HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

TAK FAT WONG APPELLANT

AND

THE QUEEN RESPONDENT

Wong v The Queen
[2001] HCA 64
15 November 2001
S193/2000

ORDER

1. Appeal allowed.

2. Set aside the order of the Court of Criminal Appeal of New South Wales dated 16 December 1999.

3. Remit the matter to that Court for further hearing and determination conformably with the reasons of this Court.

On appeal from the Supreme Court of New South Wales

Representation:

J Basten QC with N J Williams for the appellant (instructed by Legal Aid Commission of New South Wales)

P S Hastings QC with F A Veltro for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M J Leeming intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor).

B M Selway QC, Solicitor-General for the State of South Australia with C D Bleby intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia).

M G Sexton SC, Solicitor-General for the State of New South Wales with K M Guilfoyle intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales).

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

JACKIE KAI CHU LEUNG APPELLANT

AND

THE QUEEN RESPONDENT

Leung v The Queen
15 November 2001
S198/2000

ORDER

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2. *Set aside the order of the Court of Criminal Appeal of New South Wales dated 16 December 1999.*

3. *Remit the matter to that Court for further hearing and determination conformably with the reasons of this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

J Basten QC with G D Wendler for the appellant (instructed by Van Houten)

P S Hastings QC with F A Veltro for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M J Leeming intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor).

B M Selway QC, Solicitor-General for the State of South Australia with C D Bleby intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia).

M G Sexton SC, Solicitor-General for the State of New South Wales with K M Guilfoyle intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales).

CATCHWORDS

Wong v The Queen
Leung v The Queen

Criminal law – Sentencing – Federal offences – Guideline judgments – Appellants convicted of being knowingly concerned in the importation of narcotics – Whether Court of Criminal Appeal erred in failing to give adequate reasons for increasing sentences imposed by trial judge – Whether Court of Criminal Appeal erred in disturbing sentences without identifying a relevant error – Whether Court of Criminal Appeal erred in failing to take adequately into account the nature of a prosecution appeal – Whether Court of Criminal Appeal erred in publishing "quantitative guideline" – Whether such guidelines inconsistent with applicable legislation – Matters to which court to have regard when passing sentence – Significance of weight of narcotics – Whether "two-stage" approach to sentencing open – Whether publication of prescriptive table of sentences within jurisdiction or power of Court of Criminal Appeal when exercising federal jurisdiction.

Constitutional law – Federal legislation providing for sentencing of convicted federal offenders – State court of criminal appeal publishes "quantitative guidelines" – Whether "promulgation" of guidelines incompatible with the exercise of federal jurisdiction by State court – Whether incompatible with decision of a "matter" within Ch III of the Constitution – Whether inconsistent with terms of federal legislation applicable to the case.

Constitution, s 77(iii).
Crimes Act 1914 (Cth), s 16A.
Customs Act 1901 (Cth), s 235(2)(c)(ii).
Judiciary Act 1903 (Cth), s 68.
Criminal Appeal Act 1912 (NSW), ss 5D and 12.

1 GLEESON CJ. The Court of Criminal Appeal of New South Wales allowed appeals by the Commonwealth Director of Public Prosecutions pursuant to s 5D of the *Criminal Appeal Act* 1912 (NSW) against sentences imposed upon the present appellants by Judge Davidson in the District Court, following their conviction, after trial, for being knowingly concerned in a heroin importation[1]. The question for decision by this Court is whether the Court of Criminal Appeal was in error in concluding that the sentences imposed by Davidson DCJ were manifestly inadequate, and in fixing heavier sentences.

2 The Court of Criminal Appeal was composed of five, rather than the usual three, members, because the Court had been given notice that the Commonwealth Director of Public Prosecutions would urge it to publish a "guidelines judgment" in relation to heroin importation. What that involved will be examined below. The Court was unanimous in its conclusion that the sentences imposed by Davidson DCJ were manifestly inadequate, that appellate intervention was required, and that heavier sentences should be imposed. The maximum penalty was imprisonment for life. Davidson DCJ had sentenced each offender to imprisonment for 12 years with a non-parole period of 7 years. All five members of the Court of Criminal Appeal agreed that those sentences should be quashed, and that each offender should be sentenced to imprisonment for 14 years with a non-parole period of 9 years.

3 The Court of Criminal Appeal was divided on whether it was appropriate to publish a guidelines judgment. Four members of the Court (Spigelman CJ, Mason P, Sperling and Barr JJ) thought it was. Spigelman CJ, who delivered the principal judgment, set out guidelines[2]. Simpson J thought it undesirable to publish guidelines for two reasons: first, the proposed guidelines related to people involved at a lower level in the scheme of importation than the two offenders; secondly, the examination of sentencing patterns showed that sentencing was already consistent, and at a suitable level. However, she agreed with the disposition of the appeals in relation to each offender, and with the orders proposed by Spigelman CJ[3].

4 Most of the argument in this Court was addressed to the subject about which the members of the Court of Criminal Appeal were divided: the guidelines. Indeed, the grounds of appeal were addressed exclusively to the guidelines, and set out a number of reasons in support of a conclusion that they were either beyond power, or involved an improper or inappropriate exercise of

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1 *R v Wong; R v Leung* (1999) 48 NSWLR 340.

2 (1999) 48 NSWLR 340 at 366.

3 (1999) 48 NSWLR 340 at 373.

power. Such was the concentration upon the guidelines in this Court that there was no examination, either in written submissions or oral argument, of the reasons for sentence given by Davidson DCJ. Yet, in order to satisfy this Court that the appeals to it should be allowed, and the decision of the Court of Criminal Appeal set aside, the appellants must show that the Court of Criminal Appeal was in error in relation to the matter about which it was unanimous. As the concurrence of Simpson J in the ultimate decision shows, it is not necessary to agree with the decision to formulate guidelines to reach the conclusion that the appeal under s 5D should have been allowed. The grounds of appeal in this Court appear to have been framed upon an assumption which may ultimately be found to be correct; but which is not self-evident. A successful attack upon the decision to publish guidelines does not necessarily mean that the decision to uphold the prosecution appeal against leniency was affected by error. Accordingly, it is necessary to examine the reasons of the Court of Criminal Appeal for its decision to allow the appeal under s 5D, and the role of the guidelines in those reasons. It is convenient to begin by noting how it was that the matter of guidelines arose.

The idea of guidelines

5 The expressions "guidelines" and "guidelines judgments" have no precise connotation. They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion[4]. Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.

6 One of the legitimate objectives of such guidance is to reduce the incidence of unnecessary and inappropriate inconsistency. All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.

7 Most sentencing of offenders is dealt with as a matter of discretionary judgment. Within whatever tolerance is required by the necessary scope for individual discretion, reasonable consistency in sentencing is a requirement of justice. The *Judicial Officers Act* 1986 (NSW) identifies sentencing consistency

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4 *Norbis v Norbis* (1986) 161 CLR 513 at 536 per Brennan J.

as a legislative objective. That Act established the Judicial Commission of New South Wales to monitor sentences and disseminate information about sentences "for the purpose of assisting courts to achieve consistency in imposing sentences" (s 8). How does collecting and disseminating information about sentences help to fulfil the statutory purpose? The obvious legislative assumption is that knowledge of what is being done by courts generally will promote consistency. That assumption accords with ordinary practice. Day by day, sentencing judges, and appellate courts, are referred to sentences imposed in what are said to be comparable cases. There will often be room for argument about comparability, and about the conclusions that may be drawn from comparison. But sentencing judges seek to bring to their difficult task, not only their personal experience (which may vary in extent), but also the collective experience of the judiciary. Communicating that collective experience is one of the responsibilities of a Court of Criminal Appeal.

8 One of the reasons for giving a Court of Criminal Appeal jurisdiction of the kind conferred by s 5 of the *Criminal Appeal Act* is to secure consistency in sentencing[5]. In *R v Osenkowski*[6], King CJ, in a passage that has been quoted with approval many times, said:

> "The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

9 McHugh J, in *Everett v The Queen*[7], referred to the role of prosecution appeals when "a sentencing judge imposes a sentence that is definitely below the range of sentences appropriate for the particular offence". Whether one talks in terms of a range of appropriate sentences or, like Canadian courts, in terms of a starting-point for consideration, appellate courts, both for the purpose of making and explaining their own decisions, and for the guidance of primary judges, may find it useful to refer to information about sentences that have been imposed in comparable cases, and to indicate, subject to relevant discretionary considerations, the order of the sentence that might be expected to be attracted by a certain type of offender who commits a certain type of offence. In some jurisdictions, such as the United Kingdom, this has been undertaken more often,

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5 *Everett v The Queen* (1994) 181 CLR 295 at 306 per McHugh J.

6 (1982) 30 SASR 212 at 213.

7 (1994) 181 CLR 295 at 306.

and with greater specificity, than in others. But it has also been done in Canada[8], Hong Kong[9], and New Zealand[10]. In 1992 the Council of Ministers of the Council of Europe approved recommendations concerning sentencing consistency, which included reference to guidelines judgments by superior courts when that is appropriate to the constitution or the traditions of the relevant legal system[11]. In some jurisdictions there is statutory backing for the practice; in others there is not. The history of the practice, with particular reference to what had been done in the past in New South Wales, and the reasons for recent developments in that jurisdiction, may be seen in the judgment of Spigelman CJ in *R v Jurisic*[12].

10 The increasing size of the judiciary, and the legal profession, is a factor in the importance which is attached to the problem of inconsistency, and the need for appellate guidance. In the days when criminal justice was administered by a relatively small group of judges, it was easier to maintain consistency. The range of likely penalties for common offences was well known, and significant departures from that range were readily identified. Idiosyncratic decision-making was not difficult to recognise. Now, at least in New South Wales, a large number of judges (and acting judges) sentence offenders, and there is a growing need for the Court of Criminal Appeal to give practical guidance to primary judges. The form that such guidance might properly take is an important issue in the administration of criminal justice. If there is insufficient guidance, and resulting inconsistency, public confidence in the value of discretionary sentencing will suffer.

11 It is necessary to relate what was said and done about guidelines in the present case to the actual decision that is under appeal. Referring to the Canadian approach to guidelines, McLachlin J said[13]:

> "The starting-point approach was developed as a way of incorporating into the sentencing process the dual perspectives of the seriousness of the offence and the need to consider the individual

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8 *R v McDonnell* [1997] 1 SCR 948.

9 *Chan Chi-ming v The Queen* [1979] HKLR 491.

10 *R v N* [1998] 2 NZLR 272.

11 Council of Europe, Recommendation No R (92) 17, *Consistency of Sentencing* (Strasbourg, 1993).

12 (1998) 45 NSWLR 209. See also von Hirsch and Ashworth (eds), *Principled Sentencing, Readings on Theory and Policy*, 2nd ed (1998) at 212-239.

13 *R v McDonnell* [1997] 1 SCR 948 at 989.

> circumstances of the offender. It represents a restatement of the long-standing practice of sentencing judges of beginning by considering the range of sentence that has been posed for similar criminal acts followed by consideration of factors peculiar to the case and offender before them."

12 This does not have to be taken as referring to a strictly sequential process of reasoning. Judges are generally capable of entertaining two or more ideas at the one time. It simply recognises the potential relevance of comparable sentences, both for the primary judge, in fixing a sentence, and for an appellate court in considering whether a sentence is manifestly inadequate or, in the case of an offender's appeal, manifestly excessive. Both in argument, and in reasons for judgment, inadequacy or excessiveness is often demonstrated by a process of comparison. Such a process is a legitimate forensic tool for advocates and judges; and has been employed for many years.

The reasoning of the Court of Criminal Appeal

13 The decision to allow the prosecution appeal against the sentences imposed in the District Court was unanimous.

14 Spigelman CJ, and three other members of the Court of Criminal Appeal, were in favour of formulating sentencing guidelines in the course of dealing with the prosecution appeal. One thing should be noted about the nature of the challenge to the guidelines. It is not contended that they involve, or are based upon, factual error, or misinterpretation of information, or that they reflect an approach to the objective seriousness of the offence of heroin importation that is unduly severe. It is said that they are too detailed and inflexible, and, in particular, that they attach too much importance to one particular factor. But it is not said that they are inherently harsh. In fact, the guidelines promulgated were somewhat less severe than those for which the prosecution contended and Simpson J said that if, contrary to her view, there should be such guidelines then, on the information available from judgments in comparable cases, she would agree with the range of sentences indicated.

15 Spigelman CJ, having referred to the prosecution's submission that there should be a "guidelines judgment", said that it was proper to consider "the appropriate pattern of sentencing for this offence" (ie being knowingly concerned in the importation of heroin). The appeals he said, raised a question of "the appropriate sentencing range". He indicated a willingness to consider whether it was possible to identify an appropriate range by reference to information about established sentencing practice. There is nothing unusual about that.

16 His Honour said:

> "I should note in this context, that [the offenders] indicated expressly that there was no objection to the Court having regard to the

> schedules of sentencing outcomes for this offence, in this and other States, provided to the Court by the Crown. Nor was there any objection to the Court considering the Judicial Commission's sentencing statistics. As will appear further below, it is only this material which has proved to be of significance for the formulation of the guidelines in the present case."

17 Thus, it was common ground that the Court of Criminal Appeal was entitled to have regard to all the primary information about sentencing in other cases that was taken into account in formulating the guidelines. There was no objection to the Court of Criminal Appeal looking at that information, and there was no suggestion that the information was incorrect, or misleading, or selectively prepared. Essentially, it was information about the outcomes of other cases, many of which were decisions of the Court of Criminal Appeal itself. Much of the "information" took the form of reminding the Court of Criminal Appeal of its own experience.

18 Reference was made to the case of *Ferrer-Esis*[14] in which Hunt J (as he then was), in a single sentence, had set out what Spigelman CJ said was a "guideline". Hunt J said[15]:

> "The recognised pattern of sentencing for couriers of substantial quantities of *heroin* … produced head sentences of between 12 and 16 years, with minimum terms generally fixed within the order of approximately 60 to 75 per cent of the head sentence."

19 By more recent standards, if that is a "guideline", it is rather modest. Hunt CJ at CL said in a later case[16]:

> "Where this Court refers to a range of sentences which have been imposed for a particular offence, it is doing no more than recording, as an historical fact, that that is the general pattern of sentencing at that particular time, so that sentencing judges will have regard to that general pattern when imposing sentences in the particular case."

20 Spigelman CJ quoted that passage, and made it clear in that it was an exercise of that kind with which he was concerned in the present case, although he had in mind a greater degree of specificity than had been employed by Hunt J. Spigelman CJ formed no impression of inconsistency or systematic inadequacy of sentencing in drug importation cases. He decided to adopt a set of guidelines "which does not contain any significant prescriptive element", basing his

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14 (1991) 55 A Crim R 231.

15 (1991) 55 A Crim R 231 at 236.

16 *Lawson, Wu & Thapa* (1997) 98 A Crim R 463 at 465.

conclusions on "the collective wisdom of trial judges and appellate judges of great experience".

21 There is one aspect of the guidelines as ultimately formulated which appears to have caused some misunderstanding. The Court of Criminal Appeal examined a number of its own earlier decisions, and certain schedules of information provided by the prosecution, noting a prosecution submission that it was much easier to identify a sentencing pattern for low to mid-range quantities of drugs, and for couriers rather than persons higher up in the organisational structure. Hence, the guidelines proposed by the prosecution were "for head sentences in the case of couriers pleading guilty". He noted that there was only limited information, and limited guidance by way of sentencing patterns, in more serious cases. Against that background, on the basis of existing sentencing practice, Spigelman CJ proposed a guideline which was "non-binding" and "intended to apply to couriers and persons low in the hierarchy of the importing organisation". It is set out in the judgment of Gaudron, Gummow and Hayne JJ. The reason why the guideline was restricted to those persons was that there was insufficient information to indicate a pattern of sentencing, in relation to persons higher in the organisational hierarchy, which could be formulated with sufficient clarity.

22 The highest level in the guideline for couriers and persons low in the hierarchy was expressed in relation to the importation of a substantial commercial quantity (3.5 kgs – 10 kgs). The range was 10 – 15 years.

23 The present appellants were concerned in the importation of 9.356 kgs of pure heroin. They did not plead guilty. Their role in the importation was closely examined. They had been found to be "major participants in the distribution chain", and "the level of objective criminality was of a similar order to a principal". Spigelman CJ said that the proposed guideline was, therefore, "not relevant".

24 One other fact should be noted. Apart from the quantity of heroin involved, and the roles they played in the importation, there was little of relevance to sentencing that was known about the appellants. The importation was arranged and effected by a gang of Chinese men. The heroin arrived in Adelaide from Bangkok and was then transported to Sydney. In this respect the remarks on sentence of Davidson DCJ are significant. They are mainly devoted to the objective facts concerning the scheme of importation and the role of each offender. There were pre-sentence reports giving some personal information about each appellant, but the learned judge expressly stated that he did not obtain any substantial assistance from that information. The second appellant had some previous offences, but they were regarded as insignificant. The case was not one in which subjective considerations played an important part. And the role of the appellants in the importation was such that they would have known the quantity of heroin involved. Thus, whatever might be said in theory, or in relation to

other possible cases, in relation to these appellants the quantity of heroin imported, and their roles in the importation, were the dominant factors in any proper approach to fixing their sentences.

25 Spigelman CJ concluded that the sentences imposed at first instance were manifestly inadequate. The size of the importation and the role of the appellants led him to that conclusion. He considered a question of suggested disparity by reference to the sentence imposed on a co-offender, but that is not presently material. It seems apparent that, in reaching his conclusion of manifest inadequacy, Spigelman CJ took account of the primary information to which he had been referred in composing guidelines for couriers. Let it be assumed that it was beyond power, or inappropriate, either to publish guidelines for couriers, or to publish guidelines as specific and inflexible, or as controlled by quantity, as those that were adopted. It does not follow that the conclusion of manifest inadequacy in relation to the subject sentences was wrong. In fact, if one goes behind the courier guidelines to the primary sentencing information on which they were based, and allows for the quantity of heroin involved in the present case, and the role of the appellants in the importation, such information supports the conclusion reached by Spigelman CJ.

26 That is the way Simpson J looked at the case. Although she would not go along with the publication of courier guidelines, her judgment was that the sentences were manifestly inadequate.

27 There is no reason to think that, if the other members of the Court of Criminal Appeal had been of a mind, like Simpson J, to decline the invitation to produce a "guidelines judgment", they would have reached any different conclusion as to the outcome of the prosecution appeals.

The criticism of the guidelines

28 The guidelines formulated by Spigelman CJ, and adopted by three other members of the Court of Criminal Appeal, do not form part of the judgment or order of that Court. This Court cannot quash them, or set them aside.

29 Disapproval of the guidelines might be thought more likely to result in setting aside a decision in a case in which they have been applied than in a case in which they have not been applied. They were not applied in the present case. They are guidelines relating to couriers; not to people in the position of the appellants. The information from which they were prepared was taken into account. But there is no suggestion that such information was erroneous, misleading or irrelevant. There was no objection to its being considered. In judging the adequacy of the sentences imposed on the appellants, there was no error in the Court of Criminal Appeal having regard to sentences that had been imposed upon couriers.

30 I have difficulty in accepting that any relevant question of power arises. If, in the course of deciding whether the sentences imposed on the appellants were manifestly inadequate, the Court of Criminal Appeal decided to have regard to previous sentences imposed on couriers, as it was entitled to do, then it required no grant of power to say anything it wanted to say about those sentences. What it said might have led it into error in relation to the matter it had to decide, or it might lead some future courts into error. That is another question. But there was no need of any particular power to express a conclusion about the pattern of sentencing of couriers, or to commend that conclusion to sentencing judges as a guideline.

31 Even so, there is, in my view, a valid criticism to be made of the guidelines, although it is not one that has a bearing on the outcome of the present appeals. There is utility in addressing the criticism, because of the danger that in future cases, where the guidelines are applied, error may result. I agree with the contention of the appellants that, making due allowance for all the qualifications with which the guidelines were accompanied, there is a substantial risk that they may result in an approach to sentencing which is inconsistent with the requirements of s 16A of the *Crimes Act* 1914 (Cth). Insofar as they are a mere compilation or classification of sentencing information, then they are either accurate or inaccurate, helpful or unhelpful. But they are clearly intended to be more than that. The effect they will have, is to constrain the exercise of sentencing discretion. This is a risky undertaking when there is a federal statute which spells out in detail the matters to be taken into account by a sentencing judge. The statute is important both for what it says and for what it does not say. In particular, the guidelines, in their specificity, and in the significance they attach to the objective fact of the quantity of heroin imported, which is broken down into sub-categories which have no statutory foundation, are likely to lead to error. To take one example, which is not uncommon, although it has nothing to do with the present case, it may be that an offender's state of information and belief about the quantity of heroin imported is much more significant than the objective fact as to quantity. A given judge, looking at the guidelines, but also taking account of all the qualifications expressed, might not necessarily take an approach inconsistent with s 16A. But there is a real risk that another judge might.

Conclusion

32 The decision of the Court of Criminal Appeal has not been shown to be in error. There is a valid criticism to be made of guidelines that were formulated in relation to couriers, but that criticism relates to the use that is likely to be made of the guidelines in future cases and has no bearing upon the present case.

33 The appeals should be dismissed.

34 GAUDRON, GUMMOW AND HAYNE JJ. The appellants were convicted of being knowingly concerned in the importation into Australia of a quantity of heroin not less than the commercial quantity applicable to heroin[17]. They now appeal against orders of the Court of Criminal Appeal of New South Wales[18] made on appeals by the Director of Public Prosecutions (Cth) against the sentences imposed on them by the trial judge. The Director's appeals to the Court of Criminal Appeal were allowed. The sentence of 12 years with a non parole period of seven years imposed on each of the appellants was quashed and in lieu each was sentenced by the Court of Criminal Appeal to 14 years with a non parole period of nine years.

35 Spigelman CJ (with whom Mason P, Sperling and Barr JJ agreed) gave the leading judgment and stated a "guideline" for sentencing those knowingly concerned in the importation of narcotics. The fifth member of the Court, Simpson J, considered that the cases before the Court were not suitable to provide the foundation for a guideline judgment[19] and doubted the need for a guideline judgment[20]. The guideline stated by Spigelman CJ in his reasons was said[21] to be "determined primarily on the basis of existing sentencing patterns and is intended to apply to couriers and persons low in the hierarchy of the importing organisation". That "guideline" was[22]:

"∃	Low level traffickable quantity (2 grams-200 grams)	–	5 to 7 years
∃	Mid level traffickable quantity (200 grams-1 kilogram)	–	6 to 9 years
∃	High range traffickable quantity 1 kilogram-1.5 kilograms (heroin)	–	7 to 10 years

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17 *Customs Act* 1901 (Cth), s 233B. Schedule VI of that Act specifies the commercial quantity applicable to heroin as 1.5 kg.

18 *R v Wong; R v Leung* (1999) 48 NSWLR 340 (Spigelman CJ, Mason P, Simpson, Sperling and Barr JJ).

19 (1999) 48 NSWLR 340 at 372-373 [189]-[190].

20 (1999) 48 NSWLR 340 at 372 [190].

21 (1999) 48 NSWLR 340 at 366 [142].

22 (1999) 48 NSWLR 340 at 366 [142].

1 kilogram-2 kilograms (cocaine)

∃ Low range commercial quantity – 8 to 12 years
1.5 kilograms-3.5 kilograms (heroin)
2 kilograms-3.5 kilograms (cocaine)

∃ Substantial commercial quantity – 10 to 15 years
(3.5 kilograms-10 kilograms)".

Yet later in his Honour's reasons he said[23] that:

> "On [the trial judge's] findings, Wong and Leung were major participants in the distribution chain. Whilst they may not have been principals in the act of importation, the level of objective criminality was of a similar order to a principal. The guideline I have proposed above is not relevant to the cases of Wong and Leung."

36 Passing sentence on a convicted person was once a ritual which neither required nor permitted the exercise of any judgment by the judge. Now, apart from some very rare cases, a judge who is required to pass sentence on an offender must choose which of several forms of disposition should be made and must decide how great the punishment will be. The legislature prescribes the maximum punishment that may be imposed. In some (relatively few) cases it will prescribe a minimum. The judge must decide, having regard to what the offender has done and whatever may be urged in aggravation or mitigation, what sentence should be passed. If the judge imposes a punishment that is plainly too heavy, it is said that the sentence is manifestly excessive; if it is plainly too light, it is manifestly inadequate.

37 Why should an appellate court which is charged with the task of determining appeals against sentence not give guidance to sentencing judges by promulgating a table of the range of punishments it would expect to be imposed for certain kinds of offence? In 1901, before the establishment in England of the modern system for criminal appeals, Lord Chief Justice Alverstone and a committee of judges of the Queen's Bench had produced (but not disseminated widely) a memorandum containing a table of "normal punishments" for six

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23 (1999) 48 NSWLR 340 at 368-369 [163].

general categories of offence[24]. Does not promulgating such a table save time and money and lead to a more certain administration of the criminal law? In doing so, is an appellate court doing more than ensuring the coherent and consistent administration of the law?

38 The answers that should be given to these questions depend upon issues of fundamental principle. They call for close attention to the nature of the task that confronts a sentencing judge, and to the jurisdiction and powers of the Court of Criminal Appeal that were engaged in these matters. Because the Court of Criminal Appeal was exercising federal jurisdiction questions may also arise about the difference between legislative and judicial functions. The task of answering these questions is not assisted by the simple application of approving or disapproving epithets to what the Court of Criminal Appeal has done, as being "convenient" or "inconvenient", "efficient" or "inefficient". "Convenience" and "efficiency" might be achieved by retreating to the days when a judge had no discretion about what sentence should be passed.

39 The "guideline judgment" in the present matters produced no order or declaration setting out the table of range of sentences proposed by the Court. The content of the table is, therefore, not directly subject to appellate review by this Court in exercise of the jurisdiction conferred by s 73 of the Constitution[25]. No party to the proceedings in which it was published could appeal to this Court against anything but the order of the Court of Criminal Appeal disposing of the proceeding and that order did not incorporate the table.

40 The question which arises in this Court is whether the Court of Criminal Appeal made an error of law in making the orders which it did make. Did the reasons of the Court of Criminal Appeal, including as they did the guideline to which we have referred, reveal error?

Guideline judgments

41 It is as well to begin by examining what was meant in the present case by saying that the judgment was a "guideline judgment". The practice of describing some judgments of the Court of Criminal Appeal of New South Wales as

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24 Radzinowicz and Hood, *A History of English Criminal Law*, (1986), vol 5, "The Emergence of Penal Policy" at 755-757; Thomas, *Constraints on Judgment; The Search for Structured Discretion in Sentencing, 1860-1910*, (1979) at 70-74.

25 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289.

"guideline judgments" began in *R v Jurisic*[26]. The description has since been used in several judgments[27]. Since the practice was first adopted, the *Criminal Procedure Act* 1986 (NSW) ("the 1986 Act") was amended by introducing Pt 8, entitled "Sentencing guidelines". In that Part, a "guideline judgment" was defined[28] as "a judgment containing guidelines to be taken into account by courts sentencing offenders". Part 8 provided[29] for the Court of Criminal Appeal to give a guideline judgment on the application of the Attorney-General and[30] that such a guideline judgment "may be given separately or may be included in any judgment of the Court that it considers appropriate". Section 28(a) provided that nothing in Pt 8 "limits any power or jurisdiction of the Court to give a guideline judgment that the Court has apart from section 26". Part 8 has since been repealed[31] and very similar provisions made by Pt 3, Div 4 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

42 Part 8 of the 1986 Act was not engaged in the proceedings concerning the present appellants. There was no application by the Attorney-General for the State of New South Wales (although the Attorney intervened in the appeals to contend that a guideline judgment could be given[32]).

43 In the present matters, Spigelman CJ said that, by a "guideline judgment", the Court of Criminal Appeal seeks to identify what is or should be the appropriate pattern of sentencing for an offence[33]. The pattern that is identified (as that which "is or should be" regarded as appropriate) is, therefore, more than an historical record of what sentences have been passed by the courts. It is a record of what is thereafter to be regarded as "appropriate". At least to that

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26 (1998) 45 NSWLR 209.

27 For example, *R v Henry* (1999) 46 NSWLR 346; *R v Thomson* (2000) 49 NSWLR 383.

28 *Criminal Procedure Act* 1986 (NSW), s 25.

29 s 26(1).

30 s 26(5).

31 *Crimes Legislation Amendment (Sentencing) Act* 1999 (NSW), s 6, Sched 4.13, Item [4].

32 (1999) 48 NSWLR 340 at 343 [3].

33 (1999) 48 NSWLR 340 at 347 [22].

extent the judgment is intended, therefore, to be prescriptive. It was said by the Court of Criminal Appeal that the guideline is "indicative only"[34] and "may be departed from … [I]t is not binding in any formal sense nor does it constitute a rule of law"[35]. Plainly, however, the statement that it is "not binding in any formal sense" is not intended to convey to the reader (lay or judicial) that the guideline may be ignored in determining sentences in future cases. Thus, it was said that two consequences follow from "promulgating a quantitative guideline"[36]:

> "First, by providing guidance to trial judges it is less likely that sentences will be imposed which suggest a need for appellate review. Secondly, the clear promulgation of likely actual sentences will assist the objective of general deterrence."

44 It may be observed at once that it is highly likely that the publication of a guideline judgment will affect what sentences trial judges impose. The first of the identified consequences may be accepted as not only likely to follow but also as intended to follow. The second asserted consequence is open to much greater doubt. If, as was accepted in the Court of Criminal Appeal in these cases[37], the publication of maximum sentences does not perform a substantial deterrent function, there is no reason to think that publishing the fact that other, *lesser*, sentences are likely to be imposed in certain circumstances will have some *greater* deterrent effect. Be that as it may, the Court's intention is clear. It intended that thereafter sentencing judges should take account of what was set out in the guidelines[38].

45 Yet the table in this case was produced by the Court following argument in which there was no single party and no group of parties in whose interests it was to mount arguments against all aspects of the proposed table of punishments. There was no party in the position of contradictor of all aspects of the submissions the Director advanced in support of publishing a table of punishments. It was promulgated having regard, no doubt, to the collective experience of the members of the Court in dealing with offences of the kind

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34 (1999) 48 NSWLR 340 at 349 [32].

35 (1999) 48 NSWLR 340 at 349 [32].

36 (1999) 48 NSWLR 340 at 363 [125].

37 (1999) 48 NSWLR 340 at 363 [126].

38 See also (1999) 48 NSWLR 340 at 372 [190] per Simpson J.

under consideration, but it is not clear from the reasons given in the present matters what range of facts had been taken into account in its formulation. Most importantly, because the process was directed to the articulation of proposed *results* rather than the articulation of the *principles* which should inform the judge who is called on to perform the task of sentencing an individual offender, the table of outcomes and the Court's reasons give little or no guidance about what may make a particular case "typical" or "exceptional".

Federal jurisdiction

46 The Court acted as it did in the present matters on the basis that it was empowered to do so by ss 5D and 12 of the *Criminal Appeal Act* 1912 (NSW). Section 5D(1) provides that the Attorney-General, or the Director of Public Prosecutions, in each case of the State, may appeal to the Court of Criminal Appeal against any sentence pronounced by the Court of trial in any proceedings to which the Crown was a party and that the Court of Criminal Appeal "may in its discretion vary the sentence and impose such sentence as to the said court may seem proper". Section 12 provides that the Court may, "if it thinks it necessary or expedient in the interests of justice … exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters …".

47 As has been noted earlier, the Court of Criminal Appeal was exercising federal jurisdiction, invested in it by s 68 of the *Judiciary Act* 1903 (Cth). It was accepted that the Attorney-General of the Commonwealth (and, thus, by operation of s 9(1) of the *Director of Public Prosecutions Act* 1983 (Cth), the Director) had a right of appeal to the Court of Criminal Appeal against the sentences imposed on the present appellants[39].

48 The laws of the State respecting the procedure for the hearing and determination of appeals arising out of the trial of the appellants (charged as each had been with an offence against the laws of the Commonwealth) were to apply and be applied, subject to s 68 of the *Judiciary Act*, so far as they are applicable[40]. Importantly, they were to be applied, in the exercise of the judicial power of the Commonwealth, so far as they are consistent with Ch III of the Constitution. That is an inquiry which first requires examination of the ambit of

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39 *Peel v The Queen* (1971) 125 CLR 447. See also *Seaegg v The King* (1932) 48 CLR 251; *Williams v The King [No 1]* (1933) 50 CLR 536; *Williams v The King [No 2]* (1934) 50 CLR 551; *R v Williams; R v Somme* (1934) 34 SR(NSW) 143.

40 *Judiciary Act* 1903 (Cth), s 68.

the relevant State provisions and the jurisdiction and powers they confer on the Court of Criminal Appeal.

49 The relevant State provisions engaged by s 68 of the *Judiciary Act* are, then, those mentioned by the Court of Criminal Appeal – ss 5D and 12 of the *Criminal Appeal Act*. Nothing in either of those sections gives the Court of Criminal Appeal any jurisdiction or power other than jurisdiction in the matter or matters before the Court and powers relating to the decision of that matter or those matters. Accordingly, the Court had neither jurisdiction nor power to prescribe what sentences should be passed in future matters. That being so, no separate question about disconformity between the State legislation picked up and applied by s 68 of the *Judiciary Act* and Ch III arises.

50 It was accepted in the proceedings in this Court that the "matter" in respect of which the Court of Criminal Appeal was exercising jurisdiction was the appeal by the Director of Public Prosecutions against the sentences imposed by the trial judge. That was the controversy which the Court of Criminal Appeal was given jurisdiction to quell by making an order determining the Director's appeal. This, of course, the Court did by making the order which it made. Did it err in making that order?

51 In approaching that question it is also necessary to bear steadily in mind that, in deciding what sentence should properly have been imposed on the appellants, the Court of Criminal Appeal was bound to consider any issue that was raised about whether the trial judge had properly applied Pt 1B of the *Crimes Act* 1914 (Cth). That Part makes provision, among other things, for the sentencing of persons convicted of an offence against a law of the Commonwealth.

Error?

52 The appellants contended that so distracted was the Court of Criminal Appeal by the stating of guidelines for other cases, that it gave no, or at least no sufficient reasons for its conclusion that the sentences originally imposed on the appellants should be set aside and new sentences passed. The respondent contended that the statement of guidelines was no more than extended obiter dicta and it was, in any event, the Court properly performing the "function" of giving guidance to sentencing judges.

53 Most of the first 142 paragraphs of the reasons for judgment of Spigelman CJ are directed to whether the Court could or should issue a guideline judgment and to what that guideline should be. The last 44 paragraphs relate directly to the Director's appeals against the sentences imposed on the present appellants. It would be surprising indeed if the reasons were to be understood as

dealing with two wholly separate and unconnected issues: the first about guidelines for sentencing those who were knowingly concerned in the importation of narcotics and the second about the particular sentences imposed on the appellants for that offence. It would be a radical departure from accepted judicial method to use reasons for judgment disposing of a matter before the Court for some statement of policy on an unconnected subject. Yet that is, in essence, what the respondent contends has happened here. The statement in the principal reasons of the Court that the guideline "is not relevant to the cases of Wong and Leung"[41] gives considerable weight to that contention.

54 When read as a whole, however, the reasons reveal that there is a single chain of reasoning adopted in formulating the guidelines and in disposing of the Director's appeals. Leaving aside the Court's reasoning on the question of its jurisdiction or power to issue a guideline, the essential reasoning of the Court had the following elements. First, the formulation of principles was understood to include "the identification of quantitative aspects of discretionary decisions"[42]. That is, the Court understood that the result arrived at in sentencing an offender was itself an "aspect of [the] discretionary decision". Secondly, although it was accepted that the quantity of narcotic imported was not the only factor to be taken into account in fixing a sentence[43], it was said to be a "central factor"[44]. "[O]ther considerations, both objective and subjective, which usually arise for determination in this context" of sentencing for an offence of being knowingly concerned in the importation of narcotics were treated as being able to be, and intended to be, encompassed within the ranges stated[45]. Nevertheless, it was accepted that sentences outside the range may be appropriate, for example, if the offender gave substantial assistance to authorities, or pleaded guilty, or if the offender were "the principal of an organisation responsible for an importation or a person high in the hierarchy of such an organisation, *to whom an increment should be applied*"[46] (emphasis added). But absent those or other like factors,

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41 (1999) 48 NSWLR 340 at 369 [163].

42 (1999) 48 NSWLR 340 at 346 [18].

43 (1999) 48 NSWLR 340 at 357 [76].

44 (1999) 48 NSWLR 340 at 365 [140].

45 (1999) 48 NSWLR 340 at 365 [140].

46 (1999) 48 NSWLR 340 at 365 [141].

sentences outside the range were said to be likely to "attract the close scrutiny" of the Court of Criminal Appeal[47].

55 Both the guidelines that were produced, and the dispositions of the Director's two appeals, were supported by this chain of reasoning. In particular, in disposing of the Director's appeals it was said (as has been noted earlier) that the appellants were major participants in the distribution chain[48] and that the trial judge had "failed to give proper weight to the size of the importation"[49]. Because the appellants were "*major* participants in a very *large* importation"[50] (emphasis added) it was found that the head sentences imposed on them were manifestly inadequate.

56 It is desirable to examine separately the two steps in the Court's reasoning: that the *result* of sentencing an offender is an aspect of the discretionary decision and that the *weight* of the narcotic imported is the chief factor to be taken into account in fixing the sentence to be imposed on a person knowingly participating in the importation. Both steps are flawed. It follows that not only was the formulation of the guideline table affected by these errors, so too were the orders disposing of the Director's appeals. The appeals to this Court should therefore be allowed, the orders of the Court of Criminal Appeal set aside and the matters remitted to that Court for further consideration.

Results and reasons

57 The actual sentence which a court imposes on an offender reveals very little about the reasons which the court had for fixing that sentence. Contrary to submissions made on behalf of the Attorney-General of the Commonwealth (intervening in support of the respondent) the sentence itself gives rise to no binding precedent. What may give rise to precedent is a statement of principles which affect how the sentencing discretion should be exercised, either generally or in particular kinds of case. It is, therefore, fundamentally wrong to speak of "quantitative aspects" of discretionary decisions[51].

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47 (1999) 48 NSWLR 340 at 365 [141].

48 (1999) 48 NSWLR 340 at 368 [163].

49 (1999) 48 NSWLR 340 at 370 [175].

50 (1999) 48 NSWLR 340 at 371 [181].

51 (1999) 48 NSWLR 340 at 346 [18].

58 So much is, or should be seen as, no more than a statement of elementary principle. If, however, further elucidation of the principle is necessary, it is evident in cases like *House v The King*[52] and the discussion of when an appellate court may conclude that a trial judge's exercise of discretion has miscarried. Reference is made in *House* to two kinds of error. First, there are cases of specific error of principle. Secondly, there is the residuary category of error which, in the field of sentencing appeals, is usually described as manifest excess or manifest inadequacy. In this second kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons. It follows that for a court to state what *should* be the range within which some or all future exercises of discretion should fall, must carry with it a set of implicit or explicit assumptions about what is, or should be regarded as, the kind of case which will justify a sentence within the specified range. It is those assumptions that may reflect or embody relevant principle, not the result.

59 Similarly, recording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told *why* those sentences were fixed as they were.

60 Rather than "promulgating a quantitative guideline"[53] that may be underpinned by those assumptions and principles, it may very well be necessary and appropriate for a court, in the course of resolving the issues presented by the matter before it, to make explicit the sentencing principles that were engaged in the particular matter. Thus, there will be cases where, for example, it may be appropriate to conclude that sentencers should give chief weight to general deterrence in sentencing for a particular kind of offence. Such statements are obviously important in ensuring a principled approach to sentencing in future cases. In this respect, reference might be made to the approach adopted in *Re Attorney-General's Application [No 1]*[54], an application under the 1986 Act

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52 (1936) 55 CLR 499.

53 (1999) 48 NSWLR 340 at 363 [125].

54 (1999) 48 NSWLR 327.

for a "sentencing guideline judgment" in respect of the burglary offences created by s 112 of the *Crimes Act* 1900 (NSW). There was, therefore, a specific basis in State law for the application and no federal element. Grove J (with whom Spigelman CJ and Sully J agreed) said it was inappropriate, in that case, to give a guideline judgment which prescribed a specific range of sentences. His Honour did so principally for the reason that "the great diversity of circumstances in which the offence is committed" made "a guideline expressed in quantitative terms" inappropriate[55]. Grove J, however, went on[56] to set out a number of factors that could be taken into account by a court in assessing the seriousness of an offence.

61 The "promulgation of a quantitative guideline" may also usefully be contrasted with what was said by the majority of the Full Court of the Supreme Court of South Australia in *Police v Cadd*[57] as "authoritative guidance to magistrates on the approach to be taken to sentencing persons, convicted of driving a motor vehicle while disqualified from holding or obtaining a driving licence"[58]. The guidance that was given was, as Doyle CJ recorded in the Addendum to his judgment[59]:

> "that the punishment should be imprisonment 'in the ordinary case of contumacious offending by a first offender, but the circumstances of the offending or the offender or both may dictate some less severe form of punishment …'".

What is important to notice is the form that the "guidance" took and how the Court arrived at it.

62 The guidance given was expressed as being about the type of punishment that should *ordinarily* be exacted: actual imprisonment rather than a suspended sentence. No suggestion was made about how long a sentence should be imposed. The real content of the guidance lay in the reasons which were given for the stated conclusion. It was there that meaning was given to "ordinary" in the expression "ordinary case of contumacious offending" and it was in the

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55 (1999) 48 NSWLR 327 at 336 [43].

56 (1999) 48 NSWLR 327 at 337-338 [48].

57 (1997) 69 SASR 150.

58 (1997) 69 SASR 150 at 171 per Doyle CJ.

59 (1997) 69 SASR 150 at 171.

reasons that guidance was given about the criteria that should be applied in exercising the discretion in sentencing an offender for the offence in question.

63 The reasons focused upon the nature of the offence, the consequences of its commission, and the purpose of punishing its commission. Thus, Doyle CJ identified the offence of driving while disqualified as "erod[ing] disqualification as a means of punishment"[60], especially when regard was had to the fact that a person driving while disqualified would ordinarily be detected only when the attention of police was attracted for some other reason. Reference was made to various other relevant considerations that might bear upon sentencing, such as the offender's character, age, contrition and the like, or the impact of imprisonment on the offender's employment[61], but the detail of the treatment of these matters is not important. Having regard to the nature of the offence, the consequences of its commission, and the purpose of punishing its commission, Doyle CJ concluded that deterrence must predominate in sentencing for the offence[62]. That being so, as Doyle CJ said[63], "circumstances justifying suspension [of a term of imprisonment] are unlikely to be found in what are routine or run of the mill aspects of the circumstances of this offence." What is to be noted is that the Court articulated the reasons which it had for disposing of the appeals before it by reference to the principles which informed those dispositions. It is those principles which properly guide future sentencers.

64 In relation to the offence of being knowingly concerned in the importation of heroin, like features can be identified as bearing upon the formulation of applicable principles. Those features include the difficulty of detecting the offence and the great social consequences that follow from its commission. The former suggests that deterrence is to be given chief weight in the sentencing task; the latter, that stern punishment will be warranted in almost every case. Those features will also include those that differentiate between particular cases: the quantity of drug involved, the offender's knowledge about what was being imported, the offender's role in the importation[64], the reward which the offender hoped to gain from participation. All these are matters properly to be taken into account in determining a sentence. We deal later with the significance to be

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60 (1997) 69 SASR 150 at 162.

61 (1997) 69 SASR 150 at 168.

62 (1997) 69 SASR 150 at 166.

63 (1997) 69 SASR 150 at 167.

64 cf *R v Olbrich* (1999) 199 CLR 270.

given to the weight of the drug imported. In general, however, the larger the importation, the higher the offender's level of participation, the greater the offender's knowledge, the greater the reward the offender hoped to receive, the heavier the punishment that would ordinarily be exacted. It is by these kinds of criteria that comparisons are to be made between examples of the offence and the sentences that are or were imposed. Our purpose in mentioning these matters is, however, not now to attempt an exhaustive statement of relevant factors, or to attempt some formulation of applicable principles. What is important for present purposes is that it is all of the matters mentioned, and others, including those mentioned in Pt 1B of the Commonwealth *Crimes Act*, which should be taken into account in formulating applicable principles.

65 To focus on the *result* of the sentencing task, to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice. 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. Publishing a table of predicted or intended outcomes masks the task of identifying what are relevant differences.

66 Further, to attempt some statistical analysis of sentences for an offence which encompasses a very wide range of conduct and criminality (as the offence now under consideration does) is fraught with danger, especially if the number of examples is small. It pretends to mathematical accuracy of analysis where accuracy is not possible. It may be mathematically possible to say of twenty or thirty examples of an offence like being knowingly concerned in the importation of narcotics where the median or mean sentence lies. But to give any significance to the figure which is identified assumes a relationship between all members of the sample which cannot be assumed in so small a sample. To take only one difficulty, why were the highest and lowest sentences set as they were? Do they skew the identification of the median or the mean? The task of the sentencer is not merely one of interpolation in a graphical representation of sentences imposed in the past. Yet that is the assumption which underlies the contention that sentencing statistics give useful guidance to the sentencer.

Weight of narcotic

67 The weight of the narcotic which is imported is given statutory significance for sentencing purposes by the Parliament's distinguishing between the maximum sentence that may be imposed for offences involving trafficable and commercial quantities[65]. No doubt, within both of those categories, the

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65 *Customs Act*, s 235.

particular amount of narcotic involved can have significance in fixing the sentence that is to be imposed on an offender. But is weight generally the chief factor to be taken into account in fixing a sentence?

68 It must be recognised that not all offenders will know or even suspect how much pure narcotic is to be imported. Apart from the extent to which the pure narcotic is diluted or cut (a matter about which those involved in the importation may know little or nothing), it is by no means uncommon for many of those involved in an importation of narcotics to know nothing at all about what they are dealing with, except that it is a quantity of narcotic.

69 It follows that there will be many cases in which a sentencing judge will be more concerned to identify the level of the offender's criminality by looking to the state of the offender's knowledge about the importation in which he or she was involved. Often enough, information about the kind and size of reward given or promised to the offender for involvement in the importation will be seen as important in fixing a sentence and distinguishing between offenders.

70 These are reasons enough for concluding that the Court of Criminal Appeal was in error in attributing chief importance to the weight of narcotic in fixing sentences for the offence. The error of the Court is, however, more deep seated than the factual difficulties to which reference has been made. The selection of weight of narcotic as the chief factor to be taken into account in fixing a sentence represents a departure from fundamental principle.

71 First and foremost, as the Court of Criminal Appeal recognised in its reasons[66], a judge sentencing an offender for being knowingly concerned in the importation of narcotics must give effect to Pt 1B of the Commonwealth *Crimes Act*. The sentencer must, therefore, "impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence": s 16A(1). Standing alone, the reference to imposing "a sentence … of a severity appropriate in all the circumstances of the offence" might be read as directing the sentencing judge to determine a sentence proportionate to the wrong-doing without regard to considerations of rehabilitation or incapacitation of the offender[67] or the offender's prior criminal history[68]. But s 16A(1) does not stand alone. To the

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66 (1999) 48 NSWLR 340 at 357 [76], 358 [89], 365 [140].

67 von Hirsch and Ashworth (eds), *Principled Sentencing – Readings on Theory and Policy*, 2nd ed (1998) at 141-149.

68 von Hirsch and Ashworth at 191-197.

extent that the matters identified in s 16A(2) are relevant and known to the Court, the sentencer must take those into account. This group of matters is very diverse. It includes not only "the nature and circumstances of the offence"[69] but also matters such as the degree to which the offender has shown contrition[70], the offender's "character, antecedents, cultural background, age, means and physical or mental condition"[71] and "the need to ensure that the person is adequately punished for the offence"[72]. What is notably absent from s 16A is any guidance about the accommodation that is to be made between these various factors or between these factors and the general requirement that the sentence be of a severity appropriate in all the circumstances of the offence. There is no statement of the kind found, for example, in the *Sentencing Act* 1991 (Vic)[73] of the *purposes* for which sentences may be imposed, and there is no statutory requirement which obliges a sentencer to give particular weight to one or other of those purposes in sentencing certain kinds of offender[74]. Section 16A obliges the sentencer to take *all* of them into account and effect must be given to that legislative command.

72 In those circumstances, while s 16A takes the form it now does, it would be wrong to produce some numerical guideline system of a kind similar to that adopted in some jurisdictions in the United States under which presumptive sentences are fixed by reference to a classification of the gravity of an offence and the seriousness of the offender's previous criminal history[75]. To do so would obviously depart from the legislative command of Pt 1B of the Commonwealth *Crimes Act* if only because it fastens upon only some of the factors that are mentioned in the Act. Yet that is what the Court of Criminal Appeal's tabulation of sentences does. It offers a grid against which future sentences are to be judged

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69 *Crimes Act* 1914 (Cth), s 16A(2)(a).

70 s 16A(2)(f).

71 s 16A(2)(m).

72 s 16A(2)(k).

73 s 5.

74 cf *Sentencing Act* 1991 (Vic), s 6D(a), which directs the Court sentencing a "serious offender" to regard the protection of the community from the offender as "the principal purpose for which the sentence is imposed".

75 von Hirsch and Ashworth at 231-234; United States Sentencing Commission Sentencing Table.

and it is a grid which is founded entirely on gravity of the offence as measured only by the weight of narcotic concerned.

73 It is not enough to say, as the Court of Criminal Appeal said[76], that other matters mentioned in s 16A may be taken into account by fixing a sentence within the ranges specified or, as appears to be acknowledged elsewhere in the reasons, in some unspecified cases, outside those ranges. The starting point which is given by the Court of Criminal Appeal is based on the false premise that gravity of the offence can usually (perhaps even always) be assessed by reference to the weight of narcotic involved.

74 Secondly, and no less importantly, the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in which there are to be "increment[s]"[77] to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a "two-stage approach" to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.

75 It departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say "may be" quite wrong because the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an "instinctive synthesis"[78]. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.

76 In *R v Thomson*[79], Spigelman CJ reviewed the state of the authorities in Australia that deal with the "two-stage" approach of arriving at a sentence, in which an "objective" sentence is first determined and then "adjusted" by some

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76 (1999) 48 NSWLR 340 at 365 [140].

77 (1999) 48 NSWLR 340 at 365 [141].

78 *R v Williscroft* [1975] VR 292 at 300 per Adam and Crockett JJ. See also *R v Thomson* (2000) 49 NSWLR 383.

79 (2000) 49 NSWLR 383 at 396-411 [54]-[113].

mathematical value given to one or more features of the case, such as a plea of guilty or assistance to authorities. As the reasons in *Thomson* reveal, the weight of authority in the intermediate appellate courts of this country is clearly against adopting two-stage sentencing and favours the instinctive synthesis approach[80]. In this Court, McHugh and Hayne JJ, in dissenting opinions in *AB v The Queen*[81] expressed the view that the adoption of a two-stage approach to sentencing was wrong. Kirby J expressed a contrary view[82]. We consider that it is wrong in principle. The nature of the error can be illustrated by the approach adopted by the Court of Criminal Appeal in these matters. Under that approach, the Court takes, for example, the offender's place in the hierarchy and gives that a particular significance in fixing a sentence but gives the sentencer no guidance, whatever, about whether or how that is to have some effect on other elements which either are to be taken into account or may have already been taken into account in fixing the guideline range of sentences. To take another example, to "discount" a sentence by a nominated amount, on account of a plea of guilty, ignores difficulties of the kind to which Gleeson CJ referred in *R v Gallagher*[83] when he said that:

> "It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical."

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80 *R v Geddes* (1936) 36 SR(NSW) 554 at 555 per Jordan CJ; *R v Gallagher* (1991) 23 NSWLR 220 at 227-228 per Gleeson CJ, 233-234 per Hunt J; *R v Beavan* unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 22 August 1991; *Winchester* (1992) 58 A Crim R 345 at 350 per Hunt CJ at CL; *R v Williscroft* [1975] VR 292 at 300; *R v Young* [1990] VR 951 at 955-956; *R v Perrier (No 2)* [1991] 1 VR 717; *O'Brien* (1991) 55 A Crim R 410; *R v Nagy* [1992] 1 VR 637; *R v Harman* [1989] 1 Qd R 414 at 421 per de Jersey J; *R v Corrigan* [1994] 2 Qd R 415; *Pavlic v The Queen* (1995) 5 Tas R 186; cf *R v Sutherland* unreported, Court of Criminal Appeal of the Supreme Court of South Australia, 16 November 1992; *R v Harris; R v Simmonds* (1992) 59 SASR 300; *Verschuren v The Queen* (1996) 17 WAR 467.

81 (1999) 198 CLR 111 at 121-122 [15]-[18] per McHugh J, 156 [115] per Hayne J.

82 (1999) 198 CLR 111 at 148-149 [99]-[100].

83 (1991) 23 NSWLR 220 at 228.

So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.

77 The core of the difficulty lies in the complexity of the sentencing task. A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence for which the offender stands to be sentenced and the personal history and circumstances of the offender. Very often there are competing and contradictory considerations. What may mitigate the seriousness of one offence may aggravate the seriousness of another. Yet from these the sentencing judge must distil an answer which reflects human behaviour in the time or monetary units of punishment.

78 Numerical guidelines either take account of only some of the relevant considerations or would have to be so complicated as to make their application difficult, if not impossible[84]. Most importantly of all, numerical guidelines cannot address considerations of proportionality[85]. Their application cannot avoid outcomes which fail to reflect the circumstances of the offence *and* the offender (with absurd and unforeseen results) if they do not articulate and reflect the principles which will lead to the just sentencing of offenders whose offending behaviour is every bit as diverse as is their personal history and circumstances.

Power to prescribe guideline tables

79 It is convenient, at this point, to return to the question of jurisdiction and power to issue prescriptive guideline tables of sentences. Those who supported the continuation of the practice of publishing guideline tables of sentences placed chief reliance upon this Court's decision in *Norbis v Norbis*[86] where a majority of the Court held that the Full Court of the Family Court of Australia could properly

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84 See, for example, the cubic representation of such a framework in Lovegrove, "Writing Quantitative Narrative Guideline Judgments: A Proposal", [2001] *Criminal Law Review* 265 at 279; cf Alschuler, "The Failure of Sentencing Guidelines: A Plea for Less Aggregation", (1991) 58 *University of Chicago Law Review* 901; Freed, "Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers", (1992) 101 *Yale Law Journal* 1681.

85 *Veen v The Queen [No 2]* (1988) 164 CLR 465.

86 (1986) 161 CLR 513.

give guidance "in the form of guidelines rather than binding principles of law"[87] about how the discretion given by s 79 of the *Family Law Act* 1975 (Cth) should ordinarily be exercised. What the Full Court had done was to say that in deciding what division of property between parties to a marriage was just and equitable, having regard to each party's contribution to those assets, it is ordinarily more convenient to consider the assets globally rather than one by one. Importantly, the three Justices who constituted the majority in *Norbis* did not agree on what consequence would follow if a trial judge did not observe a guideline of the kind that had been adopted. Two members of the majority, Mason and Deane JJ, were of the opinion that an appellate court which gives guidance as to the manner in which a statutory discretion should be exercised may prescribe that such guidance should have the force of a binding legal rule. The third member of the majority, Brennan J, disagreed.

80 This difference of opinion in *Norbis* identifies the central difficulty about a guideline judgment which purports to identify a particular range of results that should be reached in future cases, rather than the considerations which a judge should take into account in arriving at those results. If a table that is published is intended to found arguments in future cases that the discretion exercised in that future case miscarried, whatever may be the caveats that might be entered at the time of promulgating the table, it becomes, in fact, a rule of binding effect. Departure from it must be justified. Or as the Court of Criminal Appeal said here, departure will "attract … close scrutiny"[88]. The fixing of such a table begins to show signs of passing from being a decision settling a question which is raised by the matter, to a decision creating a new charter by reference to which further questions are to be decided[89]. It at least begins to pass from the judicial to the legislative. If, by contrast, the table is not intended to have that effect, what is its purpose? Is it intended as no more than some warning about how the Court of Appeal *might* act in future cases? If it represents a departure from hitherto accepted levels of sentence, is it intended to have the effect of prospectively overruling past decisions of either the Court of Appeal or trial judges?

81 Questions of this kind are not often asked if there is no relevant constitutional limitation on judicial power. It is, thus, not surprising that they are questions that have not been considered directly in England. This is

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87 (1986) 161 CLR 513 at 520 per Mason and Deane JJ.

88 (1999) 48 NSWLR 340 at 365 [141].

89 cf *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J.

notwithstanding the English Court of Appeal having given judgments for more than 20 years which were intended to guide the future exercise of sentencing discretion by stating either the level or the range of sentence that would ordinarily be imposed in certain circumstances[90]. But they are questions that have been considered by the Supreme Court of Canada in *R v McDonnell*[91]. The majority of the Court (Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ) held that not characterising an offender's conduct according to judicially created categories of a particular statutory offence was not an error of principle. Particular categories of the offence of sexual assault had been specified in a "starting point judgment" given by a provincial Court of Appeal. The minority of the Court (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ) considered that the "starting point" approach to sentencing did not violate the *Canadian Charter of Rights and Freedoms* and did not amount to the judicial creation of a new offence. It was, in the minority's view, no more than a tool for assessing whether a particular sentence is manifestly excessive or inadequate (or, in Canadian terms "demonstrably unfit").

82 What is important for immediate purposes is, however, not the detail of the particular debate that is reflected in the reasons of the members of the Court in *McDonnell*. What is significant is that the immediate focus of that debate was on the distinction between the judicial and the legislative function. The majority held that it was not for the courts to create subsets of the legislatively identified offence[92]. The point of difference between the members of the Court turned upon the degree to which the starting point given by the court below could or should be taken as prescriptive. As Sopinka J, writing for the majority, noted[93], even if it is said that a failure to characterise an offence as falling within a particular judicially created category of assault does not amount to error in principle justifying appellate review, using it as a "tool to determine the proper range of sentence for a certain type of offence"[94] amounts to treating the failure as if it were an error of principle. That is, it gives prescriptive force to the subsets of offence which are identified in the guideline.

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90 For example, *Willis* (1974) 60 Cr App R 146; *Farrugia* (1979) 69 Cr App R 108; *Aramah* (1982) 76 Cr App R 190; *R v Boswell* [1984] 1 WLR 1047; [1984] 3 All ER 353; *Bilinski* (1987) 86 Cr App R 146; *Aranguren* (1994) 99 Cr App R 347.

91 [1997] 1 SCR 948.

92 [1997] 1 SCR 948 at 975 [34] per Sopinka J.

93 [1997] 1 SCR 948 at 979-980 [42].

94 [1997] 1 SCR 948 at 1009 [109] per McLachlin J.

83 For the reasons that have already been given, the guideline stated in the present matters was intended to have prescriptive effect. As was said in *McDonnell*, it was to be treated as if departure from it would evidence an error of principle by the sentencing judge. Again, for the reasons given earlier, there is an important distinction between a court articulating the principles which do, or should, underpin the determination of a particular sentence and the publication of the expected or intended results of future cases. Articulation of applicable principle is central to the reasoned exercise of jurisdiction in the particular matters before the court. By contrast, the publication of expected or intended results of future cases is not within the jurisdiction or the powers of the court.

84 No doubt the provisions of the *Criminal Appeal Act* which give the Court of Criminal Appeal its jurisdiction and its powers are to be read without "making implications or imposing limitations which are not found in the express words"[95]. But the conclusion that the jurisdiction conferred on the Court of Criminal Appeal by the *Criminal Appeal Act* does not extend to publication of expected or intended results in proceedings other than the proceeding before the Court is a conclusion that does not depend on implying some limitation on or in the provisions by which the jurisdiction is given. In the words of s 5D(1) of the *Criminal Appeal Act*, the Court's powers were to "vary the sentence and impose such sentence" on the *particular* offenders as was proper. It had jurisdiction in the matter which concerned the sentence passed on those particular offenders. It had no jurisdiction in respect of sentences passed or to be passed on others. The publication of a table of future punishments was neither to vary the sentence that was passed nor to pass a new sentence. It is not within the jurisdiction or the powers of the Court to publish such a table because, to adopt constitutional terms, that is not directed to the quelling of the only dispute which constitutes the matter before the Court. Nothing in s 12 of the *Criminal Appeal Act* gave the Court any relevant additional jurisdiction or power.

85 Further, as Winneke P rightly pointed out in *R v Ngui & Tiong*[96]:

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95 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421. See also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 per Wilson J, 290 per Gaudron J; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185 per Mason CJ and Deane J, 202-203 per Dawson J, 205 per Gaudron J; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270.

96 (2000) 1 VR 579 at 584 [12].

> "Experience in other areas of the law has shown that judicially expressed guidelines can have a tendency, with the passage of time, to fetter judicial discretion by assuming the status of rules of universal application which they were never intended to have[97]. It would … be unfortunate if such a trend were to emerge in the sentencing process where the exercise of the judge's discretion, within established principles, to fix a just sentence according to the individual circumstances of the case before him or her is fundamental to our system of criminal justice[98]."

86 It was, therefore, no "function" of the Court to publish the table it did. To speak in this context of the "functions" of a court distracts attention from the relevant inquiries which are inquiries about the court's jurisdiction and its powers. "Function" is a term which may carry with it unintended meanings and consequences, as appears to have been the case in the present matters. It may lead to the inversion of the proposition that the statement of principle applied by an appellate court in deciding a matter commands precedential obedience by courts lower in the hierarchy deciding future cases to the entirely wrong proposition that an appellate court may therefore issue such guidance about future cases as it sees fit. It has neither jurisdiction nor power to do that.

87 Not only was there no jurisdiction or power to issue the guideline, the principles which informed its construction were flawed (by the error in selecting weight of narcotic as the chief factor in sentencing) and either were incomplete (because of insufficient reference to the other factors mentioned in s 16A of the Commonwealth *Crimes Act*) or were not stated at all.

88 In the present matters, the error of the Court of Criminal Appeal lies in applying wrong principles in deciding the Director's appeals. The table which it published is affected by the same errors of principle. Further, to publish any table of intended future punishments exceeds the jurisdiction and powers which are given to it by the *Criminal Appeal Act*, as picked up and applied in these matters by s 68 of the *Judiciary Act*. No question arises in these matters of any disconformity between the State Act which was engaged (the *Criminal Appeal Act*) and the *Judiciary Act* or the Constitution. It would seem very likely that there would be such a disconformity if it were sought to engage Pt 8 of the 1986 Act in relation to federal offences but that is not a question which now arises.

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97 cf *Norbis v Norbis* (1986) 161 CLR 513 at 533 per Wilson and Dawson JJ, 538 per Brennan J; *Masel v Transport Industries Insurance Co Ltd* [1995] 2 VR 328 at 334-335.

98 *Lowndes v The Queen* (1999) 195 CLR 665 at 671-672 [15].

Nor is it necessary to consider whether the Court of Criminal Appeal in dealing, as it was, with a federal offence should have paid greater attention to the decisions of other intermediate appellate courts relating to that offence[99].

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99 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.

89 KIRBY J. In *Lowe v The Queen*[100], Mason J explained that consistency in criminal punishment is "a fundamental element in any rational and fair system of criminal justice". Inconsistency, he declared, "is calculated to lead to an erosion of public confidence in the integrity of the administration of justice" and is "regarded as a badge of unfairness and unequal treatment under the law"[101]. He was there speaking of disparity between the sentences imposed on co-offenders. However, the principle is one of general application.

90 In an attempt to reduce inconsistency in sentencing, suggestions have been made by law reform bodies[102]. Laws have been enacted, some seeking to give greater guidance to the exercise of sentencing discretions[103]. Other laws have set out to reduce the ambit of discretion and to substitute mandatory sentences for a wider category of offences[104]. One judicial response to the perceived concern about inconsistency has been the adoption of sentencing guidelines. Such guidelines were formulated by the Criminal Division of the English Court of Appeal 20 years ago[105] and have been followed since[106]. Similar initiatives have been taken by judges in New Zealand[107], Hong Kong[108] and elsewhere[109].

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100 (1984) 154 CLR 606 at 610.

101 (1984) 154 CLR 606 at 611.

102 eg Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (Interim), (1980) esp Ch 11 ("Guiding Judicial Discretion").

103 *Crimes Act* 1914 (Cth), s 16A. See also *Sentencing Act* 1995 (WA), ss 6(5), 143(1): *R v GP* (1997) 18 WAR 196 at 235.

104 Morgan, "Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?", (2000) 24 *Criminal Law Journal* 164 referring to *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 (WA) and *Sentencing Act* (NT), ss 78A, 78B. See also "Forum – Mandatory Sentencing Legislation: Judicial Discretion and Just Deserts", (1999) 22 *University of New South Wales Law Journal* 256-314.

105 *Bibi* (1980) 71 Cr App R 360; *Clarke* (1982) 4 Cr App R (S) 197.

106 *De Havilland* (1983) 5 Cr App R (S) 109 at 114; *Aranguren* (1994) 99 Cr App R 347.

107 *R v Urlich* [1981] 1 NZLR 310; *R v Accused* [1990] 2 NZLR 316; *R v Stanaway* [1997] 3 NZLR 129. These decisions are cited in *R v Wong; R v Leung* (1999) 48 NSWLR 340 at 365 [136] although they are not "precise as to quantum". See also *R v Puru* [1984] 1 NZLR 248 at 249.

91 Australian courts of criminal appeal have also instituted attempts to reduce inconsistency in sentencing. At first, such attempts focused upon consideration of sentencing data, including statistics, particularly as provided to the New South Wales Court of Criminal Appeal by the Judicial Commission of that State[110]. Certain reservations have been expressed in other States about the risks inherent in the use of such data[111]. Raw statistics may afford impressions as to the range and patterns of sentencing; but they can sometimes mask a great variety of facts concerning an offence and an offender which only the study of the detailed reasons in each case would unveil.

92 More recently, the New South Wales Court of Criminal Appeal, at first without, and later with, statutory authority[112], has provided sentencing guidelines concerning particular offences[113]. The present appeals[114] involve an instance in which that Court formulated a "guideline judgment", identifying quantitative aspects of the offence in question to govern the sentencing of convicted offenders. The Court was clearly motivated by the laudable aim of removing the badge of unfairness, so far as that was possible and consistent with evaluative decisions made by judicial officers in a judicial proceeding. The purpose of "guideline judgments" is to replace informal, private and unrevealed judicial means of ensuring consistency in sentencing with a publicly declared standard.

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108 *R v Chan* [1987] LRC (Crim) 660; *R v Lau Tak-ming* [1990] 2 HKLR 370; *Attorney General v Jim Chong-shing* [1991] LRC (Crim) 832 at 849-854.

109 See reasons of Gleeson CJ at [9].

110 eg *R v Spiteri* [1999] NSWCCA 3 at [15]; cf *Director of Public Prosecutions v Whiteside* (2000) 1 VR 331 at 338 [21]; Potas, "The Judicial Commission of NSW: Treading a fine line between judicial independence and judicial accountability", in Corns (ed), *Reshaping the Judiciary*, (2001) 102 at 119.

111 *R v Ngui* (2000) 1 VR 579 at 583-584 [12].

112 *Criminal Procedure Act* 1986 (NSW), Pt 8: see now *Crimes (Sentencing Procedure) Act* 1999 (NSW), Pt 3, Div 4. See reasons of Gaudron, Gummow and Hayne JJ at [41] ("the joint reasons").

113 *R v Jurisic* (1998) 45 NSWLR 209; *R v Henry* (1999) 46 NSWLR 346; Spigelman, "Sentencing Guideline Judgments", (1999) 73 *Australian Law Journal* 876; Morgan and Murray, "What's in a Name? Guideline Judgments in Australia", (1999) 23 *Criminal Law Journal* 90.

114 From the judgment of the New South Wales Court of Criminal Appeal: *R v Wong; R v Leung* (1999) 48 NSWLR 340.

93 The central question presented by these appeals is therefore whether the guidelines "promulgated"[115] by the Court of Criminal Appeal in the appellants' case (presumably with some relevance to its disposition) were unlawful when measured against the applicable principles of the common law, the powers of that Court, and the legislation which that Court was bound to apply in disposing of appeals before it. The appeals also raise a more fundamental question as to whether such guidelines were compatible with the requirements of the Constitution.

The facts, judgments and common ground

94 The facts surrounding the conviction and sentencing of Tak Fat Wong and Jackie Kai Chu Leung ("the appellants") for being knowingly concerned in the importation of a prohibited import, namely heroin, contrary to s 233B of the *Customs Act* 1901 (Cth), are set out elsewhere[116].

95 The Court of Criminal Appeal (like the District Court of New South Wales in which the appellants were tried, found guilty and convicted) was exercising federal jurisdiction[117]. Jurisdiction in relation to offences against laws of the Commonwealth was conferred by s 68 of the *Judiciary Act* 1903 (Cth), which picked up and applied to the trials of the appellants, State laws not inconsistent with federal law[118] to the extent that such laws were applicable[119]. The jurisdiction and powers of the Court of Criminal Appeal had been invoked by the Commonwealth Director of Public Prosecutions ("the DPP"), relevantly in a prosecution appeal against the alleged inadequacy of the sentences imposed by the sentencing judge. The DPP was empowered to bring such an appeal and the

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115 (1999) 48 NSWLR 340 at 346 [16], 348 [29], 349 [31], 360 [101], 361 [114], 362 [116], 363 [124]-[126], [128], 372 [189].

116 Joint reasons at [34]; reasons of Callinan J at [152]. See also (1999) 48 NSWLR 340 at 366-369 [143]-[163].

117 The jurisdiction and power of the Court of Criminal Appeal to issue guideline judgments with respect to federal offences was specifically challenged in the Court of Criminal Appeal and determined against the objection: (1999) 48 NSWLR 340 at 345-349 [14]-[32].

118 *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 331-332.

119 *Judiciary Act* 1903 (Cth), ss 68(1), 68(2); cf *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119.

Court of Criminal Appeal, in accordance with s 5D of the *Criminal Appeal Act* 1912 (NSW), had the power to determine it[120].

96 It was not suggested, either below or in this Court, that any specific error on the part of the sentencing judge had been demonstrated. The sole common ground of appeal to the Court of Criminal Appeal relied on by the DPP was that the sentences imposed were, in each case, "manifestly inadequate". The DPP requested a "guideline judgment". In support of this submission, the DPP pointed to differences of view in the New South Wales Court of Criminal Appeal[121] and as between like courts in different States[122]. It was such differences that, in *Blanco*[123], led to a suggestion that the Court of Criminal Appeal should reconsider the matter "by way of a guideline judgment". The DPP took the hint and submitted that this matter afforded an appropriate vehicle for that purpose.

97 The DPP tendered a considerable amount of statistical, graphical and analytical material in support of the request for a guideline judgment and the submissions as to what the guidelines should be[124]. In the Court of Criminal Appeal, the appellants objected to the course that the DPP advocated. They did not provide evidence or submissions of their own on the alleged patterns and trends in sentencing persons convicted of the applicable offence. In the nature of things, such materials would not have been so readily available to the appellants[125], or those representing them, as to the DPP and the Court itself.

98 It was not contested that the appellants were "major participants"[126] in the offences for which they had been convicted, rather than couriers or other low-level participants. This fact caused Simpson J to dissent from the suitability of

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120 *Williams v The King [No 2]* (1934) 50 CLR 551; *Ex parte Williams* (1934) 51 CLR 545; *Peel v The Queen* (1971) 125 CLR 447.

121 *Ferrer-Esis* (1991) 55 A Crim R 231 at 237; *Bernier* (1998) 102 A Crim R 44; cf *R v Olbrich* (1999) 199 CLR 270.

122 *R v Perrier (No 2)* [1991] 1 VR 717 at 722, 727-728; *R v Ngui* (2000) 1 VR 579.

123 (1999) 106 A Crim R 303 at 307 [24] per Wood CJ at CL, noted (1999) 48 NSWLR 340 at 354 [63].

124 Some of the material is reproduced in the Schedules to the reasons in *Wong* (1999) 48 NSWLR 340 at 373-380.

125 In this respect I agree with the comment of Callinan J at [165].

126 (1999) 48 NSWLR 340 at 372 [189] per Simpson J.

the prosecution appeals to afford the occasion to formulate guidelines addressed mainly to the problem of sentencing low-level offenders, in respect of whom the main disparities of sentencing had occurred[127]. Nevertheless, the majority agreed with Spigelman CJ[128] that the guidelines should be provided[129].

99 The appellant Jackie Leung sought special leave to appeal to this Court against his conviction. That application was dismissed[130]. It is in this way that the only issues before this Court are those raised in the challenge to the guideline judgment of, and substituted sentences imposed by, the Court of Criminal Appeal. In each case, that Court upheld the prosecution appeal. It set aside the sentences imposed by the trial judge. It increased the head sentence and non-parole period of the sentences in each case by an additional two years[131].

The issues

100 The grounds relied on by each appellant in this Court raised many of the same issues as those canvassed below. For the prosecution, the system of guideline judgments was an "interesting innovation to the criminal process" permissible by the common law, consistent with the applicable legislation and compatible with the Constitution. But for the appellants it was none of these things. In light of the grounds of appeal, the following issues arise for determination:

Common law issues:

(1) Did the Court of Criminal Appeal err in applying a "two-stage approach" to the sentencing of the appellants?

(2) Did it err by disturbing the sentences imposed by the trial judge without identifying any error to warrant such disturbance?

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127 As to the classification of couriers: *R v Olbrich* (1999) 199 CLR 270 at 279-280 [19]-[23]; cf at 286-290 [43]-[50].

128 *Wong* (1999) 48 NSWLR 340 at 372 [187] per Mason P, 373 [194] per Sperling J, 373 [195] per Barr J.

129 The guidelines are set out in the joint reasons at [35]; reasons of Callinan J at [156].

130 Special leave hearing, 4 August 2000. In the Court of Criminal Appeal (differently constituted) the appellants had earlier challenged their convictions without success: *R v Leung* (1999) 47 NSWLR 405 per Spigelman CJ, Simpson and Sperling JJ.

131 (1999) 48 NSWLR 340 at 372 [183].

(3) Did it err in failing to approach the appeals with the appropriate restraint required in the case of prosecution appeals?

(4) Did it err in failing to give reasons, or adequate reasons, for proceeding from the "guidelines" propounded to disturb the sentences imposed on the appellants?

Statutory issues:

(5) Having regard to the applicable federal legislation, did the Court of Criminal Appeal err in "promulgating" and applying guidelines, necessarily applicable in only one State?

(6) Did it err in effectively substituting identified tiers of punishment for those expressly enacted by the Parliament?

(7) Did it err in purporting effectively to require the exercise of the judicial discretion to sentence the appellants in ways different from, and inconsistent with, such legislation?

Constitutional issues:

(8) Was the "promulgation" of guidelines by the Court of Criminal Appeal an act legislative in character, incompatible with the exercise by a court vested with federal jurisdiction and with the judicial power of the Commonwealth?

(9) Was the "promulgation" of guidelines and application of them to the sentences of the appellants incompatible with the disposition by a State court exercising federal jurisdiction of a "matter" within the meaning of Ch III of the Constitution?

(10) Were the guidelines a discriminatory law contrary to s 117 of the Constitution?

Common law sentencing principles

101 "*Two-stage*" *approach to sentencing*: It is possible to deal briefly with a number of objections concerning the judgment and reasoning of the Court of Criminal Appeal. I mention the first of the suggested errors only because it is referred to in the joint reasons in this Court[132]. It concerns the alleged error of approach, described as the "two-stage" or "two-tiered" approach, said to have been adopted by the Court of Criminal Appeal in this case. This controversy was

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132 cf joint reasons at [74]-[78].

first mentioned in *AB v The Queen*[133], although McHugh J and Hayne J, in separately expressing their disagreement with a delineation of the stages of sentencing, were there in dissent.

102 The question of whether sentencing should return to the so-called "instinctive" or "intuitive" synthesis approach is a very large one[134]. The debate about it should be reserved to an appeal where an answer is essential. Recent decisions of this Court[135] have been interpreted[136], correctly in my opinion, as requiring greater disclosure by sentencing judges of the way in which they actually arrive at the sentence imposed on a person convicted of an offence. The final sentence will normally include elements of judgment and intuition. But in my view, it cannot be denied that adjustments are made to a prima facie level with which the sentencing judge begins the task. How can one even begin to think of "discounts", for example, without at least conceiving the integer which is the subject of the discount? The ultimate product is no more scientifically demonstrable than a judgment for damages for personal injuries[137]. But it would be a retrograde step to subsume the adjustments which the law requires to be taken into account in sentencing by a "return to unexplained judicial intuition"[138]. Greater transparency and honesty are the hallmarks of modern public administration and the administration of justice. In sentencing, we should not turn our backs on these advances.

103 It follows that, whilst, in my view no error of approach has been demonstrated in this respect, these appeals do not present a proper occasion to explore any supposed error of such a kind. It was not one identified amongst the complaints in the submissions of the appellants. On the contrary, the approach

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133 (1999) 198 CLR 111 at 121-122 [15]-[18] per McHugh J, 156 [115] per Hayne J; cf at 150 [102] of my own reasons.

134 Joint reasons at [77].

135 eg *Pearce v The Queen* (1998) 194 CLR 610; cf *Ryan v The Queen* (2001) 75 ALJR 815 at 822 [35], 832 [98], 845-846 [178]; 179 ALR 193 at 201, 216, 234-235, where adjustments were mandated on the specified grounds.

136 eg Wood, "Sentencing Review", (1999) 11 *Judicial Officers' Bulletin* 33 at 35.

137 cf *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 at 124.

138 *AB v The Queen* (1999) 198 CLR 111 at 150 [102]; cf *R v McDonnell* [1997] 1 SCR 948 at 986-988 [57]-[61] which postulates a "starting point" and a "second stage" of "individualisation" of the particular crime and the particular offender in reaching the ultimate sentence; cf reasons of Gleeson CJ at [11]; joint reasons at [76].

which the appellants said that the Court of Criminal Appeal should have taken postulated the observance of identified stages in what was to be done both by the sentencing judge and the Court of Criminal Appeal.

104 *Express finding of error*: There is more substance in the appellants' complaint that the Court of Criminal Appeal erred by failing to identify clearly the error on the part of the trial judge that authorised its disturbance of their sentences. This Court has repeatedly emphasised that[139]:

> "According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."

105 In a number of recent decisions, this Court has set aside orders of courts of criminal appeal where the reasons supporting disturbance of the original sentence, and substitution of a different sentence, have not sufficiently, or at all, identified the error said to justify that course[140]. The same principle is applied in civil appeals[141]. It was applicable here. The appellants argued that the Court of Criminal Appeal had been so influenced by a desire to establish guidelines that it had wrongly failed to discharge the function imposed on it by s 5D of the *Criminal Appeal Act*. Relevantly, this was only to determine the prosecution appeals against their sentences.

106 The DPP contested this argument. Both by reference to the issue that was before the Court of Criminal Appeal, that Court's reasons and its resulting judgment and sentence, the DPP submitted that the error of the sentencing judge was the imposition on the appellants of manifestly inadequate sentences.

107 Ultimately, I have concluded that the appellants' submission on this point should be rejected. This is not (as it was said to be) a case like *Lowndes v The Queen*[142]. Although the error relied upon to authorise its interference was not expressly specified by the Court of Criminal Appeal, no particular form of words is mandatory. It is enough that the reasons of the appellate court should indicate adequately a correct application of the applicable principles. The reasons in the present matters expressly reject demonstration of specific error on the part of the

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139 *Norbis v Norbis* (1986) 161 CLR 513 at 518-519.

140 *Lowndes v The Queen* (1999) 195 CLR 665 at 671-672 [15], 679 [38]; *Dinsdale v The Queen* (2000) 202 CLR 321 at 339-340 [57]-[61]. See also *House v The King* (1936) 55 CLR 499 at 504-505.

141 *AMS v AIF* (1999) 199 CLR 160 at 222-223 [184]-[185].

142 (1999) 195 CLR 665.

sentencing judge[143]. Correctly, they identify the issue for decision as being "whether the sentences themselves are manifestly inadequate, either in the head sentence or the non-parole period"[144]. The conclusion is stated that the sentences imposed were "manifestly inadequate"[145]. All that is missing are the words "and that amounts to an error requiring that the appeal be upheld". In this case, those words can be implied both from what precedes and follows the cited passage.

108 The DPP submitted that this conclusion was sufficient to dispose of both appeals. It was pointed out that appeals lie to this Court from the judgment and order of the Court of Criminal Appeal, not from that Court's reasons. This Court, it was argued, should not disturb the resulting judgment and sentences, which responded to the manifest inadequacy of the appellants' sentences because dicta were included in the reasoning of the Court of Criminal Appeal with which this Court disagreed. I disagree. Having regard to the reasons given by that Court and the process by which it reached its conclusions, it is impossible to ignore the appellants' complaint that the resulting judgment and sentences were flawed because founded on an imperfect, or legally impermissible, process of reasoning. Although the judges below declared the guidelines which they formulated were not *applicable* to the cases of the appellants, it defies reason to say that they were totally *irrelevant*. Why include them in the appeals if that were so? Obviously, they set a relevant and higher benchmark of punishment. It should not be supposed that their inclusion in the reasons of the Court of Criminal Appeal was totally irrelevant to that Court's process of decision-making. At the very least the guidelines distracted the Court from a full consideration of all of the matters, statutory and otherwise, that would ordinarily have been given weight. To read the reasons of the Court of Criminal Appeal without the guidelines is like reading *Hamlet* without the Prince.

109 *Approach to prosecution appeals*: The third point of general principle raised by the appellants involved a complaint that the Court of Criminal Appeal had failed to take into account the consideration of restraint conventionally observed in prosecution appeals. There is nothing in s 5D of the *Criminal Appeal Act* that dictates an approach of particular restraint to prosecution appeals. However, that approach has existed in this country for decades. Section 5D was enacted in 1924[146]. A long line of judicial authority has since established the conventional way in which prosecution appeals against sentence are approached.

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143 (1999) 48 NSWLR 340 at 370 [174].

144 (1999) 48 NSWLR 340 at 370 [174].

145 (1999) 48 NSWLR 340 at 371 [180]-[181]. See reasons of Callinan J at [161]-[162].

146 *Crimes (Amendment) Act* 1924 (NSW), s 33.

Where specific error of sentencing principle is not demonstrated and the complaint is one of manifest inadequacy of the sentence, it is only where it is shown that the "sentence is definitely outside the appropriate range that [a court] is ever justified in granting leave to the Crown to appeal against the inadequacy of a sentence"[147].

110 Although under s 5D leave to appeal against sentence is not required by the prosecution[148], the principle of restraint in allowing prosecution appeals against sentence is well entrenched. It has sometimes been explained by reference to the species of "double jeopardy" that a prisoner uniquely faces in such an appeal[149]. Whilst the facility of prosecution appeals is afforded to contribute to the desirable aim of consistency in sentencing[150], it is normal to require a clear or definite case of demonstrated appellable error before a prosecution appeal is upheld by a court of criminal appeal. No submission was made in these appeals challenging that approach or even calling it into question[151].

111 It is true that the reasons of the Court of Criminal Appeal do not set out, or refer to, the rule of restraint in prosecution appeals before proceeding to the actual conclusion that the sentences imposed on the appellants were "manifestly inadequate" and such as warranted orders setting them aside and substituting new sentences in their place. However, it is also true that, in proceeding to devise the substitute sentences, the reasons allude to the normal approach of restraint. There was repeated reference in the reasons to the fact that the appeal before the Court was a "Crown appeal"[152] and that this enlivened particular "discretionary considerations"[153]. Although the considerations mentioned were confined to those of delay on the part of the prosecution in bringing the appeals[154], inherent

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147 *Everett v The Queen* (1994) 181 CLR 295 at 306; *Dinsdale v The Queen* (2000) 202 CLR 321 at 340-341 [62].

148 Such leave is required for a prisoner's appeal against sentence: *Criminal Appeal Act* 1912 (NSW), s 5(1)(c).

149 *R v Tait* (1979) 24 ALR 473 at 476-477; 46 FLR 386 at 388-389; *Papazisis* (1991) 51 A Crim R 242 at 247.

150 *Everett v The Queen* (1994) 181 CLR 295 at 306.

151 cf *Griffiths v The Queen* (1977) 137 CLR 293 at 310.

152 (1999) 48 NSWLR 340 at 369 [170].

153 (1999) 48 NSWLR 340 at 369 [170].

154 (1999) 48 NSWLR 340 at 369-370 [167]-[173].

in the general remarks and the approach to that point was acceptance of the special burden facing re-sentencing (with the risk of an increased custodial sentence) which informs the principle of restraint observed in dealing with prosecution appeals against sentence. The fact that "the principle of double jeopardy"[155] was expressly mentioned in calculating the substitute sentences also indicates that that consideration was in the mind of the Court of Criminal Appeal. It is reasonable to infer that, although not so stated, it was a consideration taken into account in deciding that appellable error had been shown. Not without hesitation, therefore, I would also reject this complaint.

112 *Provision of adequate reasons*: The appellants then complained that the reasons of the Court of Criminal Appeal by which it had proceeded from the guidelines stated to the conclusions in their particular matters were inadequate as failing to disclose the train of reasoning that justified setting aside the sentences initially imposed on them. Put bluntly, the appellants submitted that the conclusions in the reasons of the Court of Criminal Appeal (and the judgment and sentences which it substituted) were not supported either by the guidelines themselves or by the discussion sustaining those guidelines. Instead, the appellants said, most of the reasoning of the Court of Criminal Appeal was concerned with controversies that had arisen about the sentences appropriate to a "courier", "possessor" and "minder"[156] of drugs, descriptions which, on no view, applied to the appellants. Their parts in the offences of which they had been convicted were concededly "major"[157].

113 The appellants argued that by addressing so much attention to "couriers and others involved at a low level in the hierarchy of an importing organisation"[158], the Court of Criminal Appeal had taken into account irrelevant considerations as preliminary to the only true legal issue before it, namely whether to allow the prosecution appeal in *their particular* cases; if so, whether to increase their sentences and, if so, to what extent. Indeed, the Court of Criminal Appeal itself had said that nothing in the materials presented to the Court, or in the experience of the judges, suggested any systemic inadequacy in sentencing patterns of trial judges "with respect to the offence under consideration"[159].

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155 (1999) 48 NSWLR 340 at 372 [182].

156 (1999) 48 NSWLR 340 at 355 [67].

157 (1999) 48 NSWLR 340 at 372 [189] per Simpson J.

158 (1999) 48 NSWLR 340 at 357 [78] per Spigelman CJ; cf *R v Nicholas* (2000) 1 VR 356 at 408 [169]-[170].

159 (1999) 48 NSWLR 340 at 361 [110].

114 The appellants contrasted the detail which, they said, was lavished on the "existing sentencing patterns [which] is intended to apply to couriers and persons low in the hierarchy of the importing organisation"[160] and the peremptory disposal of the prosecution appeals in their cases, once immaterial grounds had been eliminated. According to the appellants the actual disposition of their appeals amounted to no more than a statement of a conclusion that the sentences imposed by the trial judge "were lower than the least sentence that could properly have been imposed in each case"[161]. The link between that conclusion and the elaborated guidelines was left to an undisclosed premise of reasoning. Presumably this was that, if for "couriers and persons low in the hierarchy of the importing organisation" the range of sentences in the case (as here) of a "[s]ubstantial commercial quantity (3.5 kilograms - 10 kilograms)" was "10 to 15 years"[162], the range for persons still higher in the hierarchy of the importing organisation (such as the appellants) had to be commensurately greater, but to an undisclosed degree.

115 There is merit in this complaint. The DPP argued that the missing premise was obvious as was the inadequacy of the sentences imposed on the appellants as a matter of impression. In so far as the Court of Criminal Appeal's reasoning about "low-level participants" was immaterial to the appellants' cases, the DPP ultimately suggested that it amounted to no more than harmless *obiter dicta*. This had not undermined the correctness of the final conclusion reached and the orders made.

116 In the context of judicial review of a decision of an administrative tribunal, this Court has said that "at common law … want of logic is not synonymous with error of law"[163]. However, in the case of a court, within the integrated Australian judicature, which takes the serious step of setting aside sentences imposed by a judge with the primary responsibility for imposing the sentence, and then increases the sentences substantially, "the channels of logic"[164] should normally be displayed so the persons affected, a court to which appeal may lie and the community are aware of the essential chain of reasoning that brought about the judgment and warranted alteration of the sentence that was imposed.

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160 (1999) 48 NSWLR 340 at 366 [142].

161 (1999) 48 NSWLR 340 at 371 [180].

162 (1999) 48 NSWLR 340 at 366 [142].

163 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356.

164 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 446 per Meagher JA.

117 Again with hesitation, I will assume that it is possible to add flesh to the bare bones of the final step by which the actual judgment affecting the appellants was arrived at in the Court of Criminal Appeal. In all truth, this requires a leap of logic from the table in the guidelines to the appellants' actual cases which fell outside that table. I shall make this leap because the appellants have still more substantial arguments to advance under the applicable legislation and the Constitution, to which I now turn.

Statutory issues

118 *Guidelines for a single State*: The appellants were convicted of federal offences applicable throughout the Commonwealth. In the nature of international transport into Australia, a large number of those charged with such offences are tried and, where convicted, sentenced in New South Wales courts. However, the legislation creating the substantive offence[165], the legislation establishing general principles of sentencing to be observed in such cases[166] and the legislation rendering such federal laws applicable in State courts exercising federal jurisdiction[167] are all federal, enacted on the postulate that they will operate uniformly in all parts of the nation[168].

119 The *jurisdiction* of the Court of Criminal Appeal to hear and dispose of the prosecution appeals in the appellants' cases was not contested. It was engaged by the DPP's action in lodging the appeals. But a question is raised concerning the *power* of that Court to determine such appeals in accordance with, or by reference to such guidelines as were "promulgated" in this case. In part, that question is presented for decision because of the assumptions said to be inherent in, if not expressed by, the federal legislation under which the Court of Criminal Appeal derived its authority over the appellants. A number of the appellants' objections on this basis must be considered.

120 The first is that it was incompatible with the uniform application of the federal legislation to contemplate detailed guidelines in one State which would not, of their own authority, apply in other States (and Territories) of the Commonwealth. In proof of this proposition, it was suggested that it would be foolish to contemplate eight or more different sets of guidelines. That would

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165 *Customs Act* 1901 (Cth), s 233B(1).

166 *Crimes Act* 1914 (Cth), s 16A.

167 *Judiciary Act*, s 68(2).

168 *Krasnov* (1995) 82 A Crim R 92 at 95-96; 125 FLR 120 at 123.

contradict the provisions of, and assumptions in, the federal legislation, if not of the Constitution itself[169].

121 In support of the proposition that such guidelines were impermissible in the case of federal legislation, the appellants relied upon the reservations expressed in the Victorian Court of Appeal. In *R v Ngui*[170], Winneke P referred to the particular importance "where the offences are created by Commonwealth statutes" of achieving consistency to the extent possible because "sentences for such offences are being imposed by courts throughout Australia". Moreover, the Court of Criminal Appeal of Western Australia declined to follow the guidelines established by the New South Wales Court of Criminal Appeal[171]. The inevitable result is disparity, and not uniformity, in the sentencing of federal offenders.

122 The appellants accepted that some disparity was inherent in the assumption upon which the federal laws were written, namely that sentencing judges, for the most part in State courts, would enjoy a discretion, appropriate to the particular case, subject only to the maximum sentences fixed by the Federal Parliament and review for error by courts of criminal appeal. But beyond such disparity, the appellants submitted, it was outside the powers of the New South Wales Court of Criminal Appeal to press ahead with guidelines such as those "promulgated" for a federal offence in one State alone. That Court's sole function, postulated by federal law, was to determine, in the exercise of federal jurisdiction, any appeal brought to it. To attempt more conflicted with the assumptions inherent in the applicable federal laws and should therefore not have occurred. Standards emerging over time from the determination of a number of cases were one thing. But "guidelines" which were purportedly "promulgated" to apply to all current and future cases were quite another.

123 This argument also has merit. However, had it stood alone, I would not have disturbed the judgment and sentence of the Court of Criminal Appeal on this ground. If, for example, applicable guidelines, otherwise valid, were exposed in one State to provide an explicit principle to justify the judgment and sentence of a court of criminal appeal in that State, it could, if compatible with the law and properly used, contribute to the attainment of uniformity and consistency. As Winneke P remarked in *R v Ngui*[172], if the guidelines were used as no more than a "sounding board" or a "check" against the exercise of the sentencing judge's discretion, this alone would not be incompatible with the

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169 Constitution, s 117; cf *Leeth v The Commonwealth* (1992) 174 CLR 455.

170 (2000) 1 VR 579 at 583 [12]; see joint reasons at [85].

171 *Serrette* (2000) 118 A Crim R 204 at 208-209 [14]-[16].

172 (2000) 1 VR 579 at 584 [13].

assumptions of the federal legislation. Such legislation is enacted for operation in a country in which virtually all serious federal crimes, of the kind here in question, are tried in State courts exercising federal jurisdiction. It is inherent in this arrangement (and contemplated by the Constitution) that such courts will discharge their functions individually. Their judgments and orders are subject to appeal, ultimately to this Court[173]. They are enjoined by this Court to avoid needless disparities in the interpretation and application of federal law[174]. In the event of a difference of opinion as to a *principle* applicable to the exercise of federal jurisdiction (called in a particular State a *guideline*) it would be possible for this Court to eliminate any such differences. In a particular case, any principle which this Court stated could modify or overrule a principle called a "guideline" with which it disagreed. Even if not formally part of the "judgments", "orders", or "sentences" appealed from[175], this Court could make its disagreement known and in practice that would normally suffice.

124 The appellants' rejoinder to this argument was that, in disposing of such an appeal, this Court would necessarily confine itself to correcting any part of a "guideline" incompatible with the principles applicable to the particular case and nothing more. This would leave the other parts of the "guideline" uncorrected by the appellate process. I shall return to this problem in addressing the appellants' constitutional objections. For the moment, it is enough to say that, in my view, none of the statutes applicable to the appellants' matters necessarily excluded experimentation by courts of criminal appeal in the way they reasoned to conclusions in particular cases. There is no magic in the appellation "guideline judgment". In Australia, it is not at all uncommon for courts, responding to issues before them, to express applicable principles in a statement placed within a broader context addressed to a wider range of issues. I agree with Gleeson CJ that communicating collective experience is an important responsibility of courts of criminal appeal[176]. If that had been all that the "guideline judgment" in the present case had involved, it would not have warranted disturbance of the judgment and sentences under appeal, unless, for other reasons, they were shown to be erroneous.

125 *Non-statutory sentencing tiers*: The second objection of the appellants based on the federal legislation was that the Court of Criminal Appeal's guidelines represented additional judicial sub-categories of punishment by

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173 Constitution, s 73.

174 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

175 Constitution, s 73.

176 Reasons of Gleeson CJ at [5]-[12].

reference to the quantity of the drug in question superimposed upon those contained in the federal legislation. Contrasting the sub-categories introduced by the guidelines[177] with those set out in Sched VI of the *Customs Act* (which gives effect to the distinction expressed in s 235 between a "trafficable quantity" and a "commercial quantity"), the appellants submitted that the legislative scheme was so specific, and particular to the weight of the narcotic substance, that it excluded the judicial creation of further sub-categories of offence. For example, as the Court of Criminal Appeal recognised, the trafficable quantity for cocaine commences at 2.0 grams and the commercial quantity at 2.0 kilograms. In the case of heroin, the trafficable quantity also commences at 2.0 grams but the commercial quantity commences at 1.5 kilograms.

126 In *Cheng v The Queen*[178] (coincidentally disposing of an appeal concerning offenders who participated in South Australia in the importation in respect of which the present appellants were convicted in New South Wales) the majority of this Court concluded that the terms of the *Customs Act* do not posit a state of knowledge on the part of the offender, one way or the other, as to the quantity of the narcotic substances actually imported. That quantity is an objective fact, fixed by reference to the evidence. The crime that was committed is determined in this way[179]. I took a different view, having regard to the opinion which I hold concerning the requirements of s 80 of the Constitution[180]. However, the holding of the Court emphasises the objective categorisation of the *offence* in the legislation as enacted.

127 Once the *offence* is so established, the *Customs Act* leaves it to the sentencing judge to fix the sentence applicable to the particular case by reference to a maximum punishment attaching to the applicable quantity. The individual features of the offence and the particular matters relevant to the offender are then, within the limits fixed by very large maximum penalties, left, by the scheme of the legislation, to the judge. In the case (as here) of a "commercial quantity", the maximum penalty contemplated by law is "imprisonment for life or for such period as the Court thinks appropriate"[181]. That formula, and the inclusion of the highest penalty known to the law in Australia, emphasises the purposeful

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177 (1999) 48 NSWLR 340 at 366 [142]. See joint reasons at [35]; reasons of Callinan J at [156].

178 (2000) 74 ALJR 1482; 175 ALR 338.

179 (2000) 74 ALJR 1482 at 1487 [25], 1500 [102]; 175 ALR 338 at 343-344, 361-362.

180 (2000) 74 ALJR 1482 at 1524 [229]; 175 ALR 338 at 395; cf *Kingswell v The Queen* (1985) 159 CLR 264 at 294.

181 *Customs Act*, s 235(2)(c)(ii).

provision to the court sentencing the appellants of a discretion wide enough to permit the wide variety of considerations applicable to the offence and to the offender to be taken into account.

128 There is authority in the Supreme Court of Canada in *R v McDonnell*[182] that lends support to the appellants' submissions in this regard. There it was held that there was "no legal basis for the judicial creation of a category of offence within a statutory offence for the purposes of sentencing … [I]t is not for judges to create criminal offences, but rather for the legislature to enact such offences." The Supreme Court of Canada disapproved of the creation by the Alberta Court of Appeal of what it regarded as effectively a new and different offence of "major sexual assault". This was held to be incompatible with the scheme of the Canadian *Criminal Code*. A minority dissented[183]. They held that the categories of major and minor sexual assaults merely represented the "starting point" approach and constituted a variation on traditional concepts of ranges of sentences for particular types of criminal acts.

129 It is by no means unusual for appellate courts to identify recurring features of typical cases as amounting to circumstances aggravating[184] or mitigating[185] sentence. If that had been all that the guidelines "promulgated" in the present case had done I would, with the minority in *McDonnell*, have regarded it as no more than an expression of a relevant consideration and not a judicially created sub-set of offences unauthorised by the legislature. After all, one could scarcely deny that the quantity of an illegal drug will usually be relevant to culpability. Commonly, it will be connected with the damage that may be done to the number of persons who use the drug, the reward to the importer and the size of the chain of supply and distribution. Quantity is not, therefore, irrelevant to punishment. However, as I read the guidelines, they go well beyond a reference to this factor as relevant to the sentencing task. The guidelines purport to identify precise sub-

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182 [1997] 1 SCR 948 at 974-975 [33] per Sopinka J (Lamer CJ, Cory, Iacobucci and Major JJ concurring).

183 La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.

184 eg abuse of trust by a person in authority: *Ryan v The Queen* (2001) 75 ALJR 815 at 829 [78]; 179 ALR 193 at 211.

185 The observance of common discounts is a frequent feature of sentencing practice, most especially in the cases of pleas of guilty and for cooperation with the authorities: cf *Director of Public Prosecutions (Cth) v Said Khodor El Karhani* (1990) 21 NSWLR 370 at 383-385; *Wong* (1999) 48 NSWLR 340 at 350 [42]. Legislation sometimes expressly requires adjustments: *Crimes Act* 1914 (Cth), s 16A(2)(g). See also as to finding of good character: *Ryan v The Queen* (2001) 75 ALJR 815 at 818 [12], 832 [96], 847 [185]; 179 ALR 193 at 196, 216, 236-237.

classifications of the offences provided by the Parliament, and to do so by including highly specific categories determined by reference *only* to the quantity of the substance involved. To that extent, I consider that it imposed on the statutory scheme a gloss that went beyond permissible judicial elaboration. To the extent that it displayed an approach that influenced to whatever degree the response to the appellants' sentences, it was erroneous.

130 The introduction of sub-classifications of the statutory offence, by reference to quantity alone, is incompatible with the scheme devised by the Parliament. That scheme contemplated that, within the boundaries it had set, a general judicial discretion would remain. To reduce that discretion rigidly by the superimposition of sub-categories identified by reference only to quantity, is impermissibly to alter the design enacted by the Parliament. Having regard to what follows, this conclusion is not avoided, as the Court of Criminal Appeal thought, by referring to the fact that the guidelines were "indicative only"[186]. Numerous passages in the reasons of that Court (given emphasis by the minority opinion of Simpson J) make it clear that "following the promulgation of a guideline, it is to be expected, and indeed is intended, that sentencing courts will, generally speaking, adhere to the range of sentences promulgated as appropriate"[187]. In practical terms, that would necessarily be so and was intended to be so.

131 Accordingly, the "guidelines" stated in these matters were inconsistent with the federal legislation applicable to the offences. To the extent, as it must be inferred, that the "guidelines" affected the approach and conclusion, judgment and sentences of the Court of Criminal Appeal, the orders of that Court were erroneous. No statement of sentencing principle, whether called a "guideline" or otherwise, may be inconsistent with federal legislation applicable to the case. This argument of the appellants must therefore be upheld.

132 *Individualised statutory discretion*: The appellants have also made good a second objection, based on the applicable federal legislation. It was likewise rejected by the Court of Criminal Appeal[188]. This is that the language and purpose of the applicable legislation assumes the exercise by the sentencing judge, as by an appellate court considering an appeal against sentence, of an individualised discretion. This is one that takes into account *all* of the circumstances relevant to the offence and the offender and cannot be constrained by judge-made considerations defined in terms of particular outcomes referable to specific weights of narcotic substances not expressed in the legislation itself.

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186 (1999) 48 NSWLR 340 at 349 [32].

187 (1999) 48 NSWLR 340 at 372 [190].

188 (1999) 48 NSWLR 340 at 345-349 [14]-[31].

133 In part, this argument depended on the express requirement imposed on the judge sentencing the appellants to conform to the requirements of s 16A of the *Crimes Act* 1914 (Cth)[189]. That section expresses a number of matters to which a court *must* have regard when passing sentence on a person convicted of a federal offence. Necessarily, in any appeal against a sentence so imposed, the same considerations must apply in the appellate court. The terms of the section are clearly stated on the hypothesis that the judges concerned in the determination, and review, of such a sentence must perform their functions imposing an individual sentence "that is of a severity appropriate in all the circumstances of the offence"[190].

134 There follows, in s 16A(2) of the *Crimes Act*, a list of matters particular to the offence and the offender involved. To superimpose upon that list highly specific requirements expressed in terms of anticipated outcomes defined by reference only to the weight of narcotic substances cuts across the scheme of the individualised and complex assessment of relevant considerations contemplated by s 16A(2). This inconsistency is specially objectionable because of the holding that the overall parameters of the offence in question are defined by reference to the objective quantity of the drug imported. Within the maximum limits of punishment set by the definition of the offence in that way, the Parliament intended matters of aggravation and mitigation to be particular to the offence and the offender. Those considerations were not subject to additional rigidities caused by the highly particular and unique reference in the guidelines to the quantity of the narcotic substance in question.

135 It is true that s 16A(2) of the *Crimes Act* begins with an acknowledgment that "any other matters", in addition to those listed may be taken into account by the court concerned in the sentence of a convicted federal offender. It is in this way that the consideration of general deterrence has been given weight, although it is not mentioned in the list[191]. But the common feature of the list, as of the substantive offences provided in the *Customs Act*, is that a sentence will be imposed which addresses all the individual circumstances of the offence and the offender. That is not the hypothesis upon which the "guideline judgment" under consideration is drawn. The guidelines contemplate a result or outcome derived not from multiple factors but only from a single identified factor, namely the weight of the narcotic substance in question. To elevate that consideration (which would otherwise be given appropriate attention but as one only of the

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189 Set out in the reasons of Callinan J at [166].

190 s 16A(1).

191 *El Karhani* (1990) 21 NSWLR 370 at 383-385.

many considerations relevant to sentencing[192]) to such a position of primacy is to distort the command of the Parliament governing the approach to sentencing of convicted federal offenders which was binding on the sentencing judge and the Court of Criminal Appeal.

136 Because it was incompatible with the federal legislation creating the offence, and with the sentencing legislation enacted by the Parliament[193], the Court of Criminal Appeal, in exercising federal jurisdiction over the appellants pursuant to s 5D of the *Criminal Appeal Act*[194] had no power to proceed in the contrary manner that it did.

137 This Court has held that, in encouraging the consistent exercise of discretionary decision, it is permissible for appellate courts to express guidelines[195]. I fully agree with that principle. I also support the notion that publicly available guidelines, in the sense of relevant factors declared by an appellate court, are to be preferred to undisclosed or secret "tariffs" or rules of thumb that are not so readily susceptible to debate in public, including in a court which has relevant sentencing responsibilities and powers. However, despite the statement that the guidelines in the present case were not meant to be "binding in any formal sense"[196], the mollifying words must be read with others that make the obvious point that sentences outside the range promulgated would "attract the close scrutiny" of the Court of Criminal Appeal[197]. As the joint reasons in this Court point out, the guidelines were intended to have a prescriptive effect[198].

138 The central problem in this case is therefore that the guidelines were so highly specific. They referred only to one of the relevant considerations (weight). Moreover, as a matter of practicality, they were expressed in terms prone to coerce those with the responsibility of sentencing to attribute to the stated factor a disproportionate importance in order to achieve a *result* that is, in

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192 eg *Crimes Act*, s 16A(1), (2).

193 *Crimes Act*, s 16A.

194 As applied by the *Judiciary Act*, s 68(2); cf joint reasons at [84].

195 *Norbis v Norbis* (1986) 161 CLR 513 at 519; cf *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 86 [35], 121 [134].

196 (1999) 48 NSWLR 340 at 349 [32].

197 (1999) 48 NSWLR 340 at 365 [141]. See also *R v Henry* (1999) 46 NSWLR 346 at 357 [29].

198 Joint reasons at [83]; see also (1999) 48 NSWLR 340 at 372 [190] per Simpson J.

turn, largely based on analysis of past instances. Being so based, the result is only as sound as the instances of previous sentencing from which it is derived. These were not particularly numerous. And they were provided by isolating one consideration (weight of the narcotic substance) from the multitude of unidentified considerations which the sentencing judges concerned took into account in the cases used as the source of the sample.

139 In these circumstances, what is provided is not the kind of permissible "guideline" of referable principle, contemplated by this Court's decisions on appellate guidelines[199]. It is, instead, the provision of an effective rule likely, and even intended, to harness judicial discretions in a way prone to attribute excessive importance to the consideration of weight of the substance at the cost of all other considerations that a judicial discretion would normally address.

140 The appellants are therefore entitled to succeed on their second objection based on the federal legislation applicable to their cases. Having regard to such legislation, the guidelines which the Court of Criminal Appeal "promulgated" could have no application to federal offenders such as the appellants. To the extent that it must be inferred that the Court of Criminal Appeal reached its conclusions about the sentences imposed on the appellants (and the sentences which that Court then felt it necessary to impose in substitution) by reference to the guidelines, the appeal from the judgment and sentences of the Court of Criminal Appeal must succeed.

Constitutional objections

141 *A legislative function?* The foregoing is sufficient to dispose of the appeals. However, because the appellants raised even more fundamental objections of a constitutional character to the course adopted by the Court of Criminal Appeal it is appropriate to mention those objections briefly because, on one view, they represent an even more basic defect, at least in the case of federal offences, forbidding "guideline judgments" of the kind attempted here.

142 The appellants contended that the "promulgation", as the Court of Criminal Appeal itself described its action, of "guidelines" was incompatible with the exercise of judicial power contemplated by the Constitution. This was because it amounted to the establishment of a new legal norm, having a legal effect wider than was necessary to determine only the controversy before the court, expressed in language which was prescriptive and prospective for all current and future cases and, moreover, with an effect that would bind persons who had been afforded no opportunity to make submissions relevant to the new norm.

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199 *Norbis v Norbis* (1986) 161 CLR 513 at 519-520, 536-537.

143 The appellants argued that, subject to the Constitution, the Parliament might establish such universal criteria; but a court exercising the judicial power of the Commonwealth could not do so. They submitted that the vice inherent in such "promulgations" was made plain by the fact that the guidelines in question were devised only to apply to "couriers and persons low in the hierarchy of the importing organisation"[200]. It was only linked to them by an unexpressed leap of reasoning.

144 There is force in this submission. But much will depend upon the way in which "guidelines", so-called, are expressed and the manner in which they are used[201]. If they were merely a "sounding board" or "check" against the exercise of a sentencing discretion, so as to bring greater consistency to that exercise, they would not be incompatible with the performance of judicial functions. Similarly, just because of the language used ("promulgation"), the treatment of considerations irrelevant to the particular case or suggested illogicality of reasoning, a court would not necessarily go beyond its judicial functions. Sometimes, in expressing a binding rule for the case before it, a court may go into elaboration thought useful to provide a conceptual context although not strictly necessary to deciding the case in hand. If, for example, the Court of Criminal Appeal had cited statistical and historical material and decisional analysis to describe relevant ranges of punishment by reference to multiple factors and what had occurred in the past, no offence to the exercise of judicial power would have been committed. The fact that so many judges in different jurisdictions have sought to promote greater consistency in sentencing by the use of what they have called "guidelines" is a reason for this Court to exercise caution before condemning the innovation as incompatible with judicial functions under the Australian Constitution. In most of the overseas jurisdictions mentioned[202], the constraints of a federal constitution are missing. But, just as the functions of the other branches of government vary over time so, in my view, those of the Judicature may do so, within limits, in order to fulfil the role contemplated of the courts by Ch III of the Constitution[203]. Innovation is not, as such, incompatible with the exercise of constitutional power, including federal judicial power.

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200 (1999) 48 NSWLR 340 at 366 [142].

201 *R v Ngui* (2000) 1 VR 579 at 583-584 [12]-[13].

202 eg in England, Hong Kong and New Zealand.

203 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 369-371 [84]-[89]; cf *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 at 238 [309], where McHugh J refers to an analogous adaptation of powers of executive government.

145 Necessity of a "matter": A second way in which the appellants mounted their constitutional attack on the guidelines "promulgated" in their cases arose from their suggestion that such a statement of rules, applicable to circumstances extraneous to the litigation, was incompatible with the nature of the judicial power referred to in Ch III of the Constitution. The common feature of the jurisdiction so conferred upon this Court in its original jurisdiction[204], upon other federal courts[205] and upon State courts invested with federal jurisdiction[206], is the requirement that there be a "matter". Exactly what is contemplated by the requirement of a "matter" is elusive[207]. There must be involved in the legal proceeding in question, a subject apt for determination by a court by reference to some "immediate right, duty or liability" susceptible of judicial determination[208]. This has been the basis of this Court's rejection of the conferral of jurisdiction and powers to provide advisory opinions[209] or a decision upon abstract questions divorced from the actual administration of the law[210]. The appellants submitted that "guideline judgments", to the extent that they assumed a function of laying down rules intended to be applied in future and current cases of differing but specified facts, partake of the character of advisory opinions or the determination of abstract questions. Such judgments were divorced from the limited but important function assigned to the Judicature by the Constitution, which is only the exercise of jurisdiction over a particular "matter".

146 Once again, it is not necessary in this case to determine this argument. Clearly, the Constitution envisages the performance by State courts of appellate functions, including when exercising federal jurisdiction. These have traditionally involved the identification and formulation of general principles as

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204 Constitution, ss 75, 76.

205 Constitution, s 77(i) and (ii).

206 Constitution, s 77(iii).

207 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 585 [215].

208 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

209 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612, 642; cf at 666-667.

210 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303; *Croome v Tasmania* (1997) 191 CLR 119 at 125, 135.

ancillary to the disposal of the particular case before the court[211]. The binding rule of a decision is limited by the issues that were in contest between the parties and the way in which those issues were decided by the [majority of the] court[212]. But it is not at all unusual, in achieving the orderly application and development of the law, for appellate courts, including this Court[213], to identify the applicable principles in terms that go beyond the strict requirements of the dispute between the parties. Doing this, in a way that affords general principles for use in other current or future cases not before the court, does not necessarily take the court concerned outside its jurisdiction in a "matter". That this is so, can be seen in many instances where this Court has, in the context of a particular case, propounded broad principles[214] or condoned judicial guidelines as compatible with law[215].

147 It is unnecessary to decide whether the guidelines that were "promulgated" in the present case went beyond the constitutional jurisdiction afforded to the Court of Criminal Appeal over the "matters" concerning the appellants. But it is obvious that, to the extent that such guidelines deal with considerations wholly extraneous to the decision in a particular "matter" they run the risk of passing beyond *obiter dicta* to the impermissible resolution of other, future or theoretical "matters" beyond those actually before the Court and divorced from the administration of the law in a particular matter. Much depends upon the way in which so-called "guidelines" are expressed and the manner in which they are used. At least in federal jurisdiction, there is a constitutional boundary; and it must not be passed.

148 *Discriminatory laws*: The appellants are both Chinese nationals. Neither of them is, within s 117 of the Constitution, a "subject of the Queen", or Australian citizen. The implications of s 117 for the differential treatment of residents of different States of the Commonwealth, possibly involved in the application to them in one State alone of guidelines expressed by particular reference to the differentiated weight of imported goods, is not therefore raised

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211 *Muschinski v Dodds* (1985) 160 CLR 583 at 615; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 397 [189].

212 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 37; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 571 [101], 598 [182].

213 eg *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

214 eg *Dietrich v The Queen* (1992) 177 CLR 292 at 315; *McKinney v The Queen* (1991) 171 CLR 468 at 485.

215 *Norbis v Norbis* (1986) 161 CLR 513 at 519-520, 536-537.

for decision in these appeals[216]. Like the other constitutional points, it can be left to another day.

Conclusion and orders

149 I would therefore confine my conclusion in these appeals to the opinion that the guidelines formulated by the Court of Criminal Appeal, and inferentially used as a benchmark from which to derive an outcome affecting the appellants, were incompatible with the terms of the federal legislation applicable to their cases. The question whether other guidelines could be formulated consistently with the federal legislation and with the Constitution does not need to be answered. In accordance with the orthodox approach to constitutional adjudication, the arguments based on the common law and statute should be dealt with first[217]. As often happens, when this is done in the present case the specific answers to the constitutional questions can be postponed.

150 I agree in the orders proposed in the joint reasons.

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216 cf *Leeth v The Commonwealth* (1992) 174 CLR 455.

217 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266; *R v Hughes* (2000) 74 ALJR 802 at 816 [66]; 171 ALR 155 at 173-174; *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1030 [80]; 172 ALR 366 at 389.

151 CALLINAN J. These appeals were heard together. They raise the same questions: whether the Court of Criminal Appeal of New South Wales erred, in increasing the sentences imposed upon the appellants by the trial judge; and, whether that error was caused by, or perhaps may be discerned from, the lengthy discourse about, and statement of, the sentencing guidelines in the Court's reasons for judgment, albeit that the Court held that the guidelines had no application to these appellants. It is relevant to notice at the outset that because the appellants were charged with offences under s 233B(1)(d) of the *Customs Act* 1901 (Cth) ("the Act"), the courts below were, in dealing with the appellants, exercising federal jurisdiction.

The facts

152 On 8 November 1997 the appellants were arrested in Sydney and charged with being knowingly concerned in the importation of a "commercial"[218] quantity of heroin in contravention of s 233B of the Act. On 7 September 1998 the appellants were convicted by a jury in the District Court of New South Wales. On 18 December 1998, each was sentenced by the trial judge, Davidson DCJ, to a term of 12 years imprisonment with a non-parole period of seven years, dating from 8 November 1997.

153 On 24 February 1999 the Acting Commonwealth Director of Public Prosecutions ("the Director") gave notice of intention to appeal against the sentences imposed on the appellants on the ground that they were manifestly inadequate. The appeals were listed for hearing before a Court of Criminal Appeal constituted by five judges, Spigelman CJ, Mason P, and Simpson, Sperling and Barr JJ because, before the hearing, the Director gave notice that he sought a "guideline judgment" in relation to offences under s 233B of the Act with respect to the importation of heroin.

154 In support of his submissions that there should be a guideline judgment, the Director submitted a comprehensive bundle of documentary material to the Court relating to the prevalence of offences under s 233B, approaches to sentencing adopted in other jurisdictions, and an analysis of sentences imposed for various contraventions of s 233B by New South Wales courts, and by other Australian State and Territory courts.

155 The Court of Criminal Appeal gave judgment on 16 December 1999. All members of it agreed with the judgment of the Chief Justice, subject to a reservation expressed by Simpson J[219], as to "the suitability of the cases presently

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218 See Sched VI of the Act.

219 *R v Wong; R v Leung* (1999) 48 NSWLR 340 at 372 [189].

before the Court to provide the foundation for a guideline judgment in relation to couriers and persons low in the hierarchy of an importing organisation".

156 Spigelman CJ accepted the submission of the Director that the case was an appropriate one in which to promulgate a guideline judgment. The guidelines were as follows[220]:

> "The following guideline is intended to be non-binding in the sense explained in *Jurisic*[221] and *Henry*[222]. It has been determined primarily on the basis of existing sentencing patterns and is intended to apply to couriers and persons low in the hierarchy of the importing organisation.
>
> - Low level traffickable quantity - 5 to 7 years
> (2 grams-200 grams)
> - Mid level traffickable quantity - 6 to 9 years
> (200 grams-1 kilogram)
> - High range traffickable quantity - 7 to 10 years
> 1 kilogram-1.5 kilograms (heroin)
> 1 kilogram-2 kilograms (cocaine)
> - Low range commercial quantity - 8 to 12 years
> 1.5 kilograms-3.5 kilograms (heroin)
> 2 kilograms-3.5 kilograms (cocaine)
> - Substantial commercial quantity - 10 to 15 years
> (3.5 kilograms-10 kilograms)"

157 The Court of Criminal Appeal upheld the Director's appeal, quashed the sentences imposed on the appellants by the District Court, and substituted in each case a sentence of imprisonment for 14 years, with a non-parole period of nine years to commence from 8 November 1997.

The appeal to this Court

158 The appellants' first submission was that it was an error on the part of the Court of Criminal Appeal to conclude that it had jurisdiction to promulgate a guideline judgment in the exercise of federal jurisdiction. It will not be necessary to deal with this submission if the appellants' alternative submission, to which I will go first, is correct.

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220 *R v Wong; R v Leung* (1999) 48 NSWLR 340 at 366 [142].

221 *R v Jurisic* (1998) 45 NSWLR 209.

222 *R v Henry* (1999) 46 NSWLR 346.

159 The appellants' alternative submission is that, because the Court was "unable to discern any error of principle in the way Davidson DCJ approached the exercise of the sentencing discretion"[223], the Court should have proceeded in four stages: first, by establishing an appropriate "norm" by reference to the objective features of the offence; secondly, by determining whether there were circumstances which might properly justify departure from that "norm"; thirdly, by considering whether any departure in the sentences imposed by the trial judge demonstrated manifest inadequacy in their particular cases; and, fourthly, by considering whether, if such inadequacy were established, these were proper cases in which to interfere with the exercise of the sentencing judge's discretion.

160 The appellants' reliance, in respect of the alternative submission, on the facts and with regard to the alleged illegitimacy of the promulgation of the guidelines is limited because they do not contend that any of them were applied in their cases. They say that their formulation was, because of their prominence in, and effective domination of the contents of the judgment, a distraction from the real task upon which the Court was engaged, and must, therefore, have led the Court into irrelevancy and error.

161 As the appellants developed their alternative argument they refined it, to focus upon an absence, as they submitted, of any explanation, or sufficient explanation for the holding of the Court of Criminal Appeal that the sentences were manifestly excessive, a holding which was in these terms[224]:

> "Wong and Leung were major participants in a very large importation. The head sentences of twelve years are, in my opinion, manifestly inadequate. On this basis, the sentencing discretion falls to be re-exercised by this Court."

162 On analysis I do not think that the submission is correct. It seems to me that the Court of Criminal Appeal did properly explain, if only briefly, why the sentences imposed were manifestly inadequate. The explanation was simply that the Court formed the opinion that it did because the sentencing judge failed to give due weight to the great quantity of the drug that had been imported. This appears from what Spigelman CJ said in the following passages which emphasise the significance of this matter[225]:

> "*This was a very large importation*. The extent of human misery which would have been inflicted on our community if the shipment had

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223 *R v Wong; R v Leung* (1999) 48 NSWLR 340 at 370 [174].

224 *R v Wong; R v Leung* (1999) 48 NSWLR 340 at 371 [181].

225 *R v Wong; R v Leung* (1999) 48 NSWLR 340 at 370 [175], 371 [180].

> been delivered, is immense. *If the ultimate sentence is manifestly inadequate, it is likely to be because his Honour failed to give proper weight to the size of the importation.*
>
> …
>
> In my opinion, on the basis of the facts as found by Davidson DCJ and the objective and subjective circumstances to which he referred, and taking into account the [sentencing] considerations in s16A, the sentences his Honour imposed were lower than the least sentence that could properly have been imposed in each case." (emphasis added)

163 What I have said is enough to dispose of this appeal, unless, contrary to what the Court of Criminal Appeal said (that the guidelines had no relevance to these appellants) the Court did in fact, in some way, treat them as relevant, or allowed itself to be influenced by them; and that the Court had no jurisdiction, or power to formulate or use guidelines in the exercise of federal jurisdiction.

164 It may well be that the Court of Criminal Appeal would have been better advised, as Simpson J suggested, if it wished (and could, within jurisdiction properly) to state guidelines, to await a different and more typical case, perhaps, than these. And, again, it might appear incongruous that so much time and thought have been expended on the formulation of guidelines in two cases which, in the end, do not call for their application. But the Court expressly held the guidelines to be irrelevant here. Accordingly, they were not invoked in, and it is not for this Court to hold that they were influential with respect to, the process of dealing with these two appellants. Whether the guidelines should have been formulated, or were or were not within the power or jurisdiction of the Court of Criminal Appeal, is not, therefore, to the point in these appeals which, in my opinion, should be dismissed.

165 All that I would say about the guidelines is this. I strongly doubt, without deciding, that the formulation and application of guidelines can be a proper exercise of the judicial power of the Commonwealth. They appear to have about them a legislative quality, not only in form but also as they speak prospectively. Despite the qualifications that their makers express, they also do have, and in practice will inevitably come to assume, in some circumstances, a prescriptive tone and operation. There is also the problem that in formulating guidelines the Court does not have the advantage of the presence of a contradictor. In any case in which a prosecutor seeks a statement of guidelines, the interest of the accused in whose case the application is made will usually be with respect to his or her penalty only, and he or she would be unlikely to wish to, or, indeed, even be able to make any useful contribution to a debate about all relevant aspects of the sentence sought.

166 Section 16A of the *Crimes Act* 1914 (Cth) provides as follows:

"(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

(a) the nature and circumstances of the offence;

(b) other offences (if any) that are required or permitted to be taken into account;

(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character - that course of conduct;

(d) the personal circumstances of any victim of the offence;

(e) any injury, loss or damage resulting from the offence;

(f) the degree to which the person has shown contrition for the offence;

(i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or

(ii) in any other manner;

(g) if the person has pleaded guilty to the charge in respect of the offence - that fact;

(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;

(j) the deterrent effect that any sentence or order under consideration may have on the person;

(k) the need to ensure that the person is adequately punished for the offence;

(m) the character, antecedents, cultural background, age, means and physical or mental condition of the person;

(n) the prospect of rehabilitation of the person;

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

(3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order."

167 Even though the section is not an exhaustive catalogue of the considerations relevant to the imposition of penalties for federal offences, I strongly doubt whether the reference in s 16A(2) to "any other matters" may be taken to be intended to refer, or can be read, consistently with Ch III of the Constitution, as incorporating the concept of sentencing guidelines. I would not readily regard a guideline settled on another occasion as a proper matter for consideration in determining the penalty to be imposed upon an offender against federal law, although penalties for similar offences by other persons on other occasions almost certainly will be. Nonetheless, contrary to the submissions made by the Director, the difference between guideline judgments and judgments setting forth sentencing principles of a type which Courts of Criminal Appeal have delivered for almost a century is more than one of mere nomenclature. I say this because of my concern that guidelines do have a legislative flavour about them, and, because, by their very nature, they may detract from a proper consideration and application of the principles which the section requires be considered and applied in each case[226].

168 It is unnecessary to express any concluded opinion upon the validity of guidelines stated by courts in the exercise of jurisdiction which is not federal. There is now a legislative basis for them in New South Wales[227] and Western Australia[228]. The relevant New South Wales provision was not available in this

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226 See Breyer, "Federal Sentencing Guidelines", (1990) 26(1) *Criminal Law Bulletin* at 5-37 for a description of the mechanistic and formulistic way in which guidelines are applied in the United States and which inevitably inhibit the exercise of the broad discretion that the sentencing process requires.

227 *Crimes (Sentencing Procedure) Act* 1999 (NSW), Pt 3, Div 4.

228 Section 143 of the *Sentencing Act* 1995 (WA) provides a statutory basis for guideline judgments in that State. See "Sentencing - guideline judgments", (1998) 10 *Judicial Officers' Bulletin* at 67 (based on material prepared by the Supreme Court of New South Wales).

case for the reasons stated by Gaudron, Gummow and Hayne JJ[229]. It is difficult to see, however, why a State legislature might not, as these States have, legislate for the promulgation of guidelines in relation to State offences, so long as it is understood that they are guidelines only, that is, at most, merely indicative starting points, not to be rigidly or mechanistically applied, and that the trial judge still has a real, judicial sentencing discretion to exercise of the kind discussed by this Court in *House v The King*[230].

Orders

169 I would dismiss both appeals.

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229 Reasons of Gaudron, Gummow and Hayne JJ at [41]-[42].

230 (1936) 55 CLR 499.