

THE LABYRINTHINE NATURE OF FEDERAL SENTENCING

Justice Mark Weinberg¹

A modified and updated version of the keynote address delivered at conference entitled 'Current Issues in Federal Crime and Sentencing', National Judicial College of Australia and ANU College of Law, Canberra on 11 February 2012

1 As any judge who has ever sentenced an offender will know, it is no easy thing to imprison a fellow human being. Yet, someone must perform that most difficult task. The offending must be denounced, and appropriate punishment must be meted out. Still, it can be a daunting task to balance the interests of the community, and of the victim, all the while ensuring that any sentence imposed is proportionate to the gravity of the offence in question.

2 Sentencing used to be a relatively straightforward exercise, at least in a technical sense. Regrettably, that is no longer the case. It now involves recourse to a highly complex body of statutory law, as well as consideration of numerous authorities said to be of pivotal importance. It is now full of traps for the unwary.

3 In *R v Lim and Ko*,² Brooking JA, with whom Phillips and Buchanan JJA agreed, uttered the following lament:

Nowadays, no appeal against sentence is complete without the citation of authority, and Mrs Hampel and Mr Tehan both rose to the occasion by referring us to a number of reported cases. I have not found it necessary to discuss any of them, although I venture to record with respectful concern the melancholy fact that in one of the cases relied on, *R v Downie & Dandy* (1998) 2 VR 517, it was found to be desirable, as an interim measure, to lay down nine large bundles as part of "the law on prevalence", which was said at 520 to await its Labeo. I note with apprehension that Labeo is the Roman jurist reputed to have written 400 books.

¹ Judge, Court of Appeal, Supreme Court of Victoria. I wish to acknowledge the invaluable assistance of my Associate, Jack O'Connor, who is responsible for those parts of the paper that can be commended. I take responsibility for the remainder. The views expressed in this paper are, of course, my own, and not necessarily representative of those of other members of the Court.

² [1998] VSCA 54.

Most appeals against sentence can and should be disposed of without the citation of authority. We must do what we can to strive for simplicity.

4 My purpose in this paper is not to add to the already excessive amount that has been written upon this subject in general, but rather to focus upon a single discrete topic, namely what has been described as the ‘labyrinthine’³ nature of federal sentencing.

5 For the first 90 years after federation, it was not thought necessary to develop any separate body of federal sentencing law. All federal offenders were sentenced in accordance with the law that applied in the particular state or territory where their offences were committed.⁴ There was virtually no legislation of any consequence dealing with sentencing throughout that period, and so both state and federal offenders were, in the main, sentenced in accordance with those common law principles of sentencing that had developed, as they applied in the particular state or territory where the offence was committed.

6 That all changed on 17 July 1990. On that day, Pt 1B of the *Crimes Act 1914* (Cth) (‘the *Crimes Act*’) came into effect, creating a new federal sentencing regime. Part 1B came about as a result of a report published by the Australian Law Reform Commission in 1988 (‘ALRC No 44’).⁵ That report was prepared in response to a reference which the ALRC had been given on the subject of federal sentencing as far back as 1978.

7 Even after all this time, I remember clearly the events leading up to the introduction of Pt 1B. I happened to be Commonwealth Director of Public Prosecutions at the time. My office had the carriage of all indictable prosecutions for federal offences, and many summary matters as well. As was to be expected, we

³ *R v Carroll* [1991] 2 VR 509, 514 (Young CJ, Crockett and O’Byrne JJ). I have reason to remember that case since I argued it, on behalf of the Crown.

⁴ This was part of what Sir Owen Dixon once described as the ‘autochthonous expedient’. For many years, it featured as a practical solution to some of the problems associated with federal/state relations, at least in relation to matters of federal jurisdiction. To a considerable extent, it still does.

⁵ Law Reform Commission, *Sentencing*, Report No 44 (1988).

were invited to comment upon the draft Bill, based upon ALRC No 44, that was then about to be introduced into the Parliament. It was understood that the Bill gave effect to some, but not all, of the recommendations contained in the ALRC report.

8 I can recall our sense of annoyance at being provided with the actual text of the draft Bill only two or three days before it was to be debated in Parliament. We were told that we had only those few days to make any submissions regarding the contents of the Bill. In fact, there was a great deal that we would have wanted to say, but we were effectively prevented from doing so.

9 My office was, of course, familiar with the ALRC report (and its 179 separate recommendations). We could see at once that a number of those recommendations had not found their way into the Bill. There was nothing particularly unusual about that. There have been many examples of ALRC recommendations that have met a similar fate at the hands of politicians and bureaucrats. In the case of Pt 1B, however, the government's decision to ignore a number of specific recommendations contained in the ALRC report led to particularly unfortunate results.

10 I will take but one example, the drafting of s 16A. As is well known, that section is in the following terms:

16A Matters to which court to have regard when passing sentence etc.

(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

- (a) the nature and circumstances of the offence;
- (b) other offences (if any) that are required or permitted to be taken into account;
- (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – that course of conduct;
- (d) the personal circumstances of any victim of the offence;
- (e) any injury, loss or damage resulting from the offence;

- (f) the degree to which the person has shown contrition for the offence:
 - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
 - (ii) in any other manner;
- (fa) the extent to which the person has failed to comply with:
 - (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976*; or
 - (ii) any obligation under a law of the Commonwealth; or
 - (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*;

about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;
- (g) if the person has pleaded guilty to the charge in respect of the offence – that fact;
- (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
- (j) the deterrent effect that any sentence or order under consideration may have on the person;
- (k) the need to ensure that the person is adequately punished for the offence;
- (m) the character, antecedents, age, means and physical or mental condition of the person;
- (n) the prospect of rehabilitation of the person;
- (p) the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants.

11 Put simply, s 16A sets out a number of matters to which a judge must have regard when sentencing a federal offender. The list is detailed, but does not purport to be exhaustive.

12 It is fair to say that when we first glimpsed the wording of s 16A, we did not anticipate the difficulties that it would eventually bring about. The section has proved to be something of a legal minefield. Even as recently as February of this

year when the High Court handed down its judgment in *Bui v DPP (Cth)* ('*Bui*'),⁶ some 22 years after the enactment of the section, its meaning continues to provoke confusion and uncertainty.

13 The history of s 16A, and the early case law surrounding the construction of that section, is illuminating. One of the very first questions raised concerned the meaning to be accorded to s 16A(1). That provision requires a court to impose a sentence 'of a severity appropriate in all the circumstances of the offence'. It would be difficult to think of a more banal, and useless, instruction. What else could a judge sentencing an offender be expected to do?⁷

14 However, even if s 16A(1) was intended to be nothing more than a piece of harmless (albeit meaningless) rhetoric, some thought should have been given to what is often described as 'the law of unintended consequences'. With hindsight, it should have been foreseen that even a provision drafted in such hopelessly vague terms might one day be said to be of pivotal legal importance.

15 That is precisely what occurred. Counsel, faced with the impossible task of making bricks without straw, turned to the language of s 16A(1), and contrasted it with that of s 16A(2). The argument was that the two subsections had to be read together, and that each would take its meaning from the other. That argument was repeated on a number of occasions, and led to a plethora of appeals concerning the relationship between these two provisions, and their proper construction.⁸

16 The drafting of s 16A(2) also gave rise to other problems. Anyone reading that subsection closely would soon observe that there was something extremely odd about it. The list of matters to be taken into account when passing sentence contains one extraordinary omission. There is no mention whatever of the principle of

⁶ (2012) 284 ALR 445.

⁷ Cf *Stafford v The Queen* (1997) 79 FCR 1, 5 in which Miles J considered that the terms of s 16A(1) suggested an 'emphasis' on severity, rather than on 'rehabilitation and repatriation'. With respect, that seems a somewhat strained interpretation.

⁸ See generally *Wong v The Queen* (2001) 207 CLR 584, 609-10 (Gaudron, Gummow and Hayne JJ) regarding the relationship between ss 16A(1) and 16A(2).

general deterrence. That omission is all the more peculiar given that specific deterrence is identified as a matter that must, in every case, be taken into account.⁹

17 It was entirely predictable that the failure to include general deterrence as a relevant sentencing consideration would soon prompt a submission, on behalf of a federal offender, that general deterrence was not a relevant factor to be taken into account when fixing his sentence.

18 That submission was swiftly rejected. In *DPP (Cth) v El Karhani*,¹⁰ the New South Wales Court of Criminal Appeal observed that the failure to include general deterrence in the list of relevant sentencing factors contained in s 16A(2) might be viewed as nothing more than a 'legislative slip'.¹¹

19 Had the Court stopped at that point, its reasoning would have been comprehensible, albeit contestable. However, the route by which the Court in *El Karhani* arrived at the conclusion that general deterrence continued to be an important sentencing factor was more problematic.

20 The Court observed that the requirement that every sentence imposed be of a 'severity appropriate to all the circumstances of the offence', as contained in s 16A(1), was of primary importance.¹² Somehow, mysteriously, that requirement was said to embody the principle of general deterrence. Why the same logic did not apply to all other sentencing considerations, and render s 16A(2) completely otiose, was not explained.

21 *El Karhani* remains one of the leading cases on the interpretation of these provisions. Yet, it vacillates, somewhat uncertainly, between the suggestion that general deterrence was omitted from s 16A(2) merely as a result of legislative oversight, and an inconsistent, albeit implicit, finding that the Parliament must have

⁹ *Crimes Act 1914* (Cth) s 16A(2)(j).

¹⁰ (1990) 21 NSWLR 370 (*'El Karhani'*).

¹¹ *Ibid* 378 (Kirby P, Campbell and Newman JJ).

¹² *Ibid*.

chosen, indirectly, to include general deterrence through the vehicle of s 16A(1).

22 Subsequent analysis reveals that the legislative oversight hypothesis simply
does not hold water. In fact, in the early drafts of the Bill general deterrence was
expressly included among the list of matters that were to be taken into account in
sentencing federal offenders. At some point, for reasons that I cannot now ascertain,
general deterrence was deleted from that list. That must have been a conscious
decision on the part of the draftsman.

23 It has been suggested that general deterrence may have been omitted because
ALRC No 44 had included a statement to the effect that merely increasing the levels
of punishment for particular offences had no bearing upon their deterrent effect.¹³

24 No doubt, that statement reflected a view that was in vogue in some circles at
the time. It was, after all, a period in modern penology where utilitarianism was in
decline, and 'just deserts' and proportionality were very much at the centre of
thinking.

25 Of course, it is now clear that the decision to omit general deterrence from the
list of relevant sentencing considerations contained in s 16A(2) was a serious error of
judgment. Whatever view one may take as to the overall importance of general
deterrence, its role in relation to certain offences surely cannot be discounted. It
must feature as at least one of the factors to which any sentencing judge should have
regard.

Criticisms of Part 1B

26 Most judges and criminal law practitioners have, at some point, expressed
frustration at the drafting of Pt 1B and the complexity of the entire federal sentencing
regime.

27 Even judges who normally approach their work with equanimity have been
known to voice their anger when required to sentence federal offenders under this

¹³ At [37].

regime. Some examples of judicial annoyance will suffice.

28 In *R v Paull*,¹⁴ Hunt J first attacked the very idea that sentencing principles should be codified.¹⁵ He then said, specifically of Pt 1B:

It is to be hoped that the Federal Parliament will quickly come to realise the difficulties caused by this unnecessarily complicated and opaque legislation and that it will give urgent reconsideration to its provisions. At the present time, the question of sentence will take longer to deal with in the average trial than the question of guilt itself.¹⁶

29 Hunt J was not alone in expressing views of this nature. In *R v Muanchukingkan*,¹⁷ Wood J (with whom Gleeson CJ and Grove J agreed) said:

Some little care and time needs to be taken in [resentencing the applicant] in order to comply with [Part 1B], the convoluted, opaque and unnecessarily time consuming nature of which was identified by this Court in *El Karhani*...¹⁸

30 In *R v Carroll*,¹⁹ the Victorian Court of Criminal Appeal echoed these sentiments. In a joint judgment (Young CJ, Crockett and O'Bryan JJ), the Court described Pt 1B as a 'legislative jungle in which any court sentencing a federal offender must now spend a considerable time'.²⁰ Their Honours went on to say that the cost to the community of the time required to give meaning to these provisions was 'enormous'. They described the new laws as 'labyrinthine' and noted, prophetically, that the situation was likely to be even more difficult where an offender was to be sentenced at the same time for state and federal offences.²¹

31 It might have been expected that, over time, such criticisms would abate. That is far from being the case. Years later, in *R v Bibaoui*,²² Ormiston JA²³ began his

14 (1990) 20 NSWLR 427.

15 Ibid 434.

16 Ibid 437.

17 (1990) 52 A Crim R 354.

18 Ibid 358.

19 [1991] 2 VR 509.

20 *R v Carroll* [1991] 2 VR 509, 514 (Young CJ, Crockett and O'Bryan JJ).

21 Ibid.

22 [1997] 2 VR 600.

23 With whom Southwell AJA agreed.

judgment in the following way:

Again the court is called upon to construe the convoluted and confusing provisions relating to practice, procedure and sentencing contained in the Commonwealth Crimes Act 1914 ...²⁴

32 Others have gone still further. They have attacked the very notion that there should be a separate federal sentencing regime, still less that it should be codified. For example, Sir Guy Green, formerly Chief Justice of Tasmania, speaking extra-judicially, referred to Pt 1B as a 'federal experiment' which, in his view, had been a complete failure.²⁵

33 Sir Guy's criticisms warrant careful attention. They were put at two levels. First, he attacked the very concept of federal sentencing itself. He argued that the effect of s 16A had been to introduce 'wholesale disparity' into sentencing throughout Australia.²⁶ His contention was that Pt 1B had altered the common law approach to sentencing in a number of significant ways, and that this meant that different classes of offenders, all of whom had committed similar crimes, had to be treated differently, depending upon whether they were charged with federal or state offences. He extolled the virtues of the common law, particularly its flexibility and adaptability. He attacked the rigidity of what he perceived to be a partial codification of a branch of the law that was inherently unsuited to such treatment.

34 In a telling comment, Sir Guy said:

I have absolutely no doubt that the form of injustice that I would most want to avoid is that which is most apparent, that is, the injustice that would be seen within the same jurisdiction. It would be even more apparent if the two offenders [from the same city] ... were sentenced by the same court (in one case in the exercise of Federal jurisdiction) and they were both sent to the same prison perhaps occupying cells next to each other. Any difference in their sentence in that case would be totally inexplicable as a matter of ordinary notions of justice.²⁷

²⁴ *R v Bibaoui* [1997] 2 VR 600, 600.

²⁵ Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 *Australian Law Journal* 112, 120.

²⁶ *Ibid* 120.

²⁷ *Ibid* 121-2.

35 His second set of criticisms turned upon the actual drafting of some of the provisions in Pt 1B. For reasons of space, I shall not set them out here. However, a number of them are telling.

36 Sir Guy's rejection of the need for a separate federal sentencing regime represents one strand of a debate that has been going on for many years. At the heart of that debate is the question whether we should seek 'interjurisdictional', rather than 'intra-jurisdictional', parity between offenders.²⁸

37 In March 1992, Mr Michael Rozenes QC,²⁹ my immediate successor as Commonwealth Director of Public Prosecutions, made his views on this subject unmistakably clear. In characteristically blunt terms, he excoriated the then new federal sentencing regime.³⁰ He made it clear that, in his opinion, there were obvious advantages in judges being able to sentence both state and federal offenders by applying state law, with which they were already familiar, rather than having to absorb an entirely new legislative scheme, and thereby struggle with a combination of different sentencing requirements.

38 Dealing with Pt 1B, he said:

Unfortunately, while eagerly awaited, I do not believe that I am being too uncharitable in saying that the new legislation has proved to be something of a disaster. Indeed, from the outset it was recognised by at least those who would have to work with it, both sentencers and practitioners, that it is fundamentally flawed.³¹

39 Mr Rozenes noted that his office had recommended that, despite the decision in *El Karhani* having reintroduced general deterrence into federal sentencing, s 16A(2) should nonetheless be amended to put that matter beyond any doubt. It is ironic that some 20 years later, our legislators have still not gotten around to doing just that.

²⁸ Kate Warner, 'Sentencing Review, 2005-2006' (2006) 30 *Criminal Law Journal* 373.

²⁹ As his Honour then was.

³⁰ Michael Rozenes and Justin McCarthy, 'Sentencing for Commonwealth Offenders' (Speech delivered at Law Council of Australia, Hobart, 7 March 1992).

³¹ *Ibid.*

The ALRC Report of 2006 – Same Crime, Same Time

40 In belated recognition of the difficulties associated with some aspects of the drafting of Pt 1B, the government, in 2004, called upon the ALRC to conduct a second review of federal sentencing. This led to the publication of ALRC Report No 103.³²

41 That report was published in 2006. Unsurprisingly, in light of the way sentencing law has developed, it ran to nearly 900 pages. It contained 147 separate recommendations for changes to the federal sentencing regime. A number of these recommendations were of a quite radical nature.

42 The ALRC noted that Pt 1B had been the focus of a great deal of criticism. Although the legislation had been amended several times since 1990, this was the first major review since its introduction.

43 Among the key recommendations made by the ALRC were the following:

- A new, stand alone, Federal Sentencing Act should be enacted which would include a statement of the purposes of sentencing, the fundamental principles to be applied in sentencing, and factors that courts were obliged to consider when sentencing federal offenders.
- The new Act would provide that the only legitimate purposes of sentencing were retribution, deterrence, rehabilitation, incapacitation of the offender, denunciation and restoration.
- The new Act would also provide that the fundamental principles of sentencing were proportionality, parsimony, totality, consistency and individualised justice.
- As regards factors to be taken into account in sentencing federal offenders, the new Act would not contain any designated list as such. Rather, it would identify broad categories of factors such as those

³² Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) ('ALRC Report No 103').

relating to the offence, those relating to the conduct of the offender and those relating to the impact of the offence upon the victim or the community. It would be made clear that these factors should promote or facilitate the purposes or principles earlier discussed.

- In addition, both a plea of guilty, and cooperation with the authorities, would be dealt with separately to make it clear that these did not, of themselves, advance the purposes of sentencing, but were included to promote the proper administration of the criminal justice system.
- Whilst not supporting the use of designated aggravating or mitigating circumstances, the new Act would specify that certain matters should not aggravate a federal sentence, such as the fact that an offender had pleaded not guilty to an offence.

44 I happened to be an ALRC Commissioner, on a part-time basis, during the course of this review. I took part in the preparation of the report, and endorsed each of its recommendations. Not without some hesitation, I still do.

45 It is now almost six years since ALRC Report 103 was published. I understand that although a number of ancillary recommendations have been taken up, and a government response to the report has been prepared, that response is not publicly available. Apparently, it is still being considered by 'various stakeholders'. None of the major recommendations for reform contained in the report have been implemented.

46 Even by ordinary standards of bureaucratic inertia and government procrastination, a delay of six years in deciding what to do about a report as detailed and carefully considered as this is plainly excessive. It is not as though federal sentencing is working satisfactorily, quite the reverse. Surely, there must be some sense of urgency regarding the need for reform.

47 The failure of successive governments to respond intelligently to the numerous criticisms that have been levelled at the current federal sentencing regime

may not have been of any great importance when Pt 1B was enacted. At that time, federal criminal law was something of a backwater when compared with its state counterparts. That is no longer the case.

48 Over the past decade or so, the Commonwealth has intruded into the area of criminal law to an astonishing degree. It has enacted a vast body of legislation sometimes dealing, in the most excruciating detail, with new forms of criminality, and, on other occasions, setting its stamp upon many crimes that were traditionally regarded as purely state matters.

49 The culmination of this development has been the enactment of the *Criminal Code Act 1995* (Cth) ('the *Criminal Code*'). This Act stands out, even by the normally prolix standards of Commonwealth legislative drafting.

50 Anyone wishing to practise in the field of criminal law today must now become familiar not just with state legislation dealing with substantive offences and a host of procedural matters, as well as sentencing, and not just with the remnants of common law that continue to apply to the criminal law in general, but also an extraordinary array of Commonwealth statutes that have taken over large swathes of the criminal law. The fact that we are dealing with a code, rather than a statute as such, in relation to federal offences, only adds to the difficulty.

51 It is hard enough to keep track of state sentencing legislation, and judicial exegesis upon key provisions. In Victoria, the *Sentencing Act 1991* (which itself runs for some hundreds of pages) is amended on a regular basis. Judgments of the Court of Appeal have become ever more lengthy, and complex, in responding to the development of a body of sentencing jurisprudence.

52 The interplay between federal and state criminal law can sometimes produce unpredictable consequences. For example, in *Dickson v The Queen*,³³ the High Court held, to the astonishment of many, that a person charged with conspiracy to steal,

³³ (2010) 241 CLR 491 ('*Dickson*'). I should declare an interest. I sat on the Court that dismissed Dickson's appeal.

under state law,³⁴ could not lawfully have been tried for that offence given the following circumstances.

53 The property that was said to be the subject of the conspiracy, tobacco, had been seized by Customs and was being stored in a facility owned by a private company. There was no doubt that the tobacco was ‘property belonging to another’ within the meaning of that expression in s 72 of the *Crimes Act 1958* (Vic).³⁵ At the same time, the fact that it was being held on behalf of Customs made it relevantly property which ‘belong[ed]’ to the Commonwealth.³⁶ According to the High Court, that meant that the provisions of the *Criminal Code* were engaged.

54 It might be thought that this was a case where both federal and state criminal law could co-exist harmoniously. However, that view did not prevail. The High Court held, pursuant to s 109 of the *Constitution*, that the state provisions had no application to the tobacco because the *Criminal Code* covered the field. Not surprisingly, no one detected the constitutional issue at trial, or before the Court of Appeal. Indeed, it was not detected by the High Court during the special leave application, and was only raised by that Court shortly before the hearing of the appeal.

55 After the decision in *Dickson* was handed down, there was genuine apprehension on the part of law enforcement agencies throughout this country that there would be further surprises in store, based upon what might be termed the ever increasing ‘constitutionalisation’ of the criminal law. At the very least, the need to engage in the intricacies of constitutional jurisprudence, before laying even simple and straightforward charges, would be costly, and productive of delay.

56 In *Momcilovic v The Queen*,³⁷ which raised issues similar to those discussed in *Dickson*, the appellant was convicted of trafficking in methylamphetamine contrary

³⁴ *Crimes Act 1958* (Vic) s 321(1).

³⁵ *Ibid* s 72.

³⁶ *Criminal Code* s 131.1.

³⁷ (2011) 280 ALR 221 (*‘Momcilovic’*).

to state law.³⁸ The problem was that trafficking in that very same drug had also become an indictable offence under the *Criminal Code*.³⁹ As it happened, the state offence carried a higher maximum penalty than did the federal offence. It also, of course, required the application of a completely different sentencing regime.

57 To the obvious relief of lawmakers, the High Court managed to distinguish *Dickson*, and did not strike down the entire body of drug law in the State of Victoria. Only Hayne J found that the police could not charge the appellant with a state offence because of s 109 inconsistency.

58 It is interesting to note that even while upholding the decision, in these circumstances, to charge a state offence, a majority of the High Court introduced a further, and quite unnecessary, complication into the operation of the drug laws of this country. It would no doubt have come as a surprise to many to learn that a prosecution for a state offence that had been investigated by state police, and instituted and carried on by the state prosecuting authorities, in fact, and unbeknown to anyone, involved the exercise of federal jurisdiction.⁴⁰

59 The way that came about was as follows. It emerged, for the first time during the course of the High Court proceeding, that the appellant had been residing in Queensland just prior to the commencement of her trial in Victoria. According to Gummow J⁴¹ (with whom French CJ,⁴² Hayne,⁴³ Crennan and Kiefel JJ⁴⁴ relevantly agreed), that meant that the prosecution of the appellant was a ‘matter’ which was between ‘a State and a resident of another State’ within the meaning of s 75(iv) of the *Constitution* (sometimes referred to as ‘diversity jurisdiction’).⁴⁵ That, in turn, meant

³⁸ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC.

³⁹ s 302.4.

⁴⁰ Another way of characterising this would be to say that the judicial power of the Commonwealth was engaged.

⁴¹ *Momcilovic* (2011) 280 ALR 221, 271.

⁴² *Ibid* 229.

⁴³ *Ibid* 306.

⁴⁴ *Ibid* 390.

⁴⁵ *Ibid* 271.

that the County Court was invested with federal jurisdiction by s 77(iii) of the *Constitution* and s 39(2) of the *Judiciary Act 1903* (Cth). Accordingly, both the County Court and the Victorian Court of Appeal happened to be exercising the judicial power of the Commonwealth, even if no one had the slightest idea that this was happening.

60 The five members of the High Court who characterised both the trial and the appeal as having involved an exercise of federal jurisdiction considered, but rejected, a submission on behalf of the Attorney-General for Victoria that diversity jurisdiction did not extend to criminal proceedings. Gummow J recognised that the United States Supreme Court had long taken that view.⁴⁶ However, his Honour was not persuaded to follow the United States approach, given the difference of language between the *Australian Constitution* and that of the United States.⁴⁷

61 Neither Heydon J nor Bell J expressed any view as to whether the trial involved federal jurisdiction.

62 It is by no means clear why the five members of the Court who held that ‘diversity jurisdiction’ had been engaged felt it necessary to make any comment upon that subject. So far as I can see, characterising the jurisdiction in that way makes not the slightest difference to either the conduct of the proceeding, or the sentencing regime to be applied. French CJ acknowledged that, in the circumstances of the case, the fact that federal jurisdiction was being exercised did not ‘affect the outcome of the appeal or the orders which should be made’.⁴⁸ The trial was still one

⁴⁶ *Chisholm v Georgia* 2 US 419 (1793).

⁴⁷ *Momcilovic* (2011) 280 ALR 221, 271.

⁴⁸ *Ibid* 229.

for a state offence, conducted entirely according to state law, and subject to state sentencing practice.⁴⁹

63 My discussion of *Momcilovic* is intended to illustrate just how complex the criminal law has become, particularly when both federal and state laws may be applicable. The same can be said of federal sentencing, but even more so.

64 Recently, in *Pantazis v The Queen*,⁵⁰ a five member Victorian Court of Appeal was faced with a sentencing problem arising out of the concurrent operation of federal and state criminal law.

65 That problem can best be explained by tracing the history of the particular sentencing doctrine under consideration in that case.

66 In *R v Liang and Li*,⁵¹ the appellants were each charged with several counts under both state and federal law. One of the charges was that of dishonestly obtaining a financial advantage by deception, contrary to s 82(1) of the *Crimes Act 1958* (Vic). They were each sentenced effectively to three years' imprisonment with a non-parole period of two years. They appealed against that sentence. The Victorian Court of Appeal held that the appeal should be allowed, on the basis that they had been exposed to an injustice by being charged with the state offence when there was a more appropriate charge reflecting the gravamen of their conduct available under Commonwealth law. That charge carried a significantly lower maximum penalty.

67 In upholding the appeal, the Court followed two other cases, *Scott v Cameron*⁵²

⁴⁹ In a formal sense, the state law that governed the conduct of the trial did so indirectly, via s 79(1) of the *Judiciary Act 1903* (Cth). However, nothing at all turned on that fact, and it is difficult to conceive of any case where the fact that federal jurisdiction was being exercised in a criminal trial would have any practical effect whatsoever. Section 80 of the *Constitution*, which requires trial by jury for any trial on indictment for an offence 'against any law of the Commonwealth', would not apply. *Momcilovic* was not tried for any such offence. For the same reason s 68(2) of the *Judiciary Act 1903* (Cth) would have no application.

⁵⁰ [2012] VSCA 160 (*Pantazis*).

⁵¹ (1995) 82 A Crim R 39 (*Liang and Li*).

⁵² (1980) 26 SASR 321.

(a decision of White J of the Supreme Court of South Australia), *R v Whitnall*⁵³ (a decision of the Full Court of the Federal Court, on appeal in the ACT). The same approach had earlier been taken by the Victorian Court of Criminal Appeal in *R v Young*.⁵⁴ In that case, Starke J (with whom Crockett and O'Bryan JJ agreed) held that where an accused had been convicted of attempting to pervert the course of justice (a common law offence under state law) and there was an applicable alternative statutory offence available under Commonwealth legislation which carried a lesser penalty, the sentencing judge was required to take that lesser penalty into account as a relevant sentencing consideration.⁵⁵

68 More recently, in *R v El Helou*,⁵⁶ the New South Wales Court of Criminal Appeal took an entirely different approach to this question. There, the offender had pleaded guilty to supplying a prohibited drug contrary to state drug laws.⁵⁷ That charge had been brought by the Commonwealth Director of Public Prosecutions who could, had he been minded to do so, instead have charged an offence under s 306.2 of the *Criminal Code*.

69 It was common ground in *El Helou* that the offence under the *Criminal Code* would have been equally apt to encompass the offender's conduct. As it happened, the state offence with which he was charged carried a significantly heavier penalty than the federal offence.

70 On a Crown appeal against sentence, the Court in *El Helou* summarily rejected an argument that the sentence imposed for the state offence should, for that reason alone, have been reduced.

⁵³ (1993) 42 FCR 512.

⁵⁴ (Unreported, Court of Criminal Appeal, Starke, Crockett and O'Bryan JJ, 2 December 1982) ('*Young*').

⁵⁵ The decision in *Young* was cited with approval in *R v McEachran* (2006) 15 VR 615. As recently as last year, the Queensland Court of Appeal followed *Liang and Li* in holding that, had a state offence been more appropriate to encompass the offending in question, it would have been permissible for the maximum penalty for that offence to be taken into account when sentencing for a federal offence: *R v Gordon; ex parte DPP (Cth)* [2011] 1 Qd R 429.

⁵⁶ (2010) 267 ALR 734 ('*El Helou*').

⁵⁷ *Drug Misuse and Trafficking Act 1985* (NSW) s 25(2).

71 In rejecting that submission, Allsop P (with whom Grove and Hislop JJ
agreed) said:

Finally, it was submitted that the sentence should be reduced to bring a degree of conformity with the penalty under s 306.2. I disagree. The laws of New South Wales should be applied for New South Wales offences. It would be inappropriate for a lesser sentence than that warranted under New South Wales law to be imposed on Mr El Helou by reference to a possible charge under a Commonwealth law carrying a lower penalty, with which offence he was not charged.⁵⁸

72 It appears that neither *Liang and Li*, nor any of the other cases that had held to the contrary, were cited in *El Helou*. It is perhaps idle to speculate what that Court would have done had that line of authority been drawn to its attention.⁵⁹

73 The Court in *Pantazis* was therefore faced with conflicting authority as to how to deal with this situation, involving, as it did, broad questions of high principle.

74 In the end, the Court unanimously held that the principle in *Liang and Li* was to be 'confined to less punitive offences that exist within the jurisdiction in which the judicial power is being exercised'.⁶⁰ That principle did not apply to require a judge exercising state judicial power to take account of lesser penalties under federal law. In other words, the approach taken in *El Helou* was specifically approved.

75 The Court did qualify its adoption of the *El Helou* approach in one respect. It observed, without finally deciding, that there might be scope for a proceeding to be stayed as an abuse of process if the prosecuting authorities chose to charge an offence that was not apt to describe the offending conduct merely in order to allow for a heavier penalty to be available.⁶¹ That would be so irrespective of whether the charge were state or federal.

⁵⁸ Ibid 750 [90].

⁵⁹ See also *Standen v DPP (Cth)* (2011) 254 FLR 467, in which the New South Wales Court of Criminal Appeal, not surprisingly, followed *El Helou*.

⁶⁰ [2012] VSCA 160, [6].

⁶¹ Ibid [60]-[63].

Joint federal/state indictments

76 The problems associated with maintaining a separate legislative regime for sentencing federal offenders are exacerbated by the use, on occasion, of what are known as joint federal/state indictments. There are obvious difficulties posed in such cases by s 80 of the *Constitution* which, as the High Court has held, requires not just trial by jury, but unanimity as well in relation to the trial of federal offences. That section of the *Constitution*, of course, has no application to state offences.

77 In addition, the task of trying an offender on a joint federal/state indictment almost always creates problems simply because there is a need to direct the jury in such a case as to the elements of the different offences in a manner that is likely to be confusing. The conceptual framework associated with the *Criminal Code* is significantly different from that applicable to state offences. Even within the *Criminal Code* itself, the law is extraordinarily complex.

78 Yet, the difficulties associated with conducting a trial involving both and state and federal offences almost pale into insignificance when a judge is faced with the problem of having to sentence an offender convicted of those offences. Indeed, a number of trial judges have made it abundantly clear that they simply will not permit any joint federal/state indictment to be filed.

79 The sheer complexity of the task of sentencing offenders on a combination of federal and state charges makes the entire exercise one that is fraught.⁶² If anyone doubts what I say about the technical difficulties associated with this process, may I suggest they read *Fasciale v The Queen*,⁶³ where a number of these problems were canvassed.

⁶² One of the main difficulties is that terms of imprisonment for state offences commence on the date on which the sentence is imposed, whereas federal sentences can, and often do, commence at a later date. Another problem that arises in cases of joint federal and state offences is how to deal with what, in Victoria, is described as 'dead time': See, eg, *R v Renzella* [1997] 2 VR 88; *Karpinski v The Queen* (2011) 207 A Crim R 429.

⁶³ (2010) 207 A Crim R 488.

Can sentencing be made technically more straightforward?

80 I was recently told that after the introduction of major sentencing reforms in England in 2003,⁶⁴ it was discovered that more than 10 per cent of all sentences passed under the new regime were entirely invalid. One wonders what the figure would be if every sentence imposed in this country were subjected to the closest scrutiny.

81 It is a sad fact that, in Victoria in particular, a significant proportion of all sentences subjected to appeal have to be set aside, not because they are inappropriate as such, but for technical reasons. County Court judges, in particular, are obliged to deal with a sentencing regime that is, in many respects, remote from reality, and is to be found expressed in legislation that is often poorly drafted. At the same time, the relevant provisions are couched in terms that are highly prescriptive, and quite unforgiving.

82 There is, today, a vast body of statute law dealing with the sentencing of offenders. In recent years, there has been an explosion of case law on this subject. Nonetheless, there remain many unanswered questions.

83 It is extraordinary to think that a judge who sentences a federal offender may be required to apply three quite separate sets of sentencing laws. As matters stand, a judge must, in such a case, have regard to Pt 1B of the *Crimes Act*, any relevant state sentencing legislation, and also any applicable common law sentencing principles.

84 If, as we are told, it is desirable that federal offenders be treated in a consistent manner,⁶⁵ irrespective of where their offence was committed, it is questionable whether that object can ever be achieved given the need to have regard to so many different bodies of sentencing law.

⁶⁴ *Criminal Justice Act 2003* (UK) c 44.

⁶⁵ See, eg, *De La Rosa* (2010) 29 NSWLR 1, 31 (Basten JA).

Bui, and more complications

85 At present, the law that applies to federal sentencing renders certain common law principles applicable to that task, but not others. Plainly, this is a recipe for confusion.

86 In *Bui*,⁶⁶ the High Court had to decide whether the abolition of the common law principle of double jeopardy in relation to Crown appeals against sentence, in state matters,⁶⁷ also applied in relation to such appeals in federal matters. The Court held, once again to the surprise of many, that double jeopardy had never operated as a constraint upon the powers of intermediate appellate courts in dealing with Crown appeals against federal sentences.

87 Carried to its logical conclusion, the decision in *Bui* means that, under the law as it stood for many years, a Crown appeal against sentence, brought by the one Director of Public Prosecutions, in respect of a combination of federal and state offences, required double jeopardy to be taken into account in relation to the state offences, but not the federal offences. Given that double jeopardy is itself a common law doctrine, it is difficult to think of any rational justification for a distinction of that kind.

88 In *Bui*, it was recognised that a number of common law principles regarding sentencing were, and always had been, applicable to federal offences. Other common law principles did not apply. Regrettably, the reasoning in *Bui* makes it difficult to determine into which category a particular common law rule might happen to fall.

89 *Bui* held that the route by which common law principles are subsumed within Pt 1B was via the somewhat circuitous path through s 80 of the *Judiciary Act 1903* (Cth).⁶⁸ That section provides as follows:

⁶⁶ (2012) 284 ALR 445.

⁶⁷ See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 68A; *Criminal Procedure Act 2009* (Vic) s 289(2).

⁶⁸ *Bui* (2012) 284 ALR 445, 448-9, 453 (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

80 **Common law to govern**

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

90 In other words, the ‘common law in Australia’, including those aspects that relate to sentencing, and were ‘applicable’ and ‘not inconsistent’ with the laws of the Commonwealth, govern sentencing for federal offenders. However, double jeopardy, not being relevantly ‘applicable’, never did have any role to play in that regard.

91 The Court’s explanation for the dividing line that was adopted was essentially as follows. First, it emphasised that a common law rule would be ‘picked up’ by s 80 only where necessary to remedy a ‘gap or omission in Commonwealth statute law’.⁶⁹ It was therefore necessary to construe s 16A(1) to determine its capacity to ‘accommodate’ judge-made principles. Secondly, while the Court held s 16A(1) to be sufficiently general in its terms to accommodate ‘some judge-made sentencing principles’, it did not accommodate double jeopardy. The reason given for that conclusion was that double jeopardy was not a necessary aspect of the task of resentencing the appellant, and therefore should not be regarded as having given ‘relevant content’ to s 16A(1). Double jeopardy provided nothing more than a ‘gloss’ for which there was no textual foundation.⁷⁰

92 The analysis in *Bui* is, as is to be expected, both thorough and carefully crafted. With great respect to the authors of that judgment, however, it is surely doubtful whether judges who are obliged to sentence offenders (not to mention magistrates as well) will find it easy to determine whether, in any particular case, a

⁶⁹ Ibid 454 (French CJ, Gummow, Hayne, Kiefel and Bell JJ) citing *Blunden v The Commonwealth* (2003) 218 CLR 330.

⁷⁰ Ibid 446 (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

common law principle of sentencing is to be applied to the task at hand, by virtue of s 80, or alternatively, whether it can and should be ignored.⁷¹

93 Of course, *Bui* was not the first case to embark upon a consideration of the relationship between Pt 1B, general state sentencing statutes, and common law sentencing principles.⁷² There are many such instances. In *Wong v The Queen*,⁷³ the High Court held that the common law principle of proportionality applied to federal sentencing. In *Johnson v The Queen*,⁷⁴ the High Court said that, on its proper construction, s 16A could accommodate the application of a number of such principles, including, specifically, totality. A similar point was made in *Hili v The Queen*.⁷⁵ In none of these cases did the Court provide any clear guidance as to which, of many, common law principles were applicable in federal sentencing.

94 As previously indicated, it is clearly established that general deterrence is a factor to be taken into account in sentencing federal offenders.⁷⁶

95 The consensus seems to be that a number of other common law principles also apply to federal sentencing. For example, in *R v Verdins*⁷⁷ the Victorian Court of Appeal laid down a series of principles designed to provide guidance as to when an offender's mental disorder or condition can be treated as a mitigating factor. The

⁷¹ Indeed, the reasoning in *Bui* is also likely to cause difficulty in determining whether a state statutory provision relevant to sentencing is picked up by ss 68 or 79 of the *Judiciary Act 1903*. That is because the expression 'so far as it is applicable and not inconsistent with' in s 80 of that Act has the same meaning as the corresponding phrases in ss 68 and 79: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, 9 (Allsop P).

⁷² To cite but one example, the High Court in *Bui* made extensive reference to the judgment of the New South Wales Court of Criminal Appeal in *De La Rosa* (2010) 79 NSWLR 1. In that case, the Court held that a New South Wales statutory provision abolishing double jeopardy as a consideration in Crown appeals against sentence was not 'in conflict' with s 16A(2)(m). That was because it did not prohibit regard being had to actual (as opposed to presumed) anxiety or distress, as is required by s 16A(2)(m) of the *Crimes Act*. It could therefore be 'picked up' by the provisions of the *Judiciary Act 1903* (Cth): at 44 (McClellan CJ at CL).

⁷³ (2001) 207 CLR 584, 609-10 (Gaudron, Gummow and Hayne JJ).

⁷⁴ (2004) 205 ALR 346, 353 (Gummow, Callinan and Heydon JJ).

⁷⁵ (2010) 242 CLR 520, 528 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*'Hili'*).

⁷⁶ *El Karhani* (1990) 21 NSWLR 370.

⁷⁷ (2007) 16 VR 269 (*'Verdins'*). See also *R v Tsiaris* [1996] 1 VR 398, 400 (Charles, Callaway and Vincent JJA).

Court said:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.

96 It has been held, at least at first instance, that these *Verdins* principles do apply when sentencing federal offenders.⁷⁸ Yet, that matter may perhaps require further consideration. Section 16A(2)(m) of the *Crimes Act 1914* (Cth) speaks of the 'mental condition' of the offender being a matter that must be taken into account. Yet, *Verdins* arguably goes much further than this. It speaks of the effect of a 'condition' upon the mental capacity of an offender, which may or may not be the same as a 'mental condition'. There might be a question, for example, as to whether a personality disorder (recognised in Victoria as potentially capable of giving rise to a *Verdins* discount), and historically described as a form of psychopathy, might fall naturally within the term 'mental condition' in s 16A(2).

⁷⁸ Bongiorno J applied the principles in *Verdins* to federal sentencing in two terrorism cases: *R v Atik* [2007] VSC 299; *R v Kent* [2009] VSC 375.

97 There might also be a question as to whether, in the case of a federal offender, all aspects of *Verdins*, including the additionally burdensome nature of imprisonment brought about by the condition or disorder (as discussed in principle 5), are to result in an amelioration of penalty. It should be noted that *Verdins* represents a far more elaborate statement of common law principle than is generally accepted in other states and territories. That of course raises to the question whether the principles in *Verdins* can truly be described as the ‘common law in Australia’, as that expression is understood in s 80 of the *Judiciary Act 1903*. If not, there is no legitimate route, according to *Bui*, by which *Verdins* can apply to the sentencing of federal offenders.

98 Much the same can be said of many other common law sentencing principles.⁷⁹

99 Even within the Victorian Court of Appeal, there is considerable debate about a range of matters relevant to sentencing, some of which involve the application of common law principles. For example, to what extent does the common law either permit or require a sentencing judge to have regard to statistics, and other information concerning what are said to be comparable cases? Much, but not all, of the debate has focused upon the expression ‘current sentencing practices’ in s 5(2)(b) of the *Sentencing Act 1991* (Vic).⁸⁰ It should be noted that there is no direct analogue to s 5(2)(b) anywhere in Pt 1B, and it seems that the matter should be approached, at a federal level, from the point of view of the common law.

100 The same can be said about sentencing methodology in general. We know that two-tier sentencing has been rejected at both state and federal level. It has been

⁷⁹ See for example the rule developed by the Court of Appeal in Victoria that a prosecutor is obliged, when asked by the sentencing judge, to provide a range of appropriate sentences: *R v MacNeil-Brown* (2008) 20 VR 677. See generally as to the applicability of this rule to federal sentencing *Nguyen v The Queen*; *Phommalyack v The Queen* (2011) A Crim R 380; *DPP (Cth) v Coory* [2011] VSCA 316. There must also be some uncertainty as to whether the common law approach to the weight to be given to a plea of guilty, as discussed for example in *R v Phillips* [2012] VSCA 140, has any application to federal sentencing.

⁸⁰ See, generally, *Ashdown v The Queen* [2011] VSCA 408, and the various views expressed by Maxwell P and Ashley and Redlich JJA therein.

held by the High Court that the preferred method by which the sentencing task is to be performed is that of intuitive synthesis. Is that, of itself, a common law requirement? If so, is it one that is picked up by s 80? If not, how has it come to be binding when dealing with federal sentencing?

101 Federal sentencing in this country is, and always has been, a very complex area of law, and I would argue quite unnecessarily so. Regrettably, calls for the law to be rendered clearer, and easier to apply, are usually followed by the enactment of more legislation, often badly drafted, and always highly prescriptive.

102 I am reminded at this point of that great actor, the late Mr Peter Finch in perhaps his most celebrated role, as the angry newsreader in the film 'Network'. One day, a judge, faced with the extraordinarily difficult task of sentencing an offender for a combination of state and federal offences, is likely to hurl his or her wig down onto the bench, and proclaim loudly: 'I'm as mad as hell and I'm not going to take it anymore'. It is entirely possible that the judge who reaches that final stage of exasperation will be me.
