How Judges Sentence

By Geraldine Mackenzie
The Federation Press, 2005

Few events in the legal process seem to cause as much controversy as the sentencing of high profile offenders.

During the sentencing hearing judges and counsel know only too well the complicated steps involved. Competing interests have to be balanced in an attempt to reach a stage where 'all will come right if we all work together to the end' as Churchill once said. But how do we achieve that end?

To start with, it is not just a matter of working out figures.

In *R v Bezan*: (2004) 147 A Crim R 430 a decision of the New South Wales Court of Criminal Appeal the former chief judge at Common Law said that when dealing with the repeal of s16G of the *Crimes Act 1914* it was inappropriate in the sentencing exercise to use 'a broad arithmetic approach' or 'some bare arithmetic formula'. Hayne J in *AB v The Queen*: (1999) 198 CLR 111 was clear that sentencing an offender is not some 'mechanical or mathematical process'.

Exactly what approach to adopt still appears to be a matter of debate at the highest level.

Recently in *Markarian v The Queen* (2005) 79 ALJR 1048 McHugh J and Kirby J discussed the relative merits of the 'two-tier' approach and the 'instinctive synthesis' approach to sentencing. McHugh J at [51] described the two approaches in this way:

> By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the 'objective circumstances' of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier. By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

It seems fair to say that McHugh J favoured 'instinctive synthesis' and Kirby J the 'two-stage approach'. The fact that there were competing views is a matter of record. In 2002 Kirby J indicated that:

> In this court, there has been something of a controversy about whether it is appropriate, in sentencing, to proceed explicitly by way of a 'two-stage' approach or not.

A somewhat novel approach to the whole sentencing procedure has been taken by Professor Mackenzie in her book *How Judges Sentence*. Following a promise of anonymity the author conducted interviews with 31 judges of the Queensland Supreme and District courts about their experiences with sentencing. It is a process that could usefully be repeated in many of the other jurisdictions in Australia. The results of the authors work do indeed provide insights into sentencing practice and she sets out with a great deal of success to examine judicial perceptions, methodology and attitudes towards the sentencing process as seen through the eyes of these judges.

The book came out before the judgments in *Markarian* were published so obviously there is no reference to it. However the author does deal with the 'instinctive synthesis' approach and its origins apparently in Victoria in *Williscroft* (1975) VR 292 at 300 where the full court of the Supreme Court of Victoria said:

> Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.

Interestingly enough the author tells us that a search of databases in Queensland in 2004 failed to locate any use of the term 'instinctive synthesis' in reported sentencing judgments. However, six of the judges she interviewed actually used terms reflecting such a view when they referred to either an intuitive or instinctive process that they follow, as in: 'In sentencing, there is room for an intuitive view. Sentencing is not solely science, art or intuition'.

Throughout the work we have some at times remarkably frank and revealing comments made by the various judges. For example, some judges were in favour of communicating themselves with the offender in court. They appear to see that as the court considering the sentencing and its impact on the offender.

Clearly there was a great deal of concern about the conditions and lack of rehabilitation generally in the prison system. Availability of illicit drugs and often unavailability of therapy for addicts were raised as well. The rising Queensland prison population was also referred to by a number of judges: it being described as '… something like the fastest rate of increased incarceration in western countries'.

In Queensland, the *Penalties and Sentences Act 1992* sets out the purposes of sentencing and is mirrored in legislation in many other jurisdictions. Some of the judges apparently did not see the purposes set out in the sentencing legislation as new or innovative. Some even described the purposes as obvious without the need for legislation and referred to them as 'motherhood statements'. This seemed to be criticism of an attempt to put well-known principles of sentencing in an overly formal way.

It is difficult to do some of the topics justice without going into detail but a few examples will give the flavour:

- Half a dozen judges were critical of the lack of evidence from the Crown when it was asserting that various offences were prevalent.

- Deterrence as a principle, and whether it only applied to geographical locations or certain groups, reveals some very careful thinking about the difficulties involved with such concepts.
- The judges seemed to be very frank about the fact that public opinion influenced sentencing albeit subconsciously.
- There was also some concern expressed about the difficulties raised by community involvement in sentencing, particularly the media and so-called law and order champions.
- Some judges saw a positive role for the media in disseminating information about sentences.
- Generally speaking, the judges tended to rely on submissions from counsel to settle the proper range of sentences.

This is a very interesting book and well worth reading, especially for the large number of quotes from the judges.

It struck me when I reached the end of Professor Mackenzie's work that there was an even bigger book in this. Interviewing everyone involved in the sentencing process, including the offenders and counsel would give us a pretty good idea if it really did come right in the end.

Reviewed by Keith Chapple SC

International Sales Law: A Critical Analysis of CISG Jurisprudence

By Larry DiMatteo, et al
Cambridge University Press, 2005

The United Nations Convention on Contracts for International Sale of Goods (CISG) was adopted on 11 April 1980 and entered into force on 1 January 1988. As at February of this year, 64 countries had adopted the CISG as their international sales law. Within Australia, the convention has been implemented municipally by each of the states: see, for example, *Sale of Goods (Vienna Convention) Act 1986* (NSW). The *Trade Practices Act 1974* (Cth) also provides, in section 66A, that:

> The provisions of the United Nations Convention on contracts for the International Sale of Goods, adopted at Vienna, Austria, on 10 April 1980, prevail over the provisions of this Division to the extent of any inconsistency.

To date, state legislation enacting CISG has not given rise to much case law in Australia. Nor do the important provisions of this legislation attract much attention in leading Australian texts on contract law.

The broad approach of this book, written by predominantly American academic lawyers, is to track through the CISG (which is reproduced in an appendix), dealing, in turn, with writing requirements, offer and acceptance rules, obligations of buyers, obligations of sellers, common obligations of buyers and sellers, breach of contract by seller and buyer, damages, excuse and preservation. It draws together and analyses decisions from a range of jurisdictions with published arbitration awards involving the interpretation of the CISG. As such, it is an extremely valuable collection of multiple-jurisdictional material that may otherwise not be available or, at least, not available in distilled form to practitioners. (For those interested in the area, one important qualification to this statement is the Pace Law School web site (http:\\cisgw3.law.pace.edu\\cisg) which is a web site specialising in CISG jurisprudence.)

As with many international conventions, the language employed in many sections of the CISG is open ended, no doubt reflecting compromises necessary in the drafting of the convention to permit it to be brought to fruition. Such open ended language, however, opens up the possibility of varying interpretations which is anathema for a Convention which was adopted to promote uniformity and certainty in an important are of commercial law. The scope for varying interpretations is all the greater, of course, given the absence of an international court empowered authoritatively to pronounce on the meaning of the various articles of the convention. As one example, the authors observe (p.75) that: