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# Update Summary

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**UPDATE 14**

**JUNE 2014**

## **AUSTRALIAN SENTENCING**

### **Highlights**

- New commentary for Judicial Reasoning, Aggravating Factors, Mitigating Considerations, Sanctions and Offences against the person.
- Legislative amendments have been made to *Crimes (Sentencing Procedure) Act 1999* (NSW), *Criminal Law (Sentencing) Act 1988*, *Sentencing Act 1991* (Vic) and *Sentencing Act 1995* (WA).

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## New and updated commentary and cases

New and updated commentary by **Mirko Bagaric** has been inserted into:

### Judicial reasoning

- **[200.120]** regarding the source of the instinctive synthesis. The cases of *Markarian v The Queen* (2005) 228 CLR 357; *Hudson v The Queen* (2010) 205 A Crim R 199; *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54 and *R v McHarg* [2011] NSWCCA 115 are discussed;
- **[200.680]** regarding the adoption of instinctive synthesis. The cases of *Elias v The Queen* (2013) 248 CLR 483; [2013] HCA 31; *Bugmy v The Queen* (2013) 87 ALJR 1022; [2013] HCA 37 and *Wong v The Queen* (2014) 88 ALJR 372; [2014] HCA 2 are discussed;
- **[200.900]** regarding the implicit and intrinsic problems associated with unfettered judicial discretion. The case of *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 is discussed;
- **[200.2420]** regarding the meaning of manifestly excessive. The cases *McPherson v The Queen* [2014] VSCA 59 and *R v Demaria* [2008] VSCA 105 are discussed;
- **[200.2440]** regarding the meaning of manifest inadequacy. The case of *Director of Public Prosecutions v Chatterton* [2014] VSCA 1 is discussed;
- **[250.3260]** regarding the role of the prosecution. The case of *Barbaro v The Queen* (2014) 88 ALJR 372 is discussed; and
- **[350.1180]** regarding the other objective considerations influencing penalty: maximum penalty and tariff. The cases of *GHK v Western Australia* [2014] WASCA 19; *Bensegger v The Queen* [1979] WAR 65; *Veen v The Queen (No 2)* (1988) 164 CLR 465 and *R v Tait* (1979) 46 FLR 386 are discussed.

### Aggravating factors

- **[450.4600]** regarding reasons for treating prior convictions as aggravating. The case of *Director of Public Prosecutions v Bryan* [2014] VSCA 54 is discussed;
- **[450.7800]** regarding an offence committed at the victim's home. The cases of *Melbom v The Queen* [2013] NSWCCA 210 and *Montero v The Queen* [2013] NSWCCA 214 are discussed; and
- **[450.11100]** regarding motive. The case of *R v Perzefi* [2014] SASFC 12 is discussed.

## Mitigating considerations

- **[500.4200]** regarding the size of the discount. Section 9AA of the *Sentencing Act 1995* (WA) and the case of *R v Ceruto* [2014] SASCF 5 are discussed;
- **[500.5200]** regarding how the strength of prosecution case is not important. The cases of *Morton v The Queen* [2014] NSWCCA 8; *Perry v The Queen* (2006) 166 A Crim R 383 and *R v Sutton* [2004] NSWCCA 225 are discussed;
- **[500.12500]** regarding when mental illness is mitigatory. The cases of *Andrew Iskandar v The Queen* [2013] NSWCCA 235; *R v Engert* (1995) 84 A Crim R 67; *R v Israil* [2002] NSWCCA 255; *Courtney v The Queen* (2007) 172 A Crim R 371; *Miller v The Queen* [1999] WASCA 66 and *R v Verdins* (2007) 16 VR 269 are discussed;
- **[500.12700]** regarding limits of mitigation of mental illness. The cases of *Barton v Director of Public Prosecutions* [2013] VSCA 360; *Western Australia v Khasay* [2014] WASCA 58 and *R v Engert* (1995) 84 A Crim R 67 are discussed;
- **[500.20100]** regarding delay. The cases of *Arthurs v The Queen* [2013] VSCA 258 and *R v Alt* [2013] QCA 343 are discussed;
- **[500.22900]** regarding incidental injuries or harm stemming from offending. The cases of *Altun v The Queen* [2014] VSCA 46; *R v Daetz* [2003] NSWCCA 216; *Chaplin v The Queen* [2010] VSCA 145; *Fuller v The Queen* [2013] VSCA 186 and *Khoja v Director of Public Prosecutions* [2014] VSCA 9 are discussed;
- **[500.24100]** regarding lower sentences when offences occurred. The cases of *MPB v The Queen* [2013] NSWCCA 213 and *Leo v The Queen* [2014] NTCCA 8 are discussed; and
- **[550.1200]** regarding the erasure of Indigenous identity in sentencing. The cases of *Namarnyilk v The Queen* [2013] NTCCA 17 and *R v MBY* [2014] QCA 17 are discussed.

## SANCTIONS

- **[650.920]** regarding the relevance of the impact on the offender of imprisonment. The cases of *RWB v The Queen* (2010) 202 A Crim R 209; *R v Gooley* (1996) 66 SASR 380; *Milenkovski v Western Australia* [2014] WASCA 48; *R v Benbrika (No 20)* (2008) 182 A Crim R 205; *R v Rostom* (1996) 83 A Crim R 58; *R v Vachalec* [1981] 1 NSWLR 351; *Pfeiffer v The Queen* [2009] NSWCCA 145 and *Cameron v The Queen* (2002) 209 CLR 339 are discussed;
- **[650.2940]** regarding sentencing for multiple offences - totality principle. The cases of *Dang v The Queen* [2014] VSCA 49; *R v Audino* (2007)

180 A Crim R 371 and *R v Healey* (2008) 186 A Crim R 4332 are discussed; and

- **[750.100]** regarding fines and other less severe sanctions. The case of *Director of Public Prosecutions v Fucile* [2013] VSCA 312 is discussed.

### Offences against the person

- **[820.1600]** regarding the summary of the main principles. The case of *Hunter v The Queen* [2013] VSCA 385 and *Richardson v The Queen* [2013] NSWCCA 218 are discussed; and
- **[900.2100]** regarding the discussion of principles. The cases of *Doe v Regina* [2013] NSWCCA 248 and *R v Buda-Kaa* [2013] ACTCA 46 are discussed.

## Legislative amendments

### New South Wales

The ***Crimes (Sentencing Procedure) Act 1999*** has been amended by:

- the *Bail (Consequential Amendments) Act 2014* (Act 5 of 2014): ss 11(1) to (2A) and 80(2) with effect from 20 May 2014.

### South Australia

The ***Criminal Law (Sentencing) Act 1988*** has been amended by:

- the *Statutes Amendment (Attorney-General's Portfolio No 2) Act 2013* (Act 47 of 2013): ss 44(2) to 44(2b) with effect from 17 May 2014.

### Victoria

The ***Sentencing Act 1991*** has been amended by:

- the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Act 32 of 2013): ss 3, 16A, 48C(3), 48CA, 49 to 69ZG, 83ADA, 83ADB, 83AG(1), 83AI(1) to (2), 83AJ(1), 83AL(1), 83AL(3), 83AM(1) to (2), 83ASA, 83C(3), 83H, 83AV(2) with effect from 19 April 2014.
- the *Crimes Amendment (Grooming) Act 2014* (Act 7 of 2014): Sch 1 cl 1 with effect from 9 April 2014.

## Western Australia

The ***Sentencing Act 1995*** has been amended by:

- the *Sentencing Legislation Amendment Act 2014* (Act 6 of 2014): ss 85(1), 93(1) and 95A with effect from 23 April 2014.