A survey of appellate authority involving the Commonwealth Director of Public Prosecutions between 1 January 2010 and 31 December 2010.

Presented by

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1. The purpose of this paper is to provide an overview of the past year's appellate cases involving the office of the Commonwealth Director of Public Prosecutions. What it may lack in depth, it should make up for in breadth.
2. First, the statistics: in 2010 there were 67 decisions involving the Commonwealth Director of Public Prosecution's office at appellate level throughout Australia. Of those 67 decisions:

    a. 4 were in the High Court;

    b. 38 in the NSW Court of Criminal Appeal;

    c. 5 in the Victorian Court of Appeal;

    d. 9 the Queensland Court of Appeal;

    e. 5 in the Western Australian Court of Appeal;

    f. 5 in the South Australian Court of Appeal;

    g. 1 in the Australian Capital Territory Court of Appeal; and

    h. None in either the Tasmanian Court of Appeal or the Northern Territory Court of Appeal.

3. In NSW, the most common offences pursued on appeal were, in descending order, drug offences (19), specifically, importation offences, child pornography offences (6), with money laundering, defrauding the Commonwealth and other miscellaneous offences each having 4.

4. This paper does not seek to summarise each case, although it attempts to ensure that every jurisdiction (except NSW) has had most of its appeals summarised on the basis that practitioners in NSW would be less familiar with what has occurred elsewhere. I have also used the term 'offender[1]' and 'Crown' rather than 'Appellant' and 'Respondent' in the summaries for the sake of consistency.

5. Given the large number of sentencing matters, many of which turned on their particular facts and did not raise any new or interesting legal matters, they are generally referred to in the paper only briefly, if they are referred to at all.

[1] I have used the term 'offender' because by the time the matter reaches appellate level the person must have been convicted.

THE HIGH COURT OF AUSTRALIA

Muslimin v The Queen [2010] HCA 7

The offender, Mr Muslimin, was an Indonesian national charged with an offence under s 101(2) of the *Fisheries Management Act.* The indictment alleged that, in April 2008, at a place in the waters above the Australian continental shelf but outside the Australian Fishing Zone, the offender had in his possession a foreign boat equipped with nets, traps or other equipment for fishing for 'sedentary organisms'. Mr Muslimin was tried and convicted in the Supreme Court of the Northern Territory. He appealed on the basis that he had been charged with offence which was unknown at law. The Court of Criminal Appeal of the Northern Territory dismissed his appeal. The High Court granted the offender special leave to appeal the conviction.

Section 101(1) of the FMA prohibits a person having in his or her possession a foreign boat equipped with nets, traps or other equipment for fishing in a place in the AFZ, except in certain defined circumstances.

Section 12(2) of the FMA extends provisions *"made in relation to fishing in the AFZ … to the extent that [they are] capable of doing so"* to "*fishing for sedentary organisms, in or on any part of the Australian continental shelf not within the AFZ … as if [the sedentary organisms] were within the AFZ ...".*

Section 4 of the FMA defines fishing as:

> *(a) searching for, or taking, fish; or*
> *(b) attempting to search for, or take, fish; or*
> *(c) engaging in any other activities than can reasonably be expected to result in the locating, or taking, of fish; or*
> *(d) placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons; or*
> *(e) any operations at sea directly in support of, or in preparation for, any activity described in this definition; or*
> *(f) aircraft use relating to any activity described in this definition except flights in emergencies involving the health or safety of crew members or the safety of a boat; or*
> *(g) the processing, carrying or transhipping of fish that have been taken.*

The High Court concluded that each of the paragraphs which defined "fishing" in s 4 of the FMA referred to an activity. Thus, laws made and enforceable "in relation to fishing" in the Australian Fishing Zone, whose application was extended by s 12(2) of the FMA to the Australian continental shelf, must refer to provisions concerning the *activity of fishing*.

However, the offence provision of section 101 was directed not to the activity of fishing, but rather to a state of affairs, that is, the having in your possession or charge a particular kind of boat, that is, a foreign boat equipped for fishing. The High Court held that section 101 was not a provision *made in relation to fishing and* thus its coverage was not extended beyond the Australian Fishing Zone to the Australian continental shelf by the operation of s 12(2).

The High Court determined that the original indictment did not disclose any offence and ordered that the appeal to the Court of Criminal Appeal be allowed, the offender's conviction be quashed and a verdict of acquittal be entered.

HILI v THE QUEEN; JONES v THE QUEEN [2010] HCA 45

This case involved tax evasion offences prosecuted as part of Project Wickenby. The Offenders were convicted of offences under the *Criminal Code* (Cth) and the *Crimes Act* 1914 (Cth) in respect of tax evasion covering over $750,000 of income tax.

In the New South Wales District Court each offender had been sentenced to 18 months' imprisonment with a recognizance release order to take effect after seven months. On appeal by the prosecution, the Court of Criminal Appeal held that the sentences imposed were manifestly inadequate, and sentenced each accused to a total of three years' imprisonment with a recognizance release order to take effect after 18 months. There were three points before the High Court:

1. Should there be, "a norm or starting point, expressed as a percentage" for the period of imprisonment that a federal offender should actually serve in prison before release on a recognizance release order?
2. Did the Court of Criminal Appeal give adequate reasons for its conclusion that the sentences imposed at first instance were manifestly inadequate?
3. Did the orders made by the Court of Criminal Appeal leave intact the recognizance release order made at first instance in respect of the sentence imposed on Mr Jones for money laundering? Special leave to appeal this ground was refused.

The High Court unanimously dismissed appeals by the two individuals against the sentences imposed on them by the Court of Criminal Appeal of New South Wales, accepting the Crown's prosecution's submissions that there is no judicially determined norm or starting point for the period of imprisonment that a federal offender should actually serve in prison before release on a recognizance release order.

At para. 18 the Court held:

> *'The question of "norm" or starting point raises questions about consistency in sentencing federal offenders. It will therefore be necessary to examine what is meant by "consistency", and to consider the means by which consistency is achieved. These reasons will show that the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence. Consistency in sentencing federal offenders is achieved by the proper application of the relevant statutory provisions, having proper regard not just to what has been done in other cases but why it was done, and by the work of the intermediate courts of appeal.'*

The Court held that the applicable provisions of Part IB of the *Crimes Act*, which govern the sentencing of federal offenders, made no provision fixing any relationship between the head

sentence and a recognizance release order, and that the sentencing court had the power to fix a recognizance release order to take effect at any time during the period of the head sentence. The exception to that general approach is section 19AG of the *Crimes Act* which provides, in effect, that for certain specified offences (treachery, terrorism offences, and offences against Divs 80 or 91 of the Code, which deal with treason, sedition and offences relating to espionage and similar activities) a court must fix a single non-parole period of at least three-quarters of the sentence for that offence.

The Court considered that the CCA was incorrect in saying that the "norm" for a period of mandatory imprisonment under the *Crimes Act* was between 60 and 66% because there was no statutory basis and if it was a proposition of universal application. The High Court then went on to ask a series of rhetorical questions at para. 37 including:

> *'..if reference to a 'norm' is intended as a compendious description of what has been done in other cases what are those other cases? … is the historical description of what is being done intended to guide what should be done thereafter? What is the principal that will tell a sentencing judge when or how the norm should be applied?*'

Clearly the High Court felt that the term 'norm' was misleading because it distracted attention from the actual provisions within Part 1B of the *Crimes Act.* The High Court referred to the Queensland Court of Appeal decision of *Ruha* [2010] QCA 10 (reviewed below) which also held that the first consideration of sentencing for any federal offender was Part 1B *Crimes Act*.

The High Court held at para. 44:

> *'It is wrong to begin from some assumed starting point and then seek to identify "special circumstances." Rather, a sentencing judge is to determine the length of sentence to be served before a recognizance order takes effect by reference to, and application of, principles identified by this court…'*

The High Court then went on to discuss the importance of trying to achieve consistency in sentencing across the jurisdictions for federal offences and stated at para. 48:

> *'Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.'*

The Court then went on to stress the importance of basing sentencing on matters set out in section 16A of the Crimes Act, rather than, *'being distracted or influenced by other than*

different provisions that would be engaged if the offender concerned were not a federal offender.'

The court then referred to *De La Rosa* [2010] NSWCCA 194 (which was handed down in September 2010 and referred to below)and her Honour Justice Simpson's remarks regarding the use that can be made by that Court of previous sentences which had been passed for the same or similar offences. The High Court agreed that a history of other sentences can establish a range, but that does not necessarily mean that the range is correct. The High Court made the point that past sentences should be regarded as no more than historical statements of what has happened in the past and simply a yardstick against which to examine proposed sentence. Perhaps tellingly there was no comment made about the enormous amount of work that his Honour McClellan CJ undertook in *De La Rosa* to analyse other relevant cases. It begs the question perhaps whether the High Court endorsed that approach?

However, the High Court then at para. 57 emphasised the need for intermediate Courts of appeal, such as the NSW CCA, to follow the interpretation placed on Commonwealth legislation by other Australian intermediate courts unless they were convinced that those courts had a plainly wrong interpretation.

The High Court then went on to assess the appropriateness of the sentence imposed on the offenders and found that the sentences imposed by the trial judge were manifestly inadequate given the nature of the offence, amount involved, its planned and deliberate nature and the size of tax fraud involved. On the basis the CCA was correct in concluding that the sentences imposed by the District Court were manifestly inadequate.

THE QUEEN v LK & THE QUEEN v RK – (2010) 241 CLR 177

On 26 May 2010 the High Court handed down two separate decisions regarding s 11.5 of the *Criminal Code* – the conspiracy provisions. The offence of conspiracy created by the Code is committed where there is an agreement between the offender and one or more other persons, coupled with an intention, on the part of the offender and at least one of the other persons, that an offence will be committed pursuant to the agreement. Proof of commission of an overt act by the offender or another party to the agreement pursuant to the agreement is necessary. The primary question in the Crown's appeal was whether the offence of conspiracy was committed when there is an agreement to commit the offence of dealing with money the proceeds of crime where recklessness as to the fact that the money is proceeds of crime is an element of the substantive offence.

On 19 May 2008, the respondents, LK and RK, were charged under s 11.5 of the *Criminal Code* with conspiring to deal with money worth $1 million or more, being reckless as to the fact that the money was proceeds of crime (section 400.3(2) of the Code. The money was part of a larger sum, in the order of $150 million, of which the Commonwealth Superannuation Scheme had been defrauded. Neither respondent was said to be a party to the fraud or to have knowledge of it. However, RK had agreed to a proposal, made by LK at the behest of a third party, that RK's Swiss bank account be used for the transfer of funds from Australia.

At the conclusion of the Crown's case in the NSW District Court, the respondents submitted that there was no case to answer and requested that the trial judge direct the jury to acquit. The trial judge held that the offence with which the respondents had been charged was bad at or unknown to law. The Crown appealed under s 107 of the *Crimes (Appeal and Review) Act* 2001 (NSW) to the NSWCCA, which dismissed the appeal, holding that, to support the charge of conspiracy under the Code, the Crown had to prove that the respondents knew the facts constituting the offence the object of the conspiracy.

The Crown unsuccessfully argued before the High Court that the CCA's interpretation of the Code was incorrect. The High Court held that a person cannot be found guilty of conspiracy under the Code unless he or she knows (and is not simply reckless) the facts that make the proposed act or acts unlawful. In this case, the relevant fact was that the money was proceeds of crime.

His Honour Chief Justice French at para. 75 of the judgment stated:

> *'The charge of conspiracy to commit an offence, which is created by s 11.5(1) of the Code, requires proof of an agreement between the person charged and one or more other persons. Moreover, the person charged and at least one other person must have intended that the offence the subject of the conspiracy would be committed pursuant to the agreement. Intention to commit an offence can be taken to encompass all the elements of the offence (subject to the operation of s 11.5(7A) in relation to special liability provisions in the substantive offence). That intention extends to both physical and fault elements of the substantive offence.'*

Essentially, there cannot be a conspiracy in which the parties to the agreement are reckless as to the existence of a circumstance which is a necessary element of the offence said to be the subject of the conspiracy. The Court found that such recklessness would be inconsistent with the intention that is necessary at common law and under the Code to form the agreement alleged. In this case that intention is an intention to deal with money which is proceeds of crime. Recklessness as to whether the money is proceeds of crime is recklessness about a term of the agreement constituting the conspiracy and was insufficient. The prosecution must prove beyond reasonable doubt that the offender actually *meant* to conspire.

RK & LK had argued that no appeal lay to the Court of Criminal Appeal because s 107 of the *Crimes (Appeal and Review) Act* did not come into effect until after the proceedings against the respondents had been commenced. The High Court rejected the argument on the basis that the respondents' trial commenced with their arraignment in the District Court, which was after 15 December 2006, when the *Crimes (Appeal and Review) Act* came into operation.

RK & LK had also argued that the provision of an appeal by the Crown against a directed verdict of acquittal infringed the guarantee in s 80 of the Constitution of trial by jury for offences against Commonwealth law tried on indictment. This argument was also rejected. The High Court held that the creation of such a right of appeal did not interfere with the jury's function because a jury can exercise no discretion in the face of a direction from a trial

judge to return a verdict of acquittal. As the appeal against the directed verdict involved only questions of law, there was no infringement of s 80 of the Constitution.

ANSARI v THE QUEEN (2010) 241 CLR 177

In this matter the offenders, Hajamaideen and Mohamed Ansari, were brothers who operated a money exchange business in Sydney. They arranged for the collection and deposit into various bank accounts of approximately $2 million. Each deposit was for an amount less than $10,000 in cash. The offenders were alleged to have made similar arrangements in relation to a further $2 million to $3 million in cash, though they were arrested before receiving any of the money. Under the Commonwealth's *Financial Transaction Reports Act* 1988 banks and other financial institutions are obliged to report cash transactions involving amounts of $10,000 or more to a Federal Government agency. A person commits an offence if they participate in two or more cash transactions involving less than $10,000 in such a way as to make it reasonable to conclude that the person conducted the transaction(s) in that way to avoid the transaction(s) being reported.

The offenders were jointly tried and convicted on charges under ss 11.5 and 400.3(2) of the Code of conspiring to deal with money worth $1 million or more, being reckless as to the risk that the money would be used as an instrument of crime. They appealed unsuccessfully to the NSW Court of Criminal Appeal.

The offenders' principal argument before the High Court was that the charges against them were bad in law because a criminal conspiracy under the Code could not have as its object an offence an element of which was recklessness. They contended that, were it otherwise, such a charge would require proof that the offenders intended to be reckless as to the fact that there existed a risk that the money would become an instrument of crime.

The High Court rejected the argument, holding as incorrect the premise on which it was based — that proof of an intention to commit an offence requires proof of an intention that each physical element of the offence will come into existence and that the fault element specified for that physical element will also come into existence at the same time. What is required, the Court held, was proof of an intention that an act or acts be performed, which, if carried out, would amount to the commission of an offence. The offenders' argument did not take into account that, under the Code, recklessness may be satisfied by proof of intention or knowledge. Provided that the offenders intended that the conduct upon which they agreed would be carried out and that they knew all the facts that made that conduct criminal, it did not matter that the offence that was the object of the conspiracy charge was one for which the fault element is recklessness.

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NEW SOUTH WALES COURT OF CRIMINAL APPEAL

DPP (Cth) v De La Rosa [2010] NSWCCA 194

This well-known decision from 17 September 2010 dealt with an offender who had pleaded guilty to the importation of a marketable quantity of cocaine. While at its core it was a Crown appeal on the question of whether or not the offender's sentence of eight years and a non-parole period of five years was manifestly inadequate, a bench of five of the CCA dealt with the issue of double jeopardy in relation to the NSW *Crimes (Appeal and Review) Act 2001,* specifically section 68A and whether or not the requirement for considerations of double jeopardy under the NSW act was inconsistent with section 16A(2)(m) *Crimes Act* (Cth). Consideration was also given to sections 68, 79 and 80 of the *Judiciary Act* 1903 (Cth). The case is also significant because within the judgment of his Honour the Chief Judge at Common Law, Justice McClellan, there is a substantial of analysis of case law involving the sentencing of offenders convicted for Commonwealth offences.

Section 68(2) of the *Judiciary Act* 1903 (Cth) confers appellate jurisdiction on the NSW CCA in respect of Commonwealth offences, applying s 5D of the *Criminal Appeal Act* 1912 (NSW). Section 16A of the *Crimes Act* 1914 (Cth) identifies matters which, if known and relevant, must be taken into account when determining a sentence; sub-section 16A(2)(m) encompasses the "mental condition of the person".

Section 68A of the *Crimes (Appeal and Review) Act* 2001 (NSW) precludes a court dismissing a prosecution appeal against sentence, or imposing a less severe sentence than it would otherwise consider appropriate, because of any element of double jeopardy involved in the respondent being sentenced again. "Double jeopardy" in this context referred to the distress and anxiety to which a respondent is presumed to be subject by reason of being exposed to the risk of a more severe sentence. At paras. 276-279, her Honour Justice Simpson stated:

> *'What s 68A precludes is reliance by the court upon **the presumption** that a respondent is suffering from that distress or anxiety. In my opinion, there is a significant distinction between a presumption of fact (even if drawn from common experience) and an inference available from evidence in the proceedings (see the judgment of Basten JA, para [106]). It is only the former that is excluded by s 68A.*
>
> *The principle of double jeopardy evolved as a humanitarian consideration in circumstances where an offender, having been sentenced leniently – manifestly too leniently, on the Crown case – faces the prospect of losing the benefit of that leniency. Courts presumed that that prospect would be the source of distress and anxiety.*
>
> *That may not invariably have been the case. Where it was, the principle that came to be called the principle of double jeopardy meant that it was unnecessary for evidence to be given to that effect. Where it was not, the offender benefited from a presumption of fact that was not, in reality, warranted.*

> *Section 16A(2)(m) of the Crimes Act enables, and requires, the court to take into account the mental condition of a person standing for sentence – where evidence is given of that condition. That is the actual mental condition of that person – not his or her presumed condition. An appellate court, under s 68A, cannot take the mental condition of an offender into account in the absence of such evidence – that is, it cannot act upon any presumption of distress and anxiety.'*

By majority it was held that there was no inconsistency between section 16A(2)(m) of the *Crimes Act* (Cth) and section 68A of the NSW *Crimes (Appeal and Review) Act* 2001 for the purposes of 109 of the Constitution. The main basis for that conclusion appears to be that while section 68A precludes reliance by the court upon a presumption that a respondent was suffering anxiety and stress, that was not inconsistent with section 16 A(2)(m) which required the court to take into account actual, rather than presumed, anxiety and stress.

It was held that the sentence did not fall outside the sentencing judge's proper range of discretion for an offence of this type. More significantly though than this ruling is the effort McClellan CJ At CL went to compare other matters involving the Commonwealth (chastising both parties for failing to do so themselves, particularly the Commonwealth. Simpson J and Basten JA were also critical of the Commonwealth in that regard). His Honour stated at para. 193:

> *'During the hearing of the appeal, this Court repeated a request which had previously been made in other matters involving the Commonwealth for assistance in identifying previous cases in which sentences had been imposed for relevant Commonwealth offences. These include, in the present case, the offences of importation of border controlled (or prohibited) drugs as well as allied "attempt", "aid, abet, counsel or procure" and "conspiracy" offences. The Court has made a number of similar requests over the course of various appeals. However, the decisions to which we are referred tend to be of limited value or, as in this case, largely confined to sentences imposed by New South Wales courts. 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.'*

McClellan CJ at CL then discussed various comparable cases at great length and categorised them at para. 224 in tables where he sought to group cases according to their common facts in an attempt to provide a broader picture than he regarded was being presented by the use of comparative tables and sentencing statistics. Contrast this approach with the High Court's approach in Hili.

Ultimately the Court held that the sentence was within the range.

Leighton v R [2010] NSWCCA 280

This case involved a sentencing appeal in relation to a 72 year old offender who had pleaded guilty to three charges of social security fraud that between 1996 and 2006 he received an overpayment in the amount of approximately $110,000. The sentence was 6 years with a non-parole period of 4 years and a reparation order made in the sum of $105,060.97 pursuant to s 21B *Crimes Act* 1914 (Cth). There were six grounds of appeal, which included amongst other things, a failure by the sentencing judge to pay sufficient consideration to the offender's age, apparent ill-health and the two year delay in the charge being brought.

The CCA held that an inexplicable delay between the discovery of the crime and the prosecution of an offender may entitle him or her to an element of leniency on sentencing, due to the uncertainty and stress that they may be under during the intervening period. However, there needs to be some evidence from the offender as to how he has been affected by the delay. The court made the point that although the offender's health had deteriorated during the intervening two year period, that was not an effect that the delayed prosecution had brought about, which is what the court would need to consider to give the delay much consideration when sentencing.

The court held that some weight should have been given to the applicant's ill health in determining the sentences, but when balanced against the seriousness of the offences, the extent of the mitigation should have been modest.

Li, Wing Cheong v R [2010] NSWCCA 40

The offender was convicted of a charge that between 13 April 2005 and 19 April 2005 he dealt with money which was the proceeds of crime and which he believed to be proceeds of crime and, at the time of the dealing, the value of the money was more than $1,000,000, contrary to s 400.3(1) of the *Code* for which the maximum penalty prescribed is relevantly imprisonment for 25 years. The offender was sentenced to a term of imprisonment of 12 years with a non-parole period of 8 years.

This was a conviction appeal with a focus on whether or not certain evidence should have been admitted and the content of closing submissions made by the Crown. At the trial evidence of telephone conversations were admitted between parties not charged with the offence and in which the offender was not a participant. There was a question as to whether or not those telephone calls were hearsay and/or should have been excluded under section 137 of the Evidence Act. The appeal raised the question of whether the trial judge failed to conduct the required balancing exercise between probative and prejudicial before admitting the evidence.

The fundamental proposition relied upon by the Crown was that an out-of-court statement, made in the absence of an accused, is admissible so long as its contents are not relied upon to prove a fact asserted by the statement itself. The CCA accepted that was the purpose in which the telephone calls were admitted. The CCA referred to *Papakosmas v The Queen* (1999) 196 CLR 297 at 312 per Gaudron and Kirby JJ which confirmed the common law position that evidence of statements made outside court is admissible to prove that a

statement was made and, also, to prove its contents but not necessarily its truth. From that evidence, inferences may be drawn. Commonly, inferences may be drawn as, for example, to the speaker's intention, emotion or knowledge of or belief in the facts stated.

The CCA rejected the argument that the trial judge had failed to properly consider section 137 with respect to the phone calls, stating that it is fundamental for such an appeal point to succeed that the offender must be able to precisely identify any specific error made by the trial judge and not effectively simply invite the CCA to consider the matter itself.

The trial judge gave directions to the jury regarding how they were to use the telephone calls, specifically, that they were not to be regarded as to the truth of their contents but simply evidence that the participants were focusing on a particular, important subject. The offender submitted that the direction was such that it could have been misunderstood by the jury and the telephone calls used in an inappropriate manner. The appeal failed for 2 main reasons, firstly, because the trial judge did everything he could to make sure the jury would follow the directions and secondly because counsel for the offender at the trial failed to take any issue with the nature of the direction at the time it was given.

Another ground of appeal was submitted to be the trial judge's failure to give a character direction to the jury given the offender's previous good character. Again, this was a matter that was not raised at the time of the trial. The CCA stated that simply because a direction or warning might have been given, it does not follow that there was a miscarriage of justice because the direction or warning was not given, especially where it was not sought, and on that basis the ground of appeal failed.

The final ground of appeal was that the trial had miscarried because some jury members were playing a puzzle or game known as 'Target' while in court. This only became known after the trial (which lasted for one month) and was the subject of an investigation by the Sheriff's office. The CCA stated that there was nothing in the statements of the jurors made during the course of the Sheriff's investigation that indicated that any misconduct or misbehaviour occurred in the jury room that could possibly bring about a miscarriage of justice, so that ground of appeal was also dismissed.

R v Scott McConalogue [2010] NSWCCA 56

This was a section 5F Crown appeal regarding evidentiary matters. The Crown alleged that the respondent was a party to a joint enterprise to manufacture amphetamines and sought to adduce evidence at the trial that:

1. at the time of the search of the property, the respondent was confronted by several police officers, made to lie on the ground, was handcuffed and was searched by an officer who asked him whether there was anyone else in the house. The respondent said that there was not. The officer asked whether there were any weapons in the house, to which the respondent replied, "*Yes, there's a pistol in the bedroom*."
2. There were three bedrooms in the house. Apart from the main bedroom, there was a second bedroom which may have been used by the respondent. A third bedroom

had been converted into a sophisticated hydroponics set up, apparently for growing marijuana. Two hydroponic light bulbs in the room contained fingerprints of another person believed to have been involved with the offence. Over one kilogram of marijuana was also found in a large shed on the property.

The CCA found in favour of the Crown on the preliminary point, that is, that the 5F appeal was justified because the absence of that evidence would substantially weaken the Crown case. The court cited *R v Shamouil (*2006) 66 NSWLR 228, at [27] – [40] which held that it was necessary not just to examine each of the items of evidence concerned but also to have regard to their combined effect, which involves an assessment of the case at hand.

The evidence of the conversation between the offender and the officer was objected to on the basis that he was should have been cautioned pursuant to section 23F of the *Crimes Act* in order for his statement to be admissible. The Crown submitted that the questions and answers put to the offender were not put him in the context of his being a suspect or under arrest, but merely to secure the property and enforce the warrant. The CCA agreed with that submission, stating that there appears to be no basis upon which a breach of s 23F of the *Crimes Act* could have been found to justify the exclusion of the evidence.

In rejecting evidence of the hydroponic set up in the third bedroom, the trial judge recognised that the Crown did not rely upon it as tendency evidence, but only as evidence tending to establish the true nature of the relationship between the offender and another relevant person to be involved in the production of the amphetamines, and to rebut any suggestion that that relationship was solely one of landlord and tenant. However, the trial judge held that the fact of the hydroponic set up in the third bedroom would be unfairly prejudicial and its admission into evidence was rejected pursuant to section 137 of the *Evidence Act*.

The CCA found that his Honour had fallen into error, stating that it was difficult to see how the respondent would suffer any unfair prejudice through admission of the evidence, let alone prejudice such as to outweigh its probative value. The evidence was found to be highly probative and on that basis should have been admitted.

Barnes v R [2010] NSWCCA 136

The offender was convicted of two charges under s 1309(1) of the *Corporations Act* 2001 (Cth). Section 1309(1) provides that an officer of a corporation who makes available or permits the making available to an operator of a financial market, in this case Australian Stock Exchange Ltd (“ASX”), of information that relates to the affairs of the corporation and that, to the knowledge of the officer, is false or misleading in a material particular, is guilty of an offence. He was sentenced to a term of imprisonment of 9 months, to be released on a recognizance after 6 months. He was released on bail pending the determination of the appeal against his conviction.

On appeal the offender submitted that the jury verdicts finding him guilty of the charges were flawed because, **firstly,** there was no evidence at his trial that he knew that the statements particularised in the charges were included in the reports submitted to the ASX, **secondly** that there was no evidence of the falsity of those statements, **thirdly** that there was no evidence that the offender knew the statements to be false and **fourthly** that a purported director's minute of 12 February 2004 was wrongly admitted into evidence at the trial.

The CCA accepted that the particulars identified in the Crown case as forming the basis of the two charges could not been made out to the jury based on the evidence that had been before them. As a result the offender's conviction was quashed. That issue turned largely on the particular facts and is not particularly of note. More interesting though was the CCA's analysis of two versions of purported board Minutes dated 12 February 2004. Those documents were admitted into evidence over the objection of defence counsel at the trial.

The significance of the Minute was that it was said to be a record of a meeting of the directors of the company at which the offender and other directors were present. The basis of the objection appears to have been the purpose for which the Crown sought to rely on the Minute(s) and whether or not its admission into evidence would cause the jury to make improper conclusions regarding the offender's knowledge of various matters.

The Crown submitted that the admission of the document was not to seek to establish the facts contained in the document but merely as evidence of the fact that the person who prepared the document (who was not the offender but the company secretary) made the assertions contained in it. On that basis it was admitted. During the course of the trial defence counsel requested the trial judge on several occasions to remind the jury as to the limited purpose which the Minute(s) were admitted. Such a reminder did not occur.

A fundamental difficulty the Crown had in the prosecution was that it could not prove the offender's knowledge regarding the misrepresentations contained in the documents sent to the ASX. The CCA held that the Crown had sought to prove that fact by relying on the Minute(s), which on their face showed a meeting which discussed the impugned half yearly report and which the offender attended, despite the fact that that was the very inference the defence had sought the Crown not to do and was the basis of the objection of the document being admitted.

While it is expected that a document admitted on a limited basis cannot have it is use broadened simply for the convenience of either party, it is not clear from the summarised facts exactly why its accuracy was questioned, although I note that the company secretary, the person responsible for the creation of the board Minutes, was not called to give evidence at the trial. The reasons do not disclose why.

The appeals were allowed and based on the absence of evidence, the offender was acquitted.

Anderson v R [2010] NSWCCA 130

This case concerned an offender who was sentenced to 18 years imprisonment with a non-parole period of 11 years after conviction for importation of a commercial quantity of cocaine (14.4 kg pure). The appeal was against the length of the sentence and against the conviction itself.

The sentence appeal can be dealt with fairly simply. Essentially, the offender, sought to introduce fresh evidence regarding his medical condition, specifically, progressive liver failure and osteoarthritis. The Crown opposed the introduction of fresh evidence regarding the offender's health issues on the basis that the sentencing judge took into account the offender's various medical conditions, his age and life expectancy.

Importantly, part of the fresh evidence before the CCA was a report from Justice Health which suggested that although the offender's health was deteriorating, he could be adequately cared for in custody. His Honour Justice Buddin, writing for the Court, referred to *R v Goodwin* (1990) 51 A Crim R 328 which is authority for three general principles regarding the admission of fresh evidence on sentencing appeals:

1. the additional material sought to be put before the court was of such significance that the sentencing judge may have regarded it as having a real bearing upon his or her decision;
2. that although the existence of the evidence may have been known to the applicant, its significance was not realised by him at the time; and
3. its existence was not made known to the applicant's legal advisers at the time of the sentencing proceedings.

The CCA endorsed the approach but ultimately decided that it did not have to make a decision about the new evidence because even if the new evidence was to be admitted, the CCA would not be minded to reduce the sentence imposed on the offender.

The conviction appeal turned largely on the admission into evidence of two exhibits and the manner in which the Crown prosecutor had addressed the jury, either one of which was said to have been of sufficient gravity to warrant the discharge of the jury.

It is unnecessary to deal with the appeal point concerning admission of the evidence, what is of note is the CCA's remarks regarding the discharge of juries. At para. 18, the court was critical of the offender's trial counsel who did not object to the evidence being admitted and it was only later, after a comment by the trial judge, that an application was made for the jury to be discharged.

The CCA stated that the issue is not simply the trial judges exercise of discretion regarding an application to discharge the jury, but whether the failure to do so lead to a substantial miscarriage of justice. The court stated: *"… When her Honour became aware of the problems she acted decisively and having the admissible material immediately retrieved from the jury. Her honour then gave appropriate directions to the jury about excluding from their*

consideration any of the inadmissible material in the event that any of them had, at that stage, had an opportunity to pay any regard to… Her honours directions cured any mischief that may have arisen."

The appeal point relating to the Crown prosecutor's address to the jury was that he had apparently used words and phrases that were "intemperate and inflammatory". Again the CCA was critical of defence counsel at the trial for failing to raise any concerns regarding the Crown's address at the time, although importantly the trial judge was obviously aware of some remarks which sought to characterise certain evidence in an impermissible way, leading her Honour to give the jury a direction about how it was to use that evidence. The submission by the offender on appeal was that the failure to raise any concerns at the time was irrelevant because no directions could have cured the prejudice which he had suffered as a consequence of that address.

At paragraph 34 the CCA held that while it had some misgivings about the Crown's frequent reference to the offender as a 'totally dishonest person' and found that the address went beyond what was necessary to enable him to properly discharge his functions, it did not lead to a miscarriage of justice because the trial judge gave proper directions to the jury about how it should use that certain evidence.

At para 35 the court stated:

> *"…none of the grounds of the appeal against conviction have been made out. Moreover, even if error had been established, I would unhesitatingly conclude that this is a case in which the proviso should be applied upon the basis that there has been no substantial miscarriage of justice:* ***Criminal Appeal Act 1912*** *s 6(1). Such a conclusion, in my view, is dictated by the fact that whilst the Crown case is compelling the defence case is threadbare, and the asserted errors would have had minimal, if any impact, upon the course of the proceedings. Accordingly, although I would grant leave, I propose that the appeal against conviction should be dismissed."*

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VICTORIAN COURT OF APPEAL

Director of Public Prosecutions v D'Alessandro [2010] VSCA 60

This appeal concerned the use of an electronic carriage service in breach of the *Code* for the *a*ccessing, possessing and transmitting images of child pornography and child abuse, that is, offences pursuant to sections 474.19(1)(a)(i), 474.19(1)(a)(iii), 474.20(1), 474.22(1)(a)(i), 474.22(1)(a)(iii) and 474.23(1).

At first instance the offender, who was aged 25 at the time of the offences and pleaded guilty, was sentenced to a total effective sentence of two years' imprisonment but was granted immediate release upon his entering into a recognisance release order in the sum of $100 requiring him to be of good behaviour for a period of 3 years. He was also registered as a sex offender. The Crown appealed on the question of whether the sentence was manifestly inadequate; whether sufficient weight was given to the nature, circumstances and gravity of the offences; issues of general deterrence; the absence of previous convictions; the guilty plea; prospects of rehabilitation and the offender's likelihood of re-offending.

The VSCA endorsed the NSW CCA decision of *Mouscas* [2008] NSWCCA 181 that for offences involving the possession of child pornography where general deterrence is of importance and where the offences are frequently committed by persons of prior good character, it is legitimate for a court to give less weight to prior good character as a mitigating factor.

The offender was re-sentenced to a total effective sentence of three years' imprisonment but there was a requirement that he serve two years imprisonment before being eligible for release pursuant to section 20(1)(b) of the *Crimes Act 1914* upon giving security by recognizance.

Director of Public Prosecutions v Groube [2010] VSCA 150

An appeal concerning the sentence imposed upon an offender who pleaded guilty to using a carriage service to access and transmit child pornography pursuant to section 474.19(1)(a) of the Code and possession of child pornography pursuant to section 70 of the Victorian *Crimes Act.* The offender was sentenced to a term of 18 months' imprisonment, to be released forthwith on entering into a Recognizance Release Order, pursuant to s 20(1)(b) of the *Crimes Act 1914* subject to certain conditions, and in relation to court 2, 150 hours of community work over two years.

The Crown appealed on the basis that the sentence was manifestly inadequate with the County Court paying insufficient regard to aggravating factors and too much weight to mitigating circumstances. The Crown's submission was that nothing less than an immediate custodial sentence was warranted given that the offender had 12,802 files containing child pornography, which were discovered on two of his computers, and on 18 compact discs.; the extreme nature of content; young age of children; purpose of possession was for partly for sale or distribution but the images did not contain infant children, extreme violence or bestiality. However, AJA Coghlan, writing for Full Court stated:

Offending of this nature and gravity would ordinarily lead to an immediate custodial sentence.[2] *In my view, and notwithstanding the mitigating circumstances, it should have done so in this case. …*

It does not follow that appellate intervention is necessarily warranted. There are two reasons for declining to interfere. The first is that a Director's appeal always gives rise to an issue of double jeopardy. The second is the caution which this Court exercises when the Director seeks to substitute for a non-custodial sentence one that involves immediate imprisonment.[3]

In this case the respondent has completed the required community work component. He has also met the financial condition imposed on count 1, namely a payment of $6000 to the Royal Children's Hospital. That too, is of some relevance when considering whether to allow this appeal, and cause him to be re-sentenced on count 2….This Court has a discretion, on a Director's appeal, as to whether or not to intervene irrespective of whether sentencing error has been shown. In view of the factors set out above, I would exercise my discretion against such intervention. I would therefore dismiss the appeal.

Di Tomasso v The Queen [2010] VSCA 180

The offender pleaded guilty in the County Court to importing into Australia a marketable quantity (34.5g pure) of cocaine. After a plea, he was sentenced to be imprisoned for a term of 30 months. The sentencing judge directed that the offender was to be released on a reconnaissance release order at the expiration of 18 months of the sentence.

There were two grounds of appeal. The first was that the judge's findings regarding the purpose of the importation proceeded upon an uncertain and erroneous footing. The offender pleaded guilty to the offence of importing a marketable quantity of a border controlled drug, contrary to the provisions of s 307.2(1) of the Code. Section 307.2(4) provides that it is a defence to prove that the accused did not intend to sell any of the border controlled drug and did not believe that another person intended to sell any of the drug. The burden of proof resting upon the offender is one to be discharged on the balance of probabilities pursuant to s 313.4(b) of the Code. If the drug is imported for personal use, or some other non-commercial purpose, the importer commits an offence under s 307(4). The offender submitted that the judge's approach to the question and his sentencing remarks created such uncertainty as to the legal basis upon which the plea was conducted and the findings that were made, that there has been sentencing error and accordingly the sentence should be set aside.

The first ground was rejected on the basis that the offender was sentenced upon the basis that there was a commercial purpose for the importation. That was clearly correct. The offender pleaded guilty to charge under s 307.2(1) of the Code. The offender did not establish that the drug was intended solely for his personal use and no burden lay upon the

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[3] See *Best* (1998) 100 A Crim R 127, 132-133; *DPP v Wilson* (2000) 1 VR 481, 489-90; and *DPP v Leach* (2003) 139 A Crim R 64, 74-5.

Crown to establish that the importation was for a commercial purpose. The Court unanimously held that s 307 of the Code does not permit an enquiry as to the use of the drug contemplated by the importer, independently of the question whether the offence is one under s 307(2) or s 307(4).

The second ground of appeal was that the sentence was manifestly excessive in light of the offender's youth; immaturity and impulsivity; his previous good character; his work history; his prospects of rehabilitation; his mild depression; his remorse; the hardship to the offender of serving a term of imprisonment as a consequence of his poor English; the circumstances of the offence; and importantly, the early plea of guilty. This was rejected with the Court finding that the sentence was within the range of a sound sentencing discretion.

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SOUTH AUSTRALIAN FULL COURT OF THE SUPREME COURT

Poniatowska v DPP (2010) 107 SASR 578

The accused entered guilty pleas in the South Australian Magistrates Court to 17 counts of receiving a financial advantage from the Commonwealth contrary to s.135.2 of the Code. She received a sentence of 21 months imprisonment. The severity of the sentence was appealed to a single judge of the SA Supreme Court and the appeal was dismissed. The offender then appealed to the full court of the SA Supreme Court against the decision of the single Judge and although it began as an appeal against sentence and, in particular, against the single Judge's decision to affirm the recording of the convictions, offender filed a Notice of Appeal against conviction and the central issue on appeal was whether an offence pursuant to s.135.2 could be committed by way of omission. The relevant omission in this case was the offender's failure to advise Centrelink of her receipt of commission from a period of employment which in turn adversely affected her entitlement to part parenting payment.

The Court held by majority (Sulan J dissenting):

(1) The essence of the offence created by s 135.2 is the obtaining of a financial advantage with the fault elements that are applicable under s 5.

(2) In light of the definition of "engage in conduct" in s 4.1 and the stipulation in s 135.2 that "engage in conduct" constitutes a physical element of the offence created by that section, it must be acknowledged that an offence under this provision can be committed by means of an omission.

(3) However, the definition of "engage in conduct" which includes an omission to perform an act does not overcome the requirement that the conduct charged must be an omission to carry out an obligation imposed by law.

(4) Section 135.2 does not itself create a legal obligation to act and not omit; the section has not made an omission to perform an act a physical element of the offence.

(5) Accordingly, the offender could not have been convicted in law of the offences to which she had plead guilty, and the convictions were set aside.

Significantly, this decision was appealed by the Crown and heard by a bench of five of the High Court on 3 March 2011. Judgment is pending.

R v Padberg (2010) 107 SASR 386

Charges laid under s 474.19(1)(a)(i) of the Code regarding the use of a carriage service to access child pornography. For the first offence the District Court Judge sentenced the offender to imprisonment for 16 months. But for his cooperation and early guilty plea he would have imprisoned him for 24 months. In relation to the second offence the Judge

sentenced the offender to imprisonment for 12 months, reduced from 18 months on the same basis as for the first offence. The Judge fixed a non-parole period of six months in respect of the second offence. He ordered that the second sentence operate concurrently with the first sentence. The Judge made a recognizance release order in relation to the first offence, the order to take effect immediately. The Judge suspended the sentence in respect of the second offence. That meant that Mr Padberg did not undergo imprisonment. On appeal, the Crown challenged only the order for immediate release and the order suspending the sentence in respect of the second offence. The head sentence and non-parole period were not appealed.

The appeal was dismissed by majority. The Full Court held that while serious, the offender had not paid for the images or sold or communicated them – if he had, they would have been aggravating features. For an offence of this nature a period of imprisonment is usually required, even where there has been a guilty plea with an offender who has no prior convictions. The Full Court held that a wholly suspended sentence was inappropriate, however, it did not amend the sentence. The Full Court held that because the original sentence did not actually involve the offender going to gaol, and because he was currently on bail, the Court 'was reluctant' to now imprison him.

R v Toe (2010) 199 A Crim R 347

The offender was convicted by jury of two counts of importing a marketable quantity of a border-controlled drug contrary to the *Criminal Code* (Cth), s 307.2. The police intercepted two packages containing prohibited drugs which arrived from India and Brazil respectively. They removed the drugs, reconstructed the packages and arrested the offender when he collected the packages via a courier service. The quantities of the heroin and cocaine were not in dispute. The issue (as in R v Campbell) was whether the jury was properly directed on a matter of law as to what amounts to "importing" .

The Court held that the (previous) definition of 'import' at section 300.2 of the Code had the effect of finding that the 'import' occurred when the goods were delivered at the point at which they were going to remain in Australia. This point in time was held to precede the fault element of intention being formed by an accused because the accused would not receive the goods until some point after the import had occurred. On that basis the fault and physical elements did not occur simultaneously and the charge could not be proved.

(However, in light of the legislative amendment to the definition of 'import' which appeared in the Code on 20 February 2010 by the C*rimes Legislation Amendment (Serious & Organised Crime) Act* 2010, the definition of import found by the NSW CCA in *R v Campbell* (2008) 73 NSWLR 272 and in *R v Toe* is of diminishing relevance.)

R v Phan [2010] SASC 24

Offender charged with three counts of defrauding the Commonwealth contrary to s 29D of the *Crimes Act 1914* and forty-eight counts of dishonestly causing a loss under s.135.1 of the

Code. He was convicted of defrauding the Commonwealth offences on forty-five offences and acquitted of three charges. There were two grounds of appeal.

Firstly, that the not guilty verdicts were inconsistent with the guilty verdicts and inconsistent with not guilty verdicts of a co-accused on corresponding charges. The appeal was dismissed on the basis that the test for whether a verdict was internally inconsistent was *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-368 where their Honours held that the test is one of "logic and reasonableness" and that "if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted". Underpinning these principles is "the respect for the function which the law assigns to juries". An appellate court will be required to intervene only where different verdicts represent "an affront to logic and common sense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty", such intervention being required to prevent possible injustice. No such intervention was justified in this matter.

The second ground was that the indictment itself was defective because it did not refer to an essential element of the offence, namely a description of the mental element required for either fraud or dishonesty. The Court rejected that argument on the basis that while indictment should have referred to the offender's dishonesty in relation to the charges, the court held that this aspect of the Crown case was clear from the nature of the indictment's particulars, how the Crown ran its case and its closing – there was no prejudice to the offender.

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QUEENSLAND - COURT OF APPEAL

R v Ruha 198 A Crim R 430

On 25 August 2009 each of the respondents pleaded guilty to an offence against s 135.4(3) of the *Criminal Code* (Cth) that between 28 August 2003 and 4 July 2005 each conspired with the other with the intention of dishonestly causing a loss to a Commonwealth entity, namely the Commissioner of Taxation. On 31 August 2009 the respondents were convicted of that offence and convictions were recorded. Roland and Wikitoria Ruha were sentenced to a term of imprisonment of three years and it was ordered that they be released after serving 12 months of that term upon giving security by recognisance in the sum of $1,000, conditioned upon good behaviour for a period of three years. Harris was sentenced to a term of imprisonment of 20 months to be released after serving six months upon giving security by recognisance in the sum of $1,000 conditioned on good behaviour for a period of three years. Each of the respondents was also ordered to pay $138,551.37 to the Commissioner of Taxation, each respondent being jointly and severally liable for that payment.

The appeal turned on the pre-release periods set by the sentencing judge. The offender argued that the sentencing judge failed to properly consider *R v CAK* [2009] QCA 23, which held that the pre-release period should ordinarily be 60-66% of a head sentence unless there are "most unusual factors" to justify its being outside the range. The Crown appealed the sentence and argued that the sentences were manifestly inadequate.

The Court held there was no sentencing principle that requires the pre-release period under a recognisance release order for a Commonwealth offence to be between 60% and 66% of the head sentence unless there are unusual factors to justify a percentage outside this range. The length of the pre-release period is to be determined in accordance with generally-applicable sentencing principles after taking into account all the circumstances of the offence. Discussion of the sentencing scheme in the Crimes Act 1914 Cth, Pt 1B, and the relevant sentencing principles concerning recognisance release orders.

This decision was handed down on 9 February 2010 and was later endorsed by the High Court in *Hili.*

R v Dobie [2010] QCA 34

This case concerned charges of trafficking in persons, dealing in the proceeds of crime in an amount exceeding $10,000 and presenting a false document. The offender pleaded guilty at the District Court and was sentenced to four years imprisonment for each of counts 1 and 2 (trafficking in persons), 12 months imprisonment for count 3 (dealing in proceeds of crime in an amount exceeding $10,000)[4] and for each of counts 4 to 7 inclusive (presenting a false document). The terms of imprisonment imposed for counts 1 to 5 inclusive were ordered to

be served concurrently but the concurrent sentences for counts 6 and 7 were ordered to be served cumulatively on the sentences for counts 1 and 2.

A year after his conviction the offender sought to appeal his sentence and withdraw his guilty pleas. The Court refused the appeal and the withdrawal of the guilty pleas and, after referring to *Meissner* 184 CLR 132 at 157, the leading cases on the withdrawal of pleas summarised the position at para 22 as:

> *In the circumstances it is plainly no easy task for the applicant to demonstrate, as he must, that a miscarriage of justice has occurred. The applicant's pleas of guilty were made in open court. It is not suggested that they were not made on legal advice in the exercise of the applicant's free choice. The statement of agreed facts, agreed or acquiesced in by the applicant's counsel on the sentencing hearing, provided a factual foundation for the pleas. No basis for the withdrawal of the pleas has been made out and even without considering the "high public interest in the finality of legal proceedings", the applicant has not succeeded in discharging the onus which he bears.*

R v Byrne [2010] QCA 33

The offender pleaded guilty to one count of fraud under s 408C(1)(c) and (2)(d) *Criminal Code* (Qld) (count 1) and one count of dealing in proceeds of crime in excess of $1,000,000 under s 400.3(1) *Criminal Code* (Cth) (count 2). He was sentenced on 13 August 2009 in the Supreme Court to three and a half years imprisonment on count 1 and six years imprisonment with a non-parole period fixed after three and a half years on count 2. He sought leave to appeal against that sentence, arguing that it was manifestly excessive in its own terms and also when compared to what two foreign co-accused received. Perhaps significantly, although legally represented at sentence, he was self-represented in this application – which given the appeal Court's remarks, may have been helpful.

The offender was 48 at sentence. He usually lived in Sydney where he looked after his elderly mother. Defence counsel had tendered numerous references which stated that the offender was well regarded in the community, that he was a kind and generous person, and that these offences were out of character. The references and a medical report confirmed that Byrne was a kindly carer for his aged mother. The medical report also stated that the offender had suffered from chronic depression over many years and that this had been severely exacerbated at times when he had contemplated suicide; he was still suffering from depression at sentence.

He had also provided police with a lengthy statement and genuinely tried to identify those involved, although his information failed to do so.

The Court of Appeal examined the particular facts and held that in the circumstances it was necessary to reduce the non-parole period from 3.5 years to 18 months, stating at para. 36:

> *First, his Honour, who, unlike this Court, did not communicate directly with Byrne, did not appreciate that Byrne's reasoning processes seemed to be*

impaired. The submission made on his behalf, that he failed to fully appreciate the seriousness of his offending, was, in fact, probable.

Second, his Honour was not aware of the sentences imposed on Zhang and Chan in Hong Kong and on Chan subsequently in the trial division of this Court. Chan and Zhang were apparently the instigators of Byrne's offending. They used him as a gullible but essential pawn in their scheme. Chan, for his role in this offending and for other broadly similar earlier offending, was effectively sentenced to six years and seven months imprisonment (or seven years and two months imprisonment) with parole after 36 months. The unique combination of circumstances in this case make it manifestly excessive to require Byrne to serve six months more in custody than Chan before becoming eligible for parole. In addition, Byrne's seemingly impaired rationality supports a lengthy parole period to protect the community and to assist his rehabilitation. The mitigating factors support an early parole release date. After weighing up the competing exacerbating and mitigating features, I consider that Byrne should be sentenced to six years imprisonment with a non-parole period of 18 months.

R v Grehan [2010] 199 A Crim R 408

The offender cooperated fully with the police and pleaded guilty to two counts of knowingly possessing child exploitation material and one count of using a carriage service, the internet, to access child pornography. He was given a sentence of three years and one day, with a non-parole period of 18 months in respect of each count. The crime related to over 40,000 images of child pornography, which covered all the degrees of depravity as envisaged in *R v Oliver* [2003] 1 Cr App R 28. The offender argued the sentence was manifestly excessive, having regard to his chronic mental illness, an obsessive compulsive disorder.

By reference to the system of classifying child exploitation (CE) material according to its degree of depravity, explained in *R v Oliver* [2003] 1 Cr App R 28 it was said that in relation to count 1 there were 39,668 images in the lowest category; 174 images in the second category; 101 images in the third category, 400 images in the fourth category and one image in the fifth or worst category. With respect to count 2 there were 4,192 images in the first category; 82 images in the second category; 87 images in the third category; 205 images in the fourth category and six images in the fifth category. With respect to the 32 videos of CE material found on the computer the subject of count 1, five were in category 1; 11 in category 2; none in category 3; 15 in category 4 and one in category 5.

The significance and volume of the material was relevant on sentencing. However, on appeal, and with the evidence of a psychiatrist who had also been relied upon at first instance, the Court of Appeal took a different attitude to the significance of the type and volume. The offender's psychiatrist's opinion was that the volume of material demonstrated the offender's obsessive compulsive disorder which manifested in both an obsession with pornography and secondly, a need to obtain it and organising it.

The Court held that the sentencing judge did not pay sufficient emphasis to the offender's mental impairments and mitigated the sentence on that basis. The Court adopted the reasoning of the Queensland Court of Appeal in, amongst others, *R v Neumann; Ex parte Attorney-General (Qld)* [2007] 1 Qd R 53 which held that offender of low intelligence and diminished responsibility falling short of insanity will (if otherwise relevant) act as a mitigating factor on sentence because it diminishes the moral culpability of the offender. The Court also referred to *R v Elliott* [2000] QCS 267 "Mental abnormality falling short of insanity may be a significant mitigating factor. Apart from the question of culpability, it makes it difficult for the court to apply a factor such as general deterrence."

The Court also noted that the authorities indicate that the courts have not imposed a sentence greater than 18 months imprisonment on charges of simply possessing CE material. There have been longer sentences in cases where the offender distributed the material, or made it. The cases also suggest that where the Commonwealth offence of using a carriage service is joined with possession the two offences, though different and with different maximums, are punished to the same extent. The number of images possessed and their content are rightly considered highly relevant to sentence, but need to be approached in the context of the individual offender's circumstances.

R v Newton [2010] 199 A Crim R 268

This appeal concerned an offence under s.134.2 of the Code - obtaining a financial advantage by deception. The offender failed to declare employment income to Centrelink and improperly received $50,379.62 over four years. She was sentenced to two years imprisonment, with orders for release after five months, and required to make reparation and ordered to make reparation to the Commonwealth in the sum of $47,293.30 pursuant to s 21B of the *Crimes Act 1914*. She appealed, submitting the sentence was manifestly excessive and failed to properly take into account her early guilty plea; efforts at reparation; community work; lack of criminal history; family circumstances and the fact that the over-payments were used for everyday living expenses not a "lavish lifestyle".

The Court of Appeal held (per Holmes JA and Atkinson J, Chesterman JA dissenting) that (1) Offending of this type is serious and often regarded as difficult to detect, although electronic data-matching between records of the Australian Taxation Office and Centrelink facilitate detection whereas here, no false identity is used, and thus deterrence in sentencing has less impact and needs to be balanced against the applicant's personal circumstances.

Secondly, that in comparison with other cases, the applicant's offending, although extending over four years, was relatively unsophisticated, partial repayment had occurred (At the time of sentence she had repaid $3,086.32 by way of a debt recovery arrangement with Centrelink) and also taking into account the applicant's personal circumstances (At the time of sentence she was single with no dependant children. Her daughter, who suffered from cystic fibrosis and was under her care until 2007, died in 2008. Her surviving daughters were

aged 22 and 26. Her husband died in 1995 from asbestosis). The sentence of imprisonment for five months before release on recognisance was manifestly excessive.

The appeal was allowed and the offender ordered to be released after serving three months imprisonment.

R v Moti [2010] 240 FLR 218

The Crown appealed against the stay of an indictment charging the respondent with seven counts of engaging in sexual intercourse with a person under 16 while outside Australia, contrary to s 50BA of the *Crimes Act 1914*. Four of those counts were allegedly committed in Vanuatu on various dates between 1 May and 13 August 1997, while the remaining three counts are alleged to have been committed in New Caledonia, in October 1997. The learned primary judge stayed the indictment because she had concluded that financial support given to witnesses (the complainant's family members in Vanuatu) brought the administration of the justice system into disrepute and that on a balancing of the relevant policy considerations, the appropriate course to remedy that abuse of process was a stay of the indictment. There had been other basis for the seeking of the stay which failed at first instance but which were the subject of a Notice of Contention, which are not dealt with as part of this summary.

On appeal the central issue remained the appropriateness of the Commonwealth providing financial support to witnesses. The key Commonwealth legislation which was under review was the *Financial Management and Accountability Act 1997* and its associated *Regulations.*

The background to the payments to various witnesses began in 2006 when AFP officers went to Vanuatu to gather evidence in relation to the matter. The complainant was 22 years old and was living in a small village with her parents and siblings. In October 2006, she travelled to Brisbane to provide a further statement. On her return to Vanuatu, she raised concerns about her safety. The Australian Federal Police concluded that there was no evidence of an actual threat, so that the complainant did not qualify for witness protection; instead they considered a "witness management approach" appropriate. The decision was made that the complainant and her daughter could be maintained in Australia on the equivalent of Centrelink benefits.

In early 2007, the complainant's father made a request for financial assistance and the complainant spoke about withdrawing from the case unless her family could live with her in Australia. In December 2007, she again advised AFP that if her family were not brought to Australia with her, she would withdraw as a witness; that indication was reiterated in an SMS message a couple of days later and repeated in a meeting between the complainant, her father and an AFP. At a meeting between officers of the Director of Public Prosecutions' office and the Australian Federal Police, it was agreed that it was not feasible to bring the whole family to Australia, and the complainant was advised accordingly. She reiterated that if the entire family were not removed to Australia she would not participate further and said that she would approach the media with a complaint about having been exploited by the

Australian Government. Her father again demanded immediate financial support for the family and its removal to Australia.

In January 2008, two AFP officers visited the family. The complainant's father had a vanilla plantation and a tamanu oil processing plant. He claimed that he had lost contracts because of his daughter's involvement in the prosecution. He complained that the family had no income, was in debt and was selling household items to buy food, and demanded that they be sent to the south of France where (as French citizens) they could receive social security benefits. The complainant said that if that demand were not met, she would withdraw from the case. A decision was made to provide monthly financial payments to the complainant, her mother, her father and her brother of a total of $6,725.

At first instance the judge hearing the matter was critical of the AFP's approach to witness management and the apparently superficial manner in which the financial payments were assessed, stating *"It raises questions about the integrity of the administration of the Australian justice system, when witnesses who live in a foreign country, where it is alleged an Australian citizen committed acts of child sex abuse, expect to be fully supported by the Australian Government, until they give evidence at the trial in Australia of the Australian citizen. The conduct of the AFP in taking over the financial support of these witnesses who live in Vanuatu is an affront to the public conscience. It squarely raises whether the court can countenance the means used to achieve the end of keeping the prosecution of the charges against the applicant on foot."*

The Court of Appeal disagreed. After reviewing a number of authorities dealing with stays, her Honour Holmes JA, who wrote the leading judgment, stated that there was no evidence the proceedings had been brought for an improper purpose and while the level of payment may have been excessive, it was not designed to induce the witnesses to give false evidence. At para. 32 her Honour stated, "The payments were made to ensure the continued willingness of the recipients to give evidence, not in order to induce the giving of evidence in the first place; an important distinction. Endeavouring to ensure that witnesses will be available for trial is not, of itself, an improper endeavour, although the question of how it is carried out must be examined".

At para. 38 her Honour stated:

> *"…this case seems to me not one of abuse of process but, at the highest, one involving conduct of questionable wisdom "which falls short of establishing that the process of the Court is itself being wrongly made use of". Instead, its process is being used for what the High Court in Ridgeway described as its proper purpose: to seek the conviction of someone charged with very serious offences. And the fact that a court does not give a stay does not, contrary to the submission of the respondent, amount to approval of what has been done by the prosecuting authorities. In this case, it is difficult to accept that by allowing the charges against the respondent to proceed, the Supreme Court would appear to be sanctioning the conduct of the Federal Police officers in making the payments.*

There were, in my respectful view, two crucial errors in the learned primary judge's reasoning: the failure to recognise that the questioned payments were not designed to, and did not, procure evidence from the prosecution witnesses; and the failure to pay sufficient regard to the fact that the payments made, while beyond existing guidelines, were not illegal. The conclusion that the making of the payments was such as to bring the administration of justice into disrepute if the prosecution were allowed to proceed was not, in my view, open on the facts."

R v Moti [2010] QCA 241

Costs issue

There was a costs argument that followed Mr Moti's stay of proceedings. Mr Moti sought an indemnity pursuant to the Queensland *Appeal Costs Fund Act* 1973 for his costs. The application dealt solely with Queensland law and the CDPP does not appear to have played any role in opposing the application. For those reasons is not summarised here, although for the record it is worth noting that the application failed.

R v Garget-Bennett [2010] QCA 231

The offender pleaded guilty to one count of using a carriage service to access child pornography material between 1 March 2005 and 14 September 2008, contrary to s 474.19(1) of the *Code* and one count of knowingly possessing child exploitation material on 13 September 2008, contrary to s 228D of the Queensland *Criminal Code.* He was sentenced to three and a half years imprisonment with a non-parole period of 21 months for the Commonwealth offence and three and a half years imprisonment suspended after 21 months for an operational period of two years for the State offence. The applicant offender sought leave to appeal against the sentences on the ground that they are manifestly excessive and applied for leave to appeal on the ground that the learned sentencing judge erred in considering that there was a requirement to fix a non-parole period of 60 to 66 per cent in respect of the Commonwealth offence unless unusual circumstances existed to warrant a reduction in that percentage.

There was no significant development of sentencing principles in this matter and the appeal centred on the party's competing views regarding which existing authorities provided the best parallel for the offender to be sentence. Ultimately the Court of Appeal adopted the offender's view that the sentencing judge placed reliance on the Queensland District Court's sentencing earlier in 2010 in the matter of *Grehan,* which had been set aside on appeal ([2010] QCA 42). In that case sentences of two years imprisonment on each count were substituted for the original sentences of imprisonment of three years and one day. The sentences for the State offences were suspended after six months, with an operational period of two years, and an order was made for Grehan's release upon recognizance after serving six months of the sentence for the Commonwealth offence. The offender submitted that when regard was had to *Grehan*, it was manifest that the sentences imposed on him were excessive.

The Court of Appeal agreed and stated at para. 35:

> *"For the reasons given, this Court should set aside the sentences of three and a half years imposed in respect of both offences. This Court must now decide the sentences that are appropriate to the circumstances of the applicant's offending, including the period of actual imprisonment that he should serve. The sentence should reflect the need for denunciation and deterrence, whilst taking into account circumstances of mitigation. The circumstances of mitigation include the applicant's early plea of guilty, his co-operation with the authorities and, importantly, the fact that he sought professional treatment for his behaviour before the authorities intervened."*

R v Desborough [2010] QCA 297

The offender pleaded guilty under s 134.2(1) of the *Code* to obtaining a financial advantage by deception from the Commonwealth between 24 May 2001 and 6 September 2006. During the period of her offending, she received about $57,000 from Centrelink when she was entitled only to $7,600 so that her overpayments totalled $49,334.55. She was sentenced in the Gladstone District Court to two years imprisonment with release after six months upon giving security by recognizance in the sum of $3,000, conditioned that she be of good behaviour for three years. She was also ordered to repay the Commonwealth $41,096.22. The offender appealed against her sentence on the grounds that the sentence was excessive because the prosecution recommended her release after three months and because she made regular repayments to the Commonwealth.

The Court of Appeal held that a "term of actual imprisonment was plainly warranted" but decreased the non-parole period to three months on the grounds that the sentence was excessive given her personal circumstances, specifically, her offending was serious but it was a less serious example of such an offence; the need for deterrence must be weighed against the mitigating features: her plea of guilty; that she was the primary care giver for her nine year old child; her efforts at rehabilitation, including the payments of reparation and obtaining fulltime work which remained open to her if she was released from prison within three months, and that this would allow her to meet her reparation commitments to the Commonwealth.

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WESTERN AUSTRALIAN COURT OF APPEAL

Bransby v The Queen [2010] WASCA 165

The offender was convicted of 11 counts of doing something with the intention of dishonestly causing a loss to another person contrary to s 135.1(3) of the *Criminal Code* (Cth). The offender was sentenced to 2 years 3 months' imprisonment on each count. The sentencing judge ordered that the sentences on counts 1 and 2 be served cumulatively and that all the other sentences be served concurrently, resulting in a total sentence of 4 years 6 months. The 11 counts correspond with 11 separate entities registered by the offender (each allocated a different ABN) in order to dishonestly claim refunds of GST. The offender registered the entities progressively over the period 5 February 2007 to 25 November 2008. A number of new entities were registered after the Australian Taxation Office (ATO) placed stops on refunds to the entities the subject of some of the counts in May 2008. The offender used the names of strangers for a number of the entities which had the effect of avoiding the stops and distancing the offender from the offending.

The basis of the appeal was that the sentencing judge imposed a sentence that was manifestly excessive given the fact that all of the offences contained essentially common elements and were committed against the one entity (i.e. it offended the 'totality principle') and secondly that the sentencing judge failed to take into consideration the administrative penalty of 75% which was imposed by the Commissioner of the ATO upon the offender which equated to over $251,000.

The Court rejected the submission that there was a rule which applied in circumstances where the offence was essentially one transaction. At para. 33 the Court held: "There is no absolute requirement that a sentencing judge must impose concurrent terms in cases involving multiple offences constituting a continuing episode. In each case, what justice requires is due consideration of whether, and to what extent, the offender was truly engaged upon one multi-faceted course of criminal conduct, and whether the sentences imposed properly reflected the outcome of that consideration: *Johnson v The Queen* [2004] HCA 15.

The Court stated that the purpose of the totality principle was to ensure that the total sentence should be proportionate to the degree of criminality involved. Simply because the offences were identical in the manner in which they were carried out and involved the same victim did not mean there should automatically be a lesser sentence. The overall criminality needed to be considered, including the ease of detecting the offence.

With respect to the ATO's penalty on the offender, the Court of Appeal held, *"It is not necessary on the facts of this case to make any authoritative statement about the mitigatory weight which might be given to the payment of an administrative penalty. Here, the offender has no capacity to repay the amount he defrauded the Commonwealth, let alone any penalty. It is highly unlikely that he will suffer any hardship as a result of the administrative penalty. In these circumstances, the imposition of the administrative penalty carries no mitigatory weight."*

Payne v The Queen [2010] WASCA 177

The offender was charged with one count of dishonestly obtaining a financial advantage from Centrelink by deception, contrary to s 134.2(1) of the *Criminal Code* (Cth) (Code) (count 1); and one count of engaging in conduct with the intention of dishonestly obtaining a gain from Centrelink, contrary to s 135.1(1) of the Code (count 2). The offender entered pleas of guilty in the District Court and was sentenced on count 1, to 12 months' imprisonment and on count 2 to 6 months' imprisonment. His Honour ordered that the sentence for count 2 be served cumulatively on the sentence for count 1. The total effective sentence was therefore 18 months' imprisonment. His Honour ordered that the offender be released after serving 9 months, upon entering into a recognisance in the amount of $3,000 to be of good behaviour for a further 9 months.

The offences related to the payment by Centrelink to the offender of a parenting payment (single), and the payment by Centrelink to her of amounts, in the total sum of $50,754.98, to which she was not entitled.

Ground 1 alleges that the sentencing judge failed to take into account a material consideration, namely, that there had been a substantial delay in commencing criminal proceedings against the offender. Ground 2 was abandoned. Ground 3 relied on the 'totality principle' and was to the effect that the total effective sentence does not bear a proper relationship to the overall criminality involved in the offences, having regard to the circumstances in which the offences were committed and matters personal to the offender.

With respect to the delay in prosecution, the Crown accepted that there had been a delay between the brief of evidence being referred to the Commonwealth Director on 28 February 2008 and the signing of the prosecution notice on 28 August 2009, being a period of about 18 months. The Court held that the relevance and significance (if any), for sentencing purposes, of delay in the charging of an offender, or in the disposition of a pending prosecution against an offender, will depend on all the circumstances of the particular case. Subject to that overriding principle and the necessity for flexibility of approach to accommodate the individual facts of each case. Moreover, the Court held that as the delay was not caused by dilatory or neglectful conduct by the Crown or any investigatory body it was of no significance. In any event, even if there was any dilatory or neglectful conduct, it does not, in the circumstances of the present case, require a reduction in the individual sentences or the total effective sentence imposed because:

- the nature of the offending and its objective seriousness precluded any additional discount on the sentences imposed on the offender.
- the delay, while undesirable, was not inordinate or exceptional.
- the delay was conducive to the emergence of a significant circumstance to be considered in mitigation, namely, the provision of an opportunity for the offender, which she acted upon, to make restitution of the amount she had defrauded from Centrelink.

- there was no evidence before the sentencing judge that the delay had resulted in significant stress for the offender or left her, to a significant degree, in "uncertain suspense". Further, there was no evidence that during the period of the delay the offender had adopted a reasonable expectation that she would not be charged or that she had ordered her affairs on the faith of any such expectation. It is true that there was evidence that the offender had experienced stress and suffering, but this appears to have been connected with the fact of her conviction and its impact upon her present and future employment, her family and her young child.
- although the sentencing judge did not expressly take into account delay (because, no doubt, neither the prosecutor nor the offender's lawyer mentioned it), he did expressly take into account all relevant factors with which delay was associated.

The Court referred to the two aspects of the totality principle, being, firstly, the total effective sentence imposed on the offender must bear a proper relationship to the overall criminality involved in all of the offences viewed in their entirety, having regard to all relevant circumstances including those referable to the offender personally (this was the aspect the offender emphasised) and secondly, the total effective sentence imposed on an offender should not constitute a "crushing" sentence; that is, it should not destroy any reasonable expectation of useful life after release from custody.

The Court rejected the offender's submissions, finding that it was reasonable and open to the sentencing judge to aggregate the individual sentences in order to reflect the offender's overall criminality and that the sentencing judge took into account proper considerations including the nature and circumstances of the offences, including the maximum penalties available for each count; the injury, loss or damage resulting from the offences, namely, the amount of $50,754.98; the degree to which the offender had shown contrition; the offender's pleas of guilty; the degree to which the offender had cooperated with law enforcement agencies in the investigation of the offences, including her admissions to and cooperation with Centrelink; etc etc.

Gok v The Queen [2010] WASCA 185

The offender was convicted by a District Court jury of two counts of obtaining a financial advantage by deception, contrary to s 134.2(1) of the *Code*. The offender was sentenced to 3 years' imprisonment on each charge to be served concurrently commencing from 13 March 2009. Pursuant to s 20(1)(b) of the *Crimes Act 1914* his Honour ordered that the offender be released after serving 2 years' imprisonment upon entering into a recognisance to be of good behaviour in the sum of $5,000 for the balance of the sentence.

The case concerned the GST and payment of GST refunds to businesses deemed to have overpaid GST. The offender was an employee of the ATO and involved in the refund of GST. Essentially the offender created fraudulent invoices between two business which included an alleged payment of GST in the amount of $92,458 which the offender sought to be 'refunded' to himself. The ATO uses various algorithms designed to check for fraudulent refunds which worked on one occasion, but not the other.

On appeal the offender sought leave to appeal against his sentence on a number of grounds, including that they were manifestly excessive. The respondent has sought leave to cross-appeal, alleging that the sentences were manifestly inadequate.

At para. 97 the Court referred to another WA case, *McDougall v The State of Western Australia* [2009] WASCA 232 [13] and stated that to determine whether a sentence is manifestly excessive or inadequate, regard is to be had to the maximum sentence prescribed by law for the crime, the standards of sentencing customarily observed with respect to the crime, the place which the criminal conduct occupies on a scale of seriousness of crimes of that type and the personal circumstances of the offender.

After reviewing a number of comparable cases submitted by both the Court held that the sentences imposed by the sentencing judge were within a 'sound discretionary range' and that no error had been made.

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AUSTRALIAN CAPITAL TERRITORY- COURT OF APPEAL

James Paul Seivers v The Queen [2010] ACTCA

The offender was an ASIO employee who, along with a friend, were charged with offences contrary to the *Australian Security Intelligence Organisation Act* 1979 Cth, s 18(2), concerning unauthorised disclosure of official documents. While at the employee's house, his friend had come into possession of the relevant documents. The friend denied that the employee had played a part in disclosure of the documents. The Crown prosecutor invited the jury to disregard the friend's evidence exculpating the employee, as the prosecution stood or fell on co-operation in the alleged illegal disclosure being established. The employee, having been convicted, appealed on four grounds, specifically, that: (a) the jury verdict was unreasonable and could not be supported by the evidence; (b) the verdict was unsafe and unsatisfactory (c) a properly instructed jury would have entertained a reasonable doubt; and (d) the prosecutor had made prejudicial remarks about one of the key witnesses. The Court upheld the grounds of appeal, including the ground that the prosecutor's remarks were prejudicial. The offender was acquitted.

With respect to the ground regarding the prosecutor's remarks, it stemmed from the manner in which the 'friend' of the offender's evidence was treated. In evidence the friend said that he had been at the offender's home where the sensitive information had been left and that he accessed it, photocopied it and distributed it without the ASIO employee's knowledge.

The Crown Prosecutor had commented in relation to the friend's evidence: *"It's in his interests, it's in Matthew O'Ryan's [ie the friend] interest to say that"* and *"He [Mr O'Ryan] can only be convicted if he was acting [for] James Seivers so he can admit his role but deny that portion of it and get that benefit for himself."*

The offender and his friend were described as "inherently incredible witnesses".

The Court of Appeal held that if the evidence of the offender had been treated in the way the Crown prosecutor appeared to suggest, the evidence of the offender would have been subjected to a dismissive scrutiny rather than the independent assessment it deserved. It should not have been linked to the evidence of the other witness. Although this was not a case of a clash of credibility between prosecution witnesses and the offender, that did not make the Crown prosecutor's comment any less likely to operate unfairly on the way the offender's evidence should be treated.