IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M3 of 2013

BETWEEN:

PASQUALE BARBARO

Applicant

10 **- and -**

THE QUEEN

Respondent

INTERVENER'S AMENDED SUBMISSIONS

Part I: Suitability for publication on internet

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1.1 The Intervener certifies that this submission is in a form suitable for publication on the internet.

Part II: Basis of intervention

2.1 The Intervener seeks leave to intervene or appear as amicus curiae in this application.

2.2 Intervention is not sought to be made in support of either party in this application.

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Part III: Why leave should be granted

3.1 At the heart of this application is the breadth of the role of a prosecutor in assisting a judge in the discharge of the sentencing function. In Victoria, at least since the handing down of the decision of the Court of Appeal in ***R v MacNeil-Brown***,[1] the practice is that a prosecutor is under a duty to provide a "sentencing range" (that is the nomination of *actual figures* as to the outer limits of the sentencing discretion) if requested by a judge, or, in order to avoid a real risk of the judge falling into appealable error.

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3.2 As the Applicant submits at para [6.4] of the Amended Submissions, the issue raised in this application is "whether a prosecutor *may* make the submission" as to sentencing range; and further at para [6.18], a real question may arise as to the "propriety and, perhaps even the utility, of submissions as to range".

3.3 Further, at para [27] of the Respondent's Submissions, the Respondent states that it "would prefer it if the provision of a range on judicial request was not mandatory, but rather was permitted if requested or otherwise considered appropriate…".

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[1] (2008) 20 VR 677

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3.4 It is respectfully submitted that leave should be granted to the Intervener to advance submissions before the Court on the issues identified above by the Applicant and Respondent.[2] At para [6.20] of the Amended Submissions, the Applicant submits that the decision in ***R v MacNeil-Brown*** represents the current state of law in Victoria; however, the duty to so assist can only derive from the common law (there being no statutory mandate), and thus a question arises as to the propriety of the practice in all Australian jurisdictions.

3.5 As identified in the joint judgment of Maxwell P, Redlich and Vincent JJA, the Intervener disputes that the scope of the duty imposed upon the Crown extends to the provision of actual figures when making submissions as to range "unless specifically asked, and then only in an *exceptional* case."[3] That position was maintained by the Intervener in its support of the applicant on the application for special leave in ***MacNeil-Brown v The Queen.***[4]

3.6 In short, the Intervener supports the separate judgments of Buchanan JA and Kellam JA in ***R v MacNeil-Brown*** in which their Honours disagree (with the joint judgment) as to the propriety and utility of counsel nominating a sentencing range.[5]

3.7 The principles relating to non-party intervention were recently restated by this Court in ***Roadshow Films Pty Ltd v iiNet Ltd*** as follows:[6]

> In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria*, are relevant. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected.... Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.
>
> Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.
>
> The grant of leave for a person to be heard as an amicus curiae is not dependent upon the same conditions in relation to legal interest as the grant of leave to intervene. The Court will need to be satisfied, however, that it will be significantly assisted by the submissions of the amicus and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance.
> ...
> In considering whether any applicant should have leave to intervene in order to make submissions or to make submissions as amicus curiae, it is necessary to consider not only whether some legal interests of the applicant may be indirectly affected but also, and in this case critically, whether the applicant will make submissions which the Court should have to assist it to reach a correct determination....

3.8 The Victorian Director of Public Prosecutions is responsible for the prosecution on behalf of the Crown of all state indictable offences (including appeals) in both the County Court and Supreme Court in Victoria[7] and prosecutors are now routinely called on by judges of the County Court and the Supreme Court (Court of Appeal) [but not the Supreme Court sitting in its trial division[8]] to provide submissions on sentencing range.

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[2] The Respondent has indicated it does not intend to file any notice of contention in this application
[3] Ibid, at 690 [39]
[4] [2008] HCATrans 411
[5] (2008) 20 VR 677, at 709 [122]; 712-713 [139]
[6] (2011) 86 ALJR 205, at 206 [2]-[4], [6]; see also *Levy v Victoria* (1997) 189 CLR 579, at 602-605
[7] See section 22(1)(a), *Public Prosecutions Act 1994 (Vic)*
[8] See *Barbaro & Zirilli v The Queen* [2012] VSCA 28, at [13]

3.9 According to the latest *Annual Report* published for 2012/2013, the Victorian Office of Public Prosecutions prepared 36,005 briefs for criminal prosecution and attended 34,233 hearings in Melbourne and regional courts in the financial year.

3.10 The affirmation of a duty reposed in a prosecutor to provide a sentencing range in a plea hearing "directly" affects the Director in the discharge of his statutory functions. In the alternative, leave should be granted to appear as an *amicus* as the interests of the Director are plainly "indirectly" affected; and importantly, the submission to be made on the correctness or otherwise of the reasons of the joint judgment in ***R v MacNeil-Brown*** (on the topic of duty to assist) is (1) important to the administration of criminal justice and, (2) not sufficiently addressed by the submissions of either party in this application.[9]

Part IV: Applicable constitutional provisions, statutes and regulations

4.1 Not applicable.

Part V: Statement of issues sought to be raised by intervener

Grounds of appeal

5.1 On 16 August 2013 Justices Bell and Gageler referred the following amended grounds into an enlarged Full Court for consideration:[10]

A. The Court of Appeal erred in holding that the appellant was not deprived of procedural fairness when the sentencing judge refused to permit [the prosecutor's] submissions as to sentencing range.
B. The Court of Appeal erred in holding that a [prosecution] submission as to sentencing range is not a 'relevant' or 'legitimate consideration' in the public law sense, which the judge is bound to hear and consider.

The plea hearing

5.2 The Applicant had earlier pleaded guilty to the following commonwealth offences:[11]

- charge 1 – conspiracy to traffick in a commercial quantity of a controlled drug
- charge 2 – trafficking in a commercial quantity of a controlled drug
- charge 3 – attempting to possess a commercial quantity of a border controlled drug.

The maximum penalty for each offence is life imprisonment.

5.3 The plea hearing was conducted in the Supreme Court of Victoria before Justice King; the Respondent was represented by Mr B Young and the Applicant was represented by Mr P Dunn QC (with Mr S Stanton and Mr M McGrath).

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[9] See *Wurridjal v Commonwealth* (2009) 237 CLR 309, at 313-313

[10] See *Barbaro v The Queen* [2013] HCATrans 184

[11] In addition, the Applicant had the following offences taken into account pursuant to section 16BA of the Act:

- item 1 – conspiracy to import a border controlled precursor in a commercial quantity
- item 2 – dealing with the proceeds of crime
- item 3 – receive, possess and dispose of money reasonably suspected to be proceeds of crime

The maximum penalty for items 1 and 2 is 25 years imprisonment and the maximum penalty for item 3 is 2 years imprisonment.

5.4 The prosecutor tendered a document entitled "Prosecution Plea Summary" (marked as Exhibit 1) which set out in the detail the circumstances of the relevant offending.

5.5 At the commencement of the hearing, the sentencing judge indicated that she had received material from defence counsel which included a "chronology of plea discussions". The following exchange then occurred with the prosecutor:[12]

> HER HONOUR: And it seems to contain within it some sort of discussion about sentencing and years mentioned, can I make it clear that I do not seek and will not seek any indication of sentencing range from anyone.
> MR YOUNG: Yes.
> ...
> HER HONOUR: Right, and I want everyone to understand I will not in any way be looking at the *MacNeil-Brown* figures that have been put forward.
> MR YOUNG: Well they don't form part of any document that we've provided to the court ...
> ...
> HER HONOUR: Generally as a court, we have a policy that we tend not to ask for any sentencing indications or ranges. It's not – I'm unaware of any judge of this court who requests it.

5.6 In opening the plea in mitigation, defence counsel tendered a bundle of documents which included correspondence from the Commonwealth DPP (Melbourne Office) dated 10 October 2011 setting out the history of plea discussions between the parties (marked as Exhibit 5); that correspondence also detailed the Crown's indicative position on the sentencing range (a head sentence of 32-37 years imprisonment with a non-parole period of 24-28 years imprisonment was indicated). Counsel returned to this correspondence towards the close of his submissions but the sentencing judge reminded counsel as to her earlier injunction (in relation to submitting a sentencing range).[13]

5.7 Defence counsel ultimately submitted that the Applicant should receive a definite head sentence with a non-parole period fixed – and summarised eight reasons why this submission should be accepted by the sentencing judge.[14]

5.8 In reply, the prosecutor tendered a sentencing summary of like sentencing decisions (marked as Exhibit 9) at the request of the sentencing judge (in order to ascertain sentencing practices).[15]

5.9 The Intervener notes that both defence counsel and the prosecutor adhered to the judge's injunction and no submission was put as to the "appropriate" sentencing range.

The sentence

5.10 On 23 February 2012 the Applicant was sentenced to a total effective sentence of life imprisonment with a non-parole period of 30 years imprisonment fixed.[16]

5.11 In sentencing the Applicant, the judge stated that she had "examined the range of sentences that have been imposed in commonwealth and state cases involving offences of this type" but noted that it was "difficult to find a comparable series of offences".[17]

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[12] See *DPP (Cth) v Barbaro & Zirilli* (2012) VSC 47, at 6-7
[13] See *DPP (Cth) v Barbaro & Zirilli* (2012) VSC 47, at 115
[14] See *DPP (Cth) v Barbaro & Zirilli* (2012) VSC 47, at 119
[15] See *DPP (Cth) v Barbaro & Zirilli* (2012) VSC 47, at 161, 162
[16] See *DPP (Cth) v Barbaro & Zirilli* (2012) VSC 47 (Sentence), at 35 [106]
[17] See *DPP (Cth) v Barbaro & Zirilli* (2012) VSC 47 (Sentence), at 32 [101]

5.12 The Intervener notes that the sentence imposed by Justice King exceeded the proposed Crown range both as to the head sentence and the non-parole period.

The appeal

5.13 On 30 November 2012 the Victorian Court of Appeal dismissed an appeal against sentence filed by the Applicant.[18]

5.14 The primary complaint agitated in the appeal was the refusal by the sentencing judge to entertain a submission from the Crown on sentencing range.

5.15 The Court of Appeal dismissed a complaint that it was a breach of natural justice for the sentencing judge to refuse to hear a Crown submission on sentencing range.[19] In addition, the Court dismissed a complaint that the said refusal constituted a failure to take into account a relevant consideration.[20]

5.16 In short, the Court of Appeal found that the sentencing judge had committed "no error of law".[21]

5.17 As an aside, the Court of Appeal agreed with the sentencing judge's observation that a "plea agreement" (which in this case included the proposed Crown range on sentence) did not bind a court.[22] This conclusion was, of course, uncontroversial and consistent with this Court's decision in ***GAS v The Queen; SJK v The Queen***.[23]

5.18 Interestingly, the Court of Appeal observed that defence counsel was always at liberty to make a submission on sentencing range as the decision in ***R v MacNeil-Brown*** only related to the ability of a *prosecutor* to make such a submission; but in this particular case defence counsel had chosen not to do so.[24]

Intervener's complaint

5.19 The Intervener submits that whilst the Court of Appeal was correct in finding that the sentencing judge had not erred, the Court was incorrect in affirming the "duty [of a prosecutor] to assist" encompasses the provision of a sentencing range as set out in ***R v MacNeil-Brown.*** In short, the "duty to assist" the court in the sentencing exercise does not extend to a prosecutor informing the judge as to an appropriate sentencing range; but only embraces submissions on all relevant facts and considerations that may impact on the proper exercise of the sentencing discretion.

5.20 As the imposition of sentence is quintessentially a judicial function requiring the "instinctive synthesis" of all relevant considerations (a discretionary judgment), that task falls to the judge alone; and a judge is not assisted by a range that is proffered by a prosecutor without reference to all the considerations and weightings which underpin it.

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[18] See *Barbaro & Zirilli v The Queen* [2012] VSCA 288
[19] See *Barbaro & Zirilli v The Queen* [2012] VSCA 288, at [14], [15], [20], [21]
[20] See *Barbaro & Zirilli v The Queen* [2012] VSCA 288, at [14], [22]
[21] See *Barbaro & Zirilli v The Queen* [2012] VSCA 288, at [15]
[22] See *Barbaro & Zirilli v The Queen* [2012] VSCA 288, at [26]
[23] (2004) 217 CLR 198
[24] See *Barbaro & Zirilli v The Queen* [2012] VSCA 288, at [23]

The decision in MacNeil-Brown

5.21 In ***R v MacNeil-Brown***,[25] the offender pleaded guilty in the County Court of Victoria to a presentment preferring 5 counts of obtaining property by deception. That offence carried a maximum penalty of 10 years imprisonment. The offender had made, between January 2001 and July 2005, some 94 unauthorised cheque payments to accounts under her control. In all, she had obtained by deception a total of more than $920,000.

5.22 At the conclusion of the prosecutor's submissions in reply, the sentencing judge invited the prosecutor to "make submissions as to the appropriate range of sentence beyond which would constitute sentencing error".[26] After a luncheon adjournment, the prosecutor stated that his instructions were not to make submissions as to "an applicable range".[27] The sentencing judge then responded by stating he "would be assisted by the Crown complying with its duty, to make a submission as to a range of penalty".[28]

5.23 After the plea hearing was adjourned to the next day, the prosecutor stated that the Crown was "reluctant ... to offer figures" but eventually provided actual figures as to the head sentence and the non-parole period.[29] In response, defence counsel provided a range only as to the non-parole period which was lower than that proffered by the prosecutor.[30]

5.24 The sentencing judge imposed a total effective sentence of 6 years imprisonment with a non-parole of 4 years imprisonment. The sentence imposed fell within the figures provided by the prosecutor. The offender appealed against severity of sentence.

5.25 The appeal was dismissed by the Victorian Court of Appeal. In dismissing the appeal, Maxwell P, Redlich and Vincent JJA in a joint judgment observed:[31]

> These appeals raise an important point of principle concerning the discharge of the sentencing function. The issue for determination is whether, and if so in what circumstances, it is appropriate for the Crown prosecutor to make a submission to the sentencing judge about the sentencing "range" applicable to the case at hand.
>
> For reasons which follow, we consider that the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court....
>
> It is only reasonable, in our view, for the sentencing court to expect the prosecutor to make a submission on sentencing range if:
> (a) the court requests such assistance; or
> (b) even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a submission is made.
>
> The function of such submissions is to promote consistency of sentencing and to reduce the risk of appealable error.

5.26 In the joint judgment, their Honours noted that the appeal was confined to the question of the proper role of the prosecution in assisting the sentencing court; however, it was noted that defence counsel is under the same duty to assist the court as is any other counsel.[32]

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[25] (2008) 20 VR 677
[26] Ibid, at 699 [75]
[27] Ibid, at 699-700 [76]
[28] Ibid, at 700 [77]
[29] Ibid, at 700-701 [79], [80]
[30] Ibid, at 701 [80]
[31] Ibid, at 678-679 [1]-[4]
[32] Ibid, at 696 [62], [63]

5.27 Buchanan JA and Kellam JA in separate judgments also dismissed the appeal; however, their Honours both rejected the notion that the duty to assist extended to the provision of sentencing ranges by a prosecutor.[33]

Special leave to appeal refused

5.28 On 11 December 2008 Justices Hayne and Keifel refused an application for special leave by the offender (application supported by the Intervener). Importantly, their Honours concluded that the "Court of Appeal's reasons and orders in the present case necessarily focused upon the orders and reasons of the sentencing judge".[34]

Examination of earlier decisions on the duty to assist the court

5.29 As pointed out in ***R v MacNeil-Brown***, one of the duties of a Crown prosecutor is to "assist the court" in sentencing. The Intervener unequivocally accepts that proposition. However, the question remains – what is the breadth of the "assistance" required?

5.30 In the seminal decision (on this topic) in ***R v Tait & Bartley***,[35] the Full Court of the Federal Court (Brennan, Deane and Gallop JJ) emphasised that the Crown was under a duty to assist the sentencing court to avoid "appealable error". The relevant duty was expressed in the following terms:[36]

> [T]he Crown has a duty to the court to assist it in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it. If the proposition that the Crown is not concerned with sentence was ever construed as absolving the Crown from this duty, it cannot be so construed when a Crown right of appeal against sentence is conferred.

5.31 Importantly, the duty as expressed does not extend to the provision of sentencing ranges. The decision has been routinely cited with approval in all Australian jurisdictions.

5.32 However, in ***R v Casey & Wells***,[37] the Full Court of the Supreme Court of Victoria (Crockett, McGarvie and Southwell JJ) appeared to extend the duty (for the first time) to include the nomination of a sentencing range if requested. Their Honours observed:[38]

> [W]e do not think it appropriate for counsel — either for the prisoner or for the prosecution — to suggest a precise period of imprisonment as being a proper penalty. Nor would the prosecutor's duty extend "to assisting the court to avoid appealable error if that means to urge the court not to impose a sentence less than a specified sentence" .... But it is altogether another thing to assist the court by submission as to the range of sentences that could be said to be appropriately open, which is all that the judge asked for in the present case. After all, just such a submission is made almost daily in this Court ... If it is acceptable, and indeed helpful, to assist this Court with such submissions there can be no objection to counsel, on both sides, adopting a similar course during the hearing of a plea ...

5.33 The decision in ***R v Casey & Wells*** was cited in the joint judgment of Maxwell P, Redlich and Vincent JJA in ***R v MacNeil-Brown*** as representing the law in Victoria.[39] But three things must be said about that decision:

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[33] Ibid, at [122]-[130] per Buchanan JA and [138]-[148] per Kellam JA

[34] See *MacNeil-Brown v The Queen* [2008] HCATrans 411 – the Intervener herein again adopts the contentions (on the topic of duty of assistance) advanced by the Applicant in her filed Summary of Argument in the application for special leave

[35] (1979) 24 ALR 473

[36] Ibid, at 477

[37] (1986) 20 A Crim R 191

[38] Ibid, at 196

(1) the sentencing judge in *R v Casey & Wells* was dealing with the first prosecution involving the drug "ephedrine" and, as the Full Court commented, the judge was at "a considerable loss" as to what an appropriate sentence was in all the circumstances;
(2) there is a fundamental difference between a prosecutor's submission on appeal as to the "appropriateness" of a sentence already passed and a submission on a range during a plea hearing involving a sentence yet to be passed; and
(3) the decision handed down in 1986 did not lead to change in conventional practices that existed in the Victorian criminal courts (generally judges did not ask for, and counsel did not proffer, sentencing ranges).[40]

5.34 In a series of recent decisions, the Victorian Court of Appeal has again returned to the topic of the provision of sentencing ranges.

5.35 In ***Director of Public Prosecutions v Josefski***,[41] Maxwell P asked the appellant to provide a range during the hearing of a Crown appeal against sentence. The majority (Chernov and Callaway JJA) disapproved of the Crown being requested to define the limit of the applicable sentencing range.

5.36 In ***R v Bangard***,[42] the Court of Appeal had cause to comment on the utility of sentencing statistics in a sentence appeal. In allowing the appeal, Eames JA observed:[43]

> As Chernov JA also points out in *Josefski*, notwithstanding the admitted difficulty of ascertaining the limit of the range applicable in a given case the Court of Appeal ordinarily declines to invite or entertain submissions by counsel as to the range. However, in my view, whilst discouraging counsel from attempting to usurp the role of judges or from indulging in sentence bargaining, the appellate courts and sentencing judges should be alert not to also discourage counsel from proffering useful and relevant information which may remove some of the uncertainty in the search for the appropriate range in a given case.

5.37 However, in ***R v S***,[44] the Court of Appeal rejected a complaint that it was "wrong in principle" for a submission on sentencing range to be made on behalf of the Crown. Maxwell P, Neave JA and Bongiorno AJA, in a joint judgment, stated:[45]

> One of the functions and duties of a prosecutor is to assist the court to avoid error in the conduct of criminal proceedings, whether at trial or on sentencing. In a sentencing hearing a prosecutor should be ready to assist the court by drawing attention to any statutory maximum penalty applicable and to any particular sentencing options available or unavailable in the particular case. In addition, the prosecutor should be ready to make submissions about the sentencing range applicable to the offence(s) for which the person is to be sentenced.

5.38 And, finally, in ***R v Piggott***[46] (dealt with at the same time as the appeal in *R v MacNeil-Brown*), the Court of Appeal allowed the appeal against sentence in circumstances where the sentencing judge received a sentencing range from the Crown which nominated a specific sentence and not a range (a head sentence of 6 years imprisonment with a non-parole of 4 years imprisonment). In this case, the sentencing judge had imposed a sentence of 5 years 10 months imprisonment with a non-parole period of 3 years 9 months imprisonment. The Court held that "the imposition of a sentence closely

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[39] (2008) 20 VR 677, at 684 [21]
[40] See Respondent's Submissions, at paras [15], [17]
[41] (2005) 13 VR 85
[42] (2005) 13 VR 146
[43] Ibid, at 151 [23]
[44] [2006] VSCA 134
[45] Ibid, at [39]
[46] (2008) 20 VR 677

approximating the figure nominated by the Crown did – unavoidably – create the appearance that the judge might have been unduly influenced by the Crown".[47]

5.39 Thus, the decisions in ***R v Casey & Wells***, ***R v S*** and ***R v MacNeil-Brown*** all support an extension of the duty to encompass the provision of sentencing ranges. However, the Intervener notes that not one of these decisions appears to have been cited and followed (on this topic) in any other jurisdiction within Australia.

A different view as to the scope of the duty - R v Malvaso

5.40 In ***R v Malvaso***,[48] the Supreme Court of South Australia reached a different conclusion as to the provision of ranges by a prosecutor. In allowing a Crown appeal against sentence, King CJ (Cox and O'Loughlin JJ agreeing) summarised the position as follows:[49]

> The prosecution has a role in the sentencing process which consists of presenting the facts to the Court and of making any submissions which it thinks proper on the question of what sentence ought to be imposed. The decision as to what sentence is to be imposed is, however, entirely a matter for the Court which may, of course, be influenced by the arguments that are placed before it by the prosecution as well as by the defence, but must never be influenced by the attitudes or opinions as distinct from the arguments of either. In particular it must be stressed that the attitude of the prosecution towards a particular proposed course of action in relation to sentence is, as such, irrelevant; the view of the prosecution has no greater weight than the arguments advanced in support of that view. These propositions are elementary and fundamental propositions relating to the administration of criminal justice by independent courts …
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> It was put to us that the views, as distinct from the arguments advanced in support of those views, of the prosecution were proper to be taken into account in determining sentence in certain cases. I think that that is fundamentally wrong. It is true, of course, that the view of the prosecution as to certain relevant circumstances may be significant.... Other examples could be given but these are mere factors to be taken into account in assessing the appropriate punishment. It is quite another thing to suggest that the courts should be influenced by views as to the punishment of a particular offender entertained by those who are responsible for prosecutions.
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> When these principles are grasped, it will be seen that any deal entered into by investigating or prosecuting authorities with an offender can have only a limited impact upon the ultimate decision of the Court. It is the Court which must decide, in the end, having taken into account all relevant factors and arguments put to it, what mitigation of sentence is appropriate in recognition of the co-operation given to the authorities by the offender. The views of the prosecuting authorities cannot influence the Court....

5.41 On appeal to this Court, the decision was reversed.[50] However, Mason CJ, Brennan and Gaudron JJ in their joint judgment, referred to the observation of King CJ that "[t]he views of the prosecuting authorities cannot influence the court" without demur.[51]

Position in other Australian jurisdictions

5.42 In ***R v MacNeil-Brown***, Maxwell P, Redlich and Vincent JJA stated that the view expressed in their joint judgment was "consistent with the position adopted in most Australian States and Territories".[52]

5.43 Whether that conclusion expressed was correct or not, it is perhaps more instructive to ascertain what the position is today. In response to a request by the Victorian Director of

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[47] Ibid, at 707-708 [112]
[48] (1989) 50 SASR 503
[49] Ibid, at 509-510
[50] (1989) 168 CLR 227
[51] Ibid, at 232
[52] (2008) 20 VR 677, at 692-693 [50]-[53]

Prosecutions as to the practices in other Australian jurisdictions, the Intervener has now been advised:

- as to the position in the **Australian Capital Territory**, Mr Jon White (ACT DPP) advises that the decision of *R v MacNeil-Brown* is not followed and that a range of sentences (in actual figures) is not placed before the court by either the defence or the Crown (and would not be done even if a judge asked for such a submission) – and that the decision in *R v Tait & Bartley* remains the authoritative guide to prosecutors in discharging their duty of assistance to the court (however the duty may extend to a submission on the appropriateness of a particular sentencing order)
- as to the position in **South Australia**, Mr Adam Kimber SC (SA DPP) advises that the position is the same as that pertains in the Australian Capital Territory[53]
- as to the position in the **Northern Territory**, Mr Jack Karczewski QC (NT DPP) advises that the practice is not to advance a range cast in figures and that the decision in *R v MacNeil-Brown* is not followed – the duty to assist is still governed by the principles laid down in *R v Tait & Bartley*[54]
- as to the position in **Tasmania**, Mr Daryl Coates SC (Tas Assistant DPP) advises that prosecutors do not provide ranges nor are they requested to do so by sentencing judges[55]
- as to the position in **New South Wales**, Mr Lloyd Babb SC (NSW DPP) advises that the decision of *R v MacNeil-Brown* is not followed – rarely would a prosecutor indicate or be asked to indicate a range on sentence to the court and a prosecutor would usually decline to do so if asked
- as to the position in **Queensland**, Mr Tony Moynihan SC (Qld DPP) advises that the provision of sentencing ranges by a prosecutor to a sentencing judge is routinely done in plea hearings.[56]

5.44 Whilst no formal response was received in respect of the practice in Western Australia, the Intervener notes:

- as to the position in **Western Australia**, section 141 of the *Statement of Prosecution Policy and Guidelines 2005* (issued by the office of the Director of Public Prosecutions for Western Australia) states that "a prosecutor should not in any way fetter the discretion of the Director to appeal against the inadequacy of a sentence".

The decision of R v MacNeil-Brown in practical operation

5.45 Before turning to specific criticisms of the majority judgment in ***R v MacNeil-Brown***, it is important to note some of the practical difficulties already encountered by the Intervener in the discharge of the duty to provide sentencing ranges.

5.46 *First*, the decision not only requires the nomination of the outer limits of a head sentence and non-parole period, but a judge may request a prosecutor to provide the range in respect of each separate count on an indictment and orders for cumulation. For example,

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[53] See, for example, *R v Nemer* (2003) 87 SASR 168, at 173 [28]
[54] See, for example, *R v Anzac* (1987) 50 NTR 6; *R v Morton* (2001) 11 NTLR 97
[55] Section 80 of the *Sentencing Act 1997 (Tas)* governs what a party may address on as to sentence
[56] See, for example, *R v Potter; Ex parte A-G (Qld)* [2008] QCA 91; *R v Mara* (2009) 196 A Crim R 506

in ***DPP v CPD***,[57] the Court of Appeal requested that the Crown provide ranges for the individual sentences to be imposed on 6 counts of sexual offences against a child, the ranges for the various cumulation orders, and the ranges for the total effective sentence and non-parole period. Such detailed information is routinely requested from sentencing judges in the County Court.

5.47 *Secondly*, a prosecutor is often called on to provide a sentencing range in advance of hearing a plea in mitigation, or immediately at the conclusion of a plea where there is simply little time to digest all the relevant matters prayed in aid of an offender. Interestingly, the Court of Appeal in ***R v Humphries***[58] (Maxwell P, Redlich and Mandie JJA) sanctioned the provision of a sentencing range by a prosecutor which contained a caveat that it did not take into account all matters raised on the plea.

5.48 *Thirdly*, the provision of sentencing ranges in the County Court has often led to a request by a judge to review the proffered range on the basis of alleged inadequacy. For example, in ***Talbot & Dux v R***,[59] a prosecutor revised a range when the sentencing judge suggested that the range was "unduly low". On appeal, the Court of Appeal (Maxwell ACJ and Neave JA) stated that the prosecutor was entitled to submit a significantly higher range if on reflection the original submission was considered wrong. However, with respect, it is difficult to understand why a judge should make a request of a prosecutor to review a range if a submission has been determined to be erroneous – for the judge to reach such a conclusion, the judge has already engaged in the process of "instinctive synthesis" required.

5.49 *Fourthly*, the ability of the Crown to provide a sentencing range in certain circumstances has led to an extraordinary increase in "plea-bargaining" – that is, an offer is made by an offender to plead to certain charges on condition that the Crown agree that a particular sentencing range is appropriate. In times of inordinate delay in hearing criminal matters, complexities in running trials, the interests of victims and the public interest in securing convictions in respect of guilty offenders, the "conditional" offer of a plea places unnecessary stress on the prosecuting arm of government.

A closer analysis of the functions underpinning the provision of sentencing ranges

5.50 As stated in the joint judgment of Maxwell P, Redlich and Vincent JJA, the function of submissions on sentencing ranges is "to promote consistency of sentencing and to reduce the risk of appealable error".

5.51 The <u>first</u> function identified is the promotion of consistency in sentencing. However, the Intervener submits that the provision of sentencing ranges cannot be justified on such a basis. Consistency in sentencing, as explained by this Court in ***Hili v The Queen; Jones v The Queen***,[60] refers to consistency in the application of relevant legal principles rather than numerical equivalence. The duty to assist has, at least since the decision in ***R v Tait & Bartley***, always encompassed submissions on relevant sentencing considerations; the provision of actual figures can only go to the promotion of numerical consistency.

5.52 The <u>second</u> function identified is to reduce the risk of appealable error. However, the Intervener submits that the provision of ranges cannot assist in that task unless the range

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[57] (2009) 22 VR 533, at 547-548 [58]-[59]
[58] [2010] VSCA 161, at [31]
[59] [2012] VSCA 118, at [1]-[8]
[60] (2010) 242 CLR 520, at 535-536 [48], [49]

proffered by the prosecutor is "correct" in all the circumstances of the case; and the "correctness" of a submission is dependent on a number of incommensurable factors (see below). The corollary is, of course, that an "incorrect" range is productive of error.

5.53 Furthermore, the Crown may in an exceptional case successfully depart from a sentencing range proffered at a plea hearing on a Crown appeal against sentence – for as the Queensland Court of Appeal in ***R v Henderson; Ex parte A-G (Qld)***[61] recently observed, "the ultimate responsibility for the imposition of an appropriate sentence rests with the sentencing judge rather than the prosecutor".

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Specific criticisms of the extension of the duty to provide sentencing ranges

5.54 The Intervener submits there are several reasons why the common law should not sanction the provision of a sentencing range as an integral part of the duty to assist (addressed in more detail below):

(i) no statutory mandate to do so;

(ii) the provision of a range is quintessentially a judicial function;

(iii) the submission on a range is inimical to the process of "instinctive synthesis";

20 (iv) the provision of an informed range requires the fixing of many different variables;

(v) the provision of a range may lead to a "bidding" process;

(vi) the provision of a range may reduce community confidence in the sentencing process; and

(vii) the inherent risk of a judge sentencing within a proffered range in order to avoid a possible appeal against sentence.

5.55 *First*, any submission on a range is not a "relevant consideration" identified by any of the provisions of the *Sentencing Act 1991 (Vic)*; and, as correctly pointed out by the court below, is no more than a submission on a "legal conclusion".[62]

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5.56 Further, even where the Victorian legislature has now introduced a statutory regime of *sentence indication*, the provisions only permit a judge to give an indication as to whether the offending in question warrants a term of immediate imprisonment (a form of sentencing order) rather than any specific range likely to be imposed.[63]

5.57 *Secondly*, there is a fundamental difference between the function of a judge and the role of counsel in a sentencing hearing.

5.58 The punishment of an offender is quintessentially a judicial function. As recently
40 explained by the plurality in ***Magaming v The Queen***:[64]

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[61] [2013] QCA 63, at [51] - application for special leave to appeal refused by the High Court (see [2013] HCATrans 214); compare *DPP v Karazisis & Ors* (2010) 31 VR 634, at 660 [115]

[62] See *DPP (Cth) v Barbaro & Zirilli* (2012) VSC 47, at [22]; see also *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 163 CLR 24, at 39-40

[63] See sections 207-209, *Criminal Procedure Act 2009 (Vic)*

[64] [2013] HCA 40, at [47] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; see also *Waterside Workers Federation of Australia v JW Alexander* (1918) 25 CLR 434, at 444; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, at 175; *Fencott v Muller* (1983) 152 CLR 570, at 608; *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, at 27; *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, at 248; *Re Woolley* (2004) 225 CLR 1, at 23

> ... [A]djudging and punishing criminal guilt is an exclusively judicial function. In very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge-made principles. Sentencing an offender must always be undertaken according to law.

5.59 In ***Re Nolan; Ex parte Young***,[65] Gaudron J referred to the power to punish for criminal guilt in the following terms:[66]

> But, it is beyond dispute that the power to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct lies at the heart of exclusive judicial power.

5.60 The task of a judge in imposing sentence is a "lonely" one for as this Court remarked in ***GAS v The Queen; SJK v The Queen***:[67]

> [I]t is for the sentencing judge, alone, to decide the sentence to be imposed.

5.61 The imposition of a sentence involves the exercise of a "judicial" discretion (or discretionary judgment)[68]. The discretion is to be exercised in the public interest.[69] And, as this Court observed in ***Lowndes v The Queen***:[70]

> The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.

5.62 In short, as Eames JA points out in ***R v Bangard***,[71] a request by a judge for the provision of a sentencing range is an invitation to counsel "to usurp the role of judges".

5.63 On the other hand, the role of counsel in a plea hearing is different. A prosecutor provides an adequate presentation of the facts and sentencing principles which places a judge in a position to impose a sentence which is fair having regard to the interests of the accused and the community.[72] In short, the prosecutor is under a duty to assist the Court to avoid appealable error; such assistance should not extend to performance of an important function entrusted to the judiciary.

5.64 Furthermore, it is important to recognise that a prosecutor falls under the umbrella of the "executive" in terms of the *separation of powers* doctrine. Thus, as non-judicial functions cannot be conferred upon and exercised by judicial officers, the corollary is that the executive arm cannot exercise judicial functions.[73] In short, the provision by a prosecutor of the outer limits of the range of sentence that may be imposed on an offender is incompatible with the proper performance of the prosecutorial function, or alternatively is such as to erode public confidence in the integrity and independence of both the courts and the executive arm.[74]

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[65] (1991) 172 CLR 460
[66] Ibid, at 497; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, at 611 [76]
[67] (2004) 217 CLR 198, at 211 [30]
[68] See *House v The King* (1936) 55 CLR 499; *R v Young* [1990] VR 951; *Pearce v The Queen* (1998) 194 CLR 610, at 624 [46]; *Markarian v The Queen* (2005) 228 CLR 357, at 371 [27]; *Bugmy v The Queen* [2013] HCA 37, at [24]
[69] See *Malvaso v The Queen* (1989) 168 CLR 227, at 233
[70] (1999) 195 CLR 665, at 672 [15]
[71] (2005) 13 VR 146, at 151 [23], 152 [34]
[72] See *R v Lucas* [1973] VR 693; *R v Rumpf* [1988] VR 466
[73] See *Kable v New South Wales* (1996) 189 CLR 51
[74] See *Grollo v Palmer* (1995) 184 CLR 348

5.65 As pointed out by the plurality in ***Magaming v The Queen***, "it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences".[75] Any intrusion by the courts into this function is unlawful.[76] Likewise, any intrusion by the prosecution authorities into the exclusive functions of the courts should be prohibited.

5.66 The separation of powers between the three arms of government is an important "constitutional" imperative. As the plurality observed in ***Wilson v Minister for Aboriginal and Torres Strait Islander Affairs***:[77]

> The function of the federal judicial branch is the quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the federation. This is discharged by ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion. The result is promulgated in public and implemented by binding orders. The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government. [emphasis added]

5.67 As to the role of defence counsel, their objective in making a plea in mitigation is to submit that the least punitive sanction properly available to the offender ought be imposed by the court. A reply to a submission by a prosecutor as to the available range of sentences open to the court is quite inconsistent with that important role – any agreement as to the higher end of the range is a concession by defence counsel that a judge may impose a much higher sentence upon an offender than is being advocated.

5.68 *Thirdly*, a submission made by a prosecutor on the sentencing range is likely to impair or imperil the process of *instinctive synthesis* required to be undertaken by a judge.

5.69 As Chernov JA observed in the Victorian Court of Appeal decision in ***DPP v Josefski***:[78]

> ... I consider that, ordinarily, there is difficulty in the court relying on outer parameters of a notional sentence put forward by counsel in response to a request for such information by the bench for the purpose of determining whether a sentence is plainly wrong. An analysis that is based on such material may run counter to the principles underlying the instinctive synthesis approach adopted by this court.... Moreover, reliance by the court on such material may lead to the risk of sentencing appeals being unduly concerned with sentences that were imposed in other, allegedly similar, cases. Ordinarily, if counsel were asked to formulate, in arithmetical terms, what he or she considered to be the range of sentences that was properly available to the sentencing judge, or what was the upper or lower limit of such a range, the response would necessarily be based, either on counsel's subjective views — which would not assist the court — or on sentences imposed in other cases.

5.70 However, this view was rejected in the joint judgment of Maxwell P, Redlich and Vincent JJA in ***R v MacNeil-Brown***:[79]

> To suggest, as counsel for the appellants did in these appeals, that a submission on sentencing range is merely "an expression of opinion" is to mischaracterise counsel's function. A submission on sentencing range is a submission of law.

5.71 But, with respect, the vice remains whether the submission is characterised as one of law or not – the submission is circumscribed by a party's view of the case in light of previous

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[75] [2013] HCA 40, at [20]; see also *Pearce v The Queen* (1998) 194 CLR 610, at 624 [30]; *GAS v The Queen; SJK v The Queen* (2004) 217 CLR 198, at 210 [28]

[76] See *Maxwell v The Queen* (1996) 184 CLR 501; *Likiardopoulos v The Queen* (2012) 86 ALJR 1168; *Elias v The Queen; Issa v The Queen* (2013) 87 ALJR 895

[77] (1997) 189 CLR 1, at 11

[78] (2005) 13 VR 85, at 105-106 [83]; at 95 [48], per Callaway JA agreeing with the general observations

[79] (2008) 20 VR 677, at 691 [42]

(and comparable) sentencing decisions – and thus is particularly unhelpful in providing assistance to the judge in the exercise of the sentencing discretion.[80]

5.72 The inherent problems in the synthesis of a "sentencing range" (as part of exercising the sentencing discretion) were recently affirmed by the plurality in this Court's judgment in ***Munda v The Queen***:[81]

> First, the appellant's argument assumes that only "closely comparable" cases can provide a yardstick with which to judge the adequacy of a sentence.... But in *Hili* it was distinctly not said that a yardstick derived by reference to comparable cases was an essential precondition of a conclusion that a sentence was manifestly inadequate. It was acknowledged that such a disparity is one pointer towards inadequacy; but French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ expressly approved the statement of Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa* that previous sentences may be used to establish a range of sentences that have been imposed but not that the range is correct. In particular, the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence."

5.73 In a dissenting judgment, Bell J likewise makes the same important point:[82]

> Past sentencing decisions are sometimes described as evidencing "the range" of sentences for an offence. This is a misleading description because the pattern of sentences imposed in past cases does not define the limits of the sentencing discretion. To speak of the range of sentences for an offence is a shorthand way of acknowledging that there is no one correct sentence for an offence and an offender. [emphasis added]

5.74 Furthermore, it is difficult to make a submission on the appropriate sentencing range because the "outer limits" are not amenable to precise specification.[83] As Buchanan JA observed in the Victorian Court of Appeal decision in ***DPP v Ross***:[84]

> The "range" is a reference to the concept of a sentence falling within the limits of a proper exercise of the sentencing discretion. That is not to say, however, that the limits are capable of expression in precise numerical terms....
>
> Sentencing is not a mathematical process. To specify the point at which a range of acceptable sentences begins or ends lends a misleading air of scientific precision to an exercise that cannot be precise.... The relevant factors are to be instinctively synthesized. In reviewing the performance of that task, I do not think it is helpful that counsel for an offender or the Crown express his or her opinion as to the precise point at which a sentence becomes manifestly excessive or inadequate, or his or her perception of the figure that is most likely to achieve a forensic objective and which would probably be based upon sentences imposed on other cases, where the circumstances of the offence and the offender were different.

5.75 *Fourthly*, as the exercise of the sentencing discretion is complex, it is difficult for counsel to make any adequately informed submission on the appropriate range as the range will obviously depend upon findings made by the judge as to the circumstances of the offence and the personal circumstances of the offender. As the plurality observed in this Court's judgment in ***The Queen v Olbrich***:[85]

> [A] judge passing sentence on an offender must decide not only what type of penalty will be exacted but also how large that penalty should be. Those decisions will be very much affected by the factual basis from which the judge proceeds. In particular, the judge's conclusions about what the offender did and about the history and other personal circumstances of the offender will be very important.

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[80] See *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; see also *R v King* (1988) 48 SASR 555, at 557; *Police v Cadd* (1997) 69 SASR 150, at 165; *DPP v OJA* (2007) 172 A Crim R 181, at 195 [29]; *Schaper v Western Australia* (2010) 203 A Crim R 270, at 272 [8]

[81] [2013] HCA 38, at [39]

[82] Ibid, at [95]

[83] See *Wong v The Queen* (2001) 207 CLR 584, at 608 [66]; *Makarian v The Queen* (2005) 228 CLR 357, at 383-384 [65]; *DPP v Josefski* (2005) 13 VR 85, at 95 [48]

[84] (2006) 166 A Crim R 97, at 106-107 [39]-[40]

[85] (1999) 199 CLR 270, at 274 [1]

5.76 The range will also depend upon findings made by the judge regarding a number of other relevant statutory considerations,[86] such as the maximum penalty prescribed for the offence, the gravity of the offence, the culpability of the offender, the impact of the offence on any victim, the character of the offender and the presence of any aggravating or mitigating factors concerning the offender.[87]

5.77 The range will also depend upon the application of conflicting purposes of sentencing, such as deterrence, rehabilitation, denunciation and protection of the community.[88]

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5.78 Finally, the judge must weigh all the relevant factors and reach a conclusion that a particular sentence should be imposed.[89] The process undertaken by the judge is often referred to as the "*instinctive synthesis*" which was defined by McHugh J in ***Markarian v The Queen*** as follows:[90]

> [B]y instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

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5.79 In circumstances where many of the relevant factors will be contested on the plea hearing, it is simply too difficult for counsel to accurately predict both the findings that will be made by a judge and the relative weightings to be accorded thereto; thus, counsel is not sufficiently informed to make a well-founded submission as to the appropriate range on sentence. As Ashley JA opined in ***Bala v R***,[91] a submission by a prosecutor may be no more than a mere "quote".

5.80 The importance of taking into account only relevant considerations in fixing sentence was highlighted by the plurality in this Court's judgment in ***Markarian v The Queen***:[92]

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> The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.

5.81 But, in the case of a prosecutor providing a sentencing range, some (and perhaps many) considerations taken into account will be different to those taken into account by the judge; thus, taking into account a range proffered by a prosecutor in such circumstances

40 is likely to lead to error. As Eames JA observed in ***R v Bangard***:[93]

> The sentencing process, whether at first instance or on appeal, is not amenable to simple comparisons or mathematical precision: too many variables are involved as between cases and no two cases have the same factors or equally weighted factors of mitigation and aggravation.

5.82 And, even in circumstances where a range proffered by a prosecutor is not taken into account in any material manner but perhaps used only as a "guide" or "check", then

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[86] See *GAS v The Queen; SJK v The Queen* (2004) 217 CLR 198, at 211 [31]
[87] See the list of relevant considerations set out in section 5(2) of the *Sentencing Act 1991 (Vic)*
[88] See the list of sentencing guidelines set out in section 5(1) of the *Sentencing Act 1991 (Vic)*
[89] See *AB v The Queen* (1999) 198 CLR 111; *Wong v The Queen* (2001) 207 CLR 584; *Weininger v The Queen* (2003) 212 CLR 629; *Johnson v The Queen* (2004) 78 ALJR 616; *Markarian v The Queen* (2005) 228 CLR 357
[90] (2005) 228 CLR 357, at 378 [51]
[91] [2010] VSCA 78, at [19]
[92] (2005) 228 CLR 357, at 371 [27]
[93] (2005) 13 VR 146, at 150 [23]

the comparator is of little or no utility as different considerations and weightings have informed the provision of that range.

5.83 *Fifthly*, the provision of sentencing ranges by counsel may cause the sentencing hearing to be perceived by members of the community as a "bidding process" (or 'auction") in which the judge actively participates (particularly where there is a request from a judge to review a submitted range). As Winneke P commented in ***DPP v Bulfin***:[94]

> It would, in my view, be inappropriate for a prosecutor to turn the plea into something akin to a "bidding process" by putting specific gaol terms in response to submissions made on behalf of a convicted person.... It was clear from the prosecutor's submissions to the learned judge that, for that reason, he felt he could not descend into the "arena" of specific terms in response to what had been put on behalf of the respondent. As I have said, he was acting in a responsible manner in resisting the temptation to do so.

5.84 The same point was made perhaps more forcefully during argument on the hearing of an application for special leave in ***Gany v The Queen***.[95] In response to counsel's discussion of the Victorian Court of Appeal decision in *R v S* (see para 5.37 above) requiring the Crown to proffer a range on sentence, Hayne J responded in turn:

> This notion of the Crown proffering a range simply leads to auctions, and auctions on sentencing proceedings are not of assistance to anyone, but there we are.

5.85 *Sixthly*, the provision of a range has a tendency to impair community confidence in the criminal justice system.

5.86 For example, what happens when a sentencing judge imposes a sentence outside the range submitted by the Crown, and the Crown declines to institute an appeal against the inadequacy of sentence imposed – the community may perceive that the prosecutor's submission on range was wrong, or alternatively, that the Crown is prepared to sanction an inadequate sentence.

5.87 Taking a different example, what happens if both the prosecutor and defence counsel make identical submissions on range, and the sentencing judge then imposes a sentence which falls within that proffered range – the community may perceive that the parties and the judge have simply engaged in "plea bargaining".

5.88 Furthermore, the Victorian Court of Appeal has held that a judge need not explain any sentence imposed outside a proffered range[96] – however, if the submission is characterised as a "submission of law", then it is difficult to understand why a judge is at liberty to reject a range without the provision of any reasons.

5.89 On the issue of perceptions, the majority judgment in ***R v MacNeil-Brown*** rejected the identified risks holding:[97]

> Even if, contrary to our view, the making of submissions on sentencing range did carry with it any of the risks identified, those risks — which are, essentially, risks of perception rather than of substance — would be demonstrably outweighed by the manifest public benefit in promoting consistency of sentencing and minimising appealable error.

5.90 However, the integrity of the court is of central importance to the administration of justice. As the Full Court of the Supreme Court of Victoria observed in ***R v Marshall***:[98]

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[94] [1998] 4 VR 114, at 121
[95] [2006] HCATrans 629
[96] See *Bogdanovich v R* [2011] VSCA 388
[97] (2008) 20 VR 677, at 692 [49]

> The integrity of the court is of the greatest importance to public confidence in the administration of justice. In the end, the successful administration of justice depends to a considerable extent upon public confidence in it and it is thus vital that that confidence be maintained.

5.91 *Finally*, there is an inherent risk of a judge sentencing within a proffered sentencing range in order to avoid the possibility of an appeal against sentence. This view was rejected by the plurality in ***R v MacNeil-Brown***, noting that the Crown had eschewed such a submission on the hearing of the appeal.[99]

5.92 But as Weinberg JA and King AJA observed in the Court of Appeal decision in ***LJ v R***:[100]

> Of course, the sentencing judge was not bound by any range put forward by the Crown. However, it is at least unusual, in our experience, for a sentencing judge to impose a sentence greater than the figure at the top of the range provided by the Crown pursuant to a *MacNeil-Brown* request.

Conclusion – duty does not extend to provision of sentencing ranges

5.93 The law is settled as to the existence of the duty (imposed upon a prosecutor) to assist the court in sentencing an offender. The scope of the duty was explained in ***R v Tait & Bartley***. However, it has been recently amplified by the decision in ***R v MacNeil-Brown***.

5.94 The Intervener submits that this recent amplification has crossed an important constitutional boundary separating out the functions of the judiciary from that of the executive. Whilst the line may be difficult to state with precision, the duty of a prosecutor should stop at submissions which travel beyond arguments concerning relevant sentencing considerations (which impact upon the exercise of the sentencing discretion). Perhaps an example of a submission which lies near the dividing boundary is an argument addressing the type of sentencing order available – however, in all jurisdictions the common law principle of parsimony operates (independent of any like statutory provision[101]) to require a court to impose the least severe sentencing order required to meet the relevant purposes of sentencing.

5.95 In ***R v MacNeil-Brown***, Buchanan and Kellam JJA handed down separate judgments dismissing the appeal against sentence. However, their Honours departed from the joint judgment on the topic of the provision of sentencing ranges. The Intervener supports both judgments as correct expositions on the topic of the duty to assist.

5.96 Buchanan JA relevantly stated:[102]

> The task of a sentencing judge is complex. The discretion which he exercises is unlike other judicial discretions, due to the number of factors which inform the discretion, the relevant factors or their combination differing from one case to another and being, for the most part, incommensurable.
>
> The myriad facts identified, found and classified by the sentencing judge are to be intuitively synthesised, that is, considered, in the light of general sentencing considerations, for the purpose of assessing their contribution to the determination of an appropriate sentence. This synthesis is generally not to be done mechanically by arriving at a starting point and adding or subtracting a period of time attached to each relevant sentencing factor...

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[98] [1981] VR 725, at 734
[99] (2008) 20 VR 677, at 691 [43]
[100] [2011] VSCA 3, at [29]
[101] See section 5(4) of the *Sentencing Act 1991 (Vic)*
[102] (2008) 20 VR 677, at 709-711 [124], [126], [127], [128], [130]

The expression of counsel's opinion as to the outer limits of an acceptable range of sentences in my view is of no utility to a sentencing judge embarking on the complex exercise I have endeavoured to describe. Even if counsel specifies the facts which counsel has assumed and identifies all the mitigating and aggravating factors counsel has considered, it is not possible to explain the part played by those facts and factors in arriving at the figures advanced by counsel without resorting to the mathematical approach eschewed by the High Court. In this respect, the specification of the limits of a range is unlike a legal submission, which usually is capable of being broken down into its constituent elements.

A further consideration affecting the utility of a range specified by counsel derives from the role of counsel in our system of law. Subject to the qualification that the prosecutor is required to act fairly, counsel is expected to advance the case for the client, to marshal all the arguments in favour of a particular result, rather than evaluating a case in an entirely impartial manner. Counsels' function is to advance opposing points of view. Accordingly, it is to be expected that the range advanced by defence counsel will be lower than the range advanced by the prosecutor. To require counsel to nominate what counsel considers to be the limits of a range is to seek to enlist counsel as a surrogate judge. The opinions of counsel are simply irrelevant. As King CJ said in *R v Malvaso*, the court "must never be influenced by the attitudes or opinions as distinct from the arguments" of prosecution and defence.

In my opinion, counsel can best assist a sentencing judge, not by advancing what they consider to be sentences at the lower or upper limits of a sound sentencing discretion, but by making submissions as to the existence and nature of aggravating and mitigating circumstances and providing some guide to the manner in which other judges have approached like cases by supplying sentencing statistics and citing passages from decided cases which bear upon aspects of the instant case. The synthesis of the raw material is the task of the sentencing judge, not counsel.

5.97 Likewise, Kellam JA stated:[103]

There can be no argument, as the Director of Public Prosecutions conceded readily before us, other than that a prosecutor has a duty to assist the court. However, I do not consider that a sentencing judge is in any way assisted by having the prosecution suggest a range of sentences which it submits is applicable to the case under consideration. I do not agree that a sentencing judge should require counsel to "assist", nor that counsel should purport to assist by providing an estimate of the "sentencing range" available in the particular case.

It is the judge who exercises the sentencing discretion, and not counsel.... The ultimate sentence to be imposed involves the exercise of a judicial discretion, which is the result of an "intuitive synthesis" of all the relevant facts, circumstances and sentencing principles. The exercise of that discretion is the function of the judge and the judge alone. It is not the function of counsel. Neither counsel for the prosecution nor counsel for the defence will have examined all of the relevant factors with the same scrutiny and impartiality prior to the plea hearing. Nor should they be expected to do so, for it is not their function. It is difficult to see how counsel on either side by quoting a range of head sentences and a range of non-parole periods could provide a considered and impartial view which would be of any assistance at all to a judge whose duty it is to synthesise all of the relevant factors intuitively. The difficulty in sentencing is not the assessment of an appropriate range. It is the determination of the correct sentence in all the circumstances which creates difficulty for sentencing judges. A submission as to range should not be requested by a judge, nor should it be made by counsel, because, upon proper analysis, that submission is of no assistance to the judge in performing the task to be undertaken by him or her.

The lack of usefulness in having the prosecution make such a submission as to range is demonstrated by the nature of the task of sentencing which I have set out above. It is clear from a number of authorities that the exercise of the sentencing discretion involves value judgments with no opinion being uniquely right. Having undertaken the intuitive synthesis required, the sentencing judge forms an opinion as to the correct sentence to be imposed and sentences accordingly. As pointed out above, I consider it to be highly unlikely that the prosecutor will have, or indeed will be able, to accord the appropriate consideration to the sentencing process which is required of the judge. I agree with the submission of the director that the view of the individual prosecutor in such circumstances would be irrelevant, it being no more than an expression of the opinion of a prosecutor who has determined what submission should be made as to the range of sentences applicable in a particular case. I do not agree that such a submission is a submission of law. Indeed, if I am incorrect in that regard, and such a submission can be seen as a submission of law it would be incumbent upon the sentencing judge to give reasons why such a submission should be accepted

[103] (2008) 20 VR 677, at 712-716 [139], [140], [141], [142], [144], [145], [147]

or rejected. That is not a burden which should be imposed on sentencing judges who are engaged in a process of intuitive synthesis.

However, in addition to the fact that in my view such a submission is of no assistance to the sentencing judge, there are a number of other matters of serious concern which arise by reason of the suggestion that judges should be entitled to require the prosecutor to nominate a range of appropriate sentences. The first such concern is that, at the very least, such a requirement would have the perception of an unwarranted and improper intrusion upon the sentencing discretion. Indeed, the requirement that the prosecution state such a range would be a distraction from the central task of a sentencing judge. As a matter of principle, it would be wrong for such a distraction to intrude upon the sentencing task of the judge.

...

Furthermore, even if defence counsel is able to obtain instructions to respond to the submission of the prosecutor in a meaningful manner, it is likely that any such submission would be lower than the range of sentences proffered by the prosecution. I agree with the submission made by the director that such a circumstance may lead to a perception by the media, victims and the public that what is taking place is a bidding process akin to an auction.... Furthermore, in the event that both the prosecution and the defence make similar submissions as to the appropriate range the perception that there has been a "plea bargain" may well arise.

In addition, it is difficult to see how the submission of appropriate range of sentences by the prosecution will ensure consistency in sentencing and reduce the number of appeals. It would, of course, be an abdication of the responsibility of the sentencing judge for that judge to fix a sentence within the submitted range if the judge considered it inappropriate. Yet if the judge sentenced outside that range, it requires little prescience to see that that circumstance would likely become a ground of appeal. This demonstrates not only the lack of utility of the proposal, but also its deleterious character.

...

I return to the question of what assistance should be given to a sentencing judge.... Likewise, in my experience, in Victoria it has been the practice of the State Director of Public Prosecutions to provide detailed information relating to other sentences in cases of defalcation by a solicitor. My own experience is that the provision of such material is of considerable assistance in the formulation of the appropriate sentence by intuitive synthesis. It is that raw material which should be placed before the judge, not the opinion of a prosecutor as to where that raw material leads.

Part VI: Estimate of time for presentation of oral argument

6.1 The Intervener estimates oral argument not to exceed 1 hour.

Dated: 30 October 2013

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