HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

ROBERT JOHN PUTLAND APPELLANT

AND

THE QUEEN RESPONDENT

Putland v The Queen
[2004] HCA 8
12 February 2004
D11/2003

ORDER

Appeal dismissed.

On appeal from the Supreme Court of the Northern Territory

Representation:

D Grace QC with R R Goldflam for the appellant (instructed by Northern Territory Legal Aid Commission)

D J Bugg QC with G C Fisher for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Intervener:

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

CATCHWORDS

Putland v The Queen

Criminal law – Sentencing – Offences against laws of the Commonwealth – Where offender tried in Territory court for indictable offences against laws of the Commonwealth – *Judiciary Act* 1903 (Cth), s 68(1) – Where Territory legislation permitted aggregate sentences for indictable offences – Whether aggregate sentences were permissible in the case of Commonwealth offences.

Constitutional law – Discrimination – Whether Territory legislation permitting aggregate sentencing resulted in constitutionally impermissible discrimination between federal offenders.

Words and phrases – "so far as they are applicable".

Crimes Act 1914 (Cth), s 4K, Pt 1B.
Judiciary Act 1903 (Cth), s 68.
Sentencing Act (NT), s 52.

1 GLEESON CJ. The appellant was charged in the Supreme Court of the Northern Territory with offences against the *Crimes Act* 1914 (Cth) ("the Crimes Act") and offences against the *Bankruptcy Act* 1966 (Cth). All were indictable offences. The Supreme Court was exercising federal jurisdiction. The appellant pleaded guilty. Pursuant to Northern Territory legislation referred to below, the sentencing judge imposed a single, aggregate sentence of imprisonment for four years, and ordered that the appellant be released after serving 12 months upon entering into a bond to be of good behaviour for three years. The appellant appealed against the sentence to the Northern Territory Court of Criminal Appeal. Most of the grounds of appeal are presently immaterial. The appeal was dismissed. The one ground of appeal pursued in this Court is that the sentencing judge did not have power to impose an aggregate term of imprisonment. The Court of Criminal Appeal (Martin CJ, Mildren and Riley JJ) held that, by operation of s 68 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), the law of the Northern Territory permitting an aggregate sentence applied, and that the sentencing judge had the power he purported to exercise. In this respect, the Court of Criminal Appeal followed an earlier decision of the South Australian Court of Criminal Appeal, *R v Jackson*[1]. South Australia also has legislation which permits aggregate sentences in the case of indictable offences.

The legislation

2 The *Sentencing Act* (NT) ("the Sentencing Act") provides:

> "52 (1) Where an offender is found guilty of 2 or more offences joined in the same information, complaint *or indictment*, the court may impose one term of imprisonment in respect of both or all of those offences but the term of imprisonment shall not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence." (emphasis added)

3 Sub-sections (2) and (3) impose presently irrelevant qualifications on the power given by s 52. The principles according to which such a statutory power is to be exercised, and their relationship with the sentencing principle of totality, were considered by the South Australian Court of Criminal Appeal in the case of *Major*[2]. Since we are not concerned with any issue as to the severity of the sentence in the present case, it is unnecessary to pursue that topic.

4 Section 68 of the Judiciary Act provides, so far as presently relevant, that the laws of a State or Territory respecting the arrest and custody of offenders or

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1 (1998) 72 SASR 490.

2 (1998) 100 A Crim R 66.

persons charged with offences, and the procedure for their trial and conviction on indictment, shall 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 the section. The operation of related provisions of s 68 concerning appeals was recently considered by this Court in *The Queen v Gee*[3]. The background to the section is the obvious circumstance that State and Territory laws concerning the matters to which the section relates may differ. The necessary consequence is that, in certain respects, those differences will apply as between federal offenders, depending upon where they are tried. In the present case, the sentencing judge was exercising jurisdiction conferred by s 68(2). Northern Territory laws respecting the procedure for trial and conviction on indictment were at least potentially picked up and applied as federal law by s 68(1). Sentencing laws come within that description[4]. In *Leeth v The Commonwealth*[5], Mason CJ, Dawson and McHugh JJ referred to an observation by Dixon J[6] that s 68 disclosed a policy "to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State" and that it was "no objection to the validity of such a provision that the State law adopted varies in the different States". They continued:

> "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. And if a person is convicted of a federal offence and sentenced to a term of imprisonment, he will ordinarily serve that term in a State prison in the State in which he is convicted. Prison systems differ significantly from State to State, but that is something which, in relation to federal offenders, is contemplated by s 120 of the Constitution."

5 It may be added that it is not uncommon for an accused person, standing trial in a State court, to be charged with both State and federal offences. In drug cases, for example, an accused may be charged with federal offences of importing, and State offences of trafficking. Not only are federal offenders imprisoned with State offenders; the same person may be both a State and a federal offender. References to uniformity of treatment of federal offenders may be misleading unless practical considerations of this kind are taken into account.

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3 (2003) 77 ALJR 812; 196 ALR 282.

4 *Williams v The King [No 2]* (1934) 50 CLR 551 at 560 per Dixon J.

5 (1992) 174 CLR 455 at 467.

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

6 There is no justification for distinguishing, as the argument for the appellant seeks to do, between the procedures referred to in s 68(1) and powers. Paragraphs (a) to (d) of s 68(1) refer to procedures of various kinds which typically involve or create powers.

7 The laws of a State or Territory to which s 68(1) refers apply "so far as they are applicable". Although there is not in s 68, as there is in s 79 of the Judiciary Act, an express qualification to the operation of the provision by the use of the words "except as otherwise provided by the Constitution or the laws of the Commonwealth", in the context of a problem such as the present there is little, if any, functional difference between the two forms of qualification. The meaning of "otherwise provided" was considered in *Northern Territory v GPAO*[7]. Relevantly for present purposes, s 52 of the Sentencing Act would not be picked up and applied by s 68 if a Commonwealth law expressly or by implication made contrary provision, or if there were a Commonwealth legislative scheme relating to the sentencing of the appellant which was "complete upon its face" and can "be seen to have left no room" for the operation of s 52[8]. Since the appellant relies upon both kinds of other provision, it is necessary to examine in some detail the Commonwealth laws that are said to have that effect.

8 Part 1A of the Crimes Act includes s 4K, which relevantly provides:

"4K ...

(3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.

(4) If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence."

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7 (1999) 196 CLR 553 at 587-588 [78]-[80] per Gleeson CJ and Gummow J.

8 *R v Gee* (2003) 77 ALJR 812 at 822 [62]; 196 ALR 282 at 295-296.

9 The similarity between s 52 of the Northern Territory Sentencing Act and s 4K(4) of the Commonwealth Crimes Act is apparent, but there is one critical difference. Sub-section (4) of s 4K is expressly related to sub-s (3). It was held by the Court of Appeal in Victoria in *R v Bibaoui*[9], and it was common ground in his appeal, that the sub-sections do not apply to trials on indictment, but apply only to summary proceedings. It was explained by Tadgell JA in that case[10] that sub-s (3) was necessary in the case of summary proceedings, but unnecessary in the case of indictments. There was a background of State and Territory laws which made provision for the joinder of indictable offences, but did not make provision for joinder of summary offences[11]. The Court of Appeal held there was every reason to give the expression "information, complaint or summons" its ordinary meaning which, as Ormiston JA said, referred to "well known processes for commencing criminal proceedings in summary jurisdictions"[12]. There is no reason to doubt the correctness of *Bibaoui*.

10 The above provisions were originally enacted as s 45B(2) and (3) of the *Acts Interpretation Act* 1901 (Cth), inserted by the *Acts Interpretation Amendment Act* 1984 (Cth). They were re-enacted in the Crimes Act by the *Crimes Legislation Amendment Act* 1987 (Cth). It is of significance that they pre-dated the provisions of Pt 1B of the Crimes Act, which were enacted in the knowledge that the Crimes Act itself provided for aggregate sentencing in the case of some offences to which Pt 1B was to apply, that is to say, offences dealt with summarily.

11 Part 1B was included in the Crimes Act by the *Crimes Legislation Amendment Act (No 2)* 1989 (Cth). It was described by Ormiston JA in *Bibaoui*[13] as introducing "convoluted and confusing provisions relating to ... sentencing". In *Director of Public Prosecutions (Cth) v El Karhani*[14], Kirby P, Campbell and Newman JJ, sitting as the New South Wales Court of Criminal Appeal, adopted Hunt J's description of the legislation as "unnecessarily complicated and opaque"[15]. The reasons for judgment concluded with a strong statement of the

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9 [1997] 2 VR 600.

10 [1997] 2 VR 600 at 607.

11 eg *R v Jackson* (1998) 72 SASR 490 at 513.

12 [1997] 2 VR 600 at 602.

13 [1997] 2 VR 600 at 600.

14 (1990) 21 NSWLR 370 at 372.

15 Quoting *R v Paull* (1990) 20 NSWLR 427.

need for reform of Pt 1B[16]. In a passage to which I shall return, the same three judges gave an account of the history of the legislation which demonstrates that it would be erroneous to suggest that it implemented a policy, adopted in Reports of the Australian Law Reform Commission, of ensuring uniformity in the sentencing of federal offenders. It will be necessary to return to the history, because some of the appellant's arguments appear to depend upon such a theory, which was contradicted by the joint judgment in *El Karhani*.

12 Part 1B of the Crimes Act deals with the sentencing, imprisonment and release of federal offenders. Division 2 (ss 16A - 16D) deals with general sentencing principles. In particular, ss 16A and 16B refer to matters to which a court, sentencing a person for a federal offence, must have regard. The actual decision in *El Karhani* was that those matters are not comprehensive, and that Pt 1B is not a code. In particular, it makes no reference to general deterrence, a matter so obviously relevant to sentencing that the statement of matters to which regard must be had is manifestly incomplete. Division 3 included s 16G, concerning a matter of notorious difficulty that arose from the differences between States and Territories resulting from what was called "truth-in-sentencing" legislation. That was a matter singled out in *El Karhani* as in need of reconsideration. Divisions 4 and 5 deal with fixing non-parole periods and related matters. There are a number of Divisions dealing with unfitness to be tried and mental illness. There are also a number of miscellaneous provisions.

The s 4K argument

13 It is submitted on behalf of the appellant that s 4K, which expressly permits aggregate sentencing in the case of federal offences dealt with summarily, gives rise to a negative implication excluding the application of a provision such as s 52 of the Sentencing Act (and its South Australian counterpart) in the case of federal offences dealt with on indictment.

14 This argument is undermined by part of the very reasoning that leads to the conclusion that sub-ss 4K(3) and (4) apply only to summary proceedings. Sub-section (4) is to be read together with sub-s (3). Subsection (3) was necessary in relation to summary proceedings, but it was unnecessary in relation to proceedings on indictment, because of the background of State and Territory laws providing for joinder of indictable offences. The appellant's argument concerning the negative implication must apply to both sub-sections. Yet this would be a most curious and oblique method of excluding the possibility of joinder of charges in the case of proceedings on indictment in respect of federal offences. Such joinder was accepted to be possible in both *Bibaoui* and *Jackson*.

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16 (1990) 21 NSWLR 370 at 387.

It is convenient, and is common in practice. In *ASIC v DB Management Pty Ltd*[17] this Court said that it has often been pointed out that the principle of interpretation that "an express reference to one matter indicates that other matters are excluded" is not of universal application and that the assistance to be gained from it varies widely. In the present case, there is an obvious explanation of the legislature's decision to deal specifically with joinder in summary proceedings (which was necessary), and of the decision not to deal specifically with joinder in indictments (which was unnecessary). Furthermore, an intention to prevent joinder in indictments is virtually inexplicable, and bringing about such a result would cause manifest inconvenience. Sub-sections (3) and (4) work together. They should not be understood as importing the negative implication for which the appellant contends.

15 There is, however, one significant respect in which sub-s 4K(4) tells against the appellant's case. It has already been noted that sub-s 4K(4) was in the Crimes Act, and before that, the *Acts Interpretation Act*, before the inclusion of Pt 1B. Part 1B, in its statement of principles to be applied in sentencing for federal offences, covers both summary and indictable offences. It therefore covers cases to which sub-s 4K(4) applies. It follows that aggregate sentencing, as provided for in sub-s 4K(4), is not antithetical to the provisions of Pt 1B. Those provisions must be able to co-exist with aggregate sentencing, because they exist together in the legislation, and Pt 1B was introduced into legislation that already provided (in relation to summary proceedings) for aggregate sentencing. That is to be kept in mind when considering the appellant's next argument.

The Pt 1B argument

16 It is necessary to say something further about the history of Pt 1B.

17 In *El Karhani*[18], Kirby P, Campbell and Newman JJ said:

> "The Australian Law Reform Commission has for many years been examining the reform of the sentencing of Federal offenders. It has considered some of the fundamental problems referred to above: see, eg, *Sentencing of Federal Offenders*, ALRC 15 (1980) Interim; *Sentencing*, ALRC 44 (1988). It was not suggested that the sections of the Act which must now be given meaning arose from the reports of that Commission. The Court was not taken to those reports. *A glance at them since argument shows that, whilst some of the provisions in the Act may have*

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17 (2000) 199 CLR 321 at 340 [42].

18 (1990) 21 NSWLR 370 at 375.

> *been influenced by the recommendations of the Commission, its relevant terms cannot be traced to those recommendations*. Looked at realistically, it appears that the impetus for introducing the Act, changing the nomenclature of punishment and providing for adjustment was to respond to the particular discordancy created in New South Wales by the passage of the *Sentencing Act* 1989. It was to do so in ways which extended the range of alternatives to imprisonment (as proposed by the Law Reform Commission) and to set out a number of general principles to be observed in the sentencing of Federal offenders". (emphasis added).

18 Kirby P, Campbell and Newman JJ did not attribute to the Australian Law Reform Commission responsibility for Pt 1B. They were very critical of the new legislation[19]. In particular, they said[20] that Pt 1B glossed over, and left unresolved, the difficult policy choices identified earlier in their judgment, the most notable of which was whether all federal offenders should be treated equally with one another, or whether, "out of recognition that they are housed side by side with State offenders in State prisons ... their punishment [should] be assimilated, approximately, with that of State prisoners"[21]. It is completely inconsistent with what was said in *El Karhani* to suggest that Pt 1B was enacted in conformity with the recommendations of the Law Reform Commission, or that it pursued a consistent and coherent policy of prescribing that all federal offenders be treated in the same way, regardless of where they were tried. Part 1B no doubt reflected some of the thinking of the Law Reform Commission, and increased the degree of uniformity of treatment of federal offenders, but their Honours placed some distance between the work of the Law Reform Commission and what they regarded as an unsatisfactory piece of legislation.

19 What was described in *El Karhani* as "the impetus" for Pt 1B was the difficulty that arose by reason of the truth in sentencing legislation introduced in New South Wales in 1989. The background to that legislation is discussed in *R v Maclay*[22]. It is unnecessary to go into the detail. It is sufficient to say that there was a radical alteration in the system of remissions, and the relationship between minimum terms and head sentences. Parity of sentencing, including parity in relation to State and federal offences, became a major problem.

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19 (1990) 21 NSWLR 370 at 372, 387.

20 (1990) 21 NSWLR 370 at 387.

21 (1990) 21 NSWLR 370 at 375.

22 (1990) 19 NSWLR 112.

20 In *El Karhani*, the Court of Criminal Appeal decided that the sentencing principles stated in Pt 1B were not comprehensive; they did not set out to cover the field. The Court observed that Pt 1B did not set out to implement a policy of full uniformity of treatment of federal offenders as between themselves; on the contrary, it failed to address that issue in a consistent and coherent fashion.

21 The Explanatory Memorandum dealing with Pt 1B said that the legislation had 13 main purposes:

> "1. to review and consolidate the legislation relating to the sentencing and release on parole of federal offenders;
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> 2. to give further guidance to the courts when sentencing federal offenders;
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> 3. to provide a separate regime for fixing federal non-parole periods rather than relying on applied State or Territory legislation;
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> 4. to provide that federal offenders sentenced after the commencement of the new sentencing provisions will not have their non-parole periods reduced by remission, notwithstanding that State law, in some jurisdictions, provides for remissions to reduce State non-parole periods;
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> 5. to provide new procedures for the release of federal offenders on parole or licence;
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> 6. to provide new procedures for the revocation of parole orders and licences and for the determination of the period to be served in custody by a person for breach of a condition of the parole order or licence;
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> 7. to establish new procedures for federal offenders charged on indictment with a federal offence and who are found unfit to plead or unfit to be tried or not guilty on the grounds of mental illness;
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> 8. to provide new procedures for magistrates courts when dealing summarily with federal matters where the defendant is mentally ill or intellectually disabled;
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> 9. to provide the additional sentencing options of hospital orders, psychiatric probation orders (for mentally ill offenders) and program probation orders (for intellectually disabled offenders);
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> 10. to provide clarification that the Commonwealth's spent convictions scheme covers the Defence Force and that the assessment of prospective consultants by law enforcement, intelligence and

security agencies and the cash transaction reports agency is exempted from the operation of the scheme;

11. to clarify and improve the efficiency of the various statutory processes involved in the reporting of transactions under the *Cash Transaction Reports Act* 1988;

12. to introduce an alternative mechanism for verifying the identity of new signatories to accounts; and

13. to enable State and Territory Supreme Courts to issue warrants under the *National Crime Authority Act* 1984 for the arrest of National Crime Authority witnesses who have absconded or are likely to abscond."

22 Notably missing from that statement of purposes is any reference to an overriding or general purpose of providing complete uniformity of treatment as between federal offenders.

23 It is impossible to conclude that Pt 1B left no room for the application of, or was inconsistent with, s 52 of the Sentencing Act. Such a conclusion depends upon a misunderstanding of its history, an exaggeration of its comprehensiveness, and the attribution to the legislature of a policy which cannot be discerned in the legislation.

24 It may be added that the decision of this Court in *Kesavarajah v The Queen*[23] is inconsistent with a proposition that State and Territory laws cannot be picked up unless they are expressly provided for in Pt 1B. That case concerned procedures for determining fitness to be tried. State or Territory law governs the method of determining fitness to be tried. Division 6 of Pt 1B governs the consequences. The two work together.

Discrimination

25 The appellant submits that the application of s 52 of the Sentencing Act (and, no doubt, its South Australian counterpart) would result in constitutionally impermissible discrimination between federal offenders. This submission cannot stand with the decision of this Court in *Leeth v The Commonwealth*[24]. Section 68 of the Judiciary Act reflects a permissible legislative choice[25], and one which, for

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23 (1994) 181 CLR 230.

24 (1992) 174 CLR 455.

25 *R v Gee* (2003) 77 ALJR 812 at 814 [7]; 196 ALR 282 at 285.

a century, has resulted in some differences in the sentencing of federal offenders according to where they are sentenced. Section 68 applies State and Territory laws to important aspects of criminal proceedings in relation to federal offences. If State and Territory laws were all necessarily the same, then there would be little point in having State and Territory legislatures.

Conclusion

26 The appeal should be dismissed.

27 GUMMOW AND HEYDON JJ. In the Supreme Court of the Northern Territory ("the Territory"), the Director of Public Prosecutions for the Commonwealth, prosecuting in this behalf for the Queen, charged the appellant on two counts of defrauding the Commonwealth contrary to s 29D of the *Crimes Act* 1914 (Cth) ("the Crimes Act")[26] and two counts each of breaching s 266(1) and s 269(1)(b) of the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act"). Section 266(1) of the Bankruptcy Act proscribes certain dispositions with intent to defraud creditors and s 269(1)(b) the conduct by undischarged bankrupts of various business activities. The maximum penalty for each of the bankruptcy offences was three years imprisonment and that for the contravention of s 29D of the Crimes Act was 10 years imprisonment.

28 Section 4G of the Crimes Act classifies as indictable offences offences against laws of the Commonwealth which are punishable by imprisonment for a period exceeding 12 months. Section 69(1) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") requires the prosecution by indictment of indictable offences against the laws of the Commonwealth. The counts in the indictment of the appellant alleged commission of the offences at Alice Springs. Section 70A of the Judiciary Act applied and permitted the trial to be held in any State or Territory[27]. This provision was made in furtherance of the concluding words of s 80 of the Constitution, "if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes".

29 The appellant pleaded guilty to all counts and the sentencing judge (Bailey J) sentenced him to what was identified as "an aggregate term of imprisonment" of four years. On appeal to the Court of Criminal Appeal, the appellant submitted that the sentencing judge had erred in law and lacked the power to impose an aggregate term of imprisonment upon his conviction for multiple federal offences joined in the same indictment. The consequence, it was submitted, was that the sentencing order was a nullity. The Court of Criminal Appeal (Martin CJ, Mildren and Riley JJ) dismissed the appeal. In this Court, the appellant renews those submissions. The Attorney-General of the Commonwealth has intervened in support of the Director of Public Prosecutions.

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26 Section 29D was repealed by Item 149, Sched 2, Pt 1 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth) and now appears as s 134.1 of the *Criminal Code Act* 1995 (Cth).

27 See *Fittock v The Queen* (2003) 77 ALJR 961 at 962 [7]; 197 ALR 1 at 3.

Section 68 of the Judiciary Act

30 In opposition to the appeal, reliance is placed upon the translation into federal law by the operation of s 68 of the Judiciary Act of a provision dealing with aggregate sentences of imprisonment which is found in the *Sentencing Act* (NT) ("the Sentencing Act"). Section 52 of the Sentencing Act states:

> "(1) Where an offender is found guilty of 2 or more offences joined in the same information, complaint or indictment, the court may impose one term of imprisonment in respect of both or all of those offences but the term of imprisonment shall not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence.
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> (2) A court shall not impose one term of imprisonment under subsection (1) where one of the offences in respect of which the term of imprisonment would be imposed is an offence against section 192(3) of the Criminal Code.
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> (3) Subsection (1) does not apply if one of the offences in the information, complaint or indictment is a violent offence or a sexual offence."

Reliance is placed upon s 52(1) in its unqualified form. Given the nature of the offences to which the appellant pleaded guilty, sub-s (3) thereof could have no application. Sub-section (2) operates by reference to s 192(3) of the *Criminal Code Act* (NT) ("the Criminal Code"). That provision also is concerned with a sexual offence and the result is that s 52(2) of the Sentencing Act could have no application to the present case.

31 In *Solomons v District Court of New South Wales*, Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ said[28]:

> "Section 68 itself distinguishes between jurisdiction on the one hand and powers and procedures on the other. Sub-section (1) provides for State laws with respect to procedure to apply 'so far as they are applicable'. Sub-sections (4) and (5A) confer powers respectively to amend informations and, in appropriate circumstances, to decline to exercise jurisdiction. Sub-section (2) is concerned with the ambit of the jurisdiction rather than the content of the powers to be exercised under it."

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28 (2002) 211 CLR 119 at 134 [19].

32 Section 68(2) of the Judiciary Act gave to the Supreme Court of the Northern Territory the like jurisdiction with respect to persons charged with offences against the laws of the Commonwealth to that with respect to "the trial and conviction on indictment" of persons charged with offences against the laws of the Territory. The expression "the trial and conviction on indictment" has to be read in the light of the primary meaning of the word "conviction". This denotes the judicial determination of a case by a judgment involving two matters, a finding of guilt or acceptance of a plea of guilty followed by sentence[29]. The words "or Territory" were added after the word "State" wherever occurring in s 68 by s 14 of the *Judiciary Amendment Act* 1976 (Cth) ("the 1976 Act").

33 That s 68(2) validly authorises the exercise of jurisdiction by Territory courts with respect to the trials of those charged with offences against the laws of the Commonwealth follows from the reasoning in *John Pfeiffer Pty Ltd v Rogerson*[30] and *Re the Governor, Goulburn Correctional Centre; Ex parte Eastman*[31]. The contrary has not been suggested by any party in this case.

34 Section 68(1)(c) of the Judiciary Act provides that the laws of the Territory "respecting ... the procedure for ... trial and conviction on indictment" shall, subject to the balance of s 68, apply "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 [the Northern Territory] by this section". The powers conferred under sentencing laws fall within that description in s 68(1)(c)[32].

35 Accordingly, on the face of s 68(1) of the Judiciary Act, the power conferred by the Territory law, s 52(1) of the Sentencing Act, to impose the one term of imprisonment in respect of all offences was available to the sentencing judge in respect of the federal offences of which the appellant pleaded guilty. The appellant contests that outcome on several grounds.

Inapplicability of the Territory law?

36 The first ground taken by the appellant concerns the limitation imposed by the presence in s 68(1) of the Judiciary Act of the phrase "so far as [the Territory laws] are applicable". Similar expressions appear in ss 79 and 80 of the Judiciary

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29 *S v Recorder of Manchester* [1971] AC 481 at 506.

30 (2000) 203 CLR 503 at 518-519 [18]-[19], 530-531 [54], 532 [58], 544 [103].

31 (1999) 200 CLR 322 at 339-340 [33]-[34], 347-348 [62]-[63], 349 [67].

32 *R v Jackson* (1998) 72 SASR 490 at 513.

Act and have been the subject of numerous judicial decisions. In the most recent in this Court, *Solomons* and *British American Tobacco Aust Ltd v Western Australia*[33], the earlier cases are collected and the principles to be drawn from them discussed.

37 In both *Solomons* and *British American Tobacco*, this Court decided that certain State legislation was inapplicable in the exercise of the federal jurisdiction of which the State courts in question were seized. Essentially, this was because to do so would have involved severing and "picking up" part, but not the whole, of an integrated legislative scheme and giving an altered meaning to that severed part of the State legislation.

38 No such difficulty arises with s 52(1) of the Sentencing Act. The appellant points to sub-ss (2) and (3). These qualify or exclude the operation of s 52(1) with respect to certain sexual offences. But to pick up s 52(1) with respect to the federal fraud offences in question here is not to give s 52(1) an altered or limited meaning. It bears upon the Commonwealth fraud offences in the same way as it applies to offences of that general description under Territory law.

Other provision by the Crimes Act?

39 The next objection taken by the appellant turns upon the need to read s 68 with other laws of the Commonwealth, in particular with Pt 1B of the Crimes Act. This was introduced by s 6 of the *Crimes Legislation Amendment Act (No 2)* 1989 (Cth), Act No 4 of 1990 ("the 1990 Act"). Part 1B (ss 16-22A) is headed "Sentencing, imprisonment and release of federal offenders". The introduction of Pt 1B postdates the amendment of s 68 by the 1976 Act so as to refer to the Territories as well as the States.

40 At one level, any interrelation between the 1990 Act and the provisions of s 68 as they stood at the commencement of the 1990 Act might be thought to turn upon the application of the principles concerned with implied repeal of an earlier statute by a later statute of the same legislature. The doctrine of implied repeal is said to depend upon the demonstration of "actual contrariety"[34].

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33 (2003) 77 ALJR 1566; 200 ALR 403.

34 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 275; *Dossett v TKJ Nominees Pty Ltd* (2003) 202 ALR 428 at 432 [14], 438 [43].

41 Similar questions may arise with consideration of other provisions of the Judiciary Act, including ss 39, 64, 79 and 80. However, for example, s 79 contains the phrase "except as otherwise provided by the Constitution or the laws of the Commonwealth", thereby giving the provision an ambulatory operation. Section 68(1) of the Judiciary Act does not repeat that expression. However, like s 79, s 68 has a "basal character" for the operation of federal jurisdiction[35]. It appeared to be accepted by the parties in this Court that s 68(1) was to be read in the sense it would have if, as a matter of express statement rather than implication, there was a qualification for provision otherwise made from time to time by the laws of the Commonwealth. That understanding should be accepted.

42 On that footing the appellant puts the case, as he did in the Court of Criminal Appeal, that Pt 1B of the Crimes Act "covers the field in relation to the sentencing of federal offenders in superior courts". Particular reliance was placed upon s 4K of the Crimes Act. It is submitted that, subject to the applicability of s 4K in relation to summary proceedings, Pt 1B, supplemented by the common law of Australia, excludes aggregate sentencing by superior courts sentencing federal offenders.

43 These submissions should be rejected. Before turning to consider the matter in more detail, further reference is necessary to s 4K of the Crimes Act.

Section 4K of the Crimes Act

44 It is sub-ss (3) and (4) of s 4K that are in point. These state:

> "(3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.
>
> (4) If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence."

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35 cf *Goward v The Commonwealth* (1957) 97 CLR 355 at 360; *R v Gee* (2003) 77 ALJR 812 at 822 [62]; 196 ALR 282 at 295-296.

These provisions were construed by the Court of Appeal of Victoria in *R v Bibaoui*[36]. It was held that the power conferred by s 4K(4) to impose a single penalty in respect of two or more offences charged in the same information, complaint or summons pursuant to s 4K(3) was confined to summary offences and so did not apply to indictable offences. It follows that s 4K(4) had no application to the appellant. With respect to his sentence, s 4K was not a law of the Commonwealth which otherwise provided so as to exclude the operation of s 68(1) of the Judiciary Act to "pick up" s 52(1) of the Sentencing Act.

45 Section 4K first had life as s 45B of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act") which was included in Pt X thereof by the *Acts Interpretation Amendment Act* 1984 (Cth)[37]. Part X was repealed by the *Crimes Legislation Amendment Act* 1987 (Cth) ("the 1987 Act")[38]. That statute[39] also introduced s 4K into the Crimes Act in an expanded form from that of the repealed s 45B.

46 The Court of Appeal of Victoria correctly decided in *Bibaoui* that the phrase in s 4K "information, complaint or summons" identifies the processes for commencing criminal proceedings in courts of summary jurisdiction. It is true that "information" is a term not confined to summary procedures. However, the use of an information filed in the Queen's Bench Division of the High Court of Justice as an alternative to an indictment in some cases of misdemeanour was rarely used in England even a century ago[40].

47 Something should be said here of the position respecting the joinder in summary process of more than one offence or matter of complaint. The procedures in England under s 10 of the *Summary Jurisdiction Act* 1848 (UK)[41] required that the originating process "shall be for One Matter of Complaint only, and not for Two or more Matters of Complaint"[42]. In the present case, the Court of Criminal Appeal pointed out, with reference to s 57 of the *Justices Act* 1902

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36 [1997] 2 VR 600.

37 s 18.

38 s 74(1), Sched 5.

39 By s 11.

40 *Halsbury's Laws of England*, 1st ed, vol 9, "Criminal Law and Procedure" at 329.

41 11 & 12 Vict c 43.

42 See *R v Cridland* (1857) 7 E & B 853 at 870 [119 ER 1463 at 1470].

(NSW)[43], that in some Australian jurisdictions there remains an express denial of power of joinder of charges on complaints or informations. On the other hand, for example, s 51(1) of the *Justices Act* (NT) states:

> "Charges for any number of offences may be joined in the same complaint, if the charges arise out of the same set of circumstances."

This disparity in summary procedures between the States and the Territories provided the occasion for the enactment of s 4K(3) of the Crimes Act which, in turn, led to the aggregated sentencing provision in s 4K(4).

48 The qualification in s 4K(3) "if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character" has a particular history. This is concerned not with summary procedure but with trials on indictment and was detailed in the speech of Lord Devlin in *Connelly v Director of Public Prosecutions*[44]. Section 4 of the *Indictments Act* 1915 (UK) stated:

> "Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment, but where a felony is tried together with any misdemeanour, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies."

Rule 3 of Sched I provided:

> "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment *if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character*." (emphasis added)

In England before 1915, a rule of law forbade a prosecutor from including both felonies and misdemeanours in the one indictment. However, the general rule was that in misdemeanours any number could be joined, subject to the exercise

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43 This states:

> "Every information shall be for one offence only, and not for two or more offences. Every such complaint shall be for one matter only and not for two or more matters."

44 [1964] AC 1254 at 1349-1351. See also the remarks of Brennan J in *Ryan v The Queen* (1982) 149 CLR 1 at 22.

by the court of a power to quash the indictment in extreme cases[45]. In the case of felony, there was "a rule of practice" forbidding the inclusion of more than one felony in any indictment[46]; this was "for the purpose of protecting prisoners from oppression"[47]. Certain exceptions and qualifications were developed in the case law.

49 The requirements for joinder found in r 3 of Sched I to the 1915 statute expressed a continuing concern for oppression of defendants by the inclusion of too much in the one indictment. Similar forms of words for joinder indictments were adopted in Australian jurisdictions. In 1964, the Queensland Criminal Code was amended to include s 568(6) in terms resembling the English provision. The operation of s 568(6) was considered by Barwick CJ, Gibbs and Mason JJ in *Mackay v The Queen*[48]. Similar provision was made in Victoria[49] and in South Australia by s 278(1) of the *Criminal Law Consolidation Act* 1935 (SA) but with the important qualification, explained in *R v Jackson*[50]. This is that, under the South Australian legislation (s 275), an information filed in the Supreme Court or in the District Court may properly be regarded for all purposes as an indictment. Finally, in the Territory provision to similar effect to s 278(1) of the South Australian statute is made by s 309(1) of the Criminal Code.

50 The result was that, whilst s 4K of the Crimes Act made particular provision with respect to joinder in summary process (with qualifications drawn from the revised indictment procedures) and for aggregated sentencing, no such specific provision was made by federal law with respect to the trial on indictment of federal offences. In particular, the question of the existence of any power of aggregated sentencing upon charges tried on indictment was left to the operation of s 68(1) of the Judiciary Act. The appellant seeks to deny that proposition by reference to the enactment, subsequent to that of s 4K, of Pt 1B of the Crimes Act by the 1990 Act.

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45 *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1350.

46 *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1349.

47 *R v Lockett, Grizzard, Gutwirth and Silverman* [1914] 2 KB 720 at 731.

48 (1977) 136 CLR 465 at 469.

49 By r 2 in the Sixth Schedule to the *Crimes Act* 1958 (Vic); see *Ryan v The Queen* (1982) 149 CLR 1 at 22; *R v Bibaoui* [1997] 2 VR 600 at 603, 607.

50 (1998) 72 SASR 490 at 512-513.

Moorebank to be applied?

51 The appellant referred to what was said, with reference to the Queensland limitation legislation and the recovery provisions of the *Income Tax Assessment Act* 1936 (Cth) ("the Assessment Act"), in *Deputy Commissioner of Taxation v Moorebank Pty Ltd*[51]. The particular issue in that case was whether the recovery provisions "relevantly cover[ed] the field"[52] so as to leave "no room"[53] for s 64 of the Judiciary Act[54] to apply the Queensland legislation. The Court was not persuaded that there was necessarily "any direct inconsistency", but concluded that the recovery provisions "relevantly cover[ed] the field"[55]. In particular, "the intrusion of State Limitation Acts provisions would significantly undermine the scheme for collection and recovery of tax which is contained in the Assessment Act"[56].

52 The appellant relies on that reasoning, but it does not apply in the present case. First, as is apparent from the Explanatory Memorandum for the Bill which became the 1990 Act (which introduced Pt 1B), the 1990 Act had various objectives in amending the Crimes Act. These varied between the making of exhaustive provision on some subjects and supplementary provision on others. An example of the former is the provision by Div 4 of Pt 1B (ss 19AB-19AK) of what the Memorandum had identified as "a separate regime for fixing federal non-parole periods rather than relying on applied State or Territory legislation"[57]. The appellant relies in particular upon Div 2 of Pt 1B (ss 16A-16D) and Div 3 (ss 16E-19AA), headed respectively "General sentencing principles" and "Sentences of imprisonment". These answer the broad but non-exhaustive terms

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51 (1988) 165 CLR 55.

52 (1988) 165 CLR 55 at 66.

53 (1988) 165 CLR 55 at 66.

54 Section 64 states:

> "In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

55 (1988) 165 CLR 55 at 66.

56 (1988) 165 CLR 55 at 66.

57 Australia, Senate, Crimes Legislation Amendment Bill (No 2) 1989, Explanatory Memorandum at 1.

of the Memorandum "to give further guidance to the courts when sentencing federal offenders".

53 Secondly, Pt 1B is to be read with the other and pre-existing provisions of the Crimes Act, which include s 4K. The presence of s 4K denies any proposition that Pt 1B "covered a field" as an exhaustive statement of the will of the Parliament with respect to sentencing for federal offences. This consideration led the appellant to redraw this postulated field so as to exclude sentencing for summary offences. But that process encounters the difficulty that, on their face, those express provisions which Pt 1B does make are not so confined.

54 Thirdly, it is not the case that the operation of s 68(1) of the Judiciary Act to enable the exercise of the power in s 52(1) of the Sentencing Act would undermine the provisions of Pt 1B of the Crimes Act. Reference was made in argument to par (c) of s 16A(2) of the Crimes Act. This provision perhaps reflects what earlier had been said by Brennan J in *Ryan v The Queen*[58]:

> "When an accused person is convicted on two or more counts regularly joined, the trial judge is entitled to assess an appropriate overall sentence having regard to the entire course of criminal conduct which constitutes the several elements of the offences of which the accused is convicted."

Paragraph (c) obliges the sentencing court to take into account:

> "if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – that course of conduct".

The operation of this mandatory provision is not undermined by the presence of an attendant power conferred by s 68(1) of the Judiciary Act to apply s 52(1) of the Sentencing Act by imposing the one term of imprisonment in respect of all the offences but so as not to exceed the maximum term that could be imposed were a separate term imposed in respect of each offence. Nor does the exercise of that power to apply s 52(1) clash with the requirement in s 17A(1) of the Crimes Act that the sentencing court be satisfied, after consideration of all other available sentences, that "no other sentence is appropriate in all the circumstances of the case".

55 The reasoning of the majority of the Court in *Wong v The Queen*[59] does not require any different conclusion to that expressed above respecting the power

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58 (1982) 149 CLR 1 at 22.

59 (2001) 207 CLR 584.

conferred by s 52(1) of the Sentencing Act. Their Honours held[60] that the starting point required by the sentencing "guidelines" propounded by the Court of Criminal Appeal for narcotics importation offences was inconsistent with the requirement to consider the range of matters detailed in s 16A of the Crimes Act. This was because the guidelines provided for the fixing of presumptive sentences by a grid founded entirely on the gravity of the offence as measured only by the weight of narcotic concerned.

56 Reference also was made by the appellant to s 16BA of the Crimes Act. This is not a new provision. It previously was s 21AA of the Crimes Act and was introduced into Pt 1B and renumbered by s 35 of the 1990 Act. Section 16BA provides a procedure whereby in certain circumstances in passing sentence for convictions the court may take into account offences in respect of which guilt is admitted but there has been no trial. Sub-section (10) states:

> "An offence taken into account under this section shall not, by reason of its so being taken into account, be regarded for any purpose as an offence of which a person has been convicted."

With this, sub-s (4) is to be read. This provides:

> "Where the court takes into account under this section all or any of the offences in respect of which the person has admitted his guilt, the sentence passed on him for any of the offences of which he has been convicted shall not exceed the maximum penalty that the court would have been empowered to impose on him for the offence if no offence had been so taken into account."

There is no contrariety between the scheme for which s 16BA provides and the exercise of the aggregated sentencing power in s 52(1) of the Sentencing Act in respect of multiple convictions.

57 Finally, the appellant referred to the use of the singular "sentence" throughout Pt 1B. That does not imply that, according to the context, the plural cannot be meant. There is here but the faintest support for the suggestion that s 68(1) of the Judiciary Act is denied by Pt 1B of the Crimes Act any operation to apply an aggregated sentencing provision in State or Territory law.

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60 (2001) 207 CLR 584 at 609-611 [71]-[73], 616 [87] per Gaudron, Gummow and Hayne JJ, 631-632 [129]-[131] per Kirby J.

Unequal treatment?

58 An argument also was put to the effect that to give s 68(1) the operation it had in the Supreme Court of the Northern Territory in this case was to exceed that which was permitted by the Constitution. The consequence would appear to be that s 68(1) must be read down to preserve its validity and to deny any application of s 52(1) of the Sentencing Act. The submission was that s 52(1) "would ... provide for the unequal treatment of equals" and this was "prohibited discriminatory treatment, contrary to the Constitution".

59 However, in oral submissions the appellant disavowed any application to seek leave to re-open *Leeth v The Commonwealth*[61]. That case is authority that, specific restrictions and implications arising from the federal structure apart, there is no implication to be drawn from the Constitution that federal laws must operate uniformly throughout the Commonwealth. The choices of venue authorised by s 80 of the Constitution and provided in this case by s 70A of the Judiciary Act, to which reference has been made earlier in these reasons, coupled with the operation of s 68(1), meant that the laws of the Commonwealth did not mandate a single sentencing outcome in respect of the appellant's contraventions of the Crimes Act and the Bankruptcy Act.

60 The same may be said of actions in federal jurisdiction where ss 79 and 80 of the Judiciary Act are engaged. It may also be said in the United States, at least since *Erie Railroad Co v Tompkins*[62], of the application of State law in federal cases by the progenitor of s 79 found in the *Rules of Decision Act*[63]. One of the grounds assigned by Brandeis J in *Erie* for eschewing "the federal common law" was the need to avoid "grave discrimination" by differential outcomes of State law disputes heard in the diversity jurisdiction of a federal court and in a State court[64]. Further, as Gleeson CJ observed of s 68 in *R v Gee*[65]:

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61 (1992) 174 CLR 455.

62 304 US 64 (1938).

63 Section 34 of the *Judiciary Act of 1789*. See *Northern Territory v GPAO* (1999) 196 CLR 553 at 587; Chemerinsky, *Federal Jurisdiction*, 4th ed (2003) at 312-315.

64 304 US 64 at 74-75 (1938).

65 (2003) 77 ALJR 812 at 814 [7]; 196 ALR 282 at 285. See also at 822 [63]; 296 of ALR per McHugh and Gummow JJ, 831 [115]-[116]; 308-309 of ALR per Kirby J, 840 [180]; 321 of ALR per Callinan J.

> "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."

These points are worth remarking to indicate that to utter the term "discrimination" as a solvent to issues arising in a federal court structure itself dictates no easy or universal answer.

61 That does not gainsay the proposition in *Pfeiffer*[66] that the common law choice of law rules in Australia apply the *lex loci delicti* as the law governing all questions of substance in a proceeding arising from an intranational tort. After referring to the recognition in s 80 of the Judiciary Act of the Australian common law, it was said in the joint judgment in *Pfeiffer*[67]:

> "No question presently arises as to the position which would obtain if s 80 were displaced by a specific statutory federal choice of law rule[68]. Nor is it necessary to determine what would have been the position if s 80 had not been enacted or were repealed. A question would have arisen as to whether the common law choice of law rules ... nevertheless apply in federal jurisdiction as part of the ultimate constitutional foundation."

That question was not decided. Thus, the outcome in *Pfeiffer* casts no shadow on the rather different issues of statute law considered earlier in *Leeth*.

Conclusion

62 The appeal should be dismissed.

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66 (2000) 203 CLR 503 at 544 [102].

67 (2000) 203 CLR 503 at 531 [56].

68 See, eg, *Domicile Act* 1982 (Cth), and compare *Trusts (Hague Convention) Act* 1991 (Cth).

63 KIRBY J. This is another case[69] concerned with the operation of those provisions of the *Judiciary Act* 1903 (Cth)[70] that permit the "picking up" and application of non-federal laws in proceedings in a State or Territory court exercising federal jurisdiction.

64 Such provisions effectively allow a useful integration of the statute law of a State or Territory with the federal law that has enlivened the jurisdiction concerned. However, the application is subject to a number of qualifications. These include the paramountcy of the operation of valid federal laws; the operation of any implications applicable to the particular case concerning inconsistency of the other law with the federal law in question; the need sometimes to adapt the local law to apply in a different context; and the occasional impossibility of marrying the laws of the two systems. These difficulties are recognised in the language of the *Judiciary Act* itself. That Act calls for the application of the State and Territory laws only so far as "they are applicable"[71] and with exceptions that are "otherwise provided by the Constitution or the laws of the Commonwealth"[72]. Such modifications would be required in any event. However, they are spelt out by the provisions of the *Judiciary Act* under which the "picking up" is done. They must be obeyed.

65 This Court has adopted a broad interpretation of the *Judiciary Act* so as to make available to parties in federal jurisdiction novel measures enacted by State and Territory law[73]. Given that the provisions of the *Judiciary Act* necessitate adaptation of the posited law, so that it can apply in different parts of the Commonwealth[74], no narrow view should be taken of its terms. For matters in criminal jurisdiction, State and Territory laws will often be more innovative in procedural law, in particular, than the laws enacted by the Federal Parliament, with its pressing national concerns[75].

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69 cf *Solomons v District Court (NSW)* (2002) 76 ALJR 1601; 192 ALR 217; *R v Gee* (2003) 77 ALJR 812; 196 ALR 282 and *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566; 200 ALR 403.

70 *Judiciary Act* 1903 (Cth), ss 68, 79.

71 *Judiciary Act*, ss 68(1), 79. See also s 80.

72 *Judiciary Act*, s 79. See also s 80.

73 *R v Gee* (2003) 77 ALJR 812 at 831 [115]; 196 ALR 282 at 308.

74 Including in federal criminal jurisdiction for which s 68 of the *Judiciary Act* specifically provides.

75 See eg *R v Gee* (2003) 77 ALJR 812 at 830-831 [114]; 196 ALR 282 at 308.

66 Nevertheless, the task presented by the intersection of different legal regimes "necessitates the drawing of lines about which opinions will sometimes divide"[76]. So it is in the present appeal. I differ from the majority in their finding that the provisions of the *Judiciary Act* pick up and apply a section of the *Sentencing Act* (NT)[77]. There was no contest that the sentencing of Mr Robert Putland ("the appellant") for offences against federal law involved the exercise by the Supreme Court of the Northern Territory of federal jurisdiction[78]. A close consideration of the applicable federal law, and of the *Sentencing Act*, read in the light of constitutional and statutory assumptions that apply and decisional authority lead me to a conclusion different from that reached by the majority.

67 My conclusion is influenced not only by the analysis of the language of the intersecting legislation but also by an important consideration of legal principle. Subject to law, federal offenders, convicted of indictable offences, should ordinarily be treated uniformly and without discrimination, wherever their conviction occurs in the Commonwealth. In sentencing they should be so treated unless a valid federal law authorises or contemplates a relevant difference. In this case, none does.

The facts, legislation and legislative history

68 The facts that led to the appellant's conviction of the offences against the *Crimes Act* 1914 (Cth) and the *Bankruptcy Act* 1966 (Cth) are described in the reasons of Gummow and Heydon JJ ("the joint reasons")[79]. There set out are the terms of the *Sentencing Act* which the judge of the Supreme Court, sentencing the appellant, (Bailey J) invoked to impose on him an "aggregate term of imprisonment" of four years.

69 In sentencing the appellant in this way, the judge did not identify the individual sentences which he imposed for each of the federal offences to which the appellant had pleaded guilty. The appellant complains that there was no

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76 *R v Gee* (2003) 77 ALJR 812 at 831 [115]; 196 ALR 282 at 308.

77 *Sentencing Act*, s 52.

78 *Northern Territory v GPAO* (1999) 196 CLR 553 at 589-592 [87]-[92], 604 [129], 621-623 [177]-[181], 637-638 [222], 650 [255]. The indictment charged the appellant with offences against the *Crimes Act* 1914 (Cth), s 29D (defrauding the Commonwealth) and the *Bankruptcy Act* 1966 (Cth), s 266(1) (disposing of property in the name of another whilst being an undischarged bankrupt), and s 269(1)(b) (carrying on business with intent to defraud creditors after bankrupt).

79 Joint reasons at [27]-[29].

authority in, or under, federal law to authorise such a sentence. He asserts (and it was common ground) that there was no authority at common law[80] to sustain such a sentence[81]. Accordingly, whilst aggregation in punishment in the sense of the consideration of its totality was to be taken into account[82], no warrant existed in law for the sentence imposed. On this ground, the appellant submitted that the sentence was unlawful.

70 The appellant also argued that the aggregate sentence was unjust for its lack of transparency and resulted in the imposition upon him of an excessive punishment. In the absence of identification of the components of the sentence, the aggregate sentence presented serious disadvantages for him and for the just punishment of offenders throughout Australia convicted of the same or similar indictable federal offences.

71 The appellant appealed against his sentence to the Court of Criminal Appeal of the Northern Territory. That court, in accordance with the authority of this Court[83], held itself bound to apply the majority view adopted by the Court of Criminal Appeal of South Australia[84] concerning the availability of the power in such a case to impose an aggregate sentence. That decision was to the effect that, in imposing sentences upon an offender convicted of indictable federal offences, s 68 of the *Judiciary Act* "picked up" a State sentencing statute so far as that statute permitted the imposition of a single "aggregate" sentence and applied it to the sentencing of a federal offender. Apart from such authority, the Court of Criminal Appeal went on to satisfy itself that this was the preferable view of the operation of the *Judiciary Act*[85]. In this regard it drew upon the reasons of

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80 *Ryan v The Queen* (1982) 149 CLR 1 at 4 per Stephen J, 25 per Brennan J. See Warner, "General Sentences", (1987) 11 *Criminal Law Journal* 335 at 337-339.

81 Applied to the trial by the *Judiciary Act*, s 80.

82 *Crimes Act*, s 16A(2)(c): "In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court: (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – that course of conduct". See also s 16B ("Court to have regard to other periods of imprisonment required to be served") and s 16BA ("Taking other offences into account").

83 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; see *Putland v The Queen* [2003] NTCCA 3 at [10].

84 *R v Jackson* (1998) 72 SASR 490 (Perry and Nyland JJ; Millhouse J dissenting).

85 *Putland v The Queen* [2003] NTCCA 3 at [31].

Gleeson CJ in *R v Gee*[86], citing in turn the opinion of Dixon J in 1934 in *Williams v The King [No 2]*[87] to the effect that the general policy disclosed by the *Judiciary Act* was 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". As I shall show, in relevant ways that policy has been modified by later developments in federal law.

72 The appellant challenges the judgment of the Court of Criminal Appeal. By special leave, his challenge is now before this Court.

The issues

73 Five issues are presented by the appeal. They are:

(1) *The federal jurisdiction issue*: Does a Territory court exercise federal jurisdiction in that Territory in conducting the trial of, and in sentencing, a person convicted of a federal offence? This question is answered by the terms of the *Judiciary Act* itself[88] and by the authority of this Court, referred to in the joint reasons[89]. As the existence of federal jurisdiction was not challenged by either party to this appeal, and arises whichever view is taken of the constitutional status of a court of a self-governing Territory[90], no more need be said of this issue.

(2) *The trial and conviction issue*: Does the provision in s 68(1)(c) of the *Judiciary Act* for the application of the laws of a Territory and the *procedure* for "trial and conviction on indictment" pick up the substantive law of sentencing so as to apply to a case in federal jurisdiction the provisions of the *Sentencing Act* conferring the power on a judge to impose an aggregate sentence in respect of conviction for indictable offences?

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86 (2003) 77 ALJR 812 at 814 [6]; 196 ALR 282 at 284-285.

87 (1934) 50 CLR 551 at 560.

88 *Judiciary Act*, s 68(2). See also s 79.

89 Joint reasons at [33].

90 See eg *Northern Territory v GPAO* (1999) 196 CLR 553 at 589-592 [87]-[92], 604 [129], 621-623 [177]-[181], 637-638 [222], 650 [255]; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 334 [18], 339 [32], 348 [63], 374-378 [133]-[143]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 519 [19], 530-531 [54], 564 [163].

(3) *The "otherwise provided" issue*: Assuming that, under s 68 or another section, the *Judiciary Act* appears to pick up the provisions of the *Sentencing Act* allowing aggregate sentences, do other federal laws, or does the Constitution itself, "otherwise provide", so as to prevent the "picking up" and application of the *Sentencing Act* in such a case?

(4) *The non-applicability issue*: By the provisions of s 52 or its scheme and integrated terms, does the *Sentencing Act* involve such a different and incompatible statement of sentencing principles that it is "inapplicable" to the sentencing of a federal offender such as the appellant and thus outside the terms of the *Judiciary Act*?

(5) *Resolution of the ambiguity issue*: To the extent that there is ambiguity or doubt about the intersection of the propounded federal and Territory laws, or uncertainty as to the operation of the *Judiciary Act* in the circumstances, are there any constitutional principles or considerations of sentencing policy that suggest that the Territory law is not picked up in a case such as the present, thus requiring individual sentences for federal offenders convicted of indictable offences?

Trial and conviction: jurisdiction and procedures

74 By s 68(1) of the *Judiciary Act* it is provided, relevantly, (with added emphasis) that:

> "The laws of a … Territory respecting the arrest and custody of offenders or persons charged with offences, and the *procedure* for:
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> …
>
> (c) their trial and *conviction on indictment*;
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> …
>
> 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 … Territory by this section."

75 The appellant submitted that the purpose of s 68(1), in accordance with the indications of its language and context, was confined to the application, relevantly, of the "procedures" of State or Territory law. The sub-section draws a distinction between "procedure" and "jurisdiction". Elsewhere, the Act draws a

similar distinction between "jurisdiction" and "powers"[91]. The appellant complained of a confusion between the provision in s 68(1) for the applicability of a *procedure* and the source of a *substantive* sentencing power. He argued that the latter was not supplied by s 68(1).

76 The appellant relied both on the absence of a specific power for aggregate sentencing at common law and the existence of a provision of a defined power for aggregate sentencing, confined by federal law to offenders convicted of summary federal offences[92]. He invoked the distinction noticed by McHugh J in *Solomons v District Court (NSW)*[93] between jurisdiction, powers and procedures. He submitted that this distinction confined the operation of s 68(1) of the *Judiciary Act* to procedures arising during a trial and at the stage of conviction. It did not extend to the substantive law of sentencing.

77 Even if powers with respect to sentencing might, on a broad view, be regarded as part of the act of "conviction" (and not a step occurring *after* the "conviction" was complete), the appellant argued that s 52 of the *Sentencing Act* could not be categorised as a merely "procedural" provision. Support for this submission is found in the context of s 68(1) of the *Judiciary Act* and the reference there to procedures anterior to the trial (arrest, custody and bail). Support for the distinction may also be found in observations of this Court made in relation to innovative State laws readily characterised as "procedural"[94]. Such an interpretation of s 68(1) would still leave the sub-section with much work to do. As a particular example, it would permit the laws of States and Territories governing procedures for the joinder of offences on an indictment to be "picked up" and applied to the trial and conviction on indictment of a person accused of a federal offence[95].

78 There is therefore much force in the appellant's argument that s 52 of the *Sentencing Act* is not a provision respecting "procedure" but a substantive provision altering the law of sentencing in a fundamental way by providing a power to the judiciary that does not otherwise exist in law. On this footing,

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91 The distinction between the *jurisdiction* of the Court to hear federal criminal cases and the *power* of the Court in disposing of such cases is often made: *Wong v The Queen* (2001) 207 CLR 584 at 627 [119].

92 *Crimes Act*, s 4K.

93 (2002) 76 ALJR 1601 at 1609-1610 [43]; 192 ALR 217 at 228-229.

94 Such as the *Criminal Law Consolidation Act* 1935 (SA), s 350. See *R v Gee* (2003) 77 ALJR 812 at 814 [7]; 196 ALR 282 at 285.

95 *R v Bibaoui* [1997] 2 VR 600 at 601; *R v Jackson* (1998) 72 SASR 490 at 513.

s 68(1), concerning as it does "procedures" not "powers", would have no effect to "pick up" the provisions of the Territory Act for application to the sentencing of a federal offender, even assuming that the law of sentencing could be regarded, broadly, as a law "respecting" the "conviction" of a person charged on indictment.

79 In the end, however, it is unnecessary to resolve this issue. This is because s 79 of the *Judiciary Act* applies to "pick up" the "laws of each … Territory, including the laws relating to procedure, evidence, and the competency of witnesses". As I pointed out in *Solomons*[96], although, by these terms, s 79 makes specific reference to the laws relating to procedure etc, the identified categories are mentioned "only by way of illustration". This makes it clear that s 79 has a wider ambit. It applies, so long as the conditions in that section are met. These refer to the disqualifying effect of the Constitution or of federal law "otherwise providing" and the requirement that the case in which the local law is invoked must be one to which such law is "applicable". This conclusion brings me to the central arguments in this appeal.

Federal laws "otherwise provide"

80 *The provisions of federal law*: Before considering any implications that may be derived from the Constitution, it is my opinion that certain features of enacted federal law "otherwise provide" within s 79 of the *Judiciary Act*, so as to exclude the operation of that section (and s 68) with respect to s 52 of the *Sentencing Act*. None of the identified federal laws can be viewed in isolation. What is in question here involves the overall operation of federal law, specifically the sentencing of offenders convicted of indictable federal offences. Each of the ingredients of federal law must therefore be viewed in relation to the others.

81 *The federal offences*: The starting point is an appreciation that the appellant pleaded guilty to, and was convicted of, six counts alleging substantive offences against federal law. Each of those offences, unsurprisingly, had a national element. The first two counts, of defrauding the Commonwealth, comprised offences against s 29D of the *Crimes Act*. Whilst fraud is not an uncommon offence in the laws of the States and Territories of Australia, the nominated victim in the appellant's case, the Commonwealth, gave the appellant's crimes a special character[97]. They involved an offence against the national community, represented by the Commonwealth. This consideration, and the

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96 (2002) 76 ALJR 1601 at 1622 [117]; 192 ALR 217 at 246-247.

97 *New South Wales Bar Association v Hamman* [1999] NSWCA 404 at [85] per Mason P.

element of breach of civic duty in defrauding the Australian people, is one commonly taken into account in sentencing of federal offenders convicted, as here, of tax evasion and elsewhere of social security fraud and other like federal offences. Quite properly, this aspect of the character of the crime was mentioned by the sentencing judge. He pointed out[98]:

> "The tax system is based on trust and depends, for its effective operation, on the honesty of taxpayers."

82 Because the victim of the crime is, in effect, the Australian community, the offence is the same for every offender throughout the Commonwealth. On the face of things, without a clear statutory indication of a different purpose or other justification, it would ordinarily be assumed that the approach to sentencing of offenders convicted of such a crime would not vary, or vary significantly, upon the chance consideration of where the offender happened to be tried and convicted within Australia. It was not suggested during argument that there was any "local factor" that would have warranted differential approaches to the sentencing of offenders convicted of such a crime against the national polity in the Northern Territory[99]. On the face of things, therefore, a consistent national level of punishment was called for.

83 The other counts to which the appellant pleaded guilty related to offences against ss 266(1) and 269(1)(b) of the *Bankruptcy Act*. These offences concerned disposing of property with intent to defraud creditors after bankruptcy and carrying on business in the name of another person whilst an undischarged bankrupt. Here again, each offence was one against a national law. On the face of things, such offences are designed to uphold the same standards of probity and honesty on the part of bankrupts everywhere in Australia. No "local factor" appeared to warrant differential sentencing of the appellant.

84 Starting, therefore, with the offences themselves, the suggestion that a Territory law could introduce a different approach to sentencing, resulting either in higher or lower punishment of offenders convicted of such federal offences, is unappealing. We are not talking here of novel *procedural* facilities. We are concerned with the *substantive* law of punishment under a national statute and a suggestion that differential components may be introduced into that punishment, with inevitable consequences for individual liberty.

85 *Section 4K – a limited and specific provision*: An indication that the Federal Parliament did *not* intend the importation into the sentencing of offenders

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98 Reasons for sentence at 6.

99 cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 476 per Brennan J.

convicted of indictable federal offences of a power for the aggregation of such sentences, may be found in s 4K of the *Crimes Act*. As is pointed out in the other reasons[100], that section can be traced to an earlier manifestation in federal law before it was enacted in its current form as s 4K[101].

86 I agree with the other reasons that the interpretation adopted by the Victorian Court of Appeal in *R v Bibaoui*[102] is correct. By the reference in s 4K(3) of the *Crimes Act* to "the same information, complaint or summons" it must be accepted that the provision for the imposition of aggregate sentences on convicted federal offenders was confined to those convicted of summary offences. It did not extend to indictable offences such as those brought against the appellant.

87 The provisions of s 4K were in the *Crimes Act* when relevant reforms to federal sentencing law, in the form of Pt 1B, were introduced into the *Crimes Act* by the *Crimes Legislation Amendment Act (No 2)* 1989 (Cth) ("the 1989 Act"). Whether or not these reforms were "unnecessarily complicated"[103] or as comprehensive as would have been desirable, is beside the present point. The task of this Court is to interpret them. Moreover, it must do so as a final court with a national perspective and constitutional duty to the whole of Australia. This should make the Court less sensitive to the disturbance of State (and Territory) sentencing prerogatives than a State (and Territory) judge may sometimes be. Certainly, State judicial complaints, such as those made in *Director of Public Prosecutions (Cth) v El Karhani*[104] have fallen on deaf federal ears in the 15 years since the 1989 reforms were enacted. The statutory changes were not withdrawn. The law of sentencing did not revert. This Court must therefore give full effect to the change of direction in sentencing of federal offenders introduced in 1989. In *El Karhani*, having expressed their complaints about some of the language of Pt 1B of the *Crimes Act* and having recorded the history and limitations of the Part, the participating judges meticulously applied

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100 See reasons of Gleeson CJ at [10]; the joint reasons at [45]; the *Acts Interpretation Amendment Act* 1984 (Cth) inserted s 45B in the *Acts Interpretation Act* 1901 (Cth).

101 By the *Crimes Legislation Amendment Act* 1987 (Cth), s 11.

102 [1997] 2 VR 600.

103 See comments in *R v Paull* (1990) 20 NSWLR 427 at 437 cited in *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 at 372.

104 (1990) 21 NSWLR 370.

its terms. They did so by reference to those provisions, point by point[105]. They recognised, and conformed to, the new federal sentencing regime as enacted. This Court should do no less.

88 The 1989 Act followed a report of the Australian Law Reform Commission ("the Commission"). As was pointed out in *El Karhani*[106], the Act implemented some, but not all, of the Commission's recommendations. The Commission's report on sentencing was delivered in 1988[107]. That report had followed an earlier interim report concerned with sentencing of federal offenders delivered in 1980[108]. In the earlier report, the Commission addressed directly the problem of differential punishment of federal offenders in different parts of Australia. It did so by reference to the arrangements then in place under the *Commonwealth Prisoners Act* 1967 (Cth). That Act imported into the punishment of federal offenders significantly different State procedures and substantive rules[109]. Of these, the Commission said[110]:

> "Commonwealth laws should implement the principle that offenders against the laws of the Commonwealth should be treated *as uniformly as possible throughout Australia*. Commonwealth laws and procedures which hinder the achievement of uniformity should be changed to bring them into accord with this principle even if doing so results, for a time, in differences in the way in which Commonwealth and local offenders are treated within a State or Territory jurisdiction."

89 Whilst variations in procedural matters might persist, permitting the incorporation of innovative State and Territory procedures varying as between

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105 *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 at 380-385.

106 (1990) 21 NSWLR 370 at 375 cited in the reasons of Gleeson CJ at [17].

107 Australian Law Reform Commission, *Sentencing*, Report No 44, (1988).

108 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 Interim, (1980).

109 The definition of "federal offender" in the *Commonwealth Prisoners Act* 1967 (Cth) did not apply to an offender sentenced in the Australian Capital Territory who was subject to the *Prisoners (Australian Capital Territory) Act* 1968 (Cth); see *R v Paivinen* (1985) 158 CLR 489. See also *R v Shrestha* (1991) 173 CLR 48; *Leeth v The Commonwealth* (1992) 174 CLR 455.

110 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 Interim, (1980) at xxxiii (emphasis added).

different Australian jurisdictions, in substantive matters, the Commission's approach favoured the general uniformity of punishment of persons convicted of the same offences throughout the nation. To this extent, the Commission adopted a view that departed from the one explained by Dixon J in 1934 in *Williams*[111]. This change in relation to sentencing was before the Parliament when s 4K was moved into the *Crimes Act*. True, a simple change was not adopted, as the Commission had proposed. The enacted reforms fell short of embracing the full ambit of the Commission's recommendations[112]. But the in-built inequalities of the regime in the *Commonwealth Prisoners Act* were changed. That Act was repealed. The introduction of Pt 1B demanded uniform sentences of federal offenders to the extent there provided[113]. This was something new. Inevitably, it reduced the virtually complete integration of the sentencing of a federal offender with those of the States that had preceded the 1989 Act.

90 To the extent that the Federal Parliament continued a specific provision allowing aggregation of federal offences for sentencing purposes, it confined that provision to summary offences. It could have adopted aggregation of sentences as part of the new national rules on the sentencing of federal offenders. Behind the choice that it made lay an arguable view of sentencing policy. In respect of some multiple offences against federal laws (such as repeated offences of a summary character against taxation or social security laws) aggregation in sentences could be viewed as suitable and appropriate. However, in respect of more serious federal offences, for which provision is specifically made for trial on indictment (invoking the requirements of jury trial under the Constitution[114]), the normal obligation, provided by the common law, was to continue to apply so far as federal law is concerned. Accordingly, each conviction required a separate sentence.

91 To the extent that, in the case of indictable offences for which no express federal power of aggregation of sentences is provided, it is necessary to consider a number of related sentences together, this is addressed in federal law by the specific requirement that sentencing judges have regard to the principle of

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111 Above at [71].

112 As pointed out in *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 at 375. See the extract quoted in the reasons of Gleeson CJ at [17].

113 See Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed (1999) at 7-8.

114 Constitution, s 80.

totality in sentencing, whether expressed in the common law[115] or in the statutory provisions supplementing or replacing that common law rule[116]. It is not ignored.

92 No statutory provision is made in the law of the Commonwealth, New South Wales, Queensland, Victoria[117] or Western Australia[118] for aggregate sentencing of offenders convicted of indictable offences. Only in three Australian jurisdictions does the local sentencing law permit aggregate sentencing for indictable offences, namely South Australia[119], Tasmania[120] and the Northern Territory[121]. The position in the Australian Capital Territory is unclear[122].

93 The result is that, if the present appeal is dismissed, not only is a serious divergence in the sentencing of persons convicted of indictable federal offences introduced. It is imposed on such offenders by the supposed operation of the general provisions of the *Judiciary Act*[123]. The *Judiciary Act* has not specifically addressed the issue. Yet that Act is held to expand the operation of s 4K of the *Crimes Act* in a way that the Federal Parliament has expressly held back from doing explicitly, arguably for sound reasons of sentencing policy.

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115 *Postiglione v The Queen* (1997) 189 CLR 295 at 308-309 approving *R v Gordon* (1994) 71 A Crim R 459 at 466 per Hunt CJ at CL.

116 See eg *Crimes Act*, Pt 1B, ss 16A(2)(c), 16B and 16BA.

117 *Sentencing Act* 1991 (Vic), s 9 confers on the Magistrates' Court the power to impose an aggregate sentence of imprisonment, including for indictable offences being tried summarily.

118 *Sentencing Act* 1995 (WA), ss 76, 85, 86, 89 and 94; *Sentence Administration Act* 1999 (WA). The term "aggregate" is used in the *Sentencing Act* 1995 (WA) in the same sense as in the *Crimes Act*, s 16.

119 *Criminal Law (Sentencing) Act* 1988 (SA), s 18A.

120 *Sentencing Act* 1997 (Tas), s 11.

121 Pursuant to the *Sentencing Act*, s 52(1).

122 See *Interpretation Act* 1967 (ACT), s 33C, inserted in 1985. This section is in terms similar to the *Crimes Act*, s 4K. The joinder in the same "information or summons" of multiple offences is permitted where the offences are against the same provision of an Act which permits a single penalty to be imposed. However, exceptionally, in the Australian Capital Territory, proceedings in superior courts may be commenced by "information".

123 *Judiciary Act*, s 79 and, possibly, s 68.

94 With all respect to those of the opposite view, insufficient attention has been paid to the negative implication concerning the purpose of the Federal Parliament in transferring and re-enacting s 4K as part of the general criminal statute of the Commonwealth. Had it wished to do so, the Parliament might there and then have incorporated a provision permitting an extension of the principle of aggregate sentences to indictable federal offences. This could have been done quite simply by including the word "indictment" in s 4K(3) of the *Crimes Act*. To do so would have been compatible with the introduction of a new general regime for the sentencing of federal offenders – not exhaustive, it is true, but still comprehensive. This was not done. The omission is to be evaluated against the background of a lively debate, coinciding with the enactment of s 4K of the *Crimes Act*, concerning the general desirability of ensuring, in matters of substance, the equal punishment of federal offenders for indictable federal offences wherever such offenders are convicted in the Commonwealth. The view of the Court of Criminal Appeal, now endorsed, undermines the achievement of that important federal objective which this Court should uphold. At the least, it should do so to the extent that the Parliament expressly so provided.

95 In so far as the new federal sentencing principles enacted in Pt 1B of the *Crimes Act* so provided, the Federal Parliament accepted the principle earlier enunciated by the Australian Law Reform Commission[124]. That principle is incompatible with the principle now adopted by this Court. When the new Pt 1B was enacted, the Parliament did not enact an amendment to s 4K (as it might simply then have done) to permit aggregate sentences in the case of federal offenders convicted of *indictable* offences. Instead, it left that provision confined to sentencing of federal offenders convicted of *summary* offences. It is true that care must be taken in the application of the maxim of interpretation *expressio unius est exclusio alterus*[125]. Nevertheless, the persistence in the relevant federal law (indeed the re-enactment therein) of a specific provision limited to *summary* offences, especially at the time of the enactment of several general principles for sentencing of federal offenders, suggests legislative endorsement of a policy that excludes aggregation of sentences in the most serious cases of conviction of

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124 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 5 October 1989 at 1603 (Mr Robert Brown for the Federal Attorney-General, Mr Lionel Bowen).

125 The express mention of one person or thing implies the exclusion of the other. See *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94; cf *State of Tasmania v The Commonwealth of Australia and State of Victoria* (1904) 1 CLR 329 at 343.

multiple *indictable* offences[126]. The distinction between summary and indictable offences is not an inconsequential one. It is reflected in s 80 of the Constitution.

96 It follows that, when it was suggested that the provisions of s 52 of the *Sentencing Act* were "picked up" and applied to the sentencing of the appellant, the proper answer that a court should give is that federal law, namely s 4K of the *Crimes Act* "otherwise provided". It did so by the re-enacted terms of s 4K. By its particularity that section rendered the *Judiciary Act* "inapplicable" to a case of federal offences that were indictable[127].

97 *Part 1B – a new federal sentencing regime*: The foregoing conclusion is reinforced by the provisions of Pt 1B of the *Crimes Act*. However imperfect and incomplete that Part may have been as a code, the introduction of Pt 1B undoubtedly represented an important step for the Federal Parliament in relation to the sentencing of convicted federal offenders. This Court should not undermine it. It would have been simple for Pt 1B of the *Crimes Act* to have included amongst the new federal sentencing provisions an unrestricted power to impose an aggregate sentence on persons convicted of federal offences triable on indictment. Such a provision was not enacted. On the contrary, the specific provisions contained in the Part indicate, with sufficient clarity, that separate sentences were to be imposed in respect of each such conviction[128]. The new Pt 1B was designed to introduce into the federal law of sentencing a distinct set of rules applicable throughout the nation[129], save where derogations were clearly stated or permitted[130].

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126 In this I agree with the dissenting view of Millhouse J expressed in *R v Jackson* (1998) 72 SASR 490 at 502.

127 *Judiciary Act*, s 68(1) (assuming that the section applies).

128 *Crimes Act*, ss 19(1), 19(2), 19(3), 19AB(1) and 19AB(2) each requires the imposition of separate sentences with identified commencing dates, although allowing for a single non-parole period.

129 cf *R v Ngui* (2000) 1 VR 579 at 583 [12] where Winneke P referred to the particular importance "where the offences are created by Commonwealth statutes" of achieving consistency to the extent possible because "sentences for such offences are being imposed by courts throughout Australia" (footnote omitted).

130 A similarly restrictive view of the power of State law to intrude upon the scheme of Pt 1B of the *Crimes Act* was taken in *Wong v The Queen* by Callinan J: see (2001) 207 CLR 584 at 643 [167]. The introduction of differing State "sentencing guidelines" fixed by judges was held by the majority of this Court to be incompatible with the "legislative command" in Pt 1B of the *Crimes Act*.

98 In *Wong v The Queen*[131], the joint reasons of Gaudron, Gummow and Hayne JJ emphasised the obligation of judges throughout Australia to obey the "legislative command of Pt 1B of the Commonwealth *Crimes Act*" in sentencing convicted federal offenders. There was no further judicial complaint about the perceived imperfections of the Part such as had been voiced in *El Karhani*. Their Honours in *Wong* stressed the impermissibility of disobedience to the command in Pt 1B, as by giving effect to guideline judgments devised by courts in different States by reference to considerations distinct from those contained in Pt 1B.

99 How much more important, in the federal system of government within which Pt 1B of the *Crimes Act* must operate, is it to obey the "legislative command of Pt 1B" instead of different commands of the substantive statutory law of sentencing of an individual State or Territory, enacted as part of an integrated package of sentencing law in that State or Territory in terms significantly different from those contained in the "legislative command of Pt 1B"[132]?

100 In *Wong*[133], I pointed out that the "common feature of the list [in s 16A(2) of the *Crimes Act* appearing within Pt 1B was] that a sentence will be imposed which addresses all the individual circumstances of the *offence* and the offender". I was part of the majority in that appeal that concluded that obedience to Pt 1B was not "the hypothesis upon which the 'guideline judgment' … [was] drawn"[134]. By identical analysis it was not the hypothesis upon which s 52 of the *Sentencing Act* was enacted for the Northern Territory. In the case of indictable Territory offences s 52 looks to the aggregate sentence as would be appropriate. In the case of indictable federal offences, the *Crimes Act* looks only at the particular offence and offender. In this case, this Court should adopt an approach consistent with that which it adopted in *Wong*. The different source of the attempt of a State (or Territory) to vary the "legislative command of Pt 1B" – statutory rather than judicial – makes no difference to the obedience required. The Court's object in *Wong* was not to reprove State judges. It was to insist on conformity with the command of *federal* law. We should be no less insistent now.

101 Where there is an *explicit* federal law that deals comprehensively, even if not in all respects exhaustively or as a code, with the substantive law of

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131 (2001) 207 CLR 584 at 610 [72].

132 *Wong v The Queen* (2001) 207 CLR 584 at 610 [72] per Gaudron, Gummow and Hayne JJ.

133 *Wong v The Queen* (2001) 207 CLR 584 at 633 [135]. (emphasis added)

134 *Wong v The Queen* (2001) 207 CLR 584 at 633 [135].

sentencing in the way Pt 1B of the *Crimes Act* does, that legislative scheme is not to be undone by the operation of the *general* provisions of the *Judiciary Act*. Because federal law has "otherwise provided", the provisions of the Judiciary Act do not apply. In the face of that incompatible provision, State and Territory sentencing laws are not "applicable". Federal law has validly occupied the field. Under the Constitution, no State or Territory law may derogate from, or impair, the operation of the federal law in its area of competence.

102 *El Karhani and the absence of inconsistency*: Contrary to the opinion of Gleeson CJ in this appeal[135], there is no inconsistency between the foregoing reasoning and what I said in 1990 as one of the judges who participated in *El Karhani*[136]. If there were, it would require a recantation. The earlier analysis would be wrong or incomplete – a reflection perhaps of seeing the provisions of Pt 1B of the *Crimes Act* from a different judicial perspective, in the context of a different legal problem, considered at an earlier time. But there is no inconsistency and no need to recant.

103 In this Court, it is natural and proper to consider problems from the perspective of the constitutional setting of the case and a national viewpoint. Here, the question of direct compatibility of federal and local law clearly arises. It did not arise in *El Karhani*. Since that case was decided in 1990, the Federal Parliament has enacted many more criminal offences, enlarging the ambit of federal crimes falling for the imposition of sentences in a lawful and principled way. The ambit of federal crime is infinitely greater now than in 1934 when Dixon J propounded his views in *Williams*[137]. Since 1990, the Parliament has not repealed, or relevantly modified, the provisions of Pt 1B of the *Crimes Act*. Despite the judicial complaints voiced in *El Karhani* concerning features of those provisions, the enactment of a special law to govern the sentencing of federal offenders in a particular way, has remained unchanged. That law was applicable to this case. No State or Territory law could require, or permit, otherwise.

104 The objection to the introduction of differences – certainly significant differences – in the type and level of punishment of persons convicted of federal offences, on the sole basis of the geography of their trial (and hence of the court that sentences them) rests on basic legal principle. It is one similar to that which

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135 Reasons of Gleeson CJ at [18]-[20].

136 (1990) 21 NSWLR 370.

137 (1934) 50 CLR 551 at 560. See above at [71]; cf the passage cited by Gleeson CJ in *R v Gee* (2003) 77 ALJR 812 at 814 [6]; 196 ALR 282 at 284-285. This is another illustration of the need to understand judicial opinions in the time and context in which they were expressed.

forbids the introduction into administrative decision-making of considerations irrelevant or extraneous to the power[138]. It is to be assumed that a power (here to sentence) conferred upon a repository (here the sentencing judge) by or under a single legal source (here the provision of the *Crimes Act*) will be exercised in a consistent and equal way, unless the law-maker with the same authority has validly authorised a variation. The chance consideration of the venue of the trial is not a valid point of differentiation for the punishment of the federal crime. It is the duty of this Court to say so.

105 The constitutional arrangements that permit the vesting of federal jurisdiction in State courts (and by analogy in Territory courts, assuming that such jurisdiction is not federal of its very nature) may permit some variations, generally of a procedural or adjectival kind, to creep in. They do not, however, authorise variations contrary to the express provisions of federal law. To "pick up" and apply local sentencing measures that modify the punishment of federal offenders and reduce the transparency of such punishment, would require clear and express provisions. There are none in this case. *El Karhani* says nothing to the contrary.

The Territory law is "inapplicable"

106 The essential basis for my conclusion that the Territory law invoked here is not "applicable" for the purposes of the *Judiciary Act* is therefore that federal law "otherwise provided". However, the appellant relied upon additional arguments of inapplicability derived from a close attention to the terms of the *Sentencing Act* itself.

107 Thus, the appellant pointed out that s 52 of the *Sentencing Act* contains two qualifications relating to aggregate sentencing in the particular case of a sexual or violent offence. They constitute important riders on the general application of that section. According to the appellant, these qualifications were part of a detailed and integrated Territory provision for aggregate sentencing made by s 52, deemed suitable to the criminal law of a Territory which indicate that that section could not be severed and picked up for federal sentencing purposes and limited to the application of s 52(1)[139].

108 The appellant also pointed to the comprehensive list of considerations relevant to sentencing, contained in the general provisions of the *Sentencing Act*, of which s 52 is a part. He submitted that these provisions were incompatible with the quite different federal list of sentencing principles contained in the

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138 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 503-504 [70].

139 There are, however, federal sexual offences provided by the *Crimes Act*, Pt IIIA.

Crimes Act. As such, it made picking up bits and pieces from the Territory law on sentencing dangerous. This was so, the appellant argued, because it could be assumed that each part of the local law was intended to operate in relation to others. Dissecting the Territory law would amount to an attempt to achieve a marriage of incompatibles. Moreover, it would introduce significant uncertainty and complexity into the sentencing of persons convicted of indictable federal offences. This, in turn, would undermine a major purpose of the 1989 amendments to the *Crimes Act* that introduced Pt 1B.

109 There is force in these submissions. However, I do not need to resolve them. For the reasons already given, s 52 of the *Sentencing Act* is not "applicable" to the sentencing of an offender convicted of indictable federal offences, such as the appellant. The appellant's additional arguments would merely reinforce the conclusion I have already reached. The Court of Appeal erred in deciding the contrary.

Resolution of any residual ambiguity

110 *Considerations endorsing inapplicability*: Having arrived at the foregoing conclusion, it is strictly unnecessary for me to consider the constitutional principle invoked by the appellant to lend still further strength to his statutory arguments. Nevertheless, the appellant's arguments should be mentioned because, in my view, they are persuasive and strengthen the conclusion that I have reached. For those who may still feel doubt after analysis of the intersecting legislation, there are important considerations of constitutional principle and of sentencing policy that endorse the same conclusion.

111 *Additional constitutional considerations*: The appellant did not seek to argue that the decision of the majority of this Court in *Leeth v The Commonwealth*[140] was wrong[141]. That question remains for another day. The appellant was content to avoid a direct challenge. However, he drew attention to what the Court had actually decided in that case.

112 In *Leeth*, the majority, in the joint reasons, accepted that the Commonwealth could, by a federal law, give a varying operation to its laws by providing for the operation of the laws of the States (and Territories) in a case in federal jurisdiction. It could do so whilst remaining consistent with the Constitution[142]. Gaudron J, who dissented, also held that it was inevitable that

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140 (1992) 174 CLR 455.

141 Joint reasons at [59].

142 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 468-469 per Mason CJ, Dawson and McHugh JJ.

some differences would flow from the exercise of federal jurisdiction by State (or Territory) courts[143]. However, the appellant argued that the majority principle was subject to two qualifications. The first was that basic sentencing principles should remain uniform, although their application might require weight to be given, in a particular case, to local factors[144]. Furthermore, discriminatory treatment, whereby "equals" were treated unequally, although convicted of a crime in the exercise of a federal sentencing power, would be regarded as contrary to the Constitution[145].

113 Recently, the latter principle has been endorsed by this Court in the joint reasons of Gaudron, Gummow and Callinan JJ in *Cameron v The Queen*[146]. The present appellant submitted that it would be discriminatory treatment if he were to be subjected to an aggregate sentence by a court in the Northern Territory, without disclosure to him of the individual sentences imposed for the offences to which he pleaded guilty. This was so because, had he been convicted and sentenced in most other jurisdictions of Australia, he would have been so entitled.

114 Without entering upon the larger question of whether the Constitution imports implications of basically equal punishment for the same federal offence throughout Australia wherever the conviction and sentencing of a federal offender takes place, there is force in the appellant's more limited submission[147]. The venue of the appellant's trial and conviction is irrelevant to the sentence imposed on him for that offence. It is immaterial to his right to know how that sentence is constructed. Subject to any valid exception provided by law, the normal postulate of the Constitution is that persons convicted of federal offences in State and Territory courts will be uniformly punished in like circumstances wherever in the nation that sentence is imposed[148]. That postulate derives from the single source of the power to sentence, conferred by the legislature of the same polity, namely the Commonwealth.

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143 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 502.

144 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 476.

145 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478-479.

146 (2002) 209 CLR 339 at 343-344 [15].

147 A similar constitutional point was raised in *Wong v The Queen* (2001) 207 CLR 584 at 638 [148]. In the view that the majority took, it did not have to be decided and was "left to another day".

148 cf *Wong v The Queen* (2001) 207 CLR 584 at 627 [118].

115 *Other considerations of policy*: Apart from these elements derived from constitutional principle, other considerations of legal principle and policy support the interpretation of the intersecting legislation urged by the appellant.

116 Only if specific sentences are identified for federal indictable offences, such as those of which the appellant was convicted, will the transparency of the sentencing process be fully upheld. Taking into account considerations of totality and of sentences for connected offences in relation to each other is clearly desirable and permissible[149]. However, the submergence of sentences for major crimes in a single undifferentiated aggregate sentence carries a risk of injustice to the offender. In practical terms, it makes the offender's task of challenging the unidentified components of the aggregate sentence much more difficult[150]. It risks depriving the offender of the provision of adequate reasons for the components of the sentence. It undermines the objective of identifying differential sentences for specific federal crimes so that their content might be known and compared throughout the Commonwealth by all concerned. It diminishes the effectiveness of the deterrent value of particularised sentences. It reduces the utility and availability of effective appellate review addressed to consistency throughout Australia in the sentencing of federal offenders for particular offences. In some cases, it will "mask error" in the judicial approach to sentencing[151]. As Professor Warner stated[152]:

> "A general sentence has the advantage of simplicity and convenience but may sacrifice considerations of uniformity and predictability at a time when such issues are considered particularly desirable."

117 It is true that, if s 52 of the *Sentencing Act* is picked up, it does not permit the available maximum penalties for the offences for which the offender is to be sentenced to be changed. This is because of the express prohibition in s 52(1). However, that limitation leaves standing other serious disadvantages in aggregate sentences which doubtless help to explain why such sentences were not available at common law following conviction for connected offences. In this, as in so

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149 Permitted under the *Crimes Act*, s 16A(2)(c). See also ss 16B and 16BA.

150 *R v Bibaoui* [1997] 2 VR 600 at 603. In the context of the admission of uncorroborated and disputed admissions and confessions to police this Court took a similarly practical and realistic approach to the difficulty which the accused otherwise faced in challenging the admission of such evidence: *McKinney v The Queen* (1991) 171 CLR 468 at 475-476.

151 cf *Pearce v The Queen* (1998) 194 CLR 610 at 623-624 [45].

152 Warner, "General Sentences", (1987) 11 *Criminal Law Journal* 335 at 344.

many other respects, ours is a criminal justice system demanding a high degree of particularity, especially where what is at stake is the loss of liberty and other punishments.

118 The conclusion that I favour would oblige the Federal Parliament, as it should, to consider explicitly any extension of the aggregate sentencing principle contained in s 4K of the *Crimes Act* to federal indictable offences, if that were its purpose. The view adopted by the majority allows a substantive exception to the equal treatment of federal offenders convicted in different parts of Australia to the extent that this was enacted by Pt 1B of the *Crimes Act*, without the salutary obligation for the Federal Parliament itself to address the issue, make a decision and accept the legal and political accountability for the law as then made[153].

119 All of these are reasons for maintaining and upholding the choice that was taken by the Federal Parliament in the treatment of aggregate sentencing set out in the *Crimes Act*. Sentences for *summary* offences may be aggregated; but not sentences for the typically more serious *indictable* offences. In the case of indictable offences, specificity in sentencing is at a premium. That is so because the punishment (including, as in the appellant's case, loss of liberty) is typically greater and more onerous. It should therefore be identified and identifiable.

Orders

120 The appellant succeeds. The appeal should be allowed. The orders of the Supreme Court of the Northern Territory (Criminal Court of Appeal) should be set aside. In lieu thereof, it should be ordered that the appeal to that court be allowed and the sentence imposed upon the appellant quashed. The proceedings should be remitted to the Court of Criminal Appeal for the resentencing of the appellant.

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153 See Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 cited in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 60 [106]; 192 ALR 561 at 588-589.

121 CALLINAN J. I agree with the conclusion of Gummow and Heydon JJ and the reasons that their Honours give for it, that there is no relevant contrariety between the regime for sentencing for which s 16BA of the *Crimes Act* 1914 (Cth) provides and the regime for which s 52(1) of the *Sentencing Act* (NT) provides. The form of sentence imposed could equally have been imposed under either. It was not shown to be otherwise inappropriate or erroneously determined.

122 I also agree with the conclusion and reasons of Gummow and Heydon JJ with respect to the appellant's contention that he was unfairly treated by being discriminated against contrary to the Constitution.

123 I would therefore join in dismissing the appeal.