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

SECOND RESPONDENT'S FURTHER SUPPLEMENTARY WRITTEN SUBMISSIONS

Date of document: 28 March 2011
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1. These submissions are in a form suitable for publication on the Internet.

QUESTIONS IN THE COURT'S LETTER DATED 1 MARCH 2011

Questions 1-3.

2. The second respondent (**the Attorney-General**) refers to the joint written submissions filed by him and the Attorneys-General of the Commonwealth, New South Wales, Western Australia, South Australia, Tasmania and the Australian Capital Territory in relation to these questions.

Question 4. Does s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) assist in resolving the question whether s 5 of the Drugs Act applies to "possession for sale" in the definition of "traffick" in s 70 and thereby to the offence created by s 71AC?

3. No. Although s 32 applies to "all statutory provisions",[1] which includes s 70(1) and s 5 of the Drugs Act, s 32 operates alongside other statutory principles (including the requirement to have regard to both the terms and context of s 5) to determine the meaning of s 70(1).[2]

4. Irrespective of whether "have in possession for sale" is treated as comprising separate elements of "possession" and "for sale" or as a composite phrase[3], it involves the proof of possession as a matter of fact. Such proof is the subject of s 5, which is capable of applying (subject to proof of the matters for which it provides) wherever possession arises under the Drugs Act.

5. Section 5 does not simply provide a definition of the word "possession" as that word is used in the Drugs Act. It provides for a deeming means of proof wherever the Drugs Act calls for proof of possession. The distinction is significant because it means that the application of s 5 is not confined to the situation where the word "possession" in the Drugs Act is to be given a meaning (in which case it might be argued that the use in the Drugs Act of a composite expression was not such a situation). Instead, s 5 addresses the means of proof wherever the fact of possession is in issue.

6. Section 5 deems possession to be proved "for the purposes of this Act" where the stipulated requirements are met.[4] As such, s 5 can be used not only in respect of the possession *simpliciter* offence in s 73(1), but also in proving possession both in the context of the words "have in possession for sale" in s 70(1) and, as occurred in the present case, in the prima facie evidence provision in respect of trafficking in s 73(2).

7. That s 5 may be used in this way is consistent with the settled understanding of its operation, including in the context of the offence of trafficking in drugs of dependence, where s 5 has been used to establish "possession", but the question whether that possession is "for sale" has been regarded as a separate and distinct question.[5] For the

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1 A "statutory provision" is defined in s 3 to mean any Act (including the Charter Act itself) or subordinate instrument or a provision of an Act or of a subordinate instrument.

2 See the Second Respondent's Written Submissions dated 27 January 2011 at paragraphs 25-33.

3 The settled understanding is that it comprises separate elements: see paragraph 7 below.

4 See, eg, *R v Tragear* (2003) 9 VR 107 at 116 [39] per Callaway JA (with whom Batt JA agreed).

5 *R v Clarke & Johnstone* [1986] VR 643 at 659-660 per the Full Court; *R v Tragear* (2003) 9 VR 107 at 116 [39], 117 [42] per Callaway JA (with whom Batt JA agreed).

reasons set out above, it does not matter in this regard whether "have in possession for sale" is a composite phrase; the operation of s 5 is the same in any event.

8. Section 32 of the Charter Act does not affect this position. While it may, as the parties have already argued, affect the interpretation of the concluding words of s 5 itself, it is not "possible", in the sense for which the Attorney-General has previously contended, for s 32 to require the reading into s 5 or the trafficking definition in s 70(1) of words altogether displacing the operation of s 5 in relation to any part of that definition.

Question 5. Does s 75(iv) confer original jurisdiction on the High Court in criminal proceedings brought by a State against a resident of another State? Does *R v Kidman* (1915) 20 CLR 425 at 438 (per Griffith CJ) and 444 (per Isaacs J) have any bearing on the answer to the question?

9. No. Section 75(iv) relevantly confers original jurisdiction on the High Court in all matters "between a State and a resident of another State". The question that arises is whether the County Court and Court of Appeal were exercising federal jurisdiction in a matter "between a State and a resident of another State" in circumstances where the appellant was a resident of Queensland at the time of her trial in the County Court[6] on a charge under Victorian law.

10. It is submitted that the County Court was not exercising federal jurisdiction because the diversity jurisdiction conferred on the High Court by s 75(iv) does not extend to criminal proceedings. This emerges from the history of the provision and from the absence of any rationale for conferring a criminal diversity jurisdiction on federal courts.[7]

11. Section 75(iv) was drafted with the United States arrangements for federal jurisdiction firmly in mind. Article III, s 2 of the United States Constitution relevantly provides:

> The judicial Power shall extend to ... Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States..."[8]

12. Cowen and Zines have described the historical development of s 75(iv) during the Convention Debates in the following terms:[9]

> In the 1890 meeting at Melbourne, Alfred Deakin had drawn attention to the pattern of federal jurisdiction in the United States, including diversity jurisdiction, and said that this exactly

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6 It is unclear whether the appellant was a resident of Queensland at the time of the proceeding before the Court of Appeal. The presentment [AB 3] and transcript references [AB 70.27-31; 93.6-93.12] relate only to her residence at the time of her trial in the County Court. However, it is accepted that, if the matter was in federal jurisdiction in the County Court, then it remained in federal jurisdiction on appeal.

7 As has been submitted previously, the Court need not necessarily determine whether the matter was in federal jurisdiction, as the relevant provisions of the Charter Act operate in the same way, irrespective of whether federal or State jurisdiction was being exercised. See Second Respondent's Supplementary Written Submissions dated 3 March 2011, paragraph 23.

8 The three kinds of diversity jurisdiction therein identified correspond with those found in s 75(iv), namely "all matters ... between States, between residents of different States, or between a State a resident of another State": The word "resident" was used instead of "citizen" because objection was taken to the use of the word "citizen" in the context of s 117 of the Constitution, it being replaced by the words "subject of the Queen, resident in any State". Soon after adopting that phraseology in respect of s 117, "resident" was also used for s 75(iv): see J Quick & R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p 776, and the citations therein.

9 Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002), pp 85-86 (citations omitted).

> fitted the needs of Australia. At the 1891 Convention in Sydney, a committee on the judiciary was appointed under the chairmanship of Inglis Clark. The committee reported in favour of a provision that "the Judicial power of the Union shall extend to disputes between residents of different States". It is clear that Inglis Clark intended to reproduce the American diversity provision. At the 1898 meeting, Barton moved to add the words of diversity jurisdiction – "or between residents of different States" – and this was adopted without discussion.

13. It was well understood in the United States at the time of the Convention Debates that diversity jurisdiction was not criminal in nature. That understanding properly informs the interpretation of s 75(iv)[10] and supports the proposition that s 75(iv) was only intended to confer jurisdiction in civil matters.

14. As early as 1793, in the Supreme Court case of *Chisholm v Georgia*, Iredell J said:[11]

> [I]t cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which in all instances that respect the same government only are uniformly considered of a local nature, and to be decided by its particular laws.

15. That passage was cited with approval in 1888 in *Wisconsin v Pelican Ins Co.*[12] Gray J, delivering the opinion of the Supreme Court, identified the impact of international law principles on the proper interpretation of Art III, s 2. His Honour said:[13]

> The grant is of "judicial power," and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all.
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> By the law of England and of the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country. Chief Justice Marshall stated the rule in the most condensed form, as an incontrovertible maxim, "the courts of no country execute the penal laws of another." The only cases in which the courts of the United States have entertained suits by a foreign state have been to enforce demands of a strictly civil nature.

16. The actual reasoning in these cases is not directly applicable to the Australian context, given the difference between "Controversies" and "matters" (the latter of which may include criminal matters[14]) and the position of the American States as sovereign entities each with their own common law.[15] The rationales for the two provisions may therefore diverge.[16] However, the clear understanding of the civil nature of diversity jurisdiction was well established when s 75(iv) was incorporated into the Constitution.

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10 See, by analogy, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 580-581 [97]-[98] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

11 *Chisholm v Georgia* (1793) 2 US 419 at 475. None of the other Justices cast doubt on this proposition.

12 (1888) 127 US 265 at 298.

13 (1888) 127 US 265 at 289-290 (citations omitted).

14 See, eg, *R v Kidman* (1915) 20 CLR 425.

15 See generally, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

16 The rationale for the diversity clause in the United States Constitution has been described as the avoidance of partiality or suspicion of such partiality. In *Wisconsin v Pelican Ins Co* (1888) 127 US

17. Moreover, there would be no apparent purpose in having provided for federal diversity jurisdiction in criminal matters. The general presumption at common law that crime is local is well-accepted in Australian law.[17] Criminal jurisdiction generally exists in the place where the person committed the act or omission said to constitute a crime, or the place where the crime has its effect. In either event, the jurisdiction is exercised in the courts of the polity which has attached criminal consequences to the act or omission in question.

18. The maxim that "all crime is local" must not be taken too literally.[18] The jurisdiction of a State Supreme Court will be attracted, however, whenever an accused is brought before the Court in relation to an offence which has a sufficient territorial connection with the State. In the case of offences created by State statute, provided that an offence satisfies the test in *Union Steamship Co of Australia Pty Ltd v King*[19] to fall within the extra-territorial power of a State by reason of having a sufficient nexus with that State, the criminal courts of that State have jurisdiction to try the commission of that offence. The governing law applied by a State Supreme Court in its criminal jurisdiction is that of the State.[20]

19. The State on whose behalf the prosecution is instituted seeks the adjudication of guilt and the imposition of punishment through its judicial branch in accordance with its own laws. As Gaudron, Gummow and Hayne JJ observed in *Lipohar v The Queen*:[21]

> Crime stands apart. Jurisdiction is founded by presence to stand trial ... The governing law is always that of the forum state, if the forum court has jurisdiction.
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> This state of affairs reflects the difference in kind of the criminal law. It is not concerned with the adjudication of disputes as to the respective rights and obligations of parties to a particular transaction or with respect to property in particular subject matter. The body politic by which or on whose behalf the prosecution is instituted and maintained seeks the adjudication of guilt and imposition of punishment by its judicial branch. Professor Brilmayer makes the point:
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> > "In criminal cases, the state is both a party – granted standing to prosecute by statute – and the adjudicatory forum – given jurisdiction to decide criminal cases brought by

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265 at 289, Gray J said: "The object of vesting in the courts of the United States jurisdiction by one state against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens". See also, *Chisholm v Georgia* (1793) 2 US 419 at 475-6 per Jay CJ; *Bank of United States v Deveaux* (1809) 9 US 61 at 87 per Marshall CJ. This explanation has not been adopted in the Australian context. In *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 330, Higgins J said that such jurisdiction may be thought to be "absurd in the circumstances of Australia, with its State Courts of high character and impartiality". See also at 339 per Starke J. Mr Dixon (as he then was) made remarks to the same effect before the Royal Commission on the Constitution in 1927: *Royal Commission on the Constitution*, Minutes of Evidence, p 785, cited in Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002), p 87.

17 See, eg, *Lipohar v The Queen* (1999) 200 CLR 485 at 527 [106]-[107] per Gaudron, Gummow and Hayne JJ.

18 See *Lipohar v The Queen* (1999) 200 CLR 485, 521ff per Gaudron, Gummow and Hayne JJ.

19 (1988) 166 CLR 1 at 14 per the Court.

20 *Lipohar v The Queen* (1999) 200 CLR 485 at 527 [106] per Gaudron, Gummow and Hayne JJ. See also, Leeming, 'Resolving Conflicts between State Criminal Laws' (1994) 12 *Australian Bar Review* 107, 108.

21 (1999) 200 CLR 485, 527 [106]-[107] (citations omitted).

> the state against alleged criminals. Because one state cannot validly involve the other's interest as a party in redressing an injury, states do not enforce one another's criminal laws."

20. The jurisdiction of a State court over a person charged with a criminal offence against the law of that State therefore exists by virtue of that person's presence to stand trial, irrespective of his or her residence at the time of the charge or trial. Physical presence for trial may be secured, if need be, by means of a warrant executed in another State and other coercive processes.[22]

21. In these circumstances, there was no reason to give the States the ability to try criminal offences in federal courts, more particularly the High Court, where an accused was not a resident of the State in which the act or omission occurred, or had ceased to be so by the time of the trial.[23]

22. No case in this Court has held that a criminal proceeding brought by a prosecutorial authority of one State against a resident of another State is in federal jurisdiction; the above submissions explain the absence of any such authority by reference to the American roots of s 75(iv), without which the provision cannot be properly understood.

23. *R v Kidman*[24] does not bear directly on the question; it considered the position of the Commonwealth, and not the States, and was concerned with s 75(iii), and not s 75(iv). In that case, the Court considered whether a proceeding brought in the name of the King was one within s 75(iii) as a matter "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party". Only Griffiths CJ[25] and Isaacs J[26] considered that question, answering it in the affirmative, while the other members of the Court found it unnecessary to decide.[27] The submissions set out at paragraphs 9-21 above did not arise for determination.

24. The joinder of the Attorney-General for the State of Victoria and the Victorian Equal Opportunity and Human Rights Commission (**the Commission**) to the proceeding in the Court of Appeal does not render the matter one "between" a State and a resident of another State. While a Minister would be considered the "State" for the purposes of s 75(iv),[28] the Charter Act makes clear that the status of both the Attorney-General and the Commission is as an intervener.[29] In those circumstances, even though joined as a party, the matter is not properly one "between" the Attorney-General (nor the Commission) and a resident of another State. The matter in any event remains one in criminal jurisdiction and outside the scope of s 75(iv) for the reasons set out above.

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22 See generally, *Service and Execution of Process Act 1992* (Cth), Part 5. Section 51(xxiv) of the Constitution confers a power on the Commonwealth Parliament to make laws with respect to the execution throughout the Commonwealth of the criminal process of the States: see generally, *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490.

23 Cf *Crouch v Commissioner of Railways (Qld)* (1985) 159 CLR 22 at 27 per Gibbs CJ.

24 (1915) 20 CLR 425.

25 At 438.

26 At 444.

27 At 454 per Higgins J, 457 per Gavan Duffy and Rich JJ, 463 per Powers J.

28 See, eg, *Crouch v Commissioner of Railways (Qld)* (1985) 159 CLR 22 at 37 per Mason, Wilson, Brennan, Deane and Dawson JJ.

29 See, in relation to the Attorney-General, s 34, and in relation to the Commission, s 40 of the Charter Act.

Further Oral Argument

25. The Attorney-General submits that the case should be re-entered for further oral argument on the questions that the Court has raised.

Dated: 28 March 2011.

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