IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M127 of 2011

BETWEEN:

KIEU THI BUI

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS FOR THE COMMONWEALTH OF AUSTRALIA

Respondent

RESPONDENT'S SUBMISSIONS

PART I – CERTIFICATION

1. These submissions are suitable for publication on the internet.

PART II – STATEMENT OF ISSUES

2. Whether the Court of Appeal erred in holding that ss 289(2) and 290(3) of the *Criminal Procedure Act* 2009 (Vic) are picked up and applied as surrogate federal law by virtue of ss 68, 79 or 80 of the *Judiciary Act* 1903 (Cth).

3. In summary, the Respondent contends in relation to the Appellant's issues that the appeal should be dismissed as:

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(1) sections 289(2) and 290(3) of the *Criminal Procedure Act* 2009 (Vic) prevent a court from placing any reliance upon double jeopardy - the presumption that a Respondent is suffering anxiety or distress - in relation to a Crown appeal against sentence;

(2) section 16A(1) of the *Crimes Act* 1914 (Cth) requires a court when sentencing in relation to a Commonwealth offence to *"impose a sentence ... that is of a severity appropriate in all the circumstances of the offence."* Section 16A(2) provides a non exhaustive list of matters which the court must take into account in so far as they *"are relevant and known to the court,"* which is a reference to matters actually existing in a particular case rather than matters which are or may be presumed to exist;

(3) consequently, ss 289(2) and 290(3) of the *Criminal Procedure Act* 2009 (Vic) are not in conflict with s 16A (in particular s 16A(2)(m)) of the *Crimes Act* 1914 (Cth) so as to prevent any of ss 68, 79 and 80 of the *Judiciary Act* 1903 (Cth) from picking up those sections and applying them to a Commonwealth offence.

4. The Court of Appeal followed the majority reasoning in *Director of Public Prosecutions (Cth) v De La Rosa*[1], correctly concluding that ss 289(2) and 290(3) of the *Criminal Procedure Act* 2009 (Vic) are picked up and applied to Commonwealth offences as a surrogate federal law by virtue of ss 68, 79 or 80 of the *Judiciary Act* 1903 (Cth).

5. It is to be noted while the Appellant identifies as an issue (AS [3.1]) the scope and content of ss 289(2) and 290(3) of the *Criminal Procedure Act* 2009 (Vic), that was not in dispute in the Court below and, based on the Appellant's written submissions, appears not to be in dispute now.

6. The Appellant's submissions (AS [3.4]) incorrectly refer to s 72 of the *Judiciary Act* 1903 (Cth) rather than s 79.

PART III – SECTION 78B OF THE *JUDICIARY ACT* 1903

7. The Appellant has filed appropriate notices as required by s 78B of the *Judiciary Act*.

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[1] (2010) 243 FLR 28

PART IV – STATEMENT OF FACTS

8. The facts are accurately set out in the judgment of the Court below (at [3] – [15][81]).

9. There was evidence before the Court of Appeal that the Respondent suffered anxiety and distress as a result of the instigation of the Crown appeal (at [81]). The Court took this evidence into account in considering the exercise of its discretion as to whether, having found error, it ought decline to intervene (at [87][90]) and, having rejected that, in re-sentencing (at [90][93]).

PART V – APPLICABLE PROVISIONS

10. The Appellant's statement of applicable statutes is accepted, save for the further application of ss 68, 79 and 80 of the *Judiciary Act* 1903 (Cth).

PART VI – SUMMARY OF ARGUMENT

11. The Appellant's argument is that s 16A of the *Crimes Act* 1914 (Cth) incorporates the concept of "double jeopardy" in relation to a Crown appeal against a sentence imposed for a Commonwealth offence (AS [40]).

12. Underlying that argument (AS [40][44]) is the proposition that "double jeopardy" as it appears in s 289 and 290 of the *Criminal Procedure Act* 2009 (Vic) is limited to the "*presumed distress and anxiety of the respondent to a Crown appeal having to stand for sentence*" on such appeal.

13. The Court below, relying on the decision of the New South Wales Court of Criminal Appeal in *R v JW* which was interpreting a relevantly similar provision, concluded that the reference to double jeopardy was directed to the removal from consideration of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject (at [78][82] - [87]).[2]

14. It follows that the Appellant contends that s 16A incorporates "*presumed distress and anxiety*" and as a consequence the limitations in ss 68, 79 and 80 of the *Judiciary Act*

[2] *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28 at [174] per McClellan CJ at CL; *R v JW* (2010) 199 A Crim R 486 at [14] per Spigelman CJ. The Victorian Court of Appeal in *DPP v Karazisis* [2010] VSCA 350 at [99] did not consider it necessary to determine whether the term double jeopardy in ss 289 and 290 is to be confined to anxiety and distress or whether it has broader import; and see *DPP (Cth) v Bui* (supra) at [78][86]

1903 (Cth) would prevent ss 289 and 290 of the *Criminal Procedure Act* 2009 (Vic) being picked up and applied as a surrogate Commonwealth law (AS [46]).

15. The Court below correctly rejected that contention (at [72][73]).

Application of the *Judiciary Act* 1903 (Cth)

16. Section 68(2) of the *Judiciary Act* applies to s 287 of the *Criminal Procedure Act* 2009 (Vic) so as to give the Court of Appeal the jurisdiction to hear Crown appeals against sentence in relation to Commonwealth offences.[3]

17. The Court of Appeal correctly concluded that ss 289 and 290 of the *Criminal Procedure Act* 2009 (Vic) are capable of being picked up by the provisions and being applied to Commonwealth offences either by s 68, 79 or 80 of the *Judiciary Act* 1903 (Cth)[4] (at [70][72]). The Western Australian Court of Appeal in *R v Baldock*[5] and the New South Wales Court of Criminal Appeal in *Director of Public Prosecutions (Cth) v De La Rosa*[6] reached the same conclusion in relation to relevantly equivalent provisions.[7]

18. The double jeopardy provisions in Victoria were enacted as a result of a meeting of the Council of Australian Governments (COAG) held in April 2007 at which the various states and territories agreed to implement the recommendations of the Double Jeopardy Law Reform COAG working group. While there are differences in the language adopted in the provisions enacted in various states,[8] relevantly they are indistinguishable in their effect.[9]

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[3] *Peel v The Queen* (1971) 125 CLR 447; *Rohde v The Queen* (1986) 161 CLR 119; *R v LK* (2010) 241 CLR 177

[4] And see *DPP (Cth) v Gregory* [2011] VSCA 145

[5] (2010) 269 ALR 674

[6] (2010) 243 FLR 28 at [162] – [180][274] – [282][315]; and see *R v Todoroski* (2010) 267 ALR 593

[7] While the Appellant refers in the written submission to *R v Talbot* [2009] TASSC 107 (AS [25][26]) it is to be noted that in the application for special leave he acknowledged that he was not pressing the Tasmanian position

[8] NSW: s 68A *Crimes (Appeal and Review) Act* 2001 "*68A Double jeopardy not to be take into account in prosecution appeals against sentence (1) An appeal court must not: (a) dismiss a prosecution appeal against sentence, or (b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate, because of any element of double jeopardy involved in the respondent being sentenced again*" WA: *Criminal Appeals Act* 2004 "*41 Sentencing or resentencing on appeal (1) ..(2)... (3)... (4) the appeal court deciding an appeal that does or may require it to impose a sentence, or to vary a sentence imposed, on a person for an offence (whether the appeal was commenced by the person or by the prosecutor) – (a) may take into account any matter, including any material change to the person's circumstances, relevant to the sentence that has occurred between when the lower court dealt with the person and when the appeal is heard; but (b) despite paragraph (a), must not take into account the fact that the court's decision may mean that the person is again to be sentenced for the offence (5)...*"

[9] *DPP v Karazisis* (supra) at [83]; *R v JW* (supra) at [131][132]

19. A law of a State providing for relevant considerations in sentencing cannot, of its own force, have anything to say about sentencing for an offence created by a law of the Commonwealth Parliament.[10] A court sentencing a person for an offence created by Commonwealth law looks to law provided by the Constitution and the Commonwealth, not to State law operating of its own force, in order to undertake its task. State legislation and the common law are made relevant and applicable by the operation of sections 68, 79 and 80 of the *Judiciary Act* 1903 (Cth).[11]

20. The double jeopardy provisions are not construed as operating by their own force to sentencing for Commonwealth criminal offences.[12] On the contrary, the double jeopardy provisions, if they apply, apply as surrogate federal law. It is the provisions of the *Judiciary Act* which will govern whether the State law is "picked up". Those provisions also contain their own internal exclusion of State laws where a law of the Commonwealth otherwise provides.

21. Prior to the enactment of the various provisions removing "double jeopardy" it had never been questioned that double jeopardy applied to Commonwealth Crown appeals against sentence, by virtue of s 80 of the *Judiciary Act* 1903 (Cth) (at [67][68]).[13] As concluded by the Court below (at [68]), the preconditions[14] in s 80 are met in respect of the common law concept of double jeopardy because Commonwealth legislation (including Part 1B of the *Crimes Act* 1914) does not deal with the approach to be taken by a Court of Appeal in relation to a Crown appeal on sentence.

22. Section 80 allows for modification of the common law "*by the statute law in force in the State.*" The double jeopardy provisions constitute such a modification, and therefore operate to exclude the double jeopardy principle in Commonwealth appeals (at [69] – [71]). That conclusion was also reached in *R v Baldock*[15] and *Director of Public Prosecutions (Cth) v De La Rosa*[16].

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[10] *Hili v The Queen; Jones v The Queen* (2010) 85 ALJR 195 at [21]
[11] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [31] per Allsop P, *R v Todoroski* (supra)
[12] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [31]-[34] per Allsop P
[13] *R v Baldock* (supra) at [63][111] ; *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [16][24]
[14] Namely, that the laws of the Commonwealth are not applicable or their provisions are insufficient to carry them into effect or to provide adequate remedies or punishment.
[15] (2010) 269 ALR 674
[16] (2010) 243 FLR 28

23. If section 80 does not operate in the manner contended for by the Respondent, it follows that the double jeopardy principle should never have been applied to Commonwealth Crown appeals.

24. Alternatively, ss 68 and/or 79 of the *Judiciary Act 1903* operate in such a manner that the double jeopardy provisions are applicable to Commonwealth Crown appeals as surrogate federal law. The reference to "*... and the procedure for... the hearing and determination of appeals* ..." in s 68(1) encompasses all relevant laws which the Court might apply in order to hear and determine a Crown appeal against sentence.[17]

25. Regardless of whether s 68(1) picks up and applies the double jeopardy provisions, s 79(1) of the *Judiciary Act* has that effect. That section is not confined to simply picking up the State laws of procedure, evidence and competency of witnesses. The categories of laws that are mentioned in s 79(1) are illustrative only. They are not exclusive. The ambit of s 79(1) is far wider. It operates to apply the laws of the State to courts exercising federal jurisdiction in that State "*in all cases to which they are applicable*", unless otherwise provided for in the Constitution or other laws of the Commonwealth. Given that the State appeal procedures apply to the Commonwealth, it is submitted that the double jeopardy provisions, which are provisions which affect the manner in which the appeals are decided, are also applicable.

Section 16A of the Crimes Act 1914

26. The focus of the Appellant's argument is that ss 289(2) and 290(3) of the *Criminal Procedure Act* 2009 (Vic) were not picked up by the *Judiciary Act* because s 16A of the *Crimes Act* 1914 (AS [46]) '*otherwise provided*'.[18] That argument is dependent on s 16A incorporating the concept of double jeopardy. On the Appellant's argument, as noted above (at [12] – [14]), that is that s 16A incorporates presumed anxiety and distress in the context of a Crown appeal.

27. The Appellant's submission simply asserts without reference to any authority (AS [40]) that the terms of s 16A(1) and s 16A(2) are broad enough to encompass "double jeopardy" (AS [40.1] – [40.3]) and/or that it is known to the court that a Crown appeal gives rise to presumed distress and anxiety and that is encompassed in s 16A(2)(m) which requires a court to take into account the "*mental condition of the person*".

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[17] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [10][11][24][87][90]

[18] This phrase, used in s 79, has "*little, if any, functional difference*" to the phrase "*so far as they are applicable*" in s 68(1): *Putland v R* (2004) 218 CLR 174 at [7] per Gleeson CJ.

28. Significantly the Appellant has not advanced any argument nor pointed to any error in relation to the reasoning of the Court below (or those authorities on which it relied). Nor has he addressed the distinction between actual and presumed effect.

29. Further, the Appellant has conflated the different stages in a Crown appeal addressed by ss 289(2) and 290(3). Section 289(2) addresses the issue of whether an appeal is to be allowed; preventing an appellate court exercising its discretion not to intervene on the basis of presumed anxiety or distress. Section 290(3) addresses the re-sentencing stage; preventing an appellate court from reducing an otherwise appropriate sentence on the basis of presumed anxiety.[19]

10 30. Section 16A addresses matters to be taken into account in imposing sentence only. It does not address any issue of appellate intervention. Consequently, s 289(2) could be picked up by the *Judiciary Act*. The issue in this appeal is limited to the application of double jeopardy provisions to the resentencing stage (s 290(3) of the Victorian legislation).

31. Section 16A(1) relevantly states that *"in determining the sentence to be passed .... a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence."* The section is directed to the appropriateness of the sentence and its severity *"in all the circumstances of the offence"*[20] which is to be contrasted with the circumstances of the offender. Section 16A(1) has no application
20 to the issue of double jeopardy. In the context of appeals in respect of federal offences, double jeopardy has been taken into account in the resentencing stage because of the operation of s 80 of the *Judiciary Act*, rather than under s 16A(1).

32. Section 16A(2), prescribes a non exhaustive list of matters which must be taken into account in sentencing in so far as they *"are relevant and known to the court."*[21] Contrary to the Appellant's contention (AS [40.2]), the introductory words to that section, *"in addition to any other matters"* are not apt to encompass double jeopardy. The *"other matters"* to be taken into account must be *"relevant and known to the court,"* that is *"known"* in the specific case.

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[19] *R v JW* (supra) at [14]; *Director of Public Prosecutions v De La Rosa* (supra) at [174]
[20] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [40] per Allsop P
[21] *Hili v The Queen, Jones v The Queen* (supra) at [24][25]

33. Similarly, the Appellant's reliance on s 16A(2)(m) is misplaced. That issue was specifically addressed in *Director of Public Prosecutions (Cth) v De La Rosa*[22] and the reasoning of the majority is compelling. That reasoning was correctly followed by the Court below and in *DPP (Cth) v Gregory*[23], *R v Van Loi Nguyen*[24], *R v Nguyen; R v Pham*[25] and *Regina v Nikolovska*[26].

34. The common law presumption inherent in the double jeopardy principle is not a consideration raised by s 16A(2)(m).[27] Presumed distress and anxiety to a respondent to a Crown appeal is not a "*mental condition of the person*" relevant and known to the court.[28] The Appellant (AS [40.4]) relies on the minority judgments of Allsop P[29] and Basten JA[30] in *De La Rosa* and submits that the stress and anxiety presumed to be suffered by all respondents to a Crown appeal is part of the "mental condition" of the person; therefore, the double jeopardy provisions are contrary to, and impliedly repeal in particular s 16A(2)(m), "*removing from the Court's consideration a part of the person's mental condition, even if it only be presumed by the common law to exist.*"[31]

35. It is submitted that the reasoning of the majority is to be preferred. It is the presumed nature of the distress and anxiety that is central to the *Criminal Procedure Act* 2009 (Vic) provisions.[32] Although Allsop P regarded that "*as a presumption of the reality*" of the distress and anxiety;[33] as Simpson J correctly recognised, that is not necessarily so.[34] Her Honour correctly observed that "*That may not invariably have been the case. Where it was, the principle that came to be called double jeopardy meant that it was unnecessary for evidence to be given to that effect. Where it was not, the offender benefited from a presumption of fact that was not, in reality, warranted.*"[35] The approach adopted in the minority judgment and contended for by the Appellant, does not address that consequence. Rather it perpetuates an approach whereby a specific factor is to be taken into account in re-sentencing on all Crown appeals in relation to

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[22] (2010) 243 FLR 28
[23] [2011] VSCA 145 at [45]
[24] [2010] NSWCCA 226 at [66] per Barr AJ; Beazley JA and Buddin J agreeing
[25] [2010] NSWCCA 238 at [12],[122]-[123] per Johnson J; Macfarlan JA, Hulme J agreeing
[26] [2010] NSWCCA 169 at [30],[98]-[100], per Kirby J; Beazley JA, Johnson J agreeing
[27] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [176] per McClellan CJ at CL
[28] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [176] per McClellan CJ at CL
[29] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [52]
[30] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [104] – [106]
[31] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [52]-[53] per Allsop P
[32] *R v JW* (2010) 199 A Crim R 486.
[33] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [54] per Allsop P
[34] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [277] - [278] per Simpson J
[35] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [278]

Commonwealth offences regardless of whether that factor is actually relevant in the circumstances of the case.

36. The approach also ignores that even where there is evidence of actual anxiety and distress, the weight to be accorded to that factor will vary from case to case depending on the evidence and the circumstances of the particular case.[36]

37. The consequence of the interpretation contended for by the Appellant is that in relation to sentencing on a Crown appeal, the sentence imposed would necessarily be toward the lower end of the range available than would otherwise be considered appropriate on the basis of presumed anxiety and distress (AS [20]).[37]

10 38. Those consequences are starkly illustrated in this case. As noted above (at [9]) in the Court below there was evidence of actual anxiety and distress suffered by the Respondent as a result of the instigation of the Crown appeal which was taken into account at the stages of whether to intervene and in re-sentencing. Appropriately taking that factor into account, together with other factors relevant and known to the Court, it intervened and re-sentenced the Respondent. The Appellant contends that if double jeopardy were taken into account, namely presumed anxiety and distress, the Crown appeal would have been dismissed (AS [48]) or a sentence imposed at the lower end of the range (AS [20]) even though her actual anxiety and distress, together with other factors, did not warrant that conclusion.

20 39. It is submitted that the consequence of the Appellant's argument is inconsistent with the injunction in s 16A that the court must "*impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*".[38] Section 16A does not permit making generalisations across categories of Commonwealth offences about how individual sentences are to be fixed. It requires the court to take into account all the relevant matters known to the court and determining a sentence appropriate in the particular circumstances of that case.[39]

40. Section 290 of the *Criminal Procedure Act* 2009 (Vic) places a respondent to a Crown appeal in the same position as the offender being sentenced for the first time.[40] There is no presumption of distress and anxiety in respect of sentencing at first instance.

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[36] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [280]
[37] *R v JW* (supra) at [96][97]
[38] *Hili v The Queen; Jones v The Queen* (supra) at [25]
[39] *Markarian v The Queen* (2005) 228 CLR 357 at [51]; *Muldrock v The Queen* [2011] HCA 39 at [26]
[40] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [281] per Simpson J at [24][25]

Nevertheless evidence of distress and anxiety may be relevant.[41] That is, any distress and anxiety "*relevant and known to the court,*" forming part of the offender's mental condition, must be taken into account. This approach acknowledges that there is a distinction between the distress and anxiety in facing sentence for the first time and the additional distress and anxiety caused by the possibility of a harsher sentence on appeal.[42]

41. When sentencing an offender, all aspects of a person's mental health or mental capacity before the court must be considered as they form part of the relevant subjective circumstances.[43]

10 42. While the matters listed in s 16A(2) do not require formal proof,[44] there must be some material from which it can be known rather than merely assumed.[45]

43. The Appellant's submission (AS [41][42]) that "*mental condition*" in s16A(2)(m) should be interpreted broadly does not advance his argument. It does not address or overcome the issue of actual versus presumed anxiety and distress. Contrary to the Appellant's contention, adopting a wide interpretation does not lead to any relevant inconsistency. Although the application of s 16A(2)(m) does not require some diagnosable clinical state,[46] there must nevertheless be some evidence relating to "mental condition"; it must be an actual mental condition "*relevant and known to the court*".[47]

20 44. The provisions of the *Criminal Procedure Act* 2009 (Vic) do not exclude from consideration any evidence of a respondent's mental condition, even if that mental condition includes the distress and anxiety actually occasioned by the institution of the Crown appeal.[48] There is a significant distinction between a presumption of fact and evidence of the existence of a fact. Only the former is excluded by the double jeopardy provisions.[49]

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[41] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [280] per Simpson J
[42] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [173] per McClellan CJ at CL; *R v JW* (supra) at [51] per Spigelman CJ
[43] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [171] per McClellan CJ at CL; *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370
[44] *Weininger v The Queen* (2003) 212 CLR 629 at [21] per Gleeson CJ, Gummow, McHugh & Hayne JJ
[45] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [176] per McClellan CJ at CL
[46] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [49] per Allsop P
[47] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [176][279]
[48] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [275],[279] per Simpson J
[49] *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [276] per Simpson J

45. It is submitted that the Respondent's interpretation of the relevant provisions is consistent with the terms of s 16A which ensures that, taking into account all matters relevant to the offence and the offender which are relevant and known to the court, a sentence is imposed which is of a severity appropriate to the offence.[50]

46. It is to be noted, as recognised by the Court below (at [76] – [87]), that the double jeopardy provisions remove from consideration at the stages of intervention and re-sentencing, the anxiety and distress which all respondents in a Crown appeal are presumed to have suffered. There remains a residual discretion in the Court to decline to intervene.[51]

47. The double jeopardy provisions do not purport to remove a consideration that is mandated by s 16A(2)(m). The interpretation of "mental condition" by the majority in *De La Rosa* in s 16A(2)(m) is correct. Section 16A of the *Crimes Act* 1914 (Cth) is a Commonwealth law which does not provide otherwise, so that ss 289 and 290 of the *Criminal Procedure Act* 2009 (Vic) are picked up by s 68 (or ss 79 or 80) of the *Judiciary Act* 1903 (Cth).

48. The conclusion of the Court below is correct.

Conclusion

49. The appeal should be dismissed.

50. If the appeal is allowed, the appropriate order would be for the matter to be remitted to the Victorian Court of Appeal for consideration according to law.

Dated 21 October 2011

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[50] *Hili v The Queen, Jones v The Queen* (supra) at [35]; *Muldrock v The Queen* (supra) at [26]; *Markarian v The Queen* (supra) at [51]

[51] and see *DPP v Karazisis* (supra) at [99] – [115]; *Director of Public Prosecutions (Cth) v De La Rosa* (supra) at [175][275] – [281]; *R v JW* (supra) at [95][146]