HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

THE QUEEN APPELLANT

AND

ROBERT GORDON POLLYBANK GEE RESPONDENTS
AND ANOR

The Queen v Gee
[2003] HCA 12
13 March 2003
A61/2002

ORDER

1. *Appeal allowed.*

2. *Set aside order of the Full Court of the Supreme Court of South Australia made on 14 March 2001.*

3. *Remit proceeding to the Full Court of the Supreme Court of South Australia for further hearing and determination in accordance with the decision of this Court.*

On appeal from the Supreme Court of South Australia

Representation:

C J Kourakis QC with D Petraccaro for the appellant (instructed by Director of Public Prosecutions (Commonwealth))

B W Walker SC with A L Tokley and S D Ower for the first respondent (instructed by Jon Lister)

S W Tilmouth QC with N M Hurley for the second respondent (instructed by Noelle Hurley)

Intervener:

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 the Crown Solicitor for the State of South Australia)

CATCHWORDS

The Queen v Gee

Criminal Law – Jurisdiction – Exercise of federal jurisdiction by state Supreme Courts – Offences against laws of the Commonwealth – Where s 350 of the *Criminal Law Consolidation Act* 1935 (SA) provides for the Full Court of the Supreme Court of South Australia to hear and determine questions of law reserved by the District Court – Whether s 68(2) of *Judiciary Act* 1903 (Cth) confers jurisdiction on the Full Court of the Supreme Court to hear and determine a question of law reserved by the District Court under State law during a trial of persons charged with offences against the laws of the Commonwealth.

Criminal Law – Prosecution – Commonwealth Director of Public Prosecutions – Powers of – Whether questions of law reserved to the Full Court constituted an appeal for the purposes of s 9(7) of the *Director of Public Prosecutions Act* 1983 (Cth).

Appeal – Whether case stated procedure provided for by s 350 of the *Criminal Law Consolidation Act* 1935 (SA) constitutes an appeal for the purposes of s 68(2) of the *Judiciary Act*.

Words and phrases: "appeal".

Crimes Act 1914 (Cth), ss 5, 29D.
Criminal Law Consolidation Act 1935 (SA), s 350.
Criminal Law Consolidation (Appeals) Amendment Act 1995 (SA), s 4.
Director of Public Prosecutions Act 1983 (Cth), s 9(7).
Judiciary Act 1903 (Cth), ss 2, 39(2), 68(2), 69(1), (2), (2A), 72, 73, 74, 75, 76, 77.
Judiciary Act 1932 (Cth)
Statutes Amendment (Attorney-General's Portfolio) Act 1996 (SA), s 9.

1 GLEESON CJ. The central issue in this appeal concerns the relationship between s 350 of the *Criminal Law Consolidation Act* 1935 (SA) ("the Criminal Law Consolidation Act") and s 68(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). The question is whether s 68(2) of the Judiciary Act confers jurisdiction on the Full Court of the Supreme Court of South Australia to hear and determine a question of law reserved by the District Court, on an application made under s 350 of the Criminal Law Consolidation Act, where the District Court is dealing with the trial of persons charged with offences against the laws of the Commonwealth. That question was answered in the negative by a majority of a specially constituted Full Court of the Supreme Court of South Australia[1]. That Court declined to follow an earlier decision of its own[2], and a decision of the Court of Appeal of Queensland on a similar point[3].

2 The facts of the case, and the history of the proceedings in the South Australian Courts, appear from the reasons for judgment of McHugh and Gummow JJ.

3 The case stated procedure for which s 350 provides, in its application to a matter within State jurisdiction, enables the Full Court of the Supreme Court, where appropriate, to review rulings of the kind made in the present proceedings. Whilst the fragmentation of criminal proceedings is ordinarily to be avoided, there may be circumstances where such a procedure is useful. It is part of the current South Australian system of criminal justice. When State courts hear criminal cases in federal jurisdiction, the general purpose of s 68 of the Judiciary Act is to bring about the result that, in the exercise of such jurisdiction, State courts apply the same procedure as when they exercise State jurisdiction[4]. The question is whether that legislative purpose, as expressed in the language of s 68(2), extends to the s 350 procedure.

4 Section 68(2) provides:

> "(2) The several Courts of a State or Territory exercising jurisdiction with respect to:
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> (a) the summary conviction; or

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1 *R v Thaller and Gee (Question of Law Reserved)* (2001) 79 SASR 295.

2 *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1.

3 *R v Cook; Ex parte Director of Public Prosecutions (Cth)* [1996] 2 Qd R 283.

4 *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345.

(b) the examination and commitment for trial on indictment; or

(c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth."

5 The word "appeal" is defined in s 2 of the Judiciary Act to include any proceeding to review or call in question the decision of any court or judge. The Full Court correctly held that the stated case procedure under s 350, when invoked in an ordinary case in the exercise of State jurisdiction, involves a proceeding to review or call in question the decision of a primary judge.

6 As was acknowledged by Doyle CJ, who was in the majority in the Full Court, the language of s 68(2) is both general and ambulatory. This is consistent with its purpose, which is to "assimilate criminal procedure, including remedies by way of appeal, in State and Federal offences"[5]. In *Williams v The King [No 2]*[6] Dixon J, speaking of the reference to appeal procedure, said:

> "But when this construction is given to the words of the provision, they necessarily extend to all remedies given by State law which fall within the description 'appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith'. This accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice."

7 That general policy reflects a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter. The federal legislation enacted to give effect to that choice, therefore, had to accommodate not only differences between State procedures at any given time, but also future changes to procedures in some States that might not be adopted in others. That

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5 *Williams v The King [No 2]* (1934) 50 CLR 551 at 558 per Rich J.

6 (1934) 50 CLR 551 at 560.

explains the use of general and ambulatory language, and the desirability of giving that language a construction that enables it to pick up procedural changes and developments as they occur in particular States from time to time.

8 Such a construction of s 68(2) leads to the result for which the appellant contends; a result that, as noted, had been accepted previously by the Full Court of the Supreme Court of South Australia, and the Court of Appeal in Queensland. The s 350 procedure involves the Full Court in an exercise of jurisdiction with respect to the hearing and determination of appeals arising out of a trial of persons charged with offences against the laws of the State or proceedings connected therewith. There is nothing in s 80 of the Constitution that bears upon the matter. Therefore, the Full Court has the like jurisdiction with respect to persons, such as the respondents, who are charged with offences against the laws of the Commonwealth.

9 The reason given by the majority in the Full Court for declining to accept that construction was based on legislative history and context.

10 Section 68 of the Judiciary Act is in Pt X. It constitutes Div 1 of Pt X, and is headed "Application of laws". The sub-heading is "Jurisdiction of State and Territory courts in criminal cases". Division 2 is not presently relevant. Division 3, headed "Appeals", reflects an important difference between the criminal justice system at the time of the enactment of the Judiciary Act and the present. Before 1912, criminal appeals in their present form did not exist in the Australian States. The *Criminal Appeal Act* 1912 (NSW) introduced criminal appeals in that State. Its counterpart in South Australia was enacted in 1924[7]. However, before 1912, there was legislation in the States which permitted a form of appellate review of decisions in criminal cases by way of case stated. When the Judiciary Act was enacted in 1903, ss 72-76, under the heading "Appeal", set out what was described in *Seaegg v The King*[8] as a "code of procedure for an appeal by way of case stated upon a point of law raised at the trial." That procedure was generally similar to corresponding State procedures.

11 At that time, s 68(2) did not contain the words "and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith". Thus, ss 72-77 were the only part of Pt X that dealt with appeals. Section 68 said nothing on that subject.

12 The words referred to in the preceding paragraph came to be added to s 68(2) in the following circumstances. New South Wales, in 1912, introduced a

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7 *Criminal Appeals Act* 1924 (SA).

8 (1932) 48 CLR 251 at 256 per Rich, Dixon, Evatt and McTiernan JJ.

procedure for criminal appeals of the kind with which we are now familiar. In *Seaegg*, a question arose as to whether s 68, as it then stood, picked up that procedure and conferred upon the New South Wales Court of Criminal Appeal jurisdiction to hear an appeal by a person convicted in a State court of a federal offence. This Court answered that question in the negative. Section 68(2) was then amended to overcome that result by adding the reference to appeals. Thenceforth, appeals were dealt with by Div 1 of Pt X as well as by Div 3.

13 There is no reason why the reference to appeals in s 68(2) should not be applied with full generality, having regard to the purpose of Div 1 of Pt X of the Judiciary Act. Plainly, Div 3 is no longer a code of procedure with respect to appeals. It would be contrary to the purpose of the legislation to treat Div 3 as the exclusive source of jurisdiction in relation to appeals by way of case stated. The case stated procedure provided for by s 350 of the Criminal Law Consolidation Act is a form of appeal. It does not further the general policy of placing the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State to treat the provisions of Div 3 of Pt X as, in effect, confining the case stated procedures provided for by the Judiciary Act to those of the kind in force at the time of Federation. The fact that this might result in a degree of overlap between Div 1and Div 3 does not alter the case. This Court said, in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[9]:

> "It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words."

14 For those reasons I consider that the majority of the Full Court erred in the ground upon which they decided the case.

15 It is necessary to make brief reference only to certain other arguments on behalf of the respondents that were rejected by the Full Court.

16 As explained above, the procedure established by s 350 of the Criminal Law Consolidation Act comes within the meaning of "appeal" as defined by s 2 of the Judiciary Act.

17 It was contended that what was involved was not an appeal arising out of a trial, because the trial of the respondents had not yet begun. The procedure of early arraignment, and multiple arraignments, for the purpose of enabling resolution of questions such as those that arose in the present case, was discussed

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9 (1994) 181 CLR 404 at 421.

in *R v Nicolaidis*[10]. It is a familiar and convenient procedure designed, among other things, to minimise the inconvenience to juries that results from lengthy argument, often in the absence of the jury, after a jury has been empanelled, about matters that could have been resolved at an earlier stage. The respondents had been arraigned, and, for the purposes of s 68(2), the trial had commenced.

18 The review of the trial judge's decision on the questions reserved did not involve an invitation to the Full Court to give a purely advisory opinion. The Full Court could have directed the dismissal of the application to exclude evidence, and at the least, the trial judge, on an application to reconsider his rulings, would be required to follow the decisions of the Full Court.

19 As to the argument that there was a lack of capacity in the appellant to invoke the s 350 procedure, the matter is covered by s 9(7) of the *Director of Public Prosecutions Act* 1983 (Cth).

20 I would allow the appeal and set aside the order of the Full Court and remit the matter to that Court for hearing and determination in accordance with the decision of this Court.

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10 (1994) 33 NSWLR 364 at 367.

21 McHUGH AND GUMMOW JJ. The important question raised by this appeal from the Full Court of the Supreme Court of South Australia[11] concerns the construction of s 68(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). Does s 68(2) invest that Court with federal jurisdiction to hear and determine a question of law arising in relation to a trial in the District Court of offences against the laws of the Commonwealth and reserved by the District Court under a requirement imposed by order of the Full Court made on an application under s 350 of the *Criminal Law Consolidation Act* 1935 (SA) ("the Consolidation Act") by the Commonwealth Director of Public Prosecutions ("the Commonwealth DPP")?

The principal provisions

22 Sub-section (2) of s 68, after its amendment by the *Judiciary Act* 1932 (Cth) ("the 1932 amendment") reads:

> "The several Courts of a State or Territory exercising jurisdiction with respect to:
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> (a) the summary conviction; or
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> (b) the examination and commitment for trial on indictment; or
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> (c) the trial and conviction on indictment;
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> of offenders or persons charged with offences against the laws of the State or Territory, *and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith*, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth." (emphasis added)

The words emphasised were added by the 1932 amendment.

23 The term "appeal" is defined in s 2 of the Judiciary Act as including "an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge".

24 In their application to State courts, the words "exercising jurisdiction" in the opening terms of s 68(2) refer to the jurisdiction conferred by the relevant State law in operation from time to time whether enacted before or after the

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11 *R v Thaller and Gee (Question of Law Reserved)* (2001) 79 SASR 295.

commencement of the Judiciary Act[12]. What was said by Dixon CJ, Kitto and Taylor JJ of s 39 of the Judiciary Act in *The Commonwealth v The District Court of the Metropolitan District* is true of s 68(2), namely[13]:

> "There is nothing in the language of s 39 to prevent the provision receiving an ambulatory effect and the known purpose of the provision could hardly be achieved unless it received such an effect or was repeatedly re-enacted at frequent intervals."

This "basal character"[14] of s 68(2) in the investment of federal jurisdiction ensures that, within the limits of its provisions and s 80 of the Constitution, the exercise of federal jurisdiction is facilitated by those developments which from time to time are provided by State law for the exercise of jurisdiction in State matters. This appeal concerns the utilisation of that procedure provided by s 350 of the Consolidation Act.

25 The history of the South Australian legislation respecting the stating of cases in the criminal jurisdiction was traced by Zelling J in *R v Millhouse*[15]. Section 350 of the Consolidation Act in its present form was substituted by s 4 of the *Criminal Law Consolidation (Appeals) Amendment Act* 1995 (SA) and then amended by s 9 of the *Statutes Amendment (Attorney-General's Portfolio) Act* 1996 (SA). The decision of this Court in *Director of Public Prosecutions (SA) v B*[16] was concerned with s 350 in an earlier form. As originally enacted, s 350 like its predecessors only applied where a question of difficulty arose "*on the trial or sentencing*" of a person "*convicted*" on information. One of the consequences was that a case might be stated under s 350 only after conviction[17]. Another, as illustrated by *B*, was that a question of law respecting the entry of a *nolle prosequi* arises at a stage anterior to trial, not on trial.

26 Section 350 now provides for the reservation and determination by the Full Court of a "relevant question" on an issue which is "antecedent to trial" or

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12 cf *The Commonwealth v The District Court of the Metropolitan District* (1954) 90 CLR 13 at 20.

13 (1954) 90 CLR 13 at 20.

14 cf *Goward v The Commonwealth* (1957) 97 CLR 355 at 360.

15 (1980) 24 SASR 555 at 560-564.

16 (1998) 194 CLR 566.

17 *R v Millhouse* (1980) 24 SASR 555 at 563.

"relevant to the trial or sentencing of the defendant" (s 350(1)). Such a question "must be reserved" by the trial court for consideration and determination by the Full Court if "the Full Court so requires" on an application under the section (s 350(2)). The term "relevant question" is defined in sub-s (a1) so as to include "a question of law". The expression "trial court" does not appear in s 350; rather, it identifies the "court by which a person has been, is being or is to be tried or sentenced for an indictable offence" (s 350(1)). It will be apparent, as in this case, that the trial court may not be the Supreme Court.

The course of the prosecution

27 The respondents were charged on information filed by the Commonwealth DPP in the South Australian District Court on nine counts of defrauding the Commonwealth in relation to income tax contrary to ss 29D and 5 of the *Crimes Act* 1914 (Cth) ("the Crimes Act")[18]. These were indictable offences. The respondents were arraigned in the District Court and pleaded not guilty to each of the charges. The District Court was exercising federal jurisdiction conferred by s 68(2) of the Judiciary Act. Those pleas having been entered, s 284(1) of the Consolidation Act required the District Court to proceed to the trial of the respondents.

28 The laws of evidence applicable were those in force in South Australia; they were "picked up" by the reference in s 68(1) of the Judiciary Act to "procedure" or by the specific reference to "the laws relating to … evidence" in s 79. The *Evidence Act* 1995 (Cth), by reason of the limited operation given it by s 4 thereof, did not apply.

29 Rule 9.01 of the District Court Rules 1992 (SA) provided for applications by persons including the respondents to raise questions respecting the admissibility of evidence "prior to the opening of the case for the prosecution or the calling of witnesses". Section 285A of the Consolidation Act provided for a court to determine such questions before the jury was empanelled.

30 The respondents objected to the reception into evidence of certain documents obtained by police, on the footing that the police officer who executed the search warrant in question had no power to hold or execute such a warrant. Evidence going to these issues was received on the voir dire and the judge proceeded to deal with the respondents' objections. Anderson DCJ did so before

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18 Section 5 since has been repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth), Sched 51, Item 4; s 29D was repealed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth), Sched 2, Pt 1, Item 149.

any empanelling of a jury. His Honour ruled that certain evidence was obtained unlawfully and, in the exercise of the court's discretion, should be excluded. He published reasons for so ruling. Without that evidence, the prosecution case is doomed to fail.

The Full Court

31 Thereafter, on an application of the Commonwealth DPP, the Full Court (Olsson and Mullighan JJ; Nyland J dissenting)[19] ordered that the trial judge be directed to reserve certain questions of law for consideration by the Full Court. The Full Court delivered its reasons for judgment on 2 September 1999. On 29 May 2000, after further steps which it is not necessary to narrate, save to say that on 18 May 2000 the Full Court (Doyle CJ, Duggan and Lander JJ) amended the order of 2 September 1999, the District Court judge stated a case reserving five questions for consideration of the Full Court. A five member Full Court heard argument on issues raised by the respondents respecting the jurisdiction of the Full Court to entertain the questions reserved. By majority (Doyle CJ, Prior, Duggan and Lander JJ; Bleby J dissenting), the Full Court held that it lacked jurisdiction to hear and determine the questions reserved by the District Court judge[20]. The leading judgment in the majority was delivered by Doyle CJ. Prior J agreed with the Chief Justice; Duggan J and Lander J also agreed and added reasons of their own.

32 The majority founded its decision upon the construction of s 68(2) of the Judiciary Act when read with other provisions of that statute. The reasoning in earlier decisions in South Australia and Queensland[21] which pointed to the contrary result was not accepted as meeting the points of construction which were now determinative.

33 The order of the Full Court was that, in respect of each of the questions reserved by the District Court judge, the Full Court declined to answer on the ground that it lacked jurisdiction to deal with the questions reserved. It is from this order that the present appeal is brought to this Court. Notice was given under s 78B of the Judiciary Act. The Attorney-General for South Australia intervened in support of the appellant. The Commonwealth Attorney-General did not intervene.

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19 *Gee and Thaller* (1999) 110 A Crim R 1.

20 *R v Thaller and Gee (Question of Law Reserved)* (2001) 79 SASR 295.

21 *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1; *R v Cook; Ex parte Director of Public Prosecutions (Cth)* [1996] 2 Qd R 283.

34 The appeal is brought in the name of the Queen, but it is accepted that it is conducted, as were the proceedings below, by the Commonwealth DPP in the name of the Queen. The source of that authority appears to be found in a combination of s 6(1)(a), s 9(1) and s 9(7) of the *Director of Public Prosecutions Act* 1983 (Cth) ("the DPP Act"). The Commonwealth DPP seeks an order setting aside the orders made by the Full Court and remitting the matter to the Full Court for determination of the questions reserved.

The issues

35 The Commonwealth DPP seeks to refute the reasoning of the Full Court respecting s 68(2) of the Judiciary Act, and also, further or in the alternative, to rely on the conferral of jurisdiction by s 39(2) of that statute. The respondents meet those submissions and also by Notice of Contention seek to uphold the Full Court order on additional grounds. One concerns the empowerment of the Commonwealth DPP under the DPP Act. Another is that the trial of the respondents had not commenced when the Full Court ordered Anderson DCJ to reserve the relevant questions of law; the result is said to be that, for this reason alone, s 68(2) was not attracted. The respondents also renewed some subsidiary arguments which may be considered in the course of dealing with the primary issues.

36 It is convenient to put s 39(2) to one side and to deal first with the issues concerning s 68(2) and its operation with respect to s 350 of the Consolidation Act.

Section 68(2) of the Judiciary Act and s 350 of the Consolidation Act

37 Two points first should be made. The first is that s 350 of the Consolidation Act is so drawn that the trial court which reserves questions for the Full Court may be a State court other than the Supreme Court. The second concerns the term "matter", particularly as it appears in s 77(iii) of the Constitution, dealing with the investing of State courts with federal jurisdiction. It is established by authority that a single "matter" can proceed through more than one court of a State. In *R v Murphy*[22], committal proceedings in one court and the trial of an indictable offence in another court (there having been an order for committal and presentation of the indictment) were held to be the curial process for the determination of a single "matter". That was the "matter" which the trial ultimately would determine, namely, in that case and in this case,

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22 (1985) 158 CLR 596 at 614, 617-618.

charges of offences against the Crimes Act. This reasoning was applied, with respect to civil jurisdiction, in *Re Wakim; Ex parte McNally*[23].

38 Within the meaning of the opening passage in s 68(2) of the Judiciary Act, the South Australian Full Court, when determining questions of law respecting State law reserved for its consideration by a trial court, being a court other than the Supreme Court, nevertheless is "exercising jurisdiction *with respect to* … the trial and conviction on indictment … of … persons charged with offences against the laws of the State" (emphasis added). That being so, the Full Court, subject to s 68 itself and to s 80 of the Constitution, has "the like jurisdiction" in "matters" which are "with respect to persons who are charged with offences against the laws of the Commonwealth".

39 The expressions in s 68(2) "with respect to" and "the like jurisdiction" are of wide import. In *Solomons v District Court of New South Wales*[24], McHugh J said that in s 68(2):

> "'like jurisdiction' is the authority to decide 'matters'[25] arising under federal laws in a manner similar to the authority of the court to decide matters arising under State law after allowance is made for the fact that the State jurisdiction arises under State law and federal jurisdiction arises under federal law[26]".

40 Where the trial court is invested with federal jurisdiction, as with the District Court here, it need not be the only State court which is invested with federal jurisdiction in that "matter" which arises under federal law. As was illustrated in *Murphy*[27], s 68(2) may operate to invest federal jurisdiction in those State courts which together, under the existing State court structure, exercise "like jurisdiction" with respect to matters arising under State law.

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23 (1999) 198 CLR 511 at 540 [3], 546 [26], 585 [138]. See also *Macleod v Australian Securities and Investments Commission* (2002) 76 ALJR 1445 at 1447 [8]; 191 ALR 543 at 546.

24 (2002) 76 ALJR 1601 at 1609 [41]; 192 ALR 217 at 228.

25 Constitution, ss 75, 76, 77(iii).

26 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J.

27 (1985) 158 CLR 596 at 614, 617-618.

41 Finally, the determination, before the conclusion of a trial, of a challenge to rulings excluding evidence is, within the meaning of s 68(2), the exercise of jurisdiction "with respect to" that trial.

42 The respondents submit that, contrary to a precondition to the operation of s 68(2), at the stage, before a jury had been empanelled, when Anderson DCJ reserved the questions of law for the Full Court and the Full Court became engaged in the matter, the District Court had not begun to exercise jurisdiction "with respect to … the trial and conviction on indictment" of the respondents. That submission is to be rejected.

43 In *B*[28], Gaudron, Gummow and Hayne JJ said:

> "It may be that the answer to the question – when does the trial begin – requires consideration of the context within which that question arises[29] and does not admit of an answer of the generality given in *Attorney-General's Reference No 1 of 1988*[30]. We need not decide if that is so."

In the decision referred to, King CJ had held[31]:

> "In this State, therefore, the trial commences when the accused having been arraigned before the judge who is to try him, that judge embarks upon the hearing and determination of any preliminary questions or upon the empanelling of the jury."

44 Those criteria were met in the present case, there having been arraignment[32] and determination by the judge of preliminary questions. The phrase "the trial and conviction on indictment" follows in s 68(2) upon "the examination and commitment for trial on indictment". Supervening executive

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28 (1998) 194 CLR 566 at 578 [17].

29 cf *R v Howard* (1992) 29 NSWLR 242 at 246-250; *R v Nicolaidis* (1994) 33 NSWLR 364 at 367; *R v Symons* [1981] VR 297; *R v Talia* [1996] 1 VR 462 at 470-476.

30 (1988) 49 SASR 1.

31 (1988) 49 SASR 1 at 5-6.

32 Nothing turns upon the circumstance that the respondents had been arraigned before Anderson DCJ and their not guilty pleas taken on an occasion before the voir dire.

and non-judicial acts aside, this indicates a curial continuity without fragmentation of federal jurisdiction. The description given by King CJ with respect to South Australia is at least wide enough to indicate the commencing point of the "trial" referred to in s 68(2). It is unnecessary to determine whether in s 68(2) the term "trial" has any still wider reach.

45 The respondents referred to the reservation in s 68(2) respecting s 80 of the Constitution. Nothing in s 80 forbids the taking of steps such as those taken here before empanelling of the jury.

46 The construction of s 68(2) given above should, in the absence of countervailing authority in this Court, be accepted. The consequence is that the Full Court erred in denying its competency to deal with the questions reserved.

The reasoning of the Full Court

47 The Full Court decided the matter upon a different perception of the issue of construction of s 68(2). Doyle CJ identified the issue as whether s 68(2)[33]:

> "when it refers to and vests jurisdiction with respect to appeals, makes applicable to the present case the power under s 350 of the [Consolidation Act] to require a judge to reserve questions for consideration by the Full Court".

48 His Honour, with respect correctly, rejected the submission (apparently renewed in this Court) that, because s 350 authorised the giving by the Full Court of "advisory opinions", s 68(2) could not translate the State law into "matters" of federal jurisdiction. He did not agree that the Full Court would be determining in a hypothetical or abstract fashion the legal issues to which the ruling by the District Court judge had given rise. Doyle CJ said[34]:

> "This Court is now asked, by case stated, to consider the correctness of that ruling, to pass upon its correctness, and has power to set the ruling aside and, possibly, to order that the application for exclusion of evidence be refused. At the least, this Court has power to answer the questions in a manner that will provide a basis for the [Commonwealth DPP] to request the trial judge to reconsider his rulings, and it seems to me that in that event the trial judge should do so. It would stultify the whole process if

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33 (2000) 79 SASR 295 at 297.

34 (2000) 79 SASR 295 at 320.

> the trial judge were at liberty to disregard a decision by the Full Court that the trial judge's ruling was wrong."

That reasoning should be accepted. This case is not one which attracts the objections indicated in *B*[35] and *Bass v Permanent Trustee Co Ltd*[36] to some forms of questions presented by adoption of the case stated and like procedures.

49 It should be added that, contrary to a further submission by the respondents, to accept that the trial judge would be bound by the answers given by the Full Court is not offensive to Ch III of the Constitution. The reason advanced by the respondents appeared to be concerned with the giving of directions as to the exercise of a judicial discretion. The submission may have been suggested by what was decided in *Chu Kheng Lim v Minister for Immigration*[37] respecting the invalidity of s 54R of the *Migration Act* 1958 (Cth). However, the concern there was with a direction given to the courts directly by the Parliament.

50 In the Full Court, Doyle CJ also concluded, with reference to the definition of "appeal" in s 2, that the proceeding before the Full Court was an "appeal" for the purposes of s 68(2) of the Judiciary Act, being a proceeding arising out of the trial or out of proceedings connected with the trial[38]. That view of the "matter" provided an alternative or cumulative source of the jurisdiction conferred by s 68(2). It should have resolved the objection to competency.

51 Nevertheless, the Full Court decided that it had not been invested with the necessary federal jurisdiction to deal with the questions reserved. Doyle CJ reached that conclusion in two steps[39]. The first was that the decision of this Court given 70 years ago in *Seaegg v The King*[40] required the Full Court to treat the general provision in s 39 of the Judiciary Act as not investing it with jurisdiction with respect to "appeals" in matters arising on the trial by indictment of an offence against the laws of the Commonwealth. The second was that s 68(2), even as amended after *Seaegg* by the 1932 amendment, did not invest the Full Court with the necessary federal jurisdiction; the general terms of s 68(2) in

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35 (1998) 194 CLR 566 at 576 [12].

36 (1999) 198 CLR 334 at 354-358 [43]-[54].

37 (1992) 176 CLR 1 at 35-37, 52.

38 (2000) 79 SASR 295 at 319.

39 (2000) 79 SASR 295 at 312.

40 (1932) 48 CLR 251.

its amended form still required some contraction in their operation so as to allow for the specific provisions in Pt X Div 3 (ss 72-77) of the Judiciary Act.

52 It is convenient to deal first with the second of these considerations. If now determined to be as the Commonwealth DPP would have it, the result would be to establish the foundation of jurisdiction in s 68(2) without the need to consider that additional or alternative source in s 39.

Part X, Div 3 of the Judiciary Act

53 Part X of the Judiciary Act has included ss 72-77 since enactment of the statute in 1903. The sections were introduced by the heading "*Appeal*". The rendering of Pt X into divisions was later effected by the *Statute Law Revision Act* 1973 (Cth). Since their enactment, ss 72, 74 and 76 have been amended, but in immaterial respects[41].

54 Section 68 comprises Div 1 of Pt X. Division 3 of Pt X makes specific provision for the reservation of questions of law arising on the trial of a person for an indictable offence against the laws of the Commonwealth. In its discretion and without application by the accused person, the court may reserve any question of law before or after judgment; upon application made before verdict, s 72(1) states that the court "shall" reserve any question of law which arises at the trial. The reservation is "for the consideration of a Full Court of the High Court or *if the trial was had in a Court of a State* of a Full Court of the Supreme Court of the State". The words emphasised were added by s 4 of the *Judiciary Act* 1915 (Cth). The point of present significance is that Div 3 is so cast as not to provide for a procedure of the kind for which provision now is made by s 350 of the Consolidation Act.

55 Section 72 and the succeeding provisions were enacted at a time before the establishment in the States of Courts of Criminal Appeal. At the time of the enactment of the Judiciary Act, the laws of the States made various provisions for processes falling short of what now is understood as an appeal from conviction or sentence. For example, s 471(1) of the *Crimes Act* 1900 (NSW)[42] provided for the issue out of the Supreme Court on the application of the Crown

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41 The *Judiciary Act* 1915 (Cth) amended s 72, the *Judiciary Amendment Act (No 2)* 1979 (Cth) amended ss 72 and 74 and the *Law and Justice Legislation Amendment Act (No 2)* 1994 (Cth) amended ss 72, 74 and 76.

42 Repealed by s 23(2) of the *Criminal Appeal Act* 1912 (NSW).

or the prisoner, after cause shown, of a writ of error[43]. In that setting, s 77 of the Judiciary Act assumed a particular importance. It states:

> "Except as aforesaid, and except in the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against the laws of the Commonwealth."

56 Further, after the establishment by statute of the State Courts of Criminal Appeal[44], appeals were brought to this Court, by special leave, on the footing that the legislation did not create or constitute new courts distinct from the Supreme Courts from which appeal lay pursuant to s 73(ii) of the Constitution[45]. In subsequent cases[46] in which applications were brought for special leave to appeal from decisions of Courts of Criminal Appeal exercising federal jurisdiction conferred by s 68(2) of the Judiciary Act, it appears that no objection to competency was taken that the Court of Criminal Appeal had lacked jurisdiction to deal with an appeal against conviction or sentence because the only available procedures were those specified in s 72 of the Judiciary Act. Consistently with that state of affairs, and notwithstanding some doubts as to the construction of s 72[47], from time to time this Court has entertained cases stated under s 72 of the Judiciary Act by trial judges. Examples are *R v Sharkey*[48] and *R v Bull*[49].

57 *Peel v The Queen*[50], to which reference has been made, was decided after the 1932 amendment. This Court held that s 68(2) did confer on the NSW Court of Criminal Appeal, in respect of appeals by the Commonwealth Attorney-

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43 See *Fleming v The Queen* (1998) 197 CLR 250 at 257-258 [16].

44 South Australia is in a special position in this regard: *Byrnes v The Queen* (1999) 199 CLR 1 at 12-13 [10].

45 *Stewart v The King* (1921) 29 CLR 234 at 240; *Byrnes v The Queen* (1999) 199 CLR 1 at 12-13 [10].

46 For example, *Peel v The Queen* (1971) 125 CLR 447.

47 *R v Murphy* (1985) 158 CLR 596 at 607-608, 619-620.

48 (1949) 79 CLR 121.

49 (1974) 131 CLR 203.

50 (1971) 125 CLR 447.

General against sentence, a "like jurisdiction" to that conferred by State law in respect of appeals by the State Attorney-General. That outcome is inconsistent with the thrust of the submissions by the respondents as to the impact of the provisions of ss 72-77 upon the construction of s 68(2).

Seaegg v The King[51]

58 *Seaegg* was decided before, and indeed provided the occasion for the making of, the 1932 amendment. The respondents submit that statements made in the joint judgment in *Seaegg* of Rich, Dixon, Evatt and McTiernan JJ[52] respecting Div 3 of Pt X of the Judiciary Act still retain their force for the application of s 68(2) (and s 39(2)) to the present case. Their Honours said[53]:

> "[Sections] 72 to 77 of the [Judiciary Act] are headed 'Appeal', and contain *a code of procedure* for an appeal by way of case stated upon a point of law raised at the trial. These special provisions confer a different and narrower right of appeal and different but perhaps wider remedies." (emphasis added)

In considering the words in s 68(2) as it then stood "with respect to … the trial and conviction on indictment", their Honours said[54]:

> "The words would not naturally be understood to refer to a jurisdiction to hear appeals from such convictions, and we think that the presence in the enactment of the special provisions contained in ss 72-77 again operates *to preclude* such an interpretation. It follows that the Supreme Court was right in holding that the appellant could not appeal to it except under the provisions of s 72 of the [Judiciary Act]." (emphasis added)

59 The use in the first of these passages of the term "a code of procedure" gives rise to some difficulty. The term "code" may be used in various senses. Used in respect of the Judiciary Act or any provision or group of provisions thereof, it cannot identify a law which restates or replaces the common law, such as the bills of exchange, sale of goods and partnership legislation enacted in the United Kingdom in the second half of the nineteenth century. For at least since the time fairly shortly after its enactment, the Judiciary Act has not been the only

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51 (1932) 48 CLR 251.

52 (1932) 48 CLR 251 at 256-257.

53 (1932) 48 CLR 251 at 256.

54 (1932) 48 CLR 251 at 257.

law of the Commonwealth made in exercise of its power in s 77(iii) of the Constitution to invest courts of the States with federal jurisdiction[55]. It is not a "code" in the sense of an exercise by the Parliament of the power in s 77(iii) which purports to be exhaustive.

60 The term "code" also has been used to point out a particular characteristic with which the section or group of sections is endowed by the relevant statute. An example is the expression a "small self-contained code" used in *Parsons v BNM Laboratories Ltd*[56] of ss 37 and 38 of the *Finance Act* 1960 (UK)[57]. In *Seaegg* the phrase "code of procedure" appears to be used in respect of ss 72-77 to "preclude" what otherwise might be the operation of a more generally expressed provision in the same statute.

61 In construing the provisions of the Judiciary Act as it now stands, effect no longer should be given to those statements in *Seaegg*. This is so for several reasons. First, s 68(2) itself has been significantly amended by the 1932 amendment thereby bringing it into a changed relationship with ss 72-77. Secondly, within the one statute, its various provisions, if it be possible, are to be given "a construction that will render them harmonious". That was how Gibbs J put the matter in *Ross v The Queen*[58] in considering provisions of the *Criminal Code* (Q). That attainment of harmony is not to be achieved by the adoption of notions respecting inconsistency between the several statutes of the one legislature[59] or respecting amendment and repeal[60].

62 Thirdly, some useful analogy is provided by the reasoning in cases such as *Deputy Commissioner of Taxation v Moorebank Pty Ltd*[61]. Provisions such as ss 64, 68(2) and 79 of the Judiciary Act do not operate to insert a provision of

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55 See Cowen, *Federal Jurisdiction in Australia*, 1st ed (1959) at 187-193.

56 [1964] 1 QB 95 at 119.

57 See also *Briers v Atlas Tiles Ltd* [1978] VR 151 at 168.

58 (1979) 141 CLR 432 at 440.

59 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 351 [30].

60 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 353-354 [9], 375-376 [67]-[69].

61 (1988) 165 CLR 55 at 64. See also *Northern Territory v GPAO* (1999) 196 CLR 553 at 576 [38]; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 351 [30].

State law into a Commonwealth legislative scheme which is "complete upon its face" where, on their proper construction, those federal provisions can "be seen to have left no room" for the picking up of State law[62]. The inclusion in s 68(2) of provisions respecting appeals by the 1932 amendment had the result that, if for no other reason, ss 72-77 were not on their face a complete legislative scheme with respect to processes of an appellate nature, leaving no room for State laws to be picked up by s 68(2).

63 Fourthly, as the reference to *Moorebank* indicates, since *Seaegg*, the decisions of the Court have manifested developments in the approach to be taken to those ambulatory provisions of the Judiciary Act which "pick up" State law as it exists from time to time. Part X of the Judiciary Act (ss 68-77) is headed "CRIMINAL JURISDICTION". Of that Part, Mason J said in *R v Loewenthal; Ex parte Blacklock*[63]:

> "[Part] X of the [Judiciary] Act provided a solution to the difficulties arising from a duality of jurisdiction by applying to criminal cases heard by State courts in federal jurisdiction the laws and procedure applicable in the State (s 68). The purpose of the section was, so far as possible, to enable State courts in the exercise of federal jurisdiction to apply federal laws according to a common procedure in one judicial system."

Indeed, shortly after the 1932 amendment, Dixon J said of the "general policy disclosed by [s 68(2)]" that it was[64]:

> "to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice".

The result is that, subject to the imperatives of s 80 of the Constitution, the course taken at trial of an offence against the laws of the Commonwealth may vary from State to State (and, given the terms of s 68, from Territory to Territory). The policy of which Dixon J spoke in *Williams v The King [No 2]* has been given legislative preference to a consideration that federal law always should have a uniform operation throughout the Commonwealth.

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62 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64.

63 (1974) 131 CLR 338 at 345.

64 *Williams v The King [No 2]* (1934) 50 CLR 551 at 560.

64 Moreover, it was decided in *Leeth v The Commonwealth*[65] that that exercise of legislative choice manifested in provisions such as s 68(2) violates no constitutional imperative. In their joint judgment in that case, Mason CJ, Dawson and McHugh JJ, after referring to the statement by Dixon J in *Williams*[66] set out above, proceeded[67]:

> "Thus the administration of the criminal law of the Commonwealth is organized upon a State by State basis and there may be significant differences in the procedures applying to the trial of a person charged with an offence against a Commonwealth law according to the State in which he is tried."

The relationship between s 68(2) and ss 72-77

65 With these considerations in mind, there is no difficulty in giving to Pt X of the Judiciary Act, including s 68(2) and ss 72-77, the harmonious operation of which Gibbs J spoke in *Ross*[68].

66 Division 3 of Pt X supplements the conferral of jurisdiction in Div 1 (s 68). If the procedures which s 72 provides are utilised and the presiding judge signs a case stating the question of law reserved for the "Full Court of the Supreme Court of the State" spoken of in s 72(1), the Full Court is invested with federal jurisdiction to hear and determine, in accordance with ss 73 and 74, the question reserved. Section 15C of the *Acts Interpretation Act* 1901 (Cth) makes clear the investment of federal jurisdiction in the Full Court. As presently relevant, it enacts that where a provision of a statute "whether expressly or by implication" authorises a criminal proceeding to be instituted in a particular court in relation to a matter, that provision shall be deemed to vest that court with jurisdiction in that matter. That grant of jurisdiction operates by the further grant to that made in criminal cases by s 68(2)[69]. It is unnecessary to determine the extent to which those two grants of jurisdiction operate cumulatively or alternatively to the general grant in s 39(2). Somewhat differing views on that

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65 (1992) 174 CLR 455.

66 (1934) 50 CLR 551 at 560.

67 (1992) 174 CLR 455 at 467.

68 (1979) 141 CLR 432 at 440.

69 cf *R v Bull* (1974) 131 CLR 203 at 258.

matter were expressed in *R v Bull*[70]. Subsequently, in *Brown v The Queen*, Brennan J said[71]:

> "Jurisdiction to try persons charged on indictment with federal offences is conferred on State courts by s 68(2) of the [Judiciary Act] and by s 39(2) of that Act so far as the general provisions of s 39(2) are not inconsistent with the more particular provisions of s 68(2): *Adams v Cleeve*[72]; *R v Bull*[73]. We need not consider the general provisions of s 39(2) in the present case; it is sufficient to consider the more particular provisions of s 68(2)."

67 In *Bull*, Mason J observed[74] that that case was not the occasion to undertake an exposition of the precise relationship between s 39(2) and s 68(2) of the Judiciary Act. The same is true now. However, it should be observed that since the decision in *Bull*, s 39A was inserted by the *Judiciary Act* 1968 (Cth). Among other things, s 39A(1) subjects the federal jurisdiction invested by a provision of the Judiciary Act other than s 39 to the conditions and restrictions now detailed in pars (a), (c) and (d) of s 39(2)[75]. Section 39A(2) states that nothing in s 39A or s 39 or any earlier statute prejudices the application of ss 72-77 in relation to jurisdiction in respect of indictable offences.

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70 (1974) 131 CLR 203 at 233-234, 245, 257-259, 272-273, 275.

71 (1986) 160 CLR 171 at 197.

72 (1935) 53 CLR 185 at 190-191.

73 (1974) 131 CLR 203 at 233-234, 258-259, 275.

74 (1974) 131 CLR 203 at 275. See also *Macleod v Australian Securities and Investments Commission* (2002) 76 ALJR 1445 at 1447 [8]-[10]; 191 ALR 543 at 546.

75 See *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 233. Paragraph (a) bars Privy Council appeals from a court of a State exercising federal jurisdiction conferred by s 39, par (c) bars any prohibition by State law upon the grant of special leave by the High Court and par (d) deals with the exercise of federal jurisdiction by State courts of summary jurisdiction. Paragraph (b) was repealed by s 8 of the *Judiciary Amendment Act* 1976 (Cth).

The powers of the Commonwealth DPP

68 There remains for consideration the respondents' submission by Notice of Contention concerning the powers and functions of the Commonwealth DPP. Sub-section 9(7) of the DPP Act states:

> "Where the [Commonwealth DPP] has instituted or taken over, or is carrying on, a prosecution for an offence against a law of the Commonwealth, the [Commonwealth DPP] may exercise in respect of that prosecution, in addition to such rights of appeal (if any) as are exercisable by him or her otherwise than under this subsection, such rights of appeal (if any) as are exercisable by the Attorney-General in respect of that prosecution."

In s 3(1), the term "appeal" is defined as including:

> "(a) a proceeding of the same nature as an appeal; and
>
> (b) a review or rehearing, or a proceeding of the same nature as a review or rehearing."

The matter of which the Full Court was seized with respect to the case stated under s 350 of the Consolidation Act was a procedure in the nature of a review of the ruling by the trial judge on the voir dire. Thus it was an "appeal" for the purposes of s 9(7) of the DPP Act.

Conclusions

69 The Full Court should have dismissed the objections to competency. It was invested with federal jurisdiction with respect to the determination of the questions reserved. Section 68(2) operated twice in that respect. First, the determination was the exercise of jurisdiction with respect to the trial of the respondents. The respective steps taken in the District Court and the Full Court were elements in the adjudication of the one matter arising under Commonwealth law, the determination of the charges laid against the respondents. Secondly, the proceeding in the Full Court was an "appeal" for the purposes of s 68(2). It is unnecessary to decide whether these are concurrent investments of jurisdiction or whether the second is subsumed by the first.

70 The steps taken by the Commonwealth DPP were within the charter given by the DPP Act.

Orders

71 The appeal should be allowed. The order of the Full Court in which it declined to answer the five questions reserved should be set aside. The proceeding should be remitted to the Full Court for further hearing and determination.

72 KIRBY J. This is an appeal from a judgment of the Full Court of the Supreme Court of South Australia[76]. That Court concluded, by majority[77], that it lacked jurisdiction to decide questions reserved by a judge of the District Court of South Australia. The proceedings in the District Court arose out of the prosecution of offences against a law of the Commonwealth.

73 The *Criminal Law Consolidation Act* 1935 (SA) ("the State Act"), provided for the reservation of questions by a trial judge for consideration by a Full Court. It also empowered that Court to determine such questions. However, the Full Court held that the State law was not picked up and applied by the *Judiciary Act* 1903 (Cth) ("the JA") to a case in federal jurisdiction.

74 The problem before this Court thus stems from the constitutional arrangements for the vesting of federal jurisdiction in State courts. The investment of State courts with "like jurisdiction" for the purposes of criminal proceedings for offences against the laws of the Commonwealth and the broader question concerning the application of State laws as "surrogate"[78] federal laws in the exercise of federal jurisdiction are subjects upon which "decided cases … do not speak with a single and compelling voice"[79]. Indeed, there have been significant divisions of opinion in this Court[80], as there were in the Full Court in this case.

The facts

75 Mr Robert Gee and Mr Hans Thaller ("the respondents") were jointly charged in May 1998 with offences against the *Crimes Act* 1914 (Cth)[81]. The

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76 *R v Thaller and Gee (Question of Law Reserved)* (2001) 79 SASR 295 ("*Thaller and Gee*").

77 Doyle CJ, Prior, Duggan and Lander JJ; Bleby J dissenting.

78 *Maguire v Simpson* (1977) 139 CLR 362 at 408 per Murphy J by reference to s 64 of the JA.

79 *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 651 [257] per Hayne J, in the context of the exercise of federal jurisdiction in the Territories and by reference to the JA, s 79. See also *Peel v The Queen* (1971) 125 CLR 447 at 468 per Gibbs J.

80 eg *Williams v The King [No 2]* (1934) 50 CLR 551; *Peel v The Queen* (1971) 125 CLR 447; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.

81 ss 29D and 5.

respondents were alleged to have defrauded the Commonwealth by under-stating their incomes for taxation purposes. On 19 May 1998 a prosecutor, on behalf of the Commonwealth Director of Public Prosecutions ("the Commonwealth DPP") and in the name of the Queen, presented an information against the respondents to the District Court of South Australia. It was accepted that this document constituted an indictment alleging offences against a law of the Commonwealth. As a result of the engagement of s 80 of the Constitution, the trial of the respondents was required to be by jury and to be "held in the State where the offence was committed". That State was South Australia.

76 For the purposes of the trial, the District Court was constituted by Anderson DCJ. The respondents were arraigned before his Honour. They pleaded not guilty to all counts of the indictment. They have not been re-arraigned. No jury have yet been empanelled for the trial.

77 In accordance with s 285A of the State Act and the Rules of the District Court of South Australia[82], before the jury were empanelled, the respondents sought a preliminary determination by Anderson DCJ, of a question relating to the admissibility of prosecution evidence. His Honour acceded to that request. He ruled that the evidence had been obtained illegally and, in the exercise of his discretion[83], concluded that it was inadmissible and should be excluded from the trial. The respondents claim that, if that ruling stands, they will be entitled to an acquittal at their trial. It is unnecessary in this appeal to examine the grounds for the ruling, its correctness or its consequences.

78 The Commonwealth DPP applied to the Full Court to direct Anderson DCJ to reserve certain questions for consideration by that Court. The application was made purportedly in reliance upon s 350 of the State Act. The respondents did not at first contest the jurisdiction of the Full Court to entertain the application. In September 1999, by majority[84], the Full Court ("the first Full Court") purported to require Anderson DCJ to reserve questions on a case stated for the opinion of the Full Court.

79 It was at this point that the respondents raised the objections now before this Court. In November 1999, they applied to the Full Court to quash the decision of the first Full Court on the ground that it had been made without

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82 District Court Rules 1992 (SA), Pt 4 r 9.01 provides for the issuing and service of such an application.

83 See *Bunning v Cross* (1978) 141 CLR 54.

84 *Gee and Thaller* (1999) 110 A Crim R 1: Olsson and Mulligan JJ; Nyland J dissenting.

jurisdiction. Alternatively, they asked the Full Court to reopen the matter. The Full Court refused to do this. On 14 December 1999, in compliance with the order of the first Full Court, Anderson DCJ stated a case for the opinion of the Full Court.

80 An application for special leave to appeal against the orders of the first Full Court was refused by this Court. In May 2000 Anderson DCJ amended the stated case which was thus returned before the Full Court, differently constituted ("the second Full Court")[85]. The respondents advanced their challenge to the validity of the proceedings. That Court was then reconstituted to include five judges[86] to hear the respondents' challenge. It was this Full Court that in March 2001 concluded that it lacked jurisdiction to entertain the questions reserved. In accordance with its conclusion, the Court declined to answer the questions reserved[87].

The applicable legislation

81 Before turning to the reasons of the Full Court, and my own reasons, I must identify the State and federal laws the intersection of which ultimately determines the issues in this appeal.

82 The State Act was before this Court in *Director of Public Prosecutions (SA) v B*[88]. The provisions of the State Act for reserving questions of law arising on a criminal trial in South Australia were amended, in terms inapplicable to the information laid in that case[89]. However, those amendments introduced some of the provisions that now fall to be considered in this appeal.

83 Section 285A of the State Act provides that before the jury are empanelled, a court before which the accused is arraigned may hear and determine questions of law affecting the trial, including the admissibility of evidence[90]. Such a question must be one "affecting the conduct of the trial".

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85 Doyle CJ, Duggan and Lander JJ.

86 Because a question had arisen as to the correctness of the decision in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1.

87 (2001) 79 SASR 295 at 321 [106].

88 (1998) 194 CLR 566.

89 *Criminal Law Consolidation (Appeals) Amendment Act* 1995 (SA). See *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 572-573 [5], fn 31 and at 584-585 [41], fn 72.

90 The section is set out in the reasons of Callinan J at [162].

Given the context, it is clear that the "trial" is defined broadly. The section itself contemplates that the question may arise "before the jury is empanelled".

84 The critical provisions of the State Act are found in s 350. As its terms are set out in other reasons, I will not repeat them[91]. Section 351 of the State Act provides for the statement of a case by the "trial judge"[92] and for the Full Court, if necessary, to refer the stated case back to the judge for amendment. By s 351A, the Full Court is empowered to determine a question "reserved under this Part and make consequential orders and directions". Specific provision is made concerning the setting aside of a conviction and the ordering of a new trial. However, if a defendant has been acquitted at trial "no determination or order of the Full Court can invalidate or otherwise affect the acquittal"[93].

85 By s 352 of the State Act, provision is made for the "right of appeal in criminal cases"[94]. Provision is made for appeals "on an issue antecedent to trial" adverse to a party[95]. By s 352(2), where an appeal or application for leave to appeal is made to the Full Court under the section, that Court is empowered to require the court of trial to state a case on the questions raised in the appeal or proposed appeal. The matter must then be dealt with as if such questions had been reserved on a stated case.

86 The provisions of the JA, relevant to these proceedings, are set out in other reasons[96]. Similarly, the terms of the *Director of Public Prosecutions Act* 1983 (Cth) ("the DPP Act") are itemised and can be incorporated by reference[97].

87 The common references in s 68(1) and (2) of the JA to the "hearing and determination of appeals" were inserted by the *Judiciary Act* 1932 (Cth)[98]. That

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91 Reasons of Callinan J at [197]. See also the reasons of McHugh and Gummow JJ at [26].

92 So described in the heading to s 351 of the State Act. In the section the judicial officer is described as the "presiding judge".

93 State Act, s 351A(2)(c).

94 So described in the heading of the State Act, s 352 and in s 352(1) and (2).

95 State Act, s 351(1)(b) and (c).

96 Reasons of Gleeson CJ at [4], reasons of McHugh and Gummow JJ at [22], reasons of Callinan J at [190]-[191].

97 Reasons of Callinan J at [198].

98 *Judiciary Act* 1932 (Cth), s 2(a) and (b).

amendment was enacted to fill the gap identified by the decision of this Court in *Seaegg v The King*[99]. As originally enacted, the JA included ss 72-77 providing for "Appeal". The word "appeal" for the purposes of the JA is defined in s 2. By that section, unless the contrary intention appears, the word "appeal" in the JA "includes an application for a new trial and any proceeding to review or call in question the proceedings, decision or jurisdiction of any Court or Judge".

88 The provisions in the present Pt X Div 3 of the JA (ss 72-77) reflect the limited form of appeal in criminal jurisdiction that existed in Australia before and at the time of federation[100]. Prior to the enactment of the *Criminal Appeal Act* 1907 (UK), a general appeal in criminal proceedings, whether against conviction or sentence, was not available. The normal way of challenging a conviction was by writ of error brought on the fiat of the Attorney-General to reverse the judgment (or a like writ[101]) or by the reservation by the trial judge, during the trial, of questions of law that, after the verdict of the jury, formed the basis of a stated case which the judge could transmit to the judges of the Supreme Court *in banc*. They had the power to determine the question, to affirm, amend or reverse the judgment and arrest the same in a case where a substantial wrong or other miscarriage of justice was shown[102].

89 At the time of federation, it was not uncommon for such procedures to be collected in colonial statutes under the heading of "appeals"[103]. These features of criminal "appeals" therefore existed at the time of the original passage of the JA in 1903. They explain the title ("Appeals") under which ss 72-77 of that Act still appear[104]. For the majority in the second Full Court, the continued presence of these sections was determinative.

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99 (1932) 48 CLR 251.

100 See eg *Administration of Criminal Law Act* 1848 (Imp), s 2 (11 & 12 Vict c 78); *Criminal Law Consolidation Act* 1876 (SA), ss 397-400; *Criminal Law Consolidation Act* 1935 (SA), ss 350-351; *Crimes Act* 1900 (NSW), ss 470-475; *Crimes Act* 1890 (Vic), ss 481-485; *Supreme Court Act* 1890 (Vic), s 25; *Crimes Act* 1928 (Vic), ss 478-481, 593(a); *Criminal Code Act* 1899 (Q), ss 668B, 668C; *Criminal Code Act* 1902 (WA), ss 667-671*; Criminal Law Procedure Act* 1881 (Tas), ss 7-10.

101 See eg *Crimes Act* 1900 (NSW), s 471.

102 See eg *Crimes Act* 1900 (NSW), s 470; cf s 428.

103 Such was the heading to Pt XIII Div D of the *Crimes Act* 1900 (NSW) repealed in 1912 with the enactment of the *Criminal Appeal Act* 1912 (NSW).

104 These sections of the JA are set out in the reasons of Callinan J at [196].

The decision of the second Full Court

90 On the way to reaching the conclusion that it lacked jurisdiction to decide the case stated by Anderson DCJ, the second Full Court disposed of a number of arguments raised by the respondents. Thus, in answer to the contention that s 68(2) of the JA had not been engaged because the "trial" of the proceedings against the respondents had not commenced, the Full Court concluded that, to determine when a trial begins, it is necessary to have regard to the context for which the question must be answered[105]. On that basis, as the respondents had been arraigned in the District Court before the judge who was to conduct their trial, the question reserved was one arising out of the trial. Upon this point, there was no disagreement in the Full Court[106].

91 Another argument was based on the contention that the procedure for reserving questions of law under s 350 of the State Act, as it had been invoked, did not come within the meaning of the word "appeal" in s 68(2) of the JA. Lander J, one of the judges in the majority in the Full Court's disposition of the matter, did not consider that the procedure contemplated by the State Act was an "appeal" for the purposes of the JA[107]. However, all the other judges in the second Full Court[108], including the dissenting judge[109], reached the opposite conclusion. For them, the case stated procedure envisaged by s 350 of the State Act, although not an appeal as that word is now ordinarily used, sufficiently fell within the extended definition of "appeal" in the JA to attract s 68(2).

92 A majority of the judges of the Full Court also rejected the respondents' argument that the review of the decision of Anderson DCJ, on the questions reserved, was a purely advisory or hypothetical exercise, such as could not be conferred on a court, including a State court, exercising federal jurisdiction. Their Honours accepted that, were it so, the attempted conferral of advisory jurisdiction would fail for constitutional reasons. However, they held that what

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105 *Thaller and Gee* (2001) 79 SASR 295 at 300-301 [31] referring to *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 578 [17].

106 (2001) 79 SASR 295 at 299-301 [25]-[31], 318-319 [93]-[94] per Doyle CJ, 321 [107] per Prior J, 321 [108] per Duggan J, and at 328 [177] per Bleby J.

107 In particular, his Honour did not consider that the procedure fell within the definition of "appeal" in JA, s 2: see (2001) 79 SASR 295 at 327-328 [170]-[174].

108 (2001) 79 SASR 295 at 319 [99] per Doyle CJ with whom Prior and Duggan JJ agreed.

109 (2001) 79 SASR 295 at 328 [178] per Bleby J.

the second Full Court was required to do, pursuant to the application before it, was part of "the ordinary administration of the law"[110]. The trial judge would be obliged, in disposing of the trial, to follow the answers given by the Full Court on any application to reconsider his evidentiary rulings. On that basis a majority decided that the Full Court's jurisdiction was not advisory[111].

93 The same majority rejected an argument that the Commonwealth DPP lacked power, pursuant to his own Act[112], to ask the trial judge to reserve a question of law, or to apply to the Full Court to request such a reservation, relying upon s 350 of the State Act[113]. They held that there was no reason to read the reference to rights of "appeal" more narrowly in the DPP Act than in the JA.

94 Having reached these conclusions, the majority of the Full Court struck the obstacle that was regarded as fatal to the purported reference of questions to that Court. Three judges in the majority (Doyle CJ, Prior and Duggan JJ), rejected the construction of "appeal" in s 68(2) advanced by the Commonwealth DPP. They did so because of the express provisions for "appeals" by way of a stated case in ss 72-77 of the JA.

95 Doyle CJ, who expressed the reasons for the majority's conclusion in this regard, was driven to his opinion by his view concerning the operation of the latter provisions in the context of the JA and by a number of related historical considerations. Such considerations included the fact that, when the word "appeal" was inserted in s 68(2) in 1932, there were no State legislative provisions conferring jurisdiction on State courts similar to those now contained in s 350 of the State Act[114]. Further, when it inserted the word "appeal" in s 68(2) of the JA the Federal Parliament did not repeal, but left standing, ss 72-77[115]. Having provided expressly by federal law for a case stated procedure, there was neither need nor occasion for the JA to adopt a State procedure for stating cases

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110 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 305.

111 (2001) 79 SASR 295 at 319-320 [98]-[99], 320 [103] per Doyle CJ (Prior and Duggan JJ agreeing).

112 *Director of Public Prosecutions Act* 1983 (Cth), s 9(7) ("the DPP Act").

113 (2001) 79 SASR 295 at 320-321 [105] per Doyle CJ; 321 [107] per Prior J; 321 [108] per Duggan J.

114 (2001) 79 SASR 295 at 312-313 [69]-[70] per Doyle CJ.

115 (2001) 79 SASR 295 at 314 [75]. There have been minor though immaterial amendments to those provisions of the JA.

that overlapped with the provisions of the JA that the Federal Parliament had left standing[116].

96 In his dissenting reasons, Bleby J reached the opposite conclusion on this point. He regarded ss 72-77 as providing a "fundamental guarantee, whatever restrictions may be placed on appeals or reviews by State legislation"[117]. Accordingly, he did not consider that the broad definition of "appeal" in s 2 of the JA should be read down to reflect a contrary intention in that Act, read as a whole[118]. On that footing, Bleby J concluded that s 68(2) could pick up the State Act provisions. In his view, the procedure could properly be characterised as an "appeal". The sub-section therefore conferred on the State courts "the like jurisdiction with respect to persons who are charged" with federal offences.

97 The respondents supported the conclusions of the majority in the Full Court. They also filed a notice of contention. This contested the existence of an "appeal" within the JA; asserted that the purported "appeal" amounted to an advisory opinion forbidden by the Constitution and repeated the argument concerning the want of power of the Commonwealth DPP to prosecute his application to the Full Court. The Commonwealth DPP submitted that the conclusions of Bleby J were correct.

The basic problem, two questions and five issues

98 *The problem*: It would have been possible for the Constitution to have established a single national judicial system, with courts having jurisdiction to apply both federal and State laws. Instead, it provided for separate systems of federal and State courts.

99 The inventive provision[119] by which federal law could provide for "investing any court of a State with federal jurisdiction" has been held to exclude reciprocal measures by State law[120]. Provided there is a foundation in its legislative powers, the Federal Parliament can enact laws to govern the exercise of federal jurisdiction, both at first instance and on appeal[121]. However, such

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116 (2001) 79 SASR 295 at 315 [80]-[82].

117 (2001) 79 SASR 295 at 330 [185].

118 (2001) 79 SASR 295 at 329-330 [185]-[186].

119 Constitution, s 77(iii).

120 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; cf *Gould v Brown* (1998) 193 CLR 346.

121 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603-605.

laws must conform to the rule obliging the Commonwealth to accept State courts as it finds them[122]. In the present case, the Federal Parliament could have enacted specific laws permitting State courts exercising federal jurisdiction to reserve questions for the determination by a Full Court on matters arising before the commencement of a criminal trial. Such laws could have allowed the Commonwealth DPP to secure review by a Full Court of a decision at first instance. Such a federal law would have uniform application throughout the Commonwealth to all persons charged with offences against a law of the Commonwealth. Any such provision would be subject to the requirements of s 80 of the Constitution[123].

100 Because there is no specific federal law to sustain the proceedings that the Commonwealth DPP has brought to the Full Court, it is necessary to decide whether the relevant State laws are picked up by the general provisions of the JA to invest that Court with federal jurisdiction. The State laws, on their own, cannot achieve this result. It is not competent for the State Parliament, by its law, to control and regulate the exercise of federal jurisdiction. A similar issue arises in relation to the exercise of his federal powers by the Commonwealth DPP. This follows as a matter of statutory construction. The references in the State Act to the "court" and "Full Court" must be read as limited to such bodies exercising State jurisdiction. The reference in the State Act to the "Director of Public Prosecutions"[124] would likewise be interpreted to refer only to the State office holder of that name. However the problem lies deeper. Without consent by federal law, State lawmakers enjoy no power to regulate federal concerns or the conduct of federal office holders.

101 It was to solve such problems that the JA provided, in a number of sections, for the investment of federal jurisdiction in State courts[125] and the application of State laws to the exercise of such jurisdiction[126]. Necessarily, such

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122 *Le Mesurier v Connor* (1929) 42 CLR 481 at 496, 498; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554-555; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37; *Russell v Russell* (1976) 134 CLR 495; cf *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142-1145; *Lorenzo v Carey* (1921) 29 CLR 243 at 251-253; *Solomons v District Court of New South Wales* (2002) 76 ALJR 1601 at 1615 [71]; 192 ALR 217 at 235-236.

123 See *Cheatle v The Queen* (1993) 177 CLR 541; *Brownlee v The Queen* (2001) 207 CLR 278.

124 State Act, s 352(1)(a), (ab), (b).

125 JA, ss 39, 68.

126 JA, ss 68(1), 79, 80, 80A.

provisions, expressed in general terms, present controversies at the margins concerning whether, in the particular case, a State court has "like jurisdiction" with respect to persons charged with federal offences[127]. Similarly, questions can arise as to whether State laws are applicable to the particular case. Because the application of such provisions involves a measure of adaptation proceeding through reasoning by analogy[128], it is inevitable that, in particular cases, different minds will reach different conclusions. The duty of this Court is not simply to solve each such problem as it arises. It is to do so according to clear and consistent principles.

102 *Two questions*: There are two questions that need to be answered. The first (which was determinative for the Full Court) is whether the JA[129] invested the Full Court with federal jurisdiction to require Anderson DCJ, pursuant to the State Act so applied, to reserve a relevant question[130] and thereafter to consider and determine that question[131].

103 Secondly, assuming that question is answered favourably to the Commonwealth DPP, a further question is raised by the notice of contention filed by the respondent, Mr Gee. This concerns whether the Commonwealth DPP had any such right of "appeal" under the DPP Act enumerating his powers, when that law is read together with the State Act and the JA.

104 *The issues*: The arguments addressed to these two questions were fleshed out to present five issues for the decision of this Court.

- *The appeal issue*: Whether by force of s 68(2), read with s 2, of the JA, the State Act was engaged so that it applied to State courts exercising federal jurisdiction.

- *The stated case issue*: Whether, having regard to the provisions in Pt X Div 3 of the JA, the subject matter of "appeal" by reservation of questions in a stated case had been expressly covered by the JA, so as to make it clear that the general provisions of that Act did not confer on State courts exercising federal jurisdiction the jurisdiction to reserve and determine questions in accordance with the State Act.

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127 JA, s 68(2).

128 *Williams [No 2]* (1934) 50 CLR 551 at 561 per Dixon J.

129 Either by virtue of s 68(2) or s 39(2) of the JA.

130 State Act, s 350(a1) and (2).

131 State Act, s 351A(1).

- *The trial issue*: Whether, having regard to s 80 of the Constitution, whereby the "trial" on indictment of an offence against federal law must be by jury, the application to such a trial of provisions of the State Act allowing for interlocutory appeals was forbidden.

- *The advisory opinion issue*: Whether the exercise of the Full Court's power to determine the reserved questions under the State Act amounted to the provision of an advisory opinion, forbidden to that Court when exercising federal jurisdiction.

- *The Cth DPP power issue*: Whether, having regard to the federal legislation conferring his powers, the Commonwealth DPP had the authority to invoke the jurisdiction conferred on the Full Court under the State Act.

The case stated was an appeal within federal law

105 *The respondents' arguments*: The respondents' first argument was that the JA was not engaged in their case to confer jurisdiction on the Full Court either to require the reservation of questions or to hear and determine such questions under the State Act. They contested the proposition that the general language of s 39(2) of the JA picked up such an exceptional State procedure. They also submitted that the particular language of s 68(2) of the JA, in respect of criminal jurisdiction, was only engaged to confer a "like jurisdiction" where federal jurisdiction was being exercised.

106 Primarily, the respondents' submission on this point involved arguments of statutory construction. They submitted that the provisions of the State Act governing the reservation of questions for the Full Court, and the determination of such questions by that court, did not constitute "laws of the State … with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith" within s 68(2) of the JA. The respondents argued that the word "appeals", where used in that sub-section, did not extend to the kind of procedure permitted by the State Act. Even if it did, such procedures did not fall within the adjectival clause in their case. This was because the respondents had not been "convicted" nor had their "trial" commenced. As a matter of construction, therefore, the proceedings before the Full Court did not "arise out of" a trial nor "out of any proceedings connected" with it.

107 In support of this argument, the respondents submitted that the word "appeal" would not ordinarily be broad enough to include the special procedure of reservation of questions to a Full Court. They argued that the history of the JA, and of the introduction of the reference to "appeals" confirmed this approach. At the time the JA was originally enacted in 1903, there was no right anywhere

in Australia to an "appeal" against conviction or sentence in a criminal matter, using that word in the modern sense. The notion of an appeal in such cases was only adopted when the States of Australia copied the *Criminal Appeal Act* 1907 (UK)[132]. Accordingly, when s 68 was first enacted, it did not contemplate "appeals" as such. Its application to State appellate procedures would not therefore have been intended.

108 The introduction into s 68 of the reference to "appeals" followed the decision in *Seaegg*[133]. The respondents argued that the added words were only intended to solve the problem identified in that case. They were restricted to picking up "appeals" after the conclusion of a trial or the conviction of the accused. They were not intended to pick up interlocutory appeals that would fragment the conduct of "trials" of persons accused of federal offences. Such fragmentation could be used to oppress the accused. It was alien to the ordinary notion of an "appeal".

109 The respondents pointed out that the statutory procedure for the reservation and determination of questions by the Full Court under the State Act, in respect of the determination of questions before the jury were empanelled, was unique to South Australia. They invoked the reasons of Barwick CJ dissenting in *Peel v The Queen*[134], in a passage referred to with apparent approval in the joint reasons in *Byrnes v The Queen*[135]. In *Peel*, Barwick CJ had taken a strict view of the words in s 68(2) of the JA. He concluded that "neither an appeal against acquittal nor an appeal against sentence is an appeal arising out of any proceedings connected with the trial: nor is an appeal against sentence an appeal arising out of any proceedings connected with the conviction". The strictness of Barwick CJ's view was based, in part, upon his understanding of the language of s 68(2). But it was also based on the mischief that his Honour saw to the uniform treatment of persons accused of federal offences, regardless of where the trial took place in Australia. Barwick CJ instanced the then unique provisions of Tasmanian law permitting prosecution appeals against certain acquittals[136]. He suggested that this provided an argument against the adoption of a broad view of the language of s 68(2). Such an interpretation would lead to the introduction into federal jurisdiction, through an indirect means, of radical departures from normal criminal procedure.

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132 *Criminal Appeals Act* 1924 (SA); cf *Criminal Appeal Act* 1912 (NSW), *Criminal Appeal Act* 1914 (Vic).

133 (1932) 48 CLR 251.

134 (1971) 125 CLR 447 at 454.

135 (1999) 199 CLR 1 at 26 [51] per Gaudron, McHugh, Gummow and Callinan JJ.

136 *Peel* (1971) 125 CLR 447 at 454. See also the State Act, s 352(1)(ab).

110 The respondents contested the proposition that the broad definition of "appeal", appearing in s 2 of the JA, altered these conclusions. That definition was subject to a "contrary intention". Moreover, the use of the definite article ("the") indicated that the type of "appeal" for which provision was made in the case of a "review" or process calling into question a judicial disposition was one addressed to *the* entire "proceedings, decision or jurisdiction". It was not one confined to a mere evidentiary ruling, such as was involved in the present case. On this basis, the respondents submitted that "appeal" and "review" for the purposes of s 68(2) should be reserved to their ordinary meaning and not stretched to include the exceptional provisions allowed under the State Act.

111 As to the adjectival clause qualifying "appeals" in s 68(2), the respondents finally argued that this contextual consideration reinforced the conclusion that the only "appeals" spoken of there were those that followed the conclusion of the trial, the conviction of the accused and proceedings *at that stage* connected with the trial or conviction. In support of this argument, they pointed to the place in the sub-section of the reference to "appeal" following the earlier mention of "summary conviction", "commitment for trial" and "trial and conviction on indictment". Given the temporal sequence reflected in s 68(2), the respondents submitted that the "appeals" provided for were those that history endorsed: appeals after the conclusion of the trial, not another process initiated whilst the trial was underway, still less before it had commenced.

112 *Section 68(2) was engaged*: Whilst I accept that the foregoing arguments provide a possible construction of s 68(2) of the JA I do not believe that it is the correct or preferable one.

113 Although the word "appeals" might not, in isolation, include the type of procedure provided by the State Act, it is a mistake to interpret words in isolation or as if locked in a statutory time capsule. It is necessary to look to the purpose for which s 68(2) was included in the JA. This reflects a recognition that federal law will often be lacking in detail to cover situations arising in the exercise of federal jurisdiction in State courts. Accordingly, it was necessary to provide the means of borrowing State laws, whether about the jurisdiction of courts or the application of State laws so as to fill gaps in procedural law. There is nothing in the character of the procedure for reservation of questions to the Full Court that puts it outside the notion of "appeals", as that word is used in the JA. Elsewhere in that Act, a somewhat analogous procedure appearing in Div 3 of Pt X under the heading "Appeals" suggests the contrary. Given the context, the extended definition of "appeal" and the fact that it includes proceedings of "review", it is impossible to limit "appeals" in the JA so as to exclude the kind of procedure for which the State Act provides.

114 The attempt to construe the reference to "appeals" in s 68(2) of the JA by the way in which that word would have been understood historically, whether in

1903 or 1932, is misconceived. It is ordinarily a mistake to construe statutory language by reference only to the contemporary understanding of words at the time of the statute's original enactment[137]. Especially in the case of an act such as the JA, which is intended to have an ambulatory and remedial function, that approach would defeat the attainment of those purposes. The JA is intended to apply from time to time in relation to the body of common law and statute that is constantly changing. It would constrict, and even stultify, the operation of the JA, if the "like jurisdiction" with respect to federal criminal proceedings, for which sub-s 68(2) provides, were confined to the "jurisdiction" of courts existing in 1903 or 1932. That construction would frustrate the purpose of the Act and thus must be rejected[138].

115 This conclusion does not require that every innovation of State law be picked up, and applied, in the exercise of federal jurisdiction in State courts. The jurisdiction invoked must still fit within the terms of the JA and the requirements stated or implied in the Constitution. The application is limited to investing State courts with "like jurisdiction" in federal criminal proceedings. This necessitates the drawing of lines about which opinions will sometimes divide. However, in performing this function it is important to keep in mind the purpose for which the provisions in the JA were enacted. Relevantly, the legislative policy was to put the exercise of federal jurisdiction generally on the same footing as the exercise of State jurisdiction and to avoid the creation of two wholly independent systems of criminal justice[139]. Increasingly in recent years, such considerations have led to a broad construction of the enabling provisions of the JA so as to make available to the parties in federal jurisdiction new facilities enacted by State law[140].

116 It is beside the point to argue that the consequence of such a broad interpretation is the introduction of disparity in federal proceedings in different jurisdictions of Australia, as permitted by State (or Territory) law. This is within

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137 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 at 35 per Lord Slynn of Hadley, 45-46 per Lord Nicholls of Birkenhead; *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 at 142-144 [72]-[77]; cf *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 322-323.

138 cf *Peel* (1971) 125 CLR 447 at 453 per Barwick CJ; cf *Solomons v District Court of New South Wales* (2002) 76 ALJR 1601 at 1620 [104]; 192 ALR 217 at 243-244.

139 *Williams [No 2]* (1934) 50 CLR 551 at 560.

140 *Peel* (1971) 125 CLR 447 at 456, 468; cf *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345.

the contemplation of the JA provisions. To the extent that it reduces a strictly uniform treatment of persons accused of federal offences, such an outcome is, in part, inherent in the constitutional provision for the vesting of federal jurisdiction in State courts and, in part, in the scheme for a large measure of assimilation of jurisdictional and procedural law enacted by the JA[141]. One can criticise such disuniformity in a particular case. However, it is embedded in Australian law and practice, except to the extent that the Constitution, the texts of specific federal legislation and judicial decisions otherwise provide.

117 As to the argument that the "trial" of the respondents had not commenced when the "appeal" was taken to the Full Court under the State Act, such a view cannot be reconciled with the decision of this Court in *Director of Public Prosecutions (SA) v B*[142]. In that case, the joint reasons of the majority, speaking of the statutory predecessor to the provisions in the State Act in question here, observed that the trial began after the accused was arraigned before the trial judge[143]. The same approach was adopted by McHugh J[144]. I took an even broader view, although in dissent as to the result[145].

118 In the present case, the respondents had been arraigned before Anderson DCJ. In that sense, the process of their "trial" had commenced. Upon any view, the determination of the preliminary question as to the admission of evidence by Anderson DCJ was important. Quite possibly it was critical for such "trial". I see no reason for reading the jurisdictional provisions of the JA narrowly so as to treat the procedures in the State Act, amounting to an "appeal", as unavailable because they do not "arise out of any such trial". If there were any doubt about this, the inclusion of the phrase "or out of any proceedings connected therewith" is sufficient to include the reservation of questions for the Full Court arising out of the preliminary determination of the trial judge.

119 Through an oversight, the respondents were not re-arraigned before the proceedings leading to the trial judge's actual decision on the exclusion of

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141 *Williams [No 2]* (1934) 50 CLR 551 at 558.

142 (1998) 194 CLR 566. In this analysis I have assumed that it is necessary to establish that the "trial" of the respondents had commenced in order to engage s 68(2) of the JA. This proposition was contested. It is unnecessary to resolve that issue in this appeal.

143 (1998) 194 CLR 566 at 578 [17].

144 (1998) 194 CLR 566 at 582 [32] citing *Attorney-General's Reference No 1 of 1988* (1988) 49 SASR 1 at 5-6.

145 (1998) 194 CLR 566 at 589-593 [49].

evidence. I agree with Doyle CJ that such omission was immaterial[146]. Having come to this conclusion in relation to the language of s 68(2) of the JA, and a foundation having been shown in that sub-section for the jurisdiction of the Full Court, I regard it as unnecessary to explore any additional or alternative source of jurisdiction in s 39(2) of that Act. This is not a case in which to explore the precise relationship between ss 39 and 68 of the JA[147].

Federal case stated provisions did not exclude State provisions

120 *The respondents' arguments*: The respondents defended the conclusion of the majority of the second Full Court that whatever "appeals" might mean in the context of s 68(2), the word could not include procedures of the kind provided under the State Act because Pt X Div 3 of the JA expressly allows for the reservations of points of law, but in ways different from those included in the State Act.

121 In support of this argument, the respondents placed particular emphasis on the reasoning in *Seaegg*[148]. In a later case, *Adams v Cleeve*[149], Rich, Dixon and Evatt JJ explained *Seaegg* on the footing that there:

> "the Court took the view that secs 72-77 of the *Judiciary Act*, which contain a code of procedure for an appeal by way of case stated upon a point of law raised at the trial of an indictable offence, showed an intention inconsistent with an application of sec 39(2) which would give jurisdiction over Federal offences to State Courts of Criminal Appeal."

122 It was this Court's repeated description of ss 72-77 of the JA as a "code" for appeals by a case stated that, perhaps unsurprisingly, led the majority in the Full Court to the conclusion that a State law dealing with a similar (and to some extent overlapping) procedure could not co-exist with the federal provisions. The Federal Parliament having turned its attention to that procedure, and having enacted particular provisions in relation to it, the respondents submitted that it must be assumed that this excluded the importation of a State legislative variant by way of the general facultative provisions of the Act, particularly s 68(2).

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146 *Thaller and Gee* (2001) 79 SASR 295 at 299-300 [28] per Doyle CJ relying upon *R v Williams* [1978] QB 373.

147 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 607-608.

148 (1932) 48 CLR 251 at 256-257.

149 (1935) 53 CLR 185 at 191.

123 The respondents drew a distinction between what they saw to be the policy in ss 72-77 of the JA and that reflected in the provisions of the State Act for the reservation of questions for a Full Court. They submitted that the former constituted a self-contained procedure for reserving important questions, without interrupting the conduct of the "trial" of a person charged with a federal offence. Such interruptions create risks of delaying and fragmenting the trial process in a way contrary to the repeated instruction of this Court[150]. On the other hand, the State Act enlarged the ability of the prosecution to "appeal" against interlocutory decisions and evidentiary rulings. It was in this distinction that the respondents found the justification for the conclusion of Doyle CJ in the Full Court that federal law had already made provision for reserving questions for a Full Court so that "[t]here was simply no need or occasion for the Commonwealth Parliament to adopt State laws making provision for an appeal by way of case stated"[151].

124 As to the suggestion of the dissenting judge, Bleby J, that the JA provisions for the reservation of questions to a Full Court (including of this Court) constituted a "minimum" catalogue of appeal rights, the respondents urged that this was a view incompatible with the history of those provisions and with the restriction in s 77 of the JA of appeals to this Court from a judgment or sentence, save for the case where special leave was granted.

125 The respondents pointed to the overlap between the provisions of the State Act[152] and provisions of the JA[153]. In some cases the overlap is clear. In others it is implicit[154]. The fact that the State Act draws a distinction between procedures by way of "appeal" and procedures in the form of a case stated was suggested as another argument against the importation into federal jurisdiction of a procedure that was already expressly enacted to apply to that jurisdiction, uniformly throughout the country. In the event that there was doubt about the matter, and ambiguity in the provisions of the JA, this Court was urged to resolve the doubt in a way that confined prosecutorial powers, absent a clear indication to the contrary by the Parliament[155].

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150 eg *R v Elliott* (1996) 185 CLR 250 at 256-257.

151 *Thaller and Gee* (2001) 79 SASR 295 at 315 [81].

152 eg State Act, s 351A(2).

153 eg JA, s 75.

154 eg JA, s 72, State Act, s 350.

155 *Peel* (1971) 125 CLR 447 at 452; *Everett v The Queen* (1994) 181 CLR 295 at 299; *Byrnes* (1999) 199 CLR 1 at 25-26 [50], [52]; *Bond v The Queen* (2000) 201 CLR 213 at 222-223 [27]; cf *Pearce v The Queen* (1998) 194 CLR 610 at 636 [89]-[90].

126 *State review was picked-up*: The conclusion of the majority in the Full Court was understandable, given the reasoning of this Court in *Seaegg* and subsequent pronouncements. This Court has insisted that it is its own function to modify, or re-express, a clearly stated legal rule elaborated by its earlier decisions[156]. The statement in *Seaegg*[157] that the provisions of ss 72-77 contained "a code of procedure for an appeal by way of case stated upon a point of law raised at the trial", and the decision to which that conclusion led in that case, presented proper reasons for the second Full Court to hesitate before attempting to confine what was said there.

127 However, this Court is entitled, and required, to reconsider the matter in the light of the amendments to the JA that followed *Seaegg*, the growing experience with the JA since 1932 and the adoption of State law and the jurisdiction of State and Territory courts in the conduct of cases in federal jurisdiction. Given these changes, it can now be said that the reference to ss 72-77 as containing a "code of procedure" was unnecessarily broad, at least viewed with today's eyes. It was a description inessential to the conclusion expressed in *Seaegg*. It is difficult to reconcile the notion that ss 72-77 of the JA constituted an exclusive "code" of appellate procedure with the later inclusion in s 68 of reference to "appeals" and the subsequent decisions of this Court on the application to such appeals of State (or Territory) jurisdiction and laws.

128 Each case where such issues arise requires a determination whether a particular appellate procedure of a State is compatible with the exercise of federal jurisdiction. The answer to that question obliges the decision-maker to take into account any express or implied requirements of the Constitution and any express provisions of federal law that oust the operation of "surrogate" State laws dealing with jurisdiction of courts, procedures and the like.

129 Where, as in the present case, there is textual overlap between a provision of federal law dealing with the reservation of questions for a Full Court and the provisions of a State law affording the same, or similar, facilities, an issue of the potential inconsistency of laws is presented. It is not inconsistency of the kind which concerns s 109 of the Constitution. In this case, there is no purported clash between the State Act and the provisions of ss 72-77 of the JA. Here, the suggested conflict is between two federal laws, being ss 72-77 and the provisions of the State Act allegedly given federal operation by other provisions of the JA, most notably s 68(2). Because this is not a case involving s 109 of the

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156 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17]; cf at 429-431 [69]-[74]. But see also *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-270.

157 (1932) 48 CLR 251 at 256.

Constitution, it is inappropriate to import into the resolution of this appeal the jurisprudence developed in connection with that provision dealing with cases of suggested textual collision where a demonstrated "intention to cover the subject matter" or field by the federal law works to exclude any space for a law of a State to govern the same conduct or issue[158]. Nevertheless, the two tasks are not wholly dissimilar.

130 The resolution of the question posed by the suggested operation of the successive provisions of the JA obliges the decision-maker to perform a function of statutory construction[159] and to do so looking at the substance, not just the verbal form, of the competing provisions[160]. The object is to allow the sections of the JA to work in harmony and in a way that advances their beneficial purpose to make effective the constitutional provision for the vesting of federal jurisdiction in State courts. This was one of the most inventive ideas of the Constitution. It should not be diminished without convincing reasons.

131 Approached in this way, it can be said that this Court looks today on a provision such as s 68(2) of the JA in a less restrictive manner than it was inclined to do 70 years ago. In part, this is because of the recognition of the fact that, so far as jurisdiction is concerned, Australian courts can be trusted to exercise it fairly and for the better administration of justice[161]. In part, it is because the experience of applying State laws in federal jurisdiction has proved so beneficial. In part, it is because of the recognition of a need to facilitate and take advantage of innovations of jurisdiction and law in federal jurisdiction, as they are introduced in the laws of particular States.

132 This last consideration is specially relevant to the present case. A notable feature of criminal procedures today, when contrasted to those of the time when *Seaegg* was decided, is the significant increase in the complexity and length of criminal trials. This is an important reason behind the innovations in the State

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158 *Ex parte McLean* (1930) 43 CLR 472 at 483. See *Austral Pacific Group Ltd (In Liq) v Airservices Australia* (2000) 203 CLR 136 at 144 [17].

159 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 61; *Byrnes* (1999) 199 CLR 1 at 25-26 [49]-[52].

160 cf *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 612 [137], 613 [141] per McHugh J in the context of s 79 of the JA.

161 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 191, 202-203, 205; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421; *CDJ v VAJ* (1998) 197 CLR 172 at 201 [110]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423 [110].

Act permitting questions relating to the admissibility of evidence or matters of law affecting the conduct of the trial to be decided before the jury are empanelled[162]. Such procedures were unheard of until recent times. Yet they are a useful development of criminal jurisdiction. Properly deployed, they can save substantial delays, costs to parties and the public and great inconvenience for citizens serving as jurors. Applied in criminal proceedings in federal jurisdiction, they advance, and protect, the availability of jury trial envisaged by s 80 of the Constitution in relation to trial on indictment of persons accused of federal offences[163].

133 The respondents did not contest these matters. On the contrary, they were themselves the beneficiaries of such a preliminary judicial determination. However, they were willing to take its advantages but not prepared to accept the procedural facility for an interlocutory appeal by way of reservation of questions on application by the prosecution.

134 If one surveys the decisions of this Court in recent years concerned with the use of the JA to pick up State and Territory jurisdiction and law for application to proceedings, civil and criminal, in federal jurisdiction in State and Territory courts, a trend can be discerned against the narrow reading of the Act. Thus, such provisions have been held to permit appeals by the federal Attorney-General against sentence[164]; to authorise the amendment of an indictment in accordance with State law[165]; to permit the Commonwealth DPP to appeal against sentence[166]; in certain circumstances to pick up limitation acts (or other statutory provisions) in terms applicable only to State courts[167] and to sustain the application of a Territory law to proceedings in the Family Court[168].

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162 State Act, s 285A.

163 *Brownlee v The Queen* (2001) 207 CLR 278 at 303 [69], 323 [128]-[129].

164 *Peel* (1971) 125 CLR 447.

165 *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345.

166 *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119.

167 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 140; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 591 [68], 593 [72]; cf *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55.

168 *Northern Territory v GPAO* (1999) 196 CLR 553 at 589 [84]-[85]; cf at 649 [249]-[250].

135 The growth and variety of federal jurisdiction has also led to an increased recognition of the utility of the provisions for the adaptation of State laws to that jurisdiction. These are reasons why the somewhat narrower approach, expressed in decisions such as *Seaegg* needs to be reconsidered in contemporary circumstances. This does not mean that those decisions were wrong when they were made; simply that some of the language explaining them may not be applicable to the resolution of current problems[169].

136 Approached in this way, I see no difficulty in the hearing and determination of questions reserved affecting the conduct of a trial, determined before the jury are empanelled, in attracting the facility in the State Act for the reservation and determination of such questions by the Full Court of the Supreme Court of South Australia exercising federal jurisdiction.

137 Within the four corners of the JA there is otherwise no textual conflict between the exercise of the jurisdiction provided by the State Act pursuant to s 68(2) of the JA and the exercise of the jurisdiction envisaged by ss 72-77 of the JA. Nor do those latter sections evidence a purpose to exclude from the exercise of federal jurisdiction the provisions of the State Act invoked by the Commonwealth DPP. It is not surprising that the provisions in Pt X Div 3 of the JA are silent about challenges to preliminary rulings in criminal trials. There were no provisions for such rulings in any Australian jurisdiction until quite recently. They have been enacted in response to changes in the features of criminal proceedings.

138 The respondents' complaint about bifurcation and delay in criminal proceedings is specifically addressed in the State Act. The Full Court is enjoined not to reserve a question for consideration and determination if doing so "would unduly delay the trial or sentencing of the defendant"[170]. Nor is the facility of reservation of questions for, or appeal to, a Full Court of this Court, provided in Pt X Div 3 of the JA, in any way diminished. Those facilities remain to be used if the trial proceeds before a jury. In the event of textual clash between the State Act and the provisions in Pt X Div 3 of the JA, the latter will prevail and oust the importation of the former into federal jurisdiction by means of the general provisions of the JA.

139 Looked at with today's eyes, the provisions for appeal by way of case stated in the JA may appear to be somewhat dated - reflections of provisions for criminal appeals as they existed a century ago. But, as Bleby J observed, they

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169 cf *Victoria v The Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 396 per Windeyer J.

170 State Act, s 350(3).

remain a minimum guarantee of appellate supervision of federal criminal trials. They do not purport to oust comparable later and more innovative State provisions affording jurisdiction to courts and introducing laws and procedures more in keeping with modern notions of the exercise of criminal jurisdiction. It is a common experience of federation that jurisdictional, procedural and substantive innovation in one part of the country sometimes results in similar developments elsewhere. Provisions such as s 68(2) facilitate this beneficial feature of the Constitution until the Federal Parliament decides upon any comprehensive reform of its own criminal appeal provisions.

Interlocutory appeal was compatible with constitutional trial

140 In an attempt to overcome this conclusion, the respondents submitted that s 68(2) of the JA ought to be read differently because of the terms of s 80 of the Constitution.

141 As I understood the respondents' argument on this issue it was that the reference to a "trial" in s 68(2) of the JA, would, in relation to the appeals there mentioned, only be to the kind of "trial" envisaged by s 80, namely a trial by jury where that constitutional provision applies.

142 The difficulty with this submission is obvious. The respondents wish to take advantage of the preliminary determination of the admissibility of evidence made by Anderson DCJ in this case although, on their theory of s 80 of the Constitution it was made outside the "trial" because their jury had not at that time been empanelled. They wish to resist any facility for an interlocutory "appeal" until after the conclusion of such "trial". Nothing in s 80 of the Constitution requires such a restrictive interpretation. The section does not forbid the determination of the admissibility of evidence, or any other question of law, affecting the conduct of the trial before empanelling the jury. The section should be read in a way that permits sensible innovations designed, as the State Act is, to ensure the efficient conduct of jury trials by the resolution of suitable issues before the jury are empanelled[171].

The case stated did not involve an advisory opinion

143 *The respondents' arguments*: The respondents submitted that s 68(2) of the JA could not validly provide for the application of the State Act procedures for the reservation of questions before the Full Court because, as it was put, s 350 of the State Act permitted the consideration and determination by the Full Court,

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171 *Brownlee v The Queen* (2001) 207 CLR 278 at 286 [10]-[12], 303-304 [71]-[73], 330-331 [148], 332 [154], 341-343 [184]-[190].

when exercising federal jurisdiction, of purely hypothetical questions[172]. The respondents complained about some of the questions reserved in their case. They suggested that the State provision, where purporting to authorise the giving of an appellate opinion on how a judicial discretion should be decided, was incompatible with the exercise of the judicial power of the Commonwealth.

144 In support of this submission, the respondents invoked what was said in the joint opinion of this Court in *Director of Public Prosecutions (SA) v B*[173]. Speaking there of the statutory predecessor to the provisions of the State Act in question in this case, three members of the Court said[174]:

> "The difficulties in the case stated procedure, whether the case is stated in a criminal or civil matter or, if in a criminal matter, whether stated at the instance of the prosecution or defence, are well known. At least some of those difficulties stem from a failure to recognise that the jurisdiction is not conferred to permit courts to offer general advisory opinions on hypothetical questions. The questions reserved in this matter appear to invite such an opinion."

145 The foregoing remarks were addressed to the questions reserved in the stated case then under consideration. These had peculiar and unique features resulting in an acquittal of the accused which the Crown had contested[175]. By reason of the conclusion that the questions reserved did not arise at the "trial" of the accused, a majority of this Court were of the opinion that there was no power to reserve them[176]. Accordingly, it was held that this Court "should not, and indeed cannot, accept the invitation … to express its opinion upon the issues"[177]. I expressed a different view about the "practical and concrete problems" to which the case stated had been addressed[178].

146 *The determination is not hypothetical*: In the present proceedings, the case stated is far from hypothetical. It is not divorced from the conduct of the

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172 State Act, s 350(a1)(b) was instanced.

173 (1998) 194 CLR 566 at 576 [12], 580 [24]-[25].

174 (1998) 194 CLR 566 at 576 [12] (footnotes omitted).

175 (1998) 194 CLR 566 at 573-574 [5].

176 (1998) 194 CLR 566 at 580 [24].

177 (1998) 194 CLR 566 at 580 [25].

178 (1998) 194 CLR 566 at 608 [69].

respondents' trial. Indeed, it bears close analogies to the provisions considered in *Mellifont v Attorney-General (Q)*[179]. There, the trial judge had ruled that the evidence that the accused had given to a Royal Commission was not material to the inquiries of that Commission. Before the judge could direct the jury to return a verdict of not guilty to the charge of perjury contained in the indictment, the prosecutor entered a *nolle prosequi* and the accused was discharged. It was in those circumstances that the Attorney-General referred questions to the Court of Criminal Appeal. These included whether the trial judge's test of materiality had been correct[180].

147 In *Mellifont*, this Court rejected the argument that the provisions in the *Criminal Code* (Q)[181], permitting the reference by the Attorney-General to the Court of Criminal Appeal of any point of law that had arisen at the trial, was outside the constitutional provision authorising an appeal to this Court[182]. The Court dismissed the argument that the Court of Criminal Appeal was being asked to state an advisory opinion that did not affect the rights or liabilities of any person[183]. It was held that this Court would not enter upon abstract questions of law devoid of relevance to the rights or duties of a body or person and would not make a declaration of law divorced or disassociated from any attempt to administer the law[184]. However, the Court concluded that the proceedings in that case were not hypothetical; nor divorced from the ordinary administration of the law[185].

148 Here, the determination by the Full Court is likewise far from theoretical or hypothetical. It arises in the context of pending and as yet incomplete proceedings against the respondents upon criminal charges. Depending upon the answers which the Full Court might give to the questions reserved, the trial judge

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179 (1991) 173 CLR 289 ("*Mellifont*").

180 See *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 575 [9].

181 s 669A: see *Mellifont* (1991) 173 CLR 289 at 297.

182 Constitution, s 73 grants this Court jurisdiction "to hear and determine appeals from all judgments, decrees, orders, and sentences" of the enumerated courts.

183 *Mellifont* (1991) 173 CLR 289 at 305-306; cf *Saffron v The Queen* (1953) 88 CLR 523 at 527-528.

184 *Mellifont* (1991) 173 CLR 289 at 303 with reference to *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266-267. See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-358 [45]-[51]; cf at 370-371 [87]-[88].

185 *Mellifont* (1991) 173 CLR 289 at 305.

could be obliged to reconsider his earlier evidentiary ruling, including in the light of any further evidence that may be adduced at the trial by the prosecutor. The reservation and determination of questions provided by the State Act is specifically addressed to the conduct of the trial in which those questions have arisen. The arguments of the respondents on this issue are without merit and should be rejected.

The Commonwealth DPP had power to appeal

149 *The respondents' arguments*: The respondents finally submitted that the Commonwealth DPP lacked the power under his constituting statute to seek the reservation of questions by the Full Court or to participate in any way in the steps ancillary to the consideration and determination by the Full Court of questions so reserved.

150 By s 9(7) of the DPP Act, the Commonwealth DPP is afforded such rights of appeal (as defined) as are exercisable by the Attorney-General. By its reference to "if any", the section makes it clear that it does not assume that any rights of "appeal" exist. The respondents argued that, whatever the meaning of "appeals" in s 68(2) JA, affording *jurisdiction* to a State court exercising federal jurisdiction, it remained for the Commonwealth DPP to demonstrate that he had relevant *powers* to engage an "appeal" in their case. This, it was said, was a question controlled by the DPP Act where the "right of appeal" was defined. In that Act, "right of appeal" is expressed to include a right[186]:

> "(a) to apply for a review or rehearing; or
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> (b) to institute a proceeding in the nature of an appeal or of an application for a review or rehearing."

151 The respondents argued that the application by the DPP to the Full Court, in purported reliance upon s 350 of the State Act as applied in federal jurisdiction by the JA, was not a "right of appeal" as envisaged by the DPP Act. This was because it related to a preliminary procedure for, as it was put, seeking permission of the Full Court to have a question reserved by way of a case stated by the trial judge. It did not become an "appeal" for application to the exercise of federal jurisdiction by means of the JA, including with the aid of the extended definition of "appeal" in s 2 of that Act. A case stated on an evidentiary ruling under the State Act was neither a "rehearing" nor a "review" for the purposes of

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186 DPP Act, s 9(8A). The provisions of s 9(8A) were repealed by the *Jurisdiction of Courts Legislation Amendment Act* 2000 (Cth) by which a new s 9(8A) was substituted as well as a definition of "appeal" inserted in s 3 of the Act.

the DPP Act, the latter words being concerned with a "rehearing" or "review" after the completion of a trial.

152 *The DPP enjoyed the power*: Clearly, there is a distinction between the issue of the powers of the DPP and the jurisdiction of the courts. It was a distinction explored in *Byrnes*[187]. The respondents sought, in effect, to repeat the success of Mr Byrnes. Earlier cases have involved like questions[188]. In order to invoke a given jurisdiction, imported by analogy into the exercise by a State court of federal jurisdiction, a federal office holder must be able to point to its own statutory authority affording the power to seek to exercise the jurisdiction invoked[189].

153 It is important to notice that, so far as the State Act is concerned, whilst it expressly provides certain rights of appeal in criminal cases to the Director of Public Prosecutions (being the State DPP)[190], in respect of the reservation of questions for the consideration and determination of the Full Court, the stated powers and duties are generally reposed in the courts themselves. The exception relates to the duty to reserve for consideration and determination by the Full Court a question arising in the course of a trial that results in an acquittal where the (State) Attorney-General or the (State) DPP apply to the court of trial to have such question reserved for the Full Court[191]. That provision was not engaged in the present case, the trial of the respondents not having resulted to this time in their acquittal. Accordingly, there is no express mention in the relevant provisions of the State Act of the person who may enliven the jurisdiction of the State court to reserve a "relevant question" for consideration and determination by the Full Court.

154 Because the State Act, in this respect, is not, in terms, limited to the exercise of the specified jurisdiction on the initiative of an identified State office-holder, it is a comparatively simple task to pick up the relevant provisions affording jurisdiction to the Full Court and to apply them in the context of the exercise of federal jurisdiction. At least, there is no relevant limitation (such as

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187 (1999) 199 CLR 1 at 28 [58]-[59], 36 [86], 38 [91].

188 eg *Williams [No 2]* (1934) 50 CLR 551 at 563; *Peel* (1971) 125 CLR 447 at 460, 462-464; *Rohde* (1986) 161 CLR 119 at 125-126, 137-139.

189 *Byrnes* (1999) 199 CLR 1 at 25 [48], 35-36 [85].

190 State Act, s 352(1)(a), (ab), (b).

191 State Act, s 350(2)(b).

has occurred in earlier cases) requiring the substitution of a federal office-holder for a State office-holder named in the State law[192].

155 Assuming, however, that it is implicit in the provisions of the State Act (or explicit in the State court rules) that the Full Court will be moved (as it was) by a prosecutor or a defendant to reserve for its consideration and determination a "relevant question" prior to the empanelling of the jury and that, in the case of a federal prosecutor, he or she must be in a position to point to a relevant source of the power to invoke such jurisdiction of the Full Court, I see no difficulty in that respect. The enacted powers of the Commonwealth DPP extend to the exercise of "rights of appeal". In the DPP Act, they are very broadly defined. They include the right to apply for a "review" and to institute proceedings "in the nature of an appeal". The application which the Commonwealth DPP made to the Full Court to enliven that Court's own powers to reserve a "relevant question" and thereafter to advocate the determination that should be made falls within the "right of appeal" conferred by the DPP Act as it stood when the jurisdiction of the Full Court was invoked.

Conclusion and orders

156 Contrary to its conclusion, the Full Court therefore had jurisdiction to require the reservation of any "relevant question" for its consideration and determination. It also had the power to determine the questions reserved and to make consequential orders and directions as contemplated by s 351A of the State Act. The JA, in accordance with the Constitution, invested the Full Court with "the like jurisdiction" with respect to persons charged with federal offences, as that Court would have under the State Act if the accused were charged with State offences. Moreover, the Commonwealth DPP had the power necessary to invoke the jurisdiction of the Full Court and to advocate before it the consideration and determination of the questions reserved.

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192 *Peel* (1971) 125 CLR 447 at 452, 455, 459, 463, 468-469; *Rohde* (1986) 161 CLR 119 at 125, 127, 136.

157 Although the Commonwealth DPP asked for costs to be ordered against the respondents, no order for costs was made by the Full Court. As the appeal involves the exercise of criminal jurisdiction and raises issues of general importance for the powers of the Commonwealth DPP, I would make no order in respect of the costs of the appeal to this Court.

158 The orders proposed by Gleeson CJ should be made.

159 CALLINAN J. This appeal is concerned with the relationship between the *Judiciary Act* 1903 (Cth) ("the Federal Act") and the *Criminal Law Consolidation Act* 1935 (SA) ("the State Act"). Already the case has a long procedural history.

160 The respondents were jointly charged on information in South Australia by the Commonwealth Director of Public Prosecutions on 19 May 1998 with nine offences of defrauding the Commonwealth contrary to ss 29D and 5 of the *Crimes Act* 1914 (Cth), by deliberately understating their incomes for income tax purposes.

161 They were first arraigned, and pleaded not guilty in the District Court before Anderson DCJ on 19 May 1998. They have not subsequently been arraigned, and no jury has been empanelled.

162 The respondents in the meantime made a preliminary application to exclude evidence on the basis that it was unlawfully seized. This application was set down for hearing in the District Court before Anderson DCJ. It was authorized by the District Court Rules 1992 (SA) which allowed the making of an application relating to the admissibility of evidence "in the course of any criminal proceedings"[193]. It is convenient to note at this point s 285A of the State Act which provides as follows:

> "A court before which a person has been arraigned may, if it thinks fit, hear and determine any question relating to the admissibility of evidence, and any other question of law affecting the conduct of the trial, before the jury is empanelled."

163 His Honour, on 21 May 1999 ruled that he should decline to exercise his discretion to allow the challenged evidence to be used at trial. It was, he held, illegally obtained and "is, and remains, inadmissible". If, as is the current position, the ruling stands, the respondents will argue that they are entitled to be acquitted.

164 The Director of Public Prosecutions then applied to the Full Court of the Supreme Court of South Australia for an order directing that Anderson DCJ reserve questions for consideration by the Full Court.

165 On 15 and 29 June 1999 the Full Court (Olsson and Mullighan JJ, Nyland J dissenting) (the "first Full Court") heard the application of the Director of Public Prosecutions. No argument as to the jurisdiction of the Supreme Court to entertain the application was then advanced.

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193 Rule 9.01.

166 The judgment of the majority was that Anderson DCJ reserve questions on a case stated[194].

167 On 10 September 1999, counsel for the respondents invited the Full Court to reconvene for the purposes of considering: first, the power of the Director of Public Prosecutions to bring the application; and, secondly, the Court's jurisdiction to hear and determine it.

168 On 10 and 11 November 1999, the respondents made application orally to the first Full Court for an order that it quash its original decision on the ground that it was made without jurisdiction, or that it re-open the matter to hear argument upon a number of different grounds. That Full Court refused the application.

169 On 14 December 1999 Anderson DCJ stated a case for the consideration of the Full Court of the Supreme Court of South Australia in compliance with the order of the first Full Court of 2 September 1999.

170 The respondents then unsuccessfully sought special leave from this Court to appeal against the decision of the first Full Court not to set aside its original decision, and further sought to argue the issue of the jurisdiction of the Full Court of South Australia to entertain the application under s 350(2) of the State Act.

171 On 18 May 2000 the Full Court of the Supreme Court of South Australia, constituted by Doyle CJ, Duggan and Lander JJ ("the second Full Court") sitting to consider the case stated by Anderson DCJ amended the order of the first Full Court requiring Anderson DCJ to state a case.

172 On 29 May 2000 Anderson DCJ stated a case for the consideration of the Full Court of the Supreme Court of South Australia in compliance with the order of the second Full Court (the "amended case stated").

173 The questions reserved came before the second Full Court which was reconstituted as a Court of five Justices (Doyle CJ, Prior, Duggan, Lander and Bleby JJ), because the issue of the jurisdiction of the Court to entertain the questions reserved involved a reconsideration of the Court's previous decision in *Questions of Law Reserved on Acquittal (No 2 of 1993)*[195].

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194 *Gee and Thaller* (1999) 110 A Crim R 1.

195 (1993) 61 SASR 1.

174 The reconvened second Full Court by majority (Doyle CJ, Prior, Duggan and Lander JJ; Bleby J dissenting) held that the Court did not have jurisdiction to entertain the questions reserved[196]. It is against that decision that this appeal is brought. The majority held that the trial (in vested Federal jurisdiction) of the respondents had begun, but that the presence and effect of ss 72 to 77 of the Federal Act meant that the word "appeal" in s 68(2) of that Act could not embrace the reservation of questions of law under s 350(a1) of the State Act albeit that a Full Court proceeding under that section was exercising a jurisdiction of real substance.

The appeal to this Court

175 There are a number of matters to which regard should be had in determining this appeal. The first is the history of appeals procedures in this country and of the Federal Act.

176 The history of criminal appeals has been traced in *Seaegg v The King*[197]. In this country before 1912 more limited rights were enjoyed. A convicted person's rights were, generally speaking, confined to the right to make an application, which, if successful, would result in the reservation of, and eventually argument on, questions of law by procedures of the kind for which ss 72-76 of the Federal Act make provision.

177 Legislation for a general right of appeal was progressively enacted in the States of Australia between 1912[198] and 1924[199]. Provisions for appeals by way of case stated were however retained, and, in some cases, integrated procedurally with the general appeal provisions[200]. The Commonwealth did not enact general appeal provisions but amended s 68(2) of the Federal Act after the decision of this Court in *Seaegg* to confer jurisdiction in appeals upon State courts with respect to Commonwealth offences.

178 In *Seaegg*, this Court (Rich, Dixon, Evatt and McTiernan JJ) held that ss 39(2) and 68(2) of the Federal Act did not confer jurisdiction upon the Court of Criminal Appeal of a State to hear an appeal by a person convicted in a State

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196 *R v Thaller and Gee (Question of Law Reserved)* 2001 79 SASR 295.

197 (1932) 48 CLR 251.

198 *Criminal Appeal Act* 1912 (NSW).

199 *Criminal Appeals Act* 1924 (SA).

200 See *Criminal Appeal Act* 1912 (NSW), ss 5A, 5B and 5BA; *Criminal Appeal Act* 1924 (SA), s 17(4); *Criminal Code Act* 1924 (Tas), s 406.

court of an offence against a law of the Commonwealth sought to be brought under the appeal provisions of a State Act: the only right that such a person possessed, it was held, was that provided by s 72 of the Federal Act. In *Seaegg* the Court said[201]:

> "It is said that this provision operates to confer a Federal jurisdiction on the State Courts in relation to Federal offences coextensive with their State jurisdiction in relation to State offences and, thus, that, as the Supreme Court received under the *Criminal Appeal Act* 1912 of New South Wales the jurisdiction of a Court of Criminal Appeal over State offences, it automatically obtained the same jurisdiction over Federal offences. Section 39(2) does confer upon State Courts Federal jurisdiction coextensive with their State jurisdiction in respect of matters which are, or may be placed, within the original jurisdiction of this High Court: but something further appears to be required to make the State *Criminal Appeal Act* apply to Federal prosecutions. It has not, so far, been decided that s 39(2) can operate to increase or vary the subject matter of the jurisdiction. In the present instance, the subject matter is confined to appeals against convictions upon indictment preferred under State law. It may well be that s 39(2) cannot convert the jurisdiction over that subject matter into a Federal jurisdiction over a different subject matter, viz, appeals against convictions upon indictment preferred pursuant to s 69 of the [Federal Act]. But in any case we think we ought not to construe s 39(2) as operating to give by reference to State law another and different jurisdiction over the very same subject as the [Federal Act] itself specially provides for, viz, appeal from conviction. That s 39(2) was not intended to introduce such a jurisdiction by way of appeal is made clear by the presence in the Act of special provisions expressly conferring a right of appeal against such convictions, although a limited right of appeal. Sections 72 to 77 of the [Federal Act] are headed 'Appeal,' and contain a code of procedure for an appeal by way of case stated upon a point of law raised at the trial. These special provisions confer a different and narrower right of appeal and different but perhaps wider remedies. We think that we ought not to construe the general words of s 39(2) as capable of importing a new jurisdiction by way of appeal from conviction upon indictment which, in effect, would supersede these provisions."

And later the Court made these remarks[202]:

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201 *Seaegg v The King* (1932) 48 CLR 251 at 256.

202 *Seaegg v The King* (1932) 48 CLR 251 at 257.

> "This sub-section provides that the several Courts of a State exercising jurisdiction with respect to the trial and conviction on indictment of offenders or persons charged with offences against the laws of the State shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth committed within the State. Does the Supreme Court, as a Court of Criminal Appeal, exercise jurisdiction with respect to the trial and conviction on indictment of offenders? The words would not naturally be understood to refer to a jurisdiction to hear appeals from such convictions, and we think that the presence in the enactment of the special provisions contained in ss 72-77 again operates to preclude such an interpretation. It follows that the Supreme Court was right in holding that the appellant could not appeal to it except under the provisions of s 72 of the [Federal Act]."

179 Following that decision the Commonwealth Parliament amended s 68 of the Federal Act by adding sub-par (d) to s 68(1) and a reference to appeals in the latter part of s 68(2). Section 39 was left unchanged.

180 In *Williams v The King [No 2]*[203] the legislative purpose of s 68(2) was identified as the "assimilat[ion] of criminal procedure, including remedies by way of appeal, in State and Federal offences"[204]. In that case Dixon J explained the amendment in this way[205]:

> "But when this construction is given to the words of the provision, they necessarily extend to all remedies given by State law which fall within the description 'appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith.' This accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice. It is, in my opinion, no objection to the validity of such a provision that the State law adopted varies in the different States".

181 The second relevant matters are the convenience, economy and efficacy in this country of vested jurisdiction. It works well and has done so for almost one hundred years[206]. Notwithstanding the size and variety of statutory jurisdictions

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203 (1934) 50 CLR 551.

204 (1934) 50 CLR 551 at 558 per Rich J.

205 (1934) 50 CLR 551 at 560.

206 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 620-625 [241]-[255] per Callinan J.

of the Federal Court, it has not had any general Federal criminal jurisdiction conferred on it.

182 Thirdly, it is no doubt desirable that so far as is practicable offenders against Federal laws be tried from State to State pursuant to generally uniform procedures. There is equally something to be said however for the proposition that all persons tried by a State court, whether they have offended against Federal or State law, should be tried according to the same procedures. Important safeguards and control mechanisms already exist. Section 80 of the Constitution ensures that Federal offenders charged on indictment be tried by jury, and the function of this Court as a general court of appeal, including in criminal matters, exists to ensure that the processes adopted are constitutional and otherwise lawfully conducted.

183 Fourthly, although the Federal Act contemplates the application of relevant, non-inconsistent State laws to trial procedures, it is important to keep in mind that State law can neither control the activities of Federal officials nor alter the meaning and operation of Federal law.

184 Fifthly, but as a general proposition only, fragmentation of trials should be avoided. The exception however, for which the State Act provides, is capable, in an appropriate case, of offering the advantages of savings in time and costs, and the smooth running of so much of the trial as is to take place before the jury. The procedure for reservation of a point of law is not a mandatory one. Furthermore, the State legislature, has, in any event enacted that such a procedure may be invoked in its jurisdiction.

185 Sixthly, s 68(2) of the Federal Act, to which I will come, is concerned with the application of "like jurisdiction". I take this to include any similar, and not necessarily identical jurisdiction.

186 Seventhly, there seems to have been an intentional abstention by the Federal legislature from detailed prescription for the conduct of criminal trials. Indeed, the Federal Court is expressly generally denied jurisdiction by s 39B(1) and following sub-sections of the Federal Act even to grant prerogative relief in respect of criminal proceedings proposed or pending in a State court. Neither the *Crimes Act* 1914 (Cth) nor the *Evidence Act* 1995 (Cth), in which such prescription if it were to be made could appropriately be made, contains it. In short, there is no apparent Federal legislative attempt to regulate the conduct of Federal trials, let alone to cover the field in respect of them.

187 Eighthly, and having regard to the matters I have discussed, I think it is right to approach the principal issue arising in this appeal, whether the Federal Act exhaustively defines the available appellate procedures, by immediately asking another, and I think more appropriate question, whether the State Act is

relevantly inconsistent with the Federal Act. Before answering that question the statutory framework for its consideration should be set out.

188 "Appeal" is broadly defined by s 2 of the Federal Act:

> "'***Appeal***' includes an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge."

189 The width of the words, "*any proceeding* to review or call in question the … decision … of *any* Court or Judge" (emphasis added) is significant.

190 Sub-section 39(2) of the Federal Act was only touched upon in argument, but should also be noted:

> "(2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:
>
> (a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.
>
> *Special leave to appeal from decisions of State Courts though State law prohibits appeal*
>
> (c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.
>
> *Exercise of federal jurisdiction by State Courts of summary jurisdiction*
>
> (d) The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred."

191 Section 68 of the Federal Act now provides as follows:

"(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

(a) their summary conviction; and

(b) their examination and commitment for trial on indictment; and

(c) their trial and conviction on indictment; and

(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

(2) The several Courts of a State or Territory exercising jurisdiction with respect to:

(a) the summary conviction; or

(b) the examination and commitment for trial on indictment; or

(c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

(3) Provided that such jurisdiction shall not be judicially exercised with respect to the summary conviction or examination and commitment for trial of any person except by a Judge, a Stipendiary or Police or Special Magistrate, or some Magistrate of the State or Territory who is specially authorized by the Governor-General to exercise such jurisdiction.

(4) The several Courts of a State or Territory exercising the jurisdiction conferred upon them by this section shall, upon application being made in that behalf, have power to order, upon such terms as they think fit, that any information laid before them in respect of an

offence against the laws of the Commonwealth shall be amended so as to remove any defect either in form or substance contained in that information.

(5) Subject to subsection (5A):

(a) the jurisdiction conferred on a court of a State or Territory by subsection (2) in relation to the summary conviction of persons charged with offences against the laws of the Commonwealth; and

(b) the jurisdiction conferred on a court of a State or Territory by virtue of subsection (7) in relation to the conviction and sentencing of persons charged with offences against the laws of the Commonwealth in accordance with a provision of the law of that State or Territory of the kind referred to in subsection (7);

is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

(5A) A court of a State on which jurisdiction in relation to the summary conviction of persons charged with offences against the laws of the Commonwealth is conferred by subsection (2) may, where it is satisfied that it is appropriate to do so, having regard to all the circumstances, including the public interest, decline to exercise that jurisdiction in relation to an offence against a law of the Commonwealth committed in another State.

(5B) In subsection (5A), ***State*** includes Territory.

(5C) The jurisdiction conferred on a court of a State or Territory by subsection (2) in relation to:

(a) the examination and commitment for trial on indictment; and

(b) the trial and conviction on indictment;

of persons charged with offences against the laws of the Commonwealth, being offences committed elsewhere than in a State or Territory (including offences in, over or under any area of the seas that is not part of a State or Territory), is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory."

192 Several things may be noted about this section. It is expressed in comprehensive terms, implying thereby an intention to "pick up" as comprehensively as possible State procedural laws. At first sight there appears to

be no textual impediment to regarding the State procedure adopted here as being other than, at least, the hearing of an appeal arising out of a proceeding connected with a trial.

193 As will appear, further examination of the Federal Act serves to confirm that first impression.

194 It is unnecessary to set out s 69 of the Federal Act other than sub-ss (1), (2) and (2A):

> "(1) Indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf.
>
> (2) Any such appointment shall be by commission in the Queen's name, and may extend to the whole Commonwealth or to any State or part of the Commonwealth.
>
> (2A) Nothing in subsection (1):
>
> (a) affects the power of the Director of Public Prosecutions to prosecute by indictment in his or her official name; or
>
> (b) affects, or shall be taken to have affected, the power of a Special Prosecutor to prosecute by indictment in his or her own name;
>
> indictable offences against the laws of the Commonwealth."

195 Division 3 of Pt X (ss 72-77) of the Federal Act is headed "Appeals". It provides for a form of reservation of questions of law typical of the procedures available for challenging legal error in criminal matters before the enactment of provisions for a general right of appeal in the United Kingdom and this country in and after 1907.

196 The Division states:

> "**72 Reservation of points of law**
>
> (1) When any person is indicted for an indictable offence against the laws of the Commonwealth, the Court before which he or she is tried shall on the application by or on behalf of the accused person made before verdict, and may in its discretion either before or after judgment without such application, reserve any question of law which arises on the trial for the consideration of a Full Court of the

High Court or if the trial was had in a Court of a State of a Full Court of the Supreme Court of the State.

(2) If the accused person is convicted, and a question of law has been so reserved before judgment, the Court before which he or she was tried may either pronounce judgment on the conviction and respite execution of the judgment, or postpone the judgment until the question has been considered and decided, and may either commit the person convicted to prison or admit him or her to bail on recognizance with or without sureties, and in such sum as the Court thinks fit, conditioned to appear at such time and place as the Court directs and to render himself or herself in execution or to receive judgment as the case may be.

(3) The presiding judge is thereupon required to state in a case signed by him or her the question of law so reserved with the special circumstances upon which it arose, and if it be reserved for the High Court the case shall be transmitted to the Registry of the High Court.

73 Hearing

Any question so reserved shall be heard and determined after argument by and on behalf of the Crown and the convicted person or persons if they desire that the question shall be argued, and the Court may:

(a) affirm the judgment given at the trial; or

(b) set aside the verdict and judgment and order a verdict of not guilty or other appropriate verdict to be entered; or

(c) arrest the judgment; or

(d) amend the judgment; or

(e) order a new trial; or

(f) make such other order as justice requires;

or the Court may send the case back to be amended or restated.

74 Effect of order of Full Court

(1) The proper officer of the Court by which the question reserved was determined shall certify the judgment of the Court under his or her hand and the seal of the Court to the proper officer of the Court in which the trial was had, who shall enter the same on the original record.

(2) If the convicted person is in custody, the proper officer of the Court by which the question reserved was determined shall also forthwith transmit another certificate of the same tenor under his or her hand and the seal of the Court to the superintendent of the prison or other person who has the custody of the convicted person. The certificate shall be a sufficient warrant to all persons for the execution of the judgment if it is certified to have been affirmed or as it is certified to be amended, and execution shall thereupon be executed upon the judgment as affirmed or amended: And if the judgment is set aside or arrested the certificate shall be a sufficient warrant for the discharge of the convicted person from further imprisonment under that judgment, and in that case the superintendent is required forthwith to discharge him or her from imprisonment under that judgment, and if he or she is at large on bail the recognizance of bail shall be vacated at the next criminal sitting of the Court in which the trial was had: And if that Court is directed to pronounce judgment, judgment shall be pronounced at the next criminal sitting of the Court at which the convicted person appears to receive judgment.

75 Certain errors not to avoid conviction

A conviction cannot be set aside upon the ground of the improper admission of evidence if it appears to the Court that the evidence was merely of a formal character or not material, nor upon the ground of the improper admission of evidence adduced for the defence.

76 Appeal from arrest of judgment

(1) When the Court before which an accused person is convicted on indictment for an offence against the laws of the Commonwealth arrests judgment at the trial, the Court shall on the application of counsel for the prosecution state a case for the consideration of a Full Court of the High Court or a Full Court of the Supreme Court of the State in manner hereinbefore provided.

(2) On the hearing of the case the Full Court may affirm or reverse the order arresting judgment. If the order is reversed the Court shall direct that judgment be pronounced upon the offender, and he or she shall be ordered to appear at such time and place as the Court directs to receive judgment, and any Justice of the Peace may issue his or her warrant for the arrest of the offender.

(3) An offender so arrested may be admitted to bail by order of the Court which may be made in Court or in Chambers, at the time when the order directing judgment to be pronounced is made or afterwards.

77 No other appeal

Except as aforesaid, and except in the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against the laws of the Commonwealth."

197 It is convenient at this point to set out s 350 of the State Act:

"**Reservation of relevant questions**

350 (a1) In this section -

'**relevant question**' means -

(a) a question of law; or

(b) to the extent that it does not constitute a question of law - a question about how a judicial discretion should be exercised or whether a judicial discretion has been properly exercised.

(1) A court by which a person has been, is being or is to be tried or sentenced for an indictable offence may reserve for consideration and determination by the Full Court a relevant question on an issue -

(a) antecedent to trial; or

(b) relevant to the trial or sentencing of the defendant, and the court may (if necessary) stay the proceedings until the question has been determined by the Full Court.

(2) A relevant question must be reserved for consideration and determination by the Full Court if -

(a) the Full Court so requires (on an application under this section or under another provision of this Part 1 [s 352(2)]); or

(b) the question arises in the course of a trial that results in an acquittal and the Attorney-General or the Director of Public Prosecutions applies to the court of trial to have the question reserved for consideration and determination by the Full Court.

(3) Unless required to do so by the Full Court, a court must not reserve a question for consideration and determination by the Full Court if

reservation of the question would unduly delay the trial or sentencing of the defendant.

(4) If a person is convicted, and a question relevant to the trial or sentencing is reserved for consideration and determination by the Full Court, the court of trial or the Supreme Court may release the person on bail on conditions the court considers appropriate."

198 By reason of its relevance to other issues raised by the respondents I also set out s 9 of the *Director of Public Prosecutions Act* 1983 (Cth) (the "Director's Act") as in force at the relevant time[207]:

"**Powers of Director**

(1) For the purposes of the performance of his or her functions, the Director may prosecute by indictment in his or her official name indictable offences against the laws of the Commonwealth, but nothing in this subsection prevents the Director from prosecuting an offence against a law of the Commonwealth in any other manner.

(2) Where the Director institutes a prosecution on indictment for an offence against a law of the Commonwealth, the indictment shall be signed:

(a) by the Director; or

(b) for and on behalf of the Director, by a person authorized by the Director, by instrument in writing, to sign indictments.

(3) For the purposes of the performance of his or her functions, the Director may take over a prosecution on indictment for an offence against a law of the Commonwealth, being a prosecution instituted by another person (other than the Attorney-General or a Special Prosecutor).

(3A) Where a person holding office as a Special Prosecutor under the *Special Prosecutors Act 1982* dies, or ceases for any reason so to hold office and is not forthwith re-appointed, the Director may, for the purposes of the performance of the Director's functions, take over a prosecution on indictment for an offence against a law of the Commonwealth, being a prosecution that:

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207 Section 9(8A) was repealed by the *Jurisdiction of Courts Legislation Amendment Act* 2000 (Cth).

(a) was instituted; or

(b) was, at the time when the person died or ceased so to hold office, being carried on;

by the person, or by a person acting as a Special Prosecutor under that Act in the place of the first-mentioned person.

(4) Where:

(a) a person is under commitment, or has been indicted, on a charge of an indictable offence against a law of the Commonwealth; and

(b) the prosecution for the offence was instituted, has been taken over or is being carried on by the Director;

the Director may decline to proceed further in the prosecution and may, if the person is in custody, by warrant signed by the Director, direct the discharge of the person from custody, and where such a direction is given, the person shall be discharged accordingly.

(5) For the purposes of the performance of his or her functions, the Director may take over a proceeding that was instituted or is being carried on by another person, being a proceeding:

(a) for the commitment of a person for trial in respect of an indictable offence against a law of the Commonwealth; or

(b) for the summary conviction of a person in respect of an offence against a law of the Commonwealth;

and where the Director takes over such a proceeding, he or she may decline to carry it on further.

(5A) Where the Director is carrying on a proceeding instituted by another person, being a proceeding of the kind mentioned in paragraph (5)(a) or (b), the Director may decline to carry it on further even if the Director has not taken it over under subsection (5).

…

(7) Where the Director has instituted or taken over, or is carrying on, a prosecution for an offence against a law of the Commonwealth, the Director may exercise in respect of that prosecution, in addition to such rights of appeal (if any) as are exercisable by him or her otherwise than under this subsection, such rights of appeal (if any)

as are exercisable by the Attorney-General in respect of that prosecution.

(8) Nothing in subsection (7) prevents the exercise by the Attorney-General of a right of appeal that, but for that subsection, would be exercisable by the Attorney-General.

(8A) In subsections (7) and (8):

'**right of appeal**' includes a right:

(a) to apply for a review or rehearing; or

(b) to institute a proceeding in the nature of an appeal or of an application for a review or rehearing.

(9) For the purposes of the performance of the function referred to in paragraph 6(1)(g), the Director may institute, in the name of the Commonwealth or of an authority of the Commonwealth, proceedings for the recovery of a pecuniary penalty under a law of the Commonwealth.

(10) For the purposes of the performance of a function referred to in paragraph 6(1)(fa) or (h), the Director may take, in the name of the Commonwealth or of an authority of the Commonwealth, civil remedies on behalf of the Commonwealth or of that authority, as the case may be.

(11) Where an authority of the Commonwealth is a party to a proceeding in respect of a matter:

(a) that has arisen out of or is connected with the performance of any of the functions of the Director; or

(b) that may result in the performance by the Director of such a function;

the Director, or a person who is entitled to represent the Director in proceedings referred to in subsection 15(1), may act as counsel or solicitor for that authority."

199 The respondents, as did the Full Court, relied upon the description in *Adams v Cleeve*[208] by Rich, Dixon and Evatt JJ, of ss 72-77 of the Federal Act as a "code of procedure" and contended that those sections were exhaustive. This

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208 (1935) 53 CLR 185 at 190-191.

was the nub of the respondents' argument. They also pointed to the degree of overlap between ss 72-77 of the Federal Act and s 350(a1) of the State Act which was not confined in its operation to the sort of situation which exists here, of a preliminary ruling on a point of evidence. They emphasised that, notwithstanding *Seaegg* and the amendment to the Federal Act which followed, and the enactment of the various provisions in the States for general rights of appeal, ss 72-77 of the Federal Act have remained in force and have not been materially amended.

200 The appellant sought to explain any abstention from amending or repealing ss 72-77 on these bases: that the amendment to s 68(2) was a pragmatic response to *Seaegg*; that the provisions in the Federal Act with respect to appeals were left as minimum appeal rights; and ss 72-77 to continue to allow for a case to be stated directly from a State Supreme Court to the High Court[209]; and they make provision for a Justice of the High Court conducting a trial[210], or the trial judge of any other federal court with jurisdiction to hear indictable offences against the laws of the Commonwealth, to reserve questions of law for the consideration of the Full Court of the High Court.

201 The appellant submitted that the assimilation of Commonwealth and State criminal jurisdictions can only effectively be achieved if s 68(2) is given an ambulatory operation (which Doyle CJ in the second Full Court accepted the sub-section should have), so that the equivalent of any State jurisdiction which falls within the ordinary connotation of the word "appeal" is conferred on State courts hearing Commonwealth matters.

202 The appellant further submits that the procedure for which s 350(a1) of the State Act makes provision is different from the procedures prescribed by ss 72-77 of the Federal Act: s 72 of that Act provides for the reservation of a question of law *after verdict*, and either before or after judgment on the application of the accused made before verdict, or, in the discretion of the trial judge at any time. In the case of a question reserved following a verdict of guilty, the procedure for a case stated operates as an appeal on a question of law[211]. It is only if a trial judge arrests judgment following a verdict of guilty that the trial judge will be required to state a case on the application of the prosecution. On the other hand a question cannot be reserved on an interlocutory question or issue before verdict pursuant to ss 72-77.

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209 *R v Sharkey* (1949) 79 CLR 121; *R v Murphy* (1985) 158 CLR 596 at 619.

210 Under s 30(c) of the Federal Act the High Court has original jurisdiction in trials of indictable offences against the laws of the Commonwealth.

211 Federal Act, ss 73 and 76.

203 In my opinion, s 68(2) of the Federal Act does pick up and apply s 350(a1) of the State Act and those other sections of it providing the machinery for the reservation and determination of relevant points of law and the giving of such directions as may be necessary to a trial judge. This is so for two particular reasons: because of the amplitude of the words used in s 68(2) of the Federal Act: in particular, the words "with respect to", "arising out of any such trial …", "or out of any proceedings connected therewith" and the broad definition of "appeal" in s 2 which includes "any proceeding to *review* or call in question the … decision … of any Court or Judge"; and, because, as the appellant correctly submits, the respective procedures in the State Act and the Federal Act are different in some significant respects.

204 There is good reason why the Federal legislature may have left ss 72-77 of the Federal Act materially unchanged during and since the period that the States enacted separate and much more expansive provisions for rights of appeal, and indeed, provisions of the kind under consideration here in the State Act, designed to facilitate the more expeditious and convenient form of trial than that which may result from lengthy argument on major points of evidence after a jury is empanelled[212]. The presence of s 72-77 ensures that no matter how the States may legislate, and whatever procedures they may adopt, minimum, effectively guaranteed rights under those sections will remain.

205 Other points by way of contention and otherwise were raised by the respondents. One was that the trial in this case had not commenced, and that until it did, the Federal Act could have no operation to pick up any provision of the State Act. I would reject that argument. *Director of Public Prosecutions, South Australia v B*[213] does not assist the respondents. There, the question was whether the trial had begun at a stage when the prosecutor sought to enter a *nolle prosequi*, a stage before the arraignment and plea of the accused. In the joint judgment[214] it is expressly stated that the trial began on the arraignment of the

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212 See for instance s 592A of the *Criminal Code* (Qld). Queensland provides for early (after presentation of an indictment) determination procedures for, *inter alia*, questions of admissibility of evidence by sub-s (4), though no interlocutory appeal may be brought. Victoria has similar provisions in s 446, *Crimes Act* 1958 (Vic), although the Victorian legislation does not provide that interlocutory appeals may not be brought from pre-trial determinations of points of law.

213 (1998) 194 CLR 566.

214 *Director of Public Prosecutions, South Australia v B* (1998) 194 CLR 566 at 571 [1] per Gaudron, Gummow and Hayne JJ.

accused[215]. In this case, the respondents had been arraigned before Anderson DCJ. Accordingly, the trial had begun.

206 Nothing here turns upon the partial overlap between the relevant provisions of the State Act and ss 72-77 of the Federal Act. There is room for the operation of both. The "field" is not covered by the Federal Act, and, to the extent that there is no inconsistency, the State Act may, and does have operation here.

207 The respondents sought to call in aid s 80 of the Constitution[216]. Their argument seems to be that because s 80 is mentioned in s 68(2) of the Federal Act, the reference in the latter to an appeal can only be to an appeal following a trial in which the jury has participated, presumably up to the stage of giving a verdict and not to a trial of, or a decision with respect to, some other issue or issues. The argument has no substance. Sub-section 68(2) of the Federal Act refers, for example, to a "decision" in criminal trials on matters of law before a judge, and these will ordinarily include points of evidence.

208 Another argument that was advanced by the respondents was that the procedure contemplated by the State Act involved the exercise of an advisory, that is to say, a non-judicial function incompatible with the exercise of the judicial power of the Commonwealth.

209 The question which was raised here was no more hypothetical than any other relevant question arising from time to time in the ordinary course of a criminal trial in relation to the admissibility of evidence. Even when the ruling on the question involves, as it often will, discretionary considerations, there will still usually be an underlying legal question, whether the grounds for an exercise of the discretion have been laid. Each point taken will require a trial judge to give a ruling, and to make a decision which is, subject to appellate review, or some other development in the trial, conclusive. The rulings that will be made may well vary in significance and importance. Whether they are decisions, as opposed to advisory or hypothetical opinions, does not depend upon their relative importance. Rulings on the admissibility of evidence are at least as closely connected with a trial as the matters the subject of the reference by the Attorney-General to the Court of Criminal Appeal in *Mellifont v Attorney-General (Q)*[217].

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215 See also McHugh J at 582 [32], Kirby J at 589-592 [48]-[49].

216 "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

217 (1991) 173 CLR 289.

210 The respondents mounted a last argument, that it was beyond the power of the appellant to invoke the jurisdiction of the South Australian Court to deal with the questions raised pursuant to s 350(a1) of the State Act. The appellant's powers if they exist, in this regard, must be found in ss 7, 8 and 9(8A) of the Director's Act, the last of which included the power "to apply for a review or rehearing" or "to institute a proceeding in the nature of an appeal"[218]. Once again these are words of amplitude. I do not doubt that the process for which the State Act makes provision is a proceeding in the nature of an appeal. It is not only that, but it is also, in my opinion, at least a proceeding to call in question a decision of a judge, that is to say, an appeal within the meaning of s 2 of the Federal Act. This is not a case in which there is any attempt by the holder of a federal office to exercise the powers of the holder of an office under State law[219].

211 The appeal should be upheld. I would not make any order for costs. The appeal was of particular relevance to the appellant and his office. The case should be remitted to the Full Court for further disposition.

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218 Section 9(8A) was repealed by the *Jurisdiction of Courts Legislation Amendment Act* 2000 (Cth).

219 cf *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119.