PARTIES:	MARGARET NALYIRRI WYNBYNE
	v
	ADRIAN ARTHUR MARSHALL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT
FILE NO:	JA 80 of 1997 (9711013)
DELIVERED:	26 SEPTEMBER 1997
HEARING DATES:	19 & 20 AUGUST 1997
JUDGMENT OF:	MARTIN CJ, MILDREN AND BAILEY JJ

REPRESENTATION:

Counsel:

Appellant:	C McDonald Q.C., P McNab
Respondent:	T Riley Q.C., M Carey
Attorney-General for the N.T. (intervening):	D Jackson Q.C.; S Southwood
Attorney-General for W.A. (intervening):	J Meadows Q.C., J Thomson

Solicitors:

Appellant:	K.R.A.L.A.S.
Respondent:	Solicitor for the N.T.
Attorney-General for the N.T.:	Solicitor for the N.T.
Attorney-General for W.A.:	Solicitor for the N.T. as Town Agent for the Crown Solicitor

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA80 of 1997 (9711013)

IN THE MATTER OF AN APPEAL
UNDER THE *JUSTICES ACT*

BETWEEN:

MARGARET NALYIRRI WYNBYNE

Appellant

AND:

ADRIAN ARTHUR MARSHALL
Respondent

CORAM: MARTIN CJ, MILDREN AND BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 26 September 1997)

MARTIN CJ

The central issue in this appeal is whether his Honour the Administrator can validly assent to a law imposing a duty on the courts, after a finding of guilt of certain offences, to record a conviction and impose a sentence of imprisonment, when the assent has purportedly been given under s7(2)(a) of the *Northern Territory (Self Government) Act* (Cth) 1978 ("the Act"). The term of the imprisonment to be imposed is bound by a minimum ascertained by reference to

factors set out in the legislation, and the maximum fixed by provisions of the kind commonly experienced.

But between the two extremes, the courts are unfettered as to the discretion which may be exercised regarding the appropriate term. The term may not be suspended wholly or in part, nor may the court fix a period prior to which the prisoner will not be eligible to be released on parole (*Trenerry v Bradley*, Full Court of the Supreme Court of the Northern Territory, unreported 20 June 1997).

Details of the legislation and facts and circumstances giving rise to the appeal are set out in the reasons for judgment of Mildren J. and I need not repeat them. I agree with the orders proposed. However, since my reasons appear to diverge from his in some respects, it is better that I express them, albeit briefly.

In *Wake v The Northern Territory of Australia and Ors* (1996) 5 NTLR 170, the Full Court at pp177-178 dealt with the power of the Legislative Assembly to make laws for the peace, order and good government of the Territory. It is a plenary power (*Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at p10; *Capital Duplicators Pty Ltd and Anor v Australian Capital Territory & Anor* (1992) 177 CLR 248 at pp281-282 and *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279). In the judgment of Martin CJ. and Mildren J. it was noted that there was no authority to support the suggestion that legislative power is subject to some other restraints by reference "to rights deeply rooted in our democratic system of government and the common law" (*Union Steamship Co of Australia Pty Ltd v King*). There has been no authority

along those lines in the meantime. The power is subject to the Commonwealth Constitution, and the Act itself, for example, the requirement for the assent of the Administrator or the Governor-General ss6, 7 and 8. In this case it is an agreed fact that it was his Honour who assented to the legislation upon the basis of advice to him that it was a proposed law making provision only in respect of a matter specified in the Regulations under s35 of the Act. In so far as it is suggested that the legislation here in question affects any abrogation of fundamental rights, then as in *Wake*, the language is clear and unambiguous and thus such an abrogation is within the legislative competence of the Territory Parliament (*Coco v The Queen* (1994) 179 CLR 427 at 437). In *Wake* at p184 it was said that there was no valid reason for reading down the width of the authority contained in subr4(1) "by distinguishing between the words "in respect of" appearing therein and the words "with respect to" appearing in s51 of the Commonwealth Constitution". It was in that context that the majority said that what was required in considering heads of authority under subr4(1) is a "relevance to or connection with a subject matter assigned" or a "substantial connection" between the law and the relevant head of power.

The question is whether the impugned law is for the peace, order and good government of the Territory in respect of a matter specified in the Regulations. In approaching that task, I consider that the law in relation to the validity of legislation enacted by the Commonwealth Parliament for the peace, order and good government of the Commonwealth with respect to the subjects set out in s51 of the Constitution may be applied by analogy. Accordingly, the Territory law is within power "if the acts, facts, matters or things upon which it operates

fall within the description of one or more of the heads of power" per Dawson J. in *Leask v The Commonwealth* (1996) 70 ALJR 995, and the reference to the observations of McHugh J. in *Re Dingjan; Ex parte Wagner & Anor* (1995) 183 CLR 323 at 368-369. See also the discussion and the authorities referred by Brennan J. in *Cunliffe & Anor v The Commonwealth of Australia* (1993-1994) 182 CLR 272 at 314-315. The law challenged in these proceedings prescribes a set of circumstances in which the courts are required to convict and sentence a particular class of criminal offender to imprisonment for a minimum term. It deprives the courts of a range of discretionary powers otherwise available (see the *Sentencing Act* (NT) 1995 s7). The circumstances invoking the conviction and sentence are a finding of guilt, in respect of which the courts' functions are not impaired, and the number of times upon which the offender has been before found guilty of any of the prescribed offences.

In its operation the law will be harsher on some offenders than the law prior to its enactment. In so far as the minimum term is required to be imposed, it does not discriminate in relation to many matters relevant to sentencing, such as the value of the goods stolen or damaged, the circumstances in which the offence is committed or the circumstances of the offender. The intention of the Parliament is clear. It imposes a duty on the courts, and, in my opinion, the duty here imposed is within the competence of Parliament. That proposition is firmly established in Australia by the decision of the High Court in *Palling v Corfield* (1970) 123 CLR 52. There is nothing in the reasons for the decision in that case that would indicate that they were in any way dependent upon the nature of the legislation there in question. Barwick CJ. at p58:

> "It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute."

See also Menzies J. at p64-65, Owen J. at p67 and Walsh J. at p68. Windeyer J. and Gibbs J. agreed with the other members of the court.

This is a law in respect of courts including the procedure of courts, a matter specified in the Regulations. The legislation simultaneously negates jurisdiction previously conferred by the Parliament on courts and imposes a jurisdiction which the courts did not previously have in relation to property offences, that is, to inflict a sentence of imprisonment where it might not be otherwise warranted. But there is nothing unusual about a Parliament imposing a duty on courts to impose a particular penalty in prescribed circumstances. It is not unique to the Northern Territory.

In my opinion this legislation rests upon a "non-purposive" power in so far as it is connected with "Courts", but to say that the law is in respect of courts is not to assert that it is only in respect of courts. There can be no objection to the law on that ground.

As Stephen J. said in *Actors and Announcers Equity Association of Australia and Others v Fontana Films Pty Ltd* (1981-1982) 150 CLR 169 at 192:

> "To recognize that a law may possess a number of quite disparate characters is, then, to accept reality. Few laws will involve only one element. Even the simplest form of law will commonly contain two elements when it forbids, regulates or mandates particular conduct on the part of a particular class of person ... Many laws will, because of the relatively complex concepts to which they give effect, involve still further elements. These elements may, of course, all bear one and the same character. However, where they do not, any search for a single character by which to describe the law is likely to prove fruitless.
>
> Were constitutional dogma to require such a search to be pursued, the difficulty in choosing between competing elements might readily lead different minds, perhaps influenced by quite subjective considerations, to varying conclusions as to the dominant character of a law. But to accept as constitutionally permissible the fact that a law may bear several characters, each as valid as the other because each is reasonably capable of fairly describing the law as a whole, disposes of the need to rely upon what may prove to be quite subjective reasons for selecting one particular description only. With the disappearance of subjective criteria, the process of characterization then becomes less uncertain and more a matter of logic than of idiosyncratic assertion."

It seems to me that this law is also in respect of "maintenance of law and order and the administration of justice". It is not correct to say that to be valid a law under this heading must be a law which falls within the phrase as a whole. A law which falls to be considered either as in respect of the "maintenance of law and order" or in respect of "the administration of justice" would be valid notwithstanding that it did not touch upon the other. There is no necessity to endeavour to identify with any degree of precision what law or laws may be said

to be in respect of the maintenance of law and order. In my opinion the law in respect of maintenance of law and order is purposive. It is a head of power which is to be employed to fulfil a purpose. In such a case it is suggested in *Leask* by Brennan J. at p999 that: "... the existence of a connection may be determined more easily by comparing the purpose of the law and the purpose of the power"; Dawson J. at p1007 "... a court must ask whether it is a law for the specified purpose, and the court may have to inquire into whether the law goes further than is necessary to achieve that purpose. That is an exercise in proportionality". Toohey J. at p1012 indicated that he did not accept those views saying: "... the place of reasonable proportionality in the characterisation of a law is where there is a tension between two operative principles", adding at p1013 that: "If reasonable proportionality were to become a general touchstone of constitutional power, the Court would be drawn inexorably into areas of policy and of value judgments". McHugh J. at p1013 said that: "If there is a sufficient connection between a subject of federal power and the subject matter of a federal law, it matters not that the federal law is harsh, oppressive, or inappropriate or that it is disproportionate or ill adapted to obtain the legislative purpose." His Honour would not appear to have distinguished between purposive and non-purposive powers; similarly, Gummow J. does not appear to venture upon the ground of the test of validity to be applied in relation to what is described as a purposive power, there was no need to do so. Kirby J. at p1024 remarked that the proportionality test "has not enjoyed universal favour" but adds that

"Distinctions have been drawn (repeated in this case) between the value of the concept in cases where the constitutional power is conferred in purposive terms, cases where the power is expressed as restricted by a limitation and other cases".

Adopting for these purposes the test propounded by Dawson J. at p1007, I answer the question whether this law is for the maintenance of law and order, yes. I do not think it necessary to enquire into whether the law goes further than is necessary to achieve that purpose. It is a question not capable of being answered by the court in these proceedings. Penalising offenders is undoubtedly an instrument for the maintenance of law and order. Punishment is generally regarded as being fixed by the courts with reference to a number of factors, including retribution, deterrence, both personal and general, and rehabilitation, all with the ultimate objective of protecting the community. It cannot be maintained that the statutory scheme requiring compulsory imprisonment will not operate so as to deter those first tempted to commit a property offence from committing it, nor that it will not deter a person once or more punished for such an offence from doing the same again. Thus it cannot be maintained that the law is not a law for the maintenance for law and order.

MILDREN J:

This is an appeal against sentence pursuant to the provisions of the *Justices Act*.

On 27 June 1997 in the Katherine Court of Summary Jurisdiction, the appellant pleaded guilty to one charge that she unlawfully entered the Wanda Inn at Top Springs with intent to commit an offence, mainly, to steal contrary to s213 of the *Criminal Code* and to one charge that she did steal a can of Victoria Bitter beer valued at $2.50, contrary to s210 of the *Criminal Code*.

The facts as accepted by the learned Magistrate were that on the morning of Thursday the 13th of March 1997, the appellant and two co-offenders, Rita Danby and Michael Wynbyne, went to the Wanda Inn at Top Springs. One of the co-offenders used a metal bar to make a hole in the side entrance doorway to the bar area, before reaching in and unlocking the door. All three persons then entered the premises. Rita Danby removed a can of Victoria Bitter beer from a refrigerator. On hearing a dog barking, the appellant, having become frightened of the dog, left the premises and sat outside nearby whilst Danby and Michael Wynbyne remained inside.

The co-offenders were discovered by the licensee who locked them in a toilet. Subsequently the appellant returned to the premises and she also was detained by the licensee and locked in the toilet. When the police arrived, due to her apparent intoxication, the appellant was taken into protective custody pursuant to the provisions of s137 of the *Police Administration Act*. She was conveyed to the Kalkaringi Police Station and there placed in the cells.

Later that morning, the appellant, having spoken with police, was charged and subsequently bailed for these offences. The property damage was estimated at $80 and restitution was sought against the appellant in the sum of $28, which she paid.

The appellant was born on the 18th of April 1974 and was 23 years of age at the time of the offences. She lived and worked at Kalkaringi which is a settlement some 763 kilometres by road from Darwin, in the Victoria River district. She was employed at the Kalkaringi Women's Centre and had been so employed since she left school. She was single, although she had a two year old son in respect of whom she was the primary care-giver. She was born in Kalkaringi and had lived there all her life. Her first language is Gurindji, English being very much a second language. The co-offender, Michael Wynbyne, is one of her older siblings.

The appellant was educated at the Kalkaringi School to year 6/7 and she then went to Yirrara College for one year. She returned to Kalkaringi at the age of eighteen and had since then been employed by the women's centre. Her employment was organised through the CDEP Scheme. She received $285 per fortnight. The appellant had no prior convictions and did not normally consume alcohol. The offence on this occasion occurred in the context of her having been drinking in the vicinity of the Wanda Inn with relatives and immediate family.

A report from the Council Clerk of the Daguragu Community Development Council was tendered in support of her claim to be a person of good character and in support of her work history, which His Worship accepted.

On the 1st of July 1996 the *Sentencing Act 1995* came into operation (the principal Act). The principal Act consolidated the law relating to the sentencing of offenders in the Northern Territory and provided for a number of sentencing guidelines (s5) and sentencing options (s7). In general terms, the principal Act may be said to reflect sentencing principles which have been developed by the courts over many years. In addition, provision was made for a number of new sentencing options not previously available to the courts. S7 of the principal Act empowered courts, upon a finding of guilt, and subject to any other specific provision relating to the offence, to impose what are described as "sentencing orders" ranging from, at one end of the scale, ordering the dismissal of the charge without recording a conviction, to recording a conviction and ordering that the offender serve a term of imprisonment at the other. S5 of the principal Act did not seek to interfere in any way with the traditional judicial discretion which courts in this Territory have enjoyed in imposing sentence. Indeed s5(1)(a) specifically provided that "The only purposes for which sentences may be imposed on an offender are - (a) to punish the offender to an extent or in a way that is just in all of the circumstances;".

The *Sentencing Amendment Act No. 2. 1996*, (the amending Act) was introduced in the Legislative Assembly on the 13th of August 1996 as a draft bill some seven weeks after the commencement of the principal Act. The amending

Act was assented to on the 31st of December 1996 and came into operation on the 8th of March 1997. The amending Act inserts after Division 5 of Part 3 of the principal Act, a new Division 6 which provides for compulsory imprisonment for certain defined property offences, and for punitive work orders.

S78A(1) provides:

> "Where a courts finds an offender guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days."

In *Trennery v Bradley* (unreported, 20th June 1997) a Full Court of this Court unanimously held that on the true construction of s78A and s78B of the amending Act a court is precluded from making orders wholly or partially suspending a term of imprisonment ordered to be served under s78A or from imposing a home detention order. The majority of the Court (Martin CJ and Angel J) further held that the effect of these provisions was to prevent a court from exercising those powers regardless of the length of the sentence ordered, and that if a court were to impose a sentence of 12 months or more in circumstances where the principal Act would otherwise require the court to fix a non-parole period, no non-parole period may be fixed.

In *Trennery v Bradley* the constitutional validity of the amending Act was not called into question.

It was conceded before the learned Magistrate and before us that both of the offences in respect of which the appellant had pleaded guilty were property

offences as defined, and that if s78A(1) was valid, the learned Magistrate had no alternative but to record a conviction and impose a minimum sentence of not less than 14 days imprisonment. However, counsel for the appellant submitted to the learned Magistrate that the provisions of s78A were invalid and requested the learned Magistrate to state a special case to the Supreme Court pursuant to s162(1) of the *Justices Act*. The proposed stated case challenges the validity of s78A. After hearing submissions from counsel, His Worship declined to state a special case. Subsequently His Worship heard further submissions in relation to penalty. His Worship observed that had the offences been committed before the 8th of March 1997 it was likely that he would have imposed non-custodial sentences. His Worship then convicted the appellant on both counts and sentenced the appellant to 14 days imprisonment on each count to be served concurrently. From this decision, the appellant has appealed to this court. Pursuant to s21(1) of the *Supreme Court Act* the appeal has been referred to the Full Court.

The grounds of appeal relied upon by the appellant are as follows:

"1 That the learned Magistrate erred in law by finding that the Sentencing Amendment Act (No. 2) 1996 ("the Act") and in particular s78A thereof was valid under the Northern Territory (Self-government) Act 1978 (Commonwealth) and the Regulations made thereunder.

2 The learned Magistrate erred in law by finding that the *Act* and, in particular s78A thereof was valid and operative notwithstanding the operation and effect of the Judiciary Act 1903 (Commonwealth).

3 The learned Magistrate erred in law in sentencing the appellant to 14 days mandatory imprisonment, because the Act, in particular s78A thereof was invalid or inoperative.

4 The learned Magistrate erred in law in the exercise of his discretion in refusing to reserve a question of law and to state a special case for the opinion of the Supreme Court under s162 of the Justice Act (NT) in respect of all or of any of the questions of law specified in the draft special case which was before him in the proceedings."

The relevant provisions of the amending Act have been set out and discussed in two previous decisions of this court, namely *Trennery v Bradley* (supra), and *McMillan v Pryce* (unreported 20th of June 1997) and it is unnecessary to repeat the analysis made of the relevant provisions in those judgments.

Ground 1 of the Appeal

The threshold question raised by this ground of the appeal is whether the amending Act, and in particular s78A thereof, is a law making provision only for or in relation to a matter specified under s35 of the *Northern Territory (Self-Government) Act 1978* of the Commonwealth. The appellant's submission is that the Administrator of the Northern Territory did not validly assent to the amending Act because he did so pursuant to s7(2)(a) of the *Self-Government Act*; that this was only lawful if the proposed law made provision only for or in relation to a matter specified under s35 of the *Self-Government Act*, and there was no matter specified under s35 of the *Self-Government Act* in respect of which the amending Act made provision. The legislative background to this argument was the same as that discussed in *Wake and Gondarra v Northern Territory of*

Australia and Another (1996) 5 NTLR 170 at 179-181. As was said in that case at p181:

> "The first critical question therefore is whether the Act is only for or in relation to one or more of the matters set out in reg 4(1) of the *Self-Government Regulations*. If it is, the assent was validly given. If it is not, other considerations arise."

Counsel for the appellant, Mr McDonald Q.C. submitted that this question should be answered in the negative. Counsel for the Attorney-General for the Northern Territory, Mr Jackson Q.C., and for the respondent, Mr Riley Q.C. submitted that the relevant provisions of the amending Act were validly assented to because they had a relevance, to or connection with three heads of power set out in reg 4(1) of the regulations, namely "Maintenance of law and order and the administration of justice", "Courts (including the procedures of the courts ...)" and "Correctional services".

In my opinion the principal purpose of s78A(1) is to require courts, upon reaching a finding of guilt in respect of a certain defined types of property offences, to both proceed to conviction and as well to impose a minimum sentence of imprisonment of not less than 14 days to the exclusion of any other lesser sentencing order. In *Wake* (supra, at 182, 185-6) all members of the Court were of the view that a law which proscribes conduct and makes it criminal is a law in relation to or in respect of the maintenance of law and order. It was submitted on behalf of the appellant that the expression "Maintenance of law and order and the administration of justice" is a composite phrase and that therefore the proposed law must have a relevance or substantial connection to both of the

composite elements of the phrase. That submission is not open in the light of the reasoning in *Wake*. Moreover I do not consider that the word "and" should be given the construction contended for by the appellant. Sub-regulation 4(3) of the *Northern Territory (Self-Government) Regulations* provides that "subject to sub-regulations (2) and (4), the inclusion of any matter in sub-regulation (1) (whether with another matter or a separate matter) does not derogate from or affect the generality of any other matter specified in that sub-regulation". I accept the submission of Mr Jackson Q.C. that the words in parenthesis indicate that matters may be grouped together without derogating from or affecting the generality of any other matter specified in the group. There is also a further difficulty with the appellant's argument. As Mr Jackson Q.C. submitted, if a similar approach were to be adopted with other heads of power such as "flora and fauna" and "estates and trusts," it would be necessary, for a law to be validly given assent, for the law to be for or in relation to both flora and fauna, or both estates and trusts. Such an approach would seem extremely unlikely. In any event, Mr Jackson Q.C. submitted that a law imposing a mandatory minimum penalty fell within both heads, whether they are to be read as separate heads or not. Plainly the power to impose sanctions or penalties for breaches of the criminal law is a necessary incident to the power to proscribe conduct. Without penalties or sanctions, the criminal law would be ineffective. The same could be said about the power to make laws for the administration of justice. Indeed in *Deaton v The Attorney-General and the Revenue Commissioners* [1963] IR 170 the Supreme Court of Ireland said, at p183:

> "…. the selection of punishment is an integral part of the administration of justice …"

The appellant did not seek to challenge the proposition that the Legislative Assembly could make a law imposing a mandatory minimum sentence. Nor did the appellant assert, as I understood the argument, that the Administrator could not validly assent to such a law under s7(2)(a) of the *Self-Government Act*. The attack seemed to be concentrated upon the requirement of the section that a court must record a conviction as well as impose a mandatory minimum sentence which was said to be an interference with the judicial independence of the courts. It is difficult to see how a statutory requirement that a court must impose a conviction upon a finding of guilt is not a law for the maintenance of law and order and for the administration of justice. Once the necessary facts have been proven, it is difficult to see on what basis it could be said the requirement to record a conviction does not have the necessary relevance to, or connection with the subject matter. At common law, a court exercising criminal jurisdiction had no power not to record a conviction once an offence had been proved: see Richard Fox and Arie Freiberg, *Sentences without Conviction: from Status to Contract in Sentencing* (1989) 13 Crim. LJ 297 at 298-299.

The appellant's second submission was that the head of power "maintenance of law and order and the administration of justice" is truly purposive in nature and that the law went further than was necessary to achieve the purpose. Mr Jackson Q.C. submitted that the relevant head of power was not purposive at all. Having regard to the observations of Dawson J in *Leask v The Commonwealth* (1996) 70 ALJR 995, especially at 1003-1007, I am of the view that the relevant head of power is clearly not purposive. At p1003, His Honour said:

> "To say that a law is not reasonably capable of being seen as appropriate and adapted to achieving an object or purpose within power or is not reasonably proportionate to some object or purpose within power is to posit a proposition or propositions which do not assist in determining the validity of the law. The expressions are borrowed from other jurisdictions and their usefulness is limited; indeed, it may be thought that they confuse rather than clarify the processes by which the validity of a law under our constitution must be determined."

At p1005, His Honour said:

> "The fact that the Legislative powers conferred upon the Commonwealth Parliament by s51 of the Constitution are expressed to be with respect to subject matters means a law is within power if the acts, facts, matters or things upon which it operates fall within the description of one or more heads of power ...
>
> Establishing the requisite connection is often a matter of degree, but once it is established, it does not matter that the legislature has chosen a means of achieving its aim which goes further than is necessary or desirable. That is a matter for the Legislature."

In *Wake*, the majority accepted the validity of the analogy with s 51 of the Constitution as to the approach to the question of the extent of ministerial responsibility by Territory Ministers, and said at 184 that there was no meaningful distinction between the words "in respect of" appearing in sub-reg 4(1) of the Self-Government Regulations, and the words "with respect to" appearing in s51 of the Commonwealth Constitution.

In *Leask*, Dawson J at 1007, recognised that, nevertheless, one head of power under s51 was purposive, viz defence. That is because that head of power expands and contracts depending upon the threat to the nation in war or peace.

Mr McDonald Q.C. submitted that analogously, a power relating to the maintenance of law and order and the administration of justice relates to internal security and is therefore also purposive. But the analogy falls down because, unlike defence, the power in question does not expand or contract.

The majority of the Court in *Leask* expressed similar views to that of Dawson J: see Brennan CJ at 998-999, 1001; Toohey J at 1012-13; McHugh J at 1013-14; Gummow J at 1018. Purposive tests are recognised as relevant in other situations: first where the power is expressed in purposive terms. As explained below, that is not the case here. Secondly where the head of power is subject to a constitutional limitation, express or implied, which restricts the head of power (see for example, Brennan CJ at 1000, Dawson J at 1007). There is no express limitation, and for the reasons given below in rejecting ground 2 of the appeal, no implied limitation. Thirdly, the purpose of the law sought to be impugned may sometimes be considered to see if the relevant connection exists between the law and the relevant head of power, but then the question is one of connection, not appropriateness or proportionality: see for example Brennan CJ at 999, McHugh J at 1013-14.

There is nothing in the language of regulation 4 to indicate that the heads of power or any of them are purposive; by contrast, the head of power contained in sub-regulation 4(5)(c) may well be purposive having regard to the language of that head of power. Here there is a subject matter and it is possible to delineate the boundaries of the power by reference to the subject matter. Once the relevant law is found to be within the head of power by reference to its subject matter no

question of proportionality arises, and the proportionality or appropriateness of the means selected by the Legislative Assembly to achieve the end in view which the legislation seeks to address is a matter for it alone. To the extent that Angel J in *Wake* adopted the purposive of test (at page 186) I respectfully disagree with it; no purposive test was used by the majority of the court.

Mr McDonald Q.C. also advanced an argument, similar to that advanced in *Wake*, that it could not be the case that the Commonwealth intended to transfer executive power to the Northern Territory to pass mandatory minimum sentencing laws where those laws intruded upon the independence of the judiciary. It was submitted that the independence of the judiciary had been intruded upon because the courts no longer had a power to fix a just sentence in that the legislature has by s78A(1) preordained in a discriminatory way a sentence to be imposed when the circumstances of the case indicate that the appellant is entitled to be treated differently. Mr McDonald Q.C. elaborated upon this by submitting that the infliction of punishment is purposive and that the measures taken by s78A(1) of the *Amending Act* are an extraordinary intrusion into the court's powers and are not reasonably adapted to achieve any legitimate end.

A similar type of argument was presented to the court in *Wake* and it was rejected by the majority of the court at pages 181 following. That is not to say, however, that the appellant's argument, in so far as it is based upon interference with the independence of the judiciary, must be rejected. However, in my

opinion s78A(1) does not interfere with the independence of the judiciary for the reasons given below.

Accordingly I would dismiss the first ground of appeal.

Ground Two of the Appeal

The second ground of appeal is premised upon an argument that a legislative direction to the courts both mandating conviction and sentence violates the doctrine of the separation of powers.

Assuming a separation of powers doctrine can be found or implied, a question I do not find it necessary to decide, it was submitted that a legislative direction to the courts both mandating conviction and sentence is invalid as it intrudes upon the perception of the independence of the judiciary.

In *Chu Kheng Lim v The Minister for Immigration* (1992) 176 CLR 1 at 27 Brennan, Deane and Dawson JJ held, in the context of Ch III of the Constitution, that:

> "There are some functions which, by reasons of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt ... In exclusively entrusting to the courts ... the function of the adjudgment and punishment of criminal guilt ... the Constitution's ... concern is with substance and not mere form."

It was submitted that the amending Act impinged directly upon the function of the courts by directing the court to perform its judicial functions in a particular way, namely to convict and detain involuntarily a person in prison when the circumstances of the particular case would not objectively call for a conviction and custodial sentence.

There are a number of authorities which discuss this type of question in the context of mandatory minimum sentencing. In *Deaton v The Attorney General and the Revenue Commissioners*, (supra) O'Dalaigh CJ, speaking for the Supreme Court of the Republic of Ireland, said, at p181:

> "It is common ground that it is for the Legislature, when it creates an offence, to prescribe what punishment shall attach to the commission of such offence. It is also common ground that the Legislature may for a particular offence prescribe a single or fixed penalty, or a maximum penalty, or a minimum penalty, or alternative penalties, or a range of penalties."

And at page 182:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case.... The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment."

In *Palling v Corfield* (1970) 123 CLR 52, Barwick CJ said at 58-59:

"It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it make lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose a specific punishment. If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed.

Also it is within the competence for the Parliament to determine and provide in the statute a contingency on the occurrence of which the court shall come under a duty to impose a particular penalty or punishment. The event or the happening on which a duty arises or for that matter a discretion becomes available to a court in relation to the imposition of penalties or punishments may be objective and necessary to have occurred in fact or it may be the formation of an opinion by the court or, in my opinion, by some specified or identifiable person not being a court. The circumstance that on this happening or contingency, the court is given or is denied as the case may be any discretion as to the penalty or punishment to be exacted or imposed will not mean, in my opinion, that judicial power has been invalidly invaded or that judicial power is attempted to be made exercisable by some person other than a court within the Constitution."

See also McTiernan J at 62-63, Menzies J at 64-65, Owen J at 67 and Walsh J at 68.

In *Hinds v The Queen* [1977] AC 195; [1976] 1 All ER 353, Lord Diplock, after referring to the doctrine of the separation of powers, said ([1977] AC 195 at 226; [1976] 1 All ER 353 at 370):

> "In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of this case.
>
> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits on the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on any individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstances of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body ... a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

This passage was cited with approval by the Privy Council in *Ali v R* and *Rassool v R* [1992] 2 All ER 1 at 7.

In *Liyanage v The Queen* [1967] AC 259, Lord Pearce, after referring to the fact that certain Acts passed by the Parliament of Ceylon created crimes and penalties which were not of general application, said, at 289- 290:

> "But such a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings.... legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case the Lordships have no doubt that there was such an interference ... Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons and these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial ...
>
> If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out the hands of the judges."

It is to be observed in the instant case that s78A(1) applies equally to all persons found guilty of the class of offences to which s78A relates.

A similar conclusion was reached by the Court of Appeal of the Solomon Islands in *Gerea and others v Director of Public Prosecutions* [1986] LRC (Crim) 3. Connolly JA with whom White P concurred, said, at 10-11:

> "The more serious question is whether a court can be said to be other than independent because a provision of the law imposes a mandatory sentence. Obviously the provision of the mandatory sentence excludes all discretion in the court. This, it may be noted, was the position for hundreds of years under the law of England in the days of capital punishment, when for murder the only sentence which might be pronounced was a sentence of death. For our part we find it difficult to believe that the courts were any less independent on this account. Statutes in many countries make provision not only for mandatory sentences but for maximum and for minimum sentences. It may be said that the latter two categories leave the court some discretion but it cannot be denied that they restrict it. The fact, however, is that it is of the nature of the legislative process constantly to vary the content of the law to be applied by the courts. This means that with every exercise of the legislative power there comes into existence a new legal framework to which the court must give effect. Thus a court which is free to act on the principles of common law and equity may find that a new defence or a new cause of action is introduced by a statute. It cannot, in our judgment, seriously be described as trenching upon the independence of the court to say that it is required to give effect to the alteration in the law. The courts exist to enforce the law in the form which it takes from time to time. They are, in our judgment, independent within the meaning of s10(1) if in the exercise of that function they are subject neither to control nor pressure by any outside body. The requirement of s10(1) is, in our opinion, fully met if, as in the case in Solomon Islands, they are subject to no direction by the legislature or the executive government as to the disposition of a particular case and of no form of pressure from outside bodies in the performance of their judicial functions. They are, however, like the courts in all civilised countries subject to the same body of law as is every other citizen. The courts are not intended by s10(1) to be independent of the law but independent within it."

In *Kable v Director of Public Prosecutions* (NSW) (1996) 70 ALJR 814, the High Court of Australia was divided as to whether or not an Act which required

the Supreme Court of New South Wales to impose preventative detention on a single individual was an invalid interference with the judicial power. Dawson J held, at 831, that "it is not apparent that an order that the appellant be detained represents the exercise of executive or legislative power rather than of judicial power". Toohey J said, at 837, that:

> "The Act does prescribe criteria of which the Court must be satisfied before making an order. Limited though it is, the role of the Supreme Court is not reduced to saying no more than that the person charged has been identified as fitting a description laid down in the Act. The Act is not invalid on that ground, divorced from any consideration of Chapter III.
>
> However the Act is invalid by reason of the incompatibility with Chapter III of the Commonwealth Constitution that its implementation produces. If the Act operated on a category of persons and a defence to an application for a preventive detention order was confined to a challenge that the criteria in s5(1) had not been met, different questions might arise. In that situation the judicial power of the Commonwealth may not be involved; that is something on which is unnecessary to comment. But here the judicial power of the Commonwealth is involved, in circumstances where the Act is expressed to operate in relation on one person only, the appellant, and has led to his detention without a determination of his guilt for any offence. In that event validity is at issue, not simply the reach of the Act in a particular case."

Gaudron J said at page 842:

> "The integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence of that process. Particularly is that so in relation to criminal proceedings which involve the most important of all judicial functions, namely, the determination of the guilt or innocence of persons accused of criminal offences. Public confidence cannot be maintained in the courts and their criminal processes if, as postulated by s5(1), the courts are required to deprive persons of their liberty, not on the basis that they have breached any

law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities they may do so."

McHugh J said at page 850:

"It is not merely that the Act involves the Supreme Court in the exercise of non-judicial functions or that it provides for punishment by way of imprisonment for what the appellant is likely to do as opposed to what he has done. The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. It makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person.

... It is not going too far to say that proceedings under the Act bear very little resemblance to the ordinary processes and proceedings of the Supreme Court. They do not involve any contest as to whether the appellant has breached any law or any legal obligation. They "are not directed to any determination or order which resolves an actual or potential controversy as to existing rights or obligations" which is the benchmark of an exercise of judicial power."

Gummow J said at page 857:

"The Act is an extraordinary piece of legislation. The making thereunder of "detention orders" by the Supreme Court in the exercise of what the statute purports to classify as an augmentation of its ordinary jurisdiction, to the public mind, and in particular to those to be tried before the Supreme Court for offences against one or other or both of the State and federal criminal law, is calculated to have a deleterious effect. This is that the political and policy decisions to which the Act seeks to give effect, involving the incarceration of a citizen by court order but not as punishment for a finding of criminal conduct, have been ratified by the reputation and authority of the Australian judiciary. The judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature. Thereby a

perception is created which trenches upon the appearance of institutional impartiality to which I have referred."

There is nothing in any of these statements which suggests that merely because a court, having found the appellant guilty of an offence, is mandated to record a conviction and impose a minimum sentence of imprisonment, that is an interference with the independence of the judiciary. The amending Act is not ad hominem but applies equally to all adults found guilty of certain defined property offences. Nor does the amending Act direct the Court to reach a finding of guilt. Guilt is proved in the usual way - by admissible evidence led by the prosecution. Only when guilt is thus established is a court required to convict. As to that, whilst the legislation has restricted the operation of a statutory power which did not exist at common law, which enables courts in the Territory to dismiss a charge in appropriate cases, notwithstanding that the accused is guilty, this is not an interference with the independence of the judiciary. There is no transference of judicial power to any executive body such as had occurred in *Deaton v The Attorney-General and the Revenue Commissioners*, (supra) in *Liyanage v The Queen* (supra), or *R v* Ali (supra). Nor are courts merely the instruments or arms of the executive to implement a legislative plan to imprison people who have committed no crimes. In my opinion, leaving aside a slender line of Canadian authority which is premised upon entrenched constitutional provisions in that country and which have no relevance to the situation in this country, the authorities to which I have referred support only one conclusion, viz., that the amending Act does not interfere with the independence of the judiciary.

Nor could it be said that the imposition of a mandatory minimum term of imprisonment is unconstitutional because it requires the court to impose "cruel or unusual punishment". Assuming that there is a restriction on the ability of the Legislative Assembly to pass laws which require courts to impose punishments which are cruel or unusual, there is nothing cruel or unusual in the requirement, imposed by the legislature, to record a conviction upon a finding of guilt and impose a mandatory minimum sentence of the present nature: see *Constitutional Reference by the Morobe Provincial Government* [1985] LRC (Const) 649, per Kidu, CJ at 659-660, and per Kapi, D.C.J. at 660; *Harmelin v Michigan* (1991) 501 US 959; *Boyd* (1995) 81 A Crim R 260 at 266-269.

Accordingly I would dismiss ground two of the appeal.

Grounds three and four of the appeal depended upon the appellant succeeding upon either of grounds one or two. As she has failed to do so, I would dismiss both grounds three and four of the appeal, and order that the appeal be dismissed.

BAILEY J

I agree that the appeal should be dismissed for the reasons given by Mildren J and have nothing to add.