Commonwealth Criminal Law – An Overview

INTRODUCTION

This paper is a revised version of one that I gave with Angela Cook, now of counsel, in 2007. Responsibility for updates is mine. The paper is intended to be a guide to the main areas of Commonwealth criminal law as practised in the Commonwealth Crime Unit, and to recent developments. Many Local Court practitioners will have greater experience than us in summary Commonwealth matters.

There is a separate and complex process for dealing with fitness, acquittal because of mental illness, Local Court procedure for those with a mental illness or intellectual disability, and sentencing alternatives where convicted on indictment in Divisions 6 to 9 of Part 1B of the *Crimes Act 1914* (Cth) (Crimes Act) that is not covered in this paper. For those interested in the area of mental illness and Commonwealth matters please contact Juliana Crofts who has done a summary of the provisions.

Thanks to Kathy Bagot for contributions on social security offences, *Poniatowska*, *Hili* and *JS*.

PROCEDURE

Introduction

Section 68 of the *Judiciary Act 1903* (Cth) applies state and territory procedure to Commonwealth matters. The provision specifically refers to arrest, custody, bail, summary conviction, committal, trial on indictment and appeals. This means that the NSW *Evidence Act 1995,* the *Bail Act 1978* and *Criminal Procedure Act 1989* apply in Commonwealth matters heard in NSW courts.

Due to section 80 of The Constitution, federal defendants are tried in the State where the offence was committed.

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the office was committed, and if the offence was not committed within any State the trial shall be held as such place or places as the Parliament prescribes.

The wording of this section meant that if a federal offence occurs in an Australian **territory**, the defendant can be prosecuted in any jurisdiction. Since 2010, Legal Aid NSW has coordinated the representation of over 100 Indonesians charged with aggravated people smuggling. The offences are alleged to have occurred in the territories of Christmas Island, Ashmore Reef, Cartier Island etc.

Also, if a client is pleading guilty to a federal offence the sentence proceedings can occur in any Australian jurisdiction.

The Prosecution Policy of the Commonwealth is available at www.cdpp.gov.au/Prosecutions/Policy.

Summary or Indictable

Commonwealth offences punishable by imprisonment for a period exceeding 12 months are indictable offences: Crimes Act, section 4G. As a result, the police statement of facts and CAN almost always say ‘strictly indictable’ or ‘SI’ next to a Commonwealth offence. This is not necessarily correct due to the following.

- Section 4J(1) of the Crimes Act sets out which indictable offences can be dealt with summarily. Anything carrying a maximum penalty of 10 years or less can be determined summarily ‘with the consent of the prosecutor and the defendant’. The CDPP does not readily consent to summary jurisdiction.

- Where a Commonwealth offence carrying a maximum penalty of 5 years or less is dealt with summarily, the maximum penalty is 12 months imprisonment and/or a fine of 60 penalty units (s 4J(3)(a)). A penalty unit is $110: Crimes Act section 4AA(1).

- Where a Commonwealth offence carrying a maximum penalty of 10 years or less is dealt with summarily, the maximum penalty is 2 years imprisonment and/or a fine of 120 penalty units (s 4J(3)(b)).

Elements

The Criminal Code defines offences in terms of physical elements and fault elements. This is set out in Part 2.2. Physical elements are defined in section 4.1 (conduct, a result of conduct etc) and fault elements in section 5.1 (intention, knowledge, recklessness or negligence). Section 5.6 applies where the law creating the offence does not specify a fault element.

> (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
> (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Odgers and the *Watson & Watson* looseleaf provide useful commentaries. See attachment A in regard to *R v JS* [2007] NSWCCA 272 which is authority for the proposition that each physical element must have a fault element.

Extensions of criminal responsibility, such as complicity, are codified and may differ in some respects from the common law.

For example, the law relating to ‘attempt’ is set out in section 11.1 which provides that a person who attempts to commit an offence is punishable as if the offence attempted had been committed. However, the following subsection provides that for the person to be guilty, their conduct must be ‘more than merely preparatory to the commission of the offence’. This is a question of fact.

Importantly, section 11.3 provides that for an attempt offence, 'intention and knowledge are the fault elements in relation to each physical element of the offence attempted'. If a client is charged with possessing a border controlled drug then the fault element is recklessness but where the offence is an attempt (usually because the drugs have been removed by authorities in a controlled delivery) the prosecution must prove actual knowledge of the drugs. This can be a difficult for the Crown in the absence of admissions.

Detention After Arrest

Caution

Section 23F(1) of the Crimes Act provides that a person who has been arrested by an investigating official must be cautioned before they are questioned. The statutory caution is: You do not have to say anything but anything you do say may be used in evidence.

The provision also applies to ‘protected suspects’ who are defined in section 23B(2) as persons in the company of investigating officials who are being questioned about a Commonwealth offence, who have not been arrested, and who are not free to leave (or perceive that they are not).

Investigating official is defined in section 23B as a member of the AFP, a member of a State or Territory police service and 'a person who holds an office the functions of which include the investigation of Commonwealth offences and who is empowered by a law of the Commonwealth because of that office to make arrests in respect of such offences'. This definition is narrower than that in section 139 of the *Evidence Act 1995* (NSW) because it applies only to those with a power of arrest. Investigating official is defined in the Evdience Act Dictionary to include police and:

> (b) a person appointed by or under an Australian law (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences.

In a recent summary hearing, the Magistrate accepted the argument that SERCO officers (who are contracted to run immigration detention centres) are investigating officials for the purposes of this definition and should have cautioned a detainee suspected of assault before questioning him. [I argued SERCO officers are appointed under the *Migration Act* but this point needs more research.] The admissions were excluded as improperly obtained under section 138.

Investigation Period

- The standard investigation period is 4 hours: section 23C(4)(b)
- For a child, Aborigine, Torres Strait Islander this is reduced to 2 hours: section 23C(4)(a)
- For these two groups off offenders the period can be extended by a judicial officer once for a period of 8 hours.
- For a terrorism suspect the above investigation periods apply but the period can be extended by a judicial officer any number of times up to 20 hours: section 23DA.
- Time outs are covered by subsection 23C(7).

Other Rights

Many of the rights of people arrested for Commonwealth offences are similar to those of state suspects.

- Right to communicate with third persons: section 23G.
- Aboriginal suspects: section 23H.
- Child suspects: section 23K.
- Right to an interpreter: section 23N.
- Confessions and admissions should be tape recorded where practicable or written down: section 23V.

The following additional rights apply.

Suspects who are not Australian citizens have a right to communicate with the consular office of the country of which they are a citizen or to which they claim ‘a special connection’: section 23P. Suspects must be advised of this right and cannot be questioned before they are so advised.

All persons under arrest must be ‘treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment’: section 23Q. This reflects Australia’s obligations under articles 7, 9 and 10 of the International Covenant on Civil and Political Rights.

There is a statutory right to remain silent under section 23S.

BAIL

Due to the intricacies of the *Bail Act 1978* (NSW) (Bail Act) and the number of double negatives, this section is intended to be a rough guide only to presumptions for the more common Commonwealth offences. Many CCU clients are not Australian citizens or residents so their chances of getting bail, even where there is a presumption in favour, are often hampered by lack of community ties (and of financial support).

There is a presumption in favour of bail for **all** offences under the *Customs Act* as there is no mention of that Act in the exceptions to section 9, nor in Division 2A. Applications should always be made for clients charged with offences such as import tier 1 goods (which includes steroids and pseudoephedrine), although they may still be caught by section 9B.

There is also a presumption in favour for most other types of federal offences, such as fraud and disseminate child pornography.

For the most serious drug importation offences involving commercial quantities of border controlled drugs there is a presumption against bail under section 8A(1)(b). Most of these offences carry a maximum sentence of life imprisonment.

Under section 8A(1)(b1) there is a presumption against bail for importing marketable quantities of border controlled drugs except where the quantities are the same as those required for offences under sections of the *Drug Misuse and Trafficking Act 1985* (NSW) listed in section 8A(1)(a). In effect this means that there will be no presumption either way for an offence of import marketable quantity of border controlled drugs where the amount involved is less than the commercial quantity under NSW drug law. For the most common drugs these amounts are as follows.

Amphetamines	250 gms
Cocaine	250 gms
Heroin	250 gms

For added confusion, the Bail Act quantities bear no relationship to the quantities that govern which importation provision a defendant will be charged under. For example, under the Criminal Code (section 314.4), a marketable quantity of heroin is anything between 2 grams and 1.5 kgs.
Anything over a 1.5 kgs is a commercial quantity. There is no concept of large commercial quantity.

Many clients will be charged with importing amounts under 250 grams and may have a reasonable chance of conditional bail. It is also worth noting that the effect of section 312.1 of the Criminal Code is that the defendant is only liable for the quantity of 'the pure form of the drug'. An estimate of the pure weight will be provided in the brief after scientific analysis. Once this is received, the client's chances of bail may improve. [See further on 'pure weight on page 13 below.]

Section 9(1)(e) lists around 20 serious drug offences from Part 9 of the Criminal Code which are excluded from the presumption in favour of bail 'but only if the goods or substances concerned are alleged to be of a nature and quantity required for an offence referred to in paragraph (d)'. The quantities referred to in paragraph (d) are 'at least twice the indictable quantity' under NSW drug law as follows.

Amphetamines	More than 10 gm
Cocaine	More than 10 gm

Heroin	More than 10 gm

In practice, the presumption in favour won't apply to many clients as the amounts are so small.

SENTENCING

Crimes Act Options

Sentence Options

- Section 19B – discharge without conviction. This can be by dismissal or discharge subject to conditions, such as a good behaviour bond for up to 3 years. The factors to be considered are set out in subsection (b).

  The Court must be satisfied that it is inexpedient to inflict any punishment on the offender or that probation is expedient. This decision is to be made with regard to: (i) the character, antecedents, age, health, or mental condition of the person; **or** (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.

- Section 20 – conditional release after conviction. Good behaviour bonds of up to 5 years with various conditions relating to reparation, supervision etc.

- Section 20(1)(b) – allows for a suspended sentence if the term imposed is up to 5 years. A sentence does not have to be wholly suspended.

- Section 20AB – state sentence alternatives as prescribed, being home detention and ICOs. [Crimes Regulations 1990 (Cth), Reg 6]

Sentence Considerations

- Under section 16C – a court must take into account the financial circumstances of the person before imposing a fine.

- Section 17B of the Crimes Act restricts the use of imprisonment for property offences under $2000.

- Under section 16F– the court is required to explain the sentence.

- Under section 17A(1) and at common law a sentence of imprisonment is a sentence of last resort and in that case, the shortest sentence possible should be imposed.

  > A court shall not pass a sentence of imprisonment on any person for a federal offence, or any offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is

appropriate in all the circumstances of the case: *Parker v DPP* (1992) 28 NSWLR 282.

- Section 16E(2) permits a court to order that the sentence imposed is to commence on the date on which the offender was taken into custody.

Form 1 Equivalent

Section 16BA of the Crimes Act allows for matters to be dealt with on a Schedule, the equivalent of a Form 1. State offences cannot be dealt with on a Commonwealth Form.

Cumulative/Concurrent

Section 19 of the Crimes Act sets out the procedure when sentences are imposed for more than one federal offence. It allows for accumulation and partial or total concurrency by reference to the commencement of particular sentences, but not in the same way as for state offences.

Section 16A

Section 16A(2) provides a checklist of matters that the court is to take into account in the sentence of a Federal offender. The checklist is non-exhaustive and is in addition to 'any other matters'. The overriding principle in section 16A(1) is that the sentence or order must be 'of a severity appropriate in all the circumstances of the offence'.

The 16A(2) factors are as follows. [It is not clear what happened to subsections (i), (l) and (o).] The looseleaf includes detailed commentary on these provisions, including guidance from other states. I have included notes where CCU experience has something to add, or it warrants emphasising.

(a) Nature and circumstances of the offence

This factor can take into account both objective and subjective considerations.

(b) Other offences that are required/ permitted to be taken into account

(c) The course of conduct if the offence forms part of a course of criminal conduct (series of criminal acts of the same/ similar nature)

(d) Personal circumstances of the victim

(e) Injury, loss or damage

There is technically no prohibition to this subsection including injury/ loss/ damage to the offender, such as for example, where an internal courier has suffered an overdose.

(f) Degree to which the person has shown contrition by way of taking action to make reparation or in any other manner

Arguably the contrition needs to be demonstrable.

(g) The fact of the plea of guilty

While the NSW guideline judgement on pleas of guilty was not intended to apply to Commonwealth offences, the general principles are relevant in calculating any discount on the head sentence: *R v Bugeja* [2001] NSWCCA 196. It is permissible for a sentencing judge to identify the measure of discount allowed for a plea of guilty: *R v Markarian* [2005] HCA 25. See also the recent case of *Tiknius* V R [2011] NSWCCA 215 at para 82 which confirms this line of authority in NSW and notes that a discount for contrition 'should be separately reflected'.

(h) Cooperation with law enforcement

There are two distinct bases for a discount for assistance/ co-operation in a Commonwealth matter. These are often referred to as past and future co-operation. This subsection provides for past co-operation. Section 21E is relevant to future co-operation. A sentencing court is required to specify the discount attributed for future co-operation. Combined with a plea of guilty the maximum is accepted to be 40-50% depending on the circumstances in which the sentence will be served.

Co-operation can be distinguished from assistance and can include consent to the various searches (frisk/internal).

(j) Deterrent effect on the person

This section provides for specific deterrence only. However, at common law, the Court must also take into account general deterrence: *DPP (Cth) v El Karhani* (1990) 51 A Crim R 123.

(k) Need to ensure adequate punishment

(m) Character, antecedents, age, means, physical/mental condition

The usual leniency extended to first time offenders does not necessarily benefit people convicted of drug offences: *R v Klein* [2001] NSWCCA 120.

In *Du Randt v the Queen* [2008] NSWCCA 121 the New South Wales Court of Appeal noted that the mental health of an accused person is an important consideration pursuant to Section 16A(m) of the Act. This cannot be disregarded entirely because of Section 16A(2)(k). The Court is required to consider if the sentence would operate more onerously on an accused by reason of his or her mental condition and if

a positive finding is made to that effect, the sentence should normally be reduced.

It is well established in NSW that an offender's mental condition can have the effect of reducing their moral culpability so that matters such as general deterrence have less weight. This approach was recently confirmed by the High Court in *Muldrock v The Queen* [2011] HCA 39 at paras 50-55. See for example:

> …the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community. [para 54]

(n) Prospect of rehabilitation

(p) Probable effect of sentence on family/dependants

This section allows for the *probable* effect on family/ dependants to be taken into account. The section does not strictly require the effect to be demonstrated, the effect may be speculative.

In *R v Togias* [2002] NSWCCA 363 the Court of Criminal Appeal stated that the hardship to family or dependants had to be 'exceptional' before it could be given substantial weight for the purposes of section 16A(2)(p). This effectively reads down the literal interpretation of 16A(2)(p) to bring it into line with the common law as discussed in *R v Edwards* (1996) 90 A Crim R 510. See *Van Eeden v The Queen* [2012] NSWCCA 18 which confirms this narrow interpretation.

In *Girard* [2004] NSWCCA 170, the NSW Court of Criminal Appeal held that although exceptional circumstances are required before the effect on an offender's family will be taken into account as a specific matter leading to a substantial reduction or elimination of imprisonment, a sentencing judge can take into account the effect of imprisonment on the offender's family as part of the general mix subjective matters. See also *R v Nguyen* [2006] NSWCCA 369.

Non-Parole Period/Recognizance Release Order

For sentences under 3 years, the court must sets a recognizance release order (RRO) rather than a NPP. For sentences over 3 years the court can set a NPP or a recognizance release order: Crimes Act sections 19AB and 19AC. The RRO is an order under section 20(1)(b) and any breach is dealt with as a breach of bond.

Federal legislation does not specific a usual ratio for non-parole periods. At common law, the usual ratio between the head sentence and the NPP was 60 to 66.6%: *R v Selim* [1998] NSWSC 165; *Bernier (1998) 101 A Crim R 44;*

R v Stitt (1988) 102 A Crim R 428.. The NSW Court of Criminal Appeal held that a NPP of 75% was 'reserved for the worst category of case': *R v Cordero-Vidal* (2002) 128 A Crim R 543. The term 'special circumstances' is not used in Commonwealth legislation.

However in *Hili v The Queen; Jones v The Queen* [2010] HCA 45 the High Court made clear that a sentencing judge should determine the minimum term to be served in accordance with Part 1B of the Crimes Act 1914, together with the application of the principles identified in *Power v The Queen (1974) 131 CLR 623*, *Deakin v R (1984) 54 ALR 765* and *Bugmy v The Queen* (1990) 169 CLR 525. Those cases provide that a court must set a minimum time that justice requires the person to serve having regard to all the circumstances of the offence. The Court made clear that it was not appropriate to begin from some assumed starting point.

Where there is a mix of Commonwealth and State offences, the Court of Criminal Appeal has held that where the Commonwealth offences were the more serious, it was unfair to sentence by complying with the more severe state regime where the statutory ratio is 75%: *R v Cahyadi* [2007] NSWCCA 1. This point will need to be reargued in light of *Hili*.

The fact that an offender will be deported at the end of the non-parole period, rather than being supervised by Australian authorities, should not stop the court from setting an appropriate date for release to parole: *R v Shrestha* (1991) 173 CLR 48. This decision was subsequently given effect by section 19AK of the Crimes Act.

Parole Breaches and Revocation

There is no federal Parole Board. There is an automatic right of release to parole for sentences under 10 years. Other matters are determined by a delegate of the Attorney-General. The details of the parole process are set out in sections 19AL to 19AZD of the Crimes Act.

It seems to be quite rare for federal parole to be revoked. The process works very differently from the NSW Parole Board.

If a federal parolee is sentenced to imprisonment of 3 months or more for any fresh offence, their parole is taken to be revoked from the date of sentence under section 19AQ(1). This does not apply if the new sentence is suspended: section 19AQ(6).

Federal offenders are supervised by the probation and parole service of the relevant state or territory. If the client breaches a parole condition, the parole service sends a breach report to the Attorney-General.

If parole is to be revoked under section 19AU, the client is notified in writing and given a chance to respond, seeking that the revocation be rescinded. In reality, many of those in breach of parole won't receive the notice or be in a position to respond.

Once parole is revoked, the client accrues 'street time' until the date of their arrest, which is added to the end of their original sentence date. Once arrested the prisoner is brought before the Local Court. The magistrate is asked to issue a warrant committing the parolee to gaol and a date is set for a hearing to confirm the new sentence expiry date and to determine whether a fresh non-parole period should be set (provided there is more than 3 months left to serve). Importantly, there is a right of appeal to the Supreme Court within 21 days under section 19AY on both these points.

Release on Licence

Under section 19AP of the Crimes Act, a prisoner serving a sentence for a federal offence can be released on licence by the Attorney-General in exceptional circumstances, whether or not a non-parole period was set, after making written application. If refused, a further application can be made after 12 months. Once released, the person may be supervised for a stated period. If serving a federal life sentence, the person must be supervised for at least 5 years.

In *Re Antoun El Hani* [2007] NSWSC 330 the Supreme Court held that post-sentence assistance to authorities cannot be taken into account by the Court of Criminal Appeal on the question of whether there was an error in the sentencing process. Such assistance is appropriately dealt with by the Commonwealth Executive, such as by release on licence. [In this case, Mr El Hani had not given a section 21E undertaking to give future assistance so his sentence had not be reduced. He gave assistance to overseas authorities after his initial sentence was refused.]

Use of Comparative Cases

In the 2010 decision of *Hili* referred to above, the High Court criticised the concept that past sentences can establish an appropriate range for future sentences in Commonwealth matters and has emphasised that the sentencing task should focus on the factors set out in Pt 1B of the *Crimes Act* (Cth). The majority stated at [54] (footnotes have been omitted):

> In *Director of Public Prosecutions (Cth) v De La Rosa*, Simpson J accurately identified the proper use of information about sentences that have been passed in other cases. As her Honour pointed out, a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. As her Honour said: "Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts." But the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence". Past sentences "are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, *and stand as a yardstick against which to examine a proposed sentence*" (emphasis added). When considering past sentences, "it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned".

The High Court did, however, allow some use of past sentences, provided they were approached with sufficient care. At para [53] the majority stated:

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

CDPP v De La Rosa [2010] NSWCCA 194 was a Crown Appeal against a Commonwealth sentence. It was a decision of a five-judge bench. Part of the basis for the CCA's decision to dismiss the Crown appeal was that it had not made out its appeal because the Crown had not provided sufficient interstate cases. The Court presented its own table of interstate sentencing decisions, which is lengthy and attached to the back of the judgement. The comment by the CCA clearly also applies to sentencing at first instance. All judges emphasised this. The comments are put succinctly by McClellan J at 193:

> It is a mistake to assume that this Court should confine its consideration to New South Wales decisions when considering Commonwealth offences. State courts must endeavour to achieve consistency in sentencing patterns. There should be consistency in the approach taken across all State courts when sentencing for Commonwealth offences.

Repealed Section 16G

In January 2003, section 16G of the Crimes Act was repealed. It effectively required the court to take account of the absence of remissions in NSW and reduce the head sentence by around one third.

The transitional provisions in the amending legislation indicated that the amendments applied to any sentence imposed after the commencement of the amendment whether or not the offence concerned was committed before the amendment commenced: *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act* 2002, section 4.

The CDPP often includes material on this section in their submissions. It's only real ongoing relevance is in terms of JIRS statistics – be sure to refer to ranges established 'after the repeal of section 16G'.

DRUG OFFENCES

Criminal Code Offences

In late 2005, the importation offences formerly found in the *Customs Act 1901* (Cth) were moved to the Criminal Code. The elements of the offences are largely similar but some of the terminology has changed. The old offence of import trafficable quantity of a prohibited import (namely heroin) under section 233B, for example, has become import marketable quantity of a border controlled drug under section 307.2.

Section 307.2(4) provides that a person will not be guilty of importation if 'the person proves that he or she neither intended, nor believed any other person intended, to sell any of the border controlled drug'. The standard of proof is the balance of probabilities.

Drugs are divided into border controlled drugs, border controlled plants, border controlled precursors, and controlled drugs/plants/precursors. 'Controlled drugs' is a different name for the same drugs as the import provisions but in different circumstances, for example, when trafficked across state borders. The respective quantities vary. A marketable quantity of heroin for an importation is anything between 2 grams and 1.5 kilograms but for trafficking from Victoria to NSW, a marketable quantity is anything between 250 grams and 1.5 kilograms. [Criminal Code Division 314.]

As part of the Model Criminal Code project, many drug offences such as trafficking controlled drugs in division 302 now 'duplicate' state offences. [The constitutional power relied on was external affairs.] Informal advice from the Attorney-General's Department indicates that it was intended that these would be used only to complement the 'traditional' federal offences. For example, where someone is arrested for attempting to possess prohibited import and is also found in possession of some cannabis, a Criminal Code offence can be laid instead of a charge under the DMTA.

Duress

Under section 10.2 of the Criminal Code, duress is a complete defence. It arises commonly in instructions on drug importation matters but is notoriously difficult to establish, particularly as there are usually (objectively) multiple opportunities to report the threat to and seek protection from airline staff, airport authorities and the like.

Duress is frequently raised in mitigation on sentence, particularly as part of establishing that the defendant was a 'mere courier' and in submissions on motivation for the offence as part of the assessment of the objective seriousness. The case law on so called 'non-exculpatory duress' is usefully summarised in the recent decision of *Tiknius v R* [2011] NSWCCA 215

Pure Weight

In Commonwealth matters, the pure weight of the drug (as opposed to the overall weight of the seizure) is the relevant weight for all proceedings: Criminal Code Act section 312.1; *R v King* (1978) 24 ALR 346.

A Commonwealth drug brief will ordinarily include a statement from a Federal Police Officer in the physical evidence team (PET) and a statement from the National Measurement Institute (NMI). The PET will deconstruct a package/ concealment of drugs and obtain an overall weight of the powder/ liquid. A sample of the powder/ liquid will be sent to the NMI who in turn test the purity of the sample. Using the figure of the purity, the PET then calculate the pure weight of the import.

Evidence of the analyst is admissible as *prima facie* evidence if the analyst certificate complies with the provisions outlined in section 233BA *Customs Act 1901* (Cth). It is worth having a thorough look at the requirements of this section.

If the import is in a form other than powder (such as narcotics concealed within gel), it may be worth considering whether the NMI has any approved standard procedure(s) for the extraction, testing and estimating of the purity of the narcotic.

Sentence Cases

Unfortunately, the well established principle for offences relating to the importation of narcotic goods is that a custodial sentence is to be imposed except in truly exceptional circumstances.

> Non-custodial sentences for this offence must be restricted to truly exceptional cases: *R v Wong and Leung* (1999) 48 NSWLR 340 at 104 per Spigelman CJ.

Truly exceptional circumstances may be difficult to establish given the usual impoverished/unfortunate/disadvantaged background of the average courier or drug mule.

In determining the culpability of the offender, it is desirable where appropriate for the court to determine the position the offender held in the overall criminal enterprise (such as courier v principal): see *R v Bimahendali* [1999] NSWCCA 409 and *R v Wong and Leung* (1999) 48 NSWLR 340. In *R v Olbrich* (1991) 199 CLR 270 at 19 the High Court cautioned:

> Further, it is always necessary, where one of several offenders are to be dealt with in connection to a single importation of drugs, to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a 'courier' or principal must not obscure the assessment if what the offender did.

However, it may be a mitigating factor on sentence if the offender is a courier or low in the overall hierarchy of the drug importation syndicate. The onus is on the offender to establish, on the balance of probabilities, that he/ she was less than a principal. The Crown must establish that an offender was a principal beyond a reasonable doubt: *R v Olbrich* (1991) 199 CLR 270.

The weight, purity and value of the drugs are relevant in assessing the seriousness of the offence and the appropriate maximum penalty. However, it is one of many factors to be taken into account. The Court of Criminal Appeal in NSW has cautioned against giving too much emphasis in the sentencing process to the weight, street value and purity of the drug. The need for great care arises from a recognition by the courts that few, if any, offenders who are couriers are aware of the quantity, purity or street value of the drug; nor have any control over those factors.

Though the NSW Court of Criminal Appeal decision in the Guideline Judgement of *R v Wong and Leung* (1999) 108 A Crim R 351 was the subject of criticism by the High Court in *Wong* (2001) HCA 64, the ranges of sentences discussed by the Court of Criminal Appeal in *Wong and Leung* have continuing relevance as they were based primarily on pre-existing patterns of sentencing for drug offences: *R v Paliwala* (2005) NSWCCA 221 at 27; *R v Taru* (2002) NSWCCA 391; and *R v Bezan* (2004) 147 A Crim R 430.

Australian Customs and Border Protection Service Powers

Questioning and Arrest

The majority of import cases rely significantly on the evidence of Customs Officers (and, less often, quarantine officers).

Under section 195 of the *Customs Act 1901* (Cth), an officer can question any passenger as to whether that person, or any child accompanying them, have any dutiable good, excisable goods or prohibited goods on their person or in their baggage. It is a penalty notice offence not to answer these questions.

In practice, many Customs Officers ask extensive questions of passengers when searching their baggage, often related to their reasons for travel, length of stay, purpose of travel etc.

It is possible to argue that once a passenger becomes a suspect, evidence of statements or admissions to Customs Officers should only be admissible if they have appropriately cautioned. Section 23F(1) of the Crimes Act provides that a person who has been arrested by an investigating official must be cautioned before they are questioned. Customs officers come within the definition of investigating official in section 23B.

Under section 210 of the *Customs Act 1901* (Cth) Customs Officers and police may arrest without warrant any person who they have ‘reasonable grounds’ to believe is guilty of committing import offences (and a few others offences).

Personal Searches

Customs and quarantine law gives Officers broad powers to search baggage and parcels for excisable or prohibited items. The powers to search passengers are subject to certain protections.

- Section 219L – detention for frisk search to look for prohibited goods.
- Section 219Q – detention for external search to look for prohibited goods.
- Section 219S – where a detention officer or a police officer suspects on reasonable grounds that a person is ‘internally concealing a suspicious substance’ they may detain the person to obtain their consent to a search or to make an application under section 219T if they do not consent, or cannot because they are ‘in need of protection”.

> [Section 4(20) defines the latter as a person under 18 or 'in a mental or physical condition (whether temporary or permanent) that makes the person incapable of managing his or her affairs' – section 219X.]
> Most clients consent to the search once the AFP tell them they can be detained for 48 hours for an application to be made to a judicial officer.

'Detention officer' is defined in section 4 as a customs officer who has been declared to be so under s 219ZA(3). [The CEO of Customs declares a class of officer to be declared for the purposes of Subdivision C. In practice this means a senior customs officer/customs officer level 2.]

When a person has consented to an internal search or has been detained for one, a detention officer or police officer can ask the person questions that are reasonable to determine whether the detainee is internally concealing a suspicious substance or questions about a substance found concealed. But the person must be cautioned under s 219W(5) first.

An internal search must be carried out by a medical practitioner and is done by way of CT scan at Hospital to determine whether the suspect has a foreign objects internally concealed.

The detainee has the right to an interpreter if not able to communicate with 'reasonable fluency' in the English language unless the detainee and an official can communicate in a language other than English or 'satisfactorily by any other means' (section 219ZD).

[Many passengers seem to be flagged for search under the Customs Pass Alert System based on a variety of information, including frequent travel to 'suspect' ports in South-East Asia, travelling in the company of a suspect passenger, paying cash for an airline ticket, and changing travel arrangements at short notice.]

SOCIAL SECURITY OFFENCES

General

It has long been established principle that a custodial sentence should be imposed for social security fraud unless there are 'very special circumstances' justifying a lesser order: *R v Purdon* NSWCCA, unreported, 27 March 1997.

The appropriateness of a suspended sentence for social security fraud was discussed by Howie J in *R v Hinton* [2002] NSWCCA 405 at [32]:

> The question of whether an particular sentencing alternative, including a suspended sentence, is an appropriate or adequate form of punishment must be considered on a case by case basis, having regard to the nature of the offence committed, the objective seriousness of the criminality involved, the need for general or specific deterrence and the subjective circumstances of the offender.

A nil criminal history carries less mitigating weight with ongoing offences: *R v Phelan* (1993) 66 A Crim R 446. However, it remains open to the Court to take this into account on sentence, particularly when assessing the likelihood of recidivism and the issue of individual deterrence.

Social security fraud committed before 24 May 2001 is charged as make false representation under the now repealed section 29B of the Crimes Act (2 year maximum) or as general fraud under repealed section 29D (5 year maximum). Offences after that date are charged under the general dishonesty provisions in section 135.1 of the Criminal Code (5 year maximum).

Poniatowska

In *CDPP v Poniatowska* [2011] HCA 43 Ms Poniatowska had been sentenced for Centrelink fraud. She was working and claiming Centrelink benefits. Importantly, she had never told Centrelink *anything* about her work, that is, it was a case of *pure omission*. The section under which she was charged, section 135.2(1)(a) of the *Criminal Code*, required that the prosecution prove that she intentionally did an act or intentionally omitted to perform an act. The High Court considered s 4.3 of the *Criminal Code* which states

> Omissions
> An omission to perform an act can only be a physical element if:
> (a) the law creating the offence makes it so; or
> (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

The High Court held that one could only be guilty of an offence committed by omission where the law created a *positive duty* to do something. There was no positive legal duty on her to report her income to Centrelink, so therefore she was not guilty of the offence. This would apply to other cases where the offence is alleged to have been committed by omission alone.

However, there are a number of limitations to keep in mind.

First, this reasoning only applies in cases of *pure omission*. If Ms Poniatowska had said (or written) *something* to Centrelink there would not be an omission, but a positive act (or a positive act and an omission, so *Poniatowska* wouldn't apply). An example of a positive act would be falsely reporting that one wasn't working, or reporting only part of one's income to Centrelink. Pure omissions will be rare. To work out whether you are looking at a *pure omission* we suggest you do this: draw up a chronological table. Start with the beginning date on the charge and end with the finishing date on the charge. Type up all the bits of evidence that relate to what your client has done and what other people have done between those dates. Can you find any positive acts or positive statements or representations by your client? If so, it is not a case of pure omission.

Secondly, in relation to this offence (and some other Centrelink charges) the Parliament has now created a positive duty to report income, so *Poniatowska* is no longer any defence in the Centrelink situation. (The positive duty is contained in *Social Security (Administration) Act 1999* (Cth) s 66A.)

This positive duty to report income is expressed to be retroactive, applying to all omissions to report income since 20 March 2000. While retroactive criminal legislation seems very draconian, *Polyukhovich v The Queen (War Crimes Act Case)* (1991) 172 CLR 501 is regarded as authority that retroactive criminal legislation is not unconstitutional (at least not in these circumstances). One issue that may arise in a prosecution where the Crown relies on s 66A operating retroactively is whether the Crown can prove the requisite fault element – as how can one know or believe that they are not entitled to the payment of the Centrelink benefit if the positive duty was legally created after the event? However, provided the client was sent, received, read and understood the Centrelink form letters that told them (incorrectly!) that they were required to report income to Centrelink then we think that this is enough because at the time they omitted to report income to Centrelink they believed (albeit mistakenly) that they had a legal duty to do so. This really seems to take us back to the old, pre-*Poniatowska* situation in which Centrelink matters were often about whether the person got or understood Centrelink's fairly incomprehensible letters.

If you believe you have a matter that warrants a *Poniatowska* defence despite the legislative amendment, it may be worth emailing Gary Corr at the Public Defenders who has given Legal Aid NSW an advice on this.

General Deterrence and Full Time Imprisonment

In these matters the bench and the CDPP will invariably submit that general deterrence should be given particular importance because of the difficulty of detecting the offences, and that full time imprisonment is required except in very special circumstances. *Purdon* is discussed above. The rationale for the rule in *Purdon* was that (when that case was decided) Centrelink offences were difficult to detect, and an emphasis on general deterrence was said to be necessary to address this.

However, since *Purdon* was decided technology has advanced rapidly and Centrelink offences are now very easily detected through software that matches benefits with information from the ATO. There are two reasons why *Purdon* may now be questioned.

Queensland authority has questioned the rationale which underlies cases like *Purdon.* This argument was very well expressed recently by Atkison J, with whom Holmes JA agreed, in *R v Newtown* [2010] QCA 10 at [29] to [33]. This

decision is quoted at length because it explains the technology now used.

> [29] Offending of this type is serious and often regarded as difficult to detect. The public interest relies on the honesty of those who receive benefits from the Commonwealth. In *R v Hurst*; *ex parte Cth DPP* [2005] QCA 25 at p 7 McMurdo P, with whom Mackenzie and Chesterman JJ agreed, observed:
>
> > "The honesty of those claiming under the welfare system is essential to its successful operation. Offences like these are hard to detect. They lead to public loss of confidence in the integrity and worth of the social security system and create a risk of demonising the genuine and needy in our society who require such assistance from time to time. Those like Mr Hurst, who intentionally abuse the system unlawfully obtaining benefits of more than $70,000 over eight years, must expect to be sent to prison for a substantial time as a deterrent not just to them but to others who might be tempted to commit similar offences. Those principles are well established: compare *R v Wright* (1994) 74 A Crim R 152 and *R v Holdsworth* CA No. 94 of 1993, 22 June 1993."
>
> Because of electronic data matching between the records held by the Australian Tax office (ATO) and Centrelink, it is now much easier to detect offending of the type in this case where the applicant did not use a fraudulent identity. She used her own name and took up employment where she would become a taxpayer. If data matching took place between the two government departments, her offending was almost certain to be detected.
>
> . . . [E]vidence shows that, as well as other sharing of information on a weekly or other regular basis, data matching is carried out between records relating to PAYG taxpayers and their partners and recipients of Commonwealth benefits twice a year. Where anomalies are detected between the income declared to Centrelink and the ATO, the details are loaded into an electronic integrated review system (IRS) and reviewed. The Program Protocol for this data matching was lodged with the Privacy Commissioner in May 2004. The protocol shows that depending on the result of the IRS review, further action may be taken, including reduction or cancellation of payment, raising of a debt and where warranted, prosecution.
>
> [31] The PAYG electronic data matching program was first introduced on a pilot basis. The pilot project, trialled in parts of the country, led to almost $16,000,000 in savings and so a permanent program of data matching was introduced on the lodging of the Program Protocol in May 2004. Paragraph 9.3 of the Program Protocol sets out its effects on compliance and deterrence caused by the increased likelihood of detection:
>
> > "The community's compliance with the law increases when it knows that Centrelink has effective controls in its system to detect incorrect payments and fraud. That is, people claiming or receiving income support payments are more likely to comply voluntarily with the law if they know that:
> >
> > - there is a high probability that incorrect payments will be detected;
> > - they will be required to repay any debt; and
> > - they may be prosecuted if they attempt, by fraud or misrepresentation, to obtain payments to which they are not entitled."

> [32] It appears therefore that offending of the kind committed by the applicant in this case is no longer as difficult to detect as it once was. As the protocol recognises, the likelihood of detection has a significant deterrent effect.
>
> [33] Moreover, as the respondent submitted, the need for deterrence should be appropriately balanced against circumstances pertaining to an offender. In *Oag*, the Court observed:1
>
>> "The need for deterrence must be balanced against the applicant's personal circumstances, including his remorse and the problems which his family were experiencing at the time."

Their Honours found that in a $50,379 fraud conducted over 4 years by falsely under-declaring or not declaring income a sentence of two years' imprisonment with only three months to serve was sufficient. They stated (at [38]) "The need for deterrence is now also met by the likelihood of detection."

While this is a Queensland decision, *CDPP v De La Rosa* [2010] NSWCCA 194 at [194] and *Hili v The Queen; Jones v The Queen* [2010] HCA at [57] make clear that reference to interstate sentencing cases is essential in Commonwealth matters, and that the NSWCCA should strive for interstate consistency whenever possible. (In *de la Rosa* the NSWCCA found that the Crown had not proved its case on a Crown appeal as the CDPP did not provide adequate interstate comparative cases.) Interstate decisions are, in any case, relevant as there is a single common law in Australia, not a separate common law for each state (*Lipohar v The Queen* (1999) 200 CLR 485) and the High Court has stated intermediate state courts should follow the appellate decisions of other intermediate state courts unless they are clearly wrong (*Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey, Gaudron JJ).

The second reason to question the rule in *Purdon* is comments from the High Court in *Hili* about the nature of the sentencing exercise. In *Hili* the High Court emphasised that in federal sentencing the focus must remain on the statutory provisions in Pt 1B, and especially s 16A. The majority stated at [25]:

> Section 16A accommodates the application of that and some other judicially developed general sentencing principles because those principles give relevant content to the statutory expression "of a severity appropriate in all the circumstances of the offence" used in s 16A(1), as well as some of the expressions used in s 16A(2), such as "the need to ensure that the person is adequately punished for the offence". But s 16A does not permit the making of generalisations across all forms of federal offence about how individual sentences are to be fixed. To attempt such a generalisation would depart from the injunction that the sentencing court "must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence" [scil. the *particular* offence for which a sentence is to be imposed]. (emphasis added).

Such a firm rule as was expressed in *Purdon* seems to be inconsistent with section 16A, and also section 17A which requires the Court to consider whether any other sentence is appropriate before imposing a sentence of imprisonment.

Delay

Even with prosecutions arising from ATO data-matching, there is an ongoing pattern of delay in initiating proceedings. Often there is no explanation for the delay. Almost always, the alleged offender has not contributed in any way to the delay.

Delay between the date of the offence and the date of sentence is a relevant factor for the court to consider. It is relevant to the extent that it requires the sentencer to exercise flexibility in the approach to sentencing which may in some circumstances result in leniency : *R v Todd* [1982] 2 NSWLR 517.

It is relevant, as a mitigating factor, if a person has rehabilitated himself/ herself between the date of the offences and the date of sentence: *R v V* NSWCCA, unreported, 28 February 1998; *R v Karipidis* [2003] NSWCCA 168.

The following quote is also useful.

> The reason why delay is to be taken into account when sentencing an offender relates first to the fact of the uncertain suspense in which a person may be left; secondly to any demonstrated progress of the offender towards rehabilitation during the intervening period; and thirdly, to the fact that a sentence for a stale crime does call for a measure of understanding and flexibility of approach: *R v Blanco* [1999] NSWCCA 121 Woods CJ at CL para 16.

Delay of 2 years and 8 months between the offender making admissions and a prosecution being commenced was a significant factor in the overturning of a custodial sentence for social security fraud by the Court of Criminal Appeal: *R v Winchester* NSWCCA unreported, 28 February 1992. A section 20(1)(a) conviction and conditional release was imposed instead.

> Where an offender of the present type makes immediate admissions of guilt, but is permitted…for a substantial period to make regular repayments of the amount involved in the offence before any action is taken to prosecute the offence, what may be required by way of punishment if the prosecution had been instituted speedily is no longer necessarily required when the prosecution is, without any valid explanation, brought on tardily. [Para 7.]

Comparative Cases

R v Aller [2004] NSWCCA 378.

A two year sentence suspended on entering a 5 year bond was upheld. The defendant defrauded $146 706 over 18 years by claiming benefits in her own name and in a false name. Mrs Aller was 77 at the time of sentence and had the care of an invalid son.

R v Hart [1999] NSWCCA 204

A sentence of 300 hours community service was upheld. Mrs Hart was overpaid $75 597 over a ten year period because she failed to disclose her husband’s superannuation payments. She was 74 at the time of sentence and

in poor physical health. Judge Sperling noted that: '[T]he community service order will involve a significant degree of hardship in this case in view of the respondent's ailments and disabilities.' [Para 14.]

Judge Sperling characterised the offences under 29B as follows.

> The amount of money involved is substantial but the maximum penalty prescribed places the offence in the lower range of crimes of dishonesty, as I have said. It is also to be recognised that the respondent's non-disclosure was much less culpable than the kind of reported case where there is repeated positive misrepresentation, such as the use of multiple false names. [Para 14.]

R v Killen [2005] NSWCCA 17

A 21 month sentence suspended on entering a bond of the same length was upheld for an offence under section 29D of the *Crimes Act*. Mrs Killen continued to claim a sole parent pension over a period of 9 years when her child was no longer living with her and was overpaid $102 321. The offender was 39 at the time of sentence and had severe medical difficulties including alcoholism and partial paralysis.

R v Hull NSWCCA, unreported, 6 October 1994

A sentence of 3 years imprisonment to be suspended after 18 months was overturned after a severity appeal. 12 months periodic detention was imposed. Mrs Hull continued to claim a widow's pension after remarrying and was overpaid $76 000. There were extreme subjective circumstances.

An accumulation of subjective factors can make a case 'very exceptional'.

A table of social security fraud sentence decisions since 2005, prepared by Kathy Bagot, is at attachment B.

FRAUD OFFENCES

General

In *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, the Court held that: as well as the factors identified in section 19B itself, the court may take into account the matters set out in 16A when deciding the issue of expediency; and section 19B is generally not appropriate to revenue offences.

Comparative Cases

Appeal courts have repeatedly held that in cases of serious offences of defrauding revenue, general deterrence is of great importance and offenders should receive full time imprisonment: *DPP v Hamman* NSWCCA, unreported, 1 December 1998; *McKenna v R*[1999] NSWCCA 358; *R v Caradonna* [2000] NSWCCA 398. However, it is worth noting that these cases involve sophisticated fraud schemes motivated by greed dealt with on indictment.

R v Martin NSWCCA, unreported, 16 February 1990

Mr Martin defrauded the Department of Defence of $46 139.38 over a period of 13 months by falsely directing leave and compensation payments into his own bank account. Mr Martin had no criminal history and made immediate admissions to the offence when confronted with the allegations. He had paid the money back in full by his sentence hearing. The 3 year good behaviour bond under section 20 was upheld on appeal. In the particular context of a Crown appeal, the Court of Criminal Appeal found that the special subjective circumstances of the offender did not warrant a custodial penalty.

R v Brillo NSWCCA, unreported, 14 May 1997

A severity appeal by Ms Brillo was dismissed. She was sentenced to a maximum of 3.5 years with 18 months to serve for 10 counts of fraud (148 matters on a form) to which she had pleaded guilty. The offences took place over 13 months and netted over $188 000 through altering business cheques. Ms Brillo's crimes involved a breach of trust. She was 21 years old at the time of the offences and had no previous convictions.
R v Montesinos [2002] NSWCCA 470

Ms Montesinos was convicted of 15 counts of use false instrument after trial. She had deposited cheques drawn on her employer's business account into her own bank accounts. A Crown appeal against the 2 year suspended sentence was dismissed. The Court of Criminal appeal noted that while the sentence was lenient, the sentencing judge had properly taken account of the offender's history of serious depression.

R v Finn [2002] NSWCCA 86

A sentence of 3 years with a non-parole period of 2 years was reduced to an overall sentence of 2 years with 16 months to serve. Mr Finn had pleaded guilty, although not at the earliest opportunity in the opinion of the sentencing judge, to 6 counts of make false instrument (17 counts of a form). The frauds involved fake NRMA motor vehicle claims over a period of 3 years. The offender's direct benefit was $12 800 but he facilitated fraud over $700 000.

FOREIGN NATIONAL STATUS/ IMMIGRATION ISSUES

Immigration status may be relevant in a numbers of ways.

- Foreign national status is likely to impact upon the custodial conditions of a prisoner. A foreign national may be prevented or limited in progressing through the classification system. In some cases it may be argued that this is a mitigating factor on sentence.

- Clients who do not have means of support and wish to have the CDPP provide for their subsistence may make an application to the CDPP for subsistence payments. The application is made by way of a statutory declaration addressing specific criteria such as financial and domestic

circumstances. Clients in custody on remand are regarded as having a means of support and subsistence payments will not be made.

- At the expiration of the NPP (and upon automatic release to parole if the head sentence is less than 10 years or) a foreign national is ordinarily deported. The client will ordinarily be taken from Corrective Service custody to Immigration custody whilst awaiting deportation. If the client consents to deportation the process will be faster.

- Defendants who are Australian residents but not yet Australian citizens can face deportation proceedings after conviction.

- Foreign national status associated with harsher custodial conditions (distanced from family/ friends/ support, NESB/ unable to access various programs) may be a reason to vary the usual ratio between the head sentence and NPP.

- A useful and plain English Information sheet on 'Deportation and Cancellation Information for Prisoners' can be obtained from the Immigration Advice and Rights Centre website www.iarc.asn.au

PROCEEDS OF CRIME

It is LAC policy that any matter involving funds restrained under the federal *Proceeds of Crime Act* 2002 should be assigned as the Commission can seek payment of its costs from the restrained funds. At the time of writing, any application for Aid in a Proceeds of Crime matter should be referred to Steven Doumit for determination.

Frith Way
Senior Solicitor
Commonwealth Crime Unit
August 2012

Attachment A – R v JS

R v JS [2007] NSWCCA 272 is an older case, but it is being applied currently to argue that the prosecution has a wider duty of proof of fault elements.

Judge Howie, in a paper delivered to the PDs conference in 2010 sets out the (fairly complex) law in *R v JS* better than I could so I will quote him:

> 10 In *R v JS* [2007] NSWCCA 272 the offence with which the Court was concerned was the intentional destruction of data that might be required in judicial proceedings, an offence contrary to a provision of the *Crimes Act* (Cth). An element of the offence was that the accused knew that the data being destroyed might be required in judicial proceedings. A subsection stated that for the purposes of the section the proceedings were to be Federal judicial proceedings. The fact that the proceedings were in the Federal jurisdiction was what gave the Commonwealth jurisdiction to create the offence. One might have expected to find such a physical element of circumstances to carry with it a fault element of absolute liability. Other provisions in the Act did just this. But not this one.
>
> 11 The trial judge held that it was an element of the offence that the proceedings were Federal judicial proceedings and that, as this was a physical element of circumstance and as there was no fault element stated, the default element of recklessness applied. As the Crown could not prove that the accused either knew or was reckless as to the Federal nature of the proceedings the charge must fail. This was despite the fact that under the common law interpretation of the same provision of the *Crimes Act* creating the offence, the Crown would not have had to prove knowledge or recklessness on the part of the accused as to the nature of the proceedings. It had been held that the issue of whether the proceedings were Federal in nature would have been a question of law for the judge to determine. A five Judge Court upheld the trial judge's decision.
>
> 12 Spigelman CJ stated:
>
>> 149 The general approach to interpretation of the Code is well established. (See *Bank of England v Vagliano Bros* [1891] AC 107 esp at 144-145; *Brennan v The King* (1936) 55 CLR 253 esp at 263; *Robinson v Canadian Pacific Railway Co* [1892] AC 481 at 481-487; *Vallance v The Queen* (1961) 108 CLR 56 at 74-76; *R v Barlow* (1997) 188 CLR 1 esp at 18-19 and 31-32.) There may be occasions on which it is appropriate to refer to the common law, e.g. where the Code employs a technical legal term or where an interpretation is well established or in the case of patent ambiguity. (See e.g. *Sungravure Pty Ltd v Middle East Airlines Airliban S.A.L.* (1974) 134 CLR 1 at 22; *Stuart v The Queen* (1974) 134 CLR 426 at 437; *Lee v R* [2007] NSWCCA 71 at [19]-[26].)
>>
>> 150 When interpreting a Code all of the principles of statutory interpretation are applicable. The language used must be construed in its context. The fact that the Code creates criminal offences will often be determinative e.g. to

> decide that references to reasonable care import a standard of criminal negligence. This may be a specific example of patent ambiguity in a Code, arising when the words are construed, as they must be, in their context in the first instance and not merely after some ambiguity is discerned in the words of the specific offence. (*CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408; *Project Blue Sky* supra at [69].)
>
> ………………..
>
> 152 No provision of the Code states that a physical element which is a question of law for the judge cannot have attached to it a fault element which the jury must decide. The Code makes no direct distinction between questions of law and questions of fact. It does, however, make express provision for decoupling a specific physical element, relevantly a question of law, from any fault element. This can be done by either providing that no fault element applies to that physical element (under s3.1(2)) or by specifying that strict or absolute liability applies to the offence (under s6.1 or s6.2). Neither was done here.

13 It did not matter in this case that amendments were made to the *Crimes Act (Cth)* to apply the principles of the *Code* with the expressed intention of preserving the law as it was before the *Code* was enacted. There was an oversight in that the element that the proceedings were Federal judicial proceedings should have been made an element of absolute liability. It is worth noting what the Chief Justice said about the second reading speech that introduced the amendments of the Crimes Act to bring it in to line with the Code.

> 141 The Appellant submitted that the 2001 legislation, which applied the *Criminal Code* to the relevant *Crimes Act* provisions did not intend to alter the operation of s39 from its prior operation at common law. The Appellant relied on express statements by the Minister in the Second Reading Speech and in the Explanatory Memorandum, asserting that no change was intended. Such assertions are rarely useful and often have been rejected in the course of interpretation by the courts.
>
> 142 The task of the courts is to interpret the words used by the Parliament. It is not to divine the intent of the Parliament. (See *State v Zuma* (1995) (4) BCLR 401 at 402; (1995) 2 SA 642; *Matadean v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *Pinder v The Queen* [2003] 1 AC 620.) The distinction between interpretation and divination is an important one. The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say. (See *R v Bolton ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne & Frew v Australian Airlines Limited* (1995) 185 CLR 410 at 459; *Wik People v Queensland* (1996) 187 CLR 1 at 168-169; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Limited* (2003) 218 CLR 1 at [10].) At times that will require the court to refuse to implement an express statement as to what the Parliamentary intention is. (As in *R v Bolton ex parte Beane* supra.)
>
> 143 Statements of the character that the drafter of the legislation did not intend to change the prior operation of the law are rarely, if ever, useful, let alone entitled to significant weight. Such an assertion makes two assumptions. First, that the author knows completely and precisely how the previous provision has been and will be applied. Secondly, that the author has stated the new provision with indisputable comprehensibility. Each assumption reflects a conceit to which drafters of texts are prone when

> appraising their own work. Each assumption is rarely, let alone generally, applicable.

14 One of the important aspects of the case was that the Court rejected the submission that there were categories of fault elements that arose by implication and were not specified in the provisions of the Code. The Chief Justice stated:

> 126 In its submissions to this Court the Appellant sought to draw a distinction between different kinds of elements of an offence. It invoked a distinction between "substantive" and "definitional" characteristics of a physical element of an offence, suggested by the author of a text on the Code. (See Stephen Odgers *Principles of Federal Criminal Law,* Law Book Co, Sydney, (2007) at p22 par 4.1.390.) It also invoked a similar distinction, drawn by the author of another text, between "facts" and "statutory references or designations". (See Attorney-General's Department *The Commonwealth Criminal Code: A Guide for Practitioners,* Canberra, March 2002, p119.)
>
> 127 I do not think it is open, when construing a Code, to decide that there are elements of an offence that are merely "definitional" or "referential" in such manner as to permit the words used in the formulation of the offence to be set aside. The very breadth of the definition of "physical element", encompassing as it does anything capable of answering the description of a "circumstance", indicates that all of the words of a statutory offence to which the *Criminal Code* applies must be given force and effect.
>
> 128 Accordingly, in the present case the characterisation of the proceedings as 'federal' must be accepted to be either a component part of the single circumstance of judicial proceeding or a separate circumstance. In either event, the issue has to be determined as to whether or not the fault element of knowledge expressed in s39 applies to that circumstance.
>
> 129 A Commonwealth offence to which the *Criminal Code* applies must, by reason of the nature of the Code, be approached on the basis that it comprehensively states each of the elements of a criminal offence. That is the central purpose of adopting a Code. The *Criminal Code* assumes that it is apparent on the face of the offence, as interpreted in the light of the *Criminal Code,* precisely what are the physical elements of an offence and to precisely which of those physical elements a fault element, if any, attaches and what that fault element is.

We have successfully applied *R v JS* to argue that in an Escape brought under the Commonwealth provisions our client was not guilty because he did not know that the nature of his custody was Commonwealth custody – how would be know the different roles of the AFP and the NSW Police. Unfortunately the Commonwealth's response to *JS* has been to amend this and many other offences to provide that the fault element that relates to the physical element of someone being a Commonwealth official, or proceedings being in Commonwealth proceedings, is absolutely liability.

It has, however, been raised in people smuggling cases and we are hopeful of a positive ruling. Many of our clients know they are coming to "Christmas

Island" (which is called "Pulau Kriasmas" in Bahasa Indonesia and means "Island of the pointy sword" or to Ashmore Reef, which is called "Pulau Pasir", meaning "Sand Island"). They do not, however, know that Pulau Kriasmas or Pulau Pasir are part of Australia. We say that the Commonwealth must prove that they know these places are part of Australia. A number of (though not all) District Court judges have agreed with us. In some jurisdictions it has been held that they do not need to prove this. In Victoria, there has been a recent result in favour of the defence in *PJ v The Queen* [2012] 146. We are waiting for a decision in NSW and expect that the decision may go to the High Court.