HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

Matter No S449/2005

ISLAND MARITIME LIMITED APPELLANT

AND

BARBARA FILIPOWSKI RESPONDENT

Matter No S450/2005

SACHIN KULKARNI APPELLANT

AND

BARBARA FILIPOWSKI RESPONDENT

Island Maritime Limited v Filipowski
Kulkarni v Filipowski
[2006] HCA 30
15 June 2006
S449/2005 & S450/2005

ORDER

In each matter, the appeal is dismissed.

On appeal from the Supreme Court of New South Wales

Representation

P Byrne SC with G J Grogin and C P Carter for the appellants (instructed by Ebsworth & Ebsworth)

A J Meagher SC with A L Hill and A J Payne for the respondent (instructed by Dibbs Abbott Stillman)

CATCHWORDS

Island Maritime Limited v Filipowski
Kulkarni v Filipowski

Criminal law – Double jeopardy – Autrefois acquit – Successive charges arising out of same facts – Charge brought against appellants under s 27(1) of the *Marine Pollution Act* 1987 (NSW) – Charge dismissed on basis that s 27(1) did not apply where a charge was available under s 8 – Charge subsequently brought against appellants under s 8 – Where s 27(1) offence included all elements of s 8 offence together with additional element – Whether second charge barred by principles of autrefois acquit – Whether appellants stood in jeopardy on first charge – Whether plea of autrefois acquit available if all elements of offence first charged not included in elements of offence charged second.

Criminal law – Abuse of process – Delay – Where first prosecution brought more than two years after the relevant events – Where second prosecution brought eight months after first defective prosecution dismissed.

Words and phrases – "abuse of process", "autrefois acquit", "double jeopardy", "in jeopardy".

Marine Pollution Act 1987 (NSW), ss 8, 27(1).

1 GLEESON CJ, HEYDON AND CRENNAN JJ. These appeals relate to an alleged discharge of oil from a ship, the "Pacific Onyx", into Botany Bay on 14 November 1999. The owner of that ship is alleged to be Island Maritime Limited and the master is alleged to be Sachin Kulkarni ("the appellants").

2 On 20 February 2002, the prosecutor, Barbara Filipowski ("the respondent"), filed two identically worded summonses in the Land and Environment Court of New South Wales alleging a contravention by each of the appellants of s 27(1) of the *Marine Pollution Act* 1987 (NSW) ("the *Marine Pollution Act*"). Section 55(1)(b) of the *Marine Pollution* Act provides that proceedings for an offence against the Act "may be dealt with summarily before ... the Land and Environment Court in its summary jurisdiction". A trial proceeded before that Court on 20 and 21 February 2003, in which the prosecution called all its evidence. Talbot J dismissed the summonses on 7 March 2003[1].

3 On 18 November 2003, two further summonses relating to the alleged discharge of oil on 14 November 1999 were filed. This second set of summonses was identical to the first, save that the legislation allegedly contravened was not s 27(1) of the *Marine Pollution Act*, but s 8. It was the respondent's intention to use the same evidence as had been tendered at the trial of the first set of summonses. The appellants filed a notice of motion seeking a permanent stay of the second set of summonses on the grounds that the proceedings were barred by the principles of autrefois acquit or that the proceedings were an abuse of process. Bignold J dismissed the application for a stay[2]. The Court of Criminal Appeal dismissed an appeal[3].

4 The question here is whether the Court of Criminal Appeal was correct to dismiss the appellants' appeal. That question must be answered affirmatively. The possibility of a bar arising from the principles of autrefois acquit does not exist because the appellants were never in the relevant sense "in jeopardy" on the first set of summonses; and, unsatisfactory though the history of these proceedings may be, the respondent's conduct is not an abuse of process.

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1 *Filipowski v Island Maritime Limited* (2003) 124 LGERA 331.

2 *Filipowski v Island Maritime Limited* (2004) 135 LGERA 229.

3 *Island Maritime Limited v Barbara Filipowski* [2004] NSWCCA 453 (Sully, Dunford and Hidden JJ).

Statutory background

5 The damaging effects of discharging oil into the sea or other waters have attracted the attention of the New South Wales legislature for some time. Section 3(1) of the *Oil in Navigable Waters Act* 1927 (NSW), which was modelled on United Kingdom legislation[4], prohibited the discharge of oil into the territorial waters of New South Wales and other waters such as harbours, estuaries, rivers and canals, whether the discharge was from vessels, from the land or from apparatus used to transfer oil to or from vessels. That legislation was repealed and replaced by the *Prevention of Oil Pollution of Navigable Waters Act* 1960 (NSW). That Act remained in force until the *Marine Pollution Act* came into force on 4 May 1990[5].

6 The *Marine Pollution Act* was part of a cooperative scheme with the Commonwealth. The scheme was developed as a result of Australia's adhesion to the International Convention for the Prevention of Pollution from Ships, 1973 ("the Convention")[6]. Annex I to the Convention deals with oil pollution and Annex II with pollution by noxious liquid substances in bulk. The Convention obliges State parties to enact laws prohibiting discharges from their own ships "wherever the violation occurs" and from foreign ships "within the jurisdiction" of the party[7].

7 The Commonwealth met its obligations under the Convention by enacting the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 ("the Commonwealth Act"). Parts II and III prohibited discharges from Australian ships into the sea outside the territorial sea of Australia; Pt II applied to discharges of oil (s 9) and Pt III to discharges of noxious fluid substances (s 21). When the Commonwealth Act was enacted in 1983, it was assumed that complementary State and Territory legislation would be enacted containing identical prohibitions in relation to the territorial sea of Australia and that sea on its landward side[8]. Delay took place in enacting that legislation, and in

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4 *Oil in Navigable Waters Act* 1922, s 1.

5 *New South Wales Government Gazette*, No 57 at 3509, 4 May 1990.

6 The original Convention is Sched 1 to the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth). The Protocol of 1978 amending the Convention is Sched 2 to that Act.

7 Articles 1 and 4 of the Convention.

8 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 February 1986 at 870-871.

consequence the Commonwealth Act was amended in 1986 by the *Protection of the Sea (Prevention of Pollution from Ships) Amendment Act* 1986 (Cth)[9]. The amendments extended the prohibitions in Pts II and III to cover discharges by ships into the territorial sea of Australia and into that sea on its landward side. The responsible Commonwealth Ministers pointed out that this would not infringe any State or Territory rights because there was a saving provision to ensure that the Commonwealth Act would not apply when State or Territory legislation came into force for the territorial sea and that sea on its landward side. What they meant can be seen by taking the provisions affecting oil discharges in relation to States as an example. Section 9(1) of the Commonwealth Act provides that, subject to s 9(1A), the master and the owner of a ship from which a discharge of oil or an oily mixture into the sea takes place is guilty of a criminal offence. Section 9(1A) provides:

> "Subsection (1) does not apply in relation to the sea near a State ... to the extent that a law of that State ... makes provision giving effect to Regulations 9 and 11 of Annex I to the Convention in relation to that sea."

Regulation 9 of Annex I prohibits discharges of oil or oily mixtures from ships into the sea, and reg 11 creates exceptions to the prohibition. The Commonwealth Act, in s 3(1A), defines the "sea near a State" as a reference to:

> "(a) the territorial sea of Australia adjacent to the State; and
>
> (b) the sea on the landward side of the territorial sea of Australia adjacent to the State".

8 The substantive aspects of the 1986 amendments to the Commonwealth Act came into force on 23 September 1988[10]. The prohibition in s 9(1) of the Commonwealth Act as amended applied in relation to the territorial sea adjacent to New South Wales and the sea on the landward side of the territorial sea until 4 May 1990, for it was not until then that the *Marine Pollution Act* came into operation. That is, it was not until 4 May 1990 that a law of New South Wales made provision giving effect to regs 9 and 11 of Annex I to the Convention. The relevant provision was s 8 of the *Marine Pollution Act*, which appears in Pt 2. Section 8(1) provides:

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9 Australia, Senate, *Parliamentary Debates* (Hansard), 20 March 1986 at 1367-1369.

10 *Commonwealth of Australia Gazette*, S291, 23 September 1988. Sections 1 and 2 of the amending Act had commenced on the date of assent, 24 June 1986.

"(1) Subject to subsections (2) and (4), if any discharge of oil or of an oily mixture occurs from a ship into State waters, the master and the owner of the ship, and any other person whose act caused the discharge, are each guilty of an offence punishable, upon conviction, by a fine not exceeding:

(a) if the offender is a natural person – 2 000 penalty units, or

(b) if the offender is a body corporate – 10 000 penalty units."

Section 8(2) and (4) create defences. The burden of proving the matters of fact in s 8(1) lies with the prosecution and the burden of proving a defence lies on the defence: s 8(6). The expression "State waters" is defined in s 3(1) as meaning:

"(a) the territorial sea adjacent to the State,

(b) the sea on the landward side of the territorial sea adjacent to the State that is not within the limits of the State, and

(c) other waters within the limits of the State prescribed by the regulations for the purposes of this definition".

The waters described in pars (a) and (b) correspond with those referred to in the Commonwealth Act as "the sea near a State". Thus, s 8 of the *Marine Pollution Act* is a law of the State of New South Wales giving effect to regs 9 and 11 of Annex I to the Convention in relation to the sea near New South Wales within the meaning of s 9(1A) of the Commonwealth Act. In these waters, the *Marine Pollution Act* applies and the Commonwealth Act does not. Similar provisions appear in Pt 3 of the *Marine Pollution Act* to ensure that in relation to the release of noxious substances there is complementarity between it and the Commonwealth Act.

9 However, the *Marine Pollution Act* also introduced provisions not falling within s 9(1A). They appear in Pt 4. Among them are ss 26 and 27(1). Section 26 provides in part:

"This Part applies to a discharge of oil or of an oily mixture or of a liquid substance or of a mixture containing a liquid substance into State waters:

(a) from a ship or place on land in or in connection with a transfer operation, or

(b) from any apparatus or purpose-built pipeline used in or in connection with a transfer operation, whether or not it is being so used,

but does not apply:

(c) ... , or

(d) to a discharge to which Part 2 or 3 applies."

Section 27(1) provides:

"(1) If a discharge to which this Part applies occurs, each appropriate person in relation to the discharge, and any other person whose act caused the discharge, are each guilty of an offence punishable, upon conviction, by a fine not exceeding:

(a) if the offender is a natural person – 2 000 penalty units, or

(b) if the offender is a body corporate – 10 000 penalty units."

There is a definition of "transfer operation" in s 25(1) as meaning:

"... any operation that is involved in the preparation for, or in the commencement, carrying on or termination of, a transfer of oil or of an oily mixture or of a liquid substance or of a mixture containing a liquid substance to or from a ship or a place on land."

Section 27(2) provides what are in substance defences, but they are less extensive than those which are referred to in s 8(2) and (4) and which correspond with those in regs 9 and 11 of Annex I to the Convention. On the other hand, the penalty for a contravention of s 27(1) is the same as that which exists for a contravention of s 8(1).

10 The function of s 26(d) is plainly to ensure that in relation to discharges of the kind described in Pt II (in particular s 9(1)) and Pt III (in particular s 21(1)) of the Commonwealth Act, the only applicable State legislation is Pts 2 and 3 of the *Marine Pollution Act*. If this function were not fulfilled there would be a risk that Pt 4 would operate in a manner inconsistent with the Convention scheme reflected in the complementary Commonwealth and State legislation.

The need for the accused to be "in jeopardy"

11 It is not necessary to examine the arguments advanced by the appellants to support the conclusion that a plea of autrefois acquit was available. That is because a key precondition must be satisfied before consideration is given to the

principles relating to a plea of autrefois acquit. The defendant must have been in jeopardy on the charge[11].

12 In *Broome v Chenoweth*[12] the defendant, an employer, was charged by information with failing to make a compulsory deduction from an employee's wages, contrary to s 221C of the *Income Tax Assessment Act* 1936 (Cth). The defendant had earlier been charged on an information which counsel for the informant had attempted to withdraw because of defects in its form, but which a magistrate instead dismissed. Dixon J held that that order would have been capable of barring the second information on grounds of double jeopardy, but for one difficulty. His Honour said:

> "[T]here is left the question whether upon the earlier information there could have been a valid conviction. If a conviction in that proceeding could not have been effective, the defendant never did stand in jeopardy upon the earlier charge."[13]

Dixon J found that the first information failed to allege two ingredients in the offence. He then said[14]:

> "The old rule was that, if the defendant could have taken a fatal objection to the earlier indictment or information, his discharge or acquittal thereon could not afford a bar. 'The point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for, if he could, no acquittal will avail him, but if he could not, it is always competent for him to shew the offences to be really the same, though they are variously stated in the proceedings'[15].
>
> In the present instance I think that, unless the information had been amended, the defects I have mentioned are such that a conviction in its terms could not have been sustained."

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11 *Broome v Chenoweth* (1946) 73 CLR 583.

12 (1946) 73 CLR 583.

13 (1946) 73 CLR 583 at 599.

14 (1946) 73 CLR 583 at 600.

15 Quoting Chitty's *Criminal Law*, 1st ed (1816), vol 1 at 455.

13 Starke J reached the same conclusion. He relied[16] on the following passage from *Archbold's Criminal Pleadings*[17]:

> "Generally it may be laid down that whenever, by reason of some defect in the record ... the prisoner was not lawfully liable to suffer judgment for the offences charged against him in the first indictment as it stood at the time of its finding, he has not been in jeopardy, in the sense which entitles him to plead the former acquittal (or conviction) in bar of a subsequent indictment."

14 These principles have been summarised as follows[18]:

> "[I]t is essential that the defendant has been in jeopardy on the charge. If summary dismissal occurs because the charge is defective, or because as a matter of law the evidence available to the prosecution cannot support a conviction, the defendant will never have been in jeopardy ... . Where the dismissal was not founded upon a consideration of the merits, even in the largest and most liberal sense of that expression, there is no adjudication of the innocence of the accused."

15 Neither Dixon J nor Starke J doubted that the relevant principles applied as much to summary proceedings on information as they did to prosecutions on indictment[19]. There is accordingly no reason to suppose that those principles do not apply to proceedings such as these, dealt with summarily before the Land and Environment Court in its summary jurisdiction, and the appellants did not submit that they could not. This flows from the fact that a plea of autrefois acquit rests on the rule against double jeopardy, as explained in *Pearce v The Queen*[20].

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16 (1946) 73 CLR 583 at 595.

17 31st ed (1943) at 138.

18 Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd ed (1996) at 32, par 59. Counsel for the appellants relied on another passage at 173, par 321 (text at n 57), but that does not qualify the correctness of the passage quoted in relation to autrefois acquit; it is suggested rather to relate to abuse of process. The first authority cited in n 57, *Williams v DPP* [1991] 1 WLR 1160 at 1170; [1991] 3 All ER 651 at 658-659, supports the passage quoted.

19 (1946) 73 CLR 583 at 595 per Starke J and 600 per Dixon J.

20 (1998) 194 CLR 610 at 627-628 [61] per Gummow J; see also at 617 [22] per McHugh, Hayne and Callinan JJ.

The proceedings before Talbot J

16 Before Talbot J, the prosecution read affidavits and some cross-examination of the deponents took place. At the conclusion of the prosecution case, counsel for the defendants submitted that there was no case to answer, on two bases.

17 The first was that the prosecution evidence, taken at its highest, could not establish that the discharge of oil occurred "in or in connection with a transfer operation" within the meaning of s 26(a) of the *Marine Pollution Act*, and hence the defendants could not be convicted. Talbot J did not accede to that submission, because it turned on the reliability of the expert evidence called by the prosecution, and that "must be left to the ultimate determination of fact"[21].

18 The second basis for the defendants' no case submission rested on s 26(d) of the *Marine Pollution Act*. Talbot J summarised it thus[22]:

> "The evidence clearly establishes the fact that there was a discharge of oil from the vessel into the State waters of Botany Bay. The simple submission is that Pt 2 applies because s 8(1) operates to make it an offence if any discharge of oil occurs from a ship into State waters. Part 4 does not apply to a discharge of oil to which Pt 2 applies by dint of s 26(d)."

Talbot J accepted that submission[23].

Were the appellants "in jeopardy" on the first set of summonses?

19 Counsel for the appellants contended that the trial before Talbot J had been conducted by the prosecution as, and was, a hearing on the merits. They argued that before Talbot J the prosecution pressed the view that the charges had been properly brought under s 27(1); that the present cases were not analogous to those instances of demurrers or formal objections or jurisdictional objections challenging proceedings at their very inception, which, according to the appellants, alone fell within the doctrine applied in *Broome v Chenoweth*; and

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21 *Filipowski v Island Maritime Limited* (2003) 124 LGERA 331 at 337 [30].

22 *Filipowski v Island Maritime Limited* (2003) 124 LGERA 331 at 337-338 [31].

23 *Filipowski v Island Maritime Limited* (2003) 124 LGERA 331 at 338 [36], 339 [39].

that the defect in the first set of summonses only emerged after the whole of the prosecution's evidence had been called.

20 Despite these submissions, there are three points of view from which it can be seen that on the first set of summonses there could not "have been a valid conviction", so that the appellants "never did stand in jeopardy", because they "could have taken a fatal exception", and hence they were "not lawfully liable to suffer judgment for the offences charged".

21 First, the first set of summonses on their face are defective. A charge under s 27(1) of the kind which the prosecution wished to proffer requires an allegation not only that there was a discharge of oil into State waters from a ship, but also that the discharge was "in or in connection with a transfer operation". This latter allegation was missing from the first set of summonses, which only stated that the appellants were owner or master of "a ship ... from which a discharge of oil occurred into State waters namely the waters of Botany Bay in contravention of Section 27(1) of the Marine Pollution Act, 1987."

22 Secondly, even if that problem were to be overlooked, or, as the appellants submitted, were cured by the reference to s 27(1), or were cured by amendment, it is plain on the face of the first set of summonses that no conviction for a contravention of s 27(1) could result from them. This is because the allegations that there was a discharge of oil into State waters from a ship brought the circumstances within s 8(1), and hence made the discharge one to which Pt 2 applied. Section 26(d) in turn had the consequence that Pt 4 did not apply, and hence no conviction under s 27(1) was possible.

23 Thirdly, although the trial before Talbot J began as proceedings in which the prosecution was seeking to place the defendants in jeopardy by obtaining factual findings adverse to them, by the time the prosecution evidence had been tendered and the no case submission had been argued, it was plain that the only possible view of the evidence was that, as a matter of law, it negated any possibility of a conviction under s 27(1) because Pt 2 applied and Pt 4 did not. The question is whether the appellants "could have taken a fatal exception" to the summonses, not whether they did, or when they did; they were served before the trial with the affidavits on which the prosecution relied at the trial; and even if, contrary to the fact, the form of the summonses did not reveal that the point which eventually succeeded after the prosecution case ended could have been taken before it began, the evidence contained ample material on which it could have been taken.

24 Accordingly, the appellants were never "in jeopardy" in the relevant sense before Talbot J, and his dismissal of the first set of summonses is incapable of supporting a plea of, or in the nature of, autrefois acquit.

Autrefois acquit

25 It is therefore not necessary to follow the course taken by the parties of analysing exhaustively the doctrines associated with autrefois acquit. In particular, it is not necessary to re-examine all of what was said in *Pearce v The Queen*[24] on that subject.

26 Counsel for the respondent attacked one aspect of *Pearce v The Queen*. It was the part of the following passage in the joint judgment to which emphasis has been added[25]:

> "It is clear that the plea in bar goes to offences the elements of which are the same as, or *are included in*, the elements of the offence for which an accused has been tried to conviction or acquittal."

Counsel said that the words "are included in" should have been "include". When the passage is read in context, however, it is plain that the proposition which counsel for the respondent said the reasons for judgment should have asserted was in fact encompassed in what was said in *Pearce v The Queen*. There are three particular aspects of the context to note.

27 One aspect of the context is that the words "are included in" were succeeded by a footnote reference to *R v Elrington*[26]. In that case the accused was charged on information with common assault. He was acquitted by justices of the peace, who certified that the information was not proved and was dismissed. The accused was then prosecuted on indictment for assault causing grievous bodily harm and assault causing actual bodily harm. The Court of Queen's Bench (Cockburn CJ and Blackburn J) held that the relevant statute meant that the certificate could be pleaded in bar to the indictment. However, the significance of the case goes beyond the operation of the statute, for Cockburn CJ remarked[27]:

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24 (1998) 194 CLR 610.

25 (1998) 194 CLR 610 at 616 [18] per McHugh, Hayne and Callinan JJ (footnotes omitted).

26 (1861) 1 B & S 688 [121 ER 870].

27 *R v Elrington* (1861) 1 B & S 688 at 696 [121 ER 870 at 873].

> "[W]e must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

The elements of assault causing grievous bodily harm are not "included in" the elements of common assault, but the former elements do include the latter.

28 The second matter of context is the statement appearing a little later in the joint judgment in *Pearce v The Queen*[28]:

> "[T]here are sound reasons to confine the availability of a plea in bar to cases in which the elements of the offences charged are identical or in which all of the elements of one offence are wholly included in the other."

R v Elrington was a case of that kind.

29 A third feature of the context is that in the footnote appearing next after the reference to *R v Elrington*, the joint judgment referred approvingly to *Li Wan Quai v Christie*[29]. The explanation given of Griffith CJ's formulation of the test in that and other cases[30] a little later in the joint reasons[31] is consistent with the view that the joint judgment favoured acceptance of the plea of autrefois acquit where the elements of the offence charged second are the same as, or include, the elements of the offence charged first.

30 As the joint judgment pointed out, when Griffiths CJ said in *Li Wan Quai v Christie*[32] that "[t]he true test whether [a plea of autrefois acquit] is a sufficient bar in any particular case is, whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction upon the first", his reference to "evidence" must be understood as a reference to the facts

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28 (1998) 194 CLR 610 at 618 [24] per McHugh, Hayne and Callinan JJ.

29 (1906) 3 CLR 1125 at 1131.

30 *Ex parte Spencer* (1905) 2 CLR 250 at 251; *Chia Gee v Martin* (1905) 3 CLR 649 at 653.

31 (1998) 194 CLR 610 at 617 [20].

32 (1906) 3 CLR 1125 at 1131.

constituting the elements of the offence[33]. One thing is clear. Griffith CJ was referring to a case, like *R v Elrington*, where the offence the subject of the second charge was, to use the words of Cockburn CJ, a more aggravated form of the offence the subject of the first charge. In the passage from *Li Wan Quai v Christie* just quoted, which was cited in *Pearce v The Queen*, Griffith CJ referred to the 21st edition of *Archbold's Criminal Pleading*. His statement of the "true test" was taken directly from *Archbold*[34], which, in turn, referred[35] to *R v Elrington*. It cannot be that *Pearce v The Queen* was contradicting the propositions stated by Cockburn CJ and Griffith CJ. For our part, however, we find it unnecessary to decide whether the principle is wider than that stated in the older authorities, and whether it also covers a case in which the first prosecution was for the more aggravated form of offence and the second is for a lesser form. Such a case would be the reverse of that referred to by Cockburn CJ and Griffith CJ. These questions do not arise for decision.

Abuse of process

31 Counsel for the appellants contended that the second set of summonses should be stayed on the ground of oppression. He referred to many authorities illustrating different types of oppression, but none of them bore on the specific circumstances of this case. Counsel pointed to the delay in filing both the first set and the second set of summonses, to the prosecution's adoption at the trial before Talbot J of a stance diametrically opposed to its stance in the second set of summonses, and to the ordeal compulsorily undergone by the appellants of experiencing a trial which, the prosecution now conceded, they should never have been subjected to. Counsel did not claim any actual prejudice to the appellants independent of the inevitable prejudice caused by being a defendant in a criminal proceeding, but submitted that actual prejudice was not necessary. He submitted that it was not legitimate to expect a person in the position of the master, and in the position of responsible officers of the owner, to cope with a

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33 (1998) 194 CLR 610 at 617 [20]: "the inquiry suggested ... is an inquiry about what evidence would be *sufficient* to procure a legal conviction. That invites attention to what must be proved to establish commission of ... the offences. That is, it invites attention to identifying the elements of the offences ...." (emphasis in original). See also *Ostrowski v Palmer* (2004) 218 CLR 493 at 501-503 [5]-[10] per Gleeson CJ and Kirby J.

34 At 148.

35 At 149.

continuation of the prosecution after what had taken place before the second set of summonses was filed.

32 The error by the prosecution in filing the first set of summonses as it did is regrettable but not oppressive. The appellants are not being prosecuted for the same offence, or overlapping offences: originally they were prosecuted for the wrong offence and now they are being prosecuted for the right one. The Court of Criminal Appeal rightly said that the delays that have taken place reveal a desultory approach which is to be deplored, but the delays, partly unexplained though they are, have not been of extraordinary length. The filing of the second set of summonses was not in substance anything more than a belated amendment of the first set. The problem with which the Convention, the Commonwealth Act and the *Marine Pollution Act* are attempting to deal is a very serious one. Depending on the circumstances eventually established, the crimes alleged against the appellants are serious. There is a high public interest in having the allegations disposed of, one way or the other, on the merits. Nothing has been pointed to which prevails over that interest, and no appellable error has been demonstrated in the handling of this question in the courts below.

Order

33 The appeals should be dismissed.

34 GUMMOW AND HAYNE JJ. The facts and circumstances giving rise to these appeals, and the applicable statutory provisions, are set out in the reasons of Gleeson CJ, Heydon and Crennan JJ. It is unnecessary to repeat those matters.

35 The first summonses filed by the respondent in the Land and Environment Court of New South Wales on 20 February 2002, and alleging contravention of s 27(1) of the *Marine Pollution Act* 1987 (NSW) ("the Act") showed, on their face, that an offence under s 27(1) could not be established. Those summonses charged that the first appellant was the owner, and the second appellant was the master, of a ship "from which a discharge of oil occurred into State waters namely the waters of Botany Bay".

36 Section 27(1) of the Act created an offence "[i]f a discharge to which this Part [Pt 4] applies" occurred. Section 26(d) of the Act provided that Pt 4 did not apply "to a discharge to which Part 2 or 3 applies". Part 3 of the Act is not presently relevant. Part 2 governed the consequences of "any discharge of oil or of an oily mixture [which] occurs from a ship into State waters"[36]. On their face, the summonses that were first issued showed that the alleged discharge of oil was a discharge to which Pt 2 of the Act applied: they alleged that a discharge of oil had occurred into State waters, namely the waters of Botany Bay. It followed that the alleged discharge was not a discharge of the kind identified by s 27(1), namely "a discharge to which this Part [Pt 4] applies". If an offence had been committed, it was an offence under s 8 of the Act.

37 Because the appellants were never in jeopardy of conviction of the offences charged in the first summonses issued, the maxim reflected in the double jeopardy rule[37] had no application in the subsequent summary proceedings instituted by the second set of summonses issued in the Land and Environment Court on 18 November 2003. A plea of autrefois acquit would not have been available if the proceedings in question had been on indictment. Neither the plea, nor the analogous application of the maxim in summary proceedings, was available because "the defendant never did stand in jeopardy upon the earlier charge"[38]; each "defendant could have taken a fatal objection"[39] to the first summons that was issued.

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36 *Marine Pollution Act* 1987 (NSW), s 8(1).

37 *Pearce v The Queen* (1998) 194 CLR 610 at 627-628 [61] per Gummow J.

38 *Broome v Chenoweth* (1946) 73 CLR 583 at 599 per Dixon J.

39 *Broome v Chenoweth* (1946) 73 CLR 583 at 600 per Dixon J.

38 This is reason enough to conclude that the appeals must be dismissed. It is necessary, however, to deal with a point that lay at the heart of the arguments, both in this Court and in the Court of Criminal Appeal, and underpinned the reasoning adopted in the Court of Criminal Appeal[40]: a point about this Court's decision in *Pearce v The Queen*[41].

39 The arguments in this Court focused upon one passage taken from the joint reasons in *Pearce*[42] where it was said that "[i]t is clear that the plea in bar goes to offences the elements of which are the same as[43], or *are included in*[44], the elements of the offence for which an accused has been tried to conviction or acquittal" (emphasis added). The Court of Criminal Appeal decided[45] that *Pearce* thus established that a plea of autrefois acquit was not available if all of the elements of the offence first charged were not included in the elements of the offence charged second. Or, to put the same proposition positively, the Court of Criminal Appeal decided that *Pearce* established that a plea of autrefois acquit is available only if all of the elements of the offence first charged (for example, a simple assault) were included in the elements of the offence charged second (for example, an aggravated form of assault on the same victim on the same occasion). That is, the Court of Criminal Appeal held that the order in which charges are preferred is relevant to the availability of the plea of autrefois acquit and the application of the equivalent rule in a court of summary jurisdiction: a plea in bar is available only where the elements of the second charge include all the elements of the first charge.

40 That is not right. The passage in the joint reasons upon which the argument fastened must be read in the context of the reasons as a whole. *Pearce* held that a plea in bar is available, or, in courts of summary jurisdiction, an equivalent rule is applied, in cases "in which the elements of the offences charged are identical or in which all of the elements of one offence are wholly

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40 *Island Maritime Ltd v Filipowski* [2004] NSWCCA 453.

41 (1998) 194 CLR 610.

42 (1998) 194 CLR 610 at 616 [18] per McHugh, Hayne and Callinan JJ.

43 *R v Emden* (1808) 9 East 437 [103 ER 640]; *R v Clark* (1820) 1 Brod & B 473 [129 ER 804].

44 *R v Elrington* (1861) 1 B & S 688 [121 ER 870].

45 [2004] NSWCCA 453 at [14] per Dunford J (with whom Sully and Hidden JJ agreed).

included in the other"[46]. The order in which the charges are preferred does not affect the availability of the plea, or the applicability of the equivalent rule. It is as well to say more about why that is so.

41 "Double jeopardy" is an expression that is not always used with a single meaning. It is an expression used in relation to several different stages of the process of criminal justice: prosecution, conviction and punishment. It describes values which underpin a number of aspects of the criminal law, rather than a rule that can be stated as the premise for deductive reasoning. The essence of these values is most often seen as captured in three maxims: *interest reipublicae ut sit finis litium* (it is in society's interest that there be an end to litigation), *res judicata pro veritate accipitur* (what is adjudicated is taken as the truth), and *nemo debet bis vexari pro una et eadem causa* (no one should twice be vexed for one and the same cause). It is these values that underpin the rule that evidence is inadmissible where, if accepted, it would overturn or tend to overturn an acquittal[47]. It is these values that inform the rules governing successive prosecutions – rules which find their origins in the pleas in bar of autrefois convict and autrefois acquit but now have wider application than those pleas in bar.

42 Principles governing the availability of a plea in bar of either autrefois convict or autrefois acquit were developed and applied in courts of record. As Deane and Gaudron JJ pointed out in *Rogers v The Queen*[48], "[a]utrefois convict is the application in criminal proceedings of the doctrine of merger which gives rise to res judicata or cause of action estoppel in civil proceedings". Just as judgment of a court of record in a civil action changes the cause of action to a matter of record[49], conviction in a court of record in respect of a criminal offence brings about "the substitution of a new liability"[50]. As Gummow J noted in *Pearce*[51], this principle of merger is connected with, but distinct from, the principles encapsulated in the three maxims cited earlier. Those principles are of fundamental importance to the structure and operation of our legal system.

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46 (1998) 194 CLR 610 at 618 [24] per McHugh, Hayne and Callinan JJ, 628 [63] per Gummow J.

47 *Garrett v The Queen* (1977) 139 CLR 437 at 445; *Rogers v The Queen* (1994) 181 CLR 251 at 277-278; *R v Carroll* (2002) 213 CLR 635.

48 (1994) 181 CLR 251 at 276-277.

49 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 606.

50 *R v Wilkes* (1948) 77 CLR 511 at 519.

51 (1998) 194 CLR 610 at 625 [53]-[54].

43 The plea of autrefois acquit "is the species of estoppel by which the Crown is precluded from reasserting the guilt of the accused when that question has previously been determined against it"[52]. It is a plea that prevents the relitigation of matters already determined in favour of the accused. Like the plea of autrefois convict, the plea of autrefois acquit prevents inconsistent decisions, serves to maintain the acceptance of orders and other solemn acts of the courts as incontrovertibly correct, and avoids the injustice occasioned by the relitigation of what has already been determined. But until more recent times, the pleas of autrefois acquit and autrefois convict "remained the only manifestations of the rule against double jeopardy"[53]. As the criminal law has become more complex, and as the number of offences that may be dealt with summarily has increased, questions of double jeopardy have taken on greater significance. When criminal offences were relatively few and distinct, a single course of conduct would constitute but one offence. With the proliferation of overlapping and related statutory offences, a single allegedly criminal transaction will often yield numerous offences[54].

44 That it is the values of double jeopardy that inform the rules about double prosecutions is most easily demonstrated by reference to summary prosecutions. First, a conviction in a court of summary jurisdiction does not invoke doctrines of merger by which there is the substitution of a new liability. The principles that are to be applied in considering cases of successive prosecutions in a court of summary jurisdiction are developed by analogy with the principles that govern the availability of pleas in bar in a court of record. They draw upon the values encompassed in the expression double jeopardy[55].

45 Secondly, and no less importantly, a conviction or acquittal in a court of summary jurisdiction will be explained and supported by reasons. The bases on which a court of summary jurisdiction has acquitted or convicted of a charge are thus ascertainable. That is not always so when there has been trial by jury. No doubt a jury's verdict of guilt is to be understood as expressing the jury's satisfaction, beyond reasonable doubt, of all of the elements of the charge. But a jury's verdict of not guilty is entirely unrevealing. The most that it can be taken as showing is that the jury was not satisfied beyond reasonable doubt that all of

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52 Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd ed (1996) at 311.

53 Hunter, "The Development of the Rule Against Double Jeopardy", (1984) 5 *Journal of Legal History* 3 at 14.

54 *Ashe v Swenson* 397 US 436 at 445 (1970).

55 See, for example, *Flatman v Light* [1946] KB 414 at 419.

the elements of the relevant charge had been established. It will not reveal which element or elements were not established or why that was so.

46 The inscrutability of a jury's verdict of not guilty may be a sufficient basis for considering the availability of a plea in bar to a later prosecution on a basis that would interpret the jury's verdict in the earlier case in the way that is most favourable to the accused. If that is done, the earlier verdict may be understood as yielding an estoppel or preclusion against proof of *any* of the elements of the charge of which the accused was acquitted. But if that is so, it would yield a rule that would allow a plea of autrefois acquit in any case where *any* of the elements of the *first* charge preferred against the accused was included in the elements of the second charge. The premises so far identified would not yield a rule confining autrefois acquit to cases where *all* the elements of the first charge preferred are included in the second charge.

47 If the rule that is to be applied stems only from the inscrutability of a jury's verdict, and assumptions that are made about the jury's findings, the ultimate reason for such a rule would have no application in cases of summary prosecution. The rule to be applied in summary prosecutions is analogous to the rules governing the availability of the pleas in bar but it must be applied where the basis for the disposition of the former prosecution is ascertainable.

48 Further, the history of the application of the pleas in bar reveals that the plea of autrefois acquit is not based *only* in the inscrutability of a jury's verdict of "not guilty". Rather, as is revealed by cases like *Wemyss v Hopkins*[56], *R v Elrington*[57], and, in this Court, *Chia Gee v Martin*[58] and *Li Wan Quai v Christie*[59], as well as the course of decisions in the Supreme Court of the United States[60] about the application of the double jeopardy clause of the Fifth Amendment, the problem has always been seen as a more deep seated and complex question than may be answered by reference only to the inscrutability of a jury's verdict of not guilty.

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56 (1875) LR 10 QB 378.

57 (1861) 1 B & S 688 [121 ER 870].

58 (1905) 3 CLR 649.

59 (1906) 3 CLR 1125.

60 In particular, *Ex parte Nielsen* 131 US 176 (1889); *Blockburger v United States* 284 US 299 (1932); *Brown v Ohio* 432 US 161 (1977); *Grady v Corbin* 495 US 508 (1990); *United States v Dixon* 509 US 688 (1993).

49 No doubt a plea in bar is available if the offence charged second is the *same* offence as was the subject of an earlier conviction or acquittal. But the pleas in bar are not confined to cases of identical charges. As was noted in *Pearce*[61], *Li Wan Quai* expressed[62] the relevant test (as did other earlier cases[63]) as being whether the first prosecution was for an offence "substantially the same" as the second offence charged. Expressing the test in this way presented further questions. In particular, what was meant by "*substantially* the same"? As the course of United States' decisions reveals[64], to treat the test of "sameness" as requiring identity (or substantial identity) between the *evidence* that had to be led in support of the two charges produces a rule that is unstable in application. Rather, as the course of decisions in this Court, up to and including the decision in *Pearce*, reveals, the relevant test must be framed by reference to the *elements* of the offences under consideration. But recognising that the test of "sameness" requires examination of the elements of the two offences in question, rather than of the evidence that may be offered in proof of each, does not reveal the extent of the overlap that is to be required if the test is to be met. Rather, to identify the content of the test of "sameness" of two offences, when expressed by reference to the elements of those offences, it is necessary to consider the principles and values that underpin both the availability of a plea in bar of autrefois acquit and the application of an analogous principle in cases in summary jurisdiction.

50 To confine autrefois acquit (and the analogous principle) to cases where all the elements of the first offence are elements of the second offence would treat the plea as no more than a species of preclusion. The preclusion would be confined to the elements of the first offence and would proceed from the assumption that the prosecution was to be taken to have failed to establish any of those elements. It would be a rule of preclusion closely analogous to, if not identical with, the principles of issue estoppel applied in civil cases. So to confine autrefois acquit, and the analogous principle, would entail the further conclusion that the preclusion thus provided was a sufficient satisfaction of the values of double jeopardy identified earlier – the public interest in finality, the avoidance of conflicting decisions (by accepting curial decisions as incontrovertibly correct), and the injustice to the individual of requiring relitigation. But those are values that are not met by treating autrefois acquit (or the analogous principle) as no more than a particular species of issue estoppel.

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61 (1998) 194 CLR 610 at 616 [18].

62 (1906) 3 CLR 1125 at 1131.

63 For example, *Wemyss v Hopkins* (1875) LR 10 QB 378 at 381 (the "same matter").

64 Especially, *Grady v Corbin* 495 US 508 (1990) and *United States v Dixon* 509 US 688 (1993).

51 The applicability of principles of issue estoppel in criminal law has in the past been a matter of judicial and academic controversy both in Australia and elsewhere[65]. In Australia the question may now be regarded as settled by this Court's decision in *Rogers*[66] in favour of the view that doctrines of issue estoppel of the kind developed in civil proceedings are not applicable to criminal proceedings[67]. Rather, it is the values embraced by the notions of double jeopardy that are to be reflected in the development of the criminal law. As Deane and Gaudron JJ said in *Rogers*[68]:

> "Issue estoppel would not only overlap with the plea of autrefois acquit and with the doctrines that have already developed, but its importation into the realm of criminal proceedings could well impede the development of coherent principles which recognize and allow for the distinct character of such proceedings. The preferable course, in our view, is to accept that the principles which operate in this area are fundamental and that the pleas and the developed doctrines relating to the unassailable nature of acquittals and the need for consistency may not exhaust their operation."

52 The values embraced by notions of double jeopardy require that autrefois acquit and analogous principles are given no narrow operation. In particular, neither the plea in bar nor the analogous principle applied in summary jurisdiction is to be confined to precluding the prosecution from controverting one or more elements of an offence charged first where the elements of that first offence are wholly included in the second. To demonstrate why that is so, it is convenient to proceed by reference to an example.

53 If an aggravated form of offence is charged first, and the accused is acquitted of that offence by a jury, it will not be possible to discern from that verdict whether the jury was not satisfied of one or more of the elements constituting the unaggravated offence, or was not satisfied of the element or elements of aggravation. (By contrast, in a court of summary jurisdiction, the

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65 See, for example, *Director of Public Prosecutions v Humphrys* [1977] AC 1.

66 (1994) 181 CLR 251 at 254-255 per Mason CJ, 278 per Deane and Gaudron JJ. See also *R v Storey* (1978) 140 CLR 364 at 371-374 per Barwick CJ, 379-389 per Gibbs J, 400-401 per Mason J. Cf *R v Wilkes* (1948) 77 CLR 511; *Mraz v The Queen [No 2]* (1956) 96 CLR 62.

67 *R v Carroll* (2002) 213 CLR 635 at 662 [90] per Gaudron and Gummow JJ.

68 (1994) 181 CLR 251 at 278.

basis for the acquittal can be identified from the reasons given.) May the accused be put at risk of conviction for the lesser, unaggravated, form of the offence at a subsequent trial?

54 If autrefois acquit is confined to cases where all the elements of the first offence charged (and of which the accused has been acquitted) are elements of the second offence, the plea in bar would not be available. Yet because the jury's verdict of acquittal says nothing of why the jury acquitted, the verdict of not guilty of the aggravated offence is consistent with the jury having not been persuaded that all of the elements of the simple, unaggravated, offence had been established beyond reasonable doubt. That may be contrasted with the circumstances where the first charge is not determined by a jury. In such a case it would be known, from the reasons given for acquitting the accused of the first offence, whether the tribunal was not satisfied that the elements of the unaggravated offence had been established. Presumably, it would be accepted that, if one or more elements of the unaggravated offence was not established at the first trial, the prosecution should not be permitted to have a second opportunity to prove that lesser offence.

55 But that is a conclusion that cannot be based on doctrines of issue estoppel similar to those applied in civil proceedings. First, as noted earlier, to apply such principles would be at odds with the state of the authorities in this Court. Secondly, and no less importantly, as *R v Storey*[69] and *Rogers* demonstrate, there are insuperable difficulties in the way of treating a lack of satisfaction that a fact has been proved beyond reasonable doubt as establishing any proposition. Rather, the refusal to permit the prosecution to have a second opportunity to prove what was found not to have been established at an earlier trial is based in the need to maintain the incontrovertible character of that earlier decision.

56 It may readily be accepted that the need to maintain the incontrovertibility of earlier decisions can be identified as an important root of the principles of issue estoppel that have been developed and are applied in civil proceedings. But in considering what are the principles that are to be applied in criminal proceedings, it is necessary to return to not only that particular root but also the other values which are encompassed by the notion of double jeopardy. It would be wrong to conclude the inquiry about the principles to be applied in the criminal law at the point of drawing some analogies with the separate principles of issue estoppel in civil litigation simply because those principles are seen to derive from one of the several roots that together are described as double jeopardy.

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69 (1978) 140 CLR 364.

57 Thus, what is revealed by the contrasting outcomes postulated by reference to the example given earlier, according to whether the first offence is tried by jury or tried summarily, is that to treat the plea of autrefois acquit as yielding no more than a form of issue estoppel does not give effect to all of the values embraced by the notion of double jeopardy. In particular, to treat an acquittal on one charge as barring a subsequent prosecution concerning the same events as founded that first charge only where all the elements of the first offence are included in the elements of the second offence not only would fail to accept that the earlier decision was correct, but also would require the individual to relitigate matters that the public interest requires be treated as finally determined.

58 Statutory provisions permitting juries to find an accused person guilty of an offence, other than the offence charged, avoid many of the problems that might otherwise be thought to arise from giving autrefois acquit and analogous principles an operation that is not confined to precluding proof of the elements of the first offence only when those elements are all included in the elements of the second. Typically those provisions permit a jury considering one charge to find the accused not guilty of the offence charged but guilty of a less serious offence constituted by the conduct proved.

59 An early example of such provisions is found in s 9 of the *Criminal Procedure Act* 1851 (UK) (14 & 15 Vict c 100) which permitted a jury to convict of an attempt when only the completed offence was charged. Provisions for alternative verdicts where certain sexual offences or property offences are charged have a long history[70]. More recently, the *Criminal Procedure Act* 1986 (NSW) makes detailed provision (Div 7 of Pt 3 of Ch 3, ss 165-169) for dealing with what that Act calls "back up offences" and "related offences". It is not necessary to consider these provisions in any detail. It is enough to notice that the *Criminal Procedure Act* 1986 provides that where an indictable offence is charged, the court may deal with offences that can be dealt with summarily and which arise from substantially the same circumstances as those from which the indictable offence has arisen or whose elements are necessary to constitute the indictable offence charged. What these various statutory provisions show is that, in very many cases, a prosecution for a lesser form of offence than the offence first charged will be barred, because the court or jury trying the first charge will have had to consider whether that lesser form of offence is established.

60 It may be possible to discern some similarities between the approach reflected in the provisions of the *Criminal Procedure Act* 1986 and what has come to be known in the United States as a doctrine of "lesser included offences". This doctrine, traced to earlier New York legislation, was given

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70 See now, for example, *Crimes Act* 1900 (NSW), ss 66E, 119-124.

federal statutory effect in the United States in 1872 by *An Act to further the Administration of Justice*[71]. That Act provided:

> "That in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged".[72]

And for a time at least, it seems that a doctrine of lesser included offences was understood in the United States as a unifying principle informing the consideration of both what verdicts a jury might return on an indictment charging a particular offence, as well as questions about successive prosecutions[73]. Thus in *Blockburger v United States* it was held[74] that "the test to be applied to determine whether there are two offenses or only one [for the purposes of the double jeopardy clause of the Fifth Amendment] is whether each provision requires proof of a fact which the other does not". Yet this test is often expressed in terms of lesser included offences. Thus in 1997 it was said[75] that "a greater offense, under *Blockburger*, is treated as the same as any logically lesser-included offense with some but not all of the formal 'elements' of the greater offense". And as early as 1889, in *Ex parte Nielsen*, it was said[76] that:

> "[I]n order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal. But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that ... an acquittal would not or might not be a bar".

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71 Ch 255, s 9, 17 Stat 196 at 198 (1872).

72 This provision was replaced in 1946 by r 31(c) of the Federal Rules of Criminal Procedure.

73 Hoffheimer, "The Rise and Fall of Lesser Included Offenses", (2005) 36 *Rutgers Law Journal* 351.

74 284 US 299 at 304 (1932).

75 Amar, "Double Jeopardy Law Made Simple", (1997) 106 *Yale Law Journal* 1807 at 1813.

76 131 US 176 at 189-190 (1889).

61 It would be wrong, however, to give too much emphasis to this conception of lesser included offences, or the procedural rules, rooted in statute, which may be seen as lying behind it, in deciding when a plea of autrefois acquit is available, or when the analogous principle should be applied. Apart altogether from the difference in context provided by the double jeopardy clause of the Fifth Amendment[77], what is said in the American cases cannot be divorced from the application of the constitutional principle of collateral estoppel. That principle (that once a criminal defendant has prevailed against the government on an issue of ultimate fact, he should not be forced to continue to relitigate it criminally[78]) is also said to emerge from the double jeopardy clause of the Fifth Amendment rather than the due process clause of that Amendment[79].

62 It is neither necessary nor appropriate to reach any concluded view about whether that is so, or about the present state of the law of the United States on this subject more generally. In particular, it is not necessary to consider the validity of the criticisms that have been levelled[80] against particular applications of the *Blockburger* test in the United States. What is important to notice about the United States law is, first, that the *Blockburger* test, which was adopted by the majority of this Court in *Pearce*, applies whenever all of the elements of one offence are included in the other, no matter the order in which the offences are charged. Secondly, references made in statutory provisions and in judicial and academic writings in the United States to "lesser included offences" are not to be understood as exhausting the application in the several jurisdictions of the United States of the values encompassed by double jeopardy.

63 So, too, in Australia the values encompassed by double jeopardy require that the plea of autrefois acquit, and the analogous principle applied in summary jurisdiction, be available whenever all of the elements of one offence (of which an accused stands, or stood, in jeopardy) are included in the other offence of which that accused stands, or stood, in jeopardy, and that the plea be available, and the analogous principle applied, no matter the order in which the offences are

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77 "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb".

78 *Ashe v Swenson* 397 US 436 at 446 (1970) quoting *Green v United States* 355 US 184 at 190 (1957): The Constitution "surely protects a man who has been acquitted from having to 'run the gantlet' a second time".

79 "[N]or be deprived of life, liberty, or property, without due process of law".

80 For example, by Professor Amar in the 1997 essay referred to earlier in these reasons – "Double Jeopardy Law Made Simple", (1997) 106 *Yale Law Journal* 1807.

charged. The values embraced by double jeopardy are fundamental to the criminal law. It is those values that are reflected in the rule which was adopted in *Pearce*. In this case, the rule was not engaged, not because of the order in which charges were preferred, but because the appellants never stood in jeopardy of conviction for the offences first charged. Those charges were fatally defective.

64 The appellants made the further submission that the institution and maintenance of the proceedings commenced by the second summonses (issued on 18 November 2003) was an abuse of process. The essence of the appellants' submission in this regard was that the second proceedings were oppressive. It was not altogether clear, however, whether the oppression was said to lie in there being successive prosecutions seeking to controvert an earlier acquittal, or was said to lie in the fact of successive prosecutions alone. To the extent that the appellants' submissions about abuse of process restated the contentions made about double jeopardy, they should be rejected for the reasons already given: the appellants were never put in jeopardy of conviction by the first summonses.

65 To the extent that the appellants sought to make a separate point about abuse of process, it is sufficient to say only that to issue and maintain new proceedings in place of earlier, fatally defective, proceedings constituted no abuse of process. Questions of delay, and its consequences, though mentioned in argument, were not developed by counsel in a way that revealed any abuse of process in the present cases. No doubt there are cases in which delay in instituting proceedings may give rise to such unfairness that to continue the proceedings would constitute an abuse of process[81]. The appellants, however, pointed to no particular unfairness said to follow from the length of the period between the happening of the events in question and the institution of the second set of proceedings in the Land and Environment Court. It is, therefore, not necessary to explore this aspect of the matter further.

66 Each appeal should be dismissed.

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81 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 28 per Mason CJ.

67 KIRBY J. In these appeals from a judgment of the Court of Criminal Appeal of New South Wales[82], two issues arise for decision by this Court. A third issue has been debated concerning what was said in *Pearce v The Queen*[83].

68 The facts, the applicable legislation and the arguments of the parties are set out in the other reasons[84]. There is no need for me to repeat them. This allows me to go directly to the questions for decision and to the one point upon which a difference of views has emerged in this Court.

The two issues in the appeals

69 *The autrefois acquit issue*: The first issue in these appeals is whether the second proceedings, by way of prosecution, brought against the master and owner of the ship "Pacific Onyx" ("the appellants"), for offences against the *Marine Pollution Act* 1987 (NSW) ("the Act") should have been dismissed in the courts below by the application of the principles of autrefois acquit. This was suggested because the appellants were thereby purportedly subjected to double jeopardy in the relevant sense, having earlier been put on trial for what they assert were the same, or "substantially the same"[85], offences. This is the double jeopardy issue. It concerns the legal rights of the appellants and their entitlement to have the benefit of those rights.

70 *The abuse of process issue*: The second issue arises if the first is determined against the appellants. It concerns whether, assuming that they are not entitled as of right to relief on the basis of autrefois acquit, the appellants are nonetheless entitled to protection against what they claim is the abuse of process involved in subjecting each of them to a second prosecution, the first having failed.

71 The appellants allege that they were wrongfully exposed to prosecution in the earlier proceedings; that those proceedings were greatly delayed in their commencement; that they involved serious criminal charges and potentially heavy punishment upon conviction; that they were brought under incorrect and inapplicable provisions of the Act; that this subjected them to a lengthy and complex trial with the inevitable anxiety, costs and inconvenience that this

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82 *Island Maritime Ltd v Filipowski* [2004] NSWCCA 453.

83 (1998) 194 CLR 610 ("*Pearce*") at 616 [18].

84 Reasons of Gleeson CJ, Heydon and Crennan JJ at [17]-[18], [19], [31]; reasons of Gummow and Hayne JJ at [35]-[36], [39], [64]; reasons of Callinan J at [93]-[94].

85 *Pearce* (1998) 194 CLR 610 at 645 [109] citing *Li Wan Quai v Christie* (1906) 3 CLR 1125 at 1131.

involved; and that, those summonses having been dismissed and following still further inordinate and unexplained delay, they are now subjected, once again, to fresh criminal proceedings arising out of the same incident of maritime pollution that happened in Botany Bay, near Sydney, in November 1999. Against this conduct the appellants ask this Court to provide a permanent stay of proceedings, bringing their ordeal to a close.

Autrefois acquit is not available

72 *The absence of legal jeopardy*: My mind in these appeals has travelled along the lines explained in the reasons of Callinan J[86]. The double jeopardy issue must be resolved against the appellants for the technical reason that they were not, in law, subject to jeopardy in the first proceedings at all.

73 I realise that, having been confronted with the prosecutorial power of the state, subjected to the full panoply of a criminal trial, apparently exposed (had they been convicted) to criminal punishment, and submitted to protracted anxiety, costs and inconvenience, it must have seemed to the appellants that they stood in jeopardy during the first trial. However, in law, they did not. The prosecution wrongly framed the charges. On those charges, the appellants could never have been lawfully convicted. They were never "in jeopardy" within the meaning of that phrase, as it applies to the doctrine of autrefois acquit[87].

74 Why this is so is explained, with reference to authority, in the joint reasons of Gummow and Hayne JJ[88]. On the face of the first summonses, the offences alleged against the appellants involved the "discharge of oil … into State waters, namely the waters of Botany Bay"[89]. Yet those offences were not available under the section of the Act, as charged. The appellants could have raised an objection to the charges immediately after the summonses were received. They could have moved at once to have those charges withdrawn or dismissed. For whatever reason, such a course was not taken. They faced their trial and were acquitted.

75 *Conclusion – no legal jeopardy*: The fatal flaw in the charges meant that the appellants were not, therefore, "in jeopardy" of conviction of the first charges, as brought. At least, they were not in jeopardy of *lawful* conviction, assuming that the flaw was ultimately perceived by the prosecutor, the defence or

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86 Reasons of Callinan J at [94].

87 See *Williams v Director of Public Prosecutions* [1991] 1 WLR 1160 at 1170.

88 Reasons of Gummow and Hayne JJ at [37].

89 Reasons of Gummow and Hayne JJ at [35].

by the court of trial or on appeal. Thus, technically, double jeopardy was not established in law. It follows that a plea of autrefois acquit was not available. In all of this, I agree in what is written by the other members of this Court. The courts below made no error in rejecting the claim to a *right* to acquittal of the second charges upon this ground. To this extent, the appeals fail.

A permanent stay of proceedings is not appropriate

76 *The principles governing such stays*: On the alternative claim for discretionary or quasi-discretionary relief[90], on the basis that the second summonses amount to an abuse of process in criminal proceedings, entitling the appellants to protection in the form of stay orders from this Court, I confess to having more sympathy for the viewpoint stated by Callinan J[91] than those of either Gleeson CJ, Heydon and Crennan JJ[92]; or Gummow and Hayne JJ[93].

77 In substance, whatever may have been the technical legal position on the pleas, the appellants were subjected to a serious and unnecessary ordeal. It entailed many of the practical features of double jeopardy. The reason why they were never, in law, exposed to "double jeopardy" is all very well. However, it might have counted for nothing if the parties and the courts below had failed to notice the unavailability of the nominated provisions of the Act to sustain the charges as laid (as, apparently, the prosecutor did initially).

78 The provision of orders granting a permanent stay of criminal proceedings is a remedy that Australian courts have asserted in order to protect parties before the courts against a misuse or abuse of prosecutorial power, oppression by the organs of the state or subjection to a proceeding that would not amount, in the circumstances, to a real trial at all[94].

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90 See further *Pearce* (1998) 194 CLR 610 at 638 [93].

91 Reasons of Callinan J at [96].

92 Reasons of Gleeson CJ, Heydon and Crennan JJ at [31]-[32].

93 Reasons of Gummow and Hayne JJ at [64]-[65].

94 See discussion in *Williams v Spautz* (1992) 174 CLR 509 at 521; *Jago v District Court of NSW* (1989) 168 CLR 23 at 61; *Rogers v The Queen* (1994) 181 CLR 251 at 255-256. See also *The Queen v Carroll* (2002) 213 CLR 635 at 643-644 [22]-[23] per Gleeson CJ and Hayne J and 661 [86], where Gaudron and Gummow JJ outline further institutional justifications, the public interest in concluding litigation through final, binding and conclusive judicial determinations; and the need for orders of a court to be treated as correct, unless set aside or quashed.

79 The facility may ultimately have a constitutional foundation, deriving from the implied powers of the integrated Judicature of the Commonwealth to protect its own processes from legislative or executive abuse or misuse. This much appears to have been in the minds of Gaudron and Gummow JJ in *The Queen v Carroll*[95], where their Honours identified the interests involved as "fundamental to the ... nature of judicial power". It may also have been in the contemplation of the majority of this Court in *Dietrich v The Queen*[96], in holding that the conduct of a "trial" of an accused who, through no fault of his or her own could not afford counsel, might be stayed permanently where serious criminal charges were involved or, at least, stayed until the accused was provided with appropriate legal representation.

80 Analogous relief against proceedings that would amount to an abuse of process has also been upheld by this Court in non-criminal matters, including in the prosecution of greatly delayed disciplinary proceedings[97], and even in civil proceedings involving a greatly protracted action for damages for alleged negligence[98]. However, whilst previous doubts about the availability and ambit of the power of the courts to provide such relief have been settled in Australia (laying at rest, for this country, the conflicting opinions expressed in the House of Lords in *Connelly v Director of Public Prosecutions*[99]), the ordering of such stays is still most exceptional. Basically, this is so because of the conception that we hold of the role of courts. It is a conception that lies deep in our constitutional history. It is reflected in the text and structure of the federal Constitution.

81 Generally speaking, courts exist to quell the controversies brought to them by the parties[100]. Their powers, of their own initiative, to institute or terminate proceedings are exceptional. Such powers are kept in firm check[101]. Courts in

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95 (2002) 213 CLR 635 at 661 [86]; Kirby, "Carroll, double jeopardy and international human rights law", (2003) 27 *Criminal Law Journal* 231 at 245.

96 (1992) 177 CLR 292 at 311, 326, 359, 362.

97 *Walton v Gardiner* (1993) 177 CLR 378.

98 *Batistatos v Roads Traffic Authority of New South Wales* [2006] HCA 27.

99 [1964] AC 1254 at 1361. See *Pearce* (1998) 194 CLR 610 at 648-649 [115]-[117].

100 *Hill v Van Erp* (1997) 188 CLR 159 at 229; *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 638-639 [215]-[219]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 1003 [61]; 207 ALR 12 at 27.

101 As to criminal trials see *R v Apostilides* (1984) 154 CLR 563 at 575-576.

this country are not, generally speaking, inquisitors. This is true of civil process. With even greater emphasis, it is true of criminal process. There, judges are repeatedly enjoined to respect the prosecutor's independent discretions[102]. Ordinarily, those discretions, if made within power, are exempt from judicial superintendence or interference. They generally belong, in our system of government, to the Executive, its agencies and officials, not to the judiciary which ordinarily keeps its distance from such decisions, just as it demands independence in the discharge of its own functions. These are not absolute rules. But in Australia these cases (both in criminal and civil proceedings) are acknowledged as exceptional[103].

82 There may be a place, in the modern age, for some reconsideration of this doctrine within the constitutional division of judicial and executive functions[104]. The cost, duration and stress of litigation today may indicate a need for greater judicial intervention, including in cases of seriously delayed, repeated, burdensome or oppressive litigation. However, no submissions were received in these appeals that challenged the established Australian law on this subject and its approach. When that approach is applied, it brings me (as it has brought the other members of this Court) to a conclusion that the appellants are not entitled, on conventional principles, to a stay of proceedings upon the second summonses. As has been said[105], this is so despite the lamentable history that has proceeded, and accompanied, the prosecutor's second attempt to secure convictions of the appellants under the Act.

83 *Reasons for refusal of a stay*: Some of the considerations that have informed my conclusion in this regard have already been stated in the reasons of the other members of this Court. Further reasons include:

(1) The considerable public importance of effectively protecting the marine environment of Australia, a vast land surrounded by waters vulnerable to devastating ecological, economic and other damage from oil pollution.

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102 *Barton v The Queen* (1980) 147 CLR 75 at 94-95; *R v Apostilides* (1984) 154 CLR 563 at 571-575; *Maxwell v The Queen* (1996) 184 CLR 501 at 534, see also 513-514; *DPP (SA) v B* (1998) 194 CLR 566 at 579-580 [21]; *Dyers v The Queen* (2002) 210 CLR 285 at 317 [88]; *Mallard v The Queen* (2005) 80 ALJR 160 at 180 [82]; 222 ALR 236 at 260.

103 See eg, *Truong v The Queen* (2004) 78 ALJR 473 at 491 [95]-[96], 497-498 [132]-[137]; 205 ALR 72 at 96, 104-106.

104 cf *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 168.

105 Reasons of Gleeson CJ, Heydon and Crennan JJ at [4].

Effective protection requires the enforcement of specially enacted laws[106]. The offences alleged against the appellants are not, therefore, minor, routine or ordinary criminal offences. They have a significant public, environmental and governmental importance. They affect, potentially, very large natural concerns, substantial economic interests and many people;

(2) A reflection of the importance of the law involved in this appeal may be found in the acceptance by the Commonwealth of Australia of obligations under the International Convention for the Prevention of Pollution from Ships, 1973[107]. Under that Convention, nation states assume obligations to enact laws prohibiting and sanctioning pollutive discharges (relevantly) from foreign ships within the jurisdiction of the states parties[108]. Inferentially, they accept obligations to prosecute those laws effectively not only in the interests of the states parties and their own marine environment but also in the interests of the international community as a whole;

(3) The specific inhibition that applies to the disturbance by courts of prosecutorial discretions involving the commencement of criminal proceedings, a powerful consideration in Australia, given the conventional rules that govern the making of such decisions in this society;

(4) The power of the courts, at least in this type of criminal prosecution, to order costs[109] in favour of the accused where the acts or omissions of the prosecutor[110] are shown to warrant that course; and

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106 See reasons of Gleeson CJ, Heydon and Crennan JJ at [5]-[7].

107 The International Convention for the Prevention of Pollution from Ships is Sched 1 to the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth). A Protocol of 1978 amending the Convention is contained in Sched 2 to that Act. The Convention and Protocol are found in [1988] ATS 29 ("MARPOL 73/78, opened for signature 17 February 1978; entered into force 2 October 1983).

108 cf United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 [1994] ATS 31 (entered into force 16 November 1994), Art 192.

109 The proceedings in the Land and Environment Court of New South Wales included provisions for costs. See *Filipowski v Island Maritime Ltd* (2003) 124 LGERA 331.

110 On 17 April 2002, the appellants' lawyers invited the prosecutor to withdraw the first summonses under s 27(1) of the Act, disclosing only that "the facts and circumstances of the incident do not fall within section 27 of the Act". Attention

(Footnote continues on next page)

(5) The election by the appellants to proceed to trial on the first summonses without disclosing to the prosecution the fatal legal defect which was ultimately revealed at the trial. This defect appears to have been known to the appellants' lawyers well before the trial[111].

84 *Conclusion – no error*: It follows that the appellants also fail on the second issue. No error is shown in the way in which the courts below identified and evaluated the considerations relevant to the decision on this issue.

The contested approach to multiple charges

85 *The difference within this Court*: This leaves only the difference of opinion that has emerged in this Court concerning the respondent prosecutor's attack on an aspect of the reasoning in the joint reasons in *Pearce*[112]. The difference is expressed in the respective reasons of Gleeson CJ, Heydon and Crennan JJ[113], on the one hand, and of Gummow and Hayne JJ[114], with the concurrence of Callinan J[115], on the other.

86 Strictly speaking, this appeal can be decided by the Court without resolving this point of difference. This is so as the contested "rule" in *Pearce* was not engaged in this appeal, precisely because the charges in the original summonses were fatally defective. The appellants were not, therefore, in jeopardy of conviction on the offences first charged. Accordingly, no issue arises by reason of the particular order in which the respective charges were brought in the courts below.

87 Nevertheless, as the other members of this Court point out, the issue is one of considerable practical significance for criminal procedure in Australia. There is a very real potential today for overlap between the contents of multiple

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was not further drawn to the legal defect but clearly it had been appreciated by those advising the appellants by that time. Whilst in criminal proceedings, disclosure was not required, its omission is relevant to the assessment of the consequential need for a second trial, relying on the legally applicable provisions of the Act.

111 See reasons of Gleeson CJ, Heydon and Crennan JJ at [23].

112 See the reasoning in *Pearce* (1998) 194 CLR 610 at 616 [18], 624 [36].

113 Reasons of Gleeson CJ, Heydon and Crennan JJ at [25]-[30].

114 Reasons of Gummow and Hayne JJ at [38]-[40].

115 Reasons of Callinan J at [95].

statutory offences of the same jurisdiction; common law offences and related statutory provisions applicable within a jurisdiction; as well as federal, State or Territory offences dealing in particular ways with what is generally the same subject matter[116]. The difficulty of resolving such issues and expressing rules for their resolution is ordinarily better left to a case in which the factual circumstances afford a hard instance in which to sharpen the appropriate principle.

88 *The values behind the double jeopardy rule*: In so far as it is necessary, I express my agreement in the approach that Gummow and Hayne JJ have taken on this issue. I do so for several reasons.

89 First, the approach that their Honours favour appears better adapted to affording a workable means of resolving future overlapping criminal charges in contemporary Australian society. The provision of a sensible common law solution is more likely to grow out of the "values" that the principles of double jeopardy and autrefois acquit were designed to secure. Secondly, the preferred approach shifts the focus of attention from purely technical issues of preclusion and criminal pleading to the more substantive considerations of the kind that, in *Pearce*[117], I suggested ultimately lay behind the double jeopardy rule[118]. Thirdly, the approach has the advantage of bringing Australian law closer to the notions expressed in other major common law legal systems[119]. Fourthly, it also brings Australian law, in this regard, into closer harmony with the international law of human rights, and the provision that law makes for the rule against double jeopardy. The applicable principle is stated in Art 14.7 of the International Covenant on Civil and Political Rights[120], as follows[121]:

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116 *Pearce* (1998) 194 CLR 610 at 644-645 [107].

117 (1998) 194 CLR 610.

118 (1998) 194 CLR 610 at 636-637 [89]-[91]. See also at 630 [73].

119 See for example, *Blockburger v United States* 284 US 299 at 304 (1932) and subsequent cases concerned with the double jeopardy clause of the Fifth Amendment of the United States Constitution, discussed in *Pearce* (1998) 194 CLR 610 at 618-619 [27], 628-629 [62]-[66], 642-643 [104].

120 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976).

121 Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*, 2nd ed (2005) ("Joseph") at 461.

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

There is a similar reflection of the international law principle *ne bis in idem* in the statute of the International Criminal Court[122].

90 *The evolution of the rule*: What began as a philosophical[123] or religious[124] rule in ancient times was developed by English legal procedures into a rule of criminal pleading and practice[125]. It is now in the process of further evolution: returning to a broad concern about "values" and individual rights. At this late stage, this process may not be capable of rescuing the technical law governing the pleas of autrefois acquit, autrefois convict or the innominate plea in bar described in *Pearce*[126], having regard to the special features of the history of such pleas. However, attention to the deeper "values" that lie behind concerns over double jeopardy may yet have an impact upon fair prosecution practice[127]; stimulate the just conduct of the trial[128]; encourage attention to the need to avoid double punishment[129] where the accused is convicted of several related offences;

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122 Joseph at 461-462; cf van den Wyngaert and Stessens, "The International *Non Bis in Idem* Principle – Resolving Some of the Unanswered Questions", (1999) 48 *International and Comparative Law Quarterly* 779.

123 *Pearce* (1998) 194 CLR 610 at 630 [74], 647 [112].

124 *Pearce* (1998) 194 CLR 610 at 630 [74] with reference to I Nahum 9. Saint Jerome drew from this passage the principle that God does not punish twice for the same act: *Bartkus v Illinois* 359 US 121 at 152 (1959) per Black CJ, Douglas J concurring.

125 *Pearce* (1998) 194 CLR 610 at 640-641 [99]-[101] with reference to Coke's *Commentaries*; Hale's *Pleas of the Crown* (1800) vol 2, Ch 31 at 245; Hawkins, *Treatise of the Pleas of the Crown*, 8th ed (1824), vol 2 at 516; cf *R v O'Loughlin* (1971) 1 SASR 219 at 240-241 per Wells J.

126 *Pearce* (1998) 194 CLR 610 at 646 [110].

127 On prosecution practice in this context, see *Pearce* (1998) 194 CLR 610 at 638 [95].

128 On the fair conduct of a trial in this context, see *Pearce* (1998) 194 CLR 610 at 647-648 [114].

129 *Pearce* (1998) 194 CLR 610 at 649-650 [119].

and inform the consideration of a stay of further proceedings where, exceptionally, that course can be justified[130].

91 The approach that Gummow and Hayne JJ have adopted to the "values encompassed by double jeopardy", wherever all of the elements of one offence (of which an accused stands, or stood, in jeopardy) are included in the other offence (of which that accused stands, or stood in jeopardy) is closer to the approach that I favour, as expressed in *Pearce*. I would therefore endorse what their Honours have said in this case as a statement of the applicable Australian law. Future criminal practice and procedure should evolve by reference to the identified "values" that lie behind the universal double jeopardy rule. Further refinement and elaboration of this point must await cases in which it is actually presented for determination and application.

Conclusion and orders

92 A plea of autrefois acquit being unavailable, and an order for a permanent stay of the second summonses being inappropriate in this case, the trial of the appellants on the second summonses should proceed. Their appeals to this Court should be dismissed.

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130 *Pearce* (1998) 194 CLR 610 at 648-649 [115]-[118].

93 CALLINAN J. As appears from the reasons of the other judges in these appeals, the respondent, inexplicably and without any apparent justification, more than two years after the relevant events, charged the appellants on summons with a contravention of s 27(1) of the *Marine Pollution Act* 1987 (NSW) ("the Act"). The matter proceeded to a full trial in the Land and Environment Court of New South Wales in which the respondent called all of its evidence. Talbot J, who was hearing the case summarily, dismissed the summons on 7 March 2003[131].

94 A further eight months elapsed, again inexplicably, before the appellants were charged on summons with a contravention of s 8 of the Act. As the judgment of Gummow and Hayne JJ holds, the appellants' plea of autrefois acquit was rightly rejected because the appellants were not, in the strict legal sense, "in jeopardy". This is so because the authorities to which other members of the Court have referred, state a rather narrow definition of "jeopardy". The defence requires, according to Dixon J in *Broome v Chenoweth*[132] exposure to a "risk of a *valid* conviction" for the same, or perhaps substantially the same, offence. I say that the definition is a narrow one for the reason that defendants such as the appellants, having been charged effectively by a state authority, forced to prepare for a trial, and having been obliged to submit to proceedings in which all of the respondent's evidence was presented against them, would understandably be inclined to think that they had been in jeopardy. I will return to this matter when I deal with the appellants' argument that the second set of proceedings were an abuse of process.

95 As to the principles applicable to a plea of autrefois acquit or convict, it is sufficient for me to say that I agree with the analysis of Gummow and Hayne JJ of the joint judgment in *Pearce v The Queen*[133], with their Honours' conclusions with respect to it, and its application to these appeals.

96 I have experienced much more hesitation about the other limb of the appellants' argument, that these proceedings constituted abuses of process. They were almost inexcusably belated in their commencement. The respondent chose the wrong charge initially. A defendant who chose to conduct a defence upon an erroneous legal basis would rarely, if ever, be given another chance. It is all very well to say that the appellants were not, in the first proceedings, at "risk of a *valid* conviction", but they still had all the anxiety, inconvenience, expense[134] and pain

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131 *Filipowski v Island Maritime Ltd* (2003) 124 LGERA 331.

132 (1946) 73 CLR 583 at 599 (emphasis added).

133 (1998) 194 CLR 610 at 612-624 [1]-[50] per McHugh, Hayne and Callinan JJ.

134 Talbot J reserved the question of costs: *Filipowski v Island Maritime Ltd* (2003) 124 LGERA 331 at 339 [42]. It is not apparent from the record whether the

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of what must have seemed to them a real trial in which they were in jeopardy. It is also all very well to say that they could not have been validly convicted, but errors do occur, and not just at first instance. Experience tells that many litigants, assured by their advisers of a favourable outcome, but unsuccessful at first instance, lack the confidence, the resolve and the financial and emotional resources to pursue an appeal.

97 In the end however, I have concluded that despite what has happened, the second proceedings do not constitute abuses of process. Something else, or perhaps more: greater delay, more obscurity in the language of the statutory provisions, an absence of bona fides by the respondent, or serious prejudice to the defendant, might have, taken with the other matters, constituted an abuse. It is not possible to state any comprehensive rule: each case must depend on its own facts. If I had concluded otherwise however, I would have exercised my discretion to grant a stay. For the reasons which I stated in *Batistatos v Roads and Traffic Authority of New South Wales*[135] I do not think that the decision in *House v The King*[136] would impose any inhibition on the exercise, on appeal, of that discretion accordingly.

98 The appeals should be dismissed.

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appellants recovered their costs or not in those proceedings. In any event, the actual costs incurred are likely to have exceeded any recoverable costs.

135 [2006] HCA 27 at [223].

136 (1936) 55 CLR 499.