IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P55 of 2016

BETWEEN:

JOHN RIZEQ
Appellant

and

THE STATE OF WESTERN AUSTRALIA
Respondent

WRITTEN SUBMISSIONS OF THE RESPONDENT

PART I: SUITABILITY FOR PUBLICATION

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. In principal issue in this appeal is: was the Appellant's trial in the District Court of Western Australia on two charges of possession of a prohibited drug with intent to sell or supply, contrary to s 6 of the *Misuse of Drugs Act* 1981 (WA), a trial for an "offence against any law of the Commonwealth" within the meaning of s 80 of the *Constitution*, by reason of the fact that the trial was in federal diversity jurisdiction?

3. That principal issue raises the following subsidiary issues:

   (a) Did the *Misuse of Drugs Act* 1981 (WA) apply to the Appellant, a resident of a State other than Western Australia, of its own force, or could it only apply through the operation of s 79 of the *Judiciary Act* 1903 (Cth)? and

   (b) If the *Misuse of Drugs Act* 1981 (WA) applied to the Appellant through the operation of s 79 of the *Judiciary Act* 1903 (Cth), did that make the trial a trial for an "offence against any law of the Commonwealth" within the meaning of s 80 of the *Constitution*?

PART III: SECTION 78B OF THE *JUDICIARY ACT* 1903 (CTH)

4. The Appellant has given notice in compliance with s 78B of the *Judiciary Act*.

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PART IV: MATERIAL FACTS

5. The Respondent agrees with the facts set out in Part V of the Appellant's submissions.

PART V: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

6. All of the relevant Constitutional provisions and legislation are reproduced in the Annexure to the Appellant's submissions.

PART VI: SUBMISSIONS

SUMMARY OF RESPONDENT'S ARGUMENT

7. The Respondent submits that the answer to the principal issue identified above is "No": the Appellant's trial was not a trial for an offence against a law of the Commonwealth within the meaning of s 80 of the *Constitution* but was, at all times, a trial for an offence against a law of Western Australia, in relation to which s 80 of the *Constitution* did not apply.

8. In that regard, the Respondent submits, s 79 of the *Judiciary Act* did not alter the character of the law in relation to which the Appellant's guilt or otherwise was to be determined, from a law of the Sate to a law of the Commonwealth. Rather:

   (a) the *Misuse of Drugs Act* 1981 (WA) could and did apply to the Appellant's trial by its own force[1];

   (b) section 79 of the *Judiciary Act* did not create a new offence against the law of the Commonwealth in relation to the Appellant's conduct on or about 16 July 2012 (the date of the offence)[2];

   (c) section 80 of the *Constitution*, in applying to trials on indictment of "offences against any law of the Commonwealth", is concerned with laws made by the Commonwealth Parliament, pursuant to the heads of power in ss 51 and 52 of the *Constitution*, which proscribe the conduct of persons.

9. The Respondent accepts that the District Court of Western Australia, in trying the Appellant for the charges against the *Misuse of Drugs Act* 1981 (WA), was exercising

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1 Cf Appellant's submissions at [28.2].

2 Cf Appellant's submissions at [28.3].

federal diversity jurisdiction[3]. That is, however, because the Appellant was a resident of another State at the time that the indictment was lodged (s 75(iv) of the *Constitution*) and not because the Appellant was being tried for a matter arising under a law of the Parliament (s 76(ii) of the *Constitution*).

10. The "matter" which enlivened the District Court's federal diversity jurisdiction was whether, on or about 16 July 2012, the Appellant had breached s 6 of the *Misuse of Drugs Act* 1981 (WA). That "matter" existed independently of, and logically prior to, the commencement of proceedings brought for its determination, without which jurisdiction could not have been enlivened[4].

11. The proceedings commenced for the determination of that matter were always in federal jurisdiction (the Appellant having been a resident of New South Wales at the time of their commencement). The federal nature of the jurisdiction being exercised never changed. Nor, however, did the nature of the "matter" the subject of that jurisdiction, namely whether, on or about 16 July 2012, the Appellant had breached s 6 of the *Misuse of Drugs Act* 1981 (WA).

12. The Appellant's contentions, to the contrary, rely upon a fundamental, but erroneous, proposition that all State laws, including the *Misuse of Drugs Act* 1981 (WA), cannot apply of their own force in federal jurisdiction unless they are picked up and applied by a Commonwealth law, as Commonwealth law.

13. This proposition is erroneous, and the Respondent's contentions correct, for the following reasons.

14. *First*, the Appellant's contentions are inconsistent with the Constitutional framework, in which State laws will operate, according to their tenor, to affect rights and liabilities of all persons within the State, including interstate residents whose rights and liabilities fall to be determined in the exercise of federal jurisdiction.

15. *Secondly*, the Appellant's submissions consistently fail to distinguish between the jurisdiction of a court (the authority to adjudicate[5]) and the law regulating the rights,

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3 Appellant's submissions at [28.1].

4 *CGU Insurance Ltd v Blakely* (2016) 90 ALJR 272 per French CJ, Kiefel, Bell & Keane JJ at 280–281 [29]-[30].

5 See *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ & Gummow J at 589 [87] (and the cases cited therein).

duties and liabilities of the persons who come before that court, which laws operate prior to, and independently of, the jurisdiction of a court to determine controversies in relation to those rights, duties and liabilities.

16. *Thirdly*, the Appellant's construction of s 79 of the *Judiciary Act*, to the effect that it applies *all* laws of the State – for all purposes – as laws of the Commonwealth, is not supported by the text, purpose, history or context of that provision.

17. Rather, it is submitted, s 79 applies, as Commonwealth law, those State laws which could not, of their own force, apply in the exercise of jurisdiction[6]. It is necessary, for that purpose, to identify what are the laws that meet that description. They do not include, it is submitted, State laws prescribing norms of conduct such as s 6 of the *Misuse of Drugs Act* 1981 (WA).

18. *Fourthly*, the previous decisions of this Court, relied upon by the Appellant, do not support the general proposition that State laws can only apply through s 79 of the *Judiciary Act* (or some other Commonwealth law) in the exercise of federal jurisdiction.

19. *Fifthly*, the construction of s 79 of the *Judiciary Act* contended for by the Appellant would lead to absurd results, which should not be attributed to the intention of the Parliament.

20. *Finally*, even were s 6 of the *Misuse of Drugs Act* "picked up" by s 79 of the *Judiciary Act* to be, in some sense a surrogate federal law, it would, nevertheless, not become an offence against a law of the Commonwealth for the purposes of s 80 of the *Constitution*.

THE CONSTITUTIONAL CONTEXT: STATE LAWS APPLY DIRECTLY TO MATTERS WITHIN FEDERAL DIVERSITY JURISDICTION

21. The Appellant's submissions maintain, as a matter of Constitutional power, that no State law may apply of its own force in federal jurisdiction, including federal diversity jurisdiction under s 75(iv) of the *Constitution*, being matters "between States, or between residents of different States, or between a State and a resident of another State".

22. The Appellant goes so far as to submit that "an Act of the Commonwealth Parliament

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6 *Solomons v District Court (NSW)* (2002) 211 CLR 119 per Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ at 134 [21].

is required to provide for matters ***to do with*** federal jurisdiction" (emphasis added)[7]. In the context of federal diversity jurisdiction (under s 75(iv) of the *Constitution*), that submission amounts to the claim (essential to the Appellant's case) that rights, liabilities, duties, and obligations "between States, or between residents of different States, or between a State and a resident of another State" are a matter of exclusive Commonwealth legislative power, in relation to which the States have no legislative power.

23. That claim, it is submitted, is inconsistent with the notion of "one indissoluble Federal Commonwealth" and with the terms of the *Constitution* itself.

24. Upon federation, and subject to the *Constitution*, the States had (and have) plenary power to legislate for the peace, order and good government of the State. That plenary power extends to laws, including criminal laws, having extraterritorial operation where the law has a sufficient connection with the State[8]. *A fortiori*, a State has legislative power to makes laws, operating within the territorial limits of the State, which apply to residents of other States.

25. So much is recognised by s 117 of the *Constitution*, which, while prohibiting discriminatory burdens on the rights of residents of other States, is nevertheless premised upon the fact that residents of one State will be subject to the general laws of the other States. The *Misuse of Drugs Act* 1981 (WA) is such a law and applied to the conduct of the Appellant while he was present in Western Australia.

26. The invocation of federal diversity jurisdiction to determine a controversy under the *Misuse of Drugs Act* 1981 (WA) in relation to a resident of another State, does not alter that position. The *Constitution* does not require that there be a Commonwealth law applying that State law to the resident of another State; it already applied[9].

27. Were it otherwise, the Appellant's starting proposition would lead to the consequence that a resident of one State would be immune from the laws of another State (including in relation to conduct in that State), in the absence of some Commonwealth legislation.

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7 Appellant's submissions at [37].

8 *Pearce v Florenca* (1976) 135 CLR 507 per Gibbs J at 517-518; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey & Gaudron JJ at 12.

9 Whether, and if so, which court will have authority to adjudicate a controversy in relation to the application of that law (i.e. jurisdiction) is a different question, addressed below.

Such a consequence would be inconsistent with the very notion of a Federal Commonwealth.

THE INVESTITURE OF FEDERAL JURISDICTION

28. The laws which give rise to a "matter" in federal jurisdiction must be clearly distinguished from the conferral of federal jurisdiction itself.

29. "Jurisdiction", in the context of ss 75, 76 and 77 of the *Constitution*, and ss 39 and 79 of the *Judiciary Act*, signifies ***authority to adjudicate***[10]. All that is meant by "federal jurisdiction" in a particular matter is that the court's authority to adjudicate upon the matter is part of the judicial power of the Commonwealth[11].

30. In that regard, as the plurality confirmed in *Fencott v Muller*[12]:

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

31. As observed by Deane and Gaudron JJ in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[13]:

> "[T]he right to invoke the jurisdiction is essentially an auxiliary or facultative one in the sense that the jurisdiction which [s 75(v) of the *Constitution*] confers upon the Court is to hear and determine the designated matters in accordance with the *independently existing substantive law*." (Emphasis added)

32. Depending upon the particular matter, the authority to adjudicate, in one case, may arise under a law made by the Commonwealth Parliament (as in the case of jurisdiction under s 76(ii) of the *Constitution*). In another case, it may not. This may be so, for example, in a case within federal diversity jurisdiction. Unlike federal jurisdiction under s 76(ii) of the *Constitution*, which necessarily will involve substantive rights deriving from the laws of the Commonwealth, diversity jurisdiction may arise in relation to the adjudication of substantive rights that have no federal component whatsoever; that is,

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10 See *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ & Gummow J at 589 [87] (and the cases cited therein).

11 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 per Kitto J at 30 (cited in *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ & Gummow J at 589 [87]).

12 *Fencott v Muller* (1983) 152 CLR 570 per Mason, Murphy, Brennan & Deane JJ at 606, quoting, with approval, *Felton v Mulligan* (1971) 124 CLR 367 per Windeyer J at 393.

13 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 per Deane and Gaudron JJ at 205. See also *Australian Securities and Investment Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 per Gleeson CJ, Gaudron and Gummow JJ at 586 [55].

the jurisdiction arises purely by reason of the residency of the parties and not under a law of the Commonwealth.

33. The very notion of "accrued" federal jurisdiction, for example, is premised upon the notion that federal jurisdiction "may include a cause of action arising under a non-federal law"[14].

34. Indeed, prior to the enactment of s 39(1) of the *Judiciary Act*, which rendered the jurisdiction of the High Court (under s 75 of the *Constitution*) exclusive of the jurisdiction of the Courts of the States[15], the Courts of the States already possessed State jurisdiction in relation to a number of the matters referred to in ss 75 and 76 of the *Constitution*[16]. This included disputes between residents of different States (i.e. diversity jurisdiction)[17]. It was only the enactment of s 39(1) of the *Judiciary Act* that rendered jurisdiction in relation to such matters exclusively federal; and s 39(2) which invested that federal jurisdiction in the Courts of the States[18].

35. What this serves to highlight is that the "matter" the subject of the authority to adjudicate must be identified independently of, and logically prior to, the commencement of proceedings brought for its determination, without which jurisdiction could not be enlivened[19]. And, in the absence of s 39(1) of the *Judiciary Act*, depending upon the circumstances, the same "matter" could have been the subject of both State and federal jurisdiction.

36. The matter in the present case would have been such a circumstance.

37. The "matter" – the justiciable controversy – in the present case, was whether, on or about 16 July 2012, the Appellant had breached s 6 of the *Misuse of Drugs Act* 1981

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14 *Fencott v Muller* (1983) 152 CLR 570 per Mason, Murphy, Brennan & Deane JJ at 606 (identifying this to be the ratio decidendi in *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457).

15 Being an exercise of the power in s 77(ii) of the *Constitution*.

16 *MZXOT v Minister for Immigration* (2008) 233 CLR 601 per Gleeson CJ, Gummow & Hayne JJ at 618-619 [22]-[30]; *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 per Isaacs J at 1142. See generally, Geoffrey Lindell, *Cowen & Zines's Federal Jurisdiction in Australia* (The Federation Press, 4th ed, 2016) at 43-44, 134-135, 254-257.

17 *MZXOT v Minister for Immigration* (2008) 233 CLR 601 per Gleeson CJ, Gummow & Hayne JJ at 619 [25].

18 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 per Starke J at 129.

19 *CGU Insurance Ltd v Blakely* (2016) 90 ALJR 272 per French CJ, Kiefel, Bell & Keane JJ at 280-281 [29]-[30].

(WA). In the absence of s 39(1) of the *Judiciary Act*, the District Court of Western Australia would have had jurisdiction – authority to determine that controversy – as a matter of State jurisdiction.

38. Any such State jurisdiction, however, had been withdrawn by s 39(1) and replaced, by s 39(2), with federal jurisdiction to determine the same matter. The essential nature of the "matter", however, does not change; it remains a question as to whether the Appellant was guilty of breaching the law of the State; the *Misuse of Drugs Act* 1981 (WA).

39. As Kitto J stated in *Anderson v Eric Anderson Radio & TV Pty Ltd*: "To confer federal jurisdiction in a class of matters upon a State court is therefore not, if no more be added, to change the law which the court is to enforce in adjudicating upon such matters; it is merely to provide a different basis of authority to enforce the same law"[20].

40. Does s 79 of the *Judiciary Act* alter this position?

41. The Respondent submits that it does not.

SECTION 79 OF THE *JUDICIARY ACT*

42. Section 79 of the *Judiciary Act* is concerned with the exercise of jurisdiction – the authority to adjudicate – not with the creation of the independently existing substantive law[21] defining all of the rights and liabilities of the parties to proceedings in federal jurisdiction. As the authorities emphasise, s 79 is addressed to courts and only operates where "there is already a court 'exercising federal jurisdiction', 'exercising' being used in the present continuous sense"[22].

43. In particular, s 79 does not operate, as the Appellant's submissions require, to create an offence against a law of the Commonwealth in relation to events which occurred prior to any jurisdiction being invoked (in this case on 16 July 2012, the date of the conduct the subject of the charge).

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20 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 per Kitto J at 30 (see also *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ & Gummow J at [87]).

21 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 per Deane and Gaudron JJ at 205. See also *Australian Securities and Investment Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 per Gleeson CJ, Gaudron and Gummow JJ at 586 [55].

22 *Solomons v District Court (NSW)* (2002) 211 CLR 119 per Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ at 134 [23].

44. In this regard, a clear distinction must be made between:

    (a) Those laws of a State which apply of their own force in federal jurisdiction, and in relation to which s 79 of the *Judiciary Act* is, and can only be, declaratory; and

    (b) Those laws of a State which could not apply of their own force in federal jurisdiction, in relation to which, they must be applied as "surrogate" federal laws.

45. That such a distinction must be drawn, it is submitted, is required not by only the text, purpose, history or context of s 79, but by the distribution of legislative power effected by the *Constitution* itself.

46. Subject to the *Constitution* and any inconsistent Commonwealth laws, the Parliaments of States have plenary power to make laws which regulate the substantive rights and interests of persons present in the State (regardless of their place of residence), including criminal laws of general application. Those laws will apply to persons who are resident in different States of their own force.

47. The same is not true of the Commonwealth Parliament, which does not have general legislative power to regulate all of the substantive rights and interests between persons resident in different States. The Commonwealth only has legislative power over those relationships insofar as they fall within the specific grants of legislative power in the *Constitution* (principally in ss 51 and 52). As is clear from the breadth of the jurisdiction in s 75(iv) of the *Constitution*, federal jurisdiction can, therefore, arise in circumstances in which the Commonwealth has no substantive legislative power[23].

48. Less still could it be supposed that the Commonwealth has *exclusive* legislative power over those relationships, as is implied by the unqualified statements in the Appellant's submissions at [34] and [36]. For this reason, it is submitted, s 79 must be construed as being only declaratory in relation to the operation of State laws which can apply of their own force and independently of Commonwealth law. Such a construction is necessary to ensure that s 79 remains consistent with the extent of Commonwealth legislative power[24].

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[23] See the discussion in Justice B Selway, "The Australian 'Single Law Area'" (2003) 29 *Monash University Law Review* 30 at 36-37.

[24] See Graeme Hill & Andrew Beech SC, "'Picking up' State and Territory Laws under s 79 of the Judiciary Act - three questions" (2005) 27 *Australian Bar Review* 25 at 30ff; Justice B Selway, "The Australian 'Single Law Area'" (2003) 29 *Monash University Law Review* 30 at 36-37. See also *Federated Sawmill,*

49. Where s 79 is more than merely declaratory, and operates so as to translate a State law into a new federal law, is in the case (and only in the case) of laws of a State which *could not* apply of their own force to a Court exercising federal jurisdiction.

50. State laws that could not apply of their own force to a Court exercising federal jurisdiction are those with respect to the exclusive powers of the Commonwealth with respect to "the conferring, defining and investing of federal jurisdiction" (i.e. the authority to adjudicate)[25]. Indeed, this follows from the head of legislative power by which s 79 is supported, namely "s 51(xxxix) of the *Constitution* as a law with respect to matters incidental to the execution of powers vested by Ch III in [the] Federal Judicature"[26].

51. Accordingly, laws which go to the invocation of the authority to adjudicate, its manner of exercise and the powers of the court (such as limitation periods[27], rules of pleading[28], contribution between parties[29] and the orders the Court may make[30]) are all laws that could not apply in federal jurisdiction of their own force and which must be "picked up" by s 79 of the *Judiciary Act* and applied as federal law. Indeed, in the present case, s 114(2) of the *Criminal Procedure Act* 2004 (WA), providing for majority verdicts for convictions of State offences, was such a law. That section applies, in federal jurisdiction, to the trial of an offence against a law of the State.

52. This is the case regardless of whether the laws are categorised as purely "procedural" (as in the case of pleadings) or substantive (as in the case of some limitation periods: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [98]). The limitation on State legislative power, with respect to "the conferring, defining and investing of federal jurisdiction"[31], does not turn on a distinction between procedural and substantive laws,

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Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander (1912) 15 CLR 308 per Griffiths CJ at 313.

25 *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 per Gummow J at 406 [230].

26 *Australian Securities and Investment Commission v Edensor* (2001) 204 CLR 559 per Gleeson CJ, Gaudron and Gummow JJ at 587 [57].

27 *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581.

28 *Agtrack NT Pty Ltd v Hatfield* (2005) 223 CLR 251 per Gleeson CJ, McHugh, Gummow, Hayne & Heydon JJ at 265 [39].

29 *Austral Pacific Group Ltd v Airservices Australia* (2000) 203 CLR 136.

30 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.

31 *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 per Gummow J at 406 [230].

but exists in relation to laws that provide for and regulate the exercise of the authority to adjudicate in federal jurisdiction[32].

53. An offence creating provision, such as s 6 of the *Misuse of Drugs Act* 1981 (WA), concerning the conduct of persons outside, and independently of proceedings in, a Court is of a different character. That law does not "provide for and regulate the exercise of federal jurisdiction" or concern "the conferring, defining and investing of federal jurisdiction". It is simply a law providing a relevant norm of conduct which applies to all persons in Western Australia (including residents of other States or indeed other nations). It does not fall within the exclusive power of the Commonwealth such that it requires the support of a Commonwealth law to create the offence.

54. The cases relied upon by the Appellant (at [34] and [36]) in support of the proposition that no State law (including the *Misuse of Drugs Act* 1981 (WA)) can apply of its own force in federal jurisdiction must be understood in this light.

55. All of those cases are concerned with laws that properly meet the description of laws dealing "with something arising in the course of exercising judicial power, something attendant upon or incidental to the fulfilment of powers truly belonging to the judicature"[33]. Those cases do not concern laws of general application affecting the rights of persons outside, and independently of, court proceedings. Nor do the passages relied upon by the Appellant refer to such laws.

56. The passage in *Solomons v District Court of New South Wales*[34] relied upon by the Applicant, for example, simply confirms that:

> "...State laws *upon which s 79 operates* do not thereby apply of their own force in the exercise of federal jurisdiction." (Emphasis added)

57. This passage begs the question as to *which* laws s 79 operates upon to create new federal law and whether those laws include State laws that, by their own force, already apply to define the rights and liabilities of the parties in question.

58. All of the other cases cited by the Appellant relate to State laws which could not apply directly to the exercise of federal jurisdiction, because they either would have

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32 *Alqudsi v The Queen* (2016) 90 ALJR 711 per Nettle & Gordon JJ at 749 [171].

33 The kind of laws supported by s 51(xxxix) and within the exclusive legislative power of the Commonwealth: *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 587.

34 (2002) 211 CLR 119 at 134 [21].

withdrawn or limited the authority of a Court to exercise the judicial power of the Commonwealth.

59. Limitation periods, which directly affect the invocation and exercise of jurisdiction, are the paradigm example.

60. In *Pedersen v Young*[35], for example, the observation of Kitto J that "[i]t is obvious that the Queensland enactment could not of its own force limit the time within which an action may be commenced in this Court" clearly relates to a law which would, if it had applied directly, regulate the exercise of federal jurisdiction by the High Court. That observation, however, does not stand for the proposition that all State laws relevant to the rights of the parties could not so apply. Indeed, Kitto J immediately went on in that passage to acknowledge the capacity of State laws to apply by their own force:

> "It is, I think, in accordance with the received opinion as to the operation of ss 79 and 80 to hold that, subject to the Constitution and to the laws of the Commonwealth, all Queensland laws must be treated as binding in this Court, as federal law *if not by their own force*, whenever the Court is exercising jurisdiction in Queensland." (Emphasis added)

61. *John Robertson & Co v Ferguson Transformers*[36], similarly, was concerned with a State limitation period and whether it could apply, of its own force, in any action based on a Commonwealth enactment. Unremarkably, it is submitted, the passages cited by the Appellants, when read in their context, held that the relevant State limitation law could not apply of its own force to the action in the High Court because a State Parliament does not have power to validly prescribe a rule of procedure to be applied directly in the High Court[37].

62. Similarly, *British American Tobacco v The State of Western Australia*[38] held that the *Crown Suits Act* 1947 (WA) could not apply directly in the Supreme Court of Western Australia exercising federal jurisdiction because it would impermissibly impose a constraint on that federal jurisdiction[39]. The jurisdiction being exercised in that case was that conferred under s 76(i) of the *Constitution*, which conferral necessarily

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35 (1964) 110 CLR 162 per Kitto J at 165.

36 *John Robertson & Co v Ferguson Transformers* (1973) 129 CLR 65.

37 *John Robertson & Co v Ferguson Transformers* (1973) 129 CLR 65 per Menzies J at 79, Walsh J at 84, Gibbs J at 87-88 and Mason J at 93.

38 (2003) 217 CLR 30.

39 (2003) 217 CLR 30 per McHugh, Gummow & Hayne JJ at 53-54 [44]-[45].

involved the conferral of any right to proceed against a State as a party in that matter[40]. The State law that sought to take away that right could therefore not directly apply[41].

63. These cases, accordingly, simply confirm that State laws which attempt to withdraw or otherwise limit federal jurisdiction cannot apply directly. They say nothing of substantive laws which create and define the subject matter and rights to be applied within that jurisdiction. The statements in them as to the inability of State laws to operate must be understood in that context.

64. Accordingly, it is submitted, s 79 of the *Judiciary Act* should be construed to apply as surrogate federal law, only those State laws that *could not* of their own force apply in federal jurisdiction, and is otherwise declaratory of the independent operation of State laws.

65. Such a construction, it is submitted, best accords with the purpose and objective of s 79, which 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, but subject always to the overriding effect of the *Constitution* itself"[42]. In this way s 79 gives State laws their full faith and credit in federal jurisdiction[43].

66. This construction is also consistent with the legislative history and context of s 79, which was originally derived from the United States rules of decision provision[44], first enacted as § 34 of the *Judiciary Act* 1789 (US). That provision provided:

> "The laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply."

67. The purpose of § 34 was to "merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in

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40 per McHugh, Gummow & Hayne JJ at 58 [60].

41 See also *Bass v Permanent Trustee Co Ltd* (1998) 195 CLR 1 per Brennan CJ, McHugh, Gummow, Kirby & Hayne JJ at 35 [41] where s 5(2) of the *Crown Proceedings Act* 1988 (NSW) could not apply of its own force but only through s 79 of the *Judiciary Act*.

42 *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ & Gummow J at 588 [80]; *John Robertson & Co Ltd (in liq) v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 per Mason J at 95.

43 Consistent with s 118 of the *Constitution*.

44 *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ and Gummow J at 587 [78]; *Putland v The Queen* (2004) 218 CLR 174 per Gummow and Heydon JJ at 195 [60].

diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written"[45]. In that regard, § 34 was described, by the United States Supreme Court, prior to its adoption as a model in Australia, as "uniformly held to be no more than a declaration of what the law would have been without it"[46].

68. While s 79 of the *Judiciary Act* has been recognised to have a wider operation than § 34[47], and may be more than declaratory in the case of those State laws that cannot of their own force apply – this history confirms that s 79 was not intended to be a law purporting to regulate all rights of persons who might become parties to federal proceedings, including by enacting, as Commonwealth laws, State criminal laws of general application.

69. As a matter of context too, s 79 should not be taken to translate into laws of the Commonwealth, all of the laws of the State as they affect the rights of interstate residents within that State. The Appellant's contention that the conversion of State laws into laws of the Commonwealth by s 79 of the *Judiciary Act* is the sole mechanism by which State laws can operate in federal jurisdiction would render other provisions of the *Judiciary Act* otiose.

70. Section 68 of the *Judiciary Act*, for example, makes clear that in prosecutions of laws of the Commonwealth in a State court, certain laws, including those relating to the procedure for the trial and conviction on indictment, apply. If s 79 of the *Judiciary Act* were the only source for the application of State laws, then s 68 would have no work to do.

71. Ultimately, whether it is being applied in federal jurisdiction (by reason of the residence of the accused) or in State jurisdiction, s 6 of the *Misuse of Drugs Act* 1981 (WA) remains at all times a law of the State. Where a person is, in Western Australia, in possession of a prohibited drug with intent to sell or supply, that person commits the offence under that Act, regardless of whether they are a resident of another State (or later moves to another State). The law applies to residents of other States of its own force. There is nothing about the creation, or the inherent character, of federal diversity jurisdiction, or in s 79 of the *Judiciary Act*, which alters that position.

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45 *Erie Railroad v Tompkins* (1938) 304 US 64 at 72–73.

46 *Hawkins v Barney's Lessee* (1831) 30 (5 Pet) US 457 at 464; *Mason v United States* (1923) 260 US 545 at 559.

47 *Huddart Parker Ltd v Ship "Mill Hill"* (1950) 81 CLR 502 per Dixon J at 507.

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72. No previous decision of this Court, including those cited by the Appellant, stands as authority for the proposition that a trial for an offence against a law of a State, such as s 6 of the *Misuse of Drugs Act* 1981 (WA), where it is tried in federal diversity jurisdiction, becomes – by the operation of s 79 of the *Judiciary Act* – a trial for an offence against a law of the Commonwealth.

73. Indeed, it is submitted, that proposition is contrary to the decision in *Momcilovic v The Queen*[48] (*Momcilovic*). For the Appellant's proposition to be upheld, it would require the conclusion that the entirety of the reasoning of the majority, and the minority, in *Momcilovic* miscarried.

74. In *Momcilovic*, the Appellant was tried in the County Court of Victoria for an offence against s 71AC of the Victorian *Drugs Poisons and Controlled Substances Act* 1981 ("the *Victorian Drugs Act*"). There was no question that the trial was in federal jurisdiction, as Ms Momcilovic was a resident of Queensland at the time of the presentation of the indictment[49]. The circumstances were, therefore, relevantly identical to the present case.

75. It is true that *Momcilovic* did not address, directly, the question as to whether the *Victorian Drugs Act* applied directly to Appellant or, alternatively through s 79 of the *Judiciary Act* as a law of the Commonwealth. Nevertheless, every member of the Court, including Hayne J who dissented on the question of inconsistency, addressed the alleged inconsistency between s 71AC of the *Victorian Drugs Act* and s 302.4 of the Commonwealth *Criminal Code* as a question of alleged inconsistency between "a law of a State" and "a law of the Commonwealth", within the meaning of s 109 of the *Constitution*[50].

76. Indeed, Kiefel and Crennan JJ, in carrying out that analysis, specifically referred to the different modes of trial (including the application of s 80 of the *Constitution* only to

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48 (2011) 245 CLR 1.

49 See *Momcilovic v The Queen* (2011) 245 CLR 1 per French CJ at 68-69 [99], Gummow J at 82 [139].

50 See *Momcilovic v The Queen* (2011) 245 CLR 1 per French CJ at 73-74 [109]-[110], Hayne J at 148 [368], Heydon J at 188-194 [470]-[486], Crennan and Kiefel JJ at 239 [655]-[656], Bell J at 240-241 [660]. While Gummow J's summary at 86 [146(xii)] might be read as suggesting to the contrary, his Honour's reasons as a whole make clear that the Appellant was charged and tried for an offence against "State law" (see 99 [201] and 122 [277]).

offences against Commonwealth laws) applicable to the two laws under consideration[51].

77. Were the Appellant's position in the present case correct, all of the analysis in *Momcilovic* in relation to s 109 was misguided and misplaced, because, on the present Appellant's case, there was not, in fact, a law of the State and a law of the Commonwealth to be compared in *Momcilovic*, but two different laws of the Commonwealth.

78. Accordingly, while French CJ's were the only reasons in *Momcilovic* to expressly advert to the "direct application" approach, such that provisions of s 71AC of the *Victorian Drugs Act* did not have to be picked up as a surrogate federal law[52], the inherent logic of each of the separate reasons was premised upon the recognition that the offence for which the Appellant in that case was tried was an offence against a law of the State.

ABSURD RESULTS RESULTING FROM THE APPELLANT'S CONSTRUCTION

79. Were the effect of s 79 to convert offences against a law of a State into offences against a law of the Commonwealth once federal jurisdiction was invoked, it would also lead to absurd consequences the intention of which could not be ascribed to the Commonwealth Parliament[53].

80. Take the circumstances in *Momcilovic*. According to the construction contended for by the Appellant, at the time of the offence, while she was a resident of Victoria, Ms Momcilovic contravened s 71AC of the *Victorian Drugs Act*. There being no federal jurisdiction invoked at that time, Ms Momcilovic's criminal liability existed (and only existed) by reason of the *State Act*. Similarly, when she moved to Queensland, but before the presentation was filed, Ms Momcilovic's criminal liability continued to be determined by the *State Act*.

81. According to the Appellant's case, however, once the presentment was filed (years after the offence), Ms Momcilovic ceased to have any criminal liability under the *State Act* but now, was taken to have contravened an (apparently retrospective) Commonwealth offence under s 79 of the *Judiciary Act*.

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51 *Momcilovic v The Queen* (2011) 245 CLR 1 per Crennan and Kiefel JJ at 239 [655].

52 *Momcilovic v The Queen* (2011) 245 CLR 1 per French CJ at 68-69 [99]-[100].

53 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 per Gaudron, Gummow, Hayne & Callinan JJ at 80 [17].

82. Such a construction, paradoxically, would have the result that s 79, rather than *applying* State laws in federal jurisdiction, would in fact operate to *disapply* them. Such a result cannot have been intended by the Parliament in enacting s 79 which is, rather, (with s 80 of the *Judiciary Act*) intended to provide a coherent body of law consisting of laws of the Commonwealth, laws of the State and the common law[54].

83. The unintended and absurd consequences would be even more pronounced in a case which commences in a Court exercising State jurisdiction but which later becomes seised of federal jurisdiction. Where that occurs (for example, if during the course of the proceedings an issue arises involving the interpretation of the *Constitution*) the whole of the proceedings are then in federal jurisdiction[55].

84. In such a case, while the trial may have commenced as a trial for an offence against a law of the State, once an issue involving the interpretation of the *Constitution* is raised, not only does the Court become seised of federal jurisdiction, but (on the Appellant's case) the offence for which the accused is being tried becomes, retrospectively, an offence against a law of the Commonwealth.

85. In such a case, given that the mode of trial for the State offence may be different (the accused may, permissibly, have elected for trial by judge alone when the proceedings commenced[56]), on the Appellant's case the mode of trial would cease to be available, and the trial would miscarry, simply by the reason of the matter having entered federal jurisdiction.

86. None of these absurd results can arise where, as the Respondent contends, the nature of the offence itself remains either an offence against a law of the State or an offence against a law of the Commonwealth, as the case may be. This provides an additional basis for rejecting the Appellant's construction of s 79.

COMMONWEALTH OFFENCES BY ADOPTING THE CONTENT OF STATE LAWS

87. That s 79 does not create offences against the laws of the Commonwealth in this way must be clearly distinguished from federal laws that are intended to, and do, create offences by reference to another body of law, such as:

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54 *Austral Pacific Group Ltd v Airservices Australia* (2000) 203 CLR 136 per McHugh J at 154 [51]; *Northern Territory v GPAO* (1999) 196 CLR 553 per Gleeson CJ and Gummow J at 588 [80].

55 *Austral Pacific Group Ltd v Airservices Australia* (2000) 203 CLR 136 per McHugh J at 153 [50].

56 *Alqudsi v The Queen* (2016) 90 ALJR 711.

(a) offences created by s 4 of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) ("the *Commonwealth Places Act*"); and

(b) offences created by s 89(4) of the *Service and Execution of Process Act* 1992 (Cth) ("the *SEP Act*").

88. Those laws are not concerned with the conferral or investiture of federal jurisdiction but, rather, with creating new norms of conduct and criminal liability that do not exist, and indeed, cannot under State law.

89. For example, in relation to Commonwealth places, pursuant to s 52(i) of the *Constitution*, the Commonwealth has *exclusive* legislative power. There is *no* State law that can apply directly in a Commonwealth place. Only a law of the Commonwealth can create liability in such a place, as is done by the *Commonwealth Places Act*. Those criminal laws, which are within the legislative power conferred by s 52(i) of the *Constitution*, exist independently of the exercise of federal jurisdiction and attach criminal liability to persons at the time that they engage in the proscribed conduct.

90. Similarly, s 89(4) of the *SEP Act*, dealt with in *Mok v Director of Public Prosecutions (NSW)* (2016) 90 ALJR 506, creates a new federal offence applicable to the persons the subject of an order made under s 83(8)(b) of that *Act*. Again, that law creates a substantive criminal liability, applicable at the time the offence is committed, where no liability exists as a matter of State law. The substantive criminal liability is created in the exercise of the Commonwealth's legislative power under s 51(xxiv) of the *Constitution*[57].

91. As can be seen in these examples, the Act in each case refers to the provisions of State laws as a dictionary for reference for ascertaining the rights and duties under Commonwealth law[58]. It is always, however, Commonwealth law that is speaking and which creates the rights and duties, independently of the commencement of any Court proceedings. Laws such as the *Commonwealth Places Act* and the *SEP Act* do not operate, as the Appellant's case contends in relation to s 79 of the *Judiciary Act*, so as to alternate between being an offence against a law of the State and an offence against a law of the Commonwealth, depending upon whether, and when, federal jurisdiction is

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57 *Mok v Director of Public Prosecutions (NSW)* (2016) 90 ALJR 506 per French CJ & Bell J at 512 [10].

58 *Western Australia v The Commonwealth* (1995) 183 CLR 373 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ at 487.

invoked.

THE RELEVANT OFFENCES WERE NOT AGAINST A LAW OF THE COMMONWEALTH

92. If, contrary to the above submissions, s 79 of the *Judiciary Act* picked up and applied s 6 of the *Misuse of Drugs Act* 1981 (WA) as a surrogate federal law during the Appellant's trial in federal jurisdiction, it is submitted that the Court should nevertheless conclude (as the Court of Appeal did[59]) that s 6 retained its character as an offence against a law of the State, not against a law of the Commonwealth, for the purposes of s 80 of the *Constitution*.

93. This is for two reasons.

94. *First*, at the time the Appellant committed the acts constituting the offence against s 6 of the *Misuse of Drugs Act* 1981 (WA), that is on or about 16 July 2012, the Appellant committed an offence against a law of the State. That is the only law which, at that time, could apply to the Appellant, and in relation to which his trial was concerned.

95. The first time federal diversity jurisdiction was invoked was when the matter between the State of Western Australia and the Appellant commenced. That occurred when the indictment was presented in the District Court of Western Australia against the Appellant. It did not alter the nature of the offence at the time it was committed.

96. *Secondly*, the reference to a "law of the Commonwealth" in s 80 of the *Constitution* should be taken to be a reference to a statute law passed by the Commonwealth Parliament directed to persons and their conduct and which creates that offence. That meaning is consistent with the meaning of "law of the Commonwealth" in s 109 of the *Constitution*[60]. It is also consistent with the construction of s 79 of the *Judiciary Act* that it does not "create" the initial offence; it merely applies the State offence provision according to its terms in the exercise of a Court's federal jurisdiction and while that jurisdiction is being exercised.

CONCLUSIONS

97. The Appellant's conviction in the District Court of Western Australia for offences against the *Misuse of Drugs Act* 1981 (WA) followed a trial for an offence against a law of the State to which s 80 of the *Constitution* did not apply.

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59 *Hughes v The State of Western Australia* (2015) 299 FLR 197 per the Court at 219-220 [152].

60 *Hughes v The State of Western Australia* (2015) 299 FLR 197 at 219-220 [152] referring to *Momcilovic v The Queen* (2011) 245 CLR 1 per Gummow J at 104-105 [222] and 106 [226].

98. This is because the *Misuse of Drugs Act* 1981 (WA) applied directly in federal diversity jurisdiction, as do all substantive laws which create rights and obligations and which do not withdraw or otherwise limit federal jurisdiction, and which do not encroach upon the Commonwealth's exclusive legislative power.

99. Alternatively, even if the *Misuse of Drugs Act* 1981 (WA) did not apply directly, and applied through s 79 of the *Judiciary Act*, that "picking up" did not transmogrify the State offence into a Commonwealth offence to which s 80 of the *Constitution* would be attracted. The conduct was criminal at the time it was committed, and remained criminal, by reason of its contravention against a law of the State.

Dated the 9th day of December 2016

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