IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

BETWEEN:

No. M 28 of 2013

BASSILLIOS PANTAZIS (Appellant)

and

THE QUEEN (First Respondent)

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (Second Respondent)

No. M 25 of 2013

CHAFIC ISSA (Appellant)

and

THE QUEEN (First Respondent)

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (Second Respondent)

No. M 29 of 2013

GEORGE ELIAS (Appellant)

and

THE QUEEN (First Respondent)

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (Second Respondent)

APPELLANTS' JOINT SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. The appellants certify that this submission is in a form suitable for publication on the internet.

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PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED

2. The single ground of appeal raises the following issues:

3. In sentencing a person for a State offence, is a court permitted or required to have regard to a lesser maximum penalty fixed for a like offence that could have been charged under Commonwealth law? Or is the principle in *R v Liang & Li* (1995) 82 A Crim R 39 to be confined to less punitive offences contrary to the State law in the jurisdiction in which the judicial power is being exercised?

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4. In each appellant's case, did the Court of Appeal err in failing to hold that the sentencing judge erred, when sentencing on the count of attempting to pervert the course of justice contrary to common law (the maximum penalty for which is prescribed by s 320 of the *Crimes Act* 1958 (Vic) at 25 years' imprisonment):
   a) by failing to have regard to the maximum penalty fixed for the like offence contrary to s 43 of the *Crimes Act* 1914 (Cth) (which, at the relevant time, was five years' imprisonment), particularly in circumstances where the course of justice that the appellant attempted to pervert was in relation to the judicial power of the Commonwealth; or
20 b) by failing to have regard to the maximum penalty fixed for the offence under State law of assisting an offender contrary to s 325 of the *Crimes Act* 1958 (Vic) (which also carried five years' imprisonment)?

PART III: NOTICES UNDER S 78B OF THE *JUDICIARY ACT* 1903 (CTH)

5. The appellants certify that the question whether any notice should be given under s 78B of the *Judiciary Act* 1903 (Cth) has been considered. Notices were issued in the Court of Appeal and the second respondent made submissions in that court and at the special leave application. However, because leave was granted only in relation to Ground 1, there is
30 now no need to issue such a notice.

PART IV: CITATION OF THE REASONS FOR JUDGMENT

6. The Court of Appeal's judgment is not contained in any authorized report. Its medium neutral citation is *Pantazis & Ors v The Queen* [2012] VSCA 160.

PART V: NARRATIVE STATEMENT OF FACTS

Introduction

7. The background facts and issues relevant to this appeal are summarized in the judgment of the Court of Appeal.[1] A brief overview of the offences and sentences relating to each appellant follows, as well as a brief summary of the relevant issues raised on the appeal in the Court of Appeal and on the special leave application in this Court.

Bassillios Pantazis: Arraignment, plea and sentence

8. **Arraignment**: On 16 December 2010, Mr Pantazis pleaded guilty in the Supreme Court of Victoria (before Whelan J) to a presentment containing one count of attempting to pervert the course of public justice contrary to common law (the maximum penalty for which is prescribed by s 320 of the *Crimes Act* 1958 (Vic) at 25 years' imprisonment) (Count 1) and one count of dealing with proceeds of crime contrary to s 194(2) of the *Crimes Act* 1958 (Vic) (Count 2).[2]

9. **Count 1**: The factual basis of Count 1 was as follows:[3]

a) In March 2006, Antonios Mokbel was on trial in the Supreme Court of Victoria before Gillard J and a jury on the Commonwealth offence of being knowingly concerned in the importation of a trafficable quantity of cocaine contrary to s 233B(1)(b) of the *Customs Act* 1901 (Cth). On 20 March 2006, Mr Mokbel failed to answer bail and Gillard J issued a warrant for his arrest. The trial continued with Mr Mokbel *in absentia*. On 31 March 2006, he was convicted and sentenced to 12 years' imprisonment with a non-parole period of nine years. After hiding for a period of time in country Victoria, Mr Mokbel travelled across Australia by road to Fremantle, Western Australia. In November 2006, he left Australia on a yacht ("the Edwena") and travelled to Greece. He lived in Greece for a period of time until he was arrested on 5 June 2007 and extradited to Australia.

b) Count 1 related to a series of acts performed by Mr Pantazis between 10 May 2006 and 5 June 2007 that assisted Mr Mokbel to abscond from Victoria and Australia, to remain outside of the jurisdiction and thereby to impede his arrest and the punishment imposed upon him as a result of his trial for the Commonwealth offence. Mr

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[1] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [1]-[93]. In order to distinguish between the three appellants, we shall refer to them by name on occasions.
[2] See Mr Pantazis's Presentment; T 7-8.
[3] *R v Pantazis* [2011] VSC 54 at [3]-[5].

Pantazis's primary role, with the assistance of others, was in relation to the purchase and preparation of the yacht for international sea travel. He arranged for the transport of the yacht from New South Wales to Western Australia; he, together with others, physically transported Mr Mokbel from Victoria to Western Australia; he participated in arrangements whereby Mr Mokbel was hidden in Fremantle and the yacht was prepared for international sea travel; he, together with others, arranged for sailors to be engaged to sail the yacht from Australia to Greece; he met the yacht as it travelled through the Suez Canal; he spent time and significant money in Greece preparing for Mr Mokbel's arrival; and he undertook activities which enabled Mr Mokbel to live in hiding in Greece.

10. **Count 2**: During the foregoing activities, Mr Pantazis received a total $426,700 knowing those funds had been illegally obtained. All but $200,000 of that money was used by Mr Pantazis in the activities the subject of Count 1. The judge was not satisfied beyond reasonable doubt that Mr Pantazis retained the whole $200,000 for himself. Rather, he was satisfied it was a substantial sum of no less than $60,000. (Mr Pantazis had consented to a pecuniary penalty order in the amount of $60,000.)[4]

11. **Point at issue taken on the plea**: At the plea in mitigation, counsel for Mr Pantazis submitted *inter alia* in effect that, since either the offence contrary to s 43 of the *Crimes Act* 1914 (Cth) or the offence contrary s 325 of the *Crimes Act* 1958 (Vic) could have been charged and that each offence was at least as appropriate as the offence to which the appellant had pleaded guilty in Count 1, the judge should have regard to the lesser maximum penalty for those offences (five years' imprisonment) for guidance on the appropriate range of sentence.[5] Reliance was placed on the Court of Appeal's decision in *R v Liang & Li*.[6] The prosecutor conceded that the offence in s 325 could have been charged (and indeed had been charged against some co-accused involved in spiriting Mr Mokbel away) but submitted *inter alia* that, since Mr Pantazis's offending was more serious, the offence in s 325 would be inapt to identify and punish the extent and character of his offending.[7] The prosecutor did not address any submission to the Commonwealth

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[4] *R v Pantazis* [2011] VSC 54 at [6]-[9].
[5] Plea at T 36-42, 45, 49 & 67-75.
[6] (1995) 82 A Crim R 39.
[7] T 60-67. The prosecutor also referred to *R v Walsh* [2002] VSCA 98; *R v Vellinos* [2011] VSCA 131; and *R v El-Kotob* (2002) 4 VR 546.

offence contrary to s 43 of the *Crimes Act* 1914 (Cth). In his reasons for sentence, the judge referred to Mr Pantazis's submission but rejected it (in a footnote).[8]

12. **Sentence**: On 1 March 2011, the judge sentenced Mr Pantazis to eight years' imprisonment on Count 1 and to four years' imprisonment on Count 2 (with one year cumulative upon the sentence on Count 1), making a total effective sentence of nine years' imprisonment. The judge fixed a non-parole period of six years and declared 1,000 days of pre-sentence detention. The judge stated that, had Mr Pantazis not pleaded guilty, he would have imposed a total effective sentence of 12 years' imprisonment with a non-parole period of 10 years.[9]

Chafic Issa: Arraignment, plea and sentence

13. **Arraignment**: On 2 September 2009, Mr Issa, like Mr Pantazis, pleaded guilty in the Supreme Court of Victoria (but before King J) to a presentment containing one count of attempting to pervert the course of public justice contrary to common law (Count 1). He also pleaded guilty to one count of trafficking in a large commercial quantity of a drug of dependence contrary to s 71 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Drugs Act") (Count 2), one count of dealing with proceeds of crime contrary to s 194(2) of the *Crimes Act* 1958 (Vic) (Count 3) and one count of possession of cannabis contrary to s 73 of the Drugs Act (Count 4).[10]

14. **Count 1**: The factual basis of Count 1 was as follows:[11]
    a) Mr Mokbel's trial, conviction and sentence on the Commonwealth offence of being knowingly concerned in the importation of a trafficable quantity of cocaine contrary to s 233B(1)(b) of the *Customs Act* 1901 (Cth) are described above at paragraph 9(a).
    b) Count 1 against Mr Issa related to a series of acts performed by him between 31 March 2006 and 5 May 2007 that assisted Mr Mokbel to abscond from Victoria and Australia, to remain outside of the jurisdiction and thereby to impede his arrest and the punishment imposed upon him as a result of his trial for the Commonwealth offence. The assistance provided by Mr Issa to Mr Mokbel included: harbouring Mr Mokbel at a property in Bonnie Doon; travelling with him and others by car from Victoria to

[8] *R v Pantazis* [2011] VSC 54 at [27] & fn 2.
[9] *R v Pantazis* [2011] VSC 54 at [32]-[34].
[10] Mr Issa's Presentment; *R v Issa* [2009] VSC 633R at [1].
[11] *R v Issa* [2009] VSC 633R at [2] & [19]-[24].

Western Australia; and assisting Mr Mokbel and others in the modification of the Edwena so that it was capable of travelling long distances by sea.

15. **Count 2**: Between 1 July 2006 and 5 May 2007, Mr Issa, with at least nine other men, was involved in the trafficking of 33.4 kilograms of methylamphetamine for "the Company". The Company was operated by Mr Mokbel from 1 January 2006 until his arrest in Greece on 5 June 2007.[12]

16. **Count 3**: Between 30 July 2006 and 5 May 2007, Mr Issa was involved in the distribution of $1.735 million within the Company that was the proceeds of crime having being derived from the trafficking of methylamphetamine.[13]

17. **Count 4**: Following his arrest on 5 June 2007, Mr Issa was found in possession of a small amount of cannabis.[14]

18. **Sentence**: On 24 November 2009, King J sentenced Mr Issa to eight years' imprisonment on Count 1 (the same sentence as Mr Pantazis on the equivalent count). Her Honour also imposed sentences of eight years' imprisonment on Count 2 (with four years cumulative upon the sentence on Count 1), four years' imprisonment on Count 3 (with a further six months cumulative upon the sentence on Count 1), and a fine of $300 on Count 4. This produced a total effective sentence of twelve years and six months' imprisonment. A non-parole period of eight years and six months was fixed, and 903 days of pre-sentence detention was declared. The judge also stated that, had Mr Issa not pleaded guilty, she would have imposed individual sentences of 10 years' imprisonment for Counts 1 and 2 and six years' imprisonment for Count 3.

George Elias: Arraignment, plea and sentence

19. **Arraignment**: On 4 October 2010, Mr Elias, like Mr Pantazis and Mr Issa, pleaded guilty in the Supreme Court of Victoria (before Whelan J) to a presentment containing one count of attempting to pervert the course of justice contrary to common law (Count 1). He also pleaded guilty to one count of trafficking in a large commercial quantity of methylamphetamine (Count 2), one count of knowingly dealing with proceeds of crime (Count 3), one count of possession of cannabis (Count 4) and three counts of possessing

[12] *R v Issa* [2009] VSC 633R at [5]-[17].
[13] *R v Issa* [2009] VSC 633R at [14] – [16].
[14] *R v Issa* [2009] VSC 633R at [18].

an unregistered category A longarm firearm contrary to s 6A(1) of the *Firearms Act* 1996 (Vic) (Counts 5, 6 and 7).[15]

20. **Count 1**: The factual basis for Count 1 was as follows:[16]

    a) Again, Mr Mokbel's trial, conviction and sentence on the Commonwealth offence of being knowingly concerned in the importation of a trafficable quantity of cocaine contrary to s 233B(1)(b) of the *Customs Act* 1901 (Cth) are described above at paragraph 9(a).

    b) Mr Elias attempted to pervert the course of justice by assisting Mr Mokbel to hide within Victoria, to flee first to Western Australia and then to Greece, and to live in Greece until Mr Mokbel's arrest on 5 June 2007. Mr Elias committed the offence as part of a joint criminal enterprise. He joined the enterprise some time before a meeting at a remote bush track location which occurred in early October 2006 at the latest. Mr Elias was not a decision maker in relation to the conduct he was involved in concerning Mr Mokbel's flight, but he undertook a number of significant activities. He permitted Mr Mokbel to live on a property that he (Mr Elias) partly owned in Bonnie Doon. He accompanied Mr Mokbel in his journey from Victoria to Western Australia. He assisted Mr Mokbel in the fit-out and preparation of the Edwena, and he liaised with Mr Mokbel and engaged in transactions that enabled Mr Mokbel to live in Greece.

21. **Count 2**: Mr Elias trafficked in methylamphetamine as a participant in a joint criminal enterprise. His involvement commenced at the time of the bush track meeting referred to as part of the factual basis of Count 1. Initially, Mr Elias was a driver and an assistant to his older brother, Mr Issa. In February 2007, Mr Elias, or a person using his name and acting with his knowledge and co-operation, rented a self-storage unit where equipment used in the production of methylamphetamine was stored. After the arrest of his brother on 5 May 2007, Mr Elias dealt directly with Mr Mokbel and had a significant role in the "gassing" component of the production process. Mr Elias handled substantial amounts of methylamphetamine and cash on behalf of Mr Mokbel.[17]

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[15] Mr Elias's Presentment; *R v Elias* [2011] VSC 423 at [1] & [5].
[16] *R v Elias* [2011] VSC 423 at [6]; *R v Elias (Ruling)* [2011] VSC 405.
[17] *R v Elias* [2011] VSC 423 at [7].

22. **Count 3**: In a drug-related transaction on 23 May 2007, Mr Elias was handed $40,000 cash by other participants in the enterprise.[18]

23. **Counts 4-7**: These counts arose out of items found by police when a property partly owned by Mr Elias at Bonnie Doon was searched. On 5 June 2007, police found 84.5 grams of cannabis seeds in 17 zip-lock bags. On 18 July 2007, police found three unregistered category A longarm firearms.[19]

24. **Point at issue taken on the plea**: At the plea in mitigation, counsel for Mr Elias submitted *inter alia* in effect that, since the offence contrary to s 43 of the *Crimes Act* 1914 (Cth) could have been charged and that that offence was at least as appropriate as the offence to which Mr Elias had pleaded guilty in Count 1, the judge should have regard to the lesser maximum penalty for that offence (five years' imprisonment) for guidance on the appropriate range of sentence.[20] Reliance was placed on the Court of Appeal's decision in *R v Liang & Li*. In his reasons for sentence, the judge referred to Mr Elias's submission but rejected it.[21]

25. **Sentence**: On 5 September 2011, the judge sentenced Mr Elias to eight years' imprisonment on Count 1 (i.e. the same sentence as had been imposed on Mr Pantazis and Mr Issa on their equivalent counts). The judge also imposed sentences of seven years' imprisonment on Count 2 (with three years cumulative on the sentence on Count 1), two years' imprisonment on Count 3, one month's imprisonment on Count 4 and seven days' imprisonment on each of Counts 5, 6 and 7 (all concurrent), which made a total effective sentence of 11 years' imprisonment. The judge fixed a non-parole period of eight years and declared 1,552 days of pre-sentence detention. The judge stated that, but for the plea of guilty, there would have been a total effective sentence of 14 years' imprisonment with a non-parole period of 12 years.[22]

The appeals to the Court of Appeal

26. ***R v Liang & Li***: The appellants appealed against their sentences. The Court of Appeal sat five judges (Warren CJ, Redlich, Hansen and Osborn JJA and Curtain AJA) to hear the appellants' appeals along with three other appeals. All six appeals raised a common point

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[18] *R v Elias* [2011] VSC 423 at [8].
[19] *R v Elias* [2011] VSC 423 at [9].
[20] *R v Elias* [2011] VSC 423 at [27] & fn 5.
[21] *R v Elias* [2011] VSC 423 at [27] & fn 5.
[22] *R v Elias* [2011] VSC 423 at [33]-[41].

which the Court characterized in this way: whether each sentencing judge erred by failing to take into account a less punitive Commonwealth offence said to be as or more appropriate than the State offence on which each offender fell to be sentenced, which raised issues concerning the scope and nature of the sentencing principle identified in *R v Liang & Li*.[23] The other three appeals were from sentences unrelated to the present appellants' matters and concerned arguments in respect of the penalties for different Commonwealth offences that might have been charged vis-à-vis the higher penalties for different State offences that were charged. As indicated above, Messrs Pantazis, Issa and Elias had been dealt with on separate occasions but were sentenced on the same common law offence of attempting to pervert the course of justice. In summary:

a) the Court of Appeal held that the common law principle in *R v Liang & Li* is no longer to be regarded as potentially requiring a judge exercising the judicial power of the State of Victoria to have regard to lesser penalties for like Commonwealth offences and instead is to be confined to less punitive offences that exist within the jurisdiction in which the judicial power is being exercised;[24]

b) the Court of Appeal held that, even if the principle in *R v Liang & Li* did oblige a judge exercising State jurisdiction to have regard to a Commonwealth offence which had not been charged but which was "more appropriate" to the criminal conduct and which carried a lesser maximum penalty, the Commonwealth offence contrary to s 43 of the *Crimes Act* 1914 (Cth) (which carried a maximum penalty of five years' imprisonment) relied on by each appellant in this Court was not "a more appropriate offence" than the offence charged in Count 1, namely the common law offence of attempting to pervert the course of justice which, by operation of s 320 of the *Crimes Act* 1958 (Vic), carries a maximum penalty of 25 years' imprisonment;[25] and

c) in the case of each appellant in this Court, the Court of Appeal rejected the further argument that the principle in *R v Liang & Li* nevertheless compelled the sentencing judge to have regard to the less punitive State offence of assisting an offender contrary to s 325 of the *Crimes Act* 1958 (Vic) in determining the sentence for the common law offence in Count 1.[26]

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[23] (1995) 82 A Crim R 39.
[24] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [3]-[6] (summary of issue and conclusion) and [27]-[62] & [93] (analysis of issues and reasons for conclusions).
[25] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [63] (summary of conclusion in all six cases) and [64]-[90] & [93] (analysis of issues and reasons for conclusions in the three appellants' cases).
[26] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [3] (summary of issue) and [91]-[93] (analysis of issues and reasons for conclusions in the three appellants' cases).

27. **Section 109 of the Constitution**: In the Court of Appeal, notice was given of a constitutional matter under s 78B of the *Judiciary Act* 1903 (Cth). The second respondent intervened pursuant to s 78A. The Commonwealth Director of Public Prosecutions was also invited to file written submissions. The Court considered whether any inconsistency arose between any of the State offences on which the appellants to that Court were convicted and sentenced and the Commonwealth laws on which each appellant relied such as to attract the operation of s 109 of the Constitution, but concluded that no such inconsistency arose.[27] In dealing with that issue in respect of the three appellants in this Court, the Court of Appeal held that s 109 is irrelevant to a common law offence. Further, it was held that s 43 of the *Crimes Act* 1914 (Cth), when enacted, did not abolish the common law offence of attempting to pervert the course of justice in relation to federal judicial power and, instead, contemplated that a person may be charged with the common law offence and subjected to a maximum penalty of up to life imprisonment. This, in turn, said the Court, meant that there could be no inconsistency between s 43 of the *Crimes Act* 1914 (Cth) and s 320 of the *Crimes Act* 1958 (Vic), which fixed the maximum for the common law offence at 25 years' imprisonment.[28]

28. **Section 80 of the *Judiciary Act***: The Court of Appeal also rejected an argument by the first respondent to the effect that, in the cases of the appellants, s 80 of the *Judiciary Act* applied so as to give primacy to the common law because the law of the Commonwealth (in s 43 of the *Crimes Act* 1914) did not provide adequate punishment. The Court held that s 80 has no application where, as here, the sentencing court was not exercising federal jurisdiction.[29]

The applications for special leave to appeal to this Court

29. ***R v Liang & Li***: On the appellants' applications for special leave, the Court (French CJ and Kiefel J) granted special leave to appeal on the ground contained in the draft notice of appeal and reproduced in the notice of appeal.[30]

30. **Special leave not granted on other grounds**: The Court refused special leave to appeal on two other grounds.

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[27] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [7]-[22].
[28] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [10]-[11] & [13]-[19].
[29] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [23]-[26].
[30] *Pantazis & Ors v The Queen* [2013] HCATrans 051 at lines 815-816; see also lines 26-245, 378-427, 526-566 & 600-637.

a) The first proposed additional ground was that the conviction on Count 1 could not stand because (a) the course of justice had ceased by the time the behaviour alleged was committed or (b) the offence of attempting to pervert the course of justice, when committed in relation to the judicial power of the Commonwealth, is not an offence known to the law.[31]

b) The second proposed additional ground (described on the application as the third special leave issue), which relied on s 109 of the Constitution, was that the sentence on Count 1 was unlawful because it exceeded the maximum penalty that could be imposed for the offence of attempting to pervert the course of justice when committed in relation to the judicial power of the Commonwealth.[32]

PART VI: APPELLANTS' ARGUMENT

Failure to have regard to the Commonwealth offence in s 43 of the *Crimes Act* 1914

31. **The principle in *R v Liang & Li***: In *R v Liang & Li*, the applicants were jointly presented before the County Court on a series of counts which arose out of a scheme of dishonesty against the interests of Telecom, a Commonwealth authority. The prosecution brought an indictment which contained one State offence and several Commonwealth offences. On applications for leave to appeal against sentence, in amplification of a ground that the sentences were manifestly excessive, it was contended that there was a regime of less punitive Commonwealth offences designed to cover the conduct addressed by the State offence which carried a more substantial maximum penalty. Winneke P, with whom Ormiston JA and Crockett AJA agreed, said:[33]

> For my part, I think there is much substance in the argument that the applicants were exposed to an injustice, by being charged with the offence created by s 82(1) of the *Crimes Act* 1958. This injustice flowed not only because the true purpose and intent of the charge was never explained to his Honour but also because that charge (exposing the applicants as it did to higher penalties) did not, in my view, appropriately fit the nature of the applicants' conduct.
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> It would seem to me that the charge which most appropriately reflected the gravamen of the applicants' conduct in this case was the charge laid in count 2 – i.e. the offence created by s 85ZF(a) of the *Crimes Act* 1914. Insofar as relevant, that section provides: "a person shall not by means of an apparatus or device (a) defraud a carrier of any ... fee or charge properly payable for or in relation to a telecommunication service supplied by the carrier". This is precisely what the facts showed the applicants had done. This charge, as I have already indicated, carried with it a maximum penalty of five years'

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[31] *Pantazis & Ors v The Queen* [2013] HCATrans 051 at lines 112-122, 245-376, 502-507, 566-568, 588-598, 627-632, 637-645, 745-749 & 784-809.

[32] *Pantazis & Ors v The Queen* [2013] HCATrans 051 at lines 434-500, 512-526, 554-556, 643-650, 660-735 & 739-782.

[33] *R v Liang & Li* (1995) 82 A Crim R 39 at 43-44.

imprisonment and it did qualify (by virtue of s 16G of the *Crimes Act* 1914) for the benefits provided by s 10 of the *Sentencing Act*.

Although the learned sentencing judge can scarcely be blamed for the error (because no one had brought these matters to his attention), *it would, in my view, seem to be a relevant factor in the sentencing process to consider what the relevant legislative body (namely the Commonwealth) regarded as the appropriate "sentencing tariff" for an offence perpetrated against its interests or the interests of bodies for whom it had power to legislate*. In *R v Whitnall* (1993) 42 FCR 512 ..., Drummond J (sitting as a member of the Full Court of the Federal Court which was considering an appeal against a sentence imposed under s 29D of the *Crimes Act* 1914) said (at 520; ...):

> "As Davies and Higgins JJ point out, these offences could have been prosecuted under various other provisions and, at the election of the prosecution, could have been dealt with summarily rather than on indictment — all steps which would have limited the maximum sentence that could have been imposed on the respondent to much less than the 10 years' imprisonment and a fine of $10,000 which he faced for each conviction under s 29D. While it is solely for the prosecuting authority to select the provision under which it will launch a prosecution, the court is not bound to treat the prosecution decision as placing a fetter upon the court's sentencing discretion in the sense of compelling the court to impose a heavier sentence than it would regard as appropriate but for that one consideration."

The principle being enunciated in that passage means no more than this: that although it is for the prosecuting authority in its absolute discretion to determine which particular charge it will lay against an accused person, it is none the less relevant and proper for the judge on sentence to take into account as a relevant sentencing principle the fact that there was another and less punitive offence which not only could have been charged but indeed *was as appropriate or even more appropriate to the facts alleged* against the accused. (Emphasis added.)

32. **The Court of Appeal was correct to confirm the underlying rationale for the principle in *R v Liang & Li***: In *R v McEachren*,[34] Redlich JA explained the rationale underlying the principle in *R v Liang & Li* in these terms:

> [It is] part of a broader principle requiring fairness in the sentencing process. Consistency in sentencing is a mechanism by which fairness in the sentencing process is to be achieved. It requires that the court should strive to impose similar punishment for similar offences committed by offenders in similar circumstances. Conversely, disparity in sentencing can only be justified if there are acceptable and convincing grounds for differentiating between offences or offenders. Unfairness will arise where there is an inconsistent application of legal principles.

33. The Court of Appeal in the present case appeared to approve of these remarks.[35] It is submitted that the Court was correct to do so.

34. **The Court erred in confining the principle to intra-State comparisons**: However, it is submitted that the Court of Appeal erred in holding that the principle in *R v Liang & Li* is

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[34] (2006) 15 VR 615 at [55].

[35] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [28]. See also the brief discussion of *R v Liang & Li* by Professors Fox and Freiberg in *Sentencing: State and Federal Law in Victoria*, Oxford University Press, 2nd edn, 1999, at [2.205].

no longer to be regarded as potentially requiring a judge exercising the judicial power of the State of Victoria to have regard to lesser penalties for like Commonwealth offences and instead is to be confined to less punitive offences that exist within the jurisdiction in which the judicial power is being exercised.[36] Further, even if the principle is not to apply *generally* to comparisons with less punitive Commonwealth offences, it was applicable in this particular case. There are several reasons:

35. **Mutual sovereignty**: First, it is submitted that the reasoning of Winneke P in *R v Liang & Li*[37] – concerning the relevance of the Commonwealth's view as to the appropriate sentencing tariff for offending perpetrated against its interests – and the underlying rationale for the principle as explained by Redlich JA in *R v McEachren*[38] – concerning fairness and consistency in sentencing – are consistent with the fact that Australian citizens are subject simultaneously to both Commonwealth and State laws. In short, Commonwealth and State laws have "mutual sovereignty" over citizens of the Commonwealth.[39] Not only must citizens obey both "sovereigns" but, if they do not, then – and depending upon the proscribed conduct – they may be exposed to penal consequences for the same conduct from a Commonwealth, State or Commonwealth/State prosecution.

36. **Consistency in punishment and equal justice**: Secondly, in *Green v The Queen* (2011) 244 CLR 462 at [28], French CJ, Crennan and Kiefel JJ made the following remarks about notions of equal justice and consistency in sentencing:

> "Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law. It was characterised by Kelsen as "the principle of legality, of lawfulness, which is immanent in every legal order". It has been called "the starting point of all other liberties". It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*:
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> > "Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect." (Emphasis in original.)

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[36] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [3]-[6] (summary of issue and conclusion) and [27]-[62] & [93] (analysis of issues and reasons for conclusions).
[37] *R v Liang & Li* (1995) 82 A Crim R 39 at 43.
[38] *R v McEachren* (2006) 15 VR 615 at [55].
[39] Contrast "dual sovereignty" in the United States context, which is recognized as an exception to the prohibition against double jeopardy. It recognises that two sovereigns often have separate and legitimate interests in prosecuting an accused.

> Consistency in the punishment of offences against the criminal law is "a reflection of the notion of equal justice" and "is a fundamental element in any rational and fair system of criminal justice". It finds expression in the "parity principle" which requires that like offenders should be treated in a like manner. As with the norm of "equal justice", which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances. (Footnotes omitted.)

37. Whilst those remarks were made in the context of consideration of the principle of parity in sentencing of co-offenders, they are equally apposite to the issues on the present appeal. The principle in *R v Ling & Li* promotes consistency – and thereby fairness and equal justice – in sentencing across the Commonwealth for offending that relates to Commonwealth interests, whether offenders are charged with State or Commonwealth offences.[40]

38. **The Commonwealth Parliament's intention**: Thirdly, as indicated above, in *R v Liang & Li*, Winneke P said that it is "a relevant factor in the sentencing process to consider what the relevant legislative body (namely the Commonwealth) regarded as the appropriate 'sentencing tariff' for an offence perpetrated against its interests or the interests of bodies for whom it had power to legislate".[41] The Court of Appeal considered these remarks, but opined that they could not explain the decision in *R v Young*,[42] which took account of the Commonwealth offence solely because it was an identical offence.[43] But it is respectfully submitted that whether or not *R v Young* was correctly decided is not to the point. The fact is that the course of justice the appellants attempted to pervert was in relation to the judicial power of the Commonwealth,[44] which behaviour fitted precisely the offence contrary to s 43 of the *Crimes Act* 1914 (Cth). Further, the appellants' offending included conduct across four states and internationally. In those circumstances, the Commonwealth offence against s 43 was even more apt than the common law offence charged. Thus, consistently with Winneke P's remarks, in sentencing the appellants on the offence in Count 1, it ***was*** relevant to consider what the Commonwealth Parliament regarded as the appropriate "sentencing tariff" (*viz*, a maximum penalty of five years' imprisonment) for the offence perpetrated against its interests for which it had legislated, namely the judicial power of the Commonwealth.

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[40] Similar issues have been considered in the United States of America. See DeMaso, C., "Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity between State and Federal Sentences under *Booker*?", (2006) 106 *Columbia Law Review* 2095-2128.
[41] *R v Liang & Li* (1995) 82 A Crim R 39 at 43.
[42] *R v Young* (unreported, Court of Criminal Appeal (Vic.), Starke, Crockett & O'Bryan JJ, 2 December 1982).
[43] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [31]-[32] & [44]-[45].

39. **Section 5(2)(g) of the *Sentencing Act* 1991 (Vic)**: Fourthly, the Court of Appeal was wrong to conclude that s 5(2)(g) of the *Sentencing Act* 1991 (Vic) is not apt to compel a State sentencing court to have regard to the penalties fixed for like Commonwealth offences in appropriate circumstances.[45] Section 5(2)(g) provides that, in sentencing an offender, "a court must have regard to ... the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances". If, of two co-offenders jointly involved in the same behaviour in Victoria, or two unrelated offenders who independently had engaged in similar behaviour, one was charged with a State offence and the other was charged with its less punitive Commonwealth equivalent, it would be a "relevant circumstance" in sentencing the first offender that his co-accused was exposed to a lesser maximum penalty.

40. ***R v Liang & Li* applied/approved in several Australian jurisdictions**: Fifthly, there was no basis for confining the principle in *R v Liang & Li* to intra-State comparisons. The principle has been applied or referred to with apparent approval not only in Victoria[46] but also in the Full Court of the Federal Court,[47] South Australia,[48] Western Australia[49] and Queensland.[50] In none of those cases is there any suggestion that the principle should be so confined. Indeed, in what would have been an extension of the principle had the appeal succeeded, in the Queensland Court of Appeal decision of *R v Gordon; Ex parte Commonwealth DPP*,[51] Keane JA (with whom de Jersey CJ and Margaret Wilson J agreed) referred to *R v Liang & Li* and proceeded on the assumption that, had the State *Criminal Code* offence been an appropriate comparator, it would have been permissible to have regard to the lesser maximum penalty for that offence when sentencing for the more punitive Commonwealth offences. On the other hand, in the New South Wales Court of

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[44] See, e.g., *The Queen v Murphy* (1985) 158 CLR 596 at 611-612.
[45] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [41]. Contrary to this conclusion, the Court of Appeal has in at least two other decisions taken the view that the principle in *R v Liang & Li* is a relevant sentencing circumstance pursuant to s 5(2)(g). See *Stalio v The Queen* [2012] VSCA 120 at [35] & [42] and *Director of Public Prosecution (Cth) v Hussein* [2003] VSCA 187 at [26].
[46] Apart from *R v Liang & Li* (1995) 82 A Crim R 39 at 43-44 itself, see, e.g., *R v Vellinos* [2001] VSCA 131 at [11]; *Director of Public Prosecution (Cth) v Hussein* [2003] VSCA 187 at [26]; *R v McEachren* (2006) 15 VR 615; *Stalio v The Queen* [2012] VSCA 120 at [35] & [42]. See also a speech by Justice Mark Weinberg entitled "The Labyrinthine Nature of Federal Sentencing" at [47]-[56] (which was the keynote address delivered at a conference entitled "Current Issues in Federal Crime and Sentencing" at the National Judicial College of Australia and ANU College of Law in Canberra on 11 February 2012).
[47] *R v Whitnall* (1993) 42 FCR 512.
[48] *Scott v Cameron* (1980) 26 SASR 321.
[49] *Asfoor v The Queen* [2005] WASCA 126.
[50] *R v Gordon; Ex parte DPP (Cth)* [2011] 1 Qd R 429.
[51] *R v Gordon; Ex parte Commonwealth DPP* [2011] 1 Qd R 429 at [22]-[26] & [36]-[37].

Criminal Appeal decision of *R v El Helou*,[52] Allsop P (with whom Grove J and Hislop J agreed) rejected an argument to the effect that a sentence for a State offence should be affected by reference to a possible charge under a Commonwealth law carrying a lower penalty. However, no reference was made in Allsop P's judgment to *R v Liang & Li* or any of the other authorities which preceded or subsequently referred to *R v Liang & Li.*

41. **Section 43 provided an offence as or more appropriate**: Sixthly, the Court of Appeal was wrong to conclude that, even if the principle in *R v Liang & Li* does oblige a judge exercising State jurisdiction to have regard to a Commonwealth offence which has not been charged but which is "more appropriate" to the criminal conduct and which carries a lesser maximum penalty, the Commonwealth offence relied on by each appellant was not "a more appropriate offence".[53] There is debate as to whether the principle requires the comparator to be **as** appropriate or **more** appropriate. The Court in *R v Liang & Li* effectively said either formulation would do, whereas the Court in the present case said only the latter would suffice (relying on *R v Vellinos* [2001] VSCA 131).[54] There is no reason in principle why the comparator must be **more** appropriate. The notions of "fairness" and comparison on which the principle is based compel the view that it is enough that the comparator be **as** appropriate. In any event, there are several reasons why the Court was wrong to conclude that the Commonwealth offence in s 43 was not an appropriate comparator:

42. ***First***, in cases where the argument relates to a *different type* of alternative offence, it may be in some instances that the less punitive offence does not appropriately address the extent and character of the conduct such that the principle cannot apply.[55] However, that argument cannot be sustained in the present case in relation to s 43, since it addressed precisely the extent and character of the conduct alleged. In fact, s 43 was more apt than the common law offence charged because it relates to the judicial power of the Commonwealth, which was the relevant judicial power in this case (by reason of Mr Mokbel's having been convicted and sentenced for a Commonwealth offence), and the behaviour extended across four States and internationally.

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[52] *R v El Helou* (2010) 267 ALR 734 at [90].
[53] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [63] (summary of conclusion in all six cases) and [64]-[90] & [93], esp. at [82]-[90] (analysis of issues and reasons for conclusions in the appellants' cases).
[54] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [34]-[35].
[55] That was the case in *R v Vellinos* [2001] VSCA 131, because the offending charged under s 29D of the *Crimes Act* 1914 (Cth) was a sustained and deliberate defrauding of the Commonwealth at which the offence in s 29D was aimed, whereas the comparative offence relied on was an offence under the *Excise Act* which was summary in nature, not indictable, which did not require proof of fraud and which was punishable by fines only.

43. ***Secondly***, in determining whether to have regard to the fact that the less punitive offence could have been charged, it is erroneous to consider, as the Court of Appeal did here, whether ***the maximum penalty*** for the less punitive offence would be adequate to do justice to the conduct charged.[56] It is submitted that it is wrong – and to invert the instinctive synthesis – to refrain from considering the less punitive offence just because the maximum penalty is thought to be too low in the instant case. Rather, the task is first to consider whether the alternative offence adequately captures the same behaviour caught by the charged offence. If it does, then the court merely must have regard to the fact that the less punitive offence could have been charged and that the offender would have been subject to a lower maximum penalty. The fact that the penalty for the less punitive offence is comparatively low (or may even be considered to be inadequate) does not then prohibit consideration of the principle. If the conduct is considered sufficiently serious to warrant a penalty in excess of the maximum penalty prescribed by the comparator offence, then the court can sentence beyond that maximum penalty while still giving consideration to the principle.[57]

44. ***Thirdly***, the sentences of eight years' imprisonment imposed on each appellant on the count of attempting to pervert the course of justice was not only well in excess of the maximum penalty that could have been imposed for the offence in s 43 (five years' imprisonment) but was also twice the length of the longest sentence previously imposed in Victoria for the common law offence (four years' imprisonment). The more serious examples of the offence usually involve behaviour such as intimidation of witnesses, falsifying evidence or the like. But a sentence of eight years' imprisonment for the appellants' offences was surprising. Had each judge, in sentencing for the common law offence, been required to have regard to the fact that the Commonwealth offence could have been charged and that it carried a maximum penalty of five years' imprisonment, the judge could not reasonably have imposed anything approaching the sentence actually imposed in this case. Another measure of the vast length of the sentence is that, had the Mr Pantazis pleaded not guilty, the judge would have imposed on both charges an effective sentence that exceeded the sentence imposed on Mr Mokbel for actually committing the Commonwealth offence to which the appellant's attempt to pervert the course of justice related (12 years' imprisonment with a non-parole period of ten years for

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[56] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [42]-[43].

Mr Pantazis compared with 12 years' imprisonment with a non-parole period of nine years for Mr Mokbel).

45. **Negotiated presentment**: Finally, the Court of Appeal held that, because Mr Pantazis pleaded guilty to the offence in Count 1 as part of a negotiated presentment pursuant to which the Crown abandoned a drug-trafficking charge, it should exercise "considerable restraint before upsetting a negotiated plea" and "no unfairness can ordinarily be seen to arise" in such circumstances.[58] It is respectfully submitted that this is an entirely irrelevant consideration. Mr Pantazis maintained his innocence of the trafficking charge and the Crown chose not press it. Counsel for Mr Pantazis pressed for an alternative charge to Count 1 but the Crown would not accept it. A plea of guilty to Count 1 cannot mean – and was not understood to mean – that the question of law at issue in this case fell away. There is no "upsetting" of a plea bargain by applying the law. All Mr Pantazis asks is that he be sentenced according to law.

Failure to have regard to the State offence in s 325 of the *Crimes Act* 1958 (Vic)

46. **Section 325 provided an offence as or more appropriate**: If the principle in *R v Liang & Li* is confined to considering less punitive offences within the jurisdiction in which the judicial power is being exercised, it is submitted that, for the reasons given above, the Court of Appeal was in error in concluding that the sentencing judge did not err in failing to have regard to the maximum penalty fixed for the State offence of assisting an offender contrary to s 325(1) of the *Crimes Act* 1958 (Vic) (which also carried five years' imprisonment).[59] The offence in s 325(1) captures precisely what the appellants did, perhaps even more accurately than a charge of attempting to pervert the course of justice. Indeed, co-accused with lesser roles involved in Mr Mokbel's temporary evasion of apprehension, prosecution, conviction and punishment were charged with offences under this provision.[60] Contrary to the Court of Appeal's conclusion, a charge under s 325 would have been adequate to identify and punish the appellants' criminality.

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[57] See *R v Young* (unrep., Court of Criminal Appeal (Vic.), 2 December 1982) at 10 per Starke J (with whom Crockett and O'Bryan JJ agreed); *R v McEachren* (2006) 15 VR 615 at [58] per Redlich JA.
[58] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [90].
[59] *Pantazis & Ors v The Queen* [2012] VSCA 160 at [91]-[93].
[60] Query whether Mr Mokbel's Commonwealth offence – as distinct from an offence under a Victorian enactment – could amount to a "serious indictable offence". The term is defined in s 325(6) as being "an indictable offence which, by virtue of any enactment, is punishable on first conviction with imprisonment for life or for a term of five years". In *Edwards v Hutchins* (unreported, Supreme Court of Victoria, Marks J, 31 October 1990), Marks J, in reviewing a magistrate's decision, stated: "It may be assumed that there is good reason to suppose that the word 'enactment' must be Victorian only. If it were not so, there could be constitutional obstacles to validity, alternatively, difficulty in attributing to the Victorian legislature an intention

PART VII: APPLICABLE LEGISLATION

47. Section 43(1) of the *Crimes Act* 1914 (Cth) provided as follows:

> Any person who attempts, in any way not specially defined in this Act, to obstruct, prevent, pervert, or defeat, the course of justice in relation to the judicial power of the Commonwealth, shall be guilty of an offence.

48. Section 320 of the *Crimes Act* 1958 (Vic) relevantly provided as follows:

> An offence at common law specified in column 1 of the Table is punishable by the maximum term of imprisonment specified opposite it in column 2 of the Table.
>
> **TABLE**

Column 1 Common law offence	Column 2 Maximum Term of Imprisonment
...	
Attempt to pervert the course of justice	Level 2 imprisonment (25 years maximum)

49. Section 5(2)(g) of the *Sentencing Act* 1991 (Vic) relevantly provided as follows:

> In sentencing an offender a court must have regard to –
> ...
> (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

50. Section 325(1) of the *Crimes Act* 1958 (Vic) relevantly provided as follows:

> Where a person (in this section called the principal offender) has committed a serious indictable offence (in this section called the principal offence), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.

PART VIII: ORDERS SOUGHT

51. Each appellant seeks orders that:

a) the appeal to this Court be allowed and the order of the Court of Appeal dismissing the appellant's appeal against sentence be set aside; and

b) in lieu thereof, the appeal to the Court of Appeal be allowed, the sentence be quashed and the appellant be resentenced or the matter remitted to the Court of Appeal for resentencing.

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to define 'serious indictable offence' to include provisions of foreign statutes. If effect were given to such an intention the consequences would be very far reaching". However, this was not the point on the review and

Dated this 19th day of April 2013.

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Marks J went on to say (at p 3): "If I were to make an affirmative ruling on the matter I would necessarily do so without the advantage of full argument".