IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M134 of 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

and

THE QUEEN

First Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Second Respondent

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Third Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (INTERVENING)

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Part I

1. The Attorney-General for the State of New South Wales (the **NSW Attorney**) certifies that these submissions are in a form suitable for publication on the Internet.

Part II

2. The NSW Attorney intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth).

Part III

3. This Part is not applicable.

Part IV

4. The NSW Attorney accepts the appellant's statement of applicable constitutional provisions, statutes and regulations.

Part V

Overview

5. In these submissions, the NSW Attorney contends that:

   (a) the Victorian Parliament has validly conferred on the Supreme Court of Victoria (**the Supreme Court**) the function of making a declaration of inconsistent operation under s.36 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the **Charter**); and

   (b) neither s.5 nor s.71AC of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) (the **DPCS Act**) is inconsistent with ss. 13.1, 13.2 and 302.4 of the Criminal Code (Cth) (the **Code**) and as such are not invalid by reason of s. 109 of the Constitution.

6. The NSW Attorney does not make submissions on the other constitutional issues arising in the proceedings, namely whether:

   (a) s.32 of the Charter confers on the Supreme Court a legislative power so as to interfere with or impair the institutional integrity of that Court as a repository of federal judicial power; and

   (b) the High Court, in the exercise of its appellate jurisdiction under s. 73 of the Constitution, has the power to set aside a declaration of inconsistent operation made by the Supreme Court under s. 36 of the Charter.

Declaration of inconsistent operation under s. 36

7. A declaration of inconsistency under s.36 of the Charter is non-binding and has no dispositive effect. In particular, it does not affect the validity or operation of the statutory provision in respect of which the declaration is made or create any legal right or cause of action (s. 36(5)(a)-(b)).

8. Regardless of whether the function conferred on the Supreme Court by s. 36 is judicial (see In re Judiciary and Navigation Acts (1921) 29 CLR 257 at 267; Mellifont v Attorney-General (Qld) (1991) 173 CLR 289 at 305) or non-judicial (see R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 at 274 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; R v Trade Practices Tribunal; Ex parte Tasmanian Breweries (1970) 123 CLR 361 at 374–375 per Kitto J), an analysis of the nature of the function confirms that it is not incompatible with the proper discharge of the Supreme Court's federal judicial responsibilities and with its institutional integrity.

9. First, the process by which the Supreme Court makes a declaration of inconsistency does not involve any departure from the ordinary judicial processes of an independent and impartial tribunal: South Australia v Totani [2010] HCA 39 at [436] per Crennan and Bell JJ (referring to Kable v DPP (NSW) (1996) 189 CLR 51 at 121 per McHugh J).

10. A s. 36 declaration must be made without bias and by a procedure that gives the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission an opportunity to be heard (s. 36(3)-(4)). The Supreme Court is then required to make an independent determination under s.36 – a power which is confined by criteria prescribed by law: see Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575 at [116] per Gummow J.

11. Further, while a s.36 declaration given by the Supreme Court may be non-binding, the determination that the s.36 declaration ought be given does not involve abstract or hypothetical questions. For example, the Supreme Court is not being asked to give an opinion on whether, if a particular Bill were passed by Parliament, it would be constitutional.

12. Secondly, there is no scope for the exercise of what could be classed as a "*political discretion*": see Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1 at 17 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ; see also Fardon at [116] per Gummow J. The declaration may only be made if, as a matter of law, the statutory provision cannot be interpreted consistently with a "human right" as defined in Part 2 of the Charter.

13. It is to be noted that, even at the federal level, it is permissible for a Chapter III judge, who in the course of the permissible exercise of a power, whether judicial or non-judicial, perceives anomalies or inefficiencies in the operation of a law, to make an observation upon, or a recommendation for the reform of, the law. The making of such an observation or recommendation is a function properly regarded as incidental to the exercise of the power: see Wilson v Minister for Aboriginal

and Torres Strait Islander Affairs (1996) 189 CLR 1 at pg 20 (fn 68) per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

14. It is submitted that, if a Chapter III judge may permissibly make an observation or recommendation about the need for law reform, *a fortiori* at a State level (with no entrenched doctrine of separation of powers), a Supreme Court may permissibly make a declaration under s. 36. Such a declaration is made by reference to criteria prescribed by law and does not involve the Supreme Court declaring or recommending, for example, *how* the statutory provision could be amended to ensure consistency.

15. Thirdly, the function conferred under s. 36 cannot be said to bestow upon the Supreme Court a function which "is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government": see Fardon at [107] per Gummow J (referring to Wilson at 17 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). In particular:

(a) a declaration under s.36 is not made at the direction of or upon a referral from the executive or the legislature in relation to matters not in litigation; rather, a declaration may only be made in the course of a proceeding where the statutory interpretation of the provision the subject of the declaration is in issue between the parties to the proceeding (see ss. 33, 36(1) of the Charter; cf. In re Judiciary and Navigation Acts (1921) 29 CLR 257; compare also s. 53 of the Supreme Court Act (Canada) upheld by the Judicial Committee of the Privy Council in Attorney-General, Ontario v Attorney-General, Canada [1912] AC 571 at 588-589);

(b) as such, the Supreme Court performs its functions under s.36 of the Charter independently of any instruction, advice or wish of the legislative or executive branches of government: Fardon at [116] per Gummow J;

(c) nor is a declaration under s. 36 a step in a process which leads to the making of a decision by the legislature or the executive; rather, the making of such a declaration may or may not be followed by the making of a legislative decision to amend the relevant provision (cf. Wilson at 18 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ where the decision of the reporter functioned as a condition precedent to the exercise of a power by the executive).

16. In this respect, once a s. 36 declaration is made, there is no ongoing interaction between the Supreme Court and the executive or the legislature on the matter. Rather, once a s. 36 declaration is made, the only interaction between the Supreme Court and the executive or the legislature is that the Supreme Court must cause the notice to be given to the Attorney-General (s. 36(6)). Then, the Attorney-General must give the notice to the Minister administering the relevant statutory provision, who must in turn table a response to the declaration in Parliament within 6 months and publish it in the Government Gazette (s. 37). The Minister's response to the declaration is not to be served on the Supreme Court.

17. It is noted that the Court of Appeal below referred to a commentator's description of the Charter as exemplifying the "dialogue model" of human rights legislation: Momcilovic v R (2010) 265 ALR 751 at [93] per Maxwell P, Ashley and Neave JJA. However, the references to a "dialogue model" were to distinguish the model upon which the Charter is based from alternative models (where a court has power to invalidate legislation it declares to be inconsistent with a defined human right).

18. In any event, in reality any "dialogue" under the Charter is one way. Once the s.36 declaration is formally communicated by the Supreme Court to the Minister under s. 36, the interaction between the Supreme Court and the executive regarding the declaration is at an end. There is no enlistment, let alone involvement, of the Court in giving effect to legislative and executive policy: see Totani at [481] per Kiefel J.

19. Fourthly, even if a s. 36 declaration could be seen as akin to giving judicial advice, that is a function historically performed by Supreme Courts. For example, there is a long history of state legislation conferring on trustees the right to seek an opinion, advice or direction from the Court in respect of trust property or in respect of interpretation of the trust deed: see Supreme Court (General Civil Procedure) Rules (VIC) O 54.02; Trustee Act 1925 (NSW) s 63; Trusts Act 1973 (QLD) s 96-97; Administration and Probate Act 1919 (SA) s 69; Trustee Act 1936 (SA) s 91-92; Trustees Act 1962 (WA) s 92; see generally Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66 esp. at [37] per Gummow ACJ, Kirby, Hayne and Heydon JJ (referring also to the role of the inherent or implied jurisdiction of the Supreme Court in this respect).

20. For the reasons set out above, the function conferred on the Supreme Court by s.36 of the Charter is not incompatible with the proper discharge of its federal judicial responsibilities and with its institutional integrity: see generally, Totani at [69] per French CJ, at [149] per Gummow J; at [236] per Hayne J; at [436] per Crennan and Bell JJ; at [481] per Kiefel J.

Section 109 of the Constitution

General principles

21. Central to the existence of inconsistency (whether direct or indirect) is the intention of the Commonwealth Parliament: R v El Helou (2010) 267 ALR 734 at 738 per Allsop P (referring to Telstra v Worthing at [27]–[28]; Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237 at 260 and 280; Dao v Australian Postal Commission (1987) 162 CLR 317 at 335; Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union (1983) 152 CLR 632 at 642).

22. That the intention of the Commonwealth Parliament is central was made plain by Dixon J in Ex parte McLean (1930) 43 CLR 472 at 483:

> When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what

> the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume v. Palmer*). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. (citations omitted) (emphasis supplied)

23. In McWaters v Day (1989) 168 CLR 289 at 295–6, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ said:

> As evidence of the inconsistency contended for, the respondent points to the different penalties which the respective laws stipulate and to the fact that the Commonwealth offence differs in substance by containing a requirement that the person charged be incapable of having proper control of the vehicle concerned. It is true that a difference in penalties prescribed for conduct prohibited by Commonwealth and State laws has been held to give rise to inconsistency between those laws for the purposes of s 109: Hume v Palmer; Ex parte McLean; Reg v Loewenthal; Ex parte Blacklock. Equally, a difference between the rules of conduct prescribed by Commonwealth and State laws might give rise to such inconsistency. But the mere fact that such differences exist is insufficient to establish an inconsistency in the relevant sense. It is necessary to inquire whether the Commonwealth statute, in prescribing the rule to be observed, evinces an intention to cover the subject-matter to the exclusion of any other law: Ex parte McLean at CLR 483; ALR 380; Blacklock at CLR 347; ALR 300; R v Winneke; Ex parte Gallagher (1982) 152 CLR 211 at 218, 224 and 233 ; 44 ALR 577 at 581, 586 and 593; University of Wollongong v Metwally ... at CLR 456; ALR 5–6. (emphasis supplied)

24. The Court in McWaters then went on to affirm the statement of principle of Dixon J in Ex parte McLean at 483 that inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience, rather it depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.

25. In Telstra v Worthing (1999) 197 CLR 61 at 76-77 [28], the Court, before setting out the statement of principle of Dixon J in Victoria v The Commonwealth, discussed earlier authorities:

> Further, there will be what Barwick CJ identified as 'direct collision' where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided. Thus, in *Australian Mutual Provident Society v Goulden*, in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the *Life Insurance Act* 1945 (Cth)'. A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question. But that is not this case. (citations omitted) (emphasis supplied)

Concurrent operation of State laws preserved in this case

26. Section 300.4 of the Code makes plain the legislative intention of the Commonwealth Parliament by providing that Part 9.1 of the Code (containing, relevantly, s. 302.4) is not intended to exclude or limit the concurrent operation of any law of a State or Territory. The legislative intention that overlapping State and Territory drug offences will continue to operate alongside the offences in Part 9.1 of the Code was also recorded in the Explanatory Memorandum: Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), Explanatory Memorandum (at 2 and 13-14).

27. Similarly, in the Second Reading Speech, the Attorney-General said:

> Our existing offences are mainly focussed on preventing illicit drugs from crossing Australia's border. The new offences will also apply to drug dealings within Australia.
>
> To that extent, they will operate alongside state and territory offences to give more flexibility to law enforcement agencies. This approach will ensure there are no gaps between federal and state laws that can be exploited by drug cartels.
>
> (House of Representatives Hansard, Thursday, 26 May 2005 at 6.)

28. It is submitted that, when considering the operation of s. 109 of the Constitution, ss. 13.1, 13.2 and 302.4 of the Code must be interpreted in accordance with the Commonwealth legislative intention that Part 9.1 of the Code is intended to operate within the setting of State criminal laws so that it is supplementary to or cumulative upon those laws (relevantly here, ss. 5 and 71AC of the DPCS Act).

29. It is nonetheless accepted that the making of a legislative statement such as the one contained in s. 300.4 cannot of itself avoid any direct inconsistency: see R v Credit Tribunal; Ex parte General Motors Acceptance Corporation (1977) 137 CLR 545

at 563-564 per Mason J; University of Wollongong v Metwally (1984) 158 CLR 447 at 456. However, a comparison of ss. 13.1, 13.2 and 302.4 of the Code and ss. 5 and 71AC of the DPCS Act makes it apparent that there is no direct inconsistency.

Comparison of offences

30. Section 71AC of the DPCS Act (entitled "Trafficking in a drug of dependence") makes it an offence for a person to traffick in a drug of dependence (defined to include methamphetamine).

31. Section 302.4 of the Code (entitled "Trafficking controlled drugs") makes it an offence to "traffic" in a substance that is a controlled substance (defined to include methamphetamine).

32. The two offences do operate by reference to different concepts of "possession" and it may be accepted that, because of the operation of s. 5 of the DPCS Act, the concept of possession used in that Act is more extensive than that adopted under the Code.

33. A key difference under each scheme is what constitutes a "traffickable quantity" of methamphetamine, with the quantity defined in the Victorian scheme being significantly more than the quantity defined under the Code. The Code attaches liability under s. 302.4 for possession of merely 2 grams of methamphetamine (s. 314.1(1)), where possession of 6 grams is rendered criminal under s. 71AC of the DPCS Act (Schedule 11, Part 3 Column 1). The federal scheme is accordingly considerably harsher in this respect.

No inconsistency between relevant provisions

34. It is commonplace that the same conduct may lead to the commission of more than one offence, including an offence under both the law of the Commonwealth and the law of a State. This does not of itself give rise to any inconsistency between the overlapping laws nor does it necessarily offend any constitutional principle (R v Winneke; ex parte Gallagher (1982) 152 CLR 211 at 224, Mason J; at 233 per Wilson J).

35. Here, the differences between the two offences are not such as to give rise to inconsistency within the meaning of s. 109.

36. First, the appellant points to a difference in penalties between s. 302.4 and s. 71AC: Appellant's Submissions at [46(c)]. That difference may well reflect the fact that s. 302.4 renders criminal possession of only 2 grams of methamphetamine, whereas s.71AC renders criminal possession of a greater amount. In any event, a difference in penalty does not of itself give rise to an inconsistency: McWaters v Day (1989) 168 CLR 289 at 296; Viskauskas v Niland (1983) 153 CLR 280; R v Winneke; ex parte Gallagher (1982) 152 CLR 211).

37. Secondly, the appellant points to the effect of s.80 of the Constitution as constituting a difference leading to inconsistency: Appellant's Submissions at

[46(b)]. In Dickson v R (2010) 270 ALR 1; (2010) 84 ALJR 635, as here, the law of Victoria does not require unanimity, whereas s.80 of the Constitution would have mandated a trial by jury and a unanimous guilty verdict had the Commonwealth offence been charged.

38. It is submitted that in Dickson the Court merely referred to s.80 of the Constitution as a factor, among others, which strengthened the Court's conclusion of invalidity. There is no decision of this Court which holds that s. 80 is itself a sufficient basis for finding direct inconsistency.

39. It is submitted that, in the absence of any other factors supporting a conclusion of inconsistency in the present case, the differing modes of trial on indictment of Commonwealth and State offences cannot lead to the conclusion that there is inconsistency within the meaning of s. 109 of the Constitution between ss. 5 and 71AC of the DPCS Act and ss. 13.1, 13.2 and 302.4 of the Code. Given that criminal law is ordinarily the province of the States, any contrary conclusion would have far-reaching consequences and is not supported by authority. The possibly differing modes of trial are simply an aspect of the concurrent operation of federal and State law envisaged by s. 300.4 of the Code

40. Thirdly, the appellant points to a difference in the operation of the two offences in a particular set of factual circumstances: Appellant's Submissions at [45], [46(a)]. That is, because of the operation of s. 5 of the DPCS Act, in a particular set of circumstances, conduct would be rendered criminal under s. 71AC but not under s. 302.4.

41. The mere fact that differences exist in the rules of conduct prescribed by Commonwealth and State laws is insufficient to establish an inconsistency in the relevant sense: McWaters v Day (1989) 168 CLR 289 at 296. Rather, it is necessary to inquire what the intention of the Commonwealth legislature was in prescribing the rule to be observed.

42. Given here the intention of the legislature is that Part 9.1 of the Code be cumulative and overlap with State criminal laws, it is not surprising that there may be differences in the rules of conduct prescribed by Part 9.1 and the State laws with which it was intended that Part 9.1 would add to and overlap with.

43. In the light of this intention of the legislature, the mere fact that differences between the two offences exist is not enough. This is not an instance where it is not possible to obey both laws. The appellant must point to some aspect of the differences which represents a direct inconsistency.

44. There is no basis for an argument that the Commonwealth intended that, so long as persons comply with the relevant provisions of the Code, then they need do no more. Such an argument belies the express intention that the laws be cumulative and overlapping.

45. The Court in Dickson expressly distinguished the circumstances in McWaters v Day (1989) 168 CLR 289 (Dickson at [29]). It is submitted Dickson can be distinguished on the same basis in this proceeding.

46. In McWaters, a soldier was charged with an offence under the Queensland Traffic Act of driving whilst under the influence of alcohol. The respondent contended that the State provision was inconsistent with a provision of the Commonwealth Defence Force Discipline Act 1982 dealing with driving under the influence. It was argued that the two provisions had the same subject-matter and purpose and yet the Commonwealth provision contained an additional element (namely, that the person charged be incapable of having proper control of the vehicle) and imposed a different penalty.

47. The Court held that there was no inconsistency between the two laws because the Commonwealth Act was supplementary to, and not exclusive of, the ordinary criminal law. The fact that the State criminal law rendered criminal conduct that would not be rendered criminal by the federal legislation did not alter that conclusion.

48. It was held that "the Discipline Act contemplated parallel systems of military and ordinary criminal law and did not evince any intention that defence force members enjoy an absolute immunity from liability under the ordinary criminal law" (at 298).

49. Contrary to the appellant's submission, the federal law cannot be characterised as leaving an area of liberty which should not be closed up: Appellant's Submissions at [46(a)]; Dickson at [20]:

(a) As this Court observed in Dickson at [29], it was difficult to construe the federal scheme as conferring a liberty on an intoxicated soldier to drive a vehicle on service land provided he or she was still capable of controlling the vehicle. Likewise here, it is difficult to construe the relevant provisions of the Code as conferring a liberty on a person (as asserted by the appellant) to occupy premises upon which a traffickable quantity of a controlled substance is found.

(b) In any event, while the operation of s. 5 of the DPCS Act may in a particular set of circumstances render conduct criminal under s. 71AC which is not rendered criminal under s. 302.4, the appellant ignores the fact that in different circumstances, it is the federal provision which will render criminal conduct not caught by the Victorian provisions. For example, where the accused is only in possession of 2 grams of methamphetamine (and is in "possession" of methamphetamine by virtue of facts which meet the concept of "possession" under both s. 71AC and s. 302.4 of the Code).

50. Finally, it is submitted that Dickson is distinguishable from this case on a number of other grounds:

(a) The goods referred to in the presentment in Dickson were property belonging to the Commonwealth to which the theft provision in s 131.1 and the conspiracy provision in s 11.5 applied). For the offence of theft in s 131.1, property in question must be property which "belongs to" a "Commonwealth entity" (s 131.1(1)(b)) (Dickson at [11]).

(b) In the Code, Ch 4, Ch 7, Ch 8, Ch 9, and Ch 10 contained provisions so expressed as to deny for the Chapter in question, or particular portions of it, an "inten[tion] to exclude or limit" the operation of any other Commonwealth law, and also of any law of a State or Territory (see Dickson at [36]). The theft provision (s 131.1) appears in Ch 7 (which contained such a statement in s 261.1) whereas the conspiracy offence in s 11.5 appeared in Ch 2, which did not contain any such statement. The Court held that s. 261.1, relating only as it did to the theft provision, could not displace or avoid the direct collision between the conspiracy provisions with which the case was concerned (Dickson at [37]).

(c) As the Court noted, in enacting s.11.5 of the Code the Commonwealth made a "deliberate legislative choice" to alter the common law by substantially narrowing the offence of conspiracy, whereas the Victorian Act picked up the common law crime of conspiracy without alteration (at [23]-[24]; see also R v LK (2010) 84 ALJR 395 at [51]-[58], [99]-[107]). The Court then highlighted the significant differences between s.11.5 of the Code and the common law offence of conspiracy which was picked up by the Victorian law.

(d) The Court described these differences as "immediately important" in that s.11.5 of the Code had "deliberately excluded" from its ambit certain conduct to which the State offence applied: see Dickson at [22] and [25]. As such, the Victorian statute imposed obligations on the accused which were greater than those provided by the federal law.

51.
~~50.~~ For these reasons, it is submitted that neither s.5 nor s.71AC of the DPCS Act is inconsistent with ss. 13.1, 13.2 and 302.4 of the Code and as such are not invalid by reason of s. 109 of the Constitution.

Dated: 31 January 2011

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