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1. Introduction

The *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (the amending Act), which commenced on 22 February 2010, marked a departure by Parliament from previous approaches to fraud offences in NSW. This departure included dramatically reducing the number of fraud and forgery offences under the *Crimes Act 1900*,¹ removing antiquated provisions, introducing new identity offences,² and using technologically-neutral language to accommodate changes in criminal methods over time.

This monograph will examine the reasons for the reforms, set out the legislative framework for fraud, forgery and identity offences in NSW, make comparisons with Commonwealth and interstate provisions in light of the objective of national consistency, and conclude with a discussion of the applicable sentencing principles in such cases.

The fraud, forgery and identity offences in NSW are to be prosecuted summarily unless an election is made to proceed on indictment. Early indications that lower numbers of offenders are being sentenced in the District Court than in the Local Court³ seem to confirm that the bulk of these offences will be dealt with summarily, but may also reflect that major frauds often take considerable time to detect and then prosecute.⁴

While this monograph focuses on criminal penalties, it should be acknowledged that civil penalties may also be imposed for fraudulent conduct.⁵

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- 1 *Crimes Act 1900*, Pts 4AA (Fraud) and 5 (Forgery). According to then Attorney General (NSW), the Hon J Hatzistergos, “[m]ore than 30 fraud provisions ... [have been] replaced with four new provisions, and 25 forgery provisions ... [have been] replaced by six new provisions”: Second Reading Speech, *Crimes Amendment (Fraud, Identity and Forgery Offences) Bill 2009*, NSW, Legislative Council, *Debates*, 12 November 2009, p 19507 (Second Reading Speech).
 - 2 *Crimes Act 1900*, Pt 4AB (Identity offences). The term “identity offences” is used in the NSW legislation and is adopted in this monograph, except when referring to the terminology of other jurisdictions. Similar terms found in the literature include “identity theft” which refers to the theft of an actual pre-existing identity; “identity fraud” which involves gaining money or other benefits through the use of a false identity; and “identity crime” which is a broad expression for the commission of a crime facilitated by using a false identity: Model Criminal Law Officers Committee (MCLOC), *Identity Crime*, Final Report, March 2008, p 8, at <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_chapter3>, accessed 30 July 2012.
 - 3 This can be demonstrated by statistics on the Judicial Commission of NSW’s *Judicial Information Research System* (JIRS) for the new fraud offences sentenced in the Local Court compared with the District and Supreme Courts. For example, where dishonestly obtain property by deception (s 192E(1)(a)) was the principal offence, 418 offenders were sentenced in the Local Court from February 2010 to December 2011, whereas only one offender was sentenced in the higher courts from February 2010 to June 2011.
 - 4 For example, a 2010 survey into frauds in public and private organisations (committed in the period 1 February 2008 to 31 January 2010) found that the average time taken to detect a “major fraud” was 372 days, up from 342 days in 2008: KPMG, *Fraud and Misconduct Survey 2010*, November 2010, p 12, at <www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/Fraud-Survey/Pages/Fraud-Survey-2010.aspx>, accessed 30 July 2012. It should also be noted that many organisations conduct an internal investigation before a matter is referred to the police for investigation and ultimately prosecution.
 - 5 AM Gleeson, “Civil or criminal — what is the difference?” (2006) 8(1) *TJR* 1 at 4ff. See for example, *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522.

2. Rationale for change

In the 1990s, the Model Criminal Law Officers Committee (MCLOC)⁶ of the Standing Committee of Attorneys-General highlighted the importance of simplifying fraud and forgery offences and orienting them to the use of computers.⁷

The reforms introduced in NSW in 2009 were intended, according to then Attorney General (NSW), the Hon J Hatzistergos, to bring NSW “closer to the national approach”⁸ of the Model Criminal Code, to replace “outdated and redundant provisions”⁹ with “simple and modern offences”,¹⁰ and to assist law enforcement to “keep pace with modern criminal conduct”.¹¹

2.1 Change in methods of fraud

Technology has changed the face of fraud.¹² Some examples of using technology for fraudulent purposes in recent years include tampering with automatic teller machines and EFTPOS machines to “skim” account information from credit cards, sending emails which purport to be from financial institutions to obtain personal details, and creating websites to make fraudulent investment schemes appear genuine.¹³

Alex Steel, Associate Professor of Law at the University of NSW, has examined the way the internet in recent decades has facilitated the perpetration of fraud.¹⁴ Online communications designed to defraud the recipients reach many more potential victims than approaching victims in person, and require less direct effort from the offender and lower risk of redress. The immediacy of online communications enables offenders to operate from anywhere in the world, removes many of the physical cues of behaviour and demeanour, and reduces the opportunity for a third party to verify or intervene in transactions.

Crime syndicates also exploit technology in their operations, and may conceal the identities of personnel performing at one level in the organisation from those at another level, thereby protecting the syndicate if one member is arrested.¹⁵

6 The Committee’s name was, at various times, the Model Criminal Code Officers Committee (MCCOC) and the Model Criminal Law Officers Committee (MCLOC). For simplicity, the Committee will be referred to as MCLOC throughout the monograph.

7 MCLOC, Model Criminal Code, Ch 3, *Theft, Fraud, Bribery and Related Offences*, Report, December 1995, pp 1, 4, at <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_chapter3>, accessed 30 July 2012.

8 Second Reading Speech, above n 1, p 19507. In the words of Spigelman CJ in *Stevens v R* (2009) 262 ALR 91 at [2], the Bill was “designed to harmonise New South Wales law with the national model scheme”.

9 Second Reading Speech, above n 1, p 19509.

10 *ibid* p 19507.

11 *ibid*.

12 “Fraud ... is an area of crime that has exploited the opportunities opened up by technology, and that makes it hard to police”: Second Reading Speech, above n 1, p 19507.

13 A comprehensive list of fraud scams using traditional or technological methods is available on the Australian Competition & Consumer Commission’s “SCAMwatch” website at <www.scamwatch.gov.au>, accessed 30 July 2012.

14 A Steel, “The true identity of Australian identity theft offences: a measured response or an unjustified status offence?” (2010) 33(2) *UNSWLJ* 503 at 505–506. See also *Identity Crime*, Final Report, above n 2, p 9.

15 Submissions to MCLOC, Model Criminal Code, Ch 3, *Identity Crime*, Discussion Paper, April 2007, from Australian Federal Police (pp 3–4) and Australian Bankers’ Association (pp 1, 3), at <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_submissions>, accessed 30 July 2012.

2.1.1 Necessity for discrete forgery and identity offences

Forgery as a specific type of fraud “is another area of crime characterised by rapid change”.¹⁶ Equipment is often involved in these offences and may be of a specialised nature. However, the increasingly high quality of common equipment such as scanners has also assisted forgers. MCLOC considered that the authenticity of documents was of such importance that separate forgery offences should be retained despite the availability of other fraud-related charges to cover such conduct.¹⁷

A similar overlap occurs in relation to identity offences and the fraud provisions in Pt 4AA of the *Crimes Act 1900*. Inventing an identity or taking over someone else’s identity is not new and many frauds involve some manipulation of identity.¹⁸ The rationale for enacting separate identity offences in Pt 4AB of the *Crimes Act 1900* was to address “a growth crime, costing Australians millions of dollars a year”¹⁹ and “to give police the power they need to investigate and prosecute it”.²⁰ The breadth of the identity offence provisions, according to Steel, is intended to make it easier for law enforcement bodies to charge and prosecute offenders.²¹

2.2 Change in costs of fraud

The increased use of online systems and false identities has arguably expanded the cost of fraud across the community. Financial loss is the most obvious type of cost, although estimating monetary value is difficult.²² Under-reporting of fraud hinders an accurate assessment of these costs as official crime statistics only reflect reported crimes.²³ However, while the methods of fraud are expanding, and the amounts of some individual frauds may be alarming, there is uncertainty about whether the aggregate value of frauds is rising or not.²⁴

16 Second Reading Speech, above n 1, p 19507.

17 *Theft, Fraud, Bribery and Related Offences*, Report, above n 7, pp 195, 201.

18 Steel, above n 14, at 503–504.

19 Second Reading Speech, above n 1, p 19507

20 *ibid.*

21 Steel, above n 14, at 507–509, 529–531.

22 For fraud generally, KPMG’s fraud surveys are based on self-reporting by public sector and private organisations in Australia and New Zealand. During the period 1 February 2008 to 31 January 2010, the value of frauds reported by the 214 organisations participating in the 2010 survey was \$345.4 million: KPMG, above n 4, p 4. This figure excludes personal fraud, which was estimated to cost Australians \$1.4 billion in 2010–2011: Australian Bureau of Statistics, *Personal fraud 2010–2011*, 2012, cat no 4528.0, ABS, Canberra. For identity offences, estimates from 2001–2002 are given in *Identity Crime*, Final Report, above n 2, pp 9–10. In July to November 2011, the Australian Taxation Office (ATO) detected 7,300 tax returns suspected of using identities fraudulently to claim refunds worth around \$36 million: ATO, “We’re all victims of identity crime”, *Targeting tax crime: a whole-of-government approach*, Issue 6, March 2012, p 19, at <www.ato.gov.au/corporate/content.aspx?doc=/content/00313370.htm&pc=001/001/008/008&mnu=49910&mf p=001/001&st=&cy=>>, accessed 30 July 2012.

23 Organisations may be reluctant to report fraud for various reasons, including the desire to avoid adverse publicity: J Lindley, P Jorna and RG Smith, *Fraud against the Commonwealth 2009–10 annual report to government*, Monitoring Report No 18, Australian Institute of Criminology, p 5, at <www.aic.gov.au/documents/B/5/1/%7BB514C8BC-4578-4D7F-A9C8-475FF1269004%7DMR18.pdf>, accessed 30 July 2012. Presumably not all individuals report fraud either, and some may not even realise they have been defrauded.

24 KPMG, “Fraudsters target big guns”, *Fraud barometer*, Edition 5, August 2011, p 2, at <www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/Fraud-Barometer/documents/fraud-barometer-june-2011-readings.pdf>, accessed 30 July 2012. The barometer, which is based on an “analysis of court records”, indicated that the aggregate value of serious fraud cases has been falling since the peak of the Global Financial Crisis in December 2009. However, it was also acknowledged that “new trends appear to be developing in the types of frauds emerging” and it “seems too early to call a decline in serious fraud in Australia”: p 2.

Financial impact takes the form of direct costs, including the money lost by individuals or corporations and the costs involved in investigation and remedial action, while indirect costs include commercial damage to a victim's credit rating or to the reputation of a corporation.²⁵

Psychological and emotional impacts have always been felt by victims of fraud, but with the changing typology of offending, victims' exposure to these impacts appears to have increased. Traditionally, victims experienced the betrayal of being duped by someone who approached them in person and cultivated their trust. More recently, victims have experienced the shock of their privacy and sense of identity being violated by strangers who have accessed personal information without their knowledge.²⁶

3. Framework of new offences in NSW

The *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* amended the *Crimes Act 1900* by inserting Pt 4AA (Fraud) (ss 192B–192H) and Pt 4AB (Identity offences) (ss 192I–192M) and substituting Pt 5 (Forgery) (ss 250–256). As stated, the offences commenced on 22 February 2010.

The reformulated offences were influenced by three reports produced by MCLOC, although its recommendations were not adopted entirely “as some of the thinking behind the model bill has progressed”.²⁷

Table 1 compares the new fraud and forgery offences with a selection of repealed fraud and forgery offences, shows the new identity offences, and sets out the maximum penalties for each offence when dealt with on indictment. None of these offences attract or attracted a standard non-parole period. One reason for this may be the broad spectrum of conduct and financial amounts involved in fraud-related offences.

25 *Identity Crime*, Final Report above n 2, p 4. The financial impacts discussed in the context of identity offences apply generally to fraud offences.

26 *ibid* p 5. Access to information may be gained through the use of technology (for example, malicious software which detects a password to an online banking account) or by using manual methods (for example, stealing mail).

27 Second Reading Speech, above n 1, p 19507. The three MCLOC reports were *Theft, Fraud, Bribery and Related Offences*, Report, above n 7; MCLOC, Model Criminal Code, Ch 3, *Credit Card Skimming*, Final Report, February 2006, at <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_chapter3>, accessed 30 July 2012; *Identity Crime*, Final Report, above n 2.

Table 1: Fraud, identity and forgery offences under the *Crimes Act 1900* – comparisons with selected corresponding repealed offences

New offences			Selected corresponding repealed offences		
<i>Crimes Act 1900</i>					
Section	Offence	Max penalty (yrs)	Section	Offence	Max penalty (yrs)
Pt 4AA (Fraud)					
s 192E(1)(a)	Obtain property belonging to another by deception	10	s 179	Obtain property by false pretences	5
			s 178A	Fraudulent misappropriation ^a	7
			s 184	Fraudulent personation ^a	7
			s 176A	Director cheat or defraud ^a	10
s 192E(1)(b)	Obtain financial advantage or cause financial disadvantage by deception	10	s 178BA	Obtain money by deception	5
			s 178C	Obtain credit by fraud	1
			s 178A	Fraudulent misappropriation ^a	7
			s 184	Fraudulent personation ^a	7
s 192F(1)	Intention to defraud by destroying or concealing accounting records	5	s 174	Director or officer wilfully omit to make entry in records of property received	10
			s 175	Director or officer wilfully destroy, alter, etc, records of company	10
s 192G	Intention to defraud by false or misleading statement	5	s 178BB	Obtain money by false or misleading statement	5
s 192H(1)	Intention to deceive members or creditors by false or misleading statement of officer of organisation	7	s 176	Director or officer publish false statement	10
Pt 4AB (Identity)					
s 192J	Deal with identification information with intent to commit or facilitate indictable offence	10	n/a		
s 192K	Possess identification information with intent to commit or facilitate indictable offence	7	n/a		
s 192L	Possess equipment to make identification document or thing with intent to commit or facilitate indictable offence	3	n/a		
Pt 5 (Forgery)					
s 253	Make false document	10	s 300(1)	Make false instrument	10
			s 271	Forge will	14
			s 265	Forge bank note	14
s 254	Use false document	10	s 300(2)	Use false instrument	10
s 255	Possess false document	10	s 302	Custody of false instrument	10
s 256(1)	Make or possess equipment for making false document with intent to commit forgery	10	s 302A	Make or possess implement for making false instrument	10

a. Conduct which would have been caught by these repealed provisions may now give rise to offences under either ss 192E(1)(a) or 192E(1)(b), depending on the circumstances.

A comparison with the repealed provisions reveals an overall reduction in the number of offences and the doubling of maximum penalties for some of the key offences such as obtain money/financial advantage by deception or obtain property by deception/false pretences. All of the new offences are drafted to be “technologically neutral”.²⁸

3.1 Fraud offences

The four broad offences under Pt 4AA replaced more than 30 offences under various subdivisions of Pt 4.

The amending Act also inserted a definition of “dishonest” in s 4B of the *Crimes Act 1900*: “dishonest according to the standards of ordinary people and known by the defendant to be dishonest” according to those standards. The definition incorporates objective and subjective components, as recommended by MCLOC,²⁹ and mirrors the definition in the *Criminal Code (Cth)*.³⁰ The rationale for adopting the test espoused in the English case, *R v Ghosh*,³¹ was that a person should not be convicted of a serious offence without a guilty mind.³² For the purposes of sentencing, the hybrid definition supposedly means greater certainty of moral wrongdoing or culpability.³³

Division 1 of Pt 4AA sets out further key concepts. “Deception”, which s 192B defines in similar terms as former s 178BA(2), can take the form of words or other conduct and must be either intentional or reckless.³⁴ Section 192C clarifies that a person cannot obtain the property of another unless intending to permanently deprive the other person of the property, whereas s 192D clarifies that financial advantage or disadvantage can be permanent or temporary.³⁵

3.2 Identity offences

The identity offences in NSW use very similar wording to the model offences proposed by MCLOC in 2008.³⁶ Previously in NSW, such conduct would have been charged under general fraud or forgery provisions such as obtain benefit by deception or use false instrument. The three

28 Second Reading Speech, above n 1, p 19507.

29 *Theft, Fraud, Bribery and Related Offences*, Report, above n 7, p 25.

30 Section 130.3.

31 [1982] QB 1053. Lord Lane CJ, delivering the judgment of the Court of Appeal, stated at 1064: “In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest ... If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest”.

32 Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth), Notes on clauses, at [60].

33 A criticism of the purely objective test is that cases of moral uncertainty need to be eliminated by prosecutorial discretion or, if they proceed to sentence, dealt with more leniently: *Theft, Fraud, Bribery and Related Offences*, Report, above n 7, p 17.

34 The previous authorities on deception and causation should continue to apply: A Steel, “New fraud and identity-related crimes in New South Wales” (2010) 22(3) *JOB* 17 at 18.

35 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002–, “Fraud — Part 4AA Crimes Act 1900” at [5-552]–[5-580] provides suggested directions for numerous offences in Pt 4AA, reflecting the elements of the offences.

36 *Identity Crime*, Final Report, above n 2. See also MCLOC, Model Criminal Code, Ch 3, *Identity Crime*, Discussion Paper, April 2007.

identity offences under ss 192J–192L require an intention to facilitate or commit an indictable offence, which does not necessarily have to be a fraud offence.³⁷

The definition of “deal” under s 192I covers making, supplying or using “identification information”, which in turn is defined broadly to mean information relating to an individual person who is living or dead, real or fictitious, or a body corporate.

A new power was also created to certify that a person has been a victim of an identity offence, irrespective of whether an offender has been convicted.³⁸ The Local Court³⁹ may issue such a certificate, on the application of the victim or on its own initiative, if satisfied on the balance of probabilities of two criteria: that an identity offence has been committed; and that the certificate may assist with problems caused to the victim’s personal or business affairs by the offence.⁴⁰

3.3 Forgery offences

The four new forgery offences replaced approximately 25 offences under the previous version of Pt 5.

Section 252 applies the definitions under the fraud provisions relating to “obtaining property” (s 192C) and “obtaining financial advantage” (s 192D) to forgery offences. The concept of a false document replaces a false instrument. The meaning of “false document” in s 250 includes a definition of “false” which is substantially similar to the definition included in former s 299(1), but unlike former s 299(1) which defined “instrument”, does not define “document”.⁴¹

The offence of possess false document in s 255, which supersedes the offence of custody of false instrument in former s 302, still encompasses the notion of custody under the definition of “possession” in s 7.

3.4 Maximum penalties

3.4.1 Expected impact of increased maximum penalties

In *Markarian v The Queen*,⁴² the High Court confirmed:

“... careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick”.⁴³

37 Theoretically an identity offence “could extend to possessing the street address of a bank to be robbed”, given that the definition of “identification information” under s 192I includes an address: Steel, above n 34, at 20.

38 *Criminal Procedure Act* 1986, s 309A.

39 The District Court and the Supreme Court may also exercise the power in any proceedings for an alleged identity offence: s 309A(9).

40 Section 309A(1).

41 However, “document” is one of the commonly used words defined in the *Interpretation Act* 1987, s 21(1).

42 (2005) 228 CLR 357.

43 *ibid* per Gleeson CJ, Gummow, Hayne and Callinan JJ at [31].

The court also acknowledged in *Muldrock v The Queen*⁴⁴ that an increase in the maximum penalty “is an indication that sentences for that offence should be increased”.⁴⁵

The introduction of a higher maximum penalty than existed for a corresponding repealed offence:

“... require[s] some adjustment to the range of sentences that would formerly have been considered appropriate ... [A] clear expression of legislative will, while permitting some latitude in application, must be given effect”.⁴⁶

Where there is a sharp increase in the maximum penalty for re-enacted offences, a different sentencing range is required and the previous range should not be followed. In *R v Hartikainen*,⁴⁷ Gleeson CJ said that the increase in the maximum penalty for a sexual assault offence from 8 to 14 years “manifested an intention on the part of Parliament substantially to increase the penalties”.⁴⁸

3.4.2 Fraud offences

As Table 1 shows, the maximum penalties for a number of fraud offences are higher than the maximum penalties for previous offences.

The Attorney General (NSW) asserted that doubling the maximum penalty to 10 years’ imprisonment for fraud under s 192E, compared to 5 years under the former s 178BA, “demonstrat[es] how seriously we take the issue”.⁴⁹ This is also consistent with the maximum penalty in the Model Criminal Code of 10 years’ imprisonment.⁵⁰

In relation to false or misleading statement offences, the higher maximum penalty for an offence committed by an officer pursuant to s 192H (7 years) than generally under s 192G (5 years) “is justified by the position of trust and responsibility that the offender is in”.⁵¹

3.4.3 Identity offences

In *Stevens v R*,⁵² Spigelman CJ noted the special features of identity offences:

“Past sentencing practices with respect to the offence of obtaining a benefit by deception ... must be treated with some care ... There are a number of features of identity crimes which involve aggravated effects on victims and the community generally when compared with other forms of obtaining benefit by deception. These will be recognised, not least by increased maximum penalties...”.⁵³

44 (2011) 244 CLR 120.

45 *ibid* per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at [31].

46 *Baumer v The Queen* (1988) 166 CLR 51 at 57.

47 (unrep, 8/6/93, NSWCCA).

48 *ibid*.

49 Second Reading Speech, above n 1, p 19507.

50 Obtain property by deception (s 17.2) and obtain financial advantage by deception (s 17.3): *Theft, Fraud, Bribery and Related Offences*, Report, above n 7, Appendix 1, “Model Criminal Code — Chapters 1–3”, pp 317–318.

51 Second Reading Speech, above n 1, p 19508.

52 (2009) 262 ALR 91.

53 *ibid* at [2].

Some of the organisations which made submissions to the MCLOC discussion paper, *Identity Crime*, called for higher maximum penalties than were nominated by MCLOC.⁵⁴

For dealing in identification information, the maximum penalty recommended by MCLOC in its final report was 5 years.⁵⁵ This was adopted by the Criminal Law Review Division (CLRD) of the Attorney General's Department.⁵⁶ However, when the legislation was introduced, the maximum penalty for the dealing offence under s 192J was 10 years.⁵⁷ No explanation can be found in the extrinsic material for this discrepancy.

Similarly, the maximum penalty for possess identification information under s 192K (7 years) is more than double the penalty of 3 years anticipated by the CLRD⁵⁸ and recommended by MCLOC on the basis that the offence is preparatory in nature.⁵⁹

The maximum penalty for possess equipment to make an identification document under s 192L (3 years) accords with the penalty recommended by MCLOC, which again reasoned that the offence is preparatory in nature.⁶⁰

3.4.4 Forgery offences

The maximum penalties for the previous forgery provisions⁶¹ under Pt 5 ranged from 10 years⁶² to 14 years' imprisonment.⁶³ For some conduct, therefore, the maximum penalty has actually decreased. A judge is entitled to reduce the impact of the former maximum penalty when sentencing fraudulent conduct under a provision that has since been replaced by a provision with a lesser maximum penalty.⁶⁴

54 For example, the ATO generally supported higher penalties than those nominated by MCLOC (p 4); the Australian Federal Police suggested a maximum penalty of 10 years for possessing equipment to create identification information (p 5); the Australian Bankers' Association Inc submitted that 3 years was too low for identity offences and suggested up to 10 years (p 2); and the Victoria Police recommended at least 10 years for identity offences (p 2): <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_submissions>, accessed 30 July 2012.

55 *Identity Crime*, Final Report, above n 2, pp 30, 35.

56 Criminal Law Review Division (CLRD), *Crimes Amendment (Fraud and Forgery) Bill 2009*, Discussion Paper, 2009, p 6. At that stage, the relevant provision (now s 192J) was referred to as "clause 192H(1)".

57 Second Reading Speech, above n 1, p 19508.

58 CLRD, above n 56, p 7. At that stage, the relevant provision (now s 192K) was referred to as "clause 192H(2)".

59 *Identity Crime*, Final Report, above n 2, p 37.

60 *ibid* p 40.

61 The former Pt 5 also encompassed false or misleading applications, information and documents (ss 307A–307C) with maximum penalties of 2 years. These offences are now contained in Pt 5A, separate from forgery, and they are therefore excluded from the comparisons of maximum penalties.

62 A maximum penalty of 10 years applied to false instrument offences (ss 300–302A).

63 A maximum penalty of 14 years applied to forging the Royal seal, bank notes, Acts or proclamations, and certain bonds (ss 253, 255, 260, 265–267, 269–270), forging a will (s 271), forging a judge's or official's signature on a document in the Supreme Court (ss 278, 285), forging a signature or seal on a public document (s 289), further offences relating to false entries on registers or copies of registry documents (ss 291, 296–297), and demanding property by forged instrument (s 298).

64 *R v Ronen* (2006) 161 A Crim R 300 at [74].

The forgery offences in the Model Criminal Code of make, use or possess false documents each suggested a maximum penalty of 7 years and 6 months.⁶⁵ The 10-year maximum penalties for the NSW forgery offences follow the penalties for the main forgery offences in the *Criminal Code* (Cth) instead.⁶⁶

The variation between the maximum penalties for possess false document under s 255 (10 years) and the identity offence of possess identification information under s 192K (7 years) reflects the fact that the latter offence covers a wider range of material, including innocuous material.⁶⁷

3.4.5 Summary disposal in NSW and the effect of jurisdictional maximums

Chapter 5 of the *Criminal Procedure Act* 1986 requires that the indictable offences listed in Tables 1 and 2 of Sch 1 be dealt with summarily in the Local Court unless, in the case of Table 1 offences, the prosecuting authority or person charged elects to have the offence dealt with on indictment; or in the case of Table 2 offences, the prosecuting authority elects to have the offence dealt with on indictment.⁶⁸ The new fraud offences, identity offences (except s 192L) and forgery offences (except ss 256(2) and 256(3)) are Table 1 offences,⁶⁹ while the offences in ss 192L, 256(2) and 256(3) are Table 2 offences.⁷⁰ Whether a matter proceeds on indictment or summarily has a significant bearing on the penalty imposed in these cases, as explained below.

There are no monetary limits on the fraud offences which may be dealt with by the Local Court. Further, Tables 1 and 2 do not categorise the new fraud, forgery and identity offences according to specific monetary amounts. This is to be contrasted with larceny, break and enter, and various other property offences.⁷¹ Ultimately it is for the prosecution to decide whether a matter should be dealt with on indictment. The Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW) on this issue require the prosecutor to assess whether:

“... the accused person’s criminality (taking into account the objective seriousness and his or her subjective considerations) could not be adequately addressed within the sentencing limits of the Local Court; and/or ... it is in the interests of justice that the matter not be dealt with summarily...”⁷²

In relation to fraud offences, the maximum term of imprisonment that can be imposed in the Local Court for a Table 1 or Table 2 offence is 2 years.⁷³ This is a jurisdictional maximum. While this limits the penalty that the court can impose for an individual offence, the various maximum

65 Sections 19.3–19.5: *Theft, Fraud, Bribery and Related Offences*, Report, above n 7, pp 320–321.

66 *Criminal Code* (Cth), ss 145.1, 145.2, 145.3(1) and 145.3(2) (10 years); ss 145.4 and 145.5 (7 years); ss 145.3(3) and 145.3(4) (2 years).

67 CLRD, above n 56, pp 10–11.

68 *Criminal Procedure Act*, s 260.

69 *ibid* at Sch 1, Table 1, Pt 2, cl 4A, Pt 3, cll 10D, 12B.

70 *ibid* at Sch 1, Table 2, Pt 2, cll 4A, 4AA.

71 Larceny and other listed offences (including some former fraud offences such as ss 178BA and 178BB) exceeding \$5,000 are Table 1 offences: *Criminal Procedure Act*, Sch 1, Table 1, Pt 2, cl 3. Larceny and other listed offences not exceeding \$5,000 are Table 2 offences: Sch 1, Table 2, Pt 2, cl 3. Break and enter offences under ss 109 and 112(1) where the value of the property does not exceed \$60,000 are Table 1 offences: Sch 1, Table 1, Pt 2, cll 6, 8. The now-repealed false instrument offences under s 300 not exceeding \$5,000 are Table 2 offences: Sch 1, Table 2, Pt 2, cl 4B.

72 DPP (NSW), *Prosecution Guidelines*, Guideline 8, “Election for offence to be dealt with on indictment”, 20 October 2003 (amended 1 June 2007), at <www.odpp.nsw.gov.au/Guidelines/Guidelines.html>, accessed 30 July 2012.

73 *Criminal Procedure Act*, ss 267(2) and 268(1A).

penalties still give an indication of which offences are more serious than others. *R v Doan*⁷⁴ clearly rejected the argument that the 2-year jurisdictional limit in the Local Court was substituted “in lieu of prescribed maximum penalties”⁷⁵ or that 2 years’ imprisonment should be reserved for a “worst case”.⁷⁶ Rather, as Grove J explained:

“... where the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit”.⁷⁷

A recent report of the NSW Sentencing Council recommended that the 2-year jurisdictional limit be retained rather than increased.⁷⁸

As fraud cases often involve multiple counts, it is also relevant that s 58 of the *Crimes (Sentencing Procedure) Act* 1999 limits the total term of consecutive or partly consecutive sentences imposed in the Local Court to 5 years. For a course of conduct involving many serious offences, it may be relevant to consider whether the 5-year maximum can adequately reflect the criminality involved.

4. Commonwealth provisions

Fraud and forgery offences, which were previously found under the *Crimes Act* 1914 (Cth), were inserted into Pts 7.3 and 7.7 of the *Criminal Code* (Cth) by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth).⁷⁹ The introduction of specific identity offences came much later.⁸⁰ The *Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Act* 2011 (Cth) inserted new “identity fraud offences” into Pt 9.5 of the *Criminal Code* (Cth).⁸¹

74 (2000) 50 NSWLR 115.

75 *ibid* at [35].

76 *ibid*.

77 *ibid*.

78 In 2009, the Attorney General (NSW) sought the advice of the Sentencing Council in relation to a proposal to increase the length of sentences that could be imposed in the Local Court for an individual offence from 2 years to 5 years: NSW Sentencing Council, *An examination of the sentencing powers of the Local Court in NSW*, Report, December 2010, pp 2, 41, at <www.sentencingcouncil.lawlink.nsw.gov.au/sentencing/publications/completed_projects/local_court.html>, accessed 30 July 2012.

79 The Act had commenced fully by 24 May 2001.

80 The passage of the Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2008 was delayed by the 2010 federal election.

81 Commenced on 3 March 2011.

The reform of fraud and forgery offences “simplifie[d] and reduce[d] the size of the Commonwealth statute book”,⁸² replacing “overly complex”⁸³ provisions with a “modern and transparent scheme”⁸⁴ as part of a national initiative.⁸⁵

Later, the introduction of identity offences again referred to the importance of national uniformity and asserted that existing offences did “not adequately cover the varied and evolving types of identity crime”.⁸⁶

The key Commonwealth fraud provisions, namely, obtain property by deception and obtain financial advantage by deception (ss 134.1(1), 134.2(1)), largely comply with the framing of, and the maximum penalties for, the corresponding Model Criminal Code provisions. However, beyond the model offences, further offences, such as a “general dishonesty” offence (s 135.1) with a lesser maximum penalty, were added “in recognition of the vulnerability of Commonwealth assets”.⁸⁷ The key Commonwealth forgery provisions broadly reflect the model offences of make, use and possess false document, although the wording of the Commonwealth provisions is considerably more detailed and the maximum penalty was increased because a disparity between the penalties for fraud and forgery was regarded as “hard to justify”.⁸⁸ The Commonwealth identity offences reflect the substance of, and the maximum penalties for, the model offences of deal in identification information, possess identification information and possess equipment to make identification documentation, but depart in some respects from the framing of the model offences.⁸⁹

Table 2 compares the new Commonwealth fraud and forgery offences with a selection of repealed fraud and forgery offences, shows the new identity offences, and sets out the maximum penalties for each offence when dealt with on indictment.

82 Hon D Williams, Attorney-General (Cth), Second Reading Speech, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, Cth, House of Representatives, *Debates*, 24 November 1999, p 12463.

83 *ibid.*

84 *ibid.*

85 *ibid* p 12465: “The proposed offences will eventually dovetail with equivalent offences at the state and territory level when other jurisdictions implement the model”.

86 “I look forward to my State and Territory counterparts ... implementing identity crime laws so that we have uniform national coverage”: Hon J Ludwig, Second Reading Speech, Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2010, Cth, Senate, *Debates*, 29 September 2010, p 255. As it happened, the identity offence laws in NSW commenced before those of the Commonwealth.

87 Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth), p 6.

88 *ibid*, Notes on clauses, at [262]. Although the rationale of MCLOC for the lower penalty for forgery (7 years 6 months instead of 10 years) was “in recognition that forgery is preparatory to fraud, it [forgery] causes significant harm in its own right”: Notes on clauses, at [262].

89 Explanatory Memorandum, Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2010 (Cth), pp 4–9.

Table 2: Fraud, forgery and identity offences under the *Criminal Code* (Cth) – comparisons with selected corresponding repealed offences

New offences <i>Criminal Code</i> (Cth)			Selected corresponding repealed offences <i>Crimes Act 1914</i> (Cth) (unless otherwise specified)		
Section	Offence	Max penalty (yrs)	Section	Offence	Max penalty (yrs)
Pt 7.3 (Fraudulent conduct)					
s 134.1(1)	Obtain property by deception	10	n/a		
s 134.2(1)	Obtain financial advantage by deception	10	s 29D	Defraud Commonwealth	10
			s 29A	Obtain benefit from Commonwealth by false pretence	5
			s 29B	Impose on Commonwealth by untrue representation	2
s 135.1	General dishonesty	5	n/a		
s 135.4	Conspiracy to defraud Commonwealth	10	ss 86A, 86(2), 29D	Conspiracy to defraud Commonwealth	20
Pt 7.7 (Forgery and related offences)					
s 144.1	Forgery	10	s 67(b)	Forge Commonwealth document	10
			s 85G(1)	Forge postage stamp	10
s 145.1	Use forged document	10	s 67(b)	Utter forged document knowing forged	10
s 145.2	Possess forged document	10	n/a ^a		
ss145.3(1), (2)	Possess, make or adapt device for making false document with intent to commit forgery	10	n/a ^b		
s 145.4	Falsify documents	7	s 72	Falsify records by officer	7
			s 61 ^c	Official falsify records	7
Pt 9.5 (Identity crime)					
s 372.1	Deal in identification information	5	n/a		
s 372.2	Possess identification information	3	n/a		
s 372.3	Possess equipment used to make identification documentation	3	n/a		

- a. As there was no single matching offence, the appropriate provision depended on the circumstances, for example, possess false passport was an offence under the *Passports Act 1938* (Cth) (renamed *Foreign Passports (Law Enforcement and Security) Act 2005*), s 9A (rep).
- b. As there was no single matching offence, the appropriate provision depended on the circumstances, for example, possess instrument to make counterfeit money under the *Crimes (Currency) Act 1981* (Cth), s 11(1)(c).
- c. *Financial Management and Accountability Act 1997* (Cth).

4.1 Comparing maximum penalties for Commonwealth and NSW offences

With regard to the issue of a uniform national approach, there is some correlation between the maximum penalties for fraud and forgery offences in NSW and the Commonwealth.

The maximum penalty of 10 years' imprisonment for obtain property or financial advantage under ss 134.1(1) and 134.2(1) of the *Criminal Code* (Cth) is the same as for obtain property or financial advantage under s 192E(1) of the *Crimes Act* 1900. Similarly, the maximum penalty of 10 years' imprisonment for forgery, use forged document, or possess forged document under ss 144.1, 145.1 and 145.2 of the *Criminal Code* (Cth) is the same as for make false document, use false document, or possess false document under ss 253, 254 and 255 respectively of the *Crimes Act* 1900.

However, there are marked differences between some of the penalties for the Commonwealth and NSW identity offences. The Commonwealth's rationale for a maximum penalty of 3 years for possess identification information (s 372.2) or possess the equipment to make identification documentation (s 372.3) is that these are preparatory offences which justify a lower penalty than 5 years for the main offence of deal in identification information (s 372.1).⁹⁰ The maximum penalty in NSW for possess equipment (s 192L) is the same as the Commonwealth, but the maximum penalties of 7 years for possess identification information (s 192K) and 10 years for deal in identification information (s 192J) are double those of the Commonwealth, reducing the utility of sentencing comparisons.

These differences, where the conduct is the same or similar, may raise an inconsistency issue as was considered by the High Court in *Momcilovic v The Queen*.⁹¹

Section 4C(2) of the *Crimes Act* 1914 (Cth) provides that where an act or omission constitutes an offence under both Commonwealth and State laws and an offender has been punished for the offence under State law, the offender is not liable for punishment in respect of the Commonwealth offence. A mirror provision exists in NSW law.⁹²

Where an offender is sentenced for conduct which might constitute an offence against both Commonwealth and State laws, and the Commonwealth statutory regime is less punitive, there is no requirement for the court to reduce the sentence for the State offence to bring a degree of conformity with the Commonwealth offence.⁹³

4.2 Comparing Commonwealth and NSW cases

Commonwealth sentencing cases can inform NSW cases in a general sense when a principle such as character, motivation or totality is demonstrated in a useful way in a case which involves Commonwealth charges and is equally applicable to a case involving NSW charges. The role or position of an offender can also be very similar between the jurisdictions, for example, an employee who acts fraudulently in a NSW or a Commonwealth government organisation.

90 *ibid* pp 6, 8.

91 (2011) 85 ALJR 957. See also the discussion in P Johnson, "Consistency in sentencing for federal offences — some issues arising from parallel or overlapping federal and State offences" (2012) 24(3) *JOB* 17 at 19.

92 Section 20 of the *Crimes (Sentencing Procedure) Act* 1999 provides that if a penalty has been imposed on the offender under Commonwealth law the offender is not liable to any penalty for the same offence under NSW law.

93 *R v El Helou* (2010) 267 ALR 734 at [90]. This decision was adopted by the Court of Appeal of Victoria in *Pantazis v R* [2012] VSCA 160 at [58].

Further, it may be open to a court sentencing for a NSW fraud offence to have regard to a sentence imposed for a Commonwealth fraud offence where the same maximum penalty applied, conduct of a similar nature occurred, and the plea and other features of the case were comparable. In relation to drug offences, Simpson J stated in *DPP (Cth) v De La Rosa*:⁹⁴

“Both state and federal governments have legislated in respect of drug offences, some of them very similar, even parallel. It may seem odd if, in respect of comparable crimes, an offender sentenced in, say, New South Wales, under federal law was treated markedly differently from an offender sentenced in New South Wales under State law.”⁹⁵

As more than 10 years have passed since the current Commonwealth fraud and forgery provisions were introduced, there is a substantial body of case law. The cases under the general fraud provision (s 134.2(1)) span a broad range of conduct including failure to terminate the social security payments of a deceased parent,⁹⁶ tax evasion⁹⁷ and fraudulent access of funds by government employees.⁹⁸

Further reference to Commonwealth cases will be made below in the context of discussing sentencing principles.

As Commonwealth identity offences were introduced after NSW, there was a lack of available cases in the higher courts at the time of writing.

4.3 Summary disposal of Commonwealth offences

The fraud, forgery and identity offences (with one exception⁹⁹) are indictable offences. Section 4J(1) of the *Crimes Act 1914* (Cth) provides that generally an indictable offence may be dealt with summarily if the maximum penalty does not exceed 10 years' imprisonment and the prosecutor and defendant consent. When an offence is dealt with summarily, the maximum term of imprisonment which can be imposed in the Local Court is 12 months where the maximum penalty on indictment does not exceed 5 years, or 2 years where the maximum penalty on indictment exceeds 5 years.¹⁰⁰

However, s 4J(4) further provides that if the offence relates to property with a value of \$5,000 or less, the Local Court may deal with an indictable offence, if it thinks fit, on the request of the prosecutor. In this situation, the court may impose a maximum sentence of imprisonment not exceeding 12 months.¹⁰¹

94 (2010) 79 NSWLR 1.

95 *ibid* at [297].

96 *R v Schultz* [2008] NSWCCA 199.

97 *Thorn v R* (2009) 198 A Crim R 135; *Schembri v R* (2010) 78 ATR 159; [2010] NSWCCA 149.

98 *R v Pipes* [2004] NSWCCA 351; *Dwayhi v R* (2011) 205 A Crim R 274.

99 The offence of obtain financial advantage under s 135.2 has a maximum penalty of 12 months' imprisonment. Section 4H(a) of the *Crimes Act 1914* (Cth) provides that an offence punishable by imprisonment not exceeding 12 months is a summary offence.

100 Section 4J(3).

101 Section 4J(5).

The Commonwealth prosecutorial guidelines state that, in determining whether to proceed on indictment, regard should be had to various factors including whether the alleged offence is of a serious character; the adequacy of sentencing options and available penalties for summary disposal; and the greater deterrent effect of a conviction on indictment.¹⁰² These criteria are broader than the NSW prosecutorial guidelines.

5. Interstate provisions

As the package of fraud legislation which commenced in NSW in 2010 was partly in response to the national approach of the Model Criminal Code, brief observations will be made on the corresponding laws in other States. The purpose of this is to demonstrate differences of approach and a lack of uniformity between jurisdictions in terms of the number of offences, the elements of offences, and maximum penalties.

5.1 Identity offences

South Australia,¹⁰³ Queensland¹⁰⁴ and Victoria¹⁰⁵ introduced legislation for identity offences before NSW. Western Australia's identity offences legislation recently commenced.¹⁰⁶ Tasmania does not currently have separate provisions for identity offences.

In South Australia, Pt 5A (Identity theft) of the *Criminal Law Consolidation Act 1935 (SA)* preceded MCLOC's final report on identity crime in 2008 and does not mirror the model offence provisions. Produce or possess "prohibited material" (s 144D) which is defined as anything (including personal identification information) that enables a person to assume a false identity or to exercise a right of ownership belonging to someone else, has a maximum penalty of 3 years. The other identity offences do not have fixed maximum penalties. Rather, a person is liable to the penalty for the serious criminal offence that the person is attempting to commit by assuming a false identity (s 144B) or misusing personal identification information (s 144C).

In Queensland, although s 408D of the *Criminal Code 1899 (Qld)* was also introduced prior to MCLOC's final report, it uses similar concepts in creating the offences of deal with or obtain¹⁰⁷ identification information (s 408D(1)) and possess equipment (s 408D(1A)), which each have a maximum penalty of 3 years.

In Victoria, Pt I, Div 2AA (Identity crime) of the *Crimes Act 1958 (Vic)* contains three offences that are broadly similar to the NSW and Commonwealth provisions, although there is an additional requirement of intention.¹⁰⁸ Make, use or supply identification information (s 192B) has a maximum penalty of 5 years' imprisonment, while possess identification information (s 192C) or possess equipment (s 192D) each has a maximum penalty of 3 years.

102 DPP (Cth), *Prosecution Policy of the Commonwealth*, November 2008, at [6.12], at <www.cdpp.gov.au/Guidelines/Guidelines.html>, accessed 30 July 2012.

103 *Criminal Law Consolidation (Identity Theft) Amendment Act 2003 (SA)* (commenced on 5 September 2004).

104 *Criminal Code and Civil Liability Amendment Act 2007 (Qld)* (commenced on 20 March 2007).

105 *Crimes Amendment (Identity Crime) Act 2009 (Vic)* (commenced on 16 July 2009).

106 *Criminal Code Amendment (Identity Crime) Act 2010 (WA)* (commenced on 21 April 2012).

107 Section 408D(7) defines "obtaining" identification information to include possessing or making that information.

108 In addition to the intention to commit an indictable offence, ss 192B and 192C each require the offender to be "aware that, or aware that there is a substantial risk that, the information is identification information".

In Western Australia, Ch LI (Identity crime) of the *Criminal Code* (WA) enacts three offences similar to the model offences, with maximum penalties of 7 years for make, use or supply identification material (s 490), 5 years for possess identification material (s 491), and 5 years — higher than the other States — for possess identification equipment (s 492).

The utility of comparing interstate sentences for identity offences is diminished by the fact that the maximum penalties are generally well below the 10-year maximum for deal with identification information and 7 years for possess identification information in NSW. Alex Steel has criticised this disparity:

“... NSW has by far the most punitive regime. Identity crime is a national and international crime, rather than one that is likely to occur with different intensities and in different guises in local areas. Given this, there is no justification for such a disparity between maximum sentences. It strongly suggests that the setting of penalties is based on local political factors rather than any reasoned national approach”.¹⁰⁹

5.2 Fraud and forgery offences

In South Australia, Pt 5 (Offences of dishonesty) of the *Criminal Law Consolidation Act* 1935 (SA) was substituted¹¹⁰ in response to the MCLC 1995 report,¹¹¹ although local variations in the construction prevailed.¹¹² The result was a broad fraud offence of deception (s 139) and a broad forgery offence of dishonest dealings with documents (s 140), both with two-tiered maximum penalties of 10 years for a basic offence and 15 years for an aggravated offence.

Victoria, like NSW and the Commonwealth, has two main fraud offences of obtain property by deception (s 81) and obtain financial advantage by deception (s 82) under the *Crimes Act* 1958 (Vic), with equivalent maximum penalties of 10 years. However, numerous other specific fraud offences have been retained.¹¹³ Although there is no category in the Act headed “forgery”, such conduct is covered by s 83A which is titled “falsification of documents” and contains eight offences, including make, use, copy and possess a false document, mostly with 10-year maximums.

In Queensland, although various historical provisions have been omitted from the *Criminal Code* 1899 (Qld) in recent decades, there is still an assortment of provisions.¹¹⁴ The general fraud offence (s 408C) has a maximum penalty of 5 years except for certain offenders such as directors, who attract a maximum penalty of 12 years. The general forgery and uttering offence

109 Steel, above n 14, at 529.

110 The *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act* 2002 (SA) was assented to on 31 October 2002 and s 4 of the amending Act (which substituted Pt 5) commenced on 5 July 2003.

111 *Theft, Fraud, Bribery and Related Offences*, Report, above n 7.

112 The MCLC model was regarded as “not comply[ing] with the drafting style of the South Australian statute book. Consequently, an entirely fresh version adopting a substantially modified approach to the whole subject has been drafted. The result is a Bill quite different in form from other models, although its effect is very similar”: Hon MK Brindal, Second Reading Speech, *Criminal Law Consolidation (Offences of Dishonesty) Amendment Bill*, SA, House of Assembly, *Debates*, 14 November 2001, p 2770.

113 These include false accounting (s 83), suppression of documents (s 86) and false statements by officers (s 85), each with a 10-year maximum penalty; and fraudulently inducing persons to invest (s 191) with a 15-year maximum penalty.

114 For example, fraudulent concealment of documents (s 399) with maximum penalties of 3 years or 14 years depending on the type of document, and falsifying warrants for money payable under public authority (s 498) with a maximum penalty of 7 years.

(s 488) has three categories of maximum penalties (3, 7 or 14 years) depending on the type of document, while the general false instrument offence (s 510) has a maximum penalty of 14 years. None of these penalties correspond to the NSW or Commonwealth maximum penalty of 10 years for general fraud or forgery.

In Western Australia, the general fraud offence (s 409) in the *Criminal Code* (WA) has a 7-year maximum penalty which, uniquely, rises to 10 years if the victim is aged over 60. Additional fraud offences relate to companies (ss 418–421) and falsification of records (s 424). The forgery and personation offences,¹¹⁵ carrying various maximum penalties, are also not reflective of the model offence provisions.

In Tasmania, the Parliament has not responded to the national model. While there is a general fraud offence of dishonestly acquiring a financial advantage in the *Criminal Code* (Tas) (s 252A), there are no individual maximum penalties,¹¹⁶ and numerous historical fraud and forgery offences remain.¹¹⁷

This brief analysis shows that despite some efforts to achieve national uniformity, there are substantial differences between jurisdictions.

6. Relevance of past sentencing principles

Many of the existing principles in sentencing fraud cases will continue to apply to the new fraud, forgery and identity provisions. It can be expected that judicial officers in NSW will “not ignore the very significant body of case law built up in this state regarding the now repealed sections”.¹¹⁸ However, greater emphasis may also be given to some principles, such as prevalence and general deterrence, if the scale and value of fraudulent activity expands.

Section 21A of the *Crimes (Sentencing Procedure) Act* sets out the aggravating and mitigating features which are to be considered at sentence, in addition to any other matters to be taken into account by the court under any Act or rule of law. Section 21A expressly preserves the common law of sentencing. Particular care is needed in applying the aggravating factors referred to in s 21A(2) as the provision specifically states that factors which are elements of the offence are not to be taken into account as aggravating features.¹¹⁹ For example, the aggravating factor of committing an offence for financial gain (s 21A(2)(o)) is an element of obtaining a financial advantage (s 192E(1)(b)), while the aggravating factor of abusing a position of trust (s 21A(2)(k)) is an element of make false or misleading statement by officer of organisation (s 192H). Aggravating factors which are inherent to an offence similarly cannot be taken into account unless they exceed the usual case.¹²⁰

¹¹⁵ These offences (ss 473–474, 488, 510–514) are spread across three Chapters.

¹¹⁶ All indictable offences under the *Criminal Code* (Tas), with the exception of murder, have a maximum penalty of 21 years: s 389(3).

¹¹⁷ Under Pt VI (Crimes Relating to Property) and Pt VII (Frauds by Personation and Relating to Trade).

¹¹⁸ R Mayo, “Fraud & forgery: definitions problematic in new white-collar crime laws” (2010) 48(3) *LSJ* 51 at 54.

¹¹⁹ See also *R v Wickham* [2004] NSWCCA 193 at [22]; *R v Johnson* [2005] NSWCCA 186 at [22].

¹²⁰ *R v Yildiz* (2006) 160 A Crim R 218 at [37]; *Elyard v R* [2006] NSWCCA 43 at [44].

6.1 Whether to impose full-time imprisonment

Traditionally, the focus of the criminal law on preserving the peace meant that personal offences involving violence were regarded as more serious than financial or “white collar” crime.¹²¹ However, in recent years there has been an increasing concern with the integrity of financial markets and the potential for fraud to undermine public confidence and damage the economic wellbeing of society.¹²² These changing attitudes have influenced the readiness of the courts to impose sentences of imprisonment for fraud-related offences.

6.1.1 Imprisonment as last resort

The common law has long accepted that full-time imprisonment is a sanction of last resort. According to s 5(1) of the *Crimes (Sentencing Procedure) Act*, a court must not sentence an offender to imprisonment unless satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.¹²³ “Imprisonment” means a suspended sentence, an intensive correction order (ICO), home detention or full-time imprisonment. The “alternatives” referred to in s 5(1) are non-custodial alternatives and include community service, a good behaviour bond, the recording of a conviction with no further penalty, and the dismissal of charges and conditional discharges under s 10 without recording a conviction.

6.1.2 Alternative forms of imprisonment

After deciding that a sentence of imprisonment is appropriate having regard to s 5(1), the term of imprisonment should be determined. The court must decide the appropriate term before determining that there is an alternative to full-time imprisonment.¹²⁴ Once the term of sentence is set, a determination must then be made as to whether the sentence should be served by way of a suspended sentence, home detention, ICO or full-time custody.¹²⁵ Suspended sentences and ICOs are unavailable if the term is greater than 2 years,¹²⁶ while home detention is unavailable if the term is greater than 18 months.¹²⁷ Where these sentencing options are unavailable, the sentence of imprisonment must be served by way of full-time custody. The courts have recognised the inherent leniency of some forms of imprisonment in the context of sentencing for insider trading offences. For example in *R v McKay*,¹²⁸ Whealy J observed that:

“... the imposition of suspended sentences would send an inadequate message to the business and share trading community. It would not only give the appearance of inadequacy, it would, in fact, be totally inadequate ... [T]he real bite of general deterrence occurs only where an actual custodial sentence is imposed ...”.¹²⁹

121 P McClellan, “White collar crime: perpetrators and penalties”, Keynote Address, Fraud and Corruption in Government Seminar, University of NSW, 24 November 2011, Sydney, pp 23–24, citing Gleeson CJ in *R v El-Rashid* (unrep, 7/4/95, NSWCCA), at <[www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/McClellan241111v2.pdf/\\$file/McClellan241111v2.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/McClellan241111v2.pdf/$file/McClellan241111v2.pdf)>, accessed 30 July 2012.

122 *ibid* pp 24, 28, citing *R v Rivkin* (2003) 198 ALR 400 at [44].

123 *Blundell v R* (2008) 184 A Crim R 120 at [28]. Section 17A(1) of the *Crimes Act* 1914 (Cth) is the parallel Commonwealth provision.

124 *R v Assaad* [2009] NSWCCA 182 at [33].

125 *R v Zamagias* [2002] NSWCCA 17 at [25]–[29]; *Douar v R* (2005) 159 A Crim R 154 at [72].

126 *Crimes (Sentencing Procedure) Act*, ss 7(1), 12(1).

127 *Crimes (Sentencing Procedure) Act*, s 6(1).

128 (2007) 61 ACSR 470; [2007] NSWSC 275.

129 *ibid* at [73], citing *R v Zamagias* [2002] NSWCCA 17 at [29]–[32] and *R v Boulden* [2006] NSWSC 1274 at [51].

6.1.3 The current ICO debate

ICOs were introduced relatively recently in NSW and may be available when a sentence of imprisonment of not more than 2 years is imposed.¹³⁰ ICOs were not intended as a substitute for the custodial option of periodic detention, which was abolished at the same time.¹³¹ Periodic detention could be imposed for sentences of imprisonment up to 3 years. This raises the issue of whether there is now a gap in sentencing options, particularly affecting fraud offenders who are well suited to maintaining employment or business activities while serving detention on weekends.¹³²

In *R v Boughen*,¹³³ Simpson J found that the imposition of an ICO inherently carried a high degree of leniency which cut across the frequently stated principles of sentencing for tax evasion.¹³⁴ Her Honour also stated that the focus of an ICO is rehabilitation, which was an irrelevant consideration for the respondents as they had minimal prospects of re-offending.¹³⁵ The decision has been criticised because it downplays the onerous nature of an ICO.¹³⁶ Some commentators have expressed concern that the decision in *Boughen* may have the effect of “drastically reducing”¹³⁷ the availability of ICOs to cases in which there is a particular need for rehabilitation. It may be that offenders amplify problems such as alcoholism or mental illness to come within ICO territory. On 6 August 2012 in *R v Pogson*, the NSW Court of Criminal Appeal sat a 5-judge bench to consider a Crown appeal against ICOs imposed for fraud offences. One ground was that the sentencing judge erred by imposing an ICO for these types of offences. The court will consider the correctness of Simpson J’s approach in *Boughen*. At the time of writing, judgment in *Pogson* was reserved.

6.1.4 Fines

Section 15 of the *Crimes (Sentencing Procedure) Act* provides that a person convicted on indictment may, in addition to, or instead of, any other punishment, be sentenced to a fine of up to 1,000 penalty units.¹³⁸ However, other provisions restrict the use of fines in combination with some penalties.¹³⁹

When an indictable offence is prosecuted summarily, the maximum fine that the Local Court may impose for a Table 1 offence (that is, all the new fraud, identity and forgery offences except those stated below) is 100 penalty units or the maximum fine provided by law for the offence, whichever is the smaller fine.¹⁴⁰ Further, instead of imposing a term of imprisonment, the Local

130 *Crimes (Sentencing Procedure) Act*, s 7(1).

131 *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (commenced on 1 October 2010). The Agreement in Principle Speech confirmed that the ICO “is not intended to be a direct replacement of periodic detention”: Hon B Collier, Agreement in Principle Speech, *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010*, NSW, Legislative Assembly, *Debates*, 10 June 2010, p 24233.

132 *R v Hunt* [2002] NSWCCA 482 at [33].

133 [2012] NSWCCA 17.

134 *ibid* at [111].

135 *ibid* at [109]–[110].

136 Open letter from Law Society of NSW President to the NSW Law Reform Commission, 27 March 2012, at <www.lawsociety.com.au/idc/groups/public/documents/internetpolycy submissions/591253.pdf>, accessed 30 July 2012.

137 A Tiedt, “Court limits use of intensive correction orders” (2012) 50(4) *LSJ* 40 at 41.

138 One penalty unit is currently equal to \$110: *Crimes (Sentencing Procedure) Act*, s 17.

139 For example, ss 82(1), 90(1) and 95(c)(ii) of the *Crimes (Sentencing Procedure) Act* prohibit the imposition of a fine as a condition of a home detention order, community service order, or good behaviour bond respectively.

140 *Criminal Procedure Act*, s 267(3).

Court may impose a fine not exceeding 100 penalty units for a Table 1 offence in any case where a fine is not otherwise provided by law for the offence.¹⁴¹

For offences under Table 2 (that is, the identity offence under s 192L and the forgery offences under ss 256(2) and 256(3)), the maximum fine is 50 penalty units, unless the value of any property or amount of money concerned does not exceed \$2,000, in which case the maximum fine is 20 penalty units.¹⁴²

Fines have commonly been imposed for fraud¹⁴³ and forgery¹⁴⁴ offences in the Local Court, both under the old and new provisions.

6.2 Special circumstances

A common practice when imposing sentences of imprisonment in fraud cases in NSW in the past was to reduce the proportion of the non-parole period and increase the balance of term, thereby ensuring that a shorter period was spent in custody. Varying the statutory proportion in this way required a finding of special circumstances.¹⁴⁵ The justification for such an approach, as stated in *R v Corbett*,¹⁴⁶ was that it reflected the need for general deterrence while giving due account to the fact that white collar offenders frequently have no prior criminal history, are unlikely to re-offend, and have good prospects of rehabilitation.

The reasoning in *Corbett* for imposing a lengthy parole period has since been discredited. In *Scanlan v R*,¹⁴⁷ the court disagreed that a similar approach to *Corbett* should be followed.¹⁴⁸ The same submission was rejected in *McMahon v R*¹⁴⁹ as “quite out of step with current community standards. The community now views white collar crime very seriously”.¹⁵⁰ Instead, the court¹⁵¹ followed the approach of *Hili v The Queen*,¹⁵² in which the High Court stated that each case depended on its own facts and the non-parole period should be fixed accordingly.¹⁵³

141 *Criminal Procedure Act*, s 267(5).

142 *Criminal Procedure Act*, s 268(2)(b).

143 Statistics on JIRS for dishonestly obtain financial advantage by deception (s 192E(1)(b) of the *Crimes Act* 1900) show that a fine only was imposed in 20% of 471 sentence cases from February 2010 to December 2011. For the repealed offence of obtain money or valuable thing by deception (s 178BA(1)), up to \$2,000 in value, a fine only was imposed in 22% of 1,213 sentence cases from January 2008 to December 2011.

144 Statistics on JIRS for make false document to obtain financial advantage (s 253(b)(ii) of the *Crimes Act* 1900) show that a fine only was imposed in 12% of 26 sentence cases from February 2010 to December 2011. For the similar repealed offence of make false instrument with intent (s 300(1)), up to \$2,000 in value, a fine only was imposed in 12% of 83 sentence cases from January 2008 to December 2011.

145 *Crimes (Sentencing Procedure) Act*, s 44(2).

146 (1991) 52 A Crim R 112 at 117.

147 [2006] NSWCCA 238.

148 *ibid* at [89]–[90].

149 [2011] NSWCCA 147 at [82]–[83].

150 *ibid* at [83].

151 *ibid* at [85].

152 (2010) 242 CLR 520.

153 *ibid* at [44].

6.3 Prevalence of offence

Where a court approaches a sentencing exercise on the basis that the increasing prevalence of a particular crime calls for an increase in the preceding pattern of sentencing, the judge would need to be satisfied, on the basis of proper and sufficient evidence, that the factual assumption justifying such an increase is correct.¹⁵⁴

A court can take judicial notice of a statement by an intermediate appellate court as to the prevalence of an offence. In *Stevens v R*,¹⁵⁵ Spigelman CJ acknowledged that “[i]dentity crime has attained that degree of prevalence to which criminal sentencing has always responded”.¹⁵⁶ The same can be said of fraud generally.

6.4 General deterrence

In serious cases of fraud, general deterrence is very important, although mitigating circumstances and rehabilitation of the offender must still be considered.¹⁵⁷ General deterrence is also likely to have a more profound effect on “white collar criminals” as they are “rational, profit seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished”.¹⁵⁸ American studies have found that non-violent offenders such as forgers are “more aware of the risks”¹⁵⁹ of apprehension and the likely punishment than violent offenders, while tax evaders are influenced by a “low-perceived likelihood of detection”¹⁶⁰ and a belief that their peers are engaging in similar conduct.

There is evidence across fraud cases of judicial reluctance to punish tax evaders as heavily as social security offenders.¹⁶¹ In *Boughen*, Simpson J noted the tendency for the latter offenders to be “less privileged, less prosperous, less educated”¹⁶² whereas tax offenders are often “intelligent, professionally successful, financially secure, prosperous”.¹⁶³ Her Honour concluded:

“The community cannot afford for judges to be squeamish about discharging their duty, however personally painful it may sometimes be. To fail to sentence middle class offenders commensurately with social security offenders risks bringing the administration of justice into disrepute as perpetrating class bias.”¹⁶⁴

154 *R v House* [2005] NSWCCA 88 at [23].

155 (2009) 262 ALR 91.

156 *ibid* at [3].

157 *Kovacevic v Mills* (2000) 76 SASR 404 at [43], reconsidering *R v Cameron* (unrep, 19/7/93, SACCA) which said that in such cases deterrence “must be paramount” and “take priority over other considerations”.

158 *DPP (Cth) v Gregory* (2011) 211 A Crim R 147 at [53].

159 McClellan, above n 121, p 30.

160 *ibid* p 31.

161 *R v Boughen* [2012] NSWCCA 17 at [91]. The frequency of Crown appeals against sentences imposed in tax cases is evidence of this leniency: at [69]–[74]; *DPP (Cth) v Goldberg* (2001) 184 ALR 387; *DPP (Cth) v Gregory* (2011) 211 A Crim R 147; *R v Jones*; *R v Hilli* (2010) 76 ATR 249; [2010] NSWCCA 108.

162 [2012] NSWCCA 17 at [76].

163 *ibid* at [96].

164 *ibid*.

General deterrence will clearly continue to be important for the new fraud offences. In *Stevens*, anticipating the legislative changes in NSW, Spigelman CJ stated:

“... the significance of general deterrence in the exercise of the sentencing discretion will remain a matter to which particular weight must be given”.¹⁶⁵

In the same case, McClellan CJ at CL said in relation to the electronic banking system:

“If public confidence in the integrity of the system is to be maintained the courts have an obligation to ensure that when dishonest breaches of its security are identified the offenders are appropriately punished. Both personal and general deterrence are of particular significance in relation to these types of offences.”¹⁶⁶

General and specific deterrence are also matters of particular importance where false identities are used, and will continue to be so.¹⁶⁷

6.5 Fact finding and the *De Simoni* principle

A sentencing judge cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence. The principle was stated by the High Court in *The Queen v De Simoni*.¹⁶⁸

The issue is relevant to a number of fraud-related offences. For example, with regard to the identity offences in NSW, if an offender’s conduct involved possessing and dealing with identification information, but the offender pleaded guilty to possession (s 192K: maximum penalty 7 years), the dealing behaviour which carries a higher maximum penalty (s 192J: maximum penalty 10 years) cannot be taken into account.

It is therefore important in particularising the facts, and in any fact-finding exercise at sentence, that the facts reflect the charge and do not go beyond it.

6.6 Extent of loss and duration of offending

The amount of money involved in premeditated deception, and the period of time over which offences are committed, are significant factors in determining the extent of criminality.¹⁶⁹ These factors may also influence the decision to prosecute the matter summarily or on indictment, although in NSW there are no monetary limits and frauds worth millions of dollars are dealt with in the Local Court.¹⁷⁰

¹⁶⁵ (2009) 262 ALR 91 at [7].

¹⁶⁶ *ibid* at [79].

¹⁶⁷ *Van Haltren v R* (2008) 191 A Crim R 53 at [87].

¹⁶⁸ (1981) 147 CLR 383 at 389.

¹⁶⁹ *R v Mungomery* (2004) 151 A Crim R 376 at [40]; *R v Hawkins* (1989) 45 A Crim R 430 at 435, *R v Mears* (1991) 53 A Crim R 141 at 145; *R v Woodman* [2001] NSWCCA 310 at [29].

¹⁷⁰ J Sutton and R Mayo, “Frauds in the Local Court: a guide to sentencing”, paper presented at the NSW State Legal Conference, 26 March 2012, Sydney. Among the examples given of fraud cases conducted in the Local Court was a case in which the loss was \$4.2 million.

However, expansion in the scale and value of frauds due to factors including the borderless nature of computer technology and the participation of crime syndicates across national boundaries, may contribute to a shift in the severity of sentences and in the perceived need for such matters to be prosecuted on indictment.¹⁷¹

6.7 Role and position of offender

Whether the offender was the instigator of a fraudulent scheme or was prompted by another person to commit the offence can be relevant on sentence. However, it is important that an unwitting participant, upon discovering the fraudulent nature of an activity, ceases involvement promptly. In *Boughen*, the offenders were “inveigled, or lured”¹⁷² into a tax evasion scheme by a qualified accountant. Simpson J reasoned:

“Had the fraudulent conduct ceased on, or soon after, the respondents’ realisation of its true character, this circumstance may have had some weight. Given that the conduct continued for another seven years after that realisation, its significance is diminished to almost nothing.”¹⁷³

It is an aggravating factor under s 21A(2)(n) of the *Crimes (Sentencing Procedure) Act* that the offence is part of organised criminal activity. Before a court applies s 21A(2)(n) it needs to be satisfied that the offences involved sufficient “repetition and system” as explained in *Hewitt v R*.¹⁷⁴ The offender’s position in a syndicate’s hierarchy is a contributing factor to the objective seriousness of the offence, with the closeness of the offender to the principal of the syndicate generally increasing the seriousness of the offence.¹⁷⁵

Numerous offenders hold trusted positions of employment in the private or public organisations which they defraud. Breach of trust is an aggravating factor under s 21A(2)(k). Such offenders are able to use their knowledge of internal systems and procedures to their own fraudulent advantage.¹⁷⁶ Seniority of position is therefore relevant, as those in executive positions have a “greater ability to defer and perhaps avoid detection”,¹⁷⁷ although each case must be assessed on its merits.¹⁷⁸

171 In America, fraudulent “Ponzi” schemes, which pay returns to investors from their or other investors’ own money rather than from profits earned, have resulted in multi-billion dollar losses and heavy sentences. In 2009, financier Bernard Madoff was sentenced to 150 years’ imprisonment for 11 fraud offences relating to a Ponzi scheme: DB Henriques, “Madoff is sentenced to 150 years for Ponzi scheme”, *New York Times* (online), 29 June 2009, at <www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all>, accessed 30 July 2012. Another financier, Allen Stanford, was convicted in March 2012 of 13 offences in connection with defrauding nearly 30,000 investors of \$7 billion in over 110 countries. In June 2012, he was sentenced to 110 years’ imprisonment: AFP, “Stanford sentenced to 110 years for \$US7b Ponzi scheme”, *Sydney Morning Herald* (online), 15 June 2012, at <www.smh.com.au/business/world-business/stanford-sentenced-to-110-years-for-us7-b-ponzi-scheme-20120615-20dpz.html>, accessed 30 July 2012.

172 [2012] NSWCCA 17 at [95].

173 *ibid*.

174 (2007) 180 A Crim R 306 at [25], citing *NCR Australia v Credit Connection* [2005] NSWSC 1118 at [76].

175 *JOD v R* [2009] NSWCCA 205 at [74]. The sentencing judge found that the applicant occupied “a level within the syndicate ... near to that of its principal”, as he ran field operations on behalf of the principal, advised him about the operation, attended financial institutions to make fraudulent claims, instructed other offenders, and received 10–25% of the money obtained (depending on the risk involved in each offence): at [18]–[24], [74].

176 *Quetcher v R* [2010] NSWCCA 257 at [35] where the applicant was the manager of a Medicare branch.

177 *R v Pantano* (1990) 49 A Crim R 328 at 338.

178 *ibid*.

In cases where the fraud is committed against investors, s 21A(2)(k) does not change the common law principle that, for a relationship of trust to exist, there must have been at the time of offending a special relationship between the victim and offender. A position of trust does not arise simply because the two persons are involved in a commercial relationship.¹⁷⁹

6.8 Prior good character

A sentencing judge is bound to take into account that an offender is of prior good character, but the weight to be given to this factor will vary according to all of the circumstances.¹⁸⁰

A breach of trust is usually only able to be committed because of the previous good character of the person who has been placed in a trusted position.¹⁸¹ It is a well-established principle in fraud cases that where the offender has been appointed to such a position because of his or her good character, and abuses that trust, good character will be of less relevance.¹⁸²

Similarly, where there are repeated offences over a period of time, or the offender has engaged in a course of conduct to avoid detection, prior good character will carry less weight.¹⁸³

6.9 Planning

The degree of planning has long been recognised as a factor relevant to assessing the seriousness of an offence.¹⁸⁴ Additionally, an aggravating factor that can be taken into account under s 21A(2)(n) is that the offence was part of planned activity. Premeditated and systematic deception is more typical in serious fraud cases than impulsive or isolated conduct. Offences involving large or substantial sums, accompanied by systematic dishonesty, planning and a degree of sophistication, usually require substantial sentences of imprisonment in the absence of special features.¹⁸⁵

Organised crime, as previously mentioned, involves significant planning and may be on the rise due to the international nature of computer technology, which is often used in fraudulent activities.

179 *Suleman v R* [2009] NSWCCA 70 at [22]; *R v Martin* [2005] NSWCCA 190 at [40].

180 *Ryan v The Queen* (2001) 206 CLR 267 at [25].

181 *R v El-Rashid* (unrep, 7/4/95, NSWCCA); *Scanlan v R* [2006] NSWCCA 238 at [91].

182 *R v Gentz* [1999] NSWCCA 285 at [12]; *R v Pantano* (1990) 49 A Crim R 328 at 330; *R v Rivkin* [2004] NSWCCA 7 at [410]; *Milne v R* (2012) 259 FLR 42 at [272].

183 *R v Phelan* (1993) 66 A Crim R 446 at 448; *R v Smith* (2000) 114 A Crim R 8; [2000] NSWCCA 140 at [20]–[24]; *R v Houghton* [2000] NSWCCA 62 at [18].

184 *Morabito v R* (1992) 62 A Crim R 82 at 86.

185 *R v Pont* (2000) 121 A Crim R 302 at [43].

6.10 Motivation

It is relatively common for fraud offenders to have gambling addictions.¹⁸⁶ Less common, but not unusual, is a drug addiction.¹⁸⁷ An addiction may help to explain the offence, and seeking treatment may be regarded favourably for an offender's prospects of rehabilitation. However, "vulnerability arising out of a drug addiction, or a gambling addiction ... generally does not warrant the extension of leniency".¹⁸⁸

The robbery guideline judgment of *R v Henry*¹⁸⁹ reinforced that addiction is not, of itself, a mitigating circumstance.¹⁹⁰ This principle applies specifically to the need to acquire funds to support a drug habit, even a severe habit,¹⁹¹ and to a gambling addiction.¹⁹² The impact of motive on moral culpability was addressed by Spigelman CJ in *Henry*:

"The circumstances in which motive may be a mitigating factor should, in my opinion, be confined to cases in which motive impinges upon the moral culpability of the offender. This can include mental, emotional or medical problems or impulsive conduct."¹⁹³

In *Ryan v R*,¹⁹⁴ the pressures on the applicant to repay drug debts and his "need" for drugs did not diminish his moral culpability.¹⁹⁵ Personal greed, as distinct from need, is regarded as an aggravating factor at common law¹⁹⁶ and also under s 21A(2)(o) if "the offence was committed for financial gain". However, an absence of personal greed is not a mitigating factor.¹⁹⁷

6.11 Reparation

Reparation may properly be taken into account as a matter in mitigation where it is voluntary and there has been a substantial degree of sacrifice involved in the repayment.¹⁹⁸ In *R v Fell*,¹⁹⁹ the fact that the respondent had repaid almost \$280,000 to his employer, from a loss of around \$540,000, was in itself "significant enough" to have a mitigating effect on sentence.²⁰⁰ Payment

186 Recent examples include *Ryan v R* [2011] NSWCCA 250; *JOD v R* [2009] NSWCCA 205; *Gaffney v R* [2009] NSWCCA 160; *Marks v R* [2009] NSWCCA 24; *Thorn v R* (2009) 198 A Crim R 135; *R v Todorovic* [2008] NSWCCA 49; *R v Huang* (2007) 174 A Crim R 370.

187 Recent examples include *Ryan v R* [2011] NSWCCA 250; *Marks v R* [2009] NSWCCA 24; *Cranshaw v R* [2009] NSWCCA 80; *Hawkins v R* [2006] NSWCCA 91.

188 *Le v R* [2006] NSWCCA 136 at [32]; *R v Huynh* (2008) 180 A Crim R 517 at [11].

189 (1999) 46 NSWLR 346.

190 *ibid* per Spigelman CJ at [178].

191 *ibid* per Wood CJ at CL at [273].

192 *ibid* per Spigelman CJ at [203]; *R v Molesworth* [1999] NSWCCA 43 at [24]; *Assi v R* [2006] NSWCCA 257 at [27]; *R v Huang* (2007) 174 A Crim R 370 at [42]; *R v Todorovic* [2008] NSWCCA 49 at [62]; *Marks v R* [2009] NSWCCA 24 at [29].

193 per Spigelman CJ at [177].

194 [2011] NSWCCA 250.

195 *ibid* at [51]–[52], [56].

196 *Van Haltren v R* (2008) 191 A Crim R 53 at [84], [86].

197 *McCall v R* [2011] NSWCCA 34 at [78].

198 *R v Phelan* (1993) 66 A Crim R 446 at 448.

199 [2004] NSWCCA 235.

200 *ibid* at [29].

of pecuniary penalties imposed administratively by government organisations such as the Australian Taxation Office in tax fraud cases, and any hardship encountered in such payment, is also a relevant consideration at sentence.²⁰¹

Section 21A(3)(i) of the *Crimes (Sentencing Procedure) Act* provides that remorse shown by the offender may be taken into account only if there is evidence that the offender has accepted responsibility for his or her actions *and* has acknowledged any injury, loss or damage or made reparation for it.

In *Stratford v R*,²⁰² the sentencing judge was mindful of s 21A(3)(i) and correctly identified that the extent of the remorse was informed by the sacrifice which the applicant had made in repaying the stolen monies from within his own and his family's resources, but he had not been required to sell his home and the evidence did not indicate a very significant change in his family's standard of living.²⁰³

A willingness to make reparation, rather than actual reparation at the time of sentence, is significant, although its significance may be diminished by the fact that no payment has been made at the time of sentence. In *Job v R*,²⁰⁴ the steps the applicant had taken by the time of sentence, including putting his family's home and an investment property on the market, were entitled to some weight in his favour.²⁰⁵

The concept of "ameliorative conduct", which is not listed under s 21A(3), has been acknowledged in several cases as a special or unusual circumstance which may justify a measure of leniency.²⁰⁶

6.12 Totality

As fraud cases usually involve multiple offences, the totality principle is of particular relevance. The principle requires a judge to determine an appropriate sentence for each individual offence and then consider the aggregate sentence and issues of concurrence and accumulation.²⁰⁷

Determining whether sentences ought to be imposed concurrently or consecutively involves asking: "Can the sentence for one offence comprehend and reflect the criminality for the other offence?"²⁰⁸ It is more likely that, when the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other, and the sentences should be at least partly consecutive. By contrast, if two offences are part of a single episode of criminality with common factors, it is more likely that the sentence for one offence will reflect the criminality of both offences.²⁰⁹

201 *R v Gay* (2002) 49 ATR 78; [2002] NSWCCA 6 at [18], [25]; *R v Whitnall* (1993) 42 FCR 512 at 518. The correctness of these decisions was reaffirmed in *R v Ronen* (2006) 161 A Crim R 300 at [49]–[51].

202 [2007] NSWCCA 279.

203 *ibid* at [24]–[25].

204 [2011] NSWCCA 267.

205 *ibid* at [47]–[49].

206 *Thewlis v R* (2008) 186 A Crim R 279 per Simpson J at [40]. Spigelman CJ at [4] confirmed that "something special" is required for ameliorative conduct to result in mitigation of sentence.

207 *Mill v The Queen* (1988) 166 CLR 59 at 63; *Pearce v The Queen* (1998) 194 CLR 610 at [45].

208 *Cahyadi v R* (2007) 168 A Crim R 41 at [27].

209 *ibid*.

In fraud cases, monetary value may be an indicator of the criminality of each individual offence. In *Gaffney v R*,²¹⁰ the sentencing judge failed to evaluate the criminality of each offence, imposing the same sentence even though the offences involved sums of money varying between \$50,000 and \$1.84 million.²¹¹ A further problem arose in *Marks v R*,²¹² where the degree of accumulation between individual sentences for offences committed during a short period was found to be excessive, producing an overall non-parole period that was too long and an aggregate sentence that was manifestly excessive.²¹³

A potential difficulty may arise in cases where the time period of the conduct spans the old and new fraud offences, so that different counts may carry divergent maximum penalties and yet involve similar conduct.

Aggregate sentencing was recently introduced in NSW under ss 44(2A) and 53A of the *Crimes (Sentencing Procedure) Act*.²¹⁴ This option may be of assistance in fraud cases, as they tend to involve numerous offences. However, a judge imposing an aggregate sentence must still indicate the individual terms of sentence that would have been imposed separately.²¹⁵

Although it has not been decided, the NSW aggregate sentencing scheme would appear to be available to Commonwealth offenders charged with indictable offences by virtue of s 68(1) of the *Judiciary Act 1903 (Cth)*.²¹⁶

Further, a magistrate in the Local Court has the power under s 4K(4) of the *Crimes Act 1914 (Cth)* to impose a single sentence on a Commonwealth offender prosecuted for two or more summary offences of a similar character.²¹⁷

The requirement in s 19AB of the *Crimes Act 1914* that a court fix a single non-parole period (or make a recognizance release order) when sentencing an offender for multiple Commonwealth offences where the sentences in aggregate are greater than 3 years is also a form of aggregate sentencing for Commonwealth offenders.

It is not unusual for an offender to be sentenced in respect of a combination of State and Commonwealth fraud offences. However, notwithstanding the aggregate sentence provisions, separate sentences must be imposed for State and Commonwealth offences. Further, it is not possible to fix a single non-parole period (or make a recognizance release order) in respect of a combination of such offences.²¹⁸

210 [2009] NSWCCA 160.

211 *ibid* at [9].

212 [2009] NSWCCA 24.

213 *ibid* at [23], [44].

214 *Crimes (Sentencing Procedure) Amendment Act 2010*. The aggregate sentencing provisions commenced on 14 March 2011.

215 *Crimes (Sentencing Procedure) Act*, s 53A(2)(b).

216 *Putland v The Queen* (2004) 218 CLR 174; *R v Jackson* (1998) 72 SASR 490.

217 *R v Bibaoui* [1997] 2 VR 600 confirmed that the words “information, complaint or summons” in s 4K(3) denoted summary offences and did not embrace an indictment. The High Court confirmed that *R v Bibaoui* was correctly decided in *Putland v The Queen* (2004) 218 CLR 174 per Gleeson CJ at [9], Gummow and Heydon JJ at [46], Kirby J at [86].

218 *Crimes Act 1914 (Cth)*, s 19AJ. See also *Fasciale v R* (2010) 207 A Crim R 488 at [27].

6.13 Form 1 offences

In NSW, s 32 of the *Crimes (Sentencing Procedure) Act* provides that, when sentencing for the principal offence, the court may take into account additional charges that the offender has requested to be placed on a schedule, referred to as a Form 1. Additional charges are frequently taken into account on Form 1 documents in fraud cases, reflecting the high volume of offences.²¹⁹ A similar provision is available for Commonwealth offences.²²⁰

The guideline judgment on Form 1 matters confirmed that, while serious offences can be taken into account on a Form 1, it would normally be inappropriate to take into account offences that are more serious than the principal offence.²²¹

Consideration also needs to be given to whether the number and gravity of charges on the Form 1 enable the total criminality of a course of conduct to be appropriately reflected in the sentence.²²² In *Stratford v R*,²²³ the court found that the Crown's placement of matters on a Form 1, the value of which exceeded the charged offences, was "not appropriate and may have given the applicant the benefit of being sentenced for crimes with a lesser total culpability than was appropriate".²²⁴

It is to be expected that the sentence will be longer when taking into account Form 1 matters than if the principal offence stood alone. The increased sentence is the result of greater weight being given to personal deterrence and the community's entitlement to extract retribution for serious offences when there are other offences for which no punishment has in fact been imposed.²²⁵

The terms of s 33(2)(b) of the *Crimes (Sentencing Procedure) Act*, whereby a court may take the further offence(s) into account "if, in all of the circumstances, the court considers it appropriate to do so", mean the court can decline to accept the Form 1.²²⁶

219 Some examples are *Cranshaw v R* [2009] NSWCCA 80 (156 offences of make or use false instrument); *R v Mungomery* (2004) 151 A Crim R 376 (105 offences of director defrauding corporation); *R v Maharaj* [2004] NSWCCA 387 (122 offences of make or use false instrument).

220 *Crimes Act* 1914 (Cth), s 16BA. However, the additional matters are not required to be taken into account on the principal offence.

221 *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [49]–[50].

222 *ibid* at [57], [68]; *Eedens v R* [2009] NSWCCA 254 at [19].

223 [2007] NSWCCA 279.

224 *ibid* at [46]. The total value of the offences charged was \$61,804, while the total value of the matters on the Form 1 documents was \$98,633: at [3].

225 *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [18], [42]; *Dionys v R* [2011] NSWCCA 272 at [65].

226 *C-P v R* [2009] NSWCCA 291 at [8]. However, in practical terms, a court's power to reject a Form 1 is constrained. In *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, Spigelman CJ said at [67]: "... the role of the Court must be constrained, to ensure that the independence of the judicial office in an adversary system is protected. (Cf *Maxwell v The Queen* (1995) 184 CLR 501 esp at 513–514 and 534–535)".

6.14 Delay in proceedings

Delay may be a relevant factor at sentence due to the protracted nature of investigating and prosecuting fraud matters, particularly tax fraud.²²⁷ It is better that delay be taken into account on the overall assessment of a sentence rather than quantified.²²⁸

6.15 Influence of summary penalties when sentencing on indictment

A judge dealing with a fraud offence on indictment in the District Court may have regard to the jurisdictional limit of the Local Court if the case was appropriate for summary disposal, although the judge is not bound by the maximum sentence which could have been imposed in the Local Court.²²⁹ The decision in *Doan* confirmed that the availability of summary disposal can, rather than should, be a matter of mitigation at sentence, but that it is “not a universal factor for reduction of sentence”.²³⁰

Recently, *Zreika v R*²³¹ emphasised that a failure by a sentencing judge to mention that a matter could have been dealt with in the Local Court cannot of itself constitute error.²³² Furthermore, the possibility of summary disposal as a mitigating factor at sentence in the District Court is to be confined to a rare and exceptional set of circumstances where the offence may be seen as a clear summary offence and ought otherwise to have been prosecuted in the Local Court.²³³ The bare theoretical possibility of the matter being dealt with in the Local Court is not sufficient.²³⁴

6.16 The use of statistics

The High Court in *Hili v The Queen* questioned the usefulness of presenting bare sentencing information in Commonwealth fraud cases in numerical form:

“Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes.”²³⁵

227 For example, in *R v Gay* (2002) 49 ATR 78; [2002] NSWCCA 6 there was a lapse of three years between the applicant making “full admissions ... and the laying of ensuing charges”: at [18]. In allowing the severity appeal, Mason P stated at [14]: “Were it not for the combined effect of the tax penalties and the delay I would have left the sentence undisturbed”.

228 *R v Boughen* [2012] NSWCCA 17 at [105].

229 *R v Crombie* [1999] NSWCCA 297 at [16]; *R v LPY* (2002) 135 A Crim R 237 at [15]; *R v El Masri* [2005] NSWCCA 167 at [29]–[30]; *R v Palmer* [2005] NSWCCA 349 at [15].

230 (2000) 50 NSWLR 115 at [42].

231 [2012] NSWCCA 44.

232 *ibid* at [78], citing *R v Jammeh* [2004] NSWCCA 327 at [28] and *R v Pickett* [2004] NSWCCA 389 at [32].

233 *ibid* at [83].

234 *ibid* at [109], citing *McIntyre v R* (2009) 198 A Crim R 549 at [62]–[67].

235 (2010) 242 CLR 520 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [48]. The comments were made in the context of a small number of federal offenders sentenced each year.

Rather, the High Court observed:

“[W]hat is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form.”²³⁶

In fraud cases, reference to bare sentencing statistics is of limited value: given the enormous variation in objective and subjective circumstances, greater assistance is gained from general sentencing principles.²³⁷ Specifically, the sentencing statistics do not show the monetary value of the fraud for NSW offences, the duration and complexity of the fraudulent conduct or whether the offender occupied a position of trust.²³⁸ However, recent improvements have been made to the sentencing statistics for the Supreme Court and the District Court which are available on the Judicial Commission of NSW’s *Judicial Information Research System* (JIRS). Users are now able to access a table of case details, including links to published judgments, which sit behind sentencing graphs for particular offences.

Statistics are available for fraud offences on the Commonwealth Sentencing Database, which reflect Commonwealth offences prosecuted nationally, and can be sorted by the value of the fraud but, like the statistics available on JIRS, do not show the duration or complexity of the particular fraud or the offender’s role.²³⁹

7. Conclusion

Parliament has changed the sentencing landscape for fraud offences by the enactment of the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009*. The increase in maximum penalties evinces a clear intention by Parliament that the courts are to treat these crimes as serious and that harsher sentences are to be imposed. The ability of the courts to give effect to Parliament’s intent may be influenced by the way the new offences are prosecuted. The offences under consideration are usually²⁴⁰ prosecuted in the Local Court where the jurisdictional maximum of 2 years’ imprisonment has not altered. It will be for magistrates to apply *Doan*’s case for there to be any overall movement upward in sentencing patterns. The courts will have to grapple with the effect that the increase in maximum penalties has on the critical issue posed in s 5(1) of the *Crimes (Sentencing Procedure) Act* (that is, whether “no penalty other than imprisonment is appropriate”). It will inevitably involve a determination of whether alternative forms of imprisonment such as suspended sentences, ICOs and home detention are too lenient. The prediction that there will be a rise in penalties as a consequence of these reforms²⁴¹ is hard to refute.

²³⁶ *ibid* at [49].

²³⁷ *R v Martin* [2005] NSWCCA 190 at [56]; *R v Woodman* [2001] NSWCCA 310 at [22], [24]–[25].

²³⁸ *R v Hawker* [2001] NSWCCA 148 at [17], a two-judge decision.

²³⁹ The Commonwealth Sentencing Database, a joint project of the National Judicial College of Australia, the DPP (Cth), and the Judicial Commission of NSW, can be accessed through JIRS.

²⁴⁰ See the statistical example at n 3.

²⁴¹ Sutton and Mayo, above n 170.

Model Criminal Law Officers Committee, Model Criminal Code, Ch 3, *Identity Crime*, Discussion Paper, April 2007, at <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_chapter3>, accessed 30 July 2012

Model Criminal Law Officers Committee, *Identity Crime*, Final Report, March 2008, at <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_chapter3>, accessed 30 July 2012

Model Criminal Code Officers Committee, Model Criminal Code, Ch 3, *Theft, Fraud, Bribery and Related Offences*, Report, December 1995, at <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_chapter3>, accessed 30 July 2012

NSW Sentencing Council, *An examination of the sentencing powers of the Local Court in NSW*, Report, December 2010, at <www.sentencingcouncil.lawlink.nsw.gov.au/sentencing/publications/completed_projects/local_court.html>, accessed 30 July 2012

<www.scamwatch.gov.au>, accessed 30 July 2012

Second Reading Speech, Crimes Amendment (Fraud, Identity and Forgery Offences) Bill 2009, NSW, Legislative Council, *Debates*, 12 November 2009, p 19507

Second Reading Speech, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, Cth, House of Representatives, *Debates*, 24 November 1999, p 12463

Second Reading Speech, Criminal Law Consolidation (Offences of Dishonesty) Amendment Bill, SA, House of Assembly, *Debates*, 14 November 2001, p 2769

Second Reading Speech, Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2010, Cth, Senate, *Debates*, 29 September 2010, p 255

A Steel, "New fraud and identity-related crimes in New South Wales" (2010) 22(3) *JOB* 17

A Steel, "The true identity of Australian identity theft offences: a measured response or an unjustified status offence?" (2010) 33(2) *UNSWLJ* 503

Submissions to Model Criminal Law Officers Committee, Model Criminal Code, Ch 3, *Identity Crime*, Discussion Paper, April 2007, from Australian Federal Police, Australian Bankers' Association, Victoria Police, at <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_submissions>, accessed 30 July 2012

J Sutton and R Mayo, "Frauds in the Local Court: a guide to sentencing", paper presented at the NSW State Legal Conference, 26 March 2012, Sydney

A Tiedt, "Court limits use of intensive correction orders" (2012) 50(4) *LSJ* 40

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