HIGH COURT OF AUSTRALIA

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

MALCOLM MACLEOD APPELLANT

AND

AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION RESPONDENT

Macleod v Australian Securities and Investments Commission
[2002] HCA 37
11 September 2002
P55/2001

ORDER

1. *The title of the respondent be amended to read "Australian Securities and Investments Commission".*

2. *Appeal allowed with costs.*

3. *Set aside Orders 1 to 6 of the orders made by the Full Court of the Supreme Court of Western Australia on 13 April 2000 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation:

W B Harris for the appellant (of William B Harris)

D J Bugg QC with L R M Fletcher for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Interveners:

H C Burmester QC with G Witynski 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 R M Mitchell and P S Psaltis intervening on behalf of the Attorneys-General for the States of South Australia, Tasmania, Western Australia, Queensland and the Northern Territory (instructed by the Crown Solicitors for the States of South Australia, Tasmania, Western Australia and Queensland and the Solicitor for the Northern Territory)

CATCHWORDS

Macleod v Australian Securities and Investments Commission

Criminal law – Companies – Offence against *Corporations (Western Australia) Act* 1990 (WA) – Attraction of federal jurisdiction under s 75(iii) of the Constitution by presence of Australian Securities and Investments Commission as party to prosecution – Section 206A(2) of the *Justices Act* 1902 (WA) conferred standing to apply for leave to appeal (and, if granted, to institute and conduct an appeal) upon "a party" to an earlier appeal – Whether Australian Securities and Investments Commission empowered to appeal to the Full Court against the order of a single judge of the Supreme Court of Western Australia on appeal from summary proceedings – Whether s 79 of the *Judiciary Act* 1903 (Cth) "picked up" s 206A(2) of the Justices Act – Whether *Australian Securities Commission Act* 1989 (Cth) "otherwise provided" for the purposes of s 79 of the Judiciary Act.

Constitutional law (Cth) – Federal jurisdiction – Australian Securities and Investments Commission a party – s 75(iii) of the Constitution – Substantive content of matter supplied by State law – Construction of legislation in co-operative national scheme.

Appeal – Competency of appeal by Australian Securities and Investments Commission to the Full Court against the setting aside of an appeal to a single judge of the Supreme Court of Western Australia from conviction in summary proceedings.

Constitution, s 75(iii).
Judiciary Act 1903 (Cth), s 79.
Australian Securities Commission Act 1989 (Cth), ss 11(4), 49.
Justices Act 1902 (WA), s 206A(2).
Corporations (Western Australia) Act 1990 (WA), ss 7, 58.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. By complaint dated 19 January 1998, proceedings in the Court of Petty Sessions held at Perth were instituted against the appellant, Mr Macleod. They were for two offences contrary to s 999 of the Corporations Law read with s 1311(1)(a) of the Corporations Law. Reference to "the Corporations Law" is to the Law then set out in s 82 of the *Corporations Act* 1989 (Cth) ("the 1989 Act") and applied as a law of Western Australia by s 7 of the *Corporations (Western Australia) Act* 1990 (WA) ("the WA Corporations Act"). The offences in question thus were offences against the law of Western Australia.

2 The 1989 Act was repealed, with effect from 15 July 2001, by the *Corporations (Repeals, Consequentials and Transitionals) Act* 2001 (Cth) ("the 2001 Act")[1]. Section 7 of the WA Corporations Act was amended, with effect from the same date, to allow for the repeal of the 1989 Act, by s 30 of the *Corporations (Ancillary Provisions) Act* 2001 (WA) ("the WA Ancillary Act"). No party suggests that for the purposes of this appeal anything turns upon that repeal and amendment.

3 The proceedings were instituted against Mr Macleod by the body then styled the Australian Securities Commission ("the ASC"), established as a body corporate by ss 7 and 8 of the *Australian Securities Commission Act* 1989 (Cth) ("the ASC Act"). The style of the ASC was changed, with effect from 1 July 1998, to the "Australian Securities and Investments Commission"[2], but for convenience it will be referred to hereafter as the ASC. The ASC Act was repealed, with effect from 15 July 2001, by the 2001 Act[3] and replaced by the *Australian Securities and Investments Commission Act* 2001 (Cth). Section 261 of that latter statute continues the ASC as if established by it. Again, no party pointed to these changes as of any significance for the issues arising on this appeal. However, an order should be made amending the title of the respondent in this Court to "Australian Securities and Investments Commission".

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1 Sched 1, Pt 1, Item 2.

2 Upon the commencement of Sched 1 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act* 1998 (Cth).

3 Sched 1, Pt 1, Item 1.

Federal jurisdiction

4 In *Byrnes v The Queen*[4] and *Bond v The Queen*[5], prosecutions for offences under State law apparently were brought on the footing[6] that "the Crown" was an appropriate party to prosecute the offences and that the Commonwealth Director of Public Prosecutions ("the Commonwealth DPP") was the relevant officer to represent it in that regard. No point was taken, and it is not to be supposed that it was open to do so, that the involvement of the Commonwealth DPP had attracted federal jurisdiction.

5 It may be added that the legislation enacted in 2001, to which reference has been made but upon which no reliance is now placed, was part of a detailed legislative response at State and federal level to the deficiencies in the previous Corporations Law scheme, disclosed in decisions of this Court including *Byrnes* and *Bond*[7].

6 The nine heads of "matters" which fall within federal jurisdiction are identified in Ch III of the Constitution as to some by the source of the rights and liabilities in question or by the remedy sought[8]. However, s 75(iii) is attracted by the presence of the Commonwealth as a "party" in a "matter"; the rights or liabilities which supply content to the "matter" in question; and the nature of the remedy sought are to be ascertained *aliunde*. In the proceeding in the Court of Petty Sessions, the identity of the ASC as the complainant attracted the exercise by that Court of federal jurisdiction; the liability sought to be established in the proceeding, and the substantive content of the "matter" within the head of s 75(iii) was the determination of liability for contravention of certain laws of Western Australia and the imposition of penalties if liability was established. It

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4 (1999) 199 CLR 1.

5 (2000) 201 CLR 213.

6 See the submissions by the Solicitor-General for the State of South Australia in *Byrnes v The Queen* (1999) 199 CLR 1 at 19.

7 Saunders, "A New Direction for Intergovernmental Arrangements", (2001) 12 *Public Law Review* 274.

8 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 624 [86].

is accepted that, for the purposes of Ch III of the Constitution, in particular s 75(iii), the ASC is to be regarded as "a party" which is "the Commonwealth". So much was established by *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*[9].

7 However, the ASC is not in the same position as the executive branch of the government, charged by the broad terms of s 61 of the Constitution with the execution and maintenance of the Constitution itself and of the laws of the Commonwealth. The ASC is a creature brought into existence by one of those laws and endowed by it with particular functions and powers. Questions thus arise of the competence of the ASC to take particular steps and of the construction of the empowering provisions of the ASC Act.

8 In the present case, it is important to bear in mind, as already mentioned, that Mr Macleod was charged with offences against State law. He was not charged with offences against "the laws of the Commonwealth", the expression upon which turns the investment of State courts with jurisdiction by s 68(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). That provision derived from s 76(ii) of the Constitution and the body of case law construing it has no application here. In *R v Murphy*[10], the Court, when dealing with committal proceedings, observed that underlying s 68(2) was:

> "the assumption – in our opinion well-founded – that in giving jurisdiction to State courts in committal proceedings the Parliament is investing those courts with jurisdiction in a matter arising under s 76(ii) of the Constitution, the matter being the claim or charge that the person charged has committed an offence against a particular law of the Commonwealth".

9 In the present case, the investment of federal jurisdiction is supported by s 77(iii) in combination, not with s 76(ii), but with s 75(iii) of the Constitution. Hence the applicable provision of the Judiciary Act is the general investment made by s 39(2) of that statute. This investment of federal jurisdiction includes appellate jurisdiction within the provisions made for it by the relevant State

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9 (2001) 204 CLR 559 at 581 [40], 608 [126].

10 (1985) 158 CLR 596 at 617.

judicial system[11], with an appeal to this Court established by s 73(ii) of the Constitution.

10 In the Court of Petty Sessions and in the Supreme Court, both before the Commissioner and the Full Court, s 79 of the Judiciary Act operated to "pick up" State law[12], that of Western Australia. Section 79 did so without enabling the court exercising federal jurisdiction to give an altered meaning to any State statute[13]. Moreover, the section rendered binding State law "except as otherwise provided by the Constitution or the laws of the Commonwealth". This is a matter to which it will be necessary to return later in these reasons.

The charges

11 The charges concerned statements allegedly made by Mr Macleod dated 16 December 1993 in a document entitled "Exploration Results for Cambridge Gulf Exploration NL". Each statement was said to have been materially misleading and likely to induce the purchase of securities in that company by other persons when Mr Macleod ought reasonably to have known that the statement was materially misleading. The statement complained of in the first count was:

> "that six carats of diamonds were recovered at the rate of zero point four carats to the tonne [without taking] into account the overburden which had to be penetrated and removed in order to recover the diamonds".

The statement complained of in the second count was said to have contained:

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11 *Ah Yick v Lehmert* (1905) 2 CLR 593; *R v Whitfeld. Ex parte Quon Tat* (1913) 15 CLR 689.

12 Section 79 provides:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

13 *Austral Pacific Group Ltd (in liquidation) v Airservices Australia* (2000) 203 CLR 136 at 143 [13], 154 [52].

"a representation with respect to a future matter namely that it predicted an annual profit for Cambridge Gulf Exploration NL in the sum of $US1,374,000,000.00 and there were no reasonable grounds for making that representation".

12 Section 999 of the Law forbade, amongst other things, a statement materially misleading and likely to induce the purchase of securities by other persons if, when the person made the statement, that person ought reasonably to have known that the statement was materially misleading. Section 1311 stipulated that a person who did an act or thing forbidden by a provision of the Law was guilty of an offence by virtue of s 1311(1). Section 1315 of the Law stated that in any proceedings for an offence against the Law any information, charge, complaint or application might be laid or made by the ASC.

The proceedings in Western Australia

13 Section 20 of the *Justices Act* 1902 (WA) ("the Justices Act") conferred a general jurisdiction in respect of State summary offences upon two or more "Justices", a term defined in s 4 to include a magistrate acting alone pursuant to s 33. In November 1998, after a summary hearing before a magistrate in the Court of Petty Sessions, Mr Macleod was convicted in respect of the second count, concerning the prediction of the annual profit. He was found not guilty in respect of the first count, concerning the recovery of diamonds.

14 The decision and orders by the magistrate resolved the controversy between the ASC and Mr Macleod, namely the determination of his liability for contravention of State law upon the two counts in question. That particular exercise of federal jurisdiction was thereby concluded[14]. However, Pt VIII (ss 183-219) of the Justices Act provided for appeals. In particular, s 185 provided for an appeal, by leave, to the Supreme Court of Western Australia constituted by a single judge. Section 185(2) stipulated that an application for leave be made by:

"(a) any person who is aggrieved by the decision; or

(b) the Attorney General".

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14 cf *Flaherty v Girgis* (1987) 162 CLR 574 at 596-598.

Plainly, Mr Macleod was a "person … aggrieved" by his conviction in respect of the second count.

15 Section 185(2) provided for the application to be made *ex parte* unless there was an order that the application be served on any person. Leave was granted to Mr Macleod on 30 November 1998. Section 191 obliged him to give notice of the appeal to the other party to the proceedings in the Court of Petty Sessions, the ASC. The appeal came before a Commissioner sitting as a single judge of the Supreme Court. The ASC appeared, by counsel, as the respondent.

16 The presence of the ASC as a party again attracted the exercise of federal jurisdiction, on this occasion by the Supreme Court, but in a "matter" in which the right sought to be vindicated was that conferred upon Mr Macleod as an appellant by Pt VIII of the Justices Act. In particular, Mr Macleod sought to have removed his conviction on count 2 of the complaint and the controversy was whether the Court of Petty Sessions had erred in convicting him. On 31 May 1999, the Commissioner, pursuant to s 199 of the Justices Act, ordered that the appeal be allowed, the judgment of the Court of Petty Sessions be set aside and in place thereof it be ordered that counts 1 and 2 of the complaint be dismissed with Mr Macleod to have his costs of those proceedings. The Commissioner also ordered that the ASC pay Mr Macleod's costs of the appeal to the Supreme Court.

17 Section 206A of the Justices Act provided that an appeal lay to the Full Court, by leave, from a decision under s 199. Section 206A(2) stated:

"An application for leave to appeal may be made by –

(a) a party to an appeal; or

(b) the Attorney General."

18 Section 206A(2) of the Justices Act conferred standing to apply for leave to appeal (and, inferentially, to institute and conduct an appeal if leave be granted) upon "a party" to the first appeal. The ASC had been a party to the appeal before the Commissioner and thus answered the description in par (a) of s 206A(2). On the application by the ASC, the Full Court (Malcolm CJ, Ipp and Parker JJ) on 16 August 1999 granted leave to appeal from the decision of the Commissioner. Thereafter, on 13 April 2000, the Full Court (Ipp, Anderson and

Owen JJ)[15] allowed the appeal, ordered that the orders made by the Commissioner be set aside, that the conviction on count 2 be restored, the costs order made by the magistrate be reinstated and Mr Macleod pay the ASC's costs of the appeal to the Commissioner and to the Full Court.

The appeal to this Court

19 In this Court, Mr Macleod seeks orders setting aside the orders made by the Full Court and the reinstatement of the orders made by the Commissioner. He does so on the footing that the appeal by the ASC to the Full Court was incompetent because the powers of the ASC did not extend to the taking by it of that action.

20 The presence of the ASC as a party had engaged the Commissioner, as it had the Court of Petty Sessions, in the exercise of federal jurisdiction. Likewise, by appealing, with leave, to the Full Court, the ASC engaged the Full Court in the exercise of federal jurisdiction in a "matter" in which the Commonwealth was a party within the meaning of s 75(iii) of the Constitution. However, at each level, the "matter" had a distinct substantive content supplied by State law. At the Full Court level, the liability which the ASC sought to establish was that of Mr Macleod to suffer the setting aside of the orders in his favour by the Commissioner and the reimposition of the penalty imposed at first instance in respect of the conviction on count 2.

21 What was the source of the competence of the ASC to take advantage of the standing conferred by s 206A(2) of the Justices Act? On one view, s 206A(2) fixed upon a party to the proceeding heard by the Commissioner and rendered that party competent to institute the Full Court appeal, without any further inquiry being open as to the capacity of that party to act in this way. That construction of the sub-section may for present purposes be assumed. But that assumption then calls into play s 79 of the Judiciary Act. Was s 206A(2) for this purpose picked up by s 79 as a surrogate federal law?

22 That could only be so if it were not "otherwise provided" by the laws of the Commonwealth or the Constitution. What is involved in that latter phrase in

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15 *Australian Securities Commission v McLeod* [sic] (2000) 22 WAR 255.

s 79 was considered in *Northern Territory v GPAO*[16]. The relevant law of the Commonwealth which may have made other provision within the meaning of s 79 was the ASC Act. This provided for the creation, functions and powers of the ASC. If the Justices Act would have added to or derogated from those powers and functions created and conferred by the law of the Commonwealth, then it would not have been "picked up" by s 79 because the Commonwealth law would otherwise have provided.

23 The ASC submits, in effect, that its competence with respect to the Full Court appeal by it was provided both by the State law to which reference has been made, s 206A(2) of the Justices Act, and by the ASC Act itself. Neither conclusion will follow if federal law, the ASC Act, denied that competence. However, the ASC submits that, on its proper construction, the ASC Act authorised rather than denied what was done by the ASC; that also would mean that no law of the Commonwealth "otherwise provided" and that s 79 of the Judiciary Act did operate to "pick up" s 206A(2) of the Justices Act.

24 It thus becomes necessary first to construe the relevant provisions of the ASC Act. Did they "otherwise provide" or, to the contrary, did they, as the ASC submits, confer direct federal legislative authority for the ASC to act as it did?

Byrnes and *Bond*

25 One of the submissions by Mr Macleod which was rejected in the Full Court was that it followed from the decisions in *Byrnes* and *Bond* that the ASC lacked the necessary authority in federal statute law to institute and prosecute the appeal to the Full Court. In rejecting that submission, the Full Court distinguished the legislation involved in the earlier decisions of this Court and also relied upon the reasoning by the Tasmanian Full Court in *Australian Securities and Investments Commission v Hosken*[17]. In argument in this Court, reference was made to the subsequent decision of the South Australian Full Court in *Australian Securities and Investments Commission v Vis*[18] which, on this point, followed the reasoning in *Hosken*.

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16 (1999) 196 CLR 553 at 587-589 [78]-[86], 605-609 [134]-[145], 649 [249]-[250], 650 [254].

17 (1999) 9 Tas R 25.

18 (2000) 77 SASR 490.

26 In both *Byrnes* and *Bond*, the appellants had been convicted for offences against State corporations legislation. Appeals against sentence were successfully instituted by the Commonwealth DPP who controlled the Office established by s 5 of the *Director of Public Prosecutions Act* 1983 (Cth) ("the Commonwealth DPP Act"). In *Byrnes*, this Court held that the relevant law of South Australia, namely the transitional provisions in the *Corporations (South Australia) Act* 1990 (SA) ("the SA Corporations Act"), which sought to bring within the scope of the national scheme then in force prosecutions for offences against the South Australian elements of the former co-operative scheme, failed to confer the necessary authority on the Commonwealth DPP to appeal against sentence.

27 In *Bond*, this Court held that the necessary authorisation for the Commonwealth DPP in respect of an appeal against sentence upon conviction for offences under the Western Australian legislative participation in the national scheme, could not be found in federal law, in particular in the Commonwealth DPP Act. Section 17 of that statute provided that a member of the staff of the Office of the Commonwealth DPP, holding an appointment to prosecute offences against the laws of a State, might "institute and carry on, in accordance with the terms of the appointment, prosecutions for such offences". It was held that s 17 did not authorise the institution of appeals against sentences imposed, in the instant case, for offences against the WA Corporations Act. Moreover, State legislation which, on its face, authorised the Commonwealth DPP to institute appeals against sentence was to that extent invalidated by the operation of s 109 of the Constitution[19]. That operation of s 109 may be compared, for the purposes of the present case, with the provision in s 79 of the Judiciary Act respecting laws of the Commonwealth by which it is "otherwise provided" to State laws said to be "picked up" by s 79.

28 The Commonwealth DPP Act was amended by the *Jurisdiction of Courts Legislation Amendment Act* 2000 (Cth)[20] with the evident object of overcoming the deficiency disclosed in *Bond*. Section 17 of the Commonwealth DPP Act was amended by adding sub-s (2) as follows:

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19 *Bond v The Queen* (2000) 201 CLR 213 at 219-220 [15], 224 [31]; cf as to s 64 of the Judiciary Act and s 109 of the Constitution, *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55.

20 Sched 5. The amendments came into force on 30 May 2000.

> "If a member of the staff of the Office[21] is authorised by or under a law of a State to institute and carry on appeals arising out of prosecutions of offences against the laws of the State, being prosecutions by the Director as mentioned in paragraph 6(1)(m) or by members of the staff of the Office as mentioned in subsection (1) of this section, the first-mentioned staff member may institute and carry on such appeals in accordance with requirements of or under that law."

29 Paragraph (m) of s 6(1) states as one of the functions of the Director:

> "where the Director, with the consent of the Attorney-General, holds an appointment to prosecute offences against the laws of a State – to institute and carry on, in accordance with the terms of the appointment, prosecutions for such offences".

30 The 2000 legislation also added to s 6(1) a further function of the Director, specified in par (ma):

> "if the Director is authorised by or under a law of a State to institute and carry on appeals arising out of prosecutions of offences against the laws of the State, being prosecutions by the Director as mentioned in paragraph (m) or by members of the staff of the Office as mentioned in subsection 17(1) – to institute and carry on such appeals in accordance with requirements of or under that law".

31 No corresponding amendments appear to have been made to the provisions in the ASC Act providing for the beginning and carrying on of prosecutions by the ASC. It is those provisions upon which the present appeal turns.

32 Part 3 (ss 12B-93AA) of the ASC Act was headed "Investigations and information-gathering" and Div 5 (ss 49-50) was headed "Proceedings after an investigation". Sub-sections (1) and (2) of s 49 stated:

> "(1) This section applies where:
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> (a) as a result of an investigation; or

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21 Defined in s 3 of the Commonwealth DPP Act as the Office of the DPP.

(b) from a record of an examination;

conducted under this Part or a corresponding law, it appears to the Commission that a person:

(c) may have committed an offence against a national scheme law, or a relevant previous law, of this jurisdiction, or Division 2 of Part 2[22]; and

(d) ought to be prosecuted for the offence.

(2) The Commission may cause a prosecution of the person for the offence to be begun and carried on."

33 It will be apparent that the phrase in s 49(2) "a prosecution … to be begun and carried on" had a close affinity with the phrase in s 17 of the Commonwealth DPP Act "institute and carry on … prosecutions" with which the decision in *Bond* was concerned. Further, *Byrnes*, to a significant degree, turned upon the expression "the institution and carrying on of a prosecution", the terms of the power conferred by par (c) of s 91(5) of the SA Corporations Act[23].

34 In *Byrnes*, the Court held that, in the absence of the manifestation of a specific intention, no power or function in relation to appeals against sentence was to be found in the terms of s 91[24]. In that connection, the Court stressed that the terms of the section did not refer to "appeals" and noted the earlier decision in *Davern v Messel*[25], to which further reference will be made.

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22 Division 2 of Pt 2 was concerned with unconscionable conduct and consumer protection in relation to financial services and was not engaged in the present case.

23 Section 91 conferred functions upon the Commonwealth DPP in relation to offences against laws in the former co-operative scheme and was included in Div 2 of Pt 13 headed "Co-operative Scheme Laws": see *Byrnes v The Queen* (1999) 199 CLR 1 at 16-18 [20]-[23].

24 (1999) 199 CLR 1 at 26 [52].

25 (1984) 155 CLR 21.

35 The Court in *Byrnes* also referred to the point emphasised by Barwick CJ in *Peel v The Queen*[26] that neither an appeal against acquittal nor an appeal against sentence is an appeal arising out of any proceedings connected with the trial and that an appeal against sentence is not an appeal arising out of any proceedings connected with the conviction. His Honour had been construing the phrase "appeals arising out of any such trial or conviction" in s 68(2) of the Judiciary Act.

36 In distinguishing the outcome in *Byrnes* and *Bond*, the Tasmanian Full Court in *Hosken*[27] relied upon s 11(4) of the ASC Act as providing a relevant distinction for a conclusion supporting the existence of a power in the ASC to appeal to the Full Court against the setting aside of an appeal to a single judge from convictions in summary proceedings. Section 11(4) was found in Pt 2 of the ASC Act. It stated:

> "The [ASC] has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions."

37 In *Vis*, the South Australian Full Court dismissed as incompetent on other grounds an appeal by the ASC against the dismissal by a magistrate of a complaint. However, the Court went on to hold that, if the appeal otherwise had been competent, the ASC would have had power to institute it. After referring to *Bond*, Doyle CJ went on[28]:

> "In the present case, the legislation is relevantly different. The power to perform incidental functions, found in s 11(4) of the [ASC] Act, was not available in *Byrnes* or in *Bond*."

However, it is agreed by the ASC in the present appeal that, in both *Hosken* and *Vis*, the Courts in question had not had drawn to their attention an important point found in s 58(2) of the *Corporations (Tasmania) Act* 1990 (Tas) and the SA Corporations Act, as in s 58 of the WA Corporations Act[29]. In each case, it was

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26 (1971) 125 CLR 447 at 454.

27 (1999) 9 Tas R 25 at 27, 31, 34-35, 40.

28 (2000) 77 SASR 490 at 507.

29 At the relevant times for this appeal, s 58 of the WA Corporations Act applied the ASC Act "as a law of Western Australia", but not the specified "excluded

(Footnote continues on next page)

provided that, in the application of the ASC Act to the State in question, Pt 2 (which included s 11(4)) was excluded. It follows that reliance upon that sub-section in the reasoning in both cases was misplaced.

38 In any event, it must at least be doubtful whether s 11(4) would have been of assistance to the ASC in the circumstances of these cases and the present case. The sub-section stipulated that the activity in question be "necessary for or in connection with" the performance of its functions or "reasonably incidental" thereto. Litigation subsequent to the conclusion of a prosecution is not necessary for the reaching of that conclusion; nor is it apparent that that subsequent litigation is a reasonable incident to that prosecution.

Davern v Messel

39 In these circumstances, the respondent, the ASC, in this Court relied for a favourable construction of s 49(2) of the ASC Act upon a principle of construction said to be derived from *Davern v Messel* and encapsulated in the following statement by Doyle CJ in *Vis*. There, after referring to s 11(4) of the ASC Act, Doyle CJ went on[30]:

> "Nor, in the present case, are there textual reasons which would lead one to conclude that a power to appeal is not conferred. All that is left is the exceptional nature of prosecution appeals. But, as Mason and Brennan JJ said in *Davern*[31], 'courts have readily perceived indications of statutory intention to confer a right of appeal on a prosecutor from an acquittal in summary proceedings'. In this respect the case is finely balanced. In the absence of any textual indications that a right of appeal is not conferred, and bearing in mind the approach generally taken to rights of appeal in summary matters, I conclude that [the ASC] does have the power to appeal that it has exercised in the present case."

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provisions". Section 58 was amended by s 30 of the WA Ancillary Act so as to refer to the ASC Act as it was in force immediately before its repeal by the 2001 Act.

30 (2000) 77 SASR 490 at 507.

31 (1984) 155 CLR 21 at 52.

40 It thus becomes necessary to determine what was decided in *Davern v Messel*. In *Byrnes*[32], that decision was referred to as indicating that in certain matters an appeal by the Crown may be taken to the Full Court of the Federal Court. This Court in *Davern v Messel* was considering not a statutory provision conferring authority upon a prosecutor but a provision conferring jurisdiction on a federal court pursuant to s 77(i) of the Constitution. Section 24(1) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") conferred jurisdiction upon that Court to hear and determine "appeals" from "judgments" of certain courts including, as the section then stood, the Supreme Court of the Northern Territory[33]. The Court (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ; Murphy and Deane JJ dissenting) held that s 24(1) conferred upon the Federal Court power to hear and determine an appeal by the Crown from a judgment of the Supreme Court, quashing a conviction by a magistrate, on an appeal to the Supreme Court by the accused.

41 The decision in *Davern v Messel* thus turned upon the meaning to be given not to any expression resembling those at issue in *Byrnes*, *Bond* or this appeal, but to the words "appeals" from "judgments" in s 24(1) of the Federal Court Act. As Mason and Brennan JJ pointed out in *Davern v Messel*[34], appeals from a decision of a court are entirely creatures of statute (or, in this country, s 73 of the Constitution).

Double jeopardy

42 The ASC sought to bolster its arguments by the consideration that a successful appeal to the Full Court, by restoring the conviction of Mr Macleod upon the second count, would not expose him to "double jeopardy". The term "double jeopardy" is of notoriously imprecise meaning and application. It imparts a value which finds specific expression in various particular respects in the legal system. The varied usages of the term recently were considered in the

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32 (1999) 199 CLR 1 at 31 [67].

33 Jurisdiction with respect to Northern Territory appeals was removed by Sched 1 to the *Statute Law (Miscellaneous Provisions) Act (No 1)* 1985 (Cth).

34 (1984) 155 CLR 21 at 47.

judgments in *Pearce v The Queen*[35]. With respect to the present case, it may be true to say, as the ASC submits, that the consequence of its success in the Full Court was to reinstate the initial punishment rather than to duplicate it. Nevertheless, as Deane J pointed out in *Davern v Messel*[36], consideration may also be given to the renewed jeopardy to punishment in respect of the same charge upon a successful second appeal by the state against the initial successful appeal by the individual concerned.

Conclusion

43 However, whatever view one takes of the application of notions of "double jeopardy" to a person in the position of Mr Macleod, that cannot direct the meaning of s 49(2) of the ASC Act if it otherwise be clear upon its face. For the ASC to institute the appeal to the Full Court against the decision of the Commission setting aside Mr Macleod's conviction on count 2 was not to begin or carry on the prosecution. No doubt the power to conduct those activities included authority to take steps incidental and necessary to the exercise of the power[37]. However, the prosecution concluded with the making of the orders by the magistrate. The subsequent institution and conduct by the ASC of the Full Court appeal was within the terms of s 206A(2) of the Justices Act. The ASC had been a party to the appeal by Mr Macleod to the Commissioner. However, the appeal by the ASC was not a further step in the conduct of the prosecution; that had culminated in the conviction on the second count and the finding of not guilty in respect of the first count.

44 A law of the Commonwealth, such as s 49(2) of the ASC Act, is to be construed as requiring the officers or body in question to have and to exercise only such powers as the Parliament of the Commonwealth thereby has chosen to vest in them[38]. Where the law of a State purports to grant some wider power or authority to such an officer or body, then the law of the Commonwealth will be

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35 (1998) 194 CLR 610 at 621-623 [34]-[40], 625-629 [52]-[68], 630-632 [73]-[76], 636-638 [89]-[93].

36 (1984) 155 CLR 21 at 65-68. See also *Pearce v The Queen* (1998) 194 CLR 610 at 636-637 [89]-[91].

37 cf *DJL v Central Authority* (2000) 201 CLR 226 at 240-241 [25]-[26].

38 *Bond v The Queen* (2000) 201 CLR 213 at 219-220 [15].

one by which it is "otherwise provided" for the purposes of s 79 of the Judiciary Act. The result is that federal law did not empower the ASC to institute and conduct the appeal to the Full Court, nor did s 79 "pick up" any provision of State law otherwise expressed in terms sufficiently broad to endow the ASC with the capacity to take those steps.

45 It is unnecessary to determine whether the provisions of the Justices Act which had the consequence of bringing the ASC before the Commissioner to oppose Mr Macleod's appeal against his conviction were not "picked up" by s 79 of the Judiciary Act. Nor is it necessary to consider other submissions by the intervening Attorneys-General respecting the legislative power of the Commonwealth under pars (i), (xx) and (xxxix) of s 51 of the Constitution and other questions, to which some reference was made in *R v Hughes*[39].

46 The title of the respondent to the appeal in this Court should be amended to read "Australian Securities and Investments Commission". The appeal should be allowed with costs. Orders 1 to 6 of the orders made by the Full Court should be set aside. In place thereof it should be ordered that the appeal to that Court be dismissed with costs.

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39 (2000) 202 CLR 535 at 554-558 [37]-[46], 580-584 [110]-[122].

47 KIRBY J. This appeal is the latest chapter in a series of cases[40] that have concerned the power of federal authorities to appeal in matters involving challenges to a conviction for offences against the Corporations Law[41].

The course of the proceedings and issues

48 *The proceedings*: There is no doubt that the Australian Securities and Investments Commission (formerly the Australian Securities Commission)[42], the respondent to this appeal, thought that it had the power to bring the appeal in question. The appellant (Mr Malcolm Macleod) originally accepted that assumption. He raised no objection to the respondent's right to do so when the respondent sought leave to appeal to the Full Court of the Supreme Court of Western Australia ("the Full Court")[43]. Nor did he challenge the competency of the appeal during argument when the appeal was first heard by the Full Court[44].

49 However, after the Full Court had reserved its decision, this Court decided *Bond*[45]. On its own initiative, the Full Court, noting that decision, invited submissions about the competency of the respondent's appeal. It was only at that stage that the appellant advanced a submission that the appeal was incompetent[46].

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40 The earlier cases were *Byrnes v The Queen* (1999) 199 CLR 1 ("*Byrnes*"); *Bond v The Queen* (2000) 201 CLR 213 ("*Bond*") and *R v Hughes* (2000) 202 CLR 535 ("*Hughes*"). Another relevant appeal is *Gee v The Queen*, which was heard by the Court and judgment reserved on 14 August 2002.

41 The Corporations Law relevant to this appeal is the *Corporations Act* 1989 (Cth), s 82 as applied as a law of the State of Western Australia, by the *Corporations (Western Australia) Act* 1990 (WA), s 7. See *Macleod v ASC* (1999) 32 ACSR 172 at 173 [1].

42 By s 7(2) of the *Australian Securities and Investments Commission Act* 1989 (Cth), formerly the *Australian Securities Commission Act* 1989 (Cth) ("the ASC Act"), with effect from 1 July 1998, the Australian Securities Commission became the Australian Securities and Investments Commission. See reasons of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ ("the joint reasons") at [3].

43 *ASC v McLeod* [sic] (2000) 22 WAR 255 at 272 [79].

44 *ASC v McLeod* (2000) 22 WAR 255 at 272 [79].

45 (2000) 201 CLR 213.

46 *ASC v McLeod* (2000) 22 WAR 255 at 272 [80].

50 The Full Court rejected that submission. It concluded that *Bond*, and the earlier decision in *Byrnes*[47], were distinguishable. Having upheld the competency of the process that invoked its jurisdiction and powers, the Full Court proceeded to uphold the appeal. It set aside the orders made by Commissioner Martin QC, sitting as a single judge of the Supreme Court of Western Australia[48]. His orders had allowed the appellant's appeal to the Supreme Court, set aside the original judgment of the Court of Petty Sessions and, in its place, ordered that the two counts of the original complaint against the appellant be dismissed. The appellant was also awarded the costs of the initial proceedings and of the appeal to the Supreme Court.

51 In consequence of the Full Court's order, the order of the Commissioner was, in its turn, set aside. The conviction of the appellant on the second count was "restored"[49]. The costs order of the magistrate was reinstated. The appellant was ordered to pay the respondent's costs of both appeals to the Supreme Court.

52 By special leave, the appellant now challenges the judgment of the Full Court. The only ground of appeal relates to the competency of the respondent's purported appeal to the Full Court giving rise to that judgment. The appellant seeks the "reinstatement" of the "judgment of Commissioner Martin".

53 *Two issues*: The appellant's arguments about the competency of the respondent's appeal to the Full Court are framed in the alternative:

54 First, the appellant submits that the respondent had no authority or power under federal statute law to bring its purported appeal to the Full Court. In so far as it was suggested that State statute law conferred any such authority or power on the respondent (a federal agency), as with the aid of the *Judiciary Act* 1903 (Cth) (the "Judiciary Act"), such attempt was ineffective because the powers of the respondent to proceed against the appellant were conferred comprehensively and exclusively, by its own (federal) statute[50]. Secondly, the appellant submitted that, if it were held that the propounded federal law on its true construction purported to confer on the respondent, or authorise, a power derived ultimately from State law to initiate the appeal to the Full Court, any such authority was invalid as going beyond the legislative powers of the Federal Parliament.

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47 (1999) 199 CLR 1.

48 *Macleod v ASC* (1999) 32 ACSR 172.

49 This was the only count on which the respondent had been convicted in the Court of Petty Sessions.

50 ASC Act, Pt 3, Div 5.

55 The second issue was not initially raised in the appellant's submissions. The respondent, however, for precaution, because of what had been said on the special leave application, gave notice of the second issue pursuant to the Judiciary Act, s 78B. That notice attracted the intervention of the Attorney-General of the Commonwealth. He relied on several sources of constitutional power to sustain the propounded legislation and also on the *Corporations (Administrative Actions) Act* 2001 (WA). A number of State Attorneys-General intervened to advance different submissions on the constitutional issue. However, that issue is not reached if, as a matter of construction, the respondent lacked authority to bring its appeal to the Full Court. Conforming to the practice of this Court in such matters, it is appropriate first to address the arguments concerning the applicable legislation and its meaning[51].

The Commission lacked authority to appeal

56 The appeal involves a simple and narrow question. That question ought not to be expanded to raise unnecessary issues[52].

57 The respondent is a statutory authority created by the Federal Parliament. Ordinarily, its functions and powers must therefore be found in valid federal legislation, whether the Act of the Parliament creating it or other federal legislation that refers to it explicitly, or by necessary implication. The respondent is not a federal court. It is not therefore affected by the implied limitation that this Court has found upon the powers of State Parliaments to confer authority and functions on federal courts[53]. It is possible for a State law to provide certain functions and powers which, by force of the provisions of federal law (usually the Judiciary Act) are applied to a federal executive authority, such as the respondent. However, such derivative State functions and powers could not be inconsistent with functions and powers conferred on the respondent by federal law[54]. In other words, a grant of functions and powers derived from State law must be compatible with the respondent's grant of functions and powers by

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51 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *Hughes* (2000) 202 CLR 535 at 565 [66].

52 cf *Hughes* (2000) 202 CLR 535 at 582 [115].

53 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ("*Re Wakim*"); *Hughes* (2000) 202 CLR 535 at 570-571 [78]-[81]; Saunders, "In the Shadow of *Re Wakim*", (1999) 17 *Company and Securities Law Journal* 507 at 516.

54 cf Hetherington, "Resolving the Company Law Crisis after the High Court's Decision in The Queen v Hughes", (2000) 28 *Australian Business Law Review* 364 at 370; Riley, "Re Wakim; Ex Parte McNally: Towards an Integrated and Efficient Judicial System", (2000) 18 *Company and Securities Law Journal* 455 at 470.

federal law[55]. Otherwise, the explicit provisions of the federal law will exclude the possibility that the powers provided by State law are "picked up" and made "surrogate" federal law. The federal law would then be held to have "otherwise provided"[56] or, for like reasons, not to be engaged[57].

58 When a question arises as to whether a function or power originating in a State law has been conferred on a body such as the respondent, compatibly with federal law, and where such function or power would, if exercised, have the consequence of affecting adversely the rights and liberties of individuals, the empowering provisions of such laws must be clear. This is so because of the interpretive principle of long standing that courts will not impute to parliaments, federal or State, a diminution or restriction of the rights and liberties of the individual, unless that purpose is made clear by the terms of the legislation in question[58].

59 These principles are elementary. They explain the decisions of this Court in the earlier cases in this series. They must be applied by this Court to the present appeal.

60 The scheme of the interlocking federal and State legislation upon which the respondent relied to sustain its power to appeal to the Full Court is explained in the joint reasons[59]. I will not repeat the applicable provisions. I am prepared to accept that the State legislation, to which the respondent referred as the initial source of its power to appeal to the Full Court, or to apply for leave to appeal to the Full Court as a "party" to the earlier "appeal" heard by Commissioner Martin[60] was expressed in general terms. They were terms otherwise susceptible to being "picked up" and applied on the initiative of the respondent. However,

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55 *Hughes* (2000) 202 CLR 535 at 569-570 [77]; cf Rose, "The Hughes Case: The Reasoning, Uncertainties and Solutions", (2000) 29 *Western Australian Law Review* 180 at 184.

56 Judiciary Act, s 79.

57 Judiciary Act, ss 79 and 80 as not "applicable" or s 80 "inconsistent with … the laws of the Commonwealth": cf *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 591 [68], 609 [129], 630-632 [194]-[199].

58 *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396; *Malvaso v The Queen* (1989) 168 CLR 227 at 232-233; cf *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 at 246; *Booker v SRA of NSW [No 2]* (1993) 31 NSWLR 402 at 410.

59 The joint reasons at [1]-[3], [12]-[18].

60 *Justices Act* 1902 (WA), s 206A. See the joint reasons at [18].

any such authority under State law had to be complemented by a provision under federal law that was compatible with the respondent's proceeding to exercise such State-derived authority. In other words, the State Parliament could not confer on the respondent authority that went beyond, or was incompatible with, the functions and powers conferred on the respondent by federal law. If it did so, there would be no lawful basis in the respondent's own charter permitting it to appeal or seek leave to appeal. The mere fact that it was permitted to do so under a State law that it invoked and asked to be "picked up" would not alone confer that essential ingredient. The State attempt, alone, would be futile.

61 The foregoing propositions follow from the simple constitutional requirement that a creation of federal legislation cannot act in ways unauthorised by, or inconsistent with, any explicit federal law governing its own functions and powers. No general provisions, such as those in the Judiciary Act could repair such a deficiency of power.

62 The decisions of this Court in *Byrnes* and *Bond* were concerned with the power of the Commonwealth Director of Public Prosecutions ("the DPP"), under a federal Act creating his office and defining his functions and powers, to institute and carry on an appeal in respect of a prosecution which the DPP had earlier initiated. The legislative defect identified in those decisions was eventually repaired. The Federal Parliament enacted the *Jurisdiction of Courts Legislation Amendment Act* 2000 (Cth)[61]. That Act inserted among the statutory powers of the DPP an express power, where "authorised by or under a law of a State", to "institute and carry on appeals arising out of prosecutions of offences against the laws of the State"[62]. At the same time the general powers of the DPP were enlarged to include the institution, and carrying on, of appeals arising out of prosecutions for offences against the laws of a State[63].

63 Those amendments have no application to the present proceedings. They did not come into effect until after the respondent's appeal to the Full Court was decided[64]. More fundamentally, the enhancement of the DPP's powers does not enlarge the powers of the respondent. In this case, it was the respondent Commission, and not the DPP in the name of the Crown, that brought the prosecution against the appellant. The respondent purportedly did so pursuant to

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61 In particular Sch 5. See the joint reasons at [28]-[30].

62 *Director of Public Prosecutions Act* 1983 (Cth), s 17(2).

63 *Director of Public Prosecutions Act* 1983 (Cth), s 6(1)(ma).

64 The amendments came into force on 30 May 2000. The Full Court delivered its decision and pronounced its orders in the subject appeal on 13 April 2000.

its own powers, conferred upon it under the legislation that created it[65]. Relevantly, that legislation empowered the respondent, if it appeared to it that a person "may have committed an offence against a national scheme law" who "ought to be prosecuted for the offence"[66], to "cause a prosecution of the person for the offence to be begun and carried on"[67]. There is no reference in the respondent's enabling legislation to instituting and carrying on an appeal. Like the legislation relating to the DPP that was considered in *Byrnes* and *Bond*, the enabling federal law is silent on the power and authority of the federal instrumentality concerned to institute and conduct an appeal.

64 The documentation filed in the Full Court, both in the application for leave and subsequently in the respondent's purported appeal, make it plain that the party seeking to invoke the appellate jurisdiction of the Full Court was the respondent itself, not the DPP. True, the DPP signed each process, by one of his officers, as "solicitor for the appellant". But the DPP did not purport to take over the role of a party. In any case, at the relevant time the DPP, like the respondent, also had no express power or authority to appeal in such a case[68].

The suggested differences from *Byrnes* and *Bond*

65 It follows that consistency with the decisions in *Byrnes* and *Bond* appears to require a similar conclusion in these proceedings, namely that the federal legislative authority to cause a prosecution to be begun and carried on, does not extend to clothe the respondent with the power to institute its appeal to the Full Court. However, at different stages three arguments have been propounded to sustain the respondent's power to appeal in this case:

1. That it was authorised by a particular provision of the respondent's constituting statute empowering it to do whatever was "necessary for or in connection with, or reasonably incidental to, the performance of its functions"[69];

2. That the principle of strict construction which had produced the outcome in *Byrnes* and *Bond* had no application in the circumstances of the respondent's appeal; and

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65 ASC Act, s 49. See the joint reasons at [32].

66 ASC Act, s 49(1).

67 ASC Act, s 49(2).

68 See *Bond* (2000) 201 CLR 213.

69 ASC Act, s 11(4).

3. That the principle of strict construction was inappropriate to the elucidation of the meaning of interlocking federal and State legislation designed to give effect to a national scheme ("template"[70]) law and that, when this consideration was given due weight, it cured the deficiency in favour of the respondent's construction.

The incidental functions provision did not apply

66 As is explained elsewhere[71], argument (1), although successfully relied upon in somewhat analogous proceedings in State courts[72], was based on a mistake or oversight, easy enough to happen in legislation of this complexity. It was accepted by the respondent in this Court that the provision in question had no application to elaborate the performance of its functions[73]. Accordingly, the question whether the provision would have been of any utility to expand the authority and applicable power of the respondent to "cause a prosecution … to be begun and carried on"[74] into one to institute and carry on appeals, can be put to one side. The suggested legislative elaboration is unavailable. The respondent is therefore forced back to the authority and power conferred on it by the relevant federal law, expressed in terms of carrying on a "prosecution".

The distinction of appeals to restore convictions is unavailing

67 Argument (2) cannot be dismissed so easily. Two Australian appellate courts have upheld the authority of the respondent, in circumstances akin to the present case, to institute an appeal under its general powers of carrying on a prosecution where the appeal in question was not the exceptional act of a public authority endeavouring to overcome an acquittal but instead (as here) simply an attempt to restore a conviction which the respondent asserts has been correctly

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70 Saunders, "Administrative Law and Relations Between Governments: Australia and Europe Compared", (2000) 28 *Federal Law Review* 263 at 273.

71 See the joint reasons at [37].

72 *Australian Securities and Investment Commission v Hosken* (1999) 9 Tas R 25 ("*Hosken*") at 27 [3], 31 [12], 39-40 [29]; *Australian Securities and Investments Commission v Vis* (2000) 77 SASR 490 ("*Vis*") at 507 [75]; cf Taylor, "From *Wakim* to *Hughes*: The current status of corporations and securities regulation and enforcement", (2000) 38 (9) *Law Society Journal* 50 at 53.

73 See the joint reasons at [37]-[38].

74 ASC Act, s 49(2).

entered at trial but incorrectly set aside in a first level appeal brought by the convicted person[75].

68 In such a case, the respondent argued, the strong presumption that dictated a narrow reading of the legislation, so as to require express authority for a prosecutor's own appeal, was inapplicable. The legislation could therefore be read according to its ordinary meaning. So read, it would sustain, as within the federal law empowering the "carrying on" of the prosecution, an attempt by the respondent (through a process of appeal) to do no more than restore the conviction secured at first instance in the "prosecution", where that conviction had been erroneously disturbed. The respondent submitted that, in such a case, considerations of "double jeopardy" that lay behind the strict construction principle, had no application. There was no need therefore to insist that the power to appeal (and to seek leave to appeal) must be expressly stated[76]. It could be derived from a reading of the federal law so as to achieve its purpose of empowering the respondent to "carry on" a prosecution.

69 With respect, as a matter of statutory construction, this suggested distinction cannot be sustained. First, it is not supported by an analysis of what this Court held in *Davern v Messel*[77], as appears to have been the view of the courts below. That decision was concerned with the jurisdiction and power of the Federal Court of Australia to hear and determine "appeals" under its constituting Act[78]. It was not concerned with the authority and power of a federal statutory agency to prosecute an appeal. The latter must be found in valid and applicable federal legislation. Where it may impinge adversely on the rights of individuals, the power must be clearly granted. The point that distinguishes *Davern* from the present case was urged in the courts that considered this point[79]. Incorrectly, the distinction was rejected. The issue presented for decision in *Davern* was therefore different from that addressed to the Court in this appeal.

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75 *Hosken* (1999) 9 Tas R 25; *Vis* (2000) 77 SASR 490.

76 *Hosken* (1999) 9 Tas R 25 at 28 [5], 33 [17], 39-40 [29]; *Vis* (2000) 77 SASR 490 at 508 [79].

77 (1984) 155 CLR 21 ("*Davern*").

78 *Federal Court of Australia Act* 1976 (Cth), s 24. See *Hosken* (1999) 9 Tas R 25 at 38 [26].

79 *Hosken* (1999) 9 Tas R 25 at 31 [11], describing the submission of counsel for the unsuccessful respondent (accused). See also *ASC v McLeod* (2000) 22 WAR 255 at 274-275 [89]-[93]; *Vis* (2000) 77 SASR 490 at 507-508 [75]-[77].

The applicable authority in this case was to be found in *Byrnes*[80] and *Bond*[81], not *Davern*[82].

70 The respondent then latched onto what it said was the essential difference between the power to bring the appeal in the present case and that propounded in *Byrnes* and *Bond*. Most especially, it submitted that what was involved in this case was not a species of "double jeopardy". Properly analysed, the case was one of single jeopardy which had erroneously miscarried and should now be corrected within the general power of the respondent to conduct and "carry on" its "prosecution" to its lawful conclusion.

71 It is true that the present is not a case of "double jeopardy", strictly so called. By its appeal to the Full Court the respondent was not subjecting the appellant to repeated prosecutions to convict him for an offence where earlier attempts had failed. It was endeavouring, by the use of the procedure of appeal, to ensure that its single prosecution was brought to a successful conclusion. The same can be said of prosecution appeals against acquittal (where this is available) and against sentence. That is why use of the description "double jeopardy" in such cases is somewhat loose and metaphorical.

72 Nevertheless, from the point of view of the individual who has been relieved of a criminal conviction and punishment by a decision of a court, the further prosecution of court proceedings clearly represents a species of double jeopardy. In such a case, the individual is once again subjected[83]:

> "… to embarrassment, expense and ordeal and [compelled] to live in a continuing state of anxiety and insecurity, as well as [subjected to] the possibility that even though innocent he may be found guilty".

73 It is in this broader sense that the phrase "double jeopardy" has commonly been used by courts in Australia[84] and overseas[85]. The expression has not been

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80 (1999) 199 CLR 1.

81 (2000) 201 CLR 213.

82 (1984) 155 CLR 21.

83 *Green v United States* 355 US 184 at 187-188 (1957); *Pearce v The Queen* (1998) 194 CLR 610 at 636 [90].

84 *Pearce v The Queen* (1998) 194 CLR 610 at 636 [90]; *Cooke v Purcell* (1988) 14 NSWLR 51 at 56-57; *R v Tait* (1979) 24 ALR 473 at 476-477; 46 FLR 386 at 388-389 per Brennan, Deane and Gallop JJ.

85 *Cullen v The King* [1949] SCR 658 at 668.

confined to protection of the individual from the risk of double punishment for the one offence. It also extends to vexation by public authorities using the powers of the state in ways that may adversely affect the rights of the individual[86].

74 Following the decision of Commissioner Martin, the appellant walked from the Supreme Court freed from the conviction[87] and relieved of punishment[88] for the offences for which the respondent had prosecuted him[89]. Moreover, he had secured orders in his favour obliging the respondent to pay his costs. To suggest, in such circumstances, that he was not subjected to a species of "double jeopardy" by the further appeal to the Full Court brought by the respondent, although it put him once more in peril, requires a somewhat ethereal view of what "jeopardy" means in this context. Certainly, the appellant would have been entitled to consider himself as subjected to a repeated attempt by a public authority to secure his conviction of a criminal offence. The suggested point of distinction between obtaining that conviction again and merely restoring a conviction that had been set aside would probably have struck the appellant as precious and somewhat scholastic.

75 But is the distinction legally correct and compatible with the reasoning in *Byrnes* and *Bond*? I think not. In *Byrnes*, I suggested that the requirement of clear legislative authority to appeal was derived in that case, in part, from the character of appeal, as a legal process – one invariably created by statute[90]. I further suggested that the law's insistence on clear authority to bring a prosecution appeal in a criminal case "can be traced to the bias of our law in

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86 *R v Hughes* (2000) 202 CLR 535 at 557-558 [46]; see also Hetherington, "Resolving the Company Law Crisis after the High Court's Decision in The Queen v Hughes", (2000) 28 *Australian Business Law Review* 364 at 370.

87 The magistrate had convicted the appellant on the second count of the complaint but dismissed the first count. See *Macleod v ASC* (1999) 32 ACSR 172 at 174 [4].

88 The magistrate, after convicting the appellant on the second count, imposed a fine of $2,500 in relation to that offence. In respect of the dismissed count one, he awarded the appellant costs fixed in the sum of $5,000. In respect of count two, he ordered costs of $5,000 to be payable to the respondent. See *Macleod v ASC* (1999) 32 ACSR 172 at 177 [21].

89 Under s 999 of the Corporations Law read with s 1311(1)(a) of the Corporations Law.

90 *Byrnes* (1999) 199 CLR 1 at 35 [84]. As it is pointed out in the joint reasons, in Australia appeal is provided by the Constitution which is also a statute, although of a particular kind. See the joint reasons at [41].

favour of the liberty of the individual and against exposure of the individual to repeated jeopardy in criminal proceedings"[91]. I might have added that, in any case, there were obvious difficulties, as a matter of language, in stretching a statutory authority to perform enforcement powers, including "prosecution" of offences, into an "appeal" as in some way amounting to the carrying on of such "prosecution"[92]. Because of the history of appeals, particularly in respect of criminal proceedings, the word "prosecution" used in a legal sense, would not normally extend to include the bringing of an appeal. "Prosecution" is typically no more than a proceeding in a criminal court brought by a formal process (indictment, presentment, complaint or information) for the purpose of putting an alleged offender on trial for an offence.

76 It follows that considerations of legal history, presumptions defensive of individual rights and the construction of the statutory language according to its ordinary meaning combine to sustain the decisions in *Byrnes* and *Bond*. Those decisions did not depend upon a consideration so narrow as the course of proceedings that led to the appeal in question. Nor did they contemplate a differential construction of identical statutory language depending on who brought the appeal. They rested on broader considerations of legal principle.

77 The foregoing considerations are applicable to the present case. Indeed, since the earlier decisions, the principle which they upheld has been reflected in legislation enacted by the Federal Parliament. An express power to appeal has now been provided to the DPP[93]. But the respondent did not enjoy similar authority and powers under its Act when it purported to appeal to the Full Court in the appellant's case. The reliance on the general language of the respondent's enabling statute is therefore to no avail. Seeking to appeal from the orders of Commissioner Martin was not the carrying on of "a prosecution"[94]. The attempt to propound the contrary runs into the principle that appeals in criminal matters, like prosecutions, although they are within the jurisdiction of a superior court when lawfully brought, must be clearly authorised by law. Because there was no

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91 *Byrnes* (1999) 199 CLR 1 at 35 [85].

92 See the legislation set out in *Byrnes* (1999) 199 CLR 1 at 16-17 [20]-[22].

93 *Director of Public Prosecutions Act* 1983 (Cth), s 17(2). See above, these reasons at [62]. The *Director of Public Prosecutions Act* 1991 (WA) at the relevant time also drew a clear distinction in ss 11 and 12 on the one hand and s 13 on the other, between the functions of the State Director "to bring and conduct prosecutions …" (s 12(a)) and "to bring and conduct, or to conduct as respondent, any appeal or further appeal relating to a prosecution" (s 13(a)).

94 Within s 49(2) of the ASC Act.

clear authority for the respondent to appeal to the Full Court, its appeal was incompetent. The Full Court erred in failing to so hold.

The construction of cooperative national legislation

78 What I have said is sufficient to dispose of the appeal to this Court. However, there remains a third argument. It can be dealt with briefly for it arises from published criticisms of the decision in *Bond* rather than any suggestion of the parties that this Court should reconsider that decision. For their part, the parties were content for this Court to apply *Byrnes* and *Bond* to the different factual circumstance of the appellant's case.

79 In a commentary[95], it has been stated that the reasoning in the joint reasons in *Bond* (in which I participated) was incompatible with my earlier affirmation of the implication, inherent in the federal character of the Constitution, that the component parts of the Australian federation are ordinarily to be taken to operate with a high measure of cooperation, as implied by the "federal idea"[96]. It was suggested that this Court's reasoning in *Bond* had failed to carry forward this constitutional notion of cooperative sharing in the context of inter-governmental cooperation and coordinated national laws[97]. It was argued that I must have overlooked my earlier commitment to "uphold and facilitate such cooperation as one of the objectives for which the Constitution was made"[98] as well as my statement that such cooperation was one of the "purposes of good government which the Constitution was designed to promote and secure"[99]. The approach of the Court in *Bond* (and by inference *Byrnes*) was said to be incompatible with the proper construction of cooperative federal-State legislation endorsed in the

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95 McConvill and Smith, "Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective", (2001) 29 *Federal Law Review* 75. See also De Costa, "The Corporations Law and Cooperative Federalism after *The Queen v Hughes*", (2000) 22 *Sydney Law Review* 451 at 452.

96 *Gould v Brown* (1998) 193 CLR 346 at 477 [276.2]; cf *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 580.

97 *Re Wakim* (1999) 198 CLR 511 at 604 [198].

98 McConvill and Smith, "Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective", (2001) 29 *Federal Law Review* 75 at 88 (fn 59) citing *Gould v Brown* (1998) 193 CLR 346 at 478 [276.2].

99 McConvill and Smith, "Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective", (2001) 29 *Federal Law Review* 75 at 90 citing Kirby, "Constitutional Interpretation and Original Intent – A Form of Ancestor Worship", (2000) 24 *Melbourne University Law Review* 1 at 14.

foregoing observations and indeed in the approach of the Court as a whole to statutory interpretation more generally, as evidenced in recent decisions, such as *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[100].

80 These observations do not cause me to doubt the correctness of *Byrnes* or *Bond* or their application to the interlocking federal and State laws in this case.

81 The principle of legal cooperation within a federation such as Australia may be accepted as an ordinary presupposition of the Constitution[101]. It may sometimes afford a useful tool of statutory construction to help the resolution of constitutional or statutory ambiguities[102]. The word "federal" itself comes from the Latin *foedus* meaning treaty or agreement[103]. Further, the concept of federalism is constantly evolving and changing[104]. I remain of the opinions expressed in the cited passages.

82 However, those opinions represent only one constitutional premise in the syllogism presented by any task of construing particular legislation in Australia. A court may be inclined, as I am, towards upholding as valid and effective the cooperative legislative enactments of all constituent parts of the federation. Ultimately, however, the court will reach a boundary fixed either by the limits of the propounded constitutional power or by the terms in which the applicable legislation has been expressed. In the trilogy of cases which preceded this one, and in this appeal, this Court has not been dealing, as such, with a socio-political issue of cooperative federalism. It is deciding an appeal, as provided by the Constitution, involving a challenge by a person subject to criminal punishment, to the lawfulness of the conduct of a federal statutory authority in endeavouring

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100 (2000) 200 CLR 591 at 603 [20], 612-613 [50], 629 [100], 653-654 [163]-[164], 670 [214]. See McConvill and Smith, "Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective", (2001) 29 *Federal Law Review* 75 at 80.

101 cf *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 613 [140]-[141].

102 cf Kirk, "Constitutional Interpretation and a Theory of Evolutionary Originalism", (1999) 27 *Federal Law Review* 323 at 360.

103 Claus, "Federalism and the Judges: How the Americans made us what we are", (2000) 74 *Australian Law Journal* 107 cited in McConvill and Smith, "Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective", (2001) 29 *Federal Law Review* 75 at 87-88.

104 Longo, "Co-operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal", (1997) 25 *Federal Law Review* 127 at 163-165.

to secure the restoration of that punishment. In such a case, the observations of McHugh J in *Krakouer v The Queen*[105] come to mind:

> "A court should not disregard clear words and interpret a legislative provision so as to extend the scope of criminal liability even if it thinks that, by inadvertence, the legislature has failed to deal with a matter."

83 Similarly, this Court may not fill legislative omissions because it regards the omission to provide an essential authority for a prosecutor to appeal as an unintended gap in complex legislation[106]. Or because it considers the point on which the appellant succeeds to be devoid of substantive merit[107].

84 In the competition between the principle of interpretation that approaches constructively the derivation of the meaning of interlocking legislation which constitutes a cooperative national legislative scheme and the principle of construction that protects individual liberties and rights, especially in penal laws, the outcome will in each case depend on an analysis of the legislation in question. The starting point for the task of construction is always the statutory language itself. In the present case, as in *Bond*, in the absence of an explicit power in the respondent to appeal, that involves eliciting the meaning of "carrying on" a prosecution in the context. No general provision of the Judiciary Act can fill this clear gap in the respondent's authority or power to appeal.

85 One can have as much inclination towards upholding cooperative legislation and national scheme laws as one likes but, in the end, it is impossible to transmute the power and authority to prosecute or to "carry on" a prosecution into a power and authority to appeal against an order that has relieved an accused of the burden of conviction, punishment and costs. To do so is to defy the nature of "appeal" in our law, the particular history of appeals in criminal cases[108], the settled character of a "prosecution" as a legal idea[109], the rule of statutory construction defensive of individual liberties and rights and the language and structure of the law in question conferring authority and powers on the respondent.

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105 (1998) 194 CLR 202 at 223 [62].

106 *Byrnes* (1999) 199 CLR 1 at 33 [78].

107 *Byrnes* (1999) 199 CLR 1 at 33-34 [78].

108 cf *Seaegg v The King* (1932) 48 CLR 251 at 257 and *Williams v The King [No 2]* (1934) 50 CLR 551 at 566-567.

109 *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 128-129; *Byrnes* (1999) 199 CLR 1 at 26 [50].

86 The decisions in *Byrnes* and *Bond* disclosed, it is true, an unintended failure of the interlocking legislation enacted to implement a cooperative national law of much importance. So probably does this decision. But in concluding as it did in *Byrnes* and *Bond*, and in applying the same principle to the present case, this Court is not needlessly frustrating cooperation within the federation. It is simply giving effect, as its constitutional duty requires, to the extent of the cooperation that is lawfully enacted by the component parts of the federation[110]. The notion that any deficit or flaw of a national law can be ignored or papered over in the name of federal cooperation is one that I would reject. Inter-governmental cooperation does not overcome a demonstrated defect in constitutional or legislative power[111].

Orders

87 The appellant therefore succeeds on his argument on the first issue. Accordingly, it is unnecessary to consider the submissions received on the second issue[112]. The respondent's purported appeal to the Full Court was incompetent. I agree in the orders proposed by the other members of this Court.

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110 *Re Wakim* (1999) 198 CLR 511 at 576-577 [113]; cf at 545 [22]; *Hughes* (2000) 202 CLR 535 at 557-558 [45]-[46], 565-570 [65]-[80].

111 Saunders, "In the Shadow of *Re Wakim*", (1999) 17 *Company and Securities Law Journal* 507 at 514; Lyon, "*R v Hughes*: Shuffling the Deck Chairs on the Titanic?", (2001) 6 *Deakin Law Review* 184 at 196.

112 See above, these reasons at [55].