



THOMSON REUTERS

Publication **Information**

AUSTRALIAN SENTENCING

Bagaric & Edney

**Quickly and thoroughly prepare for sentencing pleas and appeals
with Australian Sentencing – new from Thomson Reuters**

Well over 500,000 sentencing decisions are made in Australia annually, and sentencing appeals comprise a substantial part of the work of the Courts of Appeal. Arguing for the sentence appropriate to the circumstances is critical in achieving the best outcome in the matter, and reduces the likelihood of an appeal.

Now you can manage the increasing significance and complexity in sentencing law and principles with ease.

Whether you're advising a client, appearing at a sentencing hearing, or running a trial, Australian Sentencing provides immediate offence- and principle-based guidance on the considerations that impact on sentence.

Prepare better, knowing you've got expert help conveniently at hand.

Australian Sentencing

Bagaric & Edney
2011 pricing

Looseleaf (1 volume)
Code: 7340Q
\$900.00 incl. GST

Online
Code: 7340OI
\$900.00 incl. GST[^]

[^] Price is for a single annual subscription for one practitioner. For pricing for multiple users please contact us.

www.thomsonreuters.com.au/sentencing

AUSTRALIAN SENTENCING

Table of Contents

Preliminary

Preface, Tables, Index

Commentary

INTRODUCTORY

The sentencing landscape and structure of the commentary

Punishment and sentencing

***Judicial reasoning in sentencing and moves to greater consistency: statistics, guideline judgments and standard penalties – see sample pages

Procedural and evidential matters of sentencing hearing

High Court sentencing jurisprudence

CONSIDERATIONS

The principle of proportionality

The main objectives of sentencing: deterrence, community protection and rehabilitation and how they impact on sentencing outcomes

Aggravating factors

Mitigating considerations

The nature of criminal sanctions

Imprisonment

Intermediate sanctions

Discharges and bonds, fines and disqualifications

SPECIFIC OFFENCES

Specific Offences – a guide to use

Murder

Manslaughter

Dangerous driving causing death or serious injury

Assault / causing injury offences

Rape/ sexual assault

Sexual offences against children

Child pornography

Large scale drug offences

Robbery

Burglary/ breaking and entering

Fraud offences against the public revenue: taxation and social security offences

Larceny/ stealing/ theft and fraud/ deception

Occupational health and safety offences

Precedent Pleas

Legislation

Crimes (Sentencing) Act 2005 (ACT)
Crimes Act 1914 (Cth), Part 1B (ss 16-22A)
Sentencing Act (NT)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Penalties and Sentences Act 1992 (Qld)
Criminal Law (Sentencing) Act 1988 (SA)
Sentencing Act 1997 (Tas)
Sentencing Act 1991 (Vic)
Sentencing Act 1995 (WA)

About the Authors

Mirko Bagaric is a professor of law at Deakin University. He is also a practising lawyer and editor of the *Criminal Law Journal*. He has written several books on sentencing and completed his PhD in this area; his thesis is titled 'Punishment and Sentencing: A Rational Approach'.

Richard Edney is a member of the Victorian Bar. He practises exclusively in the area of criminal law. He is widely published in the areas of sentencing, evidence and criminal procedure.

Sample Pages

*** The following pages are from the pre-press edition of *Australian Sentencing*.

AUSTRALIAN SENTENCING
Sample pages from uncorrected proof edition
"JUDICIAL REASONING IN SENTENCING"
and
"LARGE SCALE DRUG OFFENCES"

**CONSIDERATIONS THAT MAY CURTAIL THE INSTINCTIVE
SYNTHESIS: SENTENCING STATISTICS, GUIDELINE JUDGMENTS
AND MINIMUM PENALTIES**

[200.1200] Despite the ostensibly unfettered nature of the instinctive synthesis, there are a number of considerations or situations in which it can potentially be fettered leading to more predictable outcomes.

Sentencing statistics

[200.1400] Statistics on sentencing outcomes, normally based upon offence type, in some jurisdictions are becoming increasing available as more resources are being directed towards the collation of this information¹. The relevant available data of this nature, is set out in Part D of this commentary.²

¹ The Sentencing Advisory Council in Victoria has been important in this regard. See <http://www.sentencingcouncil.vic.gov.au>. There are also Sentencing Advisory Council's in Queensland, New South Wales and Tasmania.

² For a general discussion of the relevance of statistics, see Judicial College of NSW, *Use and Limitations of Sentencing Statistics* (2004), at: <http://www.judcom.nsw.gov.au/publications/st/st31/index.html>; but note that this publication is prior to case developments discussed below.

[200.1420] Different approaches to relevance of sentencing statistics

However, as noted by the High Court in *Hili*, above, statistics are often of limited utility in sentencing given the instinctive synthesis approach to sentencing. The ambivalent judicial attitude towards sentencing statistics is demonstrated by the differing judicial views in *Bangard* [2005] VSCA 313.¹ On a charge of manslaughter, the accused on appeal against sentence produced a document outlining 93 manslaughter sentences delivered since 1998 in the Supreme Court of Victoria. The material showed that in only one of one case out of the 93 was a sentence as high as that received by the accused (11 years' imprisonment) imposed on an accused. The judges differed in their views regarding the relevance of such data. Buchanan and Eames JA were receptive to the use and relevance of sentencing statistics in terms of informing the sentence that is appropriate. Buchanan JA stated:

Sentencing statistics may be of limited value, for each sentence involves a unique synthesis of diverse factors stemming from the circumstances of the crime and the character and antecedents of the offender. Nevertheless, statistics may provide guidance by showing general trends in sentencing. In *R. v. Giordano*, Winneke P said:

However, a general overview of the sentences imposed by courts over a substantial period for offences of a similar character must inevitably play its part in provoking the instinctive reaction of any court which is asked to consider whether a particular sentence is manifestly excessive or manifestly inadequate.

His Honour was speaking of appellate courts, but in my view sentencing statistics may equally benefit judges imposing sentences at first instance.

Eames JA, at [29]-[34], stated

A document such as that prepared by Mr McLoughlin serves another useful purpose, in that it provides some guidance to a judge, necessarily only in a broad way, on the important question of consistency in sentencing. I do not suggest that in all cases such information ought be provided to a sentencing judge by counsel, but certainly where the judge invites assistance in the sentencing task I can see no reason why counsel should be reluctant to provide it. Relevant and accurate sentencing information is much more readily available today than was the case in years past. In my opinion, the exercise of the sentencing discretion may be intuitive, but it neither is, nor should be, uninformed.... In my opinion

the Courts should not discourage counsel from providing such practical assistance as Ms Dixon has demonstrated could have been provided to the judge in this case. The judge made it clear that he was inviting assistance in the exercise of his task; he was not inviting counsel to usurp his role.

Less receptive to such evidence was Nettle JA who held, at 39-40:

I am ... of the view that the sentencing statistics put forward by counsel for the applicant are of limited assistance. Apart from the inherent limitations of sentencing statistics, those which are put forward imply that a number of judges in recent years have given insufficient weight to the increase in the maximum sentence for manslaughter, from 15 years to 20 years, which was implemented with effect from September 1997. Granted that a sentencing judge is enjoined by s. 5(1)(b) of the *Sentencing Act 1991* to take current sentencing practice into account, the practice is not a tariff. If, therefore, the practice is to impose sentences that are too low, a judge may rise above it. So to say is not to ignore the importance of consistency in sentencing. If a sentence is higher than any other in statistics furnished to a court of criminal appeal, it goes without saying that it is a matter which calls for scrutiny. That is why trial judges should and do take sentencing statistics into account. But if upon analysis a sentence accommodates all of the criteria to which a sentencing judge must have regard, including the maximum sentence set by Parliament, the fact that the sentence may range above the current practice is not a basis to disturb it. I would not be disposed to interfere with this sentence on the basis of statistics alone.

The ambivalence expressed by Nettle JA in *Bangard* [2005] VSCA 313 has been endorsed in a number of other cases, for example, *Ioane* [2006] VSCA 84,² and *Manners*.³ Also as noted by Wright J in *Dowie*⁴:

A court may frequently be aided by the provision of statistical data as to sentences previously imposed in this State ... but in my view, it cannot allow such material to overshadow or displace its own evaluation of the gravity of the offence before it in light of all the known facts and circumstances⁵

In *Dieguez v The Queen* [2008] NSWCCA 147 the Court stated:

24 To call in aid the Judicial Commission statistics in order to demonstrate manifest excess, as the applicant does, is not always helpful. It is apparent that the applicant's sentence is at the upper end of the range of sentences imposed for this offence, according to those statistics. The fact remains that it is nonetheless within the range of sentences imposed for an offence carrying a maximum penalty of 15 years imprisonment. Caution should be exercised when having regard to this data. As Hulme J observed, with the concurrence of the other members of the Court in *Ma & Pham v R* [2007] NSWCCA 240:-

91 Subliminal in the reference to the statistics and the observation that the sentences here fall into the highest end of the range is the proposition that that is indicative of error. The proposition must be rejected. As this Court has said on many occasions, the range extends to the maximum penalty set by Parliament and it is against that that an offender's conduct must primarily be judged. Certainly, the statistics may at times inspire further reflection on the sentence in a particular case and perhaps give some limited guidance but, of themselves, they do not demonstrate error. Particularly is this so because, within each category, they provide no details of the cases reflected in them.

See also *R v Vu* [2003] NSWCCA 316 at [33]; *Lu v R* [2007] NSWCCA 74; *Derrington v R* [2008] NSWCCA 94.⁶

1 [2005] VSCA 313.

2 [2006] VSCA 84. [20].

3 *R v Manners* [2002] VSCA 161. [16] per Chernov JA.

4 [1989] Tas R 167.

5 [1989] Tas R 167 at 186.

6 See too, *Parkinson v R* [2011] NSWCCA 133; *Wilcox v R* [2011] NSWCCA 42.

[200.1440] Statistics of limited utility where offence can be committed in wide range of circumstances

It has also been noted that in relation to some offence types, statistics are of very limited utility given the vast range of situations in which the offence can be committed. In relation to manslaughter, the Supreme Court of Tasmania stated:

There is no identifiable sentencing tariff for manslaughter. It encompasses a wide range of situations, varying in their degree of heinousness, to the extent that it has been said that “there is no offence in which the permissible degrees of punishment cover so wide a range, and none perhaps in which the exercise of so large a discretion is called for in determining the appropriate penalty”. *Withers* (1925) 25 SR (NSW) 382 at 394 - 395.¹

¹ *Attorney-General (Tas) v Wells* [2003] TASSC at [26] per the Court.

[200.1460] Statistics more useful where they relate to a large number of cases

Other cases are more receptive to the use of statistics. In *Crowley*¹ Evans J relied upon statistical data in dismissing an appeal on the ground of manifest excess by an offender for the offence of maintaining sexual relationship. He stated:

As Professor Warner observed in her text, *Sentencing in Tasmania*, 2nd Ed, par11.436, the data for sentences imposed during the period from 1995 to 2000 for a single count of maintaining a sexual relationship with a young person is insufficient to establish a range for such sentences. However, this Court’s sentencing database now includes 45 sentences (excluding the sentence which is the subject of this appeal) imposed on offenders whose primary crime was maintaining a sexual relationship; 24 of those sentences were imposed subsequent to 2000, that is, the end of the period to which Professor Warner’s observation relates; and 12 of those 24 sentences ranged between three years and eight years. This demonstrates that the upper segment of the range of sentences for the crime of maintaining a sexual relationship is well beyond the penalty imposed on the appellant of two years six months’ imprisonment with six months of that sentence suspended²

Sentencing statistics, like all statistics, assume their greatest relevance where they relate to a large number of events. Spigelman CJ has stated that sentencing statistics may provide an indication of the general sentencing standards, and thus “may be of assistance in ensuring consistency in sentencing”.³ In *Henry* the NSW Court of Appeal closely examined the relevant sentencing statistics in a bid to discern any relevant sentencing trends. The Court focused on statistics concerning the sentences imposed over nearly a four year period for armed robbery and robbery in company. During this period there was a total of 835 cases. It noted that the “statistics strongly suggest both inconsistency in sentencing practice and systematic excessive leniency in the level of sentences”.⁴ However, the statistics did show that most offenders were imprisoned for the type of offence under consideration, and they were used as a basis for setting a guideline judgment.

In *R v Nguyen; R v Pham* [2010] NSWCCA 238 the Court relied heavily on a schedule of 68 sentences relating to drug importation. The Court stated:

104 The gathering of sentencing decisions into a schedule, to assist both intermediate appellate courts and sentencing courts, has proved useful in a number of circumstances. The analysis contained in the decision of this Court in *R v Lee* identified sentences which had been imposed over a period of time for commercial drug importation offences, and has served to promote consistency where sentences for federal offences of that type are passed in a range of courts throughout the States and Territories of Australia.

105 Of course, *R v Lee* did not (and cannot) purport to be a guideline judgment. The fact that this Court has been provided with an updated schedule for the period 2007 to 2010, and has received submissions concerning that schedule for the purpose of determining these Crown appeals, does not translate the present judgment into a form of guideline judgment.

106 Comparable cases can be useful guides, but care remains necessary in the use of case schedules given the objective and subjective differences between cases and the need to render individual justice: *R v Todoroski* [2010] NSWCCA 75 at [26].

107 The submissions to this Court by reference to the updated schedule have been made in relatively general terms and it is appropriate that the Court respond in similar terms. Having considered the cases referred to in the updated schedule, I am satisfied that the schedule continues to support the analysis contained in *R v Lee*.

108 Of course, there are differences between offences and offenders in the cases referred to in the schedule, including quantities of drugs involved, the offender's plea and the timing of the plea, the giving of discounts for assistance to authorities and the role of the particular offender in the various cases.

109 An examination of these cases, however, supports the Crown submission with respect to manifest inadequacy in this case, where the Respondents played senior roles, and were key organisers critical to the success of the enterprise, being large-scale importations of border controlled drugs. The position reached by reference to arguments advanced on the appeals is supported by the fact that the Respondents appear to fall within the second group of commercial quantity offenders identified by McClellan CJ at CL in *Director of Public Prosecutions (Cth) v De La Rosa* at [210]-[211], [224], being part of an analysis which Simpson J (at [291]-[305]) and Barr AJ (at [313]) regarded as helpful.

1 [2003] TASSC 147.

2 *Crowley* [2003] TASSC 147 at [21] per Evans J.

3 See also *Bloomfield* (1998) 101 A Crim R 404, 408. See also, *Dougan* (2006) 160 A Crim R 135 and *Des Rosiers* (2006) 159 A Crim R 549 where it was noted that statistics are never decisive.

4 *R v Henry* (1999) 46 NSLWR 346, [110].

[200.1480] Post-Hili consideration of statistics

Irrespective of which view is adopted, it is clear that statistics can still be of benefit in identifying the appropriate sentencing range for an offence and can be of considerable utility on appeals where the sentence is clearly outside the mean range. In *FD v The Queen* [2011] VSCA 8 the Victorian Court of Appeal discussed the use of the statistics. The decision is important because it is post-*Hili* and provides an illustration of where the weight of the (albeit crude) statistics was instrumental in leading to a lower penalty.

In *FD*, the appellant pleaded guilty to numerous counts of incest against his daughters and was sentenced to a total effective sentence of 16 years with a minimum of 13 years' imprisonment. Statistical data was produced at the appeal which showed that the penalty in this case was one of the heaviest for incest. In considering the data and other specific incest cases, the Court adopted the views set out in *Hudson v The Queen* which downplayed the relevance of sentence in other cases. The court stated at [10]:

The selection of a sentence involves the exercise of a judicial discretion which is informed by the circumstances in which the offence was committed and the character, antecedents and conditions of the offender. It is not possible to say that a sentence of a particular duration is the only correct or appropriate penalty to the exclusion of any other penalty. The method of instinctive synthesis will by definition produce outcomes upon which reasonable minds will differ. For that and other reasons, counsel are precluded from submitting that a specific sentence should be imposed.

Like cases can only, at best, provide a general guide or impression as to the appropriate range of sentences. In that context it has been said on many occasions that "comparable cases" can only provide limited assistance to this Court. They may however be used in search of unifying principles. That was not the use to which counsel sought to employ them here. ...

On appeal, the question is not whether the sentence under challenge is more or less severe than some other sentence that is within the range, but whether the sentence falls within the range of sentences that are appropriate to the objective gravity of the offence and to the matters personal to the offender.

However, the court allowed the appeal and in doing so, was influenced by the “major statistical discrepancy” when the sentence under appeal was compared with that for other incest offences. The court concluded at [34] that:

The sentencing snapshot and the examples set out above assist the intuitive synthesis to which we would, in any event, have arrived, namely that the sentence which his Honour imposed in this case was outside the range of a sound sentencing discretion.

Thus, it seems that crude sentencing statistics remain important where they show a major disparity between sentences for offence under appeal and other sentences for the same offence.¹

¹ See also, *DeWhite v The Queen* [2010] VSCA 261; *DPP v Lovett* [2008] VSCA 262.

[200.1500] Statistics can be used across jurisdictions

Statistics are of increasing importance in relation to federal offences, where they relate to cross-jurisdictional sentences. In *R v Mokoena* [2009] QCA 36 the court stated that in relation to federal offences, consistency of sentences imposed the courts across Australia is an important consideration. In *R v Chandler* [2010] QCA 21 the court approved of the following passage from *R v Ruha, Ruha & Harris; Ex parte Director of Public Prosecutions (Cth)* [2010] QCA 10:

Sentencing judges should take into account decisions which are sufficiently like the subject case to shed light on the proper sentence. That includes comparable decisions both in Queensland and in the other States and the Territories which shed light upon the proper orders, although sentencing judges should also take into account that both the head sentence and order for early release in such cases might have been influenced by inconsistent local sentencing practices which must be put to one side in sentencing for Commonwealth offences (It is not necessary in these appeals to consider the considerable complexities which may be thrown up in cases where it is necessary to impose sentences both for State and Commonwealth offences).

Statistics are not necessarily jurisdiction specific. Data from one jurisdiction can be used to inform a sentencing benchmark in another jurisdiction. In *R (Cth) v Nguyen; R (Cth) v Nguyen* [2010] NSWCCA 331 it was noted that at [71]-[72]:

Commonwealth offences of this nature [conspiracy to traffic marketable quantity of controlled drug] being relatively recent in origin, the statistical material yielded by analysis of Code offences is too sparse to be of use. Indeed, it is very likely that some, at least, of the small number of sentences constituting the basis of the statistics are the sentences imposed on the respondents and other members of the Ken Syndicate. However, consistently with the view I expressed in *R (Cth) v Cheung; R (Cth) v Choi* [2010] NSWCCA 244 at [131] I consider it appropriate to have regard to sentences imposed under comparable, and much longer established, State law. The most nearly comparable offence is the supply of not less than the commercial quantity of heroin which, pursuant to s 33 of the *Drug Misuse and Trafficking Act 1985*, carries a maximum penalty of imprisonment for 20 years. The commercial quantity is 250 grams. The range of sentences imposed after pleas of guilty (17 cases) is 3 years to 12 years, with the majority lying in the range of 4 to 5 years. Assuming universal reduction of 25 per cent for the pleas of guilty, the range is 4 years to 16 years. After conviction following a plea of not guilty (4 cases only) the range is 4½ years to 7 years. Exposing those figures dramatically exposes one of the limitations on the use of statistics – they do not say anything about the vast range of relevant circumstances, including the quantity of drug and the role of the offenders.

All that I can say is that, using these statistics as a yardstick, with all their limitations, I am not persuaded, by that reason, that the sentences here imposed were below the range legitimately available.

Different offence elements do not deter courts in one jurisdiction looking at sentences in other jurisdictions. For example, in *R v Robertson* [2010] QCA 319 McMeekin J made the following comments in allowing an appeal against sentence at [47]-[48]:

Whilst conscious of the differing legislative regimes in place in different States, a review of decisions in driving manslaughter cases in other States suggests that sentences in excess of 10 years are rare: *Penny v The State of Western Australia* [2006] WASCA 173; (2006) 33 WAR 48 [80]-[87] per Buss JA; [28] *Bombardieri v The Queen* [2010] NSWCCA 161 at [19]; [40]-[49]. [29] I do not think that the sentencing norms in those States are so different as to make the accumulated experience of those jurisdictions unhelpful.

The significant point, it seems to me, is that cases of driving manslaughter in which sentences in excess of 10 years imprisonment have been imposed are not only unusual, but the period of imprisonment does not seem to ever exceed 10 years by any great amount. This appears to be the case in Queensland as well. Those cases where longer sentences of imprisonment have been imposed have involved circumstances which, in my view, are only slightly less serious than the circumstances here. The question here is whether a forty percent increase in the term of imprisonment is justified when comparison is made with those cases.

[200.1520] Summary of relevance of statistics

Thus, the following key points emerge in relation to the use of statistical data to guide sentencing outcomes:

1. Statistical analysis of sentencing outcomes for particular offences provide a good starting point for ascertaining the sentence that should be imposed;
2. Statistical data is more useful when it is in the form of data covering at least several years;
3. Statistical data from other jurisdictions for the relevantly similar offence is relevant, but not as weighty as data within the relevant jurisdiction;
4. Sentencers will usually impose a sentence within the range suggested by the statistical data;
5. Statistical data is useful for suggesting a certain range; but not a specific penalty;
6. Sentencers will go outside this range if there is an unusual feature of the case, or for some reason there is a basis for increasing or decreasing the tariff;
7. Statistical data is most relevant where the sentence is profoundly different outside the range. In such a case, it is strongly suggestive of error in the penalty imposed.

[The next text page is 1-13501]

LARGE SCALE DRUG OFFENCES

[960.100] Overview

Each jurisdiction (including the Commonwealth) has strict laws prohibiting dealings with illicit drugs. The types of dealings range from possession, manufacturing, trafficking and importing. Over the past decade, maximum penalties for dealings with large amounts of drugs have increased, to a point where they include life imprisonment. The precise elements and descriptions of the drug offences vary across Australia, however, the sentencing principles are uniform. To this end, it is important to note that courts have expressly looked at sentencing data from other jurisdictions and endorsed that as being relevant to the tariff for the offence.

It is in the area of large scale drug offences that the Appeal Courts throughout the country have tended to do their most exacting and methodological work. There are a number of judgments where a court has discussed and analysed large numbers of drug offences in order to contrast it with the case in question. Moreover, the courts have, with a high degree of precision, indicated the tariffs for such offences and the most important sentencing considerations.

The reason for this high degree of rigour and precision is that drug offences are often met with very harsh penalties and they frequently come before the courts. To assist the lower courts, Appeal Courts have therefore provided increasingly detailed and clear sentencing guidance.

[960.600] Tariff

The normal penalty for a large scale drug offence is a term of imprisonment with a head sentence of over five years' imprisonment.

[960.1100] Statistics

ALRC Report 103, *Same Crime, Same Time: The Sentencing of Federal Offenders* (2006)¹ looked at sentences across Australia involving a commercial (although one part of the report indicates that the data is for trafficable quantities – but this is an error) quantity of MDMA during the five-year period between 2000-2004.

The report looked at 63 matters which involved a single charge. The jurisdictions where most cases occurred were New South Wales, Western Australia and Victoria. Overall the mean prison terms across all jurisdictions were 136 months (maximum prison sentence) and 66 months (minimum prison sentence). In New South Wales, the mean sentences were 154 months (maximum) and 72 months (minimum); in Western Australia, they were 132 months and 69 months; and in Victoria, they were 66 months and 39 months.² For a commercial quantity of heroin by comparison the overall means were 333: 133 (for trafficable quantities of heroin it is 87: 48).

These figures need to be used with caution. In 2008, the High Court in *Adams* ruled that there is no difference in drug seriousness for sentencing purposes. Thus, the disparity between sentences for MDMA and heroin is no longer justified.

The Judicial Commission of NSW report titled the *Impact of the Standard Non-parole Period Sentencing Schemes on Sentencing Patterns in New South Wales* sets out data for the offence of supplying a commercial quantity of a prohibited drug, which as a maximum penalty of 20 years and a standard non-parole period of 10 years. The data is for offences between the years of 2003-2007. There were 36 such offences. The imprisonment rate was 97.6% overall and 96.8% for offenders pleading guilty. The median sentence for offenders pleading guilty was seven years with the median non-parole period being four years.³

The Judicial Commission of NSW report also sets out data for the offence of supplying a large commercial quantity of a prohibited drug, which as a maximum penalty of life imprisonment and a standard non-parole period of 15 years. The data is for offences between the years of 2003-2007. There were 74 such offences. The guilty plea rate was 85%. The imprisonment rate was 98% - this is the same whether the offender pleaded guilty or not guilty. The median

sentence for offenders pleading guilty was seven years and seven and a half months with the median non-parole period being four years and nine months.⁴

The Victorian Sentencing Advisory Council has provided more recent data for sentences for trafficking in large commercial quantity of drugs (the maximum penalty for this offence is life imprisonment) and trafficking in commercial quantity of drugs (the maximum penalty for this offence is 25 years imprisonment). The data is for all offences committed between 2004–2005 to 2008–2009.

In relation to large commercial quantities of drugs, there were 70 offenders and 90% of these received a term of imprisonment. The terms of imprisonment range from one year to 16 years. The median term was six years and six months and the most common prison term was six years.⁵

In relation to commercial quantities of drugs, there were 181 offenders and 78% of these received a term of imprisonment. The terms of imprisonment range from one year to nine years. The median term was three years and 10 months and the most common prison term was three years.⁶ This is similar to the equivalent offence in New South Wales, despite the fact that New South Wales has a 10 year non-parole standard penalty for the offence.

1 <http://www.austlii.edu.au/au/other/alrc/publications/reports/103>.

2 See <http://www.austlii.edu.au/au/other/alrc/publications/reports/103/38.html>. For a commercial quantity of heroin by comparison the overall means were 333: 133 (for trafficable quantities of heroin it is 87: 48).

3 Judicial Commission of NSW report titled *The Impact of the standard non-parole period sentencing schemes on sentencing patterns in New South Wales* (2010), 51.

4 Judicial Commission of NSW report titled *The Impact of the standard non-parole period sentencing schemes on sentencing patterns in New South Wales* (2010), 51.

5 http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/snapshot_102_sentencing_trends_for_trafficking_in_a_large_commercial_quantity_of_drugs_in_the_higher_courts_of_victoria__june_2010.pdf

6 http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/snapshot_101_sentencing_trends_for_trafficking_in_a_large_commercial_quantity_of_drugs_in_the_higher_courts_of_victoria__june_2010.pdf

[960.1600] Summary of main principles

1. General deterrence is the most important consideration.
2. It is rare for offenders who are found guilty of large scale drug offences to not receive a custodial term.
3. In terms of offence severity, the most important consideration is the offender's role.
4. The second most important consideration is the amount of drugs.
5. Courts do not distinguish between degrees of dangerousness of drugs.
6. There is scope for mitigating factors to reduce the sentence.
7. The most important mitigating factors are:
 - assistance to authorities
 - low purity of drugs
 - drug addiction
 - no commerciality
 - previous good character.

DISCUSSION OF PRINCIPLES

[960.2100] Courts do not grade seriousness of drugs

In *Adams v The Queen* [2008] HCA 15 the High Court held that the courts do not grade the seriousness of drugs in terms of their harm. Thus ecstasy for example is not regarded as being less harmful than heroin. This statement is to some extent qualified in *Hinchcliffe v The Queen* [2010] NSWCCA 306 where the court stated:

39 It is now well established that it is not for the courts to construct a gradation of seriousness of different drugs by reference to perceptions of their harmfulness: *Bimahendali* at [16]; The seriousness of drug offences is determined by the legislature by the prescription of maximum penalties. One guide to the dangers of a particular drug as perceived by the

legislature is the prescription, in Schedule 1 of the DMT Act, of the quantities that constitute traffickable, indictable, commercial and, where applicable, large commercial quantities. In this respect a perusal of Schedule 1 suggests that the traffickable quantity of amphetamines, referred to by the sentencing judge, is 3.0 grams. That is comparable with, for example, heroin and cocaine. When compared with other drugs on the Schedule, it would appear that, to the extent the quantity identified as constituting a traffickable quantity is relevant, the description of “mid range” of amphetamine is, if anything, favourable to the applicant. As a rule of thumb, it might be thought that the smaller the quantity that constitutes a traffickable quantity, the greater the perception of harmfulness of the drug. It may be also be an indicator of the quantities found to be sufficient for the purposes of illegal supply.

In *R v Nguyen* [2010] NSWCCA 238, the New South Wales Court of Criminal Appeal usefully set out the principles that apply in sentencing serious federal drug offenders. The court stated:

70 The importation and possession offences now contained in the *Criminal Code Act 1995* (Cth) provide for 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: *Adams v The Queen* [2008] HCA 15; 234 CLR 143 at 146.

71 Before turning to the individual sentences imposed in this case, it is appropriate to refer to principles applicable to sentencing for drug importation offences. I include in this offences of attempting to possess a quantity of an unlawfully imported border controlled drug contrary to s. 307 *Criminal Code Act 1995* (Cth).

72 The following general propositions emerge from the authorities:

- (a) the criminality of an offender must be assessed by consideration of the involvement of the offender in the steps taken to effect the importation: *R v Lee* at [27];
- (b) problems may emerge when a sentencing court attempts to categorise the role of the offender in the drug enterprise, as in many cases the full nature and extent of the enterprise is unlikely to be known to the Court: *The Queen v Olbrich* [1999] HCA 54; 199 CLR 270 at 279; *R v Lee* at [25];
- (c) it is the criminality involved in the importation which must be identified - the fact that another person may be characterised as the “mastermind” does not mean that a person who was responsible for managing the importation into Australia is properly described as having only a middle level of responsibility: *R v Lee* at [26];
- (d) although the weight of the drug imported is not the principal factor to be considered when fixing sentence, the size of the importation is a relevant factor and has increased significance when the offender is aware of the amount of drugs imported: *Wong v The Queen*; *Leung v The Queen* at 607-608; *R v Lee* at [23]-[24];
- (e) the statements by the High Court in *Wong v The Queen*; *Leung v The Queen* do not suggest that, in an appropriate case, the amount of the drug involved in an importation is not a highly relevant factor in determining the objective seriousness of the offence, even to the extent of assessing that a particular offence is in the worst category of its type; in many cases, the only factor that would lead to a determination that one importation is worse than another would be the amount of drug involved where otherwise the circumstances of the importation were the same or very similar: *R v Nguyen* [2005] NSWCCA 362; 157 A Crim R 80 at 102; *Sukkar v The Queen (No. 2)* [2008] WASCA 2; 178 A Crim R 433 at 447-448;
- (f) as a matter of common sense, it should be inferred, unless there is evidence to the contrary, that a person who is importing drugs is doing so for profit: *R v Kaldor* [2004] NSWCCA 425; 150 A Crim R 271 at 297; *R v Lee* at [32];

- (g) the difficulty of detecting importation offences, and the great social consequences that follow, suggest that deterrence is to be given chief weight on sentence and that stern punishment will be warranted in almost every case: *Wong v the Queen*; *Leung v The Queen* at 607-608;
- (h) the sentence to be imposed for a drug importation offence 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: *R v Chen and Ors* [2002] NSWCCA 174; 130 A Crim R 300 at 382-383; *R v Stanbouli* [2003] NSWCCA 355; 141 A Crim R 531 at 552-553;
- (i) involvement at any level in a drug importation offence must necessarily attract a significant sentence, otherwise the interests of general deterrence are not served: *R v Pang* [1999] NSWCCA 4; 105 A Crim R 474 at 476;
- (j) the prior good character of a person involved in a drug importation offence is generally to be given less weight as a mitigating factor on sentence: *R v Barrientos* [1999] NSWCCA 1 at [52]- [57]; *R v Paliwala* [2005] NSWCCA 221; 153 A Crim R 451 at 456-457 [20]- [25]; *R v Lee* at [14]; good character is not an unusual characteristic of persons involved in drug importation: *Okafor v R* [2007] NSWCCA 147 at [47]; *Onuorah v R* [2009] NSWCCA 238; 234 FLR 377 at [49];
- (k) where offenders are not young (Mr Nguyen was 42 years' old and Ms Pham was 32 years' old), the immaturity of youth cannot be claimed as a factor bearing upon their transgressions: *Tyler v R*; *R v Chalmers* [2007] NSWCCA 247; 173 A Crim R 458 at 474;
- (l) where an offender (such as Ms Pham) is to be sentenced for an attempted possession offence, it should be kept in mind that the act of attempted possession can be attended by a wide range of moral culpability, so that the circumstances in which a person so charged attempted to come into possession of the drug, and what it was that the person intended to do with that drug, is relevant to determining the degree of moral culpability attached to the act of attempted possession itself, so that 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: *El-Ghourani v R* [2009] NSWCCA 140; 195 A Crim R 208 at 217 [33]- [37];
- (m) offences of attempting to possess imported drugs are not, for that reason, in a less serious category than that of importing the drugs: *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 230;
- (n) the range of sentences referred to in the decision of the Court of Criminal Appeal in *R v Wong and Leung* remain 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 *Crimes Act 1914* (Cth): *R v Taru* [2002] NSWCCA 391 at [12]; *R v Bezan* at 438 [34]-[36]; *R v Mas Rivadavia* [2004] NSWCCA 284; 61 NSWLR 63 at 67-68 [65]- [66]; *R v SC* at [27]; *R v Chea* [2008] NSWCCA 78 at [40];
- (o) insofar as each Respondent asked the sentencing Judge to take into account on sentence offences under s. 16BA *Crimes Act 1914* (Cth), it is necessary for a sentencing court to comply with the general principles applicable to the State regime for taking offences into account in accordance with *Attorney General's Application Under Section 37 Crimes (Sentencing Procedure) Act 1991 No. 1 of 2002* [2002] NSWCCA 518; 56 NSWLR 146: *R v Poynder* [2007] NSWCCA 157; 171 A Crim R 544 at 550; *Assafari v R* [2007] NSWCCA 159 at [9].

In *R v Nguyen* [2010] NSWCCA 238, the court used a schedule of cases containing importation sentences imposed by courts throughout the county. The schedule was initially provided in *R v Lee* [2007] NSWCCA 234 at [35], and updated in *R v Nguyen* [2010] NSWCCA 238.

In *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194, McClellan CJ at CL further summarised the relevant principles and provided general tariffs for large scale drug offences. These were endorsed by Maxwell P in *Phuong Bich Nguyen v The Queen* [2011] VSCA 32 who at [33] summarises the analysis of McClellans CJ as follows:

35 In *De La Rosa*, [19] McClellan CJ at CL identified the following as key reference points for sentencing (and for comparing sentences) in cases such as these:

- quantity;
- role;
- reward;
- assistance to authorities;
- criminal history; and
- prospects of rehabilitation.

36 His Honour reviewed a large number of sentencing decisions, which he grouped into the categories set out in the table below. It should be emphasised that this classification was intended to be descriptive of current sentencing practice and hence to promote consistency of sentencing in future. His Honour was not purporting to lay down quantitative sentencing guidelines. (The Court of Criminal Appeal subsequently made use of this categorisation in *Nguyen and Pham*.)

| Import commercial quantity <i>Customs Act 1901 (Cth) s 233B and Criminal Code Act 1995 (Cth) s 307.1</i> | | Range of sentences imposed | |
|--|---|-----------------------------------|--------------------------|
| | | 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 | 25y to life | 8y 6m–30y |
| 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 | 18–24y 6m | 10–16y |
| Group 3 | Quantity generally below 7 kg; mid-range role; discount for assistance, cooperation; plea not indicative | 8–15y | 4–11y |

| Import commercial quantity <i>Customs Act 1901 (Cth) s 233B and Criminal Code Act 1995 (Cth) s 307.1</i> | | Range of sentences imposed | |
|---|--|----------------------------|-------------------|
| | | Head sentence | Non-parole period |
| 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 | 6y 3m–8y | 3–4y 6m |

This chart needs to be applied in a flexible manner. In *Trajkovski v The Queen* [2011] VSCA 170 the court disapproved of the chart in a prescriptive manner. The court held that this is to adopt a two-stage sentencing process.

In the context of large scale drug offences, in *Tulloch v The Queen* [2004] WASCA 169¹, the court approved the following observations in *Aconi v The Queen* [2001] WASCA 211² regarding the importance of general deterrence:

18 It can ... be accepted that the applicant had an important role in the distribution chain, having access, for distribution purposes, to relatively large quantities of high grade heroin. In those circumstances this was a case in which the starting point for the sentencing of the applicant could be expected to be severe. As was pointed out by Kennedy J in *Serrette v The Queen* [2000] WASCA 405 at [2], it has frequently been said that those who engage in the illicit drug trade, whatever their role in the enterprise, must expect heavy sentences in which general deterrence will be the principal purpose of the punishment. This is especially so where an offender plays an important role in the distribution process [emphasis added].³

In a similar vein, in *R v Riddell* [2009] NSWCCA 96⁴ it was noted that:

57. Courts have also long recognised the importance of general deterrence in sentencing in respect of drug importation offences. In *R v Cheung Wai Man & Ors* (Supreme Court of New South Wales, 22 March 1991, unreported) Sully J said:

The importation of heroin into this country in any amount and at any time constitutes a deliberate threat to the well being of the Australian community ... The importation or the attempted importation of, and the trafficking or attempted trafficking [of heroin] ... is in a very real sense a declaration of war upon this community. ... In the face of such challenges each of the institutional supports of our society has a role to play. That of the Courts is to punish and deter according to law. Obviously, the Courts alone cannot meet adequately, let alone defeat, the challenge of which I have been speaking. What the Courts can do is to punish drug-related crime in a way which signals plainly to drug traffickers, especially foreign drug traffickers, that the Courts are both able and willing to calibrate their sentences until a point is reached at which, to a significant extent even if never perfectly, fear of punishment risked will neutralise the greed which is the only possible motive of those who ... engage in drug-related crime when they are themselves not drug dependent.⁵

In *Taylor v The Queen* [2007] WASCA 146, the court stated:

16 It is well established that the actual weight of the drugs is not the chief factor to be taken into account in fixing sentence: (*Wong v The Queen* (supra) at [68]) and the question is to identify the level of the offender's criminality by looking at the offender's knowledge about the importation in which she was involved: (*Wong v The Queen* (supra) at [69])...

18 In *R v Olbrich* (1999) 199 CLR 270 at [19] Gleeson CJ, Gaudron, Hayne and Callinan JJ pointed out that in sentencing offenders of this nature the true assessment to be made is an assessment of what the offender did rather than putting the offender into a particular category. That passage is in the following terms:

Sometimes, when drugs are imported into this country, more than one person connected with the importation of those drugs (or subsequent dealings with them) is prosecuted. Sometimes, those persons will be charged with different offences under the Customs Act. One may be charged with importing the drugs; others may be charged with conspiracy to import prohibited imports [contrary to Customs Act, s 233B(1)(cb)], or being knowingly concerned in the importation of such imports [contrary to Customs Act, s 233B(1)(d)]. If several of those persons are convicted of, or plead guilty to, the offences with which they are charged, it will, of course, be necessary to identify any feature that should lead to imposing a different sentence on one from that imposed on another. In that context, a distinction between “couriers” and “principals” may prove a useful shorthand description of different kinds of participation in a single enterprise. And it may be that in the circumstances of a particular case, different levels of culpability might be identified by adopting those terms. But this was not such a case. Further, 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.

1 [2004] WASCA 169.

2 [2001] WASCA 211.

3 See further [400.600].

4 [2009] NSWCCA 96.

5 In *R v Riddell* [2009] NSWCCA 96 the court noted, at [58], that: This passage has been cited with approval on numerous occasions. Its relevance is not restricted to the importation of the particular drug in that case. It is an important statement of principle relating to the importation of any illegal drug. Sully J reiterated his comments in *R v Nguyen* [2004] NSWSC 144 at [53], which involved the importation of ecstasy. See also *R v Wei Ming Chen* [2002] NSWCCA 174; (2002) 130 A Crim R 300 at [286] (NSWCCA), 382 (A Crim R); *R v Chun Hing Law* [2002] NSWSC 952 at [24] and *R v Stanbouli* [2003] NSWCCA 355. Most recently see, *Phuong Bich Nguyen v The Queen* [2011] VSCA 32; *R v Nguyen* [2010] NSWCCA 238; *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194.

[960.2120] Commerciality in relation to a drug offence is an aggravating factor

Rarely do large scale drug matters result in a suspended sentence. In *Western Australia v Johnson* [2010] WASCA 187 the court stated:

16 In *Cartwright v The State of Western Australia* [2010] WASCA 4 [8] - [10], the relevant principles relating to suspension of a term of imprisonment were identified as follows:

Section 39(2) of the *Sentencing Act 1995* (WA) (the Act) sets out the various sentencing options. The ultimate option is a term of immediate imprisonment and the two preceding it are conditional suspended imprisonment and suspended imprisonment respectively. Under s 39(3) of the Act a court must not use a sentencing option in subs (2) unless satisfied that it is not appropriate to use any of the options listed before that option. The same considerations that are relevant to the imposition of a term of imprisonment must be revisited in determining whether to suspend the term; the power to suspend is not confined by reference wholly, mainly or specially to the effect that suspension would have on the rehabilitation of a particular offender: *Dinsdale v The Queen* [2000] HCA 54; (2000) 202 CLR 321 [18], [26], [84], [85].

However, as noted in *Collins v The State of Western Australia* [2007] WASCA 108 [17], the sentencing discretion is not to be exercised in a vacuum. A sentencing judge must impose a type of sentence that falls within a sound discretionary range. The decisions of this court and its predecessor provide guidance to sentencing judges with the aim of

achieving consistency in sentencing. This court has made it plain that generally, a term of immediate imprisonment is the only appropriate sentencing option for serious drug offences. The incentives, financial and otherwise, to participate in the illicit drug distribution network must be counterbalanced by a clear and certain understanding that such involvement will ordinarily result in a penalty of immediate imprisonment: *The State of Western Australia v Saxild* [2008] WASCA 156 [12]. Thus, the imposition of a sentence other than immediate imprisonment for such an offence is, as a matter of fact, exceptional: *The State of Western Australia v Andela* [2006] WASCA 77 [17]; *Saxild* [13].

However, even if a term of immediate imprisonment is generally the appropriate penalty, the sentencing judge is not relieved of his or her obligation to determine the appropriate penalty in the particular case. In such circumstances the question for the sentencing judge is whether having regard to all relevant sentencing factors, the case does not require the imposition of the generally appropriate type of sentence: *Collins* [21].

17 It is the experience of the courts that illicit drugs cause or materially contribute to a very significant proportion of the criminal offences committed in this State, either as a result of users acting under their influence or because of the need to finance or secure a supply of drugs. There are often strong financial incentives to deal in prohibited drugs. Further, significant public resources are devoted to the difficult task of detecting and apprehending persons involved in the supply and distribution of illicit drugs. It is for these reasons that in sentencing for offences under s 6(1) of the Act, significant weight is given to general deterrence with the consequence that mitigating circumstances personal to the offender, including age and good character, are accorded less weight.

- Length of the term

18 The State contends the total sentence of 4 years 4 months' imprisonment infringes the first limb of the totality principle in that it is manifestly disproportionate to the degree of criminality involved in the offending conduct as a whole. In assessing this question regard is had to the circumstances of the offences viewed in their entirety and all the circumstances of the case, including those referable to the offender personally.

19 Total sentences imposed in comparable cases provide a reference point against which a judgment can be made as to whether a total sentence is broadly in line with those customarily imposed in this jurisdiction, bearing in mind the significant variations in relevant sentencing factors: *Sabau v The State of Western Australia* [2010] WASCA 3 [18].

20 Comparable drug dealing cases include *HV v The State of Western Australia* [2006] WASCA 242; *Dixon v The State of Western Australia* [2006] WASCA 255; *Burke v The State of Western Australia* [2007] WASCA 210; *Vagh v The State of Western Australia* [2007] WASCA 17; *The State of Western Australia v Andela* [2006] WASCA 77; *McDougall v The State of Western Australia* [2009] WASCA 232; *Cohen v The State of Western Australia* [2007] WASCA 279; *Rigney v The State of Western Australia* [2008] WASCA 96.

21 The State also relied on *Bosworth v The State of Western Australia* [2007] WASCA 144; (2007) 175 A Crim R 49. As previously noted, it is wrong to regard pars [40] - [41] of the judgment of Miller JA in *Bosworth* as providing a sentencing matrix for the determination of the appropriate sentence. That is neither the intended nor a proper use of that material: *Fernandes v The State of Western Australia* [2009] WASCA 227 [14]. Indeed, it is apparent from the decided cases that matters personal to an offender have a greater impact on the length of a term of imprisonment than on the type of sentence imposed.

22 When regard is had to the differences in relevant sentencing variables, it cannot be said that the length of the total sentence imposed on the respondent is disproportionate to the total criminality of his offending. I would dismiss ground 1.

- Suspension of sentence

23 The overwhelming majority of offenders convicted of offences against s 6(1) of the Act are sentenced to terms of immediate imprisonment. As previously noted, the imposition of a suspended term is, as a matter of fact, exceptional. The number of suspended terms of imprisonment (conditional or otherwise) upheld or imposed on appeal in recent times can be counted on the fingers of one hand (*Attenborough v The State of Western Australia* [2005] WASCA 132; *Samuel v The State of Western Australia* [2004] WASCA 154; *The State of Western Australia v Skaines* [2006] WASCA 160; and *The State of Western Australia v Marchese* [2006] WASCA 153).

24 In *Marchese*, the respondent pleaded guilty to possession of 27.97 g of methylamphetamine and 2.06 g of MDMA with intent to sell or supply. He was sentenced to terms of imprisonment of 2 years and 16 months respectively, with the terms to be served concurrently and with the terms suspended for 2 years. The appellant had pleaded guilty on the fast-track, was 24 years old, had no criminal record, supported his de facto partner and child and to some degree his mother. A significant delay between the imposition of the sentence and the hearing of the State appeal and the application of the double jeopardy principle were the determinative factors in this court's decision to dismiss the appeal.

25 In ordering suspension in this case the sentencing judge emphasised the appellant's age and prior good character. Youth (which term is used in the sentencing of adults to cover people in their late teens to middle 20s) and the absence of prior relevant convictions do not ordinarily result in the suspension of a term of imprisonment for drug dealing offences: see *Mishal v The Queen* [2001] WASCA 328; *Vogel v The State of Western Australia* [2002] WASCA 261; *Duong v The State of Western Australia* (2006) 32 WAR 354; *Jecks v The State of Western Australia* [2007] WASCA 111; *Wong v The State of Western Australia* [2004] WASCA 286; *The State of Western Australia v Munro* [2000] WASCA 285; *The State of Western Australia v Saxild* [2008] WASCA 156; *Dixon; Andela; RP v The State of Western Australia* [2010] WASCA 75; *Burke; Vagh; Lam v The State of Western Australia* [2010] WASCA 61. It is not uncommon in this State for young persons of good character from advantaged backgrounds to engage in the distribution of prohibited drugs. Further, many of the youthful offenders in these cases had (after being charged) taken positive steps towards rehabilitation and were not found to be at any significant risk of re-offending. The imposition of a term of immediate imprisonment in these types of circumstances reflect the significant weight accorded to the need for general deterrence and the prevalence of offending of this type among young people. The latter may have some correlation with the nature of the market for prohibited drugs.

[960.2140] General deterrence does not overwhelm all other considerations

In *Sukkar v The Queen (No 2)* [2008] WASCA 2 it was stated:

21 It is established that the major sentencing considerations for offences of trafficking in dangerous drugs of addiction, including cocaine, are general and personal deterrence. See *Bellissimo* (1996) 84 A Crim R 465, 471. Although the weight of the illicit drug is not, generally, the chief factor to be taken into account in fixing a sentence, it is, plainly, a matter of importance. Other matters to be taken into account include the offender's knowledge of the type and quantity of the drug in question, and the nature and level of the offender's participation in its trafficking. See *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 [67] - [70]; *Tulloh* [50]. *Although matters personal to an offender will almost always be a very limited consideration in sentencing for serious drug trafficking offences, they are not entirely irrelevant* [emphasis added].

[960.2160] The addiction of offender can mitigate penalty

In *R v Lacey* [2007] VSCA 196 the appellant pleaded guilty to trafficking in a drug of dependence (heroin) and was sentenced to imprisonment for four years, with a non-parole period of two years. The sentencing judge stated that the appellant's drug addiction was not an important mitigating factor. The Court of Appeal summarised the authorities relating to the relevance of drug addiction to sentencing.

12 There is clear and binding authority that in Victoria drug addiction may constitute a significant mitigating factor. In our view, in the circumstances of this case the learned sentencing judge was in error by, in effect, putting to one side the appellant's addiction in holding that it did not make "a substantial difference to the seriousness of the offending".

13 In *R v Nagy*, McGarvie J stated that:

The law does not preclude a court in sentencing this applicant from regarding it as an important factor that he and his *de facto* wife were heroin addicts and that the crimes were committed with a view to obtaining heroin and money to enable their addiction to be satisfied. Such a factor has been regarded as important in the determination of a person's criminality: *R v Voegeler* (1988) 36 A Crim R 174 at p.175. The regard that is to be paid to this factor depends on the circumstances but there is no legal restriction on the extent of the allowance which can be made for it in determining a sentence....

15 In *R v McKee*, Buchanan JA summarised the position as follows:

The motive for the commission of the crimes was the appellants' need of money with which to buy heroin to feed their addiction. According to the Court of Criminal Appeal in New South Wales it has been "said on countless occasions that addiction to heroin is not to be considered as effective reduction of what would otherwise be an appropriate sentence". While the existence of an overwhelming physical craving may explain the commission of a crime to obtain money to purchase heroin to still the craving, the courts' refusal to take it into account may be due to the view that the decision to begin to use drugs is said to be voluntary and the commission of crimes to feed an addiction is a likely consequence of that choice. In *R v Henry*, Spigelman CJ said:

[S]elf-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice.

The extent to which a decision to experiment with drugs is freely made, in my view, bears upon the moral culpability of the offender who commits a crime as a consequence of addiction to drugs. Age is relevant to the question, as Spigelman CJ acknowledged. I would add that in the case of adults, despair and low self-regard may also play a significant part in the decision to use drugs and that condition may be the result of social or economic disadvantage, poor education or emotional or physical abuse. An addiction to heroin may also bear upon the question of rehabilitation, where the prospects of success will often depend upon the likelihood of the addiction being successfully treated. In my view, a sentencing judge may have regard to the circumstances which led to an addiction that caused the commission of the offence and to whether the addiction has continued or is being treated in deciding upon a sentence appropriately tailored to the personal circumstances of the offender.

[Citations omitted]

16 The offender's addiction will only call for mitigation of punishment where it is established on the balance of probabilities that there was a link between that addiction and the commission of the offences. Sentencing error will only arise where it can be shown that, on the material presented on the plea, the sentencing judge was bound to find the requisite link between the offender's addiction and the offences.

17 In the present circumstances, there was a strong case for the appellant's drug addiction to be considered in sentencing. Relevant matters to be taken into account were that the appellant's drug taking had started when he was still only a child, that he had become addicted at a young age, that his long criminal history was drug-related, that part of the drugs he purchased were for his own personal use and that of his partner, that the charges against him arose out of street level operations and that there was no evidence of enrichment. Moreover, the appellant's history, as recited in the psychologist's report, indicates that his use of heroin may no longer be one of choice, but rather compulsion and as a result of addiction. To adopt the words of the Queensland Court of Appeal, addiction in this case is a factor that helps the offender:

to the extent of showing that his ... descent into the crime in question was a *secondary* consequence of desperation produced by a human weakness rather than a primary choice.

18 In our view, the material required the learned sentencing judge to find that the appellant's addiction was linked in the requisite way to the commission of the offences. The sentencing discretion is therefore reopened.

See also See also *Koumis v The Queen* [2008] VSCA 84.

[960.2180] Low purity of drugs can also mitigate penalty

In *Trajkovski v The Queen* [2011] VSCA 170, the court noted that the low purity of drugs is a mitigating factor:

124 There is no reason, in principle, why the fact that the mixture contains what is plainly only the most minuscule quantity of a drug of dependence, and is therefore unlikely to produce the deleterious effects normally associated with a much larger amount of that particular drug, albeit in a mixture, should not be regarded as a significant factor to be taken into account in assessing the gravity of the offending.

125 This very point was considered by the Western Australian Court of Criminal Appeal in *R v Mahasay* [64] There it was held that the low level of purity of the methylamphetamine in question was a factor of some importance, at least in a case involving trafficking in that drug. In the case of couriers, the purity might be less relevant.

126 The matter arose again, before this Court, in *R v Minh Thanh Do* [65] There, the Court found it unnecessary to determine whether the low level of purity of a drug as a mitigating factor had survived the rejection by this Court in *R v Pidoto & O'Dea* [66] of a harm-based system of classification of drug offences.

127 In my opinion, there is nothing in *Pidoto* which requires the low level of purity of a particular drug in a case such as the present to be given little or no weight. Whether one views such a matter as a mitigating circumstance, or rather as simply reducing the objective culpability of the offending, matters little in the ultimate result. There is obviously a difference between trafficking in 3.9 kilograms of pure methylamphetamine, and trafficking in 1.9 grams of methylamphetamine in a mixture of 3.9 kilograms. To treat these two offences as relevantly indistinguishable would be an affront to common sense.

In *Michael v The Queen* [2011] NSWCCA 122, the court summarised the circumstances in which an offender can avoid prison for trafficking drugs.

42 It was clear that the applicant had never previously been convicted of supplying a prohibited drug. It was submitted by the applicant that the amounts involved in this case were modest and there was a real question as to whether he could have been said to have been involved in drug trafficking "... to a substantial degree".

43 This submission was based upon a consistent line of authority in this Court that where an offender has been "*substantially involved in the supply of a prohibited drug*", unless there are truly exceptional circumstances, a fulltime custodial sentence ought to be imposed: see

R v Gu [2006] NSWCCA 104 per Howie J (Grove and Simpson JJ agreeing); *Scott v R* [2010] NSWCCA 103 at [27]- [29] per Hislop J (Allsop P and Grove J agreeing).

44 In *R v Ozer*, unreported, NSWCCA (9 November 1993), Hunt CJ at CL held that where an offence was a limited and isolated event, the offender was not trafficking in the sense in which he had used that expression.

45 In *R v Gip* (2006) 161 A Crim R 173, when considering this line of authority McClellan CJ at CL discussed two unreported decisions of this Court, namely *R v Clark*, unreported, NSWCCA (15 March 1990) and *R v Bardo*, unreported, NSWCCA (14 July 1992). These were the decisions to which Hunt CJ at CL had referred in *Ozer*. McClellan CJ at CL said at [13] this:

My understanding of these various statements is that where a finding can be made that an offender has engaged in repeated offences so that his or her activities can be described as trafficking, a full time custodial **sentence** should, unless there are exceptional circumstances, be imposed. However, if only one offence can be proved, but the circumstances surrounding that offence indicate that it was the result of a sophisticated commercial arrangement, the objective criminality involved may also require a custodial **sentence**, unless exceptional circumstances can otherwise be shown.

46 Rothman J in *Gip* cautioned that the views expressed in *Clark* and *Bardo* ought not be regarded as if they were a legislative enactment. He said that the proper approach for a sentencing judge was to concentrate on the substance of what was revealed by the facts in each case. At [43]-[44] he said:

43 The ultimate question is whether the accused is involved, in the ordinary sense, in trafficking. The mere fact that a person has been caught on only one occasion does not mean the person is not involved in trafficking. The question for the sentencing judge is whether there are facts, proven beyond a reasonable doubt, which facts give rise to an exercise of discretion consistent with the approach in *Clark*. Those facts may be an agreement to supply on another occasion, and attempt to supply on another occasion, participation in a process which envisages supply on more than one occasion, participation in a syndicate, or a number of other circumstances.

44 The ultimate question must be whether, on the application of ordinary principles of sentencing, full-time custody is warranted. In any situation where the person has been shown to have been involved (directly or indirectly) in an ongoing arrangement, or intended ongoing arrangement, for the supply of drugs, that person, for the purpose of the sentencing principle, should be taken to have been involved in trafficking. The isolated, one off incident of supply, ... does not include persons who, although charged with one offence, are otherwise shown to have an involvement in a process which contemplates supply on more than one occasion. That could be shown, as already stated, by proving any one of a range of activities which give rise to the inference of past, present or future involvement in trafficking.

47 I respectfully agree with the statement of Rothman J as to the proper approach by a sentencing judge, in the circumstances of a case such as this.

[960.2200] A minor role in a drug transaction is an important sentencing consideration

A good example of how a minor role in a large scale drug matter can significantly reduce sentence is *Director of Public Prosecutions (Cth) v Aisbett* [2009] VSCA 172 where the offenders pleaded guilty to attempting to possess a commercial quantity of a prohibited import. It was one of Australia's largest ecstasy hauls. The drugs weighed 1.2 tonnes, of which the weight of pure ecstasy was approximately 500 kilograms. This is more than 1,000 times the weight of a commercial quantity of the drug. It has a value of between \$150 million and \$350 million. Both offenders had significant prior convictions for drug offences. The

respondents were each sentenced to imprisonment for six years, with a minimum of four years. The prosecution appeal against sentence was rejected, with the Court of Appeal noting the minor role each offender had in the transaction – essentially each being paid \$1,500 to assist with transporting of the drug.

[960.2680] Illustrative cases

In *Ljuboja v The Queen* [2011] WASCA 143 the court provided the following sample cases:

82 In *Sukkar v The Queen [No 2]* [2008] WASCA 2; (2008) 178 A Crim R 433, Steytler P, McLure JA and I, in our joint reasons, reviewed the sentences imposed in numerous cases involving the importation of large quantities of illicit drugs. I will reproduce those cases which are of relevance to the present appeal.

83 In *Cheung* (1997) 97 A Crim R 283, the offender was convicted of being knowingly concerned in the importation of a commercial quantity of heroin, being 45 kg (or 32.41 kg of pure heroin). He was then aged 32 years. He had pleaded guilty only to possession of the drugs in question and was convicted after trial on the offence charged. The offender had no prior criminal record. He assisted in loading drugs onto a ship in China. He then came to Western Australia in order to assist in the unloading and further distribution of the drugs in this country. He was sentenced to 25 years' imprisonment with a non-parole period of 13 years. The sentence was upheld on appeal.

84 In *R v Suarez-Mejia* [2002] WASCA 187; (2002) 131 A Crim R 577, the offender was convicted of importing a commercial quantity of cocaine, being 937.9 kg (or 707.1 kg of pure cocaine). He was a Columbian national who had a prior conviction for the importation of cocaine into Curacao. He pleaded guilty to the offence charged. He represented the financiers of the importation and was responsible for guarding the drugs and ensuring their arrival at their intended destination. He was to be paid US\$200,000 for his role. He was sentenced to life imprisonment with a non-parole period of 20 years.

85 In *R v Reaves* [2004] WASCA 106; (2004) 147 A Crim R 26 and *de la Espriella-Velasco v The Queen* [2006] WASCA 31; (2006) 31 WAR 291, each of Reaves and de la Espriella-Velasco were co-offenders with Suarez-Mejia. De la Espriella-Velasco had controlled and run the shore-based element of the process of importation. He pleaded not guilty to the offence charged. He was sentenced, after trial, to life imprisonment with a non-parole period of 26 years. Reaves, who was a United States citizen, had purchased and modified the ship in which the drugs were imported. He piloted the ship into Australia and physically unloaded the drugs. He had a prior criminal history that included drug offences. He was to be paid US\$300,000 for his role. He pleaded guilty. The offender was aged 59 years when sentenced by the trial judge. After a successful Crown appeal, he was sentenced to life imprisonment with a non-parole period of 18 years. When resentenced on appeal he was aged 61.

86 As Steytler P, McLure JA and I noted in *Sukkar* [31], it is important to bear in mind, when considering cases decided in New South Wales, that s 16G of the Crimes Act was repealed on 16 January 2003. That section provided that, if a federal sentence was to be served in a prison of a State where sentences were not subject to remission or reduction, the court imposing the sentence was required to take that fact into account in determining the length of the sentence and must adjust the sentence accordingly. Sentences in New South Wales were not subject to remission or reduction. Consequently, sentences imposed prior to 16 January 2003 were reduced in accordance with s 16G, but those imposed after that date were not.

87 In *R v Vo* [2000] NSWCCA 440; (2000) 118 A Crim R 320, the offender was convicted of being knowingly concerned in the importation of a commercial quantity of heroin. The quantity involved was 54.5 kg of pure heroin. She was convicted after a trial, having pleaded not guilty. The heroin had been concealed in a consignment of tinned pineapple shipped to Sydney in 1997. The offender arranged for Customs clearance, storage, delivery and unloading of the shipment. She was not the principal in the cartel responsible for the importation, but was a "key" participant, both before and after the container arrived in Australia. Her role was described as being more crucial to the success of the operation than that of her co-offenders. She was 25 years old when the offending occurred. She was sentenced to 22 years' imprisonment with a non-parole period of 14 years. Her appeal was dismissed.

88 In *R v Jackson* [2003] QCA 31; (2003) 138 A Crim R 148, the offender pleaded guilty to importing a commercial quantity of cocaine, being 89.1 kg with an average purity of 70%. The