IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M82 of 2015

BETWEEN:

THE QUEEN (Cth)

Appellant

and

VU LANG PHAM

Respondent

Appellant's reply

Part I – Certification

1. These submissions are suitable for publication on the Internet.

Part II

Prior intermediate appeal court decisions

2. To authorise the exclusion by intermediate appeal courts of the taking into account of sentencing outcomes previously reached in other jurisdictions, as happened in this case, would limit the achievement of the overall objective stated by this Court in ***Hili*** *& Jones v The Queen* [2010] HCA 45; (2010) 242 CLR 520 at 527 [18] and 535 [47] of reasonable consistency of sentencing outcomes for federal offenders nationwide, so that like cases are treated alike and the administration of criminal justice is systemically fair on a national basis. Contrary to the respondent's submissions at [24]-[26] and [46]-[47] (**RS [24]-[26], [46]-[47]**), this approach does not entail numerical equivalence or treating prior actual sentences as a precedent.

3. It is submitted that *Hili* at 538 [57], in the context of [18] and [47]-[56], extends both to the application of sentencing principles and to due consideration of the outcomes previously reached, and why. Intermediate appeal courts are required to consider prior appellate sentence outcomes placed before them as an important sentencing consistency yardstick and therefore a relevant and important consideration in deciding whether a sentence under appeal should be disturbed, as well as for the purposes of re-sentencing.

Commonwealth Director of Public Prosecutions
16th Floor
460 Lonsdale Street
MELBOURNE VIC 3000

Solicitor Code: 9570
DX: 446
Telephone: 9605 4333
Fax: 9670 4295
Ref: MC12100654J /Andrew Doyle

4. The subsequent decisions of this Court in ***Lacey v Attorney-General (Qld)*** [2011] HCA 10; (2011) 242 CLR 573 and ***Barbaro v The Queen*** [2014] HCA 2; (2014) 253 CLR 58 should not be taken to have confined the meaning of *Hili* as suggested by the respondent at RS [46]-[47].

5. In support of the argument that *Hili* should not be confined in the manner suggested by the respondent, it is submitted that:

   (a) the overall objective is *reasonable* consistency in federal offence sentencing sufficient to avoid the vice of going beyond the limits of variability of discretionary decision-making and crossing into the territory of systemic unfairness, being a form of injustice: *Hili* at [47], cf RS [2(b)];

   (b) the achievement of reasonable consistency is advanced by two distinct but related means, with the first and paramount means being the proper *application* of the relevant legal principles, principally consistency in the *application* of Part 1B of the *Crimes Act 1914* (Cth), but also State or Territory laws applied as surrogate federal law for aspects of sentencing that are not covered by Part 1B: *Hili* at [49]-[52] (cf RS [39]);

   (c) the second means for the achievement of reasonable consistency is considering, as a yardstick, the outcomes in prior cases, with bare statistics telling a judge very little that is useful unless accompanied by an explanation of why the prior sentences were fixed as they were: *Hili* at [53]-[55].

6. To confine *Hili*, especially [57], to require intermediate appeal courts to consider what has been decided previously about sentencing principles would unnecessarily limit the work able to be done by those courts in achieving reasonable consistency (falling short of numerical equivalence) in federal sentencing outcomes, and thereby helping to ensure that like cases are treated reasonably alike, nationwide.

7. In any event, neither *Hili* at [57], nor *Barbaro*, nor *Lacey* provide support for the Court of Appeal's decision to disregard inter-State intermediate appeal court approved or imposed sentences for offences similar to that committed by the respondent in the process of deciding whether the sentence imposed in this case was manifestly excessive.

8. The "*consistency of decision*" required is both consistency in the application of legal principles and reasonable consistency of outcomes, not just in their meaning and interpretation, even on the more limited view taken by Heydon J in *Hili*.

The respondent's notice of contention

9. In reply to the respondent's notice of contention submissions (RS [76]-[85]), the appellant submits that this Court ought not entertain it, and that leave to rely upon the supporting affidavit and exhibits thereto should be refused, for the following reasons.

10. In the Court of Appeal, the respondent argued that "*there is a stark difference between sentencing practice in Victoria and that in other states for importation offences involving comparable quantities*": *Vu Lang Pham v The Queen* [2014] VSCA 204 at [8] per Maxwell P. It is therefore not open to the respondent now to assert, contrary to the stance taken below, that "*the original sentence was heavy compared to sentences imposed in the compared cases in all jurisdictions, not merely Victoria*" (cf RS [80]).

11. In any event:-

(a) the question of whether a sentence is "*heavy*" is not a relevant question for this Court to consider;

(b) the material sought to be used by the respondent represents an inappropriate use of graphs and statistical analysis of the very kind disapproved of and warned against by this Court in *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at 606 [59] per Gaudron, Gummow and Hayne JJ and the plurality in *Hili* at 535-6 [48]-[49] and 537 [55];

(c) that statistical material can go no further than establishing that the original sentence was "*stern*", as submitted by the appellant in the Court of Appeal: *Vu Lang Pham v The Queen* [2014] VSCA 204 at [6] per Maxwell P;

(d) those graphs and statistics do not, and could not, establish that the sentence originally imposed in this case was manifestly excessive.

Robert Bromwich

24 July 2015

Daniel D Gurvich
Tel: (03) 9225 6946
Fax: (03) 9225 8480
Email: ddgurvich@vicbar.com.au