IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M127 of 2011

BETWEEN

KIEU THI BUI
Applicant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS FOR THE COMMONWEALTH OF AUSTRALIA
Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I. PUBLICATION ON THE INTERNET

1. These submissions are in a form suitable for publication on the internet.

PART II. BASIS OF INTERVENTION

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**) in support of the respondent.

PART III. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

3. The relevant legislative provisions are ss 68(1), 79(1) and 80 of the Judiciary Act and the provisions reproduced in the annexures to the Appellant's Submissions.

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PART V. STATEMENT OF ISSUES

4. The issues raised for determination by this appeal concern the law to be applied when a Victorian Court is exercising federal jurisdiction in hearing and determining a Crown appeal against the sentence imposed on a person convicted of a federal offence.[1]

5. The principal issue is whether the abolition of sentencing double jeopardy effected in Victoria by ss 289(2) and 290(3) of the *Criminal Procedure Act 2009* (Vic) (the **Criminal Procedure Act**) is:

   (1) a modification to the common law in Australia that, by virtue of s 80 of the Judiciary Act, governs State courts hearing and determining a Crown appeal in relation to a federal sentence; and/or

   (2) a State law that is binding on State courts exercising jurisdiction in Crown appeals in relation to a federal sentence by virtue of s 79(1) or s 68(1) of the Judiciary Act.

6. In determining this issue, it will be necessary to assess whether ss 289(2) and 290(3) of the Criminal Procedure Act are:

   (1) "inconsistent" with s 16A(1) and (2) of the *Crimes Act 1914* (Cth) (the **Commonwealth Crimes Act**), so that s 80 of the Judiciary Act cannot apply; and/or

   (2) contrary to what is "otherwise provided" by s 16A(1) and (2) of the Commonwealth Crimes Act, so that s 79(1) of the Judiciary Act cannot apply; and/or

   (3) not "applicable", so that s 68(1) of the Judiciary Act does not apply.

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[1] It is convenient to use the expression "Crown appeal" notwithstanding that the appeal is brought by the Director of Public Prosecutions (Cth), pursuant to s 287 of the Criminal Procedure Act, read with s 68(2) of the Judiciary Act and s 9(7) of the *Director of Public Prosecutions Act 1983* (Cth): see *Rohde v DPP* (1986) 161 CLR 119.

A. Summary of Intervener's Argument

7. In summary, the Attorney-General for the State of Victoria makes the following submissions.

(1) The abolition of sentencing double jeopardy effected by ss 289(2) and 290(3) of the Criminal Procedure Act is a modification to the common law in Australia that governs Victorian courts exercising federal jurisdiction in Crown appeals by virtue of s 80 of the Judiciary Act. No inconsistency between those provisions and s 16A(1) or (2) of the Commonwealth Crimes Act arises.

(2) Sections 289(2) and 290(3) of the Criminal Procedure Act are also laws of the Victorian Parliament that are binding on Victorian Courts determining Crown appeals in respect of a federal sentence pursuant to s 79(1) of the Judiciary Act. These provisions are not contrary to what is otherwise provided by s 16A(1) or (2) of the Commonwealth Crimes Act.

(3) Sections 289(2) and 290(3) of the Criminal Procedure Act are also binding by virtue of s 68(1) of the Judiciary Act, in that they are laws of a State respecting the procedure for the hearing and determination of an appeal arising out of the trial or conviction of a person charged with offences against a law of the Commonwealth and are capable of applying consistently with s 16A(1) and (2) of the Commonwealth Crimes Act.

8. While the application of a State law under the Judiciary Act raises as a threshold question whether the State law is invalid by virtue of any inconsistency with Commonwealth law under s 109 of the Constitution, that issue does not arise in the present case because it is not possible for a State law validly to direct a court in its exercise of federal jurisdiction. As such, no s 109 issue calls for consideration.[2]

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2 See *DPP (Cth) v De La Rosa* (2010) 273 ALR 324 at [31]-[33] (Allsop P), [79] (Basten JA), [162] (McClellan CJ at CL), [273] (Simpson J), [314] (Barr AJ). The appellant does not assert that there is any inconsistency for the purposes of s 109 of the Constitution.

B. Crown appeals in respect of federal sentences

9. When hearing and determining a Crown appeal against a federal sentence, the Court of Appeal exercises federal jurisdiction conferred by s 68(2) of the Judiciary Act.[3] Federal law therefore controls, and requires the ascertainment under the Judiciary Act of, the applicable law in the hearing and determination of such appeals.[4]

10. A Crown appeal against sentence is a unique form of appeal; it is not regarded simply as the mirror image of an appeal by a convicted person.[5] Crown appeals have been said, for example, to represent a departure "from traditional standards of what is proper in the administration of criminal justice".[6]

11. Such statements have been underpinned by "the common law's antagonism to double jeopardy".[7] The rule against sentencing double jeopardy was developed by the common law in recognition of the fact that a Crown appeal "puts in jeopardy 'the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal'".[8]

12. The rule received its clearest expression in the High Court in cases where the Crown required leave to appeal against sentence, in which it applied as a principle of judicial restraint on the grant of leave.[9] The same constraint operated in Victoria, despite the absence of any requirement of leave.[10] It has operated in

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3 See *Peel v The Queen* (1971) 125 CLR 447. See also *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 124 (Gibbs CJ, Mason and Wilson J) and 126-126 (Brennan J).

4 See *Sweedman v Transport Accident Commission* (2006) 206 CLR 362 at [33] (Gleeson CJ, Gummow, Kirby and Hayne JJ) and the cases cited therein.

5 *DPP v Karazisis* [2010] VSCA 350 at [74] (Ashley, Redlich and Weinberg JJA).

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

7 *Lacey v Attorney-General (Qld)* (2011) 275 ALR 646; (2011) 85 ALJR 508 at [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

8 *R v Tait* (1979) 24 ALR 473 at 476 citing *Whittaker v The King* (1928) 41 CLR 230 at 248 (Isaacs J).

9 See, for example, *Everett v The Queen* (1994) 181 CLR 295 and *Malvaso v The Queen* (1989) 168 CLR 227.

10 *DPP v Karazisis* [2010] VSCA 350 at [23]-[24] (Warren CJ and Maxwell P).

relation to a Crown appeal in respect of a federal sentence by virtue of s 80 of the Judiciary Act.[11]

13. The rule against sentencing double jeopardy is relevant to each of the three questions (or "stages") that have traditionally arisen in the determination of a Crown appeal against sentence.[12]

(1) The first stage involves consideration of the nature of the sentencing error in order to determine whether it satisfied common law requirements intended to ensure that such appeals should be "rare and exceptional" and do not unduly circumscribe the sentencing discretion.[13]

(2) The second stage involves consideration of whether, even if the error meets those requirements, for reasons of principle or because of discretionary considerations the Court should decline to intervene because it does not consider that a different sentence should be imposed.

(3) The third stage, reached if the Court elects to intervene, involves the Court imposing a lesser sentence than it would otherwise have imposed, generally toward the lower end of the appropriate range.

14. At the first stage, the "rationale" of sentencing double jeopardy was seen as underpinning the relevant common law requirements. At the second stage, it operated as a discrete sentencing principle, influencing the Court's determination as to whether to intervene in the sentence. At the third stage, sentencing double

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11 See *DPP (Cth) v Bui* [2011] VSCA 61 at [67]; see also *R v Baldock* (2010) 269 ALR 674 at [111] (Buss JA).

12 See the judgment under appeal: [2011] VSCA 61 at [56] (AB154-155); *DPP v Karazisis* [2010] VSCA 350 at [51] (Ashley, Redlich and Weinberg JJA).

13 In *R v Clarke* [1996] 2 VR 520 at 522, the Victorian Court of Appeal (Charles JA, with whom Winneke P and Hayne JA agreed) said that occasions may arise for the bringing of a Crown appeal where a sentence reveals manifest inadequacy or inconsistency in sentencing standards as to constitute error in principle, where it is necessary for a court of criminal appeal to lay down governance and guidance of courts having the duty of sentencing convicted persons, to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected, to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience or to ensure uniformity in sentencing. See also *DPP v Bright* (2006) 163 A Crim R 538 at 542.

jeopardy also operated as a discrete sentencing principle, resulting in a reduction of the sentence to be imposed.[14]

15. Since the enactment of the Criminal Procedure Act, double jeopardy considerations no longer have any role to play in Victoria at any stage of the appellate consideration of a Crown appeal against sentence.[15] The rule against sentencing double jeopardy no longer provides the rationale for the approach taken in determining whether appellable error is disclosed, nor does it form any part of the residual discretion of the Court to order that a Crown appeal be dismissed notwithstanding sentencing error having been shown, nor any part of the resentencing exercise.[16] It is therefore abolished in Victoria in its previous application to all three stages of the determination of a Crown appeal against sentence.[17]

C. The operation of ss 80 and 79(1) of the Judiciary Act

16. The law to be applied by a court exercising federal jurisdiction in a Crown appeal against sentence derives from the Commonwealth Crimes Act and the Judiciary Act. Section 16A of the Commonwealth Crimes Act applies of its own force. State laws, and/or the common law, apply as provided for by the Judiciary Act, and in particular ss 80, 79(1) and 68(1) respectively.

17. In light of the fact that the "double jeopardy" principle as applied to sentencing is derived from the common law, and that the common law has been modified in Victoria by the enactment of ss 289 and 290 of the Criminal Procedure Act, it is convenient to commence the analysis by reference to s 80, which provides:

> *So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State*

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14 *DPP v Karazisis* [2010] VSCA 350 at [51] (Ashley, Redlich and Weinberg JJA).

15 *DPP v Karazisis* [2010] VSCA 350 at [13] (Warren CJ and Maxwell P). The rule against double jeopardy was abolished because it was regarded as distorting sentencing by interfering with an appellate Court's ability to provide guidance on sentencing to lower courts, and as unduly subordinating the public interest in adequate punishment: see *Karazisis* at [72]-[78] (Ashley, Redlich and Weinberg JJA).

16 *DPP v Karazisis* [2010] VSCA 350 at [72]-[78] (Ashley, Redlich and Weinberg JJA).

17 See the judgment under appeal: [2011] VSCA 61 at [57]-[59] (AB155-156).

> *or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.*

18. The opening words of s 80 condition the operation of the balance of s 80 on two circumstances: first, that "the laws of the Commonwealth" are not applicable, and second, that the provisions of "the laws of the Commonwealth" are insufficient to carry them into effect or to provide adequate remedies or punishment.[18] The term "the laws of the Commonwealth", read with s 80 taken as a whole, identifies statute law only, not the common law.[19]

19. The content of the "common law in Australia" will, in the ordinary course of events, change from time to time according to the decisions of the courts.[20]

20. Alternatively, the analysis could proceed by reference to the possible application of the Victorian statutory provisions through either s 79(1) or s 68(1) of the Judiciary Act. Section 79(1) provides:

> *The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all case to which they are applicable.*

21. The objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements of which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution.[21]

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18 *Blunden v Commonwealth* (2003) 218 CLR 330 at [28] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

19 *Blunden v Commonwealth* (2003) 218 CLR 330 at [27] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

20 *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). Prior to its amendment in 1988, s 80 referred not to "the common law in Australia", but to "the common law of England".

21 *Northern Territory v GPAO* (1999) 196 CLR 553 at [80] (Gleeson CJ and Gummow J).

22. Section 79(1) is couched in mandatory terms, subject to four limitations. First, the section only operates where there is a court "exercising federal jurisdiction". Second, s 79(1) is addressed to those courts; the laws in question shall be binding upon them. Third, the compulsive effect of the laws in question is limited to "those cases to which they are applicable". Finally, the binding operation of the State laws is "except as otherwise provided by the Constitution or the laws of the Commonwealth".[22]

23. Section 79(1) operates beyond practice and procedure and picks up substantive law.[23]

24. One of the "laws of the Commonwealth" to which s 79 is expressly subjected is s 80 of the Judiciary Act.[24] Section 79 will operate to "pick up" State or Territory laws only to the extent that the statute law of the Commonwealth and the common law in Australia need to be supplemented to enable the matter in issue to be determined.[25]

25. In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*,[26] McHugh J said that courts exercising federal jurisdiction "should operate on the hypothesis that s 79 will apply the substance of any relevant State law in so far as it can be applied". The efficacy of federal jurisdiction "would be seriously impaired if State statutes were held to be inapplicable in federal jurisdiction by reason of their literal terms or verbal distinctions and without reference to their substance".[27]

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22 See *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

23 See *DPP (Cth) v De La Rosa* (2010) 273 ALR 324 at [13] (Allsop P) and the cases cited therein.

24 *Commonwealth v Mewett* (1997) 191 CLR 471 at 522 (Gaudron J), see also Gummow and Kirby JJ at 554; *Blunden v Commonwealth* (2003) 218 CLR 330 at [18] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

25 *Commonwealth v Mewett* (1997) 191 CLR 471 at 522 (Gaudron J), see also Gummow and Kirby JJ at 554.

26 (2001) 204 CLR 559 at [141].

27 (2001) 204 CLR 559 at [141].

26. Section 68(1) of the Judiciary Act provides:

> *The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:*
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> *(a) their summary conviction; and*
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> *(b) their examination and commitment for trial on indictment; and*
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> *(c) their trial and conviction on indictment; and*
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> *(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;*
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> *and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.*

27. Sentencing laws are laws respecting the procedure for trial and conviction on indictment.[28] The purpose of s 68 is to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice, irrespective of whether the State law adopted varies in different States.[29]

28. Ultimately each of ss 80, 79(1) and 68(1) should yield the same result. In particular, the phrases "except as otherwise provided" in s 79(1) and "so far as they are applicable" in s 68(1) have little if any functional difference.[30] The same can be said of the expression "so far as it is applicable and not inconsistent" in s 80.[31]

29. Nothing in s 16A of the Commonwealth Crimes Act prevents any of these provisions operating to apply ss 289(2) and 290(3) of the Criminal Procedure Act to the hearing and determination by a Victorian Court of a Crown appeal in respect of a federal sentence:

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28 *Putland v The Queen* (2004) 218 CLR 174 at [4] (Gleeson CJ), [34] (Gummow and Heydon JJ), [121] (Callinan J); cf [78] (Kirby J).

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

30 *Putland v The Queen* (2004) 218 CLR 174 at [7] (Gleeson CJ), [41] (Gummow and Heydon JJ), [121] (Callinan J); see also at [79] (Kirby J).

31 *DPP (Cth) v De La Rosa* (2010) 273 ALR 324 at [17] (Allsop P).

(1) Each of the requirements of s 80 is satisfied. There is no law of the Commonwealth that has application in relation to the rule against double jeopardy in the hearing and determination of such appeals by a State court. The common law of Australia, in so far as it incorporates the rule against sentencing double jeopardy, has been modified by the statute law in force in Victoria. For the reasons outlined below, s 16A of the Commonwealth Crimes Act is not inconsistent with that modified common law, which is therefore to be applied by the Court of Appeal of Victoria when exercising federal jurisdiction in criminal matters.

(2) Each of the requirements of s 79(1) is also satisfied. Sections 289(2) and 290(3) of the Criminal Procedure Act are laws of Victoria. For the reasons outlined below, s 16A of the Commonwealth Crimes Act does not provide otherwise to ss 289(2) and 290(3), which therefore apply in the Court of Appeal of Victoria when it is exercising federal jurisdiction.

(3) The requirements of s 68(1) are also met. Sections 289(2) and 290(3) are, again for the reasons outlined below, capable of applying consistently with s 16A of the Commonwealth Crimes Act and are therefore "picked up" as "applicable" by s 68(1).

D. Section 16A of the Commonwealth Crimes Act is not "inconsistent" with the Criminal Procedure Act, nor does it "otherwise provide"

30. The appellant submits that the abolition of sentencing double jeopardy effected by ss 289(2) and 290(3) of the Criminal Procedure Act does not apply to the determination of Crown appeals in respect of a federal sentence because s 16A of the Commonwealth Crimes Act incorporates a requirement that Courts determining such appeals have regard to the rule against sentencing double jeopardy.[32]

31. Section 16A is the key provision in Division 2 of Part 1B of the Commonwealth Crimes Act. Division 2 contains the general principles applicable to sentencing of federal offenders. Where a Crown appeal is brought in respect of a sentence

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32 Appellant's submissions, [40].

imposed on a federal offender, these sentencing principles are relevant to the second and third stages of determining the appeal.[33]

32. Section 16A is said by the appellant to require a court determining a Crown appeal against a federal sentence to have regard to the rule against sentencing double jeopardy, by virtue of:[34]

(1) the words "a severity appropriate in all the circumstances of the offence" in s 16A(1);

(2) the opening words of s 16A(2) "In addition to any other matters";

(3) the "combined effect" of the two matters referred to above; and

(4) the requirement in s 16A(2)(m) that the appellate court take into account the "mental condition" of the federal offender.

33. Each of these four matters is examined in turn below.

(1) Section 16A(1): "a severity appropriate in all the circumstances of the offence"

34. Section 16A(1) imposes on a Court sentencing a federal offender the duty, which is its primary obligation, to ensure that the sentence or order imposed on a federal offender "is of a severity appropriate in all the circumstances of the offence".[35]

35. The appellant seeks to give this obligation an expansive content, such that it requires the application of the common law rule against sentencing "double jeopardy". Since s 16A is concerned with sentencing generally and is silent as to any considerations peculiar to re-sentencing, the suggested requirement must emerge by implication. But the very generality of the provision tells against such a specific operation.

36. Section 16A(1) is directed to the appropriateness or proportionality of the sentence to the circumstances of the offence, not to the incorporation of special

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33 *DPP (Cth) v De La Rosa* (2010) 273 ALR 324 at [82]-[83] and [98] (Basten JA).

34 Appellant's submissions, [40].

35 *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 378.

principles in relation to sentencing double jeopardy.[36] The words "of a severity appropriate in all the circumstances of the offence" do not pick up the attitude of restraint adopted by appellate courts in the traditionally unusual circumstance of a Crown appeal against sentence.[37]

37. The appellant's contention[38] that the rule against sentencing double jeopardy is "inextricably linked" to "all the circumstances of the offence", as that phrase is used in s 16A(1), should therefore be rejected. Rather, s 16A leaves it to s 80 of the Judiciary Act to determine the extent to which the common law principles regarding sentencing double jeopardy apply.

(2) Section 16A(2): "In addition to any other matters"

38. Section 16A(2) contains a catalogue of matters to be considered in determining the "severity appropriate in all the circumstances of the offence".[39] Application of the list is mandatory, to the extent that matters included on the list must be taken into account if they are "relevant and known to the court".[40]

39. The list of matters in s 16A(2) has been held not to create "a code of features being the exclusive universe of considerations in sentencing".[41] This is because s 16A(2) was passed against the background of the common law and upon the assumption that common law principles would apply.[42]

40. Section 16A(2) falls well short of enacting the common law principles of double jeopardy in Crown sentence appeals. Apart from the absence of any textual

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36 *DPP (Cth) v De La Rosa* (2010) 273 ALR 324 at [40] (Allsop P). Cf *R v Talbot* [2009] TASSC 107 at [19], disapproved in *De La Rosa* at [35] and *R v Baldock* (2010) 269 ALR 674 at [64] and [118]-[119].

37 *R v Baldock* (2010) 269 ALR 674 at [114] (Buss JA).

38 Appellant's submissions, [40.1].

39 *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 378.

40 *DPP (Cth) v De La Rosa* (2010) 273 ALR 324 at [101]; however, the list was intended to be "reasonably comprehensive": [109] (Basten JA). See also *Hili v The Queen* (2010) 85 ALJR 195 at [40] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

41 *DPP (Cth) v De La Rosa* (2010) 273 ALR 324 at [42] Allsop P.

42 *DPP (Cth) v De La Rosa* (2010) 273 ALR 324 at [43] (Allsop P). See also *Johnson v The Queen* (2004) 78 ALJR 616 at [15] (Gummow, Callinan and Heydon JJ) and *Putland v The Queen* (2004) 218 CLR 174 at [22]-[24] and [53]-[54].

support for that result, the precise identification and operation of those principles was still evolving when s 16A was enacted in 1989.[43]

41. In any event, nothing in the terms of s 16A(2) operates to prevent a State Parliament from modifying (or abolishing) a principle that had previously applied as part of the "milieu of the common law"[44] against which s 16A(2) operated. The "other matters" to which s 16A(2) refers are dynamic, and their content may be (and has been) expanded or contracted by parliamentary intervention. Again, s 16A does not purport to exclude the application of the Judiciary Act in that regard.

10 42. All of the factors specified in s 16A(2) remain relevant to the appellate court's exercise of its resentencing discretion.

(3) The combined effect of (1) and (2) above

43. Given that neither the opening words of s 16A(2) nor the words "of a severity appropriate in all the circumstances of the offence" in s 16A(1), when considered in isolation, incorporate the rule against sentencing double jeopardy, nor can they do so when considered in combination.

(4) Section 16A(2)(m): the "mental condition of the person"

44. Section 16A(2)(m) requires an appellate court to take into account "the character, antecedents, age, means and physical or mental condition of the person", so far as
20 those matters are relevant and known to the court.

45. The scope of the term "mental condition of the person" was the subject of detailed consideration in *DPP (Cth) v De La Rosa*.[45] The New South Wales Court of Criminal Appeal was there required to consider whether the abolition of the rule against sentencing double jeopardy effected by s 68A of the *Crimes (Appeal and*

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43 See generally, *R v JW* (2010) 77 NSWLR 7, Spigelman CJ at [65]-[130], referring among other cases to *R v Tait* (1979) 24 ALR 473 at 476 (Brennan and Deane JJ) and *R v Holder* (1983) 3 NSWLR 245 at 255-256 (Street CJ). See also *DPP v Bright* (2006) 163 A Crim R 538 at 542-543 [10] (Redlich JA), *R v Clarke* [1996] 2 VR 520 at 522-523 (Charles JA, Winneke P and Hayne JA agreeing).

44 See *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 487 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

45 (2010) 273 ALR 324.

Review) Act 2001 (NSW) (the **NSW Act**) was in conflict with s 16A(2)(m) of the Commonwealth Crimes Act. By majority, the Court held that it was not.

46. In undertaking their analysis of s 16A(2)(m), the Court referred to the explanation of the term "double jeopardy", as used in s 68A of the NSW Act, provided by the Court of Criminal Appeal in the earlier case of *R v JW*.[46] Spigelman CJ (with whom Allsop P, McClellan CJ at CL, Howie and Johnson JJ agreed on this point) had said that when used in the context of sentencing, the principle of sentencing double jeopardy encompasses the element of distress and anxiety which a respondent suffers from being exposed to the possibility of a more severe sentence.[47] The effect of s 68A was therefore to remove from consideration the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.[48]

47. A majority[49] of the Court in *De La Rosa* held that the consideration required by s 16A(2)(m) of the Commonwealth Crimes Act of the "mental condition" of a person the subject of a Crown appeal against a federal sentence did not incorporate consideration of the rule against sentencing double jeopardy. This was because sentencing double jeopardy concerned the element of anxiety and distress to which respondents to a Crown appeal are *presumed* to be subject, not any actual anxiety or distress occasioned by the fact that the respondent may be resentenced. Any actual distress or anxiety to which a particular respondent was subject would form part of that respondent's "mental condition" and thus remained a factor the Court was required to consider by s 16A(2)(m). Section 68A of the NSW Act did not preclude any such consideration.

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46 (2010) 77 NSWLR 71.

47 (2010) 77 NSWLR 71 at [54]. His Honour noted that the Crown had withdrawn a submission that a wider range of matters relevant to the exercise of the sentencing discretion fell within the double jeopardy principle: [53]. In *DPP v Karazisis* [2010] VSCA 350 at [83], the Victorian Court of Appeal found it unnecessary to determine whether "double jeopardy" as used in the "essentially indistinguishable" Victorian provisions was of wider import. In this proceeding, the Court of Appeal applied the meaning of "double jeopardy" ascribed by Spigelman CJ to the Victorian provisions: see [2011] VSCA 61 at [87].

48 (2010) 77 NSWLR 7 at [141(ii)]

49 McClellan CJ at CL, Simpson J and Barr AJ.

(1) McClellan CJ at CL[50] emphasised that the principle of sentencing double jeopardy was based on a common law assumption that a person facing sentence for a second time would be distressed and anxious, and this could not be a consideration raised by s 16A(2)(m). However, any actual distress or anxiety would be a subjective consideration of the particular offender's mental condition, which must be considered notwithstanding s 68A.[51]

(2) Simpson J[52] held that there is a significant distinction between a presumption of distress or anxiety (even if drawn from common experience) and an inference available from evidence in a particular proceeding. Her Honour regarded only the former as excluded from consideration by s 68A.[53]

48. In contrast, the minority judges in *De La Rosa* took the view that although s 68A of the NSW Act was directed to the stress and anxiety to which all respondents to a Crown appeal are presumed to be subject, that presumed stress and anxiety formed part of the "mental condition" of the offender, to which s 16A(2)(m) was directed. Allsop P took the view that the presumption was "of the reality of the distress and anxiety".[54] Basten JA said that the term "presumed" was used in *JW* in the sense of a fact inferred from common experience, without necessarily being proved.[55] Both judges emphasised the need to give an expansive reading to a provision such as s 16A(2).[56]

49. The majority approach in *De La Rosa* on this point is to be preferred and the Court of Appeal in the present case was correct to do so.[57] Section 16A(2)(m)

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50 With whom Barr AJ agreed: see (2010) 273 ALR 324 at [315].

51 (2010) 273 ALR 324 at [175]-[176].

52 With whom McClellan CJ at CL and Barr AJ agreed on this point: see (2010) 273 ALR 324 at [180] and [315].

53 (2010) 273 ALR 324 at [276].

54 (2010) 273 ALR 324 at [54].

55 (2010) 273 ALR 324 at [106].

56 (2010) 273 ALR 324 at [49] and [106].

57 See the judgment under appeal: [2011] VSCA 61 at [73] (AB159).

does not require, and never has required, that regard be had to the distress and anxiety that every respondent to a Crown appeal is presumed to suffer. To the contrary, s 16A(2) requires that the matters listed be taken into account if they are "known to the court". That language suggests that reference be made to the actual facts rather than to legal presumptions. Prior to the enactment of the Criminal Procedure Act, presumed distress and anxiety was relevant by virtue of the application to such appeals of the common law of Australia (including the rule against sentencing double jeopardy), which was effected by s 80 of the Judiciary Act. Section 16A(2)(m) directs attention to the actual mental condition of an individual respondent to a Crown appeal. It has nothing to say about the rule against sentencing double jeopardy.

E. Conclusion

50. Sections 289(2) and 290(3) of the Criminal Procedure Act apply in Victorian Courts exercising the federal jurisdiction involved in hearing and determining a Crown appeal in relation to a federal sentence by virtue of s 80, s 79(1) and/or s 68(1) of the Judiciary Act.

51. The appeal should be dismissed.

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