



THOMSON REUTERS

Update Summary

PLEASE CIRCULATE IMMEDIATELY!

UPDATE 16

DECEMBER 2014

AUSTRALIAN SENTENCING

**Professor Mirko Bagaric
Richard Edney**

Material Code 30176107

© Thomson Reuters (Professional) Australia Limited 2014

Looseleaf Support Service

You can now access the current list of page numbers at

<http://www.thomsonreuters.com.au/support/product-support.aspx?id=/mediaTree/58599>. If you have any questions or comments, or to order missing pages, please contact Customer Care LTA ANZ on 1300 304 195

Fax: 1300 304 196 Email: LTA.Care@thomsonreuters.com

Updated Commentary

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

The Sentencing Landscape

- Discussion of sentencing considerations for particular offences. The material that focuses on specific offences at [100.1220].
- Discussion of hybrid theories. The theories of utilitarianism and retributivism are discussed [150.680].

Judicial reasoning

The evolution of the instinctive synthesis

- Discussion of the source of the instinctive synthesis and the case of *Markarian v The Queen* (2005) 228 CLR 357; 79 ALJR 1048; [2005] HCA 25 is at [200.120].
- Discussion of the evaluation of the instinctive synthesis approach to sentencing and the cases of *Pesa v The Queen* [2012] VSCA 109; *CD v The Queen* [2013] VSCA 95 and *Director of Public Prosecutions (Vic) v Terrick* [2009] VSCA 220 at [200.850].
- Discussion of the different approaches to relevance of sentencing statistics and the case of *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 205 A Crim R 1; [2010] NSWCCA 194 is discussed at [200.1420].
- Discussion of the meaning of manifestly excessive and the cases of *Phan v Western Australia* [2014] WASCA 144 and *Chan v The Queen* (1989) 38 A Crim R 337 at [200.2420].
- Discussion of the rules of evidence do not generally apply to contested sentencing hearing and the cases of *Cheung v The Queen* (2001) 209 CLR 1; [2001] HCA 67 and *R v Elias* [2001] VSC 405 at [250.660].
- Discussion of the role of the prosecution and the cases of *R v MacNeil-Brown* (2008) 20 VR 677; 188 A Crim R; [2008] VSCA 190 and *Barbaro v The Queen* (2014) 88 ALJR 372; [2014] HCA 2 at [250.3260].

Aggravating factors

Common law principles of aggravation

- Discussion of reasons for treating prior convictions as aggravating and the case of *R v Darrell Terry McNaughton* (2006) 66 NSWLR 566 at [450.4600].

Mitigating Considerations

Voluntary disclosure of crime

- Discussion on voluntary disclosure of crime and the case of *Hill v Western Australia* [2014] WASCA 150 at [500.11300].
- Discussion that sometimes intoxication can be aggravating and the case of *R v Henry* (1999) 46 NSWLR 346; 106 A Crim R 149; [1999] NSWCCA 111 at [500.14600].
- Discussion of the summary of relevant principals and the cases of *Vergados v The Queen* [2011] VSCA 438 and *Arbili v The Queen* [2012] NSWCCA 48 at [500.15600].
- Discussion on absence of prior convictions and good character, the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the case of *Cobiac v Liddy* (1969) 119 CLR 25; 43 ALJR 257; [1969] ALR 637 at [500.19900].
- Discussion on traditional punishment and the case of *Munda v Western Australia* (2013) 249 CLR 600; 229 A Crim R 354; [2013] HCA 38 at [500.22905].
- Discussion of the rational approach to aggravation, mitigation and the evidence of first time offenders being less likely to recidivate than repeat offenders at [500.24600].

Sanctions

Considerations relevant to the imposition of imprisonment

- Discussion of imprisonment and hardship to others and the cases of *R v MacLeod* [2013] NSWCCA 108; *R v Day* (1998) 100 A Crim R 275 and *R v T* (1990) 47 A Crim R 29 at [650.2430].
- Discussion on how the parsimony principle reduces length of imprisonment and the case of *Jabaltjari v Hammersley* (1977) 15 ALR 94 at [650.2930].

- Discussion on the frequency of use of community-based orders and the rates of persons in community-based corrections at [700.600].
- Discussion of new section The Way Forward – Strategic Sentencing at [750.1000].

Specific Offences

Murder

- Discussion on illustrative cases and the case of *Director of Public Prosecutions v Terrick* [2009] VSCA 220 at [800.2600].

Legislative amendments

New South Wales

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

- the *Crimes Legislation Amendment Act 2014* (Act 59 of 2014) with effect from 23 October 2014.

The purpose of this Act is to require a court that imposes an aggregate sentence when sentencing for two or more offences to make a written record of the sentence that would have been imposed, and the non-parole period that would have been set for any offence to which a standard non-parole period applied, for each offence had it imposed separate sentences.

- Sections 53A(2) and 54B(4) have been amended.

Northern Territory

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

- the *Correctional Services (Related and Consequential Amendments) Act 2014* (Act 27 of 2014) with effect from 9 September 2014.
 - Sections 3(1), 34(2), 34(4)-(5), 35(1)-(2), 37(1), 38(1)-(3), 39(1), 39(5), 39C, 39E(1)-(3), 39F(1), 39G(1), 39J(1), 39K(1), 39L(1)-(5), 39N(8), 39P, 39R(1), 44(3), 44(6), 45(1)-(2), 47(1)-(4), 48(1), 48(8), 48C, 48E(1)-(4), 48E(6)-(7), 48G(1), 48H(1), 48J(1)-(5), 48J, 48N, 48Q(1), 53A(3), 56(1), 56(3), 60A, 63(2)-(3), 63(6), 63A, 64(1)-(2), 64(4), 65(9), 65(11), 78K(2), 78L, 78M(1)-(4), 80(3), 83(6), 80(11), 103(1), 108(4), 114(7), 114(10), 115(1)-(2), 115(5), 115(10) and 116 have been amended.

Queensland

The ***Penalties and Sentences Act 1992*** has been amended by:

- the *Safe Night Out Legislation Amendment Act 2014* (Act 42 of 2014) with effect from 1 October 2014.
 - Sections 43I(1), 43J(3), 43N, 43N(1) 160A(4), 171(2) and Sch 2 have been amended.
 - Section 43I(2) has been repealed.
 - Division 11 and ss 43G, 43J(4A) to (4C), 43N(2), 236, 237 and 238 have been inserted.

Victoria

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

- the *Sentencing Amendment (Baseline Sentences) Act 2014* (Act 52 of 2014) with effect from 2 November 2014.

The purpose of this Act is to provide for baseline sentences for indictable offences.

 - Sections 3(1), 5A to 5B, 6AC, 11A, 51(1A), 152 and 155 have been inserted.
- the *Criminal Organisations Control and Other Acts Amendment Act 2014* (Act 55 of 2014) with effect from 1 October 2014.

The purpose of this Act is to provide for the making of a serious drug offender declaration.

 - Section 5(2A) has been amended.
 - Sections 89DD(5), 89DG(2A) to (2B), 89DG(6), 89DI, 153, and Div 5 have been inserted.
 - Section 89DG(2) has been substituted.
- the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Act 63 of 2014) with effect from 1 November 2014.
 - Sections 3(1), 5A(6), 10(2), and Sch 1 cl 2 have been amended.
- the *Sentencing Amendment (Emergency Workers) Act 2014* (Act 69 of 2014) with effect from 2 November 2014.

The purpose of this Act is to provide a custodial sentence for certain violent offences committed against emergency workers; to the release on parole of persons in respect of whom a youth justice centre order and to expand the list of arson offences in Sch 1.

 - Sections 5(2AA), 10(2), 10A(2)-(3), 44(3) and Sch 1 cl 5 have been amended.
 - Sections 5(4C), 10AA, 10A(2A), 36(2), 44(1A), 44(4) and 154 have been inserted.

- the *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Act 72 of 2014) with effect from 1 November 2014.

The purpose of this Act is to provide statutory minimum sentences of 10 years imprisonment for manslaughter in certain circumstances, and to require the DPP to give notice of the prosecution's intention to seek the statutory minimum sentence in manslaughter trials.

- Sections 9A-9C and 152 have been inserted.
 - Sections 9B(3), 9C(6), 10, 10A and 10A(2) have been amended.
 - the *Justice Legislation Amendment (Confiscation and Other Matters) Act 2014* (Act 79 of 2014) with effect from 1 November 2014.
- The purpose of this Act is to make further provision for community correction orders (CCO) made by the Magistrates' Court of Victoria.
- Sections 10A(2), 10AA(6), 38(1) and Sch 1 cl 4 have been amended.
 - Section 41A has been reinserted.
 - Sections 44(1B) and 156 have been inserted.

Western Australia

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

- the *Criminal Code Amendment (Unlawful Possession) Act 2014* (Act 11 of 2014) with effect from 13 August 2014.
- The purpose of this Act is to outline sentencing when in possession of stolen or unlawfully obtained property where the property is either a motor vehicle and driven recklessly or dangerously, or an aircraft.
- Schedule 1A Pt 1 has been amended.
 - the *Statutes (Repeals and Minor Amendments) Act 2014* (Act 17 of 2014) with effect from 6 September 2014.
 - Sections 46, 108(3), 108(6) and Sch 1 have been amended.

Updated Tables

The Supplementary Table of Cases and Statutes have been updated to include recent additions to the service, as well as amendments to paragraph numbers.