

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

MARTIN FRANCIS BYRNES

APPELLANT

AND

THE QUEEN

RESPONDENT

Byrnes v The Queen [1999] HCA 38
12 August 1999
A44/1998
A17/1994

ORDER

1. *Appeal allowed.*
2. *Set aside the orders made by the Court of Criminal Appeal of the Supreme Court of South Australia on 17 June 1998, and in their place order that the appeal to that Court be dismissed.*
3. *Application for special leave to appeal:*
 - a. *from the judgment of the Court of Criminal Appeal of the Supreme Court of South Australia dated 2 May 1996; and*
 - b. *from that portion of the judgment of the Court of Criminal Appeal of the Supreme Court of South Australia dated 21 April 1994 dismissing the applicant's appeal in respect of his conviction on count 2 of the indictment**refused.*

On appeal from the Supreme Court of South Australia

Representation:

T A Gray QC with A L Tokley and M A Perry for the appellant (instructed by Haarsmas Lawyers)

D M J Bennett QC, Solicitor-General for the Commonwealth with S J Gageler and S J Maharaj for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Intervener:

B M Selway QC, Solicitor-General for the State of South Australia with L A P Grenfell intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

TIMOTHY PAUL HOPWOOD

APPELLANT

AND

THE QUEEN

RESPONDENT

Hopwood v The Queen
12 August 1999
A45/1998
C7/1999

ORDER

1. *Appeal allowed.*
2. *Set aside the orders made by the Court of Criminal Appeal of the Supreme Court of South Australia on 17 June 1998, and in their place, order that the appeal to that Court be dismissed.*
3. *Application for special leave to appeal from the judgment of the Court of Criminal Appeal of the Supreme Court of South Australia dated 2 May 1996 refused.*

On appeal from the Supreme Court of South Australia

Representation:

T A Gray QC with K V Borick and G B Hevey for the appellant (instructed by Hume Taylor & Co)

D M J Bennett QC, Solicitor-General for the Commonwealth with S J Gageler and S J Maharaj for the respondent (instructed by Commonwealth Director of Public Prosecutions)

2.

Intervener:

B M Selway QC, Solicitor-General for the State of South Australia with L A P Grenfell intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Martin Francis Byrnes v The Queen **Timothy Paul Hopwood v The Queen**

Constitutional law - Inconsistency between Commonwealth and State laws -
Conferral of functions on Commonwealth Director of Public Prosecutions by State
law - Whether permitted by Commonwealth law.

Constitutional law - Offences against *Companies (South Australia) Code* -
Whether offences deemed to be offences against a law of the Commonwealth -
Whether s 80 of the Constitution applies to trial of accused.

Constitutional law - State legislative power - Corporations law national scheme -
Whether South Australian legislature abdicated its authority by participating in
scheme.

Courts - Court of Criminal Appeal of South Australia - Appeal against sentence by
Commonwealth Director of Public Prosecutions - Offences against *Companies*
(*South Australia*) *Code* - Whether deemed to be offences against the Corporations
Law - Nature of appellate jurisdiction - Whether statutory grant of administrative
power also conferred judicial authority to hear appeal.

Courts - Inferior courts of limited jurisdiction - District Court of South Australia -
Nature of jurisdiction - Whether appeal lies to Court of Criminal Appeal of South
Australia.

Criminal law - Companies - Directors - Improper use of position - Furnishing
misleading information - Offences against *Companies (South Australia) Code* -
Conviction and sentence - Whether Commonwealth Director of Public
Prosecutions empowered to appeal against sentence.

Statutes - Construction - Whether construction extending criminal liability
appropriate in the absence of specific legislative intent.

Words and phrases - "appeal" - "enforcement power" - "relating to".

The Constitution, s 109.

Corporations Act 1989 (Cth), ss 4, 38, 45, 47(1), 73.

Director of Public Prosecutions Act 1983 (Cth), ss 3, 6, 9(7).

Judiciary Act 1903 (Cth), s 68(2).

Acts Interpretation Act 1915 (SA), s 22.

2.

Companies (South Australia) Code, ss 229(4), 564(1).

Corporations (South Australia) Act 1990 (SA), ss 3, 29, 31, 53, 55, 56, 84, 85, 87, 91.

Corporations (South Australia) (Miscellaneous) Amendment Act 1991 (SA), s 18.

Corporations (South Australia) (Jurisdiction) Amendment Act 1995 (SA), s 19.

Criminal Law Consolidation Act 1935 (SA), ss 275, 348, 352.

Director of Public Prosecutions Act 1991 (SA), s 7.

District Court Act 1991 (SA), ss 4, 5, 9.

Juries Act 1927 (SA), s 7.

I THE NATURE OF THE LITIGATION

- 1 The appellants were prosecuted by the Commonwealth Director of Public Prosecutions ("the Commonwealth DPP") and convicted of State criminal offences and sentenced in the District Court of South Australia ("the District Court"). The Commonwealth DPP appealed successfully to the Full Court of the Supreme Court ("the Court of Criminal Appeal") against the sentences imposed by the trial judge upon the present appellants. The jurisdiction of that appellate court and its description as a "court of criminal appeal" will be considered in Sections II and VII of these reasons. The appellants advance as principal questions in these appeals whether the Commonwealth DPP had the power to constitute and prosecute those appeals against sentence and whether there had been conferred upon the Court of Criminal Appeal the requisite jurisdiction to entertain those appeals. If the answers are in the negative, then the appeals to this Court should be allowed, the orders of the Court of Criminal Appeal should be set aside and the appeals to that Court be dismissed. We would have this Court make those orders. This conclusion is reached by following a thread through the eyes of several legislative needles, of both Commonwealth and State manufacture, until the thread breaks. It is convenient to take up the thread by looking first to the relevant facts.

II THE FACTS

- 2 In March 1993, the Commonwealth DPP laid an information against Timothy Paul Hopwood and Martin Francis Byrnes, the appellants, charging Mr Hopwood with one offence and Mr Byrnes with three offences under the *Companies (South Australia) Code* ("the State Code"). In South Australia, all indictable offences are charged on an information¹. The events giving rise to the laying of the information against the appellants are set out in the reasons of Brennan, Deane, Toohey and Gaudron JJ in *R v Byrnes*² and do not call for repetition here.
- 3 By the time the information was laid, the State Code had been repealed by the joint operation, commencing 1 January 1991, of ss 85 and 87 of the *Corporations (South Australia) Act* 1990 (SA) ("the State Corporations Act"). However, the effect of s 85(1) was to continue the operation of the State Code in respect of the offences with which Mr Hopwood and Mr Byrnes were later charged and convicted. The general purpose of the new legislation was to provide for the

1 See *Criminal Law Consolidation Act* 1935 (SA) ("the CLC Act"), s 275.

2 *R v Byrnes* (1995) 183 CLR 501 at 504-508.

replacement of that co-operative scheme with what is known as the national scheme. Part 13 (ss 81-96) of the State Corporations Act was headed "TRANSITIONAL". These appeals involve the operation of Div 2 thereof (ss 84-92), which is headed "CO-OPERATIVE SCHEME LAWS".

4 The appellants challenge the effectiveness of measures purporting to draw within the scope of the national scheme prosecutions for offences under the former co-operative scheme, where an appeal against sentence is brought by the Commonwealth DPP. Indeed, at the threshold, the appellants attack the validity of the laws by which South Australia participates in the national scheme. They submit that the Parliament of that State has attempted to "abdicate" its legislative authority and has gone beyond its competence in seeking to do so. Submissions to like effect have been rejected on other occasions³. The same result should follow here.

5 The appellants pleaded not guilty and a trial by judge and jury commenced on 6 April 1993 in the District Court. Subsequently, two jurors were excused. The trial recommenced before a judge alone pursuant to s 7 of the *Juries Act* 1927 (SA) ("the Juries Act"). Section 7 was considered by this Court in *Brown v The Queen*⁴ in relation to the trial of a person charged with a Commonwealth offence. It provided:

"(1) Subject to this section, where, in a criminal inquest before the Supreme Court or a District Criminal Court—

(a) the accused elects, in accordance with the rules of court, to be tried by the judge alone;

and

(b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner,

3 *Cobb & Co Ltd v Kropp* [1967] 1 AC 141 at 156-157; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 263-265; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 384; *Gould v Brown* (1998) 193 CLR 346 at 485-487.

4 (1985) 160 CLR 171.

3.

the inquest shall proceed without a jury.

(2) No election may be made under subsection (1) where the accused is charged with a minor indictable offence and has elected to be tried in a District Criminal Court.

(3) Where two or more persons are jointly charged, no election may be made under subsection (1) unless all of those persons concur in the election.

(4) Where a criminal inquest proceeds without a jury in pursuance of this section, the judge may make any decision that could have been made by a jury on the question of the guilt of the accused, and such a decision shall, for all purposes, have the same effect as a verdict of a jury."

6 Convictions were recorded against each appellant on 3 August 1993. Both appellants were convicted of the count of improper use of the position of director under s 229(4) of the State Code, and Mr Byrnes was convicted of two further counts of furnishing misleading information under s 564(1) of the State Code.

7 The appellants appealed to the Court of Criminal Appeal against their respective convictions on a number of grounds. Their appeals to that Court against conviction on the count of improper use of the position of director succeeded and those convictions were quashed. In addition, Mr Byrnes' appeal on one of the counts of furnishing misleading information was allowed⁵. On appeal to this Court, the orders of the Court of Criminal Appeal quashing the convictions of each appellant, in respect of the count of improper use of the position of director, were set aside and the matter was remitted to that Court to be dealt with in accordance with the reasons for judgment delivered by this Court⁶. On remittal, the Court of Criminal Appeal, in dismissing the appeal, upheld the convictions⁷ and the matter was returned to the trial judge for sentencing.

8 On 22 October 1997, the trial judge (Lunn DCJ) imposed a single sentence on Mr Byrnes to pay a fine of \$8,000 for both the count of improper use of the position of director and the remaining count of furnishing misleading information.

5 See *R v Byrnes* (1995) 183 CLR 501 at 509.

6 (1995) 183 CLR 501 at 524.

7 *R v Byrnes*; *R v Hopwood* (1996) 20 ACSR 260 at 290.

4.

On 19 January 1998, his Honour sentenced Mr Hopwood to pay a fine of \$4,500 in respect of the count of improper use of the position of director.

- 9 The Commonwealth DPP filed applications for leave to appeal against the respective sentences on 10 November 1997 and 19 January 1998. The matters were heard together on 19 May 1998 in the Court of Criminal Appeal. Judgment was delivered by Olsson J, with whom Prior and Williams JJ concurred, on 17 June 1998. The Court granted leave to appeal and disposed of the appeals by setting aside the sentences and substituting sentences in the following terms, as proposed by Olsson J:

"I would grant leave to appeal, allow the appeal, set aside the fines imposed, and substitute for them the following sentences:—

- * As to the respondent Hopwood – imprisonment for a period of twelve months, with a non parole period of eight months
- * As to the respondent Byrnes – imprisonment for a period of eighteen months, with a non parole period of twelve months.

I would not suspend these sentences."

- 10 The record in respect of which the appeals have been brought to this Court describes the judgment as delivered by a court identified as both the "Supreme Court of South Australia" and the "Court of Criminal Appeal". The definition of "Full Court" in s 348 of the CLC Act, the operation of which in the context of the conferral of jurisdiction on the Court of Criminal Appeal will be considered in Section VII, does not turn on the description of the court; rather it directs attention to matters of substance, namely that the "Full Court" be the Supreme Court constituted in a particular manner. In this case, three judges of the Supreme Court heard the Commonwealth DPP's appeal against sentence and the requirements of s 348 were therefore met. The Court, whilst styled or described for administrative purposes or for ease of reference as the "Court of Criminal Appeal", retained the juridical character of the Supreme Court, the superior court of that State, from which appeal lay to this Court pursuant to s 73(ii) of the Constitution⁸.

8 cf *Stewart v The King* (1921) 29 CLR 234 at 240.

III THE WAY AHEAD

11 Bentham viewed with disfavour "the dark Chaos of Common Law", favouring the prescription of rules of conduct by statute⁹. This, Bentham said, would "mark out the line of the subject's conduct by visible directions, instead of turning him loose into the wilds of perpetual conjecture"¹⁰. By that criterion, the legislative scheme, the subject of these appeals, is a failure. It does not go so far as to bind the citizen by a law, the terms of which the citizen has no means of knowing. That, as Barwick CJ put it in *Watson v Lee*¹¹, "would be a mark of tyranny". However, the legislative scheme does require much cogitation to answer what, for the citizen, should be simple but important questions respecting the operation of criminal law and procedure.

12 It is convenient to set out the threads through the wilds of legislative complexity which will be followed in the reasons which follow. First, a threshold matter arises, the power of the Commonwealth DPP to lay the information against the appellants and to conduct the prosecution at trial. This thread, taken up in Sections IV and V, is then followed in Sections VI and VII to the structure and powers of the District Court and the appellate jurisdiction conferred on the Court of Criminal Appeal to hear appeals against sentence brought by the Director of Public Prosecutions of South Australia ("the State DPP"). Having considered this special jurisdictional regime, a new thread is picked up in Sections VIII and IX. It is whether this regime has been extended by either South Australian or Commonwealth laws to include appeals brought by the Commonwealth DPP against sentences imposed for State Code offences. A number of statutory knots were located by counsel for the respondent, and it is sought to unpick them in the reasons which follow. Finally, various residual matters are considered, beginning in Section X. The applicability of s 80 of the Constitution to the appellants' trial for the State Code offences and the applications brought by the appellants for special leave to appeal against dismissal of their appeals against conviction are dealt with in Section XI.

9 Burns and Hart (eds), *A Comment on the Commentaries and A Fragment of Government*, (1977) at 198.

10 Burns and Hart (eds), *A Comment on the Commentaries and A Fragment of Government*, (1977) at 95. See also Schofield, "Jeremy Bentham: Legislator of the World", (1998) 51 *Current Legal Problems* 115 at 122.

11 (1979) 144 CLR 374 at 379.

- 13 Before turning to the matters relating to the Commonwealth DPP's power to appeal against sentence, it is first convenient to consider the power of the Commonwealth DPP to lay the information against the appellants and to conduct the prosecution at trial.

IV POWER AND FUNCTIONS OF THE COMMONWEALTH DPP

- 14 To determine these matters, it is necessary to consider the operation of both the so-called "uniform" national scheme and the *Director of Public Prosecutions Act* 1983 (Cth) ("the Commonwealth DPP Act").

- 15 Section 6(2) of the Commonwealth DPP Act provides that, in addition to those functions of the Commonwealth DPP set out in s 6(1), which are not relevant to these appeals¹², the functions of the Director include:

"(a) functions that are conferred on the Director by or under any other law of the Commonwealth; and

(b) such other functions as are prescribed".

- 16 Section 3 of the Commonwealth DPP Act defines "law of the Commonwealth" to include "a law of a Territory" but not to include a number of matters. Legislation enacted by the Commonwealth Parliament is within the ordinary meaning of this inclusive definition.

- 17 Section 47(1) of the *Corporations Act* 1989 (Cth) ("the Commonwealth Corporations Act") is such a law of the Commonwealth. It confers functions and powers on prescribed authorities and officers of the Commonwealth in the following terms:

"Regulations under section 73 may provide that prescribed authorities and officers of the Commonwealth have prescribed functions and powers that are expressed to be conferred on them by or under corresponding laws."

12 It was not contended that the Commonwealth DPP relevantly held an appointment to prosecute offences against the laws of South Australia within the terms of s 6(1)(m).

7.

Section 38 of that statute defines "corresponding law" in Pt 8 (ss 37-48) to mean:

- "(a) an Act of a jurisdiction (other than the Capital Territory) that corresponds to this Act; or
- (b) regulations made under such an Act; or
- (c) the Corporations Law, Corporations Regulations, ASC Law, or ASC Regulations, or any other applicable provision^[13], of such a jurisdiction; or
- (d) rules of court made because of such an Act".

18 A question would arise as to the operation of s 109 of the Constitution if the South Australian legislature had purported to confer functions or powers on the Commonwealth DPP in the absence of s 47(1) of the Commonwealth Corporations

13 Defined in s 4(1), "in relation to a jurisdiction", means a provision of:

- "(a) the Corporations Law, or Corporations Regulations, of that jurisdiction; or
- (b) the ASC Law, or ASC Regulations, of that jurisdiction; or
- (c) in the case of the Capital Territory – a Commonwealth law as applying, of its own force or because of another Commonwealth law, in relation to:
 - (i) an offence against; or
 - (ii) an act, matter or thing arising under or in respect of;a provision that, because of any other application or applications of this definition, is an applicable provision of the Capital Territory or any other jurisdiction; or
- (d) in the case of a jurisdiction other than the Capital Territory – a Commonwealth law as applying, because of a law of that jurisdiction, in relation to:
 - (i) an offence against; or
 - (ii) an act, matter or thing arising under or in respect of;a provision that, because of any other application or applications of this definition, is an applicable provision of that or any other jurisdiction."

Act and s 6(2) of the Commonwealth DPP Act. This Court in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd*¹⁴ considered the interdependence of Commonwealth and State legislation which vested powers in the Coal Industry Tribunal. The Court remarked¹⁵:

"The necessity for authorization under the [*Coal Industry Act* 1946 (Cth) ('the Commonwealth Act')] for the Tribunal's exercise of powers conferred by the [*Coal Industry Act* 1946 (NSW)] was explained by Brennan J in *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd*¹⁶:

"If the [Commonwealth] Act had merely constituted or authorized the constitution of a tribunal and had vested federal powers of conciliation and arbitration in it without reference to State powers, an attempt by a State Act to vest similar State powers in the same tribunal would fail – not because of a constitutional incapacity in a Commonwealth tribunal to have and to exercise State power, but because the Commonwealth Act would be construed as requiring the tribunal to have and to exercise only such powers as the Commonwealth Parliament had chosen to vest in it."

Any question as to the exclusiveness of the Commonwealth DPP's functions under an exhaustive and self-contained Commonwealth law does not arise in this case; the Commonwealth Parliament has expressly provided for the Commonwealth DPP to receive and exercise such other functions as from time to time are conferred or prescribed within the terms of s 6(2) of the Commonwealth DPP Act. This section, in turn, is provided with content by s 47(1) of the Commonwealth Corporations Act and the Regulations made under s 73 of that Act.

- 19 Section 73 of the Commonwealth Corporations Act empowers the Governor-General to make regulations, not inconsistent with the Act, prescribing matters (a) required or permitted by the Act to be prescribed or (b) necessary or convenient to be prescribed for carrying out or giving effect to the Act, other than in relation to Pt 5 of the Act¹⁷. In exercise of this power, the Corporations (Commonwealth

14 (1987) 163 CLR 117.

15 (1987) 163 CLR 117 at 127-128.

16 (1983) 158 CLR 535 at 579.

17 Part 5 has no present relevance.

9.

Authorities and Officers) Regulations (Cth) were made ("the Corporations Authorities Regulations"). Regulation 3(1) provided that:

"[e]ach of the following authorities and officers of the Commonwealth have the functions and powers that are expressed to be conferred on them by or under a corresponding law:

...

(d) [the Commonwealth DPP]".

The Corporations Authorities Regulations did not define, at any relevant time, the phrase "corresponding law"¹⁸. The phrase must therefore be construed in light of the legislation under which the regulations were made¹⁹. The definition of "corresponding law" contained in s 38 of the Commonwealth Corporations Act informs the meaning of the phrase in reg 3(1) of the Corporations Authorities Regulations.

20 The question therefore arises: what, if any, "corresponding law" (as defined) confers functions and powers on the Commonwealth DPP? The enabling legislation for the "uniform" national Corporations Law in South Australia is such a "corresponding law", namely the State Corporations Act. It is an "Act of a jurisdiction (other than the Capital Territory) that corresponds" to the Commonwealth Corporations Act within par(a) of the definition of "corresponding law" in s 38 of the Commonwealth Corporations Act. Section 91 of the State Corporations Act is a provision of central importance to these appeals. It provided so far as material:

"(1) The [Commonwealth DPP]–

(a) has the same enforcement powers in relation to the co-operative scheme laws as has the Crown in right of South Australia acting by the Attorney-General or the [State DPP]; and

18 Regulation 2 of the Corporations Authorities Regulations was amended by the Corporations (Commonwealth Authorities and Officers) Regulations (Amendment) Regulations (Cth), ss 2 and 3, to omit what was then the definition therein of "corresponding law". This amendment commenced on 1 January 1991.

19 *Acts Interpretation Act* 1901 (Cth) ("the Commonwealth Interpretation Act"), s 46(1)(a).

- (b) may, in relation to an offence against a co-operative scheme law, perform the functions and exercise the powers conferred on the [Commonwealth DPP] by the [Commonwealth DPP Act] in relation to offences against the laws of the Commonwealth as if the offence against the co-operative scheme law were an offence against a national scheme law of this jurisdiction.

...

- (4) For the purposes of the exercise of enforcement powers, and other functions and powers conferred by this section, including the obtaining of warrants to arrest, an offence against a co-operative scheme law is taken to be an offence against a national scheme law of this jurisdiction."

21 As first enacted, s 91(1) conferred upon the Commonwealth DPP, in relation to offences against a co-operative scheme law, such as the State Code, the functions and powers conferred upon that officer by the Commonwealth DPP Act as if the offence were an offence against a national scheme law of South Australia. The provision set out above is that substituted (with effect from 1 January 1991, that is, before the information was laid against the appellants) by s 18 of the *Corporations (South Australia) (Miscellaneous) Amendment Act 1991* (SA) ("the State Corporations Amendment Act"), and amended by s 19 of the *Corporations (South Australia) (Jurisdiction) Amendment Act 1995* (SA). The earlier provision had not endowed the Commonwealth DPP with the same enforcement powers as the prosecution authorities of South Australia in relation to co-operative scheme offences. The present provision is that in force when the Commonwealth DPP instituted the appeal proceedings in the Court of Criminal Appeal.

22 Three definitions elucidate the scope of s 91 in its relevant form: the definitions of "national scheme law of this jurisdiction" in s 3(1), "co-operative scheme laws" in s 84, and "enforcement power" in s 91(5) of the State Corporations Act. It is convenient to set out the text of these provisions:

"3. (1) In this Act—

...

'national scheme law of this jurisdiction' means—

- (a) this Act; or
(b) the Corporations Law of South Australia; or

11.

(c) the ASC Law of South Australia".

"84. For the purposes of this Act, the following are the co-operative scheme laws:

Companies (Application of Laws) Act 1982

[the State Code]

...".

"91. (5) In this section, '**enforcement power**' means a function or power relating to—

- (a) the investigation of an offence; or
- (b) the arrest and custody of persons charged with an offence; or
- (c) the institution and carrying on of a prosecution of an offence; or
- (d) matters relating to such an investigation, arrest, custody or prosecution."

23 The appellants were charged with offences under the State Code. As such, they were offences arising under "co-operative scheme laws" for the purpose of s 91(1)(a) of the State Corporations Act.

V "ENFORCEMENT POWERS" OF THE CROWN
IN RIGHT OF SOUTH AUSTRALIA

24 The Second Reading Speech of the State Corporations Amendment Act, delivered in the South Australian Legislative Council by the Attorney-General²⁰ contained reference to the aspirational object of the amended s 91 of the State Corporations Act²¹:

20 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 14 November 1991 at 1911.

21 The *Acts Interpretation Act 1915* (SA) ("the State Interpretation Act") appears not to contain any provision for reference to the speeches of the South Australian Parliament, or part thereof, in construing legislation enacted under its authority.
(Footnote continues on next page)

"The Bill contains a provision to amend section 91, so as to bring this provision in line with equivalent provisions of the application laws of other States and the Northern Territory. At present, section 91 of the Act does not give the [Commonwealth DPP] the same enforcement powers in relation to the Co-operative Scheme Laws as the Crown Prosecutor for South Australia. This needs to be addressed so as to enable the [Commonwealth DPP] to have the powers of enforcement in relation to the Co-operative Scheme Laws."

25 It is convenient to note that the Attorney-General of South Australia envisaged only the conferral of powers under this section, as opposed to the conferral of jurisdiction, a matter to which we will return.

26 To determine the scope of the Commonwealth DPP's "enforcement powers" conferred by s 91(1)(a) of the State Corporations Act, it is necessary to inquire what "enforcement powers" were vested in the Crown in right of South Australia, acting by the Attorney-General or the State DPP.

27 One begins with the *Director of Public Prosecutions Act* 1991 (SA) ("the State DPP Act"), which came into operation on 6 July 1992. Section 7²² thereof conferred powers, in part, on the State DPP:

"(a) to lay charges of indictable ... offences against the law of the State;

(b) to prosecute indictable ... offences against the law of the State;

...

(g) to exercise appellate rights arising from proceedings of the kind referred to above;

...

(i) to do anything incidental to the foregoing".

However, in determining the mischief to which the section was aimed it is permissible at common law to refer to the speech of the Minister in charge of the Bill, namely the Attorney-General of South Australia in this case: see *Wacando v The Commonwealth* (1981) 148 CLR 1 at 25; cf *Pepper v Hart* [1993] AC 593.

22 This section was amended by the *Statutes Amendment (Attorney-General's Portfolio) Act* 1994 (SA). However, nothing turns on this amendment.

Section 275 of the CLC Act stated, after amendment by Sched 2 of the State DPP Act and s 5 of the *Statutes Amendment (Attorney-General's Portfolio) Act 1992* (SA)²³:

"(1) Any person may be put upon his trial at any criminal sessions of the Supreme Court or District Court, for any offence, on an information presented to the Court in the name and by the authority of the [State DPP].

(2) Every rule of law and enactment for the time being in force in the State relating to indictments and to the manner and form of pleading thereto and to the trial thereon, and generally to all matters subsequent to the finding of the indictment, shall apply to any information so presented."

28 The definition of "enforcement power" in s 91(5) of the State Corporations Act includes functions or powers relating to "the institution and carrying on of a prosecution of an offence". This would encompass and "pick up" those powers conferred on the State DPP by s 7(1)(a), (b) and (i) of the State DPP Act.

29 The Commonwealth DPP therefore had power in March 1993 to lay the information against the appellants for the offences arising under the State Code and to conduct the prosecution of these offences at trial. Whether the Commonwealth DPP had the power to appeal against sentence is a matter which will be considered below.

30 It is convenient now to consider the jurisdiction of the District Court and the South Australian appellate system in relation to trials of persons charged with offences under the State Code.

VI JURISDICTION OF THE DISTRICT COURT

31 The District Court was established by s 4 of the *District Court Act 1991* (SA) ("the District Court Act") and s 5 provided that it was a court of record.

23 The information was laid in the name of the Commonwealth DPP and the orders of the Court of Criminal Appeal allowing the appeals against sentence were so entitled as to show that officer as the appellant. In the record in this Court the respondent has been identified as the Queen. The Solicitor-General for South Australia submits that the Commonwealth DPP should be understood as an officer carrying out, pursuant to statutory mandate, a function of the Crown in right of South Australia. The correctness of that view may be accepted as no party to the appeal disputed it.

32 Section 9 conferred jurisdiction in the following terms:

"(1) The Court has jurisdiction to try a charge of any offence except treason or murder, or a conspiracy or attempt to commit, or assault with intent to commit, either of those offences.

(2) The Court has jurisdiction to convict and sentence, or to sentence, a person found guilty on trial, or on his or her own admission, of such an offence.

(3) The Court's jurisdiction to try, convict or sentence for a summary offence exists only where the offence is charged in the same information as an indictable offence.

(4) The Court has any other criminal jurisdiction conferred by statute."

This section conferred jurisdiction on the District Court to try and sentence the appellants for the offences charged. The District Court is an inferior court of limited jurisdiction. It stands in stark contrast to a Supreme Court of a State, which is a superior court of unlimited jurisdiction, charged with the administration of justice. Dawson J in *Grassby v The Queen* said of such a court²⁴:

"But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster^[25]. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court."

The District Court does not enjoy a "well of undefined powers", rather it is a court whose power and jurisdiction are specified by statute. The District Court Act

24 (1989) 168 CLR 1 at 16.

25 And with respect to federal jurisdiction, by Ch III of the Constitution: see *Pelechowski v Registrar, Court of Appeal* (1999) 73 ALJR 687 at 695-696; 162 ALR 336 at 347-348.

delineates the borders of an enclosed area of power, which is only supplemented by such jurisdiction as arises by necessary implication "upon the principle that a grant of power carries with it everything necessary for its exercise"²⁶ and such additional jurisdiction as is conferred by other legislation. This is not a case where the considerations referred to by this Court in its joint judgment in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* are applicable. Their Honours said²⁷:

"There are well-known passages in *National Telephone Co Ltd v Postmaster-General*²⁸, which it may be as well to quote. Viscount Haldane LC said: 'When a question is stated to be referred to an established court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right of appeal from its decisions likewise attaches'²⁹. ... When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality."

- 33 The District Court Act does not enjoy such "ordinary incidents". Any question of the susceptibility to Crown appeals of sentences imposed by the District Court must be determined by reference to particular statutory provisions. In *Holmes v Angwin*, Griffith CJ considered the power of a legislature to create a new court and the subjection of orders of that court to appeals³⁰:

26 *Grassby v The Queen* (1989) 168 CLR 1 at 16. See also *Pelechowski v Registrar, Court of Appeal* (1999) 73 ALJR 687 at 695-696; 162 ALR 336 at 347-348.

27 (1956) 94 CLR 554 at 559-560. See also *Minister for Army v Parbury Henty & Co* (1945) 70 CLR 459 at 499; *Martin v Commissioner for Employees' Compensation* [1953] St R Qd 85 at 88.

28 [1913] AC 546.

29 [1913] AC 546 at 552; cf *Hilton v Wells* (1985) 157 CLR 57 at 72, 80-82.

30 (1906) 4 CLR Pt 1 297 at 304.

"It is a general rule that when a new Court is created, whatever jurisdiction is conferred upon it, there is no appeal from the decision of that Court unless it is conferred by Statute."

The Chief Justice went on to state the exception to this rule, "[i]n the case of an inferior Court to which new jurisdiction is given, the Supreme Court can, in the exercise of its general powers, control it if it exceeds or refuses to exercise its jurisdiction"³¹. This jurisdiction of a Supreme Court to supervise an inferior court is an exercise of original jurisdiction³². This case concerns an "appeal" and not an exercise of original jurisdiction by the Court of Criminal Appeal. The scope and effect of an appeal are governed by the terms of the enactment creating it³³.

- 34 It is therefore necessary, first, to determine whether any other statute conferred jurisdiction on the Court of Criminal Appeal to entertain an appeal against sentence for State Code offences at the instance of the Commonwealth DPP and, secondly, whether the Commonwealth DPP was invested with the right to institute and conduct such an appeal.

VII SOUTH AUSTRALIAN APPELLATE SYSTEM FOR STATE CODE OFFENCES

- 35 At the time of the institution of the proceedings in the Court of Criminal Appeal, which gave rise to this set of appeals to this Court, s 352(2) of the CLC Act provided a limited regime for appeals against sentence:

"Where a person is convicted on information and sentenced, the Director of Public Prosecutions may, with the leave of the Full Court, appeal to that Court against the sentence passed on that person, unless the sentence is one fixed by law."³⁴

31 (1906) 4 CLR Pt 1 297 at 304.

32 *CDJ v VAJ* (1998) 72 ALJR 1548 at 1565; 157 ALR 686 at 709; *Fleming v The Queen* (1998) 73 ALJR 1 at 5-6; 158 ALR 379 at 384-385.

33 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225.

34 Section 352 was repealed and a new section substituted with effect from 4 January 1996 by ss 2 and 6 of the *Criminal Law Consolidation (Appeals) Amendment Act* 1995 (SA). Nothing turns on this amendment due to the terms of s 11(1), a transitional provision contained therein, which preserved the previous s 352 in
(Footnote continues on next page)

36 Section 352(2) was first introduced by s 9 of the *Criminal Law Consolidation Act Amendment Act* 1980 (SA) and conferred the appellate function upon the Attorney-General. The provision was amended by Sched 2 to the State DPP Act to substitute for the phrase "Attorney-General" the phrase "Director of Public Prosecutions"³⁵. This identifies the State officer of that title.

37 Section 352(2), to adopt the language of Dixon J in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*³⁶, performs a "double function". His Honour remarked that the legislation there in question³⁷:

"must be taken to perform a double function, namely to deal with substantive liabilities or substantive legal relations and to give jurisdiction with reference to them. It is not unusual to find that statutes impose liabilities, create obligations or otherwise affect substantive rights, although they are expressed only to give jurisdiction or authority, whether of a judicial or administrative nature."

In bestowing upon the State DPP the conditional privilege of appeal, s 352(2) affected the substantive legal liabilities of the appellants by the conferral of substantive legal rights upon the State DPP³⁸. Further, the "Full Court", as defined in s 348 of the CLC Act and considered in Section II of these reasons, was invested with jurisdiction to entertain both a leave application and an appeal against a conviction on information, unless the sentence was one fixed by law.

38 The blurring of two, conceptually discrete, legal functions into a single section such as s 352(2) of the CLC Act is a mode of draftsmanship fraught with the dangers of oversight. In *Canada (Human Rights Commission) v Canadian*

respect of proceedings founded on informations laid before that date and "any related proceedings". Hence, the relevant provision for the purposes of these appeals remains s 352(2) as it stood before 4 January 1996.

35 See *Kolaroff* (1997) 95 A Crim R 447 at 449, 454.

36 (1945) 70 CLR 141 at 165. See also *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 73 ALJR 238 at 242-243; 159 ALR 268 at 274; Aitken, "Jurisdiction, Liability and 'Double Function' Legislation", (1990) 19 *Federal Law Review* 31.

37 (1945) 70 CLR 141 at 165-166.

38 cf *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 495.

*Liberty Net*³⁹, the Supreme Court of Canada recently considered the effect of a so-called "'gap' in statutory grants of jurisdiction". The case concerned the jurisdiction of the Federal Court of Canada to grant injunctive relief in support of certain prohibitions contained in the *Canadian Human Rights Act* 1985 (Can)⁴⁰. The effect of s 44 of the *Federal Court Act* 1985 (Can)⁴¹ was to confer jurisdiction upon the Federal Court to grant an injunction "[i]n addition to any other relief" even if the substance of the dispute fell to be determined by another court. Bastarache J, for the majority of the Supreme Court, considered the relationship between the provincial superior courts of general jurisdiction and the limited jurisdiction of the Federal Court. Having rejected the proposition that the inherent jurisdiction of provincial superior courts affects the construction of a federal law which positively grants jurisdiction to the Federal Court⁴², Bastarache J remarked⁴³:

"[T]he doctrine of inherent jurisdiction operates to ensure that, having once analysed the various statutory grants of jurisdiction, there will always be a court which has the power to vindicate a legal right independent of any statutory grant. The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, the provincial superior court."

It is unnecessary to consider whether such a doctrine applies in the Australian federal system and the nature of any jurisdiction which may be invoked where an Australian legislature has not vested jurisdiction in any court to vindicate a new legal right and s 75 of the Constitution does not apply of its own force to invest original jurisdiction in this Court; s 352(2) of the CLC Act is adequate to the task in the present case.

- 39 It is appropriate now to consider whether any other legislation extended this special jurisdictional regime to authorise appeals by the Commonwealth DPP against the sentence of persons convicted on information of State Code offences.

39 [1998] 1 SCR 626 at 658.

40 RSC 1985 c H-6.

41 RSC 1985 c F-7.

42 [1998] 1 SCR 626 at 656.

43 [1998] 1 SCR 626 at 658.

VIII OPERATION OF THE STATE CORPORATIONS ACT

40 The question arises as to whether the special regime created by s 352(2) of the CLC Act has been amended in all its incidents by s 91 of the State Corporations Act. The text of s 91, so far as material, is set out in Section IV.

41 Section 91 is not in terms expressed to amend or repeal any other particular laws. Rather, it is an ambulatory provision conferring extensive prosecutorial powers on the Commonwealth DPP. The operation of this law must be ascertained and, to the extent that it thereby effects a change in the operation of an earlier statute, the several or "combined"⁴⁴ legal meanings must be identified.

42 It is convenient to consider the operation of par (b) of s 91(1) of the State Corporations Act before returning to consider the scope of the conferral by par (a) of "enforcement powers" on the Commonwealth DPP.

43 Section 91(1)(b) reflects the terms of s 91 before amendment by the State Corporations Amendment Act. Section 91(1) then stated:

"The [Commonwealth DPP] may, in relation to an offence against a co-operative scheme law, perform the functions and exercise the powers conferred on the [Commonwealth DPP] by the [Commonwealth DPP Act] as if the offence were an offence against a national scheme law of this jurisdiction."

As explained in Section V, the mischief in the old s 91 to which the amendment was directed, by including what is now s 91(1)(a), was that it did not give to the Commonwealth DPP the same enforcement powers in relation to Co-operative Scheme Laws as the South Australian prosecution authorities. It thus would not have availed the Commonwealth DPP in the present case. Nor does s 91(1)(b).

44 Paragraph (b) facilitates, as a matter of State law, the performance of certain functions and the exercise of certain powers conferred by the Commonwealth DPP Act. The question whether the power or function exists must be determined by reference to federal law.

45 The Commonwealth DPP Act does not, in terms, confer any powers or functions on the Commonwealth DPP in respect of "co-operative scheme laws" or "national scheme laws", as defined in the State Corporations Act. Rather, as outlined in Section IV, s 6(2) of the Commonwealth DPP Act provides for a

44 *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 740; 152 ALR 540 at 565.

"mechanism" by which further functions may be conferred by or under any law of the Commonwealth or through proscription by regulation. As described in detail in Section IV, the conferral of powers in respect of "co-operative scheme laws" can be traced through ss 47(1) and 73 of the Commonwealth Corporations Act, reg 3(1) of the Corporations Authorities Regulations and, ultimately, to s 91(1)(a) of the State Corporations Act.

- 46 It was submitted that s 9(7) of the Commonwealth DPP Act operated in conjunction with s 91(1)(b) of the State Corporations Act to confer the power to appeal against sentence on the Commonwealth DPP in respect to State Code offences. Section 9(7) provides:

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

- 47 The appellants were charged, tried and convicted of State criminal offences under the State Code. Section 91(1)(b) of the State Corporations Act did not change the character of these offences. They remained State offences. The proposition that s 9(7) of the Commonwealth DPP Act confers additional powers on the Commonwealth DPP in relation to offences against a law of the State of South Australia should be rejected. The Commonwealth Parliament did not re-enact these offences such that they attained the legal character of "offences against a law of the Commonwealth".

IX APPEAL AGAINST SENTENCE BY THE COMMONWEALTH DPP

- 48 There remain the following two central questions. The first is whether, in conjunction with any other State law, s 91(1)(a) of the State Corporations Act confers on the Commonwealth DPP a power to appeal against sentence for State Code offences to the Court of Criminal Appeal. The second is whether, in such conjunction, s 91(1)(a) confers jurisdiction on the Court of Criminal Appeal to hear an appeal against sentence brought by the Commonwealth DPP for such offences.

- 49 It is convenient first to address the conferral of "enforcement power" on the Commonwealth DPP. The definition of "enforcement power" in s 91(5) of the State Corporations Act does not expressly refer to a function or power relating to "appeals". It remains a question of statutory construction whether any of the

matters enumerated in s 91(5) include a power to institute and conduct an appeal against sentence. Neither par (a) nor par (b) has any bearing on this question. Both paragraphs deal with matters anterior to the prosecution of the accused. Equally, par (c), which concerns a function or power relating to "the institution and carrying on of a prosecution of an offence", is insufficient. This is because the "carrying on of a prosecution" concerns the conduct of the prosecution at trial. The remaining paragraph specifies a function or power "relating to— ... (d) matters relating to such ... [a] prosecution". The duplication of the phrase "relating to" imports a wide penumbra of matters connected to a prosecution. It is through the application of the rules of statutory construction that the scope of this penumbra is delineated.

- 50 In our opinion, upon the proper construction of this law, an appeal against sentence does not relate to "matters relating to such ... [a] prosecution", as provided for in s 91(5) of the State Corporations Act. It is here that the thread taken up at the beginning of these reasons breaks. In *Rohde v Director of Public Prosecutions*, Deane J said⁴⁵:

"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: cf *Thompson v Mastertouch TV Service Pty Ltd* [No 3]⁴⁶; *Davern v Messel*⁴⁷."

- 51 The terms of s 91(5) of the State Corporations Act do not refer to "appeals". They stand in contrast to s 68(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), the construction of which was considered by this Court in *Peel v The Queen*⁴⁸. Although in the minority in that case, Barwick CJ made the following remarks concerning the meaning of the phrase "appeals arising out of any such trial or conviction" contained in s 68(2) which have force in the context of the construction of s 91(5) of the State Corporations Act⁴⁹:

45 (1986) 161 CLR 119 at 128-129.

46 (1978) 38 FLR 397; 19 ALR 547.

47 (1984) 155 CLR 21.

48 (1971) 125 CLR 447.

49 (1971) 125 CLR 447 at 454.

"[N]either an appeal against acquittal nor an appeal against sentence is an appeal arising out of any proceedings connected with the trial: nor is an appeal against sentence an appeal arising out of any proceedings connected with the conviction."

- 52 In the absence of the manifestation of a specific intention, no power or function in relation to appeals against sentence is to be found in the terms of s 91(5). This construction is consistent with s 22 of the State Interpretation Act which provides:

"(1) Subject to subsection (2), where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object.

(2) This section does not operate to create or extend any criminal liability."

A construction of s 91(5) of the State Corporations Act which would vest the Commonwealth DPP with the power to appeal would create or extend criminal liability within the terms of s 22(2) because it would render a convicted person liable to an increased punishment.

- 53 This construction of s 91(5) of the State Corporations Act finds its force in the underlying principle that a convicted person should not be deprived of the liberty left after sentencing at first instance except by procedures which have been expressly authorised⁵⁰ and strictly complied with in a court of proper jurisdiction. This notion of jeopardy to the accused's liberty and its relationship with the administration of criminal justice was considered in *Everett v The Queen*⁵¹. Brennan, Deane, Dawson and Gaudron JJ considered the jurisdiction of the Tasmanian Court of Criminal Appeal to grant leave to the Attorney-General of that State to appeal against sentence and said⁵²:

50 *Malvaso v The Queen* (1989) 168 CLR 227 at 233.

51 (1994) 181 CLR 295.

52 (1994) 181 CLR 295 at 299. See also *Pearce v The Queen* (1998) 72 ALJR 1416 at 1426-1427, 1431; 156 ALR 684 at 697-699; 704.

"An appeal by the Crown against sentence has long been accepted in this country as cutting across the time-honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed⁵³."

54 This is not "procedural due process" as understood in United States constitutional jurisprudence⁵⁴; rather it is the process of the due administration of justice⁵⁵ 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.

55 In dealing with the subject of "Double Jeopardy, Pleas and Verdicts", the Law Reform Commission of Canada accurately observed⁵⁶:

"There are a number of concepts involved in the notion of double jeopardy, including *autrefois acquit* and *convict*, the rule against multiple convictions and its effect on pleas and verdicts, issue estoppel and inconsistent judgments, the extent to which foreign decisions can bar subsequent prosecutions, and so on. Any discussion of double jeopardy issues involves not only the substantive issue of the scope of the rule in question but also other important matters such as the procedure to be followed to raise the issue in the first place and the remedy to be applied."

56 It is now convenient to consider whether the Court of Criminal Appeal is invested with jurisdiction to entertain an appeal against sentence by the Commonwealth DPP. This is a question whose answer lies particularly in the operation of s 91 of the State Corporations Act. The answer is that there is no investment of jurisdiction and this is the second, and perhaps more generally

53 See, eg, *Whittaker v The King* (1928) 41 CLR 230 at 248; *R v Tait* (1979) 46 FLR 386 at 388-389; 24 ALR 473 at 476-477; *R v Wilton* (1981) 28 SASR 362 at 367-368; *R v Holder* [1983] 3 NSWLR 245 at 255-256; *R v Peterson* [1984] WAR 329 at 330-331; *R v Stach* (1985) 5 FCR 518 at 522; *Cooke v Purcell* (1988) 14 NSWLR 51 at 57-58; *R v Dowie* [1989] Tas R 167 at 177; *R v Arnold* (1991) 56 A Crim R 63 at 64-65; *R v Hillsley* (1992) 34 FCR 148 at 152-153.

54 Tribe, *American Constitutional Law*, 2nd ed (1988) at 663-768; Rotunda & Nowak, *Treatise on Constitutional Law*, 2nd ed (1992), vol 2, Ch 17.

55 *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 129.

56 Canada, Law Reform Commission, *Double Jeopardy, Pleas and Verdicts*, Working Paper 63, (1991) at 43.

significant, break in the thread taken up at the beginning of these reasons. We turn to explain the reasons which disclose this deficiency.

57 Section 91(1)(a) of the State Corporations Act stands apart from statutory provisions such as s 352(2) of the CLC Act and those considered by Dixon J in *Ex parte Barrett*⁵⁷. It does not refer to jurisdiction or to court process, such as the process of appeal which is the subject-matter of s 352(2) of the CLC Act. It does not refer to a judicial function to be performed or to the manner in which a court is constituted. The subject-matter of s 91(1)(a) is the conferral of powers on a Commonwealth statutory entity, the Commonwealth DPP. This matter was addressed in a passage in the Second Reading Speech of the Attorney-General of South Australia, set out in Section V. To the extent that s 91(1)(a) requires the existence of the same enforcement powers existing in the Crown in right of South Australia acting by the Attorney-General or the State DPP, it may be assumed that it was drawn with the aspiration of placing the Commonwealth DPP in the same position as the State DPP in relation to co-operative scheme laws.

58 This aspiration has not been met by s 91(1)(a). Conferral of powers on a statutory authority is conceptually discrete from the grant of jurisdiction to a court. The distinction is not a matter of dry legal terminology. It reflects fundamental concerns in the structure of government under the rule of law. To confer jurisdiction is to expand judicial authority; to confer powers on a statutory entity is to expand administrative authority. The exception to this basic rule, an example of which is s 352(2) of the CLC Act, is found where the conferral of authority on a statutory entity is premised on the existence of jurisdiction. In such a case, the question arises whether the section conferring authority on a statutory entity performs a "double function", to which Dixon J referred in *Ex parte Barrett*⁵⁸. This is not such a case. None of the "enforcement powers" as defined in s 91(5) includes a power or function to appeal against sentence.

59 Section 91(1)(a) is not an independent grant of appellate jurisdiction on the Court of Criminal Appeal, nor does it modify the regime of appellate jurisdiction created by s 352(2) of the CLC Act. This is not a case where it is necessary to read s 91(1)(a) as adding to or qualifying the appellate jurisdiction conferred upon the Court by s 352(2) of the CLC Act. In this respect, this is no occasion for a "combined"⁵⁹ or conflated meaning of the two provisions. The subject-matter of

57 (1945) 70 CLR 141.

58 (1945) 70 CLR 141 at 165.

59 *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 740; 152 ALR 540 at 565.

s 91(1)(a) of the State Corporations Act is divorced from so much of the subject-matter of s 352(2) of the CLC Act as is concerned with the conferral of jurisdiction upon the Court of Criminal Appeal.

X ANCILLARY MATTERS

60 First, it was submitted by the respondent that the conferral of jurisdiction on the Court of Criminal Appeal to hear an appeal against sentence brought by the Commonwealth DPP arose by operation of ss 55, 56, 91(1)(b) and 91(4) of the State Corporations Act in conjunction with s 352 of the CLC Act. Sections 55 and 56 are contained in Div 2 (ss 53-56), entitled "VESTING AND CROSS-VESTING OF CRIMINAL JURISDICTION", of Pt 9 (ss 40-56), entitled "JURISDICTION AND PROCEDURE OF COURTS", of the State Corporations Act. Section 53 delineates the scope of Div 2 as follows:

"This Division provides in relation to—

- (a) the jurisdiction of courts in respect of criminal matters arising under the Corporations Law of South Australia; and
- (b) the jurisdiction of the courts of South Australia in respect of criminal matters arising under the Corporations Law of any jurisdiction."

For the purposes of Div 2, s 54(2)(a) defines a reference to the Corporations Law of South Australia to include a reference to:

- "(i) the Corporations Regulations of South Australia; and
- (ii) the ASC Law of South Australia; and
- (iii) the ASC Regulations of South Australia; and
- (iv) any other applicable provisions (as defined in section 3) of South Australia; and
- (v) this Act; and
- (vi) regulations made under this Act; and
- (vii) rules of court made by the Supreme Court of South Australia, and rules of court applied by the Federal Court because of a provision of this Act, and rules of court applied by the Supreme Court of another State, or of

the Capital Territory, when exercising jurisdiction conferred by this Division (including jurisdiction conferred by virtue of any previous application or applications of this subparagraph)".

61 Section 55(1) operates to confer an "equivalent jurisdiction" on the several courts of each State and the Capital Territory exercising jurisdiction with respect to the trial and conviction on indictment, amongst other matters, of offenders or persons charged with offences against the laws of the State or the Capital Territory. The "equivalent jurisdiction" is conferred "with respect to offenders or persons charged with offences against the Corporations Law of South Australia". Section 55(1) does not modify the jurisdiction of the several courts of South Australia in respect to non-Corporations Law offences, such as the State Code offences at issue in this case. The jurisdiction of the several courts of South Australia, such as the Court of Criminal Appeal, in respect to non-Corporations Law offences must originate from a source other than s 55(1).

62 Likewise, s 56(1) applies existing laws of South Australia in respect to certain specified matters, so far as they are applicable, "to persons who are charged with offences against the Corporations Law of South Australia or of another State or the Capital Territory in respect of whom jurisdiction is conferred on a court of South Australia by this Division or a corresponding law of another State or the Capital Territory". This section does not modify the laws of South Australia other than to extend their operation to certain offences against the Corporations Law in its various guises. There is no provision in the State Corporations Act which effects a change in the nature of offences against the State Code, with which the appellants were charged and convicted, such that they are deemed to be offences against the Corporations Law. The transitional provisions contained in Pt 13 (ss 81-96) of the State Corporations Act, referred to in Section II, do not effect such a fundamental change. Rather, in contradistinction, s 85(1) relevantly provides that the co-operative scheme laws are to continue to operate of their own force in relation to matters arising before the enactment of s 85. As such, State Code offences are not within this extended operation of s 56(1).

63 In light of the limited conferral of jurisdiction provided for by ss 55 and 56 of the State Corporations Act, the respondent's submission must fail. These sections have no relevant nexus with s 91 of the State Corporations Act. Neither confers jurisdiction in relation to non-Corporations Law offences such as those with which the appellants were charged and convicted. Section 91 operates, in the manner outlined above, to confer and regulate governmental power in relation to the co-operative scheme laws and therefore has no relevant connection to the conferral of jurisdiction in relation to Corporations Law offences which is the subject-matter of ss 55 and 56 of the State Corporations Act.

27.

64 Secondly, it was submitted that s 45(1) of the Commonwealth Corporations Act had a field of operation in respect of the State Code offences with which the appellants were charged. Section 45(1) provides:

"For the purposes of a law of the Commonwealth or a law of the Capital Territory, an offence against the applicable provisions of a jurisdiction other than the Capital Territory:

- (a) is taken to be an offence against the laws of the Commonwealth, in the same way as if those provisions were laws of the Commonwealth; and
- (b) is taken not to be an offence against the laws of that jurisdiction."

Sub-section (2) of s 45 states that sub-s (1) has effect for the purposes of a law only in so far as it is within the authority of the Parliament to provide in relation to that law as mentioned in par (a) of sub-s (1).

65 Section 45 is included in Div 2 of Pt 8 of the Commonwealth Corporations Act. The object⁶⁰ of Div 2 is to further the object of Pt 8 "by providing for an offence against an applicable provision of another jurisdiction to be treated in the [Australian] Capital Territory as if it were an offence against a law of the Commonwealth" (s 40(1)). This indicates that s 45 has nothing to say for the present case which turns upon the law in force in South Australia. In any event, s 4(1) of the Commonwealth Corporations Act, which is set out in Section IV, defines "applicable provision" in the same terms as the definition contained in s 3(1) of the State Corporations Act. The result is that s 45(1) has no application to State Code offences because the definition of "applicable provision" is exhaustive and does not include State Code offences.

66 Therefore, s 45(1) has no bearing on these appeals. This makes it unnecessary to consider the further question of whether the Commonwealth Parliament had the power to enact s 45, whether under the territories power, the corporations power, or some other authority.

60 Section 15AA of the Commonwealth Interpretation Act provides:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

67 Thirdly, it is now necessary to dispose of a further submission made by the Commonwealth Solicitor-General in support of the proposition that the Commonwealth DPP had a right to appeal against the appellants' sentences to the Court of Criminal Appeal. Through the interaction of ss 29, 31 and 91(1)(b) of the State Corporations Act, s 9(7) of the Commonwealth DPP Act and the appeal provisions of s 24 of the *Federal Court of Australia Act* 1976 (Cth), it was submitted that the above proposition could be sustained. It is unclear whether the Commonwealth Solicitor-General sought ultimately to rely on this submission but the submission is without merit. It is not to the point that, in certain matters, of which the present sentences are not instances, an appeal by the Crown may be taken to the Full Court of the Federal Court⁶¹.

68 It follows that the appeals to this Court should be allowed, the sentencing orders of the Court of Criminal Appeal set aside and the appeal to the Court of Criminal Appeal by the Commonwealth DPP be dismissed.

69 That leaves standing the convictions themselves. There are also before this Court two applications for special leave to appeal which attack the convictions. To these we now turn. Each raises the same issue as to the application of s 80 of the Constitution.

XI SECTION 80 OF THE CONSTITUTION

70 Each applicant submits that his trial was vitiated by an omission, that it was not before a jury. The State Code offences with which the applicants were charged and convicted are offences against laws of the State of South Australia. Section 80 of the Constitution confers a right to a jury where a person is subject to a "trial on indictment of any offence against any law of the Commonwealth". Without more, the terms of s 80 would dispose of the applicants' submission and the decision with respect to s 7 of the Juries Act in *Brown v The Queen*⁶² would not be in point. However, the applicants submit that s 80 was "picked up" by s 68(2) of the Judiciary Act and thereby rendered applicable to their trials. Neither proposition has substance. It follows that the applications for special leave should be refused.

61 See *Davern v Messel* (1984) 155 CLR 21.

62 (1986) 160 CLR 171.

71 Section 68(2)⁶³ confers on the several courts of a State⁶⁴, including the Supreme Court and District Court of South Australia, a particular species of federal jurisdiction. This is with respect to "offences against the laws of the Commonwealth". The investment of jurisdiction is supported by s 76(ii) and s 77(iii) of the Constitution. As just observed, the applicants were tried for offences against State law. Section 68(2) was not engaged.

72 The section identifies in its opening terms the State courts in which it invests jurisdiction by reference to the jurisdiction they already exercise under State criminal law. But that is of no decisive importance for the present applicants. The investment of federal jurisdiction is expressed to be, as would be the case in any event, subject to s 80 of the Constitution. That likewise is of no avail to the applicants. They were not charged with offences against the laws of the Commonwealth, the subject-matter of the investment of federal jurisdiction by s 68(2)⁶⁵.

63 Section 68(2) states:

"The several Courts of a State or Territory exercising jurisdiction with respect to:

- (a) the summary conviction; or
- (b) the examination and commitment for trial on indictment; or
- (c) the trial and conviction on indictment;

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

64 The section also applies to Territory courts, but nothing turns on this for present purposes.

65 It is unnecessary for the purposes of this case to consider any operation this section may have in relation to offences against the Corporations Law, in its various guises: see *R v Cook; Ex parte Commonwealth Director of Public Prosecutions* (1996) 20 ACSR 618 at 620.

- 73 Further, it was argued for the applicants that s 29(1) of the State Corporations Act operated to apply s 80 of the Constitution to their trial on indictment for the State Code offences. Section 29(1) provides:

"The Commonwealth laws apply as laws of South Australia in relation to an offence against the applicable provisions of South Australia as if those provisions were laws of the Commonwealth and were not laws of South Australia."

- 74 Section 3(1) of the State Corporations Act contains an exhaustive definition of "applicable provisions", as employed in various provisions including s 29(1). The definition does not include State Code offences. Moreover, no other provision in the Act, including s 91, operates to apply s 29 to State Code offences. Section 29(1) therefore has no bearing on these applications. As such, it is unnecessary to consider whether the phrase "Commonwealth laws" in s 29(1) includes s 80 of the Constitution. Equally, it is unnecessary to consider the operation and effect of s 29(2) of the State Corporations Act, which also operates exclusively in relation to "an offence against the applicable provisions of South Australia"⁶⁶.

XII ORDERS

- 75 The appeals should be allowed. The orders of the Court of Criminal Appeal made on 17 June 1998 should be set aside and the appeals to that Court be dismissed. The applications for special leave to appeal should be refused.
- 76 The orders of the Court of Criminal Appeal to be set aside provided for the sentences which were stayed, by orders of this Court, pending delivery of judgment in these appeals.

66 Section 29(2) states:

"For the purposes of a law of South Australia, an offence against the applicable provisions of South Australia—

- (a) is taken to be an offence against the laws of the Commonwealth, in the same way as if those provisions were laws of the Commonwealth; and
- (b) is taken not to be an offence against the laws of South Australia."

- 77 KIRBY J. These appeals present a further illustration of the grotesque complications that exist in the regulation of corporations under Australian law. Such complications derive from a heady mixture of legal history, the separate corporations legislation of the Commonwealth, the States and the Territories, a narrow constitutional decision⁶⁷, and the successive and unduly complex legislative schemes that have responded to the foregoing.

Unintended gaps in complex legislation

- 78 Wherever such legislative calamities are inflicted on a nation, and on the corporations essential to its economic well-being, gaps are bound to occur. They are usually unintended. They are generally found when spectacles are applied to the magnifying glass through which lawyers of ability and infinite patience search with a microscope the text of legislation and are rewarded with the discovery of an omission advantageous to generally well-funded clients. The substantial merits of a case then fall into the crack. The legislation is held to have misfired. What would clearly have been the purpose of the legislators, had only their drafters had the skill or foresight to address the problem, comes to naught in the failure or infelicity of legislative expression. So it is in this case.
- 79 One can say with as much certainty as is possible in human affairs that it was not within the subjective intention of the ministers, the officials who gave drafting instructions, legislative counsel or the members of the legislatures concerned, to create the statutory gap which carries the day for the appellants. There is no rational reason why the Director of Public Prosecutions for the Commonwealth ("the Commonwealth DPP") should have been afforded the power to charge and prosecute persons such as the appellants for the relevant offences but, unlike the State Director of Public Prosecutions ("the State DPP"), not to appeal (or seek leave to appeal) against sentence where, for exceptional reasons, this was deemed appropriate and necessary.
- 80 However, subjective intentions, even those that may reasonably be imputed to the makers of legislation, are irrelevant. The purposes of a legislature must be ascertained from the language of the legislation which it enacts⁶⁸. This is a cardinal rule. There are strict limits on the extent to which courts can fill gaps in legislation where they come to light, particularly where such gaps expose a person affected to additional criminal punishment involving the deprivation of liberty⁶⁹. These considerations reveal, once again, why it is incorrect, and potentially misleading,

67 *New South Wales v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482.

68 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

69 *Piper v Corrective Services Comm* (1986) 6 NSWLR 352 at 361.

to talk of the "intention" of Parliament. Here the "intention", in a general sense, is clear enough. But the focus must be upon the meaning and effect of the legislation appearing from its words. As this case illustrates, to conceive of the problem in terms of legislative "intention" is to invite a risk of error. Avoidance of that fiction helps us to prevent such a risk.

81 The point on which the appellants are entitled to succeed has no substantive merit - only legal merit, which is enough. It is not a point which they raised at trial or in earlier proceedings in the Court of Criminal Appeal of South Australia⁷⁰. They did not raise it in earlier proceedings in this Court⁷¹. Nor on the return of the appeals to the Court of Criminal Appeal⁷². Indeed, it was not raised until special leave was, for a second time, sought and obtained to bring the matter once again to this Court.

82 The facts and circumstances of the present appeals are set out in the reasons of the other members of this Court. So are the provisions of the interlocking Federal and State legislation. I will not repeat these. The appellants are entitled to succeed upon the basis that no legislative grant is demonstrated for the power which the Commonwealth DPP purportedly exercised in appealing to the Court of Criminal Appeal of South Australia against the sentences imposed on the appellants in the District Court of that State.

83 Once that conclusion is reached, it is unnecessary (and in my view undesirable) to say much more about the tortured path of legislative interconnections examined in these proceedings. If the Commonwealth DPP had no power to appeal against the appellants' sentences, whether contingently with leave or otherwise, other issues (including the jurisdiction of the Court of Criminal Appeal and the powers of the District Court of South Australia) do not arise. There was simply no foundation in law for the purported invocation of an appellate reconsideration of the sentences imposed. I would confine my reasons to that holding. I would leave other questions to be scrutinised on any future occasion on which this Court is obliged to resume the unpleasant task of studying the legislation in question.

Lack of authority for an appeal by Commonwealth DPP

84 The reasoning by which I reach the same conclusion as the other members of this Court can be stated quite briefly. Appeal is not a creature of the common law.

⁷⁰ Sub nom *Hopwood v The Queen* (1994) 13 ACSR 219.

⁷¹ *R v Byrnes* (1995) 183 CLR 501.

⁷² *R v Byrnes; R v Hopwood* (1996) 20 ACSR 260.

It is invariably the creation of statute⁷³. To assess, where challenged, the purported exercise by a party of a right to appeal (and the purported assertion by a court of jurisdiction to hear and determine the appeal so initiated), it is essential to scrutinise the suggested legislative foundation for such right and jurisdiction. If it cannot be demonstrated in the language, or in the implications to be derived from the language, of the relevant statute, the right and jurisdiction asserted do not exist. The common law cannot be invoked to fill total silences in the legislation.

85 In the specific matter of appeals against a criminal sentence, it is well established that clear language is necessary to afford to a prosecutor a right of appeal (and thus to a court the jurisdiction to hear such an appeal)⁷⁴. In part, this principle derives from the general statutory character of appeals. But mostly it can be traced to the bias of our law in favour of the liberty of the individual and against exposure of the individual to repeated jeopardy in criminal proceedings⁷⁵. In part, it is a reflection of history and of the practice of the Crown and its emanations in the matter of criminal prosecutions. Therefore, to sustain his now challenged assertion of a right to appeal against the sentences imposed on the appellants, the Commonwealth DPP must be able to point to a clear statutory authority affording him that right.

86 No such authority appears in the terms of his own enabling statute in relation to a prosecution conducted by the Commonwealth DPP of persons such as the appellants charged with offences against State law. Perhaps there should be a general and ample power in the Commonwealth DPP to appeal, whether with leave or otherwise, against sentences following convictions in trials in State courts in which he has appeared or has some other lawful interest. But the Federal Parliament has not expressly conferred such a power. None therefore existed under federal law at the time that the appeals were purportedly lodged by the Commonwealth DPP in these proceedings. The Commonwealth DPP holds an

73 *Attorney-General v Sillem* (1864) 10 HLC 704 at 720-721 [11 ER 1200 at 1207-1208]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 553; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108; *CDJ v VAJ* (1998) 72 ALJR 1548 at 1562; 157 ALR 686 at 705-706; *Fleming v The Queen* (1998) 73 ALJR 1 at 6; 158 ALR 379 at 385; *SRA (NSW) v Earthline Constructions* (1999) 73 ALJR 306 at 322; 160 ALR 588 at 609.

74 *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 128-129 per Deane J.

75 *Everett v The Queen* (1994) 181 CLR 295 at 299. See also *Pearce v The Queen* (1998) 72 ALJR 1416 at 1426-1427 per Gummow J, 1427 per my own reasons; 156 ALR 684 at 698-699, 699; *Grady v Corbin* 495 US 508 at 529 (1990) per Scalia J (dissenting, Rehnquist CJ and Kennedy J joining).

office created by legislation. He has no more powers⁷⁶ than those enjoyed under: (1) the *Director of Public Prosecutions Act* 1983 (Cth)⁷⁷; (2) any other law of the Commonwealth conferring powers upon him; (3) any law of a State or Territory which with the authority of the Federal Parliament⁷⁸ confers such powers, or (4) the incidents and implications necessarily read into the foregoing, express grants of power. In this respect, the Commonwealth DPP does not succeed to those prerogative powers of the Crown which have devolved by history and law to an Attorney-General. His powers must be expressly stated, or necessarily implied, in a valid grant of power given by, or under the authority of, the Parliament.

- 87 It was acceptance of these premises which led to the search, through the maze of interconnected State laws of South Australia, for a basis in law for the hitherto unchallenged power of the Commonwealth DPP to bring the appeals that purported to invoke the jurisdiction of the Court of Criminal Appeal leading to the orders of which the appellants complain. Two bases were suggested to support the Commonwealth DPP's right to appeal. The first was s 91(1)(a) of the *Corporations (South Australia) Act* 1990 (SA)⁷⁹ ("the State Act"). This provision afforded the Commonwealth DPP the same "enforcement powers" in relation to the co-operative scheme laws⁸⁰ as were enjoyed in South Australia by the Crown in right of the State (acting by the Attorney-General or by the State DPP). By s 7 of the *Director of Public Prosecutions Act* 1991 (SA), the State DPP enjoys expressly conferred powers to lay charges and prosecute offences of the kind for which the appellants were convicted and also "to exercise appellate rights arising from

76 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 121.

77 Relevantly, s 6(2). The pertinent provisions are set out in the reasons of the other members of this Court, Section IV.

78 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 579 per Brennan J; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 127-128; *Gould v Brown* (1998) 193 CLR 346 at 382, 491; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 884-888; 163 ALR 270 at 333-337.

79 Set out in the reasons of the other members of this Court, Section IV.

80 The appellants were charged with offences under the *Companies (South Australia) Code*. Pursuant to s 84 of the State Act, these were offences arising under "co-operative scheme laws" for the purpose of s 91(1)(a) of the State Act. The relevant provisions are set out in the reasons of the other members of this Court, Section IV.

proceedings of the kind referred to above"⁸¹. So far the argument appears convincing.

88 However, the words "enforcement powers" in s 91(1) of the State Act were not left at large. They were given a special statutory meaning by s 91(5) of the State Act. Relevantly, they were defined to include the investigation of an offence; the arrest and custody of persons charged; and the institution and carrying on of a prosecution and matters relating to such an investigation, arrest, custody or prosecution⁸². None of the phrases in the State Act defining "enforcement powers" is broad enough to encompass the power to appeal (or seek leave to appeal) against a sentence imposed on a person convicted of an offence against the co-operative scheme laws. This, then, is the gap which opened in the legislation when it was subjected to the belated scrutiny of the appellants' representatives. The provisions of s 91(1)(a) of the State Act which, clearly enough, were intended generally to provide a bridge between the powers enjoyed in South Australia by, relevantly, the State DPP and the Commonwealth DPP, contained a fatal defect. The power to appeal was excluded from the powers conferred by State law on the Commonwealth DPP. No federal law filled that gap.

Additional arguments for the right to appeal fail

89 Nothing is added by s 91(1)(b) of the State Act for the reasons explained by the other members of this Court. Nor is there any substance in the second argument that s 9(7) of the *Director of Public Prosecutions Act* 1983 (Cth) affords a foundation for the Commonwealth DPP to bring an appeal. That sub-section is expressly confined to appeals in the case of a prosecution for an "offence against a law of the Commonwealth". The offences of which the appellants were convicted, and for which they were sentenced, were indubitably offences against State law. There is likewise no substance in the submission resting on s 24 of the *Federal Court of Australia Act* 1976 (Cth). Nor, for the reasons of the other members of this Court, does the submission that s 45(1) of the *Corporations Act* 1989 (Cth) operates in respect to State offences have any bearing on these appeals⁸³.

90 The closest that the Commonwealth DPP comes to establishing jurisdiction within the defined "enforcement powers" conferred upon him by s 91(1)(a) of the State Act is the potentially large ambit of the matters included within the definition of "enforcement powers" in s 91(5)(d) of the State Act. By a double combination

81 s 7(g). See the reasons of the other members of this Court, Section V.

82 The terms of s 91(5) are set out in the reasons of the other members of this Court, Section IV.

83 See the reasons of the other members of this Court, Section X.

of the words "relating to", both in the opening words of the sub-section and in par (d), a flimsy argument may be advanced that the bringing of an appeal is a power *relating to* matters *relating to* a prosecution. However, this argument founders on the previously stated rule of construction that a conferral on prosecuting authorities of statutory powers to appeal against a criminal conviction or sentence must be clearly expressed. To say the least, this did not occur in the inter-meshing Federal and State legislation in question here.

91 The Commonwealth DPP did not, therefore, enjoy a power to appeal against the sentences imposed on the appellants by the Court of Criminal Appeal of South Australia. His purported appeals were therefore invalid. His notices of appeal could not invoke the jurisdiction of that Court. Unless lawfully invoked, that Court, even as the *alter ego* of the Supreme Court of the State (as I am prepared to accept), had no jurisdiction to proceed upon a review of the sentences lawfully imposed by the primary judge. It could not do so on its own initiative nor without valid process before it to define the issues to be decided. No other consideration need be given to the jurisdiction of the Court of Criminal Appeal. The Commonwealth DPP knocked on the Court's door. But as he had no lawful authority to do so, the Court could not bid him enter. It could only open its door a fraction to say so and to send him on his way.

92 It is upon this footing that I would uphold the appellants' appeals. For completeness, I should say that there was no merit in the alternative attack of the appellants on the constitutional validity of the State Act on the footing that it amounted to an abdication by the Parliament of South Australia of its legislative authority under the State and Federal Constitutions⁸⁴. Nor, in my opinion, were any of the other complaints of the appellants made good or necessary to answer. The appellants succeed only on their objection to the Commonwealth DPP's purported appeals against their sentences. And that is enough.

Application for special leave to appeal against convictions

93 That leaves only the appellants' applications for special leave to appeal against the convictions entered at the trial upon the footing that the requirements of s 80 of the Australian Constitution were not observed. This argument has no substance for the reasons demonstrated by the other members of this Court. The applications should be rejected.

Orders

94 I therefore agree in the orders proposed by Gaudron, McHugh, Gummow and Callinan JJ.

84 cf *Gould v Brown* (1998) 193 CLR 346 at 485-487.