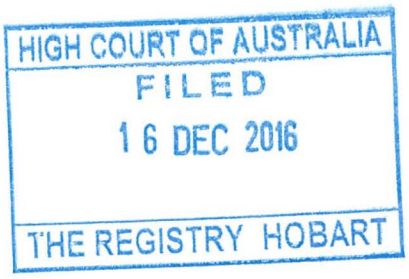
IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P55 of 2016

BETWEEN



JOHN RIZEQ
Appellant

AND

THE STATE OF WESTERN AUSTRALIA
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF TASMANIA, INTERVENING

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General of Tasmania intervenes pursuant to s 78A of the *Judiciary Act 1903 (Cth)* in support of the Respondent.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not Applicable

PART IV: APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The applicable Constitutional and legislative provisions are identified in Part VII and the Annexure to the Appellant's Submissions.

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Filed on behalf of the Attorney-General for Tasmania

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PART V: SUBMISSIONS

Preliminary matters

5. The Attorney-General for Tasmania broadly supports the Respondent's submissions and makes the following additional submissions.

Issues

6. The Attorney-General for Tasmania makes submissions in relation to the following issues:

   a) Did the *Misuse of Drugs Act 1981 (WA)* apply to the prosecution of the Appellant, as a resident of New South Wales, of its own force or was it applied by s 79 of the *Judiciary Act 1903*?

   b) In either event, was the Appellant's trial in the District Court of Western Australia on charges of offences under the *Misuse of Drugs Act 1981 (WA)* a trial of an "offence against any law of the Commonwealth" for the purposes of s 80 of the *Constitution*?

Summary

7. In answer to those issues, it is submitted that:

   a) the *Misuse of Drugs Act* applied of its own force to the trial of the Appellant. It did so on the basis that it operated independently prior to the time that a matter arose for the purposes of the exercise of federal jurisdiction; and

   b) the Appellant's trial did not involve an "offence against any law of the Commonwealth" for the purposes of s 80 of the *Constitution* for the reason that the *Misuse of Drugs Act* was either not picked up by s 79 of the *Judiciary Act* or, alternatively, if it was so picked up, it did not become a "law of the Commonwealth" in the context of s 80. Accordingly, there was no requirement for a unanimous verdict. [1]

8. It is accepted that the Appellant's trial was a matter within federal jurisdiction.[2]

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1 *Cheatle v The Queen* (1993) 177 CLR 541.

2 *Momcilovic v The Queen* (2011) 245 CLR 1 at [9] and [134] to [139]

A "matter"

9. A "matter" is a justiciable controversy.[3]

10. In this case, the existence of a matter for the purposes of s 75(iv) of the *Constitution* depends upon an offence having been committed against a State law.

11. In the case of a prosecution of an interstate resident for an offence against a law of a State, a justiciable controversy does not arise until the prosecution is initiated.

The enlivening of federal jurisdiction

12. Federal jurisdiction derives from Chapter III of the *Constitution*. Section 77(iii) provides that "with respect to any of the matters mentioned in the last two sections the Parliament may make laws investing any court of a State with federal jurisdiction".

13. Included amongst the matters referred to in the preceding two sections are all matters "between States or between residents of different States, or between a State and a resident of another State" (s 75(iv)).

14. The Parliament has made a law under s 77(iii) investing the original jurisdiction of the High Court in State courts. Subject to the exceptions in s 38, *Judiciary Act 1903*, s 39(2) confers federal jurisdiction in all matters in which the High Court has original jurisdiction.

15. Thus, the source of power for a State court to exercise federal jurisdiction is found in s 77(iii) of the *Constitution*.

16. The notion of "jurisdiction" involves the authority to adjudicate upon a justiciable controversy.[4] This has been accepted in the context of s 39(2) of the *Judiciary Act*. As Gleeson CJ and Gummow J wrote in *Northern Territory v GPAO*[5]:

> "Section 39(2) of the *Judiciary Act* confers "federal jurisdiction" on the several Courts of the States within the limits of their

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3 See eg., *Minister for Immigration and Multicultural and Indigenour Affairs v B* (2004) 219 CLR 365 at 377 and 395

4 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Baxter v Commissioner of Tax (NSW)* (1907) 4 CLR 1087 at 1142; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 377

5 (1998) 196 CLR 553 at 589, [87]; *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Baxter v Commissioners of Taxation* (NSW) (1907) 4 CLR 1087 at 1142.

several jurisdictions. The term "jurisdiction" here signifies authority to adjudicate".

17. Further, as Windeyer J said in *Felton v Mulligan*[6]:

> "The existence of federal jurisdiction depends upon the grant of an authority to adjudicate rather than upon the law to be applied or the subject of adjudication."

18. That passage was approved in *Fencott v Muller*[7] and referred to by French CJ in *Momcilovic v The Queen*[8]. Professor Zines has also observed:

> "In the context of diversity jurisdiction ... the *content* of the jurisdiction of State courts remains the same, but the *source* is different and the conditions and regulations imposed by s 39(2) are attached."[9]

19. The enlivening of federal jurisdiction has been described as the "essential condition" to s 79 operating to "pick up" State laws.[10] The essential condition is satisfied, in the present case, by the act of the State executive initiating a prosecution under a State law. However, it is only when a court is called upon to adjudicate upon a "matter" that any question of federal jurisdiction arises[11].

20. There is, thus, a crucial distinction to be maintained between the characterisation of the relevant offence at the time of its commission (by an interstate resident or otherwise) and the characterisation and treatment of the consequential prosecution of an interstate resident in federal jurisdiction.

21. It is submitted that the relevant time for identifying whether the nature of the offence is one against the law of a State or as against a law of the Commonwealth is at the time that the offence is committed. It is not, in our submission, to be determined at the time a matter (relevantly a prosecution) is brought before a court invested with federal jurisdiction. Significantly, if an interstate resident, having committed an offence against the law of a State or Territory, is not charged or an indictment is not laid to bring the matter before a court, the offence

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6 (1971) 124 CLR 367 at 393.
7 (1983) 152 CLR 570 at 606.
8 (2011) 245 CLR 1 at [99].
9 *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 90.
10 *Commonwealth v Mewett* (1997) 191 CLR 471 per Gummow and Kirby JJ at 555
11 *Commonwealth v Mewett* (1997) 191 CLR 471 per Gaudron J at 530 and Gummow and Kirby JJ at 555

necessarily remains an offence against a law of that State. The fact that it might eventually be brought before a court exercising federal jurisdiction cannot alter the essential nature of the offence as one against the law of a State.

22. The conferral of federal jurisdiction upon a court does not alter the nature of the laws which give rise to the matter which is to be adjudicated. It is simply a grant of authority for the matter to proceed in that court.

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23. The commission of an offence in one State (Western Australia) by a resident of another State (New South Wales) does not give rise to any alteration in the character or nature of the law so infringed. The law is and remains a law of Western Australia. In our submission, it applies directly and there is no need for it to be picked up by s 79.

24. The *Misuse of Drugs Act* must therefore apply directly. If it does not, there simply can be no matter within s 75(iv).

20 Section 79

25. The text of s 79 distinguishes between "the laws of each State and Territory" and "the laws of the Commonwealth". It is a direction to a court, exercising federal jurisdiction to apply State or Territory laws that are applicable and not otherwise excluded by the Constitution or a law of the Commonwealth.[12]

26. It "picks up" State provisions as surrogate (but not actual) laws of the Commonwealth. The laws of the State or Territory in which the
30 jurisdiction is exercised are applied as part of a coherent body of law, comprising also of law of the Commonwealth. This was recognised by Gleeson CJ and Gummow J in *Northern Territory v GPAO*[13]:

> "The objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth".

40 27. Having been invested with federal jurisdiction in regard to a matter so as to enliven the judicial power of the Commonwealth, consideration then turns to whether the statute law and the common law need to be supplemented to enable the matter in issue to be determined. Where

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12 *Solomons v District Court of Western Australia* (2002) 211 CLR 119 at 136 [25]

13 (1999) 196 CLR 553 at 588 [80]

there is a gap, s 79 will operate to pick up State or Territory laws to fill the gap. As Gaudron J wrote in *Commonwealth v Mewett* at 522:

> "s 79 will operate to "pick up" State or Territory laws only to the extent that the statute law of the Commonwealth and the common law in Australia need to be supplemented to enable the matter in issue to be determined".

28. In this way, s 79 allows for resort to be had to the laws of the prosecuting State in order for the prosecution to proceed within the Supreme Court exercising federal jurisdiction. It enables laws which would not otherwise have application in federal jurisdiction to be used for the purposes of the proceedings.

29. If, as contended by the appellant, a law of a State were to transmogrify into a law of the Commonwealth under federal diversity jurisdiction, it would arguably be open to the Commonwealth Parliament to make laws in relation to all matters between residents of different States and a State and a resident of another State, as being incidental to the execution of a power vested in the Federal Judicature.[14] That is an extremely broad and entirely radical interpretation of the *Constitution* and should not be accepted.

30. Taken to its extreme, the Appellant's argument tends to suggest that there may be a head of power for the Commonwealth Parliament to make laws (criminal or otherwise) in relation to matters between residents of different States or between a State and a resident of another State[15]. Such an outcome would significantly undermine the foundations of the federation and gives rise to risk of interference with the plenary legislative power of the States.

31. Moreover, if an offence under a State law is alleged to have been committed by a resident of another State and, according to the Appellant's argument is thereby an offence against a law of the Commonwealth real questions arise as to the ability of the State to prosecute the matter in the first place. Its powers in that respect will not be "picked up" by s 79 of the *Judiciary Act* because until there is a prosecution, there is no matter in a court and therefore no exercise of federal jurisdiction upon which s 79 can operate.

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14 *Constitution*, s 51(xxxix); "Hill, G and Beech, A *"Picking up" State and Territory laws under s 79 of the Judiciary Act – three questions"* (2005) 27 Aust Bar Review 25 at 30, 51

15 Appellant's Written Submissions at [36], [48], [51], [55], [77] & [78].

32. A State is not authorised to bring an indictment in relation to an offence against a law of the Commonwealth in its own right [16]. That authority primarily rests with the Commonwealth Director of Public Prosecutions[17].

Section 80

33. The clear intent of s 80 is to ensure that a trial of an offence against a law made by the Commonwealth Parliament is to be by jury. It cannot have been intended to operate so as to create a new legislative area in which the Commonwealth Parliament has power to make laws in relation to interstate residents. Nor is it apparent that s 80 was intended to cover matters within federal diversity jurisdiction.

34. In any event, a surrogate law of the Commonwealth[18] is not identical to "a law of the Commonwealth" for the purposes of s 80 of the *Constitution*. It was made clear in *Maguire v Simpson* that a "surrogate Commonwealth law", in the context of s 64 of the *Judiciary Act* was only a surrogate law for the purposes of that provision. Similarly, in relation to s 79, we submit that in so far as a State law is picked up, it applies as a surrogate Commonwealth law only for the purposes of s 79.

35. In the context of s 80, as with s 109, it is submitted that the words "law of the Commonwealth" means a law of the Commonwealth Parliament. In *Momcilovic* , Gummow J wrote at [222]:

> "The 'law of the Commonwealth' of which s 109 speaks is a reference to those enacted by the Parliament in the exercise of the power to make 'laws'".

36. In addition those words may also include the *Constitution* and the laws of the Federal Parliament and certain common law offences against the Commonwealth[19]. They do not refer to State law which is picked up and applied as surrogate Commonwealth law and they certainly do not mean State law which applies directly of its own force in federal diversity jurisdiction.

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16 But may do so through those of its prosecuting officers who have received a delegation of relevant powers from the Commonwealth Director of Public Prosecutions under s 31 of the *Director of Public Prosecutions Act 1983 (Cth)*.

17 Sections 6 and 9 of the *Director of Public Prosecutions Act 1983 (Cth)*, but without affecting the power of the Attorney-General, or a person appointed by the Governor-General or of a Special Prosecutor (s 10).

18 *GPAO* at 588, [80]; *Maguire v Simpson* (1977) 139 CLR 363 at 408.

19 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 980.

Conclusions

37. The offence was committed against a law of the State before any "matter" can be said to have arisen for the purposes of s 75(iv) and 77(iii). That is, the law was already in operation and the offender had already breached it. At the time of the offence, the law was a State law. It cannot retrospectively be turned into a federal law for the purposes of its enforcement. The prosecuting State and the offender are brought into federal jurisdiction by virtue of s 75(iii) for the enforcement of the criminal law of the State. However, there is no basis to require the offence to become a Commonwealth law in order to enforce it in federal jurisdiction.

38. The appellant has conflated the notions of federal jurisdiction (the authority to decide) with the laws to be enforced in the exercise of that jurisdiction which give rise to the very s 75(iv) matter in the first place.

39. Tasmania submits that the Appellant's statement of issues at paragraphs [3] to [6] of his written submissions can be answered in the following way:

a) The Appellant's prosecution and trial on indictment was a matter of federal jurisdiction by reason of s 75(iv) of the *Constitution*.

b) The *Misuse of Drugs Act* applied of its own force to the prosecution of the Appellant notwithstanding that the matter was in federal jurisdiction.

c) Alternatively, if s 79 of the *Judiciary Act* applied the *Misuse of Drugs Act* to the prosecution of the Appellant, the offences nonetheless remained State offences.

d) In the event that s 79 of the *Judiciary Act* did operate to create federal offences, they were not offences "against a law of the Commonwealth" within the meaning of s 80 of the *Constitution*.

40. Accordingly, there was no requirement arising from s 80 that the Appellant had to be convicted by unanimous verdict rather than by majority verdict. Therefore, in our submission, the Court of Appeal was correct to dismiss the Appellant's conviction appeal.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

41. Tasmania estimates that it will require not more than 10 minutes for presentation of oral argument.

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