Judicial Oversight of Prosecutorial Discretion: A Line in the Sand?

The Hon Justice Mark Weinberg[1]

1 An integral feature of virtually all common law systems of criminal justice is the width accorded to prosecutorial discretion. That discretion is not, however, unfettered. [2]

2 It may be useful to say something briefly about the role of the prosecutor. In presenting the case against an accused, the prosecutor has an overriding duty to act fairly.[3] Nonetheless, it must be remembered that a criminal trial is an adversarial proceeding, and the prosecutor is in an adversarial relationship with the accused.

3 It has been said that the role of the prosecutor is to act as a 'Minister of Justice', to present the case fairly and, more specifically, to call all material witnesses.[4] In Australia, as I am sure is the case in Hong Kong, prosecutorial obligations are set out in prosecuting guidelines, as well as professional rules of practice.

4 The decision whether or not to lay charges is, in the first place at least, normally a matter for the police, rather than the Director of Public Prosecutions ('DPP'). In other words,

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2 Prosecutorial discretion is typically more tightly controlled in civil jurisdictions. See, eg, John H Langbein, 'Controlling Prosecutorial Discretion in Germany', 41 (1974) *University of Chicago Law Review* 439.

3 *Whitehorn v The Queen* (1983) 152 CLR 657, 664–5 (Deane J). See also *Alister v The Queen* (1984) 154 CLR 404, 429 (Murphy J); *R v Tran* (2000) 105 FCR 182; *Wood v The Queen* [2012] NSWCCA 21.

4 *Whitehorn v The Queen* (1983) 152 CLR 657, 664–5 (Deane J); *R v Apostilides* (1984) 154 CLR 563; *R v Kneebone* (1999) 47 NSWLR 450.

in most cases the police determine, what charges, if any, should be brought, and against whom such charges should be laid. Neither the DPP nor the judiciary play any role at that stage.

5 Once serious charges have been laid, and sometimes even before that stage, prosecuting lawyers become involved in the process. Even then, the courts generally have no role to play until much later in the piece.

6 When the matter first comes before a court, the position changes. At this point, at least from a constitutional perspective, the judiciary plays a central role. The paramount duty of any judge is to ensure a fair trial. This may, on occasion, require a judge to intervene and perhaps even 'second guess' decisions taken by or on behalf of the prosecution in the exercise of prosecutorial discretion. Such cases are rare, largely because judges are careful, in the main, not to overstep the mark and enter into matters which are not in the judicial domain.

7 In any society that purports to be governed by the rule of law, tensions will arise, from time to time, between the executive and the judiciary. The modern, some would say more activist, approach to judicial review that currently seems to prevail sometimes exacerbates these tensions. It is hardly surprising that Ministers and senior officials react badly to judges who set aside their decisions on what these officials often regard as technical and specious grounds.

8 Those who prosecute are, when exercising that function, discharging core executive responsibilities. Although they are usually experienced, and have specialist knowledge of the criminal law and procedure, they must accept that there comes a point at which their decisions will be subjected to judicial scrutiny.

9 The question that I wish to focus upon in this paper is when that point can be said to have been reached? Another way of putting the matter, more colloquially, is whether there is in fact a discernable 'line in the sand' which judges should not cross?

10 These thoughts are the result of musing over a number of cases, most of them Australian, involving whether, in the particular circumstances of each, the judge acted

correctly in intruding upon the exercise of prosecutorial discretion, or whether in the particular case greater deference should have been shown to prosecution decisions taken in good faith.

Prosecutorial discretion —General

11 Wherever there exists an independent prosecution service, including of course Hong Kong, it is recognised that prosecutorial decision making should be de-politicised, and carried out by specialist and highly trained lawyers.

12 Essentially, this process stems, in Hong Kong, from the creation of the office of Crown Prosecutor in the early 1980s, and the replacement of that office by the DPP in the late 1990s. In Australia, the office of DPP came into existence in the early 1980s in both Victoria and in the Commonwealth, and has since been replicated in all Australian States and Territories. In England and Wales, it was not until the mid-1980s that the Crown Prosecution Service was created, with the DPP in its modern incarnation as its head.

13 Although, as I understand the position, the Secretary of Justice occupies a more significant role in the actual prosecution process in Hong Kong than does the Attorney-General in Australia, the basic paradigm in both systems is the same. The Commonwealth DPP and his State counterparts in Australia operate under a set of published guidelines, drafted by their offices, which are to be followed in the making of prosecution decisions.[5] Thus, while it is clear that prosecutors have considerable scope for the exercise of discretion at almost every stage of the prosecution process, those guidelines inform the way in which prosecutorial decisions are taken.

The first stage of prosecutorial discretion

14 It is, as I have said, a matter for the police (or other relevant law enforcement or regulatory body), in the first instance, to decide whether or not it appears that a crime has been committed. Having concluded that there is evidence of criminal conduct, it is necessary

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5 Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* (September 2014).

to characterise that offence. Normally, at that stage, the DPP is not involved. Sometimes, in particularly complex cases, whether they involve fraud, money laundering, large-scale drug trafficking, or conspiracy of some kind, advice will be sought from DPP lawyers during the course of the investigation, and before arrests are made and charges laid. For the most part, however, the process does not involve what would ordinarily be described as an exercise of prosecutorial discretion at this very early and rudimentary stage.

15 From a prosecutorial point of view, the first question to be determined is whether there is sufficient admissible evidence to warrant laying charges. The second question to be resolved is whether a prosecution is justified in the public interest. Every common law jurisdiction of which I am aware operates under some variant of this dual test.

16 In Australia, the first limb of the test requires consideration of whether there are reasonable prospects of conviction.[6] That means that not only must the evidence establish a bare prima facie case, but it must also satisfy the prosecuting authority that a conviction is either likely, or at least so close to being likely, as to make it appropriate to proceed. Essentially, this part of the task is predictive. The second limb of the test involves a host of complex factors, some of them subjective and peculiar to the person suspected of having committed an offence. Others are of a more general nature.

17 Ordinarily, courts have no role to play in either the decision to lay charges, or in the choice of charges that are instituted.[7] This is as it should be. These are matters for the executive through the prosecutorial arm.

18 It must be said that there have been times, in Australia, when judges, particularly those exercising purely civil jurisdiction, have found it difficult to resist the temptation to interfere in matters that really should be no business of theirs. I refer in particular to the 1980s, when shortly after the creation of the office of Commonwealth DPP in 1984, there developed a somewhat novel branch of judicial review, essentially involving 'second guessing' a host of

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6 Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* (September 2014) 4.

7 *Likiardopoulos v The Queen* (2012) 247 CLR 265; *Maxwell v The Queen* (1996) 184 CLR 501; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Barton v The Queen* (1980) 147 CLR 75.

prosecutorial decisions.

19 Traditionally, the decision to lay criminal charges did not involve the exercise of statutory power. To the extent that various prosecutorial discretions were involved, the decisions in question were merely an exercise of the prerogative. At that stage, decisions of that kind were considered non-reviewable by the courts.

20 Once the various prosecutorial powers and functions came to be vested in a statutory officer, the DPP, under legislation creating that office, everything changed. In accordance with what were thought to be orthodox principles of administrative law, the full range of administrative remedies were suddenly sought to be invoked. This was usually done on behalf of particularly wealthy suspects, and by way of challenge to various investigative acts and prosecutorial decisions. The process became known, colloquially, as 'collateral review'.

21 Thus, we had a significant number of cases where well-heeled individuals who faced the prospect of criminal charges sought to institute proceedings, usually in the Federal Court of Australia, a purely civil court, challenging on administrative law grounds, the exercise of statutory power. Not surprisingly, it would often take many months, and sometimes even years, for these challenges to be finally resolved. They almost always failed. However, a delay of that order could do enormous damage to the chances of securing a conviction. Having appeared in many such cases, on both sides, it is fair to say that, regrettably on occasion, that was precisely the object sought to be achieved.

22 There were a number of instances where judicial review was sought in relation to various steps taken as part of the police investigation.[8] Surprisingly, the members of the Federal Court, few of whom had any extensive experience of the criminal law, willingly embraced the opportunity to apply classic judicial review reasoning to aspects of the criminal process.[9] As if interference in the investigative process was not sufficient, it became almost

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8 See, eg, *Brewer v Castles* (1984) 1 FCR 55 (whether search warrant drafted in excessively wide terms); *Re Beneficial Finance Corporation Limited v Commissioner of Australian Federal Police* (1991) 31 FCR 523 (whether decision to issue search warrants made in accordance with requirements of statute and whether warrant sufficiently particularised).

9 See *Murchison v Keating* (1984) 54 ALR 380 (decision by Federal Treasurer to institute legal proceedings against applicant by way of indictment rather than summary prosecution); *Reid v Nairn* (1985) 60 ALR 209 (decision by DPP to institute legal proceedings against applicant by

de rigueur, in complex cases, to challenge by way of such review even evidentiary rulings made during the course of committal hearings. Once again, not surprisingly, a separate round of collateral challenges could be brought against the decision to commit for trial.[10]

23 It is true that Federal Court judges, when asked to review decisions taken as a prelude to the filing of an indictment in the State (criminal) courts, generally paid lip service to the principle that they would only sparingly engage in such review. The problem was that, by the time the matter had been fully argued, including its discretionary aspects, the damage had been done. Once the door to judicial review was left even slightly ajar, the temptation to bring such proceedings, and thereby gain some advantage to the defence, proved irresistible.

24 To my certain knowledge, a significant number of prosecutions were thwarted by the inability of these judges, in particular, to appreciate that there really is a fundamental difference between an ordinary bureaucratic decision, and the exercise of prosecutorial discretion. The criminal justice system depends, to a considerable degree, upon the timely resolution of allegations of serious criminality. Years of delay, deliberately fomented by 'gaming' that system, led to a number of cases having to be abandoned.

25 The members of the criminal bar had their fun. However, the lawyers' picnic eventually came to an end. The critical point came in what surely must be one of the most powerful statements against fragmentation of the criminal justice system ever delivered by an appellate court.

26 In *Yates v Wilson*,[11] the High Court dismissed an application for judicial review of a magistrate's decision to commit for trial in the following unequivocal terms:

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way of indictment rather than summary prosecution); *Newby v Moody* (1988) 83 ALR 523 (decision by DPP to prosecute tax offences without giving appropriate weight to personal hardship to defendant); *Stergis v Boucher* (1989) 86 ALR 174 (decision by DPP to prosecute tax matters rather than rely upon civil penalty remedies).

10 See, eg, *Lamb v Moss* (1983) 49 ALR 533 (decision that a prima facie case had been established at committal and magistrate's refusal to allow additional cross-examination of Crown witnesses); *Young v Quin* (1985) 59 ALR 225 (decision to permit certain cross-examination of Crown witness by defence counsel during committal hearing); *Shepherd v Griffiths* (1985) 60 ALR 176 (decision to exclude certain evidence from being admitted in preliminary examination and committal proceeding); *Foord v Whiddett* (1985) 60 ALR 269 (decision that a prima facie case had been established at committal); *Murphy v DPP* (1985) 60 ALR 299 (decision to commit on basis that a jury, properly instructed, would be 'likely to convict');.

11 (1989) 168 CLR 338.

> It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should inhibit the Federal Court from exercising jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and as well inhibit this Court from granting special leave to appeal.[12]

27 What is remarkable about this case is that the High Court itself chose to have these remarks published in the Commonwealth Law Reports, these being the authorised reports of High Court decisions. I believe that the judgment, as reported, is the most succinct and probably shortest judgment ever published in that series.

The nature of the charges brought

28 Here trial judges plainly have at least a limited role in dealing with matters arising out of the exercise of prosecutorial discretion. Of course, it is for the prosecution, in the first instance, to determine what charges are appropriate. Yet as part of the overall duty to ensure a fair trial, judges have for many years been prepared to set boundaries upon what the prosecution seeks to do.

29 Thus, for example, rules have developed as to the circumstances in which it may be appropriate to charge a person with a conspiracy when, as part of that conspiracy, a substantive offence or offences have been committed, and there is a sufficient and effective charge available to deal with the matter on that basis. Courts have strongly deprecated the use of conspiracy charges where prosecutors have sought to gain forensic advantage by adopting that course.[13]

30 Another area where judges have, on occasion, intervened in prosecutorial discretion lies in the efforts made to avoid what are generally termed 'overloaded indictments'.

31 Australian prosecutors are amongst the worst offenders in this regard. Seemingly oblivious to the fact that, unlike the position in Hong Kong, virtually all serious crimes are

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12 Ibid 339.

13 *R v Hoar* (1981) 148 CLR 32. There is a belief amongst some prosecutors that the co-conspirators rule, which allows statements and acts of co-conspirators to be received in evidence against all alleged parties to the conspiracy, is confined to charges of conspiracy. In fact, the rule is broader than that, and applies as well to various forms of complicity.

tried before juries, indictments have regularly been drafted in a manner that is prolix, and results in a trial that sometimes approaches incomprehensibility. The result has been that trials in my home State, Victoria, have often run far longer than they should.

32 I am sorry to say that, in Victoria, we hold the record for some of the longest and most complex criminal trials that have ever been conducted.

33 For example in *Dragojlovic v The Queen*,[14] a trial involving a reasonably straightforward allegation of tax fraud, the trial itself occupied 11 months of sitting days before a jury. It extended over a period of almost 17 months from arraignment.[15]

34 One case, which led to an appeal on which I recently sat, involved an indictment containing some 37 separate counts involving sexual offences against five separate complainants.[16] Unbelievably, some of the offences which were not particularly serious went back to the mid-1960s. The offending conduct was said to have extended over 30 years. The offences themselves varied greatly, from the comparatively trivial, to the extremely serious. To make matters worse, the prosecution relied upon what we, in Australia, refer to as 'uncharged acts'. These are said to provide 'context' for the specific allegations contained within the counts laid in the indictment. In all, therefore, the jury had to assimilate and consider something of the order of one hundred or so separate and distinct allegations of

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14 (2013) 40 VR 71.

15 The judgment of the Court of Appeal refers at some length to earlier examples of dislocated trials. For example, *R v Wilson & Grimwade* [1995] 1 VR 163, which involved 676 days between arraignment before the jury and verdict. An earlier trial was aborted some 33 weeks into the evidence. In *R v Higgins* (1994) 71 A Crim R 429, which involved a single accused, a police officer was charged with conspiracy to obstruct justice. The trial began on 1 November 1991, and a verdict was returned on 26 March 1993. The Court in *Higgins* noted that long criminal trials were by no means a new phenomenon, referring to *Castro v The Queen* (1881) 6 App Cas 229 (the '*Tichborne Case*') which trial for perjury lasted 10 months. The Lord Chief Justice's summing up alone occupied 20 sitting days. This was the longest criminal trial in British history until *R v Cohen (*Unreported, English Court of Appeal (Criminal Division), 28 July 1992*)* (the *'Blue Arrow Case'*) which began on 11 February 1991, involved 10 accused, and lasted exactly a year. The Court of Appeal quashed the conviction for market-rigging on the basis that the trial had been too complex, and conducted in a dislocated manner. The length and complexity of the trial was said to be directly attributable to the unnecessary prolixity of the indictment.

16 *Bauer (a pseudonym) v The Queen* [2015] VSCA 55. Cf *R v Tukuafu* [2003] 1 NZLR 659 (where the New Zealand Court of Appeal refused to overturn the convictions of several co-accused who had been charged on an indictment containing some 85 counts of burglary and 33 counts of unlawful conversion of motor vehicles).

criminality. Some of these were claimed to be 'cross-admissible' under the rules regarding tendency and coincidence evidence (previously termed, at common law, 'similar fact' evidence), while others were said to be admissible only by way of background.

35 Not surprisingly, the convictions were quashed on appeal, and a new trial or trials ordered. I was particularly critical, in my judgment, as I had previously been in others, of the Crown's decision to lead evidence of so many offences in the one trial. In my view, this made the jury's task all but impossible.

36 There is a tendency amongst Australian prosecutors to identify each and every act of sexual misconduct in a trial involving sexual offending as a separate and distinct offence, warranting a separate count. All too often that practice is followed even if all those acts take place at roughly the same time, and as part of what might be regarded as 'one transaction'.[17] Thus, a typical rape trial, in Victoria, is likely to include a number of counts of indecent assault (these usually being the immediate prelude to the act of sexual penetration itself), as well as post offence touching. This is done rather than focusing upon the gravamen of the offence, which must surely be the act of sexual penetration (or rape) itself.

37 This practice is justified on the basis that, absent the drafting of specific counts for each and every act of sexual misconduct, a sentencing judge cannot legitimately take these matters into consideration as aggravating factors. That strikes me as wrong in principle, and is probably based upon a misreading of relevant authority.

38 There are other examples of judges who have, from time to time, intruded into the choice of charges brought by the prosecution. These include those cases where a deal has been struck between the prosecution and defence permitting the accused to plead guilty to what, in the view of the judge, is plainly a wholly inadequate charge. For example, a case of murder may be 'settled' on the basis of a plea to manslaughter, despite the evidence making it abundantly clear that the killing was done with murderous intent, and with no justification or excuse. To what extent, if at all, is a judge entitled to reject a plea made in such

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17 See *Andrew v The Queen* [2013] VSCA 333, [50]–[59].

circumstances?[18]

39 Alternatively, what is a judge to do if the prosecution elects to accept a plea to an offence such as recklessly causing serious injury, rather than the more serious offence of intentionally causing serious injury, where the evidence makes it clear that the plea does not, even remotely, reflect the gravity of the offending?

40 In circumstances where sentencing for drug offences is quantity based, as it is throughout Australia, may a judge refuse to accept a plea to a less serious form of the offence when the evidence makes it clear that the far more serious crime has, in fact, been committed?

41 Of course, as a general proposition, any accused is entitled to plead guilty to any offence preferred in an indictment. There must come a point, however, where to accept a plea in such circumstances will tend to bring the administration of justice into complete disrepute. Can a judge, in those circumstances, override the wishes of both the prosecution and the defence to have the case dealt with on what, objectively speaking, is a wholly fictitious basis?

42 Perhaps the answer to that question lies in suggesting that prosecutors should not engage in plea bargaining which leads to a result of that kind. The prosecution should not accept a plea to a particular charge on any basis that cannot be justified on logical and cogent grounds. If that means that there are limits upon the ability of law enforcement agencies to 'clear the books' by engaging in pragmatic, but essentially unprincipled settlement negotiations, then so be it.

43 It is understandable that, on occasion, and in order to avoid a long, complex, and expensive trial, prosecutors may be tempted to bargain with an accused by reducing both the nature of the charges brought, and their number. There is also, so far as they are concerned, the certainty of a conviction, as distinct from the risks associated with a trial. Within limits, an approach along these lines may be acceptable, but not to the point where the entire criminal justice system is brought into disrepute.

44 Occasionally, difficult problems arise. For example, in *Likiardopoulos v The Queen*,[19]

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18 See, eg, *Maxwell v The Queen* (1996) 184 CLR 501.

three individuals were charged with murder. The basis upon which that charge was formulated was joint criminal enterprise, it being unclear which of them actually inflicted the fatal wound. The evidence against each accused was, relevantly, indistinguishable.

45 The prosecution accepted pleas by two of the men to the lesser offence of manslaughter. The third accused elected to stand trial, and was convicted of murder. He argued on appeal that the prosecution had engaged in an abuse of process by not permitting him to stand trial, before a jury, on a charge of manslaughter only. The High Court rejected that argument, holding that the prosecution had been conducted fairly and appropriately. The fact that the end result may have seemed somewhat anomalous, did not mean that the process had miscarried.

Conduct of the trial

46 It is a feature of prosecutorial discretion that, in the conduct of the trial, some decisions are for the prosecutor alone, and not a matter for the trial judge. For example, the prosecution decides which witnesses to call. It may elect not to call a particular witness whose evidence is regarded as untruthful. Of course, the judge may comment to the jury upon that choice, but only where it is plainly appropriate to do so.

47 In rare circumstances, the prosecutor's refusal, at trial, to call an important witness who ought to have been called by the prosecution may give rise to a miscarriage of justice. Nonetheless, this particular exercise of prosecutorial discretion is generally regarded as a matter for the prosecutor alone, and one that the judge should normally leave alone.

48 In much the same way, the prosecution must make disclosure of all relevant material to the defence. As a general rule, the judge does not supervise, or even closely scrutinise, the performance of that duty. Nonetheless, in some cases, a failure on the part of the prosecution to make adequate disclosure may give rise to a successful ground of appeal.[20] And of course, a judge confronted with a complaint by the defence at trial that there has been a failure to

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19 (2012) 247 CLR 265.

20 *Mallard v The Queen* (2005) 224 CLR 125.

make adequate disclosure may have to rule upon that matter, and compel the prosecution to turn over more material than it would have wished to do.

Agreed penalties

49 Traditionally, in common law systems, the prosecutor played almost no role in the sentencing process. Indeed, there was very little said on a plea by either side, and certainly nothing like the care now taken to advance quite sophisticated submissions regarding relevant sentencing factors.

50 Once the prosecution gained the right to appeal against inadequacy of sentence, the position changed. Appellate courts began expecting prosecutors to assist sentencing judges to avoid error, and indicated that they would take into account the submissions put on behalf of the prosecution on the plea when determining whether to increase a sentence on appeal.

51 Over time, it became the practice for the prosecutor, on a plea, to put forward comparable cases, and to draw to the court's attention relevant authorities dealing with matters of sentencing principle. Sometimes these submissions became quite elaborate.

52 Several years ago, the Victorian Court of Appeal took this matter a stage further. In *R v MacNeil-Brown*,[21] the Court significantly raised the expectation of what the prosecution was expected to do at the sentencing stage. It held that, if called upon by the sentencing judge to do so, the prosecutor should put forward a range of sentences that might be appropriate having regard to the gravity of the offence, and the circumstances of the offender. Of course, the judge would not be bound by any such range, but would be assisted by it, as well as any competing range put forward on behalf of the prisoner.

53 Not surprisingly, the decision in *MacNeil-Brown* had a profound impact upon sentencing practice in Victoria. It led to a form of 'plea bargaining' of a kind that had never previously been countenanced in that State. In exchange for a plea of guilty, the prosecution would agree to put forward a particular range as being appropriate. In some cases, where the defence agreed with that range, this could almost be regarded as amounting to an 'agreed

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21 (2008) 20 VR 677.

penalty'.

54 There were at least two problems with the *MacNeil-Brown* approach. In a case where no 'agreement' had been reached between the prosecution and the defence as to the appropriate range, it was entirely predictable, and perhaps to some degree understandable, that some less experienced sentencing judges might try to find an accommodation between the competing submissions. On occasion this led to what might be described as 'defensive judging'. In a number of cases that reached the Court of Appeal, it became apparent, at least in my experience, that sentencing judges, particularly in the County Court, were sentencing at or towards the bottom of the Crown range. Of course, approaching the matter in that way had nothing to do with the application of proper sentencing principles, still less with the need to ensure that like cases were treated alike.

55 Also, in such a situation, it was assumed, often without justification, that the prosecution would have an informed and rational basis for the range that it put forward. All too often, that proved to be far from the truth. Figures were sometimes plucked out of the air, without any transparency or explanation as to how they had been arrived at. Yet it could be empirically demonstrated, quite conclusively, that some sentencing judges were allowing themselves to be influenced by the ranges that were put forward, irrespective of their unsatisfactory nature.

56 In cases where agreement could be reached between the parties, there was always the danger that the figures arrived at were the product of backroom deals, rather than proper attention being given to relevant sentencing principles. Because a sentencing judge was likely to give effect to an agreed range (usually, it must be said, by fixing a sentence somewhere close to the middle of that range), the perception would not unnaturally arise that the judge was acting as a kind of 'rubber stamp'. Once again, this did little, in my opinion, to promote respect for the administration of criminal justice.

57 It was inevitable that this Victorian initiative would be subjected to challenge in the High Court when a suitable case arose. In *Barbaro v The Queen*,[22] a majority of that Court

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22 (2014) 253 CLR 58.

set its face strongly against *MacNeil-Brown*, which was expressly overruled. Their Honours, in the majority, said:

> To the extent to which *MacNeil-Brown* stands as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice to which *MacNeil-Brown* has given rise should cease. The practice is wrong in principle.[23]
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> The practice countenanced by *MacNeil-Brown* assumes that the prosecution's proffering a statement of the bounds of the available range of sentences will assist the sentencing judge to come to a fair and proper result. That assumption depends upon the prosecution determining the supposed range dispassionately. It depends upon the prosecution acting not only fairly (as it must) but in the role which Buchanan JA rightly described as that of 'a surrogate judge'. That is not the role of the prosecution.[24]

58 As this paper is being written, a similar debate is taking place within Australia regarding what are known as 'pecuniary penalties'. These are monetary penalties (equivalent to fines) which can be imposed in relation to certain statutory breaches of, for example, the *Corporations Act*. They can also be imposed for other statutory breaches, such as various forms of anti-competitive conduct.

59 For years now, regulators in Australia have been entering into what I would describe as 'cosy' penalty agreements with offenders, and until recently, doing so with the imprimatur of the courts. Any such agreement regarding a civil penalty would normally be endorsed (in my terms 'rubber stamped') by the court, unless it could be said to be wholly outside the range, virtually *Wednesbury* unreasonable.[25] Given the width of the range normally accorded to sentencing judges, that threshold was hardly likely to be met. In effect, the task of punishing offenders for regulatory offences thereby shifted from the judiciary to the regulators.

60 Earlier this year, in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry and Energy Union*,[26] the Full Federal Court determined that the long

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23 Ibid 69 [23].

24 Ibid 71 [29] (citations omitted).

25 *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

26 (2015) 229 FCR 331.

line of earlier authority that had held that agreed penalties should normally be endorsed should be rejected. It was held that the decision of the High Court in *Barbaro* applied not just to criminal penalties (i.e. imprisonment and fines), but to all forms of civil and pecuniary penalty as well.

61 The question whether that decision of the Full Federal Court should stand is presently being considered by the High Court. Clearly, from the arguments presented, the regulators were extremely unhappy with the Full Federal Court's holding because it prevented them, so they said, from freely negotiating, with certainty, upon an appropriate disposition with various offenders. The regulators argued that the Full Federal Court decision would lead to more cases having to be tried, and fewer cases having to be settled, obviously problematic from a policy perspective.

62 In addition, the regulators argue, implicitly at least, that, as experts in the field, they are better placed to know what amounts to an appropriate punishment for a particular statutory breach than is a judge. They say that they should be allowed to deal with such breaches on that basis. They claim that courts have no business second-guessing their expertise, save perhaps in the extraordinary case where the agreed penalty is wholly outside the bounds of what would be reasonable in the circumstances.

63 Irrespective of what the High Court ultimately decides, I must say that, having been a prosecutor with considerable experience of prosecuting offences of this kind, I am not at all persuaded by the regulators' views. As far as I am concerned, pecuniary penalties are essentially fines by a different name. They are punitive, and intended to be so. They should be imposed in accordance with orthodox sentencing principles, and not based upon deals done which are in no way transparent, and unlikely to give sufficient weight to the need to treat like cases alike.

64 It is the task of the courts to impose punishments for serious contraventions of the law, and not the task of the regulators. They may legitimately be concerned with a host of other matters, including the need to 'clear their books' and perhaps with achieving other policy objectives. Serious statutory breaches are, effectively, offences against the community, and

should be viewed as such. The fact that they are dealt with using civil process, rather than tried on indictment, is of no present relevance.

Disposition after an appeal

65 Sometimes, after an appeal against conviction has been allowed, the question arises as to whether there should be a new trial, or a judgment of acquittal entered. Normally, appellate judges leave this matter to the DPP to resolve, taking the view that it is really a question for prosecutorial discretion. However, that is not always the case. There are examples where the appellate court takes the matter out of the hands of the prosecuting authority, and pre-empts that exercise of discretion. The circumstances under which that approach should be adopted are not always clear.

Conclusion

66 Some prosecutorial decisions should generally be immune from judicial review. Judges should be wary of intruding into the realm of prosecutorial discretion in its classical sense, trusting that prosecutors will ordinarily conduct themselves ethically and appropriately.

67 At the same time, a judge must always ensure that any trial over which he or she presides is a fair trial. The same is true, of course, of any appellate judge considering whether, in hindsight, a trial has miscarried.

68 The line between according excessive deference to prosecutorial discretion, and unduly intruding upon the exercise of that discretion is, no doubt, difficult to draw, and may be fact specific. It may be viewed as a 'line in the sand' which can be discerned, but can also easily be washed away.

69 The issue with which this paper is concerned may be seen as part of a broader debate as to the proper relationship between two arms of government, each of which has its own distinctive role to play. Prosecutors must, of course, accept that they act under certain rigorous ethical responsibilities. That means that great care must be taken to ensure that the prosecutorial role is discharged impartially, objectively, and fairly, and under ultimate judicial

supervision. Judges exercise entirely different functions and perform different constitutional roles. At the same time, they too must recognise that, short of conducing to an unfair trial, there are some matters upon which the prosecutor's view should prevail. That is so even if the judge himself or herself is not in agreement with it.