were covered under other Commonwealth legislation. Since the inception of the Code there has been an ongoing process of attempted harmonisation, whereby a number of offences that previously existed under other diverse legislation have been repealed and replaced by offences now contained within the Code itself. For example:

- A social security fraud offence of obtaining \$30,000 in benefits to which a person was not entitled might previously have been charged as defrauding the Commonwealth under s 29D of the *Crimes Act*. As s 29D has been repealed, the same conduct might now be an offence of dishonestly causing a loss to the Commonwealth, under s 135.1(5) of the *Criminal Code*.<sup>33</sup>
- A drug importation offence of importing 10 kilograms of cocaine would previously have been charged as an offence of importing prohibited imports, namely narcotic goods being not less than a commercial quantity, under s 233B(1) of the *Customs Act 1901*. The

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<sup>33</sup> Section 135 of the *Criminal Code Act* now provides for a greater range of dishonesty or 'fraud' type offences than previously provided for by the *Crimes Act*.

same conduct now would now be charged as an offence of importing a commercial quantity of a border controlled drug, under s 307.1(1) of the *Criminal Code*.

- An offence of having possession of \$10,000 reasonably suspected of being the proceeds of crime would previously have been charged under s 82 of the *Proceeds of Crime Act 1987*. The same conduct might now be charged as an offence of dealing with money believed to be the proceeds of crime, under s 400.7(1) of the *Criminal Code*.

### **Defences under the Criminal Code Act**

For all Commonwealth offences, Part 2.3 of Chapter 2 of the Code now provides statutory codification of general defences in respect of offences against the laws for the Commonwealth. These general defences include the standard defences available in most jurisdictions in respect of criminal offences. The relevant Divisions and provisions of the Code setting out these defences are:

- Division 7, ss 7.1 – 7.2 – (*doli incapax*) Incapacity due to Age
- Division 7, s 7.3 – Mental Impairment
- Division 8, ss 8.1 – 8.5 – Intoxication
- Division 9, ss 9.1 – Mistake of Fact/Ignorance of the Law
- Division 9, s 9.5 – Claim of Right
- Division 10, s 10.1 – Intervening Conduct or Event
- Division 10, s 10.2 – Duress
- Division 10, s 10.3 – Sudden or Extraordinary Emergency
- Division 10, s 10.4 – Self Defence
- Division 10, s 10.5 – Lawful Authority

Other specific ‘defences’ will be found elsewhere within the various statutes creating particular offences, including within the offence provisions of the Code itself.

## **Other Relevant Principles under the Criminal Code Act**

As with the statutory statement of applicable defences that may be raised in respect of offences against laws of the Commonwealth, the Code also contains a number of provisions that deal with fundamental concepts of the criminal law, such as the burden and standard of proof and extensions of criminal responsibility.

### Burden and Standard of Proof

Part 2.6 of the Code deals with the burdens and standards of proof for Commonwealth matters, under the heading - 'Proof of Criminal Responsibility'. Within that Part, the following should be noted:

- Section 13.1 – the prosecution will bear the legal (or persuasive) burden of proving every element of an offence relevant to the guilt of the person charged and of disproving any matter in relation to which the defendant has discharged an evidential burden to suggest a reasonable possibility that a particular matter exists or does not exist;
- Section 13.2 - the standard of proof is the standard of beyond reasonable doubt, unless the law creating the offence provides for some other standard of proof
- Section 13.3 – Subject to s 13.4, the burden of proof placed upon a defendant is an evidential burden only, that is, the burden of adducing or pointing to evidence (as the evidence may be adduced by the prosecution), that suggests a reasonable possibility that the matter exists or does not exist;<sup>34</sup>
- Section 13.4 – a law imposes a legal burden on a defendant where that law expressly states that the burden is a legal one or requires the

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<sup>34</sup> NB. A specific exception applies in respect of the defence of mental impairment under s 7.3, where there is a presumption that a person was not suffering from a mental impairment. Either the defendant or prosecution may displace the presumption if shown on the balance of probabilities that the person was suffering from a mental impairment – s 7.3(3).

defendant to prove the matter or creates a presumption that the matter exists unless the contrary is proved;

- 13.5 – where a defendant bears a legal burden of proof that burden is to be discharged on the balance of probabilities

### Extensions of Criminal Liability

Part 2.4 of the Code sets out a number of provisions that act to extend criminal responsibility in various circumstances. Amongst other things, the provisions cover the type of subject matter that is usually dealt with by the criminal law with respect to accessories or parties to offences. Within that Part, the following should be noted:

- Section 11.1 – provides for attempts to commit offences. Under the application of the Code, where the Crown alleges an attempt to commit an offence against the laws of the Commonwealth, the charge will allege a contravention of the relevant statutory provision together with s 11.1;
- Section 11.2 – is headed ‘Complicity and Common Purpose’. It deals with the criminal responsibility of persons who aid, abet, counsel or procure the commission of an offence;
- Section 11.3 – provides for an extension of criminal responsibility where a person employs an innocent agent to commit the offence, or a physical element of the offence;
- Section 11.4 – a person who urges the commission of an offence is guilty of the offence of ‘incitement’;
- Section 11.5 – provides for an offence of conspiracy. As with the attempt provision, where the Crown charges a conspiracy to commit a particular offence, the charge will allege a contravention of the relevant statutory provision together with s 11.5.

It should be noted that despite the heading of s 11.2, the Code does not make any express provision for the concepts of common purpose or joint illegal enterprise. As a result of this omission it has been doubted whether the Code actually allows these

principles to apply in respect of a prosecution for an offence against the laws of the Commonwealth. It would appear however, that the principle of common purpose, or acting in concert, does survive under the Code.<sup>35</sup>

### **Sentencing of Federal Offenders**

The relevant law applicable to the sentencing of a federal offender in a New South Wales court is to be found within the specific Commonwealth legislation, namely the *Crimes Act*, the applicable State procedural law, such as the *Crimes (Sentencing Procedure) Act* and the *Crimes (Administration of Sentences) Act* and the common law.

When dealing with the sentencing of a federal offender a court is required to apply to the relevant provisions of Part 1B of the *Crimes Act*. Barristers dealing with the sentencing of a federal offender must ensure they are familiar with Part 1B as it is the applicable legislation that prescribes the relevant sentencing options a court may impose and sets out, in s 16A(2), the relevant factors a court must take into account in determining the appropriate sentence.

### Sentencing Options Generally

The overriding principle to bear in mind in sentencing of a federal offender is that the court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.<sup>36</sup>

The various sentencing options available under the *Crimes Act* are a conglomeration of specific unique Commonwealth sentencing alternatives and, by virtue of s 20AB, the adoption of some specific State alternatives.

Federal offenders who are imprisoned serve their sentences in the correctional facilities of the relevant State or Territory. There are no prisons.<sup>37</sup>

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<sup>35</sup> See *R v Choi (Pong Su) (Ruling No 12)* [2005] VSC 32 (21 February 2005), per Kellam J; *R v Choi (Pong Su) (Ruling No 13)* [2005] VSC 32 (28 February 2005), per Kellam J; *R v Choi (Pong Su) (Ruling No 21)* [2005] VSC 32 (21 July 2005), per Kellam J.

<sup>36</sup> Section 16A(1) *Crimes Act*



## Dismissal – s 19B

This is the Commonwealth equivalent of s 10 of the *Crimes (Sentencing Procedure) Act*. Under s 19B, a court may:

- Dismiss the charges altogether without conviction and without further punishment – s 19B(1)(c); or
- Dismiss the charges and without conviction and place the person on a recognizance (bond) for a period not exceeding three years – s 19B(1)(d)

Similarly to s 10 of the *Crimes (Sentencing Procedure) Act*, the court may proceed under s 19B of the *Crimes Act* if, having regard to:

- “(i) *the character, antecedents, cultural background, age, health or mental condition of the person;*
- (ii) the extent (if any) to which the offence is of a trivial nature; or*
- (iii) the extent (if any) to which the offence was committed under extenuating circumstances”*<sup>38</sup>

*that it is inexpedient to inflict any punishment or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation”*

The operation of s 19B was considered in *Commissioner of Taxation v Baffsky*<sup>39</sup>, where the Court of Criminal Appeal concluded that the application of the discretion in s 19B involved two stages. The first stage is the identification of one or more of the factors identified in s19B(1)(b). In this regard, the Court noted that s 19B is narrower than s 10, as s 10 allows for consideration of

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<sup>37</sup> Section 19A *Crimes Act*. See also s 120 *Commonwealth of Australia Constitution Act*

<sup>38</sup> See s 19B(1)(b) *Crimes Act*

<sup>39</sup> (2001) 122 A Crim R 568; [2001] NSWCCA 332

‘...any other matter that the court thinks proper to consider.’<sup>40</sup> The second stage is the determination that, having regard to the factor or factors so identified, it ‘...is inexpedient to inflict any punishment’ or to reach the other conclusions for which s19B provides. The Court further held that the factors in s 16A(2) define the matters to be taken into account in determining whether the discretion should be exercised.<sup>41</sup>

#### Conditional Release After Conviction (Bond)

Pursuant to s 20(1)(a), where a person is convicted of a federal offence, the court may release the person, without passing sentence, upon the person giving security, with or without sureties, by recognizance or otherwise for a period of up to 5 years upon such conditions as the court thinks fit to specify.

This sentencing option is similar to a bond under s 9 of the *Crimes (Sentencing Procedure) Act*.

The *Crimes Act* uses the term ‘recognizance’ in a number of provisions with respect to sentencing and does not specifically use the term ‘bond’. A recognizance is simply an undertaking whereby an offender acknowledges liability to pay a specified amount of money to the Crown unless he or she complies with certain conditions. In that sense it is essentially the same as a bond under similar State or Territory sentencing regimes.

A recognizance may be supported by a surety, that is, another person who also acknowledges liability to pay a specified amount of money to the Crown if the offender does not comply with certain conditions.

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<sup>40</sup> See s 10(1)(3)(d) *Crimes (Sentencing Procedure) Act*

<sup>41</sup> At [10] – [29] per Spigelman CJ (with whom Einfeld AJ and Simpson J agreed)

## Fine

A court may impose a ‘pecuniary penalty’ (fine) for a Commonwealth offence, save where the contrary intention is expressed.<sup>42</sup> Many Commonwealth offences specify a maximum penalty in terms of a ‘fine/and or imprisonment’. In such instances, the court may impose either a fine or a period of imprisonment, or both. In other cases the maximum penalty may be expressed either as a fine (or penalty units) or a period of imprisonment.

The Commonwealth has adopted the use of the ‘penalty unit’ in order to determine the appropriate pecuniary penalty for a particular offence. A penalty unit is presently worth \$110.<sup>43</sup> More recent enactments containing offence provisions express penalties in terms of penalty units however, many statutes continue to express maximum penalties by reference either to a maximum fine or maximum period of imprisonment.

Where a fine is expressed to be the penalty the amount is to be first converted to penalty units, by dividing the fine amount proscribed by 100 to arrive at the appropriate penalty unit amount.<sup>44</sup> For corporations, the maximum penalty is taken to be five times the amount for an individual, unless the contrary is expressed.<sup>45</sup>

Where a period of imprisonment only is specified as the maximum penalty a fine may nevertheless be imposed.<sup>46</sup> The *Crimes Act* provides that a fine may be imposed according to a formula expressed as: period of imprisonment (in months) x 5. A fine imposed in such cases is an ‘and/or’ penalty and the person may receive a sentence of imprisonment as well as the fine.<sup>47</sup>

Practitioners should note that pursuant to s 4J of the *Crimes Act*, penalty limits where a matter is disposed of summarily in the Local Court are:

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<sup>42</sup> Section 4B *Crimes Act*

<sup>43</sup> Section 4AA *Crimes Act*.

<sup>44</sup> Section 4AB *Crimes Act*.

<sup>45</sup> See s 4B(3) *Crimes Act*

<sup>46</sup> Sections 4B(2) and 4B(2A) *Crimes Act*

<sup>47</sup> See s 4B *Crimes Act*.

- For an offence carrying 5 years imprisonment or less – 60 penalty units and/or imprisonment not exceeding 12 months;
- For an offence carrying more than 5 years imprisonment – 120 penalty units and/or imprisonment not exceeding 2 years.

In respect of indictable offences that may be dealt with summarily, a Local Court may hear and determine a matter where the pecuniary penalty/fine is the only proscribed penalty, provided the number of penalty units does not exceed 600 penalty units for an individual, or 3000 penalty units for a corporation.<sup>48</sup> Where a defendant is convicted in respect of such an offence, the Local Court may impose a fine:

- Not exceeding 60 penalty units for an individual or 300 penalty units for a corporation, where the maximum penalty upon indictment would be 300 penalty units for an individual or 1500 penalty units for a corporation; or
- Not exceeding 120 penalty units for an individual or 600 penalty units for a corporation, where the maximum penalty upon indictment would be 600 penalty units for an individual or 3000 penalty units for a corporation.<sup>49</sup>

Before a court imposes a fine on a federal offender, the court must take into account the financial circumstances of the offender.<sup>50</sup>

Pursuant to s 15A of the *Crimes Act*, State or Territory laws relating to the recovery and enforcement of fines apply in respect of fines imposed on a federal offender, subject to any Commonwealth law to the contrary and subject to the specific modifications provided by that section. In NSW this means the *Fines Act 1996* (NSW) will apply, subject to the s 15A modifications.

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<sup>48</sup> See s 4J *Crimes Act*

<sup>49</sup> See s 4JA *Crimes Act*

<sup>50</sup> See s 16C *Crimes Act*

## Community Service

The *Crimes Act* makes no provision for Community Service Orders, Periodic Detention or Home Detention. However, pursuant to s 20AB of the *Crimes Act*, a court sentencing a federal offender may impose a sentence involving a sentence option that the court would otherwise be empowered to impose in relation to a State or Territory offender.

Accordingly, a court may impose a Community Service Order upon a federal offender. The provisions of the *Crimes (Sentencing Procedure) Act* applicable to Community Service Orders apply to any such sentence.

## Recognizance Release (Suspended Sentence)

The *Crimes Act* does not use the term ‘suspended sentence’. Rather the *Crimes Act* refers to a ‘recognizance release order’. Pursuant to s 20(1)(b) of the *Crimes Act*, a court may sentence a federal offender to a period of imprisonment, but direct that the person be released, upon giving security of the kind referred to in s 20(1)(a), either forthwith or after the person has served a specified period of imprisonment.

When released on a recognizance release order the person must give security, of the type referred to in s 20(1)(a) that he or she will comply with certain conditions. In essence, the recognizance release is a conditional suspended sentence. It is important to observe that where a court imposes a recognizance release order the court must specify the amount of such security that is to be provided by the person upon their release on recognizance. This requirement is sometimes overlooked by a court.

The procedure of recognizance release is in effect similar to the imposition of a suspended sentence pursuant to s 12 of the *Crimes (Sentencing Procedure) Act*. Unlike s 12 however, under a recognizance release order a sentence may be partially suspended.

It should be noted that unless a court determines that it is inappropriate to do so, where a federal offender is sentenced to a period of imprisonment of more than 6 months, but equal to or less than three years, a court must make a recognizance release order and must not set a non-parole period.<sup>51</sup>

### Periodic Detention

As noted above, pursuant to s 20AB of the *Crimes Act*, a court sentencing a federal offender may impose a sentence of periodic detention. The provisions of the *Crimes (Sentencing Procedure) Act* applicable to periodic detention will apply to any such sentence.

### Home Detention

Similarly, pursuant to s 20AB of the *Crimes Act*, a court sentencing a federal offender may impose a sentence of home detention. The provisions of the *Crimes (Sentencing Procedure) Act* applicable to home detention will apply to any such sentence.

### Imprisonment

Commonwealth sentencing law acknowledges the fact that imprisonment is the most severe sentencing option available to a court and should be a sentence of last resort. Pursuant to s 17A(1) of the *Crimes Act*, a period of imprisonment may not be imposed unless the court is satisfied, after having considered all other sentencing options, that no other sentence is appropriate in all the circumstances of the case.

There is a restriction in the *Crimes Act* upon imposing a sentence of imprisonment for an offence where the offender is convicted of certain specified offences (generally those relating to fraud and dishonesty type offences under

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<sup>51</sup> Section 19AC *Crimes Act*

the Code), where the value of the money or property involved is less than \$2,000 and the person has not previously been convicted of any prior offence.<sup>52</sup>

It should be noted that where a federal offender is sentenced to a term of imprisonment of more than six months, but less than or equal to three years, the court must make an order for either the person's release on a recognizance release order and must not fix a non-parole period, unless the court is of the opinion that it would be inappropriate to do so.<sup>53</sup> Where the court imposes a term of imprisonment that is in excess of three years, the court must fix a non-parole period or make a recognizance release order, unless the court is of the opinion that it would be inappropriate to do so.<sup>54</sup>

Practitioners should be aware that where a federal offender is sentenced in respect of more than one federal offence, the court must fix one single non-parole period in respect of those sentences or make a recognizance release order.<sup>55</sup>

### The Non-Parole Period

It should be noted that there is a major difference in setting the ratio of the non-parole period to the head sentence between sentences for NSW State offences and sentences for Commonwealth matters. Section 44 of the *Crimes (Sentencing Procedure) Act* does not govern the setting of the non-parole period for a federal sentence.

The usual or customary range for the ratio of the non-parole period to the head sentence for Commonwealth matters is between 60 – 66.66%.<sup>56</sup> However, the sentencing court retains a wide discretion to vary the ratio where appropriate. In some cases the ratio has been as low as 50%. In others it has been as high as 80%. Indeed, in *R v Sweet*<sup>57</sup>, Spigelman CJ observed the fact that the discretion was wide was evidenced by s 19AB(3) of the *Crimes Act*, which permits a court in certain circumstances to not fix a non-parole period of any kind at all.

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<sup>52</sup> Section 17B *Crimes Act*

<sup>53</sup> Section 19AC(1) – (3) *Crimes Act*

<sup>54</sup> Section 19AB(1) – (3) *Crimes Act*

<sup>55</sup> Section 19AB(1) – (3) *Crimes Act*

<sup>56</sup> See *R v Bernier* (1998) 102 A Crim R 44

<sup>57</sup> (2001) 125 A Crim R 341; [2001] NSWCCA 446

Ultimately, the appropriateness of the non-parole period ultimately imposed will depend upon the merits or circumstances of the individual case and often a non-parole period of a greater or lesser proportion might be appropriate.<sup>58</sup>

### Other Sentencing Options

The possibility that a court sentencing a federal offender could impose a common law bond, deferring the passing of any sentence and ‘binding the person over’ to be of good behaviour upon the person entering into a recognizance to appear for sentence when required, appears to remain a viable sentencing option.<sup>59</sup>

However, given that courts have a statutory power, in s 20(1)(a) of the *Crimes Act* to order a person enter into a recognizance without passing sentence, any such common law power would seem redundant.

Similarly, the option of a *Griffiths* remand or *Griffiths* bond, where the court defers the passing of sentence to a specified date upon the person entering into a recognizance to be of good behaviour, remains as a sentencing option in respect of federal offenders.<sup>60</sup>

### Relevant Sentencing Factors

Pursuant to s 16A(2) of the *Crimes Act*, in addition to any other matters, a court must take into account such of the enumerated factors as are relevant and known to the court. The listed factors are:

(a) *the nature and circumstances of the offence;*

(b) *other offences (if any) that are required or permitted to be taken into account;*

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<sup>58</sup> *R v Quoc Phong Dang* [2004] NSWCCA 265

<sup>59</sup> *Devine v The Queen* (1967) 119 506 at 511.

<sup>60</sup> See *Griffiths v The Queen* (1977) 137 CLR 293 at 305



- (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;*
- (d) the personal circumstances of any victim of the offence;*
- (e) any injury, loss or damage resulting from the offence;*
- (f) the degree to which the person has shown contrition for the offence:
 
  - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or*
  - (ii) in any other manner;**
- (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;*
- (h) the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences;*
- (j) the deterrent effect that any sentence or order under consideration may have on the person;*
- (k) the need to ensure that the person is adequately punished for the offence;*
- (m) the character, antecedents, cultural background, age, means and physical or mental condition of the person;*
- (n) the prospect of rehabilitation of the person;*
- (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.*

Although it has been stated that s 16A(2) provides a checklist of matters relevant to sentencing, it is clear that the factors listed are non-exhaustive. In particular, it will be noted that s 16A(2) contains no reference to the need for general deterrence which is of central importance to the sentencing of many federal offenders.<sup>61</sup>

As with the procedure applicable in respect of a State offender in NSW, in sentencing a federal offender a court may only take into account an aggravating factor as a matter adverse to the offender where that factor is established beyond reasonable doubt.

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<sup>61</sup> See *DPP (Cth) v El Kaharni* (1990) 97 ALR 373.

Similarly, a court may only take into account a mitigating factor in favour of the offender where that matter is established on the balance of probabilities.<sup>62</sup>

### Section 16G

On and from 16 February 2003, former ss 16G and 19AG of the *Crimes Act* were repealed.<sup>63</sup> These sections previously operated to allow for a reduction in a sentence of imprisonment imposed by a State or Territory court, where that State or Territory did not provide a system for remissions of sentence. Accordingly where a person was sentenced in respect of a federal offence in NSW, the ultimate sentence (both the head sentence and the non-parole period) was reduced in order to reflect the absence of remissions in this State. The reduction usually imposed was about one-third.

The effect of the repeal of these sections of the *Crimes Act* caused some temporary uncertainty with respect to the approach that should be adopted by a sentencing court. Shortly after the repeal of those sections it was suggested that a sentencing court could look at previous sentences imposed for the type of offence concerned and apply a 50% increase.<sup>64</sup>

That type of formulaic approach has since been rejected and a court now sentencing a person for a federal offence is to determine the correct sentence without taking into account that s 16G (or s 19AG) existed and has now been repealed.<sup>65</sup> Insofar as regard is had to sentencing patterns which existed prior to s 16G caution must be employed.

### Guideline Judgments

Guideline judgments issued by the New South Wales Court of Criminal Appeal do not apply to Commonwealth matters.

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<sup>62</sup> *The Queen v Olbrich* (1999) 199 CLR 270 at 280 – 281.

<sup>63</sup> Section 4 *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002*

<sup>64</sup> *R v Kevenaar* (2004) 148 A Crim R 155

<sup>65</sup> See *R v Studenikin* (2004) 60 NSWLR 1, 147 A Crim R 1; *R v R v Mas Rivadavia* (2004) 61 NSWLR 63, 149 A Crim R 1

In *R v Wong; R v Leung*<sup>66</sup> the New South Wales Court of Criminal Appeal promulgated a guideline judgment in respect of couriers and persons low in the hierarchy in respect of drug importation offences under s 233B of the *Customs Act*. On a subsequent appeal, the High Court held that guideline judgments could not lawfully be set in connection with Commonwealth offences.<sup>67</sup>

Accordingly, the purported guideline judgment of the NSWCCA in *Wong and Leung* and the guideline judgment in respect of the discount applicable for a guilty plea, as espoused in *R v Thomson; R v Houlton*<sup>68</sup>, do not apply to Commonwealth sentences.

## **Conclusion**

As will be evident from the foregoing discussion, the criminal law relating to offences against the laws of the Commonwealth is substantial and often times difficult to comprehend. The requirement to adapt, or abandon altogether, firmly held concepts and familiar principles of criminal law from other jurisdictions is often necessary in order to understand the workings of Commonwealth criminal law in practice. However, in modern times, as the reach of the Commonwealth government extends further into fields that were never contemplated at the time of Federation, competent practice in the field of criminal law requires at least a working knowledge of federal criminal law. Although it is beyond the scope of this paper to provide anything more than a simple overview, it is hoped that foregoing discussion and the related seminar will assist in this regard.

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<sup>66</sup> 48 NSWLR 340; 108 ACrim R 531

<sup>67</sup> *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584

<sup>68</sup> (2000) 49 NSWLR 383