

CRIMINAL LAW JOURNAL

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THEMATIC ISSUE: SENTENCING

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ARTICLES

Judicial neurobiology, Markarian synthesis and emotion: How can the human brain make sentencing decisions? – Hayley Bennett and GA (Tony) Broe

That emotion should play a role in legal decision-making has been seen as inimical to the rule of law. Recent neuroscience research, however, has demonstrated that emotion plays a key role in legal decision-making, in particular the criminal law where personal, social, and moral circumstances are considered. The High Court recently considered judicial decision-making in *Markarian v The Queen*, particularly as it relates to sentencing, where the majority putatively upheld the “instinctive synthesis” approach. Labels aside, this article will evaluate the decision-making processes proposed by the judges, and potential alternative approaches, in the light of what is possible neurobiologically. This will include an analysis of which of the approaches to sentencing are most consistent with rational decision-making, together with an assessment of the role of emotion. The article will conclude that, in *Markarian*, the High Court in fact unanimously rejected the earlier form of Williscroft “instinctive synthesis”, which was the sentencing method most likely to allow unregulated emotion to bias decisions. The court had proposed an alternative form of decision-making, *Markarian* synthesis, which allowed an essential role for emotion, but included the safeguard of processes more typically associated with reason and deliberation. In this, the court endorsed a form of decision-making which was consistent, neurobiologically, with the highest likelihood of arriving at rational, well informed, yet humane decisions.

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Principled sentencing for environmental offences – Part 1: Purposes of sentencing – Justice Brian J Preston

Environmental law is a burgeoning field. The scale and rate of decline of the environment has been a catalyst for legislative action. Parliaments have prescribed ever increasing numbers and types of environmental offences and criminal sanctions for their contravention. Courts sentencing for environmental offences need to respond by adapting the traditional purposes of sentencing, the sentencing considerations and the types of sentences to take account of these new and different types of offences. This article assays this task. Part 1 examines the traditional purposes of sentencing in the context of environmental offences. Part 2, to be published in the next issue, will examine the sentencing considerations of relevance to environmental offences and the different types of sentences that might reflect these considerations, and further relevant purposes of sentencing.

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Bail conditions as a mitigating factor in sentencing – Richard Edney

The granting of bail to accused persons has been a familiar part of the Australian criminal justice system. Historically, there has been little explicit regard to bail and its conditions in the determination of sentences in criminal cases. However, more recently, in some Australian jurisdictions there has been judicial consideration of bail conditions and how they may be relevant to the question of sentence. This jurisprudence is likely to develop further, given the development of therapeutic jurisprudence and its prominence in bail and sentencing stages in various Australian criminal justice systems to achieve reformatory ends. In addition, given that the current authorities suggest that bail conditions may also be relevant to the punitive component of the sentence, the precise manner in which this will be determined will also need to be addressed. A possible framework for taking into account bail conditions for the purpose of sentences based on the objectives of proportionality and rehabilitation in sentencing will be discussed. 101

The use of suspended sentences in Australia: Unsheathing the Sword of Damocles – Lorana Bartels

Wholly suspended sentences are a controversial sentencing option currently available in all Australian jurisdictions. This article examines the interpretation of the two-step process for imposing a suspended sentence as set out by the High Court in *Dinsdale* and points to important differences in the approach to exercising the discretion to suspend. In addition, the varying severity of the “bite” of the sentence through the imposition of conditions or combination with other sentencing options is discussed. The significance of a suspended sentence rests, in large part, on the threat of imposition in the event of breach. The effect of divergence in relation to breach provisions is therefore also reviewed. Statistical information on the use of suspended sentences in the higher courts is presented and the need for a more consistent approach to the use of this sentencing option identified. 113

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