

The role of counsel for the prosecution in sentencing proceedings for offences under the *Occupational Health and Safety Act*¹

1. Counsel for a prosecutor must balance two aspects of the role which although not mutually exclusive, do definitely to some extent compete with each other. The prosecutor, as counsel for the prosecutor is often referred to in shorthand², must be a detached representative of the State, with the responsibility of helping to secure the fairness of a trial, which of course includes any sentencing process. There are many solemn pronouncements and guidelines to this effect – see below. In our adversarial system however, and as counsel responsible for appropriately running the case for the State as a party, there is also the duty to the client, and indeed to the Court, to appropriately press the State’s case as an advocate.
2. In representing the State and helping to ensure that a defendant’s trial is fair, the prosecutor has unique responsibilities which are distinct from those of their opposing counsel, and counsel generally.³ As guideline 2 of the Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW) states, see below, the role of the prosecutor is a specialised and demanding one, the features of which need to be clearly recognised and understood.
3. The courts have attempted to assist prosecutors in understanding their special role. In *Regina v Puddick*⁴, decided over a century ago, prosecutors were referred to as “ministers of justices” who must endeavour to ensure that criminal trials are fair and can be seen to advance the interests of justice.⁵

¹ I have been greatly assisted in the preparation of those parts of this paper dealing with the general ethical duties of prosecuting counsel by a paper presented to the Bar by the Crown Advocate, Richard Cogswell SC, on 29 September 2004. Mr Cogswell has kindly allowed me to reproduce parts of his paper.

² Which is obviously permissible, but should not be allowed to blur the distinction between the client and the legal representative where that is relevant.

³ See, for example, *Whitehorn v The Queen* (1983) 152 CLR 657 at 675 per Dawson J.

⁴ (1865) 4 F&F 497 [176 ER 662].

⁵ *Regina v Armstrong* [1998] 4 VR 533 at 537 per the Court (Charles, Batt JJA and Vincent AJA).

4. More recently Deane J, in *Whitehorn v The Queen*⁶, summarised the role of the prosecutor as follows:

“Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one.”

5. Again, even more recently, in *Regina v Teasdale*⁷ Tobias JA said, at [20]:

‘It is well established that the Crown Prosecutor has a responsibility to present the Crown case properly and fairly. The relevant authorities are collected by Greg James J, with whom Spigelman CJ agreed, in R v Kneebone (1999) 47 NSWLR 450 at 457-460 which was applied by this Court in R v Walton [1999] NSWCCA 452 and R v Kennedy [2000] NSWCCA 487.

6. However, while the special responsibilities of the prosecutor set them apart from other practitioners – prompting some to describe their role as a lonely one⁸ - the prosecutor should not be supposed to be detached from or disinterested in the outcome of a trial.⁹ To the contrary, as Barwick CJ stated in *Rattern v The Queen*¹⁰, our criminal justice system is based on the concept of a trial in which the protagonists are the State on the one hand and the defendant on the other:

“Each is free to decide the ground on which it or he will contest the issues, the evidence which it or he will call, and what questions whether in chief

⁶ (1983) 152 CLR 657 at 663.

⁷ [2004] NSWCCA 91

⁸ *Regina v Apostilides* (1984) 154 CLR 563 at 576 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.

⁹ (1983) 152 CLR 657 at 675 per Dawson J. See also the comments of Lord Devling in *Trial by Jury* (1966), pp 122-123, referred to by Carruthers J in *Regina v Rugari* (2001) 122 A Crim R 1 at 10.

¹⁰ (1974) 131 CLR 510 at 517.

or in cross-examination shall be asked; subject always, of course, to the rules of evidence, fairness and admissibility.”

7. However, despite these general expressions of the applicable principles, they are of little assistance to a prosecutor in determining, at a practical level in a particular case, what actually has to be done to ensure that a trial is a fair one while at the same time fulfilling their role as representing one of the protagonists. As Caruthers AJ noted in *Regina v Rugari*, while the general principles are well established “the difficulty which generally arises is the application of those principles to the particular facts of the subject case”¹¹.
8. Also, regularly there are cases in the appeal courts where the conduct of prosecuting counsel is called into question, and in determining those appeals the courts have examined the role of the prosecutor and commented on specific aspects of their duties.
9. Also, the topic of prosecutorial duties is of ongoing interest to legal commentators generally¹².

The professional guidelines

10. The professional associations in this State of barristers and of solicitors, respectively, and the offices of the State and Commonwealth Director of Prosecutions have thus seen fit to also proffer guidance as to the specific duties and responsibilities that a prosecutor has to observe in conducting prosecutions. Also no doubt the Police Prosecution Branch, and other branches of government conducting prosecutions have guidelines.

¹¹ (2001) 122 A Crim R 1 at 9 [44].

¹² For other articles which examine aspects of a prosecutor’s duties, see, for example, J Willis, “Some Aspects of the Prosecutor’s Role at Sentencing”, (1996) 6 *Journal of Judicial Administration* 38; The Hon Justice D Hung, “What the Courts Expect of Crown Prosecutors”, 1998) 10 *Judicial Officers’ Bulletin* 1; Y Ross, “Prosecution tactics and ethics”, (2000) 74 *Law Institute Journal* 49; M Hinton, “Unused Material and the Prosecutor’s Duty of Disclosure” (2001) 25 *Criminal Law Journal* 121; R Refshauge, “Prosecutorial Discretion – Australia”, in GA Moens, R Biffot (eds) *The Convergence of Legal Systems in the 21st Century: An Australian Approach* (2002) at 353-390; and M Hinton, “The prosecutor’s duty with respect to witnesses: pro Domina Veritate”, (2003) 27 *Criminal Law Journal* 260.

11. There are a number of different professional instruments which address the conduct of prosecutors in New South Wales, namely:
 - (a) the New South Wales Barristers' Rules of the NSW Bar Association ("the Barristers' Rules");
 - (b) the Advocacy Rules of the New South Wales Solicitors' Rules ("the Solicitors' Rules");
 - (c) the Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW) ("the State Guidelines"); and
 - (d) in respect of prosecutions in New South Wales for Commonwealth ("the Commonwealth Policy").
12. The State Guidelines also incorporate by reference the Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors which have been promulgated by the International Association of Prosecutors¹³.
13. These Rules and the Guidelines have been drafted consistently with the role of the prosecutor as a minister of justice, and the more detailed instruction which they provide assist prosecutors to analyse more precisely that role. As Greg James J stated in *MRW v The Queen*, the Rules and Guidelines operating in New South Wales with respect to prosecutors inform the more general ambit of the prosecutor's duty of fairness as explained in the common law¹⁴. At the same time, these instruments also acknowledge the adversarial nature of our criminal justice system, which of necessity impacts upon the level of impartiality that prosecutors can realistically bring to a trial.
14. In relation to the Barrister's Rules, they operate as a code of conduct enforceable by real sanctions under Part 10 of the *Legal Profession Act 1987*. A breach of

¹³ Appendix A to the State Guidelines.

¹⁴ (1999) 113 A Crim R 308 at 317 [41].

them could be the basis for a finding of professional misconduct or unsatisfactory professional conduct, for which there can be severe sanctions.

15. I understand that the Solicitors' Rules operate in the same way.
16. Rules 62-72 of the Barristers' Rules contain provisions which apply specifically to Prosecutors. In terms reminiscent of those used by Deane J in *Whitehorn*, above, Rule 62 sets out the fundamental duties of a prosecutor:

'62. A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.'

17. Rules 63-72 then flesh out those fundamental obligations, covering, among other things the prosecutor's obligations in respect of sentencing. Rule 71 provides:

*'71. A prosecutor must not seek to persuade the court to impose a vindictive sentence
or a sentence of a particular magnitude, but:
(a) must correct any error made by the opponent in address on sentence;
(b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
(c) must assist the court to avoid appealable error on the issue of sentence;
(d) may submit that a custodial or non-custodial sentence is appropriate;
and
(e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.'*

18. These prosecutor-specific rules are additional to the general provisions, which may also be relevant to the conduct of a prosecution and with which a prosecutor must also comply. See eg. Rules 21-31 re ‘Frankness in court’ Rules 35-40 re ‘Responsible use of court process and privilege’ and Rules 51-58 re ‘Duty to opponent’.
19. In addition to the Barristers’ and Solicitors’ Rules, the Offices of both the New South Wales and Commonwealth Director of Public Prosecutions have issued guidelines in relation to prosecutions conducted by or on behalf of their respective offices.
20. Like Rule 62 of the Barristers’ Rules, Guidelines 2 and 3 of the State Guidelines set out the fundamental obligations of the prosecutor as a ‘minister of justice’.
21. The State Guidelines outline the prosecutor’s duties in such matters as the disclosure of relevant or possibly relevant material to the accused¹⁵, the calling of witnesses¹⁶ and the sentencing process¹⁷ in a similar, but more detailed manner to the Barristers’ Rules.
22. At the same time, the State Guidelines recognise that there will be occasions when a prosecutor will be entitled ‘*firmly to vigorously*’ to urge the prosecution’s view about a particular issue and to test, and if necessary to attack, that advanced on behalf of an accused person or evidence adduced by the defence:¹⁸

‘A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged.’
23. The Commonwealth Policy does not cover the role and duties of the prosecutor in the same detail as the State Guidelines. However, like the State Guidelines,

¹⁵ Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW), 2003, Guideline 18.

¹⁶ Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW), 2003, Guideline 26.

¹⁷ Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW) 2003, Guideline 28.

¹⁸ Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW) 2003, p4.

the Policy acknowledges the need for a prosecutor to balance the competing tensions inherent in their role:¹⁹

‘[T]roughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice, for in the final analysis the prosecutor is not a servant of government or individuals – he or she is a servant of justice. At the same time it is important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context and seek to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.’

Submissions on sentencing – the general law

24. As the High Court recently reiterated in *GAS v Regina*²⁰, it is for the sentencing judge, alone, to decide the sentence to be imposed in the relevant case. In doing so, the judge must find the relevant facts – and it is well settled that facts aggravating the sentence are to be proved beyond reasonable doubt, facts mitigating the sentence need only be proved on the balance of probabilities – *R v Olbrich*²¹.
25. The role of the prosecutor has traditionally been one of assisting the judge to obtain all the facts, and any applicable law, which might be relevant to the sentence in question. Legislative changes to the sentencing process, see eg. s 21A of the *Crimes (Sentencing Procedure) Act 1999*, have seen an expansion of the prosecutor’s duties with regard to sentencing and given them a more active role in that process. Nevertheless, the focus remains on the prosecutor assisting the sentencing judge to ensure that he or she arrives at the appropriate sentence.

¹⁹ Prosecution Policy of the Commonwealth, para [6.1].

²⁰ (2004) 206 ALR 116 at 125-126 [28]-[32].

²¹ (1999) 199 CLR 270

26. In determining the appropriate sentence for an accused, the sentencing court is, to a large degree, dependent upon the information that the prosecution provides to it²² - especially where there is a plea of guilty and the judge has not had all the facts as to liability litigated in front of him or her. The court expects, for example, that the prosecutor will put antecedents' reports before it, showing such of the subjective material elicited in relation to the defendant as is necessary to present a fair picture to the judge, as well as any criminal record of the defendant²³.
27. With the advent of Crown appeals against sentence, courts recognised that the role of the prosecutor in the original sentencing hearing has taken on additional significance. In *Regina v Tait*²⁴, the Full court of the Federal Court discussed the impact of Crown appeals on the sentencing process and set out the following general principles as to its impact on what is required of a prosecutor in making submissions as to sentence:
- (a) The Crown is required to make its submissions as to sentence fairly and in an even-handed manner, and does not, as an adversary, press the court for a heavy sentence;²⁵
 - (b) The Crown has a duty to the court to assist it in the task of passing sentence by an adequate presentation of the facts, an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it.
 - (c) When a Crown right of appeal against sentence is conferred, the Crown is under a duty to assist the court to avoid appealable error. The performance of that duty to the court ensures that the defendant knows the nature and

²² J Willis, "Some Aspect of the Prosecutor's Role at Sentencing", (1996) 6 *Journal of Judicial Administration* 38-55 at 41.

²³ *Regina v Gamble* [1983] 3 NSWLR 356 at 359 per Street CJ.

²⁴ (1979) 24 ALR 473 at 477.

²⁵ See also *Regina v Wilton* (1981) 28 SASR 362 at 364.

extent of the case against him, and thus has a fair opportunity of meeting it.

- (d) Although the existence of an error is a common ground which entitles an appellate court to intervene in appeal by the Crown and by the defendant, there would be few cases where the appellate court would intervene on a Crown appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error, or if the defendant were unduly prejudiced in meeting for the first time on an appeal the true case against him or her.
28. While paragraph (d) above indicates that a prosecutor is entitled to make submissions in an appeal against sentence which are additional, or different, to those made at first instance, an appellate court will carefully scrutinise what happened in the court below in order to decide whether such an approach is appropriate in particular circumstances. In *Regina v Allpass*, the New South Wales Court of Criminal Appeal held that while the Crown is not debarred from taking a stance different from that taken at first instance, in the exercise of its discretion the Court was entitled to take account of the fact that, at first instance, the Crown acquiesced in the course that was taken by the sentencing judge.²⁶ The Court indicated that the weight to be given to such a consideration depended upon the circumstances of the particular case, but it may be of considerable significance if the respondent was given a non-custodial sentence at first instance.²⁷
29. In that case, the prosecutor at first instance had not contested the proposition that a non-custodial sentence involving a lengthy recognisance would be appropriate. On appeal, the Crown argued that a custodial sentence was required. The Court held that the sentencing judge had fallen into error, and that in its opinion a recognisance was unduly lenient. However, in the exercise of its discretion it

²⁶ (1993) 72 A Crim R 561 at 565, citing *Jermyn* (1985) 2 NSWLR 194; and *Malvaso* (1989) 168 CLR 277.

²⁷ (1993) 72 A Crim R 561 at 565.

dismissed the appeal, with one of the significant discretionary factors taken into account being the fact that, at the sentencing proceedings, the prosecutor submitted that the course that the sentencing judge ultimately adopted would be appropriate. In the Court's opinion considerations of double jeopardy were of particular importance in the case where the Crown, having accepted the appropriateness of a non-custodial sentence then sought, by its appeal, to have sent to prison *'an elderly man, who is mentally and physically infirm, and who has previously led a blameless life'*²⁸.

30. Similarly, in *Hewlett v Holland*,²⁹ the South Australian Court of Criminal Appeal dismissed a Crown appeal against sentence on the basis that it could and should have put the arguments it now brought before the Court to the sentencing court. In that case, Cox J referred to the times when the conventional role of the prosecutor applied as 'now passed'.³⁰

"The Crown cannot now take a neutral stand on an active issue as to the possible suspension of a sentence of imprisonment, or even remain silent on the matter, without imperilling its right to seek leave to appeal in the event of the subsequent sentence in that respect disclosing an appealable error."

31. While a prosecutor is responsible for ensuring that the sentencing tribunal has all appropriate material before it, it is not the role of the prosecutor to push for a particular length or type of sentence. In *Regina v Jamieson*, King CJ stated that any practice by which a prosecutor refers to a specific sentence is to be deprecated.³¹ The Guidelines and the Rules also clearly instruct prosecutors against seeking to persuade the judge to impose a "*vindictive sentence*" or a sentences of a particular magnitude.³²

²⁸ (1993) 72 Crim 4 561 at 566.

²⁹ (1997) 97 A Crim R 153.

³⁰ (1997) 97 A Crim R 153 at 159.

³¹ (1988) 50 SASR 130 at 133.

³² See, for example, the Barristers' Rules, Rule 71.

32. Nonetheless, it has been held acceptable for a prosecutor to indicate whether a custodial or non-custodial sentence is appropriate in the circumstances of a particular case.³³ Sentence indication hearings were an example of this process, where the prosecutor had been encouraged to submit a range of sentences to the judge hearing the matter.³⁴

Submissions on sentencing for OHAS offences

The applicable principles

33. In this jurisdiction, the substantive principles for sentencing are long settled. The case I most often quote is *Capral Aluminium Ltd v WorkCover Authority of New South Wales (Insp. Mayo-Ramsay)* [2000] NSWIR Comm 71; 99 IR 29. That judgment of the Full Bench of the Industrial Relations Commission cites the other well known Full Bench authority of *Lawrenson Dyecasting Pty Ltd v WorkCover Authority of New South Wales* (1999) 90 IR 464 and reinforces the proper step by step approach to sentencing. *Capral* also sets out the principles in relation to deterrence, both general and specific, and parity or consistency on sentencing.
34. The first step for the court is of course to determine the objective seriousness of the offence, or the *'nature and quality, or the gravity, of the offence'* by looking at the objective facts, and also consider questions of deterrence, and then to assess a nominal penalty that should be imposed.
35. The next step is to consider the subjective circumstances of the prosecution process - eg. the timing of a plea of guilty, co-operation by the defendant – and the subjective circumstances of the defendant – eg. his, her or its employment practices, financial circumstances, antecedents (which in this jurisdiction may expose it to a higher penalty under s 12 of the Act), mitigating circumstances -

³³ *Higgins v Fricker* (1992) 63 A Crim R 473.

³⁴ *Regina v Glass* [1994] 73 A Crim R 299.

and to consider whether the nominal penalty to be set after consideration of the objective circumstances should be reduced.

36. It is well settled that an early plea of guilty will entitle a defendant in this jurisdiction to a discount of up to 25% - see *R v Thomson, R v Houlton* (2000) 49 NSWLR 383 which has been cited on many occasions in the Commission with approval, and is binding on first instance judges in sentencing proceedings for OHAS offences, see *Ridge Consolidated Pty Ltd v Mauger* (2002) 115 IR 78, per the Full Bench at [37] on p 89.
37. It also seems to be well settled that a discount of up to a further 10% for subjective factors will be allowed.
38. Finally, where the court is sentencing for multiple offences, there must be a consideration of the appropriateness of the total fine after accumulating the individual fines, and where appropriate a further discounting for overlaps between the different offences, or just because in the circumstances the total fine is too high in the judgment of the court – see *Pearce v Queen*³⁵.
39. As the majority of the High Court, McHugh, Hayne and Callinan JJ, said in *Pearce*, above:

[46] Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision - cf House v The King (1936) 55 CLR 499. It is, then, all the more important that proper principle be applied throughout the process.'

The 'tariff'

40. This term is of course a term of art used by practitioners in the criminal law to indicate the normal range of sentences imposed by courts, which as any practitioner knows, is often very different to the maximum penalties set by the legislature.

³⁵ (1998) 194 CLR 610

41. Obviously, questions of range or tariff are most particularly directed to the setting of the nominal sentence before discounting for an early plea or subjective factors – ie. at the first step as above.

42. It was said by the Full Bench of Commission in *Capral* at [69]-[70]:

‘69 The further difficulty, and one very significant for present purposes, is that we do not consider that there has yet been established a general sentencing pattern in relation to serious occupational health and safety offences since the penalties were increased in 1996. The experience of members of this Court indicates that, notwithstanding the way in which those increased penalties were legislated to take effect, significant offences which attracted the \$500,000 maximum penalty did not commence to be considered by the Court until approximately mid 1998 and, although there have been a reasonable number of decided cases, we do not consider that there have been a sufficient number of cases to indicate a settled sentencing situation. This is not surprising when the terms of relevant authorities are considered. We have already adverted to the obligations on members of judiciary imposed by such legislative changes which have been recognised in the judgments in *R v Hartikainen* and *R v Slattery*, and in the other authorities to which we have referred earlier. Those authorities require the Courts “to give effect to the obvious intention of the Legislature that the existing sentencing patterns are to move in a sharply upward manner”. A sentencing pattern does not develop overnight. It involves a period of reconsideration, elaboration and then consolidation as to a new sentencing pattern. Although a pattern has begun to emerge, the collection of cases relied upon by the appellant does not evidence a sentencing pattern which would be of utility for the purpose of the disposition of this appeal. Similarly, we do not consider that the offences referred to are sufficiently similar to enable us to discern a pattern which would be of assistance as to the present offence even if we had held a different view to that which we have expressed on this issue.

70 Finally on the issue of sentencing pattern, there is certainly no pattern established in relation to serious offences where the maximum penalty for the offence is \$750,000 which, as we have held, is the maximum penalty applicable in this matter. It follows that the question of the appropriate penalty in this matter both at first instance and on appeal is one to be considered in terms of the particular seriousness of the offence in the light of the subjective or mitigating factors which the appellant is entitled to have brought into account in its favour in the assessment of the relevant penalty.’

43. This was a judgment delivered in mid 2000, and obviously the situation may have changed since that time. However, to my knowledge, no one has collected

sentencing statistics similar to those that are collected and published by the Judicial Information Research Service, available online to authorised users. This would certainly be a useful exercise.

44. In any event, many judges in mainstream crime deprecate tariff submissions – although in my experience that is usually when they have formed a fixed opinion already and wish to minimise the precedent effect of a well known range that they wish to step outside.
45. Nonetheless, those with the experience in the jurisdiction will certainly agree that penalties have been creeping upwards, and a submission that the appropriate penalty should be high range would now anticipate a nominal sentence of over \$300,000 for an individual offence.
46. The highest penalty so far handled out to any defendant is \$1.1 million in total for five offences, imposed on *Abigroup Contractors Pty Ltd* by the Full Bench of the Commission in its recent judgment *Abigroup Contractors Pty Ltd v WorkCover Authority of New South Wales (Insp Maltby)*³⁶.
47. In that prosecution, *Abigroup* had been fined a total of \$1.5 million by the trial judge, Kavanagh J, at the end of a long and vigorously defended trial after which it was convicted of all five offences charged. The total fine was the accumulation of the five penalties, which her Honour nominally assessed, at the first step of the process, at \$300,000 (x 2), \$350,000 (x 2) and \$400,000. In her Honour's view each of the offences was objectively very serious.
48. Although the appeal of *Abigroup* was allowed, and the sentence reduced, that was because of considerations of totality, at the third step of the process. The nominal sentences were not challenged, and were specifically accepted as correct by the Full Bench³⁷.

The making of submissions on sentence

³⁶ [2004] NSWIRComm 270, 24 September 2004.

³⁷ [2004] NSWIRComm 270, at [84]

49. In a case like *Abigroup*, or similar cases where the objective seriousness is obvious – see eg *Insp Littley v Tieman Industries Pty Ltd*³⁸, another judgment of Kavanagh J in which I appeared, it is easy to submit that the penalty should be at the upper end of the range. In the latter case, the accident was so severe, so avoidable, and the victim so vulnerable that her Honour had little difficulty in holding that the offence was very serious deserving a heavy penalty, and although she did not in that judgment reveal the nominal penalty that she was imposing, she did allow a discount of 25% for the early plea and indicated that she was further discounting for other subjective factors, before arriving at the fine of \$275,000 which she imposed.³⁹
50. See also *Inspector Stephen Campbell v James Gordon Hitchcock* {2005} NSWIRComm 34. In that case, in the sentencing hearing before Justice Walton I submitted that the objective seriousness of both offences for which his Honour was sentencing was ‘very high’, and his Honour agreed in his judgment. At [19] he described them as offences ‘*of great seriousness*’.
51. Similarly, offences at the lower end of the range are usually obvious, and on occasion an appropriate submission can be made in that regard.
52. Where however a judge seeks some sort of assistance in relation to the vast bulk of other offences which fall between these two extremes, it is very difficult to give any meaningful assistance to the court. In mainstream criminal law the court has many sentencing options and the prosecutor often assists the court with submissions as to the various alternatives to imprisonment, of which there are many – eg: weekend detention, home detention, suspended sentence, a bond, a Griffiths bond, a lesser fine, a lesser period of disqualification and etc. Where the only penalty is imposition of a fine and thus the severity of the penalty is the quantum of the fine, in lieu of any clear statistics as to what the current tariff is, it is really an area in which the judges discretion is paramount and in my opinion little assistance can be given by the prosecutor.

³⁸ [2004] NSWIRComm 130

³⁹ NB – her Honour’s judgment is under appeal by the defendant.

53. Indeed, submissions in ignorance of a wide range of comparative sentences in similar circumstances may be positively unhelpful and tend to lead the judge into error.
54. Also, I have had the experience of being quoted out of context by a trial judge as supporting a ‘low range penalty’ and that then being used to support an otherwise excessively light penalty – see *Inspector Lancaster v Burnshaw Constructions Pty Ltd* [2001] NSWIRComm 386, per Glynn J, at [66], which case had to be taken on appeal to correct her Honour’s error, see *Inspector Lancaster v Burnshaw Constructions Pty Ltd* [2002] NSWIRComm 319.
55. For myself, bringing together all of the above, it seems to me permissible, and it is my practice, to make sentencing submissions along the following lines:
- (a) as to the objective seriousness of the offence, taking into account aggravating circumstances, as being either at the upper end of the range, or the lower end (obviously in relation to the latter, that is something upon which I would seek approval from my instructing solicitor);
 - (b) as to comparative sentences, where the facts truly do fit (but as every case turns on its own facts often this is not able to be done);
 - (c) as to the weight that should be given, or not given, to submissions by the defence in mitigation;
 - (d) any other matters relevant to s 21A of the *Crimes (Sentencing Procedure) Act 1999*;
 - (e) the principles as to treating a defendant corporation as equivalent to an individual, where that is raised by the defence⁴⁰; and
 - (f) the principles for dealing with the matter under s 10 of the *Crimes (Sentencing Procedure) Act 1999* where that is raised by the defence⁴¹.

⁴⁰ see *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 49

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(amended and updated as at 3 March 2005)

⁴¹ see *Inspector Christopher Downie v Menzies Property Services Pty Limited* [2004] NSWIRComm 259