

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE
OF THE REGISTRY

No. M134 of 2010

APPEAL FROM THE SUPREME COURT OF VICTORIA, COURT OF APPEAL

BETWEEN

10

VERA MOMCILOVIC

Appellant



- and -

THE QUEEN

First Respondent

THE ATTORNEY GENERAL FOR THE STATE OF VICTORIA

Second Respondent

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THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION

Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

30 **PART 1: Certification of suitability for publication on Internet**

1. The First Respondent certifies that this submission is in a form suitable for publication on the Internet.

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ORIGINAL

PART 2: Response to the questions in the Court's letter dated 1st March 2011

The First Respondent adopts the joint submissions of the various Attorneys General in relation to Questions 1, 2 & 3 and makes the additional submissions set out below.

Q1. Can the question of inconsistency between the relevant law of the Commonwealth (s302.4) and the law of the State (s71AC) be determined by reference only to whether the elements of the offences in question differ?

10 A1. No. According to the authorities, a comparison of the elements is just one of a number of considerations in determining whether there is s109 inconsistency. Section 109 inconsistency may exist even though the elements of the offences are identical¹. Other relevant considerations include the intent of the Commonwealth Parliament.

20 With respect to intent, the authorities draw a distinction between cases of direct and indirect inconsistency². The intent of the Commonwealth Parliament is said to be irrelevant in cases of direct inconsistency³ but relevant in cases of indirect inconsistency⁴. It is correct that if direct inconsistency is found to exist (eg, “one [law] takes away a right which the other confers”⁵), the intent of the Commonwealth Parliament is necessarily irrelevant but such intent may be relevant in determining whether direct inconsistency exists in the first place (eg, it bears upon whether the Commonwealth Parliament actually conferred the right which the State law is said to deny). In the present case, for instance, the appellant contends that the Commonwealth law confers a right, namely, to be in “mere occupation”⁶ of premises on which drugs are found, but there is no express conferral of such a right and, to adapt the language of this Court in *Dickson v The Queen*⁷ when distinguishing *McWaters v Day*⁸, it is “difficult to construe” the Code as conferring a right or liberty on an accused person to be in occupation of premises on which drugs are located or to use, enjoy or control drugs in any

¹ *R v Lowenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 34; *Hume v Palmer* (1926) 38 CLR 441 at 448, 450-451; *Ex parte McLean* (1930) 43 CLR 472

² *Dickson v R* (2010) 84 ALJR 635 : *R v Credit Tribunal* (1977) 137 CLR 545

³ See, for instance, *Dickson v The Queen* (2010) 84 ALJR 635

⁴ *Dickson v The Queen* (2010) 84 ALJR 635

⁵ *University of Wollongong v Metwally* (1984) 158 CLR 447

⁶ See [46] of the Appellant's original written submissions.

⁷ *Dickson v R* (2010) 84 ALJR 635 at [29], the Court discussed and in distinguishing that case, said

⁸ *McWaters v Day* (1989) 168 CLR 289

place whatsoever. In the absence of an express conferral of such a right, it is submitted that it is appropriate, indeed necessary, to have regard to the Commonwealth Parliament's intention.

Furthermore, in relation to the question of the relevance of the Commonwealth Parliament's intent in determining whether direct inconsistency exists, it is submitted that where the Commonwealth law is based on the external affairs power and the subject matter of the Commonwealth law has traditionally been the province of State law, there is room on the existing authorities for the Commonwealth Parliament's intent to be taken into account unless the purported direct inconsistency arises from the fact that "one law prohibits what the other requires"⁹ or one law expressly confers a right which the other denies.

The jurisprudence surrounding s.109 developed in its embryonic form from *Hume v Palmer*¹⁰, *Ex Parte McLean*¹¹ and *R v Loewenthal; ex parte Blacklock*.¹² By 1977, *R v The Credit Tribunal; ex parte General Motors Acceptance Corporation Australia*¹³ had firmly established the dichotomy of direct inconsistency on the one hand and indirect inconsistency on the other. The development of the law relating to s.109 pre-dates the increasing resort by the Commonwealth to the external affairs power.

The breadth of the external affairs power as a basis for Commonwealth intervention in matters which since Federation have been regulated by the States emphasises the need to have regard to the Commonwealth Parliament's intent in determining whether a direct inconsistency exists where both the relevant Commonwealth and State laws are capable of mutual observance and the Commonwealth law has not expressly conferred a right which the State law is said to deny. Chapter 9 of the Commonwealth Criminal Code was enacted to give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Divisions 302, 303, 304, 305, 306 and 308 of Chapter 9 seek to proscribe conduct which has always been subject to the criminal law of the States. Further, the enactment of Chapter 9 has resulted in no diminution of the role of the States in the enforcement of laws against the possession and trafficking of illicit drugs.

⁹ *University of Wollongong v Metwally* (1984) 158 CLR 447 at pp455 to 457

¹⁰ *Hume v Palmer* (1926) 38 CLR 441

¹¹ *Ex Parte McLean* (1930) 43 CLR 472

¹² *R v Loewenthal; Ex Parte Blacklock* (1974)131 CLR 338

¹³ *R v The Credit Tribunal; ex parte GMAC Australia* (1977) 137 CLR 545

In summary, it is submitted that:

- (i) where the Commonwealth legislation operates in a particular area which has always fallen within the constitutional responsibility of the States;
- (ii) the Commonwealth legislation is enacted pursuant to s.51(xxix) of the Constitution; &
- 10 (iii) the Commonwealth expresses an intention that State laws shall continue to operate unaffected by the Commonwealth law;

then the Commonwealth's expression of intention is relevant in assessing whether s.109 inconsistency exists.

Q2. 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:

- 20 (a) engages the provisions of s 80;
- (b) engages other Commonwealth statutory provisions concerning sentencing that differ from the State provisions that would be engaged in fixing the sentence for contravention of s 71AC of the Drugs Act?

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

- 30 (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) that will, or may, yield different outcomes in a particular case; or

(c) some combination of those considerations?

10 A2. Not necessarily. It depends on whether the Commonwealth Parliament has conferred a right which the State law denies or, to put it another way, whether an “area of liberty” has been “designedly left” by the Commonwealth Parliament which the State law purports to “close up.”¹⁴ If, for instance, the Commonwealth Parliament has opted for one method of proof in respect of an element of the Commonwealth offence, and the State law has opted for a different method of proof in respect of the same element for the corresponding State offence, it remains to be determined whether the Commonwealth Parliament has in fact conferred a right upon an accused to have the element in question determined by one method of proof only, namely, its method. If the Commonwealth has not expressly conferred this right, one must consider whether it has done so implicitly and this is where the Commonwealth Parliament’s intent, objectively determined, comes into play.

20 In the present case, the Commonwealth law regulating trafficking based on possession for sale does not actually specify a method of proof for the element of possession whereas the State law does in s5 of the *Drugs, Poisons & Controlled Substances Act* 1981. To prove the element of possession under the Commonwealth law, the prosecution has to prove possession as that concept is understood at common law whereas under the State law proof that the accused occupied premises on which drugs were found or, alternatively, used, enjoyed or controlled drugs in any place whatsoever is enough to prove possession, unless the accused satisfies the court to the contrary. In relation to the element of possession for sale, the Commonwealth law does specify a method of proof, namely, proof of possession of a traffickable quantity is enough to prove the intent to sell, unless the accused satisfies the court
30 to the contrary whereas the State law provides that proof of possession of a traffickable quantity is only prima facie evidence of an intent to sell.

¹⁴ *Dickson v The Queen* (2010) 84 ALJR 635 at 25. See also *Wenn v Attorney General (Vic)*, (1948) 77 CLR 84 at p120

Neither the failure of the Commonwealth law to specify a mode of proof of the element of possession or its specification of a particular mode of proof in relation to the element of commercial intent leads to the conclusion that it has conferred a right on an accused person not to be subjected to a different scheme. Nor do the difference in the penalties and sentencing regimes dictate such a conclusion, whether considered separately or in combination.

10 3. **What is meant, in s 300.4 of the Code, by ‘concurrent’ operation of the Commonwealth and State laws? Does it mean more than that, because simultaneous obedience to the norms of conduct prescribed by the relevant Commonwealth and State provisions is possible, it is the intention of the Parliament that there should 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 fixed in a particular case will differ according to the choice that is made? Does the availability of that choice demonstrate inconsistency? How is the availability of such a choice between engagement of state and federal laws consonant with the constitutional purposes of s 109?**

20 A3. “Concurrent operation” means that the Commonwealth drug laws are designed to supplement the State laws, not displace them. S300.4 of the Code means more than simply that the Commonwealth Parliament intends that prosecutors are to have a choice as to which legislative scheme to utilize. It also means that the Commonwealth Parliament is not intending to confer the right on accused persons to be subject only to the modes of proof & adjudication and sentencing regime provided by the Commonwealth law. The availability of a choice for prosecuting authorities does not demonstrate inconsistency. Nor is there anything wrong about the availability of such a choice. There is no obligation on prosecutors to select the charges which maximize the accused’s chances of obtaining an acquittal or, if convicted, a lesser penalty. The availability of a choice is consonant with the constitutional purposes of s109 because it remains the Commonwealth’s prerogative to indicate clearly that it does intend to confer a right which the States must not deny or that it intends to cover the field.

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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?

10 A4. Section 32 of the Charter does not permit one to ignore the fact that s5 deems a person to be in possession "for the purposes of this Act". One of the fundamental purposes of the Act is the proscription of illicit drug trafficking, which includes possession of drugs for sale. As discussed in *Clarke & Johnstone*¹⁵, the words "for the purposes of this Act" mean that s5 comes into play where the charge of trafficking is based on possession for sale (s70) and works in tandem with s73(2) to make possession of a traffickable quantity of drugs prima facie evidence of commercial intent. It is not reasonably open to read the expression "for the purposes of this Act" in s5 as meaning "for only some of the purposes of this Act" or "for the purposes of this Act, save for possession for sale". Such a reading would cross the line between interpretation and legislation. Nor would it sit well with the opening words of section 32 of the Charter "so far as it is possible to do so consistently with their purpose". Those words place an important and salutary restriction on the application of s32 of the Charter as an interpretive tool.

20 The First Respondent also adopts the submissions of the Second Respondent in relation to this question.

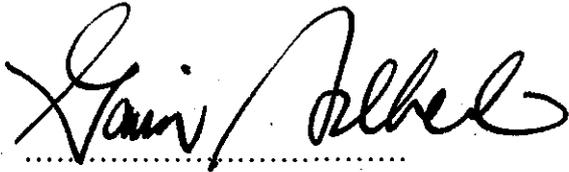
5. Does s 75(iv) confer original jurisdiction on the High Court in criminal proceedings brought by a State against a resident of another State? Does *R. v. Kidman* (1915) 20 CLR 425 at 438 (per Griffith CJ) and 444 (per Isaacs J) have any bearing on the answer to the question?

A5. The First Respondent adopts the submissions of the Second Respondent in relation to this question.

30 **PART THREE – Whether further oral submissions should be received.**

¹⁵ *Clarke & Johnstone* [1986] VR 643 at p660

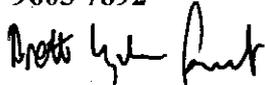
The First Respondent is willing to supplement these written submissions with oral submissions if the Court thinks that would be of assistance but is content, given the extensive written and oral submission that have been made to date, for the Court to decide the matter without hearing further oral submissions.



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