# Sentencing Commonwealth drug offenders

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# Executive summary

This study presents a national empirical picture of the sentencing patterns for the serious drug offences in Pt 9.1 of the *Criminal Code* (Cth) (the Code). It utilises data from the Commonwealth Sentencing Database (CSD) which is a joint project of the National Judicial College of Australia, the Commonwealth Director of Public Prosecutions and the Judicial Commission of NSW. The CSD was specifically designed to provide readily accessible information about sentences for Commonwealth offences prosecuted by the Commonwealth Director of Public Prosecutions.

In a federation of States and Territories it is essential for the punishment of Commonwealth offenders that like cases are dealt with in a like manner so far as possible. A challenge to achieving consistency in sentencing for Commonwealth offences begins at a jurisdictional level as there is no Commonwealth court which deals with Commonwealth matters under a single set of Commonwealth laws. This study examines the notion of sentencing consistency by reference to High Court and intermediate appellate court decisions.

The introduction of Pt 9.1 of the Code in December 2005 was a major statutory reform which saw the creation of a greater range of offences and, in the case of the trafficking and manufacturing of drugs, regulation by the Commonwealth Parliament in areas traditionally the province of the States and Territories. The empirical analysis shows that the most common offences prosecuted under Pt 9.1 relate to the importation and possession of marketable and commercial quantities of border controlled drugs. These offences carry maximum penalties of 25 years and life imprisonment respectively and are among the more serious types of offences in Pt 9.1. In the period from 1 January 2008 to 31 December 2012, we found an increase in the number of cases involving offences where the maximum penalty was less than 25 years. These were mainly offences involving the importation of marketable quantities of precursors. We also found an increase in the number of cases involving the less serious possession offences in Pt 9.1 of the Code, that is, those possession offences where the maximum penalty is 2 years imprisonment. That increase was most marked in 2011 and 2012.

## The sentencing principles

The sentencing principles which a sentencing judge must apply in this area are well established. There have been a series of High Court decisions which provide appellate guidance in relation to the application of Pt IB (Sentencing, imprisonment and release of federal offenders) of the *Crimes Act* 1914 (Cth) (the *Crimes Act*) and the operation of Pt 9.1 of the Code. These decisions include: *Wong v The Queen*,[i] *The Queen v Olbrich*,[ii] *Adams v The Queen*,[iii] *Weininger v The Queen*,[iv] *Hili v The Queen*[v] and *Barbaro v The Queen*.[vi] *Power v The Queen*[vii] and *Bugmy v The Queen*[viii] provide guidance for setting non-parole periods. In Chapter 4, "The relevant sentencing principles", we examine those cases and discuss some areas of controversy. For example, when an offender is charged with a serious drug offence which involves a commercial quantity, to what degree should the potential for profit affect the sentence ultimately imposed? This issue arose in the Court of Appeal decision in Victoria of *DPP (Cth) v Maxwell*,[ix] a case involving the importation of a commercial quantity of gammabutyrolactone (GBL). Some of the practical issues that might arise as a consequence of

i (2001) 207 CLR 584.
ii (1999) 199 CLR 270.
iii (2008) 234 CLR 143.
iv (2003) 212 CLR 629.
v (2010) 242 CLR 520.
vi (2014) 88 ALJR 372.
vii (1974) 131 CLR 623.
viii (1990) 169 CLR 525.
ix (2013) 228 A Crim R 218.

that decision are discussed in Chapter 4. The empirical analysis clearly shows that the sentences imposed when an offence involves a commercial quantity of GBL were significantly lower than those imposed when the offence involved other drug types such as heroin, 3,4-methylenedioxymethamphetamine (MDMA) and cocaine. This is an area which may require further appellate examination.

Another area of controversy, also discussed in Chapter 4, has been the approach to fixing non-parole periods and recognizance release orders under Pt IB. Here, in *Hili v The Queen*, the High Court overturned the NSW Court of Criminal Appeal approach.[x] The High Court made it clear that there is no usual fixed custodial period relative to a head sentence. In Chapter 6, "Sentencing patterns for the period 2008–2012", we analyse the impact of *Hili*. The analysis shows that since that decision there have been what appear to be significant shifts in non-parole periods relative to head sentence levels. Notably, there have been shifts towards non-parole periods which are either less than, or higher than, what was previously considered to be the norm. It is too early to make firm predictions about the impact of *Hili*. Moreover, the number of cases available for analysis in some States since *Hili* was relatively small.

## Achieving consistency

Consistency in the application of sentencing principles is a strong theme in the cases and persistently emphasised by the High Court. The study reviews the law as it relates to the use of statistics and comparative cases in the sentencing exercise. This has been the subject of several intermediate appellate decisions, such as *DPP (Cth) v De La Rosa*[xi] and *R v Cheung*,[xii] and by the High Court in *Hili v The Queen* and *Barbaro v The Queen*. For a national system to work effectively it is essential that in a given case the sentencing judge synthesise the relevant case law and the sentences imposed in past cases when determining the appropriate sentence. This issue is discussed in detail in Chapter 5, "The imperative of achieving reasonable consistency". The practical issues which might arise when a court is required to sentence an offender for the newer Commonwealth offences, such as trafficking or manufacturing which were previously only dealt with by the States and Territories, are also discussed.

The empirical analysis shows that there are differences in the lengths of the sentences being imposed in the States and the Northern Territory. Perhaps the most notable result was that offenders sentenced in Victoria were given less severe sentences (as were offenders in Queensland and, to a lesser extent, in South Australia) than elsewhere. There are also differences in the non-parole periods being fixed in the States and the Northern Territory.

## The empirical analysis

Notwithstanding that numerical ranges of sentences are historical statements of what has occurred in the past, they do provide a useful yardstick against which a sentencing court can examine a proposed sentence.[xiii] The empirical analysis in the study examines the types of offences being dealt with by higher courts and the sentences imposed during the period from 1 January 2008 until 31 December 2012. A number of the key findings of the analysis have been highlighted above. The analysis also shows that:

- Overall, the vast majority of offenders sentenced for offences in Pt 9.1 of the Code are sentenced to a term of full-time imprisonment.
- A significant majority of these offenders plead guilty and a significant majority have no prior record.

x (2010) 242 CLR 520 at [36]–[44].

xi (2010) 79 NSWLR 1.

xii (2010) 203 A Crim R 398.

xiii *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [304].

- NSW deals with almost half of the cases involving Commonwealth serious drug offences; almost double that of the next most common State, Victoria. However, there has been a steady increase in the number of cases being dealt with in Victoria since 2009 and a dramatic increase in the number of cases dealt with in South Australia in 2011 and 2012.
- Cases involving heroin and cocaine are still the most common. However, over the period of the study there has been an increase in the number of offenders being dealt with for offences involving methamphetamine and pseudoephedrine. Offences involving other drugs such as methcathinone and GBL are becoming a small but significant feature of the drug type profile of the offences being dealt with at the Commonwealth level.
- The sentences being imposed on the offenders whose offences involve commercial quantities of GBL are significantly lower than the sentences being imposed for offences involving drugs such as heroin, cocaine, MDMA and methamphetamine.
- The number of offences being dealt with where the maximum penalty is less than 25 years is increasing.
- There are particular types of offences where the offenders are not sentenced to full-time gaol terms and these are generally those offences which involve particular drug types and where the maximum penalty is less than 25 years imprisonment.
- The most common role of offenders was as a courier. This reflects that many offences involve the actual importation of border controlled drugs, and recognises that those people who import drugs are more likely to be caught than those who occupy higher roles.
- Factors identified in the case law as significant in terms of the sentence length, such as role and drug quantity, affect the sentence ultimately imposed.

This study demonstrates that when sentencing Commonwealth offenders for offences in Pt 9.1 of the Code it is important that judges around Australia are familiar with not only the intermediate appellate decisions from around Australia applying Pt IB of the *Crimes Act*, but also the national range of sentences imposed for offences against Pt 9.1. Such knowledge will ensure greater consistency in the application of the sentencing principles and also ensure that like cases are treated in a like manner.

# Chapter 1
# Introduction

The desirability for consistency in the area of laws directed towards the illicit drug trade has been recognised since at least 1980, when the Honourable Mr Justice Williams recommended that there should be uniform drug laws related to the trafficking of drugs whether they had been imported or produced locally.[1] That recommendation was never implemented. It remains the case that each of the States and Territories has its own laws in relation to parts of the drug trade, such as drug trafficking, supply and manufacture and that these laws are not uniform.

The importance of achieving consistency when sentencing Commonwealth offenders through the consistent application of sentencing principles has also been the subject of frequent comment. This has been addressed in various discussion papers and reports of the Australian Law Reform Commission (the ALRC)[2] and by the High Court and intermediate appellate courts around Australia. Strong comments about the need for sentencing consistency, and conclusions about the mechanisms for achieving it in the context of Commonwealth offenders, were made most recently by the High Court in *Barbaro v The Queen*[3] and *Hili v The Queen*.[4]

Broadly, this monograph:

- explores some of the critical issues which affect sentencing consistency for Commonwealth serious drug offences
- examines the extent of consistency in the sentences imposed for these offences in the period 1 January 2008 to 31 December 2012 (the study period).

Commonwealth serious drug offences are found in Pt 9.1 of the *Criminal Code* (Cth) (the Code). Until December 2005,[5] many of the import-export offences now found in Pt 9.1 were in s 233B(1) (rep) of the *Customs Act* 1901 (Cth) (the *Customs Act*), and there were no Commonwealth serious drug offences which arose in a domestic context, such as possession, manufacturing and trafficking of illicit drugs. These were dealt with exclusively under State and Territory legislation.

The offences in Pt 9.1 of the Code can be grouped into two broad areas:

- import-export offences relating to border controlled drugs, plants and precursors — with the exception of offences related to border controlled precursors, these offences were previously found in s 233B(1) of the *Customs Act*
- domestic offences related to controlled drugs, plants and precursors, that include the trafficking in, selling or manufacture of those substances — these offences were previously found exclusively in State and Territory legislation.

1 Cth, Vic, Qld, WA and Tas, *Australian Royal Commission of Inquiry into Drugs*, Report, Mr Justice ES Williams (Commissioner), Australian Government Printing Service, Canberra, 1980, Book D, p D29.

2 See Australian Law Reform Commission (ALRC), *Sentencing: reform options*, Discussion Paper 10, June 1979; *Sentencing of federal offenders*, Discussion Paper 15, June 1980; *Sentencing: procedure*, Discussion Paper No 29, August 1987; *Sentencing: penalties*, Discussion Paper 30, September 1987; *Sentencing: prisons*, Discussion Paper 31, August 1987; *The Commonwealth Prisoners Act*, ALRC Report 43, March 1988; *Sentencing*, ALRC Report 44, August 1988 (ALRC Report 44). See also the more recent report: ALRC, *Same crime, same time: sentencing of federal offenders*, ALRC Report 103, 2006 (ALRC Report 103).

3 (2014) 88 ALJR 372.

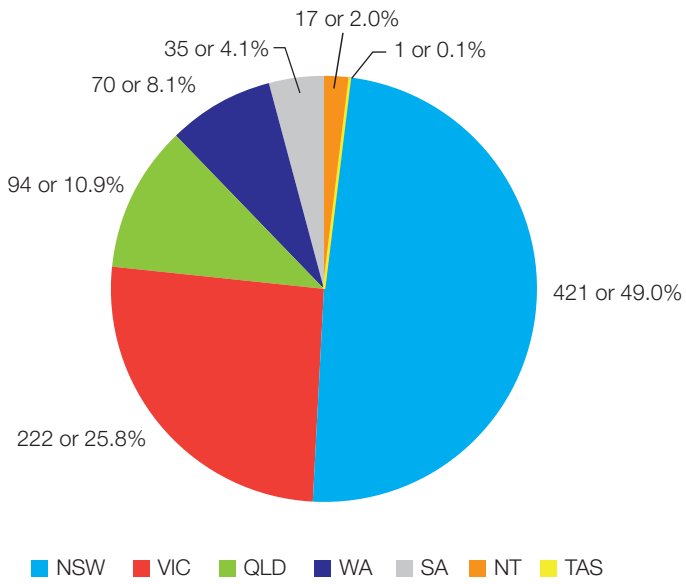
4 (2010) 242 CLR 520.

5 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005 (Cth).

Offences under Pt 9.1 represent a significant proportion of the indictable offences dealt with by the Commonwealth Director of Public Prosecutions (DPP (Cth)) in the State and Territory District and Supreme courts (the higher courts). During the study period, these offences accounted for 860 of the 3,149 cases prosecuted by the DPP (Cth) in these courts. NSW, Victoria and Queensland dealt with the vast majority of the cases, with NSW finalising approximately half of them during this period.

Figure 1.1 shows the proportion of Commonwealth serious drug cases dealt with by each of the States and Territories during the study period.

**Figure 1.1: Commonwealth serious drug cases by State and Territory**




During the study period, the vast majority of offenders were sentenced to a term of full-time imprisonment.[6] Accordingly, while maximum penalties for offences include a maximum term of imprisonment and/or penalty units, the study largely focuses on maximum terms of imprisonment.

This monograph is divided into five discrete sections comprising Chapters 2 to 6.

### Chapter 2: Commonwealth serious drug offences framework

Chapter 2 outlines the broad framework of the offences in Pt 9.1 of the Code and examines aspects of the history behind the introduction of these provisions which were influential in their enactment. Some of the differences between the import-export offences in the Code and the former offences which they replaced in s 233B(1) (rep) of the *Customs Act* are discussed. There is also a discussion of those offences that are new to the Commonwealth arena and other aspects of the legislative framework that changed when Pt 9.1 commenced.

6 During the study period, a fine was imposed on only one offender. See pp 86–87.

### Chapter 3: Issues associated with the choice of charges

Chapter 3 addresses the various options available to prosecutors with respect to charges, not only as between similar Commonwealth offences, but also where particular conduct could be charged either as a Commonwealth or a State (or Territory) offence. While the exercise of prosecutorial discretion has little impact on the sentence imposed, issues associated with consistency in a public policy sense arise.

### Chapter 4: The relevant sentencing principles

Chapter 4 identifies some of the main sentencing principles which apply when an offender is sentenced for a Commonwealth serious drug offence. These are mainly derived from s 16A of the *Crimes Act* 1914 (Cth) (the *Crimes Act*). The discussion focuses on those matters in s 16A which are analysed in the empirical study (see Chapter 6 below), such as the relevance of drug type, quantity and role. There is no discussion of sentencing principles associated with, for example, duress[7] or the effect of an offender's incarceration on his or her family,[8] which may ameliorate the sentence.[9] The proper approach to be taken when fixing non-parole periods (NPPs) or making recognizance release orders with respect to these offences is also discussed. During the early period of the empirical study there was a conflict in the authorities concerning this.[10] However, this issue was finally resolved by the High Court in *Hili*.

### Chapter 5: The imperative of achieving reasonable consistency

Chapter 5 discusses the importance of achieving consistency in the sentencing of these Commonwealth serious drug offenders and addresses in general terms where the potentials for inconsistency arise. There is also a discussion of the tools available to assist sentencing judges to achieve sentencing consistency, bearing in mind always that it is the role of the judge to determine the appropriate sentence.[11]

### Chapter 6: Sentencing patterns for the period 2008–2012

Chapter 6 examines the sentences imposed nationally in respect of the Commonwealth serious drug offences dealt with in the higher courts during the study period. This has been done to ascertain the level of consistency in the sentences imposed for these offences on a national level, and between the States and Territories. The NPPs imposed have also been examined to determine the effects, if any, of the High Court decision in *Hili*. In particular, this section examines:

- the frequency of Commonwealth serious drug offences by year, and by State or Territory
- the types of penalties (custodial and non-custodial) imposed for these offences
- the relationship between sentencing factors (objective and subjective) and terms of imprisonment to identify the factors most likely to influence sentence length
- national consistency in sentencing patterns for these offences
- the sentencing factors most strongly associated with fixing NPPs
- whether, following the High Court's decision in *Hili*, there has been a change in the relationship between the NPPs and head sentences imposed on offenders who have committed these offences.

7 In *Tiknius v R* (2011) 221 A Crim R 365 at [31]–[54], Johnson J comprehensively discussed the authorities and the relevant principles to be applied when duress is capable of being a mitigating factor on sentence.

8 Hardship to family members must be exceptional before it will significantly mitigate a sentence: see *R v Togias* (2001) 127 A Crim R 23 at [14]–[17]; *Markovic v R* (2010) 30 VR 589 at [11]; *DPP (Cth) v Bui* (2011) 32 VR 149 at [20]–[22]. This is one area where there is an inconsistency of approach at the national level. That inconsistency of approach was identified and discussed by the NSWCCA in *R v Zerafa* [2013] NSWCCA 222 at [73]–[78]. The court concluded it was appropriate for the High Court to resolve any conflict in the authorities on this issue: at [93].

9 The effect on an offender's family is a matter that can be taken into account under s 16A(2)(p) of the *Crimes Act* 1914 (Cth) (the *Crimes Act*).

10 See pp 42–44.

11 *Barbaro v The Queen* (2014) 88 ALJR 372 at [41].

The limitations associated with the usefulness of statistical analysis are acknowledged. This is because it is simply not possible to record and analyse all of the variables affecting the sentence ultimately imposed, particularly mitigating factors which in some cases justify a sentence (or a NPP) that falls well below what would otherwise be expected. As Simpson J said in *DPP (Cth) v De La Rosa*,[12] in observations which have been endorsed twice by the High Court,[13] "the ranges of sentences actually imposed, while illuminating, are no more than historical statements of what has happened in the past".[14]

However, notwithstanding those limitations, this analysis provides a useful snapshot of the national sentencing practice with respect to Commonwealth serious drug offences. This can be of assistance both to judicial officers and to those who appear in proceedings involving these types of offences. Its usefulness lies not only in the fact that the matters relate to a reasonably recent point in time, but also because it may enhance the approach to sentencing for these offences by providing an opportunity to consider how the relevant sentencing principles are being applied.

12 (2010) 79 NSWLR 1.

13 *Hili v The Queen* (2010) 242 CLR 520 at [54]; *Barbaro v The Queen* (2014) 88 ALJR 372 at [41].

14 (2010) 79 NSWLR 1 at [304].

Chapter 2

# Commonwealth serious drug offences framework

This chapter broadly outlines the legislative framework for the serious drug offences which are found in Pt 9.1 of the Code. The majority of offences dealt with in the higher courts relate to the import-export offences found in Div 307. Accordingly, the discussion in this chapter focuses on these offences and discusses how they differ from the offences in s 233B(1) (rep) of the *Customs Act*, which they were intended to replace.

The chapter also provides a brief overview of the precursor offences and drug offences involving children in Pt 9.1. Following an outline of selected domestic offences in Pt 9.1 (trafficking and manufacturing), some of the issues that arise as a consequence of the concurrent operation of these offences and State and Territory laws are also considered. The chapter concludes with a discussion of the aggregation provisions in Div 311, which permit the combining of different parcels of drugs for the purposes of the offences in Pt 9.1, and the provisions in Div 312 for working out quantities of drugs and precursors.

There is no separate discussion of the offences involving the cultivation of controlled plants or border controlled plants because to date there have been few prosecutions in respect of these provisions. Nor is there a separate discussion of ancillary offences under Pt 2.4, Div 11 of the Code (attempt, conspiracy, aid, abet, counsel or procure, joint commission, etc).[15] These offences attract the same maximum penalties as the relevant substantive offences and factors relevant to sentencing (such as drug type, quantity and offender role, etc) are the same for the substantive and ancillary offences.

## 2.1 Customs Act 1901 (Cth)

Until 6 December 2005, the most serious Commonwealth drug offences, which included the importation and possession of prohibited imports, were concisely set out in the now repealed s 233B(1) of the *Customs Act*.

The "prohibited imports" to which s 233B(1) (rep) applied were "narcotic goods",[16] defined in s 4 of the Act as goods consisting of a "narcotic substance" which was, in turn, defined as a substance named in Sch VI (rep) of the Act or any other substance declared by the regulations to be a narcotic substance. When sentencing a particular offender for an offence against s 233B(1), the relevant quantity of narcotic was (and, under Pt 9.1 of the Code, remains) the pure quantity.[17] This is generally not the position for drug offences under State and Territory legislation. For example, the *Drug Misuse and Trafficking Act* 1985 (NSW) (DMT Act) provides, in s 4, that a prohibited drug includes "a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug". Accordingly, the whole of the quantity the subject of the particular offence is relevant on sentence.[18]

15 *Criminal Code* (Cth) (Code), Pt 2.4; *Customs Act* 1901 (Cth) (*Customs Act*), s 233B(1)(cb) and (d) (rep) (prior to 15 December 2001).

16 *Customs Act*, s 233B(2) (rep).

17 ibid s 4(4).

18 The relevant quantity for the purposes of the ACT drug offence provisions is also the pure quantity: *Drugs of Dependence Regulation* 2009 (ACT), regs 4, 5, incorporating by reference *Criminal Code Regulation* 2005 (ACT), reg 9, Sch 1 (definitions of "trafficable quantity", "commercial quantity", "large commercial quantity"). However, that is not the position elsewhere where the relevant quantity can be either the pure or impure quantity of the particular drug, or in certain circumstances, combinations of drugs within a substance: see *Misuse of Drugs Act* (NT), s 3(2); *Drugs Misuse Act* 1986 (Qld), s 4 (definition of "dangerous drug"); *Controlled Substances Act* 1984 (SA), s 4 (definition of "commercial quantity", "large commercial quantity" and "trafficable quantity"); *Misuse of Drugs Act* 2001 (Tas), s 3A (definition of "trafficable quantity"); *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), s 70; *Misuse of Drugs Act* 1981 (WA), s 3 (definition of "prohibited drug" and "heroin") and s 4 (definition of "prohibited drug") and *Poisons Act* 1964 (WA), s 5 (definition of "drug of addiction").

The maximum penalties for offences against s 233B(1) were set out in former s 235 of the Act. Under s 235 (rep), the maximum penalty was dependent on whether the pure weight of the narcotic substance the subject of a particular charge was a "trafficable" or "commercial" quantity.[19] The maximum penalties for s 233B(1) offences were as follows:

- commercial quantity — life imprisonment and/or 7,500 penalty units[20]
- trafficable quantity (not cannabis) — 25 years imprisonment and/or 5,000 penalty units[21]
- trafficable quantity (cannabis) — 10 years imprisonment and/or 2,500 penalty units.[22]

Life imprisonment could also be imposed on offenders previously convicted of an offence against s 233B(1) when the earlier offence involved not less than a trafficable quantity of a prohibited import.[23]

The relevant commercial and trafficable quantities for narcotic substances were set out in Sch VI (rep) of the *Customs Act*. The commercial and trafficable quantities for other substances declared to be narcotic substances were prescribed by regulation.[24]

## 2.2 Criminal Code (Cth), Pt 9.1

Following amendments to the Code by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005 (Cth) which commenced on 6 December 2005, all Commonwealth serious drug offences are now found in Pt 9.1 of the Code. The impetus for the introduction of these offences was the release of a report by the Model Criminal Code Officers Committee (the MCCOC) in 1998.[25] The MCCOC was established in the early 1990s by the Standing Committee of Attorneys-General. Its purpose was to develop a national Model Criminal Code for all Australian jurisdictions and, in so far as that purpose related to offences concerning the illicit drug trade, to recommend changes to the law within the then existing framework with the aim of achieving greater national consistency in the criminal law.[26]

The scope of Pt 9.1 is broader than that of the previous offences in s 233B(1) (rep) of the *Customs Act* because the offences extend to conduct related to the illicit trade in drugs which were previously only dealt with under State and Territory legislation. The import-export offences in Div 307 of Pt 9.1 are based on the former offences in the *Customs Act*, s 233B(1) (see discussion below). The remaining offences are based on Ch 6 of the Model Criminal Code.

The stated purpose of the serious drug provisions in Pt 9.1 is to create offences relating to drug trafficking which give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[27] When the amending legislation was introduced in 2005, then Attorney-General (Cth), the Honourable Philip Ruddock MP, confirmed that the new offences were intended to "operate alongside state and territory offences to give more flexibility to law enforcement agencies … [and to] ensure there are no gaps between federal and state laws that can be exploited by drug cartels".[28]

19 Defined in the *Customs Act*, s 4.

20 ibid s 235(2)(c)(i) (rep).

21 ibid s 235(2)(d)(i) (rep).

22 ibid s 235(2)(d)(ii) (rep).

23 ibid s 235(2)(c)(ii) (rep).

24 *Customs (Narcotic Substances) Regulations* (Cth) (rep).

25 Model Criminal Code Officers Committee (MCCOC), *Model Criminal Code: Chapter 6*, *Serious drug offences*, Report, October 1998 (MCCOC Report), at <www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/mcloc_mcc_chapter_6_serious_drug_offences_report.pdf>, accessed 19 March 2014.

26 Second Reading Speech, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005, Cth, House of Representatives, *Hansard*, 26 May 2005, p 7. See also the Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), p 1.

27 Code, s 300.1. The convention was ratified by Australia on 16 November 1992 and entered into force on 14 February 1993.

28 Second Reading Speech, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), p 6.

Under Pt 9.1, the offences fall into two broad groups:

1. import-export offences generally, including possession in this context (Div 307), and import-export offences involving children (Div 309, ss 309.12–309.15)
2. offences arising in a domestic context, including trafficking controlled drugs (Div 302), commercial cultivation of controlled plants (Div 303), selling controlled plants (Div 304), commercial manufacture of controlled drugs (Div 305), pre-trafficking controlled precursors (Div 306), possession offences (Div 308), and drug offences involving children (Div 309, excluding ss 309.12–309.15, Div 310).

The distinction made in the Code between import-export offences on the one hand and offences arising in the domestic context on the other is reflected in the separate definitions of "controlled drug"[29] and "border controlled drug",[30] "controlled plant"[31] and "border controlled plant",[32] and "controlled precursor"[33] and "border controlled precursor".[34] Although not specifically addressed in those terms in the Second Reading Speech to the Bill, the effect of the Attorney-General's statement referred to above supports this distinction being drawn, as does the discussion about these new definitions in the Explanatory Memorandum.[35]

The MCCOC discussion paper[36] and report proposed grading offences depending on whether the quantity involved was a "trafficable", "commercial" or "large commercial" quantity.[37] The rationale for the adoption of a three-tiered structure was to "concentrate the impact of prohibitions and penalties on individuals engaged in organised commercial trade in recreational drugs"[38] and to grade offences "according to the degree of the offender's commercial involvement".[39] There are repeated references in the report to the illicit drug market and the black market in illicit drugs. So although the MCCOC did not specifically recommend the use of the term "marketable" now appearing in the Code, it is not unreasonable to assume that "marketable" was chosen because it also reflects a commercial element in those offences where less than the commercial quantity of a controlled or border controlled drug is the subject of the particular offence.

The three-tiered quantitative regime taken up in Pt 9.1 of the Code nominated the relevant threshold quantities as:

- "commercial"
- "marketable"
- less than marketable (that is, no quantity is specified).

What constitutes a "commercial quantity" and a "marketable quantity" for border controlled drugs, plants and precursors is prescribed in the *Criminal Code Regulations* 2002 (Cth) (the *Criminal Code Regulations*). Generally speaking, quantities of particular substances previously considered "trafficable" under Sch VI (rep) of the *Customs Act* are now described as "marketable".[40]

29 Code, ss 300.2, 301.1.

30 ibid s 301.4.

31 ibid s 301.2.

32 ibid s 301.5.

33 ibid s 301.3.

34 ibid s 301.6.

35 See Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), pp 2, 6–8, 104.

36 MCCOC, *Model Criminal Code: Chapter 6*, *Serious drug offences*, Discussion Paper, June 1997.

37 MCCOC Report, above n 25, p 274. Table 1 of the proposed Code regulations listed "Commonly trafficked drugs". The rationale for including the tables in regulations rather than in the Code was to ensure the tables could be amended quickly in response to developments in the illicit drug market and to ensure, so far as possible, that there were no impediments to keeping the tables consistent between jurisdictions: p 21. This recommendation was later adopted: *Criminal Code Regulations* 2002 (Cth) (*Criminal Code Regulations*) which were subsequently amended by the *Criminal Code Amendment Regulation* 2013 (No 1) (Cth) (commenced on 28 May 2013).

38 ibid p 8.

39 ibid.

40 Compare *Criminal Code Regulations*, regs 5D, 5E, 5F, and Sch 4, and *Customs Act*, Sch VI (rep).

The expression "trafficable quantity", which was previously used in relation to the narcotics offences in s 233B(1) (rep) of the *Customs Act*, is now only relevant to the availability of presumptions as to proof of the requisite commercial intent (that is, that the drug is intended for sale) in ss 302.5, 303.7, 305.6 and 309.5. Hence, the expression is no longer relevant to the import-export offences under Div 307 of the Code. Trafficable quantities for controlled drugs are prescribed in Sch 3 of the *Criminal Code Regulations*.

The relevant quantities of particular substances may vary depending on whether a substance is classified as a controlled drug, plant or precursor or a border controlled drug, plant or precursor. The different quantities nominated for cocaine provide a useful example. If an offender is charged with trafficking in a marketable quantity of cocaine pursuant to s 302.3(1) of the Code, then the marketable quantity is 250 grams. However, if an offender is charged with importing a marketable quantity of cocaine pursuant to s 307.2(1) then the marketable quantity is only 2 grams. These differences arose because the list of border controlled drugs was based on the former *Customs Act* provisions, whereas the quantities included in the list of controlled drugs were said to have been set at a level consistent with the jurisdictions across Australia which had introduced the model drug offences originally proposed by the MCCOC.[41]

One particular feature of Pt 9.1 was the introduction of a range of offences targeting the trade in precursor chemicals (the chemicals used to manufacture illicit drugs). These offences were said to be more expansive than those originally recommended by the MCCOC because the Bill included offences relating to manufacture and the possession of precursors for the purpose of manufacturing a controlled drug. The Explanatory Memorandum explained that this was necessary because there had been a significant increase in the trade in manufactured drugs and the chemical substances used to make those drugs since 1998.[42]

### 2.2.1 Further legislative amendments

Since Pt 9.1 commenced, there have been a number of amendments with an effect on the operation of the serious drug offences. These include:

- On 20 February 2010, the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2)* 2010 (Cth), extended the definition of "import" in Div 300 of the Code to include "dealing with a substance in connection with its importation".[43] This amendment was made to address the consequences of the decision of the NSW Court of Criminal Appeal (NSWCCA) in *Campbell v R*,[44] where Spigelman CJ concluded that the word "import" in the Code was used in a precise rather than an expansive sense with the effect that border controlled drugs and precursors were "imported" when they arrived in Australia from abroad and were delivered to a point resulting in the relevant substance remaining in Australia.[45] The broad interpretation given to "importation" in the repealed offence of being knowingly concerned in an importation[46] was held not to apply to the interpretation of the new import offences in Pt 9.1.[47] The effect of the cases dealing with the offence of being knowingly concerned in an importation was that an importation was a continuing process and that "concern" in an importation was manifested "in the venture [that centred] upon the importation".[48]

41 Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), p 104.

42 ibid p 1. Note however that offences related to the manufacture of precursors were proposed by the MCCOC: see MCCOC Report, above n 25, pp 124–127.

43 Sch 9[1].

44 (2008) 73 NSWLR 272.

45 ibid at [103]–[123], [126]–[128]. See also *R v Toe* (2010) 106 SASR 203 at [52]–[68].

46 *Customs Act*, s 233B(1)(d) (rep).

47 *Campbell v R* (2008) 73 NSWLR 272 at [103]–[123], [126]–[128]. See also *R v Toe* (2010) 106 SASR 203 at [52]–[68].

48 *Campbell v R,* ibid, at [178] (Weinberg AJA), referring to *R v Shin Nan Yong* (1975) 7 ALR 271. Spigelman CJ and Simpson J agreed with his Honour's additional reasons. See also *Courtney-Smith (No 2) v R* (1990) 48 A Crim R 49.

- On 20 February 2010, the *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth) inserted a "joint commission" provision, s 11.2A, into Pt 2.4 of the Code.[49] This amendment was made to address a lacuna in the Code by introducing into it the common law principle of joint criminal enterprise. It was made in response to the decision of Keleman DCJ in *R v Liu*,[50] who had found that the Crown could not rely on joint criminal enterprise because it was specifically excluded by the Code.
- On 4 April 2012, the *Crimes Legislation Amendment (Powers and Offences) Act* 2012 (Cth) inserted additional drugs in the lists of controlled and border controlled drugs and precursors in Div 314 (since repealed) of the Code. It also added threshold marketable and commercial quantities to s 314.4(1) (since repealed). The purpose of those amendments was to "help combat the emergence and importation of illicit substances".[51]
- On 28 May 2013, the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act* 2012 (Cth) moved the lists of controlled and border controlled drugs, plants and precursors (including the relevant trafficable, marketable and commercial quantities) from Div 314 (rep) to the *Criminal Code Regulations*.[52] The lists were also updated, emergency determination mechanisms were amended and the criteria for listing substances were refined. The purpose of the amendments was to enable the legislature to respond more quickly to new and emerging substances.[53]
- On 28 December 2012, the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act* 2012 (Cth) increased the value of a "penalty unit" from $110 to $170.[54]

### 2.2.2 Import-export offences

According to the Explanatory Memorandum for the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), the import-export offences in Div 307, Subdivs A–C, which replaced those previously found in s 233B(1) of the *Customs Act*, were "designed to accord as closely as possible to the offences"[55] they replaced. In addition, new offences of importing and exporting border controlled precursors (Div 307, Subdiv D) and import-export offences involving the exploitation of children (Div 309) were also created. Precursor offences are separately discussed below.

Table 2.1 sets out the import-export offences in Div 307 (excluding offences relating to precursors in Subdiv D) and the relevant maximum penalties.

49 Sch 4, Pt 1[4].

50 (unrep, 10/6/2003, NSWDC).

51 Explanatory Memorandum, Crimes Legislation Amendment (Powers and Offences) Bill 2012 (Cth), p 1.

52 *Criminal Code Regulations* were amended by the *Criminal Code Amendment Regulation* 2013 (No 1) (Cth): Sch 3 (controlled drugs) and Sch 4 (border controlled drugs) (commenced on 28 May 2013).

53 Sch 1, Pt 1; Explanatory Memorandum, Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012 (Cth), p 1; Second Reading Speech, Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012, Cth, House of Representatives, *Hansard*, 10 October 2012, p 11764. These amendments had previously been recommended by the MCCOC in its report for similar reasons, but the recommendation was not adopted when the serious drug offences were originally enacted: MCCOC Report, above n 25, p 21. The MCCOC also proposed that amendments be made to the regulations following consideration and recommendation by an interstate committee of health, justice and law enforcement officials: MCCOC Report, above n 25, p 249ff.

54 Sch 3, Pt 2; *Crimes Act*, s 4AA(1).

55 Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), p 46.

**Table 2.1: Import-export offences under the Criminal Code (Cth), Pt 9.1, Div 307 (excluding Subdiv D)**

| Section | Offence description | Maximum penalty |
|---|---|---|
| 307.1 | Import-export commercial quantity of border controlled drug or plant | Life and/or 7,500 pu |
| 307.2 | Import-export marketable quantity of border controlled drug or plant | 25 yrs and/or 5,000 pu |
| 307.3 | Import-export border controlled drug or plant: no quantity specified | 10 yrs and/or 2,000 pu |
| 307.4 | Import-export border controlled drug or plant: no defence of lack of commercial intent | 2 yrs and/or 400 pu |
| 307.5 | Possess commercial quantity of unlawfully imported border controlled drug or plant | Life and/or 7,500 pu |
| 307.6 | Possess marketable quantity of unlawfully imported bordered controlled drug or plant | 25 yrs and/or 5,000 pu |
| 307.7 | Possess unlawfully imported border controlled drug or plant: no quantity specified | 2 yrs and/or 400 pu |
| 307.8 | Possess commercial quantity of border controlled drug or plant reasonably suspected of having been unlawfully imported | Life and/or 7,500 pu |
| 307.9 | Possess marketable quantity of border controlled drug or plant reasonably suspected of having been unlawfully imported | 25 yrs and/or 5,000 pu |
| 307.10 | Possess border controlled drug or plant, reasonably suspected of having been unlawfully imported: no quantity specified | 2 yrs and/or 400 pu |

Notwithstanding that the import-export offences in Div 307 were intended to align closely with the offences in s 233B(1), there are a number of significant differences including:

- As Table 2.1 shows, the number of import-export offences in the Code is far greater than those they replaced in s 233B(1). This is partly because the offences are now based on the three-tiered structure of offending discussed above, and in part because of the creation of new import-export offences involving precursors and those involving children (discussed separately below).
- The terms "border controlled drug", "border controlled precursor" and "border controlled plant" have replaced the terms "narcotic goods" and "narcotic substance" which were used in the *Customs Act*. These new terms apply only to the import-export offences. The term "controlled drug" had been recommended by the MCCOC because it considered that terms such as "narcotic drug" did not accurately reflect the variety of substances that could be caught by drug trafficking provisions.[56]
- As a consequence of the introduction of the term "marketable" with respect to import-export offences, the expression "trafficable quantity" is no longer relevant to the Div 307 offences.
- A new penalty of 10 years imprisonment has been included for those import-export offences involving relatively small quantities of drugs where the prosecution can prove that the offence was commercially motivated.[57]
- The prosecution must still prove that an offender knew, or was reckless as to whether the substance or plant involved in the particular offence was a border controlled drug, plant or precursor.[58] However, the Code specifically provides that the prosecution is *not* required to prove that an offender knew the particular type of border controlled substance the subject of the particular offence.[59] There was no analogous provision for the previous offences in s 233B(1)(rep).[60] For sentencing purposes, however, if there is evidence to prove an offender had specific knowledge of the particular drug involved this will be a relevant factor in determining the appropriate sentence.[61]

56 ibid pp 7–8.

57 Code, s 307.3.

58 ibid s 300.5.

59 ibid.

60 In *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 537–538, Gibbs CJ (with whom Mason J agreed at 546) while not conclusively deciding, observed that while the prosecution had to prove an accused knew the substance involved in an offence was a drug or narcotic substance, it may not be necessary to prove the accused knew the particular drug the subject of the charge.

61 See generally *Wong v The Queen* (2001) 207 CLR 584 at [64] and the discussion on pp 28–29.

- Quantity is a separate element of the offences in Pt 9.1 of the Code. This was not the case with respect to offences against s 233B(1) of the *Customs Act* where quantity, by virtue of s 235, dictated the maximum penalty.[62] Where it can be proved that an offender has knowledge of the quantity to be imported, this will also be relevant at sentence.[63] The relevant quantity remains the pure quantity of the drug or drugs involved in the particular offence.
- Where an offence concerns more than one type of drug, an offender can now be charged with a single offence in respect of all or any of those different "parcels" of drugs,[64] for example, where there have been repeated instances of the importation of border controlled drugs.[65] Previously under the *Customs Act* it was necessary to separately charge for each drug. When the prosecution relies on these provisions it proves the element of the offence relating to the quantity of the border controlled substance by proving the defendant was engaged in an organised commercial activity involving the repeated import of border controlled substances *and* that the relevant quantity of that substance (or combination of border controlled substances) was imported in the course of that activity.[66] If the prosecution intends to rely on these provisions that fact must be referred to in the charge and a description of the conduct alleged for the purposes of the section must be either set out in the charge or provided to the accused within a reasonable period of time before the proceedings.[67] The broader operation of these provisions is discussed further below.
- Contrary to the position under the *Customs Act*, when an import-export offence under the Code involves a marketable quantity of cannabis, the maximum penalty is now 25 years and/or 5,000 penalty units,[68] the same as for a marketable quantity of any other border controlled drug. A primary concern of the MCCOC was to focus on the commercial intent behind particular transactions involving drugs and their subsequent illicit use which could give rise to a particular offence. This was part of the MCCOC's rationale for suggesting that penalties should be the same when particular offences involved cannabis.[69]

### 2.2.3 Offences involving precursors

Offences relating to precursors are one of the new features of the Code. Precursors are the chemicals required to manufacture semi-synthetic and synthetic drugs.[70] Precursors include pseudoephedrine which is used to manufacture methamphetamine, and phenyl-2-propanone and safrole which are used to manufacture 3,4-methylenedioxymethamphetamine (MDMA).

62 In *Kingswell v The Queen* (1985) 159 CLR 264 at 273, 276, the High Court, by majority, concluded that the quantity of the narcotic substance the subject of a charge against the *Customs Act* was not an element of the offence, that the elements of the offence were to be found in former s 233B(1)(cb) and that additional matters relevant to the maximum penalty were set out in s 235. However, at 280–281, the majority went on to state that where one of the circumstances of aggravation in s 235(2) was relied on that should be pleaded in the indictment as a matter of practice. It is interesting to note that this conclusion was partly reached because, as a consequence of procedural provisions operating in Qld which were picked up by the *Judiciary Act* 1903 (Cth), the Cth was already pleading the relevant quantity in a given charge in that State. See also *The Queen v Meaton* (1986) 160 CLR 359.

63 *Wong v The Queen* (2001) 207 CLR 584 at [64].

64 Code, s 311.1(1).

65 See, for example, s 311.4 and the other provisions in Pt 9.1, Div 311, Subdiv B.

66 Code, s 311.4(1).

67 ibid s 311.7(1).

68 With the exception of offences under s 307.12 of the Code involving precursors.

69 See MCCOC Report, above n 25, pp 8, 14–16, where this is discussed in the context of trafficking in drugs. The concept of trafficking discussed in the MCCOC Report is sufficiently broad to encapsulate the conduct involved in importation and other related offences.

70 United Nations Office on Drugs and Crime (South Asia), *Precursor control at a glance: precursor chemicals*, Regional Precursor Control Project for SAARC countries (RAS/938), Report, New Delhi, 2006, p 1.

Table 2.2 sets out precursor offences under Divs 306 and 307 of the Code and the relevant maximum penalties.[71] In addition to the offences set out in the table, there are also precursor offences involving children in Div 309. These offences carry higher maximum penalties than those for similar offences in Divs 306 and 307.

**Table 2.2: Selected precursor offences under the Criminal Code (Cth), Pt 9.1**

| Div 306: Pre-trafficking in controlled precursors | | | |
|---|---|---|---|
| **Section** | **Offence description** | **Maximum penalty** | |
| | | **Basic offence** | **Aggravated offence[a]** |
| 306.2 | Pre-traffic in commercial quantity of controlled precursor | 25 yrs and/or 5,000 pu | 28 yrs and/or 5,600 pu |
| 306.3 | Pre-traffic in marketable quantity of controlled precursor | 15 yrs and/or 3,000 pu | 17 yrs and/or 3,400 pu |
| 306.4 | Pre-traffic in controlled precursor: no quantity specified | 7 yrs and/or 1,400 pu | 9 yrs and/or 1,800 pu |
| | | | |
| **Div 307, Subdiv D: Import-export border controlled precursors** | | | |
| **Section** | **Offence description** | **Maximum penalty** | |
| 307.11 | Import-export commercial quantity of border controlled precursor | 25 yrs and/or 5,000 pu | |
| 307.12 | Import-export marketable quantity of border controlled precursor | 15 yrs and/or 3,000 pu | |
| 307.13 | Import-export border controlled precursor: no quantity specified | 7 yrs and/or 1,400 pu | |

a For the purposes of these provisions, the offence will be an "aggravated offence" under s 310.4(3) where the commission of the offence exposes a child under 14 yrs to a controlled precursor intended to be used to manufacture a controlled drug, or to the manufacture of a controlled precursor.

"Controlled precursors" and "border controlled precursors" are separately defined in ss 301.3 and 301.6 of the Code respectively. They comprise the substances listed in the regulations,[72] a salt or ester of a listed controlled or border controlled precursor, and a substance determined to be either a controlled or border controlled precursor under the emergency determination mechanism in the Code.[73] A "border controlled precursor" also includes an "immediate precursor",[74] which is defined as those substances from which a listed border controlled precursor may be directly obtained through a chemical manufacturing process.[75]

It is noteworthy that when an offence involves the importation of a commercial quantity of a precursor, the maximum penalty is 25 years compared with life imprisonment for those import-export offences involving a commercial quantity of a border controlled drug. This presumably reflects the fact that precursors are the raw materials used to manufacture drugs rather than the finished products.

71 There is also a further possess precursor offence under Div 308, which attracts a maximum penalty of 2 years imprisonment and/or 400 pu.

72 *Criminal Code Regulations*, reg 5F(1).

73 Code, ss 301.3, 301.6, 301.14.

74 ibid s 301.6(1)(c).

75 ibid s 301.6(2).

When an offender is charged with an import-export offence related to a precursor under Div 307 of the Code,[76] in addition to proving that the offender imported the relevant precursor, the prosecution must also prove that he or she intended to use any of the substance to manufacture a controlled drug or believed another person intended to do so. However, the prosecution can rely on the presumptions in ss 307.14(1) and (3) which provide that an offender is taken to have that intention if they imported (or exported) the relevant substance and authorisation was required, but had not been obtained, by Commonwealth law. An offender bears the onus of proving that he or she did not have the relevant intention or belief on the balance of probabilities.[77]

In addition to the new offences related to the import and export of border controlled precursors, the implementation of the MCCOC recommendations also saw the introduction of new offences related to "pre-trafficking" in controlled precursors in Div 306.

Some precursors have uses in legitimate industries for which there are appropriate regulations. The pre-trafficking precursor offences are intended to reduce the risk of diversion of these substances for use in the illicit manufacture of controlled drugs,[78] and to address conduct which is preparatory to the actual trafficking of a controlled drug.[79] Section 306.1 of the Code defines "pre-traffics" generally as the sale, manufacture or possession by a person of a substance believing the person to whom it is sold will use it to manufacture or sell a controlled drug. Those who manufacture the substance themselves to make a controlled drug and then intend to sell the manufactured product also fall within the terms of the definition.

There are presumptions in Div 306 concerning the sale, manufacture or possession of controlled precursors.[80] However, these apply only to an offence under s 306.4(1) and not to the more serious offences under ss 306.2 and 306.3 involving commercial and marketable quantities of controlled precursors. By comparison, the similar presumptions for the import-export offences in Div 307 apply to *all* the offences in that Division.

### 2.2.4 Offences arising in a domestic context

Commonwealth serious drug offences arising in a domestic context (aside from those offences related to precursors which have been dealt with above) include trafficking controlled drugs (Div 302), commercial cultivation of controlled plants (Div 303), sale of controlled plants (Div 304) and commercial manufacture of controlled drugs (Div 305). Commonwealth offences involving the trafficking and manufacture of controlled drugs have started to come before the courts, although they are not as common as the import-export offences in Div 307. Tables 2.3 and 2.4 set out these trafficking and manufacturing offences and the relevant maximum penalties.

**Table 2.3: Trafficking offences under the Criminal Code (Cth), Pt 9.1**

| Section | Offence description | Maximum penalty |
|---|---|---|
| 302.2 | Traffic commercial quantity of controlled drug | Life and/or 7,500 pu |
| 302.3 | Traffic marketable quantity of controlled drug | 25 yrs and/or 5,000 pu |
| 302.4 | Traffic controlled drug: no quantity specified | 10 yrs and/or 2,000 puits |

76 ibid ss 307.11(1)(b), 307.12(1), 307.13(1).

77 ibid ss 307.14(2), 307.14(4).

78 MCCOC Report, above n 25, pp 95, 119.

79 Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), p 37.

80 Code, ss 306.5–306.8.

**Table 2.4: Manufacturing offences under the Criminal Code (Cth), Pt 9.1**

| Section | Offence description | Maximum penalty | |
|---|---|---|---|
| 305.3 | Manufacture commercial quantity of controlled drug | Life and/or 7,500 pu | |
| | | **Basic offence** | **Aggravated offence[a]** |
| 305.4 | Manufacture marketable quantity of controlled drug | 25 yrs and/or 5,000 pu | 28 yrs and/or 5,600 pu |
| 305.5 | Manufacture controlled drug: no quantity specified | 10 yrs and/or 2,000 pu | 12 yrs and/or 2,400 pu |

a For the purposes of these provisions, the offence will be an "aggravated offence" under s 310.4(2) where the commission of the offence exposes a child under 14 yrs to the manufacture of a controlled drug.

Until 2005, these kinds of offences were routinely prosecuted under commensurate State and Territory laws. Since 2005, the new Code offences operate alongside these State and Territory offences. Their concurrent operation has been the subject of constitutional challenge,[81] creates issues related to the exercise of prosecutorial discretion, and has flow-on consequences for sentencing where maximum penalties differ under corresponding provisions in the Code and State or Territory laws, and different sentencing regimes apply. The issues related to the exercise of prosecutorial discretion and sentencing are dealt with in Chapter 3, "Issues associated with the choice of charges".

### 2.2.5 Constitutional challenges

Section 300.4(2) of the Code provides that:

> "[Part 9.1] is not intended to exclude or limit the concurrent operation of a law of a State or Territory law that makes:
>
> (a) an act or omission that is an offence against a provision of this Part; or
>
> (b) a similar act or omission;
>
> an offence against the law of the State or Territory."

This provision applies even if the penalty, fault element or defence under the relevant State or Territory law differs from the corresponding matters provided for in the Code.[82]

The coexistence of certain Commonwealth and State laws directed towards similar conduct means that a person could theoretically be prosecuted for substantially the same offence. This is addressed by s 4C(2) of the *Crimes Act*. This subsection provides that when an act or omission constitutes an offence under the law of the Commonwealth and a law of the State or Territory, *and* the offender has already been dealt with under the law of the State or Territory, they are not liable to be punished for the Commonwealth offence.

Whether pre-existing State laws in this area are inconsistent with analogous Commonwealth laws and therefore constitutionally invalid by virtue of s 109 of the Constitution has been considered by the High Court in *Dickson v The Queen*[83] and *Momcilovic v The Queen*.[84]

*Dickson* concerned whether there was a direct inconsistency for the purposes of s 109 of the Constitution between the conspiracy offence in s 321(1) of the *Crimes Act* 1958 (Vic) and the conspiracy offence in s 11.5(1) of the Code. The appellant was convicted of conspiring to steal cigarettes from the Australian Customs Service. The High Court concluded that there was a direct inconsistency because the Victorian provision rendered criminal conduct that was not caught by, and which was deliberately excluded from,

81 *Momcilovic v The Queen* (2011) 245 CLR 1; *R v El Helou* (2010) 267 ALR 734; *Buckman v R* [2013] NSWCCA 258.

82 Code, s 300.4(3).

83 (2010) 241 CLR 491.

84 (2011) 245 CLR 1.

the conduct rendered criminal by s 11.5 of the Code.[85] The fact the Victorian provision defined conspiracy more broadly than the Code, and that the ingredients of each offence were different in a number of respects, were matters which were determinative of whether or not the relevant inconsistency existed.[86] The court also found that differences in the method of trial between the State and Commonwealth offences and the differing maximum penalties strengthened the case for inconsistency.[87]

In *Momcilovic*, the appellant had been convicted of trafficking in methylamphetamine contrary to s 71AC of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) (the *Drug Act* (Vic)). Drugs were found in the apartment she shared with her partner. At trial, both gave evidence that she did not know the drugs were there. On appeal to the High Court, the appellant argued, relying on *Dickson*, that s 71AC of the *Drug Act* (Vic) was inconsistent with the offence of trafficking in a controlled drug in s 302.4 of the Code for the purposes of s 109 of the Constitution because of differences in the maximum penalties for the offences, the relevant sentence regimes and the modes of trial. The court rejected the appellant's argument and held that there was no inconsistency notwithstanding these differences.[88]

The proper construction of s 300.4 of the Code was significant in the ultimate finding by the court that there was no relevant inconsistency. A majority of the court concluded that it was apparent from the language of s 300.4 that the offences contained in Pt 9.1 of the Code were intended to operate as a concurrent scheme in parallel with State offences concerning the same subject matter. The court found that the language of s 300.4 and s 4C(2) of the *Crimes Act* was relevant in determining whether the Commonwealth, in enacting the Code provisions, intended that the Code offences completely, exhaustively or exclusively be the law governing that conduct.[89] The NSWCCA had previously come to the same conclusion in *R v El Helou*,[90] where the court found no s 109 inconsistency between the supply offences in the DMT Act and s 306.2 of the Code which makes it an offence to pre-traffic in a commercial quantity of a controlled precursor.[91]

Crennan and Kiefel JJ articulated this clearly in *Momcilovic* when they said:

> "… whilst the expression of intention in s 300.4 will not avoid direct inconsistency if such inconsistency exists, taken in its entirety it is a very clear indication that Pt 9.1 is not exhaustive or exclusive in respect of drug trafficking and is not intended to exclude the operation of the Drugs Act where the Drugs Act deals with the same subject matter … such an expression of intention assists in resolving, as a matter of statutory construction, whether the Commonwealth law covers the subject exhaustively or exclusively. In the present case the statements of intention found in s 300.4 accord with the intention of Pt 9.1 ascertained by a process of construction. There is no reason why effect should not be given to these statements".[92] [Citations omitted.]

Notwithstanding the fundamental proposition from *Momcilovic* that State drug trafficking laws which overlap with similar Commonwealth drug trafficking laws are not constitutionally invalid because of the operation of s 300.4 of the Code and s 4C of the *Crimes Act*, there have been three further such challenges in NSW.

*Gedeon v R*[93] confirmed the correctness of an earlier decision of the court in *R v Stevens*.[94] In *Stevens*, the NSWCCA held that although there was an overlap between the possession offences in former s 233B of the *Customs Act* and the supply offences in the DMT Act, both were directed to different conduct. The offences

85 (2010) 241 CLR 491 at [22].

86 ibid at [25]–[30].

87 ibid at [20].

88 (2011) 245 CLR 1 at [109]–[112] (French CJ), [276]–[277] (Gummow J), [478]–[481], [486] (Heydon J), [655]–[657] (Crennan and Kiefel JJ) and [660] (Bell J).

89 ibid at [103]–[104], [111] (French CJ), [266]–[272] (Gummow J), [472]–[475] (Heydon J), [654], [656] (Crennan and Kiefel JJ) and [660] (Bell J). Hayne J dissented on this issue.

90 (2010) 267 ALR 734.

91 ibid at [31], [34]. See also *Standen v DPP (Cth)* (2011) 218 A Crim R 28 at [29].

92 (2011) 245 CLR 1 at [656]. See also Gummow J (with whom French CJ at [111] and Bell J at [660] agreed) at [272].

93 [2013] NSWCCA 257.

94 (1991) 23 NSWLR 75.

in s 233B were directed towards controlling the importation of drugs whereas those in the DMT Act were aimed at controlling and creating offences related to the possession and supply of drugs in NSW.[95] The fact both s 233B (rep) of the *Customs Act* and s 25 of the DMT Act could operate with respect to the possession of prohibited drugs did not mean there was a relevant inconsistency under s 109 of the Constitution.[96]

In *Gedeon*, the appellant argued that *Stevens* should not be followed because of the High Court decisions in *Dickson* and *Momcilovic*. Consistently with the conclusions of the High Court in *Momcilovic*, Bathurst CJ observed that before considering whether there was either a direct or indirect inconsistency in the relevant provisions, it was first necessary to analyse the relevant laws to not only determine their operation as a matter of construction, but to determine the intention of the federal Parliament when it enacted the relevant federal law.[97] His Honour concluded that the language and scope of the relevant provisions and what the prosecution must prove with respect to each offence demonstrated that there was no relevant inconsistency. In the case of an offence against s 233B, which concerned imported drugs, the Crown must prove the offender knew that he or she had those goods in his or her possession,[98] whereas in the case of an offence against s 25 involving the supply of drugs (whether or not they were imported) the Crown has to prove the offender intended to supply the drugs.[99] Further, there was no inconsistency simply on the basis that the relevant provisions dealt with the same matters in different terms because s 4C(2) of the *Crimes Act* contemplates the concurrent operation of Commonwealth and State laws with respect to particular offences.[100]

In *Buckman v R*,[101] which was determined at the same time as *Gedeon*, the argument related to an asserted inconsistency between offences in Pt 9.1 of the Code and s 25(1) of the DMT Act. The court again rejected that proposition. Bathurst CJ reiterated that the first task was to analyse the relevant provisions to determine the federal legislature's intent[102] and concluded that s 300.4 of the Code, which expressly provides for the concurrent operation of Pt 9.1 with similar State and Territory drug laws, clearly indicates that the Commonwealth legislature did not intend that the offences in Pt 9.1 cover the field.[103] An argument that inconsistency was demonstrated because the inclusion of a gratuitous supply offence in s 25(1) altered, impaired or detracted from Pt 9.1 by preventing conduct not otherwise dealt with by the Commonwealth law, was also rejected.[104] Bathurst CJ observed that while Pt 9.1 did not decriminalise possession for gratuitous supply per se, such an offence was equivalent to possession but with a lesser penalty than that in the DMT Act. Further, offences of trafficking in the Code extended to non-commercial supply because of the extended definition of trafficking in s 300.2 where "sell" in the context of trafficking is defined to include barter or exchange or agree to sell.[105]

95 ibid at 82.

96 ibid at 79.

97 [2013] NSWCCA 257 at [54]–[55]; *Momcilovic v The Queen* (2011) 245 CLR 1 at [111] (French CJ), [245], [258] and [261] (Gummow J), [315] (Hayne J), [474] (Heydon J), [637] (Crennan and Kiefel JJ) and [660] (Bell J).

98 [2013] NSWCCA 257 at [56]–[58].

99 ibid at [59], [65].

100 ibid at [61]–[63]. See *McWaters v Day* (1989) 168 CLR 289 at 296; *Momcilovic v The Queen* (2011) 245 CLR 1 at [637] (Crennan and Kiefel JJ) as to the underlying principles.

101 [2013] NSWCCA 258. See also *Ratcliff v R* [2013] NSWCCA 259 where identical issues were raised. Note that Bathurst CJ stated that his reasons in *Buckman* applied equally in the instant case: at [4].

102 [2013] NSWCCA 258 at [74].

103 ibid at [78], [80].

104 ibid at [82].

105 ibid at [76].

### 2.2.6 Drug offences involving children

Division 309 of Pt 9.1 contains a range of drug offences that directly involve children. Some of these are import-export offences (ss 309.12–309.15), but others arise in the domestic context (Div 309, excluding ss 309.12–309.15). To date there is no appellate authority concerning the operation of these provisions.

The penalties for these offences are significantly higher than for similar offences elsewhere in Pt 9.1, ranging from 15 years to life imprisonment. For example, the maximum penalty for the offence of supplying a marketable quantity of a controlled drug to children for trafficking under s 309.3 is life imprisonment and/or 7,500 penalty units,[106] whereas the maximum penalty for the corresponding trafficking offence under s 302.3(1) is 25 years and/or 5,000 penalty units. Similarly, the maximum penalty for the offence of procuring a child to import a marketable quantity of a border controlled drug in s 309.12 is life imprisonment and/or 7,500 penalty units compared with 25 years and/or 5,000 penalty units for the corresponding importation offence under s 307.2(1).

### 2.2.7 Combining quantities in single charges and determining quantities when there are mixtures

Division 311 of the Code permits the combining of different "parcels" of controlled and border controlled drugs, plants or precursors into a single charge in the three circumstances set out in the Division. These are when an offender:

- engages in conduct including trafficking, manufacturing, importing or cultivating different controlled or border controlled drugs, precursors or plants on a single occasion[107]
- commits multiple offences over a period of time involving controlled or border controlled drugs, plants or precursors[108]
- engages in organised commercial activities associated with controlled or border controlled drugs or precursors on an ongoing basis.[109]

For sentencing purposes, when more than one substance is involved in any of these three scenarios, the relevant quantity is calculated in the way set out in s 312.2 of the Code. When different parcels are combined on the same occasion, or from multiple offences, the relevant quantity is the sum of the pure quantities in each parcel.[110] When different parcels are combined in organised commercial activities, the prosecution needs to also prove either a commercial or a marketable quantity was involved. There were no analogous provisions under the *Customs Act* so if, for example, an offender was charged with importing a quantity of cocaine and heroin then it was necessary to lay a separate charge for each drug even though there may have been only one physical act of importation.

When the prosecution relies on any of the provisions in Div 311 of the Code, that fact must be set out in the charge. When an offence involves organised commercial activity, the prosecution is not required to prove the date of each occasion or the precise quantity of the controlled drug involved[111] and must also either set out in the charge a description of the conduct alleged or provide that information to the accused "a reasonable time" before the proceedings.[112]

106 Code, s 309.3(1).

107 ibid s 311.1.

108 ibid ss 311.8 – 311.21.

109 ibid ss 311.2–311.6.

110 See for example the Note to s 311.1(2) and Note 1 to s 311.8.

111 ibid ss 311.3(2), 311.4(2), 311.5(2) and 311.6(2).

112 ibid s 311.7(1)(b).

There are a number of advantages with these types of provisions. For the first time at the Commonwealth level it enables the charging of people involved in systematic drug trafficking with a single offence when it amounts to organised commercial activity[113] or where it occurs over a defined period of time.[114] Previously where there was evidence that an offender was involved in drug trafficking in a commercial sense, there may have been a wide variety of possible Commonwealth and State charges. The availability of these types of charges has the potential to streamline the charging process. The flow on benefit in terms of sentencing is that the need to grapple with the issues which arise from a proper application of the principles in *Pearce v The Queen*[115] should be minimised to a significant extent.

Division 312 concerns how the prosecution proves the quantity of controlled or border controlled drugs or precursors when they are found in a mixture of substances or where different kinds of drugs are involved in the commission of a single offence. Although the provisions in Div 312 are drafted in quite convoluted terms, it is apparent that the *primary* focus of these provisions remains the pure form of the particular drug or precursor.

Section 312.1 sets out the way in which the quantity of a controlled drug or precursor or border controlled drug or precursor is calculated when it occurs in a mixture of substances.

Section 312.2 sets out the approach to be taken when an offender has been charged in relation to "parcels" of different drugs in a single offence. Sections 312.2(4)(a) and s 312.2(5)(a) provide that calculations of quantity are based on the quantity of each relevant controlled or border controlled drug in its pure form. Although ss 312.1, 312.2(4)(b) and 312.2(5)(b) all make provision for calculating quantity on the basis of a mixture of the substances, that is done by reference to Div 314 which was repealed on 28 May 2013. Presumably the reference to Div 314 remains as an oversight.[116]

Evidence about the type and quantity of drugs is normally contained in an evidentiary certificate prepared in accordance with s 233BA of the *Customs Act*. Such a certificate is prima facie evidence of the matters contained within the certificate and of the correctness of the result of the analysis.[117]

113 ibid ss 311.2–311.6.

114 ibid ss 311.8–311.21.

115 (1998) 194 CLR 610.

116 It is apparent from the Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), pp 98–99, 105, that the original intention was that quantities of controlled or border controlled drugs and precursors could also specify the total quantity of a mixture which included a prohibited substance. However, to date, the legislation has not been amended to give effect to that intention.

117 *Customs Act*, s 233BA(2).

Chapter 3

# Issues associated with the choice of charges

Determining the appropriate charge is a matter for the relevant prosecuting authority. In the case of Commonwealth offences dealt with on indictment, that decision is usually made by the DPP (Cth) and is guided by the Prosecution Policy of the Commonwealth.[118] This policy requires a prima facie case and reasonable prospects of conviction, and that the prosecution of a particular offender is in the public interest.[119] Ordinarily the charge that proceeds should be the one which adequately reflects the nature and extent of the criminal conduct disclosed by the evidence and which provides the court with an appropriate basis for sentence.[120] Normally this is the most serious offence disclosed by the evidence.[121] Recently, in *Magaming v The Queen*[122] the High Court reiterated that prosecuting authorities decide which charges will proceed in relation to a particular offender and that while such decisions may ultimately affect the punishment imposed, the exercise of that choice does not involve an impermissible exercise of judicial power.[123]

The choice of charge for serious drug offences under Pt 9.1 of the Code is complicated by the availability of:

- overlapping State or Territory drug offences which arise in the domestic context,[124] such as those involving the manufacture and trafficking in controlled drugs[125]
- other Commonwealth offences which address similar conduct, but which have lower maximum penalties.

These issues do not directly affect a sentencing judge, who must sentence an offender on the basis of the particular charge and its maximum penalty, the evidence supporting that charge and having regard to all relevant objective and subjective factors.

## 3.1 Overlapping Commonwealth and State or Territory offences

As discussed in Chapter 2, "Commonwealth serious drug offences framework", until the enactment of the array of serious drug offences in the Code, the offences contained in s 233B(1) of the *Customs Act* focused primarily on conduct that was connected with the importation of illicit drugs. However, now a number of Code offences, including those involving the trafficking or manufacture of controlled drugs or precursors, do not require proof of a connection with an importation. While previously such conduct was solely dealt with as a State or Territory offence, prosecuting authorities now have a broader range of options in terms of available charges and may choose between Commonwealth and State or Territory offences prohibiting such conduct.

118 Updated March 2009. See <www.cdpp.gov.au/publications/prosecution-policy-of-the-commonwealth/>, accessed 21 March 2014. The prosecution policies or guidelines of all of the States and Territories are in broadly similar terms with respect to this aspect of the prosecution process.

119 ibid at [2.4]–[2.11].

120 ibid at [2.19].

121 ibid at [2.20].

122 (2013) 87 ALJR 1060.

123 ibid at [38]–[40]; *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 119–120 (Latham CJ); *Palling v Corfield* (1970) 123 CLR 52 at 61 (Barwick CJ). In *Magaming v The Queen*, ibid, the court considered whether the prosecution had impermissibly exercised judicial power by choosing to prosecute Magaming for the aggravated offence of people smuggling under s 233C of the *Migration Act* 1958 (Cth), which carries a maximum penalty of 20 years and, pursuant to s 236B, a mandatory minimum term of imprisonment of 5 years, instead of the basic people smuggling offence under s 233A, which carries a maximum penalty of 10 years imprisonment. The High Court, by majority, concluded that the exercise of a choice between charging either the aggravated or basic form of the offence was not incompatible with the separation of judicial and prosecutorial functions.

124 See pp 13–14.

125 The High Court considered the availability of relevantly similar offences for fraud in *Dickson v The Queen* (2010) 241 CLR 491.

The language of the Explanatory Memorandum to the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 which introduced Pt 9.1 into the Code suggests that the choice of charge will be made on the basis of the investigative agency conducting the investigation.[126] However, this may not always be appropriate, given it is not unusual for joint taskforces of Commonwealth and State or Territory police agencies to investigate the alleged commission of serious drug, and other related, offences. The DPP (Cth) has issued a charging guideline for these domestic serious drug offences[127] which is broadly consistent with the stated policy intention. The guideline envisages that where matters are investigated by State or Territory police, the charges that ultimately proceed would normally be the appropriate State or Territory charges. However, where a State or Territory investigation has what is described as a "significant Commonwealth connection", the Commonwealth should consider proceeding with Commonwealth offences.[128] The "significant Commonwealth connection" includes whether:

- there are other serious Commonwealth offences which should be dealt with in a single trial
- there is a connection with importation activity, or
- the relevant issues are "of particular interest to the Commonwealth".[129]

The possible consequence at sentence of choosing a Commonwealth charge in preference to a State charge arose in *R v Cheung*.[130] This case involved a Crown appeal against the sentences imposed on two offenders for Commonwealth offences of manufacturing controlled drugs. In the course of discussing how a sentencing judge should determine the appropriate sentence for these new Commonwealth offences, Simpson J said that there may be differences in the various sentencing regimes for the State equivalents. Her Honour observed:

> "To opt for one sentencing regime against another has, potentially, another consequence that is both unexpected and undesirable. Where, as here, state and federal legislation creates offences that are, relevantly, identical, a prosecutor would be given the option of prosecuting under the regime perceived to be the harsher."[131]

However, the DPP (Cth)'s guideline specifically addresses this issue, stating that:

> "The mere fact that a Commonwealth offence may have a higher penalty is not a sufficient reason for preferring Commonwealth offences to State offences …".[132]

In *R v El Helou*,[133] the NSWCCA concluded that irrespective of whether there are overlapping State and Commonwealth offences, the sentence imposed cannot be reduced to bring about conformity with another possible charge with a lower maximum penalty.[134] That principle could equally apply when there are other Commonwealth offences dealing with similar conduct (as is the case with respect to the offence in the *Customs Act* concerning the importation of Tier 1 goods, discussed below).

126 Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), p 2.

127 DPP (Cth), "Charging guideline for domestic serious drug offences under Part 9.1 of the Criminal Code", Director's Litigation Instruction, Instruction No 8, updated September 2012, at <www.cdpp.gov.au/wp-content/uploads/Directors-Litigation-Instruction-08.pdf>, accessed 21 March 2014. See also the DPP (Cth), "Referrals by State or Territory Police", Guidelines and Directions Manual, updated September 2012, at <www.cdpp.gov.au/Publications/Guidelines-and-Directions/CDPP-GDM-Referrals-by-State-Police.pdf>, accessed 21 March 2014.

128 *Hatfield v R* [2011] NSWCCA 286 is an example of a prosecution by the DPP (Cth) which arose out of an investigation by a joint State and Cth taskforce. Hatfield was charged with conspiracy to import cocaine (*Customs Act*, s 233B(1) (rep)) and the supply of cocaine imported by the syndicate of which he was a principal (*Drug Misuse and Trafficking Act* 1985 (NSW) (DMT Act), s 25(2)). Were that matter to be dealt with now, Hatfield could be charged with the trafficking offences now found in Div 302 of the Code instead of the NSW supply offence. Further, offenders who purchased cocaine from Hatfield and then on-sold it could also be charged with a Code trafficking offence.

129 What might be of "particular interest to the Commonwealth" is not explained in the guideline.

130 (2010) 203 A Crim R 398.

131 ibid at [109].

132 DPP (Cth), "Charging guideline for domestic serious drug offences under Part 9.1 of the Criminal Code", above n 127, p 2.

133 (2010) 267 ALR 734.

134 ibid at [90].

The starting point for the imposition of punishment is that it is imposed for the offence for which the offender has been convicted. Consistency would not be achieved if an appropriate sentence is reduced to take into account a lower maximum penalty for a different offence.[135] Further, attempting to consider the effect of another offence that has not been charged makes the already difficult task of sentencing harder.[136]

## 3.2 Other Commonwealth offences dealing with similar conduct

Until the introduction of the import-export provisions related to precursors in Div 307, prosecutions with respect to precursors could only be conducted under s 233BAA(4) of the *Customs Act*, where the maximum penalty is 5 years imprisonment and/or 1,000 penalty units. Section 233BAA(4) can still be, and is, utilised for such prosecutions because under the *Customs Act* and the relevant regulations, scheduled precursors such as pseudoephedrine and phenyl-2-propanone, are still classified as Tier 1 goods.[137]

Statistics available from the Commonwealth Sentencing Database (CSD) show that s 233BAA(4) of the *Customs Act* is being used in NSW to prosecute offences involving the importation of precursors to an extent greater than elsewhere in Australia.[138] The choice of charge is within the absolute discretion of the relevant prosecuting authority and it is not for a sentencing judge to canvass the exercise of that discretion.[139] However, it is desirable, as a matter of public policy, that the discretion be exercised consistently within the office of the DPP (Cth).

135 *Elias v The Queen* (2013) 248 CLR 483 at [29].

136 ibid at [36], referring to *R v McEachran* (2006) 15 VR 615 at [15] (Callaway JA).

137 *Customs Regulations* 1926 (Cth), reg 179AA, Sch 1AA. Other border controlled precursors which are also Tier 1 goods include ephedrine, safrole and isosafrole.

138 In the period 1 January 2008 to 31 December 2012, there were 117 matters involving the importation of substances (generally, pseudoephedrine) which could be dealt with as Tier 1 goods under s 233BAA(4) or as precursors under of Div 307, Subdiv D of the Code. Of these, 75 (64%) were dealt with under the Code, while the remaining 42 (36%) were dealt with under s 233BAA(4). However, when the data is broken down by jurisdiction, it is clear that the prosecutorial discretion is being exercised differently in NSW relative to other States and Territories. Of the 53 matters involving these substances in NSW, 25 (47.2%) were dealt with under the Code, while 28 (52.8%) were dealt with under s 233BAA(4). By comparison, in all other States and Territories, the vast majority were dealt with under the Code provisions: NT (100%), Vic (83.3%), Qld (77.8%), and WA (66.7%).

139 *Elias v The Queen* (2013) 248 CLR 483 at [34].

Chapter 4

# The relevant sentencing principles

Part IB of the *Crimes Act* sets out the principles to be applied when fixing sentences for Commonwealth offenders.[140] When it comes to sentencing a Commonwealth offender for a serious drug offence there are a range of factors to be taken into account and the appropriate weight to be given to any one of them is a matter within the discretion of the particular sentencing judge.

Sentencing judges are allowed as much flexibility in the sentencing process as is consonant with consistency of approach and as accords with the relevant statutory regime.[141] The exercise of determining an appropriate sentence involves a discretionary judgment which requires that all relevant considerations be taken into account.[142] Taking a staged approach to the sentencing exercise has been rejected by the High Court because it involves a departure from principle. That departure comes about because such an approach does not take account of the "conflicting and contradictory elements which bear upon sentencing an offender".[143] What has been described as "instinctive synthesis"[144] requires a sentencing judge to take account of *all* relevant factors and to arrive at a sentence which takes proper account of all of them.[145] However, while sentencing judges are expected to engage in this process, given the importance of transparency, they also have a responsibility to ensure that the approach taken to particular factors in the sentencing process can be readily understood. Accessible reasoning is in the public interest.[146]

What is important is that the final sentence can be seen to have been determined consistently with the relevant sentencing principles and that, when measured against recognised yardsticks, it is broadly consistent with comparable cases.

## 4.1 Imprisonment as a last resort

Section 17A of the *Crimes Act* limits the imposition of sentences of imprisonment by providing that such a sentence should only be imposed if no other sentence is appropriate in all the circumstances. The vast majority of Commonwealth offenders sentenced for a serious drug offence are sentenced to full-time imprisonment. Of the 860 offenders dealt with during the study period, 92.0% received such a sentence. This demonstrates that sentencing judges give effect to the principle that non-custodial sentences for these offences "must be restricted to truly exceptional cases".[147]

## 4.2 The importance of the maximum penalty

The starting point for a consideration of the appropriate sentence for a serious drug offence (or indeed for any offence) is the maximum penalty. In the context of Commonwealth serious drug offences, this is because the maximum penalty provides a measure to determine the degree to which an offender's

140 *Weininger v The Queen* (2003) 212 CLR 629 at [2].

141 *Markarian v The Queen* (2005) 228 CLR 357 at [27]; *Johnson v The Queen* (2004) 78 ALJR 616 at [5] (Gleeson CJ) and [26] (Gummow, Callinan and Heydon JJ).

142 *Markarian v The Queen,* ibid.

143 *Wong v The Queen* (2001) 207 CLR 584 at [75].

144 ibid.

145 ibid.

146 *Markarian v The Queen* (2005) 228 CLR 357 at [29].

147 *R v Wong and Leung* (1999) 48 NSWLR 340 at [104].

conduct offends against the legislative objective of suppressing the illicit drug trade.[148] In *Markarian v The Queen*,[149] the High Court said that determining an appropriate sentence was ultimately guided by the maximum penalty because it provided sentencing judges with a yardstick.[150] The majority went on to say that careful attention to the maximum penalty was required because:

> "[F]irst … the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick."[151]

## 4.3 Matters to be taken into account

Section 16A of the *Crimes Act* can properly be described as the cornerstone of Pt IB because it sets out the sentencing principles a court must consider when determining an appropriate sentence. Section 16A(1) requires the court to impose a sentence "of a severity appropriate in all the circumstances of the offence" and operates in conjunction with s 16A(2) which sets out a range of objective and subjective matters which the court must consider. This is only limited by the extent to which such matters are "relevant and known to the court".[152] There is no guidance in s 16A, or elsewhere in Pt IB, about the accommodation to be made between the various factors in s 16A(2) and the requirement to impose a sentence of a severity appropriate in all the circumstances of the offence. However, because s 16A obliges a sentencing judge to take account of all of them (that is, the requirements in s 16A(1) and (2)), effect must be given to the terms of the statute.[153]

The approach taken to any of the factors in s 16A(2) is informed by the relevant case law. There is a substantial body of case law about those matters in s 16A(2) as they relate to Commonwealth serious drug offences.

### 4.3.1 Relevant sentencing principles for serious drug offences

In the recent NSW decision of *R v Ngyuen*; *R v Pham*,[154] Johnson J summarised the main sentencing principles for offences involving the importation or possession of border controlled drugs as follows:

1. The criminality of an offender must be assessed by considering his or her involvement in the steps taken to effect the importation.[155]
2. The sentencing judge may find categorising an offender's role in a drug enterprise problematic because in many cases the full nature and extent of the enterprise is unlikely to be known.[156]
3. The criminality involved in the importation must be identified — the fact another person may be characterised as the "mastermind" does not mean a person responsible for managing the importation into Australia is properly described as having only a middle level of responsibility.[157]
4. While the weight of the drug imported is not the principal factor to be considered when fixing sentence, the size of an importation *is* relevant and has increased significance when the offender is aware of the amount of drugs imported.[158]

148 *R v To* (2007) 172 A Crim R 121 at [19], referring to *R v Peel* [1971] 1 NSWLR 247 at 262.

149 (2005) 228 CLR 357.

150 ibid at [30]–[31].

151 ibid at [31].

152 *Weininger v the Queen* (2003) 212 CLR 629 at [16].

153 *Wong v The Queen* (2001) 207 CLR 584 at [71].

154 (2010) 205 A Crim R 106 at [72] (Macfarlan and RA Hulme J agreeing, without qualification, with his Honour's reasons).

155 *R v Lee* [2007] NSWCCA 234 at [27].

156 *The Queen v Olbrich* (1999) 199 CLR 270 at [19]; *R v Lee,* ibid, at [25].

157 *R v Lee*, ibid, at [26].

158 *Wong v The Queen* (2001) 207 CLR 584 at [64]; *R v Lee*, ibid, at [23]–[24].

5. In an appropriate case, the amount of the drug involved in an importation is a highly relevant factor in determining the objective seriousness of the offence, even to the extent of assessing whether a particular offence is in the worst category. In many cases, the only factor leading to a determination that one importation is worse than another is the amount of drug involved where otherwise the circumstances of the importation are the same or very similar.[159]
6. Unless there is evidence to the contrary, it should be inferred that a person importing drugs does so for profit.[160]
7. The difficulty of detecting importation offences, and the resulting social consequences, suggest deterrence should be given chief weight and that stern punishment is warranted in almost every case.[161]
8. The sentences imposed must signal to would-be drug traffickers that the potential financial rewards to be gained are neutralised by the risk of severe punishment.[162]
9. Involvement at any level in a drug importation offence attracts a significant sentence; otherwise the interests of general deterrence are not served.[163]
10. An offender's prior good character is of less weight as a mitigating factor;[164] good character is not unusual in persons involved in drug importation.[165]
11. Where offenders are not young, the immaturity of youth cannot be claimed as a factor bearing upon their "transgressions".[166]
12. Offences of attempted possession can be attended by a wide range of moral culpability, so the circumstances in which an offender comes into possession of the drug, and what they intended to do with it, are relevant to determining the degree of moral culpability attached to the act of attempted possession itself. Hence, a sentencing judge should have regard to the offender's involvement in the overall transaction for the purpose of determining the offender's degree of involvement in a drug-smuggling enterprise.[167]
13. For that reason, an offence of attempted possession is not less serious than that of importing the drugs.[168]
14. The range of sentences referred to in the NSWCCA's decision in *R v Wong and Leung*[169] remains useful to sentencing for offences of this type. Although they have no validity as guidelines, their utility results from the fact that they are based on the patterns of actual sentences, although allowance must be made for the repeal of s 16G of the *Crimes Act*.[170]
15. Where an offender asks the sentencing judge to take into account other offences under s 16BA of the *Crimes Act*, the court must comply with the general principles applicable to the State regime for taking such offences into account.[171]

159 *R v Nguyen* (2005) 157 A Crim R 80 at [110]; *Sukkar v R (No 2)* (2008) 178 A Crim R 433 at [46].

160 *R v Kaldor* (2004) 150 A Crim R 271 at [104]; *R v Lee* [2007] NSWCCA 234 at [32].

161 *Wong v The Queen* (2001) 207 CLR 584 at [64].

162 *R v Chen* (2002) 130 A Crim R 300 at [286]; *R v Stanbouli* (2003) 141 A Crim R 531 at [114].

163 *R v Pang* (1999) 105 A Crim R 474 at [6].

164 *R v Barrientos* [1999] NSWCCA 1 at [52]–[57]; *R v Paliwala* (2005) 153 A Crim R 451 at [20]–[25]; *R v Lee* [2007] NSWCCA 234 at [14].

165 *Okafor v R* [2007] NSWCCA 147 at [47]; *Onuorah v R* (2009) 76 NSWLR 1 at [49].

166 *Tyler v R* (2007) 173 A Crim R 458 at [98].

167 *El Ghourani v R* (2009) 195 A Crim R 208 at [33]–[37].

168 *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 239.

169 (1999) 48 NSWLR 340.

170 *R v Taru* [2002] NSWCCA 391 at [12]; *R v Bezan* (2004) 147 A Crim R 430 at [34]–[36]; *R v Mas Rivadavia* (2004) 61 NSWLR 63 at [65]–[66]; *R v SC* [2008] NSWCCA 29 at [27]; *R v Chea* [2008] NSWCCA 78 at [40].

171 Set out in *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146; *R v Poynder* (2007) 171 A Crim R 544 at [28]; *Assafiri v R* [2007] NSWCCA 159 at [9].

Subsequently in the Victorian case of *Nguyen v R*,[172] Maxwell P observed that this summary was of great assistance to courts dealing with Commonwealth serious drug offences and that it accorded with the course of decisions in Victoria.[173]

Although the principle in items 12 and 13 above is said to relate to the attempted possession of border controlled drugs, the principle would also apply to any of the new serious drug offences in Pt 9.1 with the same maximum penalty[174] and should also equally apply to the domestic offences in Pt 9.1.

### 4.3.2 General deterrence

There is no reference in Pt IB to general deterrence. However, in *DPP (Cth) v El Karhani*,[175] the NSWCCA concluded that the requirement in s 16A(1) to impose a sentence "of a severity appropriate in all the circumstances of the offence" imported general principles of sentencing law into the function of sentencing Commonwealth offenders. This depended, in part, on the consideration of fundamental sentencing notions such as general deterrence.[176]

General deterrence has long been recognised as of fundamental importance to any sentence for a serious drug offence,[177] not only because of the nature of the offence itself, but also because of the difficulties of detection. In *Wong v The Queen*,[178] the majority concluded that difficulties of detection suggested that deterrence was to be given chief weight in the sentencing task.[179]

Deterrence is important irrespective of an offender's role because of the seriousness of these offences. Involvement at any level in a drug importation must attract a significant sentence.[180] The sentence imposed on an offender must be severe enough to deter others from engaging in illicit drug activities and must signal to would-be drug traffickers that the potential financial rewards to be gained from such activities are neutralised by the risk of severe punishment.[181]

It has also been recognised, in NSW at least, that general deterrence can be of particular significance in sentencing an offender who has abused a position of trust to commit a serious drug offence. In *R v Nikolovska*[182] the offender, an airline employee, pleaded guilty to importing a commercial quantity of cocaine. She assisted a former colleague by, in part, monitoring and agreeing to receive a package that he had sent from overseas (using her security clearance). In allowing a Crown appeal against sentence, the court observed that general deterrence was of particular relevance when there was a breach of trust to demonstrate how seriously sentencing judges regard corruption by those in such positions.[183] The court concluded that the breach of

172 (2011) 31 VR 673.

173 ibid at [33]. Observations to similar effect were also made by the VSCA in *OPQ v R* (2012) 221 A Crim R 424 at [42] and by the QCA in *R v Hill* (2011) 212 A Crim R 359 at [277].

174 See for example, *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 239; *Pham v R* [2012] VSCA 101 at [3] (Redlich JA), [16], [24] (Harper JA).

175 (1990) 21 NSWLR 370.

176 ibid at 377–378. See also *Wong v The Queen* (2001) 207 CLR 584 at [135], although the majority concluded that this was permitted because of the reference in s 16A(2) to "any other matters" in the words prefacing the list of factors to be taken into account. Interestingly, the ALRC, in *Sentencing*, ALRC Report 44, August 1988, at [37], concluded that general deterrence should not be invoked as a sentencing objective.

177 *R v Budiman* (1998) 102 A Crim R 411 at 416; *R v Benais* [1999] NSWCCA 236 at [28]; *R v Riddell* (2009) 194 A Crim R 524 at [55]–[58].

178 (2001) 207 CLR 584.

179 ibid at [64].

180 *R v Pang* (1999) 105 A Crim R 474 at [6].

181 *R v Chen* (2002) 130 A Crim R 300 at [286]; *R v Stanbouli* (2003) 141 A Crim R 531 at [114]; *R v Nguyen; R v Pham* (2010) 205 A Crim R 106 at [72].

182 (2010) 209 A Crim R 218.

183 ibid at [57].

trust aggravated the offence.[184] A contrary view was previously taken in *R v Stanbouli*,[185] where it was found that while the offender, an employee of a customs brokerage firm, had breached his employer's trust, that breach of trust did not add to the criminality involved in the circumstances of that case.[186]

However, when an offender is able to play a significant role in a serious drug offence because of his or her employment position, the better view seems to be that expressed in *Nikolovska*. This is principally because those offenders who bring special expertise to the offence as a direct consequence of their employment, for example, because it enables them to monitor law enforcement interest in a particular importation, are in a unique position, and the exploitation of that position is relevant to the level of their moral culpability.

### 4.3.3 Sentencing factors: Crimes Act 1914 (Cth), s 16A(2)

When sentencing an offender for a serious drug offence, some of the factors listed in s 16A(2) are common to all offenders and must be taken into account, "so far as they are relevant and known to the court". The most relevant of these are discussed below.

#### 4.3.3.1 Nature and circumstances of offence: s 16A(2)(a)

Consideration of this factor in the context of a Commonwealth serious drug offence most commonly requires that particular consideration be given to a range of matters, including an offender's role and the type and quantity of drug involved in the offence. Evidence of the circumstances surrounding the offence is relevant to a determination of its objective seriousness. However, although the court can consider all of an offender's conduct, including conduct aggravating the offence, evidence of circumstances that would justify conviction for a more serious offence must not be taken into account in a way that would be contrary to the principles in *The Queen v De Simoni*.[187] A court is not prevented from assessing the level of an offender's culpability by reference to the overall context in which an offence has been committed.[188]

In *El-Ghourani v R*,[189] which involved an offence of possessing a marketable quantity of heroin, Spigelman CJ explained that the act of possession could encompass a wide range of moral culpability. The circumstances in which a person charged with a possession offence came into possession of "the offending matter" and what they intended to do with it could all be relevant.[190] In any sentencing exercise, when determining the extent of a particular offender's involvement, it is important that focus remains on the particular charge.[191] One ground of appeal in *El-Ghourani* was that the sentencing judge erred by taking into account that the applicant was a principal in the importation of the heroin[192] (essentially an argument that he was sentenced for the charge of importation and not possession). The NSWCCA rejected that argument, finding that the language the sentencing judge used throughout the sentencing remarks was significant. The court found that the sentencing judge had made permissible use of the applicant's involvement in the overall transaction — which included arranging for the receipt of the heroin, and removing/retrieving it from the frames in which it was concealed.[193] In assessing the evidence in this way, her Honour did not lose the focus on the particular charge, attempted possession.

184 ibid at [57], [71]. James J clearly adopted that approach when sentencing the offender in *R v Standen* [2011] NSWSC 1422 at [197].

185 (2003) 141 A Crim R 531.

186 ibid at [33]. This aspect of *Stanbouli* was referred to, without comment, in *Kardoulias v R* (2005) 159 A Crim R 252 at [39].

187 (1981) 147 CLR 383 at 389 (Gibbs CJ).

188 *El-Ghourani v R* (2009) 195 A Crim R 208 at [30].

189 ibid.

190 ibid at [33]. See also *R v Laurentiu* (1992) 63 A Crim R 402 at 415–416.

191 ibid at [34].

192 ibid at [15].

193 ibid at [35]–[36].

*Quantity of drug*

The maximum penalty that can be imposed for a Commonwealth serious drug offence is based on the pure weight of the particular drug (regardless of whether the offence was against the former s 233B(1) or one of the offences in Pt 9.1 of the Code). There is no requirement that the prosecution prove that an offender knew the quantity of the drug involved. However, the pure quantity of the drug involved is important because of its direct connection with the maximum penalty. Johnson J, in *R v Nguyen*; *R v Pham*, referred to this when he described Pt 9.1 of the Code as providing:

> "… a structured sentencing regime by reference to the quantity of drug imported. Section 307 adopts a 'quantity-based penalty regime' by fixing commercial and marketable quantities of certain drugs, distinguishing between those drugs in setting such quantities, but otherwise making no distinction between them in terms of maximum penalties".[194]

In *Wong v The Queen*, the High Court criticised the approach taken by the NSWCCA with respect to the promulgation of guidelines for importation offences based on the weight of the drug. According to the majority, this was because weight had been erroneously elevated to the chief factor to be taken into account in the sentencing exercise.[195] This is an error partly because often there is little or no evidence that a particular offender has any specific knowledge about the quantity of the drug involved in the offence. So much is apparent from the High Court's observation that matters such as the level of an offender's criminality or the anticipated reward were also significant distinguishing factors between offenders.[196] The court stated that:

> "… the larger the importation, the higher the offender's level of participation, the greater the offender's knowledge, the greater the reward the offender hoped to receive, the heavier the punishment that would ordinarily be exacted. It is by these kinds of criteria that comparisons are to be made between examples of the offence and the sentences that are or were imposed".[197]

The observation about the size of the importation confirms that quantity does have *some* role to play in the sentencing process, but simply as one of the number of factors which can affect the ultimate sentence. In *Tyn v R*,[198] Simpson J, with whom Spigelman CJ and James J agreed, said it was "not unimportant" to fit the quantity involved in the specific offence into the range provided by the sentencing legislation.[199] In *DPP (Cth) v De La Rosa*, her Honour developed this further saying, "there must be a sliding scale of sentencing in recognition of where the quantity actually imported sits in the range specified as exposing the offender to that penalty"[200] because:

> "If that were not so, then there would be no greater deterrent (general or specific) to the importation of 1.99 kilograms than there is to the importation of 2 grams. The greater the quantity, the nearer it is to the cut off point for a marketable quantity, and to the starting point of a commercial quantity, the closer to the maximum the penalty must be. Of course, quantity is not the only consideration, and must be tempered by other factors." [201]

In *Wong v The Queen*, the High Court recognised that not all offenders involved in the importation of illicit drugs will know or even suspect the quantity of the pure drugs being imported. However, the size of an importation is a relevant factor with increased significance when the offender has some knowledge of the amount of drugs imported.[202] Further, the quantity of the drug is material because the size of the profit and the likely harm inflicted may be proportional to the weight of the drug.[203]

194 (2010) 205 A Crim R 106 at [70], referring to *Adams v The Queen* (2008) 234 CLR 143 at [2].

195 (2001) 207 CLR 584 at [70].

196 ibid at [67]–[69].

197 ibid at [64].

198 (2009) 195 A Crim R 345.

199 ibid at [28].

200 (2010) 79 NSWLR 1 at [307].

201 ibid at [308].

202 (2001) 207 CLR 584 at [64], [68]; *R v Lee* [2007] NSWCCA 234 at [23]–[24]; *R v Nguyen; R v Pham* (2010) 205 A Crim R 106 at [72].

203 *R v Stanbouli* (2003) 141 A Crim R 531 at [102]; *R v Lee,* ibid, at [23]–[24].

Howie J, in *R v Nguyen*,[204] concluded that in an appropriate case, the amount of the drug involved in an importation may be a highly relevant factor in determining the objective seriousness of an offence, even to the extent of assessing that a particular offence is in the worst category.[205] His Honour said that in many cases, the only factor that would lead to a determination that one importation was worse than another might be the amount of drug involved where otherwise the circumstances of the importation were the same or very similar.[206] These observations have been endorsed by the Western Australian Court of Appeal in *Sukkar v R (No 2)*.[207]

### *Type of drug*

Until at least 1997, drugs such as heroin and cocaine were most commonly the subject of Commonwealth serious drug offences. Over time that has changed. During the 1990s, although importation offences in NSW involving heroin were most common, their share of convictions by drug type had been decreasing as cases involving other drugs such as cocaine and 3,4-methylenedioxymethamphetamine (MDMA) had become more common.[208] As the analysis set out in Chapter 6, "Sentencing patterns for the period 2008–2012", demonstrates, while these drugs continue to be the most common drugs in Commonwealth serious drug offending, offences involving other drugs such as methamphetamine (also known as crystal methamphetamine and methylamphetamine), gammabutyrolactone (GBL) and the precursor pseudoephedrine have become more common.[209]

The type of drug involved in a particular offence does not have separate statutory significance because the structure of the Code is such that the only relevant distinction is that drawn between the quantities of particular drugs. With the exception of the offences involving children, this determines the relevant maximum penalties.

Early cases about offences involving the importation or possession of MDMA and methamphetamine approached the sentencing exercise with respect to those drugs on the basis that they were less harmful than either heroin and cocaine and that, as a result, less serious sentences should be imposed.[210]

However, the harm-based approach to these drugs was rejected by the High Court in *Adams v The Queen*.[211] In that case, the High Court concluded that such an approach was contrary to the intention of Parliament:

> "In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. *The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme*."[212] [Emphasis added.]

204 (2005) 157 A Crim R 80.

205 ibid at [110].

206 ibid. See also *R v Nguyen*; *R v Pham* (2010) 205 A Crim R 106 at [72] and *R v Nikolovska* (2010) 209 A Crim R 218 at [63]. In *Nguyen v R* (2011) 31 VR 673 at [33], Maxwell P observed that the factors listed by Johnson J in *R v Nguyen*; *R v Pham* were in similar terms to the principles as enunciated by the VSCA.

207 (2008) 178 A Crim R 433 at [46].

208 See the discussion in I Potas and P Poletti, *Sentencing drug offenders*, Research Monograph No 19, Judicial Commission of NSW, Sydney, 1999, pp 9–10.

209 See pp 80–81.

210 See, for example, *R v Budiman* (1998) 102 A Crim R 411 at 416; *R v Bimahendali* (1999) 109 A Crim R 355 at [14]–[18].

211 (2008) 234 CLR 143. That was the approach taken in NSW in decisions such as *R v Nai Poon* (2003) 56 NSWLR 284 at [16]–[20] and *R v Neale* (2004) 148 A Crim R 493 at [73].

212 (2008) 234 CLR 143 at [10].

The High Court in *Adams* explicitly stated that because of the legislative scheme, there was no basis to treat one drug differently from another, and that irrespective of the drug involved in an offence, the primary consideration in sentencing for these offences remained deterrence.[213] The Victorian Court of Appeal has since held that *Adams* establishes that a quantity-based sentencing regime precludes the assessment of the relative harm of a particular known drug, absent any evidential foundation.[214] However, this does not mean that information about a new and unknown drug should be withheld from a court.[215] A sentencing judge is entitled to ask for information concerning the known charcteristics of a new or poorly understood drug such as benzylpiperazine (BZP) for the purposes of assessing the gravity of the crime without infringing the principle in *Adams*.[216]

It follows from the approach in *Adams* that a court is permitted to compare cases within a particular quantity regardless of the type of drug involved. Put another way, comparable cases must fall within the quantity involved in the charge before the court, but they do not need to be the same drug. The selection of such comparable cases should be based on factors such as the quantity of the particular drug, the nature and circumstances of the particular offence, what is said to be the offender's role and comparable subjective features (so far as these might be known at the time of compiling those cases).[217]

The illicit drug trade changes over time and as trends in illicit drug use change, so different drugs become a more common feature of the cases coming before the courts. GBL is one such drug, although the number of cases involving GBL is still considerably lower than those involving other drugs such as heroin, cocaine, MDMA and methamphetamine. The Australian Crime Commission reports that there has been an increase in the detections of GBL at the Australian border (principally by way of postal importations) and that the World Health Organisation is increasingly concerned about the consumption and effects of substances such as GBL when they are used on an illicit basis.[218] There is no doubt that the effects of GBL can be as harmful as drugs such as heroin, cocaine, MDMA and methamphetamine. This is reflected in reports in medical and scientific journals.[219] However, evidence of the harm caused by GBL has not been led in the cases, presumably because this would be contrary to the approach of the High Court in *Adams*.

The recent decision of the Victorian Court of Appeal in *DPP (Cth) v Maxwell*[220] raises questions about the sentences being imposed for offences involving drugs such as GBL. In *Maxwell*, the court dismissed a Crown appeal against an overall sentence of 4 years, with a non-parole period (NPP) of 2 years, imposed on an offender who pleaded guilty to two charges of importing a commercial quantity of GBL.

Although a subsequent application by the DPP (Cth) for special leave to the High Court was refused,[221] the case is of interest because it illustrates an approach to sentencing offenders who have committed offences involving drugs such as GBL which are not commonly dealt with by sentencing judges.

213 ibid at [11].

214 *Hibgame v R* [2014] VSCA 26 at [49].

215 ibid.

216 ibid at [49]–[51].

217 See pp 55–67.

218 Australian Crime Commission, *Illicit drug data report 2011–12*, pp 117–121, <www.crimecommission.gov.au/publications/intelligence-products/illicit-drug-data-report/illicit-drug-data-report-2011-12>, accessed 9 May 2014.

219 J Bell and R Collins, "Gamma-butyrolactone (GBL) dependence and withdrawal" (2010) 106(2) *Addiction* 442; M-K Lundahl et al, "Nurse's perspectives on care provided for patients with gamma-hydroxybutyric acid and gamma-butyrolactone abuse" (2013) *Journal of Clinical Nursing* (online), doi: 10.1111/jocn.12475); PI Dargan et al, "The first reported UK fatality related to gamma-butyrolactone (GBL) ingestion" (2009) 102(12) *Journal of the Royal Society of Medicine* 546. See also the following media reports: K Hagan, "GHB overdoses prompt doctor warning", *The Age (online)*, 30 November 2012; [unknown author] "Teen's death sparks call to ban synthetic drugs", *ABC News (online)*, 7 June 2013; R Callinan, "Synthetic drugs: rising death toll alarms authorities", *The Sydney Morning Herald (online)*, 11 January 2014; G Bearup, "High alert for synthetic drugs", *The Australian (online)*, 6 July 2013; [unknown author] "David O'Halloran: GHB drug probe over student death", *BBC News (online)*, 18 August 2013.

220 (2013) 228 A Crim R 218.

221 [2013] HCA Trans 178.

In *Maxwell*, the respondent imported a commercial quantity of GBL on two separate occasions in 2010. She arranged for it to be sent to her via Singapore, using a post-box re-routing system which she had established using a false name. The GBL the subject of the first importation charge was not intercepted by police, but at sentence it was conceded that the quantity involved was just over the commercial quantity. The pure amount of GBL the subject of the second charge was 1,155 millilitres.[222] The street value of the GBL imported was estimated at between $10,440 and $17,400. There was evidence that the respondent knew that the importation of GBL was illegal, acted on her own and on her own behalf (that is, she was the principal), and that the GBL was going to be sold.[223]

The essence of the Crown appeal was that the weight of the drug became the principal focus in the sentence proceedings with other relevant factors being "swamped".[224] Those other factors included:

- the maximum penalty of life imprisonment
- the offences were committed for profit
- the value of the drug imported
- the respondent organised the importation, ordered and paid for the GBL and received delivery of the first parcel
- the respondent knew the quantities being imported, that it was illegal to import GBL and that the imported GBL was going to be used to make GHB which would later be sold
- there was a degree of planning and organisation involved in carrying out the offences.[225]

A consequence of the approach taken in this case to two separate factors (low commercial weight and low financial reward) related to a particular drug (GBL) is that other factors pointing to offending of a high level of moral culpability appear to have had no significant role in the sentencing exercise.

The court accepted that the scale of an importation was almost always a significant sentencing factor, but observed that importations involving "one or two multiples"[226] of the commercial quantity of a particular drug were "'at the bottom end' of the quantitative scale".[227] While it is true the scale of an importation is a significant sentencing factor and the weight of a particular drug is one indicator of the scale of an importation, that does not mean quantity assumes more significance than any *other relevant* factor in determining the objective seriousness of a given offence when the quantity involved falls towards the bottom of the scale. So much is clear from the joint judgment of Gummow, Callinan and Hayne JJ in *Wong v The Queen*, when they criticised the approach taken by the NSWCCA where the court's error was said to be that: "the selection of weight of narcotic as the chief factor to be taken into account in fixing a sentence represent[ed] a departure from fundamental principle".[228] Nor does it mean that one factor becomes the *only* factor.

The court in *Maxwell* went on to state that "the low financial return (likely to be) derived from sales of GBL"[229] was also important:

> "In addition to the weight of the drugs imported (or trafficked), the financial reward received or anticipated by the offender is relevant to the objective gravity of the offence. *Other things being equal, an importation which is undertaken because it will bring — or is expected to bring — a large financial reward to the offender will be more serious than one where the expected reward is small or non-existent.* The underlying proposition is that *the greater the (anticipated) reward of criminal conduct such as this, which inflicts such harm on the community, the higher the offender's moral culpability*."[230] [Emphasis added.]

222 *Criminal Code Regulations*, Sch 4, provides that one kilogram of GBL is a commercial quantity of a border controlled drug.
223 (2013) 228 A Crim R 218 at [14].
224 ibid at [13].
225 ibid at [14].
226 ibid at [20].
227 ibid.
228 (2001) 207 CLR 584 at [70].
229 (2013) 228 A Crim R 218 at [20].
230 ibid at [21].

The way the court considered anticipated financial reward raises two practical issues. The first is that, on one view, the court has equated low financial reward with offending that also involves a low level of moral culpability. As the various factors outlined above demonstrate, that was not so in this case. In *Wong v The Queen*, the High Court pointed out that the combination of factors such as the size of an importation, the extent of an offender's involvement, his or her knowledge of the quantity of drugs being imported *and* the level of anticipated reward were *all* factors going to the determination of the appropriate sentence.[231] The nature of the offending here could not properly be described as offending involving a low level of moral culpability, notwithstanding the sale value of the GBL was relatively modest, but instead pointed to the need for a significantly deterrent sentence. The following factors support this:

- the respondent's role (principal)
- the respondent's motive for committing the offences (financial reward)
- the degree of organisation the respondent had undertaken to commit the offences (using false names and establishing a re-routing system via Singapore, which were all clearly intended to avoid detection)
- the respondent was aware of the quantity being imported because she organised the importations
- the respondent knew it was illegal to import GBL
- the offences were part of a course of conduct (there was evidence of the two importations and evidence of an email suggesting continuing regular orders).

The only two features that arguably pointed away from the need for a significantly deterrent sentence were the quantity of the drug imported and the anticipated low financial reward.

The court seems to suggest that if an offender receives less money for his or her involvement in an offence, that fact of itself reduces the seriousness of the offence.[232] While significant reward might, in some cases, warrant an increase in the relevant sentence, that cannot have the corresponding result that a lesser sentence must be imposed on those offenders who receive less. *Ng v R*[233] demonstrates why such an approach might be problematic. In *Ng*, the appellant had been sentenced to 11 years, 3 months with a NPP of 7 years, 3 months for importing a commercial quantity of heroin (2.4 kilograms pure). He was dealt with as a courier and it was accepted that he had no specific knowledge of the quantity of drugs that he had imported. The street value of the heroin was said to be between about $290,000 and $1.7 million. The sentence imposed demonstrates the anomaly with respect to the overall sentence of 4 years imposed on the respondent in *Maxwell*, whose two offences represented a course of conduct, and who not only knew the quantity of the drugs being imported, but whose role was significantly greater and who had taken steps to avoid detection.

When the High Court rejected the Crown's application for special leave in *Maxwell*, French CJ stated that the court did not endorse the Court of Appeal's "use of the term 'not truly commercial' to describe a low value importation".[234]

The second practical issue is whether equating low financial reward with a low level of seriousness is inconsistent with *Adams* where the High Court dealt with the differentiation between drugs on the basis of perceptions of harm. Proper application of *Adams* means that GBL should be treated as equally serious as other drugs, such as heroin, cocaine or MDMA. Additionally, Parliament itself has decreed that a commercial quantity of GBL is one kilogram and while the financial reward for one kilogram of GBL may be a relatively modest amount, it is difficult to see why that fact alone (even accepting the relatively low commercial quantity involved in these offences) should result in a lower sentence.

231 (2001) 207 CLR 584 at [64].

232 (2013) 228 A Crim R 218 at [30].

233 [2010] NSWCCA 232.

234 [2013] HCA Trans 178 at p 15.

The court appeared to equate higher profits with a corresponding greater risk of harm.[235] However, the fact a particular drug generates less in terms of profit also makes it is more accessible to those with less money. Therefore, the risk of harm may be equivalent or even greater than when the drug involved in a particular offence generates greater profits. This was not considered by the court.

In cases such as this, where the financial reward is relatively modest, another approach may be to look at how many people could purchase discrete quantities of the drug for use as well as the financial benefit to the seller (who, in *Maxwell*, was also the importer). As the High Court stated in *Adams*, "[t]he social evils of trading in illicit drugs extend far beyond the physical consequences to individual consumers".[236] Easier access to drugs, particularly at lower cost, perpetuates more readily the evils associated with trading in illegal drugs. Easier access also requires that equal effect be given to general deterrence.

However, the court in *Maxwell* concluded that it was appropriate to treat the scale of the anticipated reward as relevant to general and specific deterrence and again appeared to equate potentially greater financial rewards with more severe sentences.[237]

The approach taken by the court in *Maxwell* seems inconsistent with that taken by the Queensland Court of Appeal in *R v Hill*.[238] The majority concluded that although the sentences imposed on the four offenders in that case (which ranged from 5 to 6 years imprisonment) were lenient,[239] the Crown appeal should be dismissed. However, the court approached the consideration of whether the sentences imposed at first instance were manifestly inadequate by having regard to decisions involving other border controlled drugs and did not confine themselves to those involving GBL.[240] The court in *Maxwell* referred to *Hill*, but did not comment on the approach taken in that case.[241] White JA observed in *Hill* that "the selling value of the drug is *a* relevant matter" (emphasis added),[242] but the court did not seem to give that fact any greater weight than any of the other factors which existed in that case. In *Maxwell* it appears that the low commercial value of GBL was the dominant feature.

### *The offender's role*

To determine an offender's culpability for a particular offence the sentencing judge must first determine, if possible, the offender's role in the criminal enterprise.[243] Evidence about an offender's role is frequently incomplete, particularly in cases involving offenders who have imported a quantity of a drug where there is little or no evidence concerning the existence of any hierarchy of offenders. In *The Queen v Olbrich*,[244] the majority said that although words such as "couriers" and "principals" could describe different kinds of participation in a single enterprise of importation, too much reliance should not be placed upon these terms when sentencing a particular offender:

> "… it is always necessary, whether one or several offenders are to be dealt with in connection with a single importation of drugs, to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a 'courier' or a 'principal' must not obscure the assessment of what the offender did".[245]

235 (2013) 228 A Crim R 218 at [35].

236 (2008) 234 CLR 143 at [9].

237 (2013) 228 A Crim R 218 at [34].

238 (2011) 212 A Crim R 359.

239 ibid at [32] (Muir JA), [65] (White JA). Atkinson J (in dissent on this) would have allowed the Crown appeal: [310]–[317].

240 ibid at [11]–[13] (Muir JA); [48]–[55] (White JA).

241 (2013) 228 A Crim R 218 at [38].

242 (2011) 212 A Crim R 359 at [54]. See observations to similar effect by Muir JA at [13]. Atkinson J accepted the Crown's proposition that given *Adams* it would be contrary to the legislative regime to rely only on cases involving the same drug: at [277].

243 *R v Laurentiu* (1992) 63 A Crim R 402 at 417–418; *R v Bimahendali* (1999) 109 A Crim R 355 at [6]–[8]; *R v Nguyen*; *R v Pham* (2010) 205 A Crim R 106 at [72].

244 (1999) 199 CLR 270.

245 ibid at [19].

In those cases where the offender's role is unknown and cannot be categorised because the full nature and extent of the enterprise is also unknown, the court is not required to find facts favourable to the offender or to accept his or her version of what occurred.[246] Using a shorthand description of "the facts of particular cases should not be elevated to an essential task to be undertaken in every case, regardless of whether that is possible or appropriate".[247]

The NSWCCA has held, in respect of State drug supply offences, that an offender's role and his or her level of participation in an offence is a more important factor than the quantity of drugs, although there is some ranking of offence seriousness reflected by the increased maximum penalties as the relevant drug quantity increases.[248] It is not unreasonable to assume that such an approach should also be taken in relation to Commonwealth offenders, particularly given the conclusions of the High Court in *Wong v The Queen* concerning the variety of factors that are relevant when determining an appropriate sentence, and the relationship between them.[249]

Irrespective of the level of an offender's involvement in a serious drug offence, which is important when assessing the objective criminality of the offence, a significant sentence must be imposed, otherwise the interests of general deterrence are not served.[250] In this regard, the following observations of Wells J in *R v Le Cerf*[251] remain, as Wood J (as he then was) later said in *R v Laurentiu*,[252] apposite:

> "Where evidence discloses that a convicted person is highly placed in an organization for the importation, distribution, and sale, of drugs, contrary to law, it is … obvious that, other things being equal, he must expect condign punishment. Substantial retribution must be exacted from those who deliberately, cynically and greedily seek to profit on a large scale from breaking the law.
>
> But again, assuming all other things are equal, it does not follow that a person less exalted in the organization can confidently expect that his punishment will be correspondingly less severe. The ambit of his direct responsibility in deliberate law breaking is, in a sense, less simply because his authority and role are less important to the organization as a whole, but it remains true that he has knowingly entered into an unlawful conspiracy with persons known and unknown to obtain and distribute drugs, and it is only because persons like him are ready, able, and willing to do such a thing that the entrepreneur is able to ply his nefarious trade on a large scale. If there were no middlemen and underlings, there would be no top men in an organization. If an organization is starved of recruits it must collapse."[253]

However, although all offenders should expect severe punishment, offenders who are low in the drug hierarchy, such as couriers, are usually sentenced less harshly than those at a higher level.[254] In *Tyler v R*,[255] Simpson J explained the rationale for this as follows:

> "Those low in the hierarchy, such as couriers, are usually to be sentenced less harshly, because, although they are of fundamental importance in the execution of the object of the conspiracy — in a drug importation conspiracy, without couriers, no drug could or would be imported — they have no managerial or decision making function; and, experience shows, usually derive the least monetary reward.

246 ibid at [27]–[28].

247 ibid at [14].

248 *R v MacDonnell* (2002) 128 A Crim R 44 at [33]; *R v Green* (2010) 207 A Crim R 148 at [84].

249 *Wong v The Queen* (2001) 207 CLR 584 at [64].

250 *R v Pang* (1999) 105 A Crim R 474 at [6]; *R v Bimahendali* (1999) 109 A Crim R 355 at [31]–[32].

251 (1975) 13 SASR 237.

252 (1992) 63 A Crim R 402 at 417.

253 (1975) 13 SASR 237 at 239.

254 *Tyler v R* (2007) 173 A Crim R 458 at [79]; *R v Chea* [2008] NSWCCA 78 at [34].

255 (2007) 173 A Crim R 458.

> By contrast, those who have managerial or decision making functions are seen to occupy a more senior position, and, accordingly, to be more culpable. A relevant factor here is the level of profit to be derived."[256]

*Determining the role of offenders involved in conspiracy charges*

When an offender is sentenced in respect of his or her involvement in a conspiracy, the physical acts of the offender are relevant as part of "a complex tapestry",[257] but the sentence ultimately imposed should not be determined solely by reference to those acts. Such an approach ignores that the essential feature of a conspiracy is the agreement to participate in an organised criminal activity.[258] In *Tyler*, Simpson J said that precisely dissecting the physical acts of each conspirator and sentencing them on the basis of those acts would:

> "… be a negation of the complex inter-connection between the various participants, and the organisational nature of a conspiracy. It would represent too literal an application of the decisions that identify the 'role' of any participant as a relevant factor in the sentencing exercise".[259]

#### 4.3.3.2 Discount for guilty plea: s 16A(2)(g)

A plea of guilty for a Commonwealth offence attracts a discount based on a consideration of how the plea reflects the offender's willingness to facilitate the course of justice rather than its utilitarian value.[260] The strength of the Crown case is a relevant consideration because it may indicate whether the plea amounts to a recognition of the inevitable (where the case is strong) or it is "truly motivated"[261] by a willingness to facilitate the course of justice (presumably where the case is less strong).[262]

It is not an error to quantify the discount given for a guilty plea.[263] There are some inconsistencies between the States and Territories as to the range of discounts for guilty pleas. For example, in NSW, it has been accepted that the range applied to State offences (up to 25%) was a reasonable range to adopt with respect to Commonwealth offenders.[264] In Western Australia, discounts for fast-track pleas can be as high as 35%. It is apparent that Commonwealth offenders in Western Australia are given a discount based on whether their pleas were fast-track pleas. However, in *Johnson v The Queen*,[265] Gummow, Callinan and Heydon JJ observed that giving an offender a discount for a "fast track plea" was no more than "a recognition which all criminal jurisdictions in this country afford to accused persons in various ways and in varying degrees according to the circumstances from time to time".[266] In South Australia it is not uncommon to quantify the discount given for a plea of guilty,[267] but in Tasmania this is not the usual practice.

256 ibid at [79]–[80].

257 ibid at [84].

258 ibid at [83].

259 ibid.

260 *Cameron v The Queen* (2002) 209 CLR 339 at [14].

261 *Tyler v R* (2007) 173 A Crim R 458 at [114].

262 ibid.

263 *Markarian v The Queen* (2005) 228 CLR 357 at [24].

264 *R v Bugeja* [2001] NSWCCA 196 at [28]; *R v Simon* (2003) 142 A Crim R 166 at [19]; *R v Otto* (2005) 157 A Crim R 525 at [69]; *Lee v R* [2012] NSWCCA 123 at [58].

265 (2004) 78 ALJR 616.

266 ibid at [23].

267 See ALRC Report 103, above n 2, at [11.8].

#### 4.3.3.3 Cooperation with law enforcement authorities: ss 16A(2)(h), 21E

Cooperation can be considered under either or both of ss 16A(2)(h) and 21E of the *Crimes Act*. Section 21E is primarily concerned with undertakings for future assistance. Where an offender has given an undertaking to assist in the future, the court is required to state that the sentence is being reduced because the offender has given an undertaking to assist and to state the sentence that would have been imposed but for that future assistance.[268]

In NSW, the principles relating to assistance with respect to Commonwealth offenders were summarised in *R v Cartwright*[269] as follows:

- The public interest requires that offenders are encouraged to supply information to the authorities which will assist in bringing other offenders to justice, and to give evidence against those offenders.
- To ensure such encouragement is given, discounts should be granted regardless of the motive, whether it is remorse, contrition or self-interest. Full and frank cooperation is to be encouraged regardless of motive.
- The extent of the discount depends largely on the willingness with which the disclosure is made. An offender will not receive any discount where information is tailored so as to reveal only the information known to be in the possession of the authorities.
- Discounts will rarely be substantial unless there has been full disclosure.
- If the provision of information is motivated by genuine remorse and contrition that may justify greater leniency.
- It is not necessary to demonstrate contrition to obtain an assistance discount.
- To facilitate future assistance, a discount should be given if there has been genuine cooperation regardless of whether the information supplied is effective. What is relevant is the potential for the information to assist, as understood by the offender.

These principles are applied elsewhere in Australia.[270] Cooperation has special significance in relation to serious drug offences because of the difficulties in detecting these offences.[271] The result is that the community interest in allowing discounts for assistance by offenders who can implicate a principal in a drug importation network gives way to the principle of general deterrence.[272] However, even when assistance has been provided, the sentence imposed must not be one that "is so far out of touch with the circumstances of the particular offence and the particular offender that … it constitutes an affront to community standards".[273]

#### 4.3.3.4 Character, antecedents, age, means, physical or mental condition: s 16A(2)(m)

Two aspects of good character are whether an offender has no previous convictions and whether the offender has previously been involved in other criminal conduct.[274]

The fact that an offender has no prior record is given less weight when he or she is being sentenced for a serious drug offence because there is a perception that people without a record are less likely to attract suspicion and are recruited for this reason.[275] This is especially so, when the offender's role is

268 *Crimes Act*, s 21E(1).

269 (1989) 17 NSWLR 243 at 252–253.

270 See *R v KAK* [2013] QCA 310 at [43]; *R v B* [2013] SASCFC 40 at [50]; *Ungureanu v R* [2012] WASCA 11 at [30]–[36]; *DPP (Cth) v Bui* (2011) 32 VR 149 at [45].

271 *R v Wong and Leung* (1999) 48 NSWLR 340 at [83].

272 *R v Perrier (No 2)* [1991] 1 VR 717 at 725.

273 *R v Gallagher* (1991) 23 NSWLR 220 at 232.

274 *Weininger v The Queen* (2003) 212 CLR 629 at [25].

275 *R v Leroy* [1984] 2 NSWLR 441 at 446–447.

that of a courier because people are usually selected for this role for that reason. However, this does not mean that an offender's prior good character is not taken into account as part of the relevant subjective circumstances of the case.[276] On the other hand, having a prior conviction, especially if it relates to another drug offence is a significant factor on sentence.[277]

An absence of a prior record does not equate to prior good character. In *Weininger v The Queen*,[278] the offender was sentenced for three offences, including one of being knowingly concerned in the importation of a commercial quantity of cocaine and another of conspiracy to money launder (both Commonwealth offences).[279] In a conversation recorded by a listening device, the offender told an informant that he was involved in a continuing cocaine importation syndicate which had encountered problems importing cocaine using an established method. Material tendered as part of the defence case was to the effect that these offences were the first such offences the offender had committed. The sentencing judge concluded that the offender had been involved in the importation of cocaine with the same syndicate before the commission of the subject offences. Her Honour found that while the fact he had no prior criminal record was entitled to some weight, he could not be treated as a "first offender with the attendant leniency that that status usually attracts".[280]

The High Court concluded that the sentencing judge's approach was correct, that is, it was appropriate to treat what was known of the offender's character and antecedents as a neutral factor.[281]

### 4.3.4 Totality

The principle of totality requires that when an offender is sentenced for more than one offence, the overall sentence is "just and appropriate" and reflects the totality of the offending behaviour involved.[282] The totality principle is reflected in s 16B of the *Crimes Act* which requires a court sentencing a Commonwealth offender to have regard to:

> "(a) any sentence already imposed on the person by the court or another court for any other federal offence or for any State or Territory offence, being a sentence that the person has not served; and
>
> (b) any sentence that the person is liable to serve because of the revocation of a parole order made, or licence granted, under this Part or under a law of a State or Territory."[283]

Section 19AD of the Act also reflects the totality principle. That section sets out those considerations for a court when sentencing a Commonwealth offender who is already subject to an existing NPP in respect of a Commonwealth offence.[284]

Following a sentencing judge's evaluation of the overall criminality involved in all of the offences, the sentencing judge will then determine what, if any, downward adjustment to the sentence is necessary in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.[285]

276 *R v Lopez-Alonso* (1996) 86 A Crim R 270 at 274–275; *R v Salgado-Silva* (2001) 126 A Crim R 1 at [14].

277 *R v X* (2002) 130 A Crim R 153 at [57].

278 (2003) 212 CLR 629.

279 ibid at [2]: the third offence was a State offence of conspiracy to supply a commercial quantity of cocaine, contrary to s 26 of the DMT Act. However, the arguments on appeal focused on the Cth offences, which were the more serious.

280 ibid at [14].

281 ibid at [29].

282 *Mill v The Queen* (1988) 166 CLR 59 at 63; *Johnson v The Queen* (2004) 78 ALJR 616 at [18].

283 *Postiglione v The Queen* (1997) 189 CLR 295 at 308–309.

284 ibid at 309.

285 *R v Holder* [1983] 3 NSWLR 245 at 260 (Street CJ). The reference to *Holder* in *R v Cramp* (2010) 106 SASR 304 at [55], *Lenton v R* [2001] WASCA 392 at [3], [13], and *R v Hennen* [2004] VSCA 42 at [31] reflects the similarity of approach concerning this issue elsewhere in Australia.

The High Court, in *Mill v The Queen*[286] and *Pearce v The Queen*,[287] concluded that when sentencing an offender for more than one offence, a judge must *first* fix the appropriate sentence for each offence and then consider whether those sentences should be accumulated or served concurrently.[288] Subsequently in *Johnson v The Queen*, the High Court reiterated that while these cases stated the *preferred* approach, neither decreed "that a sentencing judge may never lower each sentence and then aggregate them for determining the time to be served"[289] because:

> "To do that, is not to do what the joint judgment in *Pearce* holds to be undesirable, that is, to have regard *only* to the total effective sentence to be imposed on an offender. The preferable course will usually be the one which both cases commend but neither absolutely commands. Judges of first instance should be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime under which the sentencing is effected."[290] [Emphasis in original.]

In Queensland it is common practice to impose a sentence for the most serious offence that is higher than that which would have been imposed if that offence stood alone, the higher sentence being intended to reflect the criminality of the other offences.[291] Such an approach would not usually be taken in NSW where the NSWCCA has stated that "there is no justification for imposing a sentence for one offence that is increased to encompass the criminality of all offending".[292]

This is likely to be less of an issue when sentencing for Commonwealth serious drug offences because in almost three-quarters of cases an offender is only being sentenced for one offence.[293]

### 4.3.5 Parity

Consistency of punishment reflects the notion of equal justice and the parity principle is one expression of it. The parity principle requires that like offenders should be treated in a like manner, but allows for the imposition of different sentences to reflect different degrees of culpability and the different circumstances of offenders.[294]

While the parity principle is a sentencing principle in its own right, because it also operates as a measure by which consistency in sentencing can be achieved, it has been dealt with in more detail in Chapter 5, "The imperative of achieving reasonable consistency".[295]

286 (1988) 166 CLR 59.

287 (1998) 194 CLR 610.

288 *Mill v The Queen* (1988) 166 CLR 59 at 63; *Pearce v The Queen* (1998) 194 CLR 610 at [45].

289 (2004) 78 ALJR 616 at [26].

290 ibid.

291 *R v Nagy* [2004] 1 Qd R 63 at [39] (Williams JA), [66] (Jerrard JA). Some of the problems that may be encountered in taking such an approach when an offender is being sentenced for Cth and State offences were alluded to by Fraser JA in *R v NK* (2008) 191 A Crim R 483 at [73]–[75], although his was a minority view.

292 *R v Merrin* (2007) 174 A Crim R 100 at [37]. That approach has been taken by the NSWCCA in respect of Cth offences as well. See, for example, *Cargnello v DPP (Cth)* (2012) 224 A Crim R 204 at [92]–[94].

293 See p 84.

294 *Green v The Queen* (2011) 244 CLR 462 at [28].

295 See p 57.

## 4.4 The relationship between the non-parole period (NPP) and the head sentence

### 4.4.1 The legislation

When a Commonwealth offender is sentenced to a term of imprisonment greater than 3 years, s 19AB(1) of the *Crimes Act* requires a sentencing judge to either:

- fix a single NPP (irrespective of whether there are one or more charges), or
- make a recognizance release order.

Section 19AB(3) of the Act provides that the court may decline to do either if, having regard to the nature and circumstances of the offence and to the offender's antecedents, the court is satisfied neither is appropriate. In such a case, s 19AB(4) requires the court to state its reasons for refusing to make such an order. Section 19AJ specifically states that the court cannot impose a single NPP or make a recognizance release order with respect to both Commonwealth and State or Territory offences.[296]

The effect of s 19AB, therefore, is that a court exercising federal sentencing jurisdiction has a discretion to *either* make a recognizance release order *or* fix a NPP when the overall sentence imposed is greater than 3 years.

Under s 19AC(1), a court *must* fix a recognizance release order when the sentence of imprisonment does not exceed 3 years.[297]

#### 4.4.1.1 Recognizance release orders

Recognizance release orders are fixed in accordance with s 20(1)(b) of the *Crimes Act*. An offender must give security and the court may impose such conditions as are considered appropriate.

One important feature of a recognizance release order is that the sentencing judge (or magistrate) determines the date of release of the particular offender. This is because a recognizance release order automatically takes effect once the offender has served that portion of the sentence that the court has directed to be served before release.

#### 4.4.1.2 Non-parole periods (NPPs)

Determining the appropriate NPP for any Commonwealth offence involves the exercise of judicial discretion.[298] Beyond providing for the fixing of NPPs in s 19AB, there is no guidance in either the provision itself or the *Crimes Act* more generally as to the approach a sentencing judge should take to the fixing of a NPP for Commonwealth offences. Further, the Act does not prescribe a fixed ratio between the NPP and head sentence.[299] This is not the position in NSW where s 44(2) of the *Crimes (Sentencing Procedure) Act* 1999 provides that a NPP should not be less than 75% of the overall sentence for NSW offence(s) unless there are special circumstances justifying the imposition of a lesser period.[300]

296 *Fasciale v R* (2010) 30 VR 643 at [27].

297 Subject to ss 19AC(4) and (5) which are in similar terms to ss 19AB(3) and (4). Where there are multiple sentences of less than 3 years, a sentencing judge is only required to make a single recognizance release order: *DPP (Cth) v Couper* [2013] VSCA 72 at [129].

298 *Bick v R* [2006] NSWCCA 408 at [14]; *Bertilone v R* (2009) 197 A Crim R 78 at [55].

299 Although s 19AG of the *Crimes Act* provides that when a court imposes a sentence for the offence of treachery (s 24AA of the Act), a terrorism offence, or an offence against Pt 5.1, Div 80 (Treason and urging violence) or Pt 5.2, Div 91 (Offences relating to espionage and similar activities) of the Code, the non-parole period (NPP) *must* be at least three-quarters (75%) of the sentence. See also s 236B of the *Migration Act* 1958 (Cth) which makes provision for mandatory minimum NPPs for particular people smuggling offences.

300 In the ACT, Qld, SA and Vic, the fixing of a NPP is a matter for the court's discretion, subject to particular statutory exceptions. Like NSW, in the NT, Tas and WA there are general statutory rules for fixing NPPs. In P Poletti and H Donnelly, "Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999", *Sentencing Trends & Issues*, No 42, Judicial Commission of NSW, 2013, p 4, the authors observed that the statutory ratio fixed in NSW was relatively high compared with other Australian jurisdictions.

The *Crimes Act*, in s 19AK, provides that the fact a person is liable for deportation does not preclude the fixing of a NPP. Accordingly, the sentence imposed on a foreign national may include a NPP.[301]

By comparison with recognizance release orders, whether or not a Commonwealth offender is granted parole is determined by the Attorney-General (Cth), not the court, and that determination is made in light of circumstances existing when the NPP is completed.[302] At that time, s 19AL(1) of the Act requires the Attorney-General to either make or refuse to make an order directing that the offender be released on parole. Notwithstanding those provisions in Pt IB, such as ss 19AL and 19AN, which deal with the mechanics of the grant of parole, there is no statutory guidance as to the factors to be considered when deciding whether or not parole should be granted. When the ALRC published its report in 2006 about the sentencing of Commonwealth offenders, it was advised by the Attorney-General's Department that while there were internal guidelines concerning the making of this decision, these were not publicly available.[303]

Common sense suggests the process of making such a determination must necessarily involve a degree of consideration of the needs of a particular offender and what will best assist that offender's integration back into society. The fact this determination is made at a time proximate to release is a significant difference to recognizance release orders, which are made at the time of sentence and on the basis of factors known to the court at that time.

### 4.4.2 Case law concerning the fixing of non-parole periods (NPPs) or making recognizance release orders for Commonwealth offences

When rejecting that there could be a "norm" for the relationship between NPPs and the term of a sentence, the High Court in *Hili v The Queen*[304] said that in fixing such periods, the principles to be applied were those articulated in *Power v The Queen*,[305] *Bugmy v The Queen*[306] and *Deakin v The Queen*.[307]

In *Power v The Queen*, Barwick CJ, Menzies, Stephen and Mason JJ said the following about the approach to be taken when determining the NPP after imposing a sentence:

> "In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the *crime* committed calls for such detention."[308] [Emphasis added.]

The High Court confirmed that the fixing of a NPP is as much concerned with deterring an offender or others from committing offences as the determination of the head sentence:

> "Surely the requirement that a prisoner must stay in confinement for some period seen by a judge to be appropriate in *all* circumstances, [operates] more as a deterrent than to allow the prison gates to be opened almost as soon as they have closed, that is, when the paroling authority has had time to consider whether the sentence should be served in confinement. To the extent to which deterrence is an object of imprisonment, then imprisonment without a chance of release for a longer time, rather than for a shorter time, is within that objective."[309] [Emphasis added.]

301 *The Queen v Shrestha* (1991) 173 CLR 48 at 56 (Brennan and McHugh JJ), 73 (Deane, Dawson, Toohey JJ); *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 386; *Adenopo v R* [2011] VSCA 269 at [6].

302 This distinction was discussed by Riley J (with whom Martin CJ and Mildren J agreed) in *R v Woods* (2009) 24 NTLR 77 at [23].

303 ALRC Report 103, above n 2, at [23.68].

304 (2010) 242 CLR 520 at [40].

305 (1974) 131 CLR 623.

306 (1990) 169 CLR 525.

307 (1984) 58 ALJR 367.

308 (1974) 131 CLR 623 at 628.

309 ibid.

The High Court has examined this issue in a number of cases since *Power*. For example, in *The Queen v Shrestha*,[310] Brennan and McHugh JJ, after discussing the authorities concerning the relationship between the head sentence and NPP, observed that:

> "It is clear that, although a minimum term is a benefit for the offender, it is a benefit which the offender may be allowed only for the purpose of his rehabilitation *and it must not be shortened beyond the lower limit of what might be reasonably regarded as a condign punishment*. Moreover, the release of an offender for the purposes of rehabilitation through conditional freedom is not to be seen solely as a mercy to the offender but also, and essentially, as a benefit to the public."[311] [Emphasis added.]

In *Bugmy v The Queen*, Dawson, Toohey and Gaudron JJ confirmed that a NPP should be fixed because "*all* the circumstances of the offence require that the offender serve no less than that term, without the opportunity of parole" [emphasis added].[312]

Subjective features assume greater significance at the time of fixing the NPP. However, release for the purposes of rehabilitation should only occur once the offender has served the minimum time which justice requires be served having regard to all of the circumstances of the offence.[313] Although deterrence of the offender and others remains important, rehabilitation assumes greater significance when determining the appropriate NPP.[314]

In a Western Australian appeal against a sentence imposed for the importation of a marketable quantity of methamphetamine, Buss JA in *Bertilone v R*[315] summarised the nature and purpose of NPPs as follows:

- The NPP is part of the sentence.[316]
- Fixing a NPP serves the community's interests rather than those of the offender, although a minimum term confers a benefit on the offender.[317]
- The NPP is the minimum period of imprisonment that justice requires the offender to serve. It mitigates the offender's punishment in favour of rehabilitation through conditional freedom.[318]
- The considerations which must be taken into account when fixing the NPP are the same as those which apply to the setting of the head sentence. However, the weight given to those factors, and their relevance, differs as a consequence of the different purposes underlying each function.[319]
- The main factors relevant to the determination of the appropriate ratio between the NPP and head sentence include:
  - the length of the head sentence and its position in the permissible range
  - the seriousness of the offence
  - the prospects of rehabilitation
  - the need to ensure that the sentence reflects the criminality involved and does not lessen the effect of general deterrence.[320]

310 (1991) 173 CLR 48.

311 ibid at 63.

312 (1990) 169 CLR 525 at 538.

313 *Power v The Queen* (1974) 131 CLR 623 at 628; *The Queen v Paivinen* (1985) 158 CLR 489 at 495; *Griffiths v The Queen* (1989) 167 CLR 372 at 396.

314 *R v Lian* (1990) 47 A Crim R 444 at 449–450. See also *Bugmy v The Queen* (1990) 169 CLR 525 at 531.

315 (2009) 197 A Crim R 78.

316 ibid at [29], citing *R v Rajacic* [1973] VR 636 at 641; *R v Hopkins* (2008) 22 NTLR 125 at [12].

317 ibid at [30], citing *Bugmy v The Queen* (1990) 169 CLR 525 at 531.

318 ibid at [31], citing *Power v The Queen* (1974) 131 CLR 623 at 628–629; *Deakin v The Queen* (1984) 58 ALJR 367 at 367; *Griffiths v The Queen* (1989) 167 CLR 372 at 396; *Bugmy v The Queen* (1990) 169 CLR 525 at 531.

319 ibid at [32]. See also *R v Suarez-Mejia* (2002) 131 A Crim R 577 at [47]–[48] (Parker J).

320 ibid at [33], citing *Bick v R* [2006] NSWCCA 408 at [15] (Price J). See also *The Queen v Shrestha* (1991) 173 CLR 48 at 68 (Deane, Dawson and Toohey JJ) and *R v Suarez-Mejia* (2002) 131 A Crim R 577 at [24] (Murray J) and [48] (Parker J).

#### 4.4.2.1 The position before Hili v The Queen

Until the High Court decision in *Hili*, it was common practice, especially in NSW where the practice originated, that when a federal sentence of imprisonment was imposed, the NPP was fixed at between approximately 60 and 66% of the head sentence. That practice arose as a consequence of the decision of the NSWCCA in *R v Bernier*.[321] In that case, the applicant had been sentenced to 12 years imprisonment with a NPP of 7.5 years for an offence of importing a commercial quantity of cocaine. The court discussed the problems associated with identifying a relationship that should normally exist between a NPP and head sentence and repeated Hunt J's earlier admonition in *R v Paull*[322] that applying set ratios in fixing NPPs may frustrate the exercise of sentencing discretion.[323] The court said:

> "Subject to those caveats, the norm for non-parole periods is in the range of about 60 per cent to 66 and two-thirds per cent. One factor which may be material is the length of the head sentence and its position in the permissible range. Circumstances may exist which make it appropriate to move outside the usual range for non-parole periods."[324]

In discussing that range, the court emphasised that when fixing the NPP, a "mathematical or rigid"[325] approach should be avoided and that a degree of "caution and flexibility"[326] should be used. Following *Bernier*, it was common for that ratio to be adopted when sentencing offenders for serious drug offences particularly in NSW, but also elsewhere in Australia.

In *Bertilone* the court noted[327] that the practice in *Bernier* was applied, without discussing the relevant principles, in the Victorian cases of *R v Phong*,[328] *R v Thomas*[329] and *R v Ngui*.[330] It also noted that in Western Australia, in *Mustafa v R*,[331] and in South Australia, in *R v Cheng*,[332] the ratio of the NPP to the head sentence was 52% and 56% respectively. The court emphasised that sentencing judges retain a discretion, conferred by s 19AB(1) of the *Crimes Act*, to determine the appropriate NPP and that it could not be determined by automatically applying the ratio identified in *Bernier* (referred to as a "general guide"). The ratio could be higher or lower as the facts and circumstances of a particular case required.[333] The court reiterated that it was incumbent on a sentencing judge to ensure that the NPP imposed in a particular case was the minimum period of imprisonment that justice required the offender to serve.[334]

The adoption by a court sentencing for a Commonwealth serious drug offence of the "general guide" referred to in *Bernier* may be justified on the grounds of sentencing consistency. This is especially so if the task of fixing the NPP is undertaken in accordance with the approach described in *Bernier* and summarised in *Bertilone*. Support for this is found in the Queensland Court of Appeal decision in *R v Mokoena*.[335]

321 (1998) 102 A Crim R 44.
322 (1990) 20 NSWLR 427.
323 ibid at 435.
324 (1998) 102 A Crim R 44 at 49.
325 ibid.
326 ibid.
327 (2009) 197 A Crim R 78 at [47]–[51].
328 (2005) 12 VR 17.
329 [1999] VSCA 204.
330 (2000) 111 A Crim R 593.
331 (2002) 133 A Crim R 133.
332 (1999) 73 SASR 502.
333 *Bertilone v R* (2009) 197 A Crim R 78 at [55], [60].
334 ibid at [59].
335 [2009] 2 Qd R 351.

In *Mokoena*, the applicant had been sentenced to 9 years imprisonment with a NPP of 4 years, 9 months for an offence of importing a marketable quantity of heroin. On appeal, he argued that the NPP departed from usual sentencing practice in Queensland following a guilty plea.[336] At first instance, the sentencing judge was informed by the Crown that the appropriate range in sentencing for Commonwealth serious drug offences was between 60 and 66% of the head sentence and, on appeal, demonstrated that this practice was common in NSW and had been applied in other States.[337] Holmes JA rejected the proposition that the Queensland practice applied to the process of fixing a NPP for a federal offence. While her Honour confirmed that setting the NPP was a matter of individual discretion when exercising federal jurisdiction, consistency with decisions in other jurisdictions was desirable.[338] After considering a number of intermediate appellate cases from other jurisdictions, her Honour concluded that a NPP of 53% was consistent with "the practice in other drug importation cases"[339] of setting the NPP beyond 50% of the head sentence. In reaching that conclusion, her Honour said it was clear the sentencing judge properly considered all the relevant mitigating factors in the applicant's favour when fixing the NPP.[340]

The desirability for consistency between jurisdictions in the context of fixing NPPs and recognizance release orders was addressed by that court again in *R v CAK*.[341] In that case, the court accepted that the "norm" for NPPs and periods required to be served before release on recognizance was generally after the offender had served 60 to 66% of the head sentence. However, the court recognised that the period could fall outside of that range "as it is a matter of judicial discretion and is not necessarily capable of precise mathematical calculation".[342]

Subsequently in *R v Ruha*,[343] the court rejected the proposition of a norm, concluding that the proper approach was to apply the relevant provisions in Part IB of the *Crimes Act*. The court stated:

> "… because the relevant factors and the relative differences in the weight to be afforded to each factor in the different aspects of the overall sentencing process may differ according to infinitely variable circumstances, there can be no 'mechanistic or formulaic' approach which requires sentencing judges to ensure that the proportion which the pre-release period bears to the sentence of imprisonment must … usually fall within a range which is substantially narrower than the whole period of the imprisonment".[344] [Citations omitted.]

In *R v Chandler*,[345] the Queensland Court of Appeal considered *CAK* and *Ruha* when determining an appeal against a sentence of 5 years imprisonment with a NPP of 3 years for importing a commercial quantity of pseudoephedrine. Apparently accepting the correctness of the approach taken by the court in *Ruha*, Keane JA identified the issue to be determined as whether the sentence imposed at first instance was manifestly excessive bearing in mind both the head sentence and the NPP. His Honour observed

336 It is common in Qld for eligibility for parole to commence when an offender has served half of the term of imprisonment: [2009] 2 Qd R 351 at [12]. In *R v Robertson* (2008) 185 A Crim R 441 at [4]–[6] (Fraser JA), the QCA rejected the proposition that the State approach to fixing NPPs (identified as being about one-third of the overall sentence) applied to Cth offences and that the starting point was Pt IB of the *Crimes Act*. See also *R v To* [1999] 2 Qd R 166 at 170.

337 *R v Mokoena* [2009] 2 Qd R 351 at [10].

338 ibid at [12], citing *R v Tran* (2007) 172 A Crim R 436 at [31]–[35].

339 ibid at [17].

340 ibid.

341 [2009] QCA 23 at [14].

342 ibid at [18].

343 [2011] 2 Qd R 456.

344 ibid at [47]. See also *R v Woods* (2009) 24 NTLR 77 at [25] where the court acknowledged that while there *may* be reasons why the norm for NPPs might be considered to be in the range of about 60 to 66%, those reasons did not apply to the making of a recognizance release order. Fixing the time for release under such an order is to be determined by reference to the particular circumstances of the offence and the offender in the context of the circumstances of the case. The court noted that commonly recognizance release orders for less serious Cth offences such as social security fraud were made without serving any term of imprisonment.

345 [2010] QCA 21.

that consistency could be achieved by reference to what he described as "authoritative sentences"[346] in comparable cases in Queensland and other States and Territories. After considering decisions from Queensland, NSW and the Northern Territory that reflected a variety of sentences and NPPs fixed from approximately 33 to 60%, his Honour found that the sentence was not manifestly excessive.[347] His Honour quoted that part of *Ruha* where the court had said that the application of sentencing principle determined the NPP in a given case, and observed the sentence imposed required the applicant to spend 3 years in custody before release. His Honour concluded:

> "The applicant is a mature man. His crime was committed for profit. He is not an addict … [I]t is clear that a sentence involving a non-parole period of three years is not excessive bearing in mind the high level of criminality which falls to be punished. Especially is this so when the offender's mature age suggests that a shorter period of actual incarceration is unlikely to facilitate a more effective rehabilitation of the applicant and there is no evidence to the contrary."[348]

It fell to the High Court to resolve the conflict in the authorities concerning this issue.

#### 4.4.2.2 Hili v The Queen

In *Hili*, the High Court categorically stated that there neither was, nor should be, a "judicially determined norm or starting point" for the period of imprisonment a Commonwealth offender should serve in prison before release.[349] The court observed that using such a "norm" was misleading if it distracted from the relevant sentencing provisions in Pt IB of the *Crimes Act* or if it was read as saying that the same proportionate relationship existed between the time to be served and the length of the sentence imposed for all Commonwealth offenders regardless of the offence.[350]

The High Court accepted as correct, the Queensland Court of Appeal's conclusion in *Ruha* that ss 16A(1) and (2) made plain that all of the circumstances, including those listed in s 16A(2), were to be taken into account when making recognizance release orders, just as they were when imposing a sentence of imprisonment.[351] The court specifically endorsed that part of the Court of Appeal's decision in *Ruha* set out above and observed that the same point was previously made in NSW in *Paull*, *Bernier* and *R v Viana*,[352] and in Western Australia in *Bertilone*.[353] The court said:

> "It is wrong to begin from some assumed starting point and then seek to identify 'special circumstances'. Rather, a sentencing judge should determine the length of sentence to be served before a recognizance release order takes effect by reference to, and application of, the principles identified by this Court in *Power*, *Deakin* and *Bugmy*."[354]

While the High Court's reasons were expressed by reference to recognizance release orders made in accordance with s 19AB(3) of the *Crimes Act*, the same principles have been taken to apply to the fixing of NPPs.[355]

346 ibid at [19].

347 ibid at [20]–[24].

348 ibid at [27].

349 (2010) 242 CLR 520 at [13], [36]–[44].

350 ibid at [38].

351 ibid at [40], quoting *R v Ruha* [2011] 2 Qd R 456 at [45].

352 [2001] NSWCCA 171 at [3].

353 See p 41.

354 (2010) 242 CLR 520 at [44].

355 See, for example, *Fasciale v R* (2010) 30 VR 643 at [46]; *R v Nikolovska* (2010) 209 A Crim R 218 at [82]; *R v Burling* [2011] QCA 51 at [1] (McMurdo P) and [24]–[29] (Chesterman JA).

#### 4.4.2.3 The position following Hili v The Queen

Following *Hili*, it has been suggested that NPPs in Commonwealth matters could fall below 50%.[356] However, if sentencing judges apply the relevant principles in the way outlined by the High Court, and it is suggested in the way applied by Keane JA in *Chandler*, it is difficult to see why that would necessarily be the case.

*Hili* requires a sentencing judge to look at *all* of the relevant factors connected both with the offence and the offender and consider those factors in the way identified in the authorities. As has already been discussed, the need to provide the offender with sufficient opportunity for rehabilitation is a key feature when determining the relevant NPP, but the objective seriousness of the offence and the need for general deterrence are still important considerations.

In *Bertilone*, the court set out the following six relevant principles to be applied when determining the NPP for Commonwealth serious drug offences:

- Section 19AB(1) of the *Crimes Act* confers a discretion on a sentencing judge to determine the appropriate NPP.[357]
- Neither s 19AB(1) or any other statutory provision requires the NPP to bear any particular relationship to the head sentence.[358]
- A review of the case law demonstrates that generally the NPP for Commonwealth serious drug offences is usually about 60 to 66.7% of the head sentence.[359]
- The relationship between NPPs and the head sentences which have customarily been imposed is, at most, a general guide. It must not control or fetter the proper exercise of a sentencing judge's discretion.[360]
- Sentencing judges must determine the appropriate NPP in each case by applying the established legal principles to the facts and circumstances of the particular offence and offender. That process is not rigid or mathematical. Care must be taken to ensure that the NPP in a particular case is the minimum period of imprisonment that justice requires the offender to serve.[361]
- The NPP must not be determined by automatically applying the general guide. The ratio in a particular case may be within the general guide or higher or lower, depending on the facts and circumstances of the particular case.[362]

Notwithstanding that *Bertilone* pre-dates *Hili*, the summary of those principles remains useful because it succinctly sets out those matters which the High Court itself identified as relevant to the fixing of the NPP. It is apparent from that summary and from the principles derived from *Power*, *Bugmy*, *Shrestha* and *Griffiths v The Queen*[363] that all factors relevant to determining the head sentence, including the maximum penalty and the objective circumstances of the offence, still play a role in determining the appropriate NPP. Those factors do not become less significant even though providing the offender with a sufficient opportunity for rehabilitation clearly assumes greater significance.

Further, if NPPs have been fixed in past matters at above 50% of the head sentence as part of a principled exercise of sentencing discretion, then those matters retain value as sentencing comparatives. This is because that period was determined in accordance with principle rather than by the simple application of what was previously described as the "norm". There is no reason why such decisions cannot continue to be used as comparative cases assuming they are relevantly comparable.

356 See, for example, *R v Ding* [2011] NSWDC 184 at [10]; *R v Ta* [2011] NSWDC 209.

357 (2009) 197 A Crim R 78 at [55].

358 ibid at [56].

359 ibid at [57].

360 ibid at [58].

361 ibid at [59].

362 ibid at [60].

363 (1989) 167 CLR 372.

Chapter 5

# The imperative of achieving reasonable consistency

One conclusion that can be drawn from the language used by the High Court in *Hili v The Queen* is that a fundamental requirement for achieving consistency in sentencing is through the consistent application of the relevant sentencing principles.[364] As these are derived from Pt IB of the *Crimes Act*, and applied by all courts exercising federal jurisdiction in relation to sentencing, Pt IB is central to any consideration of consistency.[365]

In addition to the consistent application of principle, consistency in sentencing operates through the imposition of a sentence that not only fits the particular circumstances of the offence and offender, but is broadly consistent with existing sentencing patterns for the particular offence.

A fundamental barrier to achieving consistency in sentencing for Commonwealth offenders occurs at a jurisdictional level because there is no Commonwealth court which deals with Commonwealth matters under a single set of Commonwealth laws. Sentencing is carried out by State and Territory courts. Sentencing judges may not have the same familiarity with Pt IB of the *Crimes Act* as they have with their home State or Territory sentencing laws. In this environment, lawyers appearing on behalf of the Commonwealth have a special responsibility to inform the court of the requirements of the Act and of the relevant case law throughout Australia.

## 5.1 The objective of sentence consistency

The principle of consistency in sentencing is, of course, of universal application and not peculiar to Commonwealth serious drug offences or even Commonwealth offences more generally. However, the potential for inconsistency in this area is increased by:

- the fact some offences have a domestic context[366] and operate concurrently with some State or Territory drug laws
- the existence of different Commonwealth offences which address the same conduct, but which carry different maximum penalties.[367]

The principle of sentence consistency was described by Mason J in *Lowe v The Queen*[368] as "a fundamental element in any rational and fair system of criminal justice"[369] that operates essentially as a rule of fairness and a means of maintaining public confidence in the integrity of the administration of justice.[370] When an individual offender is sentenced, the offender, and the public, must be confident that the offender will not be sentenced according to the individual whim of a particular judicial officer, but that the judicial officer will apply the relevant sentencing principles fairly and in conformity with the approach established by the relevant legislation and appellate authorities. However, this will never provide a basis for identical sentencing results, not only because of the discretionary nature of decision-making, but because the individual circumstances in each matter will vary, in some cases, greatly.

364 (2010) 242 CLR 520 at [18].

365 This is apparent from the approach taken by the High Court at [18], [20]–[25] in *Hili*, ibid. See also the discussion about the relationship between s 16A of the *Crimes Act* and the approach to be taken in Cth Crown appeals in light of the operation of s 16A in *Bui v DPP (Cth)* (2012) 244 CLR 638 at [20].

366 See pp 13–14.

367 See p 21.

368 (1984) 154 CLR 606.

369 ibid at 610.

370 ibid at 610–611.

In *Wong v The Queen*, Gleeson CJ specifically recognised the inevitability of some inconsistency in sentencing when he said:

> "All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency."[371]

Notwithstanding the necessity to allow for individual discretion, Gleeson CJ emphasised that reasonable consistency was a requirement of justice.[372] In *Hili*, the High Court reiterated the importance of achieving consistency when sentencing Commonwealth offenders. The Crown argued in *Hili* that the existence of a judicially determined "norm" or starting point for the period of time a Commonwealth offender should serve in custody before release on a recognizance or parole was one means of ensuring consistency.[373] That argument was emphatically rejected by the High Court.[374]

## 5.2 Operational inconsistency

The High Court has recognised the desirability of treating like offenders in a like manner, but has also accepted that the nature of the federal system itself, whereby State and Territory courts have jurisdiction to determine matters in respect of Commonwealth offenders, tolerates a degree of inconsistency in the treatment of those offenders.[375] This type of inconsistency in the treatment of offenders (operational inconsistency) arises not only because of the operation of ss 68(1) and 79 of the *Judiciary Act* 1903 (Cth) (the *Judiciary Act*), but also because of those provisions in Pt IB of the *Crimes Act* which specifically apply State and Territory laws with respect to some aspects of the sentencing process and the administration of Commonwealth sentences.

Operational inconsistency may or may not have an impact on sentencing consistency. This is examined below.

### 5.2.1 Picking up State and Territory provisions

Section 68(1) of the *Judiciary Act* confers jurisdiction on State and Territory courts with respect to Commonwealth offenders and provides that State and Territory laws relating to the procedure for trial and conviction apply to those offenders. These laws are not uniform, so to the extent that they differ between States and Territories, there will be a degree of inconsistency in the treatment of Commonwealth offenders as between those States and Territories. For example, in *Putland v The Queen*,[376] the High Court recognised that the operation of particular State and Territory sentencing laws fell within the ambit of s 68, in particular, s 68(1)(c),[377] and that the power of a Territory court to impose an aggregate sentence[378] was picked

371 (2001) 207 CLR 584 at [6].

372 ibid at [7].

373 (2010) 242 CLR 520 at [46].

374 ibid at [13], [44].

375 See, for example, *Williams v The King (No 2)* (1934) 50 CLR 551 at 560 (Dixon J); *Leeth v Cth* (1992) 174 CLR 455 at 467 (Mason CJ, Dawson and McHugh JJ); *Putland v The Queen* (2004) 218 CLR 174 at [4]–[5] (Gleeson CJ), [59]–[60] (Gummow and Heydon JJ).

376 (2004) 218 CLR 174 at [25] (Gleeson CJ), [34]–[35], [59] (Gummow and Heydon JJ) and [121] (Callinan J).

377 ibid at [34]. See also *R v Jackson* (1998) 72 SASR 490 at 513.

378 *Sentencing Act* (NT), s 52(1).

up and applied to Commonwealth offenders.[379] At the time *Putland* was decided, aggregate sentencing in higher courts was not available in all States and Territories.[380]

Section 79(1) of the *Judiciary Act* provides that the laws of a State or Territory relating to procedure, evidence and the competency of witnesses also apply to all courts exercising federal jurisdiction except as otherwise provided for by the Constitution or by Commonwealth law.

By virtue of the operation of ss 68 and 79 of the *Judiciary Act*, those aspects of local sentencing practice, which vary around Australia, affect Commonwealth offenders differently depending on where their matters are heard. Whether all such variations have an impact on the sentence imposed by a sentencing judge is difficult to determine. However, difference in local sentencing practice is an important factor to keep in mind, especially when an offender is being sentenced for one of the offences in Pt 9.1 which is in similar terms to a pre-existing State drug offence, and there is reliance on the sentences imposed for the comparable State offence. This is because some such variations may produce what might appear to be more lenient (or even harsher) sentences in one place than elsewhere. The different approach to discounts for a guilty plea, already discussed in Chapter 4, "The relevant sentencing principles",[381] is one such example.

A Victorian example, with no impact on the sentence imposed on a Commonwealth offender, is s 6AAA of the *Sentencing Act* 1991 (Vic). This section requires a sentencing judge imposing a sentence of imprisonment to specify the sentence that would have been imposed on the offender but for the plea of guilty. This provision is intended to promote transparency. By contrast Commonwealth sentencing law does not require the quantification of such a discount.[382]

Whether s 6AAA applies to Commonwealth offenders is a source of some conflict in the authorities. Most recently, in *DPP (Cth) v Couper*,[383] it was implicit in the judgment of Tate JA, with whom Harper JA and Williams AJA agreed, that s 6AAA did apply. This is inferred from her Honour's observation that when it is necessary to quantify both the discount for a guilty plea and a discount for assistance in accordance with s 21E of the *Crimes Act*, no particular method should be used provided the discount for *each* factor is clearly articulated.[384]

Another example which *is* likely to have an impact on the sentence imposed is the approach to sentencing multiple offences. In Queensland, unlike other jurisdictions, it is common practice when sentencing for multiple offences to impose a higher sentence for the most serious offence. Such a sentence is higher than the sentence which would be imposed if that offence stood alone, the higher sentence being intended to reflect the criminality of the other offences.[385]

This issue is less likely to have an impact in the context of sentencing for Commonwealth serious drug offences because in a significant majority of cases an offender is only sentenced for one offence. However, it can have an impact on sentencing consistency because if such a case is relied on subsequently, it is necessary to be aware that the sentence was higher than would have been imposed had the offence stood alone.

379 (2004) 218 CLR 174 at [34]. See *R v Jackson* (1998) 72 SASR 490 at 513.

380 In addition to the NT, aggregate sentences are now only an available sentencing option for Cth offenders charged with indictable offences in NSW (*Crimes (Sentencing Procedure) Act* 1999, s 53A), SA (*Criminal Law (Sentencing) Act* 1988, s 18A), Tas (*Sentencing Act* 1997, s 11) and Vic (*Sentencing Act* 1991, s 9).

381 See p 35.

382 *Markarian v The Queen* (2005) 228 CLR 357 at [24]; *Lee v R* [2012] NSWCCA 123 at [58]. However, it is not an error to quantify a discount for a guilty plea: *Cahyadi v R* (2007) 168 A Crim R 41 at [34].

383 [2013] VSCA 72.

384 ibid at [144]. See also *Saab v R* [2012] VSCA 165 at [29]–[62] where, in an appeal in respect of a sentence for an importation offence, the court's discussion of the approach to an asserted error relating to the discount for a guilty plea, and its discussion of s 6AAA, makes it clear that the court considered the section applied to Cth offenders.

385 *R v Nagy* [2004] 1 Qd R 63 at [39] (Williams JA), [66] (Jerrard JA). Some of the problems that may be encountered in taking such an approach when an offender is being sentenced for Cth and State offences were alluded to by Fraser JA in *R v NK* (2008) 191 A Crim R 483 at [73], although his was a minority view. See also p 37.

### 5.2.2 Part IB of the Crimes Act 1914 (Cth)

#### 5.2.2.1 The history of Pt IB

Until Pt IB of the *Crimes Act* commenced, Commonwealth offenders were sentenced in accordance with the State or Territory sentencing legislation that applied where the offender was convicted. Between 1978 and 1989 (when the legislation inserting Pt IB into the Act was introduced), the need for reform in the area of Commonwealth sentencing was the subject of detailed consideration by the Australian Law Reform Commission (the ALRC). It published a series of discussion papers and reports[386] in the course of its inquiry into the sentencing of Commonwealth offenders, culminating in the publication of ALRC Report 44, *Sentencing*, in August 1988. This report made a number of recommendations about the proper approach to the sentencing of Commonwealth offenders. A strong underlying theme of the various reports, which ultimately influenced the Commission's recommendations in ALRC Report 44, was the need for consistency of approach in the sentencing of these offenders.[387]

When the Crimes Legislation Amendment Bill (No 2) 1989 was introduced, the government recognised that it had been government policy in the past to "maintain intrastate parity of treatment for Federal offenders".[388] However, the separate Commonwealth sentencing regime introduced in Pt IB was intended to: "ensure that federal offenders are not disadvantaged because of the complex legal problems that may arise in a Federal system";[389] and to provide a Commonwealth sentencing regime that was fair and certain.[390] Part IB has been the subject of judicial criticism since its enactment, not only on the basis of the purported complexity of the provisions,[391] but also because there is a perception that the provisions have done little to implement the policy of uniformity of treatment of Commonwealth offenders as between themselves.[392] Some of the strongest criticism occurred shortly after Pt IB was enacted.[393]

Although Pt IB perpetuates a degree of inconsistency in the treatment of Commonwealth offenders, the enactment of the Part was clearly a significant and deliberate effort to promote consistency of treatment at a fundamental level by enacting the general sentencing principles to be applied when sentencing any Commonwealth offender.

#### 5.2.2.2 Areas of inconsistency in Pt IB

Part IB permits inconsistency in the treatment of Commonwealth offenders in two ways. First, s 20AB makes additional sentencing options under State or Territory law available to a court sentencing a Commonwealth offender, such as community service orders, intensive correction orders, and other orders as prescribed by the regulations.[394] As a number of orders are only available in some States and Territories, Commonwealth offenders may receive different sentences depending on the State or Territory court in which the matter is dealt with. For example, home detention is an available sentencing option for Commonwealth offenders sentenced in NSW, the Northern Territory and the Australian Capital Territory, but not in the other States (it was an available option in Victoria until January 2012).

386 See, for example, the ALRC discussion papers and reports referred to above n 2.

387 ALRC Report 44, above n 2, pp liv (Summary of Recommendations), 14, 16ff and 147ff.

388 Second Reading Speech, Crimes Legislation Amendment Bill (No 2) 1989, Cth, House of Representatives, *Hansard*, 5 October 1989, p 1602.

389 ibid p 1603.

390 ibid.

391 As to which see, for example, *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 372; *R v Bibaoui* [1997] 2 VR 600.

392 See *DPP (Cth) v El Karhani*, ibid, at 375, 387; *Putland v The Queen* (2004) 218 CLR 174 at [20]–[22] (Gleeson CJ). In *El Karhani*, the NSWCCA expressed the view that the primary impetus for the provisions was to respond to issues created as a consequence of the enactment in NSW of the *Sentencing Act* 1989: at 375.

393 ALRC Report 103, above n 2, p 107, at [2.13].

394 Prescribed orders are set out in the *Crimes Regulations* 1990 (Cth), reg 6.

In the context of serious drug offences, the availability, or otherwise, of these additional sentencing options may have been of less significance given that historically these offences typically attracted full-time sentences of imprisonment.[395] However, as there is now a greater diversity in the nature and seriousness of drug offences with a corresponding greater range in the available maximum penalties, there is increased scope for unfairness in the treatment of some offenders where there is a broader range of sentencing options available in one place than another.[396] Depending on the seriousness of the particular offence, this might either lead to more harsh or more lenient sentences in those places where a broad range of non-custodial options are not available.

Secondly, inconsistency also arises in connection with the *treatment* of a particular offender once the uniform sentencing principles have been considered and an appropriate sentence has been determined. For example, s 16E(1) of the *Crimes Act* provides that the laws of a State or Territory relating to the commencement of sentences apply to Commonwealth offenders in the same way as they apply to State or Territory offenders being sentenced for State or Territory offences. In NSW, a sentencing judge may specify a sentence commencement date as a date before the day on which the sentence was imposed[397] and, in fixing that date, the court is required to take into account any time for which the offender has been held in custody in respect of the offence.[398] The position is different in Victoria and Queensland where a sentence commences on the day it is imposed.[399] In those States, a sentencing judge is informed of the amount of time already served[400] and makes a declaration to that effect.[401] This type of practical inconsistency has minimal, if any, impact on the sentence ultimately imposed because any time already served is still taken into account and reduced at an administrative level by corrections authorities.[402]

Notwithstanding the initial criticism of Pt IB, it is apparent that the scope for inconsistency arising from the *Crimes Act* is reasonably narrow, particularly when it comes to the imposition of an appropriate sentence. However, in 2006 the ALRC again reported on aspects of inconsistency with respect to Pt IB. It recommended that the laws related to Commonwealth sentencing principles and federal sentencing administration be consolidated into the one Act.[403]

395 For example, of the 387 offenders dealt with in NSW for drug offences against the *Customs Act* for the period 1 January 1992 until 31 December 1997, 359 (92.8%) were sentenced to a term of full-time imprisonment: Potas and Poletti, above n 208, p 15. A significant proportion of the offenders dealt with during the period of this study, 92.0% were also sentenced to a term of imprisonment.

396 The number of matters dealt with in respect of those offences in Pt 9.1 where the maximum penalty is less than 25 years imprisonment is still quite small, although there was a marked increase in the incidence of such offences in 2011 and 2012: see pp 80–82. However, it is apparent that they are the offences where sentences of full-time imprisonment are less likely: see pp 87–88.

397 *Crimes (Sentencing Procedure) Act*, s 47(2).

398 ibid s 47(3). The following State and Territory sentencing laws are to similar effect: *Sentencing Act* 1995 (WA), s 87 (although the power is discretionary); *Sentencing Act* 1997 (Tas), s 16; *Criminal Law (Sentencing) Act* 1988 (SA), s 30 (although the power is discretionary); *Sentencing Act* (NT), s 63(5) (although the power is discretionary); *Crimes (Sentencing) Act* 2005 (ACT), s 63(2).

399 *Sentencing Act* 1991 (Vic), s 17; *Penalties and Sentences Act* 1992 (Qld), s 154.

400 *Sentencing Act* 1991 (Vic), s 18(1); *Penalties and Sentences Act* 1992 (Qld), s 159A.

401 *Sentencing Act* 1991 (Vic), s 18(4).

402 Other provisions in Pt IB which pick up relevant State or Territory laws include: s 18(2) (imprisonment in particular types of prison); s 19A (detention in State or Territory prisons and movement between them); s 19AA (application of State or Territory provisions related to remissions and reductions of sentences to Cth offenders); and s 19AZD (leave of absence and procedure for pre-release of a prisoner).

403 ALRC Report 103, above n 2, at [2.10]–[2.12]; and see Recommendation 2-1.

## 5.3 Achieving sentencing consistency in practice

In *Hili*, the High Court stated that consistency in sentencing was demonstrated by the consistent application of the relevant legal principles and not by "numerical equivalence".[404] This requires a sentencing judge, at least in the Commonwealth context, to:

- apply the relevant statutory provisions, in this case Pt IB, "without being distracted or influenced by other and different provisions that would be engaged if the offender concerned were not a federal offender"[405]
- have regard to what has been done in other cases.[406]

A range of information is available to a court to assist in determining an appropriate sentence. A court may have regard to:

- intermediate appellate decisions which consider whether the relevant sentencing principles have been properly applied in the context of a given case
- statistics showing the range of penalties imposed for a given offence at a particular point in time
- comparable cases.

The usefulness and perceived limitations of statistics and comparable cases is discussed further below.

### 5.3.1 The principle of comity

There is only one common law in Australia.[407] Courts apply the principle of comity in the application of the common law. This requires judges to be aware of the interpretation of Commonwealth sentencing principles by interstate appellate courts and to not depart from those decisions unless they are plainly wrong.[408] In *R v Gent*,[409] Johnson J expressly referred to this stating that when construing and applying Commonwealth legislation, the court applied "a rule of comity with respect to decisions of intermediate appellate courts of other States dealing with the same legislation".[410] The comity principle was alluded to by Maxwell P in *Nguyen v R* when he acknowledged that the summary of sentencing principles for serious drug offenders appearing in the NSWCCA decision of *R v Nguyen*; *R v Pham*[411] "substantially accord[ed] with the course of decisions in Victoria".[412]

Intermediate appellate courts around Australia have repeatedly recognised the need for national consistency when sentencing Commonwealth offenders for serious drug offences.[413] In the Queensland decision of *R v Tran*,[414] Atkinson J examined the need for consistency in the context of sentences imposed on offenders who had imported heroin. Her Honour stated that to ensure consistency around Australia, it was necessary to consider the sentences imposed in other parts of the country.[415] Her Honour went on to say:

404 *Hili v The Queen* (2010) 242 CLR 520 at [48].

405 ibid at [50]; and see also [49], [51]–[53].

406 ibid at [53].

407 *Lipohar v The Queen* (1999) 200 CLR 485 at [45]–[46].

408 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].

409 (2005) 162 A Crim R 29 (involving the importation and possession of child pornography).

410 ibid at [29].

411 *R v Nguyen*; *R v Pham* (2010) 205 A Crim R 106 at [72].

412 (2011) 31 VR 673 at [33].

413 *The Queen v Olbrich* (1999) 199 CLR 270 at [14]; *Wong v The Queen* (2001) 207 CLR 584 at [6]; *R v Wright* (2003) 138 A Crim R 390 at [55]; *R v Tran* (2007) 172 A Crim R 436 at [31]–[33]; *R v Mokoena* [2009] 2 Qd R 351 at [12]; *Bertilone v R* (2009) 197 A Crim R 78 at [34].

414 (2007) 172 A Crim R 436.

415 ibid at [31].

> "It would seem fair that the sentence imposed on an offender for a federal offence should not depend on which side of a State border he or she happens to offend or, to use an example apposite to drug importation, on which bank of the Tweed (or the Murray) he or she happens to land.
>
> … State courts should, in my view, take into account sentences imposed by other courts within the Commonwealth with regard to offences against Commonwealth legislation."[416]

## 5.3.2 Tools for achieving consistency

### 5.3.2.1 Commonwealth Sentencing Database (CSD)

The Commonwealth Sentencing Database (the CSD) was launched in February 2008 and was a joint initiative of the Judicial Commission of NSW, the National Judicial College of Australia and the DPP (Cth).

The benefits of a Commonwealth sentencing information system, as a means of providing information about the sentences imposed on Commonwealth offenders, was identified as early as 1988 when the ALRC published ALRC Report 44, *Sentencing*. This report recommended a Commonwealth sentencing information system to ensure consistency of approach.[417] However, it was not until after 2006 when ALRC Report 103, *Same crime, same time: sentencing of federal offenders,* was published that the CSD was finally developed.

The CSD provides statistical information about the penalties imposed on offenders convicted of Commonwealth offences following prosecutions conducted by the DPP (Cth). A significant advantage of the CSD statistics for Commonwealth serious drug offences is that they can be sorted by offence, and a user is not limited only to searching for cases relating to a particular drug. This is an advantage because the drug type should not matter when the maximum penalties are the same.

Following the criticisms of the use of statistics in respect of Commonwealth offenders by the High Court in *Hili*, the CSD was modified to also allow users access to appellate judgments and/or first instance judgments (if available) which lie behind the statistics.

The enhancement was made to address the criticism in *Hili* that bare statistics could not tell the sentencing judge anything about why a sentence was fixed in the way it was.[418]

### 5.3.2.2 The limitations of statistics

Statistics, as a tool for providing some insight into the sentencing ranges for different drug offences, have been described as "opaque".[419] This is because of the variety of matters affecting the length of a sentence, such as role and cooperation with law enforcement authorities, which cannot be discerned from the statistics themselves.[420] It has been observed that statistics can provide some certainty as to the outcome in a particular case and that this is a valid form of consistency.[421] However, it is apparent from recent pronouncements by the High Court that in Australia, the use of statistical sentencing information has only a limited role to play in determining the length of a sentence.

416 ibid at [32]–[33].

417 ALRC Report 44, above n 2, pp liv, 148, at [268].

418 (2010) 242 CLR 520 at [18]. See also *Wong v The Queen* (2001) 207 CLR 584 at [59]; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [304].

419 *Putland v The Queen* (2004) 218 CLR 174 at [11]; *R v Nikolovska* (2010) 209 A Crim R 218 at [70].

420 *R v Nikolovska*, ibid, at [70] (Kirby J; Beazley JA and Johnson J agreeing).

421 S Krasnostein and A Frieberg, "Pursuing consistency in an individualistic sentencing framework: if you know where you're going, how do you know when you've got there?" (2013) 76(1) *Law and Contemporary Problems* 265 at 276.

In *Hili*, the High Court was highly critical of the use of statistical tables as a sentencing tool, emphasising that consistency in sentencing cannot be demonstrated by numerical equivalence because:

> "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 … 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."[422]

Observations to similar effect about the limitations of sentencing statistics, specifically in relation to Commonwealth serious drug offences, had previously been made by Gaudron, Gummow and Hayne JJ in *Wong v The Queen*. Their Honours said that:

> "[R]ecording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told *why* those sentences were fixed as they were."[423] [Emphasis in original.]

The majority reflected on the variety of factors which are relevant when sentencing for drug importation offences. These factors fall into two groups. The first group comprises two factors which were said to apply in every drug case: the difficulty of detecting the offences, which the majority said meant that general deterrence should be given primary consideration; and the serious consequences of offences which required "stern punishment".[424] The second group comprises factors which are particular to each case, such as the quantity of the drug, the offender's knowledge of what has been imported, his or her role and the reward he or she hoped to gain.[425] Given that variety of factors, the majority stated that:

> "To focus on the *result* of the sentencing task, to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice."[426] [Emphasis in original.]

Although these strong criticisms of the use of statistics might lead to a conclusion that they play little or no role in the sentencing process at least for Commonwealth offenders, it is apparent from *Hili*, and from the most recent High Court pronouncement about sentencing such offenders, *Barbaro v The Queen*, that that is not the case.

The majority in *Barbaro* rejected the proposition that the prosecution had a duty to provide a numerical range of sentences for the assistance of a sentencing judge and observed that such conduct was to be "distinguished from the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed".[427]

In both *Hili* and *Barbaro*, the High Court endorsed the observations of Simpson J in *DPP (Cth) v De La Rosa* as to the proper use of information about the sentences passed in previous cases.[428] In *De La Rosa*, Simpson J said sentencing patterns were useful because they were the result of the "application of the accumulated experience and wisdom of first instance judges and of appellate courts".[429] However, while

422 (2010) 242 CLR 520 at [48].

423 (2001) 207 CLR 584 at [59].

424 ibid at [64].

425 ibid.

426 ibid at [65].

427 (2014) 88 ALJR 372 at [40].

428 *Hili v The Queen* (2010) 242 CLR 520 at [54]; *Barbaro v The Queen* (2014) 88 ALJR 372 at [41].

429 (2010) 79 NSWLR 1 at [303].

her Honour acknowledged that a history of sentencing could establish the range of sentences imposed, it did not establish that either the range or the upper and lower limits of sentences were correct.[430] Further, Simpson J said:

> "… it would be a mistake to regard an established range as fixing the boundaries within which future judges must, or even ought, to sentence … The point I am making is that the ranges of sentences actually imposed, while illuminating, are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence".[431]

Given the approach taken by the High Court in both *Hili* and *Barbaro*, the "proper and ordinary use of sentencing statistics"[432] must be limited to showing the history of the sentences imposed for a particular offence at a given point in time.

#### 5.3.2.3 Comparable cases

It is common for the Crown and the defence to provide a sentencing judge with comparable cases. These may be either appellate decisions or first instance judgments. They are cases that a particular party has determined have a number of features in common with the matter then before the court, including common features related to the seriousness of the particular offence and the offender's subjective features.

Given that the principles that apply when an offender is sentenced for a Commonwealth serious drug offence do not differentiate between the types of offences, the Crown and the defence do not need to limit the cases which they refer to the sentencing judge to cases involving the particular offence before the court. Further, as there is no basis in principle for treating one drug differently from another, relevant comparative cases are not limited to those involving the same type of drug.[433] This is reflected in the approach the Crown took to the selection of cases it referred to the NSWCCA in *Maldonado v R*.[434] That case involved an appeal against the sentences imposed in respect of Code offences related to the manufacture and trafficking in a commercial quantity of cocaine. The court accepted that although the cases relied on by the Crown involved the importation or conspiracy to import, or the possession or attempted possession of commercial quantities of heroin or cocaine, they bore "some relationship to the applicant's offences in so far as an amount in excess of 2 kg of the relevant drug was imported in each case, and was in various stages of distribution".[435] Later, when dealing with the appeal as it related to the trafficking offence, Latham J observed that the cases used by the Crown:

> "… are but a rough guide to the range of sentences imposed for Commonwealth offences dealing with quantities of cocaine between 2 kgs and 10 kgs. Direct comparison with sentences imposed for trafficking in a commercial quantity of cocaine under the [Code] cannot be made, owing to the absence of reported cases. The Crown did not refer the Court to particular cases, either in NSW or elsewhere, in answer to the applicant's argument … Notwithstanding the limitation on the above analysis, the range of sentences imposed in the cases to which the applicant referred are entirely consistent with the sentence imposed on the applicant …"[436]

430 ibid.

431 ibid at [304].

432 *Barbaro v The Queen* (2014) 88 ALJR 372 at [40].

433 *Adams v The Queen* (2008) 234 CLR 143 at [10]–[11].

434 [2009] NSWCCA 189.

435 ibid at [44].

436 ibid at [54].

In 2010 in *R v Cheung*,[437] Simpson J also accepted that it was appropriate to use sentences imposed in respect of the much longer established drug importation offences with the same maximum penalty as relevant comparators for the newer domestic offences in the Code,[438] and in that case, the selection of cases provided by the Crown was capable of showing that the relevant sentences fell "somewhat below existing sentencing patterns".[439] However, her Honour somewhat curiously took the view that a collection of comparable cases could only establish a level at which sentencing could be shown to be manifestly excessive, but not one that was manifestly inadequate.[440] Why this would be the case was not explained, but in any event appears at odds with the subsequent approach taken by the High Court in *Hili* where it was accepted that a limited number of comparable cases (in that case only two) *could* demonstrate the inadequacy of a particular sentence.[441]

If no relevant distinction is to be drawn between the penalties for Commonwealth importation and possession offences, then there is no reason for a distinction to be drawn with respect to Commonwealth manufacturing offences or, as already suggested, with respect to any Commonwealth serious drug offence with the same maximum penalty. In one sense, all that any particular offence shows is the nature of the activity engaged in by an offender, and in most cases reflects aspects of what occurs in an importation and drug distribution chain. If that is correct, where there are relevantly similar features involved in the offending such as equal roles, drug quantity, the state of the offender's knowledge about drug quantity, and comparable features related to an offender's subjective case, Commonwealth cases could be the only ones placed before the sentencing judge.[442] The established nature of those offences means that it is therefore possible to demonstrate a history of sentences imposed, even in respect of offences in the Code which are new, such as the manufacturing offences, and in respect of which there may be relatively few State comparative cases in any event. The plurality in *Hili* recognised that comparable cases are useful in a particular sentencing exercise.[443] It is also apparent from *Hili*, where the court found that there were only two cases that were relevantly comparable, that the number of these cases may be relatively small and might, in an appropriate case, include first instance judgments.

Whether or not first instance decisions will be useful as comparative cases, particularly with respect to Commonwealth serious drug offences which are regularly considered by appellate courts, will depend on the particular case. The High Court emphasised in *Hili* that consistency is achieved by the consistent application of sentencing principles through the work of intermediate appellate courts of appeal.[444] In *Heydarkhani v R*,[445] which concerned a sentence imposed for a people smuggling offence, the Western Australian Court of Appeal said that, as a result of those observations in *Hili*, first instance decisions were of limited assistance.[446] An exchange between Robert Bromwich SC, the Commonwealth Director of Public Prosecutions, and Hayne J during the hearing of the *Barbaro* appeal suggests that while first instance decisions are not irrelevant, their usefulness may be limited where there is a substantial body of appellate law which reflects a range of sentences imposed in respect of particular offences, such as is the case in respect of Commonwealth serious drug offences.[447]

437 (2010) 203 A Crim R 398.

438 ibid at [129]–[130].

439 ibid at [141].

440 ibid at [149].

441 (2010) 242 CLR 520 at [64]–[66].

442 *R v Cheung* (2010) 203 A Crim R 398 at [131].

443 (2010) 242 CLR 520 at [53], [64].

444 ibid at [56]–[57].

445 [2014] WASCA 52.

446 ibid at [42]. See observations to similar effect in *Godfrey v R* [2013] WASCA 247 at [63].

447 [2013] HCA Trans 296 at pp 50–51, lines 2190–2240.

### *Parity principle and co-offenders*

Using comparable cases has special significance when multiple offenders are to be sentenced for their involvement in respect of a single drug enterprise and is one occasion where first instance decisions are important in guiding the judge in his or her sentencing task.

The parity principle operates in respect of co-offenders and is an aspect of the principle of equal justice.[448] The consistency required by the operation of that principle focuses on the particular case because it is directed towards the punishment of offenders involved in the same drug enterprise.[449] In *Green v The Queen*,[450] the High Court considered the application of the parity principle in respect of offenders who had been charged in connection with their involvement in a drug supply network. The court concluded that the principles in *Lowe v The Queen*[451] and *Postiglione v The Queen*,[452] which concerned the application of the parity principle to persons charged with the same offence arising from the same drug enterprise, extends to offenders charged in respect of the same enterprise regardless of whether they were charged with the same offence.[453]

The court accepted that while, as Campbell JA had observed in *Jimmy v R*,[454] there were limitations to the operation of the parity principle when offenders in the same enterprise were charged with different offences, that did not prevent the principle from applying.[455] Those limitations include:

- The principle cannot overcome the differences in sentence arising from a prosecutorial decision about whether to charge a person at all, or with what offence to charge a person.
- If the principle is used to compare the sentences of participants in the same criminal enterprise charged with different offences, there can be significant practical difficulties. Those difficulties may increase where the difference between the crimes charged becomes greater, and in some circumstances can become so great that in the circumstances of a particular case a judge cannot apply it, or cannot see that there is any justifiable sense of grievance arising from the discrepancy.
- The principle cannot overcome the differences in sentence that arise where one of the co-offenders has been given a sentence that is unjustifiably low.[456]

In practice, it is recognised that the types of issues that need to be addressed as a consequence of the operation of the parity principle can be avoided if co-offenders are sentenced at the same time by the same judge.[457] However, there are practical issues associated with managing this when many offenders are to be dealt with as a consequence of a single investigation. Decisions by co-offenders about whether to enter a plea of guilty or proceed to trial, or to provide assistance to law enforcement authorities, will affect the progress of their cases before the court. Notwithstanding that these issues may result in a degree of fragmentation, when separate sentencing decisions are available for multiple offenders arising out of their involvement in a single enterprise, sentencing consistency could ordinarily be achieved by referring the court to those judgments. This is necessarily subject to a requirement that the available judgments are sufficient to demonstrate that the sentences imposed on each co-offender reflect the degree of criminality or culpability involved. If this cannot be demonstrated, then clearly those judgments would need to be supplemented by other, unrelated but comparable, decisions.

448 *Green v The Queen* (2011) 244 CLR 462 at [28]; *Postiglione v The Queen* (1997) 189 CLR 295 at 301.

449 *Green v The Queen*, ibid, at [29].

450 ibid.

451 (1984) 154 CLR 606.

452 (1997) 189 CLR 295.

453 (2011) 244 CLR 462 at [30].

454 (2010) 77 NSWLR 540 at [136]; see also [246] (Howie J).

455 (2011) 244 CLR 462 at [30].

456 *Jimmy v R* (2010) 77 NSWLR 540 at [203].

457 *Postiglione v The Queen* (1997) 189 CLR 295 at 320 (Gummow J); *Lowe v The Queen* (1984) 154 CLR 606 at 617 (Brennan J) and 622 (Dawson J). The desirability of co-offenders being sentenced by the same judge has been repeatedly emphasised by the NSWCCA. See, for example, *Dwayhi v R* (2011) 205 A Crim R 274 at [32]–[46]; *R v Nguyen*; *R v Pham* (2010) 205 A Crim R 106 at [13].

*Comparative case tables or schedules*

The use of grid sentences in the United States[458] and the issuing of guidelines in the United Kingdom[459] are methods those countries have used as a means of achieving consistency of outcome when sentencing offenders for drug offences. Neither approach is currently used in Australia at the Commonwealth level.

The use of quantitative guidelines for Commonwealth serious drug offences was rejected by the High Court in *Wong*.[460] The court concluded that the approach of the NSWCCA,[461] where the guideline formulated for sentencing drug importation offences focused primarily on the quantity of the drug involved, was fundamentally flawed because it elevated one sentencing factor to be of greater significance than others.[462]

Notwithstanding the High Court's rejection of the guidelines in *Wong*, the NSWCCA subsequently held that the guidelines *were* useful as a guide to the sentences imposed before the repeal of s 16G of the *Crimes Act*.[463] In *Tyler v R*, Simpson J observed that the range of sentences proposed in the guidelines was available as "a useful guide".[464] However, subsequently in *Cheung*, her Honour rejected the Crown's submission to that effect.[465]

Perhaps because the number of serious drug offences is relatively high, there are a number of cases where detailed schedules summarising the features of particular cases have been incorporated into appellate judgments which have then been used in later cases. The purpose of these types of summaries is as "a guide or check" against which the sentence in a given case is examined.[466] The following are some examples of Commonwealth serious drug cases where such an exercise has been undertaken:

- In *R v Spiteri*[467] and *R v Kevenaar*,[468] Hulme J summarised a number of cases involving the importation and possession of commercial and marketable quantities of MDMA to determine the range of sentences imposed for offenders with different roles. The timing of these cases, 1999 and 2004, coincided with an increase in the number of such cases being dealt with by the courts and, in respect of *Kevenaar*, was intended to reflect the range of sentences imposed since the repeal of s 16G of the *Crimes Act*.
- *R v Lee*[469] annexed a summary of cases from around Australia for offences involving the importation or possession of commercial quantities of cocaine and heroin. A summary of similar cases had previously been incorporated into the judgment of the court in *Law v R*.[470] The schedule in *Lee* was intended to update the position since *Law*.[471]

458 United States Sentencing Commission, *2013 Guidelines manual*, Ch 2, Pt D, "Offenses involving drugs and narco-terrorism", at <www.ussc.gov/Guidelines/2013_Guidelines/Manual_HTML/2d1_1.htm>, accessed 15 April 2014.

459 Sentencing Council (UK), *Drug offences: definitive guideline*, 2012, at <http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_final_(web).pdf>, accessed 15 April 2014.

460 (2001) 207 CLR 584 at [87] (Gaudron, Gummow and Hayne JJ).

461 *R v Wong and Leung* (1999) 48 NSWLR 340 at [142].

462 (2001) 207 CLR 584 at [68]–[70], [87].

463 *R v Mas Rivadavia* (2004) 61 NSWLR 63 at [65]–[66]. See also *R v Taru* [2002] NSWCCA 391 at [12]; *R v Bezan* (2004) 147 A Crim R 430 at [34]–[36]; *R v Ogochukwu* [2004] NSWCCA 473 at [28]; *R v Paliwala* (2005) 153 A Crim R 451 at [27]; *R v SC* [2008] NSWCCA 29 at [27]; *R v Chea* [2008] NSWCCA 78 at [40]. These cases were cited to by Johnson J in *R v Nguyen*; *R v Pham* (2010) 205 A Crim R 106 at [72] to support the proposition that the range remained useful.

464 (2007) 173 A Crim R 458 at [136].

465 (2010) 203 A Crim R 398 at [89]–[91]. See also the observations of Kirby J in *Chan v R* [2010] NSWCCA 153 at [114] which reflect an approach similar to that adopted by Simpson J in *Cheung*.

466 *R v To* (2007) 172 A Crim R 121 at [112]; *R v Kevenaar* (2004) 148 A Crim R 155 at [103].

467 [1999] NSWCCA 3.

468 (2004) 148 A Crim R 155.

469 [2007] NSWCCA 234.

470 [2006] NSWCCA 100. Interestingly, McClellan CJ at CL observed at [60] that although the schedule contained a number of cases from interstate, most were finalised in NSW.

471 *R v Lee* [2007] NSWCCA 234 at [36].

- A summary of cases involving significant importations of MDMA by people whose roles were more culpable than those of mere couriers was included in *R v To*[472] in order to determine the range of sentences imposed for such offenders. The offences committed by the offenders in the summary included possession, importation and being knowingly concerned in the importation of MDMA.
- In *De La Rosa*,[473] McClellan CJ at CL summarised a large number of cases from around Australia involving the importation of drugs and grouped them in categories to demonstrate the range of sentences for matters with particular common features. Subsequently in Victoria in *Nguyen v R*, Maxwell P commented on the usefulness of this summary and, in turn, annexed a summary of those cases said to be of utility in determining the appeals in that case.[474]
- In *DPP (Cth) v Maxwell*, the court produced a table of cases based on information provided by the DPP (Cth) to the court at first instance to demonstrate the range of sentences imposed in matters involving the importation or possession of GBL.[475]

Such schedules can be useful as a means of promoting consistency in sentencing at the national level because they can inform a court of national sentencing practice.[476] In NSW in *De La Rosa*, McClellan CJ at CL emphasised the importance of national consistency, and said that it was of limited benefit for a NSW court to confine its consideration to NSW cases when it is considering Commonwealth offences.[477] Given the majority of cases are dealt with in NSW, an observation the Chief Judge had previously made in *Law v R*,[478] it is difficult to accept that the prosecution, or defence, should refer a court to interstate cases only for the sake of showing the types of sentences being imposed elsewhere, especially since the relevant consistency is that concerning the application of principle and not numerical equivalence. The true test, as the High Court emphasised in *Hili*, is whether the particular case is comparable with the one then before the court.

To assist in determining the Crown appeal in that matter, McClellan CJ at CL prepared a schedule of cases, comprised of first instance and appellate cases from around Australia referred to by both parties, and others that were subsequently identified by his Honour. The cases were grouped according to whether they involved the importation of a commercial[479] or marketable quantity of drugs.[480] Each group was broken down further according to the quantity of drugs involved in the particular offence and the role of the offenders. McClellan CJ at CL summarised his analysis of the cases in the following schedule:[481]

472 (2007) 172 A Crim R 121 at [112]–[116].

473 (2010) 79 NSWLR 1 at [194]–[196].

474 (2011) 31 VR 673 at [31], [37].

475 (2013) 228 A Crim R 218.

476 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [193].

477 ibid.

478 [2006] NSWCCA 100 at [60].

479 (2010) 79 NSWLR 1 at [207]–[215].

480 ibid at [216]–[223].

481 ibid at [209], [211], [213], [215], [218], [221], [223]–[224].

**Table 5.1: Schedule of cases in De La Rosa**

| Import commercial quantity: Customs Act, s 233B; Code, s 307.1 | | Head sentence | Non-parole period |
|---|---|---|---|
| **Group 1** | High quantity (tens or hundreds of kilograms); high value (tens of millions of dollars); large reward (hundreds of thousands of dollars) although finding of reward not required; not guilty plea in half of cases; no assistance; no remorse; mastermind, principal or part of organising committee; high degree of responsibility | 25 yrs – life | 8 yrs, 6 mths – 30 yrs |
| **Group 2** | High quantity; high value; guilty plea; principal, member of upper management or "essential" role with moderate to very high level of responsibility; reward in tens of thousands of dollars although finding of reward not indicative | 18 – 24 yrs, 6 mths | 10 yrs – 16 yrs |
| **Group 3** | Quantity generally below 7 kg; mid-range role; discount for assistance, cooperation; plea not indicative | 8 – 15 yrs | 4 yrs – 11 yrs |
| **Group 4** | No prior convictions; good antecedents; quantity not indicative; plea not indicative although discount provided for early plea; role not indicative although generally part of syndicate | 6 yrs, 3 mths – 8 yrs | 3 yrs – 4 yrs, 6 mths |
| **Import trafficable/marketable quantity: Customs Act, s 233B; Code, s 307.2** | | | |
| **Group 1** | Reward in the thousands of dollars; discount for assistance; subordinate role (where "mere courier", quantity high) | 9 – 18 yrs | 4 – 10 yrs |
| **Group 2** | Reward in the thousands of dollars; discount for assistance; nature and timing of plea highly relevant; quantity not indicative; courier or low level importer; some successful Crown appeals | 6 – 9 yrs | 3 – 5 yrs |
| **Group 3** | Lower quantity; monetary reward or relief of debt; discount for early guilty plea; mere courier role; adverse personal circumstances | 3 yrs, 9 mths 6 yrs | 2 – 4 yrs, 3 mths |

In *Nguyen v R*, Maxwell P pointed out that the schedule in *De La Rosa* provided the "greatest assistance"[482] because it described current sentencing practice and was therefore conducive to consistency at the national level.[483]

*Problems associated with the use of sentencing schedules*

It is apparent that summaries such as that prepared by the Chief Judge in *De La Rosa* are helpful in subsequent cases. Clearly such summaries assist by providing an insight into the reasoning behind some of the cases which form the basis of the sentencing ranges as demonstrated by the statistics.

However, such schedules also have significant limitations. They can only ever represent a snapshot of the sentences imposed at a particular point in time. Simpson J made this point clearly in *De La Rosa*[484] and the correctness of her Honour's approach has been endorsed by the High Court twice: first in *Hili*[485] and then subsequently in *Barbaro*. In *Barbaro* that occurred in the context of an argument about whether a prosecutor's duty to the court on sentence extended to the provision of a numerical range said to represent the bounds of sentencing discretion in a given case.[486]

Another limitation may arise from what is or is not included in a sentencing schedule. In practice, such schedules have commonly been offence and/or drug-type based. For instance, in the schedule prepared by McClellan CJ at CL in *De La Rosa*, his Honour limited his consideration of cases to those involving

482 (2011) 31 VR 673 at [37].

483 ibid at [36]–[37]. A Bench of two judges decided this appeal. Note that while Redlich JA also found the summary of cases useful, at [104], he did not endorse the President's proposition at [34] concerning the summary of relevant sentencing principles set out by Johnson J in *R v Ngyuen*; *R v Pham* (2010) 205 A Crim R 106 at [109]: at [106].

484 (2010) 79 NSWLR 1 at [303]–[305].

485 (2010) 242 CLR 520 at [54].

486 (2014) 88 ALJR 372 at [41].

importation offences under the relevant Code provisions and the previous offence in s 233B(1) of the *Customs Act*.[487] Importation offences are the most common Commonwealth serious drug offences and limiting the discussion to these usefully confined what was already a considerable research task. His Honour also referred to the sentencing patterns for other Commonwealth serious drug offences carrying the same maximum penalty, but it is unclear whether this was a reference to other decisions or a reference to the sentencing statistics for those offences.[488] It is certainly arguable, however, that comparable cases involving other serious drug offences which carry the same maximum penalty, such as a possession offence, may also be included in a schedule of this kind. As Spigelman CJ said in *El Ghourani v R*, there is no reason to treat offences relating to the possession of border controlled drugs as any less serious than importation offences, given the maximum penalty is the same.[489] Each offence in Pt 9.1 is directed towards particular conduct reflecting a different aspect of the commercial business of trading in drugs. It is apparent from a consideration of the cases that the principles related to, for example, the approach to be taken to determining an offender's role and the relevance of the quantity the subject of the charge, are applied identically irrespective of whether the offence involves importation, possession, trafficking or manufacturing. So much is apparent from the decision in *El Ghourani* itself. Further, as the High Court made clear in *Adams v The Queen*, under the legislative scheme set out in Pt 9.1 there is no basis for "harm-based" sentencing which would treat one drug differently from another.[490] Accordingly, the creation of schedules primarily based on offence and/or drug type will not always result in the desired sentencing consistency, especially when cases involve substantial commercial quantities of a particular drug. For instance, if a case involved the importation of a commercial quantity of GBL and its features were relevantly comparable with another case involving a conspiracy to import cocaine or methamphetamine, or a conspiracy to traffic in heroin, there is no reason in principle why the particular sentencing judge could not have regard to these other cases.

Another issue with schedules and the grouping of matters into categories according to relevant sentencing factors, such as McClellan CJ at CL did in *De La Rosa*, is the use to which those summaries are put subsequently. In *De La Rosa*, his Honour was at pains to point out that the summary he had prepared was not a guideline, stating that "it is plain that only those decisions that are relevantly comparable to the facts of a particular case are of significance when sentencing an individual offender".[491]

However, in NSW, there have been cases where the prosecution or the defence have sought to use the categories in *De La Rosa* to show that a sentence at first instance was either manifestly excessive or manifestly inadequate. The NSWCCA has been quick to reject any use of the categories in this way. For example, in *R v Holland*,[492] McClellan CJ at CL emphasised the individual nature of each sentencing exercise. His Honour said it would be wrong to sentence an offender by seeking to fit him or her into a category and then impose a sentence thought to be appropriate to an offence with characteristics falling into that category. In explaining why he distilled the categories in *De La Rosa*, his Honour said:

> "When preparing my reasons in *De La Rosa* it became increasingly apparent that there were many significant decisions with respect to the sentence for individual offenders which had never been gathered together and analysed. The number is such that to merely list them without further classification was likely to be of modest assistance to practitioners and judges required to sentence future offenders. As I said in my reasons in *De La Rosa*, so as to assist others to readily access the information I grouped the decisions by reference to common characteristics, so far as they could be identified."[493]

487 (2010) 79 NSWLR 1 at [187], [197].

488 ibid at [197].

489 (2009) 195 A Crim R 208 at [20]–[21].

490 (2008) 234 CLR 143 at [10]–[11].

491 (2010) 79 NSWLR 1 at [203].

492 (2011) 205 A Crim R 429.

493 ibid at [3].

Schmidt J, who wrote the principal judgment in *Holland*, reiterated that *De La Rosa* was not a guideline judgment, but that it "unquestionably provides a very useful tool for a sentencing judge … as a part of the instinctive synthesis undertaken when a sentence is determined"[494] because it assists in ensuring that a particular sentence is not manifestly excessive or inadequate. Her Honour was quick to observe though that the fact a particular sentence fell outside one of the ranges identified in *De La Rosa* was not, of itself, a basis upon which error in the exercise of the sentencing discretion may be identified.[495] Her Honour said a "conclusion that a particular sentence is manifestly inadequate or excessive must rest on a more particular identification of error than that".[496] The NSWCCA has made observations to similar effect in a number of cases since.[497] There appear to have been no attempts to use *De La Rosa* as a guideline anywhere in Australia, although clearly it is regarded as being of assistance because it illustrates the types of sentences imposed.

### *Cases under commensurate State and Territory offence provisions*

The creation of Commonwealth offences for conduct previously only dealt with at the State or Territory level raises the issue of whether it is appropriate to use the cases involving established offences as comparative cases for the newer Commonwealth offences. Whether such offences can be used in this way will depend on a range of factors including whether the elements of the offences and the maximum penalties are substantially the same. This was the subject of debate in NSW in respect of Commonwealth manufacturing offences in the Code in *R v Cheung*.[498]

Differences between the Commonwealth and the commensurate State and Territory offences include:

- the language used to define terms and describe elements of the offences
- the quantities of drugs which comprise the threshold quantities (where applicable) for various offences and the descriptions of threshold quantities
- whether a pure (Commonwealth) or impure (State and Territory) quantity of drugs is relevant to charging and/or sentencing
- differences in the maximum penalties, for example, when the quantity involved is a commercial quantity.

Further, each State and Territory has its own sentencing legislation and sentencing practice that determines the approach to sentencing in a given matter. The general sentencing principles relevant when an offender is being sentenced for a Commonwealth serious drug offence in so far as they relate to the need for general deterrence, the importance of role, and the relevance of quantity, appear to be relevantly similar.[499]

The discussion below uses manufacturing offences to illustrate the issues that might arise for a court considering whether to use the sentences imposed for established State or Territory offences as a "yardsticks" against which a sentence for the Commonwealth offence is measured.

Table 5.2 sets out the maximum penalties for the range of manufacturing offences in the Code and the commensurate State and Territory manufacturing offences. The Commonwealth offences are contained in Div 305 of Pt 9.1.

494 ibid at [52].

495 ibid.

496 ibid.

497 See, for example, *Kuti v R* [2012] NSWCCA 43 at [46]–[48]; *Ritter v R* (2012) 221 A Crim R 132 at [41]–[43] (Fullerton J); *Lindsay v R* [2012] NSWCCA 124 at [8]; *Nguyen v R* [2012] NSWCCA 184 at [38]; *R v Tran* [2013] NSWCCA 136 at [35]–[36]. See also *R v Nikolovska* (2010) 209 A Crim R 218 at [74], where Kirby J extracted information about particular cases from those summarised by McClellan CJ at CL, observing that those cases provided "some insight into the relevant sentencing range".

498 (2010) 203 A Crim R 398.

499 This is reflected in SA by the CCA's discussion of sentences imposed on NSW offenders for State manufacturing offences involving large commercial quantities of drugs in *R v Scarpantoni* [2013] SASCFC 120 at [83]ff. NSW cases were relied upon by the Crown because there were few cases of a similar kind in SA. The language of the decisions of the VSCA in *Trajkovski v R* (2011) 32 VR 587 and the QCA in *R v Kovacs* [2009] QCA 52 also reflect a similarity of approach in those States to these issues as they relate to sentencing offenders for drug offences.

**Table 5.2: Cross-jurisdictional comparison of serious drug manufacturing offences (excluding cannabis, precursors and aggravated offences)**

| | CTH | NSW | VIC | QLD | SA | WA | TAS | NT | ACT |
|---|---|---|---|---|---|---|---|---|---|
| **Legislation** | *Criminal Code*, ss 301.10–301.11, 305.1–305.2, 305.3–305.5<br>*Criminal Code Regulations* 2002, Sch 3 | *Drug Misuse and Trafficking Act* 1985, ss 3(1), 24(1), 24(2), 32–33, Sch 1 | *Drugs, Poisons and Controlled Substances Act* 1981, ss 4, 70, 71, 71AA, 71AC, Sch 11 | *Drugs Misuse Act* 1986, ss 4, 8<br>*Drugs Misuse Regulation* 1987, Sch 1–4 | *Controlled Substances Act* 1984, ss 4, 33, 33J<br>*Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations* 2000, reg 6, Sch 1 | *Misuse of Drugs Act* 1981, ss 4, 6(1)(b) | *Misuse of Drugs Act* 2001, ss 3, 3A, 6, 21, Sch 1 | *Misuse of Drugs Act*, ss 3(1), 8, Sch 1 and 2 | *Criminal Code* 2002, ss 601, 607<br>*Criminal Code Regulations* 2005, reg 8, Sch 1 |
| **Offence description** | Commercial manufacture of controlled drugs | Manufacture and production of prohibited drugs | Trafficking in drug of dependence | Producing dangerous drugs | Manufacture of controlled drugs for sale | Manufacture or prepare prohibited drug | Manufacturing controlled drug for sale | Manufacture and production of dangerous drugs | Manufacturing controlled drug for selling |
| **Key offence elements** | • Manufacture for commercial purpose<br>• Controlled drug | • Manufacture or produce (or knowingly take part in)<br>• Prohibited drug | • Traffick (including prepare or manufacture: s 70)<br>• Drug of dependence<br>• Without licence or authorisation | • Unlawfully produce (prepare, manufacture, cultivate, package, produce, etc: s 4)<br>• Dangerous drug | • Manufacture controlled drug<br>• Intention to sell or belief that someone intends to sell (not s 33J) | • Manufacture or prepare<br>• Prohibited drug<br>• Without authorisation | • Manufacture controlled drug<br>• Intention to sell or belief that someone intends to sell (not s 21) | • Unlawfully manufacture or produce (or take part in)<br>• Dangerous drug | • Manufacture controlled drug<br>• Intention to sell or belief that someone intends to sell |
| **Maximum penalty by quantity**[a] | **Commercial:** life (s 305.3)<br>MDMA:[b] 500g<br>Methamphetamine:[c] 750g | **Large commercial:** life (s 33(3))<br>SNPP = 15 yrs<br>MDMA: 500g<br>Methamphetamine: 1kg | **Large commercial:** life (s 71)<br>MDMA/ Methamphetamine: 750g | **Sch 1 drug ≥ Sch 4 quantity:** 25 yrs (s 8(a))<br>MDMA/ Methamphetamine: ≥ 200g | **Large commercial:** life (s 33(1))<br>MDMA/ Methamphetamine: 750g | **Irrespective of quantity:** 25 yrs (s 34(1)(a))<br>20 yrs for conspiracy offence (s 34(1)(b)) | **Trafficable:** 21 yrs (s 6(1))<br>MDMA: 10g<br>Methamphetamine: 25g or 20 packages | **Commercial quantity Sch 1 drug:** life (s 8(2)(a))<br>Methamphetamine: 40g | **Large commercial:** life (s 607(1))<br>MDMA: 500g<br>Methamphetamine: 2kg |
| | **Marketable:** 25 yrs (s 305.4)<br>MDMA: 100g<br>Methamphetamine: 250g | **Commercial:** 20 yrs (s 33(2))<br>SNPP = 10 yrs<br>MDMA: 125g<br>Methamphetamine: 250g | **Commercial:** 25 yrs (s 71AA)<br>MDMA/ Methamphetamine: 100g | **Sch 1 drug ≥ Sch 3 < Sch 4 quantity:** 25 yrs, or 20 yrs if drug dependent person (s 8(b))<br>MDMA/ Methamphetamine: ≥ 2g < 200g | **Commercial:** 25 yrs (s 33(2)(a))<br>MDMA/ Methamphetamine: 100g | | | **Not commercial quantity Sch 1 drug:** 25 yrs (s 8(2)(b))<br>Methamphetamine: < 40g | **Commercial:** 25 yrs (s 607(3))<br>MDMA: 250g<br>Methamphetamine: 1kg |
| | **Otherwise:** 10 yrs (s 305.5)<br>MDMA: <100g<br>Methamphetamine: < 250g | **Less than commercial:** 15 yrs (s 32(1))<br>MDMA: <125g<br>Methamphetamine: < 250g | **Otherwise:** 15 yrs (s 71AC)<br>MDMA/ Methamphetamine: < 100g | **Other quantity of Sch 1 drug:** 20 yrs (s 8(c))<br>MDMA/ Methamphetamine: < 2g | **Controlled drug for sale:** 10 yrs (s 33(3)(a))<br>MDMA/ Methamphetamine: < 100g | | | **Commercial quantity Sch 2 drug:** 25 yrs (s 8(2)(c))<br>MDMA: 25g | **Controlled drug for selling:** 15 yrs (s 607(5))<br>MDMA: < 250g<br>Methamphetamine: < 1kg |
| | | | | **Sch 2 drug ≥ Sch 3 quantity:** 20 yrs (s 8(d)) | **Controlled drug:** 7 yrs (s 33J)<br>MDMA/ Methamphetamine: < 100g | | | **Not commercial quantity Sch 2 drug:** 7 yrs (s 8(2)(d))<br>MDMA: < 25g | **Controlled drug:** 10 yrs (s 609)<br>MDMA: < 250g<br>Methamphetamine: < 1kg |
| | | | | **Other quantity of Sch 2 drug:** 15 yrs (s 8(e)) | | | | | |

a Terms of imprisonment *only*.

b 3,4-methylenedioxymethamphetamine.

c Also referred to as crystal methamphetamine and methylamphetamine.

*Defined terms and elements of offences*

"Manufacture", "manufactures a substance" and "manufactures a substance for a commercial purpose" are each separately defined in the Code. "Manufacture" is defined in s 305(1) as meaning any process (with the exception of cultivation of a plant) by which a substance is produced and includes:

- the process of extracting or refining a substance
- the process of transforming a substance into a different substance.[500]

This is broadly consistent with the definition of "manufacture" in commensurate State and Territory legislation.[501]

Section 305.1(2) provides that a person "manufactures a substance" if he or she:

- engages in its manufacture
- exercises control or direction over its manufacture, or
- provides finance for its manufacture.

Conduct falling within this definition is also broadly defined for the purposes of many of the relevant State and Territory definitions of manufacture although not always in identical terms.[502] Section 305.2 provides that a person "manufactures a substance for a commercial purpose" if they manufacture the substance intending to sell any of it (s 305.2(a)) or believing that another person intends to sell any of it (s 305.2(b)).

*The NSW decision of R v Cheung*

In 2010 in *Cheung*, the NSWCCA discussed some of the issues that might arise for consideration by a court determining the appropriate sentence for a Code offence where the conduct could previously only have been dealt with under State or Territory offence provisions.

The offenders both pleaded guilty to manufacturing a commercial quantity of methamphetamine contrary to s 305.3(1) of the Code. That offence has a maximum penalty of life imprisonment. Each offender had travelled to Australia to process methamphetamine from a liquid to a crystallised form. The total amount of pure methamphetamine seized was 6,588.8 grams with an estimated street value in excess of $2.5 million. At first instance, the sentencing judge concluded their offences were in the lower range, their roles were "generally equivalent"[503] and involved them refining the drug and then delivering it to others on behalf of a principal or principals resident overseas.[504] The Crown appealed against the sentence imposed on each offender on the basis of manifest inadequacy.

The significant issue of principle which arose in the appeal was whether, because of the recent creation of the Commonwealth manufacturing offence, it was appropriate to consider only those sentences imposed for Commonwealth drug offences with a maximum penalty of life imprisonment or also those imposed for comparable State offences.[505] Simpson J, with whom McClellan CJ at CL and Buddin J agreed, said that this concerned:

500 "Manufacture" in s 606 of the *Criminal Code* 2002 (ACT) and s 3(1) of the *Misuse of Drugs Act* (NT) is defined in relevantly identical terms as both jurisdictions have enacted provisions related to controlled drugs based on the model provisions recommended by MCCOC.

501 See the definition of "manufacture" in the DMT Act, s 3(1); *Controlled Substance Act* 1984 (SA), s 4; *Misuse of Drugs Act* 2001 (Tas), s 3(1). Note, however, that "manufacture" is not separately defined in the *Misuse of Drugs Act* 1981 (WA). In Qld where the offence is one of production, "produce" is defined in the *Drugs Misuse Act* 1986 (Qld), s 4, as meaning "(a) prepare, manufacture, cultivate, package or produce; (b) offering to do any act specified in paragraph (a); or (c) doing or offering to do any act preparatory to, in furtherance of, or for the purpose of, any act specified in paragraph (a)".

502 See the definition of "take part in" in the DMT Act, s 6; *Misuse of Drugs Act* (NT), s 3(6); *Criminal Code* 2002 (ACT), s 606 (where this phrase is defined in almost identical terms); *Misuse of Drugs Act* 2001 (Tas), s 3(2). See, ibid, for the definition of "produce" in the *Drugs Misuse Act* 1986 (Qld). The activity defined in (c) would cover the conduct defined in the Code.

503 (2010) 203 A Crim R 398 at [48].

504 ibid at [45]–[48].

505 ibid at [92].

> "… the base to which this Court (and sentencing courts) ought to look for guidance in determining the appropriate range of sentences for any offence against s 305.3, and in determining whether a sentence imposed lies outside the permissible range".[506]

Identifying what Simpson J described as "the base" was the difficulty. The Crown's argument that when sentencing for these types of offences, the proper way of achieving consistency at the Commonwealth level was to look at sentencing patterns for Commonwealth offences, to the exclusion of those for State offences, was ultimately rejected.[507]

After identifying that the relevant "quest" was for consistency in sentencing, Simpson J concluded that:

> "Sentencing judges are entitled to have regard to both lines of sentencing; the true comparator will be offences having sufficient parallels with the offence for which a sentence is to be passed."[508]

However, the critical question is: what *is* the "true comparator"? Her Honour observed that this would be "offences having *sufficient parallels* with the offence" [emphasis added].[509] What are these offences? In the context of a Commonwealth offender, where consistency of sentence has to be achieved between Commonwealth offenders around Australia, ideally the relevant comparator is an offence available in *all* States and Territories with the same characteristics and, more importantly, the same maximum penalty.

There is no substantial difference in terms of the broad characteristics of the various Commonwealth and State or Territory manufacturing offences. However, as already discussed, there are other differences between the Commonwealth and the States or Territories that may impact on the sentence ultimately imposed and lead to different results depending on where a matter is dealt with.[510]

The first concerns drug purity and quantity. For State or Territory offences, an offender is almost always sentenced on the basis of the impure quantity of a drug whereas Commonwealth offenders are sentenced on the basis of the pure quantity. The quantity of a particular drug attracting a particular maximum penalty varies. For example, the commercial quantity of methamphetamine is 750 grams (pure)[511] for Commonwealth offences whereas in NSW, a large commercial quantity is separately nominated as 1 kilogram (impure);[512] and in the Northern Territory a "commercial quantity" of methamphetamine is only 40 grams.[513] Table 5.2 sets out the threshold quantities for each of the States and the Territories.

The maximum penalties also vary. In NSW, a distinction is drawn between the maximum penalty for an offence involving the manufacture of a large commercial quantity of a controlled drug (life imprisonment) and a commercial quantity (20 years).[514] While life is also available as the maximum penalty in Victoria, South Australia and both Territories, in Tasmania the maximum penalty for indictable drug offences is 21 years, and in Western Australia it is 25 years irrespective of the quantity involved. The relevant comparators would necessarily have to be limited to those offences with a maximum penalty of life imprisonment. However, should this be the case irrespective of other differences?

506 ibid at [76].

507 ibid at [91].

508 ibid at [109].

509 ibid.

510 See the discussion of some examples of operational inconsistency on pp 35, 48–49. See also above n 18.

511 *Criminal Code Regulations*, Schs 3, 4.

512 DMT Act, Sch 1.

513 *Misuse of Drugs Act* (NT), Sch 1.

514 DMT Act, s 33.

While the court did not resolve these issues, the Crown submitted that the following differences with respect to NSW manufacturing offences affected whether those offences were useful comparators for the Commonwealth offence:

- Commonwealth offenders are sentenced on the basis of the pure drug involved in the relevant offence whereas NSW offenders are sentenced on the basis of the impure quantity
- the impact of the standard non-parole period (SNPP) sentencing scheme on sentencing in NSW
- the different approach taken to the relationship between the head sentence and non-parole period (NPP) in NSW compared to the Commonwealth.[515]

The last two differences may have a significant impact on the usefulness of NSW cases as comparators.

In NSW, s 54A of the *Crimes (Sentencing Procedure) Act*, which is contained in Pt 4, Div 1A, sets out the SNPPs for the offences listed in the Table to that Division. The listed offences include the manufacturing and supply offences in ss 24(2) and 25(2) (respectively) of the DMT Act.[516] In *Cheung*, the court anticipated that the introduction of the SNPP scheme in 2003 would result in increased sentences for the manufacturing offence in s 24(2).[517] Research published by the Judicial Commission of NSW in 2010 showed that there was an increase in the sentences for some of the SNPP offences in the Table.[518] While the study did not examine the effect of the SNPP scheme on sentences for the manufacturing offence, because there were insufficient cases for analysis, it did examine the sentences imposed for the supply offence. The study found that sentences for supplying a commercial quantity of heroin had increased significantly since the scheme was introduced.[519] For supplying a large commercial quantity of prohibited drugs (generally), again, the research showed that sentences for these offences have increased. To use such NSW sentences for the purpose of identifying a range of possible sentences with respect to commensurate Commonwealth offences may not therefore be helpful. This was referred to by the court in *Cheung*:

> "… care ought to be taken to ensure that a State sentencing regime such as that prescribed by Pt 4 Div 1A is not applied, by transference, to federal offenders. Part 4 Div 1A is a particular regime that operates by its own statutory force in sentencing NSW offenders: it is of no relevance or applicability to federal offenders. That is, in fact, a powerful argument in support of the DPP's general contention".[520]

In NSW, s 44(2) of the *Crimes (Sentencing Procedure) Act* provides that a NPP must not be less than 75% of the head sentence unless there are special circumstances justifying a reduction in that period (the statutory rule). A number of other States and Territories also have provisions which require that a NPP be a particular proportion of the head sentence.[521] However, it is clear, following the High Court's decision in *Hili v The Queen*, that there is no fixed ratio for Commonwealth offences.[522]

In NSW, both the SNPP scheme and the statutory rule operate as constraints on the exercise of judicial discretion. Those two factors alone suggest that NSW manufacturing offences should not routinely be used as comparators for the Commonwealth offence.

515 (2010) 203 A Crim R 398 at [119].

516 Where the quantity involved is a commercial quantity, the SNPP for these offences is 10 years, while for large commercial quantities the SNPP is 15 years.

517 (2010) 203 A Crim R 398 at [102].

518 P Poletti, and H Donnelly, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in NSW*, Research Monograph No 33, Judicial Commission of NSW, Sydney, 2010.

519 ibid p 43. The median full term of sentence increased after the introduction of the SNPP scheme from 4 years, 10 months imprisonment to 7 years, an increase of 44.8%. Whether this remains the case following the High Court's decision in *Muldrock v The Queen* (2011) 244 CLR 120, where the SNPP was said to operate only as a statutory guidepost, is yet to be examined.

520 (2010) 203 A Crim R 398 at [102].

521 See above n 300; and Poletti and Donnelly, above n 518, p 1.

522 (2010) 242 CLR 520 at [44]. See the discussion on p 44.

Further, Table 5.2, also identifies differences in the commensurate provisions which suggest they may not always be used as a "true comparator" for the Commonwealth offence.

*Cheung* was the first occasion on which the court directly raised the issue of what could be properly used to determine the appropriate range of sentences for these newer Commonwealth offences. As already discussed, in *Maldonado v R*, the court did not criticise the approach of referring only to cases which involved other Commonwealth offences with the same maximum penalty.[523]

Nor does this issue appear to have caused the same problems elsewhere. In *Barbaro* at first instance, a case which involved serious examples of Commonwealth trafficking offences, King J examined the sentences imposed for both State and Commonwealth cases involving trafficking and Commonwealth cases involving other offences.[524] While her Honour said it was difficult to identify comparable cases, she said she found the decision of the District Court of NSW in *R v Bow*,[525] involving a conspiracy to import 234 kilograms of pure MDMA, to be of some use,[526] as was the discussion of the Commonwealth drug sentencing principles in the NSW case of *R v To*.[527]

Where, as in *Barbaro*, the offences involve criminality of a high order and the quantity of drugs involved is many times in excess of the threshold quantity, the differences of approach between jurisdictions and those differences that relate to drug quantities are not as significant simply because of the length of the sentences being imposed. However, where the quantities are smaller and the criminality is of a lower order, those differences may become more significant. As is the case with any matter, if reliance is placed on cases from other jurisdictions, it is incumbent on the parties to ensure that they have selected relevantly similar cases. The mere fact that a court sentencing for one of the newer domestic offences in the Code is not referred to State cases concerning a particular type of offence does not, of itself, mean that the cases to which it is referred, which may involve other and different Commonwealth offences, cannot be of assistance.

## 5.4 The role of the prosecutor and consistency

While the prosecution has a clear duty to assist the court to avoid appealable error on sentence, that duty does not extend to providing the court with a range of sentences which is intended to represent the bounds within which the court must sentence.[528] The prosecutor's duty to assist the court on sentence is an essential one and was described by the Full Court of the Federal Court in the seminal case of *R v Tait and Bartley*[529] as follows:

> "The Crown has a duty to the court to assist it in the task of passing sentence by an adequate presentation of the facts, by 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."[530]

Until *Barbaro v The Queen*, there had been a practice in Victoria and Queensland of providing a sentencing judge with a numerical sentencing range for a particular offence and offender. Such a practice had not been adopted in the other States or Territories.[531]

523 [2009] NSWCCA 189 at [44], [54].

524 [2012] VSC 47 at [101].

525 Published judgment not available.

526 [2012] VSC 47 at [102].

527 ibid at [103].

528 *Barbaro v The Queen* (2014) 88 ALJR 372 at [6].

529 (1979) 24 ALR 473.

530 ibid at 477.

531 In his submissions on behalf of the intervener (intervener's submissions) in *Barbaro v The Queen*, the Chief Crown Prosecutor (Vic) set out the results of enquiries made by the DPP (Vic) about the current practice for the provision of sentencing ranges in other Australian jurisdictions: at [5.43].

In Queensland, the *Director's guidelines* state that the prosecution has a duty to provide the court with "an appropriate level of assistance on the sentencing range".[532] In order to fulfil this duty, the Crown generally presented the court with a single head sentence and NPP which, it was submitted, should be imposed in a particular case.[533]

The practice was somewhat broader in Victoria, where the Crown would provide a range of sentences (compared with the Queensland practice of providing a single head sentence). This became commonplace following the decision in *R v MacNeil-Brown*,[534] where the Court of Appeal expressly concluded that the Crown's duty on sentence extended to making submissions as to the range of sentence said to be appropriately open in the particular case.[535] The majority, Maxwell P, Redlich and Vincent JJA, stated that this confirmed the position previously taken in *R v Casey*[536] where the court had observed that while it was inappropriate for the parties to make a submission as to the precise penalty to be imposed, a submission as to the range of sentences appropriately open would assist.[537] Although *MacNeil-Brown* concerned a State offence, this practice was adopted by the DPP (Cth) when an offender was being sentenced for a Commonwealth offence. It was also common for the DPP (Cth) to provide the defence with the sentencing range that the prosecution would present to the court on request and before a guilty plea was entered.[538]

In *Barbaro* the High Court explicitly stated that such a practice was wrong in principle, that the prosecution is *not* required to make a submission as to an appropriate sentencing range to a judge, and that the practice should cease.[539] To the extent that *MacNeil-Brown* was authority in support of this practice, it has now been overruled.[540]

The High Court stated that the fundamental issue with the provision of a range by the Crown is that it requires the Crown to make a number of assumptions about a variety of matters to be determined by the sentencing judge in the sentence proceedings,[541] in effect, to act as a "surrogate judge".[542] It also depends on the prosecution determining the relevant range dispassionately. This, as the court pointed out, can be difficult in those circumstances when arguments supporting leniency, usually made in relation to the discount for a guilty plea and/or for assistance, might be made by both parties.[543]

This does not have the concomitant result, however, that the practice of providing a sentencing judge with statistics and comparative cases must also cease. The "proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases"[544] is still permitted because of the importance of consistency in sentencing. The High Court reiterated that this is achieved through the consistent application of principle and not through numerical equivalence.[545]

532 Office of the DPP (Qld), *Director's guidelines*, Brisbane, April 2013, at <www.justice.qld.gov.au/justice-services/justice-agencies/office-of-the-director-of-public-prosecutions#Director%E2%80%99s%20Guidelines>, accessed 7 April 2014, at [47].

533 See the DPP (Cth)'s oral submissions to this effect in *Barbaro v The Queen* [2013] HCA Trans 296 at p 52ff.

534 (2008) 20 VR 677.

535 ibid at [20]–[21]. Note that a special leave application to the High Court in *MacNeil-Brown*, which was supported by the Crown, was refused on 5 December 2008.

536 (1986) 20 A Crim R 191.

537 ibid at 196.

538 See the DPP (Cth)'s written submissions at [18]–[19].

539 (2014) 88 ALJR 372 at [7], [23], [39].

540 ibid at [23].

541 ibid at [30]–[33].

542 ibid at [29], quoting Buchanan JA in *R v MacNeil-Brown* (2008) 20 VR 677 at [128].

543 ibid at [30]–[33].

544 ibid at [40].

545 ibid; *Hili v The Queen* (2010) 242 CLR 520 at [48]–[49].

That there is a relatively limited use to be made of sentencing ranges is reflected by the court's express approval[546] again of the statement by Simpson J in *De La Rosa* that while previous sentences might establish the range of sentences imposed, they do not also establish that the range is correct and should not be taken to fix "the boundaries within which future judges must, or even ought, to sentence".[547]

In light of that statement, while the Crown and defence may continue to provide a sentencing judge with comparable cases reflecting the range of sentences imposed, those cases do no more than provide the sentencing judge with a yardstick against which a particular sentence might be examined. This was the approach taken by Fraser JA, with whom Daubney and Applegarth JJ agreed, in the Queensland Court of Appeal in *R v AAR*[548] where that court considered the effect of *Barbaro*.[549]

A sentencing judge has numerous tools available to him or her which are intended to assist in the determination of the proper sentence in a particular case. However, sentencing statistics, comparable cases and sentencing schedules are simply the "raw material" which must be considered by a sentencing judge.[550] What that "raw material" leads to, in terms of sentencing results, is the subject of the empirical analysis which follows.

546 *Barbaro*, ibid, at [41]; *Hili*, ibid, at [54].

547 (2010) 79 NSWLR 1 at [304].

548 [2014] QCA 20.

549 ibid at [43].

550 *Barbaro v The Queen* (2014) 88 ALJR 372 at [41], referring to Buchanan and Kellam JJA in dissent in *R v MacNeil-Brown* (2008) 20 VR 677 at [130] and [147] respectively.

Chapter 6

# Sentencing patterns for the period 2008–2012

This chapter reports on the sentences imposed for Commonwealth serious drug offences in matters finalised by the State and Territory higher courts[551] in the five-year period, 1 January 2008 until 31 December 2012 (the study period). The Commonwealth serious drug offences are those which arise under Pt 9.1 of the Code and s 233B(1) (rep) of the *Customs Act* and which have been prosecuted by the DPP (Cth). In the study period, there were a small number of Commonwealth serious drug offences which were dealt with by the State Directors of Public Prosecutions with the consent of the DPP (Cth). These are not included in the analysis below.

## 6.1 Introduction

The primary aim of this chapter is to examine the sentences imposed on offenders convicted of these offences and to determine the extent of national consistency in sentencing patterns. For this reason, the analysis does not generally draw distinctions between different offences when the maximum penalties are the same.[552]

The usefulness and perceived limitations of using statistics as a tool for achieving consistency is discussed in Chapter 5, "The imperative of achieving reasonable consistency".[553]

As highlighted in this earlier discussion, notwithstanding that ranges of sentences are "no more than historical statements of what has happened in the past":[554]

> "… [t]hey can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence".[555]

The task of sentencing offenders convicted of Commonwealth serious drug offences requires a judge to consider both the objective and subjective factors associated with a particular offence and offender. It is important to acknowledge that a statistical analysis of the kind undertaken below cannot consider the impact of a number of factors on sentence: principally those relating to the subjective circumstances of a particular offender, as this information is not available in the sentencing data. However, it is possible to consider factors such as the role of offenders in the drug enterprise, the quantity of the drug involved, pleas, offender antecedents, and assistance to authorities; all of which are relevant considerations on sentence.

During the study period, the vast majority of offenders were sentenced to a term of full-time imprisonment. Accordingly, references to maximum penalties below are generally speaking to the maximum terms of imprisonment only.

This chapter examines:

- the frequency of Commonwealth serious drug offences by year, and by State or Territory
- the types of penalties (custodial and non-custodial) imposed for these offences
- the relationship between sentencing factors (including a range of objective and subjective factors) and terms of imprisonment to identify the factors most likely to influence sentence length

551 "Higher courts" include the Supreme and District Courts of each of the States and Territories and the County Court in Vic. The jurisdiction of that court is similar to that of the NSWDC.

552 For completeness, a brief discussion of the penalties imposed for particular offences has been provided in the Appendix.

553 See pp 53–55.

554 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [304].

555 ibid.

- the level of national consistency in sentencing patterns for these offences
- the sentencing factors most strongly associated with fixing non-parole periods (NPPs) for these offences
- whether, following the High Court's decision in *Hili v The Queen*,[556] there has been a change in the relationship between the NPPs and head sentences imposed for these offences.

## 6.2 Methodology

### 6.2.1 The data

This study uses the raw sentencing data provided to the Judicial Commission of NSW by the DPP (Cth) from their case management system which has been processed to generate the statistics which appear on the Commonwealth Sentencing Database (CSD).[557] The data comprise first instance sentencing outcomes and have been "corrected" to take into account the outcome of appeals to intermediate appellate courts and the High Court.[558]

The statistics are appearance (or person) based and only the "principal offence" for each finalised matter is used. Where there were multiple offences, subject to below, the offence that attracted the most severe penalty is selected as the principal offence.[559] Where there were multiple offences and the Commonwealth serious drug offence did not attract the most severe penalty, the Commonwealth serious drug offence that attracted the most severe penalty is selected as the principal offence.[560] As is apparent from the discussion concerning the ability to prefer single charges where multiple substances have been involved,[561] it was not possible to determine whether those provisions had been used in any of the cases finalised during the study period. In each case, the drug identified in the CSD is the drug selected.

To ensure the accuracy of the data, information from other sources is used. For example, for the NSW data, accuracy could be checked using the data available on the Judicial Information Research System (JIRS).[562] In addition, first instance sentence remarks, intermediate appellate court judgments (where available), judgments of the High Court and internal DPP (Cth) documents are also used for this purpose.

556 (2010) 242 CLR 520.

557 The Commonwealth Sentencing Database (CSD) contains sentencing information for all matters prosecuted by the DPP (Cth). In addition to Cth offences, this will also include some State offences. See p 53 for a discussion of the CSD.

558 Where an appeal resulted in a new penalty, the first instance penalty was replaced. If the appeal resulted in an acquittal, new trial or was remitted to a lower court, the record was removed from the data. Sentences imposed following a retrial, or after the matter was remitted, have been included if they fall within the study period. Offences with a first instance date in the study period have not been "corrected" for successful conviction or sentence appeals determined in 2013 or later. Twelve (1.4%) of the 860 cases in the study period were included where a successful defence or Crown appeal was finalised in the study period but the offender was first sentenced before 1 January 2008. Three NSW cases finalised during the study period were identified which were not recorded on the CSD. These were added to the final data set.

559 If two or more Cth serious drug offences received identical penalties, the offence selected on the CSD as the principal offence was selected as such for this study.

560 This occurred in 14 cases. One example of such a case is *R v Standen* [2011] NSWSC 1422. Standen was sentenced to 18 years imprisonment for conspiring to import a commercial quantity of pseudoephedrine (Cth offence) and to 22 years imprisonment for knowingly taking part in the supply of a large commercial quantity of pseudoephedrine (NSW offence). The conspiracy offence was taken to be the principal offence for the purposes of this study. Another example is *DPP (Cth) v Haidari* [2013] VSCA 149. Haidari was sentenced to 8 years imprisonment in respect of each of two people smuggling offences and 6 years imprisonment for an offence of importing a marketable quantity of MDMA. The importation offence was treated as the principal offence for the purpose of this study.

561 See pp 17–18.

562 Raw sentencing data is provided to the Judicial Commission by the NSW Bureau of Crime Statistics and Research and then audited to generate the statistics which appears on the Judicial Information Research System (JIRS).

The most significant corrections made to the data relate to offenders sentenced for multiple offences:

- ***Corrections to recording of individual sentences:*** Sometimes the overall sentence of imprisonment was incorrectly specified as the sentence for each individual offence with respect to that offender. For example, in one case the offender was sentenced to life imprisonment for conspiracy to traffic a commercial quantity of MDMA, 23 years imprisonment for trafficking a commercial quantity of MDMA and 20 years for attempting to possess a commercial quantity of cocaine which was unlawfully imported. Life imprisonment was recorded as the penalty for each of the three offences. This was incorrect with respect to the latter two offences.
- ***Corrections to number of counts and specification of offences:*** In some cases, the individual offence provisions were correct, but the individual penalties were not. In others, both the individual offence provisions and the penalty imposed were incorrectly recorded, and in others the number of counts was not correctly identified.

### 6.2.2 Statistical analysis

Bivariate and multivariate analyses are carried out on the data.

Bivariate analyses are used to test the significance[563] of:

- the relationship between individual sentencing factors and the length of the head sentence
- the relationship between individual sentencing factors and the ratio between the NPP and the head sentence.

The statistical tests used in the bivariate analyses include:

- the Eta statistic to measure the strength of these relationships[564]
- the median test to determine if there is a significant difference between the median terms or ratios
- the Mann-Whitney U test (for two independent samples, such as gender and plea) and the Kruskal-Wallis test (for more than two independent samples, such as offence type and role) to determine if there is a significant difference in the distributions (or spread).[565]

Multivariate analyses are undertaken to determine those factors which were most likely to influence the length of sentence or ratios imposed. In order to examine multiple factors simultaneously, regression analyses are carried out. Regression analysis is used to measure the association between a dependant variable (outcome or response) and an independent variable (predictor or explanatory factor) while controlling for other independent variables in the regression. Ordered Logistic Regression is used when the dependent variable is ordinal (such as head sentence groupings). Logistic Regression is used when the dependant variable is binary (such as whether or not a ratio is in a specific range).

### 6.2.3 Terminology

In respect of sentences of full-time imprisonment, the “head sentence” refers to the individual sentence imposed for the principal offence. The “effective head sentence” and the “effective NPP” refer to:

- the head sentence and NPP imposed for the principal offence where the offender was sentenced for a single Commonwealth offence
- the overall head sentence and the single NPP imposed where the offender was sentenced for multiple Commonwealth offences.[566]

563 A p-value $< 0.05$ was considered to be statistically significant.

564 Eta has a value between 0 (completely unpredictable) and 1 (perfectly predictable).

565 The Kruskal-Wallis test returns the same value as the Mann-Whitney U test (where there are only two independent samples).

566 References to NPPs also include the period of time an offender spent in custody before release on a recognizance under s 20(1)(b) of the *Crimes Act*.

The term "median" refers to the sentence which lies in the middle of a range of values. The term "mean" refers to the average value.[567] In respect of full-time imprisonment, the percentage of head sentences which fall within the middle 50% range of values (the interquartile range) is shown. The lower limit of this range is set at the first quartile (or 25th percentile) and the upper limit is set at the third quartile (or 75th percentile). This range shows the spread of values near the centre.

## 6.3 Results of the analysis

There were 3,149 offenders who were prosecuted by the DPP (Cth) and whose cases were finalised during the study period. Of those offenders, 860 were sentenced for at least one Commonwealth serious drug offence (Commonwealth serious drug offenders), accounting for over one-quarter of the offenders dealt with during that period (27.3%).

The Commonwealth serious drug offenders were sentenced for a total of 1,289 offences. Overall, 86.0% of those offences were Commonwealth serious drug offences. State and Territory drug offences accounted for 5.4% of offences and non-drug Commonwealth and State or Territory offences accounted for the remaining 8.7%.

### 6.3.1 Types of Commonwealth serious drug offences

The Commonwealth serious drug offenders were dealt with for offences contained in either Pt 9.1 of the Code or s 233B(1) (rep) of the *Customs Act*. Given the length of time since the repeal of s 233B,[568] there was only a small number of these offences (2.3%) and these offences are grouped with the corresponding offences under the Code.[569]

Table 6.1 shows the frequency of Commonwealth serious drug offences (principal offence *only*). The four most common offences, accounting for 75.5% of offences, were:

- s 307.2(1) — import a marketable quantity of a border controlled drug (43.8%)
- s 307.1(1) — import a commercial quantity of a border controlled drug (15.6%)
- s 307.5(1) — possess a commercial quantity of an unlawfully imported border controlled drug (8.6%)
- s 307.6(1) — possess a marketable quantity of an unlawfully imported border control drug (7.4%).

The importation offences in Div 307 of the Code relate to "importing drugs", "possessing drugs unlawfully imported" and "possessing drugs reasonably suspected of being unlawfully imported". When the quantity involved in the particular offence is a marketable or commercial quantity, the maximum penalty is the same. For the purposes of the analyses, these offences are grouped together.[570] To determine the objective seriousness of offences which carry the same maximum penalty, factors such as the quantity of drugs and the offender's role, etc, will be more helpful.

567 This is calculated by dividing the sum of the values by the number of cases.

568 Repeal effective 6 December 2005.

569 As discussed on p 6, some offences under s 233B(1) (rep) of the *Customs Act* could be subject to different maximum penalties. For example, an offender charged with a s 233B(1) offence involving a marketable quantity of a substance with a prior conviction for a s 233B(1) offence (life) or where the type of drug involved was cannabis (10 years). Cases involving the first are rare and it was not possible to separately identify whether there were any such cases in this study. There were no cases involving the latter.

570 This was not possible for possession offences involving less than marketable quantities of border controlled drugs as the maximum penalty was different.

#### 6.3.1.1 Offence type (grouped)

Offences in Table 6.1 have been grouped into four broad categories. The following shows that the overwhelming majority of offenders was sentenced for importation offences:

- Div 307 — importation offences (90.5%)
- Divs 302 (trafficking controlled drugs) and 306 (pre-trafficking controlled precursors) — trafficking offences (7.4%)
- Divs 303 (commercial cultivation of controlled plants) and 305 (commercial manufacture of controlled drugs) — manufacture and cultivation offences (1.2%)
- Div 308 — possession offences (0.9%).

#### 6.3.1.2 Ancillary offences

Over one-third of the offences in Table 6.1 (37.0%) involved ancillary offences. The following shows that attempts were the most common ancillary offence:

- s 11.1(1) — attempt (16.7% of offences)
- s 11.5(1) — conspiracy (14.0% of offences)
- s 11.2(1) — aid, abet, counsel or procure (5.8% of offences)
- s 11.2A(1) — joint commission (0.5% of offences).

The type of ancillary offence was closely associated with a particular substantive offence. The majority of attempts (83.3%) were associated with the possession of unlawfully (or reasonably suspected of having been unlawfully) imported border controlled drugs, while 70.8% of conspiracies and 84.0% of aiding and abetting offences were associated with importing a border controlled drug or precursor.

Since ancillary offences are punishable as if the substantive offence had been committed and are subject to the same maximum penalty they are grouped with the relevant substantive offence.

#### 6.3.1.3 Threshold drug quantity

The quantity of the drug involved is important because it has a direct relationship to the maximum penalty for a particular offence. The maximum penalty for most offences in Pt 9.1 involving commercial quantities is life imprisonment, whereas the maximum penalties for offences involving marketable quantities is 25 years. One exception is the importation offences involving border controlled precursors, where the maximum penalty is 25 years (commercial quantities) and 15 years (marketable quantities).

Table 6.1 also shows offences according to the threshold drug quantities, that is, whether the quantity involved was either a marketable or commercial quantity. Over half of the offences (58.0%) involved marketable quantities and just over a third (34.3%) involved commercial quantities. The remaining offences involved less than marketable quantities (6.5%)[571] or were those where there was no commercial intent in the importation of border controlled drugs (1.2%).

### 6.3.2 Maximum penalty

The maximum penalty for an offence is the starting point for considering the appropriate sentence because it provides a "yardstick" as to the worst possible case against which a particular offender's conduct can be measured.[572]

571 For the purposes of the study, offences in Pt 9.1, including the possession offences in Div 308, which do not specify a quantity, are classified as "less than marketable".

572 *Markarian v The Queen* (2005) 228 CLR 357 at [30]–[31].

**Table 6.1: Frequency of Commonwealth serious drug offences**

| | | | | | Ancillary offence | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Division** | **Offence group** | **Relevant Code provision** | **Maximum penalty** | **Substantive offence *only*** | **Attempt s 11.1(1)** | **Aid, abet, counsel or procure s 11.2(1)** | **Joint commission s 11.2A(1)** | **Conspiracy s 11.5(1)** | **Total cases** | |
| | | | | n | n | n | n | n | n | % |
| Div 307[a] | **Importing border controlled drugs/plants** | | | | | | | | | |
| | Import | | | | | | | | | |
| | commercial quantity | s 307.1(1)[b] | Life | 70 | 8 | 11 | 4 | 41 | 134 | 15.6 |
| | marketable quantity | s 307.2(1)[c] | 25 yrs | 322 | 6 | 23 | 0 | 26 | 377 | 43.8 |
| | less than marketable quantity | s 307.3(1) | 10 yrs | 15 | 1 | 2 | 0 | 6 | 24 | 2.8 |
| | no commercial intent | s 307.4(1) | 2 yrs | 10 | 0 | 0 | 0 | 0 | 10 | 1.2 |
| | | | | **417** | **15** | **36** | **4** | **73** | **545** | **63.4** |
| | Possess unlawful import | | | | | | | | | |
| | commercial quantity | s 307.5(1)[d] | Life | 3 | 60 | 3 | 0 | 8 | 74 | 8.6 |
| | marketable quantity | s 307.6(1)[e] | 25 yrs | 10 | 53 | 1 | 0 | 0 | 64 | 7.4 |
| | less than marketable quantity | s 307.7(1) | 2 yrs | 2 | 2 | 0 | 0 | 0 | 4 | 0.5 |
| | | | | **15** | **115** | **4** | **0** | **8** | **142** | **16.5** |
| | Possess reasonably suspected unlawful import | | | | | | | | | |
| | commercial quantity | s 307.8(1)[f] | Life | 3 | 4 | 0 | 0 | 1 | 8 | 0.9 |
| | marketable quantity | s 307.9(1) | 25 yrs | 4 | 1 | 1 | 0 | 0 | 6 | 0.7 |
| | less than marketable quantity | s 307.10(1) | 2 yrs | 2 | 0 | 0 | 0 | 0 | 2 | 0.2 |
| | | | | **9** | **5** | **1** | **0** | **1** | **16** | **1.9** |
| | | | | **441** | **135** | **41** | **4** | **82** | **703** | **81.7** |
| | **Importing border controlled precursors** | | | | | | | | | |
| | Import | | | | | | | | | |
| | commercial quantity | s 307.11(1) | 25 yrs | 21 | 2 | 3 | 0 | 10 | 36 | 4.2 |
| | marketable quantity | s 307.12(1) | 15 yrs | 31 | 1 | 3 | 0 | 2 | 37 | 4.3 |
| | less than marketable quantity | s 307.13(1) | 7 yrs | 2 | 0 | 0 | 0 | 0 | 2 | 0.2 |
| | | | | **54** | **3** | **6** | **0** | **12** | **75** | **8.7** |
| | **Total importation offences** | | | **495** | **138** | **47** | **4** | **94** | **778** | **90.5** |

| | | | | | Ancillary offence | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Division** | **Offence group** | **Relevant Code provision** | **Maximum penalty** | **Substantive offence *only*** | **Attempt s 11.1(1)** | **Aid, abet, counsel or procure s 11.2(1)** | **Joint commission s 11.2A(1)** | **Conspiracy s 11.5(1)** | **Total cases** | |
| | | | | n | n | n | n | n | n | % |
| Div 302 | **Trafficking controlled drugs** | | | | | | | | | |
| | commercial quantity | s 302.2(1) | Life | 16 | 0 | 2 | 0 | 17 | 35 | 4.1 |
| | marketable quantity | s 302.3(1) | 25 yrs | 9 | 0 | 0 | 0 | 4 | 13 | 1.5 |
| | less than marketable quantity | s 302.4(1) | 10 yrs | 13 | 1 | 0 | 0 | 0 | 14 | 1.6 |
| | | | | **38** | **1** | **2** | **0** | **21** | **62** | **7.2** |
| Div 306 | **Pre-trafficking controlled precursors** | | | | | | | | | |
| | commercial quantity[g] | s 306.2(1) | 25 yrs | 0 | 0 | 0 | 0 | 1 | 1 | 0.1 |
| | less than marketable quantity[h] | s 306.4(1) | 7 yrs | 0 | 1 | 0 | 0 | 0 | 1 | 0.1 |
| | | | | **0** | **1** | **0** | **0** | **1** | **2** | **0.2** |
| | **Total trafficking offences** | | | **38** | **2** | **2** | **0** | **22** | **64** | **7.4** |
| Div 303 | **Commercial cultivation of controlled plants** | | | | | | | | | |
| | less than marketable quantity | s 303.6(1) | 10 yrs | **1** | **0** | **0** | **0** | **0** | **1** | **0.1** |
| | | | | | | | | | | |
| Div 305 | **Commercial manufacture of controlled drugs** | | | | | | | | | |
| | commercial quantity | s 305.3(1) | Life | 2 | 0 | 1 | 0 | 4 | 7 | 0.8 |
| | marketable quantity[g] | s 305.4(1) | 25 yrs | 2 | 0 | 0 | 0 | 0 | 2 | 0.2 |
| | | | | **4** | **0** | **1** | **0** | **4** | **9** | **1.0** |
| | **Total manufacture and cultivation offences** | | | **5** | **0** | **1** | **0** | **4** | **10** | **1.2** |
| Div 308 | **Possession offences** | | | | | | | | | |
| | controlled drug | s 308.1(1) | 2 yrs | 3 | 0 | 0 | 0 | 0 | 3 | 0.3 |
| | controlled precursor | s 308.2(1) | 2 yrs | 1 | 4 | 0 | 0 | 0 | 5 | 0.6 |
| | **Total possession offences** | | | **4** | **4** | **0** | **0** | **0** | **8** | **0.9** |
| | **Total** | | | **542** | **144** | **50** | **4** | **120** | **860** | **100.0** |

a There were no cases in the study relating to export offences.
b This offence includes 27 cases dealt with under the *Customs Act*, s 233B(1)(rep).
c This offence includes 10 cases dealt with under the *Customs Act*, s 233B(1)(rep).
d This offence includes two cases dealt with under the *Customs Act*, s 233B(1)(rep).
e This offence includes three cases dealt with under the *Customs Act*, s 233B(1)(rep).
f This offence includes two cases dealt with under the *Customs Act*, s 233B(1)(rep).
g The maximum penalty for an aggravated offence (expose child under 14 yrs) is 28 yrs. There were no cases in the study relating to an aggravated offence.
h The maximum penalty for an aggravated offence (expose child under 14 yrs) is 9 yrs. There were no cases in the study relating to an aggravated offence.

As already discussed, the maximum penalty varies depending on the quantity of the drug involved, but can also vary because of other factors, including the type of offence or whether or not a particular offence involved a commercial intent.

Table 6.1 shows that more than half of the offences (58.0%) attracted a maximum penalty of 25 years imprisonment and 30.0% were offences where the maximum was life. The remaining 12.0% involved offences where the maximum penalty was less than 25 years (15 years: 4.3%; 10 years: 4.5%; 7 years: 0.3%; 2 years: 2.8%).

### 6.3.3 Type and quantity of drug

The type of drug involved in a particular Commonwealth serious drug offence does not have separate statutory significance. The only relevant distinction is that drawn between quantities of particular drugs which, with limited exceptions, determine the relevant maximum penalties. In setting the applicable thresholds for particular drugs, Parliament "has made its own judgment as to an appropriate penal response"[573] and there is no statutory basis for sentencing judges to treat one drug as more, or less, harmful than another.

Table 6.2 shows the frequency of Commonwealth serious drug offences by drug type and broken down according to whether the offences involved border controlled or controlled drugs, plants and precursors.

In this study, offences involving amphetamines and methamphetamine are grouped together because the marketable and commercial quantities for each are the same. Those involving ephedrine and pseudoephedrine are grouped together for the same reason. These groupings are further justified on the bases that amphetamines and methamphetamine are drugs with similar effects, both being central nervous system stimulants, and ephedrine and pseudoephedrine are both precursors typically used in the production of methamphetamine.[574]

Around six in ten offences involved only two drug types: heroin (35.1%) or cocaine (26.2%). The next most common drug types were methamphetamine (13.6%), pseudoephedrine (9.1%) and MDMA (6.9%). Other drug types included cannabis (other than resin) (2.8%), GBL (2.4%) and methcathinone (1.9%). Another nine drug types accounted for the remaining 2.1% of offences.

#### 6.3.3.1 Drug quantity range

As has already been discussed, the pure quantity of the substance involved in a particular offence is important because of its direct connection with the maximum penalty.[575] However, the extent to which the quantity of the drug exceeds the legislative threshold is another of the factors which can affect the sentence. It is "not unimportant" to fit the quantity involved in the specific offence into the range provided by the sentencing legislation[576] because "[t]here must be a sliding scale of sentencing in recognition of where the quantity actually imported sits in the range specified as exposing the offender to that penalty".[577]

Table 6.2 also shows the marketable and commercial quantities (pure weight in grams)[578] specified in the *Criminal Code Regulations* for each type of drug in the study.

573 *Adams v The Queen* (2008) 234 CLR 143 at [10].

574 Australian Crime Commission, *Illicit drug data report 2012–13*, pp 24ff (amphetamines), 176ff (precursors), at <www.crimecommission.gov.au/publications/intelligence-products/illicit-drug-data-report/illicit-drug-data-report-2012-13>, accessed 9 May 2014.

575 *R v Nguyen; R v Pham* (2010) 205 A Crim R 106 at [70], referring to *Adams v The Queen* (2008) 234 CLR 143 at [2]. See also pp 5, 11, 28, 75.

576 *Tyn v R* (2009) 195 A Crim R 345 at [28] (Simpson J; Spigelman CJ and James J agreeing).

577 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [307]; see also [308].

578 Some drugs such as cannabis and opium do not have a pure form; rather, weight is measured according to the raw form.

**Table 6.2: Frequency of Commonwealth serious drug offences by drug type; threshold drug quantity**

| Border controlled drugs/plants/precursors | | | | |
|---|---|---|---|---|
| **Drug type** | **Cases** | | **Marketable quantity** | **Commercial quantity** |
| | **n** | **%** | **grams** | **grams** |
| Cannabis (other than resin) | 16 | 1.9 | 25,000 | 100,000 |
| Cannabis resin | 2 | 0.2 | 20 | 50,000 |
| Cocaine | 219 | 25.5 | 2 | 2,000 |
| N,N-Dimethyltryptamine | 2 | 0.2 | 2 | 2,000 |
| Gammabutyrolactone (GBL) | 21 | 2.4 | 2 | 1,000 |
| Heroin | 279 | 32.4 | 2 | 1,500 |
| Lysergide (LSD) | 2 | 0.2 | 0.002 | 2 |
| 3,4-Methyeneldioxymethamphetamine (MDMA) | 40 | 4.7 | 0.5 | 500 |
| 3,4-Methylenedioxypyrovalerone (MDPV) | 1 | 0.1 | 2 | 750 |
| Methamphetamine[a] | 99 | 11.5 | 2 | 750 |
| Methcathinone[b] | 16 | 1.9 | 2 | 750 |
| Monoacetylmorphines | 1 | 0.1 | 2 | 2,000 |
| Opium | 5 | 0.6 | 20 | 20,000 |
| Phenyl-2-propanone | 2 | 0.2 | 5.4 | 2,030 |
| Phenylpropanolamine[b] | 1 | 0.1 | 3.2 | 1,200 |
| Pseudoephedrine[c] | 72 | 8.4 | 3.2 | 1,200 |
| | **778** | **90.5** | | |
| | | | | |
| **Controlled drugs/plants/precursors** | | | | |
| **Drug type** | **Cases** | | **Marketable quantity** | **Commercial quantity** |
| | **n** | **%** | **grams** | **grams** |
| Cannabis (other than resin) | 8 | 0.9 | 25,000 | 125,000 |
| Cannabis plant | 1 | 0.1 | 25,000 (or 100 plants) | 250,000 (or 1,000 plants) |
| Cocaine | 6 | 0.7 | 250 | 2,000 |
| Heroin | 23 | 2.7 | 250 | 1,500 |
| 3,4-Methyeneldioxymethamphetamine (MDMA) | 19 | 2.2 | 100 | 500 |
| Methamphetamine[d] | 18 | 2.1 | 250 | 750 |
| Phenyl-2-propanone | 1 | 0.1 | 675 | 2,030 |
| Pseudoephedrine | 6 | 0.7 | 400 | 1,200 |
| | **82** | **9.5** | | |
| | | | | |
| **Total** | **860** | **100.0** | | |

a Includes five cases of amphetamines (including one case where no commercial quantity was specified for offences under the *Customs Act*, s 233B(1) (rep)).

b Quantity added to the Code on 4 April 2012: *Crimes Legislation Amendment (Powers and Offences) Act* 2012 (Cth), Sch 5[5].

c Includes five cases of ephedrine.

d Includes four cases of amphetamines.

Offences involving marketable or commercial quantities are classified as falling in a low-, mid- or high-range (the drug quantity range).[579] When a marketable quantity was involved in a particular offence, the drug quantity is classified as low-range where the pure weight of the drug was less than a third of the maximum marketable quantity. A drug quantity in the middle third is classified as mid-range and a drug quantity in the top third is classified as high-range. As the following shows, most offences involving marketable quantities fell into the low-range:

- low-range (68.9% or 40.0% of offences)
- mid-range (19.4% or 11.3% of offences)
- high-range (11.6% or 6.7% of offences).

When a commercial quantity was involved in a particular offence, the drug quantity is classified as low-range where the pure weight of the drug was less than twice the minimum commercial quantity. A drug quantity which was at least ten times the minimum commercial quantity is classified as high-range, while a drug quantity which fell between the low- and high-range is classified as mid-range. Offences involving commercial quantities fell into the following ranges:

- low-range (27.5% or 9.4% of offences)
- mid-range (33.9% or 11.6% of offences)
- high-range (38.6% or 13.3% of offences).

### 6.3.4 Commonwealth serious drug offences by year

Figure 6.1 shows the distribution of Commonwealth serious drug offences (principal offence *only*) over each of the five years of the study period.[580] It is evident that there was a marked increase in the number of cases dealt with in 2011 and 2012. Overall, there has been an increase of 31.8% in the number of cases from 151 cases in 2008 to 199 cases in 2012.

#### 6.3.4.1 Offence and drug type

As Figure 6.2 shows, the increase in the number of Commonwealth serious drug offences, especially in 2011 and 2012, was attributable mainly to an increase in the number of offences involving border controlled or controlled precursors, particularly pseudoephedrine. Offences involving precursors were fairly evenly divided between those involving commercial and marketable quantities.

The increase in the number of cases finalised in 2012 was also due to an increase in the number of importation and trafficking offences involving methamphetamine or cocaine, and to the importation of other types of drugs, particularly methcathinone. An earlier Commission study about sentencing NSW drug offenders for Commonwealth serious drug offences under s 233B(1) (rep) of the *Customs Act* reported that there had been very few cases involving methamphetamine in the 1990s.[581] By comparison, over the period of this study, offences involving that drug have increased. So too have offences involving cocaine, which overtook heroin as the most common drug in 2012. A similar pattern for heroin and cocaine was identified in the earlier Commission study.[582]

579 In some cases, such as when the offence was one of conspiracy to import a border controlled drug, it was not always possible to ascertain the pure quantity of the drug because no drug was available to be measured. However, for the purposes of the study, the gross amount specified in the CSD was used for classification purposes.

580 Excludes 12 cases where the first instance sentence date was before 2008. See also n 558 above.

581 Potas and Poletti, above n 208, pp 9–10.

582 ibid.

**Figure 6.1: Frequency of Commonwealth serious drug offences by year and State or Territory**

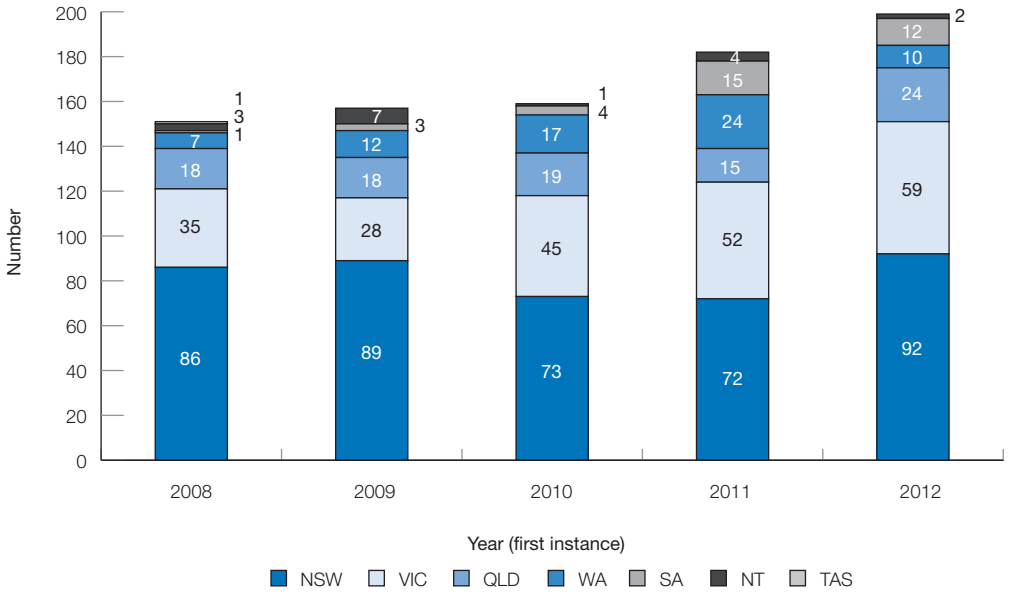
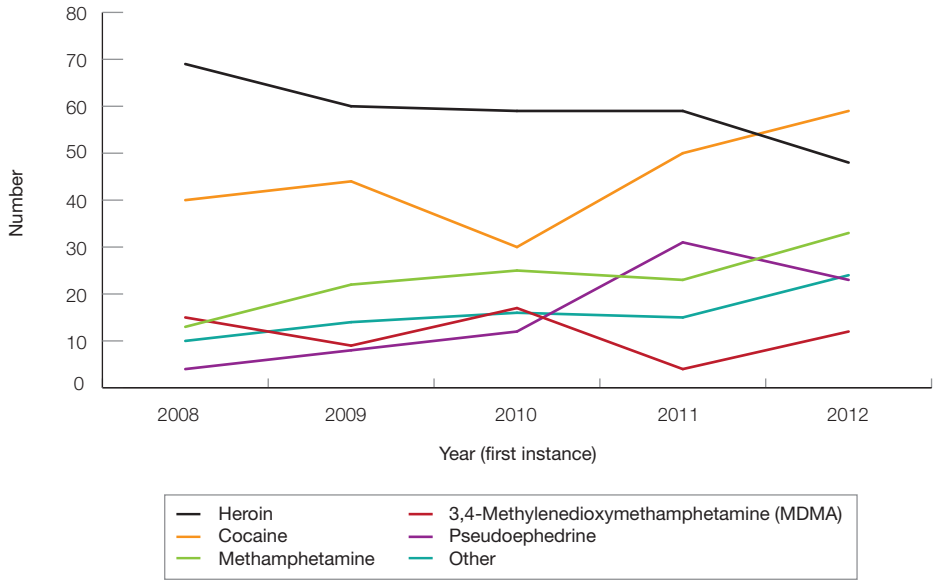



Figure 6.2 also shows that the number of offences involving heroin has fallen since 2008. The proportion of cases involving heroin finalised during the study period has decreased from almost half (45.7%) in 2008 to just under a quarter (24.1%) in 2012.

Although possession offences in Div 308 amounted to less than 1.0% of the cases finalised in the study period, interestingly all of these cases, with one exception, were finalised in 2011 or 2012, suggesting that these offences may be increasing.

**Figure 6.2: Frequency of Commonwealth serious drug offences by drug type and year**



#### 6.3.4.2 Maximum penalty

While there have been fluctuations, offences with a maximum penalty of 25 years were the most common every year, followed by those where the maximum penalty was life. However, there has been a steady increase in the number of offences with a maximum penalty of less than 25 years. Consequently, the proportion of these cases has increased significantly from 4.0% of Commonwealth serious drug offences in 2008 to 17.6% in 2012.

### 6.3.5 State or Territory

As shown in Figure 1.1 in Chapter 1, "Introduction", approximately half the Commonwealth serious drug offence cases in the study period were finalised in NSW. The frequency of cases dealt with in each State and in the Northern Territory is shown below:

- NSW (49.0%)
- Victoria (25.8%)
- Queensland (10.9%)
- Western Australia (8.1%)
- South Australia (4.1%)
- Northern Territory (2.0%)
- Tasmania (0.1%).

#### 6.3.5.1 Trends by year

As Figure 6.1 shows, NSW, Victoria and Queensland all had the highest number of cases in 2012 (92, 59 and 24 cases respectively). The number of cases in Victoria has increased since 2008 (from 35 and 28 in 2008 and 2009 respectively to 45, 52 and 59 in 2010, 2011 and 2012 respectively). There was also a dramatic increase in the number of cases dealt with in South Australia in 2011 and 2012 (from only one, three and four in 2008, 2009 and 2010 respectively to 15 and 12 in 2011 and 2012 respectively). As a result, the proportion of cases from NSW has declined since 2008 from 57.0% to 46.2% in 2012.[583]

#### 6.3.5.2 Offence and drug type

The vast majority of Commonwealth serious drug offences in each State and Territory involved importation, including all cases in the Northern Territory and Tasmania. However, in South Australia and Victoria there was a disproportionately high rate of trafficking offences (14.3% and 12.2% respectively compared with 7.4% nationally).

Offenders in South Australia and the Northern Territory were much more likely to import border controlled precursors (57.1% and 52.9% respectively). Not surprisingly, these two States had the highest proportion of offences involving pseudoephedrine (60.0% and 52.9% respectively). In South Australia, these offences were more likely to involve marketable quantities, while most in the Northern Territory involved commercial quantities.

Heroin was the most common drug type involved in offences in Victoria (43.7%), and this was higher than the national rate (35.1%). Heroin was also the most common in NSW and Western Australia (both 37.1%), and the second most common in the Northern Territory (29.4%). In addition, NSW had a disproportionately high number of offences involving cocaine (36.8% compared with 26.2% nationally), while Western Australia had a disproportionately high number of offences involving methamphetamine (32.9% compared with 13.6% nationally).

583 The proportion of cases finalised in NSW steadily decreased until 2011 where it constituted 39.6% of cases nationally. The rise in 2012 is mainly attributable to an increase in importation offences involving commercial quantities of cocaine.

The most common drug type in Queensland was cannabis in all its forms (21.3%), closely followed by cocaine (20.2%) and heroin (18.1%). Of the 27 cases involving cannabis nationally, 20 were dealt with in Queensland. Queensland also had a disproportionately high number of offences involving MDMA (13.8% compared with 6.9% nationally) and GBL (8.5% compared with 2.4% nationally).

More than half of the 16 cases involving methcathinone were dealt with in Victoria accounting for 4.1% of the offences finalised there, while one-quarter were dealt with in Queensland, representing 4.3% of the offences in that State. The national rate was 1.9%.[584]

#### 6.3.5.3 Maximum penalty

NSW had the highest proportion of offences with a maximum penalty of life imprisonment (35.9%). South Australia had the highest proportion, by far, of offences where the maximum penalty was less than 25 years (65.7%). The Northern Territory and Western Australia had the highest proportion of offences with a maximum penalty of 25 years (76.5% and 74.3% respectively).

### 6.3.6 Role of offenders

As has already been discussed, a finding about an offender's role is one aspect of the sentencing process with the capacity to affect the sentence ultimately imposed. In *The Queen v Olbrich*,[585] the High Court emphasised that the characterisation of an offender in terms of a particular role, such as that of a "courier" or "principal" should not obscure an assessment of what the particular offender had done.[586] Notwithstanding the need to focus on what an offender has done in connection with the particular criminal enterprise, it is accepted that there can be a hierarchy of offending behaviour.

Offenders are grouped into five role categories. The classification of conduct falling within particular role categories has been adapted from an earlier Judicial Commission study, *Sentencing drug offenders*.[587] Adjustments have been made to the categories to reflect the expanded scope of conduct which is prohibited under Pt 9.1, such as manufacturing and trafficking. Until December 2005, such conduct could only be prosecuted under State or Territory legislation.

#### 6.3.6.1 Principal

These offenders played a key role in the operation or in the execution of the offence. They were usually involved in critical stages of the offence, such as the planning and funding, and made decisions concerning its execution. These offenders often recruited others, organised the purchase of the drugs and managed resources.

These offenders also include:

- those found by a sentencing judge to be the principal in Australia of an international drug syndicate
- offenders who organised an importation primarily for financial gain, but the offence also included a personal use component
- offenders who played a critical role in the manufacture of drugs, including, but not limited to, permitting their property to be used for the manufacture of drugs and arranging for the purchase of materials to be used in the manufacturing process.

A principal also refers to persons who acted or may have acted alone.

584 The remaining three cases involving methcathinone were dealt with in the NT. This accounts for 17.6% of the cases dealt with there. Although this percentage appears high, a total of only 17 cases were dealt with in the NT during the study period.

585 (1999) 199 CLR 270.

586 ibid at [19].

587 Potas and Poletti, above n 208, p 10ff.

#### 6.3.6.2 High-level role

These offenders played an extensive and critical role in the operation and were usually involved in activities relevant to the higher end of the drug syndicate hierarchy such as:

- investing financially in an importation
- arranging for the purchase of the drugs
- recruiting couriers or low-level participants
- organising travel plans
- arranging the drug distribution in Australia.

In the case of manufacturing offences, these offenders include those whose sole role was to perform the manufacturing task, but who were undertaking this task at the direction of others.

#### 6.3.6.3 Courier

These offenders usually received payments of cash for importing drugs into Australia. In a small number of cases, offenders who took delivery of drugs were sentenced as couriers. Such offenders have been included in this category because there was an explicit finding to this effect in the judgment, although such conduct would typically fall into the category below. Offenders classified as a courier usually had little or no knowledge of the larger drug syndicate or the quantities of drugs involved.

#### 6.3.6.4 Low-level role

These offenders played minor roles in the operation with no responsibility for making decisions. They usually had little or no knowledge of the larger operation or the quantities of drugs involved. Such offenders may have stored prohibited drugs, acted as drivers for higher-level participants, acted as bodyguards or lookouts, unloaded containers, and/or delivered or transported drugs to suppliers.

#### 6.3.6.5 Personal use

Offenders in this category imported or received drugs solely for their own use or where the charges against them did not involve commercial intent.

#### 6.3.6.6 Frequency of offender roles

The following shows the frequency of offenders' roles in the study:[588]

- principal (20.8%)
- high-level (20.8%)
- courier (42.6%)
- low-level (12.4%)
- personal use (3.3%).

### 6.3.7 Number of offences

Almost three-quarters of Commonwealth serious drug offenders (74.3%) were sentenced for one offence *only*; while just over one-quarter (25.7%) were sentenced for multiple offences. The number of multiple offences ranged from two to 21.[589] Most of these offenders were sentenced for two offences (57.0% or 14.7% of all offenders) or three offences (21.3% or 5.5% of all offenders).

588 This information is based on 788 cases. The role of the offender was unknown in 72 cases (8.4%).

589 One offender was sentenced in SA for 21 Cth and State offences. The principal offence was the importation of a commercial quantity of GBL contrary to s 307.1(1) of the Code. The majority of the State offences for this offender were firearms offences mainly related to the possession of firearms and ammunition, but he was also sentenced for a number of State drug supply and possession offences.

#### 6.3.7.1 Commonwealth offences

Over three-quarters of the offenders (77.8%) were sentenced for one Commonwealth offence, while 22.2% were sentenced for multiple Commonwealth offences. During the study period, 5.7% of offenders were sentenced for a combination of Commonwealth and State or Territory offences.[590]

#### 6.3.7.2 Additional offences

Approximately one in five offenders (20.8%) were sentenced for another drug offence: Commonwealth *only* (16.2%), State or Territory *only* (3.4%) or both Commonwealth and State or Territory (1.3%). Of the 429 additional offences in respect of which offenders were sentenced, almost three-quarters (73.9%) were either a Commonwealth or State drug offence (57.8% and 16.1% respectively).

#### 6.3.7.3 Section 16BA schedules

Section 16BA of the *Crimes Act* permits a court, subject to the requirements of the section, to take into account other Commonwealth offences in respect of which an offender has admitted guilt. It is not possible to report on the use of s 16BA schedules nationally because this information is not available from the CSD. However, an examination of cases on JIRS showed that only 3.4% of offenders in NSW had other offences taken into account on a s 16BA schedule when the offender was sentenced for the principal offence.

### 6.3.8 Plea and assistance

#### 6.3.8.1 Plea

An offender is entitled to a discount if they plead guilty. It is not necessary for a court sentencing a Commonwealth offender to nominate the discount given for a plea. The discount is given in recognition of an offender's "willingness to facilitate the course of justice".[591]

Over four-fifths of Commonwealth serious drug offenders (84.7%) pleaded guilty, while 15.3% pleaded not guilty. The not guilty plea rate was disproportionately higher for an offence which carried a maximum penalty of life imprisonment (24.8%) or where the offender's role was found to be that of a principal (22.6%) or at a high-level (21.3%).

#### 6.3.8.2 Assistance

An offender is entitled to a discount if they provide information to the authorities that has the potential to assist in the investigation or prosecution of other offenders.[592] The range of the discount varies depending on the usefulness and value of the information provided. Approximately one-fifth of Commonwealth serious drug offenders (19.6%) provided assistance of varying degrees of usefulness, while the remaining 80.4% provided no assistance.[593] Offenders who pleaded guilty were much more likely to assist than those who did not (22.0% compared with 6.5%).

590 This includes 3.5% of offenders sentenced for one Cth offence and at least one State or Territory offence, and 2.2% of offenders sentenced for multiple Cth offences and at least one State or Territory offence.

591 *Cameron v The Queen* (2002) 209 CLR 339 at [11], [14]; see also [12]–[13].

592 *R v Cartwright* (1989) 17 NSWLR 243 at 253.

593 This information is based on 772 cases. Assistance to authorities was unknown in 88 cases (10.2%).

### 6.3.9 Subjective factors

#### 6.3.9.1 Gender

Commonwealth serious drug offenders were predominantly male (75.5%), while 24.5% were female. Females were under-represented in those offences where the maximum penalty was life imprisonment (14.7%), and over-represented in offences involving low-range marketable quantities of drugs or precursors (36.9%), offences involving heroin (38.1%), and as couriers (35.7%).

#### 6.3.9.2 Age

The median age of offenders was 36 years, while the mean age was 36.6 years. The two youngest offenders were aged 17 years and the two oldest offenders were aged 68 years.[594] Offenders are grouped into four age categories: under 25 years (14.8%), 25 to under 35 years (32.6%), 35 to under 45 years (26.5%) and 45 years and over (26.1%).

The youngest group of offenders was under-represented in offences involving a maximum penalty of life imprisonment (10.8%), and over-represented in that group of offenders found to play a low-level role in the commission of an offence (28.4%) and in offences involving methamphetamine (24.8%). Offenders aged 25 to under 35 years were over-represented in offences committed for personal use (57.7%). The oldest group of offenders was over-represented in not guilty plea cases (37.7%).

#### 6.3.9.3 Prior record

Over three-quarters of offenders (78.4%) had no prior record of offending and under one-quarter of offenders (21.6%) did. The type of prior offence was unknown in the study. Of the 336 offenders found to be a courier, 82.4% had no prior record which is consistent with the observation of appellate courts that drug couriers are often selected precisely because they are of prior good character.[595]

### 6.3.10 Overview of the penalties and sentences imposed for Commonwealth serious drug offences

The penalties imposed for the principal offences during the study period are set out below from most frequently ordered to least.

#### 6.3.10.1 Full-time imprisonment

The vast majority of offenders (791 or 92.0%) were sentenced to a term of full-time imprisonment.[596] The shortest head sentence imposed was 4.7 months[597] and the longest was life imprisonment.[598] The median head sentence was 78 months and the middle 50% range was 50 to 108 months.

These figures relate only to the principal offence and do not reflect the overall sentence imposed where there were multiple offences. Almost one-quarter of the offenders who received full-time imprisonment (24.8%) were sentenced for multiple offences. Of these, just over a half (54.1%) involved consecutive or partly consecutive sentences. The remainder received wholly concurrent sentences. The median overall head sentence was 90 months and the middle 50% range was 54 to 138 months. By comparison, the median head sentence for those offenders convicted of only one offence was 78 months and the middle 50% range was 54 to 105 months.

594 This information is based on 755 cases. Age was unknown for 105 offenders (12.2%), all of whom were sentenced in Vic.

595 *R v Lopez-Alonso* (1996) 86 A Crim R 270 at 274–275; *Okafor v R* [2007] NSWCCA 147 at [47].

596 A recognizance release order was made under s 20(1)(b) of the *Crimes Act* in respect of 17.2% of those offenders who received a sentence of full-time imprisonment. The median term of such an order was 24 months.

597 Two co-offenders were given a penalty of 141 days and were released at sentence having already served this term.

598 Single NPPs were fixed for both the offenders given a life sentence (30 years and 21 years respectively).

The median effective head sentence for *all* offenders sentenced to full-time imprisonment was 80 months and the middle 50% range was 54 to 108 months. The median effective NPP was 48 months and the middle 50% range was 30 to 66 months.

#### 6.3.10.2 Non-custodial penalties

***Suspended sentences*** under s 20(1)(b) of the *Crimes Act* were imposed on 6.9% of offenders. Section 20(1)(b) provides that where an offender is sentenced to a term of imprisonment the court may direct that the offender be released *forthwith* on a recognizance to be of good behaviour for a period not exceeding 5 years. The median duration of these recognizances was 24 months, which was fixed in respect of 51.7% of offenders. Recognizance release orders for 36 months and 12 months were also common (19.0% and 15.5% respectively). In the majority of cases (74.1%) the duration of the recognizance was longer than the term of imprisonment imposed.[599]

***Community service orders (CSOs)*** under prescribed State and Territory laws can be imposed on Commonwealth offenders by virtue of s 20AB of the *Crimes Act*.[600] This penalty accounted for 0.3% of sentences. Two Victorian offenders were ordered to perform a community-based order: one for 100 hours and the other for 2 years. One NSW offender was ordered to perform a CSO of 400 hours.

***Recognizances*** to be of good behaviour under s 20(1)(a) of the *Crimes Act* were imposed on two offenders (0.2%). The duration of the recognizance in each case was 24 months.

***A fine*** of $3,000 was ordered to be paid in respect of one NSW offender.

***No conviction*** was recorded with respect to two offenders (0.2%) who were discharged in accordance with s 19B of the *Crimes Act*, but were ordered to enter into a recognizance to be of good behaviour for 12 months and 18 months respectively.[601]

***Community corrections orders (CCOs)***[602] can be imposed under the *Sentencing Act* 1991 (Vic) on Commonwealth offenders by virtue of s 20AB of the *Crimes Act*. This penalty was imposed on one offender from Victoria (0.1%) for a term of 18 months.

***A youth justice order*** was imposed on one offender from Victoria (0.1%) under s 32 of the *Sentencing Act* 1991 (Vic) for a term of 18 months.

#### 6.3.10.3 Offences less likely to receive full-time imprisonment

As shown above, only 69 offenders (8.0%) did not receive a sentence of full-time imprisonment. The following types of offences had a disproportionately high rate of non-custodial penalties:

- importation of border controlled drugs where there was no commercial intent (70.0%)
- importation offences involving less than marketable quantities of border controlled drugs (60.0%)
- importation offences involving marketable quantities of border controlled precursors (37.8%)
- trafficking offences involving less than marketable quantities of controlled drugs (28.6%)
- possession offences (25.0%).

599 The duration of the recognizance release order was shorter than the term of imprisonment in only one case (1.7%) and was of the same duration in 24.1% of cases. The median term of imprisonment was 12 months, and the majority of sentences of imprisonment (81.4%) were in the range of 6 to 24 months.

600 These include community-based orders (CBOs) under Pt 3, Div 3 (rep) of the *Sentencing Act* 1991 (Vic). A CBO could be imposed for up to 2 years and generally involved undertaking community work. See *Crimes Regulations* 1990 (Cth), reg 6.

601 One of these offenders was sentenced in Qld and the other in Vic. Both were sentenced for an offence of attempting to possess less than a marketable quantity of an unlawfully imported border controlled drug contrary to s 307.7(1) and s 11.1(1) of the Code.

602 In Vic, this penalty replaced a number of sentencing options, including CBOs and intensive correction orders (ICO) from 16 March 2012.

The rate of non-custodial penalties was higher for offences involving methcathinone (68.8%), opium (60.0%), GBL (57.1%), cannabis (other than resin) (37.5%) and pseudoephedrine (21.8%) compared with other drug types.

Further, non-custodial penalties were imposed at a disproportionately higher rate in South Australia (34.3%), Queensland (22.3%) and the Northern Territory (17.6%). The only offender dealt with in Tasmania was sentenced to a non-custodial penalty.

All offences where an offender was less likely to be sentenced to full-time imprisonment attracted a maximum penalty of less than 25 years imprisonment. A further examination of those cases revealed that the lower the maximum penalty the higher the rate of non-custodial penalties: for maximum penalties of less than 10 years, 10 years and 15 years, a non-custodial penalty was imposed in 51.9%, 43.6% and 37.8% of cases respectively.

### 6.3.11 Analysing the relationships between sentencing factors and terms of imprisonment

*Bivariate analysis*

For each factor identified in Table 6.3 below, a bivariate analysis is conducted to determine the significance of the relationship of that factor with the head sentence imposed. The results are presented in Table 6.3.

It is important to note at the outset, that while helpful and informative, bivariate analysis cannot account for the interrelationships between the various factors, and the results of such analysis should not be taken at face value. However, this type of analysis does assist in identifying those factors with the capacity to significantly affect the head sentence for the purposes of undertaking multivariate analyses.

Table 6.3 shows the descriptive statistics for each factor, including the median and middle 50% range of head sentences for each category. The p-value showing the significance of the differences in the median terms (median test) and the significance in the distribution of terms (Kruskal-Wallis test) is also shown. The Eta statistic in the last column shows the strength of the association between the head sentence and each of the factors.

The bivariate analysis indicates that most of the identified factors had a statistically significant relationship with the length of the head sentence. The only exceptions were the number of Commonwealth serious drug offences, assistance to authorities and prior record.

In descending order of importance, the factors showing the strongest association with the head sentence were the maximum penalty, the threshold drug quantity,[603] the drug quantity range (low-, mid- or high-range), the role of the offender, the State or Territory where the offender was sentenced, drug type, plea, age group, gender and type of offence.

For each of these factors, Table 6.3 shows that the median head sentence:

- increased as the maximum penalty increased
- increased as the threshold drug quantity increased
- increased as the drug quantity range increased
- was longest when the role of the offender was determined to be at a high level and shortest for those offenders who were found to have committed offences for personal use
- was longest for offenders sentenced in NSW and shortest for offenders sentenced in South Australia
- was longest for offences involving the drug type MDMA and shorter for offences involving pseudoephedrine and “other” types of drugs, particularly methcathinone and cannabis (other than resin)
- was longest for offenders who pleaded not guilty

603 That is, the quantity expressed in the *Criminal Code Regulations* as a marketable or commercial quantity.

- was shortest for offenders in the age group under 25 years and longest for offenders aged 35 years and over
- was longest for males
- was longest when the type of offence[604] involved was manufacturing[605] and shortest for possession offences.

**Table 6.3: Bivariate relationship between sentencing factors and head sentences**

| | | | Head sentence | | | | |
|---|---|---|---|---|---|---|---|
| **Factor[a]** | **Cases** | | **Median** | **Middle 50% range** | **Median test[b]** | **Kruskal-Wallis test[c]** | **Eta[d]** |
| | **n** | **%** | **mths** | **mths** | **p-value** | **p-value** | |
| **Offence type** | | | | | < 0.090 | < 0.000 | 0.144 |
| Importation | 715 | 90.4 | 78.0 | 54.0–105.0 | | | |
| Trafficking | 60 | 7.6 | 84.0 | 43.5–130.5 | | | |
| Manufacture and cultivation | 10 | 1.3 | 99.0 | 60.0–199.5 | | | |
| Possession | 6 | 0.8 | 15.0 | 10.5–18.0 | | | |
| **Threshold drug quantity** | | | | | < 0.000 | < 0.000 | 0.575 |
| Commercial | 280 | 35.4 | 117.5 | 84.0–156.0 | | | |
| Marketable | 476 | 60.2 | 66.0 | 48.0–84.0 | | | |
| < marketable | 32 | 4.0 | 19.0 | 15.0–36.0 | | | |
| No commercial intent | 3 | 0.4 | 12.0 | | | | |
| **Maximum penalty** | | | | | < 0.000 | < 0.000 | 0.617 |
| Life | 245 | 31.0 | 120.0 | 89.0–171.0 | | | |
| 25 yrs | 488 | 61.7 | 72.0 | 48.0–87.0 | | | |
| 15 yrs | 23 | 2.9 | 31.0 | 24.0–36.0 | | | |
| 10 yrs | 22 | 2.8 | 22.0 | 17.5–37.5 | | | |
| < 10 yrs | 13 | 1.6 | 15.0 | 10.8–21.0 | | | |
| **Drug type** | | | | | < 0.000 | < 0.000 | 0.312 |
| Heroin | 300 | 37.9 | 72.0 | 54.5–96.0 | | | |
| Cocaine | 218 | 27.6 | 88.0 | 66.0–120.0 | | | |
| Methamphetamine | 110 | 13.9 | 81.0 | 48.0–120.0 | | | |
| MDMA | 59 | 7.5 | 102.0 | 48.0–145.0 | | | |
| Pseudoephedrine | 61 | 7.7 | 39.0 | 28.5–76.5 | | | |
| Other[e] | 43 | 5.4 | 42.0 | 20.0–60.0 | | | |
| **Drug quantity range** | | | | | < 0.000 | < 0.000 | 0.506 |
| Low-range | 399 | 52.8 | 66.0 | 48.0–84.0 | | | |
| Mid-range | 187 | 24.7 | 86.0 | 60.0–108.0 | | | |
| High-range | 170 | 22.5 | 120.0 | 90.0–180.0 | | | |

*(cont overleaf)*

604 While the difference in the median head sentence for this factor was insignificant ($p < 0.090$), there was a significant difference in the distribution (or spread) of head sentences ($p < 0.000$).

605 While this category includes cultivation offences, there was in fact only one case of cultivation and the offender in that case was sentenced to a head sentence of 18 months.

*Table 6.3 (cont)*

| | | | Head sentence | | | | |
|---|---|---|---|---|---|---|---|
| **Factor[a]** | **Cases** | | **Median** | **Middle 50% range** | **Median test[b]** | **Kruskal-Wallis test[c]** | **Eta[d]** |
| | **n** | **%** | **mths** | **mths** | **p-value** | **p-value** | |
| **Role of offender** | | | | | < 0.000 | < 0.000 | 0.378 |
| Principal | 145 | 20.1 | 84.0 | 45.0–141.0 | | | |
| High-level | 160 | 22.1 | 108.0 | 72.0–144.0 | | | |
| Courier | 332 | 45.9 | 72.0 | 50.0–90.0 | | | |
| Low-level | 77 | 10.7 | 60.0 | 36.0–84.0 | | | |
| Personal use | 9 | 1.2 | 18.0 | 10.8–36.0 | | | |
| **Commonwealth serious drug offences** | | | | | < 0.433 | < 0.303 | 0.082 |
| One only | 622 | 78.6 | 78.0 | 51.0–105.0 | | | |
| Multiple | 169 | 21.4 | 84.0 | 48.0–123.0 | | | |
| **Plea** | | | | | < 0.000 | < 0.000 | 0.285 |
| Guilty | 659 | 83.3 | 72.0 | 48.0–96.0 | | | |
| Not guilty | 132 | 16.7 | 108.0 | 63.8–149.3 | | | |
| **Assistance to authorities** | | | | | < 0.397 | < 0.450 | 0.028 |
| No | 565 | 79.6 | 78.0 | 48.0–108.0 | | | |
| Yes | 145 | 20.4 | 74.0 | 48.0–102.5 | | | |
| **Gender** | | | | | < 0.000 | < 0.000 | 0.157 |
| Male | 600 | 75.9 | 84.0 | 54.0–108.0 | | | |
| Female | 191 | 24.1 | 63.0 | 48.0–84.0 | | | |
| **Age** | | | | | < 0.037 | < 0.000 | 0.172 |
| under 25 yrs | 100 | 14.3 | 60.0 | 42.0–90.0 | | | |
| 25 to under 35 yrs | 220 | 31.6 | 78.0 | 56.3–111.0 | | | |
| 35 to under 45 yrs | 188 | 27.0 | 84.0 | 60.0–120.0 | | | |
| 45 yrs and over | 189 | 27.1 | 84.0 | 60.0–108.0 | | | |
| **Prior record** | | | | | < 0.308 | < 0.749 | 0.002 |
| No | 619 | 78.3 | 78.0 | 48.0–108.0 | | | |
| Yes | 172 | 21.7 | 73.0 | 54.8–108.0 | | | |
| **State or Territory** | | | | | < 0.000 | < 0.000 | 0.331 |
| NSW | 410 | 51.8 | 90.0 | 72.0–120.0 | | | |
| Vic | 202 | 25.5 | 54.0 | 36.0–72.0 | | | |
| Qld | 73 | 9.2 | 72.0 | 40.5–108.0 | | | |
| WA | 69 | 8.7 | 72.0 | 43.5–96.0 | | | |
| SA | 23 | 2.9 | 42.0 | 31.0–60.0 | | | |
| NT | 14 | 1.8 | 54.0 | 45.3–75.0 | | | |
| Tas | 0 | 0.0 | n/a | n/a | | | |
| **Overall** | **791** | **100.0** | **78.0** | **50.0–108.0** | | | |

a Figures are based on cases with known values. The role of the offender was unknown in 68 cases (8.6%). Whether the offender provided any assistance to authorities was unknown in 81 cases (10.2%). The age of offenders was unknown in 94 cases (11.9%), all of whom were sentenced in Victoria.

b The median test was used to determine if there was a significant difference between the medians.

c The Kruskal-Wallis test was used to determine if there was a significant difference in the distributions (or spread). The Kruskal-Wallis test returns the same value as the Mann-Whitney U test (where there are only two categories).

d The Eta statistic measures the strength of the relationship. Eta has a value between 0 (completely unpredictable) and 1 (perfectly predictable).

e This category includes cannabis (other than resin) (15 cases), GBL (9 cases), methcathinone (5 cases), phenyl-2-propanone (3 cases), cannabis resin (2 cases), opium (2 cases), LSD (2 cases), N,N-Dimethyltryptamine (2 cases), cannabis plant (1 case), monoacetylmorphines (1 case) and phenylpropanolamine (1 case). The median head sentence for the three most common drugs in this category were: 30 mths for cannabis (other than resin), 60 mths for GBL and 20 mths for methcathinone.

*Multivariate analysis*

A multivariate analysis is undertaken using Ordered Logistic Regression to determine which factors had a significant effect on the length of the head sentence after controlling for other factors.

With the exception of the threshold drug quantity, factors found to be significant at the bivariate level are included in the regression analysis. The threshold drug quantity is excluded because of the presence of multicollinearity[606] between it and the maximum penalty. The final regression model is shown in Table 6.4. The table displays the distribution of head sentences according to the ordinal groupings used in the regression analysis.[607]

Table 6.4 also shows the results of the regression analysis. The z-score, odds ratio, 95% confidence interval and the p-values are displayed for each category. Each category is compared to a reference category (odds ratio = 1), so that categories with odds ratios above 1 are more likely to receive longer head sentences and, conversely, categories with odds ratios below 1 are less likely to receive longer head sentences. The higher the z-score (regardless of direction) the more relevant the factor is.

Every factor entered into the regression model was still found to be significant. However, after controlling for other factors, some of the categories do not show the same effect as was found in the bivariate analysis. For example:

- ***Drug type***: In the bivariate analysis, offences involving MDMA recorded the longest median head sentence compared with other drug types, while offenders sentenced for offences involving heroin received a shorter median head sentence than those sentenced for offences involving MDMA, cocaine or methamphetamine. However, in the regression analysis, offenders sentenced for offences involving heroin were more likely than offenders sentenced for offences involving all other drug types (except cocaine) to receive longer head sentences.
- ***Role of the offender***: In the bivariate analysis, offenders with a high-level role received a longer median head sentence than principals. However, in the regression analysis, principals were more likely to receive longer head sentences.
- ***State or Territory***: In the bivariate analysis, the offenders in every State received a shorter median head sentence compared with those imposed on offenders in NSW. However, the regression analysis shows that only offenders in Victoria, Queensland and South Australia (although the effect in South Australia was relatively weak) were less likely to receive longer head sentences.

#### 6.3.11.1 Most important factors affecting head sentences

The results of the regression analysis showed a statistically significant relationship between many factors and the length of the head sentence when all other factors were held constant. The following discussion presents these factors in order of importance.

*Maximum penalty*

As was also demonstrated by the bivariate analysis, the most important factor in the regression model was the maximum penalty. The odds ratios for this factor indicate that those offenders who were being sentenced for an offence where the maximum penalty was life imprisonment were much more likely to receive longer head sentences (odds ratio = 10.672) compared with those offenders sentenced for offences with a maximum penalty of 25 years. On the other hand, those offenders sentenced for offences with a maximum penalty of less than 25 years imprisonment were less likely to receive longer head sentences (odds ratio = 0.062).

606 Multicollinearity occurs when there is a high degree of correlation between predictor variables (or factors). This is a data problem that can produce unstable or misleading results for regression analysis.

607 Using these ordered groups for the head sentence produced the same significant factors and very similar order of importance (at the univariate level) to that found using an interval scale in the bivariate analysis.

**Table 6.4: Results of regression analysis showing distribution of head sentences (final model)**

| | | Head sentence | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Factor** | **Cases** | **up to 3 yrs** | **> 3 to 5 yrs** | **> 5 to 10 yrs** | **> 10 to 15 yrs** | **> 15 yrs** | **z-score** | **Odds ratio** | **95% confidence interval** | | **Significance** |
| | n | % | % | % | % | % | | | lower | upper | p-value |
| **Maximum penalty** | | | | | | | | | | | |
| 25 yrs | 488 | 13.3 | 30.7 | 51.8 | 3.7 | 0.4 | | 1.000 | | | |
| Life | 245 | 2.4 | 7.8 | 44.1 | 26.1 | 19.6 | 9.91 | 10.672 | 6.681 | 17.047 | < 0.000 |
| < 25 yrs | 58 | 81.0 | 19.0 | 0.0 | 0.0 | 0.0 | –4.04 | 0.062 | 0.016 | 0.239 | < 0.000 |
| **Drug type** | | | | | | | | | | | |
| Heroin | 300 | 10.7 | 26.7 | 52.7 | 6.7 | 3.3 | | 1.000 | | | |
| Cocaine | 218 | 7.8 | 15.1 | 55.0 | 13.3 | 8.7 | –0.30 | 0.944 | 0.642 | 1.387 | < 0.767 |
| Methamphetamine | 110 | 11.8 | 26.4 | 39.1 | 15.5 | 7.3 | –3.61 | 0.402 | 0.245 | 0.660 | < 0.000 |
| MDMA | 59 | 16.9 | 11.9 | 32.2 | 18.6 | 20.3 | –2.07 | 0.504 | 0.264 | 0.963 | < 0.038 |
| Pseudoephedrine | 61 | 44.3 | 26.2 | 21.3 | 6.6 | 1.6 | –3.83 | 0.198 | 0.086 | 0.454 | < 0.000 |
| Other[a] | 43 | 44.2 | 34.9 | 18.6 | 2.3 | 0.0 | –7.10 | 0.028 | 0.010 | 0.075 | < 0.000 |
| **Drug quantity range** | | | | | | | | | | | |
| Low-range | 399 | 17.8 | 30.6 | 45.4 | 5.0 | 1.3 | | 1.000 | | | |
| Mid-range | 187 | 5.9 | 19.8 | 61.0 | 10.7 | 2.7 | 3.62 | 2.108 | 1.408 | 3.154 | < 0.000 |
| High-range | 170 | 4.1 | 8.8 | 38.8 | 24.7 | 23.5 | 8.89 | 8.704 | 5.402 | 14.024 | < 0.000 |
| **Role of offender** | | | | | | | | | | | |
| Courier | 332 | 11.7 | 31.0 | 53.6 | 3.0 | 0.6 | | 1.000 | | | |
| High-level | 160 | 7.5 | 12.5 | 42.5 | 25.0 | 12.5 | 2.92 | 2.049 | 1.266 | 3.318 | < 0.004 |
| Principal | 145 | 21.4 | 14.5 | 32.4 | 13.8 | 17.9 | 5.06 | 3.670 | 2.217 | 6.073 | < 0.000 |
| Low-level | 77 | 26.0 | 31.2 | 36.4 | 6.5 | 0.0 | –4.63 | 0.268 | 0.154 | 0.469 | < 0.000 |
| Personal use | 9 | 88.9 | 11.1 | 0.0 | 0.0 | 0.0 | –3.00 | 0.032 | 0.003 | 0.304 | < 0.003 |
| **Plea** | | | | | | | | | | | |
| Guilty | 659 | 17.0 | 23.5 | 47.0 | 8.5 | 3.9 | | 1.000 | | | |
| Not guilty | 132 | 4.5 | 18.9 | 38.6 | 19.7 | 18.2 | 4.32 | 2.515 | 1.655 | 3.823 | < 0.000 |
| **Gender** | | | | | | | | | | | |
| Male | 600 | 14.3 | 19.8 | 46.3 | 11.5 | 8.0 | | 1.000 | | | |
| Female | 191 | 16.8 | 31.9 | 43.5 | 6.8 | 1.0 | –2.30 | 0.658 | 0.460 | 0.940 | < 0.022 |
| **Age** | | | | | | | | | | | |
| under 25 yrs | 100 | 22.0 | 29.0 | 43.0 | 5.0 | 1.0 | | 1.000 | | | |
| 25 to under 35 yrs | 220 | 11.4 | 23.2 | 44.5 | 15.5 | 5.5 | 1.35 | 1.420 | 0.854 | 2.361 | < 0.177 |
| 35 to under 45 yrs | 188 | 10.6 | 17.0 | 51.1 | 12.8 | 8.5 | 2.77 | 2.105 | 1.244 | 3.561 | < 0.006 |
| 45 yrs and over | 189 | 9.0 | 18.0 | 55.0 | 7.4 | 10.6 | 3.36 | 2.489 | 1.463 | 4.233 | < 0.001 |
| **State or Territory** | | | | | | | | | | | |
| NSW | 410 | 3.9 | 13.7 | 60.2 | 13.4 | 8.8 | | 1.000 | | | |
| Vic | 202 | 32.2 | 33.2 | 25.7 | 5.0 | 4.0 | –8.67 | 0.116 | 0.071 | 0.188 | < 0.000 |
| Qld | 73 | 23.3 | 23.3 | 41.1 | 11.0 | 1.4 | –3.08 | 0.396 | 0.219 | 0.714 | < 0.002 |
| WA | 69 | 14.5 | 31.9 | 36.2 | 10.1 | 7.2 | –0.29 | 0.921 | 0.527 | 1.608 | < 0.772 |
| SA | 23 | 34.8 | 47.8 | 17.4 | 0.0 | 0.0 | –2.01 | 0.333 | 0.114 | 0.972 | < 0.044 |
| NT | 14 | 14.3 | 50.0 | 21.4 | 14.3 | 0.0 | –0.36 | 0.794 | 0.224 | 2.812 | < 0.721 |
| **Overall** | **791** | **14.9** | **22.8** | **45.6** | **10.4** | **6.3** | | | | | |

a This category includes cannabis (other than resin) (15 cases), GBL (9 cases), methcathinone (5 cases), phenyl-2-propanone (3 cases), cannabis resin (2 cases), opium (2 cases), LSD (2 cases), N,N-Dimethyltryptamine (2 cases), cannabis plant (1 case), monoacetylmorphines (1 case) and phenylpropanolamine (1 case).

*Drug quantity range*

The drug quantity range within the threshold drug quantity (low-, mid- or high-range) was the next most important factor. The odds ratios for this factor indicate that those offenders who were convicted of offences involving drug quantities in the high-range were much more likely to receive longer head sentences (odds ratio = 8.704) compared with those offenders convicted of offences involving drug quantities in the low-range. Offenders convicted of offences involving mid-range quantities of a particular drug were also more likely to receive longer head sentences (odds ratio = 2.108).

*State or Territory*

The State or Territory in which an offender was sentenced was also crucial to the regression. Compared with NSW, offenders sentenced in Victoria were the least likely to receive longer head sentences (odds ratio = 0.116). Offenders in Queensland (odds ratio = 0.396) and South Australia (odds ratio = 0.333) were also less likely to receive longer head sentences. Although significant, the effect for South Australia was relatively weak.

*Drug type*

With the exception of offences involving cocaine, offenders convicted of offences involving all other drug types were less likely to receive longer head sentences compared with offenders convicted of offences involving heroin ("other" drugs:[608] odds ratio = 0.028; pseudoephedrine: odds ratio = 0.198; methamphetamine: odds ratio = 0.402; MDMA: odds ratio = 0.504). Although significant, the effect for MDMA was relatively weak.

*Role of offender*

Compared with couriers, principals (odds ratio = 3.670) and offenders with a high-level role (odds ratio = 2.049) were more likely to receive longer head sentences, but offenders who committed drug offences for personal use (odds ratio = 0.032) or who had low-level roles (odds ratio = 0.268) were less likely to receive longer head sentences.

*Plea*

Offenders who pleaded not guilty were more likely to receive longer head sentences (odds ratio = 2.515) than those who pleaded guilty.

*Age group*

Compared with offenders aged under 25 years, offenders aged 35 to under 45 years (odds ratio = 2.105) and offenders aged 45 years and over (odds ratio = 2.489) were more likely to receive longer head sentences.

*Gender*

Females were less likely than males to receive longer head sentences (odds ratio = 0.658).

#### 6.3.11.2 The effect of different maximum penalties

Since the statutory maximum penalty was the most important factor in the overall regression model, offences with maximum penalties of 25 years and life imprisonment are separately analysed to determine whether each of the factors was still significant and which were the most important. The results of the regression analyses are presented in Table 6.5, while Table 6.6 shows the frequency, median and middle 50% range of head sentences for each factor found to be significant in the final regression models.

608 This category mostly comprises cannabis (other than resin) (15 cases), GBL (9 cases) and methcathinone (5 cases).

**Table 6.5: Results of regression analysis where maximum penalty 25 years or life imprisonment (final models)**

| | 25 yrs imprisonment | | | | | Life imprisonment | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Factor** | **z-score** | **Odds ratio** | **95% confidence interval** | | **Significance** | **z-score** | **Odds ratio** | **95% confidence interval** | | **Significance** |
| | | | lower | upper | p-value | | | lower | upper | p-value |
| **Drug type** | | | | | | | | | | |
| Heroin | | 1.000 | | | | | 1.000 | | | |
| Cocaine | 0.21 | 1.052 | 0.651 | 1.698 | < 0.837 | –0.95 | 0.693 | 0.325 | 1.478 | < 0.342 |
| Methamphetamine | –2.90 | 0.357 | 0.178 | 0.716 | < 0.004 | –2.14 | 0.421 | 0.191 | 0.929 | < 0.032 |
| MDMA | –2.67 | 0.174 | 0.048 | 0.628 | < 0.008 | –1.60 | 0.478 | 0.194 | 1.182 | < 0.110 |
| Pseudoephedrine | –2.23 | 0.326 | 0.122 | 0.872 | < 0.025 | | | | | |
| Other[a] | –3.12 | 0.092 | 0.020 | 0.412 | < 0.002 | –5.60 | 0.011 | 0.002 | 0.054 | < 0.000 |
| **Drug quantity range** | | | | | | | | | | |
| Low-range | | 1.000 | | | | | 1.000 | | | |
| Mid-range | 4.29 | 3.296 | 1.913 | 5.681 | < 0.000 | –0.04 | 0.985 | 0.484 | 2.003 | < 0.966 |
| High-range | 5.79 | 8.154 | 4.006 | 16.597 | < 0.000 | 5.40 | 8.394 | 3.880 | 18.156 | < 0.000 |
| **Role of offender** | | | | | | | | | | |
| Courier | | 1.000 | | | | | 1.000 | | | |
| High-level | 1.82 | 1.963 | 0.950 | 4.053 | < 0.068 | 2.78 | 3.513 | 1.449 | 8.519 | < 0.005 |
| Principal | 3.40 | 3.424 | 1.685 | 6.957 | < 0.001 | 5.05 | 11.886 | 4.550 | 31.048 | < 0.000 |
| Low-level | –2.89 | 0.352 | 0.173 | 0.715 | < 0.004 | –2.20 | 0.272 | 0.085 | 0.868 | < 0.028 |
| **Plea** | | | | | | | | | | |
| Guilty | | 1.000 | | | | | 1.000 | | | |
| Not guilty | 2.67 | 2.380 | 1.260 | 4.495 | < 0.008 | 3.05 | 2.616 | 1.409 | 4.856 | < 0.002 |
| **Age** | | | | | | | | | | |
| under 25 yrs | | 1.000 | | | | not significant | | | | |
| 25 to under 35 yrs | 0.43 | 1.152 | 0.604 | 2.198 | < 0.668 | | | | | |
| 35 to under 45 yrs | 2.03 | 1.989 | 1.025 | 3.861 | < 0.042 | | | | | |
| 45 yrs and over | 2.60 | 2.388 | 1.240 | 4.602 | < 0.009 | | | | | |
| **State or Territory** | | | | | | | | | | |
| NSW | | 1.000 | | | | | 1.000 | | | |
| Vic | –8.27 | 0.069 | 0.037 | 0.131 | < 0.000 | –3.57 | 0.297 | 0.152 | 0.578 | < 0.000 |
| Qld | –1.82 | 0.473 | 0.211 | 1.057 | < 0.068 | –1.30 | 0.474 | 0.154 | 1.458 | < 0.193 |
| WA | –0.75 | 0.765 | 0.380 | 1.542 | < 0.454 | 1.11 | 2.009 | 0.587 | 6.876 | < 0.266 |
| NT[b] | –1.85 | 0.284 | 0.075 | 1.076 | < 0.064 | | | | | |

a Where the maximum penalty was 25 yrs imprisonment this category includes phenyl-2-propanone (3 cases), cannabis resin (2 cases), LSD (2 cases), opium (1 case) and monoacetylmorphines (1 case). Where the maximum penalty was life imprisonment this category includes GBL (9 cases), cannabis (other than resin) (4 cases), N,N-Dimethyltryptamine (2 cases) and opium (1 case).

b There were no cases in the NT where the maximum penalty was life imprisonment.

**Table 6.6: Distribution of head sentences where maximum penalty 25 years or life imprisonment**

| | 25 years imprisonment | | | | Life imprisonment | | | |
|---|---|---|---|---|---|---|---|---|
| **Factor[a]** | **Cases** | | **Median** | **Middle 50% range** | **Cases** | | **Median** | **Middle 50% range** |
| | **n** | **%** | **mths** | **mths** | **n** | **%** | **mths** | **mths** |
| **Drug type** | | | | | | | | |
| Heroin | 244 | 50.0 | 72.0 | 54.0–84.0 | 53 | 21.6 | 108.0 | 96.0–180.0 |
| Cocaine | 136 | 27.9 | 82.5 | 60.0–90.0 | 79 | 32.2 | 128.0 | 102.0–180.0 |
| Methamphetamine | 53 | 10.9 | 54.0 | 42.0–84.0 | 55 | 22.4 | 120.0 | 78.0–144.0 |
| MDMA | 14 | 2.9 | 36.0 | 22.5–50.3 | 42 | 17.1 | 131.0 | 90.0–187.5 |
| Pseudoephedrine | 32 | 6.6 | 73.5 | 51.0–94.5 | 0 | 0.0 | n/a | n/a |
| Other[b] | 9 | 1.8 | 48.0 | 39.0–2.0 | 16 | 6.5 | 60.0 | 42.0–72.0 |
| **Drug quantity** | | | | | | | | |
| Low-range | 320 | 65.6 | 60.0 | 44.3–78.0 | 68 | 27.8 | 98.0 | 84.0–127.5 |
| Mid-range | 103 | 21.1 | 84.0 | 60.0–96.0 | 75 | 30.6 | 102.0 | 76.0–130.0 |
| High-range | 65 | 13.3 | 96.0 | 72.0–113.0 | 102 | 41.6 | 150.0 | 120.0–216.0 |
| **Role of offender** | | | | | | | | |
| Principal | 56 | 12.7 | 73.5 | 60.0–101.5 | 64 | 28.2 | 90.0 | 72.0–120.0 |
| High-level | 52 | 11.8 | 72.0 | 54.8–94.5 | 99 | 43.6 | 132.0 | 100.0–180.0 |
| Courier | 284 | 64.4 | 72.0 | 51.0–87.5 | 38 | 16.7 | 141.0 | 96.0–216.0 |
| Low-level | 45 | 10.2 | 48.0 | 36.0–72.5 | 26 | 11.5 | 90.0 | 60.0–120.0 |
| Personal use | 4 | 0.9 | 36.0 | 33.0–54.0 | 0 | 0.0 | n/a | n/a |
| **Plea** | | | | | | | | |
| Guilty | 426 | 87.3 | 70.0 | 48.0–84.0 | 181 | 73.9 | 108.0 | 84.0–144.0 |
| Not guilty | 62 | 12.7 | 79.5 | 60.0–111.0 | 64 | 26.1 | 144.0 | 109.5–216.0 |
| **Age** | | | | | | | | |
| under 25 yrs | 66 | 15.5 | 60.0 | 42.0–84.0 | not significant | | | |
| 25 to under 35 yrs | 123 | 28.8 | 72.0 | 54.0–87.0 | | | | |
| 35 to under 45 yrs | 115 | 26.9 | 78.0 | 60.0–90.0 | | | | |
| 45 yrs and over | 123 | 28.8 | 81.0 | 60.0–96.0 | | | | |
| **State or Territory** | | | | | | | | |
| NSW | 253 | 51.8 | 84.0 | 63.0–96.0 | 148 | 60.4 | 132.0 | 96.8–180.0 |
| Vic | 128 | 26.2 | 48.0 | 36.0–60.0 | 55 | 22.4 | 96.0 | 72.0–144.0 |
| Qld | 37 | 7.6 | 84.0 | 45.0–108.0 | 25 | 10.2 | 90.0 | 60.0–125.0 |
| WA | 51 | 10.5 | 60.0 | 48.0–84.0 | 12 | 4.9 | 162.0 | 97.0–213.0 |
| SA | 7 | 1.4 | 48.0 | 42.0–63.0 | 5 | 2.0 | 60.0 | 33.0–117.0 |
| NT | 12 | 2.5 | 57.0 | 48.5–81.0 | 0 | 0.0 | n/a | n/a |
| Tas | 0 | 0.0 | n/a | n/a | 0 | 0.0 | n/a | n/a |
| **Overall** | **488** | **100.0** | **72.0** | **48.0–87.0** | **245** | **100.0** | **120.0** | **89.0–171.0** |

a Figures are based on cases with known values. Where the maximum penalty was 25 yrs imprisonment the role of the offender was unknown in 47 cases (9.6%) and the age of offenders was unknown in 61 cases (12.5%). Where the maximum penalty was life imprisonment the role of the offender was unknown in 18 cases (7.3%).

b Where the maximum penalty was 25 yrs imprisonment this category includes phenyl-2-propanone (3 cases), cannabis resin (2 cases), LSD (2 cases), opium (1 case) and monoacetylmorphines (1 case). Where the maximum penalty was life imprisonment this category includes GBL (9 cases), cannabis (other than resin) (4 cases), N,N-Dimethyltryptamine (2 cases) and opium (1 case).

Given the small number of cases in some categories, these are excluded from this aspect of the regression analyses because the numbers were too small to draw meaningful comparisons. Therefore, seven cases from South Australia where the maximum penalty was 25 years and five cases where the maximum penalty was life are excluded. A further four offenders sentenced for offences with a maximum penalty of 25 years who committed the offence for personal use are also excluded.

The significance of two factors changed when the analysis was restricted to these more serious offences. There was no longer a difference between the head sentences imposed on females compared with those imposed on males in either maximum penalty group. The age group was no longer significant in the regression model for offences attracting life imprisonment, but remained significant when the maximum penalty was 25 years, although the effect was relatively weak.

For each significant factor the following effects were observed:

*Drug quantity range*

- This was the second most important factor irrespective of the maximum penalty.
- When the maximum penalty was 25 years, the offenders sentenced for offences involving high-range and mid-range quantities were more likely to receive longer head sentences compared with those sentenced for offences involving a low-range quantity (high-range: odds ratios = 8.154; mid-range: odds ratios = 3.296).
- When the maximum penalty was life, only those offenders sentenced in respect of an offence involving a high-range quantity were more likely to receive longer head sentences compared with those sentenced in respect of offences involving a low-range quantity (odds ratio = 8.394).

*State or Territory*

- This was the most important factor when the maximum penalty for an offence was 25 years, but was the fourth most important factor when the maximum penalty was life.
- In both maximum penalty groups, offenders in Victoria were still the least likely to receive longer head sentences compared with offenders in NSW (25 years: odds ratio = 0.069; life: odds ratio = 0.297).

*Drug type*

- This was the most important factor when the maximum penalty for an offence was life, but was the fourth most important when the maximum penalty was 25 years.
- When the maximum penalty was 25 years, offenders whose offence involved any drug type, other than cocaine, were less likely to receive longer head sentences compared with those offenders sentenced in respect of offences involving heroin ("other" drugs:[609] odds ratio = 0.092; MDMA: odds ratio = 0.174; pseudoephedrine: odds ratio = 0.326; methamphetamine: odds ratio = 0.357).
- When the maximum penalty was life, offenders whose offence involved a drug in the "other" drugs[610] category were much less likely to receive longer head sentences (odds ratio = 0.011) compared with offenders whose offence involved heroin. The "other" drugs category mostly comprised GBL. Those offenders whose offence involved methamphetamine were also less likely to receive longer head sentences (odds ratio = 0.421). Although significant, the effect for methamphetamine was relatively weak.

*Role of offender*

- This was the third most important factor irrespective of the maximum penalty.
- When the maximum penalty for an offence was 25 years, principals (odds ratio = 3.424) were more likely to receive longer head sentences compared with couriers, while offenders with a low-level role (odds ratio = 0.352) were less likely to receive longer head sentences.

609 This category includes phenyl-2-propanone (3 cases), cannabis resin (2 cases), LSD (2 cases), opium (1 case) and monoacetylmorphines (1 case).

610 This category includes GBL (9 cases), cannabis (other than resin) (4 cases), N,N-Dimethyltryptamine (2 cases) and opium (1 case).

- When the maximum penalty was life, principals (odds ratio = 11.886) and offenders with a high-level role (odds ratio = 3.513) were more likely to receive longer head sentences compared with couriers. On the other hand, offenders with a low-level role (odds ratio = 0.272) were less likely to receive longer head sentences.

*Plea*

- This was the fifth most important factor irrespective of the maximum penalty.
- Those offenders who pleaded not guilty were more likely to receive longer head sentences compared with those who pleaded guilty (25 years: odds ratio = 2.380; life: odds ratio = 2.616).

### 6.3.12 The effect of different combinations of factors on imprisonment terms

Guided by the multivariate analyses above, it is also possible to show the effect of the most important factors on the head sentence when different combinations of these factors are taken into account.

Figures 6.3 to 6.9 demonstrate some of the most important effects. To compare the effects across different scenarios, the same scale is used in each graph: the y-axis shows the median head sentence imposed (in months) with gridlines at 12 month (or yearly) intervals; the x-axis shows the combination of factors being measured while controlling for other factors.

Figures 6.3 and 6.4 relate to offences with a maximum penalty of life imprisonment, while Figures 6.5 to 6.8 relate to offences with a maximum of 25 years. Figure 6.9 relates to both maximum penalty groups.

As already discussed, when the maximum penalty was life, the three most important factors affecting the head sentences were the drug type ("other"), drug quantity range (high-range) and the offender's role. When the maximum penalty was 25 years, the most important factors were the State or Territory (Victoria), the drug quantity range, the offender's role and, to a lesser extent, the drug type. Whether or not an offender pleaded guilty was also found to have a significant effect on head sentences in the regression analyses.

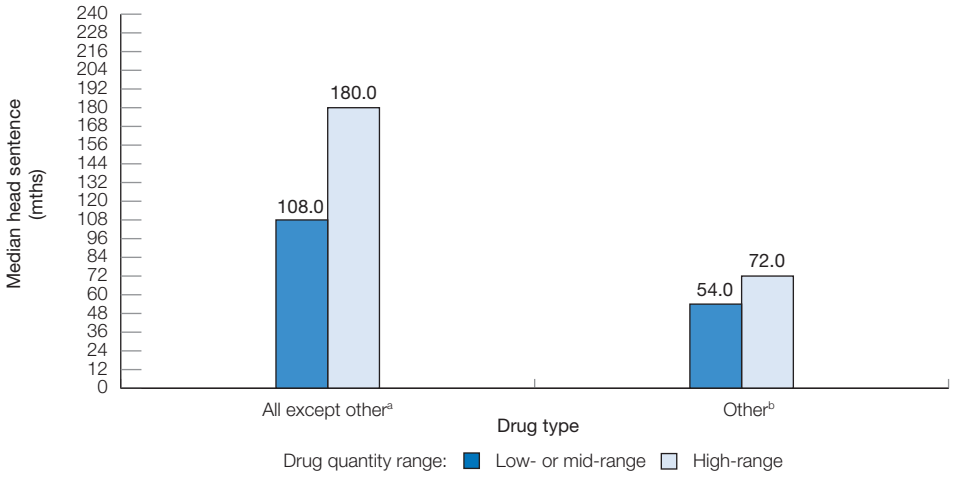
*Figure 6.3*

Figure 6.3 shows the effect of drug type and quantity on the head sentence for offences with a maximum penalty of life, controlling for the role of the offender. Offences involving cocaine, methamphetamine and MDMA are combined with heroin since no significant effect was found in the regression analysis.[611] Similarly, low-range and mid-range drug quantities are combined. Further, the analysis is limited to principals or those with high-level roles because these offenders represented all except one of the cases involving the drug type "other" and also because the offender's role had a significant effect in the regression analysis.

Figure 6.3 clearly demonstrates that when the offence involved a drug in the "other" drugs category, offenders were sentenced to a much shorter median head sentence irrespective of the drug quantity range (low- or mid-range: 54 months compared with 108 months; high-range: 72 months compared with 180 months). Furthermore, while the median head sentence was longer when the drug quantity was in the high-range, that difference was less stark when the sentence was for an offence involving a drug in the "other" drugs category.

611 Although the regression analysis found a relatively weak effect for methamphetamine compared with heroin, the largest effect was clearly for "other" drug types. An examination of cases for each drug type in Figure 6.3 revealed that methamphetamine cases received a somewhat longer median head sentence when the quantity was in the low- or mid-range (118 months compared with 108 months for heroin or cocaine and 102 months for MDMA). However, when the quantity was in the high-range, cases involving methamphetamine received a substantially shorter median head sentence (144 months compared with 207 months for heroin, 209 months for cocaine and 184.5 months for MDMA). Excluding methamphetamine cases would increase the median head sentence within the high-range only (by 12 months from 180 months to 192 months). Notwithstanding the effect found, methamphetamine cases have been combined with heroin, cocaine and MDMA.

**Figure 6.3: Effect of drug type and quantity on head sentences: principal or high-level role; maximum penalty life**




a Includes heroin, cocaine, MDMA and methamphetamine.
b Includes GBL, cannabis (other than resin), N,N-Dimethyltryptamine and opium.

**Figure 6.4: Effect of role and drug quantity on head sentences: excluding "other" drug types; maximum penalty life**

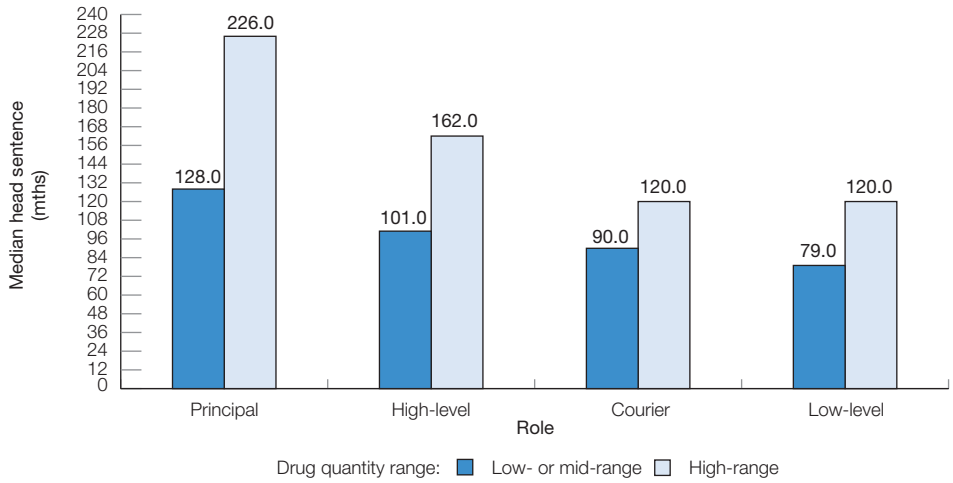



**Figure 6.5: Effect of State (NSW and Victoria) and role on head sentences: heroin or cocaine; low-range quantity; maximum penalty 25 years**

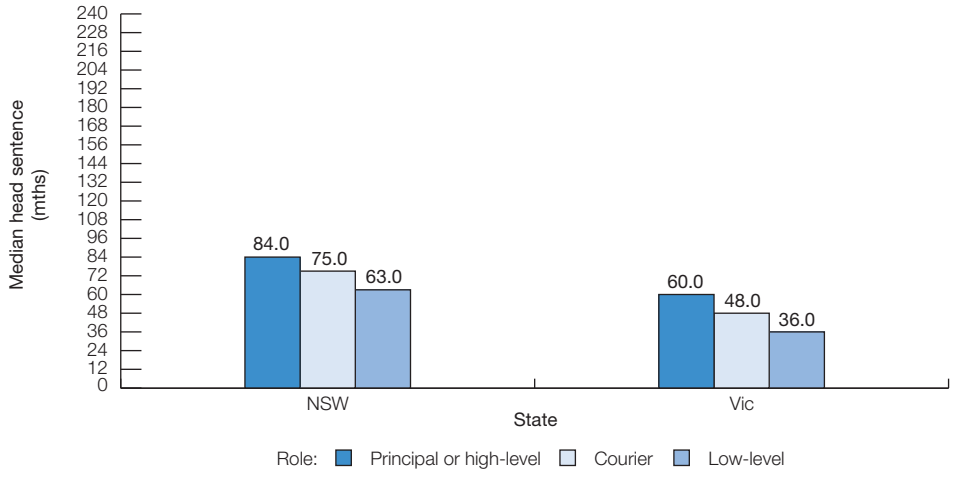


**Figure 6.6: Effect of role and drug quantity on head sentences: heroin or cocaine; excluding Victoria; maximum penalty 25 years**

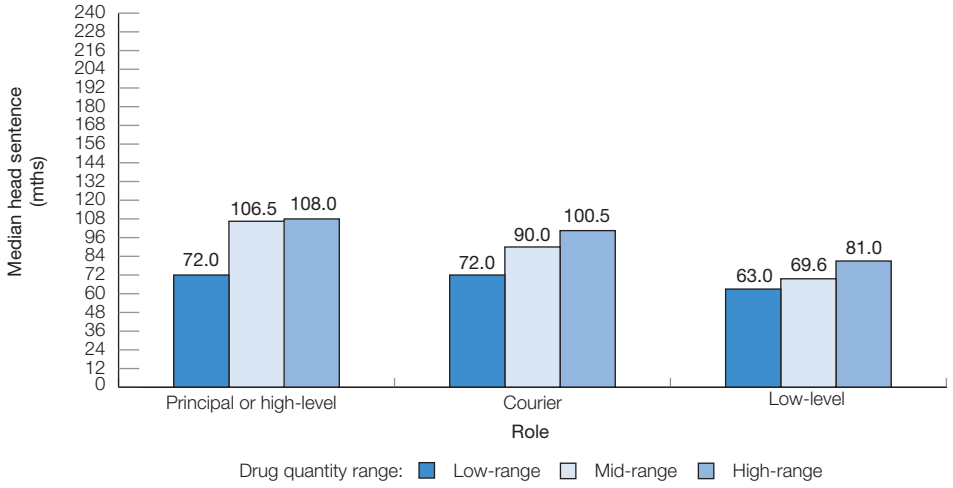
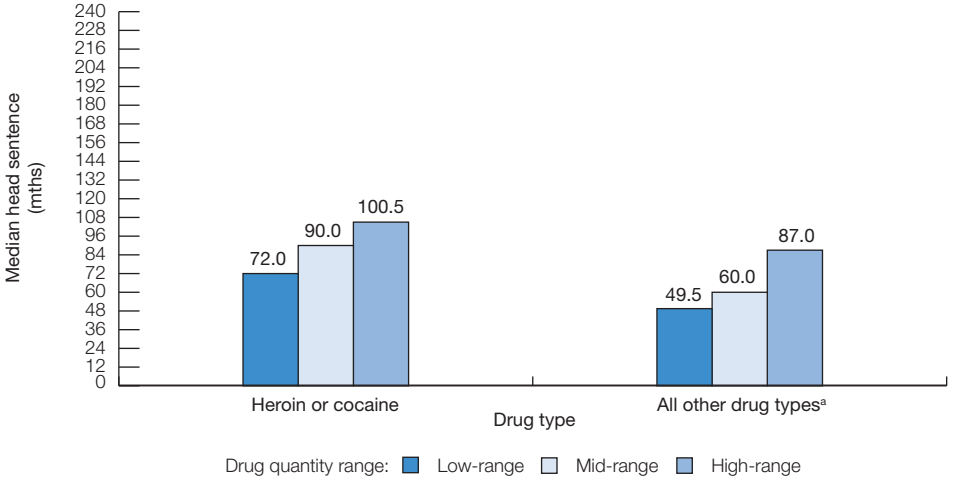
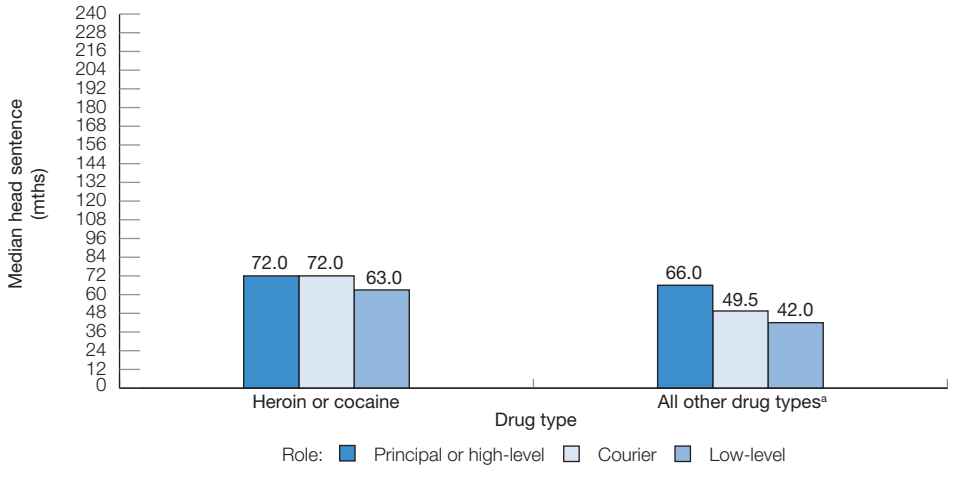



**Figure 6.7: Effect of drug type and quantity on head sentences: courier; excluding Victoria; maximum penalty 25 years**




a Includes methamphetamine, pseudoephedrine (mid-range *only*) and cannabis resin (low-range *only*).

**Figure 6.8: Effect of drug type and role on head sentences: low-range quantity; excluding Victoria; maximum penalty 25 years**




a Includes methamphetamine, MDMA, pseudoephedrine, cannabis resin, opium and phenyl-2-propanone.

*Figure 6.4*

To measure the effect of role and drug quantity on the head sentences for offences with a maximum penalty of life, the drug type "other" is excluded from the scenario identified in Figure 6.4. This figure clearly shows that the median head sentence decreased when the offender's role was lower in the drug hierarchy irrespective of the drug quantity range. Principals received the longest median head sentence (low- or mid-range: 128 months; high-range: 226 months), followed by offenders with high-level roles (low- or mid-range: 101 months; high-range: 162 months), couriers (low- or mid-range: 90 months; high-range: 120 months) and those with a low-level role (low- or mid-range: 79 months; high-range: 120 months). As expected, the median head sentence was consistently longer when the drug quantity was in the high-range. However, the difference was more noticeable for offenders who were principals or with a high-level role.

*Figure 6.5*

As discussed, the regression analysis for offences with a maximum penalty of 25 years found that offenders sentenced in Victoria were significantly less likely to receive longer head sentences compared with offenders sentenced for these offences in NSW. In order to show this effect, the drug type, drug quantity range and the offender's role are controlled for. Heroin and cocaine are combined because there was no significant difference between them. Further, it was necessary to combine certain roles so there were sufficient numbers of cases for comparison: principals are grouped with high-level roles because both were more likely to receive longer sentences compared with couriers.[612] As the drug quantity range was significant in the regression analysis, the examination is also limited to drug quantities in the low-range. Figure 6.5 presents the results for this scenario. The figure shows that the median head sentences imposed in Victoria were consistently shorter than those in NSW. However, similar patterns were observed with respect to the offender's role: principals and offenders in high-level roles received the longest median head sentence (NSW: 84 months; Victoria: 60 months), followed by couriers (NSW: 75 months; Victoria: 48 months) and offenders in low-level roles (NSW: 63 months; Victoria: 36 months).

*Figures 6.6 to 6.8*

To show the effect of role, drug quantity and type on head sentences for offences with a maximum penalty of 25 years imprisonment, Victorian offenders are excluded from the scenarios illustrated by Figures 6.6 to 6.8. Victoria had a disproportionately high number of cases involving heroin and the sentences imposed there were significantly shorter. Including Victoria here would therefore undermine the effect found in the regression analysis.

Figures 6.7 and 6.8 compare sentences imposed for offences involving heroin or cocaine with "all other drug types". All other drugs are combined because each was found to have a significant effect in the regression analysis. While the size of the effect for each varied, it was always in the same direction, that is, they were all less likely to receive longer head sentences.

*Figure 6.6*

Figure 6.6 shows the effect of role and drug quantity while controlling for drug type (heroin or cocaine *only*). As expected, the median head sentence decreased when the offender's role was lower in the drug hierarchy, particularly where the drug quantity range was either mid- or high-range. Principals and offenders with high-level roles received the longest median head sentence (mid-range: 106.5 months; high-range: 108 months), followed by couriers (mid-range: 90 months; high-range: 100.5 months) and by offenders whose role was found to be at a low-level (mid-range: 69.6 months; high-range: 81 months).

612 Although the regression analysis did not find that the effect for offenders with a high-level role compared with couriers was significant, it was approaching significance ($p < 0.068$). The odds ratio for offenders with a high-level role (1.962) indicated that they were more likely to receive longer head sentences than couriers.

*Figure 6.7*

Figure 6.7 shows the effect of drug type and quantity on head sentences while controlling for role (couriers *only*). As expected, the median head sentence increased as the drug quantity range increased irrespective of the drug type. For offences involving heroin or cocaine, the median head sentence increased from 72 months for low-range, 90 months for mid-range to 100.5 months for high-range. By comparison, the median head sentences for offences involving all other drug types for these ranges was 49.5 months, 60 months and 87 months respectively. Unexpectedly however, offenders sentenced for offences involving drug types other than heroin or cocaine received a shorter median head sentence compared with the sentences when heroin or cocaine was involved (low-range: 49.5 months compared with 72 months; mid-range: 60 months compared with 90 months; high-range: 87 months compared with 100.5 months). The difference, however, was less noticeable for high-range quantities.

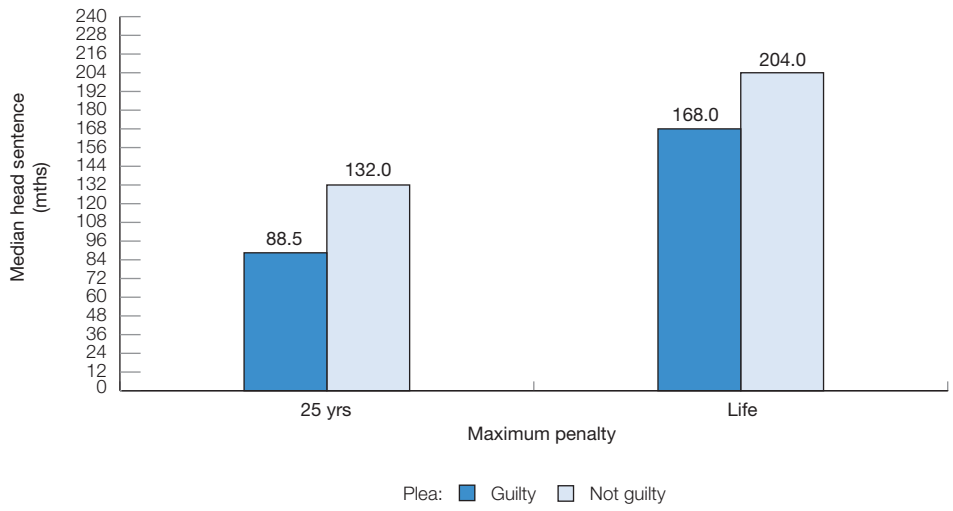
*Figure 6.8*

Figure 6.8 shows the effect of drug type and role on head sentences while controlling for drug quantity range (low-range *only*). Once again, it can be seen that the median head sentence decreased when the offender's role was lower in the drug hierarchy, particularly for "all other drug types" (principals and offenders with high-level roles: 66 months; couriers: 49.5 months; offenders with low-level roles: 42 months). The median head sentence was also shorter for offenders with a low-level role when the drug type was heroin or cocaine (63 months compared with 72 months for both principals and offenders with high-level roles, and couriers). While the median head sentence was noticeably shorter for "all other drug types" when the offender was either a courier or played a low-level role, there was less difference when the offender played a principal or high-level role.

*Figure 6.9*

Finally, Figure 6.9 shows the effect of offenders' pleas on head sentences for both maximum penalty groups. Since offenders were more likely to plead not guilty to the most serious offences, the drug quantity range (high-range *only*) and role (principal or high-level *only*) are controlled for. As expected, offenders who pleaded not guilty received a longer median head sentence than offenders who pleaded guilty irrespective of the maximum penalty group (25 years: 132 months compared with 88.5 months; life imprisonment: 204 months compared with 168 months). The difference, however, was more noticeable for offences with a maximum penalty of 25 years.

**Figure 6.9: Effect of plea and maximum penalty (25 years or life imprisonment) on head sentences: high-range quantity; principal or high-level role**



### 6.3.13 Fixing non-parole periods (NPPs)

The discussion below examines the relationship between the effective NPP and the effective head sentence (ratio) imposed on offenders to determine whether there has been any change in the ratio between these following the decision of the High Court in *Hili v The Queen*. For the purpose of this discussion, references to the "head sentence" and the "NPP" mean the "effective head sentence" and the "effective NPP".

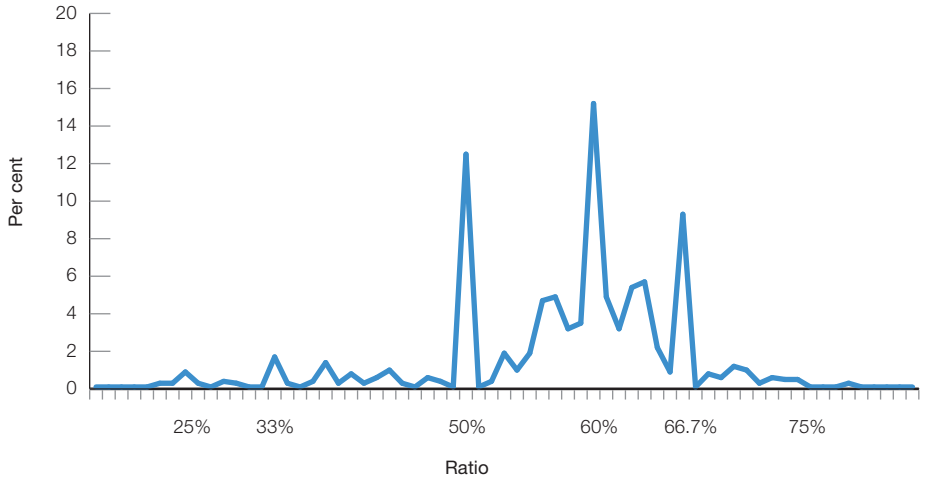
A sentence for an offender is excluded from the analysis if the sentence for Commonwealth offences was consecutive (or partly consecutive) with a sentence imposed for a State or Territory offence (12 cases), if no NPP was fixed (6 cases), or a life sentence was imposed (2 cases).

The analysis explores the general trends in the ratios overall and compares the ratio between the NPP and the head sentence in respect of sentences imposed during the period from 1 January 2008 to 7 December 2010[613] (pre-*Hili* period) with those imposed from 8 December 2010 to 31 December 2012 (post-*Hili* period). The analysis shows that during the pre-*Hili* period it was not uncommon for NPPs to be fixed in the range of 60% to 66.7% of the head sentence (the normal range).[614]

Figure 6.10 shows the ratios between the NPP and the head sentence over the study period. It shows that the most common ratio was 60% (15.2%), followed by ratios of 50% (12.5%) and 66.7% (9.5%). In almost half of the cases (47.1%), NPPs were fixed within the normal range of 60% to 66.7% of the head sentence. In just over a third of cases (34.2%), the ratio was from 50% to less than 60%, in 11.8% of cases the ratio was less than 50%, and in 6.9% of cases it was over 66.7%. The mean ratio was 57.3% and the median ratio was 60%.

Before the effect of the *Hili* decision on the distribution of ratios can be considered, it is necessary to identify other factors strongly associated with the ratios to rule out any coincidental variations before and after *Hili*.

**Figure 6.10: Relationship between effective NPP and effective head sentence (ratio)**




613 The day before the High Court handed down judgment in *Hili*.

614 The adoption of this range developed as a consequence of the decision in *R v Bernier* (1998) 102 A Crim R 44 at 49. See the discussion about the proper approach to determining the NPP or fixing a recognizance release order on pp 39–45.

#### 6.3.13.1 Most important factors associated with ratios

While many factors were found to be significantly associated with fixing NPPs, the strongest association by far was with the length of the head sentence (Eta = 0.553), followed by the State or Territory where the offender was sentenced (Eta = 0.358). As the discussion of the relevant case law demonstrates, an association with the head sentence is to be expected.[615]

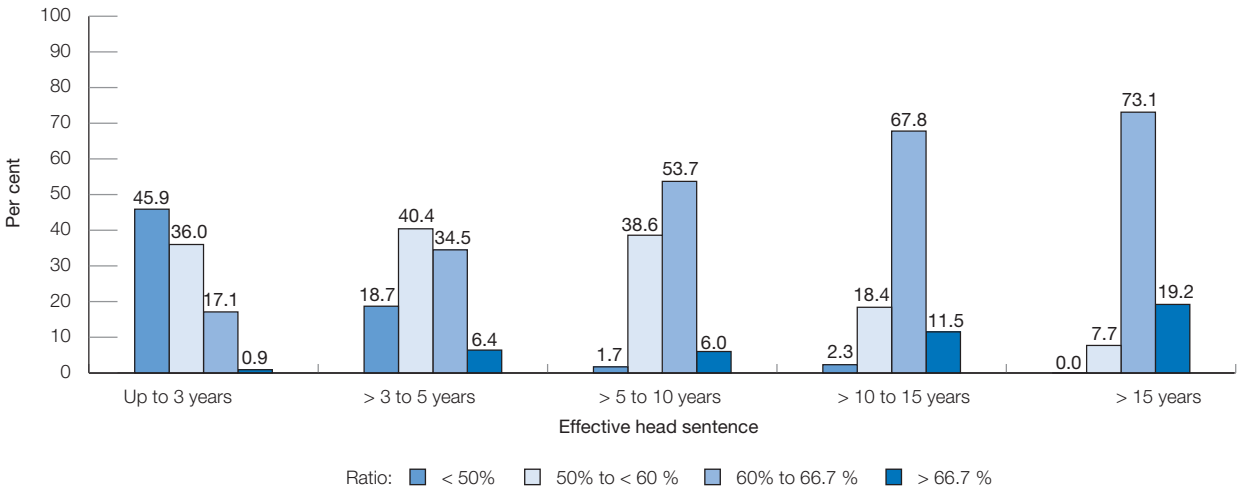
*Effective head sentence*

Figure 6.11 shows that as the length of the head sentence increased so did the ratios between the NPP and the head sentence. For example, the NPP was less than 50% of the head sentence in almost half of those cases (45.9%) where the head sentence imposed was up to 3 years. However, when the head sentence was more than 3 years and up to 5 years, such a ratio was evident in only 18.7% of cases, and was almost non-existent when head sentences were longer than 5 years.[616] Conversely, the proportion of cases where the ratio was in the highest range (over 66.7%) and the normal range (60% to 66.7%) increased as the head sentence increased.

These findings are unsurprising. It is not unreasonable to conclude that sentences of 3 years or less were usually imposed for conduct and offences involving a lesser degree of moral culpability and where there was, in all likelihood, a strong subjective case. While a sentence of full-time imprisonment was warranted, there was a corresponding need to ensure the particular offender had sufficient time for rehabilitation.

Although in the context of the NSW sentencing legislation and NSW offences, similar findings were made in a Judicial Commission study concerning the approach taken to special circumstances resulting in NPPs that were less than the statutory ratio.[617] That study found that as the length of the full term increased so did the ratio between the NPP and full term of sentence, with the lowest ratios observed for offenders sentenced to a full term less than 4 years.[618]

**Figure 6.11: Ratio of effective NPPs by reference to length of effective head sentence**




615 See the discussion of the relevant principles to be applied when fixing NPPs on pp 39–45.

616 A NPP that was less than 50% of the head sentence was fixed in 1.7% of cases where the head sentence was more than 5 years and up to 10 years, in 2.3% of cases where the head sentence was more than 10 years and up to 15 years, and 0.0% where the head sentence was longer than 15 years.

617 Poletti and Donnelly, above n 300.

618 ibid p 19, Figure 4.

Consideration of the subjective features of a selection of cases where the ratio was considerably less than 50% provides some insight into why a NPP at this level may have been set, although it is by no means clear in every case. For example, some offenders had varying degrees of intellectual impairment or were suffering from a mental illness. This was found to have contributed to their involvement in the offence, that is, they were more vulnerable as a result of such a condition and that vulnerability was exploited by another. Accordingly, general deterrence in those cases was found to be of less significance. In other cases, a NPP of less than 50% appears to have been fixed because the level of culpability of the particular offender was low and there was a combination of strong subjective factors.

### *State or Territory*

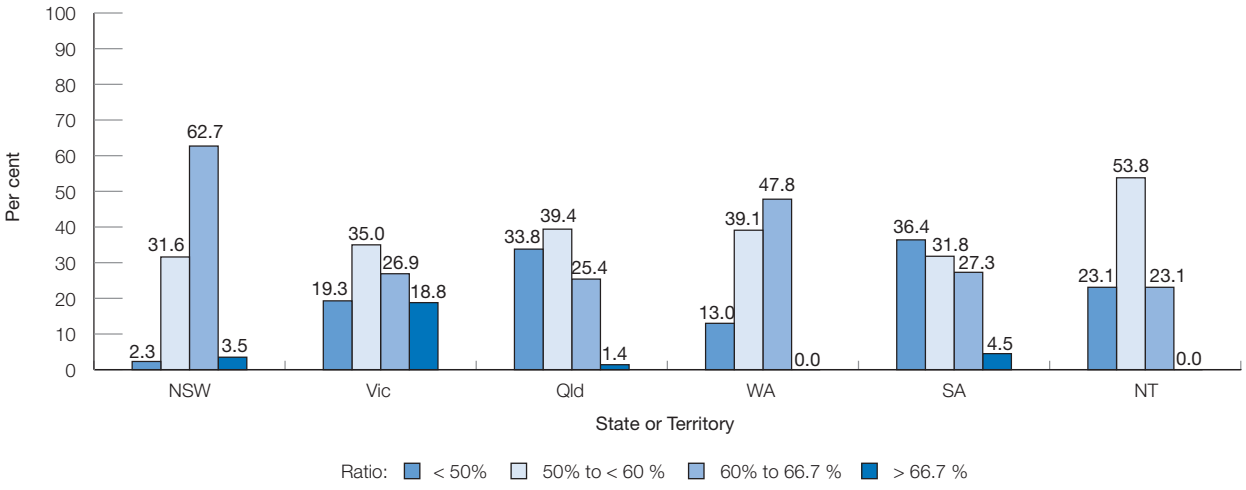
As Figure 6.12 shows, there were marked differences in the ratios between each of the States and the Northern Territory.

As mentioned above, the ratio in almost half of the cases nationally (47.1%) fell in the normal range of 60% to 66.7%. NSW had by far the highest proportion of cases with a ratio in this range (62.7%), followed by Western Australia (47.8%). Such a result is to be expected in relation to NSW because the practice of fixing NPPs within that range developed there following the decision in *R v Bernier*.[619] Every other State and the Northern Territory recorded much lower rates: South Australia (27.3%), Victoria (26.9%), Queensland (25.4%) and the Northern Territory (23.1%).

Nationally, a NPP of less than 50% was imposed in 11.8% of the cases and, with the exception of NSW, all States and the Northern Territory recorded a rate higher than the national rate: South Australia (36.4%), Queensland (33.8%), Northern Territory (23.1%), Victoria (19.3%) and Western Australia (13.0%). In NSW, a NPP in this range was fixed in only 2.3% of cases.

A NPP in the range of 50% to less than 60% was the most common range in the Northern Territory (53.8%), Queensland (39.4%) and Victoria (35.0%).

**Figure 6.12: Ratio of effective NPPs by reference to State or Territory**




619 (1998) 102 A Crim R 44.

Somewhat anomalously, Victoria recorded the highest proportion of offenders with a NPP in excess of 66.7% of a head sentence with almost one in five cases (18.8%) falling in this range.[620] There were no such cases in either Western Australia or the Northern Territory.

Comparing the median ratio in each State and the Northern Territory revealed that three States had higher ratios: NSW (60.0%), Western Australia (59.0%) and Victoria (58.0%), compared with 50% for Queensland, South Australia and the Northern Territory.

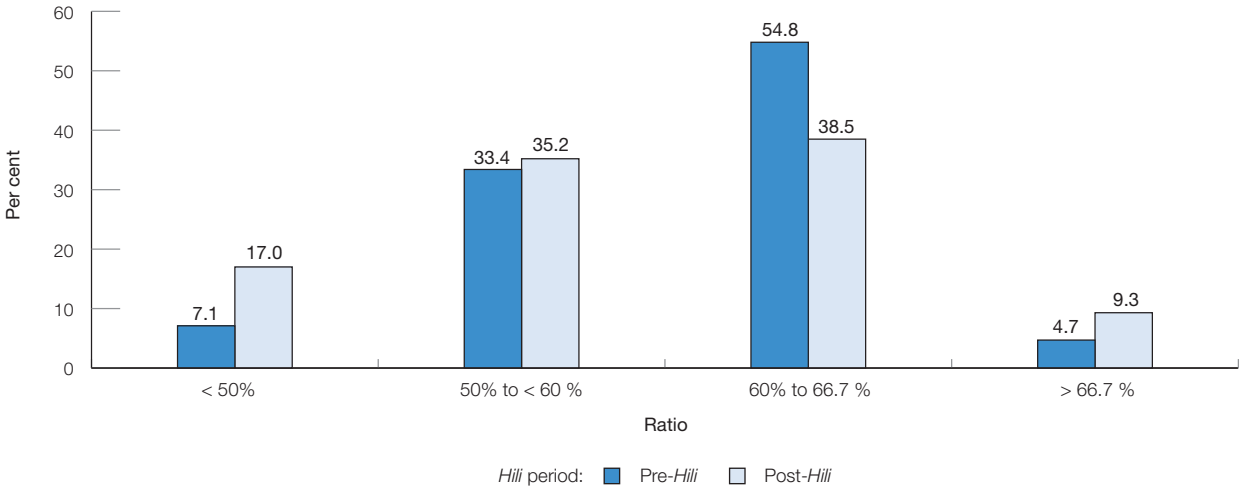
### 6.3.13.2 The effect of Hili v The Queen

Figure 6.13 shows the distribution of ratios in the pre- and post-*Hili* periods. The figure shows that there was a significant drop of 16.3 percentage points (pp) in the proportion of those cases where a NPP was set in the normal range of 60% to 66.7% from 54.8% of cases in the pre-*Hili* period to 38.5% in the post-*Hili* period.[621] This fall has been offset by increases in other ranges, particularly in the range of NPPs set at less than 50% (up 9.9 pp). There were also increases of 4.6 pp in the range of NPPs over 66.7% and 1.8 pp in the 50% to less than 60% range.

#### *Factors contributing to the change after Hili*

To determine the extent to which the variations shown in Figure 6.13 may be attributable to the *Hili* decision, a logistic regression analysis is conducted to measure the likelihood that the ratio for a particular category fell outside the normal range of 60% to 66.7%, while controlling for important factors. The factors included in the analysis are, naturally, the pre- and post-*Hili* periods, but also those factors discussed in the previous section. Five factors remained significant in the final model: *Hili* period, effective head sentence, gender, age and State or Territory.

**Figure 6.13: Ratio of effective NPPs by reference to Hili period**




620 While some of these were cases involving a high degree of criminality with nothing especially significant about the subjective factors (see for example, *Teng v R* (2009) 22 VR 706 which involved the then largest importation of heroin in Vic in what was described by the court as a "sophisticated operation" and both offenders played significant roles, and *Pham v R* [2012] VSCA 101 which involved multiple importation and multiple possession offences) this was certainly not every case.

621 Chi-square test, $p < 0.000$.

**Table 6.7: Results of regression analysis showing whether an effective NPP was outside the normal ratio range (final model)**

| | | Normal ratio range | | | | | | |
|---|---|---|---|---|---|---|---|---|
| **Factor** | **Cases** | **Inside** | **Outside** | **z-score** | **Odds ratio** | **95% confidence interval** | | **Significance** |
| | n | % | % | | | lower | upper | p-value |
| ***Hili* period** | | | | | | | | |
| Pre-*Hili* | 407 | 54.8 | 45.2 | | 1.000 | | | |
| Post-*Hili* | 364 | 38.5 | 61.5 | 3.59 | 1.812 | 1.310 | 2.507 | < 0.000 |
| **Effective head sentence** | | | | | | | | |
| up to 3 yrs | 111 | 17.1 | 82.9 | | 1.000 | | | |
| > 3 to 5 yrs | 171 | 34.5 | 65.5 | –2.26 | 0.492 | 0.266 | 0.910 | < 0.024 |
| > 5 to 10 yrs | 350 | 53.7 | 46.3 | –3.61 | 0.336 | 0.186 | 0.608 | < 0.000 |
| > 10 to 15 yrs | 87 | 67.8 | 32.2 | –4.57 | 0.187 | 0.091 | 0.385 | < 0.000 |
| > 15 yrs | 52 | 73.1 | 26.9 | –3.96 | 0.180 | 0.077 | 0.421 | < 0.000 |
| **Gender** | | | | | | | | |
| Male | 585 | 50.9 | 49.1 | | 1.000 | | | |
| Female | 186 | 34.9 | 65.1 | 2.75 | 1.717 | 1.168 | 2.525 | < 0.006 |
| **Age** | | | | | | | | |
| under 25 yrs | 99 | 30.3 | 69.7 | | 1.000 | | | |
| 25 to under 35 yrs | 213 | 56.3 | 43.7 | –3.32 | 0.389 | 0.230 | 0.679 | < 0.001 |
| 35 to under 45 yrs | 185 | 57.3 | 42.7 | –3.28 | 0.385 | 0.217 | 0.681 | < 0.001 |
| 45 yrs and over | 182 | 45.1 | 54.9 | –1.48 | 0.647 | 0.364 | 1.150 | < 0.138 |
| **State or Territory** | | | | | | | | |
| NSW | 399 | 62.7 | 37.3 | | 1.000 | | | |
| Vic | 197 | 26.9 | 73.1 | 4.29 | 3.162 | 1.869 | 5.349 | < 0.000 |
| Qld | 71 | 25.4 | 74.6 | 4.58 | 4.127 | 2.251 | 7.566 | < 0.000 |
| WA | 69 | 47.8 | 52.2 | 1.18 | 1.398 | 0.800 | 2.443 | < 0.239 |
| SA | 22 | 27.3 | 72.7 | 1.48 | 2.189 | 0.775 | 6.179 | < 0.139 |
| NT | 13 | 23.1 | 76.9 | 1.93 | 4.124 | 0.980 | 17.358 | < 0.053 |
| **Overall** | **771** | **47.1** | **52.9** | | | | | |

Table 6.7 shows the results of the regression analysis. Like the previous regression analysis, each category is compared to a reference category (odds ratio = 1), so that categories with odds ratios above 1 are more likely to have ratios outside the normal range and conversely, categories with odds ratios below 1 are less likely to have ratios outside the normal range. It also shows the proportion of cases falling inside and outside the normal range.

As the preceding discussion clearly demonstrates, the High Court decision in *Hili* has had a significant effect on the ratio between the NPP and the head sentence. After controlling for other important factors, the ratios in the period after *Hili* were more likely to fall outside the normal range (odds ratio = 1.812).

However, two factors with the strongest association at the bivariate level with ungrouped ratios — the State or Territory where the offender was sentenced and the head sentence — significantly contributed to the shift away from the normal range slightly more than the decision in *Hili* did.

The odds ratios for the State or Territory show that compared with NSW, offenders sentenced in Queensland and Victoria were more likely to have ratios outside the normal range (odds ratio = 4.127 and 3.162 respectively).[622]

622 Although the regression analysis did not find that the effect for the NT was significant, it was approaching significance ($p < 0.053$). The odds ratio (4.124) indicated that offenders sentenced in the NT were more likely to have ratios outside the normal range.

The odds ratios for the head sentences show that compared with those offenders who were sentenced to a term of imprisonment of up to 3 years, offenders with longer head sentences were less likely to have ratios outside the normal range: head sentences greater than 3 years and up to 5 years (odds ratio = 0.492); greater than 5 years and up to 10 years (odds ratio = 0.336); greater than 10 years and up to 15 years (odds ratio = 0.187); and greater than 15 years (odds ratio = 0.180).

This reflects the approach of sentencing judges that when offences are more serious and lengthier head sentences are warranted, the objective seriousness of the offence and the need for deterrence justify a longer NPP.[623]

Interestingly, another two factors also had a significant effect on the shift: age and gender. Compared with offenders who were aged under 25 years, offenders aged 25 to under 35 years and offenders aged 35 to under 45 years were less likely to have ratios outside the normal range (25 to under 35 years: odds ratios = 0.389; 35 to under 45 years: odds ratios = 0.385). Females were more likely than males to have ratios outside the normal range (odds ratio = 1.717).

### *What has changed since Hili*

To show the effect of *Hili* on the relationship between the NPP and the head sentence, it is necessary to also consider how those other factors found to be significantly associated with ratios have changed over the same period.

Two of the four factors contributing to the shift away from the normal range — the State or Territory where the offender was sentenced and the head sentence — were also found to have a significant relationship with the *Hili* period.

In relation to the State or Territory, there were disproportionately fewer cases from NSW finalised in the post-*Hili* period (46.2% compared with 56.8% in the pre-*Hili* period), whereas more cases were finalised in Victoria (29.4% compared with 22.1% in the pre-*Hili* period).

In relation to the head sentence, disproportionately more offenders were sentenced for up to 5 years in the post-*Hili* period. In particular, there were more cases with sentences up to 3 years in the post-*Hili* period (17.6% compared with 11.5% in the pre-*Hili* period). The increase in sentences of this length may be partly attributed to the increase in the number of offenders sentenced for offences where the maximum penalty was less than 25 years.

The following analysis shows the extent and direction of the shift, controlling for each significant factor.

Figure 6.14 shows the relationship between the head sentence and the ratios for the pre- and post-*Hili* periods, while Figure 6.15 shows the changes in percentage points.

These figures show that there have been dramatic changes in these ratios since *Hili* either upwards or downwards depending on the length of the head sentence:

- For head sentences up to 5 years, there has been a shift towards lower ratios. The proportion of cases in the less than 50% range increased from:
  - 29.8% to 57.8% (up 28.0 pp) for head sentences up to 3 years
  - 14.0% to 23.5% (up 9.5 pp) for head sentences greater than 3 years and up to 5 years.

  There were noticeable decreases in the 50% to less than 60% range as well.
- For head sentences over 10 years, there has been a shift towards higher ratios, with the proportion of cases in the over 66.7% range increasing from:
  - 5.9% to 19.4% (up 13.5 pp) for head sentences greater than 10 years and up to 15 years
  - 14.7% to 27.8% (up 13.1 pp) for head sentences greater than 15 years.

623 The discussion of the authorities on pp 40–45 provides ample support for such an approach.

**Figure 6.14: Ratio of effective NPPs by reference to length of effective head sentence and Hili period**

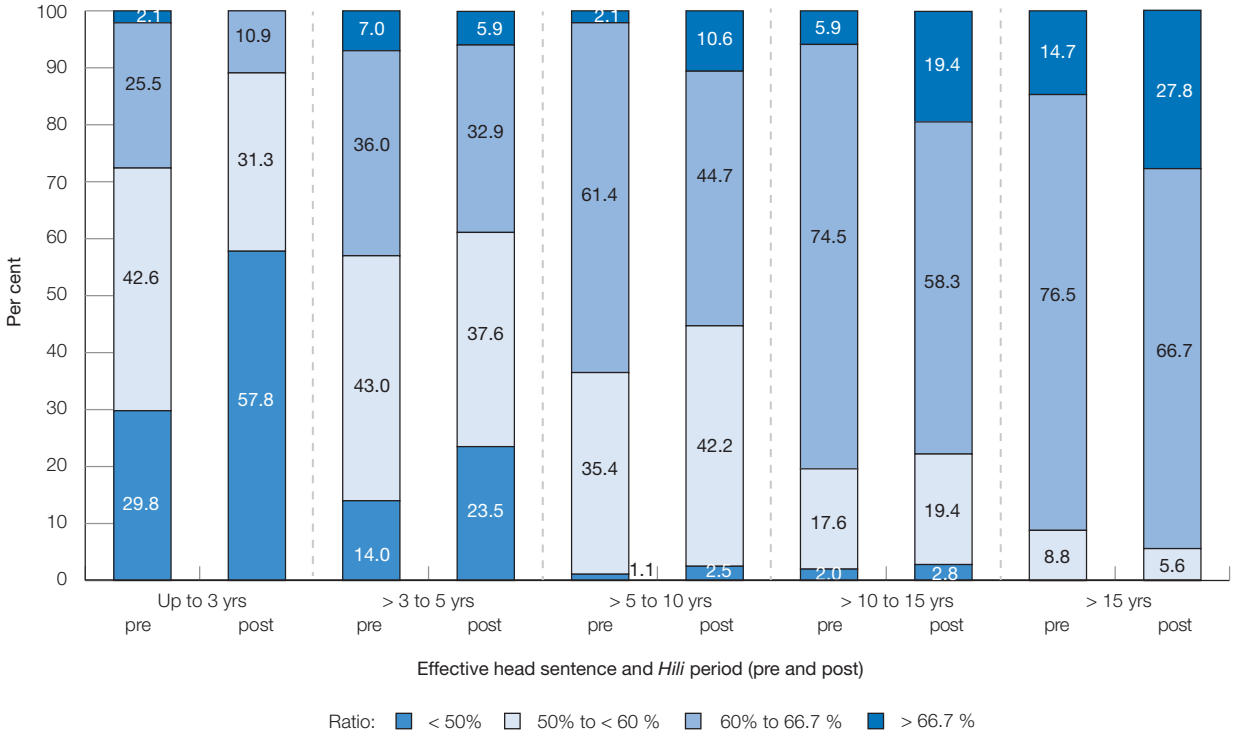



**Figure 6.15: Percentage point change in ratios of effective NPPs by reference to length of effective head sentence and Hili period**

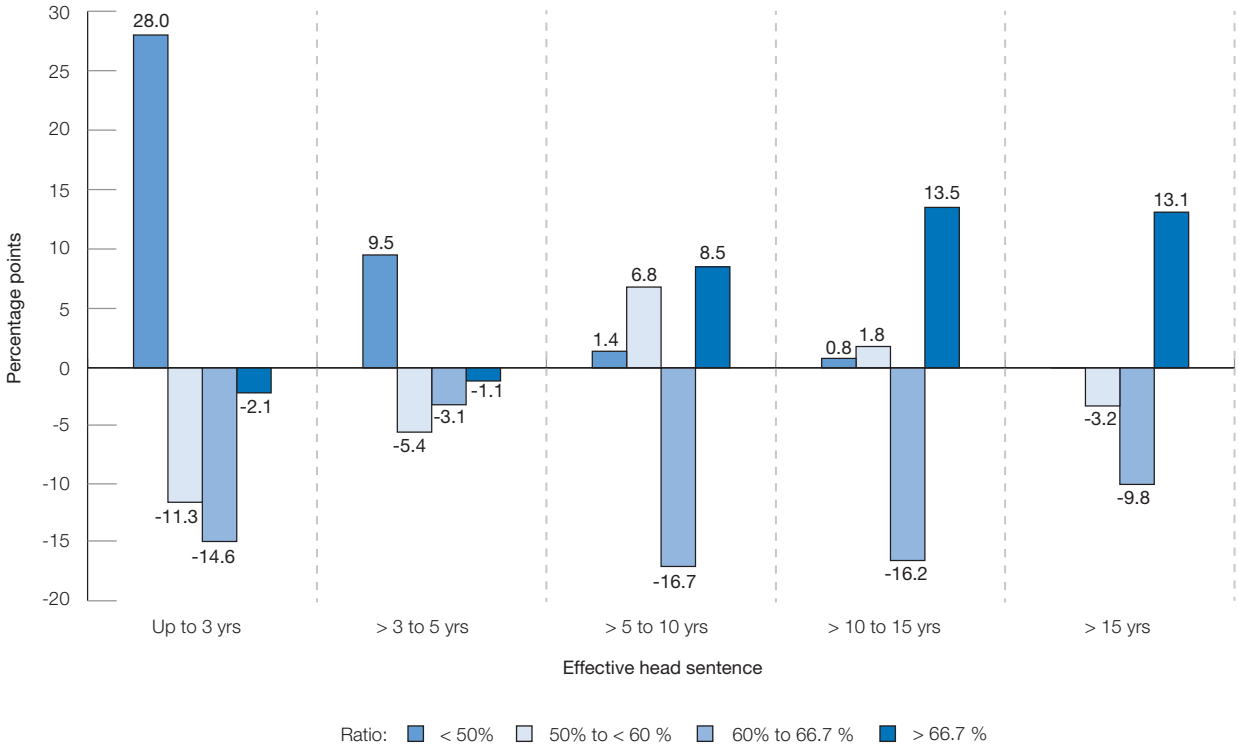


**Figure 6.16: Ratio of effective NPPs by reference to State and Hili period**

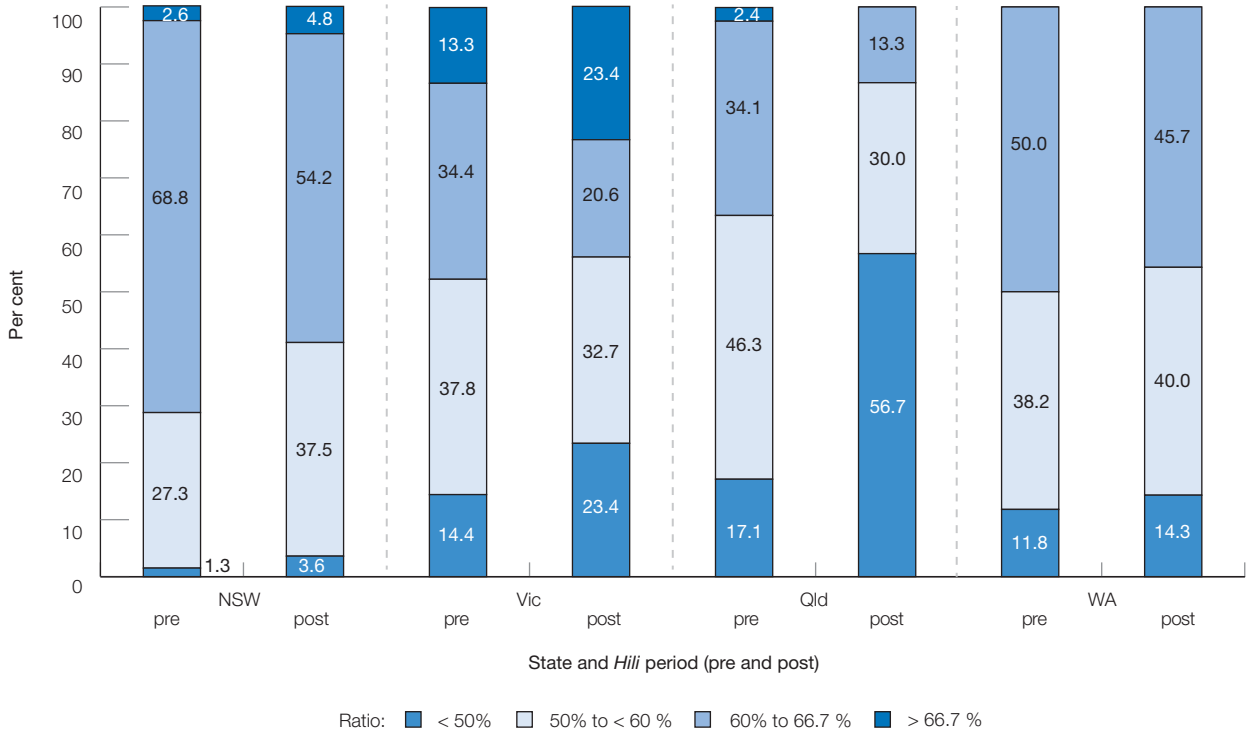



**Figure 6.17: Percentage point change in ratios of effective NPPs by reference to State and Hili period**

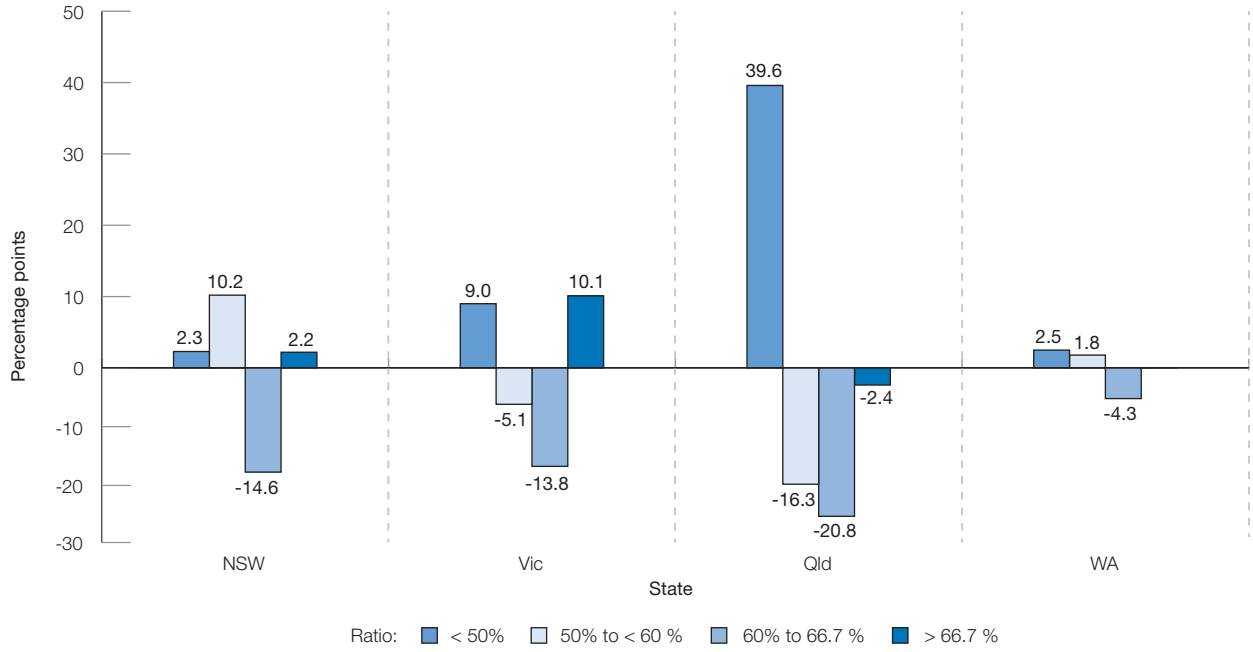


Figure 6.16 shows the relationship between those States with sufficient numbers of cases (for the purposes of analysis) and the ratios for the pre- and post-*Hili* periods, while Figure 6.17 shows the changes in percentage points. For the States analysed:

- There were proportionately fewer cases in the 60% to 66.7% range in the post-*Hili* period. However, the difference in Western Australia was only slight.
- The largest difference by far was in Queensland where more than half of the cases (56.7%) in the post-*Hili* period had ratios less than 50% compared with 17.1% in the pre-*Hili* period (up 39.6 pp). There was also a noticeable decrease in the 50% to less than 60% range.
- Unlike any other State, in Victoria there was a noticeable increase in ratios over 66.7% from 13.3% in the pre-*Hili* period to 23.4% in the post-*Hili* period (up 10.1 pp). There was also a noticeable increase in the proportion of cases with ratios under 50% (up 9.0 pp).
- The main shift observed in NSW was an increase in ratios in the 50% to less than 60% range from 27.3% to 37.5% (up 10.2 pp).

## 6.4 Conclusions concerning consistency

The results of the analysis in this study demonstrates that while there is a degree of consistency in the sentencing of offenders for Commonwealth serious drug offences, there are also examples of inconsistency which, given their nature, are of some significance.

### 6.4.1 Results which demonstrate consistency

The results of this study show that those factors identified in the case law as significant in terms of the length of the sentence ultimately imposed (such as role and drug quantity) do in fact affect the sentence imposed. For example, the greater the drug quantity and/or the more significant the role the offender plays in the particular drug enterprise, then with limited exceptions, the longer the sentence will be. The converse was also demonstrated in the results. Further, sentences tended to be longer for offences which carried higher maximum penalties. Again, this appears to be a reflection of offence seriousness, and is consistent with established sentencing principles.

Further, there is consistency in the ratio between NPPs and head sentences in so far as the analysis broadly shows that as the seriousness of the offence increases, the ratio reduces. For example, for offences involving a sentence in excess of 15 years, almost three-quarters of the cases (73.1%) had a NPP which was 60% to 66.7% of the head sentence. By comparison for sentences which were up to 3 years, almost half of the offenders (45.9%) were ordered to be released on recognizance after serving less than 50% of the head sentence.

### 6.4.2 Results which demonstrate inconsistency

#### 6.4.2.1 State-by-State sentencing

The results of the analysis clearly demonstrate that there is some inconsistency in relation to the sentences imposed on a State-by-State basis. Regardless of how the sentences are analysed, offenders who are sentenced in Victoria are more likely to get shorter sentences than those who are sentenced in NSW. Although the number of cases in South Australia was small, that State also had a similar pattern of shorter sentences. This is important because it demonstrates that while in *R v Tran*,[624] Atkinson J emphasised that the "sentence imposed on an offender for a federal offence should not depend on which side of a State border he or she happens to offend",[625] the opposite can be true.

624 (2007) 172 A Crim R 436.

625 ibid at [32].

#### 6.4.2.2 Treatment of some drugs

It is also interesting, and somewhat troubling, that the analysis shows that drug type is also a significant factor in determining an appropriate sentence when the maximum penalty for an offence is either 25 years or life imprisonment. For example, when the maximum penalty was life and the drug type was described as "other" (including for example, GBL or cannabis) the sentences imposed were significantly shorter compared with the sentences imposed when the offence involved heroin. To a lesser extent this result was replicated when the maximum penalty was 25 years and cases involved all drug types other than cocaine. In that circumstance, the sentences imposed were significantly shorter than those imposed when the offence involved heroin. Such an approach is at odds with *Adams v The Queen* where the High Court held that no distinction should be drawn between different types of illicit drugs and that one drug should be treated as more or less anti-social than another.[626] Factors that could not be measured, such as the value of the drugs when sold, may be impacting on sentence length.

The lengths of the sentences being imposed for those offenders whose offence involved a commercial quantity of GBL demonstrate this difference of approach most starkly. The sentences imposed on those offenders are interesting notwithstanding there were only 21 cases. Of those, 20 involved a commercial quantity of GBL and the offence therefore carried a maximum penalty of life imprisonment. The sentences in these cases were as follows:

- In five cases, a low-range commercial quantity was involved and non-custodial penalties were imposed.
- In 10 cases, a mid-range commercial quantity was involved and sentences of full-time imprisonment were imposed in respect of five offenders. These offenders were either a principal or found to be operating at a high level: one was sentenced to 36 months, two were sentenced to 60 months, and two to 72 months. Four of the five offenders given non-custodial penalties were found to have committed offences for personal use.
- In five cases, a high-range commercial quantity was involved and of these, four offenders were sentenced to terms of full-time imprisonment. The two offenders found to be principals received 42 months and 72 months respectively. The offender whose role was found to be at a high level received 64 months, while the low-level offender received 24 months. The sentence for one offender, charged with importing a commercial quantity of GBL in the high-range and who was found to be a principal, was fully suspended.
- Overall the median head sentence for the nine offenders sentenced to imprisonment was 60 months.

#### 6.4.2.3 Non-parole period ratios

There is also inconsistency demonstrated in the ratio of NPPs.

The discussion concerning the ratio of NPPs to head sentences by reference to each State and the Northern Territory clearly demonstrates that there were significant inconsistencies of approach everywhere. While in NSW over the entire study period the NPPs for the majority of offenders (62.7%) were fixed in the normal range of 60% to 66.7%, this was not replicated elsewhere.

Accepting that as a consequence of *Hili v The Queen* there is no longer a "norm" for the period of time an offender has to spend in custody relative to the effective head sentence, the NPPs being fixed reflect a far broader range than was previously the case. While on its face this appears to result in inconsistency, it may mean no more than that sentencing judges have adopted a different approach to the fixing of such periods and one which is no longer bound by an established "norm".[627] Different approaches at the State level to fixing NPPs may also subconsciously affect the length of such a period relative to the head sentence.

626 (2008) 234 CLR 143 at [10]–[11].

627 The principles relating to the fixing of such periods are discussed on pp 40–45.

# Chapter 7

# Conclusion

As is apparent, the landscape for the prosecution of Commonwealth serious drug offences has changed following the introduction of the array of offences in Pt 9.1 of the Code. While the vast majority of prosecutions still involve the importation or possession of border controlled drugs and precursors, Commonwealth offences related to the trafficking and manufacture of illicit drugs and a range of less serious offences are now also being dealt with by higher courts around Australia.

While the offence landscape has started to change, the sentencing landscape in terms of the relevant principles has not, and should not change to any great extent. The sentencing principles in this area are well established, and it is clear that intermediate appellate courts around Australia are familiar with them and apply them consistently in the context of the individual cases.

Consistency in the application of sentencing principles should result in broadly consistent outcomes. However there is another, more vexed issue. The analysis undertaken in this study demonstrates that there is national consistency of approach by the higher courts at some fundamental levels. For example, the offenders sentenced for more serious offences are sentenced more severely, as are those offenders who play more significant roles and whose offences involve substantial quantities of illicit drugs, compared with the sentences imposed on those offenders who commit less serious offences, with less significant roles and smaller quantities of illicit drugs. Generally however, it was found that sentences were more severe in NSW compared with those imposed in Victoria, Queensland and South Australia. Consistency is not, of course, numerical equivalence. However, this numerical disparity reinforces the need for sentencing judges to be informed of the sentences imposed in other jurisdictions. Only then can proper and complete consideration of relevantly comparable cases be made and a proper assessment made of the sentence to be imposed in a given case.

It is too simplistic to suggest that sentence outcomes in places other than in NSW should be solely determined by reference to cases finalised there. That is not the law. Nor should sentences in other States be ignored because the NSW cases represent a larger part of the whole sentencing history. What is clear is that it is necessary for the parties to carefully consider *all* of the relevant cases to determine those which are apposite to a particular case. They must also be in a position to identify, for the assistance of a sentencing judge, those features of a case relied upon which are relevantly comparable and which might provide guidance as to the appropriate sentence. This is not the same as providing a judge with a range of available sentences, a practice which cannot continue following the High Court decision of *Barbaro v The Queen*.[628] It is suggested that the approach taken by the NSWCCA in *R v Ly*,[629] which was delivered after *Barbaro*, where the NSWCCA identified comparable or distinguishing features in the cases relied upon by the Crown,[630] might be one adopted by practitioners.

A particular concern is the sentences being imposed for some drugs, notably GBL, as the sentences being imposed when offences involve a commercial quantity of this drug are significantly lower than those imposed for drugs such as heroin, cocaine, MDMA and methamphetamine. This is one area of inconsistency which may require appellate examination.

628 (2013) 88 ALJR 372 at [23].

629 [2014] NSWCCA 78.

630 ibid at [88]–[118].

The effect of *Hili* on NPPs has not been consistent nationally. In NSW, to a greater extent than elsewhere, sentencing judges perceive they have been freed from the possible constraints of *Bernier* and non-parole periods reflect a greater range as a result.

Sentencing statistics are able to identify numerical discrepancies, not only as between jurisdictions but also in relation to particular types of offences. However, statistics can only record measurable factors which impact on the sentence. There are a number of incommensurable factors which cannot be identified in the statistics.

The reiteration by courts of the need for consistency in the application of sentencing principles resonates in the cases. However, repeating that what is required is consistency in the application of sentencing principles does not, as this monograph shows, always lead to numerically consistent outcomes. What needs to be avoided is sentencing judges doing no more than sowing "a wilderness of single instances with more instances of their own choosing".[631] An appreciation of a national perspective for Commonwealth serious drug offences, such as has been attempted in this study, is one way to achieve greater consistency of outcome and to avoid the creation of a "wilderness".

A sentencing judge has numerous tools available to him or her which are intended to assist in the determination of the proper sentence in a particular case. The High Court in *Barbaro* emphasised that sentencing statistics, comparable cases and sentencing schedules are simply the "raw material" which must be synthesised by a sentencing judge.[632]

631 *Lacey v AG (Qld)* (2011) 242 CLR 573 at [55].

632 (2014) 88 ALJR 372 at [41], referring to Buchanan and Kellam JJA in dissent in *R v MacNeil-Brown* (2008) 20 VR 677 at [130] and [147] respectively.

Appendix

# Sentencing statistics for specific offences

There are sound reasons why, when the maximum penalty for an offence is the same, that comparable cases should not necessarily be limited to a particular offence.[1] However, this section, for completeness, examines the sentencing patterns for particular offences.

Table A.1 shows the frequency of Commonwealth serious drug offences in the study broken down by the threshold drug quantities.

Table A.2 provides a summary of sentencing statistics for offences where there were at least 10 cases, including the imprisonment rate, the median and middle 50% range of head sentences (where relevant) for the principal offence and the effective head sentence and effective NPP taking into account all offences. It also shows the median ratio between the effective NPP and the effective head sentence.

**Table A.1: Frequency of Commonwealth serious drug offences by threshold drug quantity**

| Offence group | Commercial quantity | Marketable quantity | Less than marketable quantity | No commercial intent | Total cases | |
|---|---|---|---|---|---|---|
| | | | | | n | % |
| **Border controlled drugs/plants** | | | | | | |
| Import | 134 | 377 | 24 | 10 | 545 | 63.4 |
| Possess unlawful import | 74 | 64 | 4 | 0 | 142 | 16.5 |
| Possess reasonably suspected unlawful import | 8 | 6 | 2 | 0 | 16 | 1.9 |
| | **216** | **447** | **30** | **10** | **703** | **81.7** |
| **Border controlled precursors** | | | | | | |
| Import | 36 | 37 | 2 | n/a | 75 | 8.7 |
| Possess unlawful import | 0 | 0 | 0 | n/a | 0 | 0.0 |
| Possess reasonably suspected unlawful import | 0 | 0 | 0 | n/a | 0 | 0.0 |
| | **36** | **37** | **2** | **n/a** | **75** | **8.7** |
| **Controlled drugs/plants** | | | | | | |
| Traffic | 35 | 13 | 14 | n/a | 62 | 7.2 |
| Cultivate | 0 | 0 | 1 | n/a | 1 | 0.1 |
| Manufacture | 7 | 2 | 0 | n/a | 9 | 1.0 |
| Possess | 0 | 0 | 3 | n/a | 3 | 0.3 |
| | **42** | **15** | **18** | **n/a** | **75** | **8.7** |
| **Controlled precursors** | | | | | | |
| Pre-traffic | 1 | 0 | 1 | n/a | 2 | 0.2 |
| Possess | 0 | 0 | 5 | n/a | 5 | 0.6 |
| | **1** | **0** | **6** | **n/a** | **7** | **0.8** |
| **Total** | **295** | **499** | **56** | **10** | **860** | **100.0** |

1 See the discussion on pp 26, 29–30, 61.

**Table A.2: Information on sentences of imprisonment for Commonwealth serious drug offences by reference to offence[a]**

| Offence type and drug quantity | Maximum penalty | Cases | Imprisonment rate | | Head sentence for principal offence (mths) | | Effective head sentence (mths) | | Effective NPP (mths) | | Ratio between effective NPP and effective head sentence |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | n | n | % | Median | Middle 50% range | Median | Middle 50% range | Median | Middle 50% range | Median[b] |
| **Border controlled drugs/plants** | | | | | | | | | | | |
| Import — commercial quantity | Life | 216 | 203 | 94.0 | 120.0 | 88.0–174.0 | 120.0 | 90.0–180.0 | 72.0 | 54.0–108.0 | 61.0% |
| Import — marketable quantity | 25 yrs | 447 | 438 | 98.0 | 72.0 | 49.5–86.3 | 72.0 | 54.0–90.0 | 42.0 | 29.0–54.0 | 59.0% |
| Import — less than marketable quantity | 10 yrs | 24 | 11 | 45.8 | 20.0 | 12.0–36.0 | 24.0 | 12.0–36.0 | 12.0 | 4.7–13.0 | 42.0% |
| Import — no commercial intent | 2 yrs | 10 | 3 | 30.0 | 12.0 | | 12.0 | | 6.0 | | 44.0% |
| **Border controlled precursors** | | | | | | | | | | | |
| Import — commercial quantity | 25 yrs | 36 | 34 | 94.4 | 73.5 | 53.0–96.0 | 76.5 | 53.0–119.3 | 47.5 | 30.0–72.0 | 60.0% |
| Import — marketable quantity | 15 yrs | 37 | 23 | 62.2 | 31.0 | 24.0–36.0 | 34.0 | 24.0–39.0 | 16.0 | 10.0–24.0 | 50.0% |
| **Controlled drugs/plants** | | | | | | | | | | | |
| Traffic — commercial quantity | Life | 35 | 35 | 100.0 | 108.0 | 90.0–150.0 | 132.0 | 96.0–162.0 | 84.0 | 60.0–120.0 | 64.0% |
| Traffic — marketable quantity | 25 yrs | 13 | 13 | 100.0 | 48.0 | 36.0–60.0 | 48.0 | 36.0–60.0 | 24.0 | 18.5–37.5 | 60.0% |
| Traffic — less than marketable quantity | 10 yrs | 14 | 10 | 71.4 | 26.5 | 17.5–43.5 | 28.5 | 17.5–46.5 | 9.5 | 4.0–19.5 | 35.5% |

a Information is shown for offences with at least 10 cases.

b The median ratio is calculated from individual sentences and not from the relationship between the median effective NNP and the median effective head sentence.

## Border controlled drugs

Offences involving border controlled drugs were the most common offences by far, accounting for 81.7% of cases in the study.

As Table A.1 shows, the importation offences[2] involving marketable quantities were the most common offences (447 cases), with just over twice as many cases as the next most common offences, the importation offences involving commercial quantities (216 cases).

As Table A.2 shows, the overwhelming majority of these offenders were sentenced to full-time imprisonment (98.0% and 94.0% respectively).[3] The median head sentence, however, was much longer when an importation offence involved a commercial quantity (120 months) compared with a marketable quantity (72 months). The median ratio between the effective non-parole period (NPP) and effective head sentence was only slightly higher (61.0% compared with 59.0%).

By comparison, the rate of imprisonment for 24 offenders dealt with for importing less than marketable quantities was 45.8%.[4] The median head sentence was 20 months and the median ratio was 42.0%. These figures do not include four offenders convicted of possessing less than a marketable quantity of unlawfully imported border controlled drug contrary to s 307.7(1) and two offenders convicted of possessing less than a marketable quantity of border controlled drug reasonably suspected of being unlawfully imported contrary to s 307.10(1).[5] Only one of these six offenders was sentenced to full-time imprisonment for 6 months to be released on a recognizance for 24 months after serving 4 months. Two offenders received a suspended sentence,[6] one received a recognizance for 24 months and two offenders were discharged without conviction to enter into a recognizance for 18 months and 12 months respectively.

### No commercial intent

Ten offenders were sentenced for importation offences where there was no commercial intent pursuant to s 307.4(1) of the Code. Three offenders (30.0%) received a sentence of full-time imprisonment and the median head sentence was 12 months.[7] Five offenders received a suspended sentence for 24 months,[8] one received a community-based order for 24 months and another received a community corrections order for 18 months.

2 See p 74 for an explanation of the offences falling within this group.

3 Non-custodial sentences were imposed on nine offenders involved in importing marketable quantities of border controlled drugs. Seven of these offenders received suspended sentences: the median duration of the recognizance release order was 24 months, with the terms of imprisonment ranging from 4 to 30 months. One offender received a recognizance for 24 months and the other offender received a youth justice order for a term of 18 months. Thirteen offenders were given non-custodial penalties where the offence involved commercial quantities. Ten of these offenders received suspended sentences: the median duration of the recognizance was 30 months, while the terms of imprisonment ranged from 6 to 36 months. One offender received a community service order for 400 hours, one offender received a community-based order for 100 hours and one offender was fined $3,000.

4 Thirteen offenders received suspended sentences: the median duration of the recognizance was 24 months, with terms of imprisonment ranging from 6 to 30 months.

5 These offenders were subject to a lower maximum penalty (2 years) compared to offenders convicted of importing less than a marketable quantity of a border controlled drug (10 years).

6 One offender was sentenced to 6 months imprisonment, but was ordered to be released forthwith on a recognizance for 24 months. The other offender was sentenced to 2 months imprisonment to be released forthwith on a recognizance for 12 months.

7 One offender was sentenced to a fixed term of 9.6 months, the other two offenders were sentenced to 12 months. The duration of the recognizances for the last two offenders were 7.5 months and 12 months after serving 4.5 months and 6 months respectively.

8 The term of imprisonment imposed ranged from 1 to 12 months.

## Border controlled precursors

Offences involving border controlled precursors accounted for 8.7% of cases in the study. As Table A.1 shows, there were a similar number of cases involving commercial quantities contrary to s 307.11(1) of the Code (36 cases) and marketable quantities contrary to s 307.12(1) (37 cases). Only two cases involved importing less than a marketable quantity contrary to s 307.13(1).

As Table A.2 shows, the overwhelming majority of offenders dealt with for importing commercial quantities of precursors were sentenced to full-time imprisonment (94.4%).[9] The imprisonment rate for importing marketable quantities was 62.2%.[10] The median head sentence was much longer for those importation offences involving commercial quantities (73.5 months) compared with marketable (31 months). The median ratio between the effective NPP and effective head sentence was also higher (60.0% compared with 50.0%). Both offenders dealt with for importing less than a marketable quantity were sentenced to full-time imprisonment for 36 months[11] and 48 months[12] respectively.

## Controlled drugs and plants

Offences involving controlled drugs or plants accounted for 8.7% of cases in the study. Of these, trafficking offences were the most common (7.2%). As Table A.1 shows, trafficking in a commercial quantity of a controlled drug contrary to s 302.2(1) of the Code (35 cases) was more common than trafficking in a marketable quantity contrary to s 302.3(1) (13 cases) or trafficking in less than a marketable quantity contrary to s 302.4(1) (14 cases).

### Trafficking offences

Table A.2 shows that all offenders sentenced for trafficking offences involving commercial or marketable quantities received full-time imprisonment. The median head sentence, however, was much longer for trafficking offences involving commercial quantities (108 months) compared with marketable quantities (48 months). The median ratio between the effective NPP and effective head sentence was also slightly higher (64.0% compared with 60.0%). By comparison, the rate of imprisonment for offenders dealt with for trafficking in less than marketable quantities was 71.4%.[13] The median head sentence was 26.5 months and the median ratio was 35.5%.

### Manufacturing offences

Nine offenders were sentenced for manufacturing a controlled drug (1.0%). Seven of these were for manufacturing a commercial quantity of controlled drug contrary to 305.3(1) of the Code and two were for manufacturing a marketable quantity contrary to 305.4(1). The drug type in all except two cases was methamphetamine. Cocaine was manufactured in one case and MDMA was manufactured in the other case.

All nine offenders were sentenced to a term of full-time imprisonment. Manufacturing offences involving commercial quantities received longer sentences than manufacturing offences involving marketable quantities. The median head sentence for offences involving commercial quantities was 138 months: the lowest was 72 months and the highest was 264 months (for cocaine). The median ratio between the effective NPP and

9 Two offenders received a suspended sentence for 36 months and 50 months. The term of imprisonment imposed was 24 months and 50 months respectively.

10 Fourteen offenders received suspended sentences: the median duration of the recognizance release order was 24 months, while the terms of imprisonment ranged from 6 to 24 months.

11 This offender was released on recognizance for 18 months after serving 16 months.

12 This offender was released on recognizance for 60 months after serving 15.6 months.

13 Four offenders received a suspended sentence: three for 24 months and one for 36 months. The term of imprisonment imposed ranged from 12 to 24 months.

effective head sentence was 66.7% (imposed on five offenders). The head sentence imposed on two offenders who manufactured marketable quantities was 24 months (for MDMA)[14] and 72 months[15] respectively. The ratio between the effective NPP and the effective head sentence was 55.6% and 65.0% respectively.

### Possession offences

Three offenders were sentenced for possessing less than a marketable quantity of a controlled drug contrary to s 308.1(1) of the Code. Two offenders received a sentence of full-time imprisonment for 6 months[16] and 12 months[17] respectively. The third received a suspended sentence for 6 months.

### Cultivation offences

One offender was sentenced for cultivating less than a marketable quantity of a controlled plant (cannabis) contrary to s 303.6(1) of the Code. This offender was sentenced to full-time imprisonment for 18 months.[18]

## Controlled precursors

There were only seven offenders (0.8%) who were sentenced for offences involving controlled precursors (mostly pseudoephedrine). Five cases involved possession contrary to s 308.2(1) of the Code. Four of these offenders were sentenced to a term of full-time imprisonment: two for 15 months and two for 18 months. Each offender was given a recognizance release order after serving between 6 and 10 months in custody. The duration of the recognizance ranged from 8 to 24 months. The other offender was given a suspended sentence for 12 months.

The remaining two offences involved pre-trafficking. One offender was sentenced to a head sentence of 84 months for pre-trafficking a commercial quantity of phenyl-2-propanone contrary to s 306.2(1).[19] The other was dealt with for pre-trafficking less than a marketable quantity contrary s 306.4(1). The sentence imposed was a term of imprisonment for 24 months to be released on recognizance for 8 months after serving 16 months.

14 This offender received an overall sentence of 27 months to be released on recognizance for 27 months after serving 15 months.

15 This offender received an overall sentence of 102 months with a single non-parole period (NPP) of 66 months.

16 This offender received an overall sentence of 13 months to be released on recognizance for 22 months after serving 2 months.

17 This offender was released on recognizance for 24 months after serving 3 months.

18 This offender received an overall sentence of 37 months to be released on recognizance for 24 months after serving 19 months.

19 This offender received an overall sentence of 108 months with a single NPP of 66 months.

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## COMMONWEALTH

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### Crimes Act 1914



### Crimes Legislation Amendment (Powers and Offences) Act 2012



### Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010



### Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012



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