IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M134 of 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

APPELLANT'S FURTHER SUBMISSIONS

Date of document: 18 March 2011
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Certification

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

Submissions in response to Court's letter of 1 March 2011

2. The appellant files these further written submissions in response to the letter received from the Court dated 1 March 2011 ("the Court's letter").

Question 1: Can the question of inconsistency between the relevant law of the Commonwealth (s 302.4) and the law of the State (s 71AC) be determined by reference only to whether the elements of the offences in question differ?

3. There are two answers to this question: First, if the Court is of the view that, upon analysis of the elements of the offences created by the two laws, an inconsistency arises, then that is sufficient to render the State law inoperative for the purposes of s 109.

4. Secondly, however, if the Court is of the view that no inconsistency arises upon an analysis of the elements of the offences, the Court must go further and consider other matters as well. On existing authorities, an inconsistency between elements of offences has not been regarded as the sole reason for a conclusion that a s 109 inconsistency exists between two laws.

5. In *Dickson v The Queen*,[1] this Court considered that both an inconsistency between the elements of the offences and a different mode of adjudication for the two offences were relevant to the question of inconsistency. It was held that there was no room for the State law to "undermine and ... negate the criteria for existence and adjudication of criminal liability adopted by the federal law".[2] Further, this Court considered that a State law that did so was directly inconsistent with the Commonwealth law.[3]

6. In *R v Loewenthal; Ex parte Blacklock*,[4] the two laws proscribed identical conduct but had different penalties. Mason J expressed the view (albeit by way of *obiter*) that the two laws were nonetheless inconsistent; and he rejected the proposition that the inconsistency could be "cured" by attributing to the Commonwealth an intention not to cover the field. His Honour said as follows:[5]

> A difference in the penalties prescribed for conduct which is prohibited or penalized by Commonwealth and State laws has been held to give rise to inconsistency between those laws (see *Hume v Palmer* [and] *Ex parte McLean*), at least when it appears that the Commonwealth statute by prescribing the rule to be observed evinces an intention to cover the subject matter to the exclusion of any other law. It is not to be supposed

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

[2] (2010) 270 ALR 1; 84 ALJR 635 at [22].

[3] *Ibid.*

[4] (1974) 131 CLR 338.

[5] (1974) 131 CLR 338 at 346-347 (citations omitted).

> 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. To conclude otherwise would be to say that the Commonwealth law contemplated the concurrent application of an inconsistent State law, a result which cannot be sustained. Indeed, there is here a direct conflict (in the matter of penalty) between the Commonwealth and the State law; in such a case it is impossible to see how the existence of inconsistency in the constitutional sense can be avoided by an argument which seeks to attribute to the Commonwealth law an intention not to cover the relevant field.

7. Likewise, in *Hume v Palmer*,[6] Knox CJ explained that, although the conduct proscribed by the two laws in question[7] was the same, there was nonetheless an inconsistency between them:[8]

> The rules prescribed by the Commonwealth law and the State law respectively are for present purposes substantially identical, but the penalties imposed for their contravention differ. Under the Commonwealth law a contravention caused by wilful default is an indictable offence, and for a contravention not so caused the penalty is a fine not exceeding £100. Under the State law the penalty is a fine not exceeding £50, and is imposed only in case of wilful default. Moreover, offences against the respective Acts are cognizable by different tribunals. … In these circumstances, it is, I think, clear that the reasons given by my brothers Isaacs and Starke for the decisions of this Court in *Union Steamship Co. of New Zealand v Commonwealth* and *Clyde Engineering Co. v Cowburn* establish that the provisions of the law of the State for the breach of which the appellant was convicted are inconsistent with the law of the Commonwealth within the meaning of sec. 109 of the Constitution and are therefore invalid.

8. In the same case, Isaacs J stated that the State law in question was inconsistent with the Commonwealth law "in various ways", including:[9]

> (1) general supersession of the regulations of conduct, and so displacing the State regulations, whatever those may be; (2) the jurisdiction to convict, the State law empowering the Court to convict summarily, the Commonwealth law making the contravention an indictable offence, and therefore bringing into operation sec. 80 of the Constitution, requiring a jury; (3) the penalty, the State providing a maximum of £50, the Commonwealth Act prescribing a maximum of £100, or imprisonment, or both; (4) the tribunal itself.

9. It is submitted that this passage offers several alternative bases for the inconsistency between the two laws – that is, that any one of these matters would have established an inconsistency, independently of any Commonwealth intention to cover the field. In

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[6] (1926) 38 CLR 441.

[7] The Collision Regulations (NSW) and the Statutory Rules 1923, No. 100 (Cth).

[8] (1926) 38 CLR 441 at 448 (citations omitted).

[9] (1926) 38 CLR 441 at 450-451.

addition, it is significant that Isaacs J reached the conclusion that the two laws were inconsistent notwithstanding a concurrency clause in the Commonwealth law.[10]

10. While it is true that some of these cases might be better classified as cases concerning indirect, rather than direct, inconsistency, it is clear that it is not necessary, in order to demonstrate an inconsistency between a State criminal law and a federal criminal law, that the elements of the two offences differ. This Court has accorded significance to other aspects of the operation of the laws in question including, in particular, a difference in the mode of adjudication of the offences.

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11. Finally, as a matter of principle, there is no reason why it should be only the elements of the offence in question that are considered in determining whether there is an inconsistency between State and federal criminal laws. Indeed, such an approach fails to pay due regard to the possibility of a "rights inconsistency" – that is, the form of inconsistency where it is possible to obey both laws, but one law confers a right that the other law removes or limits.[11] This form of inconsistency is considered further in answer to Question 2.

12. Thus the question of the inconsistency between s 71AC of the *Drugs, Poisons and*
20 *Controlled Substances Act 1981* (Vic) ("the Drugs Act") and s 302.4 of the *Criminal Code* (Cth) ("the Code") should be resolved both by reference to the elements of the two offences and by reference to the criteria for adjudication for the two offences. As explained in answer to Question 2, the differences in the criteria for adjudication in this case give rise to a direct inconsistency between the two laws.

Question 2: If there is no relevant difference between the elements of the offences that are created by the two laws, are the laws inconsistent if the relevant law of the Commonwealth (s 302.4), by prescribing the penalty for contravention as it does:

30 **(a) engages the provisions of s 80;**

(b) engages other Commonwealth provisions concerning sentencing?

That is, assuming that there is no difference between the norms of conduct proscribed by the Commonwealth and the State laws, is there an inconsistency between the laws:

(a) because the method of determining that there has been a breach of the norm differs; or

(b) because the consequences of a determination that there has been a breach are to be fixed by reference to different requirements (including by reference to different maximum penalties); or

(c) some combination of those considerations?

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13. It is submitted that:

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[10] Article 30 of the Statutory Rules 1923, No. 100 (Cth) provided that "Nothing in these Rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters." Higgins J concluded that article 30 saved the State law from inconsistency; Knox CJ concluded that the State law did not fall within article 30; and Isaacs J made no reference to article 30.

[11] See *Clyde Engineering v Cowburn* (1926) 37 CLR 466 at 478. See also *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-456 (Gibbs CJ); *Commonwealth v Western Australia* (1999) 196 CLR 392 at [54] (Gleeson CJ and Gaudron J), [171] (Kirby J).

(a) the answer to the first part of Question 2 is "Yes"; and
(b) the answer to the second part of Question 2 is that either of (a) or (b) is sufficient to give rise to a s 109 inconsistency; and that a combination of the two will also give rise to a s 109 inconsistency.

14. As Knox CJ and Gavan Duffy J observed in *Clyde Engineering v Cowburn*:[12]

> Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.

15. Further, this kind of inconsistency is a direct inconsistency.[13]

16. Provisions such as those dealing with the mode of determining that a breach of a norm has occurred or fixing the maximum penalty for an offence or the sentencing principles for such an offence should be regarded as conferring on a persons to whom they apply a right to have their conduct dealt with according to those terms (including, importantly, an entitlement to have a trial by jury according to s 80 of the Constitution where the Commonwealth offence is one triable on indictment).

Entitlement to trial by jury

17. A person who is charged with an indictable offence under Commonwealth law has an entitlement to have that charge determined by a jury in the constitutional sense, including a requirement of unanimity.[14] Section 80 of the Constitution, though not guaranteeing a right to trial by jury for all Commonwealth offences, does guarantee that, where a Commonwealth offence is triable on indictment, it is to be tried by jury. Once s 80 is engaged, it has been described by this Court as a "fundamental law" that "guarantees" trial by jury[15] and as a "constitutional guarantee".[16] Thus, once the Commonwealth chooses to render an offence triable on indictment, a person charged with such an offence has an entitlement to be tried by jury, in the constitutional sense. This is so whether or not the constitutional requirement of trial by jury is regarded as an individual right[17] or as a "constitutional guarantee ... for the benefit of the community as a whole".[18]

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[12] (1926) 37 CLR 466 at 478. See also *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-456 (Gibbs CJ); *Commonwealth v Western Australia* (1999) 196 CLR 392 at [54] (Gleeson CJ and Gaudron J) & [171] (Kirby J).

[13] *University of Wollongong v Metwally* (1984) 158 CLR 477 at 455-456 (Gibbs CJ).

[14] *Cheatle v The Queen* (1993) 177 CLR 541.

[15] *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

[16] *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

[17] *Brown v The Queen* (1986) 160 CLR 171 at 190 (Gibbs CJ and Wilson J, dissenting).

[18] *Brown v The Queen* (1986) 160 CLR 171 at 201 (Deane J, Brennan and Dawson JJ agreeing).

18. One key reason for the requirement of unanimity of verdict in a trial by jury in the constitutional sense is to protect the accused.[19] As this Court observed in *Cheatle v The Queen*:[20]

> [T]he common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt... It is true that there is no logical inconsistency involved in the co-existence in the law of the criminal onus of proof and majority verdicts of guilt... Nonetheless, assuming that all jurors are acting reasonably, a verdict returned by a majority of the jurors, over the dissent of others, objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict.

19. This protection of the accused is lost where the accused is tried other than by a jury requiring a unanimous verdict.

Accused's right to have case against her proved beyond a reasonable doubt

20. Similarly, the traditional common law requirement that the Crown prove its case beyond a reasonable doubt,[21] while not constitutionally entrenched, is for the protection of the accused person and an accused has a right to that protection subject to its removal by statute. Where that requirement is removed, the accused loses the benefit of that protection; that is, the accused loses the right to have the case against her proved beyond a reasonable doubt in order for a conviction to be recorded.

Right to have sentence determined according to law

21. A person who is found to have breached a Commonwealth law has a legal right not to have a sentence greater than the prescribed maximum imposed; and any sentence imposed greater than the prescribed maximum would be set aside on appeal.

22. Finally, a person convicted of an offence against a law of the Commonwealth has a right to have her sentence determined in accordance with relevant Commonwealth sentencing principles.

State law that denies these protections "alters, impairs or detracts from" the Commonwealth law

23. A State law that provides for a different and more stringent regime for dealing with the conduct in question – including by way of burden or standard of proof, mode of trial by jury, maximum penalty and/or sentencing principles – "alters, impairs or detracts from" the regime established by the Commonwealth law(s) in relation to the offence.

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[19] *Kingswell v The Queen* (1985) 159 CLR 264 at 301-302 (Deane J), quoted with approval in *Katsuno v The Queen* (1999) 199 CLR 40 at [49] (Gaudron, Gummow and Callinan JJ); and in *Brown v The Queen* (1986) 160 CLR 171 at 216 (Dawson J); and see 197 (Brennan J).

[20] (1993) 177 CLR 541 at 553.

[21] As Dawson J observed in *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 591, "[s]ince the decision in *Woolmington v Director of Public Prosecutions*, it is for the prosecution to prove beyond reasonable doubt the elements of a crime, including any mental element" (citation omitted).

In particular, such a State law alters, impairs or detracts from the legal right, under Commonwealth law, of the individual concerned to have the alleged conduct dealt with in a particular way (including a constitutionally mandated way). To use the language of *Clyde Engineering v Cowburn*, the State law takes away a right (or rights) that the Commonwealth law confers.

24. Thus, it is submitted that, even if the elements of the two offences in question here are not different (which is not conceded), there are other matters that lead to the conclusion that there is an inconsistency between s 302.4 and s 71AC, namely:

    (a) the method of determining that there has been a breach of the norm – i.e. the "criteria of adjudication"[22] – of the two offences is different by reason of the different burdens and standards of proof (i.e. the presence of s 5 in the Drugs Act with its requirement, where applicable, that the accused disprove on the balance of probabilities that she is in possession; and the absence of such a provision in the Code and instead a requirement that the prosecution bears the onus of proving possession beyond reasonable doubt);
    (b) the method of determining that there has been a breach of the norm – i.e. the "mode of adjudication" – for the two offences is different by reason of s 80 of the Commonwealth Constitution, which requires trial by jury, including a unanimous verdict, for the Commonwealth offence, whereas for the State offence a majority verdict is permitted;
    (c) the maximum penalties for the offences differ (15 years' imprisonment for the State offence; ten years' imprisonment for the Commonwealth offence); and
    (d) as noted in the Court's letter, the sentencing provisions for the Commonwealth and State offences are different.

25. In all of these respects, the appellant's right to have her conduct dealt with according to the law of the Commonwealth has been taken away by State law.

Question 3: What is meant in s 300.4 by "concurrent" operation of the Commonwealth and State laws? Does "concurrent" operation mean more than that, because simultaneous obedience to the norms of conduct proscribed by both laws is possible, it is the intention of the Parliament that there be a choice available to prosecuting authorities to determine whether State or Federal law will be engaged, no matter that the mode of trial and the punishment will differ according to that choice?

26. It is submitted that "concurrent" operation of the Commonwealth law in s 300.4 means that it is the intention of the Parliament that the Commonwealth offence operate alongside any State laws that also govern the conduct governed by the Commonwealth law and that such State laws not be rendered invalid (in the sense that term is used in s 109[23]) by the existence of the Commonwealth law.

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[22] *Dickson v The Queen* (2010) 270 ALR 1; 84 ALJR 635 at [22].

[23] That is to say, "inoperative" – see, e.g., *Western Australia v Commonwealth ('Native Title Act Case')* (1995) 183 CLR 373 at 464-465 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ).

27. Further, it is submitted that s 300.4 has the effect that, and means that it was Parliament's intention[24] that, there is a choice available to prosecuting authorities to determine whether State or federal law will be engaged in relation to the prosecution of a particular person, no matter that the mode of trial and the punishment will differ according to that choice.

Does availability of that choice demonstrate inconsistency?

28. It is submitted that the answer to this part of Question 3 is "Yes".

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29. The consequence (and intention) of s 300.4 is to leave in the hands of the executive (albeit through independent prosecuting authorities) the choice as to which law will apply to the conduct of a particular individual. But it is abundantly clear that the provisions cannot both operate: a person cannot be convicted of both an offence under s 71AC and under s 302.4. This is as a consequence both of the common law principles relating to double jeopardy[25] and of s 4C of the *Crimes Act 1914* (Cth).

30. Thus the very existence of a choice *between* two laws, which cannot both operate, demonstrates the inconsistency between the two laws.

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How is the availability of such a choice between engagement of State and federal laws consonant with the constitutional purposes of s 109?

31. It is submitted that the answer to this part of Question 3 is that such a choice is not consistent with the constitutional purposes of s 109.

32. Section 109 is a constitutional provision designed to resolve the question of the applicable law as between competing State and Commonwealth laws; not to leave that matter unclear; and less still to leave a choice as to the applicable law in the hands of
30 the executive government. Thus s 300.4, by leaving a choice in the hands of the executive in circumstances where there are significant differences between the criteria and methods of adjudication, the maximum penalties and the methods of determining punishment for the two laws in issue, is contrary to the purpose of s 109.

33. Furthermore, s 109 has an important constitutional role in relation to the position of individuals regulated by two levels of government. This role was explained in *University of Wollongong v Metwally*[26] as follows:

> Section 109 deals with "a matter of prime importance" in the constitutional framework
40 (see *Butler v. Attorney-General (Vict.)*, at p 282), namely the effect of an inconsistency between the enactments of two legislatures both of which operate in the same territory. Its provisions are not only critical in adjusting the relations between the legislatures of the Commonwealth and the States, but of great importance for the

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[24] In the sense discussed in *Dickson v The Queen* (2010) 270 ALR 1; 84 ALJR 635 at [32]-[33].

[25] See *The Queen v Carroll* (2002) 213 CLR 635; *Pearce v The Queen* (1998) 194 CLR 610; *Rogers v The Queen* (1994) 181 CLR 251.

[26] (1984) 158 CLR 477 at 457-458; see also 476-477 (Deane J); and see *Croome v Commonwealth* (1997) 191 CLR 119 at 129-130 (Gaudron, McHugh and Gummow JJ).

ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe.

34. It is submitted that an individual is equally entitled to know the legal regime governing her trial and punishment for breach of the law – and, as discussed in the answer to Question 2, to have applied to her the regime imposed by the Commonwealth law.

Question 4: Does s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) assist in resolving the question whether s 5 of the Drugs Act applies to "possession for sale" in the definition of "traffick" in s 70 and thereby to the offence created by s 71AC?

35. It is submitted that the answer to this question is "Yes".

36. The question whether s 5 applies to the phrase "possession for sale" in the definition of "traffick" in s 70 is a question of the interpretation of the Drugs Act. Section 32 must therefore be applied in that interpretive exercise. Section 32 requires that, if there is a choice between an interpretation that is incompatible with rights and an interpretation that is compatible with rights, then the latter interpretation must be adopted.

37. If s 5 applies to the phrase "possession for sale" in the definition of "traffick", then as the Court of Appeal correctly held,[27] it is incompatible with the right to the presumption of innocence contained in the Charter.

38. However, if s 5 does not apply to the phrase "possession for sale" in the definition of "traffick", then, in order to prove an offence under s 71AC, the Crown will be required to prove beyond a reasonable doubt that the appellant had the drugs in her possession for sale; there will be no interference with the presumption of innocence, on this construction. Thus this construction must be adopted.

Question 5: Does s 75(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 (Griffith CJ) and 44 (Isaacs J) have any bearing on the answer to the question?

39. The appellant makes no submissions in relation to this question because she contends that this question has no bearing on the outcome of her case. That is, the appeal should be resolved in her favour, on one or more of the grounds on which she relies, regardless of whether the matter was one heard in federal jurisdiction or in State jurisdiction.

Question 6: Should the case be re-entered for further oral argument on the questions that the Court has raised?

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[27] *R v Momcilovic* (2010) 265 ALR 751 (AB 318-323).

40. The appellant is content to have the Court determine the matter on the basis of the written and oral submissions of the parties and the interveners delivered thus far, and of those written submissions to come in response to the Court's letter.

41. However, if the matter is re-entered for further oral argument, the appellant will present further oral submissions.

Dated this 18th day of March 2011

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