IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

On Appeal from the Court Of Appeal, Supreme Court Of Victoria

BETWEEN:

No. M28 of 2013

BASSILLIOS PANTAZIS

Appellant

- and -

THE QUEEN

First Respondent

- and -

ATTORNEY-GENERAL FOR STATE OF VICTORIA

Second Respondent

No. M25 of 2013

CHAFIC ISSA

Appellant

- and -

THE QUEEN

First Respondent

- and -

ATTORNEY-GENERAL FOR STATE OF VICTORIA

Second Respondent

No. M29 of 2013

GEORGE ELIAS

Appellant

- and -

THE QUEEN

First Respondent

- and -

ATTORNEY-GENERAL FOR STATE OF VICTORIA

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

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PART I: SUITABILITY FOR PUBLICATION

1. The First Respondent certifies that this submission is in a form suitable for publication on the internet. The estimated duration of oral argument for the appeal is ½ day.

PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED

2.1 In Victoria there is a sentencing principle identified in the decision of the Court of Appeal of ***R v Liang & Li*** which enables a sentencing judge to mitigate punishment for a criminal offence in circumstances where the prosecution is adjudged to have acted unfairly in indicting the offender on the charged offence rather than an alternative (but equally or more appropriate) offence carrying a lesser maximum penalty.

2.2 In this appeal, each Appellant contends, inter alia, that –

(i) the principle in ***R v Liang & Li*** is a principle recognised under the common law;

(ii) the principle in ***R v Liang & Li*** operates in an unrestricted manner applying to all offences in Victoria whether State, Commonwealth or at common law; and

(iii) the sentencing judge erred in declining to apply the principle in ***R v Liang & Li*** to the facts in this matter in the exercise of the sentencing discretion.

2.3 In a filed Notice of Contention, the First Respondent submits that the principle identified in ***R v Liang & Li*** is not a sentencing principle recognised at common law.

PART III: NOTICES UNDER SECTION 78B OF THE *JUDICIARY ACT 1903 (CTH)*

3. The First Respondent certifies that the question of whether any notice should be given under section 78B of the *Judiciary Act 1903 (Cth)* has been considered; such notice is not thought to be necessary in light of the restricted grant of special leave.

PART IV: CONTESTED FACTS

4.1 The First Respondent does not contest any of the material facts set out in the Appellants' Narrative of Facts and each of the respective Chronology of Events.

4.2 In respect of Appellant *Pantazis*, the sentencing judge set out a summary of the relevant facts at [3] – [9] of the Reasons for Sentence.[1] In respect of the Appellant *Issa*, the sentencing judge set out a summary of the relevant facts at [19] – [27] of the Reasons for Sentence.[2] And, in respect of the Appellant *Elias*, the sentencing judge set out a summary of the relevant facts at [6] of the Reasons for Sentence.[3]

4.3 In addition, the First Respondent refers to the summary of evidence recounted in the joint judgment of the Court of Appeal (Warren CJ, Redlich JA, Hansen JA, Osborn JA and Curtain AJA) at [65] - [81] in rejecting the Appellants' appeal against sentence.[4]

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[1] See *R v Pantazis* [2011] VSC 54
[2] See *R v Issa* [2009] VSC 633
[3] See *R v Elias* [2011] VSC 423
[4] See *Pantazis & Ors v R* (2012) 268 FLR 121; (2012) 217 A Crim R 31; [2012] VSCA 160

Part V: STATEMENT REGARDING APPLICABLE PROVISIONS

5. The First Respondent accepts the Appellants' Statement of Applicable Constitutional Provisions, Statutes and Regulations.

Part VI: ARGUMENT IN ANSWER TO EACH APPELLANT

The nature of the complaint in this appeal

6.1 At the heart of these appeals is a complaint that each Appellant has not been sentenced "according to law" in respect of a common charge of attempting to pervert the course of public justice; and reliance is placed on the decision of the Victorian Court of Appeal in ***R v Liang & Li***[5] to make good that contention. In order to address this complaint, it is necessary to analyse both the soundness (and content) of the sentencing principle in question and the nature of the prosecution case against the Appellants.

The charge in question - attempting to pervert the course of public justice at common law

6.2 Each Appellant was charged with a common offence of attempting to pervert the course of public justice. The particulars of the relevant presentments read as follows –

> The **Director of Public Prosecutions** presents that **Bassillios (Byron) Pantazis** at Melbourne in the said State and at divers other places between the 10th day of May 2006 and the 5th day of June 2007 with the intent to pervert the course of public justice did a series of acts which had a tendency to pervert the course of public justice in that he assisted Antonios Sajih Mokbel to unlawfully abscond from the Victorian jurisdiction and to remain outside of the jurisdiction thereby impeding his arrest and the punishment imposed upon him by the Supreme Court of Victoria at Melbourne on the 31st day of March 2006.[6]

> The **Director of Public Prosecutions** presents that **Chafic Issa** at Melbourne in the said State and at divers other locations between the 31st day of March 2006 and the 5th day of May 2007 with the intent to pervert the course of public justice did a series of acts which had a tendency to pervert the course of public justice in that the said Chafic Issa assisted Antonios Sajih Mokbel to unlawfully abscond from the Victorian jurisdiction and thereby impeded his arrest and the punishment imposed upon him by the Supreme Court at Melbourne on the 31st day of March 2006.[7]

> The **Director of Public Prosecutions** presents that **George Elias** at Melbourne in the said State and at divers other places between the 31st day of March 2006 and the 5th day of June 2007 with the intent to pervert the course of public justice did a series of acts which had a tendency to pervert the course of public justice in that he assisted Antonios Sajih Mokbel to unlawfully abscond from the Victorian jurisdiction and to remain outside of the jurisdiction thereby impeding his arrest and the punishment imposed upon him by the Supreme Court of Victoria at Melbourne on the 31st day of March 2006.[8]

6.3 The above charge is a common law offence with a maximum penalty of 25 years imprisonment fixed in Victoria by virtue of section 320 of the *Crimes Act 1958 (Vic)*.

6.4 The elements of the common law offence of attempting to pervert the course of public justice are defined as follows[9] –

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[5] (1995) 124 FLR 350; (1995) 82 A Crim R 39

[6] See Count 1 on Presentment No. C0705786.9 in *The Queen v Bassillios (Byron) Pantazis*

[7] See Count 1 on Presentment No. C0705786.4 in *The Queen v Chafic Issa*

[8] See Count 1 on Presentment No. C0705786.9 in *The Queen v George Elias*

[9] See *R v Vreones* [1891] 1 QB 360; *R v Machin* (1980) 71 Cr App R 166; *R v Murray* [1982] 2 A All ER 225; *The Queen v Rogerson* (1992) 174 CLR 268; *Meissner v The Queen* (1995) 184 CLR 132

> JOHN DOE at ... on the ... day of ... with intent to pervert the course of justice, did an act (or series of acts) that had the tendency to pervert the course of justice in that he (she) did ... (particulars)

In short, the common law crime encompasses a single act or a series of acts.

6.5 The course of public justice has been held to be a broad concept, comprehending a wide range of acts. The most authoritative statement of this proposition is to be found in ***The Queen v Rogerson***,[10] where Brennan and Toohey JJ stated[11] –

> The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice. The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions.

6.6 Each Appellant pleaded guilty to the relevant charge[12] and did not challenge in the court below that the offence in question was made out by the admitted facts; rather, the complaint was that the admitted facts also proved alternative offences (which were at least equally apt to capture the relevant criminality of each Appellant) carrying a lesser maximum penalty. This in turn raises two distinct questions –

(i) did the facts in question disclose another charge carrying a lesser maximum penalty which was at least equally apt to capture the offending conduct?; and

(ii) if so, what are the consequences for sentencing in circumstances where an offender has been exposed to a charge carrying the higher maximum penalty as a consequence of the exercise of the prosecutorial discretion?

Alternative offences?

6.7 Before turning to a consideration of possible alternative offences, it is necessary to say something about the nature of the prosecution case.

6.8 First, the essence of the conduct involved an attempt by the Appellants to impede or thwart the execution of a court order imposing a sentence of imprisonment. Antonios (Tony) Mokbel had been tried in the Supreme Court on a Commonwealth offence of importation of drugs. As Mokbel had absconded towards the end of the trial, the proceedings continued in his absence culminating in a jury verdict of guilty returned and a sentence of imprisonment imposed by Gillard J on 31 March 2006.[13] That federal sentence was fixed under Part 1B of the *Crimes Act 1914 (Cth).*

6.9 There are no federal prisons in Victoria; persons sentenced to imprisonment for offences against Commonwealth law are detained in state prisons within Victoria. An obligation is imposed on all states to accommodate such prisoners under section 120 of the

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[10] (1992) 174 CLR 268

[11] Ibid, at 280; see also *Meissner v The Queen* (1995) 184 CLR 132

[12] In fact, as the court below noted, the Appellant *Pantazis* entered a plea to the relevant charge as part of a "negotiated presentment" whereby the prosecution abandoned a charge of trafficking in a drug of dependence (commercial quantity) – see *Pantazis & Ors v R* [2012] VSCA 160, at [90]

[13] See *R v Mokbel* [2006] VSC 119 – a sentence of 12 years imprisonment with a non-parole period of 9 years imprisonment was fixed by Gillard J on 1 charge of being knowingly concerned in the importation of a traffickable quantity of cocaine contrary to section 233B(1)(d) of the *Customs Act 1901 (Cth)*

Commonwealth *Constitution*.[14] In Victoria, the *Corrections Act 1986* provides for the management of prisons and the welfare of prisoners.

6.10 Part 1A of the *Corrections Act 1986 (Vic)* deals with the legal custody of persons sentenced to an order of imprisonment. Section 6A of the Act defines when a person is in the legal custody of the Secretary to the Department of Justice – this ordinarily occurs when a person acting under the lawful authority of the Secretary takes physical custody of an offender. Section 6D of the Act also provides that a person enters the legal custody of the Chief Commissioner of Police when an order of imprisonment is made in relation that person and a member of the police force takes physical custody of the person.

6.11 Thus, the offending conduct in question was directed at preventing either the Secretary to the Department of Justice or the Chief Commissioner of Police taking physical custody of Mokbel after the Supreme Court of Victoria had ordered him to serve a sentence of imprisonment. In other words, the conduct was designed to prevent any correctional officer present in court or any police officer outside court seizing Mokbel in execution of the order made by the Supreme Court.

6.12 It is standard practice in the Supreme Court of Victoria for a sentencing judge to sign a document commonly referred to as a "Return of Prisoners Convicted" – this document provides details as to the offence(s) and sentence imposed upon an offender and is duly signed and dated by the sentencing judge. This document has been described as a "mere memorial".[15] But importantly, the sentence of a superior court is the authority for the execution of the punishment it orders.[16]

6.13 Before leaving this topic, the First Respondent notes that a warrant for apprehension was also issued by Gillard J on 20 March 2006 when Mokbel failed to attend court in answer to his bail; that warrant was issued under section 26(2) of the *Bail Act 1977 (Vic)*.[17] However, the Appellants were not charged with any conduct relating to impeding the execution of this warrant until after the imposition of sentence on 31 March 2006. Even though there was a dual basis for the arrest of Mokbel, the warrant of apprehension was rendered otiose subsequent to the announcement of sentence in the Supreme Court.

6.14 Secondly, the prosecution case against each Appellant relied on a series of acts committed subsequent to the imposition of the sentence upon Mokbel. In substance, each offender was involved in a continuous activity between the particularised dates; in other words, various acts were undertaken to ensure that the Supreme Court order was not executed.

Section 43, Crimes Act 1914 (Cth) – attempting to pervert justice

6.15 In substance, ground 1(a) of the Notice of Appeal contends that the sentencing judge erred in sentencing the offenders on the count of attempting to pervert the course of public justice by failing to have regard to the maximum penalty fixed for the Commonwealth offence of attempting to pervert justice.

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[14] Section 120 provides – Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effects to this provision.

[15] See *The Queen v Turnbull; ex parte Taylor* (1968) 123 CLR 28, at 45

[16] See *The Queen v Turnbull; ex parte Taylor* (1968) 123 CLR 28; *Williamson v Inspector-General of Penal Establishments* [1958] VR 330

[17] See section 68, *Judiciary Act 1903 (Cth)* which provides for the application of State law on procedure in state courts exercising vested federal jurisdiction

6.16 As already noted, the common law offence carries a maximum penalty of 25 years imprisonment; however, the offence prescribed by section 43, *Crimes Act 1914 (Cth)* carried a maximum penalty of 5 years imprisonment at the relevant time.

6.17 In the plea in mitigation, the point was agitated by the Appellant *Pantazis*.[18] The prosecutor submitted that the common law offence of attempting to pervert the course of public justice was the "appropriate" charge in all the circumstances.[19] In delivering reasons for sentence, Whelan J rejected the Appellant's argument.[20]

6.18 Likewise, the point was raised by the Appellant *Elias* in his plea in mitigation.[21] In delivering reasons for sentence, Whelan J again rejected the argument.[22]

6.19 However, the point was not agitated by the Appellant *Issa* in his plea in mitigation.

6.20 On appeal, the Court of Appeal rejected the Appellants' argument holding –

(i) that the principle in ***R v Liang & Li*** is to be confined to less punitive offences that exist within the same jurisdiction in which the judicial power is being exercised; thus, the principle does not require a judge exercising the judicial power of the State of Victoria to take account of Commonwealth offences;[23] and

(ii) that even if the principle in ***R v Liang & Li*** did oblige a judge exercising State judicial power to have regard to a Commonwealth offence which had not been charged but which was more appropriate to the conduct in question and which carried a lesser maximum penalty, the section 43 offence relied upon by the Appellant was not a more appropriate offence.[24]

6.21 Assuming the correctness of the sentencing principle identified in ***R v Liang & Li*** for the purposes of argument, the anterior question is whether a charge could have been laid under section 43 to capture the relevant criminality. In this regard, it is important to note that the particulars of the charged offence were directed at acts committed after sentence had been imposed on Mokbel on 31 March 2006.

6.22 Section 43 of the *Crimes Act 1914 (Cth)* provided (at the relevant time) as follows[25] –

> (1) Any person who attempts, in any way not specially defined in this Act, to obstruct, prevent, pervert, or defeat, the course of justice in relation to the judicial power of the Commonwealth, shall be guilty of an offence.
>
> Penalty: Imprisonment for 5 years.

6.23 There are two obvious differences between the elements of the common law offence (set out at 6.4 supra) and the Commonwealth offence. First, the "course of justice" in section 43 must relate to the exercise of judicial power of the Commonwealth, but not so in relation to the common law offence. Thus, what is meant by the expression "judicial power"?

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[18] See *R v Pantazis* [2011] VSC 54, at 36-42, 45, 49, 67-75
[19] See *R v Pantazis* [2011] VSC 54, at 60-67
[20] See *R v Pantazis* [2011] VSC 54, at [27]
[21] See *R v Elias* [2011] VSC 423, at 568-9
[22] See *R v Elias* [2011] VSC 423, at [27]
[23] See *Pantazis & Ors v R* [2012] VSCA 160, at [4]-[6], [27]-[59], [93]
[24] See *Pantazis & Ors v R* [2012] VSCA 160, at [63], [64]-[90], [93]
[25] See Reprint prepared as at 29 March 2006

6.24 In ***The Queen v Murphy***,[26] this Court held that committal proceedings have an essential connection with the actual exercise of judicial power. The Court unanimously held[27] –

> In such a case, the committal proceedings themselves form part of a curial process which is centred upon the judicial power of the Commonwealth and which, in the case of a subsequent trial, culminates in the exercise of that power. The course of justice in the case of such an alleged offence includes that curial process. Its concern is the judicial power of the Commonwealth: whether it should be invoked, its invocation and its exercise. That course of justice relates, at every stage, to that judicial power.

10 6.25 In a more recent judgment, this Court commented on the ambit of "judicial power" in relation to a criminal trial. In ***Elliott & Blessington v The Queen***,[28] the Court in a unanimous judgment, observed[29] –

> Subject to the appellate system established by the *Criminal Appeal Act*, the exercise of judicial power with respect to the trials upon indictment of Elliott and Blessington was spent upon the subsequent imposition of the sentences upon them. The controversy represented by the indictment had been quelled and, allowing for any applicable statutory regime, the responsibility for the future of the appellants passed to the executive branch of the government of the State.

20 6.26 Thus, the First Respondent submits that section 43 could not have been charged as a viable offence as the conduct in question occurred after sentence had been imposed on Mokbel on 31 March 2006. In short, the Appellants' criminal conduct was designed to pervert not the exercise of a judicial power (the curial process was already spent and no act could alter the conviction and sentence recorded) but rather the exercise of an executive power; that is, attempts by law enforcement agencies and correctional authorities to commit Mokbel to prison.[30] As Brennan J observed in ***Leeth v Commonwealth of Australia***[31] –

> It is the duty of an Executive Government to carry a judicial sentence of imprisonment into execution.

30 6.27 Support for the above contention can also to be found in this Court's decision in ***Grollo v Commissioner of Australia Federal Police & Ors***;[32] in that case, this Court held that the power conferred upon a judge to issue an interception warrant was not part of the judicial power of the Commonwealth.

6.28 Secondly, section 43 is an inchoate offence focusing on criminal acts of "attempt" – see, for example, the amplified definition of the offence in sub-sections (3)[33] and (4)[34] which replicate the common law definition of attempting to commit an indictable offence. Similar definitions are to be found in the statutory offence of attempt in Victoria as defined in section 321M of the *Crimes Act* 1958 – see, in particular, sections 321N(1)(a)[35] and
40 321N(3).[36]

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[26] (1985) 158 CLR 596
[27] Ibid, at 611-2
[28] (2007) 234 CLR 38
[29] Ibid, at 41-42 [5]
[30] The police force is part of the executive of each State – see *Lipohar v The Queen* (1999) 200 CLR 485, at 583 [254]
[31] (1992) 174 CLR 455, at 471
[32] (1995) 184 CLR 348; see also *Love v Attorney-General* (NSW) (1990) 169 CLR 307; at 320-322; *Coco v R* (1994) 179 CLR 427, at 444
[33] Section 43(3) provides - For the person to be guilty of an offence against subsection (1), the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
[34] Section 43(4) provides - A person may be found guilty of an offence against subsection (1) even if doing the thing attempted is impossible.

6.29 On the other hand, the common law offence of attempting to pervert the course of public justice is a substantive offence (the use of the adjective "attempt" in the statement of offence is misleading).[37] This difference in offence classification perhaps explains the significant difference in the prescribed maximum penalties for the two offences. And in this case, the Appellants' conduct did succeed in perverting the course of public justice.

6.30 In addition to the arguments advanced above, the First Respondent supports the conclusion by the Court of Appeal that section 43 was an inapt offence in all the circumstances.

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Section 325, Crimes Act 1958 (Vic) – accessory

6.31 In substance, ground 1(b) of the Notice of Appeal contends that the sentencing judge erred in sentencing the offenders on the count of attempting to pervert the course of public justice by failing to have regard to the maximum penalty fixed for the State offence of accessory (commonly referred to as *accessory after the fact*).

6.32 As already noted, the common law offence carries a maximum penalty of 25 years imprisonment; by way of contrast, the offence prescribed by section 325, *Crimes Act 1958*
20 *(Vic)* carries a maximum penalty of 5 years imprisonment.

6.33 In the plea in mitigation, the point was agitated by the Appellant *Pantazis*.[38] Again, the prosecutor disputed the contention.[39] In delivering reasons for sentence, Whelan J rejected the Appellant's argument.[40]

6.34 On appeal, the Court of Appeal rejected the argument holding that a charge under section 325 would have been inadequate to identify and punish the offender for his role in the criminal enterprise.[41]

30 6.35 In their respective pleas in mitigation, the point was not agitated by either the Appellant *Issa* or the Appellant *Elias*. On appeal, the Court of Appeal noted that the Appellant *Issa* accepted in oral argument that section 325 was not an appropriate provision to be charged;[42] and that the Appellant *Elias* accepted in written submissions that section 325 was not an appropriate provision to be charged.[43]

6.36 Again assuming the correctness of the principle identified in ***R v Liang & Li***, the First Respondent supports the conclusion by the Court of Appeal that a section 325 offence was an inapt offence in all the circumstances.

40 6.37 The particulars of the relevant offence were directed at acts variously committed between 31 March 2006 and 5 June 2007; in other words, it was a series of acts designed to pervert the

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[35] Section 321N(1) provides - A person is not guilty of attempting to commit an offence unless the conduct of the person is - (a) more than merely preparatory to the commission of the offence.
[36] Section 321N(3) provides - A person may be guilty of attempting to commit an offence despite the existence of facts of which he or she is unaware which make the commission of the offence attempted impossible.
[37] See *R v Rowell* (1977) 65 Cr App R 174, at 180; *R v Machin* (1980) 71 Cr App R 166, at 170; *The Queen v Rogerson* (1992) 174 CLR 268, at 279, 297-298; *Meissner v The Queen* (1995) 184 CLR 132, at 140-141
[38] See *R v Pantazis* [2011] VSC 54, at 36-42, 45, 49, 67-75
[39] See *R v Pantazis* [2011] VSC 54, at 60-67
[40] See *R v Pantazis* [2011] VSC 54, at [27]
[41] See *Pantazis & Ors v R* [2012] VSCA 160, at [91]-[93]
[42] See *Pantazis & Ors v R* [2012] VSCA 160, at [91]
[43] See *Pantazis & Ors v R* [2012] VSCA 160, at [91]

course of public justice. The common law offence was capable of capturing the series of acts in question.[44] By way of contrast, section 325 is designed to capture a single act, which in turn explains the lesser maximum penalty.

6.38 Section 325(1) of the *Crimes Act 1958 (Vic)* provides –

> Where a person (in this section called the principal offender) has committed a serious indictable offence (in this section called the principal offence), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence. [emphasis added]

6.39 The First Respondent conceded before the sentencing judge and the Court of Appeal that section 325 was "technically" open as a charge but that it was an inappropriate one to capture the totality of the offending conduct. That contention was based on the fact that the Appellants had committed a series of discrete (but related) acts over a considerable period of time with the intent to pervert the course of justice.[45] Furthermore, it may have been open to the First Respondent to file multiple charges under section 325 to represent each separate act and seek cumulation of orders in the sentencing process; thus, the Appellants would have been in no better position than facing a single charge under the common law.

6.40 Putting to one side the correctness of the sentencing principle in ***R v Liang & Li***, the First Respondent submits that the Appellants have not suffered any miscarriage of justice ("no different" sentencing order should be made) because the two alternative offences identified are not "appropriate" charges reflecting the true criminality of the offenders.

The principle identified in R v Liang & Li

6.41 If the First Respondent is wrong in its primary contention, then it is necessary to examine the correctness (and content) of the principle identified in ***R v Liang & Li.***

6.42 In ***R v Liang & Li***,[46] the Victorian Court of Appeal dealt with an appeal against sentence wherein each offender was jointly presented on multiple counts including dishonestly obtaining a financial advantage pursuant to section 82(1), *Crimes Act 1958 (Vic)* and by a device defrauding a carrier of a charge properly payable pursuant to section 85ZF(a), *Crimes Act 1914 (Cth)* arising out of a scheme in which they participated against Telecom. The Court held that the offenders were exposed to an injustice by being charged with the section 82(1), *Crimes Act 1958 (Vic)* offence because that charge (exposing the offenders to higher penalties) did not appropriately fit the nature of the offenders' conduct. The charge most appropriately reflecting the gravamen of the offenders' conduct was the charge laid under section 85ZF(2), *Crimes Act 1914 (Cth)*. The Court further held that it was a relevant factor in sentencing to consider what the relevant legislative body (namely the Commonwealth) regarded as the appropriate sentencing tariff for an offence perpetrated against its interests.[47]

6.43 Despite its potentially broad application, the sentencing principle has been rarely invoked. In ***R v Vellinos***,[48] the Court of Appeal observed[49] –

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[44] See *R v Rowell* [1978] 1 All ER 665; *R v Machin* [1980] 3 All ER 151

[45] Whereas co-offenders Youseff and Evette Zeidan were charged with a section 325 offence for harbouring Mokbel at their property for 2 - 3 nights before he fled to Western Australia (single act) – see [2009] VSC 137

[46] (1995) 82 A Crim R 39

[47] Ibid, at 43-44

[48] [2001] VSCA 131

[49] Ibid, at [11]

In support of that proposition, counsel has called in aid a little-used, but none the less significant, sentencing principle of fairness, namely, that the prosecuting authority, whilst possessing an unchallengeable right to frame its presentment in whatever manner it thinks fit, cannot thereby preclude the sentencing tribunal from mitigating the penalty if it concludes that the charges alleged exposed the prisoner to a more punitive regime of sentencing than that to which he ought reasonably have been exposed by the preference of charges more appropriate to the crimes alleged. This was the principle applied in Liang & Li.

Decision in the court below

6.44 In rejecting the Appellants' appeal against sentence, the Court of Appeal declared that the principle in ***R v Liang & Li*** is to be confined to less punitive offences that exist within the jurisdiction in which the judicial power is being exercised; thus, the principle does not require a judge exercising the judicial power of the State of Victoria to cross jurisdictional boundaries in order to take account of Commonwealth offences.[50]

6.45 The First Respondent maintains its position in the court below – namely, that the principle identified in ***R v Liang & Li*** of unfairness in charge selection can only be remedied by way of "abuse of process" rather than some artificial reduction in sentence which is arbitrary in nature (the Court of Appeal declined to decide this point).[51] Furthermore, a close examination of the relevant authorities raising the principle in ***R v Liang & Li*** appear to reveal unexplored issues of statutory construction between alternative criminal offences.

Examination of the decision in R v Liang & Li

6.46 In ***R v Liang & Li***, the offenders were involved in a scheme of dishonesty against the financial interests of Telecom. The scheme involved the use of a device which caused certain information numbers to repeatedly ring. Telecom had entered into agreements with service providers to share the profits of telephone calls made to information numbers by callers; and in turn the service provider would pass on a share of its proceeds to the information provider. As a consequence of the bogus calls, Telecom would forward payments to the service providers, who in turn would split their profits at the direction of the information providers (who included the offenders). Payments made to the information providers were directed to bank accounts opened in false names.

6.47 The offenders were charged on a joint indictment containing 12 counts. The applicant *Liang* was charged with 1 count under section 82(1) of the *Crimes Act 1958 (Vic)*, 1 count under section 85ZF(a) of the *Crimes Act 1914 (Cth)* and 7 counts under the *Financial Transaction Reports Act 1988 (Cth)*. The applicant *Li* was charged with 1 count under section 82(1) of the *Crimes Act 1958 (Vic)*, 1 count under section 85ZF(a) of the *Crimes Act 1914 (Cth)* but only 3 counts under the *Financial Transaction Reports Act 1988 (Cth)*. The state offence under the *Crimes Act 1958* carried a maximum penalty of 10 years imprisonment, the Commonwealth offence under the *Crimes Act 1914* carried a maximum penalty of 5 years imprisonment and the Commonwealth offences under the *Financial Transaction Reports Act 1988* carried a maximum penalty of 3 years imprisonment.

6.48 Each offender was sentenced to various terms of imprisonment on the counts (including a sentence of 3 years imprisonment imposed on the sole state offence) with an overall sentence of 3 years imprisonment imposed. The offenders appealed against sentence on the basis of manifest excess.

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[50] See *Pantazis & Ors v R* [2012] VSCA 160, at [4]-[6], [27]-[59], [93]
[51] See *Pantazis & Ors v R* [2012] VSCA 160, at [60]-[62]

6.49 On the appeal, it was contended that the framework of the presentment led the judge into sentencing error because the prosecuting authority had chosen to present the offenders on a section 82 offence under State law notwithstanding that the conduct was aimed at defrauding a Commonwealth authority. Accordingly, as the state offence carried a higher maximum penalty than its Commonwealth counterpart, the prosecuting authority had exposed the offenders to a regime of sentencing which was more punitive than the one to which they should, in fairness, have been exposed.

6.50 Importantly, during the appeal it was conceded by the Crown that the State offence was laid solely because the service providers were, in part, the target of the deception. But the sentencing judge had proceeded to sentence the offenders on the basis that the State count was intended to comprehend the fraud perpetrated against Telecom. Thus, the sentence on the State count proceeded on a misconceived basis and that was sufficient alone to constitute sentencing error.

6.51 However, in upholding the appeal, Winneke P observed (Ormiston JA and Crockett AJA agreeing)[52] –

> For my part, I think there is much substance in the argument that the applicants were exposed to an injustice by being charged with the offence created by s 82(1) of the *Crimes Act 1958*. This injustice flowed not only because the true purpose and intent of the charge was never explained to his Honour but also because that charge (exposing the applicants, as it did, to higher penalties) did not, in my view, appropriately fit the nature of the applicants' conduct. It would seem to me that the charge which most appropriately reflected the gravamen of the applicants' conduct in this case was the charge laid in count 2 – ie the offence created by s 85ZF(a) of the *Crimes Act 1914*. Insofar as relevant, that section provides:
>
> "a person shall not by means of an apparatus or device
>
> (a) defraud a carrier of any ... fee or charge properly payable for or in relation to a telecommunication service supplied by the carrier."
>
> This is precisely what the facts showed the applicants had done. This charge, as I have already indicated, carried with it a maximum penalty of five years imprisonment ....
>
> [I]t would, in my view, seem to be a relevant factor in the sentencing process to consider what the relevant legislative body (namely the Commonwealth) regarded as the appropriate "sentencing tariff" for an offence perpetrated against its interests or the interests of bodies for whom it had power to legislate. [emphasis added]

6.52 Winneke P also referred to with approval the earlier decision of the Federal Court in ***R v Whitnall*** stating[53] –

> The principle being enunciated in that passage means no more than this: that although it is for the prosecuting authority in its absolute discretion to determine which particular charge it will lay against an accused person, it is none the less relevant and proper for the judge on sentence to take into account as a relevant sentencing principle the fact that there was another and less punitive offence which not only could have been charged but indeed was as appropriate or even more appropriate to the facts alleged against the accused.

Analysis of earlier decisions raising the principle

6.53 The first decision is ***Scott v Cameron***;[54] in this case, the offender had been charged with eleven offences of making untrue statements in relation to applications for unemployment benefits contrary to section 29C of the *Crimes Act 1914 (Cth)*. This provision carried a

[52] (1995) 82 A Crim R 39, at 43, 44-45
[53] Ibid, at 44; and also the decision of the South Australian Supreme Court in *Scott v Cameron* (1980) 26 SASR 321
[54] (1980) 26 SASR 321

maximum penalty of 2 years imprisonment. The offender was sentenced to a term of imprisonment of 3 months imprisonment and appealed against severity of sentence.

6.54 On appeal to the Supreme Court of South Australia, White J stated that the charges in question could have been appropriately laid under section 138(1)(d) of the *Social Services Act 1947 (Cth)* which carried a lower maximum penalty (maximum penalty of $100 or 6 months imprisonment) than that prescribed by section 29C of the *Crimes Act 1914*. In allowing the appeal against sentence, White J stated[55] –

> Counsel for the respondent correctly said that the prosecution had an absolute discretion whether to lay the complaints under one section or the other but it is for the Court not the prosecution to impose the appropriate sentence. And the Court's discretion is not to be fettered by the prosecutor's choice, at least in those cases where the facts are such that the prosecution could have been equally appropriately brought under one section or the other. Indeed it seems to me that the prosecution would have been more appropriately brought under s138 of the *Social Services Act* because that section deals specifically with this type of offence and contains the maximum penalty chosen by the legislation therefor. On the other hand, s29C of the *Crimes Act* is a general blanket section designed to cover all kinds of false statements which might be made in all kinds of circumstances to all kinds of departments for all kinds of purposes. Where, as here, the facts reveal a general "run of the mill" series of offences, its seems to me that the specific section ought to be used, while the more general provisions of section 29C of the *Crimes Act* should be reserved for particularly serious cases where it is quite obvious that the offending is far beyond the maximum penalty contemplated by the section.

6.55 However, White J cites no authority for the above proposition. The First Respondent submits that the particular facts in this appeal raise a question of statutory interpretation (application of the *generalia specialibus* maxim) rather than any special principle of sentencing. Thus, it is necessary to examine the two statutory provisions in question.

6.56 Section 138(1) of the *Social Services Consolidation Act* 1947 (Cth) provided as follows –

> A person shall not –
>
> (a) make, whether orally or in writing, a false or misleading statement -
>
> (i) in connexion with, or in support of, a claim, whether for himself or for any other person;
>
> (ii) to deceive an officer doing duty in relation to this Act; or
>
> (iii) to affect the rate of a pension, allowance, endowment or benefit payable under this Act;
>
> (b) obtain payment of a pension, allowance, endowment or benefit under this Act, or of an instalment of such a pension, allowance, endowment or benefit, which is not payable;
>
> (c) obtain payment of a pension, allowance, endowment or benefit under this Act, or of an instalment of such a pension, allowance, endowment or benefit, by means of a false or misleading statement or by means of impersonation or a fraudulent device; or
>
> (d) make or present to an officer a statement or document which is false in any particular.
>
> Penalty: Fifty pounds or imprisonment for six months.

6.57 The Act came into operation on 1 July 1947. The purpose of the Act was to amend and consolidate the law relating to the payment of various pensions, allowances, endowments and benefits by the Commonwealth. In this matter, the offender was receiving unemployment benefits under the Act.

6.58 By way of contrast, section 29C was later introduced into the *Crimes Act 1914 (Cth)* on 13 December 1960. The relevant section provided as follows –

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[55] Ibid, at 325-326

> A person who, in or in connexion with or in support of, an application to the Commonwealth, to a Commonwealth officer or to a public authority under the Commonwealth for any grant, payment or allotment of money or allowance under a law of the Commonwealth makes, either orally or in writing, any untrue statement shall be guilty of an offence.
>
> Penalty: Imprisonment for two years.

6.59 It should be noted that section 29C of the *Crimes Act 1914* corresponds closely to both sections 138(1)(a)(i) and 138(1)(d) of the *Social Services Consolidation Act 1947*. Both provisions punish conduct relating to the making of false statements in connexion with an application for Commonwealth monies. However, section 29C is a "general" provision whereas section 138(1) is a "specific" provision.

6.60 Thus, section 138(1) dealing with a specific subject matter conflicts with section 29C that deals with the same subject matter along with other matters. The approach adopted by the courts to resolve such a conflict is found in the maxim *generalia specialibus non derogant*, namely a later general provision does not impliedly repeal a specific provision. In ***Goodwin v Phillips***,[56] O'Connor J expressed the operation of the maxim in the following manner –

> Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.[57]

6.61 The second decision is ***R v Young***;[58] here, the offender pleaded guilty to a charge of attempting to pervert the course of public justice by offering a witness a sum of money to alter his evidence at an upcoming trial of another person (who was facing trial for armed robbery). An appeal against conviction was dismissed; however, the Victorian Court of Criminal Appeal allowed an appeal against sentence. Starke J held (Crockett J agreeing)[59] –

> However, the learned Judge did not have before him what I regard as a most significant matter. I said earlier that this offence was charged at common law. The identical offence with which this applicant is charged is made an offence in the Federal field by s.43 of the Commonwealth Crimes Act and the maximum sentence therein imposed is two years. This section was not referred to the learned Judge but was referred to us. It sees to me on a general basis of parity that it is an appropriate matter for a judge to take into account. But even though in the Commonwealth field the same offence is limited to a penalty of two years, it may be in some circumstances that a judge will give a greater sentence if there are special circumstances surrounding the offence. But generally, I would think, in accordance with the sound principles of sentencing, he would not go beyond the maximum of a Federal Act which deals with the same crime.

6.62 Section 43 was limited to an attempt to pervert justice in relation to the judicial power of the Commonwealth; in short, the offence simply could not apply to the commission of an armed robbery in Victoria. Yet the Court held that it was relevant for a sentencing judge to take into account the lower maximum penalty prescribed for that offence on the basis of parity. The First Respondent submits that this decision is, with respect, wrongly decided.

6.63 The third decision is ***R v Whitnall***;[60] in this case, the offender and his company furnished false taxation returns for four consecutive financial years and a bank account in a false name

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[56] (1908) 7 CLR 1

[57] Ibid, at 14; see also *Maybury v Plowman* (1913) 16 CLR 468, at 473-474; *Lukey v Edmunds* (1916) 21 CLR 336; *Bank Officials' Association (SA Branch) v Savings Bank of South Australia* (1923) 32 CLR 276, at 282, 299; *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1, at 29; *Cobiac v Liddy* (1969) 119 CLR 257, at 268; *Lee Vanit v The Queen* (1997) 190 CLR 378, at 385

[58] Unreported, Vic CCA, 2/12/1982

[59] Ibid, at 10-11

[60] (1993) 120 ALR 449 ; (1993) 42 FCR 512; (1993) 68 A Crim R 119

had been set up to receive the undisclosed income. The accused and his company were charged with eight counts of defrauding the Commonwealth contrary to section 29D of the *Crimes Act 1914 (Cth).* The offender was sentenced to a wholly suspended sentence of imprisonment and community service work.

6.64 The Federal Court of Australia dismissed a Crown appeal against sentence. In doing so, each member of the Court noted that the offender could have been prosecuted under different provisions which carried a lesser maximum penalty. This observation moved Drummond J to state[61] –

> While it is solely for the prosecuting authority to select the provision under which it will launch a prosecution, the court is not bound to treat the prosecution decision as placing a fetter upon the court's sentencing discretion, in the sense of compelling the court to impose a heavier sentence than it would regard as appropriate, but for that one consideration: see *Scott v Cameron* (1980) 26 SASR 321 at 325.

6.65 However, upon a close analysis of the alternatives, each proves to be singularly inadequate to capture the totality of offending conduct which was described by the sentencing judge as "a calculated and systematic fraud".[62] For example, Higgins J opines that the offender's conduct was covered by section 29B (imposition by untrue representation) which carried a lower maximum penalty of 2 years imprisonment.[63] But, with respect, that offence is focused on the making of untrue representations in connexion with an imposition upon the Commonwealth; whereas section 29D is focused on frauds against the Commonwealth (which in this case also included the setting up of a bank account in a false name). Likewise, Davies J opines that such offences are ordinarily dealt with under various sections found in Part 3 of the *Taxation Administration Act 1953 (Cth)*;[64] but again, an examination of those sections reveal that the focus is on the making of false or misleading statements rather than fraud.

6.66 Each of the alternative options referred to in the judgments of the Court were in fact part of a complementary regime designed to protect Commonwealth revenue; unlike the situation in ***Scott v Cameron***, there was no provision in the *Taxation Administration Act 1953 (Cth)* which was either in direct or indirect conflict with section 29D of the *Crimes Act 1914.*

Analysis of subsequent decisions applying the R v Liang & Li principle in Victoria

6.67 In ***R v Vellinos***,[65] the offender pleaded guilty to an indictment alleging that he had defrauded the Commonwealth by the non-payment of excise duties in respect of the manufacture and distribution of tobacco contrary to section 29D of the *Crimes Act 1914 (Cth).* In dismissing an appeal against sentence, Winneke P stated[66] –

> The second specific error which the grounds attribute to his Honour was his failure to have proper regard, in mitigation of penalty, to the fact that it would have been more appropriate for prosecuting authorities to have proceeded against the appellant pursuant to the provisions of the Excise Act. In support of that proposition, counsel has called in aid a little-used, but none the less significant, sentencing principle of fairness, namely, that the prosecuting authority, whilst possessing an unchallengeable right to frame its presentment in whatever manner it thinks fit, cannot thereby preclude the sentencing tribunal from mitigating the penalty if it concludes that the charges alleged exposed the prisoner to a more punitive regime of sentencing than that to which he ought reasonably have been exposed by the preference of charges more appropriate to the crimes alleged. This was the

[61] (1993) 120 ALR 449, at 457
[62] (1993) 120 ALR 449, at 451
[63] (1993) 120 ALR 449, at 455
[64] (1993) 120 ALR 449, at 450
[65] [2001] VSCA 131
[66] Ibid, at [11]

principle applied in *Liang & Li*. It had been submitted to the sentencing judge that the principle was apt to be applied in the circumstances of this case. His Honour did not agree, and it is now said that his Honour failed to pay proper regard to that sentencing principle. In my view his Honour was quite correct to disregard the principle in the circumstances of this case. The gravamen of the appellant's conduct was his deliberate and sustained fraud upon the revenue, the type of fraud at which the offence created by s29D of the *Crimes Act* is traditionally and conventionally aimed. The summary provisions of s120 of the *Excise Act* would be singularly inapt to identify and punish the sustained and calculated fraud against the revenue perpetrated by this appellant's conduct.

6.68 Interestingly, a different result was reached by the Court of Appeal in ***DPP v Hussein***[67] involving similar offending. In dismissing a Crown appeal against sentence, Buchanan JA held that the ***R v Liang & Li*** principle did apply and that regard should be had to less punitive excise offences.[68]

6.69 In ***R v Walsh,***[69] the offender was sentenced on an indictment containing 1 count of conspiracy to defraud and 3 counts of perverting the course of public justice. In dismissing an appeal against sentence, the Court of Appeal held[70] –

> The latest ground to be added to the application, ground 6, complains of error in the sentencing judge's failing to have regard to the fact that there were "other and less punitive offences ... which not only could have been charged but were as appropriate or even more appropriate to the facts alleged". Counsel had in mind, it seems, conspiracy to obtain property by deception and the like: but, as we have said above, we are far from persuaded that these alternative charges would have exhausted the case being made by the Crown against the applicant. Be that as it may, it is surely in the discretion of the Crown what offence to charge, where more than one might properly be charged; and in this case there was no error, as we have said already, in the Crown's charging the applicant with conspiracy to defraud by dishonestly inducing the Trust to invest its moneys as advocated by the conspirators. That being so, we reject the argument that there was error in the judge's failing to have regard to the penalties that would have been appropriate had other charges, however like, been laid. The judge was bound to sentence for the offences of which the applicant was found guilty by the jury. Mr Croucher referred us to the decision of this Court in *R v Liang & Li*, but the considerations that weighed there are not found here. As Winneke P said the applicants in that case had been exposed by the prosecuting authority to a more punitive regime of sentencing than the one to which they should, in fairness, have been exposed because, at least in part, the charge that was laid under State law "did not ... appropriately fit the nature of the applicants' conduct", unlike the offence available under Commonwealth law. No comparable argument exists here. [emphasis added]

6.70 In ***R v El-Kotob & Hijazi,***[71] the offenders combined with others to obtain goods dishonestly by the use of credit cards. They were initially charged with a number of offences relating to the individual transactions. However, as part of a plea negotiation, each accused pleaded guilty to a presentment consisting of one count of conspiracy to cheat and defraud and other counts of obtaining property by deception and make false documents. In rejecting a ground of appeal raising a ***R v Liang & Li*** point, Vincent JA held[72] –

> This ground lacks any merit whatsoever in my opinion in a case in which the appellant identified the precise charge that he regarded as appropriate in the circumstances and offered to plead guilty to it. The situation was significantly different than that considered by the court in *R v Liang and Li* ...
> Setting to one side the issues considered earlier with respect to conviction, the laying of a charge of conspiracy to cheat and defraud would, in my view, have been entirely appropriate in the present matter, whether or not there had been negotiations of the kind that took place. Whilst, as counsel for the appellant pointed out, the maximum penalties which can be imposed upon conviction for conspiracy to cheat and defraud (15 years' imprisonment) and conspiracy to obtain property by

[67] (2003) 8 VR 92
[68] Ibid, at 99 [26]
[69] (2002) 131 A Crim R 299
[70] Ibid, at 337 [119]
[71] (2002) 4 VR 546
[72] Ibid, at 564-565 [61]

> deception (10 years' imprisonment) vary significantly, there is nothing in the material before the court which raises the suspicion that the judge may have imposed a lesser penalty had the conspiracy count been differently formulated. It should be remembered that the appellant's conduct would constitute a serious example of the latter form of criminal conspiracy. Further, and more importantly, a count so formulated would not have addressed appropriately the extent and character of the appellant's criminal conduct. He not only conspired to obtain property by deception but entered into an unlawful combination which involved the commission of a number of other offences with the objective of cheating and defrauding others upon whom the loss might fall in consequence. [emphasis added]

6.71 In ***R v McEachran***,[73] the offender pleaded guilty to a charge of kidnapping contrary to common law (in addition to other offences). The common law offence carried a maximum penalty of 25 years imprisonment. Upon appeal against sentence, it was contended, inter alia, that the sentencing judge erred in failing to have regard to a lesser offence of child stealing contrary to section 63 of the *Crimes Act 1958 (Vic)*. The statutory offence carried a maximum penalty of 5 years imprisonment.

6.72 Redlich JA (Smith AJA agreeing) upheld this ground.[74] After examination of the various authorities, his Honour held[75] –

> In my view it could not be said that to have charged the appellant with the less punitive offence would have been inappropriate. The fact that a charge was available which dealt more specifically with the accused's offending conduct was what led White J in *Scott v Cameron* and Winneke P in *R v Liang and Li* to conclude that such a charge was appropriate. The learned sentencing judge was, as a matter of fairness, obliged to take into account the less punitive regime as a mitigating factor in fixing the sentence on the common law count of kidnapping. [emphasis added]

6.73 Again, the First Respondent submits that this decision is best understood by reference to statutory construction rather than a special principle of sentencing. As the Court observed, it was common ground that the statutory offence of child stealing included all of the elements of the common law offence of kidnapping and that the statutory provision was directed to the kidnapping of a particular class of person.[76] Where a specific provision is passed after the enactment of a general provision, the question of implied repeal is raised.

6.74 The principle in question is conveniently stated by Griffith CJ in ***Goodwin v Phillips***[77] –

> Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

6.75 Thus, it is clear that the legislature intended that the common law offence of kidnapping give way to the statutory offence of child stealing, particularly in light of the striking coincidence of the language adopting in defining the latter offence of child stealing.

6.76 The principle in ***R v Liang & Li*** is also briefly mentioned with apparent approval by the Victorian Court of Appeal in ***R v AB (No.2)***,[78] ***DPP v CPD***[79] and ***Stalio v R***.[80]

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[73] (2006) 15 VR 615

[74] Ibid, at 632-640 [35]-[58]; Callaway JA dissented on this point at 618-619 [11]-[15]

[75] Ibid, at 638 [58]

[76] Ibid, at 633 [38], [39]

[77] (1908) 7 CLR 1, at 7; see also *Saraswati v The Queen* (1991) 172 CLR 1, at 17 where a modern statement of the rule of construction can be found in the judgment of Gaudron J – "It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other."

Analysis of subsequent decisions applying the R v Liang & Li principle in Australia

6.77 In ***Asfoor v R***,[81] the offender was convicted of twelve "people smuggling" offences and one offence of presenting a false passport. Upon appeal, the Western Australian Court of Criminal Appeal allowed an appeal against conviction in respect of the "people smuggling" offences. As to the appeal against sentence in respect of the remaining false passport offence, Templeman J (other members of the Court agreeing) referred to the ***R v Liang & Li*** principle with approval[82] –

> Furthermore, the appellant was then charged with the offence under the *Migration Act* which carries a penalty of 10 years' imprisonment. It would have been open to the authorities to charge the appellant with similar offences under ss 9A or 10 of the *Passports Act* 1938 (Cth) which attracted a maximum penalty of only 2 years' imprisonment.
>
> ...
>
> In the present case, the sentencing Judge made no reference to the circumstances in which the passport offence was committed, nor to the principle summarised in *Liang's* case (supra). In these circumstances, I consider that the sentencing discretion miscarried.

6.78 Section 238(1)(a) of the *Migration Act 1958 (Cth)* dealt with an offence of production a false document (passport) in connexion with the entry of a non-citizen into Australia. On the other hand, section 9A of the *Passports Act 1938 (Cth)* dealt with offences relating to the improper use or possession of Australian passports which did not apply to the offender as he was charged with using a false Turkish passport; likewise, section 10 dealt with making false statements in connexion with an Australian passport. In short, the First Respondent submits that the principle identified in ***R v Liang & Li*** had no application.

6.79 In ***R v Gordon; ex parte DPP (Cth)***,[83] the Queensland Court of Appeal refused an application by the Crown for an extension of time to file a notice of appeal. In determining the application, the Court appeared to accept the correctness of the ***R v Liang & Li*** principle; however, in the judgment of Keane JA (as his Honour then was), the circumstances of the relevant offending in question could not be adequately captured in the postulated alternative offence.

Rejection of the R v Liang & Li principle in New South Wales

6.80 In ***R v El Helou***,[84] the New South Wales Court of Criminal Appeal rejected the sentencing principle without reference to any line of authority[85] –

> The laws of New South Wales should be applied for New South Wales offences. It would be inappropriate for a lesser sentence than that warranted under New South Wales law to be imposed on Mr El Helou by reference to a possible charge under a Commonwealth law carrying a lower penalty, with which offence he was not charged.

6.81 The decision in ***R v El Helou*** was referred to with approval in ***Standen v DPP (Cth)***.[86] In that case, the New South Wales Court of Criminal Appeal stated that in the absence of direct

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[78] (2008) 18 VR 391, at 405 [46]
[79] (2009) 22 VR 533, at 552 [76]
[80] [2012] VSCA 160, at [35]
[81] [2005] WASCA 126; see also *Van Tongeren v State of Western Australia* [2005] WASC 10, at [71]-[74] where Templeton J refered with approval to the *R v Liang & Li* principle in the determination of an application for bail
[82] [2005] WASCA 126, at [144]-[146]
[83] [2011] 1 Qd 429
[84] (2010) 267 ALR 734; [2010] NSW CCA 111
[85] Ibid, at [90]
[86] [2011] NSW CCA 187, at [29]; (2011) 254 FLR 467

inconsistency with Commonwealth legislation, the courts are required to give full effect to State legislation.

General criticisms of the R v Liang & Li principle as a principle of sentencing

6.82 An act or omission which occurs in Victoria can be punished as a criminal offence against State law, Commonwealth law or at common law. Thus, there is no single criminal code for Victoria, but rather a large number of offences which do not cohere neatly into a jigsaw. And, unfortunately, the boundaries of many offences overlap with others (for example, culpable driving and dangerous driving causing death).

6.83 Where the boundaries of different criminal offences simply overlap (that is to say statutory inconsistency cannot be demonstrated), the First Respondent submits that the ***R v Liang & Li*** principle should have no application in the sentencing process. In such circumstances, it is not open for a judge to sentence on the basis that a lesser alternative offence should have been preferred by the prosecuting authority. This is so for a number of reasons.

6.84 First, Victorian sentencing law requires that "a court must have regard to the maximum penalty prescribed for the offence";[87] but if the Appellants' argument is correct, a sentencing judge must also have regard to a lower maximum penalty prescribed for an alternative offence. With respect, any resort by a sentencing judge to a maximum penalty prescribed for an alternative offence requires disobedience to a fundamental statutory mandate in the sentencing process.

6.85 Secondly, how does a judge apply the principle when unfairness is demonstrated – is it some "general" discount to be applied to the sentence to be imposed, or is a judge required to fix a sentence no greater than the maximum penalty prescribed for the alternative sentence? And, if the alternative offence is a Commonwealth offence, is a judge obliged to take into account sentencing requirements set down in Part 1B of the *Crimes Act 1914 (Cth)*? Such questions demonstrate the "excessive subtlety" which would now be required in sentencing.[88]

6.86 Thirdly, and fundamentally, the sentencing principle subverts the independence of the prosecutorial discretion recently reaffirmed by this Court in ***Likiardopolous v The Queen***.[89] In that decision, the plurality observed[90] –

> As Gaudron and Gummow JJ explained in *Maxwell v R*, the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what. For this reason, their Honours considered that certain decisions involved in the prosecution process are insusceptible of judicial review.

In order to apply the principle articulated in ***R v Liang & Li***, a court is required to engage in the very process cautioned against by this Court.[91]

6.87 Fourthly, and as a corollary to the above proposition, application of the principle in ***R v Liang & Li*** appears to traverse the doctrine of the separation of powers. It is for the parliament to define criminal offences and penalties, but as the decision in ***R v Young***[92]

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[87] See section 5(2)(a), *Sentencing Act 1991*
[88] See *Pearce v The Queen* (1998) 194 CLR 610, at 622-3 [39]
[89] (2012) 291 ALR 1; [2012] HCA 37
[90] Ibid, at 11 [37]
[91] See also *Barton v The Queen* (1980) 147 CLR 75; *Maxwell v R* (1996) 184 CLR 501; *Cheung v R* (2001) 209 CLR 1; *GAS v The Queen; SJK v The Queen* (2004) 217 CLR 198
[92] Unreported, Vic CCA, 2/12/1982

suggests, it is open for a sentencing judge to take into account what another parliament defines as a maximum penalty for a like offence. It is responsibility of the executive to prosecute offences, but as decisions such as ***Scott v Cameron***[93] and ***R v McEachran***[94] suggest, it is open for a sentencing judge to sentence an offender for an alternative offence preferred by the judge. Finally, the invocation of the ***R v Liang & Li*** principle (selection of and sentencing for a different charge) by a judge appears to involve the exercise of a non-judicial function which is incompatible with the integrity of the court and its processes.[95]

6.88 Fifthly, the converse of the principle does not hold true. Occasions may arise where a sentencing judge considers that the prosecution should properly have charged an offender with more serious offences than those before the court; however, for a judge to give effect to such an opinion is to intrude impermissibly into the prosecutorial discretion and is forbidden. In ***Weininger v The Queen***,[96] this Court observed[97] –

> A judge will rarely have available all of the considerations that lead a prosecutor to a conclusion concerning the number and severity of the offences that will be charged. Where the offender pleads guilty to a particular offence, although some other more serious offence might seem applicable, the judge will usually be unaware of the considerations behind such an outcome....
>
> When, in the face of such prosecutorial prerogatives, judges effectively shift the focus of their attention in sentencing, from the 'instant offences', which are the subject of the charges placed before them, and import into their sentencing considerations relevant to other and different offences, not charged, they effectively substitute their views of the relevant offences for those of the prosecution. This is undesirable in principle. Still more, in this country it is legally impermissible. [emphasis added]

6.89 Sixthly, the principle identified in ***R v Liang & Li*** is capable of a very wide application in criminal prosecutions. And is it restricted to guilty pleas? For example, in a trial indictment charging an offence which has a statutory alternative (carrying a lesser maximum penalty), is a judge permitted to apply the principle when a jury returns a verdict of guilty to the more serious charge in circumstances where the judge views the statutory alternative as the more appropriate charge?

6.90 And finally, the ***R v Liang & Li*** principle is not justifiable on the basis that it promotes consistency in sentencing, particularly in relation to sentencing in respect of Commonwealth interests; for as this Court in *Leeth v Commonwealth of Australia*[98] recognised, federal offenders may not receive uniform treatment in sentencing throughout Australia (by virtue of the operation of section 68 of the *Judiciary Act 1903 (Cth)* in picking up state laws).

The principle identified in R v Liang & Li is simply a question of statutory construction

6.91 Importantly, there are occasions where there appears to be inconsistency (and not simply overlay) between different criminal provisions in Victoria. In such cases, resolution is (and should be) by way of statutory construction including the application of common law presumptions / maxims and section 109 of the Commonwealth *Constitution* (in respect of an inconsistency between state and commonwealth law);[99] at the heart of the process is the proper construction of the statutory provision.

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[93] (1980) 26 SASR 321
[94] (2006) 15 VR 615
[95] See *Kable v New South Wales* (1996) 189 CLR 51
[96] (2003) 212 CLR 629
[97] Ibid, at 654-655
[98] (1992) 174 CLR 455; see also *Putland v The Queen* (2004) 208 CLR 174
[99] In light of the recent decision of this Court in *Dickson v The Queen* (2010) 241 CLR 491, there is some doubt as to the correctness of the approach adopted by the Victorian Court of Appeal in *R v Liang & Li* (1995) 82 A Crim R 39 given that the subject matter of the fraud was directed at a Commonwealth instrumentality

6.92 The First Respondent submits that it is in this respect that the principle identified in ***R v Liang & Li*** principle can be best understood. This approach was endorsed by the United States Supreme Court in the decision of ***United States v Batchelder***.[100] In that case, the Court held that a defendant was properly convicted of the offence of being a felon receiving a firearm that has travelled in interstate commerce notwithstanding that the act in question also contravened another offence in the same Act carrying a lesser maximum penalty. In construing the statute, the Court held that the two provisions with different penalties operated independently of each other; that there was no legal impediment to a prosecution of the offence carrying the higher maximum penalty; and that upon conviction for that offence, it was not open to a court to sentence on the basis of the maximum penalty prescribed for the lesser offence.

6.93 As to section 325 of the *Crimes Act 1958 (Vic)*, a proper construction of that provision reveals no inconsistency between the offence of accessory and the common law offence of attempting to pervert the course of justice. Importantly, the two offences are not coterminous. As noted by this Court, there is a strong presumption that the legislature does not intend to constrict itself but in fact intends both provisions to operate within their respective sphere;[101] an implied repeal is considered to be "a comparatively rare phenomenon".[102] In short, there is no implied repeal.

6.94 As to section 43 of the *Crimes Act 1914 (Cth)*, the provision did not reach out to abrogate the common law offence of attempting to pervert the course of public justice in its application to the State of Victoria. Nor did the section in its terms seek to oust the operation of the offence in relation to the Commonwealth sphere.[103] And, finally, there is no section 109 inconsistency between section 43 and the common law offence of attempting to pervert the course of public justice because section 109 requires a conflict between a Commonwealth law and a State law.[104]

No miscarriage of justice - sentence imposed within permissible range

6.95 The Appellants were each sentenced to 8 years imprisonment on the common count of attempting to pervert the course of public justice and complaint is made that a sentence of that magnitude was both "surprising" and excessive. But it must be said that the offending in question was a very bad example of the crime (sustained and sophisticated in nature) and that the Court of Appeal was correct to reject a claim that the sentence was manifestly excessive in all the circumstances.[105]

Dated: this 9th day of May 2013.

Gavin J.C. Silbert S.C.	**Brett L. Sonnet**
Chief Crown Prosecutor, State of Victoria	Crown Prosecutor, State of Victoria
Senior Counsel for the First Respondent	Junior Counsel for the First Respondent

[100] See, for example, *United States v Batchelder* (1979) 442 US 114
[101] See, for example, *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, at 276
[102] See *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, at 14
[103] See *Pantazis & Ors v R* [2012] VSCA 160, at [13]-[19]
[104] As this Court explained in *Lipohar v The Queen* (1999) 200 CLR 485, at 500, 505-510, it is wrong to speak of a common law principle as a law of a particular State
[105] See *Pantazis & Ors v R* [2012] VSCA 160, at [97]-[110]