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

WRITTEN SUBMISSIONS OF THE SECOND RESPONDENT AND OF THE ATTORNEYS-GENERAL OF THE COMMONWEALTH, NEW SOUTH WALES, WESTERN AUSTRALIA, SOUTH AUSTRALIA, TASMANIA AND THE AUSTRALIAN CAPITAL TERRITORY (INTERVENING) ON QUESTIONS 1-3 OF THE HIGH COURT'S LETTER DATED 1 MARCH 2011

Date of document: 28 March 2011
Filed on behalf of: The Second Respondent and Intervening Attorneys-General

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Part I: SUITABILITY FOR PUBLICATION

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

Part II: SUBMISSIONS

2. These are joint submissions of the Second Respondent and of the Attorneys-General of the Commonwealth, New South Wales, Western Australia, South Australia, Tasmania and the Australian Capital Territory intervening.

3. They are filed in response to Questions 1-3 asked by the High Court in its letter of 1 March 2011.

4. Before turning to provide specific answers to Questions 1-3, the Second Respondent and the interveners make the following general submissions on the subject-matter of those Questions.

5. First, they adopt the oral submissions of the Solicitor-General of the Commonwealth at lines 7805 – 8510 of the Transcript.[1]

6. Secondly, they submit that the settled understanding is that the purpose of s 109 of the Constitution is to ensure, where there is an inconsistency, the supremacy of Commonwealth law.[2] That settled understanding should not be disturbed. It is in no way contradicted by the observation of Gibbs CJ in *University of Wollongong v Metwally*[3] that s 109 is not only "critical in adjusting the relations between the legislatures of the Commonwealth and the States, but of great importance for the ordinary citizen": the importance of s 109 to the citizen, as his Honour explained, lies in the citizen's entitlement to know "which of two *inconsistent* laws he [or she] is

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1 [2011] HCA Trans 016 and 017, pp 176 - 193.

2 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 154-155 per Knox CJ, Isaacs, Rich and Starke JJ. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, p 939; Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed), pp 407-408. *Official Report of the National Australasian Convention Debates*, Melbourne, 1898 (11 March 1898) at pp 2268-2275.

3 (1984) 158 CLR 447 at 457-458. The observation was picked up in *Croome v Tasmania* (1997) 191 CLR 119 at 129-130 per Gaudron, McHugh and Gummow JJ, and in *Dickson v The Queen* (2010) 84 ALJR 635 at [19] per the Court.

required to observe" (emphasis added). Similarly, Deane J in *Metwally* referred to s 109 as serving "the equally important function of protecting the individual from the injustice of being subjected to the requirements of valid and *inconsistent* laws of the Commonwealth and State Parliaments on the same subject" and explained that that function is served by s 109's express provision that "in such a case, the law of the Commonwealth 'shall prevail'" (emphasis added).[4] The importance for the citizen of s 109 provides no guide to whether a particular Commonwealth law operates to the exclusion of a State law.

7. Thirdly, they submit that the settled understanding of the test for inconsistency, is that stated by Dixon J in *Ex parte McLean*.[5] Critically:

> 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.

That settled understanding flows directly from the settled understanding of the purpose of s 109 and similarly should not be disturbed. Neither *Hume v Palmer*[6] nor *R v Loewenthal; Ex parte Blacklock*[7] is authority to the contrary. *Hume v Palmer*[8] was explained by Dixon J in *Ex parte McLean*.[9] *R v Loewenthal; Ex parte Blacklock*[10] was explained by Mason J in *R v Winneke; Ex parte Gallagher*.[11] Both were cases in which the relevant Commonwealth law was held to evince, by inference, an intention to deal with a subject to the exclusion of any other law. *R v Winneke, Ex parte Gallagher* illustrates that inconsistency within the meaning of s 109 is not established merely by reason that a Commonwealth law and a State law both operate to make the same act or omission a criminal offence.

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4 (1984) 158 CLR 447 at 477.

5 (1930) 43 CLR 472 at 483. See also *O'Sullivan v Noarlunga Meat Ltd* (1956) 95 CLR 177 at 182 (Privy Council); *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 311 per Gibbs CJ; *Viskauskas v Niland* (1983) 153 CLR 280 per the Court; *McWaters v Day* (1989) 168 CLR 289 at 296 per the Court.

6 (1926) 38 CLR 441.

7 (1974) 131 CLR 338.

8 (1926) 38 CLR 441.

9 (1930) 43 CLR 472 at 483.

10 (1974) 131 CLR 338.

11 (1982) 152 CLR 211 at 224.

8. Fourthly, they submit that the determination of the intention of a Commonwealth law for the purpose of s 109 of the Constitution involves the application of nothing more nor less than orthodox principles of statutory construction.[12] As stated in *Western Australia v Commonwealth*:[13]

> ... the intention may appear from the text or from the operation of the law. The text may reveal the intention either by implication or by express declaration. And if it be within the legislative power of the Commonwealth to declare that the regime prescribed by the Commonwealth law shall be exclusive and exhaustive, it is equally within the legislative power of the Commonwealth to prescribe that an area be left for regulation by State law.

It is only in the absence of clear words in a Commonwealth law that it ought become necessary to engage in inferential reasoning of the kind actually employed in *Hume v Palmer* and *R v Loewenthal; Ex parte Blacklock.*

9. Fifthly, they submit that an express statement of Commonwealth legislative intention is an effective statement of Commonwealth legislative intention for the purpose of s 109 of the Constitution provided only that the statement is supported by a head of Commonwealth legislative power[14] and is one that "the substantive provisions of the [Commonwealth law] are capable of supporting".[15] That is the result of the application of orthodox principles of statutory construction. As has repeatedly been recognised, such a result is also highly desirable in the interests of legal certainty.[16] It is that certainty that enhances the citizen's entitlement to know "which of two inconsistent laws he [or she] is required to observe".[17]

10. Finally, given the importance of the subject-matter, they submit that the case should be re-entered for oral argument on Questions 1-3.

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12 *Dickson v The Queen* (2010) 84 ALJR 635 at 642-643 [32], [34] per the Court; *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 336-337 per the Court; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 399-400 [203] per Gummow J.

13 (1995) 183 CLR 373 at 466 per Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ.

14 *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 466-467 per Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ.

15 *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 at 527 [20] per the Court.

16 *Council of the Municipality of Botany v Federal Airports Corporation* (1992) 175 CLR 453 at 465 per the Court; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 627 - 629 per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; *John Holland v Victorian Workcover Authority* (2009) 239 CLR 518 at 527-528 [20]-[21] per the Court.

17 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 457-458 per Gibbs CJ.

Question 1. Can the question of inconsistency between the relevant law of the Commonwealth (s 302.4) and the law of the State (s 71AC) be determined by reference only to whether the elements of the offences in question differ?

11. No. It is necessary to ascertain in every case whether the Commonwealth provision operates (often expressed in terms of Parliament's "intention") to state exclusively what shall be the law in relation to the conduct in question. This is so where the elements of the offences are identical.[18] The same analysis applies where the elements of the offences differ.[19] So much was emphatically affirmed in *McWaters v Day*:[20]

> 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* (1926) 38 CLR 441; *Ex parte McLean* (1930) 43 CLR 472; *Reg v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338. 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 p 483; *Blacklock*, at p 347; *Reg v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, at pp 218, 224, 233; *University of Wollongong v Metwally* (1984) 158 CLR 447, at p 456.

12. Here the Commonwealth legislative intention appears expressly and unambiguously from the text of s 300.4 of the Criminal Code.

13. The Commonwealth Parliament can, by articulating its intention not to state the exclusive law upon a particular topic, preserve the concurrent operation of a State law, with which the Commonwealth law is not in "direct conflict"[21] in the sense that

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18 *Hume v Palmer* (1925) 38 CLR 441 at 447 per Knox CJ, 450 per Isaacs J, 462 per Starke J; *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J.

19 *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 347 per Mason J; *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218 per Gibbs CJ, 224 per Mason J, 235 per Wilson J; *McWaters v Day* (1989) 168 CLR 289 at 296 per the Court.

20 (1989) 168 CLR 289 at 296 (emphasis added).

21 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563 per Mason J (with whom Barwick CJ, Gibbs, Stephen and Jacobs JJ agreed); *Palmdale AGCI Ltd v Workers' Compensation Commission (NSW)* (1977) 140 CLR 236 at 243 per Mason J (with whom Barwick CJ, Stephen, Jacobs and Aickin JJ agreed); *University of Wollongong v Metwally* (1984) 158

compliance with the State law would prevent or impair compliance with the Commonwealth law,[22] or in the sense that the State law takes away a liberty or right which a Commonwealth law confers.[23]

14. An inconsistency does not arise merely because, for instance, a State law imposes obligations additional to those in the Commonwealth law. In each case it is necessary to determine whether compliance with or adherence to the State law would alter, impair or detract from the operation of the Commonwealth law in a way which the Commonwealth law does not permit. This is always a question of statutory construction.

Question 2. If there is no relevant difference between the elements of the offences that are created by the two laws, are the laws inconsistent if the relevant law of the Commonwealth (s 302.4), by prescribing the penalty for contravention as it does:

(a) engages the provisions of s 80;

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

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

(a) because the method of determining that there has been a breach of the norm differs; or

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CLR 447 at 456 per Gibbs CJ, 460-461 per Mason J, 471 per Wilson J, 474-475 per Brennan J, 483 per Dawson J.

22 The practice of expressly stating this intention in Commonwealth laws, while by no means universal, is long-standing: see, for example, *State Laws and Records Recognition Act 1901*(Cth) s 19 considered in *Flaherty v Girgis* (1987) 162 CLR 574, at 591 per Mason ACJ, Wilson and Dawson J; *Copyright Act 1905* (Cth) s 8 and *Trade Marks Act 1905* (Cth) s 6; referred to in Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed) at p 410 (the *Trade Marks Act 1905* is considered in *Henry Clay & Bock & Co Ltd v Eddy* (1915) 19 CLR 641 at 643-644 per Griffith CJ; *Seat of Government Acceptance Act 1909* (Cth) s 6; *Seat of Government (Administration) Act 1910* (Cth) ss 3-4; *Insurance Act 1932* (Cth) s 7, considered in *Australian & International Insurances Ltd v Workers Compensation Commission (NSW)* (1972) 125 CLR 470 at 475-477 per Barwick CJ.

23 *Dickson v The Queen* (2010) 84 ALJR 635 at 640-641 [22] and 641 [25] per the Court.

(b) because the consequences of a determination that there has been a breach are to be fixed by reference to different requirements (including by reference to different maximum penalties) that will, or may, yield different outcomes in a particular case; or

(c) some combination of those considerations?

15. No. Where the Commonwealth Parliament has expressed a clear intention to preserve the concurrent operation of State laws within the same field, differences in the elements of offences within that field, the modes of proof and of trial, the penalties and the principles for sentencing are not sufficient to displace the expressed intention of the Parliament.[24]

16. By themselves, differences in penalty or procedure (including sentencing) amount to nothing more than two legislatures providing differently for the trial and punishment of their own respective offences.[25] In other words, penalty and mode of trial provisions are not capable of giving rise to "direct conflict" of the kind referred to in paragraph 13 above.[26] Gleaning the intention of the Commonwealth Parliament remains "the critical question".[27] As to sentencing, it is established that the Commonwealth may apply different State and Territory provisions to the sentencing of an offender for a Commonwealth offence, depending on the place of trial,[28] and that does not alter the character of the Commonwealth offence or offend any constitutional principle. The mere fact of differences between Commonwealth and State sentencing provisions cannot mean that a Commonwealth offence is necessarily inconsistent with a State offence.

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24 *Ex parte McLean* (1930) 43 CLR 474 at 483 per Dixon J; *McWaters v Day* (1989) 168 CLR 289 at 296 per the Court citing *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 347; *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218, 224 and 233; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 456.

25 *Hume v Palmer* (1925) 38 CLR 441 at 458.7 per Higgins J (dissenting, but not in this respect, since his Honour identified an intention that the Commonwealth law not "cover the field": see at 456).

26 Inconsistency under s 109 has only been held to arise from the imposition of different penalties for the same prohibited conduct by ascertaining an intention that the Commonwealth legislation cover the relevant field: *Hume v Palmer* (1926) 38 CLR 441 at 447 per Knox CJ, 450 per Isaacs J, 462 per Starke J; *Ex parte McLean* (1930) 43 CLR 472 at 479 per Isaacs CJ and Starke J, 480 per Rich J, 483, 484 per Dixon J; *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 339 per Barwick CJ, 342-343 per Menzies J, 346-347 per Mason J, 347-348 per Jacobs J.

27 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 235 per Wilson J.

28 *Putland v The Queen* (2004) 218 CLR 174 at 185 [23], [25] per Gleeson CJ, 192-193 [51]-[52], 195-196 [59]-[60] per Gummow and Heydon JJ, 215 [121]-[122] per Callinan J.

17. The existence of different modes of trial, different penalties for the same, or similar, conduct and different sentencing principles is not an uncommon feature in the Australian constitutional landscape where both the Commonwealth (pursuant to s 51 of the Constitution) and the State (relevantly, pursuant to s 16 of the *Constitution Act 1975* (Vic)) may legislate with respect to the same subject matter. Any difference of this kind is no more than a product of the reality that one act can have different consequences under different legal regimes[29] and under the Australian legal system there is a constitutionally-prescribed method of trial only in relation to offences against some Commonwealth laws.

10 18. It has been described as "commonplace" that the doing of a single act may involve the actor in the commission of more than one criminal offence.[30] Section 4C of the *Crimes Act 1914* (Cth) provides that a person shall not be liable to be punished twice for an act or omission under Commonwealth law for which the person has already been punished under State law. This provision is consistent with the *prima facie* presumption that a Commonwealth statute does not, by making an act criminal, evince an intention to deal with that act to the exclusion of any other law.[31] That presumption is confirmed in this case by the explicit intention found in s 300.4 of the Criminal Code.

19. The acceptance of the appellant's contention that differences in methods of trial is
20 determinative of s 109 inconsistency would have the effect that the "commonplace"[32] scenario of concurrent regulation of the same or similar conduct by the Commonwealth and the States would be significantly curtailed, at least in circumstances where the State law did not provide for the same jury provisions as are required by s 80.[33]

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29 See paragraph 16 above.

30 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 224 per Mason J; see also at 233 per Wilson J ("the mere fact that one act or omission may constitute both an offence under a Commonwealth Act and a State Act does not attract the operation of s 109").

31 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 224 per Mason J, referring to s 30(2) of the *Acts Interpretation Act 1901* (Cth) and s 11 of the *Crimes Act 1914* (Cth), the predecessor provisions to s 4C of the *Crimes Act 1914* (Cth).

32 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 224 per Mason J. See paragraphs 17-18above.

33 Including, relevantly, the requirement of a unanimous verdict: see *Cheatle v The Queen* (1993) 177 CLR 541. cf. *Juries Act 2000* (Vic), s 46, which permits a majority verdict for most state offences, but not for Commonwealth offences.

20. Indeed, as it cannot be known in advance of any particular trial whether an offence under s 302.4 of the Criminal Code or an offence under s 71AC of the Drugs Act will be dealt with by a court of summary jurisdiction, rather than tried on indictment, here there exists no more than the potential for different modes of trial to attach to each offence if certain conditions are met.[34]

21. In this case, s 300.4(3) of the Code explicitly provides that different penalties, fault elements or defences are not to be treated as indicative of an intention that Part 9.1 of the Criminal Code excludes or limits any law of a State or Territory.

Question 3. What is meant, in s 300.4 of the Code, by "concurrent" operation of the Commonwealth and State laws? Does it mean more than that, because simultaneous obedience to the norms of conduct prescribed by the relevant Commonwealth and State provisions is possible, it is the intention of the Parliament that there should be a choice available to prosecuting authorities to determine whether state or federal law will be engaged, no matter that the mode of trial and the punishment fixed in a particular case will differ according to the choice that is made? Does the availability of that choice demonstrate inconsistency? How is the availability of such a choice between engagement of state and federal laws consonant with the constitutional purposes of s 109?

22. The "concurrent"[35] operation of the provisions of Part 9.1 of the Criminal Code and a relevant State law (in this case, s 71AC of the Drugs Act) has two aspects for present purposes. The first is that a person may, by acting in a particular way, contravene both laws at the same time.[36] That is not to say that he or she will be punished for offences under both Commonwealth and State law,[37] but the Commonwealth Parliament, in enacting s 300.4, has evinced an intention that State laws can, and should, operate over the same subject matter.

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34 *Crimes Act 1914* (Cth), ss 4G, 4J; *Criminal Procedure Act 2009* (Vic), s 28(1)(a), s 29 and Schedule 2.

35 See also Gummow J's discussion of the meaning of "concurrent" in s 75 of the *Trade Practices Act 1974* (Cth) in *Grace Bros Pty Ltd v Magistrates, Local Courts of NSW* (1998) 84 ALR 492 at 503-507, affirmed on appeal by Lockhart, Beaumont and Hill JJ at (1989) 23 FCR 68; (1989) 91 ALR 259.

36 This is consistent with the ordinary meaning of "concurrent", being "existing or in operation at the same time": *The Australian Oxford Dictionary* (2nd ed), p 264. Similarly, Dixon J in *Ex parte McLean* (1930) 43 CLR 474 at 483 spoke of the "mere coexistence" of laws capable of simultaneous obedience: see paragraph 7 above.

37 See s 4C of the *Crimes Act 1914* (Cth), discussed at paragraph 18 above; *Maxwell v The Queen* (1996) 184 CLR 501 at 512 per Dawson and McHugh JJ and at 534 per Gaudron and Gummow JJ; *Pearce v the Queen* (1998) 194 CLR 610 at 620 per McHugh, Hayne and Callinan JJ; *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 224 per Mason J.

23. Secondly, where it is considered that a person has contravened both laws, there will be available concurrent powers to prosecute that person for each contravention (whether those powers lie with the same or different authorities). No inconsistency arises from the mere apprehension of the exercise of equivalent rights prescribed under a Commonwealth law and a State law.[38]

24. Under the laws in question in the present case, this means that a member of the relevant executive chooses whether to prosecute and if so, under which law.[39] Prosecutors regularly select between various offences with different elements or which attract different penalties where those offences are applicable to the same conduct. That "choice" might exist as between two or more offences of a particular State, as between an offence in each of two or more States,[40] or as between a State and a Commonwealth offence. It is always the task of the prosecutor to identify which offence/s will be charged, and in many instances selection must be made between similar offences which are capable of attaching to the same conduct. As Allsop P identified in *R v El Helou*,[41] there may be consultation between Commonwealth and State prosecutorial authorities concerning this matter. In enacting s 300.4 of the Criminal Code, the Parliament has made clear that it has not conferred "upon the executive government a power with respect to a particular subject the exercise of which is intended to be exclusive".[42] To the contrary, s 300.4, together with s 4C of the *Crimes Act*, contemplates the very consultation identified by Allsop P and, ultimately, the conviction of a person for one, but not both, of the offences.

25. There is nothing unusual, in a federation, about parallel systems of laws. The question whether State or federal law is engaged in relation to drug offences will often depend on which law enforcement agencies have investigated the conduct in question. There would be an obvious practical problem if State law enforcement bodies were unable to investigate conduct in this area.

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38 *Victoria v The Commonwealth ("The Kakariki")* (1937) 58 CLR 618 at 626 per Latham CJ, 629 per Dixon J, 635-636 per Evatt J, 639 per McTiernan J; *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557 at 574-576 per Latham CJ.

39 See *R v El Helou* (2010) 267 ALR 734 at 740 [37] per Allsop P (with whom Grove and Hislop JJ agreed).

40 See, for example, *Lipohar v The Queen* (1999) 200 CLR 535-536 [125]-[126] per Gaudron, Gummow and Hayne JJ.

41 (2010) 267 ALR 734 at 740 [37] per Allsop P (with whom Grove and Hislop JJ agreed).

42 *Commonwealth v Western Australia* (1999) 196 CLR 392 at 439 [139] per Gummow J.

26. By itself, the existence of a prosecutorial choice reflects nothing more than the consequence of a Commonwealth and a State law both operating to make the same act or omission a criminal offence. It does not itself give rise to any inconsistency. It is consonant with the constitutional purpose of s 109, including the citizen's entitlement to know which of two *inconsistent* laws he or she is required to observe.

Dated: 28 March 2011

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