HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

DIONNE MATTHEW LACEY APPELLANT

AND

THE ATTORNEY-GENERAL OF QUEENSLAND RESPONDENT

Lacey v Attorney-General of Queensland [2011] HCA 10
7 April 2011
B40/2010

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 11 September 2009 and, in its place, order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of Queensland

Representation

B W Farr SC with J A Fraser and A D Scott for the appellant (instructed by Howden Saggers Lawyers)

W Sofronoff QC, Solicitor-General of the State of Queensland with E S Wilson and G J D del Villar for the respondent (instructed by Crown Solicitor (Qld))

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with A M Dinelli intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with C L Conley intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

M G Sexton SC, Solicitor-General for the State of New South Wales with L A Babb SC and J G Renwick intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

M G Hinton QC, Solicitor-General for the State of South Australia with K Hodder intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

CATCHWORDS

Lacey v Attorney-General of Queensland

Criminal law – Appeal – Appeal against sentence – Appeal by Crown – Where s 669A(1) of *Criminal Code* (Q) permitted appeal by Attorney-General against sentence and provided that appellate court "may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper" – Where appellate court increased sentence without identifying any error by sentencing judge – Whether Crown must demonstrate error by sentencing judge before discretion to vary sentence enlivened.

Words and phrases – "appeal", "unfettered discretion".

Acts Interpretation Act 1954 (Q), s 14A(1).
Criminal Code (Q), s 669A(1).

FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ.

Introduction

1 By s 669A(1) of the *Criminal Code* (Q) the Attorney-General of Queensland may appeal to the Court of Appeal of the Supreme Court of Queensland[1] against any sentence imposed by a trial court or a court of summary jurisdiction dealing with an indictable offence. The court hearing such an appeal "may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper."[2]

2 The question in this appeal is whether the Court of Appeal has the power under s 669A(1) to vary a sentence absent any demonstrated or inferred error on the part of the sentencing judge. The Court of Appeal answered that question in the affirmative. It held that the "unfettered discretion" conferred by s 669A(1) meant that the Court[3]:

> "in exercising its discretion must have regard to the sentence imposed below, but come to its own view as to the proper sentence to be imposed. In doing so, it must act in conformity with the principles relevant to the exercise of judicial power."

Based on that construction of s 669A(1) the Court of Appeal, by majority[4], increased the sentence imposed upon the appellant for the crime of manslaughter[5]. The construction was erroneous. For the reasons that follow the

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1 Until 1991, the appeal lay to the Court of Criminal Appeal, which was established by ss 3 and 5 of the *Criminal Code Amendment Act* 1913 (Q), inserting s 668A into the *Criminal Code* (Q). The appeal to the Court was replaced with an appeal to the Court of Appeal by s 111 of the *Supreme Court of Queensland Act* 1991 (Q) read with Sched 2 to the Act.

2 *Criminal Code* (Q), s 669A(1).

3 *R v Lacey; Ex parte Attorney-General (Qld)* (2009) 197 A Crim R 399 at 416 [147].

4 de Jersey CJ, Keane, Muir and Chesterman JJA; McMurdo P dissenting.

5 (2009) 197 A Crim R 399 at 418 [156].

appeal should be allowed, the order made by the Court of Appeal set aside and, in its place, an order dismissing the appeal to that Court made.

Factual and procedural background

3 On 6 May 2009, the appellant was convicted in the Supreme Court of Queensland of the offence of manslaughter. The Crown Prosecutor submitted that the appropriate sentence was 13 years before deducting two years served by the appellant while on remand. On 13 May 2009, the appellant was sentenced to 10 years imprisonment and declared to have been convicted of a serious violent offence. The trial judge said he would have sentenced the appellant to 12 years imprisonment but took into account two years which he had served on remand.

4 The appellant appealed against his conviction and applied for leave to appeal against his sentence. The Attorney-General also appealed against the sentence on the alternative grounds that it was "inadequate" or "manifestly inadequate". The particulars of both grounds of the Attorney-General's appeal were that:

- the sentence failed to reflect adequately the gravity of the offence generally and in this case in particular;
- the sentence failed to take sufficiently into account the aspect of general deterrence; and
- the sentencing judge gave too much weight to factors going to mitigation.

Departing from the position taken by the Crown Prosecutor in sentencing submissions before the trial judge, the Solicitor-General of Queensland, appearing for the Attorney-General, submitted in the Court of Appeal that the appropriate range was 15 to 18 years imprisonment (before deduction for time served on remand). Thus, on the Attorney-General's submission, the appropriate range was 13 to 16 years after the deduction.

5 The appellant's appeal against conviction and application for leave to appeal against sentence were dismissed. The Attorney-General's appeal against sentence was allowed and the sentence increased to 11 years. On 24 June 2010, the appellant was granted special leave to appeal against the decision of the Court of Appeal allowing the Attorney-General's appeal.

6 At the hearing of the appeal to this Court the appellant was given leave to add a ground of appeal challenging the constitutional validity of s 669A(1) on the basis that, as construed by the Court of Appeal, it required that Court to engage in an activity repugnant to the judicial process. At the hearing of the appeal, the Court confined the parties to their submissions as to the construction of s 669A. As the matter can be decided on the constructional question, the constitutional question does not need to be considered.

7 Before turning to the decision of the Court of Appeal, it is necessary to consider the background leading to the enactment of s 669A in its original form in 1939 and its present form in 1975.

Crown appeals against sentence

8 An appeal is not a common law remedy. It requires the creation by statute of an appellate jurisdiction and the powers necessary for its exercise[6]. There was, at common law, no jurisdiction to entertain appeals by convicted persons or by the Crown against conviction or sentence. In 1892, the Council of Judges of the Supreme Court of England and Wales recommended to the Lord Chancellor[7] that a Court of Criminal Appeal be established with jurisdiction to entertain appeals against sentence and to assist the Home Secretary, at his request, in reconsidering sentences or convictions[8]. The recommendations for appeals against sentence were based upon the "great diversity in the sentences passed by different Courts in respect of offences of the same kind"[9]. The judges proposed

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6 *DJL v Central Authority* (2000) 201 CLR 226 at 245-246 [40] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 17, citing *CDJ v VAJ* (1998) 197 CLR 172 at 196-197 [95] per McHugh, Gummow and Callinan JJ; [1998] HCA 67.

7 Pursuant to s 75 of the *Supreme Court of Judicature Act* 1873 (UK) (36 & 37 Vict c 66).

8 Great Britain, Council of Judges of the Supreme Court, *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases*, (1894) at 7.

9 Great Britain, Council of Judges of the Supreme Court, *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases*, (1894) at 7.

an appeal against sentence whereby a prison sentence could be reduced "if justice requires it" and the Court, on such an appeal, should have power to increase the sentence "when the facts seem to need it."[10] The judges also recommended that[11]:

> "[a]ny independent application to increase punishment should be made on the personal responsibility of the Attorney-General, who would only so apply in cases appearing to him to be of extreme or systematic inadequacy of sentence."

9 The power to be conferred on the Attorney-General would be exercised only in rare cases but it was necessary in order to "attain and enforce a reasonable uniformity of sentences."[12] The legislature did not act on that proposal. The *Criminal Appeal Act* 1907 (UK) made no provision for a Crown appeal against sentence, although it empowered the Court of Criminal Appeal, hearing an appeal by a prisoner against sentence, to reduce or to increase the sentence[13]. It was not until 1988[14] that the Attorney-General was empowered to apply to the Court of Appeal (Criminal Division) for leave to refer a case to it for undue

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10 Great Britain, Council of Judges of the Supreme Court, *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases*, (1894) at 7.

11 Great Britain, Council of Judges of the Supreme Court, *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases*, (1894) at 7-8.

12 Great Britain, Council of Judges of the Supreme Court, *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases*, (1894) at 8.

13 *Criminal Appeal Act* 1907 (UK), s 4(3).

14 *Criminal Justice Act* 1988 (UK), s 36.

leniency in sentencing[15]. The first common law jurisdiction to introduce a Crown appeal against sentence was Canada[16].

10 The right of appeal against sentence conferred upon a convicted person by s 3 of the *Criminal Appeal Act* 1907 (UK) was replicated in the Australian States[17]. The first States to provide for a Crown appeal against sentence were New South Wales and Tasmania in 1924[18]. Crown appeals against sentence were introduced at different times in the decades that followed in the other Australian States, the Australian Capital Territory and the Northern Territory[19].

11 Following the enactment of the *Criminal Appeal Act* 1907 (UK), the English courts soon established the proposition that for a convicted person's appeal against sentence to succeed there must be evidence that the sentencing judge had acted on a wrong principle or given undue weight to some of the facts proved in evidence. It was "not possible to allow appeals because individual members of the Court might have inflicted a different sentence, more or less

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15 Pattenden, *English Criminal Appeals 1844-1994*, (1996) at 292-297.

16 *Criminal Code* RSC 1906, c 146, s 1013(2), as enacted by SC 1923, c 41, s 9. A general right to seek leave to revise a sentence had been introduced in 1921: *Criminal Code* RSC 1906, c 146, s 1055A, as enacted by SC 1921, c 25, s 22.

17 *Criminal Code Amendment Act* 1911 (WA), s 10; *Criminal Appeal Act* 1912 (NSW), s 5(1)(c); *Criminal Code Amendment Act* 1913 (Q), ss 3 and 8; *Criminal Appeal Act* 1914 (Vic), s 3(c); *Criminal Appeals Act* 1924 (SA), s 5(d); *Criminal Code* (Tas), s 401(1)(iii), as enacted by the *Criminal Code Act* 1924 (Tas).

18 *Crimes (Amendment) Act* 1924 (NSW), s 33; *Criminal Code* (Tas), s 401(2)(iii), as enacted by the *Criminal Code Act* 1924 (Tas).

19 *Criminal Code Amendment Act* 1939 (Q), s 4; *Criminal Appeals Act* 1970 (Vic), s 2; *Criminal Code Amendment Act* 1975 (WA), s 3(b); *Criminal Law Consolidation Act Amendment Act* 1980 (SA), s 9; *Federal Court of Australia Act* 1976 (Cth), ss 24(1)(b) and 28(5) (as enacted). In Western Australia, the Crown had, from 1954, the right to appeal against any sentence "which in the circumstances of the case cannot lawfully be passed on the convicted person for the offence of which he stands convicted": *Criminal Code* (WA), s 688(2)(d) as inserted by *Criminal Code Amendment Act* 1954 (WA), s 8.

severe."[20] This Court adopted the same approach to appeals against sentence under the *Criminal Appeal Act* 1912 (NSW) in *Skinner v The King*[21]. Barton ACJ, with whom the other Justices agreed, said[22]:

> "If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not."

12 Crown appeals against sentence in New South Wales were introduced with the enactment, in 1924, of s 5D of the *Criminal Appeal Act* 1912 (NSW)[23]. That section, in language that would be copied in 1939 by s 669A of the *Criminal Code*, provided that, on such an appeal by the Attorney-General, "the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper." In its first consideration of s 5D, in *Whittaker v The King*[24], this Court by majority appeared to favour, albeit obiter, a construction which conferred "unlimited judicial discretion … on the Court of Criminal Appeal"[25]. Isaacs J, however, was of the view that the Court of Criminal Appeal should not interfere in the decision of the trial judge unless it was shown to have been affected by an error in principle[26]. He said that the "jurisdiction of the Court of Criminal Appeal under sec 5D, though *discretionary*, is an appellate power to control an order that is itself *discretionary*."[27] He also

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20 *Sidlow* (1908) 1 Cr App R 28 at 29.

21 (1913) 16 CLR 336; [1913] HCA 32.

22 (1913) 16 CLR 336 at 340.

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

24 (1928) 41 CLR 230; [1928] HCA 28.

25 (1928) 41 CLR 230 at 235 per Knox CJ and Powers J; see also at 253 per Gavan Duffy and Starke JJ.

26 (1928) 41 CLR 230 at 242, 245.

27 (1928) 41 CLR 230 at 236 (emphasis in original).

pointed to the sentencing judge's advantage after a trial[28]. Higgins J was of the view that the Court should not decide the point on an application for special leave to appeal where no argument had been addressed to it and no consideration had been given to it by the court below[29].

13 The view of the majority in *Whittaker* about the nature of the appeal under s 5D was apparently endorsed by Evatt and McTiernan JJ in *Williams v The King [No 2]*[30]. They equated the "unlimited discretion" of which Knox CJ and Powers J in *Whittaker* had spoken to an "unfettered discretion"[31]. Nevertheless, it was the judgment of Isaacs J in *Whittaker* which was cited by Dixon, Evatt and McTiernan JJ in *House v The King*[32] in support of the general proposition that courts of criminal appeal could only interfere with sentences on matters of principle[33]. In both *House* and *Cranssen v The King*[34] that requirement was applied to sentences imposed after pleas of guilty, indicating that the principle did not reflect a mandated deference to the sentencing judge's advantage after trial.

14 The appellate jurisdiction considered in *Cranssen*[35] differed in terms from that applicable in *House*[36]. The difference did not prevent the majority in

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28 (1928) 41 CLR 230 at 249.

29 (1928) 41 CLR 230 at 252-253.

30 (1934) 50 CLR 551; [1934] HCA 19.

31 (1934) 50 CLR 551 at 567.

32 (1936) 55 CLR 499; [1936] HCA 40.

33 (1936) 55 CLR 499 at 505 n 5.

34 (1936) 55 CLR 509; [1936] HCA 42.

35 *Judiciary Ordinance* 1921 (NG), s 24.

36 *Bankruptcy Act* 1924 (Cth), s 26(2).

Cranssen from finding common ground with the reasoning in *House*. They said that it[37]:

> "remains true that the appeal [was] from a discretionary act of the court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised."

15 The idea that s 5D of the *Criminal Appeal Act* 1912 (NSW) conferred an unlimited or unfettered jurisdiction on the Court of Criminal Appeal was rejected by two of the Justices in *Griffiths v The Queen*[38] as a misunderstanding of what had been said in *Whittaker*[39]. It was also inconsistent with the principle, derived from the common law's antagonism to double jeopardy, that Crown appeals against sentence should only be brought in exceptional circumstances.

16 The exceptional character of the Crown appeal against sentence had been recognised by the Council of Judges in England in its recommendations to the Lord Chancellor in 1892. That character was acknowledged in *Williams [No 2]* by Dixon J, who described such appeals as "a marked departure from the principles theretofore governing the exercise of penal jurisdiction"[40]. In *Griffiths*, Barwick CJ said that an appeal by the Attorney-General[41]:

> "should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the

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37 (1936) 55 CLR 509 at 519 per Dixon, Evatt and McTiernan JJ. See also *Harris v The Queen* (1954) 90 CLR 652; [1954] HCA 51, which applied *Cranssen*.

38 (1977) 137 CLR 293; [1977] HCA 44.

39 *Griffiths v The Queen* (1977) 137 CLR 293 at 308 per Barwick CJ, 326-327 per Jacobs J.

40 (1934) 50 CLR 551 at 561.

41 (1977) 137 CLR 293 at 310.

> governance and guidance of courts having the duty of sentencing convicted persons."

That statement was endorsed by Brennan, Deane, Dawson and Gaudron JJ in *Everett v The Queen*[42]. In endorsing it, their Honours expressly included in the notion of a "matter of principle" manifest inadequacy or inconsistency in sentencing standards.

17 The treatment of Crown appeals against sentence as "exceptional" indicated a judicial concern that criminal statutes should not be construed so as to facilitate the erosion of common law protection against double jeopardy. This was reflective of a wider resistance to the construction of statutes, absent clear language, so as to infringe upon fundamental common law principles, rights and freedoms. In *R v Snow*[43], which considered the kind of appeal that would lie to this Court under s 73 of the Constitution, Griffith CJ said[44]:

> "The common law doctrine as to the effect of a verdict of acquittal is too well settled to require exposition, and it is too late to inquire into its origin. If it had been intended by the framers of the Constitution to abrogate that doctrine in Australia, and to confer upon the High Court a new authority, such as had never been exercised under the British system of jurisprudence by any Court of either original or appellate jurisdiction, it might have been anticipated that so revolutionary a change would have been expressed in the clearest language."

The Chief Justice relied upon a passage from *Maxwell on Statutes*, earlier quoted by O'Connor J in *Potter v Minahan*[45] and repeatedly invoked in this Court in support of the principle of legality in statutory interpretation[46].

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42 (1994) 181 CLR 295 at 300; [1994] HCA 49.

43 (1915) 20 CLR 315; [1915] HCA 90.

44 (1915) 20 CLR 315 at 322.

45 (1908) 7 CLR 277 at 304; [1908] HCA 63, a passage taken from the judgment of Marshall CJ in *United States v Fisher* 6 US 358 at 389-390 (1805).

46 *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ;

(Footnote continues on next page)

18 The influence, on Crown appeals against sentence, of the common law rule against double jeopardy was reflected in the observation by Deane J in *Rohde v Director of Public Prosecutions*[47] that such an appeal "infringes the essential rationale of the traditional common law rule against double jeopardy in the administration of criminal justice in a manner comparable to a conferral of a prosecution right of appeal against a trial acquittal"[48]. The effect of the common law on the interpretation of criminal statutes was stated by Deane J[49] in terms later quoted by the plurality in *Byrnes v The Queen*[50]:

> "As a matter of established principle, a general statutory provision should not ordinarily be construed as conferring or extending such a prosecution right of appeal against sentence unless a specific intention to that effect is manifested by very clear language".

Indeed, as Deane J explained, the requirement of "clear language" in this context did not depend critically upon the rule against double jeopardy, for even assuming that rule to be limited to the determination of guilt or innocence and not extending to the quantification of punishment[51]:

> "that established principle of construction extends to require clear and unambiguous words before a statute will be construed as effecting, to the

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[1994] HCA 15; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [20] per Gleeson CJ; [2004] HCA 40. See also *Wall v The King; Ex parte King Won [No 1]* (1927) 39 CLR 245; [1927] HCA 4; *Smith v The Queen* (1994) 181 CLR 338; [1994] HCA 60; and see generally Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 187-188 [5.28].

47 (1986) 161 CLR 119; [1986] HCA 50.

48 (1986) 161 CLR 119 at 128.

49 (1986) 161 CLR 119 at 128-129, a restrictive approach also applied in *Bond v The Queen* (2000) 201 CLR 213; [2000] HCA 13.

50 (1999) 199 CLR 1 at 26 [50] per Gaudron, McHugh, Gummow and Callinan JJ.

51 (1986) 161 CLR 119 at 129.

> detriment of the subject, any fundamental alteration to the common law principles governing the administration of justice."

19 In *Malvaso v The Queen*[52], Mason CJ, Brennan and Gaudron JJ pointed to the need to insist upon "[s]trict compliance with procedures which authorize an increase in sentence by an appellate court"[53]. In the same case, Deane and McHugh JJ acknowledged that the Crown appeal against sentence had become commonplace in the common law world, but said that[54]:

> "Nonetheless, it should not be forgotten that it represents a departure from traditional standards of what is proper in the administration of criminal justice in that, in a practical sense, it is contrary to the deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy".

That statement was repeated in substance by the plurality in *Everett*[55]. In *Byrnes*[56], the plurality explained that:

> "This is not 'procedural due process' as understood in United States constitutional jurisprudence; rather it is the process of the due administration of justice governed by the strictures of the rule of law. These strictures have been developed by the courts with respect to power and its exercise in appropriately constituted forums." (footnotes omitted)

20 In construing a statute which provides for a Crown appeal against sentence, common law principles of interpretation would not, unless clear language required it, prefer a construction which provides for an increase of the

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52 (1989) 168 CLR 227; [1989] HCA 58, which was concerned with s 352(2) of the *Criminal Law Consolidation Act* 1935 (SA).

53 (1989) 168 CLR 227 at 233, cited in *Byrnes v The Queen* (1999) 199 CLR 1 at 26-27 [53] per Gaudron, McHugh, Gummow and Callinan JJ. See also *Bond v The Queen* (2000) 201 CLR 213 at 223 [29].

54 (1989) 168 CLR 227 at 234.

55 (1994) 181 CLR 295 at 305 per Brennan, Deane, Dawson and Gaudron JJ.

56 (1999) 199 CLR 1 at 27 [54] per Gaudron, McHugh, Gummow and Callinan JJ.

sentence without the need to show error by the primary judge. That is a specific application of the principle of legality. It is reflected in, and reinforced by, the decisions of this Court. Such a construction also has the vice that it deprives the sentencing judge's order of substantive finality. It effectively confers a discretion on the Attorney-General to seek a different sentence from the Court of Appeal without the constraint of any threshold criterion for that Court's intervention. Such a construction tips the scales of criminal justice in a way that offends "deep-rooted notions of fairness and decency"[57]. It is not therefore a construction lightly to be taken as reflecting the intention of the legislature.

21 It is necessary now to move from these general considerations to the legislative history and judicial exegesis of s 669A(1).

Legislative history of s 669A(1)

22 The legislative history of s 669A(1) was determinative of the decision of the Court of Appeal. That history began in 1939 with the insertion of s 669A into the *Criminal Code* by the *Criminal Code Amendment Act* 1939 (Q). Section 669A provided:

> "The Attorney-General may appeal to the Court against any sentence pronounced by the court of trial and the Court may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper."

23 In explaining the new provision in his Second Reading Speech, the Premier said[58]:

> "While the Queensland Criminal Code allows the convicted offender the full right of appeal, the Crown has no such right at present. The provision we propose to insert allowing an appeal against sentence is identical with that enacted by New South Wales in 1924."

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57 *Malvaso v The Queen* (1989) 168 CLR 227 at 234 per Deane and McHugh JJ.

58 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 November 1939 at 1716.

In further explanation, the Premier said[59]:

> "We are giving the right of appeal only in a case in which it is considered that the sentence is inadequate".

24 The rationale of the provision, as explained in the Second Reading Speech, appears to have been that the Attorney-General should enjoy the same right of appeal against sentence as a convicted person. That right, as was apparent from *House*, *Cranssen*, *Harris* and *Griffiths*, required demonstration of an error of principle or the imposition of a manifestly excessive or inadequate sentence by the sentencing judge. The right of appeal of a convicted person against sentence under s 668D(1)(c) of the *Criminal Code* had been so construed in the Supreme Court of Queensland prior to 1939[60].

25 The judicial interpretation of s 669A was necessarily influenced by the decisions of this Court in *Skinner* and in *Whittaker* concerning s 5D of the *Criminal Appeal Act* 1912 (NSW). In *R v McKeown*[61], the first reported case on s 669A, the Court of Criminal Appeal of Queensland was told by counsel for the Crown not only that it had an "unfettered judicial discretion" but also that the trial judge had "misapplied the principles of punishment."[62] The Court held that "[h]ad the principles of punishment applicable been brought to the notice of the trial Judge … we think he would have awarded a different sentence."[63] The result did not therefore depend upon a construction of s 669A which would have required something less than an error of principle on the part of the primary judge to enliven the jurisdiction which it conferred.

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59 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 November 1939 at 1717.

60 *R v Buckmaster* [1917] St R Qd 30 at 31-32; *R v McIntosh* [1923] St R Qd 278 at 279-280; *R v McCowan* [1931] St R Qd 149 at 151-152 per Blair CJ and Webb J; *R v Keith* [1934] St R Qd 155 at 169 per Blair CJ, 180 per Webb J, 188 per Henchman J; *R v Parmenter* [1936] QWN 25 at 30 per Blair CJ.

61 [1940] St R Qd 202.

62 [1940] St R Qd 202 at 203.

63 [1940] St R Qd 202 at 213-214.

26 In *R v Beevers*[64], however, the Court relied upon *Whittaker* for the proposition that it had "an unfettered discretion to alter the sentence" and was "not bound by the limitations stated in *Skinner v The King* … to apply where an offender appeals against his sentence."[65] This conclusion was reached in the face of the common position of both the Solicitor-General, representing the Attorney-General, and counsel for the respondent that the criterion of intervention was whether or not the sentencing judge had proceeded on wrong principles[66].

27 Webb CJ took the view that if he would have imposed a sentence "substantially greater than that imposed by the learned trial judge" he should hold that a heavier sentence should be substituted[67]. Macrossan SPJ held that the Court should not interfere with a sentence pronounced by a trial judge unless it was "clearly satisfied that the sentence should be altered."[68] In the event, he formed the opinion that the primary judge had proceeded upon a wrong principle, being "unduly influenced by what he took to be the view of the Legislature of the gravity of the offence to which the prisoner had pleaded guilty"[69]. He also acknowledged the advantage of the primary judge, which was greater where there had been a trial than where the prisoner had pleaded guilty to the offence[70].

28 It was common ground in the submissions for the appellant and for the Attorney-General in this appeal that the interpretation of s 669A adopted by the Court of Criminal Appeal in *Beevers* continued to be applied until the decision of

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64 [1942] St R Qd 230.

65 [1942] St R Qd 230 at 232 per Webb CJ; see also at 233 per Macrossan SPJ, 236 per Mansfield J.

66 [1942] St R Qd 230 at 231, citing *R v Withers* (1925) 25 SR (NSW) 382 and *R v McKeown* [1940] St R Qd 202.

67 [1942] St R Qd 230 at 232.

68 [1942] St R Qd 230 at 233.

69 [1942] St R Qd 230 at 233.

70 [1942] St R Qd 230 at 233.

that Court in *R v Liekefett; Ex parte Attorney-General*[71]. In *Liekefett*, the Court of Criminal Appeal carefully reviewed *Skinner* and *Whittaker*, its own previous decisions in *McKeown* and *Beevers*, and decisions of the Court of Criminal Appeal of New South Wales on s 5D of the *Criminal Appeal Act* 1912[72]. Following that review the Court held[73]:

> "In the result we have concluded that there is no decision which binds us to any particular view as to the circumstances in which the discretion reposed in this Court by s 669A should be exercised. We think that the most satisfactory approach in an appeal by the Attorney-General is that which the High Court said should be adopted in an appeal by a convicted person in the passage we have cited from *House v The King*. So to hold, is in accordance with the views expressed by Isaacs J in *Whittaker v The King*, and by the Court of Criminal Appeal of New South Wales in *Reg v Cuthbert*. Both appeals are from the exercise of a discretion and there is no reason why the same principle should not apply." (references omitted)

29 In 1975, s 669A was repealed and replaced with a new section covering appeals by the Attorney-General against sentence and referral of points of law to the Court of Criminal Appeal following an acquittal after a trial upon indictment[74]. Subsection (1) of the new s 669A provided:

> "The Attorney-General may appeal to the Court against any sentence pronounced by—
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> (a) the court of trial;
>
> (b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court,

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71 [1973] Qd R 355 at 366.

72 *R v Withers* (1925) 25 SR (NSW) 382; *R v King* (1925) 25 SR (NSW) 218; *R v Geddes* (1936) 36 SR (NSW) 554; *R v Cuthbert* (1967) 86 WN (Pt 1) NSW 272; *R v Macaulay* [1969] 2 NSWR 700.

73 [1973] Qd R 355 at 366.

74 *Criminal Code and the Justices Act Amendment Act* 1975 (Q), s 34.

and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper."

30 In the course of the Second Reading Speech, the Minister for Justice said[75]:

> "The Bill is being amended to make it clear that the Court of Criminal Appeal has an unfettered discretion to determine the proper sentence to impose when the Attorney-General has appealed against the inadequacy of the sentence. The private legal profession is opposed to this amendment. I do not propose to alter this amendment because it only makes clear what was always intended, and was in fact acted upon by the Court of Criminal Appeal for 30 years until 1973, when a court decision effectively changed the law to what was not intended."

31 The first reported judgment following the 1975 amendment was *Adams*[76]. Andrews J (with whom Hoare and W B Campbell JJ agreed) characterised the "unfettered discretion" conferred by the subsection as "a discretion to vary a sentence imposed if the court is in substantial disagreement with it."[77] His Honour considered that the unfettered discretion could only be based upon "matters of substance as distinct from trivialities."[78] The legislative intention was to impose a standard of comparison less stringent than that involved in a consideration of whether a sentence was manifestly inadequate[79].

32 Seven years later, in *R v Osmond; Ex parte Attorney-General*[80], Andrews CJ restated what he had said in *Adams* and concluded[81]:

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75 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 April 1975 at 993.

76 (1979) 2 A Crim R 207.

77 (1979) 2 A Crim R 207 at 208.

78 (1979) 2 A Crim R 207 at 208.

79 (1979) 2 A Crim R 207 at 208-209.

80 [1987] 1 Qd R 429.

81 [1987] 1 Qd R 429 at 434.

> "On the history of the matter it is clear that the legislature intended in the 1975 amending Act to restore the position which had prevailed, albeit on a wrong interpretation of this Court in *R v Beevers*, of what had been said in *Whittaker v The King* that the Court is to have an unfettered discretion. It was consequent upon the ruling in this Court in *R v Liekefett* that the amendment was enacted."

Macrossan J took a somewhat more restrictive approach and said[82]:

> "The Court is left as the sole Judge of whether to interfere and nothing compels it to do so, but in the absence of a manifest misapplication of principle below, it will be disposed not to interfere unless the quantum of sentence already imposed calls, in an obvious way, for correction. I would not exclude the possibility that apart from these instances there exists, as part of the unfettered discretion, a reserve power to interfere in other cases in which the Court, in the exercise of its supervisory appellate function for the whole of the State, thinks it appropriate."

Carter J preferred to express no opinion on the statutory power to vary a sentence as the matter had not been argued before the Court[83].

33 Following this Court's decision in *Everett*, the operation of s 669A(1) was reconsidered by the Court of Appeal of Queensland in *R v Melano; Ex parte Attorney-General*[84]. Their Honours held that the discretion to vary a sentence conferred by the subsection "is an unfettered discretion either to do so or to decline to do so."[85] The discretion was subject to the limitations imposed by the purpose for which it was given and by applicable statutory and judicial

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82 [1987] 1 Qd R 429 at 437-438.

83 [1987] 1 Qd R 429 at 438.

84 [1995] 2 Qd R 186.

85 [1995] 2 Qd R 186 at 189.

sentencing principles[86]. Pointing to the wide discretion conferred on sentencing judges, the Court said[87]:

> "Unless the sentencing judge has erred in principle, either because an error is discernible or demonstrated by a manifest inadequacy or excessiveness, the sentence he or she has imposed will be 'proper' … Variation by this Court will not be justified in such circumstances, unless, perhaps, in exceptional circumstances; for example, to establish or alter a matter of principle or the sentencing range which is appropriate".

34 The Court of Appeal in *Melano* held that the operation of s 669A(1) was "generally consistent with the established principles relating to appeals against discretion."[88] The Court referred to *House*. To support its construction, the Court also relied upon the common law rule against double jeopardy and the advantage of the sentencing judge, who had seen the accused and perhaps witnesses and heard oral evidence[89].

35 The decision in *Melano* was made in 1994. Its correctness was directly called into question in *York v The Queen*[90] by McHugh J and indirectly by Callinan and Heydon JJ. *York* involved an appeal against a decision of the Court of Appeal of Queensland on a Crown appeal under s 669A(1). The criticism was obiter because it was common ground[91] before this Court and the Court of Appeal that the principles governing appellate intervention under s 669A(1) were as stated in *House* and *Dinsdale v The Queen*[92]. McHugh J considered that *Melano* could not be correct[93]. Callinan and Heydon JJ would have been inclined

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86 eg *Penalties and Sentences Act* 1992 (Q).

87 [1995] 2 Qd R 186 at 189.

88 [1995] 2 Qd R 186 at 189.

89 [1995] 2 Qd R 186 at 190.

90 (2005) 225 CLR 466; [2005] HCA 60.

91 (2005) 225 CLR 466 at 468-469 [4] per Gleeson CJ.

92 (2000) 202 CLR 321; [2000] HCA 54.

93 (2005) 225 CLR 466 at 474-475 [26].

to give the term "unfettered" its ordinary meaning of "fully unrestricted"[94] but dealt with the case on the basis upon which it had been argued. Neither Gleeson CJ nor Hayne J expressed any view on the question of construction.

The reasoning in the Court of Appeal

36 In the present case the Court of Appeal, sitting as a bench of five, decided to reconsider *Melano*. It approached that task having regard to principles governing the power of appeal courts to reconsider their own earlier decisions, as explained by this Court in *Nguyen v Nguyen*[95] and *John v Federal Commissioner of Taxation*[96].

37 The reasoning of the majority in the Court of Appeal on the construction of s 669A(1) involved the following propositions:

1. *Melano* did not rest upon a principle carefully worked out in a significant succession of cases. The Court had not attempted to come to grips with the legislative history of s 669A(1) before or after *Liekefett* and had given scant attention to the exegesis of s 669A(1) in *Adams* and *Osmond*[97].

2. *Liekefett* turned upon the proposition that while the *Criminal Code* as it stood at the time of that decision did not fetter the discretion of the Court, the Court's discretion was fettered by judicial discretion, that is to say by the acknowledgment that a discretionary power does not arise for exercise on appeal while the decision in which the discretion has been exercised still stands. That requires the earlier exercise of discretion to be set aside for error before the sentencing discretion arises to be exercised afresh[98].

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94 (2005) 225 CLR 466 at 484 [61].

95 (1990) 169 CLR 245 at 268-270 per Dawson, Toohey and McHugh JJ; [1990] HCA 9.

96 (1989) 166 CLR 417 at 451-452 per Brennan J; [1989] HCA 5.

97 (2009) 197 A Crim R 399 at 405 [122], 408 [128].

98 (2009) 197 A Crim R 399 at 406 [124].

3. The intention of the legislature in amending s 669A was to remove the "judicial fetter" upon the exercise of the discretion identified in *Liekefett*[99].

4. The observation in *Melano* that s 669A(1) conferred an unfettered discretion "either to [vary a sentence] or to decline to do so" sits uncomfortably with the fundamental principle that where a court is vested with jurisdiction it is obliged to exercise it[100].

5. The use of the term "appeal" in s 669A(1) did not indicate that the right conferred was a right to seek the correction of error, rather than a review of the sentence[101].

6. As expressed in an important passage in the reasoning of the majority[102]:

> "There can be no doubt that this Court is duty-bound to exercise the jurisdiction conferred upon it in consequence of the invocation of s 669A by the Attorney-General. This Court may decide to decline to vary a sentence where that sentence is not 'such sentence as seems proper to the Court' only where that decision is consistent with the proper exercise of the jurisdiction conferred on the Court. In our view, the terms of s 669A leave no room for this Court to decline to exercise the discretion conferred on it simply because it has not been demonstrated that the decision below should be set aside as erroneous in the *House v The King* sense."

The preceding passage, which will be further considered below, elided an important distinction between jurisdiction and power.

7. The width of the discretion imposed on sentencing judges and relied upon in *Melano* does not affect the discretion conferred on the Court by

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99 (2009) 197 A Crim R 399 at 407 [127].

100 (2009) 197 A Crim R 399 at 411 [132], citing *Ward v Williams* (1955) 92 CLR 496 at 507; [1955] HCA 4.

101 (2009) 197 A Crim R 399 at 415 [143].

102 (2009) 197 A Crim R 399 at 411-412 [133].

s 669A(1) to vary the sentence to impose "such sentence as seems proper to this Court."[103]

8. There is no scope in the language of s 669A(1) for a gloss that would limit the power of the Court to vary a "proper" sentence imposed by a sentencing judge only to "exceptional cases"[104].

9. *Melano* has been acted upon only in the general sense that later decisions have assumed its correctness and the legislature has not intervened again to seek to alter the position established by that decision[105].

10. The correctness of *Melano* was doubted by members of the High Court in *York*, albeit its authority was not challenged[106].

38 The majority in the Court of Appeal rejected a submission that s 669A(1) should be construed so as to minimise any disparity between the position of the Attorney-General and the position of a convicted person in relation to appeals against sentence. The right of appeal conferred on the Attorney-General was said to be an important means of ensuring equality before the law by ensuring that like offences and like offenders were punished alike[107].

39 The majority concluded that the approach taken in *Melano* was "opposed to the undoubted intention of the Parliament as enacted" in s 669A in its current form[108]. They returned to the approach adopted by Andrews CJ in *Osmond* and said[109]:

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103 (2009) 197 A Crim R 399 at 412 [134].

104 (2009) 197 A Crim R 399 at 412 [135].

105 (2009) 197 A Crim R 399 at 412 [137].

106 (2009) 197 A Crim R 399 at 412 [138].

107 (2009) 197 A Crim R 399 at 414-415 [142].

108 (2009) 197 A Crim R 399 at 416 [146], quoting *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 452 per Brennan J.

109 (2009) 197 A Crim R 399 at 416 [147].

> "This Court in exercising its discretion must have regard to the sentence imposed below, but come to its own view as to the proper sentence to be imposed. In doing so, it must act in conformity with the principles relevant to the exercise of judicial power."

40 Their Honours accepted that they might come to the view that the proper sentence was not so substantially different from the sentence imposed below that variation was warranted. They also referred to the Solicitor-General's acknowledgment that the right of appeal conferred by s 669A(1) "should be exercised sparingly by the Attorney-General and not merely for the purpose of having a 'second bite at the cherry'."[110] This was not evidently a factor which yielded any principle informing the exercise of the Court's discretion. However, the majority stated, in increasing the sentence imposed on the appellant, that they bore in mind "the importance of the consideration that appeals under s 669A must not be seen as a means for the prosecution to change its mind as to the level of sentence it is disposed to seek – ie to have a 'second bite of the cherry'"[111]. This comment referred to the difference between the Crown Prosecutor's submission at the trial seeking a sentence of 13 years subject to two years deduction for time served and the Attorney-General's submission to the Court of Appeal seeking a sentence of 13 to 16 years after that deduction.

41 McMurdo P dissented and, after reviewing the legislative history and judicial exegesis of s 669A(1), referred to *House* as setting out the principles governing appeals against an exercise of judicial discretion. In her Honour's opinion, it required a two-step approach in allowing appeals against sentence. Her Honour said[112]:

> "The Court must first determine whether the appeal from an exercise of judicial discretion should be allowed in accordance with long established legal principle … If the Court allows an Attorney-General's appeal against sentence under s 669A(1), it may then in its 'unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.'"

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110 (2009) 197 A Crim R 399 at 416 [148].

111 (2009) 197 A Crim R 399 at 418 [156].

112 (2009) 197 A Crim R 399 at 425 [263].

Order of the Court of Appeal

42 The order made by the Court of Appeal was in the following terms:

"1. Appeal allowed.

2. Order that the sentence imposed at first instance be varied to the extent that a sentence of 11 years imprisonment be substituted for the original sentence of 10 years imprisonment."

The approach to construction

43 The objective of statutory construction was defined in *Project Blue Sky Inc v Australian Broadcasting Authority*[113] as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have[114]. An example of a canon of construction directed to that objective and given in *Project Blue Sky* is "the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities"[115]. That is frequently called the principle of legality. The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose[116]. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to

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113 (1998) 194 CLR 355; [1998] HCA 28.

114 (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ.

115 (1998) 194 CLR 355 at 384 n 56 per McHugh, Gummow, Kirby and Hayne JJ.

116 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 345-346 per McHugh J; [1991] HCA 28; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613 per Lord Reid.

parliamentary drafters and the courts[117]. As this Court said recently in *Zheng v Cai*[118]:

> "It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[119], the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy."

44 The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.

45 In this context, reference should be made to s 14A(1) of the *Acts Interpretation Act* 1954 (Q), which requires a purposive construction of Queensland statutes and is in the following terms:

> "**Interpretation best achieving Act's purpose**
>
> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation."

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117 *Mills v Meeking* (1990) 169 CLR 214 at 226 per Mason CJ and Toohey J (Brennan J agreeing); [1990] HCA 6; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 346 per McHugh J.

118 (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52 (some footnotes omitted).

119 (2002) 123 FCR 298 at 410-412.

The term "purpose" is defined to include "policy objective"[120]. Section 14A(1) was introduced into the *Acts Interpretation Act* in 1991 but may be taken, as required by s 2 of the Act, to apply to all Acts, including those which predated its enactment[121]. Neither party placed any reliance upon s 14A, which was surprising given that an area of contest in the appeal was about statutory purpose.

46 Section 14A requires preference to be given to that interpretation which will best achieve the purpose of the Act. It differs from s 15AA of the *Acts Interpretation Act* 1901 (Cth), which requires preference to be given to a construction that would "promote the purpose or object underlying the Act" over "a construction that would not promote that purpose or object." Section 15AA contemplates a limited choice between two constructions[122]. Assuming that s 14A is not intended to displace common law rules outside its sphere of operation, the interpretations from which the selection which it mandates is to be made must be those which comply with the requirements of those rules, none of which is antagonistic to purposive construction[123].

The construction of s 669A(1)

47 Section 669A appears in Ch 67 of the *Criminal Code*, entitled "Appeal – pardon". The chapter provides, inter alia, for appeals by convicted persons from their convictions and sentences[124] and for referral to and reservation of points of law for the Court of Appeal[125].

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120 *Acts Interpretation Act* 1954 (Q), s 36.

121 *Acts Interpretation Act* 1954 (Q), s 2, which provides that "[t]his Act applies to all Acts (including this Act)." See also *GTK Trading Pty Ltd v Export Development Grants Board* (1981) 40 ALR 375.

122 *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 262 per Dawson, Toohey and Gaudron JJ; [1990] HCA 41.

123 Section 14B of the Queensland *Acts Interpretation Act*, which permits some reference to extrinsic material, may be of assistance.

124 *Criminal Code* (Q), s 668D.

125 *Criminal Code* (Q), ss 668A, 668B and 668C (which concerns the reservation of a case for consideration upon the arrest of a judgment).

48 In construing s 669A(1) it is necessary to approach it as a provision which confers jurisdiction upon the Court of Appeal together with powers to be used by that Court in the exercise of its jurisdiction. The distinction between jurisdiction and power has been made repeatedly by this Court[126]. It is a distinction which was not sharply drawn by the majority in the Court of Appeal[127]. The power given to the Court may inform the characterisation of its jurisdiction but does not necessarily define its content.

49 The jurisdiction conferred on the Court of Appeal under s 669A(1) is authority to determine an appeal to the Court by the Attorney-General against any sentence imposed by the court of trial or a court of summary jurisdiction dealing summarily with an indictable offence. The scope and limits of the Court's jurisdiction are to be derived from the word "appeal". Its powers are to be found in the final words of s 669A(1), which refer to its "unfettered discretion" to "vary the sentence and impose such sentence as to the Court seems proper."

50 The word "appeal" must be given content. In answer to a question from the Court during oral argument, the Solicitor-General of Queensland acknowledged that the construction of s 669A(1) for which he was contending was:

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126 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161-162 per Gibbs CJ, Stephen, Mason and Wilson JJ; [1981] HCA 48; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 616 per Mason CJ, 619 per Wilson and Dawson JJ, 627-628 per Toohey J; [1987] HCA 23; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 29 [27]-[28], 32 [35] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 30; *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78] per Gaudron, Gummow and Hayne JJ; [1999] HCA 65; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64]-[65] per Gleeson CJ, Gaudron and Gummow JJ; [2001] HCA 1; *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36] per French CJ; [2009] HCA 18; *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320 at 332 [19] per French CJ, Gummow and Bell JJ, 353 [78] per Hayne and Kiefel JJ; [2010] HCA 24.

127 (2009) 197 A Crim R 399 at 411-412 [133].

> "By application by the Attorney the Court of Appeal may, in any case, resentence the prisoner."

The jurisdiction is thus collapsed into the power. It is true that jurisdiction can be conferred in the same breath and by the same words as power, although its subject matter must be discernible from some source[128]. However, for the reasons given earlier, the construction propounded by the Attorney-General is not to be preferred unless required by the clear words of s 669A(1) and/or by the requirement for purposive construction set out in s 14A of the *Acts Interpretation Act*. It is a construction which gives no jurisdictional content to the term "appeal". It confers upon the Court a power unconstrained by any principle beyond those which constrained the sentencing judge.

51 In *CDJ v VAJ*[129], McHugh, Gummow and Callinan JJ observed, in relation to the appellate jurisdiction of the Full Court of the Family Court, that it was highly unlikely that the Parliament intended that the provision conferring that jurisdiction[130]:

> "should be construed in a way that would have the practical effect of obliterating the distinction between original and appellate jurisdiction."

That observation was not based upon the particular language of the statute under consideration. It reflected a well established distinction between the two kinds of jurisdiction which informed the construction of the statute in that case.

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128 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 168 per Dixon J; [1945] HCA 50. See also *Abebe v The Commonwealth* (1999) 197 CLR 510 at 605 [280] per Callinan J; [1999] HCA 14; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 459-460 [77] per McHugh J; [1999] HCA 19; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 602-603 [18]-[20] per Gleeson CJ and McHugh J; [2000] HCA 11; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590-591 [66] per Gleeson CJ, Gaudron and Gummow JJ.

129 (1998) 197 CLR 172.

130 (1998) 197 CLR 172 at 202 [111].

52 The reasoning of the majority in the Court of Appeal did not disclose any more principled basis for interference with the sentence imposed by the trial judge than would derive from the construction propounded by the Attorney-General. Neither overt nor implied error of principle, nor manifest inadequacy or excessiveness, was necessary to enliven the Court's powers on the approach taken by the majority. The majority said that in exercising its discretion the Court "must have regard to the sentence imposed below"[131], a formulation which conveyed no comprehensible restraint upon its "unfettered discretion" to vary that sentence.

53 As noted above, the majority accepted that the right of appeal "should be exercised sparingly by the Attorney-General and not merely for the purpose of having a 'second bite at the cherry'."[132] The constraint applied by the majority to give content to that figure of speech was that the Attorney-General should not invoke the jurisdiction to advance a position inconsistent with that taken by the Crown before the primary judge. The Attorney-General did just that on this occasion. The majority's response was to limit the increase in the sentence imposed to that amount which would reflect the level sought by the Crown Prosecutor at first instance. The result could hardly be seen as providing any guidance to judges at first instance in future cases. Otherwise the only limiting criterion for the exercise of the jurisdiction was the indeterminate standard of substantial disagreement with the primary judge, a standard conclusional in character and attainable by a multiplicity of pathways, including both the principled and the visceral.

54 The question raised in this case is: what purpose is served by the construction of s 669A(1) adopted by the majority and advanced on behalf of the Attorney-General on the hearing of this appeal? The majority described the right of appeal conferred on the Attorney-General by s 669A(1) as "an important tool in the maintenance of equality before the law of all convicted persons."[133] Its rationale was "so radically, and obviously, different from that which informs the conferral of an entitlement on a convicted person to seek leave to appeal against sentence, that the attempt to urge strict scrutiny of s 669A(1) in the name of the

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131 (2009) 197 A Crim R 399 at 416 [147].

132 (2009) 197 A Crim R 399 at 416 [148].

133 (2009) 197 A Crim R 399 at 415 [142].

principle of legality is distinctly unpersuasive."[134] The majority appear to have been using the term "equality before the law" in the sense of consistency in sentencing. Yet, as the plurality pointed out in *Hili v The Queen*[135], consistency in sentencing refers to "consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence."[136] Consistency in that sense is maintained by the decisions of intermediate courts of appeal.

55 The purpose imputed to s 669A(1) by the majority also invites reflection upon the observation in *Wong v The Queen*[137] that a sentence itself gives rise to no binding precedent and that[138]:

> "[w]hat may give rise to precedent is a statement of principles which affect how the sentencing discretion should be exercised, either generally or in particular kinds of case."

In the same case, Gleeson CJ made the observation, approved by the plurality in *Hili v The Queen*[139], that[140]:

> "The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency."

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134 (2009) 197 A Crim R 399 at 415 [142].

135 (2010) 85 ALJR 195; 272 ALR 465; [2010] HCA 45.

136 (2010) 85 ALJR 195 at 200 [18] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; 272 ALR 465 at 470; see also (2010) 85 ALJR 195 at 205-206 [49]; 272 ALR 465 at 478.

137 (2001) 207 CLR 584; [2001] HCA 64.

138 (2001) 207 CLR 584 at 605 [57] per Gaudron, Gummow and Hayne JJ.

139 (2010) 85 ALJR 195 at 205 [47] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; 272 ALR 465 at 477.

140 (2001) 207 CLR 584 at 591 [6].

Absent clear language, it should not be an inferred purpose of s 669A(1) to authorise the Court of Appeal, in the name of "equality before the law", simply to plant a wilderness of single instances with more instances of its own choosing.

56 Ascertainment of the statutory purpose is to be based on the words of s 669A(1) and, in particular, the word "appeal", which encompasses the jurisdiction conferred by the subsection. An appeal is a creature of statute and, subject to constitutional limitations, the precise nature of appellate jurisdiction will be expressed in the statute creating the jurisdiction or inferred from the statutory context. The purpose of s 669A(1) is to create an appellate jurisdiction exercisable upon the application of the Attorney-General and coupled with a wide remedial power. The question is what kind of jurisdiction does it create?

57 Appeals being creatures of statute, no taxonomy is likely to be exhaustive[141]. Subject to that caveat, relevant classes of appeal for present purposes are:

1. Appeal in the strict sense – in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given[142]. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance[143].

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141 A useful list of processes loosely designated "appeals" appeared in *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA and was cited in *Walsh v Law Society (NSW)* (1999) 198 CLR 73 at 90 n 51 per McHugh, Kirby and Callinan JJ; [1999] HCA 33.

142 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 107 per Dixon J; [1931] HCA 34; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619 per Mason J (Barwick CJ and Stephen J agreeing); [1976] HCA 62.

143 *Allesch v Maunz* (2000) 203 CLR 172 at 181 [23] per Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 40.

2. Appeal de novo – where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error[144].

3. Appeal by way of rehearing – where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error[145]. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence[146]. In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance[147].

58 Where the court is confined to the materials before the judge at first instance, that is ordinarily indicative of an appeal by way of rehearing, which would require demonstration of some error on the part of the primary judge before the powers of the court to set aside the primary judge's decision were enlivened.

59 Section 671B of the *Criminal Code* confers "supplemental powers" on the Court of Appeal generally, including the power to receive evidence[148]. But those powers are subject to the important limitation in s 671B(2) that "in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."

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144 *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23] per Gaudron, McHugh, Gummow and Hayne JJ; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [13] per Gleeson CJ, Gaudron and Hayne JJ; [2000] HCA 47.

145 *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23] per Gaudron, McHugh, Gummow and Hayne JJ.

146 *CDJ v VAJ* (1998) 197 CLR 172 at 202 [111] per McHugh, Gummow and Callinan JJ.

147 *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267; [1990] HCA 36; see *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23] per Gaudron, McHugh, Gummow and Hayne JJ.

148 *Criminal Code* (Q), s 671B(1)(c).

60 The appellate jurisdiction conferred by s 669A(1) must be confined, at least when the Attorney-General is asserting that the sentence should be increased, to the evidence before the primary judge, including evidence given at trial, what the jury necessarily found and evidence, if any, given at the sentencing hearing. Having regard to the categories of appellate jurisdiction and the confinement of the Court of Appeal to evidence before the primary judge, it is open to construe s 669A(1) as creating an appeal by way of rehearing and conferring appellate jurisdiction to determine only whether there has been some error on the part of the primary judge. Such error having been detected, the Court has a wide power, indicated by the words "unfettered discretion", to vary that sentence.

61 The Solicitor-General of Queensland pointed to the background to the enactment of the new s 669A(1) in 1975 as a response to the 1973 decision of the Court of Criminal Appeal in *Liekefett*. The record of the Second Reading Speech shows that the Minister for Justice intended, by the repeal and re-enactment of s 669A(1), to "make it clear that the Court of Criminal Appeal has an unfettered discretion to determine the proper sentence to impose when the Attorney-General has appealed against the inadequacy of the sentence."[149] The Minister's words, however, cannot be substituted for the text of the law, particularly where the Minister's intention, not expressed in the law, affects the liberty of the subject[150]. In any event the Minister's Speech left open the question of the content to be given to the word "appeal" and thereby to the jurisdiction conferred upon the Court. Neither expressly nor by necessary implication do the words of s 669A(1) define the jurisdiction simply by reference to the power to vary sentences if the Attorney-General chooses to appeal. Such a construction would require clear language to overcome the intention which the common law imputes to the legislature that it does not require the Court to consider an appeal on the basis that it might be persuaded to disagree with a sentence which could not be

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149 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 April 1975 at 993.

150 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ; [1987] HCA 12. See also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 499 [55] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2 and authorities there cited.

challenged as manifestly inadequate or excessive or otherwise affected by error[151].

62 In our opinion, the appellate jurisdiction conferred upon the Court of Appeal by s 669A(1) requires that error on the part of the sentencing judge be demonstrated before the Court's "unfettered discretion" to vary the sentence is enlivened. The unfettered discretion may be taken to confer upon the Court of Appeal in such a case the power to substitute the sentence it thinks appropriate where error has been demonstrated. The appeal should be allowed. The question that then arises is whether the matter should be remitted to the Court of Appeal on the basis that it did not determine whether the trial judge erred in principle or imposed a manifestly inadequate sentence indicative of such error.

63 In allowing the Attorney-General's appeal, the majority in the Court of Appeal said that it had been "apparent from what we have said in relation to the sentence imposed on the respondent in respect of his application for leave to appeal against sentence that we consider that the sentence which was imposed on him was inadequate."[152] The basis of the inadequacy there referred to appears from the penultimate paragraph of the majority's reasons for judgment disposing of the appellant's application for leave to appeal against sentence. The majority said[153]:

> "Even after making due allowance for the appellant's limited criminal history and youth, it cannot be said that the primary judge's selection of 12 years as the starting point for his sentence was excessive, let alone manifestly so. A substantially higher head sentence would have been within the proper exercise of the sentencing discretion and was in fact required if the purposes of denunciation and general deterrence were to be

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151 See the discussion of "manifest inadequacy" in *Hili v The Queen* (2010) 85 ALJR 195 at 207-208 [58]-[60] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; 272 ALR 465 at 480-481.

152 (2009) 197 A Crim R 399 at 417 [154]. This reference to the respondent is a reference to the appellant in this Court.

153 *R v Lacey; Ex parte Attorney-General (Qld)* [2009] QCA 274 at [203]. This paragraph, which appears in the published medium neutral version of the case, does not appear in the published report in the Australian Criminal Reports.

adequately served. The sentence of 10 years, after allowing for time spent which was not able to be declared time served, was, in consequence, far from excessive."

64 The appellant submitted to this Court that if he were to succeed the order of the Court of Appeal should be set aside and in its place an order made dismissing the appeal to that Court. In the alternative, an order was sought that the notice of appeal be dismissed as incompetent. Given that the Attorney-General's notice of appeal raised the alternative ground that the sentence imposed was "manifestly inadequate", the appeal could not be dismissed as incompetent on the basis that its grounds failed to invoke the jurisdiction conferred by s 669A(1) properly construed.

65 The Attorney-General did not make any submission against the proposed order that the appeal to the Court of Appeal be dismissed. The remarks made by the majority in the Court of Appeal in dismissing the appellant's application for leave to appeal against his sentence did not assert that the majority had discerned an error of principle in connection with the inadequacy of the sentence imposed. No finding of such an error was made in relation to that inadequacy in the majority's reasons for allowing the Attorney-General's appeal. Had such an error been found, that would have been a basis for allowing the Attorney-General's appeal even on the construction of s 669A(1) adopted by the majority. In the absence of any finding of error of principle on the part of the primary judge and the absence of any argument that the matter should be remitted, the appropriate order is:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 11 September 2009 and, in lieu thereof, order that the appeal to that Court be dismissed.

HEYDON J.

The stances of the parties

66 Section 669A(1) of the *Criminal Code* (Q) provides that, when the Court of Appeal is hearing an appeal by the Attorney-General against sentence, it "may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper." What does this mean?

67 The appellant's case in a nutshell, accepted by the President of the Court of Appeal (dissenting), was that the Court of Appeal must proceed in two stages. The first stage is to decide whether it is open to the Court to consider varying the sentence at all, and that depends on whether the sentencing judge fell into one of the errors described in *House v The King*[154]. Below, this will be called "error in the relevant sense". If, but only if, error in the relevant sense is found, the second stage arises. It turns on the inquiry: "To what extent should the sentence be varied?" The appellant submitted, then, that at the first stage the discretion conferred by s 669A(1) is fettered by the need to find error in the relevant sense, while it is only at the second stage that the discretion is "unfettered".

68 The respondent's case in a nutshell was that s 669A(1) meant that, on an application by the Attorney-General to the Court of Appeal, the Court might in any case re-sentence the prisoner. The respondent accepted that there were two stages, but submitted that at each stage the Court of Appeal's discretion was unfettered, and that it was possible to move to the second stage without finding

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154 (1936) 55 CLR 499 at 504-505; [1936] HCA 40. Dixon, Evatt and McTiernan JJ said:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

error in the relevant sense at the first stage. At the first stage it might decide not to embark on the second stage – for example, because it agreed with the sentence, or because it thought that any disparity between what the sentencing judge had done and what it would favour was too slight to merit embarking on the second stage, or because the conduct of the prosecution before the sentencing judge did not make it just to embark on the second stage. At the second stage it could select any sentence it chose without any fetter.

69 The parties, then, were agreed in relation to the second stage, but not the first. To avoid doubt, it should be indicated that there was a silent and correct consensus between the parties that at the second stage the discretion, though unfettered, remained a judicial discretion, not to be arbitrarily or capriciously exercised.

History

70 In 1939 the precursor to the present form of s 669A was introduced into the *Criminal Code* by the *Criminal Code Amendment Act* 1939 (Q). The Premier of Queensland, the Hon W Forgan Smith, said in his Second Reading Speech that the provision, granting a right of Crown appeal against sentence, was "identical with that enacted by New South Wales in 1924."[155] That which had been enacted for Crown appeals against sentence in New South Wales in 1924 was s 5D of the *Criminal Appeal Act* 1912 (NSW). Both s 5D and s 669A gave the appellate court a "discretion". That word was not qualified by the adjective "unfettered".

71 Eleven years before the Premier spoke, it had been said by Knox CJ and Powers J in *Whittaker v The King*[156] that a possible construction of s 5D was that it conferred "unlimited judicial discretion". Gavan Duffy and Starke JJ said[157]:

> "There is nothing in the words of the section to limit the exercise of discretion … The Court of Criminal Appeal, in imposing the sentence complained of, did not proceed in opposition to any principle of law but in accordance with its own considered view of the facts."

Isaacs J, on the other hand, thought[158] that the Court of Criminal Appeal should not interfere unless the sentencing judge had erred in some of the ways later

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155 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 November 1939 at 1716.

156 (1928) 41 CLR 230 at 235; [1928] HCA 28.

157 (1928) 41 CLR 230 at 253.

158 (1928) 41 CLR 230 at 245.

described in *House v The King*. Higgins J declined to decide the question, which had not been argued, but thought it right to assume that the sentence should not be interfered with "unless there has been a mistake of principle"[159].

72 In *Williams v The King [No 2]*[160] Evatt and McTiernan JJ treated Knox CJ and Powers J in *Whittaker v The King* as having stated not just a possible view, but an opinion that that view was right, and considered that Gavan Duffy and Starke JJ "adopted much the same interpretation, namely, that the section confers an unfettered discretion upon the Court of Criminal Appeal to alter the sentence imposed by a trial Judge."

73 It is true that in *House v The King* Dixon, Evatt and McTiernan JJ stated that appeals against exercises of discretion should only be allowed if an error was made[161]. But none of the judicial opinions cited for this proposition came from cases involving Crown appeals or from cases on s 5D, except for the opinion of Isaacs J in *Whittaker v The King*. And *House v The King* itself was not a case on s 5D.

74 In *Cranssen v The King* Dixon, Evatt and McTiernan JJ adopted the same test as they had in *House v The King* – again in a case which was not a Crown appeal and did not involve s 5D[162]. Starke J[163], on the other hand, repeated what he had said in *House v The King*, namely that the sentence imposed upon an accused person for an offence is a matter[164]:

> "peculiarly within the province of the judge who hears the charge: he has a discretion to exercise which is very wide, but it must be exercised judicially, according to rules of reason and justice, and not arbitrarily or capriciously or according to private opinion."

75 At the time when the Premier of Queensland spoke in 1939, then, there was material to suggest that the conventional understanding of the majority view in this Court on s 5D, as distinct from other provisions relating to appeals from

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159 (1928) 41 CLR 230 at 253.

160 (1934) 50 CLR 551 at 567; [1934] HCA 19.

161 (1936) 55 CLR 499 at 505.

162 (1936) 55 CLR 509 at 519; [1936] HCA 42. The same is true of *Harris v The Queen* (1954) 90 CLR 652 at 655; [1954] HCA 51.

163 (1936) 55 CLR 509 at 513.

164 (1936) 55 CLR 499 at 503.

discretionary decisions, was that no error of principle need be established. The Premier was not to know that four decades after he spoke, Barwick CJ would say in *Griffiths v The Queen*, which was a s 5D case, that while what Knox CJ and Powers J said in *Whittaker v The King* "could support" the view that no error of principle need be established, what Gavan Duffy and Starke JJ said in *Whittaker v The King* was "ambiguous"[165]. Nor was the Premier to know that in *Griffiths v The Queen* Jacobs J[166] would say that it was wrong to interpret what was said in *Whittaker v The King* as being different from what was said in *House v The King* – a proposition which, with respect, it is difficult to accept.

76 The construction of s 5D by four judges in *Whittaker v The King*, as then conventionally understood, was adopted in Queensland in *R v Beevers*[167] and continued until 1973, when the Court of Criminal Appeal decided in *R v Liekefett; Ex parte Attorney-General*[168] to follow instead the approach of Isaacs J. Two years later s 669A was replaced by the *Criminal Code and the Justices Act Amendment Act* 1975 (Q). The key amendment was to substitute for "discretion" the words "unfettered discretion".

77 With respect, the majority of the Court of Appeal in these proceedings was right to construe s 669A(1) as not requiring a demonstration of error in the relevant sense before a sentence could be varied. That is so for the following reasons.

The statutory words

78 First, the majority construction gives proper weight to the adjective "unfettered". It is, of course, open to those who think it is right to do so to criticise s 669A if it means what the Court of Appeal majority said it means in these proceedings. Many may think that, so construed, s 669A may lead to unsatisfactory results, such as a multiplication of unhelpful appellate decisions turning on different perceptions by appellate judges of justice in particular cases. It may be open to many other criticisms. But the legislature is entitled to enact a statute which is open to criticism. It is not for a court to reconstruct the statute after its own desires[169].

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165 (1977) 137 CLR 293 at 308; [1977] HCA 44.

166 (1977) 137 CLR 293 at 327.

167 [1942] St R Qd 230.

168 [1973] Qd R 355 at 366.

169 In this respect the Court of Appeal majority used some colourful language – it is not adopted here, but only drawn to attention lest oblivion overtake it: *R v Lacey* (2009) 197 A Crim R 399 at 415 [142] (last sentence).

79 It may be assumed that, without clear words, legislation should not be construed so as to derogate from existing rights or interests of various kinds. Some of the rights or interests mentioned in argument are more important than others. In this case it was said that, without clear words, s 669A(1) should not be construed to affect liberty, or to permit that form of "double jeopardy" which is involved in Crown appeals, or to permit sentences to be increased even if there is no error in the relevant sense, or to place Crown appeals in a different position from that of appeals by the accused, or to permit the Crown to bring sentencing appeals merely because it is dissatisfied with the particular sentence selected by the sentencing judge, or even, as happened here, to permit the Crown to adopt the highly unsatisfactory course of urging before the Court of Appeal a higher sentence than that which it had urged on the sentencing judge. But, to take one of these propositions by way of example, it is incontestable that s 669A, when compared to s 668E, does place the accused in a different position from that occupied by the Crown in relation to the facility of appeal, and a worse one. It is incontestable because of the clarity of the language. Contrary to the views of others, the words "unfettered discretion" are equally clear.

80 To construe the adjective "unfettered" as applying only to the process by which an appellate court decides the level to which the sentence should be varied, but not to the process by which it decides whether it should be varied at all, is both otiose and artificial.

81 It is otiose in this sense: if it were necessary to demonstrate error in the exercise of the sentencing judge's discretion before a sentence could be reviewed, the only unfettered discretion was the "second stage" discretion about what higher sentence should be imposed. But that discretion would have been "unfettered" (within the limits of a judicial discretion), without the need for inserting that word. Even McMurdo P, who dissented from the construction given to s 669A by the majority in the Court of Appeal, said that the word "unfettered" adds "nothing more than emphasis to s 669A(1)"[**170**]. But since it was entirely unnecessary to give emphasis, the insertion of the word "unfettered" would have no point. The Court of Appeal majority was correct to say that, on the appellant's argument, the 1975 amendment to s 669A(1) "achieved precisely nothing"[**171**]. That is a consideration pointing strongly against the validity of the appellant's argument in this Court.

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170 *R v Lacey* (2009) 197 A Crim R 399 at 428 [267].

171 *R v Lacey* (2009) 197 A Crim R 399 at 407 [127] per de Jersey CJ, Keane, Muir and Chesterman JJA.

82 The appellant submitted, however, that the word "unfettered" was not otiose and that it did achieve something. He gave as an example of a "fetter" which the word removed a requirement that in re-sentencing the Court of Appeal sentence only at "the lower end of the available range for sentences of the particular type of offence in question at the time." First, that supposed requirement had no statutory warrant. Secondly, there are no express words in s 669A(1), and no implications from the express words used in s 669A(1), to suggest that that factor – which may well be a relevant discretionary factor – is more significant or controlling than any other[172]. And, thirdly, that submission leaves unanswered the question why the Court of Appeal's discretion is partially but not wholly unfettered – unfettered at the "second stage", but fettered at the "first stage".

83 The existence of that unanswered question illustrates why the construction advocated by the appellant is artificial. It is artificial because there is no reason on the face of the language to treat the "unfettered" aspect of the Court of Appeal's responsibilities as limited to the "second stage" when a new sentence is selected, and as not extending to the "first stage" of deciding whether or not to interfere with the sentence at all. When Knox CJ and Powers J in *Whittaker v The King* spoke of an "unlimited judicial discretion"[173] (which expression Evatt and McTiernan JJ construed as meaning "unfettered discretion"[174]) they meant not only that the appellate court had liberty to increase the sentence at the "second stage", but also that it could decide to do so free from any need at the "first stage" to make a finding that, before increasing the sentence, the sentencing judge had proceeded on a wrong principle. That is the natural construction of "unfettered discretion". A discretion which exists only in relation to the second stage and does not exist in relation to the first is not an unfettered discretion.

84 The appellant submitted:

> "the purposive approach to statutory interpretation in this matter is of no value as such an approach would do nothing other than lead to greater confusion. In such circumstances, reliance must be placed upon the words of the legislation. To change long established legal principle requires clear and unambiguous statutory wording. Such wording is absent in s 669A(1). In that regard it would not have been difficult for the

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172 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 89-90 [55]-[59]; [2008] HCA 42.

173 (1928) 41 CLR 230 at 235.

174 *Williams v The King [No 2]* (1934) 50 CLR 551 at 567.

> legislature to have amended the section in such a way as to avoid all ambiguity as to its intention."

The first two sentences are correct. So, it may be assumed, in the context of the present proceedings, is the third sentence. With respect, the fourth is not correct. And the appellant did not suggest a clearer way by which s 669A could have been amended in 1975.

Authority in this Court

85 A second consideration of some weight supporting the construction adopted by the Court of Appeal majority is that McHugh J in *York v The Queen*[175], after giving the matter close consideration, favoured it.

What the Minister said

86 A third consideration arises out of what the Minister for Justice said in 1975. Excessive recourse to second reading speeches is one of the blights of modern litigation. Modern legislation permits it, or is often assumed to permit it, to a much greater extent than the common law rules of statutory construction did. Experience is tending to raise grave doubts about the good sense of that legislation. It may be accepted that what Ministers say about what they intended the enactment to provide is no substitute for an examination of what the enactment actually provides, only an aid to it. It may be accepted that that proposition is particularly salutary when the enactment is said to derogate from fundamental rights or damage fundamental interests. But the fact remains that the courts can investigate what Ministers say. There are rare occasions when that investigation has value. This is one of the rare occasions.

87 In what the Minister for Justice said on 23 April 1975 in his Second Reading Speech[176], there is support for the clear construction to be given to the legislative words "unfettered discretion" which was adopted by the Court of Appeal majority. There is nothing narrow or incomplete in what he said. The court decision to which the Minister referred, *R v Liekefett; Ex parte Attorney-General*, was a decision holding that error in the relevant sense had to be established before the appellate court could vary a sentence under s 669A(1). It was a decision which related to the "first stage", not the "second stage". It is that decision which the Minister saw the amendment as reversing, and the insertion of "unfettered" was a sufficiently clear method of reversing it.

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175 (2005) 225 CLR 466 at 474-475 [25]-[27]; [2005] HCA 60.

176 It is quoted above at [61].

88 The appellant dealt with the Minister's Second Reading Speech thus:

> "when the Minister for Justice told Parliament in 1975 that the amendment only makes clear what was always intended, it would seem that what was originally intended [in 1939] was that the Attorney-General should have a similar right to appeal against decisions to that of a defendant. Of course, the legislation did not give effect to that intention in 1939 as the Attorney-General was given the right of appeal against a sentence whereas an individual had to seek the leave of the Court to appeal against sentence."

Whatever was originally intended in 1939, with respect, it is plain that the Minister for Justice in 1975 was not talking about rendering the Attorney-General's facility of appealing equivalent to that of the defendant; rather he was talking about making it clear that a Crown appeal did not depend on first establishing error in the relevant sense.

89 That emerges even more forcefully from what the Minister for Justice said five days before his Second Reading Speech, on 18 April 1975, when the Bill was initiated in committee.

90 Before one examines what he said on that particular occasion, it is necessary to be sure that it is legitimate to do so.

91 A provision in an Act which the President of the Court of Appeal and six judges in this Court construe one way, and four other judges in the Court of Appeal and McHugh J construe another way, must be in some sense "ambiguous" or "obscure", even though the proponents of each side of the argument are adamant that their construction is the only possible one. Section 14B(1)(a) of the *Acts Interpretation Act* 1954 (Q) thus permits the Court to give consideration to "extrinsic material". Section 14B(3) defines "extrinsic material" as "relevant material not forming part of the Act concerned". Section 14B(3) lists, non-exhaustively, various examples. Section 14B(3)(f) permits recourse to the Second Reading Speech of the Minister for Justice. Section 14B(3)(g) would appear to permit recourse to the Minister's speech when the Bill was initiated in committee, since it would appear to fall within the words "material in the Votes and Proceedings of the Legislative Assembly or in any official record of debates in the Legislative Assembly". In any event, what the Minister said is "relevant" within the meaning of the opening words of s 14B(3).

92 The Minister said[177]:

> "The Attorney-General has a right to appeal to the Court of Criminal Appeal where he considers that the sentence on conviction on indictment was *too light*. For approximately 30 years, until a court decision in 1973, the Court of Criminal Appeal acted on the principle that the court had an unfettered discretion and was not bound to inquire whether the trial judge was *manifestly wrong* in his sentence. The court simply had to determine what was the proper sentence in the circumstances. The effect of the decision in 1973 was that the Court of Criminal Appeal does not have an unfettered discretion and the Attorney-General now has to prove that the sentence was *manifestly inadequate*. It is proposed to make it clear that the Court of Criminal Appeal does have an unfettered discretion and has therefore to determine what was the *proper sentence* in the circumstances." (emphasis added)

93 By "too light" the Minister plainly meant a sentence which the Attorney-General disagreed with, whether he thought it "manifestly wrong" or not, or "manifestly inadequate" or not. By "the proper sentence" the Minister plainly meant the sentence which the Court of Criminal Appeal thought proper because it was changed so as not to be "too light" in its view, without any need to consider whether the sentencing judge's sentence was afflicted by an error of principle. The Minister's use of the expressions "manifestly wrong" and "manifestly inadequate" correspond with the words "manifestly wrong", used by Lord Reading CJ in one of the authorities relied on in *House v The King*[178]. The Minister's expressions also correspond with the residual category of error in *House v The King* described in the last two sentences quoted above[179]. The key

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177 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 April 1975 at 834-835.

178 *R v Wolff* (1914) 10 Cr App R 107 at 110: see *House v The King* (1936) 55 CLR 499 at 505.

179 At [67] n 154. See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; [1949] HCA 26, where Dixon J, speaking of the decision of an official but in terms relevant to judicial discretionary decisions, said of the residual category:

> "If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

(Footnote continues on next page)

"fetters" which the Minister had in mind were thus those described in *House v The King*. They are "fetters" which apply, if at all, at the "first stage". The Minister's language applies to the first stage. It is not limited to the "second stage".

"Appeal"

94 The fourth consideration concerns the word "appeal". The appellant submitted that the selection of the word "appeal" in s 669A(1) indicated that the process was one involving the correction of error in the relevant sense. The submission assumes that all procedures described in legislation as "appeals" must involve the correction of error in the relevant sense. That assumption is unsound. The construction of "unfettered discretion" adopted by the Court of Appeal majority is not antithetical to the word "appeal" in s 669A(1). The legislature is at liberty to fashion what particular types of appeal it wishes to create. The word "appeal" covers a variety of processes, and the list of them is not closed. The potential reach of the expression in any particular enactment is confined only by any limit to the fertility of Parliament. Section 669A(1) empowers the Attorney-General to apply to the Court of Appeal in order to complain about a sentence. It confers on the Court of Appeal a jurisdiction to consider the appeal and a duty to do so. In carrying out its duty to consider that kind of appeal against sentence, the Court of Appeal has at the first stage a duty to consider whether the sentence imposed was such as to merit variation. If it decides that it did merit variation, at the second stage its duty is to decide what variation should be made. Nothing in s 669A(1) requires a search for error at the first stage. In carrying out the duty arising at the first stage, however, the Court of Appeal would be entitled to decline to enter upon the sentencing task involved at the second stage if, for example, it thought that any insufficiency in the sentencing judge's sentence was only minor. It would be so entitled partly to discourage frivolous Crown appeals, partly because re-sentencing in those circumstances would be a waste of its time, and partly because it is inherent in the nature of sentencing that different minds will arrive at different sentences on identical facts[180]. At that first stage the Court of Appeal has a discretion which is not fettered to decline to interfere even though it disagrees with the sentence. At the second stage, if it decides to embark on it, the Court of Appeal has a discretion which is not fettered to determine what the increase should be. The statutory

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See also *Hili v The Queen* (2010) 85 ALJR 195 at 207 [58]; 272 ALR 465 at 480; [2010] HCA 45.

180 This points to the fact that the practical difference between the majority and minority views in the Court of Appeal may be slight: for even on the majority view, the Court's discretion to decline to interfere will very commonly be exercised against interference if there is no error in principle.

language which creates this structure may be unusual, it may be wanting in sense, but it was open to the legislature to use it, and it has done so.

The *Kable* question

95 The appellant submitted in writing – the Court did not require oral argument in view of the impending success of the appellant on the construction issue – that if the construction given to s 669A by the majority of the Court of Appeal were correct, the provision was constitutionally invalid by reason of the principles stated in the line of cases commencing with *Kable v Director of Public Prosecutions (NSW)*[181]. The submission is unsound, but there is no point in lengthening this dissenting judgment by giving reasons for that opinion.

Order

96 The appeal should be dismissed.

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181 (1996) 189 CLR 51; [1996] HCA 24.