

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P55 of 2016

BETWEEN:

JOHN RIZEQ
Appellant

and

THE STATE OF WESTERN AUSTRALIA
Respondent

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APPELLANT'S SUBMISSIONS

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11 November 2016
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Part I: Certification

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

Part II: Statement of issues

2. The appellant, a resident of New South Wales, was prosecuted while in Western Australia for offences against the *Misuse of Drugs Act 1981* (WA). He was convicted by a majority verdict in the District Court of Western Australia and sentenced to a term of imprisonment.
3. The first issue is whether his prosecution and trial on indictment was a matter of federal jurisdiction by reason of s.75(iv) of the *Constitution*.
- 10 4. Secondly, did the *Misuse of Drugs Act* apply of its force to the prosecution of the appellant, notwithstanding that the matter was in federal jurisdiction, or was the State law applied by s.79 of the *Judiciary Act 1903* (Cth).
5. If s.79 of the *Judiciary Act* applied the *Misuse of Drugs Act* to the prosecution of the appellant, did the applied provisions operate as federal law so that the offences were federal offences, or did the offences nonetheless remain State offences.
6. Further, if s.79 of the *Judiciary Act* did create federal offences, were they offences against a law of the Commonwealth within the meaning of s.80 of the *Constitution*, so that the appellant had to be convicted by unanimous verdict (rather than by a majority, as occurred at his trial).

Part III: Notices pursuant to s.78B of the *Judiciary Act 1903* (Cth)

- 20 7. The appellant has given notice to the Attorneys-General pursuant to s.78B of the *Judiciary Act* on 28 October 2016.

Part IV: Citations

8. The judgment of the Court of Appeal below, *Hughes & anor v State of Western Australia*¹, is reported in (2015) 299 FLR 197.
9. There is no report or internet citation of the applicant's trial and conviction.

¹ [2015] WASCA 164.

Part V: Facts

10. At all material times, the appellant was a resident of New South Wales².
11. On 15 July 2012, the appellant flew to Perth, Western Australia³. On about 16 July 2012, while in Perth, the appellant was charged on indictment with one count of possession of MDMA with intent to sell or supply, and one count of possession of methylamphetamine with intent to sell or supply, both contrary to s.6(1)(a) of the *Misuse of Drugs Act*⁴.
12. The appellant was tried in the District Court of Western Australia in September 2013⁵.
- 10 13. The jury was unable to reach a unanimous verdict of guilty in respect of the offences with which the appellant was charged. The appellant was convicted of both offences by a decision of 11 of the 12 jurors⁶.
14. The appellant was sentenced by the District Court of Western Australia on the two counts to a total effective sentence of 10 years imprisonment⁷.
15. On 18 November 2013, the appellant commenced an appeal against his conviction to the Court of Appeal.
16. On 24 August 2015, the Court of Appeal dismissed the appellant's appeal.
17. The appellant applied for special leave to appeal to this Court on 21 September 2015.
- 20 18. On 7 October 2016, French CJ and Kiefel J granted special leave to appeal to this Court.

² (2015) 299 FLR 197 at [136].

³ (2015) 299 FLR 197 at [13].

⁴ (2015) 299 FLR 197 at [2].

⁵ (2015) 299 FLR 197 at [2].

⁶ (2015) 299 FLR 197 at [133].

⁷ (2015) 299 FLR 197 at [3].

Part VI: Argument

The decision below

19. The Court of Appeal accepted (correctly) that the District Court of Western Australia was exercising federal jurisdiction in the trial of the appellant for the offences under the *Misuse of Drugs Act*⁸.
20. The Court stated that if the offence provisions of the *Misuse of Drugs Act* had been picked up by s.79(1) of the *Judiciary Act* and had become an offence against the law of the Commonwealth within the meaning of s.80 of the *Constitution*⁹, then the appellant would have had to be convicted by a unanimous verdict.
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21. The Court of Appeal upheld the appellant's conviction, and held that s.80 of the *Constitution* did not apply and the appellant did not have to be convicted by a unanimous jury¹⁰.
22. The Court of Appeal so held on one of two bases.
23. Firstly, that the offences against the *Misuse of Drugs Act* retained their character as State offences, notwithstanding that the trial court was exercising federal diversity jurisdiction¹¹. That is, the *Misuse of Drugs Act* offences were applied by s.79(1) of the *Judiciary Act*.
24. Alternatively, even if s.79(1) of the *Judiciary Act* applied the relevant provisions of the *Misuse of Drugs Act*, the offences created were not relevantly "offences against [the] law of the Commonwealth" within the meaning of s.80 of the *Constitution*¹².
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⁸ (2015) 299 FLR 197 at [136].

⁹ (2015) 299 FLR 197 at [152].

¹⁰ (2015) 299 FLR 197 at [156].

¹¹ (2015) 299 FLR 197 at [152], [156].

¹² (2015) 299 FLR 197 at [152], [156].

The error in the reasoning of the Court below

25. The Court of Appeal was of the view that this Court's decision in *Momcilovic v R*¹³ required its two conclusions set out above.
26. Firstly, the appellant submits that this Court's decision in *Momcilovic* is not authority for either of those propositions. That decision is dealt with in more detail below.
27. Secondly, the appellant contends that the each of two conclusions reached by the Court of Appeal was wrong; and that the Court below ought to have concluded that:
 - 10 27.1 the *Misuse of Drugs Act* did not apply of its own force to the appellant;
 - 27.2 rather the content of the *Misuse of Drugs Act* was applied to the appellant via the *Judiciary Act*;
 - 27.3 the offences "against" the *Misuse of Drugs Act* were applied by the *Judiciary Act* and so became offences against a law of the Commonwealth within the meaning of s.80 of the *Constitution*;
 - 27.4 s.114 of the *Criminal Procedure Act 2004* (WA) which allowed for majority verdicts could not apply to the appellant's trial as s.80 of the *Constitution* provided otherwise; and
 - 20 27.5 the appellant had not lawfully been convicted because he was not convicted by a unanimous jury verdict as required by s.80 of the *Constitution*.

Overview of argument

28. In summary:
 - 28.1 the District Court of Western Australia was exercising federal (diversity) jurisdiction in hearing the charges brought by the State of Western Australia against the appellant;

¹³ (2011) 245 CLR 1.

- 28.2 as the matter was in federal jurisdiction, the State *Misuse of Drugs Act* could not, and did not, apply to the trial of the appellant by its own force;
- 28.3 the content of the charge came from the State legislation, but it was applied to the appellant by s.79(1) of the *Judiciary Act*;
- 28.4 via that mechanism (provided by a law of the Commonwealth Parliament within Ch III of the *Constitution*), federal offences were created;
- 28.5 they were relevantly offences against a law of the Commonwealth which attracted the operation of s.80 of the *Constitution*;
- 10 28.6 s.80 of the *Constitution* required the appellant to be convicted by unanimous verdict;
- 28.7 s.114 of the *Criminal Procedure Act 2004* (WA) which allowed for majority verdicts could not apply to the appellant's trial (via s.68 or s.79 of the *Judiciary Act*, or otherwise) because s.80 of the *Constitution* provided otherwise.

The argument

A matter of federal jurisdiction

29. The matter was one of federal jurisdiction of this Court because it was within s.75(iv) of the *Constitution*: *Momcilovic*¹⁴.
- 20 30. The "matter" was the prosecution and the trial of the appellant. The federal matter in this case came into existence at the time the prosecution of the appellant was commenced by the State of Western Australia¹⁵.
31. That authority to decide the matter in federal jurisdiction was conferred on the District Court of Western Australia via s.39(2) of the *Judiciary Act*¹⁶.

¹⁴ (2011) 245 CLR 1 at [6], [9], [99] per French CJ; at [134]-[139] per Gummow J; at [280] per Hayne J agreeing with Gummow J; at [594] per Crennan and Kiefel JJ.

¹⁵ (2011) 245 CLR 1 at [134], [139] per Gummow J; s.83(2) of the *Criminal Procedure Act 2004* (WA).

¹⁶ *Momcilovic* (2011) 245 CLR 1 at [99] per French CJ; at [139] per Gummow J.

32. The District Court only had authority to adjudicate on the matter via a law of the Commonwealth Parliament which conferred that federal jurisdiction and allowed it (the District Court) to exercise Commonwealth judicial power¹⁷.
33. The source of the District Court's jurisdiction (as in its authority to decide) was a Commonwealth law passed pursuant to s.77(iii) of the *Constitution* - not from a State enactment¹⁸.

No direct application of State law

34. This Court has consistently stated that a State law cannot apply of its own force in federal jurisdiction: *Pedersen v Young*¹⁹; *John Robertson & Co v Ferguson Transformers*²⁰; *Bass v Permanent Trustee*²¹; *Solomons v District Court of New South Wales*²²; *British American Tobacco v Western Australia*²³.
- 10
35. Importantly, that proposition does not necessarily go to the *content* of the law to be applied. Rather, it goes to *how* the content of a State law may be applied to a federal matter. Depending on the terms of the relevant Commonwealth law, the content of a State law may be applied to a federal matter, but only because of the operation of a Commonwealth law enacted within Ch III of the *Constitution*.
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36. State laws do not apply of their own force to matters in federal jurisdiction because it is within the exclusive power of the Commonwealth Parliament to legislate for federal jurisdiction: *Northern Territory v GPAO*²⁴; *Austral Pacific v*

¹⁷ *Lorenzo v Carey* (1921) 29 CLR 243 at 252 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Anderson v Eric Anderson Radio & TV* (1965) 114 CLR 20 at 30 per Kitto J; *Lipohar v R* (1999) 200 CLR 485 at [78] per Gaudron, Gummow and Hayne JJ; *CGU Insurance v Blakeley* [2016] HCA 2; (2016) 90 ALJR 272; (2016) 327 ALR 564 at [24] per French CJ, Kiefel, Bell and Keane JJ.

¹⁸ *Momcilovic* (2011) 245 CLR 1 at 100 per French CJ; *Anderson v Eric Anderson Radio & TV* (1965) 114 CLR 20 at 30 per Kitto J.

¹⁹ (1964) 110 CLR 162 at 165 per Kitto J, at 167-168 per Menzies J.

²⁰ (1973) 129 CLR 65 at 79 per Menzies J, at 84 per Walsh J, at 87-88 per Gibbs J, at 93 per Mason J.

²¹ (1999) 198 CLR 334 at [35] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ.

²² (2002) 211 CLR 119 at [21] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

²³ (2003) 217 CLR 30 at [44] per McHugh, Gummow and Hayne JJ.

²⁴ (1999) 196 CLR 553 at [195] per McHugh and Callinan JJ.

*Airservices Australia*²⁵; *ASIC v Edensor*²⁶; *APLA Ltd v Legal Services Commissioner (NSW)*²⁷; *Alqudsi v R*²⁸.

37. Consequently, an Act of the Commonwealth Parliament is required to provide for matters to do with federal jurisdiction.
38. The power of the Commonwealth Parliament to make provision for the investment, and exercise of, Commonwealth judicial power by a State court derives from Ch III and s.51(xxxix) of the *Constitution*.
39. French CJ in *Momcilovic* said in *obiter* that “there is much to be said for the proposition” that the (Victorian) State Drugs Act²⁹ applied directly to the matter and not by virtue of s.79 of the *Judiciary Act*³⁰. His Honour referred to a passage from *Felton v Mulligan*³¹ which was approved in *Fencott v Muller*³².
40. The passage relied upon by French CJ states the proposition that whether or not a matter is in federal jurisdiction depends on from where the authority to decide the matter comes. As set out above, this matter was in federal jurisdiction because of s.75(iv) of the *Constitution*, and the District Court had authority to exercise the judicial power of the Commonwealth by virtue of s.39(2) of the *Judiciary Act*.
41. The passage relied on, however, expressly says nothing about the law to be applied to the matter, nor the character of the law once applied. The passage does not support the direct application of a State law to a matter in federal jurisdiction. Nor is it against the proposition that the State law once applied is, or operates as, a federal law.

²⁵(2000) 203 CLR 136 at [51], [52] per McHugh J.

²⁶(2001) 204 CLR 559 at [57] [68] per Gleeson CJ, Gaudron & Gummow JJ, and see adoption of this in *British American Tobacco* (2003) 217 CLR 30 at [44].

²⁷(2005) 224 CLR 322 at [78], [82] per McHugh J, at [230] per Gummow J.

²⁸[2016] HCA 24; (2016) 90 ALJR 711; (2016) 332 ALR 20 at [169], [171] per Nettle and Gordon JJ.

²⁹*Drugs, Poisons and Controlled Substances Act 1981* (Vic).

³⁰(2011) 245 CLR 1 at [99].

³¹(1971) 124 CLR 367 at 393.

³²(1983) 152 CLR 570.

42. French CJ then drew an analogy between a State court exercising diversity jurisdiction and a federal court exercising accrued jurisdiction and stated that the “non-federal law is part of the single, composite body of law applicable alike to cases determined in the exercise of federal jurisdiction and to cases determined in the exercise of non-federal jurisdiction”³³.
- 10 43. It may be that the *content* of the law ultimately applied to a matter in federal jurisdiction by a State court, and that applied to a matter in the accrued jurisdiction of a federal court, is the same. However, the content of the law ultimately applied to the particular matter says nothing as to how that law came to be applied, nor its character once applied.
44. Accordingly, the *obiter* remarks of French CJ in *Momcilovic*³⁴ do not provide a sustainable explanation as to how a State law might directly apply to a matter in federal jurisdiction.
45. It should also be noted that Gummow J (with whom Hayne J agreed) in *Momcilovic*³⁵ did not support the direct application of the State Drugs Act.

How State laws may be applied

- 20 46. Ch III of the *Constitution* makes certain matters ones of federal jurisdiction. On its face, however, Ch III itself does not exhaustively provide how that jurisdiction is to be exercised, including what substantive law is to be applied in the exercise of federal judicial power.
47. However, the Commonwealth Parliament has power to direct, by legislation, how the rights and duties of a matter in federal jurisdiction are to be ascertained, including as to which substantive law is applied³⁶.
48. Sections 68, 79 and 80 of the *Judiciary Act* direct where a Court exercising federal jurisdiction is to go for the procedural and substantive law to be

³³ *Momcilovic* (2011) 245 CLR 1 at [100].

³⁴ (2011) 245 CLR 1.

³⁵ (2011) 245 CLR 1 at [146(xii)] at p.86 and [202] and [280].

³⁶ See the cases cited in [36] of these Submissions above.

applied³⁷. It is submitted that Commonwealth legislation which does so is within the power of the Commonwealth Parliament.

49. With State laws not applying of their own force to matters in federal jurisdiction, the enactment of ss.68, 79 and 80 of the *Judiciary Act* seeks to prevent lacunae occurring.
50. Section 79 of the *Judiciary Act* is not limited in its operation to the procedural laws of a State³⁸.
51. It is submitted that, in the appellant's trial, the Commonwealth Parliament provided the whole of the law to be applied to this matter by the *Judiciary Act*:
10 *Austral Pacific*³⁹; *CSL Australia v Formosa*⁴⁰.
52. Section 79(1) of the *Judiciary Act* provides for State laws to be binding *in all cases to which they are applicable*.
53. Accordingly there are statements in the cases which understandably refer to the laws on which s.79 of the *Judiciary Act* operates. Rather than indicating that there are some State laws which apply directly in federal jurisdiction, such statements are to be understood as referring to the fact that some State laws will not be able to be picked up via s.79 because of their nature⁴¹; as was the case in *Solomons*⁴².

³⁷ *Commissioner of Stamp Duties (NSW) v Owens (No. 2)* (1953) 88 CLR 168 at 170 per Dixon CJ; *South Australia v The Commonwealth* (1962) 108 CLR 131 at 140 per Dixon CJ as adopted in *ASIC v Edensor* (2001) 204 CLR 559 at [57] per Gleeson CJ, Gaudron and Gummow JJ; *British American Tobacco* (2003) 217 CLR 30 at [65] per McHugh, Gummow and Hayne JJ.

³⁸ *Commissioner of Stamp Duties (NSW) v Owens (No. 2)* (1953) 88 CLR 168 at 170 per Dixon CJ; *South Australia v The Commonwealth* (1962) 108 CLR 131 at 140 per Dixon CJ; *British American Tobacco* at [21] per Gleeson CJ at [65], [67] per McHugh Gummow and Hayne JJ.

³⁹ (2000) 203 CLR 136 at [51] per McHugh J.

⁴⁰ [2009] NSWCA 363; (2009) 261 ALR 441 at [24] per Allsop P, Basten JA and Handley AJA.

⁴¹ *British American Tobacco* (2003) 217 CLR 30 at [67] per McHugh, Gummow and Hayne JJ; *Mok v DPP (NSW)* [2016] HCA 13; (2016) 90 ALJR 506 at [36] per French CJ and Bell J.

⁴² (2002) 211 CLR 119 - because the State Act allowed for the payment by that State's consolidated revenue.

An applied law is a federal law

54. The application of the State law via s.79 of the *Judiciary Act* is the adoption of the text of the State law as a Commonwealth law⁴³. Or, as has been said in this Court, “a State law made applicable by a federal law operates as a federal law”⁴⁴.
55. Those propositions, with respect, are correct and are mandated by the exclusive power of the Commonwealth Parliament as set out above. That is, only federal statute law can operate in federal jurisdiction and States have no power by which their legislation operates of its own force in or for federal jurisdiction.
- 10 56. The adoption and application (in the analogous context of Commonwealth places) has been described as the use by the Commonwealth Parliament of “machinery” it considered appropriate to use to legislate⁴⁵.

Commonwealth laws which may apply State laws

57. That legislative power for federal jurisdiction is exclusively given to the Commonwealth Parliament by Ch III is analogous to the exclusive power given, via s.52(i) of the *Constitution*, to the Commonwealth Parliament in respect of Commonwealth places.
58. There is an analogy to be drawn between the operation of s.79(1) of the *Judiciary Act* in this case, and the provisions of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) (**CPAL Act**) and the *Service and Execution of Process Act 1992* (Cth) (**SEPA**) which each provide for the creation of offences.
- 20 59. By each of the three statutes, State laws, which cannot apply of their own force, are applied via a law of the Commonwealth to the trial of the particular

⁴³ *Western Australia v The Commonwealth (Native Title case)* (1995) 183 CLR 373 at 484-485 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Mok v DPP (NSW)* [2016] HCA 13; (2016) 90 ALJR 506 at [36] per French CJ and Bell J.

⁴⁴ *Mok v DPP (NSW)* [2016] HCA 13; (2016) 90 ALJR 506 at [52] per Kiefel and Keane JJ, and at [35] per French CJ and Bell J, at [84] per Gordon J.

⁴⁵ *R v Holmes* (1988) 93 FLR 405 at 406-407 per King CJ; *R v Porter* (2001) 53 NSWLR 354 at [30], [33], [41], [43] per Spigelman CJ for the Court.

accused, and so “new”⁴⁶ or “surrogate”⁴⁷ federal offences are created. It may be that the steps which lead to State laws being inapplicable are different, but the reasoning and result are the same⁴⁸.

60. Consistently with the above, ss.68 and 79 of the *Judiciary Act*, SEPA, and the *CPAL Act* have been referred to inclusively in this Court as being a “variety of verbal formulae by which Commonwealth laws give effect to State laws as laws of the Commonwealth”⁴⁹.
61. So, analogously with this case, this Court has described the creation of federal offences and the application of s.80 of the *Constitution* to them: *Pinkstone v R*⁵⁰; and more recently *Mok v DPP (NSW)*⁵¹.
62. The *Misuse of Drugs Act* applied to the appellant as a surrogate federal law by operation of s.79(1) of the *Judiciary Act* which created federal offences, the content of which was supplied here by the *Misuse of Drugs Act*.
63. As federal offences, they attracted the operation of s.80 of the *Constitution*, which required the applicant be convicted by unanimous verdict: *Cheatle v R*⁵².
64. Section 114 of the *Criminal Procedure Act* which allowed for majority verdicts could not be applied by any provision of the *Judiciary Act* as the *Constitution* (by s.80) provided otherwise.
65. If the above propositions were applied to the appellant’s trial, then his conviction ought to have been overturned as there was no, and could be no, operative law (in federal jurisdiction) which allowed for a majority verdict.

⁴⁶ *Mok* [2016] HCA 13; (2016) 90 ALJR 506 at [33] per French CJ and Bell J and at [53] – [54] per Kiefel and Keane JJ.

⁴⁷ *Mok* [2016] HCA 13; (2016) 90 ALJR 506 at [84] (and the cases cited in fn 106), [97] per Gordon J.

⁴⁸ For example, as noted for Commonwealth places, it is by s.52(i) of the *Constitution*; for matters in federal jurisdiction generally, it is by Ch III of the *Constitution*.

⁴⁹ *Mok* [2016] HCA 13; (2016) 90 ALJR 506 at [35] per French CJ and Bell J (emphasis added), and see at [56] per Kiefel and Keane JJ; at [84] per Gordon J.

⁵⁰ (2004) 219 CLR 444 at [38] per McHugh and Gummow JJ.

⁵¹ [2016] HCA 13; (2016) 90 ALJR 506 at [33], [36] per French CJ and Bell J; at [52], [53] per Kiefel and Keane JJ; at [85], [87], [99] per Gordon J.

⁵² (1993) 177 CLR 541, and see the cases cited in [61] above.

Previous authorities: Momcilovic

66. One has to be careful about what was argued and decided in *Momcilovic*⁵³. The argument was put that there was no offence under the (Victoria) State Drugs Act⁵⁴ because it was not a valid enactment due to a s.109 of the *Constitution* inconsistency. The appellant contended, relevantly, that the provision under which she was convicted (s.71AC of the *Drugs, Poisons and Controlled Substances Act*) was invalid by reason of being inconsistent with the provisions of the *Criminal Code* (Cth).
67. References in the judgments in that case to the "State law" were made to distinguish that from the Commonwealth *Criminal Code*. It was necessary in that case only to decide, because of the way the matter was argued, whether s.109 of the *Constitution* led to there being no valid State law. How the State Drugs Act was to be applied in federal jurisdiction was not argued nor explored in this Court.⁵⁵
68. The argument was put, and rejected by the majority, that the differences between the State and Commonwealth "regimes" led to there being a s.109 of the *Constitution* inconsistency. One of the differences was said to be the different modes of trial.
69. The present appellant does not assert that the *Misuse of Drugs Act* (WA) was invalid by operation of s.109 of the *Constitution* as being inconsistent with a law of the Commonwealth.
70. The appellant in *Momcilovic*⁵⁶ was convicted by a unanimous verdict. So no question arose as to whether s.68(1) or s.79(1) of the *Judiciary Act* picked up s.46 of the *Juries Act 2000* (Vic) which allowed for a majority verdict. This Court did not have to consider the interplay between s.68(1) or s.79(1) of the *Judiciary Act*, the *Juries Act* (Vic) and s.80 of the *Constitution*.

⁵³ (2011) 245 CLR 1.

⁵⁴ *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

⁵⁵ (2011) 245 CLR 1 at [99], [100] per French CJ.

⁵⁶ (2011) 245 CLR 1.

71. Hence, *Momcilovic*⁵⁷ dealt with a different issue from that identified as the first basis for the Court of Appeal's decision against the appellant⁵⁸. And, it did not establish the first conclusion which the Court of Appeal below purported to derive from the case. Indeed, no argument was addressed to this Court on that issue⁵⁹.
72. The Court of Appeal, in its alternative conclusion⁶⁰, assumed that s.79(1) of the *Judiciary Act* did apply the State law, but nonetheless, held it did not become a law of the Commonwealth within the meaning of s.80 of the *Constitution*⁶¹.
- 10 73. With respect, the observations of Gummow J made in *Momcilovic*⁶², on which the Court of Appeal relied, do not support that conclusion.
74. Those observations of Gummow J were made in the context of s.109 of the *Constitution* and by reference to the particular argument put by the appellant in that case. In that context, it was unnecessary for his Honour to express any view about the meaning of "law of the Commonwealth" in s.80 of the Constitution, and he did not do so.
75. The "alternative" conclusion reached by the Court below, in truth, turned on the proper characterisation of the law applied to the appellant. That was essentially the same issue answered by the first basis upon which the Court of Appeal upheld the appellant's conviction. In that sense, there was no true "alternative" conclusion reached by the Court below.
- 20 76. The appellant submits that if s.79(1) of the *Judiciary Act* applied a State law, then consistently with his submissions made above, the State enactment would cease to have that character; it would become a law of the Commonwealth, albeit a surrogate one.

⁵⁷ (2011) 245 CLR 1.

⁵⁸ As set out in [23] above.

⁵⁹ (2011) 245 CLR 1: see French CJ at [99].

⁶⁰ As set out in [24] above.

⁶¹ (2015) 299 FLR 197 at [152].

⁶² (2011) 245 CLR 1 at [222] and [226]: see the Court of Appeal below at (2015) 299 FLR197 at [152].

77. If those submissions are accepted, then Court of Appeal's alternative conclusion would not be sustainable as the Commonwealth Parliament would have, effectively, legislated for the new federal offences (of which the applicant was convicted) via s 79(1) of the *Judiciary Act*.
78. As a result, those federal offences would constitute a "law of the Commonwealth" for the purposes of s 80 of the *Constitution*. Since the *Constitution* provides otherwise, s 114 of the *Criminal Procedure Act 2004* (WA) could not apply to the appellant's trial.

Part VII: Statutory provisions

- 10 79. See annexure.

Part VIII: Orders sought

80. The appellant seeks the following orders:
 - 80.1 the appeal be allowed;
 - 80.2 the appellant's conviction be quashed and the sentence be set aside;
 - 80.3 the declaration of Drug Trafficker made on 30 October 2013 under the *Misuse of Drugs Act 1981* (WA) be quashed;
 - 80.4 there be a re-trial; and
 - 80.5 the respondent to pay the appellant's costs to be taxed, if not agreed.

Part IX: Oral argument

81. The appellant estimates he will require two hours for the presentation of his argument.

Dated: 11 November 2016



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ANNEXURE

The following constitutional provisions, statutes and regulations are applicable.

With the exception of section 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), these provisions are still in force, in this form, at the date of making these submissions.

With respect to section 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), the provision is provided in the form that was enacted at the relevant date along with the provision as amended at the date of making these submissions.

Commonwealth of Australia Constitution Act 1901 (Cth)

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

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52 Exclusive powers of the Parliament

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

75 Original jurisdiction of High Court

In all matters:

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

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the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;

77 Power to define jurisdiction

20 With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction.

80 Trial by jury

30 The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

109 Inconsistency of laws

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.

Commonwealth Places (Application of Laws) Act 1970 (Cth)

4 Application of laws in Commonwealth places

- (1) The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time.
- (1A) Subsection (1) does not apply to the provisions of the laws of a State to the extent that those provisions have effect, as laws of the Commonwealth, under the *Commonwealth Places (Mirror Taxes) Act 1998*.
- (2) This section does not:
- (a) extend to the provisions of a law of a State to the extent that, if that law applied, or had applied, in or in relation to a Commonwealth place, it would be, or have been, invalid or inoperative in its application in or in relation to that Commonwealth place otherwise than by reason of the operation of section 52 of the Constitution in relation to Commonwealth places; or
- (b) operate so as to make applicable the provisions of a law of a State in or in relation to a Commonwealth place if that law would not apply, or would not have applied, in or in relation to that place if it were not, or had not been, a Commonwealth place.
- (3) To the extent that the laws of a State would, but for subsection (1) of this section, have, or have had, the same effect, at a particular time, with respect to an act, matter or thing having a connexion with a place in that State that is, or was, at that time, a Commonwealth place as they would have, or would have had, at that time, if the act, matter or thing did not have such a connexion, that subsection does not have effect with respect to the provisions of those laws.
- (4) In so far as a law of a State has effect in another State, subsection (1) of this section operates to make the provisions of that law applicable in or in relation to a Commonwealth place in that other State.
- (5) Subsection (1) of this section does not:
- (a) have effect so as to impose any tax;
- (b) have effect so as to confer any judicial power; or
- (c) extend to the provisions of any law of a State in so far as it is not within the authority of the Parliament to make those provisions applicable in or in relation to a Commonwealth place.

- (6) The regulations may provide that such of the provisions referred to in subsection (1) of this section as are specified in the regulations do not apply, or shall be deemed not to have applied, by reason of this section or so apply, or shall be deemed to have so applied, with such modifications as are specified in the regulations.
- (7) Regulations shall not be made for the purpose of the last preceding subsection modifying the applied provisions in their application in or in relation to a Commonwealth place except in so far as the modifications are necessary or convenient to enable the applied provisions to operate in or in relation to that place.
- (8) For the purposes of the last two preceding subsections, modification includes the omission or addition of a provision or the substitution of a provision for another provision.
- (9) Any reference in a law of the Commonwealth (including the applied provisions) to a law of a State shall, if any part of the applied provisions corresponds to that law, be read as including a reference to that part.
- (10) Any reference in the applied provisions to a law of a State shall, if there is not any part of the applied provisions that corresponds to that law, be read as a reference to that law.
- (11) Any reference in a part of the applied provisions to a conviction, punishment, penalty or forfeiture under the applied provisions shall be deemed to include a reference to a conviction, punishment, penalty or forfeiture under the law of a State that corresponds to that part.
- (12) Where:
- (a) there is not in force an arrangement with the Governor of a State under subsection (2) of section 6 of this Act;
 - (b) a law of that State provides that an act may or shall be done by an authority of the State; and
 - (c) a part of the applied provisions corresponds to that law;
- that authority is empowered to do that act under that part of the applied provisions.
- (13) Without limiting the effect of any of the preceding provisions of this section, it is declared that the powers of a person under the applied provisions may be exercised in a Commonwealth place in a State in respect of an act done in that State notwithstanding that the act was not done in or in relation to that place and the applied provisions as having effect in or in relation to that place have effect in relation to anything done by a person in the exercise of a power referred to in this subsection.
- (14) Without limiting the effect of any other law of the Commonwealth, it is declared that the powers of a person under the law of a State may be exercised in that State in respect of an act done in that State notwithstanding that the act was done in or in relation to a Commonwealth place and the provisions of the laws of the State have effect in relation to anything done by a person in the exercise of a power referred to in this subsection.

Criminal Procedure Act 2004 (WA)

114 Jury's verdict to be unanimous except in some cases

- (1) Subject to this section, the verdict of a jury must be the unanimous verdict of its members.
- (2) If a jury trying a charge has retired to consider its verdict and, having deliberated for at least 3 hours, has not arrived at a unanimous verdict, the decision of 10 or more of the jurors shall be taken as the verdict on the charge.

[Section 114 amended by No. 29 of 2008 s. 30.]

10 **District Court of Western Australia Act 1969 (WA)**

42 Criminal jurisdiction

- (1) Except as provided in subsection (2), the Court has all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence.
 - (2) The Court has no jurisdiction to try an accused person charged with an indictable offence, in respect of which offence, the maximum term of imprisonment that can be imposed is imprisonment for life.
 - (3) The jurisdiction conferred on the Court by subsection (1) does not limit or diminish the jurisdiction of the Supreme Court as a Court of criminal jurisdiction.
- 20 [Section 42 amended by No. 118 of 1981 s. 8; No. 52 of 1984 s. 49; No. 74 of 1985 s. 21; No. 14 of 1992 s. 6(8); No. 53 of 1992 s. 10; No. 36 of 1996 s. 32(1); No. 29 of 2008 s. 31.]

Drugs, Poisons and Controlled Substances Act 1981 (Vic)

71AC Trafficking in a drug of dependence [as referred to in *Momcilovic v The Queen* 245 CLR 1]

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).

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71AC Trafficking in a drug of dependence [as amended by No. 2/2016]

- (1) Subject to subsection (2), a person who, without being authorized by or licensed under this Act or the regulations or the **Access to Medicinal Cannabis Act 2016** or the regulations under that Act 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).

- (2) A person who, without being authorised by or licensed under this Act or the regulations or the **Access to Medicinal Cannabis Act 2016** or the regulations under that Act to do so, trafficks or attempts to traffick in a drug of dependence at a school or in a public place within 500 metres of a school is guilty of an indictable offence and liable to level 3 imprisonment (20 years maximum).

Interpretation Act 1984 (WA)

67 Offences and proceedings for offences

- (1) Offences are of 2 kinds: indictable offences and simple offences.
- 10 (1a) An offence designated as a crime or as a misdemeanour is an indictable offence.
- (2) An offence not otherwise designated is a simple offence.
- (3) The procedure for prosecuting and dealing with offences is set out in the *Criminal Procedure Act 2004*.

[(4) deleted]

- (5) This section does not limit the operation of Part 3 of the *Children's Court of Western Australia Act 1988*.

[Section 67 inserted by No. 92 of 1994 s. 15; amended by No. 4 of 2004 s. 58; No. 59 of 2004 s. 141; No. 84 of 2004 s. 78.]

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Judiciary Act 1903 (Cth)

38 Matters in which jurisdiction of High Court exclusive

Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

- (a) matters arising directly under any treaty;
- (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
- 30 (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
- (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
- (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

Note: Under the Jurisdiction of Courts (Cross-vesting) Act 1987, State Supreme Courts are, with some exceptions and limitations, invested with the same civil

jurisdiction as the Federal Court has, including jurisdiction under section 39B of this Act.

39 Federal jurisdiction of State Courts in other matters

- (1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.
- 10 (2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:
- (a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.

Special leave to appeal from decisions of State Courts though State law prohibits appeal

- 20 (c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

68 Jurisdiction of State and Territory courts in criminal cases

- (1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
- 30 (a) their summary conviction; and
(b) their examination and commitment for trial on indictment; and
(c) their trial and conviction on indictment; and
(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;
- and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.
- (2) The several Courts of a State or Territory exercising jurisdiction with respect to:
- 40 (a) the summary conviction; or

- (b) the examination and commitment for trial on indictment; or
- (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

10 **79 State or Territory laws to govern where applicable**

- (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.
- (2) A provision of this Act does not prevent a law of a State or Territory covered by subsection (3) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.
- 20 (3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:
 - (a) limiting the period for bringing the suit to recover the amount;
 - (b) requiring prior notice to be given to the person against whom the suit is brought;
 - (c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.
- (4) For the purposes of subsection (2), some examples of an amount paid in connection with a tax are as follows:
 - 30 (a) an amount paid as the tax;
 - (b) an amount of penalty for failure to pay the tax on time;
 - (c) an amount of penalty for failure to pay enough of the tax;
 - (d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.

80 Common law to govern

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by

the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

Misuse of Drugs Act 1981 (WA)

6 Offences concerned with prohibited drugs generally

- (1) Subject to subsection (3), a person who —
- 10 (a) with intent to sell or supply it to another, has in his possession; or
a prohibited drug commits a crime, except when he is authorised by or under this Act or by or under the Poisons Act 1964 to do so and does so in accordance with that authority.

[Section 6 amended by No. 12 of 1994 s. 11; No. 9 of 2003 s. 29; No. 1 of 2004 s. 52; No. 4 of 2004 s. 58.]

11 Presumption of intent to sell or supply

For the purposes of —

- 20 (a) section 6(1)(a), a person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V in relation to the prohibited drug; or

[Heading inserted by No. 62 of 2004 s. 5.]

Service and Execution of Process Act 1992 (Cth)

83 Procedure after apprehension

- (8) Subject to subsections (10) and (14) and section 84, if the warrant or a copy of the warrant is produced, the magistrate must order:
- 30 (b) that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant.

89 Custody of persons etc

- (4) The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person

being taken to the place of issue in compliance with an order mentioned in subsection (1).