IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No: M134/2010

BETWEEN

VERA MOMCILOVIC
Appellant

and

THE QUEEN
First Respondent

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Second Respondent

and

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
Third Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I - Certification:

1. This written submission is in a form suitable for publication on the Internet.

Part II - Basis of intervention:

2. The Attorney-General for the State of South Australia ("South Australia") intervenes pursuant to s78A of the *Judiciary Act 1903 (Cth)* in support of the Respondents.

Part IV - Applicable Constitutional provisions, statutes and regulations:

3. See Appendix A to these submissions.

Part V - Argument:

4. In summary, the submission of South Australia is as follows:

10 4.1 Interpreted without regard to s32 of the *Charter of Human Rights and Responsibilities 2006 (Vic) ("Charter"),* the language "satisfies the court to the contrary", used in section 5 of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* ("*Drugs Act*") requires a defendant to disprove a stated matter on the balance of probabilities.

4.2 Assuming the acceptance of either a wide or narrow construction of s32 of the *Charter*, it is a valid law of the Parliament of Victoria. In either case, s32 requires the exercise by a State court of judicial power. Even if s32 requires an exercise of delegated legislative power by a State court exercising State jurisdiction, its conferral is neither an impermissible abdication of legislative power nor does it compromise the institutional integrity of the Supreme Court of Victoria such that it ceases to be a fit repository of federal judicial power.

20 4.3 The making of a declaration under s36 of the *Charter* is but one of a variety of functions that a State Parliament might validly confer upon a State court exercising State jurisdiction that does not of itself quell a controversy between parties. The requirement that there be a judgment, decree, order or sentence in order that there may be an appeal to this Court under s73 of the *Constitution* necessarily means that in some, albeit not many, cases there may not be a right of appeal to this Court from a decision validly made by a State court exercising State jurisdiction. The area of discourse in cases where the question is whether or not a particular outcome falls within the ambit of s73 is governed by the degree of connectedness of the outcome to the issues arising in a matter.

4.4 Presumptions that create a reverse burden, such as that in s5, have a significant effect and
30 value in criminal prosecutions. As the presumption in s5 operates to impute knowledge or awareness once occupation is proven, its practical effect is almost invariably to require a defendant to give or adduce evidence.

4.5 Section 5 and s71AC of the *Drugs Act* are not inconsistent with ss 13.1, 13.23 and 302.4 of the *Criminal Code 1995* (Cth) ("Code"). The history of illicit drug prohibition in Australia's federated system is an example of cooperative federalism with complementary Commonwealth and State offences. Issues of inconsistency should be analysed against that background. Indeed, the *Code* offences were enacted against that background and themselves expressly purport to operate concurrently with State and Territory law.

The role of s32 of the Charter in the construction of s5 of the Drugs Act

5. The appellant advances a construction of s5 of the *Drugs Act* to the effect that it would cast only an evidential rather than legal burden on a defendant at trial.[1] That interpretation is said to be available without resort to s32 of the *Charter*, but in the alternative, to arise because of it.[2]

6. Unassisted by the prosecutorial aid, the prosecution would need to prove as an element of the offence that the appellant knowingly had in her possession a substance. The effect of the prosecutorial aid in s5 is such that, once the prosecution had proven that the appellant occupied the premises, it had proven this element. South Australia adopts the submission of the First and Second Respondents that s5 then operates on ordinary principles of construction to cast a legal burden on the defendant.[3] That must be so because a Court is not in any relevant sense satisfied "to the contrary" (i.e. that a person is not in possession of a drug), if there is only evidence that suggests that the person is not in possession. South Australia however, adds the following concerning the use and interpretation of legislative provisions that operate to reverse the burden of proof in criminal trials such as s5.

7. As Gummow J observed in *Nicholas v R*:[4]

> ... there is a lengthy history of laws of the Commonwealth, particularly with respect to restrictive trade practices, immigration and customs (including s 233B(1)(c) itself), which create civil liabilities or criminal offences and reverse the traditional onus of proof.

Indeed, sufficiently historic is the practice that Isaacs J in *Williamson v Ah On*[5] was able to give examples of the use of reverse onus provisions by the Imperial Parliament and Dominion governments.[6]

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1 Appellant's Submissions [60]-[67].

2 Appellant's Submissions [68]-[77].

3 As to the distinction between a legal and evidential burden see *Purkess v Cittenden* [1965] HCA 34; (1965) 114 CLR 164 at 167-168 (Barwick CJ; Kitto and Taylor JJ); 171 (Windeyer J). See also JD Heydon *Cross on Evidence* (6th Australian Edition, 2000) [7010]-[7015]. In the context of the *Criminal Code 1995* (Cth) see s 13.

4 *Nicholas v R* [1998] HCA 9; 193 CLR 173, [152], Gummow J.

5 *Williamson v Ah On* [1926] HCA 46; (1926) 39 CLR 95.

6 [1926] HCA 46; (1926) 39 CLR 95, 116-119 (Isaacs J). Examples include *Foreign Establishments Act* (33 & 34 Vict. c. 90 s9); *Customs Law Consolidation Act* (39 & 40 Vict. c. 39, s178); *Stamp Duties Management Act* (54 & 55 Vict. c. 38, s18); *Immigration Restriction Act 1908* (NZ) s38(2); *Immigration Act 1920* (Canada) s2; South African Immigration regulations (No. 22 of 1913).

8. Section 5 is drafted adopting one of the many, now familiar formula used for the purpose of creating that reverse burden. Those formula vary from "unless the person [defendant] proves",[7] "deemed in the absence of proof to the contrary",[8] and less commonly "sufficient to show".[9] In the course of addressing challenges to the Constitutional validity of such provisions[10] this Court has consistently accepted the work done by these provisions is to cast the burden of proof on the defendant.[11]

9. It is those formula that are now commonly found in legislation regulating illicit drugs. In relation to illicit drugs specifically, such a reverse burden was first found in the *Customs Act 1901 (Cth)* as early as 1910[12] with the contemporary Commonwealth equivalent to be found in s302.5(2) of the
10 *Code*.[13] Further examples can be found across Australian jurisdictions, with regard to various forms of offences, a common example being trafficking in drugs. New South Wales,[14] South Australia,[15] Queensland,[16] Tasmania,[17] and the Northern Territory,[18] all rely on provisions utilising a reverse onus formula. At least in South Australia that is a practice that has been longstanding.[19]

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7 *Drug Misuse and Trafficking Act 1985* (NSW) s 29.

8 *Controlled Substances Act 1984* (SA) s32.

9 *Drugs Misuse Act 1986* (Qld) s 10A(4).

10 The Constitutional challenges were initially based on the premise that such a provision was an usurpation of judicial power: *Williamson v Ah On* (1926) 39 CLR 95 ; [1926] HCA 46; *R and Attorney-General (Commonwealth) v Associated Northern Collieries* [1911] HCA 73; (1911) 14 CLR 387 at 404; [1911] HCA 73; *The Commonwealth v Melbourne Harbour Trust Commissioners* [1922] HCA 31; (1922) 31 CLR 1 at 12; [1922] HCA 31; *Williamson v Ah On* (1926) 39 CLR 95 ; [1926] HCA 46 ; *Orient Steam Navigation Co Ltd v Gleeson* [1931] HCA 2; (1931) 44 CLR 254 at 259-260, 262-263 and 264; [1931] HCA 2; *Milicevic v Campbell* [1975] HCA 20; (1975) 132 CLR 307 at 316, 318-319 and 320-321; [1975] HCA 20. Later, it was argued the provision alone or in combination with other provisions, offended the principle in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51; *South Australia v Totani and Another* [2010] HCA 39 at [277], (Heydon J). see also, *The Queen v Granger* (2004) 88 SASR 453; *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at 189-190 [24] and 235-236 [153]-[156]; *Fardon v Attorney-General (Qld)* [2004] HCA 46; [2004] HCA 46; (2004) 223 CLR 575 at 600-601 [41]; *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at 356 [113].

11 For example *Tabe v The Queen* [2005] HCA 59; (2005) 225 CLR 418, [24] (Gleeson CJ); [145] (Callinan and Heydon J).

12 S233B(1) of the *Customs Act 1901 (Cth)* stated:

> Any person who –
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> ....
>
> (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act,
>
> ...
>
> shall be guilty of an offence against this Act.

13 Not only does this continue the arrangement that had prevailed when the offences were in the Customs Act, it also follows the recommendation of the Australian Royal Commission of Inquiry into Drugs. In recommending a national code for drug trafficking it recommended the insertion of a rebuttable presumption that a deemed quantity of drugs is intended for trafficking. Australian Royal Commission of Inquiry into Drugs, *Report* (1980) Book D, D29.

14 *Drug Misuse and Trafficking Act 1985 (NSW)*,S 29.

15 *Controlled Substances Act 1984 (SA)* s32(5).

10. Contemporaneous South Australian legislation has employed the phrases "unless the contrary is proved"[20] and "in the absence of proof to the contrary"[21] as stating the requirements to be met in order to rebut the presumption of deemed possession (for sale or trafficking). Such presumptions have been upheld as valid[22] and the provisions have been interpreted by intermediate appellate courts to mean:

> The counterpart statutory aid to proof provision in the former s32... was interpreted as requiring defendants to satisfy the Court on the balance of probabilities that they did not possess the relevant drug or substance for the purposes of sale. The appellant did not suggest that s32(5) in its present form should be construed any differently. If the trier of fact is satisfied beyond reasonable doubt in a case like the present that a defendant had possession of "a trafficable quantity" of a controlled drug then it is to be presumed, in the absence of proof to the contrary, that the defendant had possession of the drug with the intention of selling it. (footnotes omitted.)[23]

11. It can be taken as settled law that where a statute burdens the accused with a legal burden, that burden is discharged upon proof on the balance of probabilities.[24]

Section 32 of the Charter and its validity

12. The authorities identified by the parties suggest, in essence, alternate approaches to the proper construction of s32 of the *Charter* that are "book-ended" by two approaches in particular. They are:

12.1 that a provision must be interpreted consistently with a human rights principle in the *Charter* so far as it is possible to do so consistently with the impugned provision's purpose. The test is one of consistency with the purpose of the provision in question. This is the approach taken in this case by the Court of Appeal.[25] This is an approach almost

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16 *Drugs Misuse Act 1986 (Qld),* with regard to an offence of possessing suspected property s10A.

17 *Drugs Misuse Act 2001 (Tas),* s12(2).

18 *Misuse of Drugs Act 1990 (NT),* with regard to the offence of possessing a precursor chemical s8A(3), possession of documents or instructions to manufacture s8B(5), possession of equipment to manufacture s8C(2)(c).

19 For example, a reverse onus provision in a deemed possession for sale offence has been part of South Australia's statutory law since 1970 and uses the phrase "unless the contrary is proved"; *Dangerous Drugs Act Amendment Act (No. 2) 1970* (SA) s5, amending s5 of the *Dangerous Drugs Act 1934* (SA). This Act was the predecessor of the *Controlled Substances Act 1984* (SA) which upon its enactment contained reverse onus provisions with regard to possession offences as well as deeming the possession a quantity of controlled substance of which would constitute the offence of sale and supply.

20 *Dangerous Drugs Act 1934* (SA) s5 following amendment in 1970.

21 *Controlled Substances Act 1984* (SA), s32(3); Amended 2005 (commencing 2007), currently s32(5).

22 *R v Rowan* [2003] SASC 138; *R v Zampogna* [2003] SASC 75, [43]-[44]; (2003) 85 SASR 56, 64-5; *R v Granger* [2004] SASC 156, [7], [17]; (2004) 88 SASR 453, 457, 459; *R v Corish* [2006] SASC 369; *R v Ninnes* [2007] SASC 40; *R v Nguyen* [2010] SASCFC 23.

23 *R v Nguyen* [2010] SASCF 23, [58] (White J).

24 *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523, 533-534 (Gibbs CJ); *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536, 541 (Dixon J).

25 *R v Momcilovic* [2010] VSCA 50, [101]-[104]; AB 309-311.

synonymous with the common law requirement that legislation be read so as not to abrogate fundamental rights or freedoms unless there is an express intention to do so.[26]

12.2 that an impugned provision which, even if construed according to the ordinary principles of interpretation admits of no doubt, must be given a different meaning, and potentially a strained meaning, if that is necessary in order that it be *Charter* compliant. This is the approach taken by the House of Lords in *Ghaidian v Godin-Mendoza*[27] and *Sheldrake v Director of Public Prosecutions.*[28] A convention compliant meaning is to be given to a provision, even if such a meaning is strained, provided that there is no departure from the purpose of the legislation or a fundamental feature of it.

13. South Australia makes no submission as to which of these constructions or any that may fall between is the correct construction to be afforded s32. It does, however, submit that either of the constructions that "book-end" the issue, and, therefore, any that may fall between the two, involve a valid function that may be conferred upon a State court exercising State jurisdiction.

14. On the assumption that this Court adopts the construction at paragraph [12.1], the task of the State court is an uncontentious exercise of statutory construction. The determination of the meaning of a provision, even the determination of the meaning of a provision so as to conform with general or broad standards, whether express or implicit, simply involves a determination by the court of the law applicable to a controversy.[29] Doing so involves the court exercising judicial power. Even if it were a federal provision, such an exercise would not offend any Constitutional limits.

15. On the assumption that this Court adopts a construction of s32 as described in paragraph [12.2], again no Constitutional limits are transgressed. Even in those circumstances, the exercise remains judicial in character.[30] That said, even if it is a legislative, rather than a judicial, power, it is not impermissible for a State court exercising State jurisdiction to exercise such power:

15.1 State Parliaments, subject to the express and implied limits of the Commonwealth *Constitution*, have plenary power to legislate.[31]

15.2 State Parliaments can delegate legislative power. Indeed, it is part of the legislative power of a Parliament to be able to make laws conferring power on bodies other than the

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26 *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 [47] (French CJ); *South Australia v Totani and Another* [2010] HCA 39 [31] (French CJ); *Plaintiff S157/2000 v Commonwealth of Australia* [2003] HCA 2; (2003) 211 CLR 476, 492, (Gleeson CJ).

27 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [32] (Lord Nicholls of Birkenhead); [63]-[64] (Lord Millett).

28 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, [24] (Lord Bingham of Cornhill).

29 *Bank of New South Wales v The Commonwealth* [1948] HCA 7; (1948) 76 CLR 1, 371-2, (Dixon J).

30 *Pidoto and Others v The State of Victoria* [1943] HCA 37; (1943) 68 CLR 87, 108-110, (Latham CJ).

Parliament.[32] It was said as early 1878 that the exercise of such a power by a legislative body was "not uncommon" and in many circumstances was "highly convenient".[33]

15.3 The various Constitutions of the States do not create a binding or strict separation of powers similar to that established by the Commonwealth *Constitution*.[34] In the absence of such a strict separation, the functions that can be invested in, and performed by a State court are greater than those that may be exercised by the High Court and federal courts which solely exercise judicial power.[35]

15.4 However, a State Parliament cannot legislate so as to abdicate its legislative function.[36] Should a State Parliament do so, it is no longer exercising a power of delegation because it is not retaining intact its power to withdraw or alter the authority. Examples of an abdication of power would include:

- legislation which operated such that there was no longer a Parliament of the State;
- the creation of a new legislative authority with general legislative power.[37]
- legislation such that the Parliament could no longer legislate including by, for example, an Act that prevented the amendment of an Act,[38] an Act that prevented legislation on a subject matter, or an Act that gave to a body a power to exclusively legislate;
- legislation which required that legislation could not be enacted without the consent of an organisation, company or individual that does not form part of the legislative structure (such as a private property developer).[39]

15.5 It is clear that a State court may exercise executive power in the form of being invested with administrative functions that have historically been performed by either the

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31 *Union Steamship Co of Australia Pty Ltd v King* [1988] HCA 55; (1988) 166 CLR 1; *McCawley v The King* [1920] AC 691; *Cobb & Co Ltd v Kropp* [1967] 1 AC 141.

32 *Powell v Apollo Candle Co* (1885) 10 AC 282, 291; *Reg v Burah* (1878) 3 App. Cas. 889, 906; *Cobb & Co Ltd v Kropp* [1967] 1 AC 141.

33 *Reg v Burah* (1878) 3 App. Cas. 889, 906. See also, *Vasquez v The Queen* [1994] 1 WLR 1304 at 1312-1314 where the constitution of Belize required existing laws to be construed "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution"; *cf. Rojas v Berllaque* [2004] 1 WLR 201 at [22].

34 See *South Australia v Totani and Another* [2010] HCA 39, [66] (French CJ) and the authorities cited therein.

35 *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan Informant* [1931] HCA 34; (1931) 46 CLR 73, 98; *R v Kiby; Ex parte Boilermaker's Society of Australia* [1956] HCA 10; (1956) 94 CLR, 271-2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Western Australia v Commonwealth* [1995] HCA 47; (1995) 183 CLR 373, 387 (The Court).

36 *Giris Pty Ltd v Federal Commissioner of Taxation* [1969] HCA 5; (1969) 119 CLR 365, 373.

37 *The Queen v Burrah* (1878) 3 App Case 889; *Cobb & Co Ltd v Kropp* [1967] 1 AC 141, 154-5.

38 *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337, 356 (Brennan CJ and McHugh J). The exception would be manner and form provisions permitted by s6 *Australia Acts, 1986* (Cth).

39 *West Lakes Limited v The State of South Australia* [1980] 25 SASR 389, 397-398.

executive or the judiciary. There is no reason, subject to the *Kable* doctrine, why a State court could not also exercise delegated legislative power.

15.6 A law that requires a State court to read into an impugned provision words so that it complies with a standard fixed by Parliament, is not one where Parliament has abdicated its power, even if the Court is exercising legislative power. In such a case the rule against abdication is not offended because Parliament retains at all times the power to vary both the impugned provision, the human rights principles (ss8-27), and the rule requiring conformity (s32).

15.7 in order that the Supreme Court of Victoria remain a fit repository of the judicial power of the Commonwealth, it must be, and must appear to be, an independent and impartial tribunal - the *Kable* doctrine.[40] No relevant issue of independence or impartiality arises. Even if to the limited extent identified in *Ghaidan* the Court must then re-draft an Act and then apply it - it is doing so in circumstances where the parameters for that re-drafting are capable of ascertainment by the parties in advance as they are fixed in the *Charter* by the Parliament itself.

15.8 The situation might well be different if the *Charter* called for the Court to exercise a delegated legislative power where it needed to adopt, or select from, a range of possible options which could not be determined from the impugned Act or *Charter* itself or where a choice may need to be made without the benefit of any indicator.

15.9 Assuming s32 does not transgress these limits, the rule against abdication of legislative power, and the *Kable* principle, it is a valid law.

15.10 If s32 does transgress a limit, it must be read in accordance with s6 of the *Interpretation of Legislation Act 1984 (Vic)* that requires an Act be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria. There is nothing to suggest that s6 of the *Interpretation Act* does not apply to s32 of the *Charter*. Section 6 would in those circumstances operate to prefer a construction of s32 that is within power. In that event, the issue becomes one of construing s32, if possible, as within power by giving it a construction and meaning such that it conformed

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40 *South Australia v Totani and Another* [2010] HCA 39 at [72] (French CJ), [205] (Hayne J) *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); [2004] HCA 31; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at [10] (Gummow, Hayne, Heydon and Kiefel JJ), [48] (Kirby J), [162] (Crennan J); [2008] HCA 4; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [41] (Gleeson CJ), [63]-[64] and [78] (Gummow, Hayne and Crennan JJ); [2006] HCA 44; *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237

constitutional limits. On any argument the construction identified at [12.1] would conform with those limits.

Characterisation of a declaration made under s36 and the jurisdiction of the High Court to hear an appeal pursuant to s73 of the Constitution

16. Subject to the *Kable* doctrine, a State court exercising State jurisdiction may have jurisdiction conferred upon it to resolve a question or to advise in circumstances where the answer or advice do not resolve or quell a controversy. Courts have historically had conferred upon them the power to resolve various questions of public importance or interest precisely because of the benefits realised in invoking the defining characteristics of courts. This includes answering a question of law reserved on an acquittal,[41] offering an opinion on a point arising on a petition for the exercise of the prerogative of mercy,[42] establishing a sentencing guideline under a statutory scheme,[43] or determining, on application by the Crown or an individual, any uncertainty in the law concerning the relationship between the Crown and the individual.[44] There would appear to be an historic vesting in colonial courts of functions as broad as *advising* on liability for taxation.[45] A declaration made under the *Charter* may be seen as but another instance of such an arrangement, in the modern context of human rights, in the exercise of State jurisdiction.

17. Exercises of jurisdiction by State courts in these circumstances raise the issue as to whether this Court can hear an appeal from a decision of a State court exercising such a power. That is so because its appellate jurisdiction is limited to "judgments, decrees, orders and sentences". The meaning of these expressions take their colour from the fact that this Court may only exercise judicial power or powers incidental to the exercise of judicial power.

18. An analysis of the *Charter* suggests a declaration made under s36 has the following characteristics:

    18.1 it is *consequential* on the determination of a question arising in proceedings concerning the application of the *Charter*. That is, it can only arise if a question "arises in proceedings" that relates to the *Charter*: s36(1).

    18.2 it is *ancillary* to determination of the issue such that it can only arise from within proceedings. It does not then affect the outcome of the proceedings: s36(5).

CLR 501at 530 [89] (French CJ), 535 [111] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); [2009] HCA 4.

41 *Criminal Law Consolidation Act 1935* (SA), s350.

42 *Criminal Law Consolidation Act 1935* (SA), s369(b).

43 *Criminal Law (Sentencing) Act 1988* (SA), s29A-C.

44 *P & C Cantarella v Egg Marketing Board for the State of New South Wales* [1973] 2 NSWLR 366, 383.

45 *Tata Iron and Steel Co. Ltd v Bombay Chief Revenue Authority* (1923) 39 TLR 288.

18.3 it is *not remedial*. The declaration has no legal operation between the parties to the action: s36(5).

18.4 a statement by the Court that a law is inconsistent with principles of the *Charter*, has only political consequences in that it requires a member of the executive to explain the declaration and their response to it to Parliament: s36(6), (7), s37.

19. South Australia makes no submission as to whether a declaration under s36 may be the subject of an appeal. However, as to the breadth of this Court's appellate jurisdiction under s73 it makes the following submissions.

20. First, accepting the limits of what will be a "judgment, decree, order or sentence" within the meaning of s73 of the *Constitution*, this Court will not be able to hear an appeal from every decision validly made by a State Supreme Court. This is a natural consequence of the range of issues that have historically and can properly be the subject of the exercise of State jurisdiction.

21. Second, a comparison between the facts of *Mellifont v Attorney-General (Queensland)*[46] and those considered in *Thomas v The Queen*[47] suggests that the availability of an appeal to this Court must ultimately turn on the degree of connectedness between the originating process and the outcome (however the relevant dispositional order be described) sought to be appealed.

22. In *Mellifont*, an answer given on a question of law reserved on acquittal was held to be appellable to the High Court. The answer could not affect the acquittal. Nor did the answer turn on the existence of an information because a *nolle prosequi* had been entered. The reference was a statutory extension of, and arose out of, those proceedings. In that respect it was significant that the reference was "made with respect to a matter which was the subject of legal proceedings at first instance and was not divorced from the ordinary administration of the law."[48] The proceeding facilitated the *correction* of an error in a matter.[49] It could on that basis be distinguished from a mere advisory opinion on a question of law such as in *DPP v B* where the questions stated were not restricted to the facts of the case.[50]

23. In *Thomas*, the Privy Council decided that an appeal in a case involving a reference to the New Zealand Court of Appeal for its opinion on a point arising from a petition of mercy could not be the subject of an appeal to the Privy Council.[51] The relevant issue was whether the "advice" given

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46 [1991] HCA 53; (1991) 173 CLR 289.

47 [1980] AC 125.

48 [1991] HCA 53; (1991) 173 CLR 289 at 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

49 *Director of Public Prosecutions (South Australia) v B* [1998] HCA 45; (1998) 194 CLR 566, [10] (Gaudron, Gummow and Hayne JJ).

50 *Director of Public Prosecutions (South Australia) v B* [1998] HCA 45; (1998) 194 CLR 566, [25] (Gaudron, Gummow and Hayne JJ).

51 This was a reference to the Supreme Court on the second limb of a power to refer a petition of mercy where only advice (as opposed to a determination) is sought. The High Court has not

was within s3 of the *Judicial Committee Act 1833* "from or in respect of the determination, sentence, rule or order of any court, judge ...". The Privy Council held it had no jurisdiction because the outcome involved "no power or determination binding upon the Governor-General entrusted to the Court of Appeal."[52] The opinion they expressed, "impinged upon no legal right of the defendant, nor did it place any fetter upon the exercise by the Governor-General of the royal prerogative of mercy."[53]

24. In doing so the Privy Council applied the effect of its earlier decision in *Commonwealth v Bank of New South Wales*[54] concerning s74 of the Constitution. The Privy Council there decided it did not have jurisdiction to entertain the appeal. Lord Porter held that:

> To give effect to the appellant's submission would appear to involve the admission of an appeal not from a judicial act but from the pronouncement of an opinion on a question of law.[55]

25. The result in *Thomas*, assuming it were to be followed in the context of an appeal under s73, can be reconciled with the decision in *Mellifont* and *DPP v B* based on the degree of connectedness between the outcome sought to be appealed and the original proceedings. All are in a weak sense connected to the original proceedings by reason that they could have not occurred *but for* the original proceeding. However, in *Mellifont*, the question of law reserved arose out of the trial - the order is made for the questions to be reserved within those proceedings. The petition in *Thomas*, notwithstanding that it arises because of a conviction or sentence imposed by a Court, does not in the same way arise out of the proceedings themselves - so much is made clear by the fact that the Attorney-General may refuse to refer the petition at all.

26. With respect to this case, it can be observed that the declaration under the *Charter* like the question of law arises out of the proceedings affecting the rights of the accused. Similar to an Attorney-General's reference in *Mellifont* (but not in *Thomas*), the declaration is a new method for addressing an issue which arose in the proceedings. Consequent upon a conclusion about the operation of two statutes, the Court is called upon to simply address its conclusion to the Parliament. It is a method or procedure akin to a rule providing for a discretion for publication or suppression of a court's decision, or an aspect of it. There is no "declaration of the law divorced from an any attempt to administer that law."[56] Nor is it correct to differentiate between a

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considered whether it has jurisdiction to hear an appeal in relation to a referral under that limb. In *Mallard v The Queen* [2005] HCA 68; (2005) 224 CLR 125 it did hear an appeal in relation to a referral on the first limb where the reference is not made on the basis of advice, but to determine the matter as if it is an appeal.

52 [1980] AC 125, 136.

53 [1980] AC 125, 136.

54 [1950] AC 235.

55 [1950] AC 235, 294.

56 *In re Judiciary and Navigation Acts* [1921] HCA 20; (1921) 29 CLR 257, 266.

declaration under the *Charter* from an answer to a question of law reserved on the basis that the latter "of itself changes the law."[57] Though an answer on a reference is corrective in one sense, it will only become effective by force of a subsequent order of the court hearing another matter that applies the answer.

Utility of reverse burden provisions

27. South Australia submits that presumptions that create a reverse burden such as s5 have significant utility in criminal prosecutions. The practical effect, putting to one side their ultimate value in weighing facts as discussed in *Labrador Liquor,*[58] is to make it significantly more likely that the defendant will give or call evidence thereby exposing him or herself or a potentially exculpatory witness to cross-examination. That is against a background where the subject matter on which evidence is to be given is within the direct knowledge of the defendant. This effect on the forensic contest is sufficiently well recognised that the South Australian Full Court[59] has, for example, historically disapproved of the laying charges of unlawful possession (with its reverse presumption operating once reasonable suspicion is shown) as opposed to larceny where that latter offence is reasonably open to be charged on the evidence.

Asserted inconsistency between Commonwealth and State offences, means of proof and mode of trial

28. Before the issue of inconsistency can be addressed the relevant "law of the State" and "law of the Commonwealth" need to be carefully identified. So identified in this case, the laws are:

    28.1 the offence in s71AC of the *Drugs Act* which provides for a greater maximum penalty than the equivalent offence in S 300.2 of the *Code*.

    28.2 neither the prosecutorial aid in s5 of the *Drugs Act* nor any Commonwealth equivalent is available in proof of an offence under Part 9 of the Code.

    28.3 the mode of trial applicable to an offence under the *Drugs Act* by operation of s46 of the *Juries Act 2000 (Vic)* provides for trial by judge alone and majority verdicts not available by reason of the application of s80 of the Constitution .

29. South Australia contends that the analysis of inconsistency must ultimately be resolved in each instance identified above separately. That is, if an inconsistency is found to exist in relation to the means of proof or mode of trial, that does not, of course, mean that the offences are inconsistent.

30. As a starting point, differences in the regulation of a subject matter do not mean there is inconsistency between the two laws in the relevant sense. The question is whether those

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57 Lindell, *"The statutory protection of rights and parliamentary sovereignty: Guidance from the United Kingdom?"* (2006) 17 PLR 188.

58 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 9; (2003) 216 CLR 161, 207-8.

differences evince an intention by the Commonwealth that the Commonwealth law is exclusive. This is the position as it was explained by the Court in *McWaters v Day*:[60]

> But the mere fact that such differences exist is insufficient to establish an inconsistency in the relevant sense. It is necessary to inquire whether the Commonwealth statute, in prescribing the rule to be observed, evinces an intention to cover the subject matter to the exclusion of any other law.

31. The same notion had been addressed earlier by Mason CJ in *R v Winneke; ex parte Gallagher* [61] thus:

> It is, of course, commonplace that the doing of a single act may involve the actor in the commission of more than one criminal offence. Moreover, it may amount to an offence against a law of the Commonwealth and a law of a State. So much at least is recognized by s. 30(2) of the *Acts Interpretation Act 1901 (Cth)*, as amended, and s. 11 of the *Crimes Act 1914 (Cth)* which are designed to ensure that in such a case the offender will not be punished twice where he has first been punished under State law. These two provisions proceed in accordance with the principle that there is no prima facie presumption that a Commonwealth statute, by making it an offence to do a particular act, evinces an intention to deal with that act to the exclusion of any other law.

32. In this case, there is ample evidence that notwithstanding the differences, the Commonwealth laws were not intended to operate exclusively of the State laws. With respect to the differences in penalties and the means of proof, the co-operative history of the regulation of illicit drugs is central to understanding the absence of a relevant inconsistency.

Historical context of illicit drug regulation in Australia

33. Since federation the regulation of illicit drugs was, and has continued to be, a complementary exercise of Commonwealth and State laws.

34. Illicit drug regulation in Australia commenced as a colonial concern. The earliest regulation of illicit drugs was the prohibition of opium smoking in the Australian colonies between 1891 and 1895.[62] Around the turn of the century Colonial and then State Parliaments enacted public health and pure food legislation. These were in part aimed at drug regulation through regulation of proprietary drugs which included opiates, alcohol and cannabis in their ingredients.[63] It is said the opium controls and public health acts were part of a changing social attitude in Australia - a

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59 *Baldwin v Samuels* (1973) 6 SASR 144, 147 (Mitchell J). See also *Lenthal v Newman* [1932] SASR 126; *Lenthal v Fimeri* [1993] SASR 22.

60 *McWaters v Day* (1989) 168 CLR 289; [1989] HCA 59, [7].

61 *R v Winneke; ex parte Gallagher* [1982] HCA 77; (1982) 152 CLR 211, 224.

62 For example, *Opium Act 1895* (SA) 58 and 59 Vict No. 644; *Sale and Use of Poisons Act 1891* (Qld) Vict; *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) 61 Vict No. 17; *Opium Smoking Prohibition Act 1905* (Vic); 5 Edw VII No. 2023; *Police Offences Amendment Act 1908* (NSW) 8 Edw VII No 12.

63 *Public Health Act 1902* (NSW) 2 Edw VII No. 30; *Pure Food Act 1908* (NSW) 8 Edw VII No. 31; *Pure Food Act 1905* (Vic) 5 Edw VII No. 2010; *Food and Drugs Act 1908* (SA) 8 Edw VII No. 968. This concern also manifested itself in the Commonwealth Royal Commission into *Secret Drugs, Cures and Foods*, (1907) conducted by Octavius Beale. Desmond Manderson, *From Mr Sin to Mr Big A History of Australian Drug Laws*, (1993) 52-53.

growing faith in the appropriateness and efficacy of legal control.[64] Following federation the Commonwealth was empowered to legislate restrictions on imports and exports.[65] In 1910, the Commonwealth made it an offence to be in possession of a prohibited import.[66]

35. The early twentieth century saw Australia enter into international treaties to restrict the use of illicit drugs to medical and research purposes.[67] These treaties obliged Australia to regulate illicit drugs. The Commonwealth Parliament reacted by enacting restrictions on the importation of illicit drugs. The structure of illicit drug regulation remained substantially unchanged throughout the twentieth century with the Commonwealth maintaining their exclusive domain of regulating the importation of illicit drugs and their precursors through the *Customs Act 1901 (Cth)* leaving the
10 regulation of use, possession and manufacture of illicit drugs to the States.[68] Treaties entered into by the Commonwealth have influenced the content of Commonwealth and State laws, but not the cooperative nature of the arrangements between the Commonwealth and States.

36. The *United Nations Single Convention on Narcotic Drugs 1961* (1961 Convention)[69] was ratified by Australia in 1967.[70] Ratification was achieved in part by the enactment of the *Narcotic Drugs Act 1967* (Cth), which remains in force. It is an Act which makes clear that it forms part of a cooperative approach.[71] Further, as the then Federal Attorney-General made clear:

> In order that Australia may accede to the Convention, it is necessary for Commonwealth, State and Territory laws on narcotics control to be brought into line with the Convention's requirements. All the

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64 Desmond Manderson, *From Mr Sin to Mr Big: A History of Australian Drug Laws*, (1993) 42.

65 Historically, drug regulation by the Commonwealth relied upon 51(i) of the Constitution, trade and commerce with other countries and between the States.

66 *Customs Act 1901* (Cth). From its inception the list of prohibited imports included opium, which was later expanded to opium in its raw and processed form (i.e. morphine and heroin) when in 1920 the Commonwealth implemented the 1912 Hague International Opium Convention. Furthermore, from its inception the *Customs Act 1901* (Cth) included provisions incorporating State law in that prohibited imports per State law would also be prohibited imports for the purposes of the *Customs Act 1901* (Cth), s55. For example, South Australian law at that time prohibited opium, Indian hemp, morphine and cocaine, thus by operation of s55 these substances too would have been prohibited imports under Commonwealth law.

67 *International Opium Convention*, opened for signature 19 February 1925, League of Nations, Treaty Series, vol. 81, p. 319. (entered into force 25 September 1928); *Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs*, opened for signature 13 July 1931, League of Nations, Treaty Series, vol. 139, p. 301; (entered into force 9 July 1933).

68 See discussion in Desmond Manderson, *From Mr Sin to Mr Big A History of Australian Drug Laws*, (1993) 54-55.

69 *United Nations Single Convention on Narcotic Drugs 1961*, opened for signature 24 January to 25 March 1961, United Nations, *Treaty Series* , vol. 520, p. 151, vol. 557, p. 280, (entered into force 13 December 1964.)

70 1972 according to UN Treaty series.

71 Section 7 of the *Narcotic Drugs Act 1967* provided for inconsistency thus:

> **Inconsistency with State and Territory laws**
> This Act, regulations under this Act and directions given under section 12 or 13 do not apply to the exclusion of any law of a State or Territory or any regulation in force under an Act except in so far as that law or that regulation is inconsistent with an express provision of this Act, those regulations or those directions.

> State governments indicated their acceptance of the provisions of the Convention and all necessary amendments to State legislation have been made. ...[72]

The 1961 Convention also led to the revision of offence provisions on importation of illicit drugs in the *Customs Act 1901 (Cth)*.[73]

37. In 1992 the Commonwealth ratified the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*[74] (1988 Convention). More than seeking to regulate the international trade in illicit drugs the 1988 Convention obliged state parties to enact domestic legislation establishing criminal offences for possessing, manufacturing and trafficking narcotic drugs or psychotropic substances.[75] The Commonwealth enacted the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990 (Cth)* (*'Crimes Act'*)[76] to meet its treaty requirements but not exclusively. It also relied upon relevant State drug offences.

38. The *Crimes Act* preserved the system of complementary drug offences between the Commonwealth and States, however it did not meet the recommendation of the Justice Williams in the *Australian Royal Commission of Inquiry into Drugs* ("Royal Commission") from a decade earlier.[77] In 1977 the Royal Commission strongly recommended:

> The prime target in a strategy to reduce the quantity of illegal drugs available in Australia should be the drug trafficker. There is abundant evidence to prove that groups engaged in drug trafficking do not respect Australia's State or national boundaries. Illegal drugs are imported into Australia but are also produced in Australia in substantial quantities. Distribution networks for illegal drugs cross State boundaries.
>
> Presently the legislative scheme is that Commonwealth law, expressed in the Customs Act, seeks to prevent the importation of illegal drugs, while State law seeks to prevent the distribution of illegal drugs that have been successfully imported and to prevent the local production of illegal drugs. This scheme is, in the Commission's opinion, quite inadequate to cope with the realities of the drug trade. It has failed to concentrate the attention of all enforcement agencies against drug traffickers, has produced demarcation disputes between enforcement agencies and has generally inhibited co-operation among them. The resources of the Commonwealth which could aid law enforcement have to a great extent supported the Commonwealth law only. On the other hand, State law enforcement bodies and State resources generally have been concentrated too much on State laws.

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72 Commonwealth, *Parliamentary Debates*, The Senate, 4 May 1967, (Kenneth Anderson, Attorney General).

73 The Commonwealth responded to the *United Nations Convention on Psychotropic Substances 1971* by enacting of the *Psychotropic Substances Act 1976* (Cth) which provided controls of the import and export of psychotropic substances but again left the control of manufacture, distribution and use of those substances to State and Territory laws.

74 *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, open for signature 20 December 1988, United Nations, *Treaty Series*, vol. 1582, p. 95, (entered into force 11 November 1990).

75 *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, open for signature 20 December 1988, United Nations, *Treaty Series*, vol. 1582, p. 95, (entered into force 11 November 1990), Article 3.

76 Remains in force.

77 Commonwealth, Australian Royal Commission of Inquiry into Drugs, *Report* (1980) Book D, D29.

> There should be in force in every place in Australia legislation which in a uniform manner prohibits trafficking of illegal drugs, whether they are imported or locally produced. Legislation which is the creature of united action by Commonwealth and State Parliaments will commit all the resources of the commonwealth and States to the enforcement of that legislation. The legislation should contain powers which police forces do not presently have. This proposed Nation legislation or code is referred to by the Commission as the Uniform Drug Trafficking Act.
>
> A National Code
>
> The Commission strongly recommends that there be enacted by the Commonwealth Parliament and by legislatures of the States and Territories legislation to form a National code to deal with drug trafficking, it being made clear that the legislation is to be enforced in each State as Federal and as State legislation notwithstanding Section 109 of the Australia constitution. ....[78]

39. Further, the Royal Commission recognised that a national code on drug trafficking could have been implemented by the Commonwealth alone, based upon their treaty obligations and the external affairs power. However they noted, a co-operative approach between States and Territories would be more effective.[79]

40. The Model Criminal Code Officers Committee ("Committee") in their Discussion Paper on the Model Criminal Code,[80] agreed with the general approach of the Royal Commission and in particular, noting that "the essential vocabulary of control - the schedules, standards and nomenclature of drug law - all fall within the realm where the need for uniformity is unavoidable."[81] They further stated:

> The illicit drug distribution system operates Australia wide and internationally. Australia has undertaken international obligations requiring severe criminal measures against (sic) individuals who play a significant commercial role in the organised traffic of drugs. Though there is certainly room for variation in the legislative measures directed to the control of use and minimisation of harm to user, [i.e. the historic purview of state provisions] the arguments for uniformity in the measure directed against commercial exploitation in the illicit market are clear and compelling. [82]

41. The 2005 addition of Part 9.1 to the *Code* was a reflection of the Model Criminal Code and the underlying principles enumerated by the Royal Commission. Part 9.1 altered the previous arrangement of Commonwealth offence provisions based around importation and trafficking and included a simple possession offence.[83] The amending act[84] in codifying Commonwealth illicit drug

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78 Commonwealth, Australian Royal Commission of Inquiry into Drugs, *Report* (1980) Book D, D29.

79 Commonwealth, Australian Royal Commission of Inquiry into Drugs, *Report* (1980) Book D, D30.

80 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper Model Criminal Code Chapter 6 serious Dug Offences*, (June 1997).

81 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper Model Criminal Code Chapter 6 serious Dug Offences*, (June 1997) 2.

82 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper Model Criminal Code Chapter 6 serious Dug Offences*, (June 1997) 2.

83 It should be noted that the enacting instrument the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth) did not repeal *Narcotic Drugs Act 1967* (Cth), *Psychotropic Substances Act 1976* (Cth), nor the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth) but did stipulate one of the purposes of Part 9.1 to be meeting Australia's international obligations under the 1988 Convention.

offences and inserting them into the *Code* repealed the drug offences included in the *Customs Act 1901 (Cth)*. The Explanatory Memorandum and second reading speech show Part 9.1 was expressly not intended to override State drug provisions. Section 300.4 specifically provides that the entirety of Part 9.1 was not intended to exclude or limit the concurrent operation of any law of a State or Territory. The intention was to achieve what the Williams Royal Commission had recommended.

42. South Australia has in turn amended its legislation in response to the underlying principles of the Model Code regarding drug offences.[85] Whilst the Model Code has not been uniformly adopted, the contemporary form of the Australia's illicit drug regulation maintains the long standing arrangement between the Commonwealth and the States and Territories to ensure the problem of illicit drugs is comprehensively addressed.

43. It is that history that explains the inclusion of the deliberate and express statements of intent contained in s300.4 of the *Code*. Contrary to the submissions of the appellant such an express statement in a Commonwealth statute is relevant in construing the Commonwealth law for determining whether there is an inconsistency at all. In this respect South Australia adopts the submissions of Attorney-General for Victoria at [17]-[18] of his Written Submissions.

44. As to the asserted inconsistency of the offences, the express language of the *Code* discloses a deliberate course of providing for the complementary operation of the Commonwealth and State laws regulating controlled substances. There is nothing within the text that suggests Part 9.1 of the *Code* should be given exclusive operation. That express inter-relationship within the language of the provisions appears from:

    44.1 Section 313.1 which provides that it will not be an offence under the Part (save for s307 concerning import and export), if the conduct is both committed in a State or Territory and is justified or excused by the law of that State or Territory. This has the practical effect that not only State or Territory licences will render the conduct lawful, but that a defence that exists in the law of a State can be relied upon in defence to a Commonwealth charge.

    44.2 Section 308.1(3) provides that for offences of simple possession of controlled drugs, the defendant may be tried or punished as if the offence was an offence of possession against

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84 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth)

85 Specifically, South Australia has amended the *Controlled Substances Act 1984* (SA) and to provide for a new regime of drug offences, in particular, adopting the language of "trafficking" from the *Code*. It has also substantially modified its lists of controlled substances so as to provide for greater conformity with the lists set out in the *Code*. *Controlled Substances (Serious Drug Offences) Amendment Act 2005* (SA). Note these steps were primary objectives of the Model Code. Model

the law of the State or Territory in which it occurred. The provision is directed at permitting offences committed in that way to be dealt with in accordance with the diversionary sentencing options including treatment and education.

44.3 Section 300.4 provides that it is not the intention of the Commonwealth Parliament to exclude or limit the concurrent operation of a law of a State or Territory, including a law that makes it an offence to engage in the same or similar conduct to that prescribed by the *Code*.

44.4 The contrasting exclusivity of the Commonwealth regulation of the importation and exportation of drugs (s307) that cannot be lawfully authorised at a State level (s313.1).

45. Those inter-relationships support a conclusion that Part 9.1 as a whole, and the offences in ss302.4 and 308.1, are to be read as complementary or supplementary to the *Drugs Act* and State provisions. As to contrary intention, it should not be simply inferred because the Commonwealth created a simple possession offence (s308.1) that it intended to create a code of offences exclusive of the States. Rather, the simple possession offence provides an alternative verdict in any prosecution for more serious offences by s313.3. Without a simple possession offence, an alternative verdict on possession would not be available on any prosecution where the allegation was possession for the intention of trafficking.

46. The same conclusion is supported by the nature or subject matter regulated by Part 9.1. This Part is directed at creating offences relating to drug trafficking and to give effect to the 1988 Convention. The purposes of that Convention are to address the production; demand for, and trafficking in narcotic drugs and psychotropic substances; the effect of those substances on health and welfare of the community; the particular impact of these substances on social groups and children; and finally, address the relationship between these activities and other crime, and their impact on the security and sovereignty of States.[86] Legislation in that context directed at criminalising trafficking, similar to a provision preventing operating a vehicle while being incapable of having proper control, was not meaningfully intended to allow drunken members otherwise to drive motor vehicles. It is not to be expected that a scheme creating a regime of drug offences, expressed on its face not to limit State and Territory offences of a similar kind, was intended to create liberties for drug traffickers. These are the reasons why there is no direct inconsistency.

Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper Model Criminal Code Chapter 6 serious Dug Offences*, (June 1997) 8-9.

Inconsistency of means of proof

47. It is further asserted that an inconsistency arises from the absence in the *Code* of an aid to proof in relation to possession that arises by reason of occupation of the premises. The flaw in this analysis is to assume that the Commonwealth was intending by the absence of such an aid to create an area of freedom or liberty to the exclusion of State laws. There is little basis for that view given that the fault elements for the Commonwealth and State offences are identical. The better view is that the Commonwealth has provided for a procedure for its own offences, without in any way evincing an intention to dictate as to how the States may provide for proof of offences created under their own legislation.

Inconsistency of mode of trial

48. As to the argument concerning the mode of trial, Commonwealth enactments creating criminal offences must necessarily conform with the mode of trial requirements of s80. No automatic inference should be drawn from the Commonwealth enactment creating an offence that there was an intention to cover the field to exclusion of State laws with different mode of trial requirements by reason of the mode of trial requirements of s80 merely by reason of the existence of s80. If that were not so, a law of the State and the Commonwealth that were otherwise not inconsistent, would be inconsistent because of the *Constitution's* requirement as to the conduct of federal trials and not by reason of an inconsistency between the law of the Commonwealth creating the offence and the relevant law of the State.

Differences in *Dickson v The Queen*

49. The provisions being considered by the High Court in *Dickson v The Queen*[87] differed because of matters of context not present here:

    49.1 the offence under consideration was one where the Commonwealth Parliament was legislating with respect to unlawful dealings with property that belonged to the Commonwealth. The narrowness of that class and the Commonwealth's apparent concern to regulate dealings in its property make it easier to conclude that specific and *exclusive* rules were intended to be created.

    49.2 the Commonwealth Parliament had crafted a separate offence of conspiracy that was intentionally narrower than the common law offence of conspiracy. That is, from the express language of the provision, a comparison with the common law offence disclosed a deliberate intent to be more restrictive.

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86 *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, open for signature 20 December 1988, United Nations, *Treaty Series*, vol. 1582, p. 95, (entered into force 11 November 1990), Preamble, Pages 9 and 10.

87 [2010] HCA 30; (2010) 270 ALR 1; (2010) 84 ALJR 635.

50. Taken together, the provisions could be seen as establishing an area of freedom with respect to a narrow class of property the protection of which was likely to be of the great concern to the Commonwealth. Notwithstanding that design, the Victorian law of general application then purported to make that conduct unlawful and impair it. That is the same rationale as advanced in *The Queen v Loewenthal ex Parte Blacklock* by Mason J:[88]

> It is not to be supposed that the Commonwealth law, when it formulated the relevant rule of conduct in relation to Commonwealth property and that of its public authorities, proceeded on the footing that other and different rules of conduct might be enacted in relation to such property or that the rule of conduct which it formulated might be subjected to a different penalty.

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51. The difference here is the Commonwealth have enacted provisions with respect to all controlled drugs and precursors. It is not to be understood as fashioning special rules applicable to matters of particular and exclusive concern to it. Nor should it be understood as having created areas of freedom - indeed, the intention is that the combination of Commonwealth, State and Territory laws remove them.

52. The Commonwealth has instead crafted offences that are to be complementary of those already existing in State legislation. In that context, they do not form part of an attempt to create an area of freedom with respect to drug offences which the State law operates to impair. Accordingly, s71AC is not inconsistent with co-ordinate offences (and their alternatives) created by the *Code*.

20 ***Indirect inconsistency***

53. Nor is there an inconsistency by reason that Part 9.1 of the Code "covers the field" to the exclusion of other laws.

54. The offences in Part 9.1 of the *Code* are expressly intended not to be exclusive by operation of s300.4. That section of the *Code* is at the very least a guiding indication that the Commonwealth Parliament did not intend to make its offences exclusive in relation to illicit drugs. Section 300.4 is a provision of the kind identified by Mason J in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation,*[89] and considered again in *John Holland Pty Ltd v Victorian WorkCover Authority,*[90] that makes "clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth

30 law."[91]

55. Insofar as the rationale of *Dickson v The Queen*[92] draws attention to the placement of the relevant provisions in the *Code*, this case differs. In *Dickson v The Queen*[93] the clause stating Parliament's

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88 [1974] HCA 36; (1974) 131 CLR 338, at 347. See also Menzies J at 342-3.
89 [1977] HCA 34; (1977) 137 CLR 545.
90 [2009] HCA 45; (2009) 239 CLR 518.
91 [2009] HCA 45; (2009) 239 CLR 518, at [21] (The Court).
92 [2010] HCA 30; (2010) 270 ALR 1; (2010) 84 ALJR 635.
93 [2010] HCA 30; (2010) 270 ALR 1; (2010) 84 ALJR 635.

intention could have no operation in relation to the separate offence - conspiracy to commit an offence - that was found in another Part of the *Code*. Here, s300.4(1) does apply to the relevant offence.

Dated: 31 January 2020.

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Martin Hinton QC

Solicitor-General for South Australia

.....

Chad Jacobi

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No: M134/2010

BETWEEN

VERA MOMCILOVIC
Plaintiff

and

THE QUEEN
First Respondent

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Second Respondent

and

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
Third Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)
Appendix A

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Part IV

The following provisions are in force, in the following form at 31 January 2011.

Australian Constitution

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences--

(i.) Of any Justice or Justices exercising the original jurisdiction of the High Court:

(ii.) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

(iii.) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Charter of Human Rights and Responsibilities Act 2006 (Victoria)

Act No. 43/2006

32. Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of—

(a) an Act or provision of an Act that is incompatible with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

36. Declaration of inconsistent interpretation

(1) This section applies if—

(a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or

(b) the Supreme Court has had a question referred to it under section 33; or

(c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).

(2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

(3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.

(4) The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that—

(a) notice in the prescribed form has been given to the Attorney-General and the Commission under sub-section (3); and

(b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.

(5) A declaration of inconsistent interpretation does not—

(a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or

(b) create in any person any legal right or give rise to any civil cause of action.

(6) The Supreme Court must cause a copy of a declaration of inconsistent interpretation to be given to the Attorney-General—

(a) if the period provided for the lodging of an appeal in respect of the proceeding in which the declaration was made has ended without such an appeal having been lodged, within 7 days after the end of that period; or

(b) if on appeal the declaration is upheld, within 7 days after any appeal has been finalised.

Example

If the Trial Division of the Supreme Court makes a declaration of inconsistent interpretation (based on a referral of a question from VCAT) and on appeal the Court of Appeal upholds the declaration, a copy of the declaration must be sent to the Attorney-General within 7 days after the Court of Appeal's decision.

(7) The Attorney-General must, as soon as reasonably practicable, give a copy of a declaration of inconsistent interpretation received under subsection

(6) to the Minister administering the statutory provision in respect of which the declaration was made, unless the relevant Minister is the Attorney-General.

Drugs, Poisons and Controlled Substances Act 1981 (Victoria)

Act No. 9719/1981

(Version No. 075) Version incorporating amendments as at 30 November 2005

5. Meaning of "possession"

Without restricting the meaning of the word **"possession"**, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.

71AC. Trafficking in a drug of dependence

A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).

Division 302—Trafficking controlled drugs

302.1 Meaning of *traffics*

(1) For the purposes of this Part, a person ***traffics*** in a substance if:

(a) the person sells the substance; or

(b) the person prepares the substance for supply with the intention of selling any of it or believing that another person intends to sell any of it; or

(c) the person transports the substance with the intention of selling any of it or believing that another person intends to sell any of it; or

(d) the person guards or conceals the substance with the intention of selling any of it or assisting another person to sell any of it; or

(e) the person possesses the substance with the intention of selling any of it.

(2) For the purposes of paragraph (1)(b), preparing a substance for supply includes packaging the substance or separating the substance into discrete units.

302.2 Trafficking commercial quantities of controlled drugs

(1) A person commits an offence if:

(a) the person traffics in a substance; and

(b) the substance is a controlled drug; and

(c) the quantity trafficked is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

Note: Section 313.4 provides a partial defence in relation to the matter in paragraph (1)(c).

302.3 Trafficking marketable quantities of controlled drugs

(1) A person commits an offence if:

(a) the person traffics in a substance; and

(b) the substance is a controlled drug; and

(c) the quantity trafficked is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

Note: Section 313.4 provides a partial defence in relation to the matter in paragraph (1)(c).

302.4 Trafficking controlled drugs

(1) A person commits an offence if:

(a) the person traffics in a substance; and

(b) the substance is a controlled drug.

Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

302.5 Presumption where trafficable quantities are involved

(1) For the purposes of proving an offence against this Division, if a person has:

(a) prepared a trafficable quantity of a substance for supply; or

(b) transported a trafficable quantity of a substance; or

(c) guarded or concealed a trafficable quantity of a substance; or

(d) possessed a trafficable quantity of a substance;

the person is taken to have had the necessary intention or belief concerning the sale of the substance to have been trafficking in the substance.

(2) Subsection (1) does not apply if the person proves that he or she had neither that intention nor belief.

Note 1: A defendant bears a legal burden in relation to the matters in subsection (2) (see section 13.4).

Note 2: This section does not apply where quantities are combined for the purposes of section 311.2 (see subsection 311.2(3)).

302.6 Purchase of controlled drugs is not an ancillary offence

A person does not commit:

(a) an offence against this Division because of the operation of section 11.2; or

(b) an offence against section 11.4 or 11.5 that relates to an offence against this Division;

merely because the person purchases, or intends to purchase, a controlled drug from another person.

Note: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).

As amended by:

Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (Commonwealth) No. 3, 2010

Schedule 4—Other amendments

12 Paragraph 302.6(a) of the *Criminal Code*

After "11.2", insert "or 11.2A".