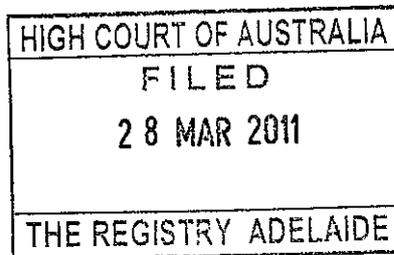


IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY



No. M134 of 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

and

THE QUEEN

10

First Respondent

**ATTORNEY-GENERAL FOR THE STATE OF
VICTORIA**

Second Respondent

**VICTORIAN EQUAL OPPORTUNITY AND HUMAN
RIGHTS COMMISSION**

Third Respondent

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**WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL OF SOUTH
AUSTRALIA (INTERVENING) ON QUESTIONS 4 and 5 OF THE HIGH COURT'S
LETTER DATED 1 MARCH 2011**

ORIGINAL

Date of document:
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Prepared by:

Crown Solicitor's Office
Level 11
45 Pirie Street
ADELAIDE SA 5000

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The Attorney-General for South Australia

T (08) 8207 1737
F (08) 8207 2103

(Solicitor-General's Chambers@agd.sa.gov.au)

Part I: SUITABILITY FOR PUBLICATION

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

Part II: SUBMISSIONS

Question 4 : Does s32 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* assist in resolving the question whether s5 of the Drugs Act applies to ‘possession for sale’ in the definition of ‘traffick’ in s70 and thereby to the offence created by s71AC?

2. The Attorney-General for South Australia makes no submission in answer to this question.

10 **Question 5 : Does s75(iv) confer original jurisdiction on the High Court in criminal proceedings brought by a State against a resident of another State? Does *R v Kidman* (1915) 20 CLR 425 at 438 (per Griffith CJ) and 444 (per Isaacs J) have any bearing on the answer to the question?**

3. The answer to this question depends upon whether the laying of a criminal charge by a State against a resident of another State constitutes a “matter” within the meaning of s75(iv). The Attorney-General for South Australia contends that it does.

4. It is clear that the concept of a “matter” used within Ch III and s75 is not limited to civil proceedings. This follows from a consideration of the breadth of meaning to be attributed the word “matter”¹ and is reinforced textually by the sense in which that word is used in s73.

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5. *The King v Kidman* supports this conclusion.² It establishes that criminal proceedings brought by the Commonwealth fall within the terms of s75(iii) and thus within the original jurisdiction of the High Court. The significance of that case lies, in particular,

¹ *Crouch v Commissioner for Railways* [1985] HCA 69; (1985) 159 CLR 22 at 37 (Mason, Wilson, Brennan, Deane and Dawson JJ).

² *The King v Kidman* [1915] HCA 58; (1915) 20 CLR 25.

in the acceptance by Griffiths CJ and Isaacs J that criminal proceedings brought on information are “matters” in which the Commonwealth is a party.³

6. Subject to any difference in requirements as to the proper informant to be found within a statute, generally speaking, indictable criminal proceedings are brought in the name of the Crown, referring to the executive of a State, and are a matter in fact brought between “a State” and the defendant.

7. But even where the proceedings are differently styled or the informant differently identified by reason of a statutory authority, this Court in its decision in *Crouch v Commissioner for Railways (Qld)* resolved that the expression “the State”, incorporated proceedings brought by or against an instrumentality or agent of the State.⁴ In resolving whether the emanation was acting as the State, it was held relevant to have regard to whether the function was traditionally discharged by the State.⁵ There can be no doubt that the function of prosecuting breaches of State laws is one traditionally discharged by the State (albeit it not necessarily exclusively).

8. In this case the criminal proceedings were laid in County Court of Victoria by the Victorian Director of Public Prosecutions, a statutory office holder.⁶ They were brought by a State within the meaning of s75(iv). Accordingly, subject to the below, the proceeding in question is a “matter” within the meaning of s 75(iv).

9. A further related question arises; at what point in time is the identity of a party for the purposes of s75(iv) to be determined? Here at the time of trial there is evidence that the Appellant was a resident of the State of Queensland.⁷ However, at the time of being arrested and charged⁸ there is evidence that the Appellant was a resident of the State of Victoria.⁹ Whilst it is clear that the conferral of jurisdiction provided for in

³ *The King v Kidman* [1915] HCA 58; (1915) 20 CLR 25 at 438 (Griffiths CJ), 444 (Isaacs J). See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [124] (Gummow J).

⁴ [1985] HCA 69; (1985) 159 CLR 22, 28 (Gibbs CJ).

⁵ *Crouch v Commissioner for Railways* [1985] HCA 69; (1985) 159 CLR 22 at 38 (Mason, Wilson, Brennan, Deane and Dawson JJ). See also, *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 651 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

⁶ Appeal Book p 1, *Public Prosecutions Act 1994* (Vic).

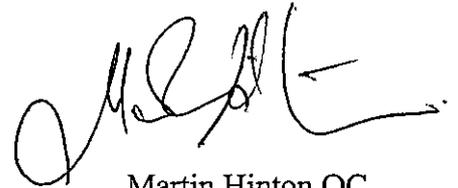
⁷ Appeal Book pp 116 (ln 29-30), p 234, p 253.

⁸ 14 January 2006; Appeal Book pp 1, 59 (ln 12).

⁹ Appeal Book pp 234, 236, and see the summary of the Appellant’s evidence commencing at 253.

s75(iv) is based on the identity of the parties¹⁰, can the original jurisdiction of this Court be enlivened if, for example, after the proceeding is instituted, one of the parties takes up residence in a different State where both previously resided in the same State, or, is it determined by reference to the identity of the parties as at that point in time when the proceeding is commenced?¹¹ If it is the latter point in time then, both parties being resident in the one State the original jurisdiction of this Court would not be enlivened.¹²

10. In *Dahms v Brandsch*¹³, *Watson v Marshall and Cade*¹⁴, and *The Queen v Oregon; Ex parte Oregon*¹⁵ Griffiths CJ, Walsh J and Webb J, respectively, approached the question of jurisdiction on the basis that residence had to be determined as at the time the proceeding was commenced.
11. It is not for the Attorney-General of South Australia to submit that jurisdiction is or is not established in this case. It is enough that the Attorney-General points out that the onus is upon the party seeking to enliven the jurisdiction of this Court under s75(iv) (or federal jurisdiction by reason of the operation of s39(2) *Judiciary Act, 1903*) to establish jurisdiction.¹⁶



Martin Hinton QC
Solicitor-General of South Australia
Telephone: 08 8207 1737
Facsimile: 08 8207 2013
Email: hinton.martin@agd.sa.gov.au

¹⁰ Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p 773. *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 306 (Isaacs J); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [86] (Gummow J).

¹¹ Before the Royal Commission on the Constitution (1929), Mr Dixon KC, as he then was, made a related point at 786 when he raised the prospect of this Court's jurisdiction being defeated by a Victorian resident who was sued in this Court by a resident of New South Wales instantly changing his residence to New South Wales.

¹² *Watson and Godfrey v Cameron* (1928) 40 CLR 446; *Cox v Journeaux* (1934) 52 CLR 282.

¹³ *Dahms v Brandsch* (1911) 13 CLR 336 at 337.

¹⁴ *Watson v Marshall and Cade* (1971) 124 CLR 621 at 623-4.

¹⁵ *The Queen v Oregon; Ex parte Oregon* (1957) 97 CLR 323 at 332-3.

¹⁶ *Dahms v Brandsch* (1911) 13 CLR 336; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 623 (Walsh J).